**ADDO**

**V.**

**THE STATE**

 IN THE COURT OF APPEAL OF NIGERIA

ON THURSDAY, THE 7TH DAY OF JANUARY, 2016

CA/AK/146C/2013

**3PLR/2016/2 (CA)**

**OTHER CITATIONS**

(2016) LPELR-40140 (CA)

**BEFORE THEIR LORDSHIPS**

MOJEED ADEKUNLE OWOADE, J.C.A

MOHAMMED AMBI-USI DANJUMA, J.C.A

JAMES SHEHU ABIRIYI, J.C.A

**BETWEEN**

SAMUEL ADDO - Appellant(s)

**AND**

THE STATE - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF ONDO STATE SITTING AT ONDO [Justice O. O. Akeredolu, Presiding)

**REPRESENTATION**

R. A. Aladesanmi with him, A. Deniran For Appellant

**AND**

E. Kolade-Oba (Principal Legal Officer, Ondo State) For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CRIMINAL LAW AND PROCEDURE - MURDER:- Proof of – Duty of prosecution to discharge burden of proof using circumstantial evidence – When deemed discharged

CHILDREN AND WOMEN LAW:- *Women and Religion/Crime/Security –* Murder *–* Partially paralyzed woman killed in a church by assailant of Pastor - Killing of an aged woman who witnessed the killing of her pastor – How treated

ELDERS AND LAW:- Healthcare, Religion and Elderly Persons – Access to healthcare – Reliance on religious platforms and practices for health related care – Implication for justice administration

HEALTHCARE AND LAW:- Access to affordable healthcare - Aged sick persons and dependency on religious platforms for care – Implication for justice administration

RELIGION AND LAW:- Dispute between religious leader and membership – Belief that religious leader can exchange the ‘glory’ of his member – Killings arising therefrom – Implication for justice administration – How treated

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CALLING OF WITNESS(ES): Whether prosecution is bound to call all witnesses to prove its case

EVIDENCE - MEDICAL EVIDENCE: Whether medical evidence is always essential to prove cause of death

EVIDENCE - CONTRADICTION IN EVIDENCE:- Witness testimonies – Mix-up in surname of deceased person – whether material contradiction

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The Appellant was arraigned on a lone count of murder to which the Appellant pleaded not guilty. The prosecution's case was/is that one Pastor Ezekiel Ayoade and Adediwura Afolabi the deceased persons were on the 2nd November, 2009 killed by the Appellant at the Church where the first deceased pastored and held meetings on the 1st day of every month. The meeting used to hold at Oke Igbala Ondo (also known as Oke Pele, Ondo). On the said date, the Appellant who is a member of the church was on the hill top church referred to as "Ori Oke Pele" to attend the monthly services but when he got there, he discovered that his things had been tampered with. He got infuriated and when he challenged the Pastor, the Pastor threw a bell at him and also whipped him with a cane which got him all the more provoked and as a result he used the bell to beat the Pastor to death. When he realized that the old woman, Adediwura Afolabi who was partially paralyzed and laid in a corner of the church saw what he had done, and because she threw stones at him, he hit her with a stone till she died. He (Appellant) had been attending the church for a while and at that point was feeling cheated because he believed that the Pastor has exchanged his "glory" even though he had rendering help to the Pastor and had also warned him to let him go. The Appellant's defence was that he only remembered that on the 1st day of November, 2009, he climbed the Ori-Oke Pele to church where he went to pray but nothing happened between him and the deceased and that he only got to the prison before he knew where he was.

DECISION(S) APPEALED AGAINST

At the end of the trial, the Learned Trial Judge found the Appellant guilty as charged on the lone count and sentenced him to death.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT(S):*

i. Whether the prosecution established the fact that the two persons on the information sheet were actually deceased and that the act(s) of the Appellant was the cause of their respective deaths.

ii. Whether the prosecution proved its case against the Appellant beyond reasonable doubt.

*BY RESPONDENT(S)*

[Respondent adopted the issues formulated by the Appellant.]

*AS ADOPTED BY COURT*

[Court resolved appeal based on issues formulated by the Appellant]

DECISION OF [CURRENT] COURT

1. The prosecution established that the two persons on the information sheet were actually deceased and that the act(s) of the Appellant was the cause of their respective deaths.

