

SUPREME COURT OF NIGERIA
FRIDAY 13TH JANUARY, 2017. SC. 125/2013
CORAM:- M. U. PETER-ODILI, M. MUHAMMAD,
C. B. OGUNBIYI, K. B. AKA'AH,
K. M. O. KEKERE-EKUN, JJSC

JOEL ADAMU APPELLANT
V.
THE STATE RESPONDENT

CHARGES - Arraignment - Procedure - Accused shall be brought before Court unfettered - Charge shall be read and explained to him - And he shall be called upon to plead thereto (H1)

CRIMINAL PROCEDURE - Conviction - Validity - As appellant's plea was not taken in respect of conspiracy - Conviction on that count amounts to a nullity (H2)

ARMED ROBBERY - Proof - Ingredients - Prosecution must prove that there was robbery - That the robbery was armed robbery - And that appellant was the robber or one of the robbers (H3)

EVIDENCE - Single witness - Weight - Prosecution has discretion to call whatever number of witness - As evidence of single witness if credible and cogent - Is sufficient to ground a conviction (H4)

EVIDENCE - Evaluation - Identification - Where case is on identification - Court must closely examine evidence - And in acting on it must be cautious - So that any real weakness must be in favour of accused (H5)

EVIDENCE - Confession - Weight - Even though appellant retracted from his confession - Trial Court properly considered weight of the confession - In relation to other evidence adduced and proved by prosecution (H6)

FACTS

Accused/appellant along with two others were arraigned before the High Court of the Federal Capital Territory Abuja on a two-count charge of conspiracy and armed robbery contrary to section 5 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990, respectively. They pleaded not guilty to the charges. The case as presented by prosecution/respondent is that appellant and the others committed the offence of armed robbery at one Anglican Church Guest House situate at Dauda Street, Wuse Zone 5, Abuja. In the course of the armed robbery they were alleged to have robbed five victims of various sums of money and other valuable items such as jewellery, handsets and wristwatches.

Shortly after the armed robbery, one of the armed robbers was arrested. He volunteered information that led to the arrest of appellant and the other gang member. They confessed to the crime. Thus they were charged before the Court in connection with the crime. At the trial, respondent called three witnesses and tendered several exhibits to support his case. In his defence, appellant testified on his own behalf and called no other witness. He denied his participation in the crime and equally distanced himself from his confessional statement tendered by respondent. At the conclusion of the trial, the learned trial Judge found him guilty on each count of the charge and sentenced him to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Abuja Division which dismissed the appeal and affirmed the judgment of the trial Court. Aggrieved further, appellant has appealed to the Supreme Court.

ISSUES FOR DETERMINATION

- i. Whether the trial conviction and sentence passed on the Appellant are not a nullity in view of the failure of the trial Court to comply with the mandatory provisions of Section 187(1) of the Criminal Procedure Code.
- ii. Whether the failure of the Respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered

from the Appellant was not fatal to its case.

iii. Whether there was proper identification of the Appellant consequently linking him to the commission of the offences charged.

iv. Whether the learned justices of the Court of appeal were right in affirming the conviction of the Appellant having regard to the evidence before the Court.

HELD (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

CHARGES - Arraignment - Procedure

1. Section 187(1) of the Criminal Procedure Code (applicable in Northern Nigeria) and Section 215 of the Criminal Procedure Act (applicable in Southern Nigeria) contain similar provisions relating to the procedure for the arraignment of an accused person. The requirements are as follows:

1. The accused person shall be brought before the Court unfettered (unless the trial Judge otherwise directs).

2. The charge shall be read and explained to the accused person to the satisfaction of the Court in the language he understands.

3. The accused person shall then be called upon to plead thereto instantly.

The requirements are mandatory, as they ensure that the accused person's right to fair hearing, as enshrined in Section 36 (6) of the 1999 Constitution, is protected. Failure to comply with these requirements would render the trial a nullity for lack of fair hearing.

(p. 11 D)

CRIMINAL PROCEDURE - Conviction - Validity

2. The offence of conspiracy is a separate and distinct offence from the offence of armed robbery. The act of

conspiracy may be based on the same facts or set of facts as the main offence of armed robbery but not in all cases. In the instant case, the appellant was properly arraigned in respect of the charge of armed robbery. Being separate and distinct offences, I am of the considered view that the counts could be severed from one another. As the appellant's plea was not taken in respect of the count for conspiracy, his conviction and sentence on that count amounts to a nullity. However, as he was properly arraigned on the count for armed robbery, the trial in respect of that offence remains valid. This issue succeeds in part in respect of the conviction and sentence of the appellant on the charge for conspiracy. (p. 13 C/H)

ARMED ROBBERY - Proof - Ingredients

3. It is settled law that in order to discharge the burden of establishing the guilt of an accused person beyond reasonable doubt in a charge of armed robbery, the prosecution must prove the following:

- 1. That there was a robbery or series of robberies.**
- 2. That each of the robberies was an armed robbery.**
- 3. That the appellant was the robber or one of those who participated in the armed robbery. (p. 16 A)**

EVIDENCE - Single witness - Weight

4. As rightly submitted by learned counsel for the respondent, the prosecution has the discretion to call whatever number of witnesses it deems necessary to discharge the burden of proof. Indeed, the evidence of a single witness, if credible and cogent, is sufficient to ground a conviction.

In the circumstances, I hold that the failure of the prosecution to call all the witnesses named in the proof of evidence or to tender in evidence the items recovered from the appellant is not fatal to the prosecution's case, as there was sufficient evidence before the Court upon

which it based its decision. This issue is accordingly resolved against the appellant. (pp. 16 D/20 B)

EVIDENCE - Evaluation - Identification

5. With regard to the issue of the identity of the appellant as one of those who took part in the armed robbery, both learned counsel have correctly stated the position of the law as regards the circumstances in which an identification parade is necessary. The law is settled that the question whether an accused person is properly identified as one of those who participated in the commission of the criminal act is a question of fact to be considered by the trial Court on the evidence adduced for that purpose. It is also trite that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the Court must closely examine the evidence and in acting on it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. However, if the evidence of a lone witness is believed, his identification of an accused person can sustain a conviction, even on a charge of murder. (p. 23 E)

EVIDENCE - Confession - Weight

6. The learned trial judge considered the facts as stated above along with the evidence of the prosecution witnesses and found that their evidence corroborated the contents of the confessional statements. In other words he properly applied the settled guidelines in determining the truthfulness of the confession. I am of the considered view that there was no uncertainty whatsoever regarding the identity of the appellant as one of those who committed the offence. He confessed to his part in the crime and thereby fixed himself at the scene. There was

also no doubt as to where the offence was committed. The observation of learned counsel for the appellant regarding the mention of hotel as opposed to guest house in the appellant's statement is of no moment, particularly as PW1 and PW2 testified that they personally interviewed the victims of the crime at the Anglican Guest House. Furthermore, even though the appellant retracted his confessional statements at the trial, the learned trial Judge was correct in the manner in which he treated the statements by considering their weight in relation to the other evidence adduced and proved by the prosecution. (p. 24 H)

REPRESENTATION

D Aliyu Saiki, Esq. with W.E. Ivara, Esq., Afolabi Omotoso, Ibrahim T. Hassan and Amal Abdulwahab (Miss) for the Appellants
Aisha Egele (Miss) for Respondent

CASES REFERRED TO

- E Kajubo v. State (1988) 1 NWLR (pt. 73) 721
Ewe v. State (1992) 6 NWLR (pt. 246) 147
Rufai v. State (2001) 13 NWLR (pt. 731) 719
Balogun v. A-G Ogun State (2002) FWLR (pt. 100) 1287
- F Eyorokoromo v. State (1979) 69 SC 3
Josiah v. State (1985) 1 SC 406
Torri v. National Park Service of Nigeria (2011) 6 - 7 SC (pt. III) 171
- G Awosika v. State (2010) 9 NWLR (pt. 1198) 49
Kayode v. State (2012) 11 NWLR (pt. 1312) 523
Millar v. State (2005) 8 NWLR (pt. 927) 236
Ogunzee v. State (1998) 5 NWLR (pt. 551) 521
Archibong v. State (2004) 1 NWLR (pt. 853) 488
- H F.R.N. v. Usman (2012) 8 NWLR (pt. 1301) 141
Okoroji v. State (2001) FWLR (pt. 77) 871
Oshodin v. State (2002) FWLR (pt. 90) 1335

STATUTES REFERRED TO

Robbery & Firearms (Special Provisions) Act Cap 398 LFN 1990,
ss. 1(2)(a), 5

Criminal Procedure Code, s. 187(1)

Criminal Procedure Law, s. 215

Evidence Act, s. 167(d)

B

LEAD JUDGMENT BY KEKERE-EKUN JSC

The appellant and two others were charged before the High Court of the Federal Capital Territory (FCT) on a two-count charge of conspiracy and armed robbery contrary to Section 5 and 1(2) (a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria, 1990 respectively.

