

SUPREME COURT OF NIGERIA
17TH SEPTEMBER, 1993 SC. 42/1993
CORAM:- A.G. KARIBI-WHYTE, A.B. WALI,
O. OLATAWURA, M.E. OGUNDARE, S.U. ONU, JJSC.

JOSEPH EJELIKWU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL LAW AND PROCEDURE - *Commencement of proceedings by Preliminary investigation - whether proceedings before the magistrate forms part of the proceedings in the High Court.*

CRIMINAL LAW AND PROCEDURE - *Where Appellant is charged with culpable homicide punishable with death - found “guilty as charged” - whether the same as conviction for culpable homicide punishable with death.*

CRIMINAL LAW AND PROCEDURE - *Accidental slip by trial judge - whether the same can be corrected by the appeal court.*

EVIDENCE - *Where other evidence of cause of death is cogent and conclusive - whether court can conclude cause of death even without medical evidence.*

FACTS

The accused a policeman charged with the offence of culpable homicide punishable with death for the murder of one Justine Damniyor by intentional shooting him with a gun. After the Preliminary Investigation the accused was committed for trial in the High Court. At the end of the trial the learned trial judge after considering the evidence before him found the accused “*guilty as charged*”. The accused appealed to the Court of Appeal against his conviction and the Court of Appeal dismissed his appeal. The Judgment of the trial court was affirmed with the addition “*the accused is sentenced to death and shall be hanged by the neck until he is dead*”. The accused person has further appealed to the Supreme Court contending that the Preliminary Investigation conducted by the Chief Magistrate did

not form part of the proceedings of the High Court and so the charge framed at the end of it being irrelevant, the accused person was not tried on a charge. He further contended that failure of the trial court to pronounce a sentence on the accused as prescribed by law vitiated the proceedings and that such irregularity cannot be remedied by an appellate court.

HELD (Unanimously dismissing the appeal)

1. Where proceedings are commenced by way of the preliminary investigation as in the instant case, the proceedings before the committing magistrate will form part of the proceedings in the High Court. This is the intent of section 180 of the Criminal Procedure Code. (P.153 L29)

2. The finding of guilt of the Appellant as charged by the learned trial Judge is the same as convicting the Appellant of culpable homicide punishable with death with which he was charged and tried. There is no magic in employing the term “*conviction*” before it is said that an accused person is guilty of the offence he is charged with. (P.154 L35)

3. The Court of Appeal was right to have corrected the accidental slip by providing and inserting the words “*the accused person is sentenced to death and shall be hanged by the neck until he is dead*” immediately after the last sentence of the judgment of the trial Judge. And it is for the appeal court to consider whether an omission or non compliance With, S.269 of the CPC resulted in failure of justice. (P.156 L16)

4. There is no contradiction between Exhibit 1 (medical report) and the evidence of the prosecution’s witnesses who observed the injuries on the deceased. Even without Exhibit 1, the evidence was cogent and conclusive that the gun-shot wound was the cause of death as the deceased died before he was given any medical treatment. And there is no intervening event to show or suggest that the deceased died from any cause other than the gun-shot wound as was confirmed by Exhibit 1. (P.159 L19)

5. There is no reason to interfere with the findings of facts of the two lower courts. The findings and conclusions in the judgment being amply supported by the evidence of the Court of Appeal was perfectly right in affirming them and dismissing the appeal. (P. 160 L14)

REPRESENTATION

J.B. Daudu, for the Appellant

Hannatu Azumi Balogan (Mrs.) Ag. Director, Legal Drafting, Ministry of Justice Kaduna

CASES REFERRED TO

1. Howard v. Bodington (1877)2 P.D.203
2. R.v. Northumberland Compensation Appeal Tribunal Exparte Shaw (1952)KE 338.
3. Dzakpe v. Tiv N.A. (1958) NR N.L.R. 135
4. Kajuba v. The State (1988)1 NWLR (pt.73)721
5. Onyejekwe V. State (1992)4 SCR (pt. 1)19
6. Onugbogu v. State (1974) A N.L.R. 561
7. Kalu v. The State (1990)4 NWLR (pt90) 503
8. Akosile v. State (1972)5 SC. 312
9. Bukar v. State (1965) NMLR 163
10. Amusa Opoola Adio v. State (1986)2 NWLR (pt.24)58
11. Ebba v. Ogoda (1984)1 SC. 372
12. Egri v. Uperi (1974) NWLR 22
13. Queen v. Oji
14. Erne v. State (1974)1 All NLR 416
15. Gwonto v. State 91983)1 SCNLR, 1

STATUTES REFERRED TO

1. Penal Code ss. 224, 221
2. Criminal Procedure Code ss. 172, 180, 187(1), 181, 185(a)(b), 207, 269 (1)(2), 381, 382, 273, 197, 208, 173, 197, 198, 275
3. Constitution of the Federal Rep. of Nigeria, 1979 - ss. 33 (b)(a), 33(7).
4. Court of Appeal Act s. 24

BOOKS

Strouds Judicial Dictionary 4th Edition p.255.

LEAD JUDGMENT BY WALL JSC

The accused person, Joseph Ejelikwu, was, after a preliminary investigation, charged as follows:-

"That you Joseph Ejelikwu, on 23 November, 1978, at about 1705 hours at G.R.A. Police Station, Katsina, committed the offence of culpable homicide punishable with death in that you caused the death of Justine Damniyor by intentionally shooting him with a gun and that you thereby committed an offence punishable under Section 224 (sic) of the Penal Code."

