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NWODE NKPUMA  
V.  
THE STATE  
SUPREME COURT OF NIGERIA

SC. 163/1993

SALIHU MODIBBO ALFA BELGORE. J.S.C. (Presided and Read the Leading Judgement)  
ABUBAKAR BASHIR WALI J.S.C.  
MICHAEL EKUNDAYO OGUNDARE, J.S.C.  
EMANUEL OBIOMA OGWUEGBE, J.S.C.  
SYLVESTER UMARU GNU, J.S.C.

TUESDAY, 12TH DECEMBER, 1995.

APPEAL – Grounds of appeal – Failure to obtain leave to file additional grounds of appeal and/or raise new issue on appeal – Effect.

COURT - Supreme court - Power of to raise issue of law suo motu

APPEAL Brief writing - Issues for determination - Where based on incompetent ground of appeal - How treated.

COURT - Supreme court - Power of to raise issue of law suo motu

CRIMINAL LAW AND PROCEDURE - Arraignment - Improper arraignment -When cannot be successfully challenged.

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PRACTICE AND PROCEDURE - Issues for determination - Where based on incompetent ground of appeal - How treated.

PRACTICE AND PROCEDURE - Supreme court - Power of to raise issue of law suo motu.

issue:

Whether the Court of Appeal rightly affirmed the conviction and sentence of the appellant.

Facts:

The appellant was charged with murder contrary 10 Section 319 of the Criminal Procedure Code before the Anambra State High Court sitting at Abakaliki. He pleaded not guilty to the charge.

On 26th March, 1983, at Ugbo Nzashi Echara Ikwo, the appellant, Nwode Nkpuma, murdered his uncle, Nweji Elom, by inflicting on him several machet wounds. The appellant had complained to the deceased of certain stomach ailments whereby he was taken to a herbalist at Obeagu. The appellant seemed dissatisfied with the treatment and returned home with the impression that the deceased had abandoned him.

The deceased left the home of P.W.I., Abba Netshi, an old blind man who being a relative of the deceased and the appellant can recognise them by their voices. As P.W.I was discussing with the deceased, the appellant came in and called out the deceased. P.W.I recognised distinctly the voice of the appellant. There ensued a struggle in which the deceased seemed to pick a stick that P.I Used in holding his door. P.W.I heard the sound of machet being used and someone falling down. He raised an alarm. The appellant fled leaving behind the mutilated corpse of the deceased.

The appellant made a voluntary statement to the police in which he claimed that the deceased must be responsible for his illness as he (deceased) wanted him insane so that he would not be able to ask the deceased for the estate of his late lather on which the deceased and his son sat. Also, his two sisters were given out in marriage and the dowries on them were collected by the deceased who never accounted to him. He relied on defence of self defence at the trial.

The learned trial Judge found that the case for the prosecution was proved beyond reasonable doubt: that the evidence of the defence could not be believed. He therefore found the appellant guilty of murder and sentenced him to death. The appellant's appeal to the Court of .Appeal was dismissed. The appellant further appealed to the Supreme Court.

In his brief of argument, the appellant evinced an intention to argue additional grounds of appeal but failed to file the additional grounds neither was leave sought to file the grounds.

Moreover, the issues involved in the proposed grounds were never raised in the two lower courts and no special leave was sought to raise them in the Supreme Court.

Held (Unanimously dismissing the appeal):

1. On When issue of improper arraignment will not succeed in a criminal case -  
Where from the record of the trial court, the charge to an accused was read and explained to the accused and he pleaded thereto, and the trial Judge diligently gave instruction as to the representation of the accused by counsel which was duly provided throughout the proceedings, then the accused would not be heard to complain of improper arraignment. Moreover, where, as in the instant case, such issue was neither raised in the trial High Court nor the Court of Appeal. (P. 512, paras. E-G).
2. On when defences of self-defence and provocation will not avail an accused –  
Where the evidence before a trial court point to the accused as the aggressor and the injuries inflicted on the deceased that caused his death were completely disproportionate to any imagined provocation, then neither the defence of self-defence nor provocation would avail an accused. [ R. v. Onyemaizu (1958) NRNLR 93 referred to]. (P. 510, paras. C-D)
3. On Need for leave of court to file additional grounds of appeal or raise new issue on appeal –  
Where an appellant intends to file new or additional grounds of appeal, leave must be sought and obtained to file and argue them. Equally, where new issues involved in the new grounds were not raised in the lower court, special leave of court must be obtained to argue them. Thus, simply averring that leave would be sought to file and argue certain grounds of appeal merely intimates the court of the intention of the party but does not manifest into the grounds being presumed filed. Such grounds are incompetent and go to no issue in an appeal. (P. 512, paras. D-E)
4. On Treatment of issue based on incompetent ground of appeal –