They were alleged to have committed the offences on 8/9/2005 at Anglican Church Guest House, Dauda Street, Wuse Zone 5, Abuja. In the course of the armed robbery they were alleged to have robbed 5 victims of various sums of money and other valuable items such as jewellery, handsets and wristwatches. The appellant and his co-accused pleaded not guilty to each of the counts. At the trial the prosecution called 3 witnesses: PW1, Inspector Akeem Lamboye a Police Officer attached to Wuse Division of the Nigeria Police, FCT Command, PW2, Inspector Obeh Azuka attached to the Special Anti Robbery Squad (SARS), FCT command who took over the investigation and PW3, Julius Nomshem, a security guard and staff of the Guest House.

In their defence the accused persons testified on their own behalf and called no other witnesses. Five sets of exhibits were tendered. Exhibit C and A1 were statements of the Appellant made at Wuse FCT and SARS respectively.

The facts of the case, as presented by the prosecution, are as follows: Upon receipt of distress call on 8/9/2005 relayed from the FCT command control room that some armed robbers had invaded the Anglican Church Guest House, PW1 and his team went to the scene to investigate. They met the manager of the hotel as well as PW3, the security guard. They also met some victims of

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the attack who narrated how they were relieved of their valuables by the bandits. On being informed that the robbers escaped through the bush, PW1 and his team proceeded to the canal at the back of the Guest House and blocked possible exits. The 1st accused, James Simon, was arrested and searched. The following items were found on him: N4,930 in cash, one necklace, two wrist watches, and a belt. The 1st accused led the police team to Jabi Motor Park where the appellant and the 3rd accused were arrested. They were searched and the police recovered cash, two handsets and jewellery from them. They were taken to the police station where they volunteered statements. The case was transferred to SARS (SCID) and handed over to PW2 who invited some of the victims. They made statements. The appellant also made a statement.

PW3, the security guard, testified as to how in the course of his patrol around 3.40am, he saw someone near the generator house. As he walked towards him several other men emerged with weapons such as cutlass, machetes, sticks and a locally made pistol. They took him to the security post and tied him down. They left one person to guard him. According to him, the 1st and 3rd accused persons were the ones who tied him up. He could see their faces because there was light in the compound. They removed his handset, the sum of N1,505.00 and his security torch light. He was gagged and threatened with death if he raised an alarm. He identified the accused person at the police station.

In his defence the appellant denied committing the offence and also denied making Exhibits C and A1. At the conclusion of the trial, in a well considered judgment delivered on 31/1/2012, the learned trial Judge found him guilty on each count of the charge and sentenced him to death by hanging. Dissatisfied with the decision, he appealed to Court of Appeal Abuja Division (the Court below), which on 23/1/2013, dismissed the appeal and affirmed the judgment of the trial Court. Still dissatisfied he has further appealed to this Court vide a notice of appeal dated 18/2/2013 containing four grounds of appeal. With leave of this Court granted on 15/7/2013, he filed an additional ground of appeal, which was

incorporated in his amended notice of appeal deemed filed the same day, making a total of five grounds of appeal.

At the hearing of the appeal on 20/10/2016, ALIYU SAIKI ESQ., leading other learned counsel, adopted and relied on the appellant's brief, which was deemed properly filed on 15/7/2013 and urged the Court to allow the appeal. AISHA EGELE (MISS) adopted and relied on the respondent's brief deemed properly filed on the same day, 20/10/2016, and urged the Court to dismiss the appeal and affirm the concurrent findings of the two lower Courts.

In his brief of argument, ALIYU SAIKI ESQ. identified 4 issues for determination as follows:

i. Whether the trial conviction and sentence passed on the Appellant are not a nullity in view of the failure of the trial Court to comply with the mandatory provisions of Section 187(1) of the Criminal Procedure Code (Ground 5).

ii. Whether the failure of the Respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered from the Appellant was not fatal to its case (Ground 2).

iii. Whether there was proper identification of the Appellant consequently linking him to the commission of the offences charged (Ground 3)

iv. Whether the learned justices of the Court of appeal were right in affirming the conviction of the Appellant having regard to the evidence before the Court. (Grounds 1 and 4)

The respondent formulated three issues thus:

i. Whether the failure of the trial Court to take the plea of the appellant in respect of the 1st count of the two count charge as required by Section 187(1) of the Criminal Procedure Code renders the entire trial a nullity. (Ground 5)

ii. Whether the failure of the respondent to call all those listed in the proof of evidence as witnesses and tender the recovered stolen items in evidence occasioned any miscarriage of justice in the conviction of the appellant. (Ground 2)

iii. Whether from the evidence adduced the learned Justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant. (Grounds 1, 3 and 4)

I shall resolve the appeal on the issues identified by the appellant.

ISSUE ONE

It is contended on behalf of the appellant that he was not properly arraigned, as his plea was taken only in respect of Count B 2 of the charge. Learned counsel submitted that compliance with Section 187 (1) of the Criminal Procedure Code (CPC) is mandatory and that failure to comply therewith renders the entire trial and conviction of the appellant a nullity. He referred to the case of C *Kajubo v. The State* (1988) 1 NWLR (Pt.73) 721 where Section 215 of the Criminal Procedure Law (CPL), which is in *pari materia* with Section 187 (1) of the CPC, was considered and interpreted. He also relied on: *Ewe v. The State* (1992) 6 NWLR (Pt.246) 147 and *Rufai v. The State* (2001) 13 NWLR (Pt.731) 719 @ 729 D - 733. He submitted that the guidelines for the proper arraignment of an accused person are in keeping with fundamental right enshrined in Section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, which guarantees every E person charged with a criminal offence the right to be informed promptly and in the language that he understands and in detail, the nature of the offence with which he is charged, He urged the Court to resolve this issue in the appellant's favour.

In response to the above submission, learned counsel for the F respondent conceded that the law as regards the mandatory nature of the procedure for the arraignment of an accused person under Section 187 (1) of the CPC and the relevant authorities are as submitted by learned counsel for the appellant. She also conceded that the learned trial judge failed to take the appellant's plea G in respect of count 1, the charge for conspiracy. In her view, the effect of this omission is that the trial and conviction of the appellant on the count for conspiracy amounts to a nullity. She however argued that, as the appellant's plea was properly taken on the count H for armed robbery, the failure to take his plea on the count for conspiracy could not nullify the entire trial. She submitted that conspiracy is a separate and distinct offence and independent of the substantive offence of armed robbery. She referred to the case

of Balogun v. A.G. Ogun State (2002) FWLR (Pt.100) 1287 @ 1306. She noted that an accused person could be convicted of the offence of conspiracy even where the substantive offence has not been proved and that an acquittal in respect of the offence of conspiracy does not translate to an acquittal in respect of the substantive offence i.e. armed robbery in the instant case. She argued further that a charge for the substantive offence could stand on its own without a charge for conspiracy. She maintained that the appellant's trial and conviction on the substantive offence of armed robbery is sustainable notwithstanding the Court's failure to take his plea on the charge of conspiracy, She urged the Court to resolve this issue in the respondent's favour.

