In the Supreme Court of Nigeria

On Friday, the 16th day of December 2011

Before their Lordships

Ibrahim Tanko Muhammad	.....	Justice Supreme Court
John Afolabi Fabiyi	.....	Justice Supreme Court
Olufunlola Oyelola Adekeye	.....	Justice Supreme Court
Nwali Slyvester Ngwuta	.....	Justice Supreme Court
Mary Ukaego Perter-Odili	.....	Justice Supreme Court

SC.270/2010

Between

Emmanuel Ochiba ..... Appellant

And

The State ..... Respondent

Judgment of the Court
Delivered by
Mary Ukaego Peter-Odili. JSC

This is an appeal against the decision of the Court of Appeal, Jos Division, hereinafter referred to as the court below. The decision of the court below was delivered on the 29th day of June, 2010, affirming the conviction and sentence of the Appellant for the offence of culpable homicide punishable with death contrary to Section 221 of the Penal Code.

At the trial high court presided over by the Honourable Justice Yargata Nimpar of the High Court of Justice, Jos, Plateau State before whom the Appellant was arraigned, on the 9th day of November, 2005, he convicted the Appellant for culpable homicide and sentenced him to death by hanging.

The Appellant appealed to the Court of Appeal, Jos, unsuccessfully as that court dismissed the appeal and affirmed the conviction and sentence of the Appellant. Against that judgment of the court below delivered on the 29th day of June, 2010, the Appellant has appealed to this court.

A brief of the facts is that the charge against the Appellant arose from an event leading to the murder of one Godwin Momoh on the 12th day of September, 2001, along Tafawa Balewa Street adjoining Langtang Street, Jos. The incident occurred when the deceased together with Barrister Jonathan A. Mawiyau and Chukwudi Achi were walking to their various houses at Langtang Street, Jos. Jonathan A. Mawiyau testified at the trial of the Appellant before the high court as PW1 and he stated that on that day, he along with Chukwudi Achi and the deceased were stopped by some policemen including the Appellant, who ordered them to come. That the three of them raised their hands up, obeyed the instructions of the policemen. He said the Appellant asked them to introduce themselves and kneeling they complied. PW1 said the Appellant then collected a gun from one of the policemen and shot the deceased on the chest and the deceased died instantly.

PW1 identified the deceased saying the incident occurred between 12 noon and 1 pm. He said earlier before the Appellant and other policemen called them, he saw them enter a shop and that he specifically saw the Appellant come out of the shop with a bottle of hot drink which he drank. PW1 went on to say that the Appellant wore the uniform of a constable which was confirmed by the investigating police officer (PW3) who said at the time of incident the Appellant was a constable.

PW2, the father of the deceased was called and he rushed to the scene and found his son in a pool of blood. That they took the body home and after sometime the Commissioner of Police sent somebody to find out what happened and the Appellant was arrested that night.

PW2 said he was present at the orderly room trial. That when Appellant was brought from the cell, he was asked if he knew PW2 and on learning who PW2 was, the Appellant knelt down to beg PW2 to forgive him.

The Appellant testified on his own behalf as DW1 and he denied the whole incident including either seeing the deceased, PW1 or even begging PW2.

There was no other witness for the defence.

At the conclusion of final addresses on the 28th day of July, 2005, the learned trial judge on the 9th day of November, 2005, in his judgment found the charge proved against the Appellant and had him convicted and sentenced to death. Those decisions were affirmed by the court below.

At the hearing the Appellant through counsel, Elisha Y. Kurah, Esq., in consonance with Appellant's brief raised two issues from the grounds of appeal which are:

1. Whether the Honourable Court of Appeal was right in affirming the conviction and death sentence passed on the Appellant by the trial court on the basis that the offence with which the Appellant was charged was proved beyond reasonable doubt.

2. Whether the failure by the Prosecution to call other eye witnesses did not amount to withholding evidence.

For the Respondent through counsel on its behalf were couched three issues which are as follows:

1. Whether the identity of the Appellant was established beyond reasonable doubt.

2. Whether the conviction of the Appellant could be said to be fatal for failure to call more than one eye-witness.

3. Whether the charge against the Appellant was proved beyond reasonable doubt.

The two versions of issues are in the main similar but those of the Appellant seem to me more easily adaptable and I shall utilize them.

On Issue No 1 in which is posed the question whether the Court of Appeal was right in affirming the conviction and death sentence passed on the Appellant by the trial court on the basis that the offence with which the Appellant was charged was proved beyond reasonable doubt, learned counsel for the Appellant, Mr. Kurah had contended that for a conviction and sentence of the Appellant to stand, the law requires the Prosecution to prove beyond reasonable doubt that:

1. The death of a human being had actually taken place.

2 Such death was caused by the Accused person.

3. The act was done with the intention of causing death, or that it was done with the intention of causing such bodily injury as:

    a. The Accused knew or had reason to know that death would be the probable and not only the likely consequence of his act;

    b. The Accused knew or had reason to know that death would be the possible and not only the likely consequence of any bodily injury which the act was intended to cause.

