**AMADI**

**V.**

**ATTORNEY-GENERAL OF IMO STATE**

SUPREME COURT OF NIGERIA

FRIDAY, 10 FEBRUARY 2017

SC.515/2012

**LEX (2017) - SC.515/2012**

OTHER CITATIONS

2PLR/2017/41 (SC)

**BEFORE THEIR LORDSHIP**

IBRAHIM TANKO MUHAMMAD, JSC (Presided)

MARY UKAEGO PETER-ODILI, JSC

OLUKAYODE ARIWOOLA, JSC

AMINA ADAMU AUGIE, JSC

EJEMBI EKO, JSC (Read the Lead Judgment)

**BETWEEN**

DAVID AMADI – Appellant

AND

ATTORNEY-GENERAL OF IMO STATE – Respondent

**ORIGINATING COURT**

COURT OF APPEAL, OWERRI JUDICIAL DIVISION (Judgment of the Court delivered on 18 May, 2012)

HIGH COURT OF IMO STATE, OWERRI JUDICIAL DIVISION (Delivered on 28 September 2006 with A. O. H. Ukachukwu J., Presiding).

**REPRESENTATION/LAWYERS**

D. O. AGBO Esq (with him, M. O. AKOH Esq) - For the Appellant.

K. C. NWOKORIE, Assistant Director, MOJ, Imo State – For the Respondent.

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

CRIMINAL LAW AND PROCEDURE – THE OFFENCE OF ARMED ROBBERY:- Ingredients of – How established.

CRIMINAL LAW AND PROCEDURE - ATTORNEY-GENERAL OF A STATE:- Power to prosecute – When delegated – Propriety of - Section 211(1)(a), 1999 Constitution (as amended) considered.

CRIMINAL LAW AND PROCEDURE - EXTRA-JUDICIAL STATEMENT AND ORAL EVIDENCE OF WITNESS IN COURT - Conflict between - Duty of trial court to resolve - Section 232, Evidence Act, 2011 considered.

CRIMINAL LAW AND PROCEDURE - PROOF OF EVIDENCE:- Purport of tendering same in court - Section 232, Evidence Act considered.

CRIMINAL LAW AND PROCEDURE - WITNESS’S TESTIMONY:– Impeachment of – Whether may be impeached based on his extra-judicial statement

CRIMINAL LAW AND PROCEDURE – EVIDENCE:- Extra-judicial statement and oral evidence of witness in court – Conflict between - Duty of trial court to resolve – Section 232 of the Evidence Act in review

CONSTITUTIONAL LAW – JUSTICE ADMINISTRATION - ATTORNEY-GENERAL OF A STATE:- Power of prosecution of - Power to delegate - Section 211(1)(a), 1999 Constitution (as amended) considered

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - FINDINGS OF FACT BY LOWER COURT:- Where concurrent - Attitude of Supreme Court thereto.

APPEAL - ISSUE FOR DETERMINATION:– When not based on grounds of appeal - Competence of – Duty of court thereto

EVIDENCE – CREDIBILITY:- Issue of - Jurisdiction to determine - Proper court seised with - Findings based thereon - Attitude of appellate court thereto.

EVIDENCE - FACTS NOT DISPUTED:- Proper treatment of – Whether deemed proven.

JUDGMENT AND ORDERS - DECISION NOT APPEALED AGAINST - Bindingness of on the parties – Duty of appellate court thereto

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellant and two others were tried for the offence of armed robbery contrary to section 1(b) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990, before the High Court of Imo.

At the close of the prosecution’s case, the appellant testified as his sole defence witness, following the dismissal of the appellant’s no-case submission. The appellant was convicted and sentenced for the offence of armed robbery.

DECISION(S) APPEALED AGAINST

The appellant lodged an appeal against his conviction and sentence at the Court of Appeal. The appeal was heard and in its unanimous judgment, the Court of Appeal dismissed the appeal of the appellant and affirmed both the conviction and sentence by the trial High Court.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

i. Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.

ii. Whether the learned justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eyewitness account of the victim, PW1 was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (ground one of the appeal).

iii. Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law?

*BY RESPONDENTS*

[The Respondent adopted the issues as formulated by the Appellant’s Counsel]

BY THE COURT

Court nullified as incompetent issue (i) of the Appellant and resolved the appeal based on the remaining issues viz:

ii. Whether the learned justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eyewitness account of the victim, PW1 was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (ground one of the appeal).

iii. Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law? The notice of appeal, at pages 257 - 260 of the records has three (3) grounds of appeal. Issues 2 and 3, reproduced above, have been formulated from the 3 grounds of appeal.

DECISION OF SUPREME COURT

1. Issue one formulated by the Appellant is incompetent as it was raised in vacou, having been raised and argued from none of the ground of appeal before the Court.

2. it is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon (on) the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called. The prosecution has made out its case.

3. Appellant contended that the extra-judicial statement of the PW1 discredited his testimony before the court. However, if the appellant had desired to impeach the credit of PW1 with the previous statement he would have followed the procedure and put in evidence the previous statement in writing. He must, under the Evidence Act, section 199 of the 1990 (Now section 232 of the Evidence Act, 2011), draw the attention of the witness to his previous statement in writing and thereafter tender it in evidence for purposes of contradicting the witness. The previous statement in writing made by the PW1 on 3 May 1998 is not in evidence. The appellant, therefore, cannot smuggle the contents of that statement by oral evidence. The court cannot also speculate on the content of a document not before it. The proofs of evidence, like in pleadings in civil proceedings, are themselves not evidence, The averments therein must be proved. Proofs of evidence, or any portions thereof, can only be used to contradict or impeach the credibility of a witness after due compliance with the procedure set out in section 209 of the Evidence Act, 2004, in pari materia with sections 199 and 232 respectively of the Evidence Acts, 1990 and 2011 respectively.

