**IN THE MAGISTRATES’ COURT OF DELTA STATE**

**IN THE AGBARHO MAGISTERIAL DISTRICT**

**HOLDEN AT AGBARHO**

**CHARGE NO: MCA/……./2020**

**COMMISSIONER OF POLICE**

**AND**

**Mr T. A. DEFENDANTS**

**Mr E. P.**

**DEFENDANTS’ FINAL WRITTEN ADDRESS**

1. **INTRODUCTION**
	1. Your Worship, on the 3rd day of December 2020, the Defendants were arraigned on four counts charge before this Noble Court and they pleaded not guilty to all the counts in the current charge.
	2. After their plea, trial proceeded with the Prosecution opening and closing its case. Similarly, the Defence opened and eventually closed its case on the 20th of October, 2021. With this, this Court ordered that final addresses be filed in compliance with the rules governing this proceeding. Hence this Defendants’ final address has been filed accordingly.
2. **BRIEF FACTS OF THE CHARGE AND EVIDENCE LED AT TRIAL**

**THE PROSECUTION’S CASE**

2.1Your Worship, the charge sheet before this Honourable Court and the evidence led by the Prosecution tells a story fit for a blockbuster movie script. Most importantly Sir, it alleges that the Defendants committed three offences.

2.2The Prosecution has maintained that on the 14th and 20th days of November 2019, the Defendants conspired between themselves to commit a felony (Count 1). According to the Prosecution, not only did the Defendants conspire between themselves, they proceeded to break and enter into three dwelling houses at Uvwiamuge Street in Agbarho (Counts 2, 3 and 4). One of these houses was specifically entered at midnight through the window (please see Count 2). In all of these houses, the Prosecution alleged that the Defendants stole various items and sums of money (Please see Counts 2, 3 and 4).

2.3 To prove that these alleged crimes actually occurred and were indeed committed by the Defendants, PW1 (Mr S. O) testified on the 3rd of December 2020. He stated that he was an eye witness to the crime alleged in Count 4 of the charge. According to him, armed robbers came to his house while he and his family were sleeping and made way with two phones and the sum of N20,000. A few days later, his stolen phone was found with a young man who was attempting to sell off the phone. This unnamed man was apprehended by the community vigilante and in the words of PW1, the apprehended man ‘confessed all these people’. He further stated that this apprehended man was shot dead by the Police while attempting to escape custody.

2.4 PW1’s testimony took an interesting turn when he truthfully stated in his examination in chief that he does not know the Defendants. He reiterated this conviction under two sets of cross examination questions. Thus, he reaffirmed his unshaken position that he definitely does not know the Defendants. He also truthfully confirmed that the evidence he gave relating to the Defendants was based on what he had been told.

2.5 After this, the Investigating Police officer – Inspector Ify testified as PW2. As expected, PW2 narrated that some criminal complaints were lodged at the station of the Nigerian Police Force where she serves. She specifically stated that she recorded the statements of Efenure Felix, Samuel Onos and one Okoro who laid the complaints. PW2 further stated that a few days later one Mr F. O. was apprehended by the Community Vigilante and brought to the station as the suspected perpetrator of the crime.

2.6 Upon receiving the said Mr F. O. who was tagged as the perpetrator of the crime by the Vigilante, PW2 took his statement and immediately swung into action by having the Vigilante arrest all and sundry mentioned or ‘confessed’ by the said Mr F. O. With these arrests, statements were taken from the Defendants and a search was conducted at the Defendants’ houses.

2.7 Yet again, in a truthful twist, PW2 stated that no incriminating evidence was found in the houses of both Defendants but a locally made gun was found in F. O’s house. F. O. attempted an escape but was shot and he died. Furthermore, various documents were tendered in evidence via PW2 as follows;

 **Exhibit A** – Extra-judicial Statement of Mr. T A. (1st Defendant)

**Exhibit B –** Extra-judicial Statement of Mr E P (2nd Defendant)

**Exhibit C –** Extra–judicial statement of Mr F. O.

**Exhibit D** – Criminal Form D (Search Warrant) dated 23rd November 2019

**Exhibit E** – Police Wireless Message signed by ‘Supol Agbarho’

Also, some photographs were tendered and marked as **ID1 to ID4**.

2.8 Under cross examination, PW2 confirmed that she was not at the scene of the crimes when they allegedly occurred. She also confirmed that there is no document before the Court showing that any of the items listed in the charge were recovered from the Defendants.

2.9 Furthermore, PW2 acknowledged that she read the extra-judicial statement of Mr T. A., the 1st Defendant (**Exhibit A**) and was aware that he stated therein that he was not at the scene of the crime. PW2 never gave evidence on steps taken to properly investigate this information of the 1st Defendant’s absence at the scene of crime. In respect of Mr E. P. (the 2nd Defendant), PW2 very truthfully confirmed that the 2nd Defendant did inform her that he went to a farm at Ekaramu on the days in question. When asked further on what steps she took to investigate this information given by the 2nd Defendant, PW2 responded with a rhetorical question; “Why should I?”

2.8 Most respectfully Your Worship, we submit that it is worthy to emphasize that Okoro Okiemute (mentioned in Count 2) and Efenure Felix (mentioned in Count 3) did not testify throughout the prosecution’s case. Even their presence in Court was not as much as hinted at or duly mentioned by the Prosecution.

**THE DEFENDANTS’ CASE**

2.9 The Defence opened its case by calling the 1st Defendant – Mr T. A. (DW1). In his evidence in chief, he stated that on the dates in question (the 14th and 19th of November 2019), he was not in Uviamuge community as he went for a POP (plaster of Paris) work at Ujevwo Community.

2.10 Under cross examination, the 1st Defendant maintained very astutely that he was not at the crime scenes on the dates relevant to the charge. He also confirmed very clearly that all the allegations of crime in the charge were grossly untrue.

