

Count 1

That you Johnson Dikko, Pius Gabriel, Moses Ekainu and Abdullahi Ishaku all male adults of FCT and Nasarawa State, on or about the 8/11/2015 at about 1000 hours at Sahara Super Cell Estate, Apo District Abuja within the jurisdiction of this Honourable Court did conspire amongst yourselves to commit an offence to wit: armed robbery. You thereby committed an offence punishable under Section 6 (a), (b) and (c) of the Robbery and Firearms [Special Provisions] Act LFN 2004.

Count 2

That you Johnson Dikko, Pius Gabriel of FCT and other members of your gang now at large, on or about the 8/11/2015 at about 0227 hours at Sahara Super Cell Estate, Apo District Abuja within the jurisdiction of this Honourable Court while arm [sic] dangerous weapons such as AK 47, pump action, Marc 4, pistols all locally fabricated Rifles and 7mm, 0.8mm, 9mm, 3 cartridges and some other live ammunitions forcefully broke in to the house of one Mr. Solomon Opaluwa male adult of B92 Super Cell Estate Apo, FCT, Abuja, attacked and shot him and his wife and forcefully collected and made away with his one hundred and thirty thousand Naira [N133,000.00] and other valuables. You thereby committed an offence punishable under section 2 [a] and [b] of the Robbery and Firearms [Special Provisions] Act LFN 2004.

Count 3

That you Johnson Dikko, Pius Gabriel and other members of your gang now at large, all male adults of FCT and Nasarawa State, on or about the 8/11/2015 at about 0200 hours at Sahara Super Cell Estate, Apo District, Abuja within the jurisdiction of this Honourable Court while armed with dangerous weapons such as AK 47, pump action, Marc 4, pistols all locally fabricated Rifles and 7mm, 0.8mm, 9mm, 3 cartridges and some other live ammunitions forcefully broke in to the house of one Mr. Tony Ndubisi male adult of Plot C3 Super Cell Estate Apo, FCT, Abuja, attacked him, shot and killed one Miss Ozorji Ofor female adult and forcefully made away with a total sum of two hundred and thirty seven thousand Naira [N237,000.00] and other valuables. You thereby committed an offence punishable under section 2 [a] and [b] of the Robbery and Firearms [Special Provisions] Act LFN 2004.

Count 4

That you Johnson Dikko, Pius Gabriel, all male adults of FCT and Nasarawa State, sometimes on the 30/11/2015 at Nyanya FCT, Abuja within the jurisdiction of this Honourable Court were arrested by the police while in possession of two fabricated locally made pistol, one AK 47 rifle, one pump action rifle, one SMG rifle loaded with 10 rounds of live ammunition without any license or legal authority to carry same. You

thereby committed an offence contrary and punishable under section 3[1] of the Robbery and Firearms [Special Provisions] Act LFN 2004.

Count 5

That you Johnson Dikko, Pius Gabriel, all male adults of FCT, and others now at large, on or about the 8/11/2015 at about 0200 hours at Sahara Super Cell Estate, Apo District Abuja within the jurisdiction of this Honourable Court while armed with dangerous weapons such as AK 47, pump action, Marc 4, pistols, all locally fabricated rifles with 7mm, 0.8mm, 9mm, 3 cartridges and some other live ammunitions forcefully broke in to the house of one Mr. Tony Ndubisi male adult of Plot C3 Super Cell Estate Apo, FCT, Abuja for the purpose of carrying out an armed robbery operation and in that process shot and killed one Miss Ozorji Ofor female adult and you did so with the knowledge that her death would be the probable and not only the likely consequence of your Act. You thereby committed an offence punishable under section 221 of the Penal Code Law.

Count 6

That you Johnson Dikko, Pius Gabriel, all male adults and other members of your gang now at large on or about the 8/11/2015 at about 0200 hours at Sahara Super Cell Estate, Apo District Abuja within the jurisdiction of this Honourable Court while armed with dangerous weapons such as AK

47, pump action, Marc 4, pistols, all locally fabricated rifles with 7mm, 0.8mm, 9mm, 3 cartridges and some other live ammunitions forcefully broke in to the house of one Mr. Solomon Opaluwa male adult of B92 Super Cell Estate Apo, FCT, Abuja for the purpose of carrying out armed robbery and in that process shot and killed his wife, named Mrs. Opaluwa Ojoma, female, adult and you carried out the said act with the knowledge that her death would be the probable and not only the likely consequence of your Act. You thereby committed an offence punishable under section 221 of the Penal Code Laws.

In proof of the counts, the prosecution called 5 witnesses: Daniel Opaluwa [PW1], Solomon Opaluwa [PW2], Tony Ndubisi [PW3], DSP Suleiman Ewida [PW4] and ASP Felix Onuoha [PW5]. When the prosecution closed its case, the 3rd & 4th defendants [i.e. Moses Ekainu and Ex-Cpl. Abdullahi Ishaku] made no case submissions. In its Ruling delivered on 24/6/2021, the Court upheld the no case submissions and discharged them.

The 1st defendant testified in his defence as DW1 while the 2nd defendant testified in his defence as DW2.

Evidence of Daniel Opaluwa - PW1:

The evidence of PW1 is that on 8/11/2015, he got a distress call from his younger brother [Mr. Solomon Opaluwa] that he and his wife [late Mrs. Ojoma Opaluwa] were shot by armed robbers at his residence located at Super Cell Estate, Apo, Abuja at about 2 a.m. His voice was trembling when he made the call. He rushed down to his brother's house. On arrival at the scene, he met 2 of them in the pool of their own blood. They were both unconscious at the time he arrived there. When he tapped his brother, he became conscious but his wife was still unconscious and was gasping for breath.

