**ADAUDU SHAIBU**

**V.**

**THE STATE**

IN THE SUPREME COURT OF NIGERIA

ON THURSDAY, THE 13TH DAY OF APRIL, 2017

SC. 287/2012

**LEX (2017) - SC. 287/2012**

**OTHER CITATIONS**

3PLR/2017/18 (SC)

(2017) LPELR-42100(SC)

**BEFORE THEIR LORDSHIPS**

IBRAHIM TANKO MUHAMMAD, J.S.C

MARY UKAEGO PETER-ODILI, J.S.C

KUMAI BAYANG AKA'AHS, J.S.C

AMINA ADAMU AUGIE, J.S.C

SIDI DAUDA BAGE, J.S.C

**BETWEEN**

ADAUDU SHAIBU - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

1. COURT OF APPEAL, ABUJA JUDICIAL DIVISION

2. HIGH COURT OF KOGI STATE, OBANGEDE

**REPRESENTATION/LAWYERS**

S.I. DOKUBO - For Appellant

AND

P.H. OGBOLE with him, BONIFACE BASSEY, OKWUDILI ABANUM, A. A. MALIK, N.L. NTA AND IBRAHIM ALHASSAN - For Respondent

**ISSUES FROM THE CAUSE OF ACTION**

CRIMINAL LAW AND PROCEDURE – MURDER – PROOF OF:- Standard of proof on prosecution – Where deemed satisfied – Confessional statement – Where case of prosecution can be sustained without the statement of the accused person – Legal effect of the retraction of said statement

CRIMINAL LAW AND PROCEDURE – MURDER – PROOF OF - MEDICAL EVIDENCE:- Principle of law that where medical evidence is essential as to the cause of death, it is invariably also essential that the person, who allegedly identified the corpse of the deceased to the Doctor, is called to testify as to identification – Exception thereto

CRIMINAL LAW AND PROCEDURE – MURDER – PROOF OF - MEDICAL EVIDENCE:- Principle that medical evidence is not essential in establishing murder where the deceased was attacked with a lethal weapon and died instantly – Whether applies to death which though not instantaneous occurred only a moment later

CRIMINAL LAW AND PROCEDURE – PROOF OF CRIME – CONTRADICTION/DISCREPANCY IN EVIDENCE:- Evidence of minor discrepancies in case presented by prosecution – Where they do not affect the credibility of witnesses or the substance of the matter – Proper treatment of by court

CRIMINAL LAW AND PROCEDURE – DEFENCES – SELF-DEFENCE:- Principle that in the case of self-defence the accused, relying on the plea, must first admit the facts of the commission of the offence and then assert that he had used such force on the assailant as was reasonably necessary to repel assault from the deceased – Evidence of pre-meditation on the part of accused person – Legal effect

CRIMINAL LAW AND PROCEDURE – DEFENCES – QUALITY OF DYING DECLARATION:- Where attacked by accused person as not rising up to the quality – Evidence that the deceased was in imminent fear of death and had no difficulty in stating at whose hand his deadly afflicted was received – Legal effect

ETHICS – LEGAL PRACTITIONER:- Duty as an officer of the Court – Wastage of the time of the court through cases deemed as “mere afterthought and voyage of discovery or at best an academic exercise” – Setting up of different cases at different levels of the judicial system regarding the same set of facts – Attitude of court thereto

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - APPEAL TO THE SUPREME COURT:- Jurisdiction – Need for grounds of appeal and issues distilled therefrom to be based on opinions already expressed by the Court of Appeal – Appeal arising from an opinion of a court other than the Court of Appeal – An appeal based on a ground of appeal which had not been ventilated before the Court of Appeal and without leave of the Supreme Court – Attitude of Supreme Court thereto

APPEAL - INTERFERENCE WITH CONCURRENT FINDING(S) OF FACT(S):- Attitude of the Supreme Court to invitation thereto.

APPEAL - FRESH POINT(S) ON APPEAL:- Raising of an issue for the first time on appeal – Where leave of Court was not obtained – How treated - Conditions that must be met before fresh points can be raised on appeal.

EVIDENCE - MEDICAL EVIDENCE - Position of the law with regards proper identification of the corpse for the purposes of a post-mortem or autopsy.

EVIDENCE - CONTRADICTION IN EVIDENCE:- When would avail a defendant - Whether minor contradiction in the evidence of witnesses can be fatal to a case.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant before the event leading to the charge, conviction and sentence was a Senior Secondary School 1 (SSS1) student of Government Secondary School Ogaminana, Kogi State. Then, he was 25 years of age. He stood trial on a three (3) count charge for the offences of culpable homicide punishable with death and causing hurt under Sections 221 (a) and 146 of the Penal Code (PC). From the evidence presented before the Court, the appellant stabbed the deceased with a sharp spear in the chest, thereby inflicting a deep injury in the right apex of the right hemi thorax region reaching the lungs tissue.

At the conclusion of trial, the appellant was found guilty of the offences charged, and was convicted for the offence of culpable homicide punishable with death under Section 221(a) PC and accordingly sentenced to death.

The appellant dissatisfied with the decision of the trial Court, appealed to the Court of Appeal. The Court of Appeal, on 8th March 2012 affirmed the decision of the trial Court while dismissing the appellant’s appeal in that regard. The appellant still dissatisfied, brought this appeal to the Supreme Court.

DECISION(S) APPEALED AGAINST

The Court of Appeal entered judgment, affirming the decision of the trial court and dismissing the appellant’s appeal against the trial court’s conviction and sentencing.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

*“Whether the lower Court was right when it upheld the conviction of the appellant.”*

*AS ADOPTED BY COURT*

[The Court adopted the Issue presented by the Appellant]

**MAIN JUDGMENT**

**AMINA ADAMU AUGIE, J.S.C. (Delivering the Leading Judgment):**

The Appellant was accused of causing the death of "Ajari Mala Sule" [the deceased] by stabbing him with a spear on the chest, and also of voluntarily causing hurt to "Awawu Molo" and "lbrahim Pemida" by stabbing them with a spear on the left arm and mouth respectively.

The Obangede High Court of Kogi State [trial Court] found him guilty of the offence of culpable homicide punishable with death and convicted and sentenced him to death accordingly. The trial Court, however, struck out the other two heads of the Charge because they *"should not have been joined to an offence as serious as the one in the first head—especially when the alleged victims are different.*

At the trial Court, the Prosecution called six witnesses and also tendered Exhibit 3, his statement to the Police, where the Appellant stated that he came home from school to meet the deceased and his brother beating his mother, and that it was when they brought out *"charms, guns and animal hun (sic)"*, that he entered his room and carried a sharp spear, which he used in hunting, to defend himself; and it was after the deceased's brother, Yakubu, shot at him and the bullet missed that he used the sharp spear on the deceased's chest.

