

**SUPREME COURT OF NIGERIA**  
FRIDAY 13TH JANUARY, 2017. SC. 117/2012  
**CORAM:- M. U. PETER-ODILI, M. D. MUHAMMAD,**  
**C. B. OGUNBIYI, K. B. AKA'AHs,**  
**K. M. O. KEKERE-EKUN, JJSC**

COMMISSIONER OF POLICE ..... APPELLANT  
V.  
MR. EMMANUEL AMUTA ..... RESPONDENT

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CRIMINAL PROCEDURE - No case submission - Conditions for  
- It is made when there is no evidence to prove vital elements of  
the offence - And when evidence adduced by prosecution has been  
discredited (H1)

CRIMINAL PROCEDURE - Criminal trespass - Bona fide claim  
of right - Should negative intention of criminal trespass - And where  
ownership is contested - Prosecution has burden to prove mens  
rea (H2)

CRIMINAL PROCEDURE - No case submission - Correctness of  
- Trial of accused from Magistrate to appellate High Court was a  
nullity - As no prima facie case was made out (H3)

**FACTS**

Before the Chief Magistrate Court Obosi in Anambra State and following a fiat issued to Obi Akpudo Esq., by the Attorney-General of the State, accused/respondent and one other were arraigned on a four count charge bordering on a misdemeanour of forcibly entering a land in peaceful possession of another, which action is capable of causing a breach of peace. Respondent pleaded not guilty to the charge. Prosecution/appellant opened its case and called four witnesses in support. The fourth witness one Romanus Amuju, was the contractor that the complainant engaged to construct a fence on the land which led to a fracas between the complainant and respondent. The said witness did not conclude

122	COP v. Amuta (2017)	1	KLR (pt. 394)	121;
	(2017) 4 NWLR (PT. 1556)			379

his evidence and all efforts in getting him to do so was unsuccessful.

At the close of appellant's case, respondent made a no case submission which was overruled by the Court. Respondent was thus ordered to enter his defence. Dissatisfied, respondent appealed to the High Court of Anambra State sitting in its appellate jurisdiction. In its judgment at the end of hearing of the appeal, the appellate High Court dismissed the appeal and held that appellant made out a prima facie case that requires respondent to enter a defence. Still aggrieved, respondent appealed to the Court of Appeal Enugu Division. The Court heard the appeal and in a unanimous decision it allowed same and set aside the judgment of the appellate High Court. Being dissatisfied, appellant has appealed to the Supreme Court.

### **ISSUE FOR DETERMINATION**

*"Whether the Court of Appeal was right in its holding that the prosecution did not make out a prima facie case that require the Respondents to open their defence."*

**HELD** (Unanimously dismissing the appeal per

**AKA'AH'S JSC)**

*CRIMINAL PROCEDURE - No case submission - Conditions*

**1. It is now settled by a long line of judicial authorities since *Ibeziako v. C.O.P* (1963) 1 All NLR 61 that a submission of no case to answer may be properly made and upheld in the following circumstances:-**

**(i) When there has been no evidence to prove an essential element in the alleged offence either directly, circumstantially or inferentially;**

**(ii) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable Tribunal can safely convict on it. (p. 128 A)**

*CRIMINAL PROCEDURE - Criminal trespass - Bona fide claim*

**2. The evidence reproduced above shows that Obed Afamefuna and the accused were exercising a bona fide claim of right resisting the effort by the PW1 to erect the wall fence which should negative the intention of criminal trespass. Although this Court recently decided by a majority of 3-2 in *Spieß v. Oni* (2016) 14 NWLR (Pt.1532) 236 that where there is lack of good faith, the bona fide claim of right will not avail a person charged with criminal trespass. The reasoning in the majority decision is that law is meant to provide peace, security, protection, concord and purposeful co-existence amongst citizens and no reasonable society will encourage resort to self-help for whatever reason. I still remain of the strong conviction that the legal position regarding the bona fide claim of right where ownership is contested, the burden of proving mens rea must be discharged by the prosecution, and *Nwakire v. C. O. P.* remains good law. (p. 132 D)**

*CRIMINAL PROCEDURE - No case submission - Correctness of*

**3. The whole trial from the issuance of the fiat by the Attorney-General to the arraignment of the respondents leading to the proceedings in the Chief Magistrate's Court and the High Court sitting on appeal was a farce. This is a clear case of the PW1 using his position as a member of the Customary Court, Oba in the Idemili Local Government Area of Anambra State to harass the late Obed Afamefuna and the respondents who were his relations from asserting their claim to the disputed boundary between them. Since action had been instituted in the High Court, the appellant should have exercised patience to await the outcome of the case instead of forcefully taking over the land.**

