IN THE HIGH COURT OF ANAMBRA STATE OF NIGERIA

IN THE HIGH COURT OF AWKA JUDICIAL DIVISION

HOLDEN AT AWKA

BEFORE HIS LORDSHIP, HON, JUSTICE D. C. MADUECHESI ON THE 16TH DAY OF FEBRUARY 2016.

APPEAL NO.A/8CA/2013

SUIT NO.MAW/ 238C /2013

BETWEEN:

COMMISSIONER OF POLICE --- APPELLANT

AND

CYPRAIN IZUOGU --- RESPONDENT

JUDGMENT

This is an appeal against the ruling of His Worship, L. C. Okoye, Esq. sitting as a learned magistrate at Awka magisterial District, holden at Amawbia. The ruling was delivered on the 5th day of October 2013.

The crux of this appeal was the refusal of the learned trial magistrate to allow a question posed by the appellant's counsel in the re-examination of the appellant's prosecution witness number one (hereinafter called

the PW1). For proper understanding, let me briefly state the facts leading to this appeal.

The pw1 is the complainant in charge No. MAW/28c/2009 – C. O. P. .V. Cyprian Izuogu. On the 2/11/2009, he gave his evidence in chief and was partly cross examined by the defence counsel. The case was adjourned to 7/12/12. (See pages 5 – 10 of the record). Nothing was shown on the record to explain what transpired in court on that 7/12/12. However, what followed in the record are the proceedings of 30/1/13.

Nonetheless, on the 30/1/13, the defence counsel continued the cross examination of PW1. It must be noted that G. u. Muoneke Esq, was recorded as prosecuting with the Attorney – General's fiat whilst Amaka Ezeno, Esq was defending in all the proceedings aforementioned.

Yet, the said defence counsel, could not finish the cross examination the learned trial magistrate "reluctantly" adjourned the case to 1/3/13 and 15/3/13 for continuation of hearing.

On the 1/3/15, the prosecuting counsel was recorded to be absent in court but the defence counsel and her team of lawyers were in attendance. Amongst several other reasons the learned trial magistrate adjourned the case to 15/3/13 for continuation of hearing.

On the 15/3/13, both counsel were recorded to be present. The defence counsel continued the cross examination; yet again, the cross – examination was not concluded. The learned trial magistrate adjourned the case to the following dates: 12/4/13, 28/4/13 and 3/5/13 for continuation. (See pages 16 – 24 of the record).

For inexplicable reasons, at least from the record, there were no records of what transpired on 12/4/13. I cannot see in the record why the case was heard on 26/4/13 instead of 28/4/13 earlier indicated. On that 26/3/13, the prosecuting counsel appeared not to be in attendance. However, one Mr. M. I. Anushiem, informed the learned trial magistrate that his principal prayed the court to allow the cross examination of PW1 to continue. The learned trial magistrate acceded to this prayer. The defence counsel thereafter continued and concluded the cross – examination of PW1.

Before I proceed, it is significant to state the questions and answers during the PW1's cross-examination on the 15/3/13. That day, both the prosecutor and defence counsel were present. The following were part of what transpired between the PW1 and the defence counsel:

> "Q. Did u write your statement at the police that deny (sic) the incident happened.
>
> Ans. We went to the CPS and then to the Area Command before we then went to the C. O. P. Then I wrote a petition to the C. O. P. then directed the state C. I. D. to handle the matter. I wrote my statement at state C. I. D.

Q. Are you telling this court that you did not make any statement at C. P. S. and Area Commander (sic).

Ans. I only told them orally.

Q. After telling them orally, was what you said written down and you append your signature on it

Ans. There was no where I appended my signature.

Q. Was the defendant invited at the C. P. S. where you first lodged your complainant (sic).

Ans. I was making my complaint and I saw him there.

Q. the police at the C. P. S. after investigation discovered your complaint was frivolous and you left that your complaint; and you left, and wrote a petition to the C. O. P. asking for your case file to be transferred out of the C. P. S.