The Appellant's mother, Seriya Shaibu, testified as PW6 for the Prosecution, and she explained that there was a fight between one Obo and her stepson, Lasisi, over a girlfriend, and it was the said Obo that beat her. She insisted that the deceased did not beat her and that the Appellant came home *"after the people fighting had left”.*

In his defence as DW1, the Appellant gave a different account of what happened. He said that when he came home from school, the deceased and his friends came to his house to abuse him, and it was while he was struggling to wrest the spear from the deceased, during the fight that ensued that the spear pierced him in the chest.

In his Judgment delivered on 20/6/98, the learned trial Judge, Olusiyi, J., found that he was an *"untruthful and unreliable witness",* and rejected *"his viva voce evidence in toto."* He further held that-

*Standing on its own, the Prosecution’s case is solid, formidable and unassailable. The admission of the Accused in Exhibit 3 that he used a* *spear on the chest of the deceased, corroborated the evidence of PW4 and PW5, thus lending weight to the case of the Prosecution.*

The Appellant's case at the trial Court was focused on self-defence, but his complaint in the Appeal filed at the Court below centered on the difference in what he said in Exhibit 3 and his defence as DW1.

The Court below expressed surprise that the complaint was not that the trial Court erred in not upholding the plea of self-defence, nonetheless, it held as follows on the issue of the said differences: –

*For the Appellant, so much fuss was made of the fact that [his] viva voce evidence was inconsistent with [Exhibit 3]. [He] did not expressly retract Exhibit 3. He must have realized from the evidence of PW4, PW5, and PW6 that his plea of self defence was hopeless and would not avail him. Hence his decision to try other defences like accident in his oral testimony. Apart from not giving the Prosecution sufficient opportunity to investigate this line of defence, the appellant was not on the same paragraph with his counsel at the trial Court. The said counsel maintained the line of self-defence. Even at that, the* *defence would appear unsustainable in view of the evidence of PW4, PW5 and PW6, (His) counsel submitted that since the viva voce evidence of the Appellant on oath was inconsistent with his extra-judicial Statement [Exhibit 3], both should be disregarded as any evidence the Court could act on. I agree entirely. This however does not earn the appellant an order of discharge and acquittal on the available facts.*

He also contended that if the trial Court had averted its mind to paragraph 8 of Exhibit 1 (the Police Post Mortem Form) that says –

*"Alleged cause of death: LYNCHED TO DEATH"*,

against what Exhibit 2 (Medical Report) says was the cause of death, it would have found that the findings at paragraph 11 of Exhibit 2 as the cause of death would have been injuries inflicted after the death of the deceased.

His argument was that there was no certainty as to whether it was the lynching or the alleged injuries on his chest that caused the death of the deceased, thus, the benefit of doubt should be resolved in his favour. The Court below, per Eko, JCA (as he then was), held –

*The suggestion that the injury on the chest of the* *deceased could have been inflicted on the corpse after [his] death failed to take into consideration the evidence of PW4 and PW5 that in [his] presence, the deceased said that it was the Appellant, who stabbed him with a spear. He did not deny the assertion; he also attacked and injured PW4 and PW5, who are credible witnesses. [His] argument though fancifully laid out is a mere attempt to mislead and confuse issues. At the trial Court, there was no dispute as to who and what caused the death of the deceased. Appellant’s counsel in his final address stated-  
PW4 and PW5 testified that the [Appellant] killed the deceased. There is evidence that (he) killed the deceased in self-defence. (His) Statement to the Police and his evidence in Court show that he acted in self-defence. I refer to Section 60 of the Penal Code, The prosecution has not rebutted [his] evidence that he acted in self-defence. I urge the Court to believe (his) evidence.*

*The Parties and this Court are bound by the record, [He] is accordingly not permitted to set up on appeal a case different from what he had set up at the trial Court. The Appellant's counsel though pontificating* *that he did not want to sound academic, did exactly that when he expended his useful time in the semantics between the words "pierce" and "struck". He submitted that PW4 And PW5 stated that [he] "pierced" the deceased with a spear and that under cross-examination, they each stated that (he) struck the deceased with a spear. There is nothing contradictory in the use of these words. The Appellant’s counsel is merely being semantic and academic. The important thing is whether the Appellant used the spear to stab deceased on the chest. So it becomes immaterial whether he used the spear to strike or pierce the deceased.*

The Court below concluded that the effect of exclusion of Exhibit 3 and his sworn testimony is that the Appellant had no viable defence; and since the Prosecution proved its case beyond reasonable doubt, it dismissed the Appeal and affirmed the Judgment of the trial Court.

Dissatisfied, the Appellant appealed to this Court with a Notice of Appeal containing seven Grounds of Appeal but he abandoned Grounds 4 and 5, and formulated one issue for Determination from Grounds 1, 2, 3, 6 and 7 in his Brief of Argument and that is simply whether the lower Court was right when it upheld his conviction.

The Respondent adopted the Appellant's issue in its own Brief. This time, and in this Court, the Appellant's complaint is as regards *"the alleged discordant statements made by the deceased heard at different times by PW4 & PW5 held to amount to dying declaration."*

On the issue of dying declaration, the trial Court stated as follows-

*Of all the prosecution’s witnesses, only PW4 and PW5 come closest to being eye-witnesses. Although they did not see the [Appellant] use a spear on the chest of the deceased, they came to the scene almost immediately and the deceased told them what [he] had done to him. They saw the (Appellant) standing beside the deceased with a spear. As if to confirm what they had just heard from the deceased, the (Appellant) attacked them with his spear, thus scaring them off.*

Relying on Section 33(1) of the Evidence Act, 1990, it went on to say –

*The deceased, who had been stabbed on the chest with a sharp spear, and was lying down on the ground crying, was definitely in danger of approaching death. The words of the deceased to PW4* *and PW5 are clear, precise and unambiguous that the [Appellant] pierced his chest with a spear. I hold that the dying declarations of the deceased to the PW4 and PW5 have met all the required conditions to make them relevant, admissible and applicable.*

The Appellant did not appeal against this finding by the trial Court, and there was no mention of dying declaration at the Court below.

The Respondent submitted that when a party is to raise a fresh issue on appeal, he ought to obtain leave before he can argue same, which the Appellant did not comply with - Director, SSS V Agbakoba (1999) 3 NWLR (Pt. 595) 315 SC and Obiakor v. State (2002) FWLR (pt. 113) 299 cited. It still proffered its own arguments on the issue.

There is no connection between this Court and the trial Court; not directly anyway. The findings of a trial Court must be affirmed or reversed by the Court below before its decision gets to this Court.