It is the law that where an issue for determination is predicated on an incompetent or defective ground of appeal such issue is unarguable. [Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718. referred to]. (P. 514, paras. F-G).

5. On Power of Supreme Conn to raise issue of law suo motu –

There is nothing precluding the Supreme Court from raising suo motu any issue of law not raised at the Court of Appeal and High Court if the end of justice will thus be served. In the instant case, however, there is no reason on the whole written record for the Supreme Court to disturb or interfere with the decision of the Court of Appeal which affirmed the trial court's decision. (P. 512-513, paras. H-A)

Nigerian Case Referred to in the Judgment:

Nwadike v. Ibekwe ( 1987) 4 NWLR (Pt. 67) 718

Nigerian Statute Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria. 1979. S. 33(6)(c)& (e)

Appeal:

This was an appeal against the decision of the Court of Appeal affirming the decision of the High Court convicting the appellant for murder and sentencing him death. The Supreme Court, in an unanimous decision, dismissed the appeal and affirmed the sentence and conviction.

Editor's Note:

The Court of Appeal judgment which is herein affirmed by the Supreme Court has been reported in (1993) 9 NWLR (Pt.317) at page 374

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Salihu Modibbo Alfa Belgore, J.S.C.

(Presided and Read the Leading Judgment): Abubakar Bashir Wali. J.S.C.; Michael Ekundayo Ogundare. J.S.C.; Emanuel Obioma Ogwuegbu J.S.C.; Sylvester Umaru Onu. J.S.C.

Appeal No: 163/1993.

Date of Judgment: Tuesday, 12th December, 1995.

Names of Counsel: Yusuf O. Alli, Esq -for the appellant.

Onyeabor C. Obi, Esq - for the Respondent

**Court of Appeal:**

Division of the Court of Appeal from which the Appeal was brought:

Court of Appeal, Enugu

Names of Justices that sat on the Appeal: George Adesola Oguntade.

J.C.A. (Presided): Samson Odemwingie Uwaifo. J.C.A.; Sunday

Akintola Akintan, J.C.A. {Read the Leading Judgment)

Appeal No: CA/E/176/90

Date of Judgment: Thursday, 24th June. 1993

Names of Counsel: C.A. Anozie (on behalf of Legal Aid Council of Nigeria) -for the Appellant

A.U. Eloike, Chief Legal Officer, Ministry of Justice, Enugu State -for the Respondent

**High Court:**

Name of the High Court: High Court, Abakaliki

Name of the Judge: Offiah, J.

Charge No: AB/69C/83

Date of Judgment: Thursday. 3rd October. 1985

Names of Counsel: Orakwelu -for the State

Nzewi -for the Accused

**Counsel:**

Yusuf O. Alli. Esq -for the appellant

Onyeabor C. Obi. Esq - for the Respondent

**BELGORE, J.S.C:** (Delivering the Leading Judgment): The appellant was convicted and sentenced to death for the offence of murder under S.319 (1) of the Criminal Code Law (Cap. 30,

Laws of Eastern Nigeria 1963 applicable to former Anambra State). The trial, at Abakaliki Judicial Division of High Court of Anambra State was before Offiah J. and the accused person pleaded not guilty to the charge. When he was arraigned before the Court on the 23<sup>rd</sup> day of February 1984 the following was recorded by learned trial Judge.

"Accused in Court.

Umearokwu for the State.

Charge is read and explained in Ibo to the accused who perfectly understands the same and pleads not guilty to the charge.

Court: Case referred to the Legal Aid Council c/o Ministry of Justice. Abakaliki, Legal Aid Council to arrange for legal representation of the accused. Registrar is to write accordingly. Proof of evidence to be forwarded to the Counsel.