4. The issue at the trial court and at the Court of Appeal is whether the available evidence proved the offence of armed robbery that the appellant was convicted and sentenced for. In the concurrent findings of the two courts below there was no doubt the respondent had proved those ingredients. There is nothing perverse about these findings of fact.

5. An Attorney-General can delegate his powers to officers of his Ministry to prosecute and defend matters in court on his behalf, be it criminal or civil. It is therefore within that province that the law officers of the State can decide in the public interest in a given case who should be charged and with what offence. Therefore the courts take it for granted that if the Director of Public Prosecution has started prosecution, he has done so in accordance with the instruction given him by the Attorney-General and it is in that wise that any law officer can sign an information on behalf of the DPP. It follows that it is not for the court or any party to begin fishing into the internal working of the Ministry of Justice to see whether such an instruction has been given and information is accorded validity.

**MAIN JUDGEMENT**

EKO JSC: (DELIVERING THE LEAD JUDGMENT:

On the charge No. HOW/ART/11/99, the appellant and two others were tried for the offence of armed robbery contrary to section 1(b) of the Robbery and Firearms (Special Provisions) Act, Cap 398, Laws of the Federation of Nigeria, 1990, before the High Court of Imo State presided by J.O.H. Ukachukwu J. The prosecution commenced evidence on 29 October 1999. Before then, the appellant had on 31 August 1999 pleaded not guilty to the charge amended at the instance of E. E. Ibe, Senior Legal Officer, prosecuting officer on behalf of the Attorney-General of Imo State. The charge, at page 20 of the records, was substituted by leave of court, as can be gleaned from page 31 of the records.

At the close of the prosecution’s case, the appellant testified as his sole defence witness, following the dismissal of the appellant’s no-case submission on 27 April 2004. On 19 June 2000, the learned trial judge, after hearing final addresses of the parties, adjourned the proceedings to 28 September 2006. The appellant was convicted and sentenced for the offence of armed robbery. On 8 November 2006, the appellant lodged his appeal against his conviction and sentence to the court below. The appeal was heard by the court below sitting at Owerri. The court below, in its unanimous judgment delivered on 18 May 2012, dismissed the appeal of the appellant and affirmed both the conviction and sentence by the trial High Court relating to the appellant. This further appeal has arisen from the said decision of the Court of Appeal, Owerri dismissing the appellant’s appeal. On 17 November 2016, this court heard this appeal. The appellant’s counsel and the respondent’s are ad idem on the three issues formulated by the appellant’s counsel for the determination of this appeal. The issues are:

i. Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.

ii. Whether the learned justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eyewitness account of the victim, PW1 was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (ground one of the appeal).

iii. Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law? The notice of appeal, at pages 257 - 260 of the records has three (3) grounds of appeal. Issues 2 and 3, reproduced above, have been formulated from the 3 grounds of appeal.

Now, the question: from which ground of appeal has issue 1 been formulated or arisen? I cannot see any. And it is crystal clear, ex facie issue 1, that the said issue 1 has not arisen from any ground(s) of appeal against the decision of the Court of Appeal, the appellant is complaining against. It is now settled beyond question that any issue raised and argument advanced on an issue not arising from a ground of appeal is incompetent. See Okpala v. Ibeme (1989) NWLR (Pt. 102) 208; Osinupebi v. Saibu (1982) 7 SC 104 at pages 110 - 111. Issues for determination of appeal are not, in appellate courts, formulated from the clouds or nowhere. See Iheanacho v. Ejiogu (1995) 4 NWLR (Pt. 389) 324; Port Harcourt City Local Government Council v. Ekeoha (2008) All FWLR (Pt. 422) 1174 at page 1192. The law and practice in the appellate courts, are now well settled that issues for determination are formulated from and on the basis of the grounds of appeal filed.

An issue formulated must therefore not only relate to the grounds, it must fall within the existing ground(s) of appeal challenging the correctness of the judgment appealed. See Modupe v. State (1988) 4 NWLR (Pt.57) 131; Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566, (1989) 2 SCNJ 956; Akinbinu v. Oseni (1992) 1 NWLR (Pt. 215) 97, (1992) 23 NSCC (Pt. 1) 22; Bamgbose v. Olanrewaju (1991) 4 NWLR (Pt. 184) 132 at page 152, (1991) 22 NSCC (Pt. 1) 501; Labiyi v. Anretiola (1992) 2 NWLR (Pt. 258) 139, (1992) 10 SCNJ 1. An issue raised in vacou, or which has been raised and argued from no ground of appeal is not only incompetent, it is completely irrelevant and extraneous. It is for this reason that this court maintains the stance or policy that an issue raised or formulated from nowhere or no ground of appeal must certainly be discountenanced. See Akinbinu v. Oseni (supra).

The totality of all I have been saying, so far, is that issue 1, raised and argued by the parties, particularly the appellant, being incompetent and irrelevant must be and it is hereby struck out and all arguments in relation thereto are discountenanced.

