

**IN THE HIGH COURT OF ANAMBRA STATE OF NIGERIA
IN THE HIGH COURT OF ONITSHA JUDICIAL DIVISION
HOLDEN AT ONITSHA**

**BEFORE HIS LORDSHIP HON. JUSTICE, A. O. OKUMA
ON THURSDAY THE 19TH DAY OF OCTOBER, 2017**

SUIT NO./62C/2012

BETWEEN:

THE STATE

::: ::: ::: PROSECUTION

A N D

1. UCHENNA IBEKWE

2. OBIAJULU IKEORAH

::: ::: ::: DEFENDANTS

JUDGMENT

The defendants on 13/11/2012 were charged to this Honourable Court of the offence of armed robbery contrary to Section 1 (2) of the Robbery and Firearms Special Provisions Act Cap. R11 Law of the Federation of Nigeria. It is alleged that the defendant between the 1st to 6th day of August 2011 at Awka Road Onitsha while armed with knife, machete, shovel and other offensive weapons did rob one Emmanuel Agu of his mobile phone valued the sum of #15,000.00 (Fifteen Thousand naira).

On the 14/5/2013 the defendants pleaded not guilty to the offence as charged and the learned prosecution counsel P. N. Oforma Esq., Principal State counsel opened the prosecution's case with the evidence of Emmanuel Agu who testified as Pw1.

The witness testified that on the 6th day of August 2011 at about 12.30 to 1am these two defendants broke their door and entered their house at No. 52A Awka Road Onitsha while he and others were

sleeping. Pw1 testified that when the defendants entered they ordered them to lie down and to bring out their money and phones. He said that he did as if he does not know one of them and the defendants collected their three phones and one suite belonging to his brother. Pw1 testified that they were three in the room on the day in question and that the defendants were armed with machet and shovel.

According to Pw1, in the early morning of that day after the incident he called the chairman of the Vigilante in Onitsha and informed him of the robbery and named Obiajulu the 2nd defendant as one of the robbers and identified him in the court while giving his evidence Pw1 said he identified the 2nd defendant as the person he knew very well before the incident and that he recognized the 2nd defendant when 2nd defendant was flashing their torch lights on them. He stated that the 1st defendant was arrested by the vigilante in course of their investigation. The witness also testified that the chairman promised to call him back and later invited the Pw1 to his house where he met the 2nd defendant saying that it was later that they went for the 1st defendant. The Pw1 then testified that he was later asked to go to police station and make a statement which he did.

Under cross – examination by O. I. Onoiribholo Esq. of counsel to the 1st defendant who was dock briefed on 11/2/2013 the witness testified that as he was lying down he was looking at the robbers and that there was no light in the room. He said they held the torch light on the left hand and that he was able to see the defendants behind the torch light saying that they were in one room and that the distance between him and the robbers was not far.

Still under cross – examination the Pw1 testified that everybody knows the 2nd defendant as he is popular and normally comes to their

village. Pw1 stated that he never lived with the 2nd defendant and never did business with him. Pw1 further under cross – examination testified that when he reported to the vigilante men he told them that he knew the 2nd defendant and gave the chairman of the vigilante group the 2nd defendant's name.

Led under cross – examination by the 2nd defendant's counsel the witness testified that the chairman of the vigilante group is from Onitsha and that he is also from Onitsha. He denied having any personal relationship with the chairman, Pw1 further testified that the sister was not in the same room with him on the day of the incident. He stated that his sister and the mother heard the noise of the broken door. Pw1 testified that only two of them came into their house when their door was broken. He stated that he did not lie down flat but was on his knees looking at them stating that the defendants were holding cutlass and shovel. Pw1 further testified that it was after the vigilante arrested the 2nd defendant that he went to their office. He also stated that it was after the robbers left by 2.am that he went and knocked on his mother's door where she slept with his sister and the sister called the vigilante.

On the 1st of July 2013 the prosecution tendered Ikechukwu Nwanosike who testified as Pw2 stating that he knows the Pw1 as furniture maker and brother being from the same clan. He denied knowing the defendants. Pw2 stated that on 6/8/2011 he invited Pw1 for a work in the night because he had urgent work and they could not do the work that night because there was no light. According to him, as they were sleeping their door was suddenly broken by the defendants and when he asked them why they did it, they started beating him and asked him to lie down. He testified that they used machet to flog him at his back before he lied down stating that they were three in the room,

himself, Emmanuel Agu and Chinedu Agu. Pw2 testified too that they stole their phones and suite with one bottle of wine. He stated that they stole Chinedu Agu's phone and suite while they stole Emmanuel Agu's phone and bottle of wine and on the next day the security caught Obiajulu (the 2nd defendant) and started torturing him while asking him questions and the 2nd defendant mentioned the 1st defendant. Pw2 further testified that while the vigilante men were telling them that they will hand them over to the police they mentioned the other person/suspect who was not around.

Pw2 testified that the vigilante men asked the defendants what they stole from them and they denied robbing them. The witness further testified that they were at the police station on 6/8/2011 when the 1st defendant brought two phones one which is Pw2's own while the other phone belongs to Chinedu Agu.

Under cross – examination by counsel to the 1st defendant, the witness testified that it was the 2nd defendant that broke the door and that they were inside while the alleged robbers were outside before the door was broken. Pw2 denied knowing the 1st defendant before the incident but said he saw him inside their apartment on that day in their apartment. He stated that it is not contained in his statement that he saw the 1st defendant. Pw2 further testified that he did not know how the robbers held their torch because they told them to lie down. He said that it was Ebuka Agu who was kneeling down among them while the incident was going on. Pw2 testified also that he came to know the 1st defendant for the first time that night.

Further in his evidence Pw2 testified that he was not around when the vigilante men tortured the defendants.

Led under cross – examination by the 2nd defendant's counsel the Pw2 testified that it was the senior sister to Ebuka Agu who invited the vigilante. He also testified that Ebuka Agu also called the vigilante chairman. He stated that he did not recognize any of the robbers that night of the incident but Ebuka did. Pw2 said further that he does not know the 2nd defendant and only met the 2nd defendant at the police station. He further said that he was not there when the vigilante men were torturing the defendants and that it was at SARS that he was told that 1st defendant was among the robbers. Under re – examination the witness testified that the other name of Emmanuel is Ebuka.