It is settled that before a pronouncement on its correctness can be made by this Court, it must be shown that the views expressed by that Court are wrong. It is only on such consideration that this Court can examine whether its Judgment is right or wrong - see Uor V. Loko (1988) 2 NWLR (Pt.77) 430, where Karibi-Whyte, JSC, added –

*The appellate Court is entitled to have the benefit of the opinions of the judges in the judgments of the Court below. It is the opinion appealed against, which is affirmed or reversed. Hence, without the benefit of such opinion, an appellate Court will be extremely reluctant to interfere. Any Judgment -- founded on grounds not canvassed in the Court below and not adverted to and pronounced upon in the judgment appealed against ideally is not an appeal against**such a judgment. Since an Appellant’s right of appeal is circumscribed within the parameters of the judgment appealed against, this Court will not lightly permit impugning the judgment on grounds of error other than are contained therein.*

See also Djukpan V. Orovuyovbe (1967) 1 All NLR 134 and Ajuwon V. Adeoti (1990) 2 NWLR (Pt. 131) 271 SC, wherein Nnaemeka-Agu, JSC, advised counsel to adhere to what Lord Birkenhead, L.C., had said in North Staffordshire Railway Co. v. Edge (1920) A.C. 254; as follows

*The efficiency and authority of a Court of Appeal, and especially of a* *final Court of Appeal are increased and strengthened by the opinions of learned judges, who have considered these matters below. To acquiesce in such an attempt as the Appellants have made in this case, is in effect to undertake decisions, which may be of the highest importance, without having received any assistance at all from the judges of the Court below.*

In any event, a party is not shut out from raising a fresh point or issue in this Court but it requires leave before it can be entertained - See Ajuwon V. Adeoti (supra), wherein Nnaemeka-Agu, JSC, added: -

*This Court has not only deprecated any attempt to, as it were, without leave, steal the show at the highest level. It has also gone ahead to lay down guidelines as to when such leave may be granted. See, for example, Stool of Abinabina v. Enyimodu (1953) 12 WACA 171, Ejiofodomi V. Okonkwo (1982) 11 SC 74.*

In this case, the Appellant also raised another fresh issue touching on non compliance with Section 249 (3) of the Criminal Procedure Code, which was not raised at the trial Court; not to mention Court below.

The said Section 249 {3) of the CPC provides as follows –

*(a) A* *written report by any medical officer or registered medical practitioner may at the discretion of the Court be admitted in evidence for the purpose of proving the nature of any injuries received by and physical cause of the death of any person who has been examined by him.*

*(b) An admission of such report, the same shall be read over to the accused and he shall be asked whether he disagrees with any statement therein and any such disagreement shall be recorded by the Court.*

It is his contention that the failure to inform him that he had a right to disagree with the Medical Report tendered at the trial Court is fatal to the Prosecution's case, and occasioned miscarriage of justice.

He did not raise or even mention this issue at the trial Court, and I will reiterate the point I made earlier that a fresh issue can only be argued with leave of Court. This is because, as an appellate Court, this Court only has jurisdiction to correct errors of the Court below - See Director, SSS V. Agbakoba (supra), Obiakor V. State (supra). See also Akpabio v. State (1994) 7 NWLR (Pt. 359) 635 SC, where this Court, per lguh, JSC, explained the position, asfollows –

*An appellate Court will not generally allow a fresh point to be taken before it if such a point was not raised and pronounced upon by the Court below unless of course, the question involves substantial points of law and no further evidence needs be adduced to determine the matter and such a course of action is necessary to prevent an obvious miscarriage of justice.*

In this case, Appellant wants to bring in the issue of dying declaration that was not canvassed at the Court below. He also wants this Court to consider another issue relating to Section 249 (3) of the CPC that was not raised or argued at the two lower Courts. The Court below was not given the opportunity to express any views on both issues, which would have allowed this Court beam its searchlight thereon.

What is more, he did not seek leave of Court to raise and argue the said fresh issues, and l am satisfied from reading the record that the questions raised thereby do not involve substantial points of law. The outcome is that the issues will and are hereby discountenanced.

The only issue left is his complaint that the two lower Courts wrongly relied on Exhibits 1 and 2, and he submitted as follows-

"Exhibit 1 shows that on 20/1/94, PW1 allegedly took the corpse- to the mortuary for post mortem examination. Under item 4 on Exhibit 1, it is stated that one Ademoh Jimoh was inserted as the person that would identity the corpse to the Pathologist. Under item 6 of Exhibit 2 captioned *“By whom identified*" no name is stated, which means that the corpse examined by the Pathologist was not identified by Ademoh Jimoh. While Exhibit 2 says the corpse was received at the mortuary by 9.15am on 21/1/94 and post mortem performed on 21/1/94. Exhibit 1 says the corpse was received by 19.35 hours on 20/1/94."

He contends that there is a material contradiction in Exhibits 1 and 2 relating to time the corpse was received. He further argued that –

"lf as Exhibit 1 says it was dumped at the hospital on 20/1/94, and Exhibit 2 says it was by 9.15am on 21/1/94 the question begging for answers would be whether the corpse examined by the Doctor is the corpse of the deceased given the fact that no one identified the corpse. Another puzzle equally begging for answer is how the doctor came to know the name of the deceased that was inserted under item 5 of Exhibit 2 in the absence of any information relating to the identity of the corpse given to the Pathologist. To worsen the confusion Exhibit 1 says the deceased that was deposited at the mortuary was lynched."

He conceded that the Court below rightly stated that where a person dies shortly after an attack by an accused, it presumed that it is the accused that killed him, but argued that the evidence acknowledged by the lower Courts is that no witness saw him when he allegedly wounded the deceased; that if Exhibits 1 and 2 are excluded as a basis for conviction, and given that Exhibit 3 and his testimony were disregarded, it means only the testimony of the *near eye-witnesses*, PW4 and PW5 can support the conviction; and that none of the witnesses gave evidence that he was there when the deceased died.

The Respondent argued that the deceased died of the injury he sustained from the sharp spear stab he received from the Appellant; that he died on being conveyed to the hospital by his mother, PW5 immediately after he was stabbed in the chest by the Appellant; and that it is settled law that once a person dies in those circumstances, the only logical conclusion is that the deceased died from the injury sustained from the spear stab, and no medical evidence is necessary (although the Prosecution procured one) to prove its case - Akpan V. State (1992) 6 NWLR (Pt. 248) 239, Emwenya v. A.G Bendel (1993) 6 NWLR (Pt. 297) 29 and Akpuenya V. State (1976) 11 SC 269 cited.

Furthermore, that the Appellant's argument about the body of the deceased not being identified, goes to no issue; and a perusal of the said Exhibits 1 and 2 will reveal that the corpse was identified –

"The name of the deceased is endorsed, the Police Officer who took the corpse for post mortem report was also indicated, and the name of the Medical Officer who did the report was also boldly endorsed on the report."

It submitted that PW4 and PW5 both saw the Appellant at the scene, where he also attacked them, and it is absolutely wrong to advance any argument as to the identity of the corpse for which a medical report that clearly identified the deceased, was presented; and that assuming without conceding that there were contradictions in the said Exhibits 1 and 2. It is immaterial and will not affect the findings of the lower Courts to necessitate setting it aside for being perverse Ibe v. State (1992) 5 NWLR (Pt. 244) 624, Onubogu V. State (1974) 1 All NLR (Pt. 11) 5 and Nasamu V. State (1979) 6-9 SC 153 cited.