2. The totality of the evidence led by the prosecution in this case could not be described as evidence of suspicion; the Trial Judge properly evaluated the evidence including the Appellant's extra judicial statements and adequately considered all the possible defences opened to the accused/Appellant including the defences of insanity and provocation before convicting the Appellant as charged.

The appeal lacks merit and it is accordingly dismissed.

**MAIN JUDGMENT**

**MOJEED ADEKUNLE OWOADE, J.C.A**. (Delivering the Leading Judgment):

This is an appeal from the decision of Honourable Justice O. O. Akeredolu of the High Court of Ondo State sitting at Ondo on the 26th day of September, 2012.

The Appellant was arraigned on a lone count of murder contrary to Section 319 of the Criminal Code, Cap. 30. Vol. II, Laws of Ondo State of Nigeria 1978.

The Appellant pleaded not guilty. The prosecution's case was/is that one Pastor Ezekiel Ayoade and Adediwura Afolabi the deceased persons were on the 2nd November, 2009 killed by the Appellant at the Church where the first deceased pastored and held meetings on the 1st day of every month. The meeting used to hold at Oke Igbala Ondo (also known as Oke Pele, Ondo).

On the said date, the Appellant who is a member of the church was on the hill top church referred to as "Ori Oke Pele" to attend the monthly services but when he got there, he discovered that his things had been tampered with, he got infuriated and when he challenged the Pastor, the Pastor threw a bell at him and also whipped him with a cane which got him all the more provoked and as a result he used the bell to beat the Pastor to death.

When he realized that the old woman, Adediwura Afolabi who was partially paralyzed and laid in a corner of the church saw what he had done, and because she threw stones at him, he hit her with a stone till she died. He (Appellant) had been attending the church for a while and at that point was feeling cheated because he believed that the Pastor has exchanged his "glory" even though he had rendered help to the Pastor and had also warned him to let him go.

The Appellant's defence was that he only remembered that on the 1st day of November, 2009, he climbed the Ori-Oke Pele to church where he went to pray but nothing happened between him and the deceased and that he only got to the prison before he knew where he was.

At the end of the trial, the Learned Trial Judge found the Appellant guilty as charged on the lone count and sentenced him to death.

Dissatisfied with his conviction and sentence, the Appellant at first filed a Notice of Appeal on 31/10/2012. On 7/4/2014, the Appellant filed an Amended Notice of Appeal (containing six (6) grounds of appeal). The Amended Notice of Appeal was deemed filed on 18/11/2012.

Appellant's brief of argument dated 6/3/2014 and filed on 7/4/2014 was deemed filed on 18/11/2014.

Respondent brief of argument dated 6/5/2015 and filed on 13/5/2015 was deemed filed on 16/6/2015.

Learned Counsel for the Appellant nominated two (2) issues for determination. They are:

i. Whether the prosecution established the fact that the two persons on the information sheet were actually deceased and that the act(s) of the Appellant was the cause of their respective deaths

ii. Whether the prosecution proved its case against the Appellant beyond reasonable doubt.

Learned Counsel for the Respondent adopted the issues formulated by the Appellant.

On issue 1, Appellant's Counsel submitted that a perusal of the name of the 1st deceased - Pastor Ayoade Ezekiel, on the information sheet shows that the retracted Appellant's extra-judicial statements Exhibits A7 and A9 do not amount to confessions to the crimes charged.

Appellant's Counsel submitted that the name mentioned by the Appellant in Exhibit A7 was Pastor Ezekiel Afolabi but that the name on the charge sheet was Pastor Ezekiel Ayoade.

Also, that Exhibit A9 never stated the names of anyone that was attacked, rather, it only stated that he hit the Pastor on the head and the Pastor fell down and died. That the same Exhibit A9 in respect of the 2nd deceased only stated "I went and meet one old woman there too and she fell down and died too---"

He submitted in effect that Exhibit A9 could not be said to be unequivocal.

Counsel further submitted that from the structure and grammar on a comparison of Exhibits A7 and A9 both statements could not be said to have been made by the same person, though both were ascribed to the Appellant.