A month later the Court started receiving evidence. The summary of the evidence is that on 26th March 1983 at Ugbo Nzashi Echara Ikwo, the appellant, Nwode Nkpuma, murdered his uncle Nweji Eloni (hereinafter referred to as "the deceased") by inflicting on him several machet wounds one of which virtually decapitated him. The accused had complained to the deceased of certain stomach ailments whereby he was taken to a herbalist - referred to as native doctor - at Obeagu. The accused seemed not satisfied with the treatment and returned home feeling the deceased had abandoned him. He enquired from the deceased why he was so abandoned but the deceased never gave an answer. The deceased left for the house of Abba Nteshi (P.W.1) a relation of both the appellant and the deceased. As he was settling down at P.W.1's house the appellant came in. P.W.1 was an old man and about two years before this time had become blind but he could recognise persons by their voices as both the deceased and the appellant were relations of his and lived near each other. As P.W.1 was discussing generally with the deceased the appellant came in and called out the deceased "Nweji, come out". P.W.1 could recognise distinctly the voice of the appellant, because, as he said "I knew it was Nwode Nkpuma's voice that I heard ..... because lived with him". There followed a struggle with P.W.1 trying to separate the appellant and the deceased. In the struggle the deceased seemed to have picked a stick that the P.W.1 used in holding his door. But he heard the sound of matches being used and finally somebody falling down. He raised an alarm by shouting "Ogbuekwaya"! "Ogbuekwaya! meaning "He has killed him. He has killed him". The appellant ran away from the scene, and by the time Nweke Oke (P.W.2) got to the

scene after hearing the alarm raised by P.W.1. the appellant was no longer there but he saw the deceased on the ground with several wounds and lying in a pool of his own blood. A report was made to the police and thereafter the medical officer (P.W.6) performed the post mortem examination. The deceased apparently died on the spot. The autopsy found multiple deep cuts all over the deceased's body e.g. on i.e. left hand that almost severed the little and middle fingers, very deep one about 8cm long across the right side of the face exposing the oval cavity, multiple deep cuts in the chest well and finally "a very deep cut on the right side of the neck severing the neck but for a thin flap of skin." All the wounds were inflicted by sharp object and he died of severe blood loss as a result of the multiple wounds.

The appellant made a voluntary statement to the police which he confirmed before a superior police officer who read it to him. The statement was admitted as Exhibit A and it is very clear what the appellant complained about. The deceased, his uncle, must be responsible for his illness as he wanted him insane so that he would not be able to ask him for the estate of his late father on which the deceased his son sat. His two sisters were given out in marriage and the dowries on them were collected by the deceased who never accounted to him. He also alleged that the deceased and his son chased him to the compound of P.W.1 and he therefore picked his cutlass and inflicted a cut on the deceased's shoulder, whereby he fell. He claimed that the deceased also inflicted a wound on him with a knife. However in his evidence in Court he abandoned the claim that the deceased and his son chased him to Abba Nteshi's house but that he found the deceased in that house. He then narrated how the deceased tried to attack him with a machet and a stick leading to a struggle in which he succeeded in wrestling the machet from the deceased before he gave him a cut.

The learned trial Judge, in a judgment that reviewed the evidence and made findings came to the conclusion that the case for the prosecution had been proved beyond reasonable doubt and that the evidence of the defence could not be believed. He therefore found him guilty of murder and sentenced him to death.

The appeal to the Court of Appeal was dismissed as the counsel for the appellant, after summarising the evidence had nothing to urge in favour of the appellant. Thus the appeal to this Court. It must be pointed out, that both the trial Court and the Court of Appeal found no substance in the defence of either self defence or provocation because the evidence before the trial Court pointed to the appellant as the aggressor. At any rate, the injuries inflicted on the deceased that

caused his death were completely disproportionate to any imagined provocation. (*R. v. Onyemaizu* (1958) NRNLR 93).