He quickly rushed them to Federal Medical Centre, Jabi with his car. On arrival at the emergency unit of the Hospital, the Hospital officials took his brother to the theatre. The doctors examined his brother's wife in the car and confirmed her dead. They took her to the mortuary. At about 10a.m. on 11/11/2015, they brought him out of the theatre to the ward after removing the bullets as a result of gun shots.

Daniel Opaluwa further stated that at about 11 a.m. that day [11/11/2015], he went back to his brother's house to pick some clothes. At that point, he snapped the scene of the robbery, the pool of blood and some bullet shells. He also snapped the legs of his brother where he was shot and the dead body of his wife, Ojoma Opaluwa. The pictures were submitted to the IPO in the course of investigation. The 5 photographs

were tendered by PW1 and received in evidence as Exhibits 1A, 1B, 1C, 1D & 1E.

When PW1 was cross examined by Kalu Ndubuisi Esq., learned counsel for the 1st& 2nd defendants at that time, he stated that there were 2 or 3 other people in the same Estate that were shot dead in the robbery of that day as he was told by his brother. His brother told him that he saw those that robbed him.

Evidence of Solomon Opaluruwa - PW2:

PW2 stated that on 8/11/2015, he was sleeping in his house at Super Cell Estate, Flat 92, Apo, Abuja. At about 2 a.m., he heard his dog barking. He got up and peeped through the window. He saw strange faces over his fence. They shot his dog at its abdomen and it ran to its cage at the back of the building. They climbed the fence into the compound. They forced the sitting room door open and gained access to the sitting room. At that point, he was forced to open the door to his bedroom for them. They asked him to put on the lights. They asked him to give them the key to the gate. One of them went outside and opened the gate. The 1st defendant was talking to him and asked him to bring all the money he had in the house. He gave the 1st defendant N100,000.00 which was in his wardrobe.

The 1st defendant asked them to submit all their phones. He gave him two of his wife's phones and one of his Nokia phone. His second phone was under his pillow. The 1st defendant asked his wife to submit her jewelries and he collected them. The 1st defendant came back to him and said: *"we no come here to collect change"*; that the money he gave him was small. At that point, his wife was on her knees begging them for leniency. The 1st defendant told him that if he failed to give them more money, he will shoot his wife. He and his wife were pleading. The 1st defendant shot 3 times on the floor of the bedroom and told him that he had already killed 2 other women in the Estate before coming to his house and that he was not there to play.

Suddenly, the 1st defendant grew angry; he shot his wife and shot him on his right knee. The 1st defendant shot him the second time on his left thigh. He was then on the floor. When the 1st defendant saw that he [PW2] was helpless on the floor, he told the rest members that they should leave. He was helpless on the floor and he managed to crawl to where his bed was. He picked his second phone under the pillow and called his elder brother, Mr. Daniel Opaluwa. He informed his brother that they had been robbed and shot by armed robbers and asked his brother to rush down to his house. After the call, he fainted. He narrated

how his elder brother and his wife came and carried him and his wife to Federal Medical Centre Jabi.

Solomon Opaluwa further testified that on arrival at the hospital, the doctors confirmed his wife dead while he was rushed to the theatre. Hewas given injections and he passed out. The following day when he came back to life, he saw himself in the hospital ward with bandages on both legs. Later, his siblings informed him that his wife was dead and in the mortuary. Exhibit 1A shows his bedroom and his bed. It also shows the blood that came out of his body. Exhibit 1B shows the bullet shells on the floor of his bedroom. Exhibits 1C & 1D show the body of his late wife who was shot and killed by the 1st defendant. Exhibit 1E shows him on his hospital bed and the right leg where he was shot by the 1st defendant.

Policemen came to the hospital and he made a statement. In January 2016 after he was discharged from the hospital, he was invited by the Police at SARS. When he got there, he was told by the Policemen that the robbers that shot and killed his wife had been arrested. He was asked to write another statement, which he did. Thereafter, he relocated to Lagos in 2017. When he went to SARS, he was not shown the defendants. PW2 said he is not sure of the faces of the 3rd&4th defendants

in the robbery. The persons he is sure of their faces are the 1st& 2nd defendants. The robbers were 7 in number.

The further evidence of PW2 is that the items taken away were 2 Samsung phones belonging to his wife, 1 Nokia phone belonging to him, one laptop and his wife's jewelry box. None of these items has been recovered. Apart from the date of the robbery, the next day he saw the defendants was in May 2017 at Maitama High Court, Abuja. On that day, he recognized the 1st& 2nd defendants.

During cross examination of the PW2 by learned counsel for the 1st& 2nd defendants [Ndubuisi Kalu Esq.], he stated that there was light when the armed robbers found themselves into his flat. When he heard his dog barking and he saw people, he became afraid. When the people found themselves inside his flat, the fear was there partially. He looked at their faces. Sometime in December 2015, he was invited to identify those who robbed him but he could not attend because he was in the hospital and he was not strong enough. The people who robbed him were not masked.

He saw the faces of those that robbed him. PW2 was asked: *"The first time you set your eyes on the defendants was in the Court in Maitama."* His answer was "Yes". He made arrangements with the Police to track the

phones stolen from him and his wife. After the tracking, the Police did not tell him that they tracked the phones to any of the defendants.

When PW2 was cross examined by learned counsel for the 3rd defendant [Andrew Eche Esq.], he said he had many white energy bulbs in his room. He saw the faces of the robbers clearly.

Evidence of Tony Ndubuisi - PW3:

PW3 stated that his address is Plot C3, Super Cell Estate, Wumba, Apo, Abuja. He knows the 1st& 2nd defendants. On 8/11/2015 at about 2 a.m., his dogs started barking. When he got up from the bedroom to the sitting room to find out why the 3 dogs were barking, he heard gun shots that lasted for about 1 minute. The next he saw were "*these men*" jumping into the compound from the fence after they had cut off the barb wire. The 1st& 2nd defendants were the ones he saw clearly but the people who jumped into the compound were up to 6.