Section 187(1) of the Criminal Procedure Code (applicable in Northern Nigeria) and Section 215 of the Criminal Procedure Act (applicable in Southern Nigeria) contain similar provisions relating to the procedure for the arraignment of an accused person. The requirements are as follows:

1. The accused person shall be brought before the Court unfettered (unless the trial Judge otherwise directs).

2. The charge shall be read and explained to the accused person to the satisfaction of the Court in the language he understands.

3. The accused person shall then be called upon to plead thereto instantly.

The requirements are mandatory, as they ensure that the accused person's right to fair hearing, as enshrined in Section 36 (6) of the 1999 Constitution, is protected. Failure to comply with these requirements would render the trial a nullity for lack of fair hearing. See: Kajubo v. The State (1988) 1 NWLR (Pt.73) 721 @ 732 E - F; Eyorokoromo v. The State (1979) 69 SC 3; Josiah v. The State (1985) 1 SC 406 @ 416; Torri v. National Park Service of Nigeria (2011) 6 - 7 SC (Pt.III) 171 @ 200 lines 4 - 31.

The appellant and his co-accused were arraigned before the

trial High Court on 1/12//2005. The record of proceedings in respect of their arraignment is at pages 102 - 103 of the record. It reads thus:

"Pros. Counsel: We pray the Court to take the plea of the accused persons.

B *Court: Count 1 is read and explained to the 1st accused in English language in all details and essentials.*

He said he understood the charge perfectly. He is asked to make his plea.

C *1st accused: I am not guilty.*

Court: Count 2 is read and explained to the 1st accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.

1st accused: I am not guilty.

D *Court: Count 2 is read and explained to the 2nd accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.*

2nd accused: I am not guilty.

E *Court: Count 1 is read and explained to the 3rd accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.*

3rd accused: I am not guilty.

F *Court: Count 2 is read and explained to the 1st accused in English language in all details and essentials. He said he understood the charge perfectly. He is asked to make his plea.*

3rd accused: I am not guilty.

G *Pros. Counsel: We apply for a date for hearing. The accused persons have all pleaded not guilty.*

Court: The case is adjourned to 19/1/2006 for hearing.

*SIGNED: Hon. Justice A.M. Talba - Presiding judge
1/12/2005"*

H It is glaring from the record reproduced above that the plea of the appellant, who was the 2nd accused, was not taken in respect of count 1 of the charge. However at the conclusion of the trial all three accused persons were found guilty and convicted on each count of the charge and were sentenced to death by hanging

accordingly. Learned counsel for the respondent concedes that the appellant was not arraigned in respect of the count of conspiracy and that his trial and conviction for that offence amount to a nullity. The point of divergence is that while it is contended on behalf of the appellant that the entire trial is a nullity, learned counsel for the respondent argues that the trial and conviction on the count of armed robbery is sustainable, as the appellant was properly arraigned in respect of that count. B

The offence of conspiracy is a separate and distinct offence from the offence of armed robbery. The act of conspiracy may be based on the same facts or set of facts as the main offence of armed robbery but not in all cases. C

On the distinction between the two offences, it was held in Balogun v. A.G. Ogun State (2002) 2 SC (Reprint) (Pt.11) 89 @ 96 per Uwaifo, JSC as follows: D

“Conviction for conspiracy does not become inappropriate simply because the substantive offence has not been proved. It is a known principle of law that conspiracy to commit an offence is a separate and distinct offence and is independent of the actual commission of the offence to which the conspiracy is related. The offence of conspiracy may be fully committed even though the substantive offence may be abandoned or aborted, or may have become impossible to commit.” E

In Balogun’s case (supra), it was found that the appellant F and others had a common purpose, namely to rob with violence, as they were together in the premises of PW1 from whom they made a demand of money under threat. However, as a result of lack of evidence that money or property was actually stolen by the appellant and others on the day in question, the offence of armed robbery was not established. However, the appellant’s conviction G for conspiracy to commit armed robbery was upheld. See also: Awosika v. The State (2010) 9 NWLR (Pt.1198) 49 @ 70 D; Kayode v. The State (2012) 11 NWLR (Pt.1312) 523. H

In the instant case, the appellant was properly arraigned in respect of the charge of armed robbery. Being separate and distinct offences, I am of the considered

view that the counts could be severed from one another. As the appellant's plea was not taken in respect of the count for conspiracy, his conviction and sentence on that count amounts to a nullity. However, as he was properly arraigned on the count for armed robbery, the trial in respect of that offence remains valid. This issue succeeds in part in respect of the conviction and sentence of the appellant on the charge for conspiracy.

ISSUE TWO

C This issue challenges the failure of the prosecution to tender the items recovered from the appellant and its failure to call the victims of the armed robbery as witnesses. Learned counsel for the appellant noted that the prosecution called only three out of eight witnesses listed in the proof of evidence, in spite of the fact that PW2, in his evidence, stated that two of the victims made statements to the Police. He submitted they were material witnesses and that failure to call them to testify was fatal to the prosecution's case. While conceding that the prosecution is not bound to call every available witness, he maintained that the failure to call vital witnesses was fatal. He relied on: Millar Vs. The State (2005) 8 NWLR (Pt.927) 236 @ 277 A B; Oguonzee Vs. The State (1998) 5 NWLR (Pt.551) 521; Archibong Vs. The State (2004) 1 NWLR (Pt.853) 488. He submitted that their evidence would have resolved vital issues such as the items stolen and the identity of the robbers. He submitted that before there can be a robbery, something must have been stolen. He referred to: F.R.N. vs Usman & Anor. (2012) 8 NWLR (Pt.1301) 141 @ 156. He submitted further that even where witnesses listed on the proof of evidence are not called by the prosecution, they must be presented for cross examination and that where the evidence of a material witness would be conclusive one way or another and he is not called to testify, the conviction would be liable to be quashed. He relied on: H Okoroji Vs The State (2001) FWLR (Pt.77) 871 @ 888 and Oshodin Vs The State (2002) FWLR (Pt.90) 1335 @ 1347. On the failure of the prosecution to tender the items allegedly recovered from the appellant, he cited the case of: Nwomukoro & Ors.

Vs The State (1995) 1 NWLR (Pt.372) 432 @ 444.

In reply, learned counsel for the respondent submitted that the prosecution's burden of proving its case beyond reasonable doubt is not discharged on the basis of the number of witnesses called by the prosecution but on the cogency of the evidence led. She referred to: *Akalezi Vs The State* (1993) 2 NWLR Pt.273) 1. She submitted that the obligation to call vital or material witnesses does not extend to calling every available witness, as it is trite that a Court can convict on the evidence of a single witness, if the witness is not an accomplice in the commission of the offence and his evidence is sufficiently probative of the offence with which the accused is charged. She relied on: *Ofoke Nwambe Vs The State* (1995) 3 NWLR (Pt.384) 385 @ 408 C H; *Onafowokan Vs. The State* (1987) 3 NWLR (Pt.61) 538. She submitted further that the number of witnesses called to establish its case is within the discretion of the prosecution. She relied on: *Ogboodu Vs The State* (1987) 2 NWLR (Pt.54) 20; *Adaje Vs The State* (1979) 6-9 SC 18.

Learned counsel submitted that PW3 who was an eye witness and victim of the offence gave a positive and cogent account of how he was tied up by the appellant and other members of his gang, how he was able to identify the 1st accused because he was one of those who tied him up and the fact that he was able to see the robbers' faces because there was light in the compound. She submitted that his evidence is credible and sufficient to establish the charge against the appellant. She submitted further that there is nothing in the record to show that the appellant applied for the production in Court of any of the witnesses listed in the proof of evidence but not called to testify for the purpose of cross examination and submitted that in the absence of such an application the prosecution had no obligation to produce them.