He anchored those principles on the cases as follows:

1. *Gira v State (1996) 4 NWLR (Part 443) 375*

2. *Nwaeze v State (1996) 2 NWLR (Part 428) 1*

3. *The State v Fatai Azeez (2008) 4 SC 188; (2008) All FWLR (Part 424) 1423 at 1455 - 1456 F-D*

4. *Ndukwe v The State (2009) 2-3 SC (Part II) 35; (2009) All FWLR (Part 464) 1447 at 1466 F- H.*

For the Appellant was further submitted that the evidence led before a trial court may be direct or circumstantial and whichever is the case, it must be evidence which would establish the guilt of the Accused beyond reasonable doubt. That in this case the Prosecution relied heavily on the evidence of the PW1 especially in respect to the identity of the culprit in a situation where PW1 had never seen the Accused before that day of incident. That an identification parade was an absolute necessity and failure of such was fatal. Since the trial court rejected what had taken place as an identification parade.

Mr. Kurah of counsel went on to say that the identification of the PW1 cannot be taken as without fault when PW1 said that he was under tension when he was asked to kneel down. That the trial and subsequently the court below ought to have considered the circumstances and found it unsafe to convict the Appellant based on his purported identification by the PW1. He cited the case of *Sunday Ndidi v The State (2007) 5 SC 175; (2007) All FWLR (Part 381) 1617 at 1638 F - G.*

That there was need for the trial court to caution itself in considering the evidence of identification as proffered by the PW1, when the identification parade was rejected by the court since it failed the test upon which it could be taken as such. That in the peculiar circumstances of this case, a proper identification parade was absolutely necessary. He cited the following cases:

1. *Abudu v The State (1985) 1 NWLR (Part 1) 55 at 62 A- E*

2. *Sunday Ndidi v The State (supra) at 1638 - 1639 H - F.*

3. *Ebri v The State (2004) 5 SC (Part II) 29; (2004) All FWLR (Part 216) 420 at 437 B - C*

4. *Segun Balogun v Attorney General of Ogun State (2002) 2 SC (Part II) 89; (2002) FWLR (Part 100) 1287 at l30l;*

5. *Kabiru Almu v The State (2009) 4-5 S.C. (Part II) 33; (2009) 4 MJSC 147 at 163 C - H.*

Learned counsel for the Appellant said the evidence of PW1 is far from being positive and/or conclusive as to who shot and killed the deceased. That his testimony did not place the Appellant in a proper position that would have enabled PW1 see when the Appellant fired the shot that killed the deceased. He stated that a lot of questions arose which begged for answers and so the evidence of Chukwudi Achi, who the PW1 said was present became crucial so as to clear the air. That PW1's evidence had some contradictions and the court cannot pick and chose what to believe and which to disbelieve. He referred to *Onubogu v The State (1974) 9 SC 1 at 17-21; (1974) 9 SC (Reprint) l.*

Mr. Kurah said the trial court did not consider the written statement of PWl which did not tally with the evidence of the PW1 in court. He referred to *Okafor v Okafor (2000) FWLR (Part1) 17 at 25.*

Responding, learned counsel for the Respondent, Mr. Pwajok stated that clearly in evidence were that PW1 saw the Appellant with other policemen who entered a liquor shop, bought some drink, came out and took it. Also that PW1 said he specifically saw the Appellant with a small bottle of hot drink and there was an exchange of words between PW1 and Appellant. Mr. Pwajok of counsel said PW1 in evidence said Appellant wore the uniform of a constable which fact was confirmed by PW3 as Appellant was a constable at the time. That there was nothing to suggest at the trial that the observation of the PW1 was impaired in any way. He cited *R v Turnbull (1976) 3 All ER 549; Mbenu & Ors. v The State (1988) 7 SC (Part III) 71; (1988) 7 SCNJ (Part II) 221 - 222; Ndidi v The State (2007) 5 SC 175; (2007) All FWLR (Part 381) 1617 at 1638 F - H.*

Learned counsel for the Respondent said the visual spontaneous evidence of identification was not discredited and therefore good enough in a murder trial. He cited *Adeyemi v The State (1991) 2 SC 93; (1991) 1 NWLR (Part 170) 679 at 694; Ogoala v The State (1991) 2 NWLR (Part 17 5) 509 at 523; Adamu v The State (1991) 6 SC 17; (1991) 4 NWLR (Part 187) 530 at 537 540.*

Mr. Pwajok of counsel for the Respondent said in order to secure a conviction for the offence of culpable homicide punishable with death under Section 221 of the Penal Code the Prosecution as in the instant case must prove,

(a) That the deceased had died;

(b) That the death of the deceased was caused by the Accused; and

(c) That the act or omission of the Accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

He cited *Adekun1e v The State (2006) 6 SC 218; (2006) All FWLR (Part 332) 1452 at 1466 G - A; Adava v The State (2006) 2 SC (Part II) 136; (2006) All FWLR (Part 311) 1777 at 1785 para E - G; Ogba v The State (1992) 2 NWLR (Part 222) 164; Uguru v The State (2002) 4 SC (Part II) 13; (2002) All FWLR(Part 103) 330.*

