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IN THE HIGH COURT OF JUSTICE OF **KOGI** STATE OF NIGERIA
 IN THE KOGI STATE JUDICIAL DIVISION
 HOLDEN AT KOTONKARFE

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ON THURSDAY, 19TH DAY OF FEBRUARY
 2009

BEFORE HIS LORDSHIP:
HON. JUSTICE ALABA OMOLAYE-AJILEYE-----
JUDGE

SUIT NO.
HCC/17^C/2008

BETWEEN:

THE STATE PLAINTIFF/APPELLANT

AND

**NYAWOSA SOLOMON
 DEFENDANT/RESPONDENT**

JUDGMENT

The charge against the accused person, as amended by an order of this **court** on Prosecution's application reads".

'That you Nyawosa Solomon on or about the 4th day of September, 2007 at Gwari Quarters, Kotonkarfe in **Kogi** Local Government Area within the **Kogi** State Judicial Division did common Culpable Homicide not punishable with death in that you caused the death of Usman Bubar by doing an act to wit: you shot him on

the head and you thereby committed an offence punishable under section 224 of the Penal Code Law”

The accused person pleaded not guilty to the charge. The Prosecution, in its attempt to prove the case against the accused person, called three witnesses. The accused person gave evidence in his defence.

The facts leading to this case appear straight forward. Usman Buba, who the accused described as his good friend, also known as Ali Usman Buba died as a result of gunshot. The medical report of the post-mortem examination of his body (Exhibit P3) reads:

“Body was found intact with fresh blood on the head, face and chest. There were also gun-shot wounds on the face, head and chest. I certify the cause of death in my opinion to be due to gun-shot injuries”.

There is, therefore, no doubt about the fact of the death of Usman Buba. Exhibit P4 is the dane gun from which the bullets that killed Usman Buba were said to have been released.

The incident which led to the death of the deceased happened in the morning of 4th of September, 2007 Exhibit P1, the brief statement of the accused tells the story in the following words:

*“On the 4th of Sept 2007 at about 0640hrs, I was passing. I saw the late deceased inside his shop. I then called on him three times and he answered me, I then told him that I will be going to my farm. He now called me that I should come to him so that he will see how my gun look(sic) like. From there I went to him for (sic) the front of his shop with the said gun with intend(sic) give him the gun. Mistakenly, I touched the trigger and the gun fire(sic) and killed the **man**. Infact, I did not kill the **man** intentionally. That is all my statement”.*

None of the three Prosecution witnesses was an eye-witness of the incident. PW1, Inspector Sumaila Meliga, only obtained the statement of the accused (Exhibit P1). Inspector Paul Elaigwu, was the investigator of the case, who obtained a medical report on the cause of death of the deceased. He also played a significant role in securing the life of the accused, by ensuring that he smuggled him out from the palace of the Ohimege, when the youths demanded his release so that he may be lynched.

Under cross-examination, PW2 re-stated the fact that both the accused person and the deceased were friends. He also confirmed that the accused person did not have any quarrel with the deceased as his investigation revealed. PW3, was Inspector Jimoh Amodu, the Exhibit keeper, who tendered Exhibit P4, the dane gun.

The defence of the accused substantially tallies with Exhibit P1, his statement to the Police. He added that it was the deceased who requested to see the dane gun in his hand as it was different from the type they used in his place. He said, in an attempt to give him, he did not know what happened as the gun released shots and the bullets hit him. He reiterated, over and over, that he did not intend to kill his friend.

In addressing me, Mr. Salihu Liman, learned counsel for the accused urged the defence of mistake upon me. According to him, both the extra-judicial statement of the accused and his oral evidence on oath showed that his action was a result of a mistake Mr. Liman submitted that where mistake is established, it has the effect of a discharge on the accused person. He cited Section 48 of the Penal Code. He urged me to hold that the prosecution failed to prove the ingredients of the offence of culpable homicide punishable with death beyond reasonable doubt. He urged me to discharge and acquit the accused.

In his reply, Mr. J.O. Olorunbogun, learned Deputy Director, for the Prosecution, argued that the prosecution succeeded in proving all the ingredients of the offence charged. He submitted further, that the fact that the act of **killing** of the deceased by the accused was a mistake and unintentional by him does not exculpate him as, according to him, the accused is still guilty of the offence of culpable homicide not punishable with death. He urged me to treat Exhibit P1 as a confessional statement under section 27(1) and (2) of the Evidence Act. He referred to **Nwachukwu v. The State (2002) 7SCNJ 230 at 235 holding 5.**

There is no doubt, from the undisputed facts adduced before me that the death of Usman Buba on the 4th of September 2007 was caused by the act of the accused. Exhibit P1 will definitely pass as a confessional statement within the meaning of section 27 of the Evidence Act. In the said Exhibit, P1, the accused "mistakenly" touched the trigger of Exhibit P4 (a dane gun) which fired and killed the deceased.