On the failure to tender the weapon used in the commission of the offence or the items recovered, learned counsel submitted that there is no duty imposed on the prosecution by law to tender them. She submitted that the presumption of withholding evidence as provided in Section 167 (d) of the Evidence Act, does not apply to the non-calling of certain witnesses, as in the instant case. She

urged the Court to resolve this issue against the appellant.

It is settled law that in order to discharge the burden of establishing the guilt of an accused person beyond reasonable doubt in a charge of armed robbery, the prosecution must prove the following:

- 1. That there was a robbery or series of robberies.***
- 2. That each of the robberies was an armed robbery.***
- 3. That the appellant was the robber or one of those who participated in the armed robbery.***

C See: Bozin vs The State (1985) 2 NWLR (Pt.8) 465; Suberu Vs. The State (2010) 8 NWLR (Pt.1197) 586; Ani V. The State (2003) 11 NWLR (Pt.830) 145; Attah V. The State (2010) 10 NWLR (Pt.1201) 190 @ 244 B D; Olayinka Vs The State (2007) 9 NWLR (Pt.1040) 551.

D ***As rightly submitted by learned counsel for the respondent, the prosecution has the discretion to call whatever number of witnesses it deems necessary to discharge the burden of proof.*** See Ochiba Vs The State (2011) 17 NWLR (Pt.1277) 663 @ 687 B - E; 691 B D; Akpan Vs The State (1991) 3 NWLR (Pt.182) 645. ***Indeed, the evidence of a single witness, if credible and cogent, is sufficient to ground a conviction.*** See Babarinde Vs The State (2013) 12 SCNJ 316; Sule Vs The State (2009) 17 NWLR (Pt.1169) 33 @ 57 - 58 H - B; F Ogoala vs The State (1991) 2 NWLR (Pt.175) 509 @ 523; Ibrahim Musa Vs The State: SC.31/2013 delivered on 16/12/2015 (unreported).

G PW3, the security guard on duty at the Guest House on the fateful day gave a first hand account of what he witnessed as follows:

H *“My name is Julius Nomshen. I live at Mararaba. I am a staff of Church Guest House at Zone 5 Anglican Commission. I am a security man, I know the three accused persons. On 8/9/2005 at about 3.40 am when I was patrolling round the premises of the Guest House I came back to the security post. After three minutes I came outside and sighted one man standing by the General in house. Then I walked towards him. Then reaching where*

he was standing many of them came up with weapons such as cutlass, machete, stick and locally made pistol. Then they held me and took me to the security post. They tied me down, they started their operation and they left one of them to guard me. When they came there was light in the compound. They removed one handset from me (sagem), the sum of N1,505,00 and a security torch light, The first and the third accused persons were the ones that tied me. I saw their faces in the light, They put a rag in my mouth that I will not shout. They said if I shout they will finish me, After the incidence (sic) the police arrested them. I went to the Police station, I saw them. The sagem handset, the security torch light and the money were recovered from the accused persons. It was the first accused person who was left to guard me. And he was the one who raised the alarm to the others when they ran away. There was security light in the security room. The security torchlight is a rechargeable one. It is for the Guest House. Immediately the police arrested them we were invited to the station and we identified them at the crime branch office.”

Under cross-examination he stated that he saw the three accused persons at the Police station and that they all confessed to participating in the crime.

PW1, one of the investigating police officers, stated how upon receiving a distress call that armed bandits had raided the Anglican Church Guest House at Wuse, Zone 5, went to the scene with a team of policemen. He stated that he met the manager of the Guest House and PW3, the security guard, who narrated what happened. He also met the victims of the robbery who were guests at the Guest House. The said victims enumerated the various items stolen from them, which included various types of handsets, sums of money, wristwatches, a necklace and some clothes. Having been informed that the robbers escaped into the bush, he stated that he and his team spread out among the three canal exits behind the Guest House to ambush the robbers and in the process apprehended the 1st accused. He stated that upon searching him the sum of N4,930.00, a necklace, two wristwatches and a belt were found on him. He stated that the items found on him tallied with

some of the items the victims mentioned had been stolen from them. It was the statement volunteered by the 1st accused that led to the arrest of the appellant and the 3rd accused. He stated that a search of their persons also produced more of the stolen items, namely two handsets, some jewellery and the sum of N11,000.00 in cash, Statements were obtained from the two accused, which were duly endorsed by a superior police officer. The appellant's statement, Exhibit C, was tendered and admitted in evidence without objection.

Under cross-examination, PW1 stated that he and his team arrived at the scene not more than five minutes after they received the distress call.

PW2, a police officer attached to the Special Anti Robbery Squad, State C.I.D. FCT Command, took over the investigation from PW1. He also conducted an investigation into the case, interviewed the victims of the robbery and obtained statements from the accused persons. The statement of the appellant was admitted in evidence without objection and marked Exhibit A1.

The appellant, in his defence stated that he was arrested at Jabi Motor Park while waiting to board a vehicle and that he was the victim of random arrests by the police. That he remained in detention because he had no money to bail himself out. He also stated that the statement obtained from him at Wuse police station was written by PW1, who had asked him a few preliminary questions such as his name, Local Government Area and educational background and that he was forced to sign it.

The learned trial Judge carefully considered the evidence led by the prosecution and the appellant's defence. He also painstakingly considered his confessional statements, Exhibits C and A1. He found as follows at page 166 lines 18 - 30 of the record:

"PW1 who responded to the distress call was the one who arrested the 1st accused and took him to Wuse Police station, I accept the evidence of PW3 who is an eye witness and a victim of the robbery incident, His evidence was not challenged, it is credible and is supported by the evidence of PW3.

I therefore believe his evidence. It is settled law that the evi-

dence of a single witness, if believed by the Court can establish a criminal case, even if it is a murder charge. See Effiong Vs The State (1998) 8 NWLR (Pt.562) 362 SC. And from the evidence of PW3 and PW1, I am satisfied with the truth of the confessional statements made by the three accused persons i.e. exhibits A, B, C and A1, B1 and C1.” B

On the failure of the prosecution to call all the witnesses listed in the proof of evidence, the learned trial judge held at page 170 lines 14 to 34:

“...a confessional statement is the best evidence on the issue of calling either the exhibit keeper or other victims of the robbery as witnesses. The law imposed no obligation on the prosecution to call a host of witnesses to prove its case. All it needs to do is to call enough material witnesses to prove its case, and in so doing it has a discretion in the matter. It does not lie in the mouth of the defence to urge the prosecution to call a particular witness. See Olayinka Vs The State (2007) 9 NWLR (Pt 1040) 561. And for the sake of emphasis the evidence of a single witness, if believed by the Court can establish a criminal case. See Effiong Vs The State (supra). D E

There is no law which imposes an obligation on the prosecution to tender as evidence the weapons used to commit an offence. Most often at times the culprits do discard the weapons after committing the offence. Similarly stolen items are rarely recovered. And where they are recovered, it is not absolutely necessary that they must be tendered in evidence in order to secure a conviction. It suffices once there is evidence to establish the fact that there was a robbery as in the instant case. Consequently the issues raised by the learned defence counsel lacks merit.” F G

In the course of its judgment, the Court below, at pages 239 - 240 of the record, endorsed the finding of the trial Court reproduced above. The trial Court had the singular opportunity of seeing and hearing the witnesses testify and of observing their demeanour. Notwithstanding the fact that the stolen items recovered from the appellant were not tendered in evidence, he found the witnesses to be credible and their evidence cogent and compel- H

ling. The lower Court found no reason to disturb the findings. Unless the appellant is able to show that the said findings are perverse, this Court will not interfere with the concurrent findings of fact by the two lower Courts. The appellant has failed to advance any special or compelling reasons to warrant interference by this Court.

In the circumstances, I hold that the failure of the prosecution to call all the witnesses named in the proof of evidence or to tender in evidence the items recovered from the appellant is not fatal to the prosecution's case, as there was sufficient evidence before the Court upon which it based its decision. This issue is accordingly resolved against the appellant.