2.11 Subsequently, the 2nd Defendant – Mr E. P. (DW2) testified in chief. He stated that on the dates in question, he went for clearing at Ughwehi Community in Udu LGA. Upon his return on the 22nd of November 2019, he was apprehended by the Community Vigilante for reasons unknown to him. He only discovered after being beaten by the Vigilante and handed over to the police that Mr F. O. ‘confessed’ him as his partner in the alleged stealing.

2.12 The testimony of the 2nd Defendant was equally not shaken under cross examination. Instead, he reaffirmed that the allegations of crime in the charge were grossly untrue and he did not confess to committing any crime.

1. **ISSUE FOR DETERMINATION**
	1. Your Worship, from the facts of this charge and the evidence led as summarily restated above and more diligently reflected in the record of this Court, we respectfully submit that a sole issue arises for determination which is;
		1. *Whether the prosecution has led sufficient or any evidence to proof beyond reasonable doubt that the Defendants are guilty of the offences charged?*
2. **ARGUMENT ON THE SOLE ISSUE**

**SOLE ISSUE:**

***Whether the prosecution has led sufficient or any evidence to proof beyond reasonable doubt that the Defendants are guilty of the offences charged?***

* 1. Most respectfully Sir, it is the law that in all criminal proceedings, the burden of proof lies on the Prosecution – **Section 135(1) and (2) of the Evidence Act 2011**. Thus, the Prosecution bears the burden of leading credible, admissible and convincing evidence to prove that a Defendant indeed committed the offence(s) he or she is charged with. This burden of proof does not shift and it is to be discharged beyond reasonable doubt; **Section 135(3) of the Evidence Act 2011.** As a corollary Sir, it is also trite law that a Defendant has no obligation to prove his innocence.
	2. In fortification of the principles restated above, we heavily rely on the authority of **ADEREMI ADEROUNMU VS FEDERAL REPUBLIC OF NIGERIA LER [2019] CA/L/782C/2018. In that case, the Court of Appeal Per Tobi JCA while extensively reviewing various Supreme Court authorities, stated as follows**

**“**The position of the law is trite. It is that in criminal cases, the burden is entirely on the prosecution to prove the guilt of the Defendant. This burden does not shift if the Respondent must secure conviction. This is because, there is the presumption of innocence in favour of the Defendant as he has no obligation in law to prove his innocence. The duty is squarely on the shoulder of the Respondent to prove all the ingredients of the offence to secure conviction. This burden does not shift at all. In **Ankpegher vs. State (2018) LPELR-43906 (SC),** the apex court per Kekere-Ekun, JSC at pages 24-25 held: “There is no doubt that in criminal proceedings the onus of proof lies on the prosecution throughout the trial and does not shift. In other words, there is no burden on the accused person to prove his innocence. It is also trite that the standard of proof in criminal proceedings is proof beyond reasonable doubt but not proof beyond the shadow of a doubt.” (Emphasis Supplied)

* 1. In addition to the foregoing Sir, the law is also well settled that for the Prosecution to succeed in discharging the burden of proof on it, it is to prove the *mens* *rea* and *actus reus* of the offence charged; **KAYODE v. FRN (2017) LPELR-41865 (CA)**, **Abeke v State (2007) LPELR-31 (SC).**
	2. The requirement above necessarily dovetails into the duty placed on the Prosecution to prove by credible evidence all the vital physical elements of the offence as well as the guilty mind (or criminal intent) of the accused. This much was made clear in the case of **Liman v State (2016) LPELR 40260 (CA),** where the Court of Appeal held as follows:

“It is also trite that criminal responsibility for the commission of a crime is premised on the satisfactory proof of the two pillars of actus reus and mens rea, the doing of the act that constitutes the offence and the requisite mental capacity and the duty is always on the prosecution to prove the commission of the crime and the requisite guilty mind of the accused beyond reasonable doubt. In other words, in a criminal trial, before an accused person is asked to undergo any sort of sentence, there must be a finding by the trial Court on the concurrence of the two main elements of any crime. Actus reus is taken to be the wrongful deed that comprises the physical components of a crime and that generally must be coupled with mens rea. Mens rea is the criminal intent or guilty mind of the accused. **For the prosecution to establish a criminal act against an accused person, it must go beyond establishing the commission of the unlawful criminal act by the accused and establish that the accused had the correct criminal mind of committing the act. The two must co-exist, whether explicitly or by necessary implication** – Njoku v State (2013) 2 NWLR (Pt 1339) 548.” (Emphasis Supplied)

* 1. The duty on the prosecution is indeed heavy. However, to clearly prevent the Prosecution from being at a loss as to how to discharge the duty placed on it, the law has given various options that the prosecution can choose from in any trial. Thus, a Prosecution may deploy a combination of three options to prove the guilt of a Defendant. These options are; (i) using the confessional statement of the accused; (ii) adducing direct evidence of an eye witness who must have witnessed the commission of the offence; or (iii) relying on cogent and unequivocal Circumstantial evidence. Any or all of these options are expected to link the Defendant to the commission of the offence and in the absence of reasonable doubt, secure his conviction; **IGRI VS THE STATE (2012) 16 NWLR (Pt. 1327) 522**.
	2. Most respectfully Your Worship, having stated the law above, we submit that when the present charge and the evidence led at the trial is evaluated through the lens of the guiding principles of law stated above, it becomes clear that the Prosecution has successfully failed at establishing the guilt of the Defendants.
	3. We contend that throughout the course of these proceedings, the prosecution has not adduced any iota of sufficient evidence to prove the Defendants’ guilt beyond reasonable doubt. Furthermore, where the Prosecution attempted to adduce evidence, it deliberately ignored adducing the evidence of vital witnesses to the charge. It rather chose the ignoble and ill fated path of calling witnesses whose evidence turned out to be tales of hearsay and half truths. Thus, the Prosecution adopted a strange strategy for prosecuting this case, and by effect hopes or maybe prays that Your Worship will perform a judicial miracle that is unsupported by the evidence on record.
	4. To clearly buttress this submission, we crave this Noble Court’s indulgence to argue the sole issue raised above under various sub-issues or sub-heads.