Before they brought down his door which was the entrance to the sitting room, he made for the rear door through the kitchen and jumped into the adjacent Plot i.e. a school. The lady friend [called Tochukwu Ozojiofor] who was in his house could not jump the wall and she was killed. She was killed by "*these men*". They were already in his sitting

room by the time he ran away. By the time the Police came to his house, they recovered over 100 spent bullets. From his hidden location, he heard his neighbor shouting "*don't kill me*", "*they have shot me*".

Tony Ndubuisi further testified that he came out from his place of hiding when the Police came. The Police took his neighbour [called Gloria] to Cedarcrest Hospital where she spent about 3 months. He later found out that in one of the houses the robbers entered in the Estate, they killed a pregnant woman. The husband of the lady that was killed was shot. He cannot remember the name of the lady that was killed and her husband. The Police caught one of the robbers and he was caught with the brandy he took from his[PW3] house.

During cross examination of PW3 by Ndubuisi Kalu Esq. on behalf of the 1st& 2nd defendants, he said he identified/recognized 1st&2nd defendants. When the people jumped into his compound, there was light in his house; both inside and outside. When he saw them inside his compound, he was "*very afraid*". After the defendants were arrested, the Police did not call him to identify them. He did not say in his statements to the Police that he recognized those who invaded his house on that day. He gave the Police the CCTV record in his house.

During cross examination of PW3 by Andrew Eche Esq. on behalf of the 3rd defendant, he stated that he had very bright light on the fence through which the robbers came into his compound.

When PW3 was cross examined by T. T. Agundu Esq., learned counsel for the 4th defendant, he said the CCTV in his house recorded the events of that day. He did not look at what was recorded before the Police took the CCTV record.

Evidence of DSP Suleiman Ewida- PW4:

The evidence of DSP Suleiman Ewida of FCT Police Command attached to CIID [SARS] is that on 8/11/2015, between 1.30 a.m. and 2 a.m., there was a distress call from FCT Command Control room that there was a robbery going on in Super Cell Estate, Apo, Abuja. He moved with his team members to the Estate where they heard gun shots. They went behind the Estate where there was a carnal and blocked there. They arrested one of the suspects called Ogbonna who confessed immediately that he was part of the robbery. They took him to the Estate and saw the destruction and damage they had done there.

Ogbonna told them who and who were involved in the crime. He gave them the name of Avangwa [their leader] and his phone number. He said if they get Avangwa, they will get all the people involved in the

crime. They were able to arrest Avangwa at Nnamdi Azikiwe International Airport when he was trying to fly out. During his statement, Avangwa said they should look for his second in-command called Stigma [i.e. Johnson Dikko, the 1st defendant]. He asked Avangwa who killed the 2 women during the operation. He said it was Stigma [Johnson Dikko].

PW4 narrated how Avangwa led them to Lafia, Nasarawa State to arrest Ishaku Abdullahi [the 4th defendant] who he said was giving them AK 47 ammunition for their operations. The 4th defendant was a Police officer working at Police Mobile Force, Lafia. Avangwa also told him how he knew Moses Ekainu [the 3rd defendant], a staff of Lafia prison, who then introduced him to 4th defendant. The 3rd defendant was arrested. Later, Avangwa took them to his armourer in Lafia where they conducted search. They recovered 11 fabricated AK 47, 1 mark 4 rifle, 1 pumpaction, fabricated short machine guns, ammunition and cartridges. Statements of the suspects were recorded in Police statement form and they signed their statements.

As the investigation was going on, the IGP Intelligence Response Team arrested the 1st defendant along with the 2nd defendant. He took the 1st defendant, 2nd defendant, Avangwa and the armourer before DCP Abba

Kyari for interview. DCP Abba Kyari asked who among them killed the Youth Corper at Supercell Estate, Apo and Opaluwa's wife who was pregnant. Avangwa and the 1st defendant started accusing each other. Avangwa told the 1st defendant whether he was not the one who asked the pregnant woman to open her private part and he opened fire on her and killed her. The statements of the 1st & 2nd defendants were recorded by the IGP Intelligence Response Team.

DSP Suleiman Ewida further testified that when Barrister A. Adama was prosecuting the case, Avangwa, the armourer, Ogbonna and 4th defendant [Ishaku] were remanded at Keffi Prison. At that time, he was transferred to Osun State Command. His former DCP, CID [Adamu Ciroma] told him via phone that those of them detained at Keffi prison were mistakenly released by a Judge. When he was transferred back to FCT Abuja, he and his team re-arrested the 4th defendant but the other people who were released were not found.

PW4 concluded that the arms and ammunitions he mentioned earlier are connected with the robbery. After the operation, they sent the arms and ammunitions to their armourer to hide for them; that was why Avangwa led them to Lafia to recover the arms and ammunitions. The arms and ammunitions were admitted in evidence as follows:

- i. 9 fabricated AK47 rifles:Exhibits 2A-2I respectively.
- ii. 2 fabricated short machine guns:Exhibits 3A & 3B respectively.
- iii. 1 original mark 4 rifle: Exhibit 4.
- iv. 1 pump action:Exhibit 5
- v. Ammunitions contained in Sprite bottle:Exhibit 6.
- vi. 3 cartridges:Exhibits 7A, 7B & 7C respectively.

During cross examination of PW4 by Ndubuisi Kalu Esq., he stated that Ogbonna mentioned the 1st defendant as one of those who robbed with him. He agreed that the only reason why he arrested the 1st defendant was because Avangwa mentioned his name. From his investigation, the 1st& 2nd defendants were fully part of the armed robbery. Nobody gave him CCTV recording and nobody told him that there was a CCTV recording. No identification parade was conducted in this case.

