IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION, HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, THE HON. JUSTICE E.O. AHAMIOJE, JUDGE
ON THE FRIDAY, THE 24TH DAY OF APRIL, 2010.

BETWEEN:		**SUIT NO. B/54C/2006**
THE STATE	**-----**	**COMPLAINANT**
VS		
OBASANJO EGHAREVBA) **EJEROKONENE VICKMAGOR)**	**-----**	**ACCUSED**

JUDGMENT

The two (2) Accused persons are arraigned on a two count of information filed on the 13/7/2006 as follows:

STATEMENT OF OFFENCE COUNT I

Conspiracy to Murder, punishable under Section 324 of the Criminal Code Cap 48, Vol. II Laws of the Bendel State of Nigeria 1976 now applicable to Edo State of Nigeria.

PARTICULARS OF OFFENCE

Obasanjo Egharevba (m) and Ejerokenene Vickmagor (m) on or about the 19th day of May 2001 at Ogba Prison Farm Settlement Benin City in the Benin Judicial Division conspired with one another to commit felony to wit: Murder.

STATEMENT OF OFFENCE COUNT II

MURDER, punishable under Section 319 of the Criminal Code Cap. 48, Vol. II Law of the Bendel State of Nigeria, 1976 now applicable to Edo State of Nigeria.

PARTICULARS OF OFFENCE

Obasanjo Egharevba (m) and Ejerokenene Vickmagor(m) on or about the 19th day of May, 2001 at Ogba Prison Farm Settlement Benin City, in the Benin Judicial Division Murdered one Lucky Ominike(m).

In this bid to prove the charge against the Accused persons, the prosecution called three witnesses. Each of the Accused persons pleaded not guilty to the two count of the information, testified on Oath in his defence and called no witness.

The case as presented by the prosecution can be summarized as follows: PW3, Mr. Friday Jatto testified that he knew the Accused persons and Mr. Lucky Ominike, (deceased) who is a prison warder. That before on the 19/5/2001, he was at Ogba Prison farm settlement. That before he was taken to Ogba Prison, he was an inmate at Oko Maximum Prison, Oko, Benin City.

He stated that on the 19/5/2001, himself, the 1st and 2nd Accused Persons were brought out from the prison to work inside the Garden in the Prison by Mr.

Lucky Ominike (decased) i.e. to cut grass in the Garden. That himself, the 1st and 2nd Accused persons were using hoes to weed the grass. As they were working, the 1st accused person told Mr. Lucky Ominike, (deceased) that he wanted to drink water. Mr. Ominike (deceased) followed the 1st Accused Person to drink water. As he was working, he heard the deceased shouting. He moved closer to the scene to know what happened to him. He then saw the 1st Accused person use the iron hoe he was working with to hit the deceased. That when he got to the scene, he still met the deceased but saw blood gushing out from his body. After the incident, the 1st and 2nd Accused persons ran away. He started to shout and nobody came to assist him. He then managed to carry the deceased to the compound. He later made a statement to the police.

Cross-examination by O.B. Ilebode, Esq., of learned counsel for 1st Accused person, PW3 stated as follows: He is 25 years old now. That he was sentenced to Prison term in 2001, and cannot remember the month. He was 22 years when he was convicted and sentenced to prison term. That he knew the 1stAccused's name as Obasanjo. That he met the 1st Accused person at the prison when he got there. That the distance between the place they were clearing the grass and the place he took the deceased to after he was hit with the hoe is not far. That there were other warders in the Quarters on the day of the incident. That there were other

prisoners in Ogba Prison Farm settlement on the day of the incident. That the distance between where they were working and the place the 1st Accused person hit the deceased was about 60 feet. That it was the shout of the deceased that attracted him to the scene. When he raised his head as a result of the shout by the deceased, he saw the 1st Accused person use the iron hoe to hit the deceased second time. That the hoes they use on that day were iron hoes. That he was not in the same cell with the Accused persons. He denied the suggestion that he is not Friday Jatto. That it is not true that he was brought in to stand as Friday Jatto. That it is not true that he does not know the Accused persons. That the Warder who told him that Mr. Ominike is dead is not in court now.

PW3 is Dr. Wilson Akhiwu, a Consultant Pathologist in charge of the Police Medical Services, Zone 5, Nigeria Police, Benin City.

He testified that on the 12/6/01, he was served coroner papers by the Airport Road Division of the Nigerian Police force. The paper requested him to carry out an autopsy on one Lucky Ominike. He proceeded to Akugbe Hospital Mortuary where the corpse was kept on the 13/6/2001 to carry out the autopsy. He stated that the body was identified to him by one Collins Ubaocha who said that he was a co-staff of the deceased. Upon examination he found the body of a young adult apparently well nourished male African. That there was nothing

externally to suggest a chronic illness. That there was freshly healed wound on the right side of the head, an area he called the right temporal scalp. When he opened the body, his important findings were on the head. That there was a collection of altered blood in the right temporal scalp area of the head. There was fracture of the right temporal scalp. There was also bleeding into a compartment that surround the brain (subdural compartment). That the bleeding compressed the brain which led to the death of the deceased. The other organs were essentially normal. He attributed the cause of death of the deceased to head injury that fractured the skull which led to intracranial bleeding. He issued a report. That the injury is about 5cm in length. That the injury on the head had healed, but the problem was inside the head. That the injury would have been caused by a blunt object. That he does not know if the injury in this case was self inflicted.

Cross-examined by O.B. Ilebode, Esq., PW2 stated he knew PW1 who signed and collected the Medical Report. That the PW1 may probably be with the state C.I.D., Benin City. That the coroner forms were served on him by the Police at the Airport Road Division, Benin City.

Cross-examination by Chief M.I. Ukpebor, PW2 stated that it is difficult to give the exact date the injury was inflicted on the deceased. That for an injury to

heal and form a scare it means that it had been there for about 14days. He stated that all his findings as regards the injuries he found inside the brain was as a result of the wound on the head which he said had healed externally.

PW1 is Sergeant Ukem Agiabekong attached to State C.I.D., Benin City. He stated that he knew Lucky Ominike who is now late, and the Accused persons.

He testified that on the 19/6/2001, a signal was sent from the Airport Road, Police Division to the state C.I.D., Benin City to take over a murder case that was already pending at the Magistrates Court, Benin City. That the signal stated that the Accused person were standing trial in Magistrates Court 8, Benin City for the Offence of conspiracy, assault occasioning harm and escape from lawful custody. That the victim had died at the UBTH, Benin City. That his team leader, Sgt. Alex Onyembi went to Magistrate Court 8, Benin City to withdraw the charge and the Exhibit, that is a wooden hoe. They went to Oko Prison and the two accused persons were brought for them to obtain their statements. The team leader, Sgt. Onyembi obtained cautionary statements from each of the Accused persons in English language in his presence.