**The Court below saw through the charade and was right in reaching the conclusion that no prima facie case**

***was made out requiring the accused to enter into their defence.***

***Accordingly I find no merit in the appeal and it is hereby dismissed.*** (p. 133 D)

**B**  
**REPRESENTATION**

S.A.M. Ofokansi (Mrs.) Assistant Director, Ministry of justice, Anambra State with O. Vivian Amadi SSC, Olakanmi, for the Appellant

C Chudi Obieze Esq. with Udoka Odiamma, Ofuneka Osotule, Uche Aduba, Nnamdi Phil-Ebosie, F. O. Aniweta and Chinenye Ezeneche, for the Respondent

**CASES REFERRED TO**

- D Ibeziako v. C.O.P. (1963) 1 All NLR 61  
 Okoro v. State (1988) NWLR (pt. 94) 255  
 Adeyemi v. State (1991) 6 NWLR (pt. 195) 1  
 Abogede v. State (1996) 5 NWLR (pt. 448) 270  
 E Suberu v. State (2010) 1 NWLR (pt. 1176) 494  
 Ikomi v. State (1986) 3 NWLR (pt. 28) 340  
 Abacha v. State (2002) 11 NWLR (pt. 779) 437  
 Nwakire v. C. O. P. (1992) 5 NWLR (pt. 241) 289  
 Spiess v. Oni (2016) 14 NWLR (pt. 1532) 236  
 F Okoro v. State (1988) 5 NWLR (pt. 94) 255  
 Okotie-Eboh v. DPP (1962) ALL NLR 352  
 Onubogu v. State (1974) 9 SC 1  
 Ekwunugo v. FRN (2008) 15 NWLR (pt. 111) 630

**G**  
**STATUTE REFERRED TO**

Criminal Code Cap 30 Vol. 1 Laws of Anambra State of Nigeria 1986, ss. 115, 120, 415(1), 496(a)

**H**  
**LEAD JUDGMENT BY AKA'AHs JSC**

The Attorney-General of Anambra State in exercise of the powers conferred on him by Section 77(1)(a)(iii) of the Magistrates Court Law, Cap 88 Vol. 6 Revised Laws of Anambra State

of Nigeria 1991 granted his fiat to Obi Akpudo Esq. to prosecute Lawrence Arinze and Emmanuel Amuta in Charge No MID/506C/97. On 16/3/2006 the two accused were arraigned on a four count amended charge to which they pleaded not guilty. The amended charge read thus:-

1. That you Lawrence Arinze (M) and Emmanuel Amuta (M) on the 17th day of April 1995 at Akuora Umuota Village Obosi in Idemili Magisterial District conspired with one Obed Afamefuna (now deceased) to commit a misdemeanour to wit, forcibly (sic) entry on land which is in the actual and peaceable possession of Ernest Nwofia and thereby committed an offence punishable under Section 496(a) of the Criminal Code Cap 30 Vol. 1 Laws of Anambra State of Nigeria 1986. <sup>B</sup>

2. That you Lawrence Arinze (M) Emmanuel Amuta (M) and Obed Afamefuna (now deceased) on the same date, time and place in the aforementioned Magisterial District in a manner likely to cause a breach of the peace or reasonable apprehension of the breach of the peace entered on a piece or parcel of land which is in actual and peaceable possession of Ernest Nwofia (M) and thereby committed an offence punishable under Section 115 of the Criminal Code Cap. 36 Vol. 1 Laws of Anambra State of Nigeria 1986. <sup>D</sup>

3. That you Lawrence Arinze (M) and Emmanuel Amuta (M) on the same date and place in the afore-mentioned Magisterial District wilfully and unlawfully damaged a shovel valued N1,600.00 (One thousand, six hundred naira) property of Ernest Nwofia and thereby committed an offence punishable under Section 415(1) of the Criminal Code Cap. 36 Laws of Anambra State of Nigeria Vol. 1 1986. <sup>F</sup>

4. That you Lawrence Arinze (M) and Emmanuel Amuta on the same date and place in the afore mentioned Magisterial District with intent to intimidate or annoy one Ernest Nwofia in a manner likely to cause a breach of the peace entered on a piece or parcel of land which is in actual and peaceable possession of the said Ernest Nwofia and therein stopped workers already working for him in the said land from continuing with their work and thereby <sup>H</sup>

