IN THE HIGH COURT OF JUSTICE
EDO STATE OF NIGERIA
IN THE UBIAJA JUDICIAL DIVISION
HOLDEN AT UBIAJA

BEFORE HIS LORDSHIP HONOURABLE JUSTICE R. IRELE-IFIJEH – JUDGE ON MONDAY THE 4TH DAY OF MARCH, 2019

BETWEEN:	**SUIT NO. HCU/1CA/2017/A**
COMM. OF POLICE	… COMPLAINANT/RESPONDENT
AND	
1. THANKGOD IYAGBA	… ACCUSED/CONVICT/APPELLANTS
2. OBODO SUNDAY	**… APPELLANT**

JUDGMENT

This Judgment was originally slated for the 20/3/2019, but since this Court has been appointed to be part of the Election Tribunal, hearing notices were served on the Appellant and Respondent, for this Judgment to be delivered today.

This is an Appeal against the Judgment of F. E. Okunrobo Esq. sitting at Magistrate Court Uromi. The Judgment was delivered on the 08/12/15 in Charge No. MUC/114C/2010.

The Appellant herein is Sunday Obodo, was charged by the Respondent as follows:-

> (1) "That you ThankGod lyagba 'm' Sunday Obodo 'm' and one other now at large on the day of August, 2010 at No. 1 Amendokhian Village Uromi, in the Uromi Magisterial District conspired with one another to commit felony to wit child stealing and thereby committed an offence punishable under Section 516 of the Criminal Code Cap 48

Vol. II Laws of the defunct Bendel State of Nigeria 1976 now applicable in Edo State."

(2) That you ThankGod lyagba 'm' Sunday Obodo 'm' and one other now at large on the 1st day of August 2010,at No.1 Amendokhian Village Uromi, in the Uromi Magisterial District stole one child named Favour Ebhokhimiage three years from Peter Ebhokhimi's house and thereby committed an offence punishable under Section 371 of the Criminal Code Cap 48 Vol. II Laws of the defunct Bendel State of Nigeria 1976 now applicable m Edo State."

At the end of the trial the Appellant was convicted on the two counts charge. It is against the order of conviction that the Appellant has appealed to this Court.

Three grounds of appeal were filed, they are:-

1. "That the decision is unwarranted,unreasonable and cannot be supported having regards to the evidence".
2. "That the sentence(s) passed on conviction is excessive".
3. "That further grounds of appeal will be filed later upon the receipt of the record of proceedings in the said Charge No. MCU/114C/2010".

Written addresses were filed and exchanged by both counsel to the Appellant and Respondent, they adopted it by way of legal argument on the 6/2/2019. Counsel representing the Appellant R.E. Orukpe Esq. in his written address raised two issues for determination.

They are:-

(a) "Whether the decision and/or Judgment of the lower Court in this case was right having regards to the evidence adduced before the lower Court?"

(b) "Assuming, but not conceding, that the findings and Judgment of the lower Court was right or correct, whether the consequential orders and/or sentences passed on the appellant on conviction was not excessive?"

Respondent's counsel Lauretta Asaka Esq. (Senior State Counsel) formulated four issues for determination which are:

1. "Whether having regards to the totality of the evidence led at the trial and the circumstances of this case, the Prosecution proved the charge of conspiracy and child stealing beyond reasonable doubt"

2. "Whether the defence of **alibi** can avail the Appellant"

3. "Whether the sentence of the trial Court imposed on the Appellant is excessive".

4. "Whether there are any material contradictions in the evidence of the Prosecution witnesses"

The summary of this case, as per the evidence accepted by the lower Court is that on the 1/8/10 the Appellant, the co-Appellant and Akhere who is now at large informed P.W.2 (Odueki Peter also known as Isabhe) that they would come and take her child by name Favour from her. That after four days the child went missing, P.W.2 in the company of her husband Peter Ebhohimhin (P.W.1) went to the house of the Appellant at Ugboha to demand for their child they were chased away, this prompted them to report to the Onogie of Ugboha who looked into the matter but could not resolve it, hence P.W.1 and P.W.2 reported the matter to the Police via a petition signed by P.W.1

The Appellant on his part denied ever telling P.W.2 he would take her daughter from her.