ISSUES THREE AND FOUR

In respect of Issue Three, it is contended by learned counsel for the appellant that an identification parade ought to be conducted where the identity of an accused person is in issue. He submitted that an identification parade is essential where the accused person was not arrested at the scene of the crime, where the victim was not acquainted with the accused before the commission of the crime or where the confrontation with the accused was very brief. He relied on: *Alabi V. The State* (1993) 7 NWLR (Pt.307) 511 @ 524 - 525 G - A and 532 - 533 H - A.; *Archibong Vs The State* (supra) at 1762.

He submitted that the appellant was not arrested at the scene of the crime and that PW3 did not mention him in the course of his testimony and did not identify him as one of the robbers. He contended that there is no nexus between the appellant and the offence with which he was charged. He submitted that the non-identification of the appellant requires the return of a verdict of not guilty unless there is other evidence to show the correctness of the identification. He referred to: *Abdullahi Vs The State* (2005) ALL FWLR (Pt.263) 698 @ 715.

In respect of Issue Four, learned counsel referred to the ingredients of the offence of armed robbery as stated in the case of *Isah Vs The State* (2010) 16 NWLR (Pt.1218) 132 @ 161. I have

set them out earlier while resolving Issue Two above. He submitted that a conviction could be based solely on the confessional statement of an accused person but that the confessional statement can only be acted upon if subjected to the following guidelines to ascertain its truthfulness:

- i) Whether there is anything outside the confession which shows that it may be true;
- ii) Whether the confessional statement is in fact corroborated;
- iii) Whether the relevant statements of fact made in it are most likely true as far as they can be tested;
- iv) Whether the accused had the opportunity of committing the offence;
- v) Whether the confession is possible; and
- vi) Whether the alleged confession is consistent with other facts that have been ascertained and established.

He referred to: *Ubierho Vs The State* (2002) 5 NWLR (Pt.819) 644 @ 655. The above guidelines are also known as the test in *R V. Sykes* (1913) 8 Cr. App. Reports 233. He submitted that although it is settled law that the Court can act on a retracted confessional statement, such statement must be subjected to the guidelines enumerated above. He relied on: *Gira Vs The State* (1995) 4 NWLR (Pt.443) 375 @ 388 and *Solola vs The State* (2005) 11 NWLR (Pt.937) 460. He identified certain statements made in Exhibits C and A1, which in his view, were inconsistent with the evidence led by the prosecution. He observed that while the charge states that the offence was committed at No. 23 Anglican Church Guest House Dauda Street, Wuse Zone 5, Abuja, in his confessional statements the appellant stated that the operation was carried out "*in one hotel in Wuse*". He contended that in the circumstances the appellant confessed to a crime that occurred at a different location from the one charged. He submitted that no evidence was led to explain the discrepancy. He submitted further that in the absence of corroborative evidence, Exhibits C and A1 neither related to the offence charged nor the scene of crime. He noted further that there was no evidence to corroborate the state-

ment that offensive weapons were used since PW1 admitted that no offensive weapons were recovered from the appellant. He submitted that the learned trial Judge wrongly placed heavy reliance on the confessional statements and failed to dispassionately evaluate the evidence given by the appellant in his defence. He argued that once the appellant's oral testimony was rejected, his extra-judicial statements were bound to be rejected also on grounds of inconsistency. He relied on: *Oladejo Vs The State* (1987) 3 NWLR (Pt.61) 364 @ 427. He submitted that Exhibits C and A1 were wrongly relied upon to convict the appellant.

In reply, learned counsel for the respondent referred to the cases of *Bozin V. The State* (supra) and *Ikemson V. The State* (1989) 3 NWLR (Pt.110) 455 for the ingredients of the offence of armed robbery, which must be established beyond reasonable doubt by the prosecution. She submitted that the identity of an accused person as one of those who participated in the commission of the crime is a crucial element in discharging this burden. She however submitted that it is not in all cases that an identification parade is necessary. She conceded that an identification parade might be necessary in the circumstances enumerated by learned counsel for the appellant but argued that the participation of an accused person in the commission of a crime may also be established through his confessional statement. On what constitutes a confession she cited the case of: *Ikemson V. The State* (supra) at 476 D. She submitted that in proving its case, the respondent relied on the two confessional statements made by the appellant as well as circumstantial evidence. Relying on the case of: *Ubierho V. The State* (supra), she submitted that an accused person can be convicted on the basis of his confessional statement alone. She noted that before a confessional statement could be acted upon the Court must subject the statement to certain tests to determine its validity. She referred to *Ubierho Vs The State* (supra). She submitted that notwithstanding the appellant's retraction of his confessional Statements, the Court is entitled to rely and act on them, once it has considered the weight to be attached thereto in line with the guidelines for assessing their truthfulness. She referred

to: Edamine Vs The State (1996) 3 NWLR (438) 530; Gira Vs The State (supra).

Learned counsel submitted that the contents of Exhibits C and A1, which were admitted without objection, are consistent with the evidence of PW3 whose evidence amounts to facts outside the confessional statements that makes them probable. On the alleged inconsistency regarding the scene of the crime, she submitted that the evidence of the prosecution witnesses regarding the date and time of the offence and the fact that it took place in a guest house, which is similar to a hotel, show that there is no inconsistency. She contended further that the fact that the appellant retracted his confessional statements at the trial does not preclude the Court from acting on them, as they are direct, positive and unequivocal as to the appellant's participation in the commission of the offence, and were tendered and admitted in evidence without objection. She submitted further that the evidence of the prosecution witnesses was cogent and credible. She also observed that in Exhibits C and A1, the appellant mentioned the names of the 1st and 3rd accused persons as members of his gang. She submitted that the Court below was right in affirming the appellants conviction and sentence and urged this Court to resolve these issues against the appellant.

With regard to the issue of the identity of the appellant as one of those who took part in the armed robbery, both learned counsel have correctly stated the position of the law as regards the circumstances in which an identification parade is necessary. The law is settled that the question whether an accused person is properly identified as one of those who participated in the commission of the criminal act is a question of fact to be considered by the trial Court on the evidence adduced for that purpose. See: Ukpabi vs The State (2004) 11 NWLR (Pt.884) 439. It is also trite that whenever the case against an accused person depends wholly or substantially on the correctness of the identification of the accused, and the defence alleges that the identification was mistaken, the Court

must closely examine the evidence and in acting on it must view it with caution, so that any real weakness discovered about it must lead to giving the accused the benefit of the doubt. See: Ukpabi Vs The State (supra); R V. Turnbull (1975) 3 All ER 549; Abudu Vs The State (1985) 1 NWLR (Pt.1) 55 @ 51 - 62; Mbenu vs The State (1988) 3 NWLR (Pt.84) 615 @ 628; Ikpo Vs The State (2015) 2 - 3 SC (Pt.III) 88 @ 111 lines 6 - 21 per Kekere-Ekun, JSC. **However, if the evidence of a lone witness is believed, his identification of an accused person can sustain a conviction, even on a charge of murder** See: Ochiba Vs The State (2011) 12 SC (Pt.IV) 79.

In the instant case, there was no serious doubt as to the identity of the appellant as one of the robbers. Although PW3 did not specifically mention him, PW1 in his evidence testified as to how the appellant was apprehended after the 1st accused was caught in the bushes behind the Guest House shortly after the offence was committed. The 1st accused led the investigating team to where the appellant and the 3rd accused were arrested. The appellant confessed to his part in the crime in his statement, Exhibit A1. The statement, which was reproduced at page 153 of the record by the learned trial Judge, reads inter alia, as follows:

“The fourth operation was 7/9/2005, Omo came to me at Jabi Park and asked me and Ibrahim to follow okada. That was around 9:30 o’clock and we went behind Ibro Hotel where they parked (sic) sand, myself and Omo smoked Indian Hemp before we left for operation. We left for the operation around 2 a.m. It was Danlami who carried cutlass and it was the cutlass we used to cut stick we used for the operation. I got entrance to the guest house through the fence, it was Awalu who brought the work, when one sighted the security he came to us that the security was writing, he never sleep. From there all of us jumped into the house and tight (sic) the security down. We collected thirteen handsets and a lot of money. My share from the money was N8,000.00 and one hand set.”