The main thrust of Issue 2 is whether the evidence of the PW1; as an eye-witness, was unchallenged and uncontradicted and therefore reliable and believable to have been acted upon, as the learned trial judge did. The Court of Appeal had unanimously affirmed the conviction and sentence of the appellant on the basis of the eye-witness account of the PW1, which the trial court found reliable and sufficiently credible to sustain the conviction of the appellant. That court further found that the evidence of PW1 was corroborated by the evidence of the PW2, even though there is nothing in law which obliged the trial court “to find further corroboration to the eye-witness account of the PW1 which had already fixed the appellant with the crime”. Relying on Okoro v. State (1998) 14 NWLR (Pt. 584) 181 at page 216; Adelumola v. State (1988) 1 NWLR (Pt. 73) 683 at 691, (1988) 1 NSCC 456, (1988) 3 SCNJ (Pt. 1) 68Anthony Igbo v. State (1975) 1 All NLR (Pt. 2) 70 at page 75, (1975) 9-11 SC 129; Ali & Anor. v. State (1988) NWLR (Pt. 66) 1, (1988) All NLR 11 and Emine v. State (1991) 7 NWLR (Pt. 204) 480; the Court of Appeal opined, correctly in law, that no law says that an accused person can be convicted on the clear and unimpeachable evidence of a single witness, and such evidence does not require corroboration. I agree entirely. The appellant’s counsel also concedes this lucid position of the law. Appellant, however argues that “the eye-witness account of PW1 was tainted with doubts which ought to have been resolved in favour of the appellant”. Counsel appears to labour heavily under some misconception in his argument, that even though in proof of the ingredients of crime, the prosecution is not obliged to call a host of witnesses, and that, however; where there are vital witnesses; the failure to call those vital witnesses could weaken the case of the prosecution as it could create reasonable doubt. Isa v. State (2010) 16 NWLR (Pt. 1218), relied heavily for this robust submission, does not repudiate the age old principle that an accused can be convicted on a clear and unimpeachable evidence of a single witness, unless such witness or his evidence needs to be corroborated as a matter of law. The prosecution, where there is no requirement of corroboration as a matter of law, does not need to call a host of witnesses once the credible evidence of a single witness proves all the ingredients of the offence charged. There would only be need to call more witnesses whose evidence would sway the court if, and only if, the available evidence does not conclusively prove the ingredients of the offence charged.

The appellant’s counsel had called in aid State v. Azeez & Ors. (2008) 14 NWLR (Pt. 1108) 451; also reported elsewhere as (2008) 4 SC 188, (2008) 3 FWLR 4567 SC as booster to his submission that if all the vital or material witnesses are not called by the prosecution the case is doomed to fail. I am afraid this does not represent the ratio decidendi of State v. Azeez (supra). The decision of this court on this point, per M. D. Muhammad JSC in the State v. Azeez (supra), is that in discharge of the burden of proving a crime beyond reasonable doubt placed by section 138 (1) of the Evidence Act 1990 (now section 135(l) of the Evidence Act, 2011):

“it is the duty of the prosecution to see that it places before the trial court all available relevant evidence. This may not mean that a whole host of witnesses must be called upon (on) the same point, but it does mean that if there is a vital point in issue and there is one witness whose evidence would settle it one way or the other, that witness ought to be called”.

The “Judge” of whose evidence establishes or proves that vital point is the prosecutor. The court will not usurp that function of the prosecutor. All the court, as the final arbiter, is interested in is whether the available evidence proves the vital point- Usufu v. State (2007) 1 NWLR (Pt. 1020) 94 at 118, (2008) All FWLR (Pt. 405) 1731, paragraphs C-E cited by the appellant, which also held that although the prosecution need not call a host of witnesses on the same point, where there is a vital point in issue and there is a witness whose evidence will settle it one way or the other that witness ought to be called, does no riot to the settled principle of law.

Notwithstanding the strenuous efforts expended on the argument that the evidence of PW1 needed corroboration before it could be acted upon, the appellant’s counsel never once criticized the concurrent findings of fact by the courts below that the evidence of PW1 and PW2, which the learned trial Judge had believed and acted upon, do not need any corroboration. This is contained in the opinion of Owoade JCA at page 249 of the record. Where the two courts below have made concurrent findings of fact, which has not been shown to be perverse in any respect, such findings must endure. This court is loathe to interfere in such situation; particularly when the findings are supported by evidence in the printed record and the findings are not perverse. See Ogoala v. State (1991) 2 SCNJ 61, (1991) 2 NWLR (Pt. 175) 509; Ogundiyan v. State (1991) 4 SCNJ 44, (1991) 3 NWLR (Pt. 181) 519.

Appellant’s learned counsel submits that the extra-judicial statement of the PW1 made on 3 May 1998 does discredit his testimony particularly that at the earliest opportunity the PW1 failed or refused to mention the names of his assailants. He, however, concedes that this previous statement of the PW1 is not in evidence. If the appellant had desired to impeach the credit of PW1 with the previous statement he would have followed the procedure and put in evidence the previous statement in writing. He must, under the Evidence Act, section 199 of the 1990 (Now section 232 of the Evidence Act, 2011), draw the attention of the witness to his previous statement in writing and thereafter tender it in evidence for purposes of contradicting the witness. The previous statement in writing made by the PW1 on 3 May 1998 is not in evidence. The appellant, therefore, cannot smuggle the contents of that statement by oral evidence. The court cannot also speculate on the content of a document not before it. The proofs of evidence, like in pleadings in civil proceedings, are themselves not evidence, The averments therein must be proved.