He also denied going to Uromi to steal the child, he admitted one Akhere who is at large is his brother, that it was because P.W.1 could not

find the said Akhere he was arrested. That he informed the Onogie of Ugboha and the Police that he did not steal any child neither does he know the name of the missing child.

In the Appellant's brief R.E. Orukpe Esq. argued that the evidence adduced before the lower Court by the Prosecution witnesses cannot support a conviction for the offences charged.

That the burden of proof in criminal cases lies on the Prosecution, who is to prove his case beyond reasonable doubt.

He referred to **SECTION 135(1) and (2) OF THE EVIDENCE ACT AND OMOREGIE v. THE STATE (2017) VOL. 268 LRCN 1 at Page 7 Ratio 5 amongst others.**

He further submitted that, the Prosecution did not adduce direct or circumstantial evidence from which conspiracy could have been inferred.

He referred to **Lines 27 - 29 of Page 3 and Page 7 lines 26- 29 of The Record of Appeal.**

He emphasized that the evidence of P.W.2 is marred with contradictions. He referred to **Pages 4-6, and Pages 9-10 of The Record of Appeal.**

He submitted further that where the extra-judicial statement of a witness is at variance with the evidence on oath in Court, both should be rejected.

He referred to **OGOGOVIE v. THE STATE (2017) VOL. 263 LRCN 144 at Pg. 17805**

He summarized some portions of Exhibit 'D' attached to the Record of Appeal and submitted that P.W.2 did not see the Appellant planning with anybody to take her child neither did she see him take the child.

He summarized the evidence of P.W.3 and referred to **Page 14 Lines 8 – 12 of the Record of Appeal**. He also summarized the evidence of P.W.4 and referred to **Page 16 lines 14 – 15 of the Record of Appeal** and submitted that the evidence of P.W.3 is at variance with that of P.W.4 to the extent that he was informed by the Appellant's co-Accused (ThankGod) that he would come and take the child.

That P.W.3 tendered Exhibit 'D' attached to the Record of Appeal as P.W.4's extra judicial statement, but in Page 16 lines 14 – 15 of the Record of Appeal P.W.4 denied making statement to the Police.

He submitted that before circumstantial evidence can be relied upon it must be credible, cogent and point irresistibly to the guilt of the Accused.

He referred to **AHMED v. THE NIGERIAN ARMY (2017) VOL. 263 LRCN 28 at Pages 36-37 Ratio 7.**

He stressed that the evidence adduced before the lower Court is based on hearsay evidence which cannot ground conviction.

He submitted further that, the Appellant raised the defence of **Alibi** that P.W.3 in his evidence never stated that he investigated the **alibi** raised by the Appellant.

That the failure of the trial Magistrate to consider the defence of **alibi** raised by the Appellant in his statement is a miscarriage of Justice.

He urged the Court to quash the conviction of the Appellant on conspiracy.

He highlighted the ingredients of child stealing and submitted that the Prosecution is to prove all the ingredients together beyond reasonable doubt.

That the Prosecution failed to prove the ingredients of the offence as none of the Prosecution witnesses admitted that they saw the Appellant steal the child.

He submitted that, should the Court find the Judgment of the lower Court to be correct, the sentences on the Appellant should be reduced as they are excessive.

He urged the Court to quash the conviction of the Appellant, and set

aside the order made by the lower Court.

In the Respondent's brief, counsel to the Respondent argued that the burden of proof placed on it has been discharged.

She listed the ways through which the guilt of an Accused can be proved and referred to **OJO v. FRN (2008) 11NWLR (Pt.1099) 467 at 515 amongst others.**

She submitted that the trial Court based it's Judgment on circumstantial evidence in the absence of an eye witness account. That circumstantial evidence is as good as direct evidence if it is unequivocal, compelling and point irresistibly to the guilt of the Accused.

She referred to **NASIRU v. THE STATE (1999) 65 LRCN 153 at 167 amongst others**.

She submitted further that the Appellant and two others informed P.W.2 that her child would be taken from her and the child was eventually stolen. It goes to show that the Appellant conspired to steal the child. That Conspiracy is complete by the agreement to perform the act.

She referred to **NJOVENS & ORS. v. THE STATE (1973) 5 SC 17 at 70 amongst others**.