*committed an offence punishable under Section 120(a) of the Criminal Code Cap. 36 Laws of Anambra State of Nigeria Vol.1 1986".*

The accused pleaded not guilty to the amended charge. The prosecution opened its case and called four witnesses. The fourth witness Romanus Amuju, was the contractor that the complainant engaged to construct the fence which led to a fracas between the complainant and the accused. He did not conclude his evidence and all efforts to get him conclude his evidence including the issuance of a bench warrant against him was unsuccessful. At the close of the prosecution's case, the accused made a no case submission which was overruled by the Chief Magistrate, Obosi. The accused were ordered to enter their defence.

The accused were dissatisfied with the order and appealed against it to the High Court of Anambra State sitting in its appellate jurisdiction. On 24/3/2009 the High Court sitting on appeal held while dismissing the appeal that the prosecution made out a prima facie case of forcible entry under count II that called for an explanation from the accused/appellants as to how they ended up in a fight if they entered the premises as Peace makers. The accused appellants further appealed to the Court of Appeal Enugu with leave of the High Court. The Court of Appeal Enugu delivered its judgment on 4/5/2011 and in a unanimous decision it allowed the appeal and set aside the judgment of the appellate High Court. In the lead judgment of Augie JCA (as she then was) she held as follows at page 208 of the records:-

*"The Respondent complied with the order, and did dispense of PW4, which meant that Pw4 remained hanging in the air, and even worse, a bench warrant for the arrest of PW4 was hanging with it. Obviously, the trial Magistrate Court and the appellate High Court did not fully grasp the effect of this state of affairs on the Respondent's case, which is why both could insist that the Appellants have a case to answer. Can the Respondent actually beat its chest and say that it made out a case for the Appellants to answer in the circumstances. I think not. As I said, a submission of no case to answer will be successful where the evidence has been so*

*discredited or is so unreliable that no reasonable Court would convict on it. PW4 did great damage to the case for the prosecution, and the only conclusion that can be reached is that the Appellants have no case to answer, and they must be discharged. Thus the appeal succeeds and is allowed. The decision of the Lower Court in its judgment delivered on 24th May, 2009 is set aside. The no case submission is upheld and the Appellants are discharged”.* B

It is against this judgment that the appellant has appealed to this Court. The Notice of Appeal containing three grounds of appeal was filed on 3/8/2011 from which the appellant’s counsel distilled the following two issues for determination:- C

*“(1) Whether the Court of Appeal misapplied the principles upon which a no case submission may be made and upheld in the circumstances of this case (Ground 2).*

*(2) Whether the Court of Appeal was correct in setting aside the judgment of the Lower Court without considering the totality of the evidence led by the prosecution before the trial Court (Grounds 1 and 3).”* D

On his part the respondent through his counsel formulated a sole issue for determination as follows:- E

*“Whether the Court of Appeal was right in its holding that the prosecution did not make out a prima facie case that require the Respondents to open their defence.”*

I agree with the respondent that only a sole issue has been generated for determination in this appeal which is issue no. (ii) in the appellant’s amended brief filed on 8/5/2015 but was deemed filed on 29/2/2016. F

The appellant’s contention is that it made out a prima facie case requiring an explanation from the respondents but the Court of Appeal only considered the inconclusive evidence given by PW4 without looking at the whole case presented by the prosecution to arrive at its judgment. The respondent on his part is arguing that the Court of Appeal was correct in coming to the conclusion that the no case submission was properly raised since the prosecution failed to establish a prima facie case which required the respondents to enter their defence. G H

***It is now settled by a long line of judicial authorities since Ibeziako v. C.O.P (1963) 1 All NLR 61 that a submission of no case to answer may be properly made and upheld in the following circumstances:-***

***(i) When there has been no evidence to prove an essential element in the alleged offence either directly, circumstantially or inferentially;***

***(ii) When the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable Tribunal can safely convict on it.*** See: Okoro v. State (1988) NWLR (Pt.94) 255. Adeyemi v. The State (1991) 6 NWLR (Pt.195) 1: Abogede v. The State (1996) 5 NWLR (Pt.448) 270 and Suberu v. The State (2010) 1 NWLR (Pt.1176) 494.

In the ruling by the Chief Magistrate on the no case submission, the Court found that a case has been made out against the accused persons in counts 1-3 of the charge and that the prosecution has failed to make out a case against the accused persons in count 4 of the charge. The High Court sitting on appeal limited its finding of a prima facie case being made out against the accused in counts 2 and 3.

