IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA
BEFORE HIS LORDSHIP: HON. JUSTICE A.S. UMAR
DELIVERED ON 1ST DAY OF JUNE, 2018
CHARGE NO: FCT/HC/CR/2/2011

BETWEEN

FEDERAL REPUBLIC OF NIGERIA - COMPLAINANT

AND

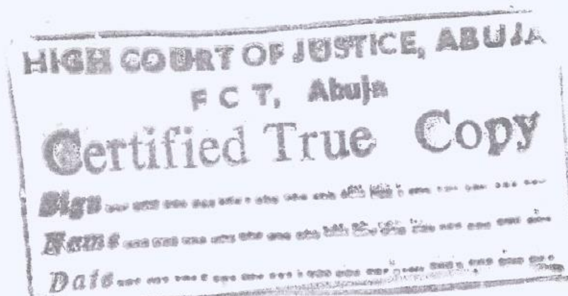
DAVID TOMBRA - DEFENDANT

JUDGEMENT

The defendant is charged before this court on one count of culpable homicide punishable with death, which reads as thus:

> **"That you Tombra David "m" 20 years of no fixed address on the 29/07/11 at about 2300hrs at Road 67, House 14 Gwarinpa Estate, Abuja, within the Abuja Judicial Division committed culpable homicide punishable with death in that you caused death of one Miss Barbara Ann "f" of Road 67, House 14, Gwarinpa Estate, Abuja by stabbing her on the neck with a knife, with the intention of causing her death or with the knowledge that her death would be the probable consequence of your act. You thereby committed an offence contrary to section 220(a) and punishable under section 221 of the Penal Code Law"**

The defendant was arraigned on the 7th day of November 2011. He pleaded not guilty to the one count charge necessitating the prosecution to open its case against the defendant. In an effort to



prove the charge the prosecution called a total of 6 witnesses and tendered documents marked as Exhibits AA1-AA3, Exhibit AA4[1-8], Exhibit AA5, AA6 & AA7[A&B] (pen knife, palm sandals and two Nokia handsets) and Exhibits AA8. Whereas the defense called 2 witnesses i.e.; mother of defendant and one other and thereafter closed his case.

At the close of trial, the defense filed their final written address and formulated the following issue for the determination in the case thus:

> **"WHETHER THE PROSECUTION HAS PROVED BEYOND REASONABLE DOUBT, IT'S CASE AGAINST THE DEFENDANT THAT HE KILLED THE DECEASED"**

Learned counsel for defense **C.C Ogbonna Esq.** on the lone issue contended that for the prosecution to succeed on the charge, it must prove all the ingredients of the offence as contained in section 221 of the Penal Code which ingredients must co-exist, none missing. He itemized the elements as thus:

a. That the deceased had died.
b. That the death of the deceased had resulted from the act of the Defendant.
c. That the act or omission of the Defendant which caused the death of the deceased was intentional with the knowledge that death or grievous bodily harm was its probable consequence.

Arguing on the issue he relied on the case of **OGBLO V STATE (2015 13 NWLR PT 1477 PG 570 @ 598 PARA B-D.** He submitted that the burden placed on the prosecution does not shift until all the elements of the offence are proved against the defendant and that the three ingredients must co-exist; for where one of them is either absent or tainted with a doubt, then the charge is said not to be proved. He cited **ALI V STATE (2015) 10 NWLR PT 1466 P9 1 @23 TO 24.**

Counsel went to criticize the evidence of the PW1 who is the Investigation Police Officer (IPO). He contended that his evidence is mainly a narration of how the defendant was arrested in Port Harcourt and brought back to Abuja and how he took the two statements from the accused and took statement from the witness; and the fact that an autopsy was conducted on the deceased body. That he gave the exhibits to the exhibit keeper.

Counsel outlined the answers elicited from the cross examination of the witness which shall also be incorporated in the course of this judgment.

Further, counsel submitted that whatever the PW1 claimed the security man told him amounted to hearsay and there was no attempt to investigate the claims of the security man as to its veracity. He argued that the IPO should have warned himself of the danger of relying solely on the claims of the security in coming to the conclusion that the defendant was the culprit, since he could be a tainted witness.