It was further submitted that PW2, the father of the deceased confirmed that he went and carried the body of the deceased from the scene and later buried same on the instruction of the Commissioner of Police. That medical report was not of essence because death was instant after the gunshot. He cited *Adekunle v The State (supra) at 1466 Paragraphs E-F; Akpan v The State (1994) 12 SCNJ 140 at 152; Jua v State (2010) 1- 2 SC 96; (2010) 2 MJSC 152 at 196 paras. D-E; Alabi v The State (1993) 7 NWLR (Part 307) 511; Annabi v. The State (2008) 4 - 5 SC (Part II) 229; (2008) 5 SCNJ 136 at 149.*

That the standard of proof required had been met and that is beyond reasonable doubt and not beyond all shadow of doubt He referred to *Agbo v State (supra) 1417 Paragraphs E-G; Jua v The State (supra) at 170 Paragraphs C-G.*

That this court can only interfere with the concurrent findings of the two lower courts if the findings were perverse and that is not the case here. He cited *Udo v The State (2006) 7 SC (Part II) 83; (2006) All FWLR (Part 337) 456 at 467 C-D; Olaiya v State (2010) 1 SC (Part I) 89; (2010) MJSC (Part l) 73 at 88 para E-G; Bakare v State (1984) 1 NWLR (Part 52) 597; OnyelokwoThe State (1992) 8 NWLR (Part 230) 444; Adekunle v The State (supra) at 1477, Paragraphs D-E.*

On the issue of identification of the Appellant, the lower court in accepting what the trial court did said:-

> "PW1 had a good view of the Appellant at close range. First, when the Appellant came out of the hotel drinking from a bottle of "Hot" drink. Secondly when he shot the deceased who at the time was kneeling beside him (PW1). All of this occurred in broad daylight (noon) and at very close distance. At no time during trial did learned counsel for the Appellant suggest that the observation of PW1 was impaired by inclement weather or distance. It is only

when the identity of the Accused person (Appellant) is really in issue that an identification parade becomes necessary .....

A review of the evidence led, particularly excerpts from the judgment confirm that the learned trial judge was right to hold that the Appellant shot and killed the deceased on the 12th September, 2001."

It is not difficult to flow along with the concurrent findings of the two courts below and that is that nothing impaired the observation put forward by the PW1 whose identification of the Appellant as the culprit was instantaneous and not discredited. The evidence of PW2, father of the deceased was not impugned by cross-examination as to who the deceased was and the state PW2 found him and took the corpse home. Also not lost in view is the encounter at the police station with the Appellant which evidence was not contradicted. The circumstances made the absence of a medical report of no moment. I place reliance on *Mbenu & Ors. v The State (1988) 7 SC (Part III) 71; (1988) 7 SCNJ (Part II) 221- 222; Ndidi v The State (2007) 5 SC 175; (2007) All FWLR (Part 381) 1617 at 1638 F-H; Adeyemi v The State (1991) 2 SC 93; (1991) 7 SC (Part.11) 1; (1991) 1 NWLR (Part 170) 679 at 694; Adamu v The State (1991) 6 SC 17; (1991) 4 NWLR (Part 187) 530 at 537-540.1*

The next question to tackle is whether the conditions under which an offence of culpable homicide punishable with death under Section 221 of the Penal Code under which the Appellant as Accused was convicted and sentenced were met. The conditions to be met are thus:-

(a) That the deceased had died;

(b) That the death of the deceased was caused by the Accused; and

(c) That the act or omission of the Accused which caused the death of the deceased was intentional with knowledge that death or grievous bodily harm was its probable consequence.

The court below following on the heels of the findings of the trial high court found those conditions properly met and upon sound evidence supporting. It is in the light of these concurrent findings so made that there is no gainsaying that this court has no business interfering therein. I anchor on the following cases:- *Olaiya v State (2010) 1 SC (Part I) 89; (2010) MJSC (Part 1) 73 at 88; Bakare v State(1984) 1 NWLR (Part 52) 597; Udo v The State(2006) 7 SC (Part lI) 83; (2006) All FWLR (Part 337) 456 at 467 C.D.*

The standard of proof required in a criminal trial such as the one at hand, that standard beyond reasonable doubt has been established and the Appellant is merely beating about the bush in his attempt to take a contrary position not buttressed by anything worthy of note. The materiality of the contradictions Appellant's counsel made a hue and cry over is not in place. I resolve Issue 1 against the Appellant.

On the second issue of whether the failure by the Prosecution to call any other eye witness did not amount to withholding evidence.

In answer to that question above, learned counsel for the Appellant said the Prosecution had applied under Section 185(1) Criminal Procedure Code (C.P.C.) through an *ex-parte* motion for leave to prefer a charge against the Appellant attaching statements of 11 (eleven) witnesses but during trial only called two of those witnesses, which include one Ubi Eze who was an eye witness. Mr. Kurah of counsel said, Ubi Eze's evidence was essential as in his statement to the police had said the person who shot the deceased had the rank of a sergeant. That though the Prosecution is not obliged to call a host of witnesses on the same point, it had a duty to call all material or vital witnesses so that all the issues would be properly placed before the court. He cited the cases of *The State v Azeez & 5 Ors. (2008) 4 SC 188; (2008) All FWLR (Part 424) 1423 at 1455 - 1256 F-D; Philip Omogodo v The State (1981) 5 SC 5 at 17; (1981) 5 SC (Reprint) 4; Umom Usufu v The State (2008) All FWLR (Part 405) 1731 at 1752 E- H.*