**Sub-issue 1: The Prosecution failed to lead any evidence in proof of the physical ingredients/elements and mental elements of all the offences charged;**

* 1. Firstly Your Worship, we submit that the Prosecution failed to lead evidence in proof of the vital elements or ingredients of the offences charged. It is obvious from the charge before this noble Court that the Defendants are being tried for three separate offences namely; the offence of conspiracy to commit a felony, the offence of House-breaking/burglary and the offence of stealing. These offences are well provided for under **Sections 516, 411 and 390(9) of the Criminal Code Law of Delta State** respectively.
	2. It goes without saying that each offence in the charge has different elements or ingredients. Also, the mens rea (and by necessary extension the actus reus) in each of the offences are different; **Spiess v Oni (2016) LPELR 40502 (SC).** Consequently, as emphasized in **Liman v** **State** (*Supra*), the Prosecution bears the burden of leading evidence that indeed proves the distinct mental and physical elements of these alleged offences.
	3. Against this background, we respectfully submit that the question that then begs for an answer is; *has the Prosecution proven by credible evidence the essential mental and physical ingredients of the offences in this charge*?
	4. To answer this fundamental question, we most respectfully submit that it is necessary to juxtapose the essential ingredients of each of the offences in the present charge with the evidence (if any) led by the Prosecution. We respectfully begin this juxtaposition with the offences contained in Counts 2, 3 and 4 of the charge.
	5. Your Worship, Counts 2, 3 and 4 allege that the Defendants committed the offences of house breaking/burglary and stealing albeit against three different persons. We submit that the law is unequivocal on the ingredients of these offences. For the offence of House breaking/burglary, the provision of **Section 411 of the Criminal Code Law of Delta State** under which the Defendants have been charged is apposite. For purpose of emphasis only, the section is reproduced hereunder as follows;

“Any person who – (1) breaks and enters the dwelling house of another with intent to commit a felony therein, or

(2) having entered the dwelling-house of another with intent to commit a felony therein, or having committed a felony in the dwelling house of another; breaks out of the dwelling house;

(3) is guilty of a felony, and is liable to imprisonment for fourteen years.

If the offence is committed in the night the offender is liable to imprisonment for life.”

* 1. Most respectfully Sir, the provision of Section 411 of the Criminal Code Law is as clear as the dawn of day. From the said section, it is obvious that in order to sustain a charge brought under the section, it must be proved that the Defendants carried out the physical action of breaking into the dwelling houses concerned. In addition, it must also be proved that the physical action of breaking into the dwelling house was done with the mental element (or criminal intention) of committing a felony therein. There must also be a breaking out of the dwelling house entered into and evidence showing the time the offence was committed; **Sunday v The State (2020) LPELR 51371 (CA), Etim v State (2013) LPELR 20639 (CA)**.
	2. With the foregoing elements brought to the fore, one need not journey deeply into the case of the prosecution to see that the elements were not proved. Thus in respect of the offence of breaking and entering/burglary as contained in Counts 2 to 4, we submit that there was no evidence led to show;
1. where the dwelling houses that were broken into are located,
2. how the Defendants alleged broke into them,
3. the tools used by the Defendants (if any) to break into the houses,
4. the time of the day or night the Defendants broke into these houses and,
5. the intention of the Defendants at the time they allegedly broke into the houses.

Milord, the absence of any evidence adduced on the elements listed above erodes the very essence of the Prosecution’s case in respect of the offence of breaking and entering contained in Counts 2 to 4.

* 1. More precisely Sir, to prove the offence of breaking and entering in Counts 2 and 3, no eye witness was called. Also, no circumstantial evidence that is cogent enough to place the Defendants at the scene of crime and link them to the commission of the crime was adduced. As though that is not enough Sir, none of the Defendants confessed to the commission of the offence of breaking and entering alleged in the said Counts (Please see **Exhibits A and B**). Rather, the Defendants in very resolute terms reaffirmed their innocence under cross examination. We submit that the Defendants’ continued and unshaken reaffirmation of their innocence under cross examination constitutes valid and authentic evidence that this Noble Court can rely upon; **Akomolafe v Guardian Press Ltd (2010) 3 NWLR (Pt. 1181) 338 at 351 F-H.**
	2. In addition Sir, in regard to Count 4, we respectfully yet vehemently contend that the evidence of PW1 does not solve the ineptitude that cripples the Prosecution’s case. He indeed testified that some armed robbers came into his house at an unmentioned time of the day. However Sir, a critical survey of PW1’s testimony will reveal that the elements of the offence of breaking and entering were not fully satisfied by his testimony. Without prejudice to the above, we also submit that the evidence of PW1 amounted to hearsay that this Court cannot rely upon; **ADAMU v. STATE (2020) LPELR-51122(CA)** per **AMINA AUDI WAMBAI, JCA (Pp 45 - 46 Paras E - C).** The following ensued under cross examination on the 20th day of January 2021 and we rely on same to substantiate our submission that PW1’s testimony amounts to hearsay evidence and should be discountenanced by this Court;

Question: You are giving evidence based on what you heard about the Defendants not that you saw the act?