On the evidence of PW3, he contended that he was inconsistent in his narration of what transpired on that day because why he insisted that he was always sitting outside the gate of the house that day, yet from the testimony of PW2, he can conclude that he was not at his duty post when he, the PW2 arrived. Stressing on this issue, counsel said PW3 continued to claim that he was available throughout the day in question yet he admitted that at a time he went to Mosque and also went to eat. Yet he insisted that nobody could have entered the compound except the defendant.

Further to this line of thought, counsel argued that in another breath, PW3 said he was outside with the defendant when he was washing the deceased car when he heard a noise inside the deceased house, then he repudiated and said the defendant was inside the

deceased house when he heard the noise. He asked; what will this court believe-that he was outside with the defendant or that the defendant was inside with the deceased when the noise was heard. He urged the court to treat the PW3 as a tainted witness. He cited **ADETOLA V STATE (1992) 4 NWLR (PT 235) PG 267, YOHANNA V STATE (2005) 1NCC PG 108, ISHOLA V STATE (1978) 9-10 SC @ 100, R V OMISADE (1964) NMLR 67 @ 99.**

He submitted that the testimony of PW3 is not to be relied upon because throughout he was laboring to cover up the facts that he was not diligent with his duties because under cross-examination, he admitted there were occasions when he was not on his duty post like when he went to pray and when he went out to find food, yet he insisted he was in a position to know when somebody else entered the deceased house. Yet he did not see PW2 when he entered the said apartment and indeed discovered that the deceased had been murdered.

Counsel posited that there is nothing in the testimonies of the witness that can prove that it was the unlawful act or omission of the defendant which caused the death of the deceased. He submitted that the prosecution's evidence has been discredited under cross examination, in that the PW3 clearly was not a witness of truth; he was a tainted witness who had issues to cover up and that the testimony of PW1 was also not a proof of culpability of the defendant. He urged the court to discountenance the evidence of PW1.

He submitted that generally speaking, the guilt of an accused can be proved by;

(a) The confessional statement of an accused
(b) Circumstantial evidence and
(c) Evidence of eye witness account of the crime.

He cited section 27 of the Evidence Act, case of **Haruna V AG Federation (2012) 9 NWLR PT 1306 P419 P445 paras C-F.** And submitted that the statement of the defendant does not amount to a confession and that cannot be a basis for conviction of the defendant. He cited **OKANLAWON V STATE (2015) 17 NWLR PT 1489 PG 445.**

Counsel went further to expound on circumstantial evidence and to argue that before a piece of evidence can be used on circumstantial evidence, such evidence must not fall short of the standard required by law, that is; prosecution must prove beyond reasonable doubt that such evidence points only to the guilt of the defendant. He relied on **Abike V State (1975) 9-11 SC P. 97, @ P 105,** to contend that for a trial court to convict an accused on circumstantial evidence such evidence must lead conclusively and indisputably to the guilt of the accused person. He cited **State V Edebor (1975) 9-11 SC P. 69.**

He submitted that on the 14th December, 2017, the defendant opened his defense. He called two witnesses vis; DW1 Mrs. Preye Dorcas Ekpebu who is the mother of the defendant and the DW2, Mr. Ejiofo Chidike an agronomist, who was next door neighbor to the deceased, Mrs. Barbara Ann. Counsel reproduced the testimony of the said witnesses and examination in chief answers to question put by defense counsel.

To further highlight on the above argument, counsel posed question thus: who is Aniete? He submitted that his name appeared like a recurring decimal in the testimonies of PW1, DW1 and DW2. He posited that he seems to be a clever gigolo who was stringing two friends, the deceased and DW1 (mother of the defendant) along. He submitted that when the deceased disclosed his duplicity to her friend the DW1, he got angry and threatened to deal with her. He stated that a policeman also revealed to the DW1 that the same

Anietie was the architect of her problems because he was the one that told them the defendant was the person that killed the deceased and; that DW2 also made unequivocal testimony about the same Aniete and told the police he would be willing to come to the station and make statement whenever required, but never came again.