He stated that he is conversant with Sgt. Onyembi's writing and signature, and had worked with him for about 2 years. That the Sgt. Onyembi had been transferred to Imo State. The statement of the 1st Accused person was admitted

in evidence as Exhibit 'A', whilst that of the 2nd Accused person was admitted and marked as Exhibit 'B'.

He stated that they visited the scene of crime. That the hoe that was allegedly used for the commission of the offence was recovered and registered with the Exhibit keeper, which was admitted as Exhibit 'C'.

He stated that a statement was obtained from the deceased before he died, where the deceased gave an account of what happened to him before he died. That coroner forms were served on the police pathologist, Dr. Wilson Akhiwu (PW2) who performed a post Morten Examination on the corpse of the deceased, and he issued a medical report.

Cross-examined by O.B. Ilebode, Esq., PW1 stated that he cannot remember the date he took over the investigation of the case. That the statement of the 1st Accused person was obtained at Oko prisons (Exh. 'A'). That it is not true that the Accused person did not make Exhibit 'A'. That all case files complied by Airport Road, Police, and Ogida Police Stations were sent to them at the State C.I.D., Benin City. That he saw the statement made by the 1st Accused person at both Police Stations. That Exhibit 'C' was recovered by the Police at Airport Road Police Station. That he was present at the Oko prison when Exhibit 'A' was

recovered. That he cannot remember when the deceased died. That he got the Doctor's report before they concluded their report.

Cross-examined by Chief M.I. Ukpebor, PW1 stated that he was with Inspector Alex Onyembi when Exhibit 'B' was made by the 2nd Accused person. That it is true that he assisted the said inspector Alex Onyembi in the investigation of the case. That he sent signals to him to come and testify in this case. That he did not received any reply from him. That the 2nd Accused person ran away from the scene after the deceased was struck with hoe. That the 3rd prisoner who did not conspire with he accused persons assisted the deceased. That he did not obtain the statement but the Airport Police Station did.

At the close of the case for the prosecution, the 1st Accused person testified that he now lives at Sapele Road Prison (white house), and has been there since December, 2001. That before that date , he was at Oko Prison, Benin City. That he was remanded to Oko-Prison on the 27/5/01 and that before on the 27/5/01, he was at Ogba Prison, Benin City.

He testified that on the 19/5/01, which was a Saturday, in the morning, one Mrs. Omoruyi who is a staff of the prison department begged him to help her worker or clear the grass in her garden. She asked him to look for four other boys to assist him do the work. He then went to Mrs. Omoruyi's farm with two elderly

men and two boys to do the work accompany by Mrs. Omoruyi. When they got to the farm, being the headman, he shared the work to ensure that it was done properly. He stated that it was lucky Omenike, (deceased) and Mrs. Omoruyi who led them to work at the farm. That as the others were working, he left them and went to a place called ogbemudia pond. He stated that the 2nd Accused person never went with them to work on the farm on that day.

He gave the names of those who went to work in the farm with him as Hakeem, Sunday and Awelo. That when they got to the farm, Mr. Lucky Ominike (deceased) left them and went away. That when he was at the Ogbemudia pond, he heard the noise of prisons shouting, and when he looked up, he saw many people running in different directions. He also ran towards the Police Station. On his way, he met a group of vigilante members. He told them to help him because he was a prisoner of Ogba prison. They did not believe him and decided to take him to their leader. He explained to their leader that there was crisis in the prison, and that he had five months left to complete his prison term. They then took him to evbotubu Police Station where he was detainted.

He stated that he met vigilante members at about 9.00pm, and that the crisis which made him to run away happened at about 11.00am. that he was in the bus between 11am-9pm. That at the Evbotubu Police Station, he was taken to

the cell where he met the 2nd Accused person. He then asked the 2nd Accused person what he was doing at the cell the following morning. He told him that he was alleged to have committed the offence of Rape. He was taken before the Divisional Police Officer in the morning. After his explanation, the Divisional Police Officer called the Commissioner of Police on the phone who came to Evbotubu Police Station. He stated that the personal Assistant to the Commissioner of police took his statement which was recorded in a cassette. That he signed his statement at Evbotubu Police Station by thumb-printing same. He stated that he was then transferred to Airport Road Police Station where he made another statement which he thumb-printed. That he was later charged to Magistrates Court from the Airport Road Police Station.

He stated that he cannot write in English language hence he thumb-printed the statements. That he did not know PW1, and he was not Investigating Police Officer in the matter. That he later heard from some persons that lucky Ominike died. He stated that the signature on Exhibit 'A' is not his own, and he did not make Exhibit 'A'. He stated that he did not hit the deceased with an iron hoe on that day at Ogba farm settlement. That he did not go to the farm with any working tool since he was the leader of the group, and PW3 was not one of the prisoners at Ogba farm settlement. That he only knew PW3 as a son to warder in

the prison and the father was present in court when PW3 testified. That he does not know the name of PW3's father. He stated that he did not agree with the statement of the 2nd Accused person wherein the 2nd Accused stated that he hit Lucky Ominike (deceased) with a hoe on the neck. That before the day of the incident, he was a prisoner serving sentence which was passed on him by the Area Customary Court, Benin City on the 11/10/2000. He stated that PW3 did not see him hit the deceased twice with hoe. That he knew the 2nd Accused person at the prison before the day of the accident.

Cross-examined by O.F Okungbowa, Esq., learned prosecuting counsel, the 1st Accused person stated that they were five persons who went to work on the farm on that day. That he was at Ogbemudia pond when he heard people shouting. He denied making Exhibit 'A'. He stated that when he saw people running towards the river, he ran towards Ekewan Road. He denied the suggestion that he was given a heo to work on that day, and that the 2nd Accused person was in the farm with him on that day. He also denied the fact that when he ran towards Ekewan Road on that day, the 2nd Accused person ran with him towards the same direction. He stated that he was in the bush between 11a.m-9.00pm before he met the vigilante members. He denied that he was apprehended at 11pm in company of the 2nd Accused person.

Cross-examined by Chief M.I. Ukpebor, the 1st Accused person stated that he did not have any agreement with 2nd Accused person to kill Mr. Lucky Ominike (deceased). That he did not go to the farm with the 2nd Accused person.

The 2nd Accused testified that he knew Lucky Ominike (deceased) who was a staff of the prison. He stated that before on the 19/5/2001, he was in Ogba farm settlement prison, Benin City for the offence of Assault, and was sentenced to prison term by the Magistrate's Court and was serving his sentence.