Learned counsel for the Appellant stated that though the statement of Ubi Eze was not tendered in evidence, the fact that it was part of the documents exhibited to the motion ex-parte seeking leave of the trial court to prefer charge against the Appellant and is part of the record of appeal is sufficient for the court to look at it and determine the materiality of his evidence as was done in the case of *The State v Azeez & 5 Ors. (supra).* He stated further that Ubi Eze was a vital witness that ought to have been called by the Prosecution as his evidence would have settled one way or the other the actual perpetrator of the crime in question. Also that both from the statement of the PW1 before trial and in evidence in court, PW1 had harped on the fact that one Chukwudi Achi was with him at the time of the incident and therefore an eye-witness and the Prosecution neither recorded Chukwudi's statement nor called him to testify which amounted to withholding evidence and thereby brought into operation Section 149 (d) of the Evidence Act. He referred to the cases - *The Republic v Edward Obinga v Anor. (1965) All NLR 501 at 503; Rose Oshodin v The State (2002) FWLR (Part 90) 1336 at 1347 Paragraph H*

In responding, learned Attorney General of Plateau State said there was no need to call Chukwudi Achi since the trial judge who heard and saw PW1 believed him, having found PW1's evidence credible and believable. That the assessment of the credibility of witnesses and the ascription of probative value to evidence are the function of a court of trial which had the advantage of seeing and watching the demeanour of the witnesses. He said those are not the functions of the court below or this court in the exercise of appellate jurisdiction to interfere with the findings of the trial court on the assessment of

credibility of witnesses. He cited *Bayo Adelumola v the State (1988) 3 SCNJ (Part l) 63 at 79; Ndidi v The State (supra) at 1649 Paragraph E.*

Mr. Pwajok for the Respondent said the defence at the trial court did not cross-examine PW2 on the evidence as to what transpired between him and the Appellant when he was brought out from the cell and told that PW2 was the father of the deceased. That this was tantamount to acceptance of the piece of evidence as true and correct. He referred to *Okosi v State (1989) 2 SC (Part I) 126; (1989) 1 NWLR (Part l00) 642; Agbo v State (2006) 1 SC (Part II) 73; (2006) All FWLR (Part 309) 1380 at 1400 Paragraphs F - H.*

Mr. Pwajok went on to say that in respect to the position of the Appellant that the Prosecution should have called other witnesses including Chukwudi Achi, that the Prosecution is not so duty bound. That it had no obligation to call a host of witnesses or to adduce every available evidence to prove its case in order to discharge its burden and a conviction can be secured on the evidence of a sole witness. He cited *Archibong v State (2006) 5 SC (Part III) 1; (2006) All FWLR (Part 232) 1747 at 1773 - 1774 Paragraphs H-B; Akpan v The State (1991) 5 SC 1; (1991) 3 NWLR (Part182) 695; Mohammed v The State (1991) 7 SC (Part I) 141; (1991) 5 NWLR (Part 192) 438; Abogede v The State (1996) 4 SCNJ 223 at 232 - 233; Oduneye v The State (2001) 1 SC(Part I) 1; (2001) 1 SCNJ 25.*

That there was no necessity for corroboration of the evidence of PW1, learned counsel for the Respondent contended. He cited *Garko v State (2006) 6 NWLR (Part 977) 524 at 542 Paragraphs B- E; Olayinka v The State (2007) 4 SC (Part I) 210; (2007) 4 SCNJ 53 at 73; State v Ajie (2000) 7 SC (Part I) 24; (2000) 3 NSQCR 53 at 66.*

What the Appellant through counsel in answering the question posed here is saying is as to whether it was not necessary to call the other eyewitness in proof of the case. The Appellant is laying a burden for the Prosecution which the law has not provided for. The law in proof of criminal offences including the capital one which is the subject of his appeal is that of proof beyond reasonable doubt. In that regard if through only one witness that burden is discharged, so be it and that is sufficient. Proof does not necessarily mean, proof by specific number of witnesses without which, it cannot be said that the case has been established by the standard required. It is rather lame to call for the operation of Section 149(d) of the Evidence Act against the Prosecution for failing to call the witnesses that Defence felt ought to be called. Since the Prosecution was able to make out their case adequately within the standard of proof required, there was no need for surplussage or superfluity serving no useful purpose. See the cases of *Oduneye v The State (2001) 1 SC (Part I) 1; (2001) 1 SCNJ 25; Akpan v The State (1991) 3 NWLR (Pt.182) 695; Mohammed v The State (1991) 7 SC (Part l) 141; (1991) 5 NWLR (Part 192) 438.*

There being nothing upon which I can upset what the court below did, I dismiss this appeal and uphold the decision of the court below which affirmed the conviction and sentence of the Appellant.