He argued that if the police had done thorough investigation of this matter, this defendant would not have gone through the trauma he had been subjected to due to the incompetence of the police. He cited the case of **ONONUJU V STATE (2014) 8 NWLR PT 1409 PG 345** to submit that it is trite law that the prosecution must present credible and cogent evidence to establish its case to secure conviction. This they have abysmally failed to accomplish. He referred to **OMOYELE V STATE (2014) 3 NWLR PT 1394.**

Restating the testimony of DW2, learned counsel submitted that the truthful evidence of DW2 was not destroyed by cross examination in that he maintained his lucidity and candor and was the most truthful witness throughout. He argued that failure of the prosecution to debunk the DW2 testimony that a man named Aniete was in Barbara's room and was engaged in a quarrel with her and that he never saw the defendant enter Barbara's room but was rather still washing her car as at the time the quarrel was ongoing renders the prosecution's case against the defendant very doubtful.

Counsel submitted that the evidence of DW1 that the Commissioner of Police told her that her son was innocent and not the culprit they were looking for and; that he had ordered his release was not debunked by the prosecution. She further gave evidence of how they were taken back to SARS and the frustrations they were subjected to because she could not raise One Hundred Thousand Naira (N100, 000.00) bribe. He stated that this same witness, DW1 narrated how police seized her ATM card in Port Harcourt and

extorted the sum of Fifty Thousand Naira (N50, 000.00) from her, clearly cast serious doubt on the motive of the police.

In conclusion, counsel submitted that by provision of section 36 (5) of the 1999 Constitution of Federal Republic of Nigeria, the defendant is presumed innocent until the contrary is proved by the prosecution and that section 138 and 139 of the Evidence Act place the burden of proving the offence charged on the prosecution beyond reasonable doubt. This burden does not shift. There is no doubt that someone was killed. What the prosecution must prove is that it was the defendant that did it. He contended that the prosecution has woefully failed to do this. He wondered and posed some rhetorical questions thus; why police did not carry out a forensic analysis of Exhibit AA5 (knife) to determine whose fingerprint was on it? Why did the police not take the finger prints of the three suspects they claimed they arrested? Yet they claimed Exhibit AA5 was the murder weapon when Exhibit AA6 they claimed belonged to the killer of the deceased. Would they not have had a strong case against the defendant if they had even asked him to wear the shoe? But they didn't even know the size of the shoe or the foot size of the defendant. That if police had investigated Mr. Anietie thoroughly may be the truth of what happened to Ms. Barbara would have become known. He submitted that the failure to establish forensic evidence of the fingerprints of the defendant on Exhibit AA5 is fatal to the prosecution's case.

In the end, counsel urged the court to discharge and acquit the defendant.

The prosecution's Counsel, A.B Mamman Esq. in response filed a 4 paragraph final written address dated the 13th day of April, 2018. He raised sole issue for determination in this case as thus:

WHETHER THE PROSECUTION HAS PROVED ITS CASE BEYOND REASONABLE DOUBT TO WARRANT THE CONVICTION OF THE DEFENDANT?

On this lone issue prosecution counsel submitted that the prosecution has proved its case beyond reasonable doubt. He contended that our adversarial criminal justice system is accusatorial, this is so because section 36 (5) of the Constitution of Federal Republic of Nigeria, 1999 as amended provides every accused person charged with a criminal offence shall be presumed innocent until he or she is proven guilty; also consistent with this cardinal principle of law that the commission of crime by a defendant must be proved beyond reasonable doubt. He cited section 135 of Evidence Act, 2011 which placed the burden in criminal cases on the prosecution.

He submitted that the prosecution is conscious of the onus of proof provided by the law in order to secure conviction against the defendant for offence charged. **He cited SOLÒMON ADEKUNLE vs THE STATE (2006) II CIPR.**

He argued that the prosecution is not required to prove an accused person's motive because the law is that a person intends the natural consequence of his conduct. He cited **ADAMU V KANO N.A (1995) FFSC 25 1 SCNLR 65. GIRA V STATE (1996) 4 NWLR PT 443, EMEKA VS THE STATE (2001) FELR (PT 66) 6&2.**

He finally urged the court to convict the defendant as charged.