I venture to state that there has been a shift in the rigid adherence to calling on an accused to enter into his defence once a prima facie case has been established against the accused as was done in Ikomi v. State (1986) 3 NWLR (Pt.28) 340.

In Abacha v. State (2002) 11 NWLR (Pt.779) 437 Belgore JSC (as he then was) in the majority judgment (with Ejiwunmi JSC, dissenting) disagreed with the opinion by the Court of Appeal that the appellant had taken a premature step of challenging the indictment when he could await the time for no case submission to move that he had no case to answer and that such challenge to quash an information should not be encouraged. He said at page 485:-

*With the greatest respect, in a democratic setting, as we now are, with no legislative ouster of Courts jurisdiction, all perceived abuses should be tested if confidence is to be preserved for Courts*



*as final arbiter in peoples rights. The Courts have inherent power to present abuse of their process by any of the parties, whether plaintiff or defendant, prosecution or defence, so that as long as democratic process exists nobody will have his rights curtailed.*

*All power to settle issues between parties is vested in Courts and Court must be vigilant that genuine issues and controversies are settled so that no accused person will be oppressed either directly or indirectly through act of prosecution; if not we shall have persecution in place of prosecution.*

With this admonition in mind it becomes imperative to examine the evidence adduced in this case in order to determine if actually the prosecution made out a prima facie case requiring the accused (now respondent) to enter into their defence.

The prosecution called four witnesses. PW1, Ernest Nwokoye Nwofia was the complainant and gave evidence as follows:-

*“On 17/4/95 in my premises at Umuota Village Obosi, I hired a group of workers, 7 of them in number headed by a contractor named Romanus Amufia to fence in an opening at the back of my premises because hoodlums and thieves had invaded me because of that. As the workers assembled and I mobilized them with tools and what to work with. When they started digging ground, one Mr. Afamefuna now deceased with members of his family came out from their compound besieged the area where the work was going on and tried to stop the worker from going with work. Then I insisted that they must continue. As they were unable to stop the workers on their own following my insistence, deceased sent for the 2 accused persons now in Court, they came and joined the deceased and members of his family and engaged the workers in a serious battle. The 1st accused told the workers to disappear and live the scene and that he was the chairman and that he had settled the matter. At that state, he damaged a shovel belonging to me valued N1,600.00, one of the workers was wounded and the place became rowdy as people rush in and at stage the situation was beyond my control. Finally the accused persons succeeded in dispersing the workers. I had to go to the police station to make a report when the police arrived, they were able to meet with vendor*

*who sold the land to me at the scene. The vendors are Edmund Iyile and Emenike Obi. On the arrival of the Police they were able to meet the late Obed Afamefuna at the scene as the 2 accused had ran away likewise the workers. The police invited me to their office at about 7.30am and when I got there I meet the 2 accused persons and the deceased and we all made statement to the police and we left .*

When PW2 was asked about what happened on 17/4/1995 he said:-

*"I was at the house of the PW1 because he asked me to erect a wall fence at the back of his compound because he is not always at home and I discovered they had a dispute there and I so advised him to get a contractor to do the job so that I will supervise the work . I told him to look for one Romanus Amuju and bring him. He called the Romanus on 17/4/1995 who came to start work but I was there earlier and while the worker brought out his (sic) working tools and was mixing the cement while the working was going the members or Afamefuna family at home all came and stop the workers from going on with the work. While this was going on, the 1st accused person came out and told the person mixing the cement to stop work. In the process the 2nd accused came out and asked the person digging the foundation for wall fence to stop work. Romanus Amuju told his workers that came with him to stop work and the PW1 told them to continue the work because he had paid him for the job because he gave him N20,000.00 in advance. While the uproar continued I advised the PW1 to stop work He then left and I went home.*

When PW2 was cross-examined he said that 1st and 2nd accused live very close to the house of PW1.

PW3 was the Police Officer who investigated the case after PW1 had lodged his complaint and he recorded the statements of PW4, Obed Afamefuna and Emmanuel Amuta. The statements were admitted in evidence as Exhibits C, D and E respectively.