PW1: Yes

* 1. In addition Sir, assuming but not conceding that PW1’s testimony does not amount to hearsay, from the totality of PW1’s evidence there was no iota of evidence showing clearly or even circumstantially that the Defendants before this Court were the same armed robbers that allegedly broke into PW1’s house. On the contrary Sir, and quite shockingly, PW1 stated during his examination in chief that he does not know the Defendants. He also restated this conviction of not knowing the Defendants under two sets of cross examination questions. Clearly Sir, PW1 having been sworn on Ogun Iron and having a clear resolve to tell the truth, did just that when he maintained this conviction.
	2. Further to the above, we contend that the Prosecution attempted to whip up mere suspicion through the testimony of PW2. We respectfully submit that this attempt has also successfully failed as we will humbly demonstrate in the next sub-issue. Thus, we submit that this Court cannot reply on half baked suspicion or non-existent circumstantial evidence to convict the Defendants on these Counts. This is because suspicion cannot take the place of legal proof, no matter how strong it is; **Abeke v State (1975) LPELR 8042 (SC)**.
	3. Additionally Sir, in respect of Counts 2 to 4 and the offence of breaking and entering therein, we submit that with the Prosecution’s failure in proving the physical elements of the offence as demonstrated above Sir, one only can wonder how the Prosecution hoped to prove the mental element of the said offence. After all, mens rea is not expected to exist in a vacuum or occur independently of the physical elements (actus reus). This is because, it is when it has been proved that a defendant physically carried out a criminal act that his mental state or guilty mind at the time of carrying out the said act can be or is called into question. As in the words of NIMPAR JCA in **Adepoju v The State (2014) LPELR 23312 (CA) at Pp 35 Paras D-E**, “*it is the actus rea that draws out the mens rea”*.
	4. On the basis of the foregoing submissions, we respectfully submit that the Prosecution has failed to prove the offence of breaking and entering/burglary as contained in Counts 2 to 4 of the charge. We humbly urge his Noble Court to so hold and accordingly discharge and acquit the Defendants.
	5. Similarly Sir, in respect of the offence of stealing also contained in Counts 2 to 4, we submit that the Prosecution again failed to prove any of the physical or mental ingredients of the offence. Quite notably, the Defendants were charged under **Section 390(9) of the Criminal Code Law of Delta State** which provides for the punishment of stealing property valued at N1,000 or upwards.
	6. Most respectfully Sir, the ingredients of the offence of stealing have been thoroughly restated in a plethora of judicial authorities. In the case of **Abiodun v State (2015) LPELR 24474 (CA) at Pp 27, Paras A-E**, the Court of Appeal defined the offence of stealing and restated the ingredients of the offence as follow;

“Stealing is defined in the case of CHIANUGO v. THE STATE (2002) 2 NWLR (Pt 750) 325 as follows: "A person who fraudulently takes anything capable of being stolen or fraudulently converts to his own use or to the use of any other person anything capable of being stolen is said to steal that thing." Ingredients of the offence were listed in the case of COMMISSIONER OF POLICE v. DONATUS UDE (2010) LPELR 8599 relying on ONWUDIWE v. FEDERAL REPUBLIC OF NIGERIA (2006) ALL FWLR Pt 774 at 810 thus:" (i) That the thing stolen is capable of being stolen. (ii) That the accused had the intention of permanently depriving the owner of the thing stolen.(iii) That the accused was dishonest.(iv) That the accused has unlawfully appropriated the thing stolen to be his own."

* 1. While reaffirming the law on the offence of stealing, the Court of Appeal in the case of **Famoroti v FRN & Ors (2013) LPELR 22064 (CA)** stated again as follows;

“Another important ingredient of the offence of stealing is the existence of the thing stolen. A person can only be charged with stealing what is in existence. Therefore before a court of law can convict an accused person for stealing, the prosecution must prove the existence of the thing allegedly stolen; **MUMUNI VS. THE STATE (1975) 6 SC 79; DR. OLU ONAGORUWA VS. THE STATE (1993) 7 NWLR (Pt. 303) 49 at pp. 88 - 89. MUSTAPHA TIJANI VS. COMM. OF POLICE (1994) 3 NWLR (Pt.335) 692 at PP. 703- 794**”

* 1. With the Law as restated in the preceding paragraphs a lot of questions come to mind. These questions obviously arise because no iota of evidence from the Prosecution’s case answers them and they reveal the missing gaps in the case as put forward by the Prosecution. These questions include;
* What evidence did the prosecution lead to show that the things alleged stolen actually existed (or are in existence) at all?
* What evidence did the prosecution lead to show that it was the Defendants who took these (non-existent) items?
* What evidence did the prosecution lead to show that this taking (if it ever happened) was done with the required criminal intent to ground the offence of stealing?
* Was evidence led to show that the stolen items were ever found with the Defendants either before or after the entire investigation of PW2?
	1. Milord, the questions are numerous and apart from those above, more still afflict the Prosecution’s case viz; who did the supposedly stolen goods/items belong to? Who saw these Defendants (and no one else) steal? Was it PW1 who confirmed that he does not know the Defendants? Or was it PW2 who merely recounted the unsavoury details of a poorly conducted investigation? If no eye witness saw them steal, is there cogent circumstantial evidencethat proves that these Defendants stole the items listed in the charge? Another important question Sir is; **where**, **when** and **how** did these Defendants (who PW2 confirmed where never found to be in possession of the items allegedly stolen) unlawfully appropriate the stolen items as their own.
	2. Most respectfully Sir, the diligent record of this Noble Court will reveal that the Prosecution left these questions grossly unanswered but it hopes to secure a miraculous conviction of the Defendants. More precisely, in respect of the questions raised in paragraph 4.25 above, we submit that the existence of the items in the charge was not proved. Also, the Prosecution did not lead any evidence to show that indeed these items were taken by the Defendants. PW1 testified that some unknown men robbed him but My Lord, the Defendants in this charge are not unknown. The 1st Defendant is Mr T. A. and the 2nd Defendant is Mr E. P.; two young men in their prime who have great dreams, aspirations and futures ahead of them. PW1 further testified that he does not know the Defendants. Thus, there is no link between the gentlemen charged before this Court and the offences for which they have been made to stand trial.
	3. More importantly Sir, the investigation of PW2 never led to the Defendants being found with any of the items listed in the charge. PW2 stated clearly under cross examination that no incriminating evidence was found in the Defendants’ houses. This is further confirmed by **Exhibit D (the search warrant)** which clearly reads at lines 12 to 13 “...*While nothing incriminating was found in the house and premises of Mr T. A. and Mr E. P.*”. Evidently PW2 told the truth on this point.
	4. Succinctly Sir, a synopsis of the Prosecution’s case will therefore go thus; no incriminating evidence was found at the residences of the Defendants, they were not found or arrested at the scene of the crimes, they were not caught with the stolen items and no eye witness that saw them committing the offences testified before this Court. With this Sir, one must only ask with bewilderment why they were charged at all. My Lord, the shabby and persecutory investigation of PW2 will offer answers to this question and we will address same subsequently.
	5. Your Worship we respectfully submit that in the absence of clear answers to the questions raised in this sub-issue, the Prosecution has after about 2 years of this trial succeeded in building a house of cards which in the interest of justice, is only fated to fall asunder. We urge this Court to so hold and accordingly discharge and acquit the Defendants.
	6. As our final submission on this sub-issue Sir, the first offence alleged as contained in Count 1 is conspiracy to commit a felony contrary to **Section 516 of the Criminal Code Law of Delta State**. In respect of this offence, we commend to this Court the case of **EZE v. FRN (2017) LPELR-42097(SC),** **Pp. 62-63, Paras. D-A**, where per PETER-ODILI, J.S.C., the Supreme Court held thus:

 "As a refreshing position, I would restate that to ground a conviction for the offence of conspiracy the essential ingredients of the offence must be established beyond reasonable doubt and they are thus; (a) An agreement between the accused persons to do or cause to be done some illegal act or some act which is not illegal by illegal means. (b) Some act besides the agreement was done by one or more of the accused Persons in furtherance of the agreement. (c) That each of the accused persons individually participated in the conspiracy. See Obiakor v. State (2002) 6 SC (Pt. 11) 33 at 39 - 40." See: AKINLOLU v. STATE (2017) LPELR-42670 (SC); ABIODUN v. STATE (2016) LPELR-41399(CA); and FAFURU v. STATE (2016) LPELR-41410 (CA)."Per TUKUR, J.C.A. (Pp. 6-8, Paras. A-E)

* 1. Furthermore Sir, we respectfully submit that our Courts have recognized the difficulty in proving the offence of conspiracy. Consequently, in the Supreme Court case of **Njovens v State (1973) LPELR 2042 (SC)**, the Apex Court stated as follows;

"The overt act or omission which evidences conspiracy is the actus reus and the actus reus of each and every conspirator must be referrable and very often is the only proof of the criminal agreement which is called conspiracy. It is not necessary to prove that the conspirators, like those who murdered Julius Ceasar, were seen together coming out of the same place at the same time and indeed conspirators need not know each other. See R. v. Meyrick and Ribuffi (1929) 21 C. App. R. 94. They need not all have started the conspiracy at the same time for a conspiracy started by some persons may be joined at a later stage or later stages by others. 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 about. 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 conspiracy the acts or omissions of any of the conspirators in furtherance of the common design may be 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 that offence." **Per GEORGE BAPTIST AYODOLA COKER, JSC (Pp 57 - 57 Paras A - G)**

* 1. My Lord, in view of the law on the offence of conspiracy as stated in **Njoven’s case** (Supra), we cannot help but vehemently submit that the Count 1 of the charge must also fail woefully. This submission is predicated on the clear fact that no criminal acts whatsoever have been successfully proven against the Defendants. In the absence of admissible and cogent evidence that the Defendants before this Court carried out the criminal acts alleged, how can it then be inferred that they conspired?
	2. Flowing from the above Sir, we submit that the Prosecution has failed to prove the guilt of the Defendants in this charge. This failure my Lord bears the legal consequence that the Defendants should be discharged – **Aigbadion v State (2000) LPELR 264 (SC).**
	3. Thus, we urge this Noble Court to hold that the Prosecution has failed to prove the charge. Consequently we urge this Noble Court to discharge and acquit the Defendants.

**Sub-issue 2: The Prosecution failed to call vital witnesses in respect of Counts 2 and 3 and this fundamental defect is fatal to the Prosecution’s case.**

* 1. In arguing this sub-issue Sir, it is conceded that the Prosecution is not duty bound to call a particular number of witnesses to prove the guilt of the Defendants. Thus, we submit that the Prosecution has the unfettered discretion in choosing how to conduct its case and it cannot be compelled to call a certain number of witnesses.
	2. Notwithstanding the above Sir, the law is now settled that the failure of the Prosecution to call a vital witness is fatal to its case; **Sale v State (2019) LPELR 52899 (SC) P. 34, Onah v State (1985) 3 NWLR (Pt 12) 236 (SC)**.
	3. In **Abdullahi v State (2018) LPELR 44455 (CA)** the Court of Appeal described a vital witness as follows;

"A vital witness is an eyewitness to the commission of a crime and or a witness who can give very truthful and relevant evidence that would resolve the case one way or the other. In other words, a witness who gives evidence on what is logical and true is a vital witness... At any rate, the prosecution is not bound to call any and every person who was present at the locus criminis. It is bound to call only those witnesses who would give relevant evidence in proof of its case. See IZIREN V STATE (1995) 9 NWLR (Prt 420) 385).

* 1. In view of the Court of Appeal’s exposition on the law as reproduced above, we submit that Felix Efenure and Okoro Okiemute whose names are mentioned in the charge sheet, are vital witnesses to the charge (especially in respect of counts 1, 2 and 3). In their absence, any other eye or relevant witness to the crime that may have been found during the (non-existent) investigation of PW2 would have been vital witness to proving the charge. Sadly Sir, none of these persons were called to give evidence in this Court.
	2. My Lord, we submit that this is an unforgiveable dent in the prosecution’s case that cannot be ignored. It ranks as highly as an unpardonable sin and therefore has one consequence. In **Sale v State (supra)**, the Supreme Court stated very clearly that the failure to call a vital witness is fatal to the Prosecution’s case.
	3. In the present charge Sir, the presence of Felix Efenure and Okoro Okiemute is especially fundamental to the determination of the charge before this Court. This is because PW2 gave evidence to the effect she was not an eye witness to the crime but these men (Felix and Okoro) who were allegedly victims of the crimes gave complaints that necessitated the series of arrests that subsequently followed. In their absence, there is no evidence linking the Defendants to the alleged commission of the crimes and the evidence of PW1 as well as that of PW2 was grossly insufficient to provide such a link - **State v Usman (2021) LPELR 55202 (SC), Okon v The State (2017) LPELR 42639, Ogudo v State (2011) LPELR 860 (SC).**
	4. Therefore, we urge this Noble Court to hold that Felix Efenure and Okoro Okiemute were vital witnesses to the present charge and the absence of their testimonies is fatal to the Prosecution’s case.