The learned trial judge considered the facts as stated above along with the evidence of the prosecution wit-

nesses and found that their evidence corroborated the contents of the confessional statements. In other words he properly applied the settled guidelines in determining the truthfulness of the confession. I am of the considered view that there was no uncertainty whatsoever regarding the identity of the appellant as one of those who committed the offence. He confessed to his part in the crime and thereby fixed himself at the scene. There was also no doubt as to where the offence was committed. The observation of learned counsel for the appellant regarding the mention of hotel as opposed to guest house in the appellant's statement is of no moment, particularly as PW1 and PW2 testified that they personally interviewed the victims of the crime at the Anglican Guest House. Furthermore, even though the appellant retracted his confessional statements at the trial, the learned trial Judge was correct in the manner in which he treated the statements by considering their weight in relation to the other evidence adduced and proved by the prosecution.

The lower Court at pages 228 - 230 of the record reviewed the findings of the learned trial Judge in respect of Exhibits A1 and C as follows:

"The learned trial Judge evaluated the evidence before him to determine the admissibility of the appellant's statements, Exhibits A1 and C. He observed at page 25 of the judgment as follows:

"I therefore believe his evidence. The law is settled that the evidence of a single witness, if believed by the Court can establish a criminal case, even if it is a murder charge. See Effiong vs The State (1998) 8 NWLR (Pt 562) 362 SC. And from the evidence of PW3 and PW1, I am satisfied with the truth of the confessional statements made by the three accused persons i.e. exhibits A, B, C and A1, B1 and C1. In fact, each of the accused persons did mention one Omo as the person who introduced them to the gang. The accused persons in their testimonies before the Court mentioned where they were arrested in the morning hours. As for the 1st accused, he said he was arrested at Wuse. While the 2nd and 3rd

accused said they were arrested at Jabi. In my view it could not have been a coincidence for each of them to mention the name Omo in their statements and names of other members of the gang. PW1 told the Court that the 1st accused was arrested at Wuse, while the 2nd and 3rd accused persons were arrested at Jabi Motor Park. The three accused persons had confirmed what PW1 told the Court. Again PW3 did inform the Court that he was tied down by the 1st and 3rd accused persons before they started their operation. And in each of their statements the three accused persons mentioned that they tied down the security man (PW3) See Exhibits A1, B, B1 and C.

It is in view of the clear consistency in the statements of the three accused persons and the evidence of PW1 and PW3, that I am convinced and satisfied with the truth of the confessional statements, I am also convinced and satisfied that the prosecution has established beyond reasonable doubt that there was a robbery at the Anglican Church Guest House Wuse, Zone 5 on the 8/9/2005. And the robbery was an armed robbery. And the three accused persons, namely James Simon, Joel Adamu and Ibrahim Musa participated in the robbery."

Moreover, the failure to object to the admissibility of the statements, Exhibits A1 and C has derailed the subsequent attempt by the appellant to disown those statements. I cannot fault the lower Court in admitting the statements for it has no reason whatsoever to reject them. Once admitted the learned trial Judge was entitled to rely on the said exhibits. The poser in issue one cannot but be answered in the affirmative and resolved against the appellant."

The concurrent findings of fact by the two lower Courts have not been shown to be perverse. They are fully founded upon the evidence before the trial Court. This Court will not interfere. Issues Three and Four are accordingly resolved against the appellant.

In conclusion, the appeal succeeds in part. The conviction and sentence of the appellant to death for the offence of conspiracy to commit armed robbery by the trial Court and affirmed by the lower Court is hereby set aside. The judgment of the Court below affirming the conviction and sentence of the appellant to death by hanging for the offence of armed robbery is hereby affirmed.

Appeal succeeds in Part.

PETER-ODILI JSC

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

This is an appeal against the judgment of the Court of Appeal, Abuja Division which affirmed the conviction of the trial Court for the offences of conspiracy and armed robbery.

The appellant was charged along with two other persons for the offences of conspiracy and armed robbery contrary to Sections 5 and 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria 1990 respectively. C

The version presented by the prosecution/respondent is that the appellant with others conspired and robbed the guests in a guest house at Wuse Zone 5, Abuja and on their arrest certain of the stolen items belonging to the victims of the robbery were recovered from the robbers. Confessional statements were tendered and admitted in evidence as Exhibits A1 and C. D E

On the other part, the appellant in his defence denied committing the offences and asserted that the confessional statements were signed under duress.

At the conclusion of the trial the appellant with the 2nd accused were convicted and sentenced to death by hanging which was affirmed by the Court of Appeal and being dissatisfied further, the appellant has appealed before this Court. F

On the 20th October, 2016 date of hearing, learned counsel for the appellant, Aliyu Saiki adopted his brief of argument in which he formulated four issues for determination which are as follows: G

(i) Whether the trial conviction and sentence passed on the appellant are not a nullity in view of the failure of the trial Court to comply with the mandatory provisions of Section 187(1) of the Criminal Procedure Code (Ground 5) H

(ii) Whether the failure of the respondent to call as witnesses the victims of the robbery and tender the items allegedly recovered

from the appellant was not fatal to its case (Ground 2)

(iii) Whether there was proper identification of the appellant consequently linking him to the commission of the offences charged (Ground 3)

B (iv) Whether the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant having regard to the evidence before the Court. (Ground 1, and 4)

Aisha Egele of counsel for the respondent adopted the brief of the respondent filed on 19/9/16 and deemed filed on 20/10/16 C and in it distilled three issues for determination which are thus:

(i) Whether the failure of the trial Court to take the plea of the appellant in respect of the 1st count out of the two count charge as required by Section 187(1) of the Criminal Procedure Code renders the entire trial a nullity. (Ground 5)

D (ii) Whether the failure of the respondent to call those listed in the proof of evidence as witnesses and tender the recovered stolen items in evidence occasioned any miscarriage of justice in the conviction of appellant (Ground 2).

E (iii) Whether from the evidence adduced the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant. (Grounds 1, 3 and 4)

F I shall utilise the issues as crafted by the appellant and take Issues 1, 2 and 3 together and 4 which I see as sufficient to answer the nagging questions in this appeal.

Whether the trial conviction and sentence passed on the appellant are not a nullity in view of the failure of the trial Court to comply with the mandatory provisions of Section 187(1) of the Criminal Procedure Code. Also the matter of the failure to produce G the absent witnesses and the identification of the appellant.

H For the appellant, learned counsel stated that on arraignment to two counts of the charge, one of conspiracy and the other of armed robbery, the appellant was only put to the plea of the armed robbery and not conspiracy and so the taking of the plea in the second count alone was contrary to Section 187(1) of the Criminal Procedure Code (CPC) and thereby created a nullification of the trial in its entirety. He cited *Kajubo v The State* (1988) 1 NWLR

(pt. 73) 721; *Ewe v The State* (1992) 6 NWLR (pt. 246) 147; *Isiaka Rufai v The State* (2001) 13 NWLR 718 at 729 733; Section 36 (6) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

That aside from the above, that the proof of evidence specified eight witnesses which made them material and vital but only three witnesses testified and the failure to call the other witnesses is fatal. Learned counsel cited *Millar v The State* (2005) 8 NWLR (pt. 927) 296 at 277; *FRN v Mohammed Usman (Alias Yaro Yaro)* and *Anor* (2012) 8 NWLR (Pt. 1301) 141 or 156 etc.

Mr. Aliyu Saiki, of counsel for the appellant contended that the respondent's failure to call the victims of the robbery brings about the presumption that the evidence would have been favorable to the accused. He relied on Section 167(d) of the Evidence Act 2011; *Oshodin v The State* (2002) FWLR (Pt. 90) 1336 at 1347.