Appellant’s counsel, trying to wriggle out of the mess, submits on authority of Agbareh v. Mimra (2008) All FWLR (Pt. 409) 559, (2008) 2 NWLR (Pt. 1071) 308 at pages 411 - 412 and Agbo v. State (2006) All FWLR (Pt. 309) 1380 of pages 1409 - 1410, (2006) 6 NWLR (Pt. 977) 545 that “a court is entitled to look at a document or documents in its file including the record of appeal before the court”. This principle does not entitle the court to descend into the arena and scoop for vital evidence that would discredit or impugn the credit of a material witness for one party. Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999, as amended, enjoins every court of law to be independent and impartial). On this note, it is my firm view that the failure of the appellant to put in evidence, the written statement of the PW1 dated 3 May 1998 is fatal to their contention now that the said statement has the effect of discrediting, and had in fact discredited the PW1. The case of Udobere v. State (2006) 6 SC 1 at 10, cited by the appellant’s counsel is of no moment. It does not advance nor support their present stance. In the Udobere case (supra) the extra-judicial statement of the PW2, which discredited her evidence, was before the trial court and in the admitted evidence. It is trite that the decision of a court of law on any disputed point or fact must be on evidence legally before it. Accordingly, a fact neither in the body of the legal evidence nor forming part of the legally admitted evidence cannot be used to contradict any evidence validly before the court. See State v. Ogbubunjo (2001) FWLR (Pt. 37) 1097 at pages 1115-1116, (2001) 2 NWLR (Pt. 698) 576 at pages 598 - 599. It is not permissible for courts of law to act on facts extraneous to the proceedings, which though may be relevant.

Appellant’s counsel, on the concurrent finding of fact that the evidence of the PW1 had pinned and fixed the appellant to the scene of crime, submits that the concurrent findings are perverse. He further submits that it is not enough, without proper evaluation, for the courts to believe the PW1 on this - relying on Hamza v. Kure (2010) All FWLR (Pt. 539) 1070 at page 1087, (2010) 10 NWLR (Pt. 1203) 630. Learned counsel submits further that when a decision is perverse, the appellate court can intervene in the interest of justice and set it aside. That undoubtedly is the law. See Nepa v. Ososanya (2004) All FWLR (Pt. 196) 908, (2004) 5 NWLR (Pt. 867) 601, (2004) 1 SC (Pt. 1) 159 at page 175; Agbomeji v. Bakare (1998) 9 NWLR (Pt. 564) 1, (1998) 7 SC (Pt. 10) 10. It is however not enough for a party to assert that the judgment of a law court which enjoys the presumption of regularity by dint of section 150 Evidence Act, 1990. (now section 168 of Evidence Act, 2011), is perverse. He must show how the decision is perverse. The basic rule is, he who asserts must prove.

The issue at the trial court and at the Court of Appeal is whether the available evidence proved the offence of armed robbery that the appellant was convicted and sentenced for. As submitted by the respondent, all that the prosecution needed to succeed in this case is proof -

“i. that theft was committed by the appellant of something;

ii. that in the course of the theft wrongful hurt or wrongful restraint was meted to the victims, owners of the thing stolen, by the accused person, and

iii. that the acts complained of were done in the process of committing theft or in order to commit theft and/ or carry away the property by theft’’.

See Abdullahi v. State (2008) All FWLR (Pt. 432) 1047, (2008) 15 NWLR (Pt. 1115) 203, (2008) 16 LCRN 96. In the concurrent findings of the two courts below there was no doubt the respondent had proved these ingredients of armed robbery for which the appellant was convicted and sentenced with the evidence of PW1, PW2 and PW3. There is nothing perverse about these findings of fact.

Issue 2 is accordingly resolved against the appellant. The appellant contends, under issue 3, that notwithstanding that the prosecution at the trial court did not prove beyond reasonable doubt the offence of armed robbery against the appellant, as the law requires there to, the conviction of the appellant was affirmed by the court below. The basis for this contention is that the PW1’s extra-judicial statement made on 3 May 1998 at the Police Station had discredited the witness (PW1). The PW1 was cross-examined and this reply on that statement is:

“I know 1 mentioned the name of the accused (appellant) unless police did not write it down. The statement was read over to me after it was made. I signed the statement”.

Appellant’s learned counsel submits that the failure of the PW1, at the earliest opportunity, to mention the name of the appellant to the police officers and in the written statement he had made at the police station has raised serious doubt whether the PW1 ever mentioned the name of the appellant on 3 May 1998. The extra-judicial written statement of the PW1 forms part of the proofs of evidence, and it is at page 24 of the records of appeal. Counsel made similar submissions at the trial court as can be seen at pages 129 and 130 of the record. The statement was not tendered in evidence. The appellant had the opportunity to have tendered it in evidence for the purpose of contradicting the PW1 and thereby impeaching his credibility. They however never did so.

The law, as re-stated by Madarikan JSC in Oseni v. Attorney-general SC. 202/1968 decided on 16 July 1969, (see Digest of Supreme Court cases, Vol. 10 at page 166) where there is a conflict between the written statement made to the police by a witness and his oral evidence in court, the trial judge ought to resolve such conflict before deciding whether to accept the witness’s evidence or not. To do that resolution between the extra-judicial statement and the oral evidence both have to be legal evidence before the court. In other words by dint of section 209 of Evidence Act, 1990 in pari materia with section 199, Evidence Act, 2004 (now section 232 of the Evidence Act, 2011), the said previous statement in writing has to be, or must be, produced for the trial court’s inspection, before “the court may thereupon make use of it far the purposes of the trial.”

In all the cases where the previous written statement of the witness, made extra-judicially by him, was held to be a contradiction of his testimony in court, the previous statement was produced for inspection of the trial court and was duly admitted in evidence as exhibit. In Oladejo v. State (1987) 4 SC 96, (1987) 3 NWLR (Pt.61) 419, the extra-judicial statements of the witness which contradicted his testimony on oath were produced and admitted in evidence as exhibits B and D. Emoga v. State (1997) 1 NWLR (Pt. 48) 615, the appellant’s extra-judicial statement, Exhibit A, was produced and admitted in evidence in the course of his being cross-examined to show his inconsistency. In Obiri v. State (1997) 7 NWLR (Pt. 513) 352, Sunday v. State (2010) 18 NWLR (Pt. 1224) 223 at page 241.