Appellant’s Counsel referred to the cases of Ogba v. State (1992) 2 NWLR (Pt.222) 164; Nwaeze v. State (1996) 2 NWLR (Pt.428) 1; Haruna v. The State (1990) 6 NWLR (Pt.115) 125 at 126 and The State v. Christopher Omoni (1969) 1 All NLR 337 and submitted that in addition to proving the death of the deceased, it is necessary for the prosecution to prove not only that the act of the accused could have caused the death of the deceased, but that in fact, the deceased died as a result of the accused act to the exclusion of all other possibilities.

In the instant case, said Counsel, there was no evidence to establish that the alleged deceased persons were dead, and that their death was as a result of the acts of the Appellant to the exclusion of all other possibilities. He noted that there was no eyewitness called to give an account of what transpired with regard to the murders. That PW1 merely testified that the 1st deceased Pastor Ezekiel Ayoade was her husband and that he was dead. There was nothing else to prove beyond reasonable doubt that his death was caused by the act of the Appellant. Indeed, that the autopsy, from the report tendered, was performed on one Pastor Ezekiel Afolabi (Exhibit 11) and stated that there were matchete cuts on the deceased. There was no evidence, even in the alleged confessional statements, Exhibits A7 and A9, that anyone used a matchete on any of the deceased persons. And, that it was unfortunate that it was the Learned Trial Judge that suo motu explained away the discrepancy in the name of the deceased stated on the charge which was 'Pastor Ezekiel Ayoade' and the name on the autopsy Exhibit 11, which was 'Pastor Ezekiel Afolabi'.

He submitted that there was no witness that testified that he or she was the one who identified any of the deceased persons to the Pathologist for the purpose of the autopsy to establish the cause of death. He referred to the cases of The State v. Omoda Edobor & Ors (1975) 9 - 11 SC 69 and Festus Amayo v. The State (2001) 18 NWLR (Pt. 745) 251 at 279 and submitted that it is settled law that failure of the prosecution to provide the witness who identified the body of the deceased for the autopsy is fatal to the case of the prosecution.

He submitted that none of very close relations of the two deceased including the names of their children listed in the proof of evidence identified their corpses to the pathologist for autopsy. Further, that Exhibit 44, the photograph taken of the alleged body of Pastor Ayoade was never identified by PW1, the wife of the 1st deceased.

Counsel submitted that it amounted to mere unfounded speculation to impute that the Appellant's acts were responsible for the death of the deceased persons.

On Issue 2, as to whether the prosecution proved its case against the Appellant beyond reasonable doubt, Counsel referred to the evidence of PW1 where she said the 1st deceased (her husband) received a call in the evening of that fateful day to come to Oke Pele (Pele Hill). He submitted that the only inference that could be drawn from the circumstances is that the person who called Pastor Ezekiel to come to Pele Hill that evening must either be the murderer or definitely, was an eye witness to the murder(s) and the failure of the prosecution to ascertain the identity of this person and call him as a witness casts several doubt on the prosecution's case.

He submitted that there appears to be concerted effort on the part of the prosecution and PW1 to shield a certain person or persons from justice and lay it all on the Appellant who was known or seen to have psychiatric challenges that made him suffer memory loss.

Also, that the circumstances in which the incident was reported to the police evidently suggest that there was an eye witness or witnesses to the incident who was not called by the prosecution. And, that the only inference that could be drawn by the failure of the prosecution to call this person who must have been a witness, and lodged the complaint specifically against the Appellant by name, was that his testimony would have been unfavourable to the case for the prosecution.

Appellant's Counsel referred to the cases of The State v. Ozaki (1986) 5 NWLR (Pt. 40) 258 (1986) All NLR 371 at 378 and Edet Offiong Ekpe v. The State (1994) NWLR (Pt. 368) 263 and admitted that it is therefore necessary for the Appellate Court in this circumstance, to consider the whole background of this case in reaching the conclusion whether the prosecution has indeed proved its case against the Appellant beyond reasonable doubt.

Appellant's Counsel pointed out that the PW2 and PW3 contradicted themselves as to the recovery of the church bell allegedly used by the Appellant. He submitted that if PW2 had on 3rd of November, 2009 recovered the 'weapon' for the murders by the stream, it is absolutely impossible and mutually inconsistent for PW3, on 7th November, 2013 to recover the same 'weapon' being the bell, from the scene of crime. He referred to the case of Adewale v. Olaifa (2012) 17 NWLR (Pt.1330) 478 at 521 and submitted that the inconsistent evidence of these prosecution witnesses as to the recovery of the alleged weapon (the bell) raises reasonable doubt about the case for the prosecution, which doubt should be resolved in favour of the Appellant.