Also submitted for the appellant is that the failure of the respondent to tender in evidence the items allegedly recovered is fatal to the case of the respondent more so in the absence of any explanation of their absence. He referred to *Nwomukoro & Ors. v The State* (1995) 1 NWLR (Pt.372) 432 at 444 (CA).

For the appellant, it was further submitted by counsel that in a criminal trial, the identity of the accused is material and crucial and it must be established by credible evidence with the required standard which is beyond reasonable doubt as provided for in Section 135(1) of the Evidence Act, 2011.

That the identification in this instance was short of that standard expected. He cited *Balogun v AG. Ogun* (2002) FWLR (Pt. 100) 1287, *Alabi v State* (1993) 7 NWLR (Pt. 307) 511 at 524 - 525.

Responding learned counsel, Aisha Egele submitted that it is conceded that failure of the appellant to plead to the count on conspiracy vitiated the trial on only that count and did not affect the count of armed robbery to which appellant pleaded as each count stood alone and separately.

That the prosecution is not obligated to call all material and vital witness if there is a witness whose sole testimony would be

sufficient in proof of the crime that is enough she cited *Ogbonu V State* (1987) 2 NWLR (Pt.54) 20, *Adaje V State* (1970) 6-9 SC18.

In summary, the long and short of the stance of the appellant is that the trial, conviction and sentence of the appellant are a nullity for non-compliance with the mandatory provisions of Section 187(1) CPC and Section 36(6) of the 1999 Constitution as amended.

Also there was no nexus between the appellant and the commission of the offences charged and respondent had failed to prove the case against the appellant beyond reasonable doubt.

The response from the other side is that the offence of conspiracy is a separate, distinct and independent of the substantive offence, hence an accused person could be convicted for conspiracy even where the substantive offence has not been proved. That an acquittal on an offence of conspiracy does not translate to acquittal on the substantive offence and that it is trite that a charge on the

substantive offence could stand on its own without the charge on conspiracy. On the substantive charge the respondent contends the offence was proved beyond reasonable doubt and that the Court of Appeal was correct in affirming the conviction and sentence of the appellant for the offences charged.

It is stating the obvious that an arraignment of an accused without his taking his plea on the Court in keeping with Section 187(1) of the Criminal Procedure Code renders the trial a nullity. The present scenario however is unique and has to be treated with the distinction it deserves.

The provisions of the said Section 187(1) of the Criminal Procedure Code (CPC) provides thus:

“When the High Court is ready to commence trial the accused shall appear or be brought before it and the charge shall be read out in Court and explained to him and he shall be asked whether he is guilty or not of the offence or offences charged”.

That provision of the CPC is similar in content to Section 36(6) (a) of the 1999 Constitution and it stipulates as follows:

“Every person who is charged with a criminal offence shall

be entitled to:

(a) Be informed promptly in the language that he understands and in detail of the nature of the offence.”

The two statutory provisions, Section 187(1) CPC and Section 36(6) (a) of the Constitution are mandatory.

Curiously at the arraignment there were two counts of the charge, the count 1 being of conspiracy while count 2 was for armed robbery and it turned out that the record showed that the accused/appellant only took the plea for the count 2 and nothing said on the count 1. There was nothing on record explaining this anomaly.

The two statutory stipulations brook no options for failure to do the needful, that is that the count or charge being read and explained to the accused in English or language he understands in all details and essentials and his understanding of what he was standing trial for, after which he is asked to make his plea. As done in count 2, shown in the record there was compliance and nothing said on count 1.

The effect of what transpired is that only count 2 stood valid and its trial thereby in order. On the other hand the count 1 on conspiracy would remain invalid and the trial thereby a nullity. See *Kajubo v The State* (1988) 1 NWLR (Pt.73) 721; *Ewe v The State* (1992) 6 NWLR (Pt. 246) 147; *Isiaka Rufai v The State* (2001) 13 NWLR 718 at 729 - 733.

The appellant's stand is that the two counts and the entire proceedings be declared a nullity. This would be taking technicality too far particularly where the offence of conspiracy is a separate, distinct and independent offence from the substantive. Since either of the two counts can fail or succeed standing alone, only count 1 of conspiracy which being visited with the fundamental vice would fail without dragging down count 2 which had no non-compliance defect. I rely on *Balogun v. Ag. Ogun State* (2002) FWLR (Pt.100) 1287 at 1306.

Therefore all references to the conspiracy and evidence laid thereby would be of no moment having died with the count 1.

On the valid count 2 of armed robbery the appellant is of the view that prosecution failed to meet the required standard of proof

which is beyond reasonable doubt. That the prosecution called only three witnesses PW1 - PW3 out of the eight listed in the proof of evidence.

It is to be said that proving the offence beyond reasonable doubt is not synonymous with the number of witnesses called by the prosecution. This Court had restated what is required in meeting the standard of proof beyond reasonable doubt in the case of *Akalezi v State* (1993) per Ogwuegbu JSC at page 13 as follows:

“Proof beyond reasonable doubt is not attained by the number of witnesses fielded by the prosecution. It depends on the quality of evidence tendered by the prosecution. In the case of Miller v Minister of Pensions (1947) 2 ALL ER 372, it was held that Proof beyond reasonable doubt does not mean proof beyond all shadow of doubt and if the evidence is strong against a man, as to leave only a remote probability in his favour; of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt.”

The learned Supreme Court jurist further stating that:

“The Court can act on the evidence of a single witness if that witness can be believed given all the surrounding circumstances. One single credible witness can establish a case beyond reasonable doubt.”

What is expected of the prosecution is to exercise of discretion on who to call to testify and is not bound to utilize those named in the proof of evidence. This is so since the Court can convict on the evidence of only one witness if that witness is not an accomplice in the commission of the offence and his evidence sufficiently probative of the offence charged. See *Ofoke Nwambe v State* (1995) 3 NWLR (Pt.384) 385 at 408; *Onafowokan v State* (1987) 3 NWLR (Pt.61) 538; *Ogboodu v State* (1987) 2 NWLR (Pt.54) 20; *Adaje v State* (1979) 6-9 SC18.

In this case at hand, the PW3 an eye witness and victim of the robbery gave a positive account of the incident, stating how he was tied up by the appellant and other members of the gang. PW3 said he had no difficulty identifying the appellant as there was light at the time of incident and he saw the faces of the assailants.

On the non tendering of the weapons used at the robbery and the recovered stolen items the learned trial judge said there was nothing reducing the probity and cogency of the evidence as there was enough evidence to establish the fact that there was a robbery. That is correct summation in the circumstances as it is not often that weapons used during such transactions are recovered or the stolen items retrieved and so such failure to tender recovered weapons or items stolen would not adversely affect the required proof once other parameters exist in the evidence. It is therefore far-fetched to invoke the presumption of withholding evidence as provided in Section 167(d) of the Evidence Act, 2011, that is that the evidence withheld would have been unfavourable to the prosecution. B

On the question whether the essential ingredients of the offence of armed robbery had been established beyond reasonable doubt. It is to be stated that the elements of the said offence are: D

- (a) That there was a robbery or a set of robberies;
- (b) That the robbers were armed;
- (c) That the accused participated in the robbery. E

See *Bozin v State* (1985) 2 NWLR (Pt. 8) 465; *Ikemson v State* (1989) 3 NWLR (Pt. 110) 455.

I am in agreement with learned counsel for the respondent that the linkage between the offence and the appellant had been made as the identity of the appellant was established in a way that made an identification parade unnecessary. See *Alabi v State* (1993) 7 NWLR (Pt. 307) 511 at 524 - 525. F

The circumstances showcased in the evidence taken along with the confessional statements of the appellant Exhibits A1 and C made it easy for the culpability of the appellant to be established as happened in this case. The confessional statement met the guidelines for which their truthfulness were assessed and the later retraction went to no purpose. G

See *Nkwuda Edamine v State* (1996) 3 NWLR (Pt.438) 530 H
and *Dapere Gona v The State* (1996) 4 NWLR (Pt.443) 375 at 388.