On the 28/11/2013, Pw3 Mr. Agu Chinedu testified for the prosecution. He stated that on 6/8/2011 armed robbers came to their house at No. 52A Awka Road Onitsha in the night. He testified that he was sleeping in the same room with Agu Emmanuel (Ebuka) and Ikechukwu Nwanosike when at early hours of the morning of 6/8/2011 their door was forced open by the defendant and he quickly woke up. Pw3 said that he then saw two armed robbers rush into the room with one outside. He testified that two of the robbers were each having torchlight, shovel and cutlass and as they came in they hit him with shovel and ordered him to lie down which he did with Ikechukwu Nwanosike with the robbers threatening and shouting that they should bring out the money or else they will kill them. Pw3 further testified that his immediate younger brother Agu Ebuka Emmanuel was not lying down properly and there was light illumination all over the room so his brother was able to see one of them and kept quiet.

Pw3 testified also that the person the brother saw is the 2nd defendant (Obiajulu) and after the robbery they checked their room and found out that they made away with a pair of suite worth #15,000, two

phones one Nokia and one Vodafone with one Henkel wine. Pw3 testified also that the sister Nnidi Agu subsequently called vigilante and his brother explained to them what happened that night and that he knew one of the robbers called Obiajulu and that he was very sure.

Pw3 testified further of how the chairman of the vigilante later invited them to explain what happened and they did before they went and called the 2nd defendant and upon the 2nd defendant's arrest he confirmed that they were the ones that robbed them stating that they were three in number and named their names as Uchenna Ibekwe and Ugochukwu upon which they went and arrested the 1st defendant and the said Ugochukwu ran away. Pw3 testified that the two defendants in his presence confirmed that they were the people that robbed them.

Pw3 testified that the case later went to SARS and at SARS the defendants admitted robbing them too.

Under cross – examination by the counsel to the 1st defendant Pw3 testified that the phones were recovered by the police from one of the defendants and stated that he did not follow the police in their investigation. He testified that the phone was given to him on bond. Pw3 testified further under cross examination that it was vigilante men who led them to the police where he made statement and that it was the vigilante men who reported the matter to the police. Pw3 further said that it was at the police station that his phone was recovered and that he does not know whether it was recovered by the vigilante.

Under cross examination by C. C. Ofoegbunam Esq. of 2nd defendant's counsel Pw3 testified that he does not know the name of the vigilante man that reported the robbery incident to the police but it is their chairman. He stated that the brother did not tell the vigilante people the address of the 2nd defendant whom he allegedly identified

and that neither him nor the brother knew the surname of the defendant. He also testified that it was at the police station that he met the 1st defendant for the first time in his life and that shovel and cutlass was recovered by the police from their house. Pw3 admitted not to have seen the robbers because he was lying down.

On the 23/6/2015 Andrew James (Inspector) attached to Special Anti Robbery Squad with force No. 167448 testified as Pw4 and gave evidence of how the police investigated this case and recovered exhibits abandoned by the robbers which he stated to be shovel handel, kitchen knife and pair of slippers belonging to one of the defendants. He also testified of how the vigilante men handed over three mobile phones recovered from one of the defendants to them.

In the course of the evidence of the Pw4 on 29/5/2015 P. N. Oforma Esq. of counsel to the prosecution sought to tender the statement of the 1st defendant as exhibit and O. I. Onoiribholo Esq. of counsel to the 1st defendant objected to its admissibility on the ground that it is obtained under torture and called for trial within trial. Trial within trial was conducted and with ruling thereto delivered on 24/11/2016 and the case adjourned to 29/11/2016 for continuation of hearing. On 29/11/2016 this case was adjourned at the instance of the prosecution due to the absence of the testifying police officer (Pw4) said to have gone on election duty in Ondo. This case suffered another adjournment on 11/1/2017 at the instance of the prosecution counsel who wrote a letter of adjournment on grounds of ill health with the case further adjourned to 13/2/2017 on which other day the learned prosecution counsel further secured an adjournment due to the absence of the said Pw4.

At last on 15/2/2017, Pw4 appeared and continued with his evidence – in – chief stating that he prepared investigation report which he submitted to his unit commander Late Emma Ochiobi who signed it before the defendants were charged to court. Under the cross examination of Pw4, the said Investigation report was tendered by the 1st defendant's counsel as Exhibit F. At the close of the cross examination of Pw4 the prosecution closed her case with this case adjourned to 11/4/2017 for defence to open their cases.

On that 11/4/2017 the 1st defendant rested his case on the prosecution's case while the 2nd defendant opened his defence. He testified that he sells engine in Mgbuka Nkpor and denied doing anything stating that he was going to work when a security man stopped him at Ugwunobamkpa by Emmanuel Church and as he was asking the security man why he stopped him, he told him to enter their motor which he refused.

Dw1 testified that as he refused to enter the vehicle they started to fight and vehicles passing by stopped at which point a man passing with his vehicle who knew him then stopped and told him to enter the vehicle before he entered the security vehicle. 2nd defendant also testified that he was taken to the security office where he was told that he robbed at a place which he denied. He stated that he was tied with rope and they were using animal's bones to break his joints before later in the evening he was taken to SARS office. Dw1 stated that he only knew Oraegbuna among the security officers and that Oraegbuna told him that he has been eyeing him for long.

Dw1 testified that Oraegbuna was having problem with the sister and he fought with him and thereafter Oraegbuna started targeting him. He claimed that Oraegbuna told the SARS officers to torture him that he

is a confirmed robber. He denied knowing the 1st defendant stating that he got to know him at the magistrate court. He also denied knowing Emmanuel Agu, Nwanosike Ikechukwu and Agu Chinedu before and maintained that he does not steal.

