**MARTIN ONUCHUKWU**

**V.**

**THE STATE**

IN THE COURT OF APPEAL OF NIGERIA

THE 20TH DAY OF JANUARY, 2017

CA/E/525C/2014

**LEX (2017) - CA/E/525C/2014**

OTHER CITATIONS

3PLR/2017/199 (CA)

(2017) LPELR-41568(CA)

**BEFORE THEIR LORDSHIPS**

JOSEPH TINE TUR, J.C.A

RITA NOSAKHARE PEMU, J.C.A

MISITURA OMODERE BOLAJI-YUSUFF, J.C.A

**BETWEEN**

MARTIN ONUCHUKWU Appellant(s)

AND

THE STATE Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF JUSTICE OF ANAMBRA STATE, IHIALA JUDICIAL DIVISION (B. A. Ogbuli, J., Presiding).

**REPRESENTATION/LAWYERS**

B.J. ADIGWE, Esq. - For Appellant

AND

OKECHUKWU N.E. EZEANYIM (Asst. Chief State Counsel, MOJ, Anambra State) - For Respondent

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

CRIMINAL LAW AND PROCEDURE - NO CASE SUBMISSION:- Essence and purport of a no-case submission - What has to be considered in a no-case submission during criminal trials

CRIMINAL LAW AND PROCEDURE – MURDER:- Proof of murder – Where prima facie case made out by prosecution – Duty of defence to cross-examine and lay out their defence – Legal implications for liberty of accused where defence counsel goes on a frolic of appeal based on a no-case submission rejected by trial court

CONSTITUTIONAL LAW – JUDICIAL PROCEEDINGS:- Section 294(2)-(4) and Section 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) – Designation of determination(s) of any Justice of the Supreme Court or the Court of Appeal

CONSTITUTIONAL LAW – JUDICIAL PROCEEDINGS:- Failure of Court to give its judgment within the three months after hearing of the appeal – Whether there is any basis to re-argue the case consequently which is founded upon the Constitution of the Federal Republic of Nigeria, 1999 as altered, the Court of Appeal Act, 2004 or the Court of Appeal Rules, 2011 – Supreme Court’s attitude and approach to appeals connected with such situations

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - CROSS-EXAMINATION:- Essence of - Effect of failure to cross-examine a witness during trial

INTERPRETATION OF STATUTE - SECTION 294(2)-(4) AND SECTION 318(1) OF THE 1999 CONSTITUTION AS AMENDED:- Proper interpretation of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The State proffered information against the appellant before the trial High Court for the offence of murder punishable under Section 274(1) of the Criminal Code Cap.36, Vol.II Revised Laws of Anambra State of Nigeria, 1991 as amended.

The appellant pleaded not guilty to the charge on 19th February, 2013.

The prosecution called witnesses who testified. They were cross-examined and re-examined before the prosecution closed its case. Learned Counsel appearing for the defence made a no-case submission but was overruled.

Dissatisfied, the Appellant appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court made a Ruling, refusing the Appellant’s no-case submission. Dissatisfied, the Appellant appealed to the Court of Appeal.

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

*BY APPELLANT:*

1. Has the prosecution witnesses PW1-PW5 established *prima facie* case against the defendant/appellant linking him to the commission of the offence of Murder of Ekene Onuchukwu on the 10th November, 2011 to require the defendant enter his defence.

2. Has the evidence of the prosecution witness been so discredited by effective and destructive cross-examination of the defence Counsel.

3. Has the prosecution established all the ingredients of murder against the defendant for the Honourable Court to dismissed the no case submission and ask the defendant to enter his defence.

4. Has the prosecution proved this charge of murder against the defendant beyond reasonable doubt for the defendant to enter his defence.

*BY RESPONDENT:*

*Whether the prosecution/respondent has established a prima facie case against the appellant from the totality of the evidence adduced by the prosecution witnesses, thus requiring the appellant to enter his defence.*

**MAIN JUDGMENT**

JOSEPH TINE TUR, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This appeal was heard on 11th October, 2016 and adjourned for a decision to another date. I am aware of the provisions of Section 294(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended reads as follows:

*(1) Every Court established under this Constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.*

My candid view of the provisions of Section 294(1) of the Constitution *(supra)* is that the Court of Appeal and the Supreme Court determines appeals on briefs of argument filed and exchanged by learned Counsel. The two appellate Courts do not hear evidence nor rely on final addresses of Counsel to render an opinion or a decision. There is no provision under Section 294(2)-(4) of the Constitution for the Justices of the Court of Appeal or the Supreme Court to hear and determine appeals on evidence supported by final addresses of Counsel. The provision of Section 294(1) of the Constitution does not apply to Section 294(2)-(5) of the Constitution*(supra)*.The provision applies to *Every Court established under the Constitution that hears evidence from the parties coupled with final addresses of Counsel to render a decision.”* In *Maxwell on the Interpretation of Statutes by P. St. J. Langan, 12th Edition, Pages 1-2* appears the following statement of the law:

A statute has been defined in previous editions of this work simply as the will of the legislature,” and this definition, it is submitted, remains sufficient provided that it is understood that the will of the legislature must be expressed either by the agreement of the Queen and Commons in accordance with the Parliament Acts, 1911 and 1949. Granted that a document which is presented to it as a statute is an authentic expression of the legislative will, the function of a Court is to interpret that document “according to the intent of them that made it.” From that function, the Court may not resile: however ambiguous or difficult of application the words of an Act of Parliament may be, the Court is bound to endeavour to place some meaning upon them. In so doing it gives effect, as the judges have repeatedly declared, to the intention of Parliament, but it may only elicit that intention from the actual words of the statute. “If”, said Lord Greene M.R., “there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used.” If language is clear and explicit, the Court must give effect to it., “for in that case the words of the statute speak the intention of the Legislature.” And in so doing it must bear in mind that its function is *jus dicere,* not *jus dare:* the words of a statute must not be overruled by the Judges, but reform of the law must be left in the hands of Parliament.

This work attempts to set out the main principles which the judges apply in carrying out their task of construing statutes.

The learned author further states at pages 86 as follows:

However wide in the abstract, general words and phrases are more or less elastic, and admit of restriction or extension to suit the legislation in question. The object or policy of this legislation often affords the answer to problems arising from ambiguities which it contains. For it is a canon of interpretation that all words, if they be general and not precise, are to be restricted to the fitness of the matter, that is, to be construed as particular if the intention be particular.

Omissions in the provisions of the Constitution, a Statute or Law are not to be supplied by the Court or those construing their provisions. This is made very clear atPage 33 of Maxwell on the Interpretation of Statutes*(supra)* to wit:

It is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express. Lord Mersey said: “It is a strong thing to read into an Act of Parliament words which are not there, and in the absence of clear necessity it is a wrong thing to do. We are not entitled,” said Lord Lorebun, L.C., “to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself.” A case not provided for in a statute is not to be dealt with merely because there seems no good reason why it should have been omitted, and the omission appears in consequence to have been unintentional.

The Legislature inserted Section 294(1) in the Constitution of the Federal Republic of Nigeria, 1999 as amended to curtail a situation where some judges used to conduct proceedings but after hearing, would take three or more months after the final addresses of learned Counsel to render a decision. In construing the provisions of Section 294(1) of the Constitution it is advisable to look at the mischief that is intended by the legislature to be remedied. What the learned Barons of the Exchequer said inHeydon’s Case in 1584 3 Co. Rep. 7awas this:

that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: (1st). What was the common law before the making of the Act. (2nd). What was the mischief and defect for which common law did not provide. (3rd). What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4th). The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo,* and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico.*” In 1898, Lindley M.R. said: “In order properly to interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case to consider how the law stood when the statute to be construed was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief.” Although Judges are unlikely to propound formally in their judgments the four questions in Heydon's Case, consideration of the “mischief” or object of the enactment is common, and will often provide the solution to a problem of interpretation.

In the well-known case of Smith vs. Hughes, for example, it was held that prostitutes who attracted the attention of passers-by from balconies or windows were soliciting “in a street” within Section 1(1) of the Street Offences Act, 1959. For my part, said Lord Parker, C.J., (at p.832), I approach the matter by considering what is the mischief aimed at by this Act. Everybody knows that this was an Act intended to clean up the streets, to enable people to walk along the streets without being molested or solicited by common prostitutes.

Viewed in that way, the precise place from which a prostitute addressed her solicitations to somebody walking in the street became irrelevant.

I also venture to say that the practice of re-hearing an appeal where a decision or opinion could not be rendered by Justices of the Supreme Court and the Court of Appeal within three months is not provided in the Constitution or any statute or law. The procedure has neither a constitutional or statutory backing or support. If the procedure is followed, it means a decision or opinion would be delayed for another three months. The parties have to wait for an opinion or a decision for another three months, totaling six months after the appeal is reheard. In Yakubu Galadima & Anor. vs. The Hon. Judge, Sharia Court, Gwana & Ors. (Unreported Appeal No.CA/J/327/2014) I delivered in the Division of the Court of Appeal, Jos, Plateau State, the appeal was argued on 27th April, 2016 but due to certain other judicial functions beyond, my control I rendered opinion on 9th November, I explained from pages 2 to 6 as follows:

Nowhere in the Constitution of the Federal Republic of Nigeria, 1999 as altered, the Court of Appeal Act, 2004 nor the Court of Appeal Rules, 2011 is there provision that upon the expiry of three months after hearing of appeal (Order 18 Rule 9(1) or “the appeal is deemed argued” (Order 18 Rule 9(4) of the Court of Appeal Rules, 2011) an appeal should be re-argued at the expiration of three months, practice that has no support in the Constitution, the Court of Appeal Act, 2004 or the Court of Appeal Rules, 2011. The current practice or trend which those who love justice and are prepared to see that justice is dispensed speedily and with minimum cost was laid down in United Bank for Africa vs. Nwora (1978) 2 LRN 149 where Fatayi-Williams, JSC ( as he then was) based on the facts of that case, held at page 155 as follows:

Admittedly, the learned Chief Judge has the discretion under Order 18 Rule 6 to extend time to enable the defendants to file their defence. But such discretion, in our view, must be exercised at all times in the interest of justice. The case of Gilbbings vs. Strong (1884) 26 Ch.66 (C.A) to which we were referred by learned Counsel for the appellants,illustrates clearly, the futilityof ordering that time should still be extended for filing a pleading which has already been filed in Court out of time. In that case, it was held that on a motion for judgment for want of defence, if a defence has been put in, though irregularly, the Court will not disregard it, but will see whether it sets up grounds of defence which, if proved, will be material, and if so, will deal with the case in such manner that justice can be done. As Lord Selborne, L.C., rightly observed at page 68-69 of his judgment in the case:-

When no defence has been put in, then, by Order 29 Rule 10, of the Rules of 1875, the plaintiff may set down the action or motion for judgment, 'and such judgment shall be given as upon the statement of claim the Court shall consider the plaintiff to be entitled to.” This means that the Court is to exercise some judgment in the case; it does not necessarily follow the prayer, but gives the plaintiff the relief to which, on the allegations in his statement of claim, he appears to be entitled; and if a defence has been put in, though irregularly, I think the Court would do right in attending to what it contains. If it were found to contain nothing, which if proved, would be material by way of defence, the Court would disregard it. If, on the other hand, it discloses a substantial ground of defence, the Court will not take the circuitous course of giving a judgment without regard to it, and obliging defendant to apply, under Order 14, to have that judgment set aside on terms, but will take steps to have the case properly tried on the merits.

Other cases on the same point are Gil vs. Woodfin (1884) 25 Ch.D.707 (C.A.); Graves vs. Terry (1882) 9 Q.B.D.170; and Montagu vs. Land Corporation 56 L.T.730. The next question is this: What steps should the Court have taken in the case in hand to have it properly tried on the merit?

Admittedly, where no statement of defence has been filed, the Court, in its discretion, has the power under Order 18 Rule 6 of the Rules to extend the time by order to enable a defendant to file his statement of defence. Furthermore, it must be pointed out that although Order 24 Rule 11 is expressed in mandatory terms, the rule is not mandatory but discretionary, and the Court retains its discretionary power whether to give judgment or to extend the time for the defendant to file his defence when it is just to do so. (See Waller-steiner vs. Moir (1974) 1 WLR 991). Moreover, there is nothing in Order 18 Rule 6 to indicate that the rule applies only to cases where no statement of defence has been filed and we are not prepared to hold that it does. We think it applies also to cases where a defence has been filed out of time. In such cases, the parties can, by consent, regularize the position or the Court, provided the statement of defence discloses a substantial ground of defence, can do so by order either on application or suo motu.

Looking at this particular case where each defendant has filed a statement of defence which, having regard to his observation, the learned Chief Judge must have found to disclose a substantial ground of defence, it seems to us that it is a wrong exercise of his discretion to have ordered the defendants to file an “application for enlargement of time within which to file a defence within 10 days” from the date of his order, thus indicating, albeit by implication, that no statements of defence had been filed before. With respect, we think it was erroneous of him to have ordered them, in those circumstances, to apply for extension of time to file what amounted to new statements of defence within ten days. Surely, this discretion, which the learned Chief Judge undoubtedly has in the matter, must be exercised judiciously, bearing in mind that it is the duty of the Court whenever possible, not only to minimize the cost of litigation, but also to see to it that justice is not delayed unnecessarily.

In our view, the learned Chief Judge, in the exercise of his power under Order 18 Rule 6, should have extended the time *suo motu* up to 18th April, 1976, the day when he delivered his ruling. By ordering the defendants, as he did, to apply within ten days to file another statement of defence, the learned Chief Judge, if we may say so again with respect, was merely taking refuge in an unnecessary legal technicality which would obviously delay the hearing of the action further. We think he should have extended the time to file the statements of defence to the date of his ruling, order that the statement of defence already filed had been duly filed, and then fix a date for the hearing of the case.

In Afolabi vs. Adekunle (1983) 2 SCNLR 141, Aniagolu, JSC held at page 150 that:

While recognizing that the Rules of Court should be followed by the parties to a suit, it is perhaps necessary to emphasize that justice is not a fencing game which parties engage themselves in an exercise of out smarting each other in a whirligig of technicalities, to the detriment of the determination of the substantial issues between them.

Even where a provision in the Constitution, a Statute or Rule of Court has been violated or breached, what is of paramount interest is whether there has been established a substantial wrong or miscarriage of justice to warrant the Court of Appeal to interfere with the verdict of the Court below.