Ans. It is not what happened.

Q. why did you call for transfer of your case file from C. P. S. to the C. O. P. office

Ans. Why I went to the C. O. P. because (sic) we had no file at the C. P. S. and I only complained orally at the Area Command – secondly the defendant did not treat me as he was told at the C. P. S. also (sic) at the Area Command, he was given the same instruction to treat me and the defendant refused to treat me in the presence of the police and the police said if he did not treat me he will be put in the cell, it was from the Area Command that he took me to the Niger optical where he paid N1,000:00.

Q. How many days from the happening of the incident did it take before you wrote your petition to the C. O. P.

Ans. The incident happened your a Friday (sic) when the next week I wrote the petition to the C. O. P.

Q. What about the complaint at the Area Command when (sic) you lay the complaint.

Ans. I laid the 2nd complaint at the Area Command, the 1st complaint at the C. P. S. was on the 20th.

Q. Put: I put it to you the petition you wrote to the C. O.P. was on the 21st and the incident happened on the 20th but you told the court that it was the next week you wrote the petition to the C. O. P.

Ans. It is not true.

Q. Look at this document is that the copy of the petition you said you wrote to the C. O. P.

Ans. This is the petition

Q. Look at the date, read out the date to the court

Ans. What is written there is 21st February 2009

Ezeno: May I tender the petition which I extract from the file of the prosecuting counsel as an Exh for purposes of contradiction.

Muoneke: No objection

Court: The document dated the 21/2/2009is admitted and marked as Exh. "B"."

See pages 17 – 20 of the record.

The above underlined portion of the proceeding appears to be the genesis of this appeal. I also underlined same for the sake of emphasis.

On the 14/6/13, Mr. Muoneke, the prosecuting counsel, in re-examination put the following question to the PW1.

> "Q. During cross-examination on 15/3/13, you told the court that the 20th Feb. 2009 on which day the offence was committed that you went to C. P. S. and on the 21st being Saturday you went to Area Command and in the following week you now petitioned the C. O. P., my question is how come Exh B the petition bears 21/2/2009, being a Saturday."

To the above re-examination question, the defence counsel objected on the ground that the PW1 should not be allowed to reopen his case and repair his contradictions occasioned by a cross examination and such if allowed would be prejudicial. Both counsel addressed the learned trial magistrate on this issue.

On the 5/7/2013, the learned trial magistrate gave her ruling. She disallowed the re-examination question. In other words, she upheld the objection of the defence counsel and directed the witness not to answer the question. The trial court further directed the counsel to rephrase the question. (See Generally pp. 30 and 46 of the record).

It was above ruling that the counsel for the prosecution appealed against vide notice of appeal dated 24/6/13. He raised a lone ground of appeal to wit:

THE ERROR IN LAW

> "The learned trial magistrate erred in law when he held that the prosecuting witness number I should not answer a question put to him in re-examination by the appellant's counsel which question is aimed at explaining the contradictions elicited during his cross examination by the respondent's counsel"

Counsel did not state any particulars in support of the lone ground of appeal. (see 3 – 4 of the record).

It is imperative for me to state that I carefully searched for the criminal charge before the learned trial magistrate upon which the above proceedings were predicted, I could not find it in the record of appeal. However, I deduced the charge might be related to offence of assault occasioning harm and probably, stealing. My deduction is hinged on the evidence of PW1 and, of course, the PW1's petition to the commissioner of police dated 21/1/2009.

I should think that in compiling records of appeal, all the relevant documents forming part of the proceedings ought to be included. This is to avoid a situation where the appellate court would be left to conjecture or surmise what the material facts are in the appeal. This is

so because even the appellant court is bound by the record of appeal. In the instant appeal, I believe that had the criminal charge been included in the record, the court would have been in a much better position to appreciate the relevancy or materiality of the question posed to PW1 in his re-examination.