The evidence of PW4 when he was cross examined by Andrew Eche Esq. and T. T. Agundu Esq. respectively on behalf of the 3rd& 4th defendants are in the record of proceedings. Be it noted that the said testimonies of PW4 are not relevant to the 1st& 2nd defendants.

Evidence of ASP Felix Onuoha- PW5:

The evidence of ASP Felix Onuoha, attached to IGP Intelligence Response Team, is that a credible intelligence was generated by the operatives of IGP Intelligence Response Team about the criminal activities of Johnson Dikko [a.k.a.Stigma] and the members of his gang in respect of the attack on Super Cell Estate, Apo, Abuja. The attack was on 8/11/2015. They made efforts and arrested the 1st defendant who confessed and volunteered his statement. He led operatives to arrest the 2nd defendant. The 2nd defendant also admitted that he participated in the robbery attack at Super Cell Estate which led to the death of Mrs. Ojoma Opaluwa, a pregnant woman.

The 1st defendant led them to the scene of crime where they established contact with Solomon Opaluwa who had fresh gunshot injuries on his 2 legs. He told them that his pregnant wife was shot through her private part by the gang, after robbing them of their valuables including money. Mr. Opaluwa also identified the suspects [the 1st& 2nd defendants] as the robbers that robbed them and killed his wife. SARS operatives had arrested some of their gang members. So, the case was later harmonized and they handed over the 1st& 2nd defendants to SARS operatives for further investigation and prosecution.

PW5 further testified that the 2nd defendant stated that on that day, the 1st defendant put a call across to him to meet him at Apo round about

where they met with other gang members. They went to a bush near the place they wanted to rob till middle of the night before they proceeded. The 2nd defendant said he was the one holding the laptop and the handset which they robbed from the place. The 1st defendant was arrested in Minna, Niger State while the 2nd defendant was arrested in Jos, Plateau state. A fabricated AK 47 rifle with 4 expended AK 47 ammunition and 90 live Ak 47 ammunition were recovered from the 1st defendant. The items were handed over to SARS operatives along with the suspects.

During cross examination of PW5 by Ndubuisi Kalu Esq. on behalf of the 1st& 2nd defendants, he stated that they arrested about 6 to 7 persons in respect of this case. They did not arrest the 1st& 2nd defendants with any arms; but the 1st defendant led them to the recovery of their operational arms, which the gang members were using to rob. The 2nd defendant stated that the first time he met the 1st defendant was in a beer parlour in Mararaba and they exchanged numbers. The 2nd defendant was arrested with one Nda alias Sariki [who was a driver] and another person.

Mr. Ndubuisi Kalu suggested to PW5 that the 2nd defendant would not have been in Court if he paid money as Nda Sariki paid. In response,

PW5 stated that investigation revealed the level of involvement and innocence of the other suspects arrested including Nda. Also, the 1st defendant's confessional statement which indicted the 2nd defendant showed that Sariki Nda was innocent. The other suspects were transferred to SARS for further investigation. The 1st defendant was arrested on 11/1/2016 while the 2nd defendant was arrested on 13/1/2016.

Evidence of Johnson Dikko -DW1:

The evidence of Johnson Dikko, represented by Kelechi Nwaiwu Esq., is that before his arrest, he was a mason [brick layer]; he was a mason for 7 years. The evidence of PW2 that he recognized him as one of the robbers that attacked him [PW2] on 8/11/2015 and that he was the one that shot his wife are not true. All the testimonies of PW2 against him are not true. The evidence of PW3 that he was the one that shot his girlfriend on 8/11/2015 is not true. He had never met PW2 or PW3 before. On 8/11/2015, he was with his wife in his house. He told his wife that he wanted to buy 'akara' from the woman that sold 'akara' near their house for his daughter.

On his way to buy the 'akara', he saw people running and people were being arrested. He came back to his house. In the morning, he went for his mason work. As he was coming back at the junction where the

woman was selling 'akara', the Police arrested him and blind folded him; his face was covered. They took him to Force CID. His wife's name is Charity and her native name is Tochukwu. His wife died while he was in custody. His child was 2 years when he was arrested and he has not had any contact with his child since he was arrested. During Police investigation, he informed the Police officers that he was with his wife on the night of the incident.

Johnson Dikko further testified that he does not know Avangwa. The evidence of PW4 that he confessed to the crime is not true. When the case was before the former Hon. Judge, the PW4 gave evidence of how they arrested people that they brought to Court in this case; that day was the first day he heard about Avangwa. PW4 told the Court that Avangwa was shot dead. The record of proceedings in this case on 27/9/2017 before My Lord, *Hon. Justice A. S. Umar, J. [as he then was]* is Exhibit 8.

When DW1 was cross examined by learned counsel for the prosecution, D. F. Abah Esq., he stated that he was arrested in December 2015. He was arrested at the junction of the woman selling 'akara'. They said someone [i.e. Avangwa] called his name that he was his gang member. He told the Police in writing that he was with his wife on the night of the incident.

Evidence of Pius Gabriel-DW2:

The evidence of Pius Gabriel, represented by Kelechi Nwaiwu Esq., is that before his arrest, he was constructing shoes. The evidence of PW2 that on 8/11/2015 he was one of the armed robbers that attacked him at Super Cell Estate is not true. The evidence of PW3 that he recognized him as one of the armed robbers that attacked him on 8/11/2015 and killed Tochukwu Ozojiofor is not true. Before his arrest, he had never met the 1st defendant. He does not know anyone called Avangwa.