**Sub-issue 3; The Evidence of the Investigating Police officer – PW2 is grossly insufficient to prove the charge**

* 1. My Lord, the Investigating Police Officer- PW2 seems to be the star witness for the Prosecution. On the 29th day of March 2021, she gave evidence in respect of the charge where she recounted the various activities carried out during the investigation of the alleged offences.
	2. In PW2’s evidence in chief before this Court, she stated that she received the complaints of the crimes from Felix Efenure, Okoro and Samuel Onos (PW1). After this, efforts were made by the Police to arrest the suspects but they were not found. Subsequently, on the 22nd of November 2021, the Community Vigilante brought one Mr F. O. to the station (that he is the suspect they apprehended). With this apprehension, the investigation of PW2 was already almost 65 percent concluded. So easy was the investigation that all that the said Mr F. O. said became gospel truth to the ears of PW2.
	3. In fact, in her own words: *“I recorded statement from Mr F. O., where he confessed that one Mr E. P. , one Mr T. A. from Uvwiamuge have together been terrorizing the community*”. The Prosecution went ahead to tender the statement of the late Mr F. O. and same was admitted as **Exhibit C**. My Lord, it is especially shocking that the evidence of PW2 reveals that once Exhibit C was made, it was taken as gospel truth and marked the end of a holistic investigation.
	4. This attitude has been rebuked severally and severely in a number of cases. One of such cases is the case of **OKWUAKA v. STATE (2018) LPELR-45155(CA)**, where the Court of Appeal stated as follows;

“The duty of a Police officer in the administration of criminal justice is not time to fishing for evidence to nail a suspect as the Investigating Police officers as done in this case. But to undertake a comprehensive and wholistic investigation of the crime reported. It is indeed a shame, that in this limit and age our Nigeria Police are still found complicit in selective investigation. The police just like judicial officers are constitutionally and statutorily required to be an unbiased party in the discharge of their duty, and not a tool to exert revenge or lazy officers who do nothing but just recording statements of the suspect(s) and/or likely witness(es) and suspect(s).”

My Lord we submit that the same tardy investigation as decried in Okwuaka v State was undertaken in this case and it is worthy of the greatest rebuke.

* 1. Furthermore Sir, we submit that the evidence of PW2 as flowery and action packed as it may seem has failed to constitute evidence that this Court can rely upon to convict the Defendants. This submission is premised on the following;
* Exhibit C is an extra-judicial statement and does not constitute evidence that this Court can rely upon.
* Assuming that the late Mr F. O. was alive and charged to Court, Exhibit C would not bind the Defendants
* PW2’s evidence sought to allege the truth of what Mr F. O. said and thus fell into the irredeemable trap of becoming hearsay evidence
* The evidence of PW2 invites this Noble Court to speculate and thus convict the Defendants in the absence of convincing evidence
	1. On the first point highlighted above Sir, the Prosecution is subtly inviting the Court to assume that Mr F. O. is indeed dead (since no death certificate was tendered to show an official record of his death). Notwithstanding Sir, we submit that Exhibit C is his extra-judicial statement and nothing more. The Prosecution in this case, is trying to give supernatural powers to the extra-judicial statement of the supposedly demised Mr F. O.. My Lord, such an attempt is not founded in law. Thus, with the greatest respect, we submit that Exhibit C is not a piece of evidence that this Court can countenance in determining the guilt of the Defendants.
	2. The Law is clear that an extra-judicial statement is evidence of the fact that it was made and it is not evidence of the truth of its contents; **Adelumola v State (1988) LPELR (SC)**. In fortification of this submission, we rely on the case of **Agbanimu v FRN (2018) LPELR 43924 (CA)** where the Court of Appeal per Otisi JCA at P 41 – 43 para D-E stated the law as follows;

“Exhibits F and G were the extra judicial statements of Ogunronbi Gbenga and of Abayomi Adeoti. None of these persons testified in this matter. I want to straightaway say that the contents of Exhibits F and G cannot at all be used against the Appellant. In criminal trial, an extra-judicial statement is used for the cross examination of the witness who made the statement in order to discredit him. The extra judicial statement of a witness who was not called to testify may only be tendered to prove that it was made in the course of investigation and no more. The contents thereof, which were not made on oath, cannot be relied upon as evidence against the accused person... That is to say, even though the extra judicial statements of Ogunronbi Gbenga and Abayomi Adeoti were admitted in evidence as Exhibits F and G, the trial Court ought not to have relied on them at all in convicting the Appellant. (Emphasis Supplied)

* 1. My Lord, although the second point highlighted at paragraph 4.44 may seem academic, we crave My Lord’s indulgence to argue it to show the deviation from the Law attempted by the Prosecution in this case. In arguing the said point, assuming Mr F. O. was alive and was charged along with the Defendants; one question arises. The question is; what would be the weight or evidential value of his having ‘confessed the Defendants’ via Exhibit C (assuming the said Exhibit C was obtained voluntarily)?
	2. To answer this poser, we commend this Court to Section 29(4) of the Evidence Act which clearly an unambiguous answer. For ease of reference only Sir, **Section 29(4) of the Evidence** Act is reproduced here under;

Where more persons than one are charged jointly with an offence and a confession made by one of such persons in the presence of one or more of the other persons so charged is given in evidence, **the court shall not take such statement into consideration** as against any of such other persons in whose presence it was made unless he adopted the said statement by words or conduct