On the issue of **alibi** she submitted that, Appellant's counsel raised heavy weather that P.W.3 did not state if the defence of **alibi** raised by the Appellant was investigated; that from P.W.3's evidence it is clear he was not asked if he investigated the defence of **alibi** raised.

That it is the duty of the Appellant to inquire if the I.P.O. investigated his **alibi** raised as the defence of **alibi** is not conceded with levity.

She referred to **UDO EBRE v. THE STATE (2005) 4 LRCN CC 212 at 223**.

On Issue three she submitted that the severity of sentence is a matter of fact not law and is not a good ground of appeal. That the trial Magistrate did not impose the highest punishment prescribed by law for the offences charged.

That it is not the duty of the Appeal Court to substitute its verdict for that of the trial Court merely because if it had tried the case, it would have come to a different conclusion, provided there is sufficient evidence in support of the verdict.

She referred to **ALAO v. C.O.P.(1978) 1LRN 9.**

She further submitted that the Magistrate considered the aggravated nature of the offence in deciding the appropriate sentence to be imposed on the Appellant, that there is no reason why this Court should interfere with the sentence imposed.

She referred to **OYENEYE. v. C.O.P. (1983) 1NCR 245@ 253.**

She referred to **R. v. ROBINSON (1922-1923) 4 NLR 91**.

On issue four she submitted that there are no material contradictions in the evidence of the Prosecution witnesses.

That only material contradictions in the evidence of Prosecution witnesses can acquit an Accused.

She referred to **AKPA v. THE STATE (2008) 6 ACLR 315 amongst others**.

She submitted finally that the appeal be disallowed and the Judgment of the trial Court affirmed and upheld.

In the Appellant's reply on point of law, Appellant's counsel re-argued issues he already addressed.

I have critically analyzed the arguments and submissions of both Appellant and Respondent counsel.

I have also gone through the Record of Appeal.

A perusal at the issues for determination raised by Respondent and Prosecuting Counsel shows that some of the issues are the same, where the issues are the same I shall consolidate them and address them as one.

I have formulated the following issues for determination:

(1) Whether from the totality of the evidence adduced by the Prosecution at the trial Court, it proved the offences charged

beyond reasonable doubt to warrant the trial Magistrate to arrive at it's decision.

(2) Whether the defence of **alibi** raised by the Appellant ought to have been considered by the trial Court.

(3) Whether there are material contradictions in the case of the Prosecution.

(4) If issue one, two and three are resolved in favour of the Respondent, whether the sentences passed on the Appellant upon conviction is excessive.

The lower Court based it's evaluation on the evidence before him.

It is trite that, the evaluation of a trial Court cannot be faulted unless his findings are perverse, based on inadmissible evidence or at variance with the law governing the case.

See **EDET EFFOI NG UKUT v. THE STATE (1995) LPELR - 331S.C.**

The Appellant in this case was charged at the lower Court for conspiracy to wit: stealing a child and stealing of a child itself.

A careful perusal of Section 371 of the Criminal Code reveals the ingredients of child stealing to be as follows:

(1) Intentionally taking, enticing or detaining a child forcefully or fraudulently.

(2) Intentionally receiving or harbouring a child knowing to have been taken, enticed or detained.

From the above, it is clear that where it is proved beyond reasonable doubt that a person or group of persons willfully, knowingly, forcefully and

fraudulently takes, entices, detains, or harbours any child so taken or enticed is guilty of the offence of child stealing and liable of the offence.

Conspiracy is the meeting of the minds of the conspirators to commit an offence and it need not be physical.

See **BUSARI v. STATE (2015) LPELR - 24279 S.C.**

Conspiracy consists not merely the intention of two or more, but the agreement of two or more to do an unlawful act or do a lawful act by an unlawful means. What this means is that the meeting of those minds must be proved to be more than a mere intention but an agreement to do or not to do an act.

See **STATE v. YUSUF (2007) ALL FWLR (Pt. 337) 1001at 1008**

Paras C - E C.A.

As I earlier mentioned above the trial magistrate based it's evaluation on the evidence before it in determining whether or not the Appellant is guilty of child stealing and came to the conclusion that the Appellant is guilty of the offence charged.