In accordance with the rules of this court, the appellant's counsel prepared the appellant's brief of argument dated 23/10/13 and filed on the 25/10/13. In response, counsel to the respondent filed the respondent's brief dated 4/3/14 and filed on the same date after obtaining leave for extension of time within which to file the respondent's brief vide a motion No/A/304m/2014 dated 4/3/14 and filed on the same date.

The appellant's counsel distilled only one issue for determination, to wit:

> "whether the trial chief magistrate court was right in upholding the submission of the defence counsel and ruled that PW1 should not answer a question put to him in re-examination which was aimed at resolving a contradiction elicited during his cross examination."

In reaction, the counsel to the respondent posed the following question for determination of this appeal

> "Whether the trial magistrate erred in law when she upheld the submissions of the defence counsel and disallowed the question put by the prosecuting counsel to PW1 in re-examination on the

ground that the question was not directed at clearing any ambiguity but rather seeks to reopen the evidence of PW1 and to give oral evidence of the document which is already before the court."

It is my view that the two issues for determination posed by both counsel are one and the same thing except to say the respondent's counsel added other amplifications and embellishments.

I would, however, decide this appeal on the appellant's issue for determination. This appears to me to be tangent on the disputed point. It was the contention of the appellant that the learned trial magistrate erred in upholding the objection on the ground that the respondent's objection was contrary to the law. Counsel for the appellant cited the following: Ss. 214 and 215 of the Evidence Act and submitted emphatically thus:

> "In the process of cross examination of a witness, there might be contradictions in evidence adduced in proof of a party's case which would be fatal where they are material. They relate to facts forming the plank or basis on which the case of the party is built. In other words, the contradictions must involve crucial facts necessary for the resolution of the issues in controversy between the parties."

Counsel called in aid the case of Fatoba .V. Ogundahinsi (2003) 4 NWLR (Part 840) 323 @ 330. He cited "Practical Approach to Criminal Litigation in Nigeria" by a learned author:J. A. Agbaba, who had opined

that the aim of re-examination is "to clear ambiguities, inconsistencies, doubts or haziness that arises out of cross-examination."

Counsel admitted that there is discrepancy on date written in the petition and PW1's answer in cross examination. That the prosecution re-examined on this discrepancy in order to clarify the ambiguity and contradiction. He further cited Okoro .V. State (2012) 4 NWLR (part 1290) 351; Ayorinde .V. Sogunro (2012) 11 NWLR (part 1312)460. Counsel relied on S. 130 (3) of Evidence Act 2011 and submitted that it is necessary for PW1 to be given an opportunity to explain the contradictions. Counsel cited the case of Audu .V. State (2003) 7 NWLR (part 820) 516 @ 532 where it was held that where a witness either gives or makes an explanation as to the inconsistencies in his earlier written statement and his evidence in court his explanation is sufficient for the trial court not to treat the witness as unreliable. In contradistinction to the foregoing, where a witness fails to explain such inconsistency, the contradiction would be resolved in favour of the accused person if it relates to a material fact in issue.

On this, counsel relied on the following cases: Egboghonome .V. State (1993) 7 NWLR (part 306) 352 and Emoga .V. State (1997) 9 NWLR (part 519) 25. Counsel posited that the law envisages that an opportunity be given to PW1 in re-examination to provide the missing link in the evidence given in cross examination. He further cited "Andrews & Hurst on Criminal Evidence" by Michael Hirst, relying on page 215 of the book; Police .V. Nwabueze (1963) 2 All NLR 119; S. T. Hon-s Law of Evidence in Nigeria Vol. 1 @ Pp. 427 – 429. Counsel contended that it is

no longer the law that without ambiguity in cross examination, re-examination is not permissible. Counsel maintained that S. 215(3) Evidence Act does not contain the word "ambiguity" but such can arise in contradictory answers in cross-examination. If so, re-examination becomes necessary. He further relied on Anyanwu .V. Uzowuaka (2009) All FWLR (part 499) 41.