Under cross – examination Dw1 testified that he was in his house on the 6/8/2011 and stated that he does not know everyone who knows him. He denied mentioning the 1st defendant. He also denied stealing that phones of Chinedu Agu and Ikechukwu Nwanosike which were recovered from the 1st defendant.

He further testified under cross examination that it is only Oraegbunam that investigated his case at the security office claiming that he was the only person in the office when he was brought to the security office. He denied telling the court during trial within trial that there are other security men. Dw1 also denied of knowing Ugochukwu Nsugbe and denied robbing the complainants along with Ugochukwu and the 1st defendant on 6/8/2011. He also denied being the leader of the gang. Cross examination of the Dw1 ended on 11/3/2017 with written address ordered by this honorable court with the case adjourned for adoption on 31/5/2017 on which date due to late filing of the defendant's address this case was further adjourned to 28/6/2017 to enable the prosecution file her written address on which date the defendants were not produced with this case further adjourned to 4/7/2017 on which date all the counsel adopted their final written address and this case was due to long August Vacation adjourned today for judgment.

O. I. Onoiribholo Esq. in his final address filed 24/2/2017 resting the 1st defendant's case on the evidence of the prosecution raised one issue for determination thus:

Whether the prosecution has proved beyond reasonable doubt that there was robbery on 6/8/2011 to secure the conviction of the 1st defendant.

Canvassing the above issue the learned 1st defendant's counsel submitted that for the prosecution to succeed in a case of armed robbery she must prove

- (a) That there was a robbery or series of robberies.*
- (b) That each robbery was an armed robbery.*
- (c) That the appellant was one of those who took part in the armed robbery.*

He cited in reliance the decisions **in ABUBAKAR SALE V. THE STATE 2016 FWLR (pt 822) 1619 at 1631 – 1632 paragraphs F – A,** and the case of **OKAWADE KOLAWOLE VS. THE STATE (2015) FWLR (pt 778) 864 at 882 paragraphs C – E.**

The learned 1st defendant's counsel submitted that from the totality of the evidence of Pw1, Pw2, Pw3 and Pw4 there was no robbery on the 6/8/2011. He referred further to exhibits A, B, E, F, and G. He argued that Pw1, Pw2 and Pw3 do not know the 1st defendant and all alleged that they know 1st defendant from the confession of the 2nd defendant adjudged to have been obtained under torture by this court and that they also knew of the alleged recovery of phones and arms from the Pw4 and the vigilante. He said Pw4 stated in court that he did not recover anything from the 1st defendant but it was the vigilante and the vigilante was not called to testify.

Learned 1st defendant's counsel stated that Pw1, Pw2, Pw3 and Pw4 only related the story of the vigilante to the court against the 1st defendant and these are hearsay evidence and cited the decision in **OKOKORO OMONGA V. THE STATE (2006) FWLR (pt 306) 930 –**

946 paragraphs D – E and urged this honourable court to hold that the prosecution failed to prove that the 1st defendant participated in the crime.

In response to the above address P. N. Oforma Esq. now Assistant Chief State counsel for the prosecution adopted the three ingredients listed above necessary to prove the offence of armed robbery and further cited the decisions in **PETER NWOMUKORO & ORS V. THE STATE (1995) NWLR (pt 372) 432 at 443, BOZIN V. STATE NWLR (pt 465) at 469, AMINA V. STATE (1990) 1 NWLR (pt 155) 125 at 135, OKOSI V. A.G. BENDEL STATE (1989) 1 NWLR (pt 100) 642, NWACHUKWU V. STATE (1985) 1 NWLR (pt 11) 218 and ANI V. STATE (2003) 11 NWLR (pt 83) 142.**

She submitted that the contention of the 1st defendant's counsel is that there is uncertainty as to date which he said stems from the fact of the discrepancies in the extra judicial statements of Pw2, Pw3, and Pw4 as to the date in which the robbery took place. She submitted that the three witnesses during their evidence in court stated their reason for the discrepancies as mistake or typographical error. The learned prosecution counsel stated that failure to note the exact date and the time of the said robbery is not at all material in proof of the suit of the defendants and referred to the provisions of Section 274 (a) of the Administration of Criminal Justice Law of Anambra State 2010.

Learned prosecution counsel stated that Pw2, Pw3 and Pw4 having corrected the date and said it is 6/8/2011 in course of their evidence the absence of evidence contradicting it for the 1st defendant left the court with no option than to believe the evidence of the prosecution witnesses as true.

With respect to whether there was robbery or each of the robbery was armed robbery, the learned prosecution counsel referred and relied on the evidence of Pw1, Pw2 and Pw3 that the 1st and 2nd defendants were armed with shovel, matchet and knife during the robbery and stated that these qualify clearly as offensive weapons. She relied on the decision in **MOHAMMED V. THE STATE (1993) 1 NWLR (pt 269) 276 at 292 – 293** wherein it was held by Olatawura J.S.C that it is the use made of a weapon and the manner it is used that qualifies it to be an offensive weapon.

With respect to issue whether 1st defendant participated on the armed robbery, the learned prosecution counsel submitted that the analysis of the 1st defendant's counsel of the evidence of Pw1 to Pw4 as to the identity of the 1st defendant as to who together with the 2nd defendant robbed Pw1 to Pw3 on 6/8/11 is not what is in the record of the court. she stated that Pw3 clearly stated that even before the police took over the investigation, that the 1st defendant confirmed in his own presence that he was one of the people who robbed them on 6/8/11 as such Pw3 met the 1st defendant before the police took over investigation of the case and that failure of the 1st defendant damage that piece of evidence under cross – examination and failure to put a defence to it makes it to be deemed as true.

P. N. Oforma Esq. of prosecution counsel further submitted that apart from the extra judicial statement of the 1st defendant which was rejected that the evidence of the prosecution clearly identified the 1st defendant as one who together with 2nd defendant robbed Pw1 to Pw3 on 6/8/2011.