The 2nd defendant narrated how he accompanied Usman [his friend] to Jos on 12/1/2016. They went to Jos to enable Usman settle the issue he had with Mariam [the woman he wanted to marry]. When they get to Jos, they entered a canteen to eat. As they were eating, someone came into the canteen. Usman knew the man. While there, Police came into the canteen and arrested all of them. He asked what he did and they said they will explain when they get to the station. They were taken to SARS.

During cross examination of DW2 by D. F. Abah Esq., he said 3 of them were arrested and brought to Abuja. The Police granted him and Usman bail for N250,000 each. They called Usman's parents because they had his father's number. They informed him to come and bail Usman.

The father came in the evening and Usman was released. He was not taken on bail because his family did not have the money.

Issues for Determination:

At the conclusion of trial, Kelechi Nwaiwu Esq. filed the final written address of the defendants on 15/7/2022. D. F. Abah Esq. filed the final written address of the prosecution on 23/8/2022. The final addresses of the parties were adopted on 15/11/2022.

Learned defence counsel posed these three issues for determination:

1. Whether in the absence of an identification parade by the Police and a weak evidence of identification, the defence of mistaken identity avails the defendants, entitling the Court to discharge and acquit the defendants.
2. Whether the contradictions of the prosecution witnesses are material which would occasion a miscarriage of justice, entitling the Court to discharge and acquit the defendants.
3. Whether in view of the evidence before the Court, the prosecution has failed to prove its case beyond reasonable doubt, entitling the court to discharge and acquit the defendants.

On the other hand, learned counsel for the prosecution formulated one issue for determination, to wit:

Whether the prosecution has proved beyond reasonable doubt, the six[6] counts amended charge against the defendants.

The 1999 Constitution [as amended] provides in section 36[5] that every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty. It is an elementary principle of criminal law that prosecution has the duty to prove its case beyond reasonable doubt.

The Court is of the view that the main issue for resolution in this case is whether, from the evidence before the Court, the prosecution has proved the offences in the 6-count amended charge against the defendants beyond reasonable doubt.

In count 1, the defendants are charged for conspiracy. In counts 2 and 3, the defendants are charged for armed robbery. In count 4, the defendants are charged for illegal possession of firearms. The defendants in counts 5 and 6 are charged with culpable homicide punishable with death.

The decision in Alufohai v. State [2015] 3 NWLR [Pt. 1445] 172 is that it is a proper approach to an indictment that contains a charge of

conspiracy and a substantive charge to deal with the substantive charge first and then proceed to see how far the conspiracy count has been made out. Thus, the Court will first consider the charges of armed robbery in counts 2 and 3; and culpable homicide punishable with death in counts 5 and 6.

Counts 2, 3, 5 and 6 - Armed Robbery and Culpable Homicide Punishable with Death:

The elements of the offence of armed robbery are: [a] that there was in fact a robbery; [b] that the robbery was an armed robbery; and [c] that the accused was the armed robber or one of those who took part in the armed robbery. See **Babarinde & Ors. v. State [2013] LPELR-21896 [SC]**

In order to secure a conviction for the offence of culpable homicide punishable with death, the prosecution is required to prove beyond reasonable doubt: [i] the death of a human being; [ii] that the death was caused by the accused; [iii] that the act of the accused which resulted in the death of the human being was done with the intention of causing death or grievous bodily harm or the accused knew that death would be a probable but not just likely consequence of his act. See the case of **Gidado Adamu v. The State [2019] LPELR-46902 [SC]**.

Without much ado, the Court holds that from the unchallenged evidence of PW1, PW2 and PW3, the prosecution proved beyond reasonable doubt that there was robbery in the houses of PW2 and PW3 at Super Cell Estate, Apo, Abuja on 8/11/2015 and that the robbery was an armed robbery. The prosecution also established that the armed robbers killed Mrs. Ojoma Opaluwa and Miss Ozorji Ofor.

The next crucial issue to determine in respect of counts 2, 3, 5 and 6 is whether the prosecution established beyond reasonable doubt that the defendants were among those who took part in the armed robbery and killed Mrs. Ojoma Opaluwa and Miss Ozorji Ofor.

Submission of Learned Counsel for the Defendants:

Learned counsel for the defendants posited that identification evidence is evidence tending to show that the person charged with an offence is the same person who committed the offence. Where a trial court is faced with identification evidence, it should be satisfied that the evidence established the guilt of the accused beyond reasonable doubt. He referred to **Ukpabi v. The State [2004] 11 NWLR [Pt. 884] 456** and other cases. In some cases where there is more of suspicion or some factors make it possible that the suspect may not be sufficiently identified, an

identification parade may be necessary. The case of Adamu v. State [1991] LPELR-73 [SC] was cited.

Kelechi Nwaiwu Esq. submitted that when an eye witness contends that he saw the accused committing the offence charged, the essential factors to consider for a proper identification were enunciated in Ikemson v. State [1989] 3 NWLR [Pt. 110] 455 thus: [i] the description of the accused given to the Police shortly after the commission of the offence; [ii] the opportunity the eye witness had of observing the accused; and [iii] what features of the accused were noted by the victim and communicated to the Police.

The defence counsel also referred to Ndidi v. State [2007] 13 NWLR [Pt. 1052] 633 where it was held that to ascribe any value to the evidence of an eye witness on identification of a criminal, the court, in guarding against cases of mistaken identity, must meticulously consider the following: [i] circumstances in which the eye witness saw the suspect or defendant; [ii] the length of time the witness saw the suspect or defendant; [iii] the lighting conditions; [iv] the opportunity of close observation; and [v] the previous contacts between the two parties. Kelechi Nwaiwu contended on behalf of the defendants that:

- a) At the time of the armed robbery, PW2 was understandably afraid, distressed and fearful for his life. Under such conditions, it would

be unrealistic to assume that he had ample opportunity to observe his assailants in detail, enough to identify them.