So, the appellant's choice of attack against the decision of the Court below appealed against is on the identification of the corpse.

He was charged with culpable homicide punishable with death. The position of the law is that where medical evidence is essential as to the cause of death, it is invariably also essential that the person, who allegedly identified the corpse of the deceased to the Doctor, is called to testify as to identification, unless identity of the deceased can be inferred from the circumstances of the case - see Enewoh V. State (1990) 4 NWLR (Pt. 145) 469, wherein Akpata, JSC, explained -

*The position, however, is that if there are facts from which it can be inferred that the corpse examined by the doctor was that of the deceased, the evidence of the person, dead or alive, said to have identified the corpse is not indispensable. Indeed, a conviction for murder can be made without the recovery of the dead body if there is* *positive evidence that the deceased has been killed. In effect, the need for anyone to identify the body of the deceased to a doctor is not a sine qua non in all murder cases. Besides, it is also trite law that medical evidence though desirable in establishing cause of death in a case of murder, is not essential provided that there are facts, which sufficiently show cause of death to the satisfaction of the Court.*

In that case, Enewoh V. State (supra), the deceased's shouts of "*Ukwa Egbe is killing me"*, brought his wife, PW1, to the scene where she saw Appellant hitting him with a rod. The Appellant's son, PW4, pleaded with his father to stop hitting the deceased. But he kept on, and the deceased later died in hospital. The person, who identified the corpse to the doctor, died before trial. This Court held that –

*Where the totality of the evidence showed unmistakably that the body on whom a doctor performed a post mortem examination was that of the deceased, a separate witness, though desirable, is not a necessity.*

In this case, PW4, lbrahim Pemida testified as follows –

*"On 20/1/94 I was returning from where I had gone to ease myself when* *I saw Sule Ajari, at his house, crying that the accused person, Adaudu Shaibu, pierced him with a spear on the chest. While I was asking the accused, who was also at the scene, what happened, he struck my mouth with the spear he was holding. I was then taken to the hospital. When I returned from the hospital I was informed that Sule Ajari had died (sic).*

Awawu Mala, the deceased's mother, testified as PW5 and she said –

*On 20/1/94 about 7.00pm I was in my house when I heard my son crying outside. I ran out where I saw my son lying down on the ground with the Accused Person standing by his side. As I was lifting my son up, the Accused struck me on my hand with a spear. My son said to me that one Lasisi gave a spear to the Accused Person with which he pierced him on the chest. When the Accused struck me with his spear I ran back to my house to call for help. My daughter went to look for a vehicle which conveyed my son to the hospital. My son later died at the Abdulraham's Hospital, lnozioni (Sic)."*

Exhibit 1 has two parts; the first is *"filled by Police when forwarding a corpse to a medical officer for post-mortem examination",* and the second is *"filled by the medical officer and handed over to the Police escort immediately on completion of the post mortem."* The first part has the name of the deceased [item 1]; the person, who will identify corpse to the medical officer - *"Ademoh Jimoh Ogaminano"* [item 4]; the date sent to the hospital 20/1/94" [item 5]; alleged cause of death - *"lynched to death"* [item 8]. The second part of it reads -

*Approximate date of death - 20/1/94 Approximate time of death - 1935 Hours  
Brief Notes of post-mortem Findings - Severe stab wound on the thorax (sic) case causing hemorrhage and pneuno thorax.*

Exhibit 2 is the REPORT OF MEDICAL PRACTITIONER, and it reads –

*1. Date and hour of receipt of corpse of Mortuary - 21/1/94 9.15am*

*4. Date and hour of holding examination - 21/1/94*

*5. Name of deceased (if known)- Ajari Malla Sule*

*6. By whom identified...*

*10. Probable date of death - 20/1/94 8pm*

*11. Medical Report - Deep Stab wound measuring about 2cm by 2cm at (Rt) apex of the (Rt) hemithorax reaching the lung tissue.*

*(SGD)*

*Medical officer  
21/1/94.*

These are the pieces of evidence the Appellant is quarrelling with. His bone of contention is that the evidence of PW4 and PW5 and the Exhibits are unreliable in identifying the corpse that was examined, and determines whether he had caused the death of the deceased.

Obviously, there is no substance to the Appellant's arguments. The Appellant pointed to some discrepancies in the said two Exhibits but these are minor discrepancies that are of no effect whatsoever. It is settled that contradiction that will be fatal must be substantial. Minor contradictions that do not affect the credibility of witnesses, as in this case, may not be fatal. The contradiction must relate to the substance of the matter - Uche v. State (2015) LPELR-249693 (SC).

In this case, the contradictions referred to are inconsequential. The evidence of PW4 and PW5 paint a vivid picture of the incident. There is no question that the Appellant stabbed the deceased and there was no lacuna or break in the sequence of events from when the deceased was stabbed until his corpse landed at the mortuary - PW5 said she heard his cries at 7pm; the time of death in Exhibit 1 is 1935 Hours; and in Exhibit 2. Probable date of death is 20/1/94 8pm.

This Court held inBen V. State (2006) 16 NWLR (Pt. 1006) 582 that medical evidence is not essential in establishing this issue where the deceased was attacked with a lethal weapon and died instantly. In that case, Ben V. State (supra), Akintan, JSC, stated as follows –

*Where a man was attacked with lethal weapon, and he died on the spot, cause of death can properly be inferred that the wound inflicted caused the death. Put in another form, where the cause of death is obvious, medical evidence ceases to be of any practical or legal necessity in homicide cases. Such a situation arises where death is instantaneous or nearly so.*

Katsina-Alu, JSC (as he then was), further observed as follows -

*The Appellant struck the deceased on the head ... He fell down unconscious, never regained consciousness until he died a few hours later in hospital. Medical evidence was not necessary to determine the cause of death in the circumstances of this case. It could properly be inferred that the wound inflicted caused the death of the deceased.*

As to identification of the corpse, which he made so much fuss over, the decision of this Court in Enewoh V. State (supra), seals that door. This Court made it very clear in that case that where the totality of the evidence adduced showed unmistakably that the body on which, the doctor performed a post mortem examination, was that of the deceased, a separate witness, though desirable, is not a necessity.

In this case, the said Exhibits 1 and 2 contained relevant details indicating that it was the body of the deceased that was examined by the medical officer, who signed Exhibit 2. The fact that the name of the person, who was to identify the deceased, was not on the Form, is not sufficient to find to the contrary in the face of all the evidence

The Respondent argued that this Appeal is a mere afterthought and voyage of discovery or at best an academic exercise to waste the time of this Court; that Courts are enjoined to desist from embarking on such academic exercises when deciding cases as it will not help the cases of litigants nor contribute meaningfully to the development of our legal jurisprudence - Adebayo V. Babalola (1995) 7 NWLR (PT. 408) 383 and Fawehinmi V. Akilu (1987) 4 NWLR (PT. 57) 797 cited. Furthermore, that the Appellant at the trial Court set up a case of self-defence; on appeal to the Court below he set up another case for contradiction in the evidence to discredit the Prosecution's case; and in this appeal, he had brought in the issue of dying declaration, which brings to the fore inconsistency in his case since he changes his reasons for going on appeal at every ladder/stage of his appeal.