Finally she cited the decisions in the case of **ALI V. STATE (2003) 3 ALL CRIMINAL LAW REPORT 581 at 595 – 596** on the

effect of the defendant resting his case on the prosecution's case which she said signifies that the defendant is satisfied with the evidence given and do not wish to explain any fact or rebut any allegation made against him. The learned prosecution counsel stated that when defendant rests his case on the prosecution's case it means.

- (a) *That when even if the evidence of the prosecution are to be believed, such evidence cannot support the charge before the court.*
- (b) *When the charge before the court is so conflicting or has been so discredited that it is not credit worthy.*

She maintained that proper appraisal of the evidence led by the prosecution in this case will show that the prosecution proved all the ingredients/elements of the offence. Learned prosecution counsel further cited the decisions in **AKINYEMI V. THE STATE (1999) 6 NWLR (pt 607) 44 at 463 ratio 11** and **MAGAJI V. NIGERIA ARMY 37 SCQR 108 ratio 11** on the effect of defendant resting his case on prosecution's case. Learned prosecution counsel stated that the apprehension of the 2nd defendant led to the arrest of the 1st defendant from whom the phones of Pw2 and Pw3 were recovered and later released on bond which was tendered as exhibit before the court and in conclusion urged this court to hold that the prosecution proved her case against the 1st defendant.

The reply of the 1st defendant's counsel filed 21/4/2017 having been read is hereby deemed for ease of reference and convenience incorporated into this judgment.

C. C. Oforegbunam Esq. of counsel to the 2nd defendant in his final address raised the issue for determination thus:

"Whether from the totality of the prosecution's evidence before the court, the prosecution has proved the offence charged beyond reasonable doubt".

He conceded to the ingredients of the offence of armed robbery.

With respect to the issue as to whether there was robbery or series of robberies, the learned counsel to the 2nd defendant submitted that the prosecution failed to prove beyond reasonable doubt that there was robbery or series of robbery on the 6/8/2011 or any other date. He maintained the same line of submission in that respect with the 1st defendant's counsel.

On the element as to whether the robbery was armed robbery C. C. Oforegbunam Esq. of counsel to the 2nd defendant submitted that since there is no proof of robbery on the 6/8/2011 there is no proof that the robbery was armed robbery as the later will not arise without proof of the 1st element.

Further on this issue, the learned 2nd defendant's counsel submitted that P1 to P4 were unable to prove that the robbers were armed as Pw1 to Pw3 claimed that they were flogged with matchets and shovels handle but they did not know which of the robbers that was holding a shovel or cutlass. He urged the court to hold that prosecution failed to prove that element of the charge against the 2nd defendant.

Canvassing the issue as to whether the 2nd defendant robbed or was one of those who robbed the complainants, the learned 2nd defendant counsel submitted that it is only the Pw1's evidence that linked the 2nd defendant when he claimed that he recognized the 2nd defendant as one of the robbers. He stated that Pw1 to Pw3 all agreed that the incident happened at night. Learned 2nd defendant' counsel further stated that Pw1 after admitting seeing, identifying the 2nd

defendant in the face of torch lighting during the operation unfortunately said he was unable to see the height of the 2nd defendant.

C. C. Oforegbunam Esq. of 2nd defendant's counsel further argued that Pw1 claimed that he knew and was able to identify the 2nd defendant because he was popular in their neighbourhood but when asked what made the 2nd defendant popular he said he does not know and testified that he is not close to the 2nd defendant. He pointed out that this 2nd defendant who Pw1 claimed is popular is not known to Pw2 who also lives in the same neighbourhood with Pw1 and works with him in the same shop.

The learned 2nd defendant's counsel further argued that the onus is on Pw1 who claimed to know 2nd defendant to establish by credible evidence and not suspicion or guess work how he was able to identify the person being that he did not see his face or height and did not see the type or colour of cloth he wore. He further argued that the very worrisome aspect is the fact that Pw1 called the vigilante chairman on phone and told him that Obiajulu robbed them and the vigilante chairman without ascertaining which of the Obiajulu's and where he lives from Pw1 went straight and arrested the 2nd defendant who he has been having problems with and without first taking him before the Pw1 to confirm if he is the person, started beating and torturing the 2nd defendant to admit committing the crime before the arrival of the Pw1. He concluded that it follows that it was the vigilante that informed Pw1 to Pw3 that the 2nd defendant was the Obiajulu that committed the crime instead of the Pw1. He further referred to Dw1's evidence on the relationship between him and the vigilante chairman which he said is the genesis of this case. He relied on the decision in **AUDU ARUNA & ANOR V. THE STATE (1990) 10 SCNJ 13** on the possibility of

feigning crime in order to settle old scores which Nnaemeka Agu J. S. C said therein cannot be ruled out.

The learned 2nd defendant's counsel finally urged this court to hold that the prosecution failed to prove her case against the 2nd defendant.

In response to the above submission, P. N. Oforma Esq. of the prosecution raised one issue for determination as it appertains the 2nd defendant thus:

1. *Whether the prosecution has not proved beyond reasonable doubt that the 2nd defendant together with the 1st defendant robbed Pw1, Pw2, and Pw3?*

Canvassing the above issue, she repeated the ingredients of the offence of armed robbery which all the counsel seems to be in accord thereto. She further repeated her submissions on the need to prove that there was robbery or series of robberies and that the robbery or each of the robbery was armed robbery which she made in respect of the 1st defendant's counsel submissions.

On the third or last element which is whether the 2nd defendant took part in the armed robbery, the learned prosecution counsel submitted that 2nd defendant conceded that the evidence of Pw1 linked him to the offence but claimed that identification of the 2nd defendant by Pw1 may not be clear. She refers to the evidence of Pw1 as to how he identified the 2nd defendant as one of the robbers who robbed them on the 6/8/2011 and said that Pw1 was unequivocal in his evidence and that identity of the 2nd defendant was not a problem and that led to the arrest of the 2nd defendant who upon his arrest named the 1st defendant who was arrested and from whom phones of Pw2 and Pw3 were

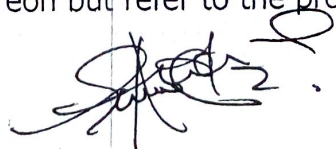
recovered and released on bound to the Pw3 which bond was tendered unchallenged as exhibit.