The learned trial Magistrate relied on the testimony of the Prosecution witnesses, that the Appellant and others earlier warned P.W.2 of the inpending disappearance of her child before the child eventually disappeared, he hinged his findings on circumstantial evidence.

See **Page 32 lines 6 to 13 of the Record of appeal**

Also **Page 33 Lines 3 to 10**.

He came to the conclusion that Conspiracy can be inferred from the circumstances surrounding the disappearance of the child after P.W.2 has been forewarned about her child's disappearance by the Appellant, his co-Appellant and another now at large.

See **Page 32 Lines 27-31 of the Record of Appeal**.

Circumstantial evidence is the combination of surrounding circumstances against the Appellant which when considered together creates strong conclusions of his guilt with a high degree of certainty. It is often the best evidence, but it is to be applied with great caution because of the possibility of fabrication which may cast suspicion on an innocent person.

See **OKETAOLEGUN v. STATE (2015) LPELR-24836 (S.C.).**

It is trite that circumstantial evidence that can lead to conviction must be such that is sufficient to link the Accused and fix him to the offence or offences charged and also point unmistakably and irresistibly to the commission of the offences by the Appellant.

See **OBIOMA v. STATE (2013) LPER- 20647 CA**.

From the evidence adduced before the lower Court, the only evidence connecting the Appellant with the offences charged is that himself and two others threatened P.W.2 that they would take her child and the child eventually got missing.

The evidence of P.W.1 and P.W.4 are hearsay evidence which is inadmissible in law, as all they told Court in their evidence were related to them by P.W.2.

See **SECTION 38 OF THE EVIDENCE ACT 2011**.
AND

Page 3 Lines 4 to 30,Page 7 lines 27 to 30,Page 16 lines 8 to 12 and Pages 22 to 24 of the Record of Appeal.

Since the evidence of P.W.1 and P.W.3 are hearsay evidence, the Court is left with only the evidence of P.W.2 to be placed side by side with that of the Appellant which is known as Oath against Oath.

Generally in Oath against Oath the Accused is given the benefit of doubt, however where there is compelling evidence of an eye witness which is believable as against that of the Accused, the evidence of such an eye witness would be believed.

In the instant case, apart from the evidence of P.W. 2 that the Appellant and others threatened to steal her child which the Appellant denied, there is no other circumstantial evidence from which the lower Court arrived at it's decision and found the Appellant guilty of the offence.

It can be said that P.W.2 only suspected the Appellant of stealing her child, since she claimed himself and others earlier threatened her to that effect. It is trite that suspicion however grave cannot amount to proof. Also an Accused cannot be convicted based on suspicion alone.

See: **NWACHUKWU v. STATE (2014) LPELR 22531CA.**

AND

ISAH v. STATE (2007) NWLR (Pt.1049) 582 at 80-81.

On issue one which is whether the evidence adduced by the Prosecution witnesses at the trial Court proved the offences charged to warrant the trial Magistrate to arrive at it's decision.

As I earlier mentioned and set out in the earlier part of this Judgment the evidence adduced by the Prosecution witnesses except for the evidence of P.W.2 are hearsay.

Since hearsay evidence is not admissible, and mere suspicions with nothing more, cannot ground a conviction, it is my view and I so hold that the evidence of the Respondent did not establish the ingredients of the offence of child stealing set out above nor did it establish that the Appellant in connivance with another person had the common intention to steal the child.

On the issue of **alibi** it is trite that **alibi** simply means the Accused person was elsewhere at the time when the offence charged was alleged to have been committed.

See **AIGUOBARUEGIAN & ANOR.v. STATE (2004) LPELR- 270 S.C.**

It is a settled principle of law that an Accused relying on the defence of **alibi** is duty bound to disclose to the Police at the earliest possible time

where he was when the crime was committed and this ought to be investigated by the Police.

See **AREMU & ANOR. v. THE STATE (1991) LPELR- 545 S.C.**

Exhibit 'F' attached to the Record of Appeal is the Appellant's statement to the Police wherein he stated that "on the 1st of August 2010 I went to farm at Abadi at about Sam and returned at about 3pm. It is not true that I accompany ThankGod lyagba to snatch one Favour...."