He stated that he was at the Evbotubu Police Station where he was detained for an alleged offence of Rape when the 1st Accused person was brought into the cell. The 1st Accused asked him what brought him to the police station. He told him that he was alleged to have raped the daughter of the Chief Warder of the Ogba farm settlement called "Geri Geri", and the name of the girl is Uyimwen. The Divisional Police Officer later ordered the investigation police officer to transfer him to the Airport Road, Police Station which was done on the 21/5/2001.

That the police obtained a cautionary statement from him for the offence of Rape. After the investigation, he was charged to Magistrates' Court, No. 12, Benin City for the offence of Rape, and was remanded to Oko Prison. He stated that he was never in the same room with 1st Accused at oko prison . He stated

that on the 8/7/2001, the Police man at the Airport Road Police Station who obtained his statement in company of the legal officer of the Prison's Department called him out from the cell at Oko prison. The police officer told him that he had a paper for him to sign. He requested that the contents of the statement be read to him. The legal officer asked him to sign the statement because it was written in his favour. He refused to sign it. The Warders, whom he cannot remember their names started to beat him. That because of the beating inflicted on him, he decided to sign the statement, Exhibit 'B'.

He stated that on the 11/7/2001, he was brought out again from the cell by the warders of the Prison Department. He met the 1st Accused person in the records office. He was then taken to the Magistrates' Court, Benin City with the 1st Accused person for the offence of murder, and remanded to Sapele Road Prison. He stated that he did not make any statement in respect of the offence of murder. That he did not accompany the 1st Accused person to work at the Ogba farm settlement on the day of the incident. He stated that PW3 lied when he stated that he accompanied them to work at Ogba farm on that day. That he did not seen the 1st Accused hit the deceased with a hoe. That he did not escape with the 1st Accused person. That he was transferred from the Airport Road Police Station to State C.I.D, Benin City but did not make any statement there.

Cross-examined by Mr. M.E. Okojie, learned Director of Legal Drafting, the 2nd Accused stated that he knew the deceased who was Warder at Ogba Farm Settlement Prison. He stated that he was sentenced to term of 1 year imprisonment. That he served about 4 months in Oko Prison and was later transferred to Ogba farm Prison Settlement. He stated that he was not taken to the farm to work, but Mr. Geri-Geri took him to his house to help him in his poultry. He stated that he met 1st Accused at Ogba Farm Settlement Prison. He denied the fact that he was taken out to work in company of PW3 and the 1st Accused. He denied the suggestion that when he discovered that the deceased fell down, he escape with the 1st Accused. That he was not arrested by the members of the vigilante group. He denied the fact that he was never beaten at the prison.

At the close of Defence, Chief M.I. Ukpebor of learned counsel for the 2nd Accused person submitted that the accused persons are arraigned before this court on a two count charge. That in proof of the charge, the State called 3 witnesses and tendered three exhibits. That the 2nd Accused testified in his defence and called no witness.

He Submitted that at the close of trail, the prosecution has not been able to established the case beyond reasonable doubt against the 2nd Accused person.

He submitted that it is settled that 3 main ingredients have to be established by the prosecution to succeed in a charge of murder as reported in the case of *STATE VS OGUNBUNJO & ANOR. (2001) 13 WRN I AT 2-3.*

He submitted that the witnesses called by the prosecution did not link the 2nd accused person with offence charged. That the PW3 who testified as an eye witness told the court that the 2nd accused was one of the three persons he was working with at the Ogba farm settlement on the day of the incident. That he saw the 1st Accused used a wooden hoe to hit the deceased on the head thrice. He did not say that the 2nd Accused did any thing directly or indirectly resulting in the death of deceased. That the 2nd Accused fled from the scene along side, the 1st Accused person.

He submitted that merely fleeing from the scene of crime dose not without more result in the conviction of an accused person for the alleged offence, and cited NWACHUKWU VS. STATE (2007) ALL FWLR (PT 390) 1380 AT 1388 AND 1390 RATIONS 17 & 21, 1414 PARAGRAPH B.

He submitted that the only reason the 2nd Accused is arraigned before this court is that he ran away from the scene of crime. That the failure to rescue the deceased when hit by the 1st Accused does not constitute a crime. That there is no other evidence beyond this.

He submitted that the prosecution witnesses have failed to established the offence as charged against the 2nd Accused person. That it is not the duty of the accused to establish his innocence. He urged the court to discharge and acquit the 2nd Accused person.

He submitted that in the alternative, the 2nd Accused told this court the circumstance leading to his arrest. That the only reason for his being arraigned was that he refused to endorse a statement to in criminate the 1st Accused person. That this evidence was never challenged. That the court has to accept the evidence as being the truth thereof. That the 2nd accused gave evidence to the effect that he was taken to both Evbotubu and Airport Road Police Stations, and they served a witness summons on them and they failed to testify to rebut this fact. He urged the court to hold that the prosecution has so much to hide in this case hence they failed to produce the evidence. That the Investigating Police Officer's (IPO) from Evbotubu and Airport Police Stations who started the investigation are material witness who were not called to testify. That their evidence would have assisted the court to determine the truth of the evidence of the 2nd Accused. He urged the Court hold that if they had been called, their evidence would have been unfavourable against the prosecution. He urged the

court to invoke the provisions of section 14 9(d) against them. He finally urged the court to discharged and acquit the 2nd accused.

On his part, O.B. Ilebode, Esq., of learned counsel for the 1st Accused person submitted that the accused person are arraigned on a 2 count charge of conspiracy and murder, and that he wish to address the court in line with two issues as follows:

(a) Whether the entire evidence led by the prosecution disclosed a guilt of the offence of conspiracy and murder as alleged in the charged? and

(b) Whether the alleged deceased was identified or properly identified as one Lucky Ominike?

He submitted that the totality of the evidence led by the prosecution fell woefully short of disclosing the guilt of the commission of the offences of conspiracy and murder, and urged the court to discharge and acquit the 1st accused person.

On the issue (a) above, he submitted that the corpse of the alleged deceased has not been strictly proved as being the corpse that was examined by doctor Wilson Aikuwu (PW2). He submitted that looking at the totality of evidence led by the prosecution, there is nothing that links the 1st accused person with the act that led to the death of Mr. Ominike Lucky as averred on the charge. That

the law is that for accused to be held responsible for the death of a deceased, the cause of death must be linked directly to the acts of the accused person. That the cause of death must be established unequivocally, and cited *JOSEPH ILORI V. STATE (1998) 1 ACLR 267 AT 278. RATIONES 4 & 5.*

He submitted that PW1 stated that he recovered a wooden hoe that was allegedly used to hit the deceased. But Exhibit 'C' , is iron or steel hoe. That this contradiction has dealt a fatal blow on the case of the prosecution. That PW2 was unable to pin the cause of death to a particular instrument whereas a particular instrument was mentioned in this incident.