The learned prosecution counsel argued that the scenario does not call for identification parade as the Pw1 had identified 2nd defendant to the vigilante who got him arrested and called the complainant to see them before handing them over to the police. She further submitted that the contention of the 2nd defendant's counsel that it was the vigilante chairman who told the Pw1 to Pw3 that it was the 2nd defendant who robbed them is not at all supported by evidence from the witnesses and urged this court to hold that prosecution proved her case beyond reasonable doubt against the 2nd defendant and to find him guilty as charged.

The reply of the 2nd defendant's counsel on point of law filed 28/06/2017 having been read is hereby deemed incorporated into this judgment for ease of reference and convenience.

It is seen from the submissions of all the counsel in this case that they all agreed on the ingredients of the offence of armed robbery for which the defendants are charged. I need not therefore spend judicial time on it being that the three ingredients variously submitted are as posited by law. See on that issue the decisions of the Supreme Court in SUBERU V. STATE (2010) 8 NWLR (pt 1197) 586 SC, OKOSI V. A. G. BENDEL STATE (1989) 1 NWLR (pt 100) 442, ANI V. STATE (2003) 11 NWLR (pt 830) 143 and OLAYINKA ABLALU V. THE STATE (2010) LPELR – 197 SC.

It is also found that both the learned prosecution counsel and all the defence counsel accepts the law as it is that onus is on the prosecution to prove her case beyond reasonable doubt. To that effect I need not dissipate energy postulating thereon but refer to the provisions



of Section 139 of the Evidence Act 2011 and Supreme Court decisions in the cases of SEBASTAIN YONGO V. COMMISSIONER OF POLICE (1992) 4 SCNJ 113, STATE V. EMINE (1992) NWLR (pt 256) 658 and ADEGOKE V. ADIBI (1992) 5 NWLR (pt 242) 13.

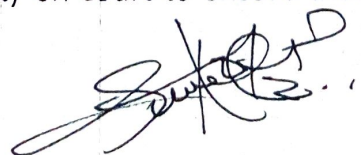
Let us now proceed to the main issue which is whether or not the prosecution proved beyond reasonable doubt that the defendants committed the offence as charged.

The 1st defendant in this case at the close of the prosecution's case rested his case on the prosecution's case. That is to say that the defendant has left it to this court to say if based on the evidence presented by the prosecution the prosecution has proved beyond reasonable doubt that he committed the offence. By resting on the prosecution's case, the 1st defendant is like saying I have nothing more to say and believing that he is not guilty. The 1st defendant in opting to rest his case on the prosecution's case no doubt accepts the risk of being guilty, based on the evidence presented by the prosecution without his presenting evidence in defence thereto.

Onnoghen J. S. C in the case of SEGUN AJIBADE V. THE STATE (2012) LPELR – 15531 (SC) stated the effect of electing not to give evidence in defence but to rest on that of prosecution thus:

"appellant elected not to give evidence in his defence but to rest his case on that of the prosecution. The election is within his right under the law but the legal effect of the said election is to leave the court of trial free to accept the un-contradicted evidence of the prosecution in proof of the charge".

I must clearly say that the fact that 1st defendant rested on the prosecution's case is not to say that the duty on court to ensure that the



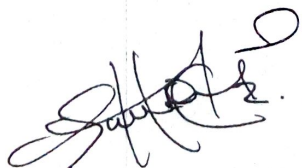
prosecution proved his case beyond reasonable doubt has been eroded, whittled or obviated. Let us now look at the evidence adduced against the defendants.

In his extra judicial statement to the police tendered as Exhibit A on 24/6/13 Pw1, Emmanuel Agu stated therein thus:

"As we were sleeping they break our door, start tell (sic) us to bring our fone (sic) and our money. One of them start using cutlass and servell to maltrete (sic) us. They collected our three fone and my brother suit, but I pretended as eve (sic) I don't know any of them around 5.30 am I called the chairman of vigilante told him everything that happened even tell him that I know one of them. The guy name is Obiajulu. He told me that he will come back, after 2 mines (sic) he called me back and ask me to come to his house. The price of my own fone is 15,000 naira. My brother but (sic) his own suit what of 35,000 thousand naira".

In the above extra – judicial evidence of Pw1 there is no doubt that there is evidence of robbery on the 6/8/2011 which Pw1 stated it happened by 12.30 to 1 O'clock am. There is no doubt that the robbery is armed robbery as he stated therein that the robbers were beating them with cutlass and shovel to maltreat them. However, it is found that Pw1 in that exhibit A did not mention the 1st defendant but specifically said he identified the 2nd defendant and informed same to the vigilante chairman around 5.30 am of that 6/8/2011.

In his evidence in chief before this court on 14/5/2013 Pw1 testified with respect to it thus:



"We were sleeping already and when they came in they asked us to bring our money and our phones. We were three. I did as if I do not know one of them and they collected our three phones and one of my brother's suit. I said I know one of them and did like I did not know him. They came in with matchet and shovel.

In the early morning of that day I called the chairman of the vigilante in Onitsha and told him what happened. I told him the person's name is Obiajulu the 2nd defendant (Witness identifies the 2nd defendant) as the person he knew very well before the incident). I identified him when he was flashing light on us. The vigilante people arrested the 1st defendant in course of investigation. The chairman promised to call me back and after he invited me to his house and in his house I saw the 2nd defendant. it was later that they went for the 1st defendant".

Under cross examination of the Pw1 on 24/6/2013 by 1st defendant's counsel the Pw1 answered thus:

Q. There was no light in your room?

Ans. Yes.

Q. The person with the torch was holding it with what?

Ans. Left hand.

Q. You cannot see behind the torch when it is pointed at your face?

Ans. I saw them.



Q. Are you saying you can see behind the torch?

Ans. He wasn't pointing the torch constantly at me but was pointing round the room.