* 1. By the Section reproduced above Sir, even if Frank were to be alive, whatever he has said in Exhibit C would never have been sufficient to convict the Defendants. This is especially so as in Exhibits A and B the Defendants did not adopt his imputation of guilt. We beg to ask; would this now change just because the Prosecution has stated (without prove) that Mr F. O. is dead? We beg to answer in the negative.
	2. On the third point Sir (as mentioned in paragraph 4.44), we submit that our Law is very careful to prevent hearsay evidence from adulterating the clean streams of justice under any guise. We concede that there are a plethora of judicial authorities on the point that the evidence of an Investigating Police Officer (IPO) is not hearsay. However Sir, we respectfully submit that there are instances where the evidence of an IPO can amount to hearsay.
	3. To buttress this submission, we rely on the case of **Uko v the State (2019) LPELR 48990 (CA**). Similarly in the case of **Eyo v State (2017) LPELR 43332 (CA)**, the Court of Appeal maintained very clearly that an IPO is entitled to recount what a deceased suspect told him **without** asserting the validity thereof. The moment he (the IPO) proceeds to assert the truth of the statement of a deceased suspect, his evidence becomes hearsay.
	4. In the present charge, we submit that to the extent that PW2’s evidence attempts or seeks to establish the truth of what she was told by Mr F. O., such portions of her evidence amount to hearsay that this Court cannot rely upon.
	5. On the fourth point Sir, we respectfully submit that the evidence of PW2 is an elaborate invitation to this Court to speculate on key aspects of the charge. PW2’s evidence is also an invitation to the Court to ignore some key aspects of the largely flawed investigation that was carried out. Thus, summarily we submit that PW2 is inviting this Court to;
* Assume or speculate that Mr F. O. is indeed dead
* Assume or speculate that his extra-judicial statement (Exhibit C) was voluntarily made
* Assume that he told the truth in that statement (while ignoring Exhibits A and B – the extra-judicial statement of the Defendants)
* Ignore the point of law that Exhibit C does not constitute evidence
* Assume that the Defendants used unmentioned and un-reproduced weapons to break into the houses in question (while ignoring PW2’s testimony and Exhibit D which are to the effect that no incriminating evidence was found at the Defendants’ houses and premises)
* Assume that the items listed in the charge actually existed
* Assume that the Defendants indeed made away with the items listed in the charge (while ignoring PW2’s evidence under cross examination that no document has been tendered before this Court to show that any of the items listed in the charge sheet were recovered from the Defendants)
* Assume that the Defendants’ had the relevant criminal intents required to ground their conviction when there is no evidence led of physical actions necessitating such an inference.
* Assume that the Defendants indeed converted the allegedly stolen items to their personal gain or benefit (while ignoring that no evidence was adduced to prove this).
* Assume that PW2’s use of the magical word – ‘terrorize’ during examination in chief gives full detail and amounts to sufficient proof of all the elements of the offences and the involvement of the Defendants.
	1. We urge this noble Court to refuse the invitation to assume or speculate as extended by the Prosecution via the evidence of PW2. Consequent on the preceding and in reliance on the authority of **Abeke v The State** (Supra), we submit that the evidence of PW2 which invites this Court to speculate remains grossly insufficient to prove the charge against the Defendants. We urge Your Worship to so hold.
	2. Your Worship, it was in consideration of the foregoing fundamental defects in the Prosecution’s case that we stated earlier that the Prosecution has adopted a strange strategy for prosecuting this case, and by effect hopes or maybe prays that Your Worship will perform a judicial miracle that is unsupported by the evidence on record.
	3. We submit that the aim of our judicial process has never been to witch-hunt the innocent. Rather the Law aims at protecting the innocent even where the machinery of the State fails to protect them as in this case Sir. Clearly Sir, a shady investigation was carried out; the Defendants maintained their innocence from the beginning (as seen in Exhibits A and B) but such declaration of innocence was not the business of PW2 and indeed the Police force. PW2 stated under cross examination that she took no steps to investigate the alibi of the Defendants when she was informed of same. In fact Sir, she answered under cross examination; “*why should I?”* As though that was not enough, when asked if her investigations really revealed the involvement of the Defendants in the offences charged before this Noble Court, she replied as follows Sir: *“...I don’t know, it was based on the compliant that they told me”*.
	4. After the failure of PW2 to carry out a proper investigation, the Prosecution instituted this charge and had the Defendants go through the painful grill of an arrest, incarceration, detention at the correctional facility and two long years of trial. Thankfully, the 2nd Defendant was discovered during a pro-bono visit and his defence has continued since then.
	5. Most importantly My Lord, today two young men are in the dock of this Court praying and hoping that justice still prevails in Nigeria – within these Court halls and walls. They hope that they will have an opportunity at their dreams and aspirations for the future. As their Counsel, we passionately urge this Court to see through the charade of prosecution in this case and see the actual persecution of the Defendants that has occurred. We urge this Court to consider the evidence on record and our submissions above and consequently discharge and acquit the Defendants on all the charges.

**Sub-issue 4: The Prosecution’s attempt at propelling the Defendants’ into proving their innocence and the Defendants’ continuing presumption of innocence**