Judgment delivered by
Ibrahim Tanko Muhammad. JSC

The Appellant was charged for the offence of culpable homicide punishable with death under Section 221 of the Penal Code. The learned trial court judge after arraignment and full trial found the Appellant guilty as charged and was convicted and sentenced to death by hanging. His appeal to the Court of Appeal, Jos Division, was unsuccessful. He further appealed to this court on six grounds of appeal. The issues distilled by learned counsel for the Appellant read as follows:

> "1. Whether the Honourable Court of Appeal was right in affirming the conviction and death sentence passed on the Appellant by the trial court on the basis that the offence with which the Appellant was charged was proved beyond reasonable doubt.
>
> (Grounds 1, 2, 3, 4 and 6)
>
> 2. Whether the failure by the Prosecution to call any (sic) other eye witness, did not amount to withholding evidence.
>
> (Ground 5)."

Learned Attorney General for the Respondent distilled the following issues:

> "1. Whether the identity of the Appellant was established beyond reasonable doubt.
>
> 2. Whether the conviction of the Appellant could be said to be fatal for failure to call more than one eyewitness.
>
> 3. Whether the charge against the Appellant was proved beyond reasonable doubt."

In the establishment of a criminal offence, with which an Accused person stands trial before a trial court, especially a capital offence such as culpable homicide, for which the Appellant stood trial at the trial court, the law requires that that offence must be proved beyond reasonable doubt by the Prosecution. (Section 138 of the Evidence Act). The rudiments, factors, ingredients or elements which the law places on the shoulders of the Prosecution to so prove are as follows:

1. that the death of a human being had actually taken place,

2. such death was caused by the Accused person Accused

3. the act was done with the intention of causing death, or that it was done with the intention of causing such bodily injury as:

   (a) the Accused knew or had reason to know that death would be the probable and not only likely consequence of his act or;

   (b) the Accused knew or had reason to know that death would be the probable and not only the likely consequence of any bodily injury which the act was intended cause.

In its judgment, the trial court, per Nimpar J., made a summary of the above requirements of the law and made its findings. The trial court held, among others as follows:

> "In a criminal trial the law expects that the Prosecution must prove its case beyond reasonable doubt. See Section 238 Evidence Act. See the case of *Adeniji* supra. This burden does not usually shift. The burden is that of the Prosecution. Let it be made clear that proof beyond reasonable doubt does not mean proof beyond all shadow of doubt.
>
> Under Section 221(b) of the Penal Code the Prosecution is expected to prove the 3 basic elements or ingredients of the offence. The ingredients were highlighted above. I shall consider the evidence available in determining if the ingredients have been proved or not. It is necessary that all the ingredients be proved and the totality of it beyond reasonable doubt for the charge to be said to have been proved against the Accused person."

The learned trial judge meticulously examined all the evidence placed before her. She rationally evaluated same and came up with the following findings in respect of the ingredients:

1st Ingredient

> "I therefore find that the Prosecution has proved the first ingredient of the offence."

2nd Ingredient

> "I therefore find that the Prosecution has proved the second element or ingredient as required by law."

3rd Ingredient

> "The act of the Accused was intentional with the knowledge that death or grievous bodily harm was its probable consequences. I find that the Accused person intended to cause bodily injury which was probable to cause the death of the deceased and indeed caused the death."

At the tail end of the evaluation of all the evidence and counsel's addresses, the learned trial judge concluded as follows:

> "From the above therefore I find that the Prosecution has proved its case against the Accused person."

After having reviewed the proceedings of the trial court including the judgment, the submissions of the learned counsel for the respective parties and the prevailing law, the court below, per Rhodes-Vivour. JCA., (as he then was) came up with the following conclusion:

> "A judge sitting on appeal should be very reluctant to differ from a trial judge on a finding of fact except those findings are perverse. I am satisfied with the findings of the learned trial judge. In this case the learned trial judge believed PW1 that the Appellant shot the deceased at close range. I affirm the judgment and dismiss the Appeal."

Beautiful!

This makes the decision appealed against to be concurrent. Before it can be set aside, it will require special grounds upon which reasons therefore, shall hang. See: *Ogundipe v Awe (1986) 3 NWLR (Part 68) 118; Ojo v Governor of Oyo State (1989) 1 SC (Part I) 1; (1989)1 NWLR (Part 95) 1; Ajeigbe v Odedire (1988)1 NWLR (Part 72) 584; Okonkwo v Okolo (1988) 2 NWLR (Part 79) 632; Ogbodu v The State (1987) 2 NWLR (Part 54) 20; Ajunwa v The State (1988) 9 SC 110; (1988) 4 NWLR (Part 89) 380*.

Now, it is to be reiterated that the role of an appeal court is simple. It affirms decisions brought to it on appeal where such decisions are based on sound legal principles which have been exposed by the trial court and or, the court from which the appeal emanated. Such are decisions which are arrived at through painstaking steps and careful evaluation of evidence. No elements of miscarriage of justice are traceable to such decisions. By their soundness, such decisions are readily acceptable

to any reasonable man who may be present at the court. The appeal court, thus, has no reason to tamper with them. I think this is what I found in this appeal. The trial court did a very good and commendable job. The court below, too, did a very good review thereof. I have no reason to tamper with the decision. An appeal court tampers with decisions which are perverse or are shown to cause some miscarriage of justice.