I have gone through the prosecution's case; watched the demeanor of witnesses called to establish the charge against the defendant and the defence witnesses, the materials tendered and admitted in proof of the charge. To my mind, the sole issue that would suffice in this case is as thus:

WHETHER THE PROSECUTION HAS PROVED HIS CASE AGAINST THE DEFENDANT BEYOND REASONABLE DOUBT AS REQUIRED BY LAW?

I have also considered the Defendant's adumbration submission dated 18-04-18.

Before proceeding, it is pertinent to give a background summary of the prosecution's case as garnered from the testimonies of its witnesses thus;

The allegation against the defendant is that he murdered one Ms. Barbara herein referred to as the "Deceased" in her house situate at Road 67, House 14, Gwarnipa Estate, Abuja, by stabbing her on the neck with a knife on the 29/7/11.

Prosecution witness No. 1 ASP Clifford Agboji told the court that he knows the defendant as Tombra David who was transferred to him from Life Camp Police station in 2011 as a murder suspect in a homicide case involving one Ms. Anna Barbara, a 52 year old woman. He said the detectives led by ASP Emenike left for Port Harcourt where they arrested the defendant and he interrogated the suspect. He told the court that autopsy was carried out on the body of the deceased and the exhibit knife was registered with their exhibit keeper. He recorded the statement from the suspect and visited the scene twice. He said the deceased was sighted with the defendant at different occasions on that day, when; they went together to buy recharge card and when they returned from the market. He said the security man sighted the defendant while he was washing the deceased car.

After washing the car, he went inside and joined the deceased in her apartment. During this period, there was nobody entering the said house except the defendant who was sighted running out from the same compound barefooted and was also seen entering Keke Napep. Few minutes later, a friend of the defendant came in looking

for the deceased. For clarity, the testimony of this witness covers that of the PW2 who is the friend to the deceased that saw the deceased's body lying lifeless in blood pool.

According to Prosecution witness No. 3, Shehu Aliu (security guard); he said that on the said day, the defendant came to their area and asked him to lend him (defendant) some money so that when his madam (deceased) returns he will pay him. When his madam returned; she and the defendant went to market and came back around 5:00 clock; they entered into the house and the defendant brought water and started washing the car. Then he started hearing some noise, shouting inside the house. The defendant came out and started running; there was no shoe on his leg and he was holding a bag. Then a friend of the deceased came and saw her vehicle outside and asked him who was the owner of the vehicle parked there, he pointed at the deceased house and he entered the house. The man saw a person lying down in the compound; he came out and called him that he saw somebody lying down. He asked him; is there any police station nearby and he showed the police station. He reported to police station.

At this juncture, I wish to state that in the course of trial on 17/2/14, the above statement of the PW3 was duly rejected in evidence having not passed through the test of admissibility. The court was left with his oral testimony given in the course of the trial.

Continuing, PW4 Inspector Godfrey Agia; he told the court that on 29/7/2011, while on duty at Gwarinpa Police station, one Uchenna Ubike reported a case that he visited his friend (deceased), that while he was in the compound he found a person lying dead in the compound. The case was referred to him for investigation. He went to the scene of crime with the complainant. On entering the compound he saw the lifeless body of the deceased with pool of blood. By the side he saw a stained knife. They proceeded to the

room and by the door there was palm sandal and handset of the deceased recovered as exhibits. Thereafter the corpse was moved to Wuse General Hospital where it was deposited for autopsy. On conclusion of his preliminary investigation, the case was transferred to state CID for further investigation.

Before proceeding further let me reiterate and affirm the position of the law that in criminal trial, the Prosecution must prove the case against an accused person beyond all reasonable doubt. This is the standard requirement under section 138 of the Evidence Act and the burden of proof is always on the prosecution and it never shifts. See also **Elizabeth v The State (1991) 4 SCNJ 44; Mallam Zakari Ahmed v The state (1999) 5 Sc (pt 11)39, UZOKA v. FRN (2009) LPELR-4950(CA)**

With respect to the present charge, the ingredients necessary to sustain the charge of culpable homicide punishable by death under the penal code law are:

1. The death of the deceased
2. The death resulted from the act of the defendant
3. That the defendant caused the death of the deceased intentionally or with knowledge that death or grievous bodily harm was its probable consequence.