In conclusion, counsel urges the court to allow the appeal.

The respondent's position is that the question asked by the appellant's counsel was not meant to clear any ambiguity but meant to reopen PW1's evidence. That if such is allowed, it is tantamount to giving oral evidence of a document that had been received as an exhibit. The counsel to the respondent maintained that re-examination shall be directed to the explanation of matters referred to in cross examination. Counsel says that the definition of "to explain" is to make clear. Counsel referred to "Hints on Legal Practice" by Anthony Ekindayo @ 237. Counsel further submitted that the only objective of re-examination is to clear ambiguities arising from cross-examination. According to counsel, New Webster's Dictionary defines ambiguity to mean "the quality of having more that one meaning, an idea, statement or expression capable of being understood in more than one sense." That it is only such that a witness can be given an opportunity to make it clear through re-examination. Counsel maintained that PW1's answer in the cross examination was clear and no ambiguity was occasioned. Counsel cited S223 of Evidence Act. Counsel further relied on Ezemba .V. Ibeneme & Anor (2004) All FWLR (part 223) 1786 @ 1861. Counsel submitted that when a witness contradicts himself under cross

examination, he cannot withdraw his evidence in re examination. Counsel cited Odu'a Invest C. Ltd .V. Talabi (1991) 1 NWLR (part 107) 761 @ 767.

That a party is not allowed to reopen his case and have a second bite at the cherry. He cites Willoghby .V. Inter. Merchant Bank Ltd (1987) Sc 137 @ 163; Amobi .v. Amobi & Ors (1996) 8 NWLR (part 469) 638; Adike .V. Obiareri (2002) 18 WR n 24 @ 58; S. 129 (3) (6) Evidence Act. Counsel finally urges the court to dismiss the appeal.

Section 215 (3) of the Evidence Act, 2011 provides as follows:

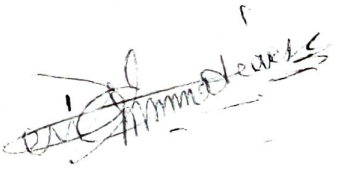
> "The re-examination shall be directed to the explanation of matters referred to in the cross examination and if a new matter is, by permission of the court, introduced in re-examination the adverse party may further cross examine upon the matter."

The question is: whether the question put across to PW1 by the appellant's counsel was geared towards explaining his oral evidence elicited in cross examination viz-a-vis the date written on Exhibit B (The petition to the Commissioner for Police).

The second point is: whether the date Exhibit B was written is material and crucial to the determination of the case. Put differently is exhibit B the very plank or foundation upon which the criminal charge was built.

I had earlier held that the criminal charge might be in connection with assault occasioning harm and probably stealing. From the evidence of PW1, both in his examination-in-chief and cross examination, the crucial issue was the altercation between a staff of the PW1 and the defendant (who is the respondent in the instant appeal). That altercation allegedly led to destruction of some of the PW1's properties. All these began on 20-2-2009.

On the same day, PW1 and the respondent had a brawl consequent upon which the PW1 went to report the case to CPS, Area Command and finally petitioned the Commissioner of Police. The real, crucial or material issue ought to be whether the incident as narrated by PW1 actually did take place.



The respondent's counsel from her line of questions in the cross examination appeared not to be contesting that the matter was actually reported to the police so as to make the dates of the various complaints by PW1 very crucial or material. As matter of fact, the respondent impliedly agreed that PW1 made such complaints. Therefore what would the prosecution gain or lose if the dates on which various complaint were made do not tally. Agreed that the PW1 gave inconsistent evidence on the actual dates, the prosecution, to my mind had the investigating police officer (IPO) to call as a witness.

Indeed, PW1 had his opportunity to adduce all material evidence to prove his allegation when he was testifying in evidence in chief. He

utilized that opportunity reasonably well. The discrepancy seen in the various dates he made various complaints notwithstanding.