On appeal to this Court, learned counsel for the appellant in his brief of argument wrote as follows:

"In the same vein leave to argue the following additional grounds of appeal shall be sought at the hearing, that is:

#### ADDITIONAL GROUNDS OF APPEAL

1. The learned Justices of the Court of Appeal erred in Law by affirming the decision of the trial court which convicted the appellant of the offence of murder when the arraignment and trial of the appellant was unconstitutional and therefore a nullity.

#### PARTICULARS

- (i) The appellant was arraigned before the trial court on 23<sup>rd</sup> February, 1984 without a counsel of his choice contrary to the provisions of Section 33(6)(c) of the Constitution of the Federal Republic of Nigeria, 1979.
  - (ii) There was failure to interpret the charge to the appellant before he pleaded to same as required by Section 33(6)(e) of the Constitution of the Federal Republic of Nigeria, 1979.
  - (iii) There was a total failure of Justice and a grave miscarriage of justice against the appellant.
  - (iv) The provisions of the Constitution on the right to Counsel and interpretation of the proceedings are mandatory and inviolate.
  - (v) Proper arraignment of an accused is a condition precedent to a valid trial and exercise of jurisdiction by the trial Court.
2. The learned Justices of the Court of Appeal erred in law when they affirmed the decision of the trial court convicting the appellant of the offence of murder when there was no observance of the mandatory provisions of Section 215 of the Criminal Procedure Act and decided authorities thereby rendering the trial and conviction of the appellant confirmed by the Court below a nullity.

#### PARTICULARS

- (i) There was non-compliance with the mandatory provisions of Section 215 of the Criminal Procedure Act.
  - (ii) The non-compliance renders the whole trial a brutum fulmen.
  - (iii) The non-compliance was not an irregularity but a failure of a condition precedent to the lawful trial of the appellant.
  - (iv) The appellant was prejudiced and a grave miscarriage of justice ensued against the appellant.
  - (v) The welter of authorities from this court makes the arraignment herewith to be fundamentally defective.
3. The learned Justices of the Court of Appeal erred in law in affirming the decision of the trial court by holding that the trial court considered adequately all the defences open to the appellant when from the circumstances such was not the case.

#### PARTICULARS

- (i) The trial court did not consider adequately the defences of self-defence and provocation that were apparent from the pre-trial statement of the appellant and his testimony in open court.
  - (ii) The trial court and the court below did not resolve the question of “who struck who first” as between the appellant and the deceased.
  - (iii) The appellant maintained in his pre-trial statement that it was the deceased that first gave him a cut on his fingers with a knife.
  - (iv) The defences of self-defence and or provocation could have availed the appellant in the circumstances of this case.
4. The learned Justices of the Court of Appeal erred in law by their failure to hold that the pre-trial statement of the appellant and his oral testimony at the trial contradicted each other materially and both should have been held as unreliable for all purposes at the trial.

#### PARTICULARS

- (i) There were material contradictions between the pre-trial statement of the appellant and his testimony at the trial

- (ii) If the trial court and the court below had held that the statement and the oral testimony were not evidence upon which they could rely, there would have been no evidence on which to convict the appellant.
  - (iii) Without the alleged confession of the appellant in his pre-trial statement Exhibit A, the prosecution did not prove the offence charged beyond reasonable doubt.
5. The learned Justices of the Court of Appeal erred in endorsing by implication the way and manner the trial court picked and chose from the facts contained in the pre-trial statement of the appellant Exhibit A, by believing portions that are against the appellant and rejecting all the portions favourable to the appellant's case.

#### PARTICULARS

- (i) A trial court either believes the contents of a pre-trial statement of an accused wholly or disbelieves same.
- (ii) The Court cannot pick areas that are against the accused from his pre-trial statement to use same against him and reject portions thereof favourable to him.
- (iii) The appellant was prejudiced by the manner the trial court accepted portions of Exhibit A that were against the appellant's case but rejected or refused to give adequate consideration to the portions that are favourable to him.
- (iv) A miscarriage of justice was engendered against the appellant."