See Nyam and ors. v. The State (1964) 1 All NLR 361.

The first ingredient to prove that there was death of a human being. Thus; Exhibits AA 4^{1-8} are photographs showing the lifeless body of the deceased which were admitted in evidence on 01/07/2014. The documents are corroborated by Exhibit AA8 which is the medical report that certifies that one Ms. Barbara was killed. These material evidence coupled with the testimonies of witnesses point to one fact ie; that there was killing of a human being. The other two ingredients

as to what resulted to her death and who did the act shall be considered in the course of this judgment.

I wish to begin by saying that there are three ways of proving a crime generally in Court. These are: (1) Direct evidence. (2) Confessional statement/statements made by the accused, and (3) Circumstantial evidence. See **Adeyemo v. State (2015) 4 SC (pt. 11) 112 at 129 paras 30-35.** "If the accused pleads guilty and admits the facts as laid the prosecution has no duty to prove what has been admitted." Per NGWUTA, J.S.C. (P. 15, Paras. A-B)."

I will look at various ways enumerated above in relation to this case. First, I would like consider this case from angle of direct evidence. By direct evidence as in this case, there must be the evidence of an eyewitness of the incident of the crime.

Like I have earlier demonstrated above, the extra judicial statement of PW3 which is the near direct perception of the incident under consideration was rejected in evidence. The court would only review his testimony in court in determining the culpability or otherwise of the defendant through direct evidence approach since his extra judicial statement can no longer be reckoned with. Under examination in chief and cross examination section of PW3; he answered questions as thus:

> Q. you said you heard a shout in the compound. The time you heard a shout where was the accused person?
>
> A. he was in the house.
>
> Q. the accused came out of the house with a bucket of water and began to wash the car, and then you started hearing shout from the house. Is that what you told the court in your examination in chief?

A. yes!

With the above questions and answers elicited at this section, it appears the witness testimony is riddled with contradiction regarding what he saw on that fateful day. In one breath he said that while defendant was washing car he heard the shout in the compound and in another version, he posited that the defendant went inside the house and he heard a shout. With this unsteady evidence, I have the firm view that the direct evidence is no longer applicable in this case. It gives the suggestion or the impression that either that the witness was not physically present at the scene of the crime or he had no grip of what actually transpired in the circumstance.

This shadow of doubt was not cleared at the trial by re-examination of the witness by the prosecution. It is not possible for the defendant to be at different places at the same time except if he is a spirit which I know he is not. It is the duty of the prosecution to streamline this material contradiction in evidence of its principal witness. This it has failed to accomplish.

Ordinarily, the direct evidence required to prove the cause of death must be such as would connect the death of the deceased person with the act of the accused. See; **Oguntolu v. State (1996) 2 NWLR (pt 432) 503." Per ARIWOOLA, J.C.A. (P. 47, paras. E-F)**

Therefore, it would accord with the best practice and in the overriding interest of justice to disallow this piece of evidence in terms of direct evidence approach to this case. I hereby discountenance with his evidence as not being direct and positive as required by the law.

The next consideration is to look at the angle of circumstantial evidence. Let me make it clear as held by the Apex Court in **NWEKE vs. THE STATE (2001) LPELR-2119 (SC) 1 at 11**: Circumstantial evidence is very often the best. It is evidence of surrounding circumstances

which, by undersigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say that it is circumstantial." See also **ADIE vs. THE STATE (1980) 1-2 SC 116 and UKORAH vs. THE STATE (1977) 4 SC 167." Per OGAKWU, J.C.A. (Pp. 30-31, Paras. D-A).** The law is clear on the point; where, as in the instant case, direct evidence of eye witness is not available, the court may infer from the facts proved the existence of other facts that may logically tend to prove the guilt of an accused person." Per OGUNDARE, J.S.C. (P. 21, Paras. A-B).

To this end, I have studied the evidence of the witnesses to decipher some circumstances and suggestions which when analyzed would give the logical result expected in this case.

First I would approach it from the extra judicial statement of the defendant.