The evidence of PW4 was that PW1 had asked him to erect a small wall behind his house but he did not do the work because when he went to the site the person claiming ownership of the land

asked him and his workers not to work because there was a dispute on it and so he packed his tools and left with his men. When he was referred to Exhibit "C" and the portion of the statement where he said he saw the accused persons and others at the scene he said:-

*"When I started the work I didn't know anybody but the complainant told me what to tell the police which they recorded".* B

After making this statement the prosecuting counsel applied for an adjournment. PW4 never concluded his evidence before the prosecution closed its case. C

The cross-examination of PW1 revealed that he the complainant had a land dispute with Obed Afamefuna and a suit was filed at the High Court and given suit No. 0/822/96 which was renumbered HID/510/97. Obed Afamefuna and the accused are from the same family. D

The cross-examination is reproduced as follows:-

*"Q. You know Ogbueshi Obed Afamefuna?*

*Yes sir, I know him*

*Q. He is the person you have a land dispute with?* E

*Yes, at the High Court and not in this case.*

*Q. Do you know the suit number of the case?*

*The suit number was 0/822/96 and with the creation of new decision it became HID/510/97.*

*Q. Tell the Court why you sued Obed there in the suit?* F

*Because he trespassed into my premises without authority.*

*Q. Where is the said premises?*

*Where I am living now and is my compound.*

*Q. Did Obed state in his defence why he trespassed into your land?* G

*I wouldn't know caused I am not a lawyer.*

*Q. Is that case still pending in Court?*

*Yes sir.*

*Q. If Obed is dead why should the case still been in Court?* H

*I wouldn't know.*

*Q. You are member of a Customary Court?*

*Yes, member for Oba Customary Court.*

*Q. On the 17/4/95 Obed stopped you from trespassing into his land.*

*It is not true.*

*Q. What did he do on that day?*

B *On that date the late Obed and the 2 accused persons with the children of Obed besieged my compound early on the said date as early as 6.45am and stopped the workers and a contractor I engaged to work for me and they were accordingly arrested by the police and charged to Court.*

C *Q. The late Obed has a common boundary with you*  
*Yes Sir.*

*Q. Mr. Obed does not have any land in other place where both of you have a common boundary?*

*I don't know.*

D ***The evidence reproduced above shows that Obed Afamefuna and the accused were exercising a bona fide claim of right resisting the effort by the PW1 to erect the wall fence which should negative the intention of criminal trespass. See: Nwakire v. C. O. P. (1992) 5 NWLR (Pt.241) 289. Although this Court recently decided by a majority of 3-2 in Spiess v. Oni (2016) 14 NWLR (Pt.1532) 236 that where there is lack of good faith, the bona fide claim of right will not avail a person charged with criminal***  
F ***trespass. The reasoning in the majority decision is that law is meant to provide peace, security, protection, concord and purposeful co-existence amongst citizens and no reasonable society will encourage resort to self-help***  
G ***for whatever reason. I still remain of the strong conviction that the legal position regarding the bona fide claim of right where ownership is contested, the burden of proving mens rea must be discharged by the prosecution, and Nwakire v. C. O. P. remains good law.***

H Coming back to the appeal, it was submitted that the Court of Appeal was wrong to set aside the judgment of the Lower Court without considering the totality of the evidence led by the prosecution before the trial Court. I have produced extenso the evidence

led, it is only the complainant who said that the accused/respondent besieged his compound and attacked the workers and also damaged the shovel valued at N1,600.00. He never produced the damaged shovel before the Court. No other witness testified that anybody was injured or working tool such as shovel was damaged. PW2 who advised the complainant to look for Romanus Amuju, the contractor who will do the work while he (PW2) supervised the contractor told the Court that Obed Afamefuna and the respondents only disrupted the mixing of the cement and digging the foundation for the wall fence.

PW4 who brought the workers to the disputed land said nothing about either himself or any of the workers being manhandled. He told the Court that it was the PW1 who told him what he should say when Exhibit "C" was being recorded. No evidence was adduced to prove the essential elements of the offences in counts 2 and 3 on which the Court below ruled, there was prima facie case requiring the respondents to enter into their defence.

***The whole trial from the issuance of the fiat by the Attorney-General to the arraignment of the respondents leading to the proceedings in the Chief Magistrate's Court and the High Court sitting on appeal was a farce. This is a clear case of the PW1 using his position as a member of the Customary Court, Oba in the Idemili Local Government Area of Anambra State to harass the late Obed Afamefuna and the respondents who were his relations from asserting their claim to the disputed boundary between them. Since action had been instituted in the High Court, the appellant should have exercised patience to await the outcome of the case instead of forcefully taking over the land.***

***The Court below saw through the charade and was right in reaching the conclusion that no prima facie case was made out requiring the accused to enter into their defence.***

***Accordingly I find no merit in the appeal and it is hereby dismissed.***

The judgment of the Court of Appeal, Enugu in Appeal No.CA/E/316/2001 delivered on 4th May, 2011 is hereby affirmed. Appeal is dismissed.