He submitted that the cause death in a criminal trial is not proved by a guess, it must be definitive as to cause of death. That PW2 state that the injuries has healed and it was diffcult to say if it was caused by a sharp or blunt. That he stated: "I don't know if it could be self-inflicted".

He submitted that in the face of these pieces of evidence, even if the 1st accused was to admit the offence, it is not conclusive that the injury was the causes of the death of the deceased, and further referred to the evidence of pw 1 and pw2. He also referred to the issue of coroner form sent to the doctor (pw2). That Pw1 stated that he served the coroner from on pw2. But the pw2 told the court that it was not pw1 who served him the coroner form.

That it was the Airport Road, Police Division. He submitted that these contradictions minor as they may appear, immediately cast some question on the identity of the corpse allegedly examined by pw2. That no Coroner form was tendered before this court. That a doubt has been created in the case of the prosecution, and cited *FRANK UWAGBOE V. STATE (2009) ALL FWLR (PT. 350) 1323 AT RATIOS 5 & 6.*

He submitted that in a criminal if there is contradiction as touching on the victim, it is a material contradiction.

That pw2 stated that he went to Akugbe hospital where he examined the body of the deceased. But Pw1 stated that they took over investigation when they learnt that the deceased had died at UBTH. That there is no explanation as to why his corpse was moved to Akugbe hospital from UBTH. There is only one conclusion deducible from the fact, that is either pw1 gave evidence in a case of which he did not investigate or the victim at the UBTH which Pw1 investigated was never examined by pw2, that it is not for this court to pick and chose between the evidence of pw1 and pw2.

He submitted that there is discrepancies as to where the hoe Exh.'C' was recovered by pw1. i.e Magistrarte Court, and the scene of crime. Pw1 stated under cross-examination that he did not personally recover the hoe, Exh. 'C'.

Pw1 stated that he did not obtain the statement of the only eye-witness to the incident.

He submitted that the head of the vigilante group who allegedly apprehended the 1st accused was never called to give evidence in this case. That no Policeman from Evbotubu was called to testify in this case. That no body from Airport Road Police Station was also called to testify in this case. That the statement of that 1st Accused person at Evbotubu and Airport Road Police Stations were not included in the proof of evidence. That every statement of the accused person whether favourable or unfavourable ought to be produced before the court. That if they had annexed the statements of the 1st accused at Evbotubu and Airport Road Police Stations, and called the leader of the vigilante all these would have been unfavourable to the prosecution. He urged the court to invoke the provision of section 149(d) of the evidence act against the prosecution.

He submitted that pw3 could not describe the kind of injury that was inflicted on the deceased. There is nothing in the evidence of pw3 that is worthy of being given any weight, and cited *SULE AHMED V. STATE (2003) 3 ACLR 145 AT 165, RATIO 5.*

He submitted that pw3 stated the deceased was bleeding and Exhibit 'C' was not forensically examined to establish a nexus between Exh. 'C' and the 1st accused. That Exhibit 'C' would have been sent for forensic test to establish that the blood on Exhibit 'C' is that of the deceased. That there is nothing on record to show that pw3 was in prison custody at all time material to this case. That the 1st accused person stated that pw3 was not among those that went to work with them on that day.

He submitted that the deceased was alleged to have sustained the injuries on the 19/5/01, and was alleged to have died on the 9/6/01. That there is nothing to show what transpired between the interval of 21 days, and cited the case of *CHIOKWO V. STATE (2003) 3 ACLR 28 AT 43 – 44.*

On issue (2), he submitted that where an accused denies making a statement, it is not for him to object to such a statement being tendered while the prosecution is taking his witnesses. That the appropriate time to challenge making of the alleged confessional statement is when he is in the witness box. That a confessional stament on its own does not stand as evidence on its own. That the truth of facts stated therein must be tested by the police. It is not enough for the police to be satisfied when confessional statement is made, and cited *UKWUENYI V. STATE (1989) 1 CLRN 114, RATIO 8, QUEEN V. OBIASA*

(1962) 1 ALL NLR 651 AT 657. QUEEN VE. AGUABOR (1962) 1 ALL NLR 287 AT 289. IKEIUREGHIAN V. STATE (2004) 12 WRN 25 RATIOS 12-15. MDJEMU V. STATE (2000) 2 CLRN 41 AT 64 RATIO 10.

He submitted that when a confessional statement is tendered, it is not proof of its contents hence it is open to the accused person either to deny or affirm same. That the 1st accused person denied in this case of making the confessional statement on the ground that he never make a statement at the State Police Headquarters. That he only made a statement at Evbotubu and Airport Police Stations; that he thumb-printed them. But, the statement before this court is signed, and cited M.A. SANUSI V. STATE (1984) 10 S.C. 166 AT 199. He submitted that the 1st accused was never cross - examined on this issue. That the statement of the 1st accused at Evbotubu and the Airport Police Stations never were produced. He urged the court to invoke the provision of section 149(d) of the Evidence Act against the prosecution.

On issue of identity of the corpse, he submitted that by the plea of not guilty of the 1st accused person to the charge, the 1st accused thereby denied all the facts in the charged including the identity of the person allegedly murdered by him. By this, it became mandatory that the person who identified the corpse to pw2 ought to have been called to testify. The person who allegedly identified

the corpse to pw2 was never called by the prosecution. Pw2 told the court that one Mr. Collins Uboacha Identified the corpse to him. That the evidence of pw2 that the corpse was identified by Mr. Collins Uboacha is haersay evidence, and cited *NISUGHANDO V. STATE (2002) 3 LRCNCC 184 RATIOS 3 AND 6; STATE V. AIRODION & ORS. (2002) 3 L.R.C.N.C.C 52 AT 66; STATE V. OGUNSUNYA (1971) 1 M. N.L .R. 125 AT 126 -127.*

He submitted that the IPO did not mention the name of the deceased person he investigated, and did not properly investigate this matter, and cited ONUBOGU V. STATE (1998) 1 ALL A.C.L.R. 67 RATIO 4; MUKA V. STATE (1998) 1 A.C.L.R 14 RATIO 4; ONAH V. STATE (1998) 1 ACLR 642 RATIOS 3 AND 10; DAIMA V. STATE (1998) 1 ACLR 159 RATIO 8.

He submitted that in the face of the contradictions in the case of the prosecution, doubts have arisen and the doubts should be resolved in favour of the 1st accused.

He submitted that there is no piece of evidence to support the offence of conspiracy to commit the offence, and urged the court to hold that the charge was not proved.

He finally urged the court to discharged and acquit the 1st accused person.

On his part, M.E. Okojie, Esq. learned Director of Legal Drafting for the State, submitted that the State has proved the case beyond reasonable doubt, and urged the court to do hold.