Appellant's Counsel also complained that Learned Counsel's attempt in the Lower Court in the cause of cross-examination to demonstrate that Exhibit A7 was not in fact recorded by PW2 through an oral application to the Court for PW2 to write some sentences was stopped by the trial Court who held at page 50 that PW2 was not on trial and that, "... if however, the accused has rebuttal evidence he is at liberty to produce it before the Court The application is misconceived it is hereby refused."

Counsel contends that the attitude of the Court below was 'if it was not the Appellant, who else? That the totality of the case put forward by the prosecution may at best have aroused suspicion and nothing more, He referred to the cases of Igboji Abieke & Anor v. The State (1975) 9 - 11 SC 97 at 1O4; Onah v. The State (1985) 3 NWLR (Pt.12) 236 at 244 and submitted that suspicion, however strong, cannot take the place of legal proof to found a conviction.

Learned Counsel for the Respondent responded to issues one and two together in one breadth.

Counsel conceded that none of PW1, PW2 and PW3 was a direct eye witness of the killing, however that their evidence coupled with other circumstantial facts proved at the trial connected in an unbroken chain of events leading to the murder of the deceased's persons. The facts which the Lower Court relied upon in coming to the conclusion of an unbroken chain of events as borne out by evidence are as follows:-

1. The Appellant's confessional statements dated 4th, 6th and 8th November consistently and graphically describes what transpired on the fateful day of the incident, how he used a bell in killing the Pastor Ezekiel and Mrs Adediwura because his glory had been tampered with by the Pastor and because the woman would expose him.

2. The pictures and negatives, Exhibits A1 - A6a show clearly that two persons died, a man and woman as well as spilled blood of these persons.

3. The Medical Report of Pastor Ezekiel and Mrs. Adediwura Afolabi, Exhibits A11and A11a signed by the State Pathologist revealed that two persons died, a man and a woman. It also revealed that they died of matchete cuts and a blunt object. This piece of evidence of evidence was corroborated in the unchallenged evidence of PW2 and PW3 where they both testified that the Appellant used a matchte that could not be recovered because it was thrown into a river but the bell was recovered and tendered in evidence. The use of bell as the weapon of murder is consistent in the evidence of the prosecution. The Appellant also made mention of using a bell and a stone.

4. Exhibit A8 is the Church bell recovered from the scene of crime. This piece of evidence corroborated the evidence of PW2, PW3 and the confessional statements of the Appellant. Exhibits A10 and A10a are the clothing worn by the Appellant on the fateful day and which had blood stains on them.

5. The identity of the deceased persons was never in dispute. The Appellant's confessional statement clearly shows that he murdered one Pastor and a woman whose corpses were taken for autopsy. PW2 and PW3 corroborated this fact in their evidence. It was their evidence. It was never the case of the defence that the deceased persons did not die. It as now being raised for the first time. Nevertheless, the post mortem result of the two deceased persons are conclusive evidence that they died.

On item (5) Respondent's Counsel submitted that it is not the law that in all cases where the person who identified the deceased to the pathologist was not called, the prosecution must fail. If there is evidence as in this case, that the corpse examined by the doctor is that of the deceased named on the charge the evidence of the person who identified the corpse is dispensable.

He referred to the case of Isang v. State (1996) 9 NWLR (Pt.473) 458 at 468.

Respondent's Counsel submitted further that the Appellant has made heavy weather of contradictions in the name of the deceased Pastor, as contained in the autopsy, report and the information as well as the Appellant's statement. He submitted that the seeming inconsistency is not material, is misplaced and does not raise any doubt as to the guilt of the Appellant. It is not in doubt, said Counsel that one male Pastor of Ori-Oke mountain Pele of Ondo town was murdered and it is not in doubt that his first name is Ezekiel.

That, it is also not challenged or controverted that one woman Mrs. Adediwura Afolabi was murdered immediately after the Pastor was murdered.

Counsel referred to the case of Atano v. State (2005) 4 ACLR 51 and submitted that contradictions must be shown to amount to substantial disparagement of the witness or witnesses concerned making it dangerous or likely to result in a miscarriage of justice to rely on the evidence of the witness or witnesses.