In Enekebe vs. Enekebe (1964) NMLR 42, Bairamian, F.J., held at page 46 as follows: *“In the cases on discretion which I have seen, the trial Court goes by the materials presented to it, and the Court of Appeal goes by the material in the record.”* In Odi & Anor. vs. Osafile & Anor. (1985) 1 All NLR 20, Obaseki, JSC held at page 23 as follows:

*It is tragic that this case continues to be beset with delays peculiarly characteristic of the slow movements of the mechanism of justice and the need to ensure that justice is done and fair hearing given to the parties in the case. The wheels of justice grind slowly but surely till its purpose is achieved.”*

All the authorities I have examined on the issue of rendering a decision within three months arose from decisions of the Courts below the Court of Appeal and the Supreme Court. There is yet to be a decision of the Supreme Court nullifying an opinion or a decision of the Court of Appeal on the grounds that it was rendered outside the three months prescribed in Section 294(1) of the Constitution. Any other interpretation being put by anybody or authority on the provisions of Section 294(1) of the Constitution will not express the intention of the legislature until there is a constitutional amendment for the provisions of Section 294(1) of the Constitution to govern proceedings in the Court of Appeal or the Supreme Court as the case may be. In this appeal, the Court of Appeal Justices went on Christmas Vacation and resumed sitting only on 16th January, 2017. I should have commenced sitting on 23rd January, 2017 but in the interest of justice I had to render this opinion on 20th January, 2017 notwithstanding I am recovering from my sudden health challenges. Besides, there is intermittent power supply hence at times I use candle or bush lamp to write this opinion. As I said before I see no need to re-hear this appeal since the practice has no support in any provisions of the Constitution of the Federal Republic of Nigeria, 1999 as amended nor any statute or law. I shall now render my opinion by examining the briefs of argument. Therein contains the arguments of learned Counsel.

The traditional practice is to tag determinations of appeals in the Court of Appeal as *judgments* or *Rulings*. But I have opted to tag this determination *“decision”*so as to conform with the provisions of Section 294(2)-(5) and 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 as amended. The provisions read as follows:

*294(2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion:*

*Provided that it shall not be necessary for the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.*

*(3) A decision of a Court consisting of more than one Judge shall be determined by the opinion of the majority of its members.*

*(4) For the purpose of delivering its decision under this section, the Supreme Court, or the Court of Appeal shall be deemed to be duly constituted if at least one member of that Court* *sits for that purpose.*

*(5) The decision of a Court shall not be set aside or treated as a nullity solely on the ground of non-compliance with the provisions of Subsection (1) of this Section unless the Court exercising jurisdiction by way of appeal or review of that decision is satisfied that the party complaining has suffered a miscarriage of justice by reason thereof.*

Section 318(1) of the Constitution reads as follows:

318(1) In this Constitution unless it is otherwise expressly provided or the context otherwise requires:

Xxx

“Decision” means, in the relation to a Court, any determination of that Court.”

The State proffered information against the appellant before the High Court of Justice of Anambra State of Nigeria holden at Ihiala Judicial Division on 10th November, 2011. The Charge read as follows:

That you Martin Onuchukwu ‘M’ of Umumelike Okohia Village Ihiala, on or about the 20th October, 2011, at Umumelike Okohia Village, within Ihiala Magistrate District, did unlawfully kill one Ekene Onuchukwu ‘M’ of same address by stabbing his back with a table knife which caused his death. You thereby committed an offence punishable under Section 274(1) of the Criminal Code Cap.36, Vol.II Revised Laws of Anambra State of Nigeria, 1991 as amended.

The appellant pleaded not guilty to the charge on 19th February, 2013. The prosecution called PW1 (Chimuanya Onuchukwu); Obiora Onuchukwu (PW2); Uche Okeke (PW3); Eke Ani (PW4) and Dr. Agubata Nnamdi (PW5) who testified, were cross-examined and re-examined before the prosecution closed its case. Learned Counsel appearing for the defence made a no-case submission but was overruled by B.A. Ogbuli, J., on 24th May, 2014 hence this appeal. The Notice of Appeal was filed on 11th June, 2014. Appellant filed a brief of argument on 30th January, 2015. The respondent’s brief was filed on 16th March, 2016 with a deeming order on 2nd June, 2016. The appellant filed a reply brief on 29th March, 2016 which was deemed on 2nd June, 2016. All briefs were adopted on 11th October, 2016. The appellant formulated the following issues for determination at paragraph 2.0-2.4 page 2 of his brief to wit:

1. Has the prosecution witnesses PW1-PW5 established *prima facie* case against the defendant/appellant linking him to the commission of the offence of Murder of Ekene Onuchukwu on the 10th November, 2011 to require the defendant enter his defence.

2. Has the evidence of the prosecution witness been so discredited by effective and destructive cross-examination of the defence Counsel.