He submitted that to prove the case of conspiracy and murder against the accused, the state called 3 witnesses. He urged court to believe their evidence as the evidence were direct and positive.

He submitted that to prove a case of murder, the prosecution is required to prove:

i. that the death of the deceased resulted from the act or acts of the accused person,
ii. that the act or omission was intentional that death or grievous bodily harm was the probable consequences.

He submitted that to prove that the deceased, Lucky Ominike is dead, the prosecution called pw2. That pw2 gave the cause of death, and urged the court to believe his evidence.

He submitted that pw3 who was the eye witness testified before this court on 17/4/08. That pw3 gave evidence that the 1st accused used a hoe to hit the deceased on the head.

He submitted that the 1st accused intended to kill the deceased when he struck him with the hoe, and intended the probable consequence of his action on that day. He submitted that the fact that the deceased did not die on that day does not derogate from this point, and cited REV V. MAYENURGU (1953) 14 WACA 379. That the deceased died within 1 year and 1 day from the day of the commission of the offence.

On the issue of identification of the deceased, pw2 stated that the deceased was identified to him by a co-worker, Collins Ubocha of the deceased before he carried out the post-mortem examination. That the failure of the prosecution to call the said Collins Ubocha has not derogated from the proper identification of the deceased. That the death of a deceased is a question that can be proved by circumstantial evidence, and cited ADEKUNLE V. STATE (2006) 14 NWLR (PT. 1000) 717 AT 727 RATIO 21.

He submitted that the evidence of the medical doctor who gave evidence is in consonance with the offence with which the accused persons are charged. That it was the same deceased who was hit by the 1st accused that was examined by the doctor, pw2. He urged the court to hold that it was Lucky Ominike, deceased who was examined by pw2, the medical doctor.

He submitted that the defence of the 1st accused is an afterthought, and urged the court to disbelieve his evidence. That the defence of the 1st accused is a complete denial of the offence and urged the court to disbelieve same.

On the issue of conspiracy, he cited the case of IKEMSON V. STATE (1989) 1 CLRN 1 AT 8 RATIOS 21 AND 22.

He submitted that conspiracy in this case is the running away of the 2nd Accused at the scene of crime, and also the Accused persons were arrested together. He referred to the definition of murder in section 316 (3) and urged the court to hold that there was concerted conspiracy between the two accused person.

Learned Director of legal Drafting conceded that there is no evidence from the prosecution against the 2nd Accused in respect of the offence of murder.

He submitted that Police force is one, and the prosecution is not bound to call a host of witnesses. That one witness if believed is sufficient to establish a case of murder, and cited THEOPHILUS V. STATE (1996) 34 L.R.C.N 74 AT 77 RATIO 1.

He submitted that Section 149(d) of the Evidence Act is not applicable in this case. That Section 149(d) talks about failure to call evidence and not failure to call a particular witness.

On the issue of contradiction in respect of Coroner form, he submitted that this is not a material contradiction. That Coroner form was tendered in evidence before this court. That issues were raised in cross-examination and not in counsel's address before the court, and cited IKEMSON V. STATE (SUPRA) RATIO 11.

On the definition of material contradiction, learned counsel referred to THEOPHILUS V. STATE (SUPRA) RATIO 5, and submitted that it is not every stiffing in consistence, that is fatal to the case of the prosecution. That whatever inconsistencies refer to by learned counsel for the 2nd Accused is not fatal but minor inconsistencies.

He submitted that the 1st Accused made a confessional statement which was admitted without objection, as Exhibit 'A'. He urged the court to accept Exhibit 'A' and the fact that he resiled from the confessional statement,Exhibit 'A' is of no moment, and cited ***IKEMSON V. STATE (SUPRA) RATIOS 2, 3 & 4.*** He urged the Court to find corroboration in respect of Exhibit 'C', and the testimony of Pw 2, Medical Doctor.

On issue of whether Exhibit 'C' is wooden or iron, he submitted that this is a matter of details. That a hoe always has an iron as a digging tool. That the only

distinction is that it has either wooden or iron hand, and cited ***REV. MAYE NUNGU (SUPRA).***

He submitted that the evidence of the Medical Doctor, PW 2 is not hearsay as to the fact that the deceased was identified to him by Mr. Collins Nbuocha, and referred to section 77 of the Evidence Act. That Pw 2 gave evidence of who identified the deceased to him. That the evidence is direct and positive and not a repeated story.

He finally urged the court to hold that the prosecution has prove the case against the Accused persons as required by law.

Replying on points of law, O. B. Ilebode, Esq., of Learned Counsel for the 1st Accused submitted that the issue of the identity of the deceased is not the same as proof of death of the deceased. That circumstantial evidence cannot prove the identity of a deceased, and cited ***STATE V. OKONKWO (1998) L.R.C.N. C.C. 33 AT 57 – RATIO 10, ENEWOH V. STATE (1999) 2 LRNCC 1 AT 14.***

It is pertinent to state that it is the cardinal principle in a criminal trial that the onus is always on the prosecution to prove the guilt of the Accused person beyond reasonable doubt, though not beyond any shadow of doubt.

In other words, the burden of proof lies on the prosecution and it never shifts. See the following Cases:

i. ESSANGBEDO V STATE (1989) N.W.L.R. (PT. 133) 57

ii. MBENU V. STATE (1988) 3 N.W.L.R. (PT. 84) 615 AT 626

iii. AIGBADION V. STATE (2000) 77 L.R.C.N. 820 AT 842

iv. STEPEHEN V. STATE (1986)5 NWLR (PT 46) 978

v. GIRA V. STATE (1996)37 L.R.C.N. 688

vi. IGABLELE V STATE (2006) 6 N.W.L.R. (PT. 975)100 AT 127

It is now firmly established that where the charge preferred against and Accused person is murder, under section 319 (1) of the criminal code, as in the instant case, the prosecution is required to prove certain ingredients. These ingredients have been stated by Onu J.S.C. in the case of IGABELE V STATE (SUPRA) At PAGE 116 as follows:-

(i) That the deceased is dead,

(ii) That the act or omission of the Accused which caused the death of the deceased was unlawful, and

(iii) That the act or omission of the accused which caused the death of the deceased must have been intentional with knowledge that death or grievous bodily harm was its probable consequence.

See also the following cases:-

(i) ABOGEDE V STATE (1996) 5 NWLR (PT. 448) 270

(ii) R. V. NTAH (1961) 1 ALL N.L.R. (PT. 4) 590

(iii) OGBA V. STATE (1992) 2 NWLR (PT. 222) 164, (1992) 8 LRCN 362

(iv) KALU V. STATE (1993) 6 NWLR (PT. 279) 59 AT 80

(v) OKEKE V. STATE (1992) 2 NWLR (PT. 590) 246 AT 273

In *GODWIN OGBA V. STATE (SUPRA) AT 198*, it was held thus:

"These three conditions must co-exist and where one of them is absent or tainted with doubt, the charge is not said to be proved."