Counsel submitted further that assuming without conceding that the seeming inconsistency as to the names of the deceased Pastor amounts to a substantial disparagement of what was given in evidence, it is not in doubt that one Mrs. Adediwura Afolabi was also murdered by the Appellant and sufficient and credible evidence which was unchallenged and uncontroverted exists to prove this fact. There was no issue raised as to any inconsistency concerning the name of the deceased woman. Furthermore, said Counsel, it is the law that where an accused leaves unchallenged and uncontroverted, cogent compelling and damaging evidence placed before the Court, the trial Court may have no option except to exercise its liberty to accept and treat the evidence as credible.

He referred to the case of Okeke v.State (2001) 2 NWLR (Pt.697) 397.

Respondent's Counsel also referred to the case of Oguntolu v. State (1996) 2 NWLR (Pt. 432) 503 at 535 and 536 for the proposition that even in the absence of the medical reports of the two deceased persons, the Courts can still convict the Appellant for offence for which he is charged.

On the issue of inconsistencies/contradictions between the evidence of PW2 and PW3 on the weapon of murder, which is the church bell tendered and admitted in evidence Respondent's Counsel submitted that the evidence of the two witnesses are not contradictory. That PW2 in his evidence stated thus:

"...He admitted in his statement that he is the one who killed the Pastor with church bell and cutlass... I asked him for the cutlass he used to matchete them to death. He took myself and a team of police officers from the state C.I.D to an adjacent which is a river and we were told that is where he threw the cutlass. We were not able to recover the cutlass because the river was deep.

We now recovered the bell. We treated the bell as an Exhibit. "

Counsel submitted that PW2 only said that they were unable to recover the cutlass but recovered the bell without saying specifically that the bell was recovered from the stream. That under cross-examination, PW2 stated thus:

"after the photograph, I recovered the bell, Exhibit A8. Exhibit A8 is the bell I recovered from the scene of the crime, There is no blood stain on Exhibit A8. I did not only recover Exhibit A8 as the weapon with which the accused killed the deceased. I stated that there was a cutlass used to cut the deceased ...".

Counsel submitted that PW2 evidence is in consonance with that of PW3 who said:

"At the scene of crime we recovered a church bell as an Exhibit We registered the bell with the Exhibit keeper and I collected it this morning as I was coming to Court".

He submitted that PW3's evidence in Court simply corroborated that of PW2 and did not in any way contradict it, Furthermore, that the Appellant's confessional statements Exhibits A7 and A9 further corroborated the use of church bell as a weapon of murder, The medical reports Exhibits A11 and A11a also revealed that the deceased had multiple cuts on the face, the head and the back of the head and that the 2nd deceased Adediwura Afolabi's death was due to traumatic head injury.

He submitted that the medical report corroborates that the deceased suffered damage to and died from injuries with respect to body areas which the Appellant mentioned in his statements to the police. The Appellant stated as follows:

“----I used the bell to brake his head then I beat him till he died, but when I saw the woman there that she exposed me and she was trace the stone on me then I thrower stone on her face till she (died) died."

That, the Appellant stated in addition "----- I followed him I now used a bell and hit him on the head (church bell) and the Pastor fell down and died, then I went and meet one old woman there too and I used stone to hit her on the head too and she fell down and died too,"

Respondent's Counsel further submitted that the evidence of PW2 and PW3 on the recovery of the church bell is in no way contradictory as PW3's team went to the scene of crime on the 7th November, 2009 while PW2 and officers from PW3's SCID visited earlier on the 3rd November 2009. That it is without doubt that the police at Funbi Fagun Police Division Ondo and the State CID worked together throughout investigations and therefore the issue of contradictions or inconsistencies as to the date and place of recovery of the bell is immaterial and unfounded.

Learned Counsel for the Respondent also submitted that contrary to the contention of the defence that particular witnesses were not called by the prosecution, it has been established in a long line of cases that the prosecution is not obliged to call a host of witnesses in the presence of other overwhelming evidence facing the accused person on this, he referred to the cases of Ijiefor v. The State (2001) 6 NSCQR 2009; Mahmuda Buba v. State (1994) 7 NWLR 195 at 203; Francis Odili v. State (1970) 4 SC 1 at 8 and Alonge v. Police (1985) 4 FSC 2003.