For the detailed reasons given in the leading judgment of my learned brother, Odili JSC., I, too, affirm the concurrent decisions of the two lower courts. The appeal lacks merit and it is hereby dismissed.

Judgment delivered by
John Afolabi Fabiyi. JSC

I have read before now the judgment just delivered by my learned brother - Peter Odili, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is devoid of merit and should be dismissed.

This is a case in which the Appellant was charged for the offence of culpable homicide contrary to Section 221 of the Penal Code and punishable with death penalty. PW1, an eye witness, stated how the Appellant shot the deceased on the chest between 12. 00 noon and 1.00 pm on the fateful day. The deceased died instantly.

The trial court, found the Appellant culpable; convicted and sentenced him accordingly. The court below affirmed the stance of the trial court in its own judgment delivered on 29th June, 2010. The Appellant decided to further appeal to this court.

One of the complaints of the Appellant relates to the fact that the Prosecution only called PW1 as an eye witness. I need to say it that it is settled law that the Prosecution was not obliged to call a host of witnesses in order to discharge the burden placed on it to prove the charge against the Appellant beyond reasonable doubt as dictated by Section 138(1) of the Evidence Act. A sole witness like PW1, who has given credible and clear evidence which was believed by the trial judge, will suffice. See: *Obue v The State (1976) 2 SC 141; (1976) 2 SC (Reprint) 79; Shurumo v The State (2010) 12 SC (Part I) 73 at 87-88; Akpan v The State (1991) 5 SC 1; (1991) 3 NWLR (Part 182) 695.*

Let me further reiterate the well settled law that where the two courts below make concurrent findings of fact, as herein, this court will not interfere unless same is perverse or runs against the current of evidence adduced or occasioned miscarriage of justice. I am unable to surmise any point in this direction. I shall not interfere. See: *Sobakin v The State (1981) 5 SC 75; (1981) 5 SC (Reprint) 46; Igwe v The State (1982) 9 SC 174; (1982) 9 SC (Reprint) 87; Shorumo v The State (supra) 96.*

The Appellant also contended that the case against him was not proved beyond reasonable doubt as dictated by Section 138(1) of the Evidence Act. I feel that the assertion equates with what can be referred to as an eye wash. This is because where all the vital ingredients of the offence have been clearly established, as herein, the charge is proved beyond reasonable doubt. See: *Alabi v The State (1993) 7 NWLR (Part 307) 511 at 523.*

For the above reasons and those carefully set out in the leading judgment, I too, feel that the appeal should be dismissed.

I order accordingly and confirm the decision of the court below which affirmed conviction and sentence passed on the Appellant by the trial court.

Judgment delivered by
Olufunlola Oyelola Adekeye. JSC.

I have read in draft, the judgment just delivered by my learned brother, M. U. Peter-Odili, JSC. The Appellant was charged to court with criminal homicide punishable with death under Section 221 (b) of the Penal Code.

The particular of charge reads,

> "That you, Emmanuel Ochiba on or about the 12th day of September, 2001, along Tafawa Balewa Street Jos, did commit culpable homicide punishable with death in that you caused the death of one Godwin Momoh by doing an act to wit - shooting him with a gun in the chest with the intention of causing his death."

He was charged before the High Court of Plateau State - Jos Judicial Division. During the trial the Prosecution called three witnesses an eye witness Jonathan Manwiyan, the father of the deceased, Peter Momoh who arrived at the scene to find the dead body of his son lying on the road from where he collected same.

The corpse was ultimately arranged for his burial by Inspector B. Okorie the investigating officer. At the end of trial and during evaluation of evidence and ascription of probative value to same, the learned trial judge considered the defence of the Appellant and every other available defence open to an Accused standing trial for murder. The court was satisfied that the Prosecution had proved the ingredients of the offence of culpable homicide against the Accused beyond reasonable doubt before proceeding to conviction and sentencing him to death by hanging. The Appellant appealed to the Court of

Appeal. The Court of Appeal dismissed the appeal, and affirmed his conviction and sentence. Being aggrieved by verdict of the Court of Appeal, the Appellant further appealed to this court.

In the Appellant's brief filed on 16/8/20 10, the Appellant settled two issues for determination by this court namely:-

1. Whether the honourable court was right in affirming the conviction and death sentence passed on the Appellant by the trial court on the basis that the offence with which the Appellant was charged was proved beyond reasonable doubt.

2. Whether the failure by the Prosecution to call other eye witness did not amount to withholding evidence.

The Respondent in his brief filled on 14/9/2011 identified three issues for determination as follows:

1. Whether the identity of the Appellant was established beyond reasonable doubt.

2. Whether the conviction of the Appellant could be said to be fatal for failure to call more than one eye witness.

3. Whether the charge against the Appellant was proved beyond reasonable doubt.

Both parties argued and made submissions on the issues raised in their respective briefs. The Appellant queried some aspects of the case of the Respondent on which he assumed the lower court was in error for not deciding them in his favour.

He faulted:

(1) The identification parade conducted by the police on 28/9/01 connecting him with the crime.

(2) He criticised the one eyewitness produced by the Prosecution.