This leads me to whether the question put across to PW1 in re-examination is appropriate or not. The provision of the Evidence Act is clear. Were there matters referred to in cross examination of PW1 which need explanation so as to warrant the prosecution to further cross examine pw1 upon that issue necessitated? It is my candid view that there was none. Absolutely none. Besides, the Evidence Act uses the word "may" as the operative word. In other words, it is not mandatory that the adverse party must re-examine.

My view is hinged on the fact that the document (ie Exh "B") was made by PW1 himself. It is not a new document to him. In his evidence in chief the following dialogue ensued between the prosecutor and PW1.

Q. Take your mind back to 20th Feb. 2009 do you remember that date?

Ans. Yes I remember

Q. Did anything happen between you and the defendant on the same date?

Ans. Yes something happened

Q. Narrate with precision what happened on that date

Ans. On the 20th February 2009, I was not in my shop. I came back around 5pm and I looked at my shop every where was scattered, etc... I then went down to CPS and I was making a report I saw him there, etc, etc,

... The next day, I went to Area Command and I was making a report at Area Command, I saw him there again etc, etc,

Under cross examination, the excerpts I had earlier quoted, took place. If these two answers given by PW1 are taken together, it would only come to be that the incident happened on Friday. On that Friday, PW1 went to CPS, the next day he went to Area Command and the next week he wrote the petition to Commissioner of Police. The date written on the petition is purely irrelevant. Even if it is, the IPO, would be in a much better position to explain or inform the court when the petition came to the office of Commissioner of Police.

I cannot also but agree with the respondent's counsel that the petition having been received in evidence and marked as an exhibit, no other oral evidence can be added, subtracted or given on it. It is a trite elementary law.

Let me make one or two comments on some of the judicial authorities referred to by all the counsel. I had the opportunity of reading most of them. In the case of of Ayorinde .V. Sogunro supra, the issue there, was a bit different from what transpired in the instant appeal. PW1 in this

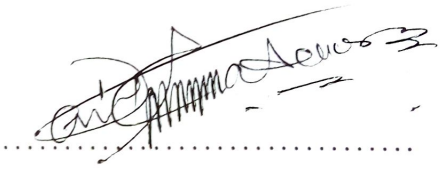
appeal before me positively reiterated his position as to the date of the petition until he was confronted with his petition. Whilst in Ayorinde's case, the word "brother" was used to refer to those who where descendants of the founder of the family. The appellate court opined that the full meaning of brother in African setting ought to have been asked in re examination. The meaning should not have been left bare.

In Okoro .V. State, supra, the appellate court made it clear that re-examination "is another chance to clarify facts but not an opportunity to restate the testimony given in evidence in chief all over again". The appellate court went on to categorically state, that the re examination must be on a material facts in controversy. As I had held earlier, the dates of the petition are not material to the case. The principles enunciated in Audu .V. State do not apply in the case in hand. The evidence of PW1 on the date cannot, by any stretch of imagination, be regarded as inconsistency. Therefore inconsistency rule as espoused in Audu .V. State, cannot apply. PW1's evidence on the date was positive and direct although immaterial to criminal charge before the learned trial court.

Before I conclude this judgment, I must state that the appellant's counsel should have taken the opportunity the learned trial magistrate offered him by rephrasing the question instead of embarking on this appeal. I say so because taking into consideration of the fact that he is prosecuting, I do not think it is a wise decision for him to stall the proceedings at the trial court. Had the defence played this role, it would have made a lot of sense to me. I say no more.

In the main, this appeal lacks merit and it is hereby dismissed. The decision of the learned trial magistrate is hereby affirmed. The appellant's counsel is hereby directed to reframe his question or call his next witness.

I make no order as to cost.



Hon. Jus. D. C. Maduechesi

Judge

APPEARANCES:

CHIEF G. U. MUONEKE WITH A. G.'S FIAT

AMAKA EZENO ESQ. FOR THE RESPONDENT