Q. The person holding the torch is at the dark and you cannot see him?

Ans. Both of us were in the room. It was not far distance. Two of them were with torch-----

Q. Do you know both of them before the incident?

Ans. I know one of them before the incident.

Q. How did you know him?

Ans. Everybody knows he is a popular figure.

Q. What made him popular?

Ans. He normally comes around our village and I know him.

Q. What name do you know him with then?

Ans. Obiajulu.

Q. Have you ever done any business with him?

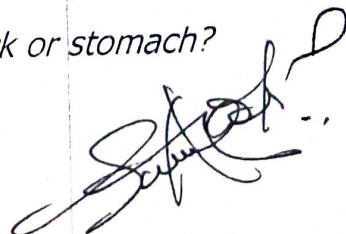
Ans. No.

Led under cross examination by learned counsel to the 2nd defendant Pw1 testified further thus:

Q. You told this court that two of them were holding torchlight and you saw their faces because of that?

Ans. Yes.

Q. When they ordered the three of you to lie down were you lying with your back or stomach?



Ans. I did not lie down flat.

Q. How were you lying?

Ans. I was on my knees looking at them.

Q. At the time you were kneeling you were squatting with your knees and elbows facing down?

Ans. I was on my knees with one hand down and one hand up while looking at them.

Q. Since you were able to see beyond the torch what other things were they holding that night?

Ans. Cutlass with Shovel.

Q. How many cutlass and shovels?

Ans. One cutlass and one shovel.

Q. You were unable to see the height of the person standing before you?

Ans. Yes.

As can be seen from the evidence of Pw1 in this court and his extra judicial statement before the police, Pw1 is consistent in both evidence that he knew the 2nd defendant before and identified him as the operation was going on. The witness insisted that he saw the two of the robbers in the room armed with cutlass and shovel but identified the 2nd defendant and also called the chairman of the vigilante who he reported the robbery to by 5.30 am and told him that he identified the 2nd defendant as one of the robbers.

Still in prove of her case against the defendants the prosecution called Pw2 who also testified of the 6th of August 2011 robbery and stated that Pw1 identified the 2nd defendant and reported same to the vigilante chairman. He testified too that it was the vigilante that caught

the 2nd defendant and he mentioned of the 1st defendant while being tortured. Pw2 testified also that they were at the police station when the 1st defendant brought two of the phones.

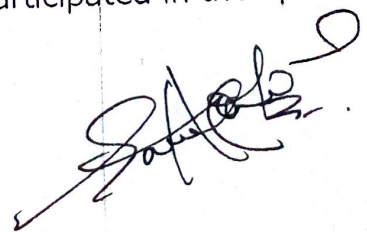
Under cross examination, the Pw2 testified that he does not know whether the vigilante found anything with the 1st defendant stating that he was not around when they were torturing the 1st defendant. He further testified under cross examination that it was the police at SARS that told him that 1st defendant was the person who robbed his phone.

Pw2 still under cross examination testified that Pw1 Emeka Emmanuel Agu, spoke with vigilante chairman after Ndidi Agu (Pw1's Sister called him with her phone). He also testified that he did not recognize any of the robbers but Pw1 did.

Pw3 as seen by this honourable court testified of the said robbery on 6/8/2011 and stated that Pw1 was not lying down properly. Pw3 further testified under cross examination that there was illumination and reflection of light all over the room and Pw1 were able to see one of them and kept quiet. He further testified that Pw1 spoke to the vigilante chairman through the sister's phone and explained what happened. He testified further that both defendants confirmed in his presence that they were the people that came to their house to rob them.

Let us analyze or evaluate the evidence relating to the 1st defendant first. As seen from the evidence of Pw1, Pw2, Pw3 and even Pw4, none of the prosecution testified that he saw the witness at the scene of the incident. The evidence of Pw1, Pw2 and Pw3 as it concerns the 1st defendant is that the 2nd defendant upon his arrest by the chairman of the vigilante mentioned the 1st defendant and one Ugochukwu as the other two persons that participated in the operation.

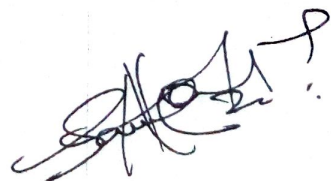
Pw1 specifically testified in chief thus:



"The vigilante chairman promised to call me back and after he invited me to his house and in his house I saw the 2nd defendant. it was later that they went after the 1st defendant".

Pw1 did not give detailed evidence as to how the 1st defendant was arrested while given evidence in chief. It is instructive to note that Pw1, Pw2 and Pw3 all agreed that it was the vigilante chairman that arrested the 1st defendant. Pw4 also admitted that the defendant's were arrested and handed over to him. It is further noted that the said chairman of the vigilante was not called by the prosecution to testify as to how he got the information that led to the arrest of the 1st defendant and as to how the phones of the complainants were recovered. The Pw4's evidence shows that he knew nothing about how the 1st defendant was arrested as the defendants and the things allegedly recovered were handed over to them by the vigilante men.

Before this honourable court the evidence of Pw1, Pw2 and Pw3 who are complainants in this case with respect to the 1st defendant is that the 2nd defendant mentioned the 1st defendant to the chairman of the vigilante. The 2nd defendant before this court denied even knowing the 1st defendant stating that he got to know the 1st defendant at the Magistrate court. Being that Pw1, Pw2 and Pw3 were not the ones that arrested or mentioned the 1st defendant the evidence of the vigilante men who arrested the 1st defendant being that he was not identified by the Pw1, Pw2 and Pw3 at the scene of the incident is therefore vital, this is much so because the evidence as to how the three phones were recovered as presented by the evidence of the prosecution seems not certain.



Pw4 in his evidence testified that the phones with the defendants were handed over to him by vigilante men.

Pw3 in his evidence as to how the phone was recovered under cross examination testified thus:

Q. It is correct to say that vigilante did not recover anything from the defendants before the matter was transferred to the police.

Ans. I don't know. It was when we got to the police that my phone was recovered.

That shows that Pw3 did not and cannot say how it was recovered. Further under cross examination by counsel to the 2nd defendant Pw3 testified that he does not know how the phone was recovered.