He submitted that the evidence of PW1 to PW3 together with the extra judicial statement of the Appellant clearly established his guilt beyond reasonable doubt. Also, that the evidence of one credible witness accepted and believed by the trial Court is sufficient to justify a conviction.

He referred to the cases of Okeke v. State (2001) 2 NWLR (Pt.697) 397 and Danjuma v. State (2003) 3 ACLR 524.

He submitted further that it is immaterial in the instant case that the prosecution could not call eye witnesses and that the duty and onus to rebut the primary presumption of law as to sanity and establish insanity rests squarely on the defence. And, that it is trite law that an accused who denies involvement in murder as in this case cannot at the same time raise aplea of insanity.

He referred to the cases of Ani v. State (2001) 5 ACLR 536 at 537 and Peter v. State (2007) 5 ACLR 207 and submitted that the issue of his possible insanity, let alone a defence to that effect goes to no issue.

He urged us to hold that the trial Court's findings were based on correct evaluation of the pieces of evidence adduced by the prosecution and that from the facts proved, the circumstantial evidence engendered were cogent compelling and led to only one conclusion, the guilt of the Appellant.

**RESOLUTION OF ISSUES**.

The main complaints of the Appellant in relation to issue 1 could be categorized as follows:

i. The fact that the Appellant's confessional statements Exhibits A7 and A9 referred to the 1st deceased as Pastor Ezekiel Afolabi but that the 1st deceased was described in the charge sheet and evidence as Pastor Ezekiel Ayoade,

ii. That there was no witness that testified that he or she was the one who identified any of the deceased persons to the pathologist for the purpose of the autopsy to establish the cause of death.

On (i) in relation to Appellant's issue 1, I do agree with the Learned Counsel for the Respondent that the fact that the charge sheet described the 1st deceased as Pastor Ezekiel Ayoade and Appellant's Exhibits A7 and A9 described the 1st deceased as Pastor Ezekiel Afolabi is not material to the prosecution's case. The reason for this is that it is not in doubt that one male Pastor of Ori-Oke mountain Pele of Ondo town was murdered and it is also not in doubt that his first name was Ezekiel. It is also not challenged or controverted that one woman Mrs. Adediwura Afolabi was murdered immediately after the Pastor was murdered. In the circumstance therefore, the mix up between the names of Pastor Ezekiel Ayoade and Pastor Ezekiel Afolabi in Exhibits A7 and A8 in describing the 1st deceased Pastor Ezekiel could not be said to be material to the Prosecution/Respondent's case.

The Supreme Court in Atano v. State (2005) 4 ACLR Page 51 stated thus:

"The contradictions referred to by Counsel to the Appellants in the evidence of the prosecution witnesses are not such as will raise any doubt as to the guilt of the Appellant and the trial Court was right in overlooking them."

In the instant case, the seeming inconsistency in the names of the 1st deceased is not material and does not raise any doubt as to the guilt of the Appellant.

On (ii) above, the Courts have held that "...medical evidence is not essential in all cases to prove the cause of death ... in examples where a person was attacked and he or she dies immediately or so soon after the infliction of the injury on him or her, medical evidence is not necessary to prove the cause of death. The cause of death in that case is the injury inflicted on the pen on and the accused who inflicted the injury is guilty of the offence charged."

See Oguntolu v. State (1996) 2 NWLR (Pt. 432) 503 at 535 and 536.

In the instant case, the prosecution tendered Exhibits A11 and A11a as medical reports on the death of the 1st and 2nd deceased persons, however, even in the absence of such medical reports, the Courts can still convict for the offence charged.

In answer to Appellants Issue One, the prosecution in fact established that the two persons on the information sheet were actually deceased and that the act(s) of the Appellant was the cause of their respective deaths.

Issue 1 is resolved against the Appellant.

In relation to Issue 2, Appellant's Counsel emphasized that there was no eye witness account of the murder of the deceased persons. That there were contradictions in between the evidence of PW2 and PW3 as to the recovery of the church bell the weapon of the offence of murder. That the prosecution should have called as a witness, the man who phoned the 1st deceased to come to Pele Hill on the night of the incident, since he (the caller) would have been the first suspect rather than the Appellant. That the Learned Trial Judge was wrong to have discontinued the cross-examination of PW2 on the ground that the witness was not on trial and that "... if, however, the accused has rebuttal evidence he is at liberty to produce it before the Court. The application is misconceived, it is hereby refused."