I agree; this is, undoubtedly, not the way to pursue an appeal, particularly, an appeal against a death sentence. The Court below pointed this out when the Appellant dropped the defence of self-defense that he relied on at the trial Court, only to come up with the complaint at the Court below about the difference in what he said in Exhibit 3 and evidence as DW1. The Court below disregarded both.

Apparently, he did not heed the warning by the Court below that he cannot set up a different case on appeal from the trial Court, because he went straight ahead to do the same thing in this Court - set up on appeal a different case from what he set up in that Court. Even worse, argue fresh issues that were not raised in that Court Without any hesitation, I say that the Appeal totally lacks merit.

Besides, there is not much this Court can do when an Appeal turns on the issue of credibility. The trial Court is at liberty to believe one side or disbelieve the other, and that belief can only be questioned on appeal if it is against the drift of the evidence when considered as a whole - see Adelumola v. The State (1988) 1 NWLR (Pt. 73) 683.

As Oputa, JSC, so aptly put it in Adelumola V. The State (supra), *"for example, we all know that 2 plus 2 makes 4. If a witness testifies that 2 plus 2 makes 5, and he is believed, his arithmetic does not cease to be wrong because the trial Court erroneously believed him. There, and in such a case, an appellate Court can intervene."*

In this case, there is more than enough evidence established to support the concurrent findings of the trial Court and Court below. In the circumstances, this Court is not in the position to intervene.

Thus, this Appeal fails, and is dismissed. The Judgment of the Court below upholding the trial Court’s decision is hereby affirmed.

**IBRAHIM TANKO MUHAMMAD, J.S.C.:**

I read before now, the judgment just delivered by my learned brother, Augie, JSC. My learned brother has painstakingly settled all the issues in dispute. I am contended with the reasoning and conclusion reached. I do not find it necessary to add anything. I too, dismiss the appeal as lacking in merit. I abide by the consequential orders made in the lead judgment.

**MARY UKAEGO PETER-ODILI, J.S.C.:**

I am in complete agreement with the judgment and reasonings just delivered by my learned brother, Amina Adamu Augie JSC and to record my support, I shall make some comments.

This is an appeal against the judgment of the Court of Appeal, Abuja Division which affirmed the conviction and sentence to death of the appellant. The judgment of the Court of Appeal was anchored by Ejembi Eko JCA (as he then was) which considered the decision of the trial High Court, Coram: H. A. Olusiyi J.

**FACTS:**

The appellant before the event leading to the charge, conviction and sentence was a Senior Secondary School 1 (SSS1) student of Government Secondary School Ogaminana, Kogi State. Then, he was 25 years of age. He stood trial on a three (3) count charge for the offences of culpable homicide punishable with death and causing hurt under Sections 221 (a) and 146 of the Penal Code (PC) respectively. From the evidence presented before the Court, the appellant stabbed the deceased with a sharp spear in the chest, thereby inflicting a deep injury in the right apex of the right hemi thorax region reaching the lungs tissue measuring about 2cm by 2cm. See Exhibit "1 & 2". It was also established that the appellant stabbed PW4 and PW5 in the mouth and arm respectively. See Pp.11, 19 and 27-29 of the record of Proceedings.

At the conclusion of trial, the appellant was found guilty of the offences charged, and was convicted for the offence of culpable homicide punishable with death under Section 221(a) PC and accordingly sentenced to death. See Pp.42-54 of the record.

The appellant dissatisfied with the decision of the trial Court, appealed to the Court below. The Court, on 8th March 2012 affirmed the decision of the trial Court while dismissing the appellant’s appeal in that regard. The appellant still dissatisfied, has brought this appeal against the decision of the Court below.

On the 19th day of January, 2017 date of hearing, learned counsel for the appellant, Uche C. Ihediwa Esq. adopted the appellant's brief of argument filed on 26/9/2012 in which he raised a single issue, viz:-  
Whether the Lower Court was right when it upheld the conviction of the appellant. (Grounds 1, 2, 3, 6 and 7).

P. H. Ogbole Esq, of counsel for the respondent adopted its brief of argument filed on the 26th February, 2013. He also adopted for use, the sole issue formulated by the appellant.

The issue as crafted by the appellant covers the question for determination in this appeal and I shall make use of it.

SOLE ISSUE:

Whether the Lower Court was right when it upheld the conviction of the appellant?

Learned counsel for the appellant submitted that the burden of proving the offence charged being murder is on the standard of proof beyond reasonable doubt as prescribed by Section 139 of the Evidence Act 2011. He cited the case of Sule v The State 117 NWLR (Pt.1169) 33 at 53; Uguru v The State (2012) 9 NWLR (Pt.771) 90; Shehu v The State (2010) 8 NWLR (Pt.1195) 112 etc.

It was submitted that there was non compliance with the provisions of Section 249 (3) of the Criminal Procedure Code with regard to the matter of a written report by a medical officer. He cited Edoho v The State (2010) 14 NWLR (Pt.1214) 651 at 678; Enewoh v The State (1990) 7 SCNJ 1 at 5 - 6; Okoro v The State (1988) 5 NWLR (Pt.94) 255 at 267.

Also contended for the appellant is that the failure of the prosecution to inform the accused/appellant of his right to disagree with the report given the apparent unsatisfactory state is fatal to the case of the prosecution. He cited Opayemi v The State (1985) 2 NWLR (Pt.5) 101 at 112; Ukaekweghinye v The State (2005) 9 NWLR (Pt.930) 227; Ajayi & Anor v Zaria N. A. (1963) All NLR 168.

Mr. Ihediwa of counsel for the appellant contended that the requirements for a statement to be taken as a dying declaration had not been met in this instance. He cited Section 40 (1) of the Evidence Act, 2011; Akinfe v The State (1988) 3 NWLR (Pt.88) 729 at 746; R v Weyeku (1943) 9 WACA 195 etc.

Learned counsel for the appellant contended that the two Courts below made use of Exhibits 1 and 2 and the dying declaration wrongly. He cited Akinola v V. C. University of Ilorin (2004) 11 NWLR (Pt.885) 616; that the concurrent findings of the two Courts below being perverse the Supreme Court should disturb them.

For the respondent, learned counsel for the respondent contended that the prosecution proved the case beyond reasonable doubt. That it is trite that once a person dies immediately from wounds sustained as in this case the logical conclusion is that the deceased died from the injury sustained from such spear stab. He cited Akpan v State (1992) 6 NWLR (Pt.248) 239 at 470. That the medical report in this instance may not be necessary. He referred to Emwenya v A.G Bendel State (1993) 6 NWLR (Pt.297) 29 at 39.