- b) In his evidence, PW3 did not explain to the Court the length of time in which he saw the defendants to assist the Court in determining whether the time was sufficient to properly identify the defendants.
- c) PW3 did not have opportunity of close observation. He stated that he identified the defendants through the sitting room while they were jumping over the offence. This was at about 2 a.m. and it was for a *“very fleeting moment”*.
- d) There is no evidence of previous contact between PW2 and the defendants as to convince the Court that he knew the defendants well and was in a position to identify them so easily in the middle of the night.
- e) There were no features of the defendants that were noted by PW2 and PW3 that night and communicated to the Police.
- f) The circumstances surrounding the commission of the alleged crime, especially as the defendants were not arrested at the scene of the crime, necessitated the conduct of an identification parade by the Police after the defendants were arrested.

g) From the evidence of PW2 and PW3, it is clear that the Police did not conduct identification parade; and failure to do so has created doubt on the guilt of the defendants and entitles them to acquittal.

In paragraphs 4.13 & 5.6[b] of the defendants' final address, Mr. Kelechi Nwaiwu - in discrediting the identification evidence of PW2 -stated that PW2 in his evidence in-chief claimed to have seen and identified the defendants. While cross examined by counsel for the 1st& 2nd defendants, PW2 stated that "*at the High Court Maitama was the first time he has seen the defendants*". He submitted that the evidence of PW2 "*gives no weight to his earlier evidence of identification. My Lord PW2 is clearly prevaricating and My Lord should reject his contradictory evidence.*" He also referred to the above evidence of PW2 as "*an unexplained material contradiction in the case of the prosecution.*"

With respect to the evidence of PW4 [DSP Suleiman Ewida], the defence counsel referred to Exhibit 8 i.e. the record of proceedings of 27/9/2017 in this case before *His Lordship, Hon. Justice A. S. Umar, J. [as he then was]*, where he [as the PW2] told the Court that "*Avangwan*" died in the hospital after a failed escape attempt. However, in this Court, he said Avangwan, the armourer, Ogbonna and Ishaku [the erstwhile 4th defendant] were released by a Judge from Keffi prison.

The defence counsel submitted that if Suleiman Ewida cannot be trusted as to his evidence on oath on both occasions regarding the whereabouts of Avangwan, the Court cannot trust any other evidence he has presented as to the culpability of the defendants.

Finally, in paragraph 5.6[d] & [e] of the defendants' final address, Kelechi Nwaiwu Esq. referred to the evidence of the PW5 that the defendants confessed and led them to the scene of the crime where PW2 identified them. He submitted that the evidence of PW2 that the Court in Maitama was the first time he set his eyes on the defendants questions the evidence of PW5 as to the identification of the defendants and considering that no confessional extra-judicial statement was tendered.

Submission of Learned Counsel for the Prosecution:

Learned counsel for the prosecutionsubmitted that PW2, a direct victim of the armed robbery incident, testified that he saw clearly and recognised the defendants amongst the armed robbery gang that came to his house, robbed and shot his wife to death. PW2 fixed the defendants to the scene of crime. PW2 *"did not find any difficulty recognizing"* the defendants as the armed robbers who, with others now at large, robbed him and killed his wife. He gave direct eye witness

evidence as to what he saw and made no mistake about that *“even during the firework of cross examination”*.

D. F. Abah Esq. also stated that the 1st defendant led PW4 [DSP Suleiman Ewida] and team of Police men to armoury at Lafia in Nasarawa State and Exhibits 2A-2I, 3A, 3B, 4, 5, 6, 7A, 7B and 7C were recovered. These Exhibits were the arms and ammunitions used in the armed robbery operation. It was submitted that the evidence of PW2 & PW3 sufficiently proved beyond reasonable doubt that the death of the deceased persons was caused by the defendants.

Prosecuting counsel further submitted that the argument of the defence counsel on identification is *“misconception of facts and law”* and has no basis as the evidence of PW2 was direct. The length of time spent traumatizing PW2 in the course of the robbery was sufficient enough for the victim to have identified his assailants. As credible as his evidence is, he did not mention the then 3rd & 4th defendants as participants in the armed robbery operation.

With respect to the evidence of PW4 and Exhibit 8, D. F. Abah Esq. argued that the defence cannot rely on Exhibit 8 which is evidence of previous trial. He referred to Esiso & Ors. v. Ogodo & Ors. [2021] LPELR-54789 [CA]. Counsel urged the Court not to place reliance or

probative value on Exhibit 8 as same cannot form part of the proceedings of this Court.

Mr. D. F. Abah concluded that it is left for the Court to decide whose story to believe in arriving at its conclusion but noted that proof beyond reasonable doubt is not proof beyond all shadow of doubt.

Decision of the Court:

In **Ogu v. State [2017] LPELR-43832 [SC]**, it was held that in most cases involving armed robbery, a crucial issue has always been the identity of the armed robber[s] involved. So, the courts have had to grapple with the question whether the accused person was identified as the robber or one of the robbers that committed the robbery charged. Where the victim and the robbers are meeting for the first time in the course of the robbery, the question would be whether the victim properly and sufficiently identified the accused person as one of the robbers that attacked him.

The defence counsel rightly stated the factors which the Court must consider in deciding whether or not to ascribe any probative value to the evidence of an eye witness on identification of a criminal. These factors

are aimed at guarding against cases of mistaken identity. I will quote the decision of the Supreme Court [Per Adolphus Godwin Karibi-Whyte, JSC] in the case of **Ikemson v. State [supra] @ 472, F-G** thus:

“I agree with the submission of Counsel to the respondent that an identification parade is only essential in the situations enunciated in R v. Turnbull & Ors. [1976] 3 All E.R. 549 at p. 551. These are cases where the victim did not know the accused before and was confronted by the offender for a very short time, and in which time and circumstances he might not have had full opportunity of observing the features of the accused. In such a situation a proper identification will take into consideration the description of the accused given to the Police shortly after the commission of the offence, the opportunity the victim had for observing the accused, and what features of the accused noted by the victim and communicated to the Police mark him out from other persons.”