The proof of evidence filed by the Prosecution reflected eleven witnesses, but only two witnesses and the investigating officer were called. He alleged that vital and material witnesses were not called like Ubi Eze and Chukwudi Achi - (aka Samco). The evidence of Ubi Eze was material in determining the actual policeman that shot and killed the deceased. In view of withholding their evidence this court must invoke Section 149(d) of the Evidence Act.

By virtue of Section 221 of the Penal Code the ingredients of the offence of culpable homicide punishable with death are:-

(a) That the death of a human being took place,

(b) That such death was caused by the Accused

(c) That the act of the Accused that caused the death was done with the intention of causing death or that the Accused knew that death would be the probable consequence of his act.

All these ingredients must be proved or co-exist before a conviction could be secured. See *Adava v State (2006) 2 SC (Part II) 136; (2006) 9 NWLR (Part 981) 152 Akpa v State (2008) 4-5 SC (Part II) 1; (2008) 2 NWLR (Part 1019) 500; Uwagboe v State (2007) 6 NWLR (Part 1031) 606.*

In every case where it is alleged that death has resulted from the act of a person, a link between the death and the act must be established and proved beyond reasonable doubt. In the course of events the cause of death must just be proved. Where the cause of death is ascertained, the nexus between the cause of death and the act or omission of the Accused alleged to have caused it must be established. These are factual questions to be answered by the consideration of the evidence. In our adversarial system of criminal justice, the Prosecution must prove its case beyond reasonable doubt with vital and relevant evidence it can produce.

In the process it must also produce vital witnesses to testify for the Prosecution. Before a trial court comes to the conclusion that an offence had been committed by an Accused person, the court must look for the ingredients of the offence and ascertain critically that the acts of the Accused complained of come within the confines of the particulars of the offence charged. See *Amadi v The State (1993) 8 NWLR (Part 314) 644; Fatoyinbo v A-G. Western Nigeria (1966) WRNLR 4; Okeke v The State (1995) 4 NWLR (Part 592) 676; Akinyemi v The State (1999) 6 NWLR (Part 607) 449*

A vital evidence is such evidence that goes to the root of the ingredients or elements of an offence of which an Accused person is charged.

The Appellant criticized his identification by PW1. PW1 gave an eye witness account of the incident. He was in the company of the deceased when the Appellant shot him. He saw the Appellant at close quarters. He was able to notice his mode of dressing and the bottle of drink he was holding and how he committed the crime. This incident occurred between

12 noon and 1 pm - in broad daylight. There could be no question of mistaken identity. The purpose of an identification evidence in all criminal trials is to show that the person charged with the offence actually committed the offence.

It is not in every case that identification parade is necessary. Where the Prosecution witness has knowledge of the Accused person, identification parade is not necessary. 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. In order to ascribe any values to the evidence of an eye witness identification of a criminal, the court in guiding against cases of mistaken identity must meticulously consider the following issues:-

(1) Circumstances in which the eyewitness saw the suspect - was it in difficult conditions.

(2) The length of time the witness saw the suspect or Defendant - a glance or longer observation.

(3) The opportunity of close observation.

(4) Previous contact between the two parties.

(5) The lighting conditions.

See *Eyisi v State (2000) 12 SC (Part I) 24; (2000) 15 NWLR (Part 697) 555; Okosi v State (1989) 2 SC (Part I) 126; (1989) 1 NWLR (Part 100) 642; Alonge v I. G. P (1959) SCNLR 156; Ikemson v State (1989) 6 SC (Part I) 114; (1989) 3 NWLR (Part 110) 455; Ukorah v State (1977) 4 SC 167; (1977) 4 SC (Reprint) 111*.

The learned trial judge warned himself of this position before making his findings on the issue of identification of the Appellant. He said in his judgment at Page 66 of the record that:-

> "On whether the identification parade was necessary, I find that since identification parade is not in evidence, the identification relied upon by court is the one PW1 said he observed the Accused at the scene and also identified him in court. The identification parade was not necessary in this case."

The court relied upon the recognition of the Accused by PW1. It is well established that recognition, visual spontaneous evidence of identification in most instances is more reliable than an identification parade and is acceptable in a murder trial, if believed by court.

On the issue of witnesses, the Prosecution has a duty to name all the witnesses it intends to call at the back of an information, where it decided not to call any of those witnesses, such witnesses should be produced for the purpose of cross-examination if available. It does not lie in the mouth of the defence to urge the Prosecution to call a particular witness - as there is nothing stopping the Accused himself from calling such witness when defence opens. See *Okoroji v State (2002) 5 NWLR (Part 758) 21*.

It is the prerogative of the Prosecution to call witnesses relevant to its case. It is however a settled principle of law that the Prosecution is not bound to call every person that was linked to the scene of crime by physical presence or, to give evidence of what he saw. Once persons who can testify to the actual commission of crime have done so, it will suffice for the satisfaction of proof beyond reasonable doubt in line with Section 138 of the Evidence Act.

It is not also incumbent on the Prosecution to call every eyewitness to testify in order to discharge the onus placed on it by law of proving a criminal case beyond reasonable doubt and as a matter of fact a single witness who gives cogent eyewitness account of the incident will suffice even in a murder charge. See *Effiong v State (1998) 5 SC 136 (1998) 8 NWLR (Part 562) 362. Usufu v The State (2007) 1 NWLR (Part 1020) 94; Gambo v State (2006) 6 NWLR (Part 977) 524.*

The Appellant assessed the witnesses not called as vital witnesses. A vital witness is a witness whose evidence may determine the case one way or the other, and failure to call a vital witness is fatal to the Prosecution's case. In other words, a witness who knows something significant about a matter is a vital witness.