Proofs of evidence, or any portions thereof, can only be used to contradict or impeach the credibility of a witness after due compliance with the procedure set out in section 209 of the Evidence Act, 2004, in pari materia with sections 199 and 232 respectively of the Evidence Acts, 1990 and 2011, which provides:

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

It is only by this procedure that the credibility of a witness whose previous statement in writing, which forms part of the proofs of evidence, contradicts his testimony in court can be impeached. See Samuel Theophilus v. State (1996) 1 SCNJ 79, (1996) 1 NWLR (Pt. 423) 139. A court of law, not being a Don Quixote, cannot in the course of doing justice, go all out on its own to scoop from the proofs of evidence, facts which discredit a witness called by a party. The proofs of evidence are not themselves pieces of judicial or legal evidence on which the court of law acts on. The proofs of evidence contain the statements or abridged statements made extra-judicially to the police or the investigator by the complainant, witnesses and/or the accused person which prima facie sustain the charge or the allegation against the accused person. For purposes of audi alteram partem, proofs of evidence give the accused person notice of the case he is going to meet at the trial. See S. T. Hon: The Law of Evidence in Nigeria and also the Court of Appeal adoption of the definition in Ibekwe v. F.R.N. (2004) All FWLR (Pt. 213) 1780; Godwin Pius v. State (2012) LPELR - 9304 CA, (2013) All FWLR (Pt. 689) 1176.

The proofs of evidence, contrary to the submission of appellant’s learned counsel, are not themselves judicial or legal evidence. When any portion of the proofs or the previous statement of a witness is tendered in evidence pursuant to section 200 of the Evidence Act, 2004 (in pari materia with section 232 of the 2011 of the Evidence Act), the purpose is merely being cross-examined, and not that it is evidence of the truth of the matters asserted in them. See Samuel Theophilus v. State (supra).

In any case, the issue being over flagged here by the appellant’s learned counsel is one of the credibility of the PW1. This Court has stated in Udofia v. DPP - SC.64/1984 of 7 December 1984, (see Digest of Supreme Court cases Vol. 10 pages 566-567) that issues of credibility should be left to the Judge who saw, heard and believed the witness and that generally an appellate court is bound by the findings of the trial court especially when the findings relate to credibility of witnesses. The flaw in the stance of the appellant’s learned counsel before us is the fact that the previous statement of the PW1, in writing dated 3 May 1998 which he relies on to make these submissions on the credibility of the PW1 viz-a-viz his oral evidence in court, is not any piece of evidence in law that the court can act on. It is left inchoate in the proofs of evidence. It is for this reason that Owoade JCA, who read the lead judgment stated at page 252 of the record that “proof of evidence is to criminal trials what pleadings (are) to civil trial”. The pleadings themselves are not evidence but averments which must be proved by evidence. I find no criticism by the appellant against this valid statement of law. In adjudication, sentiments command no place. Accordingly in adjudication what is material and relevant is legal evidence in the proceedings of the court and not facts that are completely extraneous. Facts not disputed are taken as established. At page 252 of the records the Court of Appeal finds specifically that “the statement of PW1 at page 38 of the records that he mentioned the name of the appellant in his statement to the police at Imo on 3 May 1998, at the Police station except the police did not write it down was positive and consistent reaction, to cross-reaction of PW1” and “that (the) statement did not indicate any inconsistency with either his evidence-in-chief or his previous statement on the issue”. This specific finding of fact has not been appealed or attacked. The law is trite that a conclusion or finding not appealed is deemed correct and acceptable to all the parties. See Biariko v. Eden-Ogwuile (2001) 4 SC (Pt. 2) 96; Iyoho v. Effiong (2007) All FWLR (Pt. 374) 204, (2007) 11 NWLR (Pt. 1044) 31; Usman v. Garke (2003) FWLR (Pt. 177) 815, (2003) 14 NWLR (Pt. 840) 261. Apart from the general attack on the credibility of , PW1, on the basis of the PW1’s extra-judicial statement of 3 May 1998, there was no specific attack or criticism of the above finding of fact by the Court of Appeal by the appellant’s counsel. The stance of Owoade JCA, as I earlier pointed out, is consistent with the dictum of Coker JSC, and Karibi-Whyte JSC, in Ajao v. State (1984) NSCC 783 at pages 785 and 789 respectively to the effect that a witness, who at the trial gives details of the contents of his statement to the police, cannot be said to have given inconsistent evidence.

The law is that when there appears to be some inconsistency between the oral evidence of the witness and his previous statement in writing, the witness is required to explain the inconsistency in his evidence. See Agwu v. State (1965) NMLR 18 at 20. The PW1 at page 38 made the required explanation; and the Court of Appeal affirmed it. The PW1 at the trial gave explanation for what was not in his extra-judicial statement. The trial court found his testimony credible, so also the intermediate court. The issue now is one of credibility which the trial court is the best and the undisputed Judge. See Nasamu v. State (1979) 6 - 9 SC 153 at page 181. l find no merit or substance in this third issue argued for the appellant by his counsel. This appeal has no substance and it is hereby dismissed in its entirety by me. The conviction and sentence of the appellant contained in the judgment of the trial court in the case No. HOW/ART/1199 delivered on 28 September 2006, and the judgment of the Court of Appeal, Owerri Division in the appeal No. CA/PH/417A/2007 delivered on 18 May 2012 affirming the said conviction and sentence of the appellant are hereby affirmed by me.