The other factors for the trial court to consider as listed in **Ndidi v. State [supra]** are: [i] circumstances in which the eye witness saw the defendant; [ii] the length of time the witness saw the defendant; [iii] the lighting conditions; [iv] the opportunity of close observation; and [v] the previous contacts between the two parties. Before I go further, let me

quote the admonition of *His Lordship, Pius Olayiwola Aderemi, JSC* in **Ndidi v. State [supra] @ 651-652, H-A** thus:

“Whenever the case of an accused person depends wholly [as in the instant case] or substantially on the correctness of the identification of the accused or defendant which defence alleges to be mistaken, a trial Judge must warn himself of the special regard for caution and should weigh such evidence with others adduced by the prosecution before convicting the accused in reliance on the correctness of the identification ...”[Underlining mine].

In the instant case, PW3 stated that he clearly identified the defendants when they were jumping the fence into his compound but the people who jumped into the compound were up to 6. Before they brought down his entrance door, he made for the rear door through the kitchen and jumped into the next compound. I have considered the factors in the above cases and I hold the opinion that the identification evidence of the defendants by the PW3 is very weak and unreliable as he never had any contact with the assailants and did not have any opportunity for close observation.

In his evidence, PW2 stated his encounter with the assailants and he identified the defendants as the armed robbers who entered his room,

attacked him and his wife and shot them. I note that PW2 narrated what the 1st defendant said and did in his room but he did not say that the 2nd defendant said or did anything. PW3 only mentioned the 2nd defendant in his evidence in-chief when he said: *"I am not sure of the face of the 3rd & 4th defendants in the robbery. The persons I am sure of their faces are the 1st & 2nd defendants."*

From the evidence of PW2, the lighting condition in the room was good. Although PW2 was not specific on the duration of his encounter with the robbers, one can infer from his evidence that he had the opportunity of close observation of the robbers. It is worthy of note that the circumstance in which PW2 met the robbers was horrific and horrendous. When cross examined, PW2 admitted that when he heard his dog barking and he saw people he became afraid.

It is important to point out that there is no evidence that PW2 or PW3 gave a description of the robbers to the Police shortly after the commission of the offence. Also, there is no evidence of the features of the defendants noted by PW2 or PW3 and communicated to the Police which mark each of them out from other persons. This is an essential factor which the Court must consider in ascribing any probative value or weight to the evidence of identification given by PW2 and PW3.

Now, the Court is faced with the identification evidence of PW2 and PW3 on the one hand and the defendants' denial of any involvement in the armed robbery operation on the other. Since the identity of the defendants has been put in issue, the fact that the defendants were part of the armed robbers must be proved by the prosecution beyond reasonable doubt. The Court is of the considered opinion that in the circumstances of this case, identification parade by the Police was necessary to give credibility to the evidence of PW2 and PW3.

From the evidence of PW2, PW3 and PW4, there was no identification parade by the Police to enable PW2 and PW3 identify the defendants while they were in Police custody as part of the armed robbers who attacked them. The evidence of PW2 is that when he went to SARS, he was told by the Police officers that the robbers who shot his wife had been arrested but he was not shown the defendants. So, the Police had the opportunity to conduct identification parade but they chose not to. Thus, the evidence of PW5 that the 1st defendant led them to the scene of crime and that the PW2 identified the defendants as the robbers that attacked, robbed in his house, shot him and killed his wife is unreliable.

The Court is in agreement with Kelechi Nwaiwu Esq. that failure of the Police to carry out identification parade created reasonable doubt in the case of the prosecution. In addition, the evidence of the PW2 during

cross examination by learned counsel for the defendants created serious doubt in his evidence that he identified the defendants as part of the armed robbers. The question and answer read:

Q: *The first time you set your eyes on the defendants was in the Court in Maitama.*

A: *Yes.*

The Court agrees with the defence counsel that this piece of evidence is *“an unexplained material contradiction in the case of the prosecution.”* The counsel for prosecution did not make any attempt to re-examine the PW2 for him to clarify this piece of evidence in the light of his identification evidence when he testified in-chief. To my mind, this piece of evidence of the PW2 contradicted [or whittled down] his identification evidence. It is

trite that where there is doubt in the case of the prosecution, it must be resolved in favour of the defendant. See the case of **Al-Mustapha v. State [2013] LPELR-20995 [CA]**.

I have considered the evidence of the PW4 that he took the defendants, Avangwa and the armourer before DCP Abba Kyari for interview. There, Avangwa and the 1st defendant started accusing each other about who killed the Youth Corper and Opaluwa's wife at Super Cell Estate, Apo.

Avangwa asked the 1st defendant whether he was not the one who shot and killed the pregnant woman.

Similarly, the PW5 testified that when they arrested the 1st defendant, he confessed. He volunteered his statement and led operatives to arrest the 2nd defendant. The 2nd defendant also admitted that he participated in the robbery attack at Super Cell Estate which led to the death of Mrs. Ojoma Opaluwa.

The question is whether the Court can rely on the above testimonies of the PW4 and PW5 to find the defendants guilty when the prosecution, for reasons best known to it, did not tender the extra-judicial confessional statements allegedly made by the defendants. I do not think it is right or proper for the Court to accord the oral evidence of the alleged confessional extra-judicial statement of the defendants any probative value when the prosecution chose not to tender the statement. By section 167[d] of the Evidence Act, 2011, the Court is entitled to presume that *“evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it”*. See **Adamu v. State [2014] LPELR-23299 [CA]**.