Finally the assessment of credibility of a witness is a matter within the province of the trial court as it is only the court that has the advantage of seeing, watching and observing the witness in the witness box. The court also has the liberty and privilege of believing him and accepting his evidence in preference to the evidence adduced by the defence. On the issue of credibility of witnesses the appraisal of evidence and the confidence to be reposed in the testimony of any witness, an appellate court cannot on printed evidence usurp the essential function of the trial court which saw, heard and watched the witnesses testify. The trial court on the overall evidence and watching the demeanour of PW1 Barrister Jonathan Manwiyan believed his evidence as an eyewitness of the murder based on his personality and the quality of his evidence. The trial court gave a detailed, well considered judgment which the Court of Appeal affirmed.

This court has no legal justification to upturn the findings of fact of the two lower courts. From the available facts of this case, this appeal is surely not an instance to invoke the provisions of Section 149(d) of the Evidence Act.

With fuller reasons given by my learned brother in the leading judgment, I agree that the appeal lacks merit. I dismiss the appeal and affirm the conviction and sentence of the Appellant.

Judgment delivered by
Nwali Sylvester Ngwuta. JSC

The Appellant, a policeman, was arraigned before the High Court, Jos on 19th April, 2005. He was charged with the offence of culpable homicide punishable with death under Section 221 of the Penal Code Law, Cap. 89, Laws of Northern Nigeria, 1963.

The learned trial judge, Nimpar, J., convicted the Appellant on 9th November, 2005 and sentenced him to death by hanging. His appeal to the lower court was dismissed on 29th June, 2010. The Appellant appealed to this court on six grounds from which the following two issues were framed for determination:

> "1. Whether the Honourable Court of Appeal was right in affirming the conviction as death sentence passed on the Appellant by the trial court on the basis that the offence with which the Appellant was charged was proved beyond reasonable doubt.
>
> (Grounds 1, 2, 3, 4 and 6)
>
> 2. Whether the failure by the Prosecution to call other witnesses did not amount to withholding evidence."
>
> (Grounds 5)."

On the other hand, the Respondent formulated three issues from the grounds of appeal. The issues are:

> "1. Whether the identity of the Appellant was established beyond reasonable doubt.
>
> 2. Whether the conviction of the Appellant could be said to be fatal for failure to call more than one eye-witness.
>
> 3. Whether the charge against the Appellant was proved beyond reasonable doubt."

As found by my learned brother, Peter-Odili, JSC, in the leading judgment, the issues presented by the parties are similar. However, the issues formulated by the Appellant are more appropriate and were adopted, adequately treated and resolved in the leading judgment.

The Appellant had an uphill task in this appeal. He is faced with two concurrent judgments, and he offered no special ground for the court to intervene in his favour. See *Ogbodu v State (1987) 2 NWLR (Part 54) 20*. Any shadow of doubt as to the guilt of the Appellant was dispelled by the Appellant himself when he was confronted with the PW2, the father of the deceased. PW2 said on oath that:

> "..... the Accused was asked if he knew me and he said No. Then the O.C. Homicide said this is the father of the boy you killed. He knelt down to beg that I should forgive him ....."

PW2 was not cross-examined on this point, giving rise to the presumption that the Appellant did not dispute that piece of evidence which is damaging to his case

The saying that "the police is your friend" expresses an ideal. The facts of this case demonstrate that in reality that statement is not necessarily true.

My lords, this case portrays the gross indiscipline exhibited by some security personnel in this country. The Appellant was on duty with others, including his superior officers. There is unchallenged evidence that "he had a small bottle of hot drink and his shirt was not tucked in but left loose." See Page 29 of the record of the trial court.

What was a policeman on duty doing with a bottle of hot drink? It is not surprising that he was tardy in his appearance. His superior officer ought to have, at least, denied him access to a rifle - a Mark IV - but he did not. The bottle and the rifle are incompatible and both should never be under the control of anyone.

The police have the traditional and constitutional role of fighting crime but recently, perhaps by the principle of replication, some officers appear to compete with criminals in the commission of the crimes they are trained to fight. A citizen of this country has been killed with a weapon bought with the tax payers' money for his protection. It was a senseless killing.

It is based on the above and the detailed reasons in the lead judgment of my learned brother, Peter-Odili JSS., (which I had the honour of reading before now) that I also dismiss the appeal as devoid of merit. I endorse the decision of the Court below which affirmed the judgment of the trial court.

Counsel

E. Y. Kurah *with him* Abdullahi Yahaya	.....	For the Appellant
Edward G. Pwajok *Honourable Attorney General, Plateau State* *with him,* I. T. Manomi *Director Public Prosecution* G. D. Fwomyon *Deputy Director Public Prosecutor* A. A. Garba *DDCL* I. D. Longden *Assistant Director Public Prosecutor*	.....	For the Respondent.