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B

**PETER-ODILI JSC**

I am in agreement with the judgment just delivered by my learned brother, Kumai Bayang Aka'ahs JSC and to register that support I shall make some remarks.

C This is an appeal by the appellant against the judgment of the Court of Appeal, Enugu Division which set aside the Ruling of the trial High Court which had upheld the ruling of the Magistrate Court overruling the no case submission.

D The facts in greater detail are well set out in the lead judgment and it would serve no useful purpose repeating them here.

E On the 20th day of October, 2016 date of hearing, learned counsel for the appellant, Mrs. S. A. M, Ofokansi adopted the Amended Brief of the appellant filed on the 8th day of May, 2015 and deemed filed on 29th day of February 2016. In that brief are raised two issues for determination which are as follows:

"1. *Whether the Court of Appeal misapplied the principles upon which a no case submission may be made and upheld, in the circumstances of this case. (Ground 2)*

F 2. *Whether the Court of Appeal was correct in setting aside the judgment of the Lower Court without considering the totality of the evidence led by the prosecution before the trial Court (Grounds 1 and 3)."*

G Chudi Obieze, learned counsel for the respondent adopted respondent's amended brief filed on the 15th day of May 2015 and deemed filed on 29th February 2016. He identified a sole issue for determination which is thus:

H *"Whether the Court of Appeal was right in its holding that the prosecution did not make out a prima facie case, that requires the respondent to open his defence."*

This single issue of the respondent is sufficient of itself to answer the question in this appeal.

To put across appellant's stand, learned counsel submitted that the Court of Appeal misconceived the principle upon which a no case submission may be made and upheld. That the Court below was wrong to have based its findings on the sufficiency of the evidence led by the prosecution instead of considering the totality of the evidence adduced by the prosecution to see whether there is a ground for proceeding against the accused. He Cited Ibeziako v. COP (1963) 1 ALL NLR 61 at 69; Okoro v. The State (1988) 5 NWLR (Pt.94) 255; Abacha v. The State (2002) FWLR (Pt.118) 1274 etc.

That learned counsel for the respondent did not refer to the evidence of PW4 and so could not rely on it in making the submission of no case to answer. That the Court below took up the issue of the evidence of PW4 suo motu without hearing the prosecution which occasioned a miscarriage of justice on the part of the appellant, thus calling for the intervention of this Court to re-evaluate the evidence given at the trial.

Learned counsel for the respondent contended that the PW4 is central to the proof of the charges levelled against the respondents and his evidence is a must as he was present from the beginning to the end of the alleged fiasco. That for his evidence to be hanging and incomplete left a *"very dark coloration on the case put forward by the prosecution and the Court below was right"*.

That the PW1 and PW2 did not give any evidence showing that the respondent entered into the premises in question in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace. He cited Okotie-Eboh & Ors v. DPP (1962) ALL NLR 352 at 358; Aruna v. State (1990) 6 NWLR (Pt.155) 125 at 134, Onubogu v. State (1974) 9 SC 1.

That a prima facie case is made out when the evidence presented is such that if uncontradicted and if believed, will be sufficient to prove the case against the accused and that in this instance the appellant did not make out any case in counts 2 and 3 for the respondent to make their defence. He relied on Ajiboye v. State (1993) 8 NWLR (Pt. 414) 406; Ekwunugo v. FRN (2008) 15 NWLR (Pt.111) 630 Nnaji v. IGP (1957) SCNLR 156 at 158.

In a nutshell the position of the appellant is that the Court below misapplied the principle upon which a no case submission may be made and upheld. That the Lower Court failed in its duty to consider the totality of the evidence led by the prosecution before arriving at its decision that PW4 did great damage to the prosecution's case with the result that the respondent had no case to answer.

The respondents had a contrary stance stating that the Court below was right in holding that the prosecution did not make a prima facie case that requires the respondent to open their defence.