3. Has the prosecution established all the ingredients of murder against the defendant for the Honourable Court to dismissed the no case submission and ask the defendant to enter his defence.

4. Has the prosecution proved this charge of murder against the defendant beyond reasonable doubt for the defendant to enter his defence.

The respondent distilled a lone issue for determination at page 3 of the brief as follows:

*Whether the prosecution/respondent has established a prima facie case against the appellant from the totality of the evidence adduced by the prosecution witnesses, thus requiring the appellant to enter his defence.*

Learned Counsel intending to make a no case submission at the close of evidence for the prosecution should examine the charge along with the evidence adduced by the prosecution to see whether the prosecution has made a case which warrants the appellant to be called upon for an explanation or not. Counsel should also bear in mind whether appealing against a decision of a learned trial Judge or a Magistrate for over-ruling a no-case submission would be in the best interest of the accused particularly where, in a murder charge, he is in prison custody or not. Where an appellant is in custody, over-ruling the no-case submission may result into a prolong incarceration of the appellant pending the hearing of the appeal which may be decided in favour of the appellant or the respondent. If the appeal fails, trial may proceed in the Court below. Before the fate of the appellant is determined in the Court below the appellant might have spent many years in custody. Thereafter the appellant may be convicted and sentenced in accordance with the law or may be discharged and acquitted. Whatever might be the outcome of the trial, the appellant might have been detained in custody more than necessary before an acquittal and discharge or conviction and sentence. The learned trial Judge held at pages 153 to 155 of the printed record as follows:

The defendant in this charge is standing trial on a single count of murder contrary to Section 274 of the Criminal Code Cap.36 Vol.II Revised Laws of Anambra State of Nigeria, 1999. The particular of the offence reads thus:

Martin Onuchukwu on or about the 20th day of October, 2011 at Umumelike Okohia Village, Ihiala in Ihiala Judicial Division murdered one Ekene Onuchukwu by stabbing him with a knife which led to his death.

The defendant took his plea in this charge on 19th February, 2013 and pleaded not guilty to same. The prosecution called five (5) witnesses, PW1-PW5 and closed the case of the prosecution on 20th March, 2014. The defendant indicated that he would enter a submission of no case which he, through his Counsel, filed on 27th March, 2014. The prosecution filed a reply address on the no-case submission and on 6th April, 2014 both Counsel adopted their addresses on the no-case submission and the matter was then adjourned for ruling. Section 193 of the Administration of Criminal Justice Law, 2010 provides thus:  
“If at the close of the evidence in support of the charge, it appears to the Court that a case is not made out against the defendant sufficiently to require him to make a defence, the Court shall as to that particular charge, discharge him.

Authorities are in agreement that a no-case submission can be made and upheld:

(a) Where one or the other of the essential ingredients of the offence charged was not established, or

(b) Where the evidence of the prosecution has been so discredited by effective and destructive cross-examination that no reasonable jury can act upon it and convict. See the cases of Ibeziako vs. C.O.P. (1963) 1 SCNLR 99; Onubogu vs. State (1974) 9 SC 1 and Edet Akpan vs. State (1986) 3 NWLR (Pt.27) 234.

A no-case submission is based on the absence or non-existence of any evidence on which the Court convict even if the Court believed the evidence given. See Abacha vs. State (2002) FWLR (Pt.118) 1224.

The defence Counsel has canvassed in the 28-page submission filed by the defence on 27th March, 2014 that the defendant ought not to be called to put up his defence. At the stage of submitting that the defendant has no-case to answer, the issue of credibility of a witness is not relevant. This is simply because at the stage, the inference is that even if the evidence of the prosecuting witnesses is believed, it cannot be sufficient to ground the conviction of the defendant.

I have gone through the processes filed by both the defendant and the prosecution and also have gone through the evidence led by PW1, PW2, PW3, PW4 and PW5 and I am unable to hold that the defendant, has no case to answer.

Evidence of PW1, Chimuanya Onuchukwu, on 19th February, 2013 was so direct that the defendant stabbed the deceased with a knife. PW3, on the day of the incident, heard some noise and rushed to the scene of the incident to meet the deceased shouting “Martin has killed me”. He (PW3) also heard one Chidimma, the defendant’s daughter, shouting “my daddy has killed brother, my daddy has killed Ekene.

These direct evidence demands some explanations from the defendant. It is for these reasons that I will dismiss the submission of no-case made by the defence and call on the defendant to enter into his defnce. I therefore dismiss the submission and adjourn the charge for defence to open its case.  
  