Before I proceed further, it is imperative at this juncture to address a fundamental aspect of procedural step in this case. In the course of defense, the defendant did not give evidence in his defense. Let me hasten to reiterate the position of the law as postulated in the case of **ADEKUNLE V STATE (2006) ALL FWLR PT 332 @ PAGE 1453** where the court held:

> **"an accused has the right to remain silent throughout the trial, leaving the burden of proof of his guilt beyond reasonable doubt, to the prosecution. In other words, an accused person is presumed innocent until he is proved guilty. He does not have to prove his innocence, and as such he is not a compellable witness"**

With this authority I need not to say much on this point, but only to add that where a defendant opts or elects not to testify and rests his case on that of the prosecution, he cannot be heard to complain that he was not accorded fair hearing. What it portends is that whatever the prosecution lays before the court remains

unchallenged and the court is bound to act on it. From there the court is duty bound to determine whether the prosecution has proved his case as required by the law. That option open to the defendant is constitutional and allowed by our criminal jurisprudence and given credence by a number of judicial decisions. The only implication of electing to do so is that the defendant cannot be found to complain afterwards that his right of defense was foreclosed or hindered. So, it is a balanced risk on part of the defendant.

It is against this backdrop that the Supreme in **Adekunle v State (supra)** on the right of an accused person to remain silent during the trial said thus:

> **"For the duration of a trial, an accused person, may not utter a word. He is not bound to say anything. It is his constitutional right to remain silent. The duty is on the prosecution, to prove the charge against him as I had said, beyond reasonable doubt. See Uche Williams v. The State (1992) 8 NWLR (Pt.261) 515, (1992) 10 SCNJ 74 at 80. Afterwards, an accused person, is not a compellable witness. See the case of Sugh v. The State (1988) 2 NWLR (Pt. 77) 475; (1988) 1 NSCC 852; (1988) 5 SCNJ 58." Per Ogbuagu, J.S.C. (P.26, Paras.C-E)"**

The bottom line of the foregoing is that the prosecution whether the defendant leads evidence or not is duty bound to prove the case against the defendant beyond every reasonable doubt; therefore, it is inconsequential whether the defendant led evidence or not.

Having said the foregoing, let me reverse back to the issue under consideration to wit; dissection of this case within the perimeters of circumstantial evidence. Circumstantial evidence approach shall be studied by a holistic review of the defendant's extra judicial statement. In his confessional extra judicial statement, the defendant stated as thus:

"in addition to my earlier statement I want to state that I visited Barbara Ana the deceased in her house at Gwarinpa on Friday. Although I don't know the date, but it was last two weeks, she was not at home, then I went to one canteen nearby and ate; after which I came back to her house. It was about 5pm that I first came and met her absence. When I came I met her in the house around after 5pm. I met her in the house with a visitor, a man. She told me that she was about to go out to the Kado Market. The male visitor was still in the house when we left in her car. When I was coming back with the deceased at Chambia Plaza, I saw one of my friends by name Ben. The said Ben told me that he has not seen me for a long time. He asked me where I was staying, I then I told him to follow me in Barbara's car and he followed. We then went back with the deceased to her house at Gwarinpa. The deceased took bucket from bathroom with clean and gave me to wash her car. It was around after 6pm that I washed the deceased car. That my friend Ben and the deceased's visitor were all inside her house with her when I was washing her car. There was one new tenant with his family in their house but they went to the church when I was washing the car. The gateman to the deceased at the period also came out from his security room with a lader green in his hand and he told me he was going out. By then I have finished washing the car and I took the bucket inside the compound and when I reached the partition to her house I saw blood on the floor on the corridor to her room. I then ran away outside of the compound. The blood was that of a human being, I don't know where the two people inside the house with the deceased were at the period. Before I left to wash her car, she gave me bathroom slippers to wash the car and I left my palm sandals at her veranda. I ran to the main road and entered Keke Napep and went to Lokogoma Site Apo. I left

Abuja after two days to Port Harcourt to work because one of my friends Henry called me to come and do POP work"

Above is a version of the defendant statement to the police which I have quoted verbatim. The defendant portends to demonstrate by that statement that he was not the only person in the deceased's house on the day of the incident. Conversely, the defendant did not explain the where about of his friend, Ben who he brought to the deceased house after he discovered that the deceased had been murdered. This statement leaves some gaps and much to be desired in the light of the fact that the defendant brought his stranger-friend to the deceased house.