That Exhibits 1 and 2 will reveal that the corpse was identified and the provisions of Section 249 (3) (a) of the Criminal Procedure Code (CPC) complied with and there was no miscarriage of justice.

That Exhibit 3, the appellant's extra-judicial confession was enough to ground a conviction as he admitted committing the crime. He referred to Bassey v The State (2012) 12 NWLR (Pt.1314) 209 at 227; Ntaha v State (1972) 4 SC 1 etc.

Mr. Ogbole of counsel for the respondent submitted that the appellant raising the issue of self defence is a fresh matter without leave of Court which he cannot do. He cited Director SSS v Agbakoba (1999) 3 NWLR (Pt.595) 315 at 365; Adebayo v Babalola (1995) 7 NWLR (Pt.408) 383 at 410; Fawehinmi v Akilu (1987) NWLR (Pt.67) 797.

Learned counsel for the respondent urges this Court to uphold the concurrent findings and decisions of the two Courts below.

The stance of the appellant is that this is a proper case for the Supreme Court to disturb the concurrent findings of the fact of the two lower Courts as they are perverse in view of the discordant statements by the deceased heard at different times by PW4 and PW5 which the two Courts below held to be dying declaration.

Respondent on the other hand urges the Court to discountenance the position of the appellant which at this level is new, the appellant having at the trial Court set up a case of self defence and at the appeal in the Court below raised an issue of contradiction in the evidence of prosecution witnesses and at this Apex level brought up the issue of dying declaration. That in fact there is nothing upon which a reversal of the concurrent findings of the two Courts below could be based.

In summing up the case before him, learned trial judge held thus:

"The issues for determination in this case are whether the prosecution has proved beyond reasonable doubt (1) that the death of the deceased, Sule Ajari Mala, had actually taken place, (2) that the death of the deceased was caused by the accused and (3) that the act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as the accused knew or had reason to know that death would be the probable and not only the likely consequence of his act. The case presented by the prosecution is, to me, straightforward and devoid of any contradiction whatsoever.

Of all the prosecution witnesses, only the PW4 and PW5 come closer to being eye-witnesses. Although they did not see the accused use a spear on the chest of the deceased, they came to the scene almost immediately and the deceased told them what the accused had done to him. They saw the accused standing beside the accused with a spear. As if to confirm what they had just heard from the deceased, the accused attacked them with his spear, thus scaring them off.

The evidence of the PW6, who is the mother of the accused person, completely deflated the story of the accused in Exhibit 3 that he intervened when the deceased and his brother were beating his mother and that this resulted in a scuffle which made him to attack the deceased with a spear in self-defence". See page 45 of the record.

The trial Court at pages 47 and 48 stated thus:-

"There is no meeting point whatsoever between the confessional statement of the accused, Exhibit 3, and his evidence on oath. In a nutshell, while the accused stated in Exhibit 3 that he entered into his room, brought out his spear and "used it on the chest of the deceased", in his evidence on oath, he said that the deceased came to him with a spear in his hand and that when he was struggling to get the spear from him, the spear pierced the deceased on his chest.

As to what led to the scuffle, while the accused person stated in Exhibit 3 that he intervened when the deceased and his brother were beating his mother, in his evidence on oath he said that the deceased and others came to his house to abuse him. He did not say in his evidence on oath that the deceased and others beat his mother.

It is very clear that there is no truth whatsoever in the evidence of the accused. He is an untruthful and unreliable witness. I reject his viva voce evidence in toto.

Standing on its own, the prosecution’s case is solid, formidable and unassailable. The admission of the accused person in Exhibit 3 that he used a spear on the chest of the deceased corroborated the evidence of the PW4 and PW5, thus lending weight to the case of the prosecution. Exhibit 2 shows clearly that the deceased died of “deep stab wound measuring about 2cm by 2cm at the apex of the hemithorax reaching the lung tissue". This is consistent with evidence adduced which is uncontroverted and incontrovertible

Although some of the statements of the accused in Exhibit 3 have been contradicted by the evidence of the PW6, who is the mother of the accused, the pith and marrow of it, which in his admission that he used a sharp spear on the chest of the deceased is consistent with the case of the prosecution.

In any case, I am satisfied that Exhibit 3 was made voluntarily and that it amounts to an admission of guilt, the fact that the accused person retracted it notwithstanding."

The Court of Appeal per Ejembi Eko JCA (as he then was) stated as follows:-

"It is unfortunate that the appellant's counsel seems to think that at this Court he can raise fresh issues or points that were not raised at the trial Court in order to improve the chances of the appellant. The points he is raising are largely on facts. They are not jurisdictional. The condition precedent for raising fresh issues or point on appeal are as stated by Kalgo JSC, in Obiakor v State (2002) 10 NWLR (Pt.776) 1 at page 10:

"The general principle is that when a party seeks to file and argue in this Court any fresh issue not canvassed in the lower Court, whether that issue pertains to law or otherwise, leave to file and argue the issue must be had and obtained first. But where the point or issue sought to be raised pertains to issue of jurisdiction, the point or issue can be filed and argued with or without the leave of the Court even if it is being raised for the first time.

As this Court stated in Goar v Dasun & Ors (CA/J/EP/HA/420/07 of 6th April, 2009) relying on Awuse v Odili (2003) 18 NWLR (Pt.851) 116 at 161; Olufemi v Babalola (2009) 4 SCNJ 287 etc, it is trite, that parties are not allowed to set up one case at the trial Court, but go on to set up quite another, on appeal. Consistency is the name of the game.

The case set up at the trial Court is one of self-defence. The defence counsel, at least, was emphatic and fastidious about this. Consistent with the principle in Amuneke v State (supra), in the case of self-defence the accused, relying on the plea, must first admit the facts of the commission of the offence and then assert that he had used such force to the assailant as it was reasonably necessary to make the effectual defence against the assault. See pages 113 - 114 of the record,

The lower Court stated on further at page 115 of the record thus:-

"The extra-judicial statement of the appellant, Exhibit 3, is a categorical plea of self-defence. It is also an admission that he intentionally caused the death of the deceased to avert his own death or some grievous hurt to his person. From Exhibit '3' the question as to whom or what caused the death of the deceased appears to be a non-issue. However, the appellant’s testimony in open Court was a complete departure from that plea of self-defence. I will come anon to this.

The appellant's counsel seems to miss the substance and essence of the evidence of PW4, PW5 and PW6 read together with Exhibit '3'.

The totality of the evidence of PW4, PW5 and PW6 is to prove the lie of the self-defence pleaded in Exhibit '3' and sieve it from the admission of the intentional killing of the deceased by the appellant. What can be gathered from the evidence of PW4 and PW5 is that the appellant, having stabbed the deceased on the chest with the sharp spear remained on hand to ensure that no one revived the deceased. The appellant, from the uncontradicted and credible evidence of PW4 and PW5, had attacked and injured these witnesses with his spear as they came to the rescue of the agonizing deceased. He attacked and injured the PW4 for asking him to confirm to him (PW4) that he stabbed the deceased as the deceased, crying in pain, was alleging. PW5 was attacked for attempting to lift the deceased, her son. She saw the deceased lying down on the ground with the accused person standing by his side. The appellant in his testimony made no effort however feeble, to deny or contradict the evidence of PW4 and PW5. These pieces of evidence suggest admission by conduct of the appellant."