The proposed new or additional grounds of appeal up to the lime of arguing the appeal have not been filed. No leave was sought to file the grounds. Secondly, the grounds are completely new and have not been raised in the two courts below and no special leave was sought to file and argue them. By just simply averring that leave would be sought to file and argue certain grounds of appeal merely intimates the court of the intention of the party but that does not manifest into the grounds being presumed filed. The net result is that the grounds not filed are incompetently in the Brief of Argument and go to nothing in this appeal. But I must go further. Had the grounds been competently filed what effect would they have on this appeal? I think the issue of S.33(6)(c) of the Constitution of the Federal Republic of Nigeria 1979 implying the appellant had no counsel of his choice is too overblown. As I set out in the beginning of this judgment, the appellant on being first

brought before the Court had the charge read and explained to him in the language he understood, and he understood the charge and pleaded not guilty. Trial Judge diligently gave instruction as to representation of the accused by counsel. The subsequent proceedings especially the hearing of evidence was with lull appearance of a competent counsel for the appellant and at no time did he raise question of representation by counsel or question of S.33(6)(e) of the Constitution as to interpretation of the proceedings. These are completely new matters and they can only be raised by the procedure laid down in the law and the Rules of Court. The appellant's counsel in the Court of Appeal had nothing to urge in his favour and that Court, on very dispassionate review of what transpired at the trial Court, rightly found no reason to disturb the trial Court's decision. The cases of *Uzodima v. Commissioner of Police* (1982) 3 NCLR 327-329; *The State v. Yusufu Garba* (1985) 6 NCLR 193; *Francis Asanya v. The State* (1991) 3 NWLR (Pt. 180) 422, 466-7; *Akpan v. The State* (1991) 3 NWLR (Pt. 182) 646; 657; *Gabriel v. The State* (1989) 5 NWLR (Pt. 122) 457; (1989) 12 SCNJ 32; *Gwonto v. The State* (1982) 3 NCLR 312; (1983) 1 SCNLR 1 are matters completely irrelevant to this appeal. There is nothing precluding this Court from raising suo motu any issue of law not raised in the Courts below if the end of justice will thus be served. But in this case now on appeal I have no reason, on the whole written record, to disturb or interfere with the decision of the Court of Appeal which upheld the trial Court's decision.

I see no merit in this appeal and I accordingly dismiss it. The conviction and sentence of death of the trial Court upheld by the Court of appeal is affirmed.

WALI, J.S.C.: I have been privileged to read before now the lead judgment of my learned brother Belgore, J.S.C. I entirely agree with the reasons he advanced for dismissing the appeal, and I adopt same as mine.

The appeal lacks merit and I also dismiss it and the conviction and sentence of death are hereby affirmed.

OGUNDARE, J.S.C.: I have the privilege to read in advance the judgment of my learned brother Belgore, J.S.C. just delivered. I agree with his reasonings and conclusion that this appeal is totally lacking in merit. I too dismiss the appeal and affirm the judgment of the court below.

OGWUEGBU, J.S.C.: The judgment just read by my learned brother. Belgore. J.S.C. was made

available to me in draft. I also agree that for the reasons given in the said judgment, this appeal should be dismissed and I hereby dismiss it.

Learned counsel for the appellant conceded at the hearing of the appeal that the only ground of appeal filed is incompetent. That notwithstanding, the appeal has no merit. The judgment of the trial court which was affirmed by the court below, is hereby further affirmed.

ONU, J.S.C: I had the advantage of reading before now the draft of the judgment of my learned brother Belgore. J.S.C. just delivered. I am in entire agreement with his reasoning and conclusions that the appeal fails and it is dismissed.

I wish, however, to add a few words of comments in expatiation thereto as follows:-

The facts of the case are briefly that the appellant and the deceased were related in that the deceased was appellant's uncle. The appellant had complained to the deceased that he was afflicted with belly-ache and the deceased took him to a native doctor at Obeagu for treatment. The appellant further alleged that he was abandoned at the native doctor's place. Such that when he (appellant) returned, he enquired from the deceased why he was so abandoned. The deceased did not give him an answer and soon left for the house of Abba Nteshi (P.W.1) where he later went himself.

P.W.1 was an old man whose residence was not far from the deceased's. He was the only person who was present when the incident took place. He (P.W.1) described how the deceased was discussing with him when he heard the sound of a matchet. He (being blind) heard someone say "Nweji come out" and the voice he identified was that of the appellant, and agelong neighbour. Five other witnesses testified for the prosecution.