Appeal dismissed.

**MUHAMMAD JSC:**

My learned brother, Eko JSC, permitted me to read before now a draft of the judgment just delivered. I agree with my lord’s reasoning and conclusion which I adopt. I abide by consequential orders made therein.

**PETER-ODILI JSC:**

I am in agreement with the judgment, just delivered by my learned brother, Ejembi Eko JSC and to register my support for the reasonings, I shall make some remarks.

This is an appeal against the judgment of the Court of Appeal Port Harcourt Division delivered on 18 May 2012 which said judgment affirmed the conviction and sentence of the appellant.

Background facts:

The appellant and two other persons were tried for the offence of armed robbery by the High Court Imo State, Owerri Judicial Division Coram: A. O. H. Ukachukwu J. The appellant pleaded not guilty to the charge and hearing commenced with Vitalis Abaneke testifying as PW1 as victim of the crime with PW2 and PW3, the Investigating Police Officer and Medical Doctor respectively giving evidence with the medical doctor testifying of treating PW1 for injuries.

The appellant denied the commission of the offence and raised an alibi in the dock for the first time during trial which the court rejected as belated. In the end, the trial court convicted and sentenced the appellant to death. His appeal to the Court of Appeal was dismissed and so appellant has come before this court on appeal. D. O. Agbo, learned counsel for the appellant on 17 November 2016, date of hearing adopted appellant’s brief filed on 30 September 2013 and deemed filed on 28 May 2014. In the brief were raised three issues for determination which are thus:

1. Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.
2. Whether the learned Justices of the Court of Appeal were right to have affirmed the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eyewitness account of the victim (PW1) was unchallenged, uncontradicted and was sufficiently credible to ground the conviction of the appellant (Ground one of the appeal).
3. Whether the prosecution proved beyond reasonable doubt the offence of armed robbery against the appellant as required by law. (Grounds two & three of the appeal). K. C. Nwokorie Esq. Assistant Director, ADR Department of the Ministry of Justice, Imo State, counsel for the respondent adopted its brief of argument filed on 10 June 2014 and also adopted the issues as identified by the appellant.

I shall make use of the issues as crafted, though utilising issues 1 and 3 as they are questions best suited for the determination of the offence.

Issue No. 1:

Whether a charge initiated and signed by an unidentified law officer is competent to activate the jurisdiction of the trial court to entertain it.

Mr. Agbo of counsel for the appellant submitted that there is a fundamental defect in the legal process initiating the charge against the accused/appellant as the information was not signed by a law officer whose name can be ascertained or identified on the roll of register of legal practitioners entitled to practice law in Nigeria. He cited sections 2 and 4 of the Criminal Procedure (miscellaneous Provisions) Edict, 1974; section 2(1) of the Legal Practitioners Act Cap. 207 Laws of the Federation of Nigeria, 1990 (as amended); Okafor v. Nweke (2007) All FWLR (Pt. 368) 1016, (2007) 1 NWLR (Pt. 1043) 521 at 533 etc.

That a court process which information is one, must only be signed by a legal practitioner known to law and where a person signs a process without disclosing his name, designation and office as in this case, such a process is grossly incompetent. Learned counsel contended that if a process is incompetent, the court is also incompetent and lacks the jurisdiction to entertain it. He cited S.L.B Consortium Ltd v. Nigerian National Petroleum Corporation (2011) All FWLR (Pt. 583) 1902, (2011) 9 NWLR (Pt. 1252) 317 at pages 337-338; Nwanna v. UBA Plc (2003) 16 NWLR (Pt. 846) 218.

Mr. Nwokorie, learned counsel for the respondent reacted by submitting that the information was initiated by the Attorney General of Imo State and so the process was commenced within the stipulations of the enabling statutes. He cited section 211(1) (a) of the 1999, constitution of the Federal Republic of Nigeria, sections 2(3) and (6)(1) of the Legal Practitioners Act; Sections 341 and 342 of the Criminal Procedure Law, 1963, Eastern Nigeria as applicable to Imo State of Nigeria; Ezomo v. AttorneyGeneral, Bendel State (1986) 4 NWLR (Pt. 36) 448, (1986) 2 NSCC 1154; State v. Ilorin (1983) 1 SCNLR 14 etc.

In a nutshell, the appellant posits that the information on which he was charged, signed by an unidentified law officer is fundamentally defective as it robs the trial court of the jurisdiction to entertain it or in the alternative to discharge and acquit the appellant.

The respondent’s position from the other side is that the issue of lack of competence of the charged initiated by an unidentified law officer is belated and there is no infraction of the Criminal Procedure Laws, specifically section 167. In the instance, the information was initiated by the Attorney General of Imo State under powers donated to him by section 211(1) (a) of the 1999 Constitution of the Federal Republic of Nigeria within his powers, the Attorney-General is authorised to have those prosecutorial powers exercised by officers under his office or any counsel he so assigns by fiat. Therefore, when such assignments or delegation take place, the office of the Attorney-General is taken as having performed its constitutional duty and it is not for anyone to go into the minute details of which officer is holding the forth on behalf of the Attorney General. The provisions of section 211(1) (a) of the 1999 Constitution of the Federal Republic of Nigeria are restated hereunder, viz: Section 211(1) (a) of the 1999 Constitution of the Federal Republic of Nigeria relating to public prosecution provided that:

“The Attorney-General of a State shall have the power to initiate and undertake criminal proceedings against any person before any court of law in Nigeria other than a court martial in respect of any offence created under any law of the House of Assembly.”