In the further finding of the Court below which tallied just like the other findings of the trial Court, the learned Justice anchoring the decision of the lower Court held thus:-

"The PW6 is the appellant’s own mother. Prima facie, none would expect her to testify falsely against the son. She denied appellant’s assertion that on 20th January, 1994 at 20.00 hours the deceased and others came to beat up his mother, that upon his intervention they attacked him also and he had to stab the deceased in order to defend himself. PW6’s evidence debunked the appellant's plea of self-defence, pleaded in Exhibit '3', ever before the appellant testified to the contrary, and reinforced the position of the prosecution that the killing of the deceased was premeditated. The law is settled that the plea of self-defence does not avail the accused in the face of evidence of premeditation. See Udo v State (2006) 7 SC (Pt.11) 83 at 94". See pages 115 - 116 of the record.

Indeed, the appellant was picking and choosing whichever defence suited the particular time. Firstly, at the trial Court, he raised the defence of self-defence which in effect was an admission that he stabbed the deceased even though under extenuating circumstances such as would exculpate him from blame in the light of an unjustifiable attack to which he needs to present a defence of himself. SeeKuaghshir v State (1995) 3 NWLR (Pt.386) 651 at 668per Ogwuegbu JSC referred to.

Again to illuminate the various positions of the appellant is his extra-judicial statement Exhibit '3' where he stated thus:-

"On 20/1/94 being the second day at about 1400 hours I left for my friend's house by name Sumaila Jimoh at Utokuha Quarters to solved some assignment given to us in the school, as I return home from my friend's house in the night time at about 2000 hours, I met the deceased, and his junior brother named Yakubu beating my mother. Then the deceased and his junior brother brought charms, gun and animal hun (sic) hone) to attacked (sic) him. From there I entered into my room and carried one sharpened spare which I used in hunting to defend myself. The deceased's junior brother Yakubu shot gun at me but unfortunately the bullet missed me. From there I used my sharp spear on (the deceased's) chest and he ran away. From there I gave the said spear to my junior brother by name Dada Shaibu. Later I saw the deceased’s gangs coming in numbers to my house then I ran away and hid (in) the bush that night. The following day, being 21/1/94 at about 0500 hours I traveled to Lagos to meet my brother name Chmanu Shaibu. On reaching Lagos I told my brother everything about the incident, then my brother told me to returned (sic) back home. I was in Lagos till on 24/1/94 when one Mohammed came and brought me home and handed me over to the Police Adavi finally on 29/1/94 at about 2100 hours".

The retraction of the confessional statement by the appellant did not change the situation in the light of the statement being direct, positive and related to acts, knowledge or intention, stating or suggesting the inference that the appellant committed the offence charge. That there was no corroboration would in the circumstance not matter. However, the Court out of prudence could look for something outside of that confessional statement that would show that the confession was probable. That is to say that it is trite that an accused can be convicted on his confessional statement alone where the confession is consistent with other ascertained facts which have been proved. See Bassey v State (2012) 12 NWLR (Pt.1314) 209 at 227; Akpan v State (1992) 6 NWLR (Pt.248) 439 at 468.

Though a party is not allowed to raise fresh issues not canvassed during trial or at the Court below on appeal without seeking and obtaining leave as the appellant has herein resorted to setting up a grouse against the dying declaration. See Director SSS v Agbakoba (1999) 3 NWLR (Pt.595) 315 at 365; however the contention against the quality of the dying declaration of the deceased go to no issue as what was stated by PW4 and PW5 were correctly taken to be so inspite of minor discrepancies which did not detract from the substance of the fact that the deceased was in imminent fear of death and had no difficulty in stating at whose hand or spear stab that death was occasioned. In that regard, Section 40 (1) of the Evidence Act 2011 were met. It provides as follows:-

"A statement made by a person as to the cause of his death, or as to any of the circumstances of the event which resulted in his death in cases in which the cause of that person’s death comes into question is admissible where the person who made it believed himself to be in danger of approaching death although he may have entertained at the time of making it, hopes of recovery."

The evidence of PW5 was thus:-

PW5 said:

"On 20/1/94 about 7.00pm I was in my house when I heard my son crying outside. I ran out where I saw my son lying down on the ground with the accused person standing by his side --- My son said to me that one Lasisi gave a spear to the accused person with which he pierced him on the chest”. (sic).

PW4 said:

On 20/1/94 I was returning from where I had gone to ease myself when I saw Sule Ajari, at his house, crying that the accused person, Adaudu Shaibu, pierced him with a spear on the chest" (sic).

Taking all the evidence as evaluated by the two Courts below who made concurrent findings the question that needs be asked as whether the burden of proof on the prosecution in proof of the guilt of the appellant in line with Section 135 of the Evidence Act 2011 had been carried out, The stipulations being thus:-

i. That the deceased had died;

ii. That the death of the deceased was caused or resulted from the act of the appellant and

iii. That the act of the appellant was intentional with the knowledge that death or bodily harm was a probable and not a likely consequence.

See alsoSule v The State (2009) 17 NWLR (pt.1169) 33 at P.53 paras. F - G; Obiakor v State (2002) FWLR (Pt.113) 299 at 309 - 310. I see no other answer except in the positive as there is no foundation on which the findings of the Courts below can be faulted. It follows therefore in keeping with the better reasoned lead judgment that his appeal lacks merit. I also dismiss it as I abide by the consequential orders made.

**KUMAI BAYANG AKA'AHS, J.S.C**.:

I read before now the draft of the judgment of my learned brother, Augie JSC and I am in full support that the appeal lacks merit and should be dismissed.