What the Appellant did here was to inform the Police at the earliest opportunity when he was arrested that he was not at the scene of crime in Uromi but his farmland at Abadi. The Police ought to have investigated his defence of **alibi** raised to ascertain if he was actually at his farm or somewhere else or even at the scene of crime. This is because the defence of **alibi** would crumble like a pack of card where there is stronger evidence by the Prosecution which fixes the Accused person to the scene of the crime at the material time.

See **MOHAMMED v.STATE (2015) LPELR 24397 S.C**.

In the instant case the Investigating Police Officer never testified before the lower Court to the effect that he investigated the defence of **alibi** raised by the Appellant which duty is imposed on him by law. The learned trial Magistrate in his Judgment also stated that the Appellant did not raise the defence of **alibi** in Court. See Page 31 Lines 27 to 29 of the Record of Appeal. The defence of **alibi** ought to be raised first at the Police Station. This was what the Appellant did. The issue of **alibi** ought to be considered by the trial Court because the statement of the Appellant Exhibit 'F' having been duly admitted forms part of the Prosecution's case which the lower Court should have also considered in arriving at it's decision.

I also wish to state that there is no law which places any responsibility on the Appellant to ensure that his defence of **alibi** is investigated. The law places the responsibility to investigate on the Police. Learned Respondent

Counsel was wrong in her submission.

See **ADEBAYO v. STATE (2007) ALL FWLR (Pt. 365) 498 at 520-521.**

On whether there are material contradictions in the case of the Prosecution which affects the root of the case. I wish to state here that the only material contradictions which affects the root of the case are those touching on the ingredients of the offences charged.

I agree with the Appellant Counsel that the dates P.W.2 mentioned in Court and in her statement to the Police with regards to when she was threatened and when her child was stolen are different. Also there are discrepancies as to how many persons threatened her. However these are not material contradictions which affect the substance of the case or touches on the ingredients of the offence.

See **NDIKE v. STATE (1994) LPELR -1991 S.C.**

Where I see material contradictions in this case is in the evidence of P.W.3 and P.W.4. P.W.3 testified before the lower Court that P.w.4 made statement to him at the Police Station wherein he informed him that he had a discussion with one ThankGod who is the Co-Accused in the charge before the lower Court. The said ThankGod informed him that he was coming to take P.W.2's child and he tendered Exhibit 'D' to that effect which confirmed his claim.

See **Page 14 Lines 17 to 24 of the Record of Appeal and Exhibit '01' attached to the Record of Appeal.** P.W.4 on his part denied making statement to P.W.3 and stated that it was P.W.2 who informed him about the threat and not the said ThankGod. See **Page 16 Lines 9 to 15 and Lines 24 to 25 of the Record of Appeal**. These contradictions are material and affects the Police Investigation. It ought to have been addressed by the learned trial Magistrate.

I can't but wonder how P.W.3 came about Exhibit 'D1' well it is only him and P.W.4 who can answer this question and resolve these major discrepancies in their evidence. The law is trite that where there are material contradictions on vital issues it creates reasonable doubt and the trial Judge is duty bound to resolve the doubt in favour of the Accused person.

See **OKAFOR v.THE STATE {2005) LPELR – 7566 C.A.**

The learned trial Magistrate erred in law when he based his Judgment on circumstantial evidence arising from the hearsay evidence led by the Prosecution which was not cogent neither did it point irresistibly to the guilt of the Appellant

See **ADIE v. THE STATE (1980) LPELR – 176 S.C**.

He also erred in law when he came to the conclusion that the Appellant did not raise the defence of **alibi** before him in Court. The law is very clear that the defence of **alibi** ought to have been raised timeously at the Police Station**.** However this does not stop the trial Court from considering the defence since **it** was raised at the Police Station.

See **MOHAMMED v. STATE (SUPRA).**

It is also my view that the findings of the learned trial magistrate are perverse because he based his findings on the evidence of the Prosecution which did not prove the ingredient of the offences charged.

In view of the foregoing I hereby enter and allow this Appeal.

L accordingly set aside the conviction and sentence imposed by the lower Court.

APPEARANCES:

P.O. Ojo Esq.for Complainant/Respondent.

R.E**.** Orukpe Esq. for Appellant.

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HON.JUSTICE R.IRELE-IFIJEH (MRS.)
(JUDGE)
04/03/19