It is in the light of what has been constitutionally provided for the Attorney-General of a State that the Attorney-General can so delegate his powers to officers of his Ministry to prosecute and defend matters in court on his behalf, be it criminal or civil. It is therefore within that province that the law officers of the State can decide in the public interest in a given case who should be charged and with what offence. Therefore the courts take it for granted that if the Director of Public Prosecution has started prosecution, he has done so in accordance with the instruction given him by the Attorney-General and it is in that wise that any law officer can sign an information on behalf of the DPP. It follows that it is not for the court or any party to begin fishing into the internal working of the Ministry of Justice to see whether such an instruction has been given and information is accorded validity. See M.U.D. Ezomo v. Attorney-General, Bendel State (1986) 4 NWLR (Pt. 36) 448, (1986) 2 NSCC 1154; Shittu Layiwola & Ors. v. Queen (1959) 4 FSC 119 at page 120; Abacha v. State (2002) FWLR (Pt. 118) 1224, (2002) 11 NWLR (Pt. 779) 437; Christopher Awobotu v. State (1976) SC. 49, (1976) 1 ALL NLR (Pt.1) 292, (1976) I.U.I.L.R. (Pt. 1) 5 at pages 18-20; Onwuka v. State (1970) 1 All NLR 164.

This issue here raised is clearly on the area of the hypothetical and academic as no useful purpose can be served where the court has to first satisfy itself that the information that is said to have emanated from the Attorney-General has truly come from there or has got the authority of the Attorney-General or that the personnel who has signed the information or charge from the law office of the Attorney is really so authorised and what his full names are.

Section 167 of the Criminal procedure Law, Cap. 31, Vol. 31, Laws of Eastern Nigeria, 1963 applicable to Imo State stipulates thus:

“Any objection to a charge for any formal defect on the face thereof shall be taken immediately after the charge has been read out to the accused and not later.”

The interpretation of that provision has been stated again and again to say that the adoption of a wrong method in laying an information at the High Court does not invalidate the charge once it is evidence what the intendment of the Attorney-General is. What is important is that, the accused knows the charge or charges he is faced with or in other words not in doubt why he is in court. I place reliance on the cases of Okaroh v. State (1990) 1 NWLR (Pt. 125) 128, (1990) 1 SCNJ 124; Magaji v. Nigerian Army (2008) All FWLR (Pt. 420) 603, (2008) 8 NWLR (Pt. 1089) 338, (2008) 5 SCM 126; Abacha v. State (2002) FWLR (Pt. 118) 1224, (2002) 11 NWLR (Pt. 779) 437.

For effect this court in the case of: Olatunbosun v. State (2013) 34 WRN 1, (2013) 17 NWLR (Pt.1382) 167, (2013) 55 NSCQR 702, held thus:

“It is on record that the appellant was arraigned and he pleaded not guilty to the one charge of murder with the particulars of the offence clearly read out to him. As rightly submitted by the learned respondent’s counsel, therefore, the appellant no doubt knew that he was facing the charge of murder which was also very well known to his counsel. It is sufficient to further state that the appellant was throughout the time of the trial represented by a counsel. Neither himself nor his counsel raised any objection that he could not been charged under section 319(1) of the Criminal Code”. See also Nnakwe v. State (supra) P. 1 at pages 33, 34-35.

The concern herein raised on a defective charge is otiose, belated and goes to no issue. This issue 1 is resolved against the appellant.

Issues 2 & 3:

These questions whether the Court of Appeal was right to affirm the conviction and sentence of the appellant by the trial court for the offence of armed robbery on the basis that the eyewitness account of PW1 was unchallenged, uncontradicted and sufficiently credible to ground the conviction of the appellant.

Also if the prosecution proved its case beyond reasonable doubt. Learned counsel for the appellant contended that it was essential that the family members who knew the appellant and witnessed the incident should have been called to testify. That the failure to call any of the members of PW1’s family particularly the wife and eldest son, Pascal was fatal to the prosecution’s case. He cited State v. Azeez (2008) 14 NWLR (Pt. 1108) 451, (2008) 4 SC 188, (2008) 3 FWLR 4567.

That the finding of the two courts below that the evidence of PW1 pinned down the appellant to the scene of crime is perverse and occasioned a miscarriage of justice which calls for the intervention of this court. He relied on Hamza v. Kure (2010) All FWLR (Pt. 539) 1070 at page 1087, (2010) 10 NWLR (Pt. 1203) 630; Nepa v. Ososanya (2004) All FWLR (Pt. 196) 908, (2004) 5 NWLR (Pt. 867) 601, (2004) 1 SC (Pt. 1) 159 at page 175; Agbomeji v. Bakare (1998) 9 NWLR (Pt. 564) 1, (1998) 7 SC (Pt. 10) 10.

That the prosecution did not prove the offence of armed robbery against the appellant beyond reasonable doubt. That PW1 made a statement at the police station in Ibo language the very day of the incident, but under cross-examination in court he said he knew he mentioned the name of the appellant unless the police did not write it down and yet he signed the statement.

He did not protest that omission and so this created a doubt which should be resolved in favour of the appellant. He cited Galadima v. State (2012) 18 NWLR (Pt. 1333) 610 at 631, (2012) 12 MJSC (Pt. 111) 190, (2013) All FWLR (Pt. 667) 630; Udobere v. State (2006) 6 SC 1 at 6.

Learned counsel for the respondent said from the record of appeal it is obvious that the two courts below exhaustively appraised, assessed and evaluated the evidence proffered by the prosecution and defence and made findings of fact before reaching their decisions. He stated that there is no legal obligation on the prosecution to call a host of witnesses to prove its case so long as the prosecution has called enough material witnesses to prove its case and it has the discretion to so do. He referred to Nigerian Air Force v. Obiosa (2003) FWLR (Pt. 148) 1224, (2003) 4 NWLR (Pt. 810) 233, (2003) SCM 113 at page 117; State v. Olatunji (2003) FWLR (Pt. 155) 695, (2003) 13 NWLR (Pt. 839) 57 at page 151-152 etc.