The findings and conclusion of the Court below are found at pages 207 - 208 and it went into what transpired at the Court of trial in the course of the testimony of the PW4 and that Court stated thus:

*The long and short of it is that the evidence of PW4 and the fact that a warrant of arrest had to be issued against him, puts a very dark colouration on the evidence adduced by the prosecution to prove its case.*"

That summation of the Court below seems in tandem with the record, as the evidence of PW1, the owner of the land where the fracas allegedly occurred contradicted in material particulars, the evidence proffered by the PW4 and who was not cross-examined since he absconded with the prosecution declaring him a hostile witness in between his testimony. The situation got bad enough for the prosecution to apply for and it was issued a bench warrant against PW4 to get him to come to conclude his testimony. However the prosecution failed to execute the warrant as they could not reach PW4 whereupon the prosecution had to dispense with PW4's evidence. The respondent saw this as great damage to the prosecution's case but the appellant is of the view that their case could succeed in spite of that.

It is to be re-iterated that a no case submission is said to be made out and upheld where -

*"1. There has been no evidence to prove an essential element in the alleged offence and/or*



*2. When the evidence by the prosecution has been so discredited as a result of cross-examination, or is so manifestly unreliable that no reasonable Tribunal could safely convict on it. See Ajiboye v. State (1993) 8 NWLR (Pt. 414) 406 at 414 ??? 415; Ekwunugo v. FRN (2005) 15 NWLR (Pt.1111) 630 at 639.”*

From the evidence of PW1 as against that of PW2 the fine details of what transpired at the scene of crime did not tally especially as regards whether or not the shovel was damaged in the course of the fracas. This Court in *Aruna v. State* (1990) 6 NWLR (Pt.155) 125 at 134 held that where the testimonies of the prosecution witnesses clearly conflict, it is not open to pick and choose between the testimonies. Also it is not open to the Court to credit one and discredit the other unless a proper foundation is laid for such a course. In such a situation the doubt that naturally flows is to be resolved in favour of the appellant. I call in aid the case of *Onubogu v. State* (1974) 9 SC 1.

It is clear that with or without the evidence of PW4 the prosecution cannot see its way through in making out a prima facie case and so the finding of the Court of Appeal is unassailable in that the prosecution is nowhere near making out a prima facie case for which the Court would call upon the respondent to make his defence. This is because the basis on which such a call to defend would be made has not been established. Firstly the testimonies of the prosecution witnesses are not such as the prosecution could use them to prove the essential elements of the alleged offence.

Also the evidence of the prosecution has been so discredited as a result of cross-examination and the testimonies of the witnesses are even conflicting with one another thereby producing the manifest unreliability that no reasonable Tribunal could safely convict on it. It therefore calls to reason to stop the further waste of time as the Court of Appeal found and uphold the no case submission.

From the foregoing and the fuller and better reasoning in the lead judgment I too dismiss this appeal. I abide by the consequential orders made.

**MUHAMMAD JSC**

I read in draft the lead judgment of my learned brother  
B Aka'ahs JSC just delivered. I entirely agree with his lordship's reasoning and conclusion therein that the appeal lacks merit. I adopt the lead judgment as mine in dismissing the appeal and making the same consequential orders as made in the lead judgment.

C -----

**OGUNBIYI JSC**

I read in draft the lead judgment just delivered by my  
brother, Aka'ahs, JSC. I agree that the appeal is devoid of any  
D merit and ought to be dismissed.

The background facts of the case are spelt out in the lead  
judgment. The constitutional provision on the presumption of in-  
nocence of an accused person is sacrosanct and settled. The bur-  
den is always on the prosecution to prove the guilt of the accused  
E and not his business to prove his innocence. He can decide to  
keep mute from beginning of the trial right through to the end.

It is for the prosecution to make out a prima facie case against  
the accused through credible evidence which must be laid bare  
F before the Court. It is the proof of hard facts that would lead to the  
conviction of the accused.

Without any case made out against the accused, he cannot  
be called upon to enter his defence because in doing otherwise  
would undermine the constitutional presumption of innocence.

G In the case at hand, PW4 who would have been a key wit-  
ness for the prosecution ended up as a hostile witness and his  
evidence was never concluded. The prosecution in the circum-  
stance cannot say it had made out a case against the appellant to  
H answer.

