**LAWRENCE AKHIGBE**

**V.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

THE 17TH DAY OF MARCH, 2017

CA/L/815B/2013

**LEX (2017) - CA/L/815B/2013**

OTHER CITATIONS

3PLR/2017/194 (CA)

(2017) LPELR-42319(CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, J.C.A

JOSEPH SHAGBAOR IKYEGH, J.C.A

UGOCHUKWU ANTHONY OGAKWU, J.C.A

**BETWEEN**

LAWRENCE AKHIGBE - Appellant(s)

AND

THE STATE - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE (Nwaka, J., Presiding)

**REPRESENTATION/LAWYERS**

M. ADETUNBI - For Appellant.

AND

Respondent served but did not file brief - For Respondent.

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

CRIMINAL LAW AND PROCEDURE – MURDER - COMMON INTENTION:- Proof of murder by unlawful killing/lynching in the hands of a militia/mob – Oodua People’s Congress, OPC - Proof of common intention required to found same - Instances when intention can be inferred in murder cases.

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CALLING OF WITNESS(ES):- Whether the person that identified the body of a deceased must be called as a witness.

EVIDENCE - EVIDENCE OF A SINGLE WITNESS:- Whether a court can convict on the evidence of a single witness.

EVIDENCE - MEDICAL EVIDENCE:- Purport of - Circumstance where medical evidence would not be needed.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The case for the Respondent was that the Appellant, a security guard, with others held the deceased, a Mr. Olamilekan Hassan, that he was a thief upon which they tied up the deceased and shot him to death with a gun along Ikare/Balogun Kuku Street where the 1st accused, Anthony Boyewu, and the other watchmen who were employed by the Odua Peoples Congress (OPC) were at all the material times keeping security in the night of 19-02-04.

The Appellant's case was that the deceased was a terror in the neighbourhood but that he was not responsible for his death, as he was at all material times a security guard employed by the Landlords Association of Odogbolu and Ijewere Street Aguda, Surulere, to keep night watch in their area; and that in the night of 18-02-04 some hoodlums fired sporadically in their area and across to Ikare/Balogun Kuku Street and after the shooting some people gathered in front of the bungalow of the PW1 and when he went there the PW1 introduced himself as the father of the deceased lying on the ground.

The Court below accepted the case presented by the Respondent and convicted and sentenced the Appellant to death, for murdering the deceased. Dissatisfied, the Appellant appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment, convicted and sentenced the Appellant to death for the offence of murder contrary to Section 316 of the Criminal Code Law of Lagos State 2003. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

1. Taking into consideration the failure of the prosecution to lead evidence of common intention, was it proper for the Learned Trial Judge to have convicted the Appellant for the offence of murder?

2. Has the prosecution proved the offence of murder beyond reasonable doubt against the Appellant?

**MAIN JUDGMENT**

**JOSEPH SHAGBAOR IKYEGH, J.C.A.** (Delivering the Leading Judgment):

The appeal emanated from the judgment of the High Court of Justice of Lagos State (the Court below) challenging the conviction and sentence to death of the appellant for the offence of murder contrary to Section 316 of the Criminal Code Law of Lagos State 2003.

In summary, the case for the respondent was that the appellant, a security guard, with others held the deceased, a Mr. Olamilekan Hassan, that he was a thief upon which they tied up the deceased and shot him to death with a gun along Ikare/Balogun Kuku Street where the 1st accused, Anthony Boyewu, and the other watchmen who were employed by the Odua Peoples Congress (OPC) were at all the material times keeping security in the night of 19-02-04.

The appellant's case was that the deceased was a terror in the neighbourhood but that he was not responsible for his death, as he was at all material times a security guard employed by the Landlords Association of Odogbolu and Ijewere Street Aguda, Surulere, to keep night watch in their area; and that in the night of 18-02-04 some hoodlums fired sporadically in their area and across to Ikare/Balogun Kuku Street and after the shooting some people gathered in front of the bungalow of the PW1 and when he went there the PW1 introduced himself as the father of the deceased lying on the ground.

The Court below accepted the case presented by the respondent and convicted and sentenced the appellant to death for murdering the deceased which occasioned the appeal contained in an original notice of appeal with two grounds of appeal which was amended with the leave of the Court and replaced by an amended notice of appeal with four grounds of appeal filed on 05-02-15, but deemed as properly filed on 10-02-15.