Before I conclude on counts 2, 3, 5 & 6, I must express my resentment, indignation and condemnation about the manner in which the armed

robbers attacked the houses of PW2 and PW3, gruesomely murdered Mrs. Ojoma Opaluwa and Miss Ozorji Ofor and shot the PW2. My deepest sympathy and condolence go to the family of the deceased persons.

From all that I have said, the decision of the Court is that the prosecution did not adduce credible evidence to prove the charges of armed robbery and culpable homicide punishable with death against the defendants.

Count 1 - Criminal Conspiracy:

The defendants [along with the erstwhile 3rd & 4th defendants] are charged for the offence of criminal conspiracy under section 6[a], [b] & [c] of the Robbery and Firearms [Special Provisions] Act. Kelechi Nwaiwu Esq. submitted that the prosecution failed to prove the charge of criminal conspiracy while D. F. Abah Esq. contended that the prosecution proved the charge beyond reasonable doubt.

Criminal conspiracy is the agreement of two or more persons to do or cause to be done an illegal or unlawful act or a legal act by illegal or unlawful means. In **State v. Salawu [2011] LPELR-8285 [SC]**, it was held that a charge of conspiracy is proved either by leading direct evidence in

proof of the common criminal design or it can be proved by inference derived from the commission of the substantive offence.

I adopt the decision of the Court in respect of the charges in counts 2, 3, 5 and 6 and hold without further ado that the prosecution failed to prove this charge against the defendants beyond reasonable doubt.

Count 4-Illegal Possession of Firearms:

Section 3[1] of the Robbery and Firearms [Special Provisions] Act under which the defendants are charged in count 4 reads:

Any person having a firearm in his possession or under his control in contravention of the Firearms Act or any order made thereunder shall be guilty of an offence under this Act and shall upon conviction under this Act be sentenced to a fine of twenty thousand naira or to imprisonment for a period of not less than ten years, or to both.

Submission of Learned Counsel for the Defendants:

Kelechi Nwaiwu Esq. stated that PW5 alleged that the 1st defendant was the one that led them to the recovery of their operational arms while PW4 stated that Avangwa led them to his armourer who kept their arms. It was contended that this inconsistency and contradiction have damaged the case of the prosecution significantly and have created

doubt which ought to be resolved in favour of the defendants. He cited Ahmed v. State [1999] 7 NWLR [Pt. 612] 641 and other cases in support.

Learned counsel for the defendants submitted that in view of the evidence of PW4, the prosecution cannot claim to have proved that the defendants are guilty of being in illegal possession of firearms since the arms recovered and tendered were not found in their possession.

Submission of Learned Counsel for the Prosecution:

Learned counsel for the prosecution referred to the case of Joseph Bille v. State [2016] LPELR-40832 [SC] for the elements of the offence of being in illegal possession of firearms, which are that:

- i. the accused was found in possession of firearms;
- ii. the firearms were within the meaning of the Robbery and Firearms [Special Provisions] Act; and
- iii. the accused has no license or authority to possess the firearms.

D. F. Abah Esq. argued that PW2 and PW3 testified that they saw the 1st defendant with firearms which they used in the course of the robbery. PW4 and PW5 stated how the 1st defendant, after confessing to the crime, led them to recover Exhibits 2A-2I, which are prohibited arms. He

stated that throughout the trial, it was never in dispute that the defendants had illegal possession of firearms or that Exhibits 2A-2I were recovered from the control of the 1st defendant.

Learned prosecuting counsel submitted that the evidence adduced by the prosecution on count 4 is credible, uncontroverted and unchallenged; and it becomes incumbent on the Court to rely upon same. He referred to **The State v. Oladotun [2011] LPELR-3226 [SC]** to support the legal principle that evidence adduced in court that is unchallenged becomes good and credible which ought to be relied upon by the court.

Decision of the Court:

The question is whether there is proof beyond reasonable doubt that the defendants were found in possession of any firearms. PW4 stated that Avangwa took them to his armourer in Lafia where they conducted search and recovered 11 fabricated AK 47, 1 mark 4 rifle, 1 pump action, fabricated short machine guns, ammunition and cartridges, which were admitted in evidence as Exhibits 2A-2I, 3A, 3B, 4, 5, 6 and 7A, 7B & 7C.

On the other hand, PW5 testified that a fabricated AK 47 rifle with 4 expended AK 47 ammunition and 90 live Ak 47 ammunitions were

recovered from the 1st defendant and handed over to SARS operatives along with the suspects.

In **Solomon v. State [2020] LPELR-51748 [CA]**, the position of the law was restated that where the witnesses called by a party give inconsistent and contradictory accounts of the same event and the contradictions are material and substantial to the extent that they cast serious doubts on the case presented by the party or as to the reliability of such witnesses, a trial Court should not believe the evidence. It is not the duty of the Court to resolve the contradiction in the evidence of a witness or witnesses called by a party or choose which one to believe or reject.

Also, in **Mohammed v. State [2010] LPELR-9019 [CA]**, it was held that it is illogical to accept, believe and rely on two divergent pieces of evidence which gave two different and irreconcilable conflicting accounts of a supposedly same incident or situation.

In this case, I am of the view, guided by the above authorities, that the Court cannot pick and choose between the evidence of PW4 & PW5. The effect is that serious doubt has been created in the case of the prosecution and the charge in count 4 has not been proved beyond reasonable doubt.

Conclusion:

From all that I have said, the Court enters a verdict of not guilty in favour of the two defendants in respect of all the counts in the amended charge filed on 21/2/2017. The defendants are discharged and acquitted.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Learned Counsel:

Kelechi Nwaiwu Esq. for the defendants.