There is incoherence in that aspect of his testimony. It is mind boggling and very worrisome that the defendant did not bother to enquire about what happened to the deceased but only took to his heels upon discovering the deceased in the pool of her blood. He did not report that incident to a third party, not even the gateman and also did not report to the police, but kept it all to himself and travelled all the way to Port Harcourt without showing any sensitivity to human life. His story has k-leg and cast serious doubt on its credibility.

Whilst the law is trite that a person shall not be criminally responsible for his act or omission if the act or omission is direct and reasonably necessary in order to resist actual and unlawful violence threatened to him or to another person in his presence so far he does not himself commit a crime against anybody. But the doctrine of last seen has evolved in our criminal jurisprudence, consistent with what obtains in other jurisdictions and is to the effect that it is the duty of an accused person who last saw the deceased alive to give an explanation on how the deceased met his death. In the absence of an explanation, the court is entitled to infer in the face of overwhelming circumstantial evidence that the accused person killed the

deceased. See: **Godwin Igabele v. The State (2006) 2 SCNJ 124, Bassey Akpan Archibong v. The State (2006) 5 SCNJ 202." Per OGUNWUMIJU, J.C.A. (P. 63, paras. E-G)**

In the instant case, the defendant did not state his reasons for not reporting or calling the attention of the neighbors to the crime and did not make efforts to assist the deceased get medical attention. Could it be suggested that it was the defendant's friend Ben who he claimed he picked on their way back from market or the male visitor or both that conspired and killed the deceased? The court asks rhetorically; who is Ben, where was he? Where was the male visitor when the incident took place? Were the story of Ben and deceased male friend concocted to overshadow real evidence? These questions boggle the mind of the court.

Having no answer to these questions I am constrained to ask; can the court convict solely on the above state of affairs in absence of substantial evidence bearing in mind the presumption of innocence that inures to a defendant in the Constitution and the requirement in section 138 of the Evidence Act, 2011?

The findings herein under shall be the last nail to seal the coffin in this case.

DW2, Chidike Ejiofor, while testifying for the defense said:

> ***"On 29/7/2011, I was doing some washing together with some environmental weeding when around 1pm; one Mr. Aniete, who was deceased's friend came and we exchanged pleasantries before he entered the deceased's room because he had a spare key. Later in the day about 5pm, the defendant came and asked after the deceased; I told him that the deceased hasn't come back from work. He went out and was hanging around the gate until the deceased came back. The defendant came to me and asked for a bucket to wash the***

deceased's car. I allowed him to take the bucket. He took water from the tap on the perimeter fence; and continued the washing of the car. All these while I kept hearing quarrel between the deceased and Mr. Aniete; the fighting continued until I left the house for church around 6pm. I met the defendant washing Barbara's car and I told him to drop my bucket when he is done. I came back home around 7pm and met a crowd in the house, all I was told the deceased had been killed. I was shocked. The time I left for church, I left Mr. Aniete in the deceased room. This is not the first time I saw the defendant in our compound"

Unfortunately, the investigators did not probe the aspect of this claim, whether there were/was any other person present in the deceased's house when the incident took place and to fill up the missing limb. For the doctrine of last seen to be applicable against the defendant, it must be proved that it was only the defendant that was seen with the deceased.

To further cast doubt on the prosecution's case, the claim of DW2 that he heard the deceased quarrel with one Anietie within the hours of her death was not impugned, challenged or put through the fire of cross examination by the prosecution who had ample opportunity to do so. This is even when the evidence of the PW3 the supposed direct evidence of the crime is still dangling and was neither here nor there.

To buttress and underscore the abysmal failure of prosecution in this case, let me digress a bit to have brief review of the records of this court. After the evidence of DW1 (mother of the deceased) on 14/11/17 the prosecution was not in court and the case was adjourned to 19/12/17 for cross-examination. On the said date, the prosecution was not in court to cross examine the witness. Upon the application of the defendant's counsel, the DW1 was discharged.