The appellant's brief of argument filed on 28-07-16 distilled two issues for determination from the grounds of appeal contained in the amended notice of appeal thus

1. Taking into consideration the failure of the prosecution to lead evidence of common intention, was it proper for the Learned Trial Judge to have convicted the Appellant for the offence of murder?(Ground 2).

2. Has the prosecution proved the offence of murder beyond reasonable doubt against the Appellant? (Grounds 1 and3)".

The appellant chose to argue the two issues (supra) together in his brief of argument to the following effect.

The evidence from the PW4 and PW5 in the record of appeal (the record) was that only a single gunshot wound was found on the body of the deceased and that it was obvious that the appellant and the other accused as security guards left their respective places with the intention of doing their routine duty of safeguarding the property and life of their employers without the intention to kill; therefore the killing of the deceased as shown by the evidence was not premeditated, nor did the evidence disclose the actual person that murdered the deceased, so the Court below was wrong to convict the appellant of joint murder when the respondent did not discharge the onus of proof beyond reasonable to displace the presumption of innocence of the appellant vide Woolmington v. D.P.P. (1935) AC 462, Oforlette v. State (2000) FWLR (Pt.12) 2081 at 2097, Oseni v. State (2012) 5 NWLR (pt.1293) 351 at 385, Adekoya v. State (2012) 9 NWLR (Pt.1306) 539 at 565, Section 138(1) of the Evidence Act Laws of the Federation 2004, Al-Hassani v. State (2011) 3 NWLR (pt.1234) 279, Ofuani v. Nigerian Navy (2007) 8 NWLR (pt.1037) 486 - 487, Sabi v. State (2011) 14 NWLR (pt.1256) 572, Afolalu v. State (2010) 16 NWLR (pt.1220) 609 - 610, State v. Oladotun (2011) 10 NWLR (pt.1256) 572, Jua v. State (2010) 4 NWLR (pt.1184) 243, Shande v. State (2005) 12 NWLR (pt.939) 321, Moshood v. State (2004) 14 NWLR (pt.893) 437 at 438, Nnachi v. Ibom (2004) 16 NWLR (pt.900) 638, Ugwuanyi v. Federal Republic of Nigeria (2010) 14 NWLR (pt.1213) 409.

The appellant's brief of argument went on to contend that, whereas much of the evidence of the PW2 was hearsay and borne out of emotion which should have been given little weight vide JAMB v. Orji (2008) 2 NWLR (Pt.1072) 557 at 569 - 570, the totality of the evidence of the PW1 and PW2 who were partial eye witnesses did not establish that the appellant and the others acted in concert with the common intention to murder the deceased; rather the evidence of the PW1 in pages 63 - 64 of the record and the PW2 in page 68 of the record indicated the mere presence of the appellant at the scene of crime without more; and that the objective of the appellant and the others with him at the material time was merely to humiliate the deceased thus not proving that the appellant actually killed the deceased upon premeditation, therefore the Court below was wrong in relying on their evidence to convict the appellant vide Mohammed and Anor. v. The State (1980) 3 - 4 SC 56 at 62, Ofor v. Queen (1955) 15 WACA 4 at 5, Akinkunmi v. State (1937) 1 NWLR (pt.52) 608 at 615 - 616, Oladele v. State (1993) 1 NWLR (pt.269) 294 at 310, Adekunle v. State (1989) 5 NWLR (pt.123) 505 at 519.

The appellant concluded the brief of argument by citing the case of Clark v. State (1986) 3 NWLR (Pt.35) 381 at 395 for the proposition that the combination of suspicion with lack of proof of a criminal allegation beyond reasonable doubt, as was the case here, runs contrary to the basic tenet of the administration of criminal justice that suspicion no matter how strong does not replace legal proof which in criminal trials is required to be beyond reasonable doubt to replace the presumption of innocence on the accused; consequently the appellant advocated for the appeal to be allowed, and his conviction and sentence set aside, and an order of acquittal and discharge entered for him.

The respondent was served the appellant's brief of argument but did not file any brief after the statutory period for doing had expired. Hearing notice for the appeal was also served on the respondent who chose not to participate at the hearing of the appeal. Accordingly, the appeal was heard on the brief of argument of the appellant under Order 19 Rule 10(1) of the Court of Appeal Rules, 2016 (the Rules of the Court).