The charge is clear: Ekene Onuchukwu died on or about 20th October, 2011 at Umumelike Okohia village in Ihiala, Ihiala Judicial Division, stabbed with a knife which led to his death Dr. Agubata Nnamdi (PW5) testified on 18th December, 2013 at page 144 lines 14 to page 155 lines 1-6 of the printed record as follows:

PW5: Sworn on Bible and states in English. I am Dr. Agubata Nnamdi. I presently work at Oraifite General Hospital. I live at Umunnamehi Road, Ihiala. I am a civil servant, a Medical Doctor by training. As at October, 2011, I was working at Okija General Hospital. I have been in practice since my graduation as a Medical Doctor in 1984. In course of my duty as a Doctor I saw the body of Ekene Onuchukwu. I performed a Postmortem on Ekene Onuchukwu on the 7th of November, 2011. It was a persevered body. On the day in question I observed a 7cm laceration over the right back about 20cm from the right shoulder joint and about 17cm from the right ear. I also observed multiple bruises over the central and left sides of the fore head. The conjunctiva was pale. Sclera was clear. The external genitalia was intact. When I said there was a pale conjunctiva I meant that the degree of the anemia (blood level) was low. The low blood level I assume was caused by the injury of the deceased’s body. I wrote, as the cause of death, hypovolemic shock which means shock as a result of volume (blood) loss. At the end of the day, I wrote a report which I submitted to the police. This document shown to me is the report which I signed.  
  
The report was admitted as Exhibit E.

Cross-examination of PW5 showed that the Doctor had a thirty year experience in postmortem examination. PW1 (Chimuanya Onuchukwu) testified at page 108 lines 3-28 of the printed record as follows:

On 20/10/11 (20th October, 2011) about 8.00pm I was coming back from my mother’s shop at Eke Market, Umumelike Okohia Village, Ihiala and saw my cousin, Nonso Onuchukwu, and Ekene Onuchukwu quarreling over sharing of money. Ekene said they should get into the house to get change but Nonso refused. The boys were quarreling and the wife of the defendant and the defendant both came out from their house. The quarrel degenerated into a fight and Nonso ran out to collect a bottle towards a shop at Eke Market. At that time the defendant had come out with a knife. The defendant without asking what the matter was stabbed Ekene on the back with the knife. Nobody knew the defendant had any object with him when he rushed out from his house with the knife. Ekene looked back and shouted “Martin has killed me.” The defendant stabbed the deceased (Ekene) a second time at the shoulder blade and the deceased was vomiting blood and bleeding from the stab wounds. He then fell down. When Nonso rushed back with a broken bottle he saw the deceased lying on the pool of his own blood. Nonso then ran away and the defendant also escaped. I did not witness the incident alone. There are other persons at the scene of the incidence.

One Chidimma Onuchukwu, the first daughter of the defendant, was there. One Adolph Onuchukwu, who is the son of the defendant’s brother was there. We all started shouting. Even Chidimma was blaming her father but her mother took her away. It happened by 8.00pm but there was noon light and there was light throughout from a nearby shop. I am quite sure I saw the defendant stab the deceased and the defendant also saw me that night.

In my humble opinion, the evidence of PW1 and PW5 standing alone established a *prima facie* case why the appellant should be called upon to render his own version of the story that led to the stabbing of the deceased. I have also taken into consideration the evidence of Uche Okeke (PW3) at page 124 lines 20 to page 125 lines 1-21 of the printed record to wit:

PW3: Sworn on Bible and states in Igbo. My name is Uche Okeke. I live at Umumelike Village, Okohia, Ihiala. I am a labourer and I load sand on Tipper Lorries. I know one Obiora Onuchukwu. He is a driver. He is the driver, whose Tipper lorry I load with sand. I knew one Ekene Onuchukwu, the deceased. He was loading sand like me. I know one Nonso Onuchukwu. Nonso loads sand with us. On 20th October, 2011, I went to work with Obiora Onuchukwu (PW2) and Ekene Onuchukwu (deceased) and Nonso Onuchukwu. Nonso is the son of the defendant. On that day we loaded sand in our work place. After loading sand, PW2 gave me N1,000 and gave Ekene Onuchukwu who was the senior Loader N1,000. He (PW2) gave Nonso Onuchukwu N500. At the close of work PW2 gave us the balance of our day’s earning. The balance he gave us was N2,300 for all three (3) of us. The money was handed over to Ekene. Ekene gave me N650 from the N2,300 in front of a shop at Okohia, Ihiala. I received the money and went home. Before I left the shop Ekene asked Nonso to wait so that he could get change with which to settle him by giving him his own money. When I was on my way going home I heard some noise towards the direction of the shop where Ekene gave me the money. I turned back and rushed to the direction of the noise. When I came to the scene, I heard Ekene’s voice shouting “Martin has killed me”. As I was approaching Ekene, he tried getting up but he could not and he fell down. I tried raising him up but blood was coming out from his mouth and from his neck and back. He was not showing signs of life in him. I met one Chidimma, the daughter of the defendant at the scene shouting “my daddy has killed brother, my daddy has killed Ekene”. At the scene of the incident, I saw other persons like Chidimma and one other girl related to the Onuchukwu, she is from the same family as the deceased and the defendant. When I got to the scene I did not meet Nonso Onuchukwu. On the night of the incident though it was night there was light from electricity powered by generating plant.