Still on the evidence of Pw3 on how the phone was recovered Pw3 testified thus:

"At SARS, the defendants confirmed that they were people who came and robbed us in our house so they the SARS made further investigation by taking the 1st defendant to their house where they found two of my phones and my brother's phone. They said that the other person ran away with the Henkel wine and the other phone".

The above evidence conflicts with the evidence of Pw4 (the Investigating Police Officer) who claimed that the phones and the defendants were handed over to him. Pw3's evidence above also conflicts with Pw1's evidence that the phone was recovered from the 1st defendant.



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Apart from the finding above with respect to the evidence of the prosecution against the failure of the prosecution counsel to field the vigilante officer who arrested the 1st defendant to testify as follows:

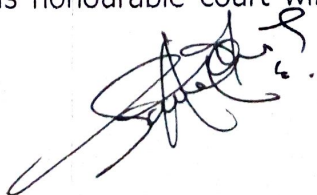
- (i) *How he received the information about the 1st defendant or who identified the 1st defendant as one of the armed robbers.*
- (ii) *How the 1st defendant was arrested by him and who identified him as the person alleged to have participated in the commission of the offence to him and*
- (iii) *Where he recovered the alleged phones and how it was identified to be that of the complainants.*

left this honourable court with doubt as to the involvement of the 1st defendant as the Pw1, Pw2, Pw3 and Pw4 did not receive the above information and did not execute the acts of interrogation and investigations that led to the arrest of the 1st defendant. A look at the evidence of Pw4 who testified in this case as the investigating police officer left this court with the finding that the police did little or nothing in identifying or revealing the 1st defendants involvement in this case.

I must say that evaluation of the 1st defendant's case with that of the 2nd defendant shows that different evidence from difference source emanated as to the involvement of the parties before this court.

The 2nd defendant is alleged to be identified by the Pw1 at the scene who promptly informed same to Pw2 and Pw3 before he called the vigilante chairman using the sister's phone.

The need for the vigilante chairman to testify in this case is therefore very necessary or vital to the proof of the involvement of the 1st defendant in this case short of which this honourable court will be



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running or embarking on the risk of convicting the 1st defendant based on hearsay evidence.

Agreed that in law prosecution counsel has absolutely the right to pick and choose witnesses to proof her case, the law is long settled also as to necessity to call a vital witness in criminal matter of this nature. Rhodes Vivour J. S. C in the case of CHUKWUKA OGUDO V. THE STATE (2011) LPELR 860 SC posited the law more eruditely thus:

"A vital witness is a witness whose evidence is fundamental, in that it determines the case one way or the other. Failure to call a vital witness by the prosecution is fatal to the prosecution's case. See STATE V. NNOLIM (1994) 5 NWLR (pt 345) 394. Further, failure, to call vital witness raises the presumption under the Section 149(d) of the Evidence Act that had he been called the evidence would have been unfavourable to the prosecution".

See the decision in ONAH V. STATE (1985) 3 NWLR (pt 12) 236 ABDULKAFIR GUSUA V. COP (1969) NWLR 329 and OPAYEMI V. THE STATE (1995) 2 NWLR 101 at 108.

In view of the uncertainty in the evidence of the prosecution as to how the 1st defendant linked to the crime, how he was arrested and as to whether or not the phones were recovered from him by the vigilante or by SARS it is the finding of this court that the prosecution's case against the 1st defendant is not proved beyond reasonable doubt. This finding is made notwithstanding the evidence of Pw3 that defendants in his presence confirmed that they were the people that came to their house to rob there before they were taken to SARS. This is because as earlier found during trial within trial and as testified by Pw2 the 1st

defendant was being tortured by the vigilante as contained in his evidence thereby making the circumstance of the mentioning of the 1st defendant not acceptable as credible evidence.

At this point it is convenient to evaluate the case of the prosecution against the 2nd defendant. Pw1, Emmanuel Agu testified that he identified the 2nd defendant on the day of the incident while they were flashing their torch light on them. Under cross examination Pw1 testified that the torch was not being pointed constantly at him but round the room. This tends to suggest that the Pw1 had opportunity in that circumstance to see the 2nd defendant whom he said everybody knows as he is a popular figure who comes around their village. This evidence seems confirmed by Pw3 under cross examination when he testified that there was illumination and reflections of light all over the room so Pw1 was able to see one of them and kept quiet.

Pw2 and Pw3 both testified that after the incident Pw1 also called the vigilante to inform them that the 2nd defendant was among the robbers that robbed them that day.

The 2nd defendant whose alleged confessional statement was discountenanced after trial within trial in his evidence admitted that he was arrested by security men who finally took him to their security office and who also told him that he robbed at a place. The striking thing about the evidence of the 2nd defendant is that he alleged the said vigilante man who he called Oraegbuna had problem with his sister and he fought him and since that day the men has been targeting him. This piece of evidence by Dw1 is meant to show malice and vengeance as the reason for his arrest. Dw1 did not call the alleged sister to testify that the she had problem with the said vigilante man and that 2nd defendant (the brother) as a result fought with the vigilante man. There

is no evidence to support this line of defence being put by the 2nd defendant. No explanation was given by the 2nd defendant to justify his failure to call his alleged sister, who at least for their relationship and need to save his brother will sacrifice her time to be in court to testify to give credence to the 2nd defendant's evidence.

Much as it is the law that the 2nd defendant is not to prove his innocence, it is the view of this court that the evidence of the sister would have helped to cast doubt in the mind of the court.

Instructively, the 2nd defendant did not deny that there is robbery operation on the 6/8/2011 in the room where the Pw1, Pw2 and Pw3 were sleeping. There is no evidence of malice against the Pw1, Pw2 and Pw3 to put doubt as to the reason why they should make allegation of robbery and claim that Pw1 identified him as one of the armed robbers.