The evidence of the PW1 in pages 64 - 65 of the record established that the deceased by the appellants was brought with his hands tied behind his back to his father, the PW1, and the deceased complained that the appellants had taken his handset, wrist watch, money and everything and the appellants led the deceased away alive who came back to PW1's house where he slumped dead from a gunshot wound within the same night of 19-02-04.

The PW1 was believed by the Court below. In murder cases where corroboration is not required the credible evidence of a witness suffices to fix to culpability of the accused videIgbo v. State (1925) 5 U.I.L.R. (pt.1) 111, Victor v. State (2014) ALL FWLR (pt.719) 1092 or (2019) 12 NWLR (pt.1369) 465 at 1104 following Idiok v. State (2008) 13 NWLR (pt.1104) 225, Eke v. State (2011) 2SCNJ 57.

Having established by the credible evidence of the PW1 that the deceased died within the same night of 19-02-04, through the oral evidence of the PW1 in pages 64 -65 of the record that the deceased died within the same day the PW1 had seen him together with the evidence of the death of the deceased given in the case by the PW1 under cross-examination in page 65 of the record that the deceased had since been buried.

The evidence of the DW3 in page 84 of the record also confirmed she saw the corpse of the deceased whom she knew as a trouble-maker. Further the evidence of the appellant in page 89 of the record referred to the dead person as the deceased whom he knew very well. The appellant went on to testify in page 90 of the record that

"I am aware that Lekan is dead. I saw his body at the police station. His body is in the van.... Yes Lekan died".

These pieces of evidence considered together proved beyond reasonable doubt the death of the deceased vide Eric Uyo v. Attorney-General, Bendel State (1986) 1 NWLR (pt.17) 418 at 432 following Lori v. State (1980) 8 - 11 S.C.81 at 87, Tonara Bakuri v. The State (1965) NMLR 163, Akpuenya v. State (1976) 11 S.C. 269, Dan Adamu v. Kano Native Authority (1956) 1 FSC 25, Chukwuma (aka Goddy) v. Federal Republic of Nigeria (2011) 115 SCNJ 40, to the effect that medical evidence is dispensable or not essential where cogent circumstantial or eye witness account confirming the death of the deceased was available as in this case through the evidence of PW1.

The fact that the PW4 and PW5 stated they saw one gunshot wound on the deceased, while the PW2 stated that the appellant and the 3rd accused shot the deceased and the PW1 testified that he heard one gunshot, in my considered opinion, a discrepancy as to detail which did not detract from the central fact dealing with one of the ingredients of the offence (cause of death of the deceased from gunshot injury) and did not, therefore, aggregate to substantial or material contradiction to destroy the evidence for the respondent on the issue videJeremiah v. State (2012) 14 NWLR (pt.1320) 248, Jizurumba v. The State (1976) N.S.C.C. 156, Ilodigwe v. State (2012) 18 NWLR (2012) 18 NWLR (pt.1331) 1, and Ashimiyu and Ors. v. The State (1982) N.S.C.C. 351.

The evidence of the death of the deceased was common ground between the appellant and the respondent as stated (supra), therefore there was no need to call the person that identified his corpse to the pathologist for post-mortem examination to testify in the case vide Afosi v. State (2013) 13 NWLR (Pt.1371) 329.

Moreover, the evidence of the PW1 was that he saw only the 2nd accused armed with a cocked gun and in the company of the appellant and 3rd accused intending to cause actual violence on that day and soon after they left with the deceased he heard gunshot. It was not the case that several of the appellants and some of the other accused were armed with guns at the material time and fired several gunshots at the scene of crime in the night of that day as to require ballistic evidence to prove the shot that resulted in mortal consequence came from a particular gun.