I have read the argument marshalled by the learned Counsel to the appellant in the brief of argument. There is no argument of substance why this Court should interfere with the decision of the lower Court. The entire argument seeks to discredit, at this stage of the evidence, the credibility of the testimonies of the prosecution witnesses. Impeachment of the prosecution witnesses’ credibility should be during trial when the witnesses are testifying in the witness box, not in an appellant’s brief of argument. It is trite law that if it is intended to impeach the credit of a witness or a party he is bound to be confronted with such evidence in the witness box so as to allow him to explain. It is improper for a defendant not to cross-examine a plaintiff or his witnesses on a material point but simply to wait to call oral or documentary evidence on the issue after the plaintiff has closed his case. SeeNwobodo vs. Onoh (1984) 1 SC 98-100 per Obaseki, JSC. In Okasi vs. The State (1989) 2 SCNJ 183 per Belgore, JSC (as he then was) held at pages 188 to 189 of the judgment as follows:

*What is remarkable in this case is that PW5 was not cross-examined by all the Counsel for the appellants and PW1 was only crossed-examined as follows:*

*Cross-examined by Ibekwe A. for 1st accused.*

*"When I was in the PW1’s room before hearing gun shot, PW2 and another person were in that room.*

*Cross-examined by Mr. Aghadiuno for 2nd accused*

*I made my statement to police on 30th July, 1983.*

*Put: You were inside the room of PW1’s when the gun was fired?*

*Ans: I saw 2nd accused from my position by the door of room of PW1 when he fired at the deceased person.*

*When the two accused rushed out of the room, PW1 urged me to close the door that armed robbers would kill her. I hear the gun shot fired by the 2nd accused and the 1st accused rushed out of the room and the door of PW1 was closed by me.*

The serious and incriminating testimonies of the PW1 and PW2 were thus left substantially unchallenged. In all criminal trials, the defence must challenge all the evidence it wishes to dispute by cross-examination. This is the only way to attack any evidence lawfully admitted at trial. For when evidence is primary, admissible in the sense that it is not hearsay or opinion and not that of an expert, and an accused person wants to dispute it, the venue for doing so is when that witness is giving evidence in the witness box. The witness should be cross-examined to elucidate facts disputed, for it is late at the close of the case to attempt to negative what was left unchallenged; it is even far an exercise in futility to demolish it on appeal and it is like building a castle in the air to find fault in such evidence in this Court.

At page 194 of the judgment **Oputa, JSC** observed as follows:

How did learned Counsel for each of the appellants deal with the evidence of this most important witness? Mr. Ibekwe for the 1st appellant asked only one feeble and irrelevant question which did not address itself to any of the serious allegations made against his client. One wonders whether Mr. Ibekwe really understood the gravity of the charge against his client and the seriousness of each allegation of fact made by PW5 against the 1st appellant. There was not even as much as a suggestion of mistaken identity. It is rather unfortunate that a serious case of murder was handled with such levity. By this failure to cross-examine PW5 one is allowed to assumed that 1st appellant was not disputing the facts the PW5 deposed to.

In that event, it will be pointless for Counsel during the closing addresses or now on appeal to dispute the facts which were not challenged at all by cross-examination. In that event also the learned trial Judge will have no option but to believe the PW5 whose story had not been challenged let alone contradicted. One will only wish that Counsel defending a man on the gravest of all charges - murder - will take their assignment more seriously, realizing that the very life of their clients may well depend on their performance.

Did Mr. Aghadiuno of Counsel for the 2nd appellant fare any better? The answer is No. But his case may be due to the fact that his client made a clear breast of it in his confessional statement Exhibit ‘5’. But even then he still had a duty to test the accuracy and veracity of the evidence of PW5. This he did not do.

Also in Babalola & Ors. vs. State (1989) 7 SCNJ 127, Nnaemeka-Agu, JSC held at pages 138 to 139 as follows:

First:- After PW4 stated in effect that he made a mistake to have mentioned the 3rd appellant instead of the 4th learned Counsel on his behalf did not as much as cross-examine PW4 or even suggest to him that he was lying or that his testimony on the point was an afterthought. On principle, where a witness called by the prosecution gives relevant and material evidence, Counsel for an accused has a duty to cross-examine on it or at least indicate that he does not accept it as true. See on this, the case of Walter Barkley Hart (1932) 23 C.A. 202 at page 207; Brown vs. Dunn 6 R. 67, 76-77, H.L. 4. If he fails to do so, then, unless the evidence itself is inadmissible, illegal, or not worthy of belief, particularly where the defence does not produce another piece of evidence which renders the particular evidence in question improbable, then a Court of trial is entitled to accept such evidence as true.