Appellant's Counsel concluded on Issue 2 that the totality of the case put forward by the prosecution amounted to suspicion which he said cannot take the place of legal proof.

I do agree with the Learned Counsel for the Respondent that the Court below relied on circumstantial evidence in view of the absence of eye witnesses before the Court. Also, the evidence of PW1, PW2 and PW3 as well as all the Exhibits provided the material from which the

Court drew the inference of guilt.

Clearly, the evidence of PW1, PW2 and PW3 together with the extra judicial statements of the Appellant established the guilt of the Appellant beyond reasonable doubt.

The evidence of PW2 and PW3 as to the recovery of the church bell is not contradictory. This is because PW2 and PW3 worked together in a team in the investigation of the murder charge against the Appellant and the evidence of PW2 tallies with that of PW3 on the recovery of the church bell. The evidence of PW2 is not inconsistent with that of PW3. Furthermore, the evidence of PW2 and PW3 is corroborated by Exhibits A7, A8, A9, A11 and A11a in respect of the murder of the two deceased persons by the Appellant.

Furthermore and contrary to the contention of the defence that particular witnesses were not called, it has been established in a long line of cases that the prosecution is not obliged to call a host of witnesses in the presence of other overwhelming evidence facing the accused person. In other words, it is the preserve of the prosecution to decide the evidence useful for it and the defence cannot dictate to the prosecution the number of persons to be fielded as witness or witnesses.

See, Ijiefor v. The State (2001) 6 NSCQR 209; Mahmuda Buba v. State (1994) 7 NWLR 195 at 203.

Still on issue 2, the Learned Trial Judge was right to have rejected the Appellant's Counsel oral application in the course of cross-examination of PW2 that the witness should "... write few sentences on plain sheet of paper" whereby the trial Court held at page 50 of the record that:

"These provisions of the law given right to fair hearing to the accused person. It does not make it obligatory on the Court to ask the investigating police officer who is not on trial to be asked to prove that he recorded and signed a document which he said he recorded and signed. The accused is entitled to call evidence to controvert the evidence of the witness that he recorded and signed the document if he has any. Principle of fair hearing gives the accused room to be heard in his trial and to call witnesses if he has any before his case is finally decided. I cannot see the relevance of S. 36 (2) of the 1999 Constitution of the Federal Republic of Nigeria to the application of the Counsel.

It is on record that the witness is one of the investigating police officers that handled this case and he said he recorded the statement in the course of investigation his act is presumed to be regular if however the accused has rebutted (sic) rebuttal evidence he is at liberty to produce it before the Court.

The application is misconceived it is hereby refused."

Truly, the learned Trial Judge was right in the above passage to refuse the application of Appellant's Counsel for PW2 to write for comparison and/or examination. PW2 was not on trial and nothing in the trial of the Appellant warranted an opinion as to the handwriting of PW2 as for example under the provision of Section 72 of the Evidence Act 2011.

Finally on Issue 2, the totality of the evidence led by the prosecution in this case could not be described as evidence of suspicion, the Learned Trial Judge properly evaluated the evidence including the Appellant's extra judicial statements Exhibits A7 and A9 and adequately considered all the possible defences opened to the accused/Appellant including the defences of insanity and provocation before convicting the Appellant as charged.

Undoubtedly, the Court can convict an accused person the moment the prosecution proves its case beyond reasonable doubt.

See, Amusa v. State (2008) 8 NWLR (Pt.85) 395; Okoro v. State (1988) 5 NWLR (Pt.94) 225 at 257.

In the instant case, the totality of the evidence adduced by the prosecution proved the guilt of the Appellant beyond reasonable doubt.

Issue 2 is also resolved against the Appellant.

Having resolved the two (2) issues in this appeal against the Appellant, the appeal lacks merit and it is accordingly dismissed.

The judgment, conviction and sentence of the Appellant on 26/09/2012 by O. O. Akeredolu J. is accordingly affirmed.

**MOHAMMED AMBI-USI DANJUMA, J.C.A**.:

I agree.

**JAMES SHEHU ABIRIYI, J.C.A**.:

I agree.