See: *OBADE V. STATE (1991) 6 NWLR (PT 198) 435*

ADAVE V. STATE (2006) 135 LRCN 703 AT 712

It is trite law that in a murder trial, the prosecution must show conclusively that death was caused by the act of the Accused. In other words, there must be nexus between the act of the Accused Person and the death of the victim.

See the following cases:-

OMINI V. STATE (1999)L.R.C.N. 3044

IGBI V. STATE (2000) 75 L.R.C.N. 302 AT 324

LORI V. STATE (1980) 8-11 SC. 81 AT 95-96

In the instant case, the two Accused persons are charged for the offences of conspiracy and murder as laid. At this juncture, I shall deal with the case of

each of the accused persons separately. I now proceed to examine the evidence adduced in this case against the 1st Accused person.

It is manifest in the instant case, that the deceased, Lucky Ominike (m) is dead. It is manifestly clear that he died of the injuries inflected on his head on the 19/5/2001. This is confirmed by the evidence of PW2, Dr. Wilson Akikhiwu, a Consultant Pathologist who performed the post – mortem examination on the corpse of the deceased. He described the injuries he found on the corpse of the deceased as follows:-

> "There was collection of altered blood in the right temporal scalp area of the head. There was fracture of the right temporal scalp. There was also bleeding into the compartment that surrounds the brain (subdural compartment). The bleeding compressed the brain which led to the death of the deceased. The cause of death is head injury that fractured the skull which led to intracranial bleeding."

Learned counsel for the 1st Accused person submitted that the corpse of the deceased has not been strictly proved as being the corpse examined by PW2. He submitted that it was mandatory that the person who identified the corpse of the deceased to PW2 ought to be called to give evidence.

In my view, the main issue here is whether ether failure of the prosecution to call as witness the person who identified the body of the deceased to the doctor (PW2) who performed the autopsy is fatal to this case of the prosecution. In other words, could it be said in the circumstances of this case that failure to call him is fatal to the case of the prosecution?

In the instant case, the prosecution as earlier state called Dr. Wilson Aikhiwu (PW2) who performed the post-mortem examination on the corpse of the deceased. PW2 testified that the body of the deceased was identified to him by one Collins Uboacha, a co-staff of the deceased. The incident that led to the death of the deceased was alleged to have occurred on the 19/5/2001. PW2 stated that he performed the autopsy on the body of the deceased on the 13/6/2001, a period of about 25 days.

It is now settled law that medical evidence, though desirable in establishing the cause of death in a case of murder, it is not always essential. Where the victim dies in circumstances in which there is abundant evidence of the manner of death, medical evidence can be dispensed with. In other words, where the cause of death is obvious, medical evidence may be unnecessary or can even be dispensed with or inferred. See LORI V. STATE (SUPRA)97; BWASHIV.STATE

(1974)6 S.C. 93; IGAGO V. STATE (2001) 2 ACLR 104; OKORO V. STATE (1991)8 NWLR (PT. 210)424.

In the case of STATE V. ADEGBAMI (1968)NMLR 349, it was held that it is not an immutable requirement that the cause of death should be proved by medical evidence. It was therefore held that "where a man is struck with a lethal weapon and he falls down and dies, it does not require medical evidence to say that the cause of death is the wound inflicted with the lethal weapon, and an eye-witness who sees the attack can give such evidence and from such evidence, the court can infer the cause of death. See also OGUNTOLU V. STATE (1987)1 NWLR (PT 50) 464 AT 469.

Further-more in the not-too-dissimilar case of IDEMUDIA V. STATE (1999) 7 NWLR (PT. 610) 202AT 216, KATSINA-ALU JSC (as he then was) held succinctly thus:

> "In the light of what I have said, I am unable to accept the submission that the person that identifies the body of a deceased to a doctor must be called as a witness. The desirability to call a person is only in circumstances where the identity of the body examined the doctor is shrouded in doubt.Where the identity of the deceased can be inferred from the circumstances of the case, then such direct evidence is not essential."

See OKOKO V. STATE (1998) 14 NWLR (PT. 584) 181; ENWOH V STATE (SUPRA).

In the instant case, although Collins Uboacha who identitied the body the deceased to PW2 was not called, there is copious evidence from PW3, Mr. Friday Jatto, an eye witness of the manner the deceased met his untimely death from which the identity of the deceased can be inferred by this court. PW3 gave direct and positive of the killing of Mr. Lucky Ominike, the deceased. He gave evidence that the deceased was hit with a hoe and he subsequently died. Notwithstanding the evidence of PW3, the Medical Doctor, PW2 gave unequivocal evidenceto establish the cause of death, and that the deceased was identify to him by Mr. Collins Uboacha, co-staff before he performed the autopsy.

It is, my view, that from the circumstances of this case, I have no doubt whatsoever in my mind that the body on which PW2, Dr. Wilson Aikhiwu performed the autopsy was the body of the deceased – Lucky Ominike. I therefore hold that Mr. Lucky Ominike is dead, and the he died of the injuries inflicted on his head with a hoe on the 19/5/2001

The 1st Accused person defence to the charge is a complete denial. Let me quickly say that I have carefully and painstaking considered the evidence adduced

by the prosecution witness and the defence of the 1st Accused person. I say straight way, that I believe the credible evidence of PW3 that the 1stAccused struck the deceased with a hoe on the head at the Ogba farm settlement on the 19/5/01 which caused injuries to his head, and his subsequent death. This is confirmed by the evidence of PW2, Dr. Wilson Aikhiwu, the Consultant Pathologist who performed the autopsy on body of the deceased and described the nature of the injuries inflicted on him. This evidence of PW2 aptly corroborated the evidence of PW3. PW2 and PW3 impressed me truthful witnesses, and therefore believe and accept their evidence. I hold the from from the credible evidence these witnesses that Lucky Ominike is dead, and that he died from the injuries inflicted on his head with a hoe by the 1st Accused person.

Consequently, I hold that there is a *nexus* between the cause of the death deceased and the act of the 1stAccused person.

The pertinent question at this stage is:Whether the 1st Accused was justified to have killed the deceased?

It is trite law that before any killing can amount to murder, it must be show to be unlawful. See STATE V. OKA (1975) 9 -11 SC 17; and Section 316 of the Criminal Code Cap 48 , Vol. ll Laws of Defunct Bendel State of Nigeria, 1976.