The appellant's appeal to the Court of Appeal was centered on two issues namely:-

*(1) That there were glaring contradictions in the evidence of the prosecution witnesses and on the totality of the evidence before the Court, the prosecution did not prove its case against the appellant for the offence of culpable homicide punishable with death under Section* *221(a) of the Penal Code.*

*(2) That it was not open to the learned trial judge to determine what weight to attach to the evidence of the appellant because of the inconsistency in what the appellant said in Exhibit 3 and his oral testimony in Court.*

In the judgment of Eko JCA (as he then was) at the Court of Appeal, he found that the case set up at the trial Court is one of self-defence. He said that following the principle in Amuneke v. State (1992) 6 NWLR (Pt. 217) 338 in the case of self-defence the accused relying on the plea, must first admit the facts of the commission of the offence and then assert that he had used such force on the assailant as was reasonably necessary to make the effectual defence against the assault. He went further to expatiate as follows at pages 115 - 116 of the record of appeal:-

*"The extra-judicial statement of the appellant Exhibit '3' is a categorical plea of self-defence. It is also an admission that he intentionally caused the death of the deceased to avert his own death or some grievous hurt to his person. From Exhibit '3' the question as to who or what caused the death of the deceased appears to be a non-issue.*

*However the appellant’s testimony in open Court was a complete departure from that plea of self-defence...*

*The appellant’s counsel seems to miss the substance and essence of the evidence of PW4, PW5 and PW6 read together with Exhibit '3'. The totality of the evidence of PW4, PW5 and PW6 is to prove the lie of self-defence pleaded in Exhibit 3 and sieve it from the admission of the intentional killing of the deceased by the appellant. What can be gathered from the evidence of PW4 and PW5 is that the appellant having stabbed the deceased on the chest with the sharp spear remained on hand to ensure that no one revived the deceased. The appellant from the uncontradicted and credible evidence of PW4 and PW5 had attacked and injured these witnesses with his spear as they came to the rescue of the agonizing deceased. He attacked and injured the PW4 for asking him to confirm to him (PW4) that he stabbed the deceased as the deceased crying in pain, was alleging. PW5 was attacked for attempting to lift the deceased, her son. She saw the deceased "lying down on the ground with the accused person standing by his side".*

*The appellant, in his testimony, made no effort, however feeble, to deny or contradict the evidence of PW4 and PW5. These pieces of evidence suggest admission by conduct by the appellant.*

*The PW6 is the deceased's mother. Prima facie, none would expect her to testify falsely against the son. She denied appellant's assertion that on 20th January, 1994 at 20.00 hours the deceased and others came to beat up his mother that upon his intervention they attacked him also and he had to stab the deceased in order to defend himself. PW6's evidence debunked the appellant’s plea of self-defence, pleaded in Exhibit '3' ever before the appellant testified to the contrary, and reinforced the position of the prosecution that the killing of the deceased was premeditated.*

*The law is settled that the plea of self-defence does not avail the accused in the face of evidence of premeditation. See Udo v. State (2006) 15 NWLR (Pt. 1001) 197; (2006) 7 SC (pt. II) 83 at 94. For the appellant so much fuss was made of the fact that appellant’s viva voce evidence was inconsistent with his extra-judicial statement Exhibit '3'. The appellant did not expressly retract* *Exhibit '3'. He must have realized from the evidence of PW4, PW5 and PW6 that his plea of self-defence was hopeless and would not avail him. Hence his decision to try other defences like accident in his oral testimony."*

The learned trial Judge in his judgment had dealt with the evidence of PW4, PW5 and PW6 when he stated at page 45 of the record appeal:-

*"Of all the prosecution witnesses, only the PW4, PW5 come closest to being eye witnesses. Although they did not see the accused use a spear on the chest of the deceased, they came to the scene almost immediately and the deceased told them what the accused had done to him. They saw the accused standing beside the deceased with a spear. As if to confirm what they had just heard from the deceased, the accused attacked them with his spear thus scaring them off. The evidence of the PW6, who is the mother of the accused person, completely deflated the story of the accused in Exhibit 3 that he intervened when the deceased and his brother were beating his mother and that this resulted in the scuffle which made him to attack the deceased with a spear in self-defence".*

The evidence given by PW4, PW5 and PW6 is summarised as follows:-

*PW4 testified that he met the deceased with the appellant and the deceased accused the appellant of piercing his chest with a spear. When he tried to enquire from the appellant what had happened, the appellant stroke his mouth with the spear he was holding. PW5 who is the father of the deceased said he heard the cry of the deceased and when he ran out he saw the deceased lying down on the ground and the appellant was standing by his side. He tried to lift the deceased from the ground and the appellant struck him with the spear on the hand. And PW6 who is the mother of the appellant denied that she was beaten by the deceased but by one Obo. Her evidence debunked the claim by the appellant that he met the deceased and his younger brother by name Yakubu beating his mother and so he intervened and as the appellant and his brother turned on him with charms and guns he had to use the spear in self defence.*

The learned trial Judge found that Exhibit 3 was made voluntarily and it amounts to admission of guilt, the fact that the accused retracted it notwithstanding; while the Court below found that the accused/appellant did not expressly retract Exhibit "3". He could still be convicted based on Exhibit 3.

The appellant's Notice of Appeal before this Court contained seven grounds of appeal from which the appellant distilled a lone issue for determination from grounds 1, 2, 3, 6 and 7 namely:-

*Whether the lower Court was right when it upheld the conviction of the appellant.*

The appellant is deemed to have abandoned grounds 4 and 5 since no issues were formulated from them and they are accordingly struck out.

The issue of dying declaration which is the pivot of this appeal cannot be raised in this Court without leave since it was not raised in the Court of Appeal. My learned brother, Augie JSC dealt exhaustively with the issue about dying declaration. Suffice it to say that it was unnecessary to prove the cause of death since the deceased died shortly after he was pierced on the chest with a spear and from the surrounding circumstances, it was obvious that it was the appellant who pierced his chest with the spear as Exhibit 3 clearly showed. Since his action was premeditated, self-defence which was raised in Exhibit 3 notwithstanding the retraction, could not avail the appellant.

Also the defence of accident cannot fly. Since the two lower Courts made concurrent findings which have not been shown to be perverse as to lead to miscarriage of justice, the appeal is completely devoid of merit and should be dismissed. It is on account of this and the more comprehensive reasons contained in the judgment of my learned brother, Augie JSC that I did not find merit in the appeal and accordingly dismissed it. The appeal is dismissed and the conviction and sentence of death by hanging which was passed on the appellant by Olusiyi J. on 30/6/98 and affirmed by the lower Court is further affirmed by me.

**SIDI DAUDA BAGE, J.S.C.:**

I have had the advantage of reading in draft the Lead Judgment just delivered by my learned brother, Augie, JSC. I am in complete agreement with the reasonings, and conclusion, arrived at, in the Judgment. I shall add a few words of my own in total support. The concurrent findings of fact, as was done by the two Courts below, in the instant appeal are rarely disturbed by this Court. Seldom would this Court be compelled to interfere if the findings are perverse or cannot be supported by the evidence before the Court or there is or was a miscarriage of justice or violation of some principle of law or procedure.

See UGWANYI VS F.R.N. (2012) NCC 105 at 123 paragraphs G-H, 124 paragraph 'A', CAMEROON AIRLINES vs. OTUTUIZU (2011) 1-2 SC (Pt. III) 200, ALAKIJA VS ABDULLAHI (1998) 5 S.C. 1, OLOKE VS AGBODIVA (1999) 12 S.C. (Pt. II) 101 and OGBU VS WOKOMA (2005) 7 SC (Pt. II) 123.

In the instant appeal, there is more than enough evidence established to support the concurrent findings of the two Courts below.

In the circumstance, this Court is not in the position to intervene. The appeal is thus devoid of merit, and also dismissed by me. The Judgment of the Court below upholding the trial Court's decision is also affirmed by me.