That the alibi raised by the appellant collapsed with the positive evidence of the prosecution which pinned the appellant at the scene of crime. He cited Adekunle v. State (1989) 5 NWLR (Pt. 123) 505, (1989) 12 SCNJ 184.

The Court of Appeal in a judgment which lead was rendered by Owoade JCA stated as follows:

“Again, the statement of PW1 at page 38 of the record that he mentioned the name of the appellant in his statement to the police except the police did not write down was a positive and consistent reaction to cross- examination by PW1. That statement did not include any inconsistency with either his evidence-in-chief or his previous statements on the issue.

Finally, on this score, proof of evidence is to criminal trials what pleadings is to civil trials. The proof of evidence in a criminal trial does not have to obtain every bit of evidence that prosecution requires as long as it contains relevant and sufficient facts to sustain the case of the prosecution.

In the instant case, the non-inclusion of the statement first made to the police at Iho by PW1 in the proof of evidence does not derogate from the facts proved by the prosecution in the case. On the whole, I agree with the learned counsel for the respondent that the prosecution proved all the ingredients of the offence of armed robbery against the appellant by the evidence of PW1, PW2 and PW3.

In particular, the prosecution succeeded in case to prove:

(i) Theft by the accused person(s);

(ii) The causing of hurt or wrongful resistant on the victims by the accused person(s);

(iii) The act(s) complained of were done in the process of committing the theft or in order to commit the theft and or carry away the property by theft. What the court below did tallied with the findings and conclusion of the learned trial judge. And on concurrent findings of the two courts below and with the pride of place of the trial court in its unique position, this court had this to say in Arum v. Nwobodo (2004) 9 NWLR (Pt. 878) 411, (2005) All FWLR (Pt. 246) 1231, (2004) 54 NSCQR (Pt. 11) 894-895.

The trial court has the best opportunity of seeing the witness and hearing them give evidence; the court was best placed to assess such evidence based on the demeanour of each witness. The appellate court has not got these opportunities. It only sees written records and counsel who are not legal witnesses. And so, when the Court of Appeal agreed with the findings of fact made by the High Court and affirmed the conviction and sentence of the appellant, the attitude of this court is clear. The concurrent findings of fact of the courts below will never be disturbed so far as the findings are not tainted with miscarriage of justice.”

The Supreme Court is not in the habit of interfering with concurrent findings of two lower courts where there is no reason such as perversity leading to those findings and in that regard those findings remain untouched. See Usman v. State (2014) All FWLR (Pt. 713) 1929; Jimmy v. State (2013) 18 NWLR (Pt. 1386) 229, (2014) All FWLR (Pt. 714) 103.

The appellant’s posture is that inspite of the evidence of PW1, victim of the incident, his wife and children ought to have been called for the proof to be rock solid. That stance flies off the handle in view of not only the evidence of PW1, there were those of PW2 and PW3 from which the trial court as affirmed by the court below could see that the alibi of the appellant not only failed but the appellant was pinned to the scene of crime and actively participated in the commission of the offence. This apart from the fact that the said alibi was not set up at the earliest opportunity when first confronted by the police instead of what he did herein raising the alibi in the witness box and called no witness. See Adekunle v. State (1989) 5 NWLR (Pt. 123) 505, (1989) 12 SCNJ 184.

In conclusion, from the foregoing and the fuller reasoning of my learned brother, Ejembi Eko JSC, I am satisfied that the concurrent findings are well in order and there being no basis for interference, I too dismiss this appeal as I abide by the consequential orders made.

**ARIWOOLA JSC:**

I had the privilege of reading in draft, the lead judgment just delivered by my learned brother, Ejembi Eko JSC and I agree entirely with the reasoning in the said lead judgment that led to the conclusion that the appeal is devoid of merit and deserves to be dismissed. I too will dismiss the appeal for the same reasoning. Appeal dismissed.

I abide by the consequential orders arrived at including the orders on costs.

**AUGIE JSC:**

I have had a preview of the lead judgment delivered by my learned brother, Eko JSC, and I agree with him that the appeal lacks merit. As he pointed out, there is not much this court can do when an appeal turns on the issue of credibility. It is the trial court that saw the witnesses, heard them and watched their demeanour in court that is in the vantage position to believe or disbelieve the witnesses, and that advantage can never be recaptured by an appellate court. Thus, the trial court has the liberty and privilege 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. State (1988) 1 NWLR (Pt. 73) 683, (1988) 1 NSCC 456, (1988) 3 SCNJ (Pt. 1) 68.

As Oputa JSC, so aptly put in Adelumola v. 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, the appellant has not proffered any valid reasons to question the findings of the trial court that touches on credibility. It is also settled that where there is sufficient evidence to support concurrent findings of fact by two lower courts, such findings will not be disturbed unless there is significant error apparent on the record; that is, the findings are shown to be perverse, or some miscarriage of justice or some violation of principles of law or procedure is shown: See Ogoala v. State (1991) 2 SCNJ 61, (1991) 2 NWLR (Pt. 175) 509 SC. In this case, there is more than enough evidence established by the prosecution to support the concurrent findings of the trial court and court below. In the circumstances, this court is not in the position to intervene. It is for this and the other reasons in the lead judgment that I also dismiss the appeal and affirm the decision of the court below. Appeal dismissed