In the instant case, the 1st Accused person in his oral testimony denied the charged against him. He gave a completely different version of the incident from his earlier statement to the police. He stated the one Mr. Omoruyi and the deceased took them out for work at Mr. Omoruyi's farm. While others were working, he went to a place called Ogbemudia Pond. That while there, he heard the noise of persons shouting people running in different directions, and he also ran towards the police station. On his way, he was apprehended by vigilante members and was taken to Evobotubu Police Station. He stated he was in the bush from 11am-9pm before he was apprehended.

Be that as it may, the 1st Accused person at the earliest opportunity when he was arrested made Exhibit 'A' to the police wherein he admitted hitting the deceased with a hoe on the head which led to his death.

Now, confession has been defined by Section 28 (1) of the Evidence Act to be an admission made at anytime by a person charged with a crime, stating or suggesting the inference that he committed that crime.

It follows that once the Accused person makes a statement under caution saying or admitting that he committed the offence(s) charged, the statement becomes confessional. And being so, it becomes relevant to the proceedings by virtue of Section 27(2) of the Evidence Act, which provides thus:

"A confession, if voluntary are deemed to be relevant facts against the person who made them only."

The law is firmly settled by string of judicial authorities that a free and voluntary confession which is direct and positive, and properly proved is sufficient to sustain a conviction without corroborative evidence, so long as the court is satisfied with its truth.

In EMEKA V. STATE (2001)14 NWLR (PT. 734)666,the court re-echoed the above principle, and stated thus:

"A free and voluntary confession, if direct, positive, duly made and satisfactorily proved, is sufficient to ground a conviction."

See also the following cases:

(1) KASA V. STATE (1994)18 LRCN 28;

(2) GIRA V. STATE (1996)LRCN 688 AT 693;

(3) AKINMOJU V. STATE (2000)77 LRCN 885

It must, however, be stressed that there is a duty on a trial judge to test the truth of the a confession by examining it in the light of the evidence before the court. See JIMOH YESUF V. STATE (1976)6 S.C. 167.

In the case of ACHABUA V. STATE (1976) 12 SC 63 AT 68, the Supreme Court observed thus:

> "The secrecy with which criminals perpetuated theirs crimes has tended to deprive the prosecution in some cases of eye witnesses; hence confession alone even without corroboration can support a conviction as long as the court is satisfied of the truth."
>
> See also UDO V. STATE (1972)6-9 SC 234 AT 240.

In the instant case, as earlier stated the 1st Accused person in his evidence in the witness box resiled or retracted from the contents of Exhibit 'A', his confessional statement to the police. He gave a completely different evidence from the facts stated in Exhibit 'A'.

It is now settled law by plethora of authorities that where there is a confessional statement, the fact that it has been retracted does not preclude the court from acting on it. In other words, the mere fact that the Accused person is now denying the admission, does not make it inadmissible. See AKINMOJU V STATE (2007)77 LRCN 885; EDAMINE V STATE (1996) 36 LRCN 455.

In IKE V STATE (2010)5 NWLR (PT. 1186) 41 AT 54 – 55, the Court of Appeal held thus:

"An accused person's confession is relevant and should not be disregarded merely because he later resiles from it. What is important is the weight the trial judge will attach to such confession and retraction."

See GIRA V. STATE (1996)37 LRCN 688 AT 693; EGBOGHONOME V STATE (2000)2 A.C.L.R. 262

In the instant case, from the facts of the admission of the 1st Accused person in Exhibit 'A" and the surrounding circumstances of the whole case, particularly the credible evidence of PW1,PW2 and PW3, I am satisfied that he signed same. I, therefore hold and find that the 1st Accused person made Exhibit 'A' actuated by remorse of conscience to make reparation for his dastardly and wicked act of savagely hitting a defenceless deceased with the hoe, Exhibit 'C'on the head on the 19/5/2001. On the whole, I find the confessional statement of the 1st Accused person, Exhibit 'A' to be true. I therefore disbelieve his oral testimony in the witness box that he did not hit the deceased with Exhibit 'C'. I regard his story as puerile and after thought to hoodwink this court. I equally regard his oral testimony as a deliberate fabrication contrived for the sole purposed of his defence, and I reject it in its entirety. On the contrary, I believe the facts contained in Exhibit 'A' as truly reflective of what transpired between the deceased and the 1st Accused on the fateful day o the incident.

I, therefore attach no weight or probative value whatever to the oral testimony of the 1st Accused person and regard his evidence in court as most unreliable.

This now leads me to the consideration of the defence(s) available to the 1st Accused person.

It is settled law that in a trial of murder, it is the duty of the court to consider all the defences raised by the evidence whether the person charged specially put up the defences or not. Simply put, the defence of an Accused person, however stupid must be considered, see NWOSU V. STATE (1998)8 NWLR (PT. 562) 433 AT 441; IBINA V. STATE (1993)5 NWLR (PT. 120) 238 AT 248.

I have myself carefully considered the defence of the 1st Accused person. It is my view that the defence of the 1st Accused person is a complete denial of the offences charged. There is no evidence from the 1st Accused person that the deceased offered him any abuse which resulted in loss of self-control as to resort to his hitting him with a hoe, Exhibit 'C' on the head. There is also no evidence from the 1st Accused person that he hit the deceased with the hoe in self -defence or by accident. I therefore hold that the defences(s) of provocation, self -defence or by accident did not avail the 1st Accused in this case.

Let me now briefly consider some aspects of learned counsel submissions in respect of the 1st Accused person.

Learned counsel, O.B. llebode, Esq., made a heavy weather on the issue of contradictions in the evidence of the prosecution witnesses as regard the hoe, Exhibit 'C'.

It is trite law that for contradiction in the evidence of the prosecution to be fatal, it must go to the root of the entire charge. In other words the contradiction must be fundamental and substantial. Mere minor discrepancies or miniature contradictions, which merely scratches the surface of inconsequential points are really not fatal to the case of the prosecution. See IBEH V. STATE (1997)1NWLR (PT. 4891)632; ESANGBEDO V. STATE (1989)7 S.C.M.J. 10

In the case of IKEMSON V. THE STATE (1989)3 NWLR (PT. 110) 452 AT 479 OPUTA JSC states thus:

> "Two witness who saw the same incident are not bound to describe it in the same way. There is bound to be slight differences in their account of what happened. Where their stories appear to be very similar, the chances are that those were tutored and tailored witness. Minor variations in

testimony seem to be a badge of truth. But when the evidenced of witness violently contradicts each other, then that is a danger signal. Contradictory means what its says – contra-dictum-to say the opposite. Contradiction should be on a material issue to amount to material contradiction"

See IKE V STATE (SUPRA) AT 59 -60;

EHOT V. STATE (1993)4 NWLR (PT.290) 644.