Learned for the accused must have been carried away by the use of the word "Mistakenly" by the accused for him to have urged the defence of mistake upon me for the accused. The Oxford learner's dictionary defines the word "mistake" as *'an action or opinion that is not correct or that produces a result that you did not want'*. This appears to be the sense in which learned counsel for the accused addressed the defence of mistake.

But then, the defence of mistake under S.45 of the Penal Code is a technical term. It provides:

"Nothing is an offence which is done by any person who is justified by law or who by reason of mistake of fact and not by reason of mistake of law believes himself justified by law in doing it".

The defence here envisages a situation where an accused acted under an honest and reasonable belief in a given state of situation which,

if true would have justified the act. There must be an honest belief in the existence of a fact upon which the mistake must rest. And the test will invariably be, whether the accused honestly and in good faith and without any fault or negligence on his part, made a mistake in the nature of situational premise prevailing as at that time. Again, this shall be determined and related to the circumstances as might be reasonably to be expected to affect his mind to induce belief or otherwise of the defence of mistake see **Aiguokhaian v. The State (2004) NJSC-192**

The facts of the following cases on where the defence of mistake under S. 45 of the Penal Code was raised bring out clearly the true nature of the defence. In **State v. Shalifu Musa No Mo/645/65 of 12/2/65 (unreported) quoted from Defences to Criminal Liability in Nigerian Law by Harisu s. Chukkol (1993), Page 21,** the accused mistook a human being for a **monkey** and shot him to death. Also, in **State v. Achema Okoliko (unreported) quoted from Hharisa S. Chukkol (supra) at P.2** the accused in that case shot and killed a co-hunter under the mistaken belief that deceased was a **monkey**.

In the present case, having regard to all the circumstances of the case, what should have induced the defence of mistake is the existence of the fact as to whether or not the dane gun was loaded. For instance, if the gun was loaded and the accused honestly believed that it was not, upon a situational premise, it would be a mistake of fact for him to press the trigger with the belief that it would cause no harm. However, this is not the case; I do not think the defence of mistake under S. 45 of the Penal Code is open to the accused in this case.

I take liberty here, in the many decisions of the Supreme **Court**, in considering the defence of accident, which in my view is open to the accused, having regard to the facts I find established before me. The Supreme **Court** had held, in numerous cases, such that it can now be said to be trite, that it is the duty of a trial **court** to consider all defences available to an accused. In **Laoye v. The State (1985) 2 NSCC 1251,** Supreme **Court** held, that it is the duty of the **court** to consider all possible defences to an accused on the evidence before the **court** or even from his statements to the Police, notwithstanding that such defences were not specifically raised by the accused person or his counsel see also **Ojo v. The State (1973) NSCC 590, Apishe v. The State (1971) ANLR 53.**

The defence of accident is provided for under Section 48 of the Penal Code which states:

"Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the course of doing a lawful act in lawful manner by lawful means with proper care and caution".

From the wording of this section of the Penal Code, it is quite clear

that the defence of accident presupposes that the accused physically committed the offence with which he is charged but having regard to the facts which he admits, all the same, he should be acquitted because his conduct in the commission of the offence was an accident. See **Chukwu v. The State (1992) 1NWLR (Prt 217) 255 at 269** where Karibi-Whyte JSC said;

'Where the voluntary act results in an event which neither intended nor foreseen, the consequence is an accident. Hence, in Iromantu v. The State (1964) 1ALLNLR311, it was held that a person who discharges a firearm unintentionally and without the attendant criminal malice or negligence will be exempt from criminal responsibility both for the firing and for its consequences'.

In dealing with the meaning of accident again in **Bello Ors v. A.G. Oyo State, (1986) 5 NWLR (Prt 45) 828** Kabiri-White JSC, said:

'An accident is the result of an unwilled act and means an event without the fault of the person alleged to have caused it'.

See also **Adelumola v. The State (1988) INWLR (Prt 73) 683.**

In this case, the accused gave the gun to the deceased at the request of the deceased. Although, it was the hand of the accused that triggered off the gun, the accused consistently maintained that it was not intentional. Having regard to all the circumstances of the case, I accept his evidence that the firing of the gun was not intended in the first place, let alone the **killing** of the deceased. It was, therefore, an accident that was not willed by the accused. There is no evidence from the Prosecution that the firing of the gun was due to any fault or negligence on the part of the accused. And, since the Prosecution in proving its case against the accused did not lead evidence to negative the story of the accused, defence of accident, in this respect, must succeed. In the circumstance, the accused is entitled to acquittal. Accordingly, I discharge and acquit the accused.

Signed:

Hon. Justice Alaba Omolaye-Ajileye

Judge

09/02/2009

Counsel Representation:

J. O. Olorunbogun Esq, Deputy Director of Prosecution, for the State.

Salihu Liman Esq for the Accused.