As rightly held by the respondent's counsel, the evidence of  
PW4, is necessary and vital for the prosecution to make out a  
prima facie case against the appellant, without which the case

must of necessity fail. It is on record that PW4 was present from the beginning to the end of the alleged fracas. His evidence was incomplete and the consequences are devastating and destructive to the prosecutions case. With the evidence of PW4 being in conflict with that led by PW1 and PW2, the effect is to render the entire case of the prosecution as discredited; thus, no prima facie case can be said to have been made out by the Prosecution which will require the respondent to open his defence. The Lower Court was well grounded therefore when it held thus:-

*“Obviously, the trial Magistrate Court, and the appellate High Court did not fully grasp the effect of this state of affairs on the respondent’s case, which is why both could insist that the appellant have a case to answer.”*

Also at Page 207, lines 1 - 6 of the records, the Lower Court rightly held and said:-

*“the appellant canvassed arguments on this issue from pages 1 22 of their brief and the respondent did so from pages 13 to 14 of its brief, but it will not (sic) necessary in my view to go into details of their argument. The long and short of it is that the evidence of PW4, and the fact that a warrant of arrest had to be issued against him, put a very dark coloration on the evidence adduced by the prosecution to prove its case.*

In support of the settled principle of a no case submission, the following decisions of this Court are evidence: *Ajiboye v. State* (1993) 8 NWLR (Pt.414) p.406 at 414 - 415 and *Ekwunugo v. FR.N.* (2005) 15 NWLR (Pt.1111) p.630 at 639.

The Lower Court was right in its holding that the prosecution did not make out a prima facie case against the respondent, to open their defence.

With the few words of mine and more particularly on the comprehensive reasoning and conclusion arrived at by my brother Aka’ahs, JSC, I adopt his judgment as mine and also dismiss this appeal as lacking in merit. I abide by all orders made in the lead judgment.

**KEKERE-EKUN JSC**

I have had a preview of a draft of the judgment of my learned brother, KUMAI BAYANG AKA'AH, JSC just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed.

B The only issue that calls for determination in this appeal is the sole issue identified by the respondent, which reads thus:

*"Whether the Court of Appeal was right in holding that the prosecution did not make out a prima facie case that required the respondents to open their defence."*

C I adopt as mine the summary of the facts that gave rise to this appeal as set out in the lead judgment.

D It is settled law that a submission that there is no case to answer by an accused person means that there is no evidence upon which, even if the Court believed it, it could convict. In other words, where there has been no evidence to prove an essential element of the offence, or where the evidence adduced by the prosecution has been so discredited as a result of cross-examination E or is so manifestly unreliable that no reasonable Court or Tribunal can safely convict on it. At the Stage when a no case submission is made, the trial Court is not called upon to express an opinion on the evidence before it. The credibility of the witnesses is not in issue at this stage All that the Court is required to do is to determine whether or not there is any legally admissible evidence linking the accused person with the commission of the offence with F which he is charged. If the submission is based on discredited evidence, such discredit must be apparent on the face of the record. G If it does not, the submission is bound to fail. See: *Daboh v. The State* (1977) All NLR 146 per Udo Udoma, JSC; also found in (1977) LPELR 904 (SC) 1 @ 15-16 A; *Ekwunugo v. F.R.N.* (2008) 15 NWLR (Pt.111) 630; *Ibeziako v. C.O.P.* (1963) 1 SCNLR 99; *Owonikoko v. The State* (1990) 7 NWLR (Pt.62) 381; *Agbo v. The State* (2013) 11 NWLR (Pt.1365) 377.

H In the instant case, as rightly held by the Court below, PW4 was the star witness for the prosecution, being the contractor engaged by the complainant PW1, to supervise the construction of a

fence at the back of his premises and who was on site with his workers when the alleged attack occurred. His evidence was the glue that would have tied all the evidence led by the other prosecution witnesses together. In the course of examination in chief, learned counsel for the prosecution applied to treat him as a hostile witness, as his evidence was at variance with his statement to the Police as to what transpired on the day in question. However, he admitted during his testimony that what he told the Police about seeing the accused person and others at the scene was what PW1 told him to say. Thereafter he could not be located to conclude his evidence and be cross-examined thereon, in spite of a bench warrant ordered against him. The prosecution had to close its case leaving the evidence of PW4 inconclusive. B C

I agree entirely with the finding of the Court below that Pw4 did considerable damage to the prosecution's case, as his evidence had been rendered unreliable. The evidence of PW1, PW2 and PW3, even if believed by the Court, was not sufficient to sustain a conviction against the respondent. PW1's shovel, which he alleged was damaged in the fracas and which might have provided a link between the respondent and the offence was neither produced nor tendered in evidence. The no case submission was properly made out in the circumstances of this case. D E

For these and the more detailed reasons adduced in the lead judgment, I hold that this appeal is devoid of merit. I hereby dismiss it and affirm the judgment of the Court below. F

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