I have myself adverted to the highlighted contradictions by learned counsel for the 1st Accused person. The alleged contradiction is as to the alleged "wooden" or and iron hoe" used by the Accused person to hit the deceased. It is common knowledge that a hoe is either made of an iron or a wooden handle or iron head and iron handle. The main issue in this case is that the 1st Accused used a hoe to hit the deceased on the head. The hoe, Exhibit 'c' is made of an iron. The mere fact that a prosecution witness said that the handle of Exhibit "C" is wooden does not distract from the fact both the head of Exhibit 'C' and the handle are iron. In any event, the 1st Accused person in Exhibit 'A' admitted that he used a hoe to hit the deceased on the head. It would have been a different thing if the prosecution has tendered a cutlass or a shovel as the instrument used and not a

hoe. The issue, in my view, is about the description of the hoe, Exhibit 'C' and nothing more.

It is therefore, my considered view that the minor inconsistency in the description of the hoe, Exhibit 'C' is not material of fundamental to the case of the prosecution. I have also considered other minorinconsistencies highlighted by the learned counsel. I also hold that they are not material contradictions which is fatal to the prosecution.

The only remaining issue is whether the unlawfully and voluntary act of the 1st Accused was of such a kind that grievous bodily harm was the natural and probable result?

The law presumes that a person intends the natural and probable consequences of his acts. The test to be applied in the circumstance is the objective test namely; the test of what a reasonable person would contemplate as the probable result of his act. See *GARBA V. STATE (2000) 77 LRCN 1126 AT 1139.*

It is, my view, on the state of the evidence in the instant case that the 1st Accused person must at least have appreciated that to hit the deceased with a hoe, *Exhibit 'C'* which has an iron or steel head, which resulted in his death would at least occasion serious harm on him. There can be no doubt that the 1st Accused by hitting the deceased with a hoe, *Exhibit 'C'* on a delicate or vulnerable part of the deceased body such as the head which fractured the scalp is deemed to have intended to cause him bodily injury as he knew that death would be the probable consequence of his act. This is a clear manifestation that the 1st Accused person actually intended to kill the deceased by the intentional and murderous assault on his vital part of the body which resulted in the death of the deceased. I hold that the evidence of unlawful killing has disclosed that it was a cold-blooded murder.

It is unlawful according to our law to kill a human being unless the Homicide is authorized or justified or excused by law. See Section 306 of the Criminal Code. It is clear from the evidence before this court that the 1st Accused intended to kill the deceased and in fact did so. It is, my view, that the killing is neither justified, authorized or excused by law. It is therefore unlawful.

Let me now return to consider the case of the 2nd Accused person. The evidence of the prosecution witness (Pw 3) is to the effect that it was the 1st Accused person who struck the deceased with the deadly weapon. The only

evidence of the prosecution witness which linked the 2nd Accused person is that he went to work in company of the 1st Accused person on that day. That the 2nd Accused fled the scene with the 1st Accused person after the 1st Accused struck the deceased with the hoe on the head. The 2nd Accused was subsequently apprehended when he tried to escape.

Mr. M. E. Okojie, Learned Director of Legal Drafting for the State, conceded, rightly in my view, that there is no direct evidence from the prosecution witnesses to link the 2nd Accused person with count 2 of the offence of murder. However, he submitted that the offence of conspiracy to murder can be inferred against the 2nd Accused person by the fact of his running away from the scene of crime; and also that he was arrested together with the 1st Accused. He urged the court to hold that there was concerted conspiracy between him and the 1st Accused person to commit the offence.

Conspiracy is defined as an agreement by two or more persons to do or cause to be done an illegal act; or an act which is not illegal by illegal means. Thus, an offence of conspiracy can be committed where persons have acted either by agreement or in concert.

In the case of ***PATRICK NJOVENS VS. STATE (1998) 1 ACCR 224 AT 263-264 COKER J.S.C.*** *held thus:*

"The gist of the offence of conspiracy is the meeting of the mind of the conspirators. This is hardly capable of direct proof, for the offence of conspiracy is complete by the agreement to do the act or make the omission complained off. Hence conspiracy is a matter of inference from certain criminal acts of the parties concerned done in pursuance of an apparent criminal purpose in common between them, and in proof of the conspiracy the acts or omissions of any of the conspirators in furtherance of the common design may be any and very often are given in evidence against any other or others of the conspirators. It is therefore the duty of the Court in every case of conspiracy to ascertain as best as it could the evidence of the complicity of any of those charged with the offence."

In the instant case, there is only one act of evidence which is being used to prove the conspiracy as well as the offence of murder. The evidence of Pw 3, as earlier stated did not link the 2nd Accused person directly with the murder of the deceased. It is therefore, my view that there is no iota or modicum of evidence from the prosecution witnesses upon which this court can infer any act or conspiracy or complicity of the 2nd Accused person with the offence charged.

It is trite law, that mere presence at the scene of crime or the fact that an Accused person fled from the scene of crime without more is not evidence of the commission of crime, let alone murder. In *ORJI V. STATE (2008) 10 NWLR (PT. 1094) 31 AT 54 RATIO 8,*the Supreme Court held thus:

> "The mere presence at the scene of crime does not, as a matter of law, render the person so present guilty of the crime."

See also*MOHAMMED V STATE (1991) 5 NWLR (PT 192) 438; OGUNLANA V. STATE (1995) 5 NWLR (PT 395) 266.*

It is, my view, that the prosecution has failed abysmally to prove the charges or offences as laid against the 2nd Accused person beyond reasonable doubt as required by law. Consequently, the 2nd Accused person is hereby and accordingly discharged and acquitted on the two count charge of the information.

In respect of the 1st Accused person, having fully considered the totality of the evidence adduced before me, I have come to the irresistible conclusion that the 1st Accused person murdered the deceased, Lucky Ominike in cold - blood.

In the result, arising from all the analysis, I hold that the prosecution has proved the guilt of the 1st Accused person beyond reasonable doubt as required

by law. In the circumstance, if find the 1st Accused person guilty of the murder of Lucky Ominike (m), and I hereby convict him accordingly.

ALLOCUTUS

O. B. Ilebode, Esq:- I urge the court to satisfy itself in line with justice.

SENTENCE:

There is only one sentence provided for the offence of murder under Section 319 (1) of the Criminal Code. There is no alternative.

Obasanjo Egharevba (m), you have been found guilty by this court of the murder of Lucky Ominike (m). The sentence of this court upon you is that you be hanged by the neck until you be dead.

May the Good Lord have mercy on your soul.

_____

HON. JUSTICE E. O. AHAMIOJE

JUDGE

24/4/2010

COUNSEL

M. E. Okojie, Esq. ……. For the Complainant

(Learned Director of Legal Drafting)

O. B. Ilebode, Esq. …… for the 1st Accused

Chief M. I. Ukpebor…….. for the 2nd Accused