In the instant case, the evidence of PW1 in pages 63 - 64 of the record showed he appeared to have stepped in to prevent the appellant and the two other accused from taking away the deceased, his son, to no avail, and that his son's death ensued proximate to the firing of the gun after he was taken away by the appellant and his cohort and to quote the PW1 in page 64 of the record:

"I saw that he (the deceased) was tied all over and his hands tied to his back. I then saw the three accused persons (the appellant as the 1st accused; one Lawrence as the 2nd accused; and one Kayode Adebiyi as the 3rd accused) and one other at large and the Gomenu who come to call me. I asked the 1st accused person what my son did to warrant the treatment given to him. The 2nd accused cocked hid(?) gun and threatened to shoot me if I came near. I started shouting some people came bundled me and threw me inside my house. I then raised alarm and the neighbours came out... I was able to look out of my louvers. I saw about ten of them surrounding my son. One of them knelt down and directly shot my son. I heard gbua! ... I then noticed that the rope was released. My son ran towards the house and used his head to hit my door and fell and died....."

Accordingly, the inescapable inference from the totality of the evidence established beyond reasonable doubt that the appellant and his comrades-in-crime were acting in concert when they refused to release the deceased to his father, the PW1, but decided to lead the unarmed deceased away at gunpoint (a lethal weapon) with the deceased's hands tied behind his back and the gun already cocked showing their intention to cause actual violence which supplied the link that the appellant and his cohort acted together or in concert in murdering the deceased in cold blood by the extra-judicial execution style of tying up the deceased's hands behind his back before shooting him to death on the fateful day.

The piece of evidence (supra) established that the deceased died from gunshot inflicted on him by one of the several persons whom the appellant accompanied and were acting in concert at the material time on the same day vide Ndike v. State (1994) 8 NWLR (pt.360) 33, see also Dan Adamu v. Kano Native Authority (supra), Eric Uyo (supra), Bakuri (supra), Akpan v. State (1994) 12 SCNJ 140.

In cases of acting in concert the fatal act of one of the participants is the fatal act of all the participants present vide Atiku and Ors. v. State (2010) 9 NWLR (pt.1199) 241 at 274 per the lead judgment of his Lordship Garba J.C.A., following Emeka v. State (2001) 14 NWLR (Pt.234) 666, Idiok v. State (2006) 12 NWLR (Pt.993) 1 and Nwankwoala v. State (2006) 12 NWLR (Pt.1000) 663.

Consequently, the fatal gunshot that killed the deceased was deemed in the eyes of the law to have been fired by the appellant and his cohort on the footing that the person who fired the fatal shot in such a case is no more than the hand by which the others fired the gun or struck vide Joseph Ogundipe and Ors. v. The Queen (1954) 14 WACA 458, Ofor and Anor. v. The Queen (1955) 15 W.A.C.A. 4 at 5, Mbang v. State (2009) 18 NWLR (Pt. 1172) 140 at 157 - 158 following Ogbali v. State (1983) NSCC 156.

I am, accordingly, satisfied from the totality of the evidence that the Court below was right in holding that the elements of the offence of murder to wit-that the deceased died; that the death of the deceased resulted from the concerted act of the accused and his comrades-in-crime; and that the said concerted act of the accused and his cohort was intentional with knowledge that death or grievous bodily harm was its probable consequence which were proved beyond reasonable doubt displaced the presumption of innocence of the appellant vide Akinfe v. State (1988) 3 NWLR (Pt.85) 729, Ogba v. State (1992) 2 NWLR (Pt.222) 164 and the series of cases (supra) cited by the parties on the point.

On the whole, I find the appeal unmeritorious and hereby dismiss it and affirm the decision of the Court below (Nwaka, J. ) convicting and sentencing the appellant to death for the murder of the deceased, a Mr. Olamilejun Hassan.

**MOHAMMED LAWAL GARBA, J.C.A.:**

The issues for decision in this appeal have been concisely and very admirably considered and resolved by my learned brother Joseph Shagbaor Ikyegh, JCA in the lead judgment just delivered, a draft of which I read before today. For reasons set out therein, I agree that the appeal deserves to fail for lack of merit and join in dismissing it in terms of the lead judgment.

**UGOCHUKWU ANTHONY OGAKWU, J.C.A.:**

I have had the privilege of reading in draft the leading judgment just delivered by my learned brother, Joseph Shabgaor Ikyegh, JCA and I agree that there is no substance in this appeal and that the same should be dismissed.

For the same reasons set out in the said judgment, I too, dismiss this appeal.

The decision of the High Court of Lagos State in charge No LCD/22/2005: THE STATE vs. LAWRENCE AKHIGBE delivered on 3rd June 2013 is hereby affirmed.

Appeal dismissed