On the same date, DW2 was led in evidence in chief and the case was adjourned to 29/1/18 for cross examination of DW2. On that date, A.B Mamman Esq. applied for record of proceedings to enable him cross examine DW2 and despite objection to the application, the court obliged him in the interest of justice and the matter was adjourned to 13/2/18. There was no effort by the prosecution to recall DW1 that had been discharged on 19/12/17 for cross examination; leaving her testimony unchallenged.

Apart from the foregoing remarks, the prosecution did not attend court on the date fixed for adoption of final written addresses to highlight its case. Worst still, the prosecution filed only 4 paragraph final written address in a matter that trial spanned 7 years and six witnesses called across the divide. That notwithstanding, he filed a scanty address when he ought to have comprehensively addressed the court; marrying facts with the law.

Though, it is trite that an address cannot take place of law but it is desirable to do so when the court is confronted with a controversial and complicated case and as weighty as culpable homicide punishable by death, more so that a vital witness was not cross examined.

Be that as it may, in total consideration of the un-contradicted facts and testimony of DW2 that there was another person (Anietie) in the deceased's house on that fateful day, the court is of the firm view that circumstantial evidence has equally failed to link the defendant to the commission of the alleged crime.

The last means of ascertaining whether the defendant killed the deceased is by his confessional statement. By virtue of Section 27(1) of the Evidence Act, a confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

The law is that if the accused makes a free and voluntary confession which is direct and positive and is properly proved the accused may be convicted on the confession. See **Afolabi v. Commissioner of Police (1961) All NLR 654. Per Amaizu JCA.**

In this guise, the court has reviewed the two extra judicial statements of the defendant herein partly highlighted; there is nothing in the entire statement suggesting the inference that the defendant admitted killing the deceased. Therefore, the said statement cannot be hanger upon which the court can convict the defendant as charged.

In **Udosen v. State [2007] 4 N.W.L.R. (Pt. 1023) 125 at 161 Para.C (CA)** the court held thus:

> ***"A 'doubt' in the mind of a court presupposes that the case against the accused person has not been proved beyond reasonable doubt. In the instant case, the Supreme Court had a big doubt about the guilt of the appellant and accordingly resolved same in favour of the appellant. Namsoh v. State (1993) 5 NWLR (Pt. 292) 129; Nwokedi v. Commissioner of Police (1977) 3 SC 35; Kalu v. State (1988) 4 NWLR (Pt. 90) 503." Per Ogbuagu J.S.C***

It is the duty of the prosecution to prove the charge against an accused person beyond reasonable doubt. If there is any doubt, the doubt must be resolved in favour of the accused as the presumption is that the accused is innocent until proven guilty. See **Williams v. The State (1992) NWLR (Pt. 261) 515: Ogundiyan v. State (1991) 3 NWLR (Pt. 181) 519; Chukwuma v. F.R.N. (2011) LPELR-SC. 253/2007." Per IYIZOBA, J.C.A. (Pp. 37-38, Paras. E-A)**

In view of the foregoing, the court has weighed, dissected and wholly analyzed the case as presented by the prosecution and come to the conclusion that the court cannot manufacture

evidence to nail the defendant or to secure conviction at all cost. In our adversarial jurisprudence as opposed to inquisitorial system applicable in other jurisdictions, the court is bound to remain an independent umpire and precluded from descending into the arena of justice. It is obvious that the prosecution has failed to prove the charge against the defendant. It is also obvious from the way and manner the prosecution handled this case leaves so much to be desired. There is no sense of diligence throughout the prosecution of this case.

I must say regrettably that the address of the prosecution is of no help to this court. The address portrays counsel as unserious. This case exposes the laxity and lack of seriousness of some prosecutors. I think I am speaking the minds of all engaged in the Administration of Criminal Justice not only in this court but in all the courts in Nigeria.

In sum total therefore, the evidence in this case weighs in favor of setting the defendant free and consequently, the defendant is hereby discharged and acquitted accordingly.

Signed

Judge
01-06-2018

Appearances:
Adegoke Kayode with Fumilayo Aremu for Prosecution
C.C. Ogbonna with Chuma Chukwudi for Defendant.

Signed

Judge
01-06-2018