The confessional statements alone could sustain the convic-

tion in this matter as there was corroboration and the statements met the six way test restated in the case of Ubierho V The State (2002) 5 NWLR (Pt. 819) 644 at 655.

The six way tests are:

- B 1. Whether there is anything outside the confession which shows that it may be true;
2. Whether the confessional statement is in fact corroborated;
3. Whether the relevant statement of fact made in it are most C likely true as far as they can be tested;
4. Whether the accused had the opportunity of committing the offence;
5. Whether the confession is possible and;
- D 6. Whether the alleged confession is consistent with other facts that have been ascertained and established.

Indeed there is nothing on which I can go against the concurrent findings of the two Courts below and their conclusion on the count 2 of armed robbery.

E ISSUE 4

Whether the learned justices of the Court of Appeal were right in affirming the conviction and sentence of the appellant having regard to the evidence before the Court.

F Canvassing the position of the appellant, Mr. Saiki stated that to establish the offence of armed robbery the prosecution needed to prove that there was robbery which was armed robbery and the accused was part of the incident.

He cited Isah v The State (2010) 16 NWLR (Pt. 1218) 132 at 161.

G That the confessional statement of the accused/appellant alone could ground a conviction if it met the guidelines established. That the retraction of such a statement does not change the use the Court could make of it. He cited Dapere Gona v The State (1996) 4 NWLR (Pt. 443) 375 at 388. That in the case at hand the H statements did not meet the expected guides as Exhibits A1 and C did not relate to the offences charge and there were no corroborative evidence. He relied on Gabriel v State (2010) 6 NWLR (Pt.1190) 280 at 324; Alor v State (1997) 4 NWLR (Pt. 505) 511.

Also learned counsel for the appellant stated that since the oral testimony of the appellant was inconsistent with the statement Exhibits B and C1, the statements are bound to be rejected. He cited *Oladejo V. State* (1987) 3 NWLR (Pt. 61) 364 at 427.

For the respondent it was submitted by Miss Aisha Egele that the respondent adopted two modes of establishing the guilt of the appellant which are confessional statement and circumstantial evidence. That the confessional statement in his case was enough to sustain the conviction She relied on *Ikemson V. State* (1989) 3 NWLR (Pt. 110) 455 at 476: *Ubierho V. The State* (2002) 5 NWLR (Pt 819) 644 at 655. B C

Flowing from the answers in Issues 1, 2 and 3 this issue 4 seems to have its answer cut out for it as indeed the Court of Appeal was correct to affirm the conviction and sentence of count 2, the viable charge. There is no basis to deviate at this point there being no misapplication of law in that regard nor any miscarriage of justice in place. D

From the foregoing and the better reasoning in the lead judgment I dismiss this appeal. E

I abide by the consequential orders made.

MUHAMMAD JSC

I read in draft the very thorough judgment of my learned brother Kekere-Ekun JSC just delivered. I adopt the reasons therein stated to allow the appeal in part. F

Appellant's conviction for conspiracy to commit armed robbery, an offence for which appellant had not been properly arraigned, is accordingly hereby set-aside. The appeal having however failed in respect of appellant's conviction and sentence for armed robbery as affirmed by the lower Court is hereby dismissed. G

OGUNBIYI JSC

I read in draft the lead judgment just delivered by my brother, Kekere-Ekun, JSC. I adopt same as mine and have nothing more H

useful to add. In other words I agree that the totality of the appeal herein should succeed in part. In other words while the conviction and sentence of the appellant to death for the offence of armed robbery is affirmed also by me, the other arm of the conviction and sentence of the appellant for the offence of conspiracy to commit armed robbery, is hereby set aside for the reasons and conclusions arrived thereat in the lead judgment.

AKA'AH'S JSC

I was privileged to read before now the judgment of my learned brother, Kekere-Ekun JSC wherein she nullified the conviction of the appellant for the offence of conspiracy to commit armed robbery and affirming the conviction for the substantive offence of armed robbery as laid under Sections 5 and 1(2)(a) of the Robbery and Firearms (Special Provisions) Act Cap 398 Laws of the Federation of Nigeria 1990. I agree with the resolution of the issues raised the appeal.

In the course of taking the pleas, the learned trial Judge omitted to ask the appellant to take his plea on count 1 which dealt with the Conspiracy charge. However when he came to deliver his judgment, the appellant was found guilty of conspiracy and sentenced to death along with the other two accused persons.

The Notice of Appeal to the Court of Appeal contained six grounds. Ground 4 from which issue No. (iii) was formulated complained that the offence of conspiracy was not proved by the prosecution. It is only in this Court that the appellant raised the issue of the absence of proper arraignment as prescribed by Section 187(1) of the Criminal Procedure Code which mandates that after an accused person has been arraigned before the Court, the charge shall be read and explained to him in the language he understands to the satisfaction of the Court. After the charge has been read and explained, the accused is then called upon to plead to the charge. This ensures that the accused's right to fair hearing as enshrined in Section 36(6) of the 1999 Constitution (as amended) is not compromised. Usually where there is more than one count in the

charge, all the counts are read and explained and each accused is then called upon to take his plea.

In paragraph 5.04 of the appellant's brief learned counsel stated that only one count out of the two counts charge was read and explained to the appellant and submitted that there was no proper arraignment as required by the Criminal Procedure Code which goes to the root of the criminal trial and affects the outcome of the trial and so urged this Court to declare the trial conviction and sentence of the appellant as a nullity. B

Learned counsel to the respondent conceded that the failure of the trial Court to comply with the provision of Section 187(1) of the Criminal Procedure Code and Section 36(6) of the Constitution only relates to count one dealing with conspiracy. C

At page 102 of the records the following minutes appear in relation to the 2nd accused (now appellant): D

"Court: Count 2 is read and explained to the 2nd accused in English language in all details and essentials. He said he understood the charge perfectly. He asked to make his plea.

2nd accused: I am not guilty" E

The appellant was properly arraigned in count 2 of the charge and pleaded not guilty to it. He was not misled and the proceedings were properly conducted. The omission by the Court to read and explain Count 1 to him and thereafter ask him to take his plea cannot in any way vitiate the proceedings under count 2 as to render his trial conviction and sentence for the offence of robbery a nullity. The charge was not incurably defective as was the case in *Okoro v. The State* (1953) 14 WACA 370 nor is the arraignment completely null and void as was the case in *Kajubo v. State* (1988) 1 NWLR (Pt. 73) 721. If the Court had read and explained count 1 to the appellant and asked him to take his plea, the conviction and sentence on count 1 would have stood. F

I agree with the reasoning and conclusion reached by my learned brother, Kekere-Ekun JSC. Even though the charge for conspiracy is based on the same facts as the charge for armed robbery, nonetheless the two counts are separate and create distinct offences and the principle of severance can be invoked in H

respect of the convictions which were returned by the trial Court. In this regard the conviction and sentence for the offence of armed robbery stands while the one for conspiracy to commit armed robbery is a nullity since he was not properly arraigned on that count.

B On 16th December, 2016 the appeal by Ibrahim Musa in SC.31/2013 was dismissed by this Court. The remaining issues in this appeal which were based on the same facts as SC.31/2013 should suffer the same fate as the appellant in this appeal was tried along with Ibrahim Musa and James Simon and it was the C arrest of James Simon that led to the arrest of the appellant and Ibrahim Musa.

D The appeal succeeds on the 1st issue. The conviction and sentence of the appellant on the count of conspiracy to commit armed robbery is declared a nullity since he was not properly ar-
raigned on that count but his conviction and sentence for armed robbery is affirmed because he was properly arraigned and took his plea on that count. Appeal therefore partially succeeds on the count of conspiracy to commit a felony to wit armed robbery.

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