* 1. We submit that the law is to the effect that in criminal trials, once the commission of an offence has been proved beyond reasonable doubt, the burden of proving reasonable doubt shifts to the Defendant; **Section 135(3) of the Evidence Act 2011**. This burden on the Defendant is to be discharged on the balance of probabilities – **Section 137 of the Evidence Act 2011**. Furthermore, if the Prosecution fails to prove its case, the Defendant is not under the duty to adduce any evidence because there is nothing laid before the Court that he may be required to rebut.
	2. In arguing this final sub-issue Sir, we submit that in the course of trial the Prosecution attempted a feat that is unknown to our Law. More precisely, in the course of cross examining the 2nd Defendant, the Prosecution attempted to turn the tables and thus have the 2nd Defendant prove his innocence. This she attempted to do by asking the 2nd Defendant to point out where in his extra-judicial statement (Exhibit B) he stated that he was away from Uvwiamuge Community. We respectfully submit that this attempt is unknown to our law. Furthermore, it does not ameliorate the Prosecution’s failure in proving its case neither does it rebut the presumption of innocence in favour of the Defendants.
	3. My Lord, we concede that the Defendants’ defence is based on alibi. However, it seems that the said alibi was not timely raised. This is the conclusion the Prosecution wants this Noble Court to arrive at. But we beg to ask – is this the actual position as the evidence on record before this Court reveals? We answer in the negative.
	4. In substantiation of our answer above, we begin by conceding that the Defendants did not know well enough to ensure that they wrote down the details of their whereabouts in Exhibits A and B. The Prosecution has thus thought it wise to capitalize on this ignorance.
	5. Yet Sir, it is noteworthy that PW2 stated truthfully under cross examination that the Defendants informed her of their locations which were away from the scene of the offences. As a Police officer who knew better and who should have been after finding out the truth, it beats the imagination that PW2 never thought it proper to ensure that the Defendants wrote these details in their extra-judicial statements. She also never thought to ask further questions to elicit more details so that she could document same and do the needful. If we may ask; is that not what a proper investigation should really entail?
	6. PW2 also admitted under cross examination that she never investigated the pieces of information given by the Defendants on the point that they were not in Uvwiamuge when the offences were allegedly committed. Clearly to her mind, once the statements were obtained, there was no need for any investigation and whoever was unfortunately (or even wrongly) named by one suspect would be nailed for the offences alleged even when the other suspects maintained their innocence from the onset. My Lord this can only be described as a travesty of duty.
	7. Consequent on the above, we thus beg to ask, should these pieces of evidence elicited from PW2 under cross examination be swept under the carpet? We respectfully answer yet again in the negative as they constitute evidence that this Court can rely upon. In reliance on the foregoing, we submit that the alibi of the Defendants was timely raised and we urge this Noble Court to so hold.
	8. Furthermore Sir, assuming without conceding that the defence of alibi was not timely raised, we respectfully submit that relying on the lacuna in Exhibits A and B to convict the Defendants would defeat the aim of justice. This is because all the inadequacies and ineptitudes in the Prosecution’s case would have to be ignored and this would be tantamount to tasking the Defendants with the duty of proving their innocence. My Lord, we respectfully submit that such undue burden is not one that our Law allows the Prosecution to pass unto the Defendants.
	9. As stated in Section 135(3) of the Evidence Act 2011, the Defendants will only be tasked with proving reasonable doubt when the commission of the offence has been proved beyond reasonable doubt. In reliance on the arguments canvassed in sub-issues 1 to 3, we submit that the Prosecution has failed to prove the commission of the offences charged beyond reasonable doubt. Thus, the burden of proving reasonable doubt has not shifted to the Defendants throughout this case. We urge this Honourable Court to so hold.
	10. Notwithstanding the above, we respectfully contend that any lacuna in Exhibits A and B is not sufficient to ground the Defendants’ conviction. This is because the Defendants’ defence is to be considered holistically with the Prosecution’s case as well as the continuing presumption of innocence in their favour. This much was made clear in the case of **Ipalibo v State (2014) LPELR 22678 at P 11 – 12 Paras G –B** where the Court of Appeal stated as follows;

"Before the trial Court comes to the conclusion that the prosecution have proved their case against the accused beyond reasonable doubt it must evaluate the totality of the evidence called by the prosecution. See BOY MUKA v. THE STATE (1976) 10-11 SC 305 at 325-326. Thereafter the defence evidence must be considered against the background of the prosecution’s case to see if reasonable doubts exist. If no reasonable doubts exist, the trial Court may convict. If however reasonable doubts exist the accused is entitled to be discharged and acquitted. The accused is, at all times, entitled to the benefit of doubt, if any exists in the case."

* 1. My Lord in the circumstances, we submit that even in the absence of any testimony from the Defendants, the evidence of PW1 and PW2 (as highlighted in the preceding paragraphs) is sufficient to create substantial doubt in the mind of this Court. Such doubt must be resolved in favour of the Defendants.
	2. It is on this holistic consideration and in line with our previous submissions that we again submit that the Prosecution has not discharged the burden on it and has attempted to abdicate its duty and have the Defendants prove their innocence. Having not discharged its burden, we submit that the Defendants cannot be required to prove their innocence and the presumption of innocence in their favour has continued unscathed throughout this case.
	3. Consequently, we urge this Honourable Court to discharge and acquit the Defendants on all the charges.
	4. We are most grateful for Your Worship’s gracious indulgence.
1. **CONCLUSION**
	1. On the basis of the arguments made in this written address, it is the Defendants’ humble submission that;
		1. The Prosecution has failed to adduce sufficient evidence in proof of the charge before this Court.
		2. More precisely, the evidence of PW1 did not link the Defendants to the commission of the crime as he stated very convincingly during examination in chief and under cross examination that he does not know the Defendants.
		3. PW1 also stated that his evidence is based on what he was told and thus his evidence amounts to hearsay evidence that this Noble Court cannot rely upon.
		4. Furthermore Sir, the Prosecution failed to call vital witnesses that were necessary to prove the charge before this Court and this failure is fatal to the Prosecution’s case.
		5. In addition, the evidence of PW2 is grossly insufficient to ground the conviction of the Defendants.
	2. On the basis of the arguments in this address and the judicial authorities cited herein, we urge Your Worship to discharge and acquit the Defendants on all the counts in the charge.
	3. We beg to so urge.
	4. We are grateful to Your Worship for the indulgence.

**Dated the 10th of November 2021**

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Defendants’ Counsel

**XXXXXXXXXXX Legal Practitioners**

No. XXXXXXXXXX

, Enugu State.

**FOR SERVICE ON**

The Prosecution

C/O Inspector M.

Nigerian Police Force

Delta State.