This principle applies not only in criminal but also in civil proceedings. In Agbonifo vs. Aiwereoba (1988) 2 SCNJ (Pt.1) 146, Nnaemeka-Agu, JSC held at pages 161-162 as follows:

Finally, I would wish to underscore the fact that the adversary system of administration of justice which we operate has no room for any sneak game of hide and seek. It does not permit a defendant to conceal a vital evidence in his case from his adversary and his witnesses until they have testified and closed their case. To do so is to negate an essential object of cross-examination: to establish a party’s own case by means of his opponent’s witnesses. (See on this Phipson: On Evidence (11th Edn.) Paragraph 1544). A corollary of this is, of course, that in a case like this in which an important part of the defendant’s case was that plaintiff’s star witnesses, PW4 and PW5 signed thedocuments of title which they (the defendants) were relying upon, it was obligatory of them to have confronted those witnesses with their signatures while in the witness box. The (English) Court of Appeal summed up the principle in the case of Walter Berley Hart (1932) 23 App. R. 202, where Hewart, L.C.J. said at page 207:

*In our opinion, if, on a crucial* *part of the case, the prosecution intends to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness box or at any rate, that it should be made plain, while the witness is in the box, that his evidence is not accepted.*

Lord Ronan, L.J., used much the same words in the civil case of Flannagan vs. Fahy (1918) 2 1r. R. 361, page 388-389, C.A.; See also Brown vs. Dunn (1894) 6 R.67 (H.L.). It is noteworthy that if the signature of PW4 and PW5 on Exhibits ‘H1’ and ‘J’ were established it would have completely destroyed the appellant’s case that the plots in dispute were not granted to any person before they were granted to his vendor in 1963. But the respondents carefully and deliberately let the opportunity of destroying the appellant’s case under the fire of cross-examination to slip from them. In my view, as the appellant had discharged the general onus of proof on him of tracing his possessory title to the Oba of Benin, it was incumbent on the respondents to prove their own title likewise before the issue of priority of their grant could arise. As they withheld the vital evidence in proof of the signature of their application and recommendation for a grant by the appropriate officers of the Plot Allotment Committee, PW4 and PW5, by failing to ask them to confirm their signatures while in the witness box, I feel entitled to draw the inference under Section 148(d) of the Evidence Act that if they had asked the question the answer thereto would have been unfavourable to them.

**Obaseki, JSC** held similar views at page 163 of the decision as follows:

The documents of title Exhibits A, B and C produced by the plaintiff have been proved to be valid and obtained in accordance with Benin Customary Law. They have also been proved to vest title of the land in dispute according to Benin Customary Law in the plaintiff. On the contrary, the documents in the hands of the defendants were not proved valid to relate to the land in dispute and the approval of the Oba on the face of it was not proved to have been obtained in accordance with the procedure laid down for obtaining approvals. Although the Secretary of the ward whose signature was alleged to be on Exhibit ‘H1’ testified for the plaintiff as PW5 to the effect that there was no allotment made in the area in dispute in 1956 the year 1st defendant alleged she got the allotment, Exhibit ‘H1’ was not put to him to identify his signature appearing on it. The document was only produced at the defence stage by the defendant. This golden opportunity of confronting PW5 with Exhibit ‘H1’ having slipped by Exhibit ‘H1’ became worthless. Similarly, Exhibit ‘J’ was rendered worthless by the same testimony of PW4 and PW5. Having been rendered worthless, they became ineffectual in competing with the title documents of the plaintiff Exhibit ‘A’, ‘B’ and ‘C’.  
No defective document of title to land can displace a valid document of title to land. Where a plaintiff has been able to satisfy the Court that the documents of title to land he holds are valid and effectual as against the defective documents in the hands of the defendants and the identity andcertainty of the land established, the plaintiff is entitled to be declared owner of the land in dispute**.**

I am of the humble opinion that the prosecution established a *prima facie* case why the appellant should enter his defence. Nothing useful has been urged in the appellant’s brief to warrant this Court to interfere with the decision of the learned trial Judge in the Court below.

Accordingly, this appeal lacks merit and is dismissed. I uphold the decision of the learned trial Judge.

**RITA NOSAKHARE PEMU, J.C.A.:**

I have read in draft the lead judgment of my brother JOSEPH TINE TUR, JCA. I agree with his reasoning and conclusions in this appeal.

The appeal is devoid of merit and I affirm the decision of the lower Court in the charge, the subject matter of this appeal.

**MISITURA OMODERE BOLAJI-YUSUFF, J.C.A.:**

I was privileged to read in draft the judgment of my learned brother, JOSEPH TINE TUR, JCA. I agree with the conclusion therein that this appeal lacks merit and should be dismissed. With the evidence of PW1 who was an eye witness to the incident which culminated in the charge of murder against the appellant herein, it cannot be said that there is no legally admissible evidence on record linking the appellant with the offence or that the prosecution has failed to establish a *prima facie* case against him to warrant his being called upon to enter his defence. I too dismiss the appeal and abide by the consequential orders made therein.