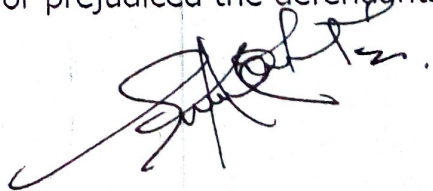
The 2nd defendant did not lead evidence of where he was at the time of the crime before this court. being that the evidence of Pw1, Pw2 and Pw3 were consistent that Pw1 identified the 2nd defendant during the operation and in the morning called the vigilante to inform them of the incident and identified him to the vigilante the 2nd defendant who he named as Obiajulu to them and upon the arrest of the 2nd defendant who also answers Obiajulu, the Pw1 confirmed him as the person that participated in the operation. Further being that from the evidence of Pw1 and Pw3 on illumination of the room and that the torch light was not constantly on Pw1, I find that with the Pw1, Pw2, Pw3 and 2nd defendant being in the same room with the said illumination and further being that Pw1 testified that he knew the 2nd defendant before the incident and even named him to the vigilante that evidence of prosecution on the identification of the 2nd defendant at the scene of the crime is direct and unequivocal.



Let me quickly say that the contention or submission of the learned counsel to the 2nd defendant that Pw1 under cross examination testified that he did not see the height of the 2nd defendant while lying down in the way he was is not sufficient to discredit the identification made by the Pw1. It is not unusual to see only the face of person in the circumstance of the evidence of the Pw1 in a crime scene to identify the culprit. It is not expected and that is not the law that an eye witness should also see the height of the suspect before he can be said to have seen the culprit.

The learned counsel to the 1st and 2nd defendants in their submissions made issue about the variance in the dates stated in the statement of Pw1, Pw2 and Pw3 in their statement to the police, and the statements in court with that on the investigation report which the Pw4 testified that it is as result of typographical error or mistake. A look at the evidence of Pw1, Pw2, Pw3 and Pw4 before this court shows that they are consistent that the incident occurred on the 6/8/2011 while in Pw1's extra judicial statement made on 6/8/2011 he merely stated the hour of the incident without stating the date, the same is seen in the statement of Pw2 to the police on 8/8/2011 while in the statement of Pw3 made 08/08/11 he stated that it is 4/8/2011.

A look at the investigation report shows that the report to the police was made on 06/08/11 and it indicated that a lot of residence were affected by the armed robberies. It clearly stated that investigation was commenced upon which the two defendants were arrested. That clearly shows that Pw4 was correct that it is error that was made where in the report a different date was stated. I do not see how that affected the evidence of the prosecutions that the incident happened on that 6/8/2011. I do not see how it affected or prejudiced the defendants who

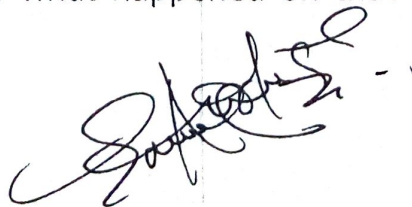
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never claimed to have robbed on a particular day not 6/8/2011. Above all the evidence of Pw1 to Pw4 were consistent that the Pw1, Pw2 and Pw3 were robbed on one day and not separate days or separate places.

P. N. Oforma Esq., of counsel to the prosecution relied on Section 274 of the Administration of Criminal Justice Law 2010 in contending that the discrepancies in the date is of no moment. I have read that Section and hold the firm view that it applies where there is application to stay judgment or reverse a judgment on the grounds of any objection which if stated after the charge was read over to the defendant or during the progress of the trial might have been amended by the court. It does not apply to this case because no judgment is being stayed or being reversed at this moment.

This court has further read Section 272 of the Administration of Criminal Justice Law 2010 and found that it applies to error in stating an offence or particulars which is not the case as the charge contains the 6/8/2011 which the prosecution and his witness testified that the incident occurred.

To this court, what is to be considered is whether discrepancy in date in the circumstance of this case is material and did prejudice the defendants. Fatayi Williams Ag. J.S.C (as he then was) while dealing with similar situation in the unreported case of DAGEMU V. STATE SC/00/1969 stated that discrepancies in the evidence of prosecution witnesses as to the date on which the accused committed an offence will not be prejudicial to the accused (defendant) if there is abundant evidence to prove guilt of the accused (defendant). I do not see how the defendants were prejudiced particularly the 2nd defendant who testified before this court and led evidence of what happened on that 6/8/2011



and not of any other day indicating that he was not in any way misled as to the date.

With respect to the 2nd defendant it is found that the evidence of the prosecution clearly established beyond reasonable doubt that the Pw1, Pw2 and Pw3 were robbed at the early hours of the 6/8/2011 and that the robbers were armed with cutlass and shovel. It is further found that the prosecution proved beyond reasonable doubt that the 2nd defendant participated in the armed robbery operation for which he is charged before this honourable court.

In totality of the findings above made, I hold that the prosecution failed to prove beyond reasonable doubt that the 1st defendant committed the offence. I further hold that the prosecution proved beyond reasonable doubt that the 2nd defendant committed the offence as charged. The 1st defendant is hereby discharged and acquitted by this honourable court while the 2nd defendant is hereby found guilty as charged.

ALLOCUTUS:

At this point C. C. Ofoegbunam Esq. whom O. I. Onoiribholo Esq. of the counsel to the 1st defendant held his brief earlier now appears for the 2nd defendant.

He submits that the 2nd defendant from all the evidence before the court is a first offender. He prays this court to temper justice with mercy.

SENTENCE:

I have heard the plea of the learned counsel to the 2nd defendant which would have been helpful should this case not be a capital offence/matter which this court has no discretion to reduce the sentence. The hands of



this court are thereto tied by the law. This court is duty bound by law to sentence the 2nd defendant according to the law. Consequently in line with the finding of guilty made above the sentence of the court upon you is that you be hanged by the neck until you be dead and may the Lord have mercy upon you.

APPEARANCE:

Defendants in court.

P. N. Oforma Esq. Assistant Chief State counsel appears for the state.

O. I. Onoiribholo Esq. appears for the 1st defendant and also holds the brief of C. C. Oforegbunam Esq. for the 2nd defendant.



HON. JUSTICE A. O. OKUMA
19 - 10 - 2017