The accused was committed to the High Court for trial in accordance with Sections 172 and 180 of the Criminal Procedure Code Law.

On 27 August, 1980, the accused, represented by his learned counsel Christ, appeared in the High Court and the charge, as framed by the Magistrate after the Preliminary Investigation was read and explained to him in compliance with Section 187(1) and his plea taken down as required under Section 188 of the Criminal Procedure Code respectively.

At the end of the trial, the learned trial Chief Judge, Umaru Abdullahi (as he then was), considered the evidence adduced before him and concluded:-

"I am satisfied that the accused knew or had reason to know that death of Justine Damniyor would be the probable and not only a likely consequence of shooting Justine Damniyor with Exhibit 2 or of any bodily injury which the shooting was intended to cause. In the light of the findings I made above, I am satisfied beyond any doubt that the prosecution had proved its case beyond reasonable doubt and I accordingly find the accused person Joseph Ejelikwu guilty as charged."

The accused appealed to the Court of Appeal against his conviction. The appeal was dismissed. The judgment of the trial court was affirmed with the following additional addendum -

"The accused is sentenced to death and shall be hanged by the neck until he is dead."

The accused person has now further appealed to this court.

From now onwards the accused shall be referred to as the appellant in this judgment.

Before I consider the issues raised in this case, I consider it pertinent to state in brief, the facts of this case as presented by the prosecution. The prosecution will also henceforth be referred to as the respondent. On 23rd November, 1978, the appellant was on duty at G.R.A. Police Station, Katsina as a Station Writer. On that day the deceased came to the Police Station on his new motor-cycle. He showed it to another police constable, John Zar, who was also on duty at the station. P.c. Zar took the motor-cycle from the deceased and rode it to the main road. At the time he left for the main road, the deceased was standing very close to the station premises. He was coming back and just when he was entering the station premises, he heard a gun shot and saw the appellant holding a rifle running towards the barracks. At the same time he saw the deceased falling down with blood coming out of his body. He was rushed to the hospital where he later died on the same day.

The appellant was followed to the barracks, arrested and charged to court.

In the appellant's brief, the following four (4) issues were formulated for determination by this court. The issues are:-

"1. Whether the Court of Appeal was right in holding that the appellant was tried on a charge discernible from the real record of proceedings and in compliance with all initiatory processes of a criminal proceedings under the Criminal Procedure Code?"

2. If answered negatively, will the proceedings not be void particularly on account of the absence of a charge and in such a situation, which is the preferable consequential order between declaring the proceedings a nullity and discharging the appellant and ordering a retrial, new trial or trial de novo?"

3. Whether in the light of the peculiar provisions of the Criminal Procedure Code the omission by a court to pronounce a sentence is not fatal to the entire proceedings particularly in this instance where the learned trial Judge omitted to pass the mandatory sentence of death on the appellant and if answered negatively whether the Court of Appeal could in the circumstances remedy the error of the trial court?"

4. Whether there were material contradictions in the evidence

of the prosecution on the cause of the deceased's death as to entitle the appellant to be discharged and acquitted."

The respondent also formulated 4 issues in the brief filed and are -

"1. Whether the Court of Appeal was right in holding that the Appellant was tried on a charge and in compliance with section 187⁵ of the Criminal Procedure Code and section 33(6)(a) of the 1979 Constitution.

2. If answered negatively, what should have been the holding on the court as regards the proceedings and what consequential order ought to be made in such a circumstance. 10

3. Whether the Court of Appeal was right in holding that the failure of the trial Judge to pronounce sentence was an accidental slip which was curable.

4. Whether there were material contradictions in the evidence¹⁵ of the prosecution on the cause of the deceased's death as to entitle the Appellant to be discharged and acquitted."

These issues are subsumed in that of the appellant, so in deciding this appeal, I shall go by the issues in the appellant's brief.

Issues 1 and 2

It was the submission of learned counsel for the appellant that the entire authentic record of proceedings did not disclose a charge on which the appellant was tried and convicted. He contended that the real record of proceedings commences from page 20 of the printed record and that what was annexed at pages 1 - 19, being the proceedings of the preliminary investigation conducted by Sada Abdulmumini the then Chief Magistrate, did not form part of the proceedings of the High Court and therefore the charge framed at the end of the Preliminary Investigation was irrelevant. He submitted that the appellant was not tried on a charge. He then referred to Section 33(7) of the 1979 Constitution and concluded that the word "shall" is mandatory and a failure to comply with it renders the proceedings thereunder null and void. He referred to several authorities in support of his arguments amongst which are Howard & Ors v. Bodington (1877) 2 P.D. 203 at 210; Strouds Judicial Dictionary 4th Edition P2515; R. v. Northumberland Compensation Appeal Tribunal Ex Parte Shaw (1952) K.B. 338 at 352 and Dzakpe v. Tiv N.A. 25 30 35

(1958) N.R.N.L.R. 135. On the appropriate order to be made if his submissions are accepted that the trial is a nullity, he referred to cases on order for a retrial and urged this court to depart in particular, from this court's order in *Kajubo v. The State* (1988) 1 NWLR (Pt.73) 721 and urged that the appellant be discharged, particularly when
5 he has spent over 15 years in prison custody.

In answer to the appellant counsel 's submissions (supra), learned counsel for the respondent referred to sections 172, 180, 181, 185 and 187(1) of the Criminal Procedure Code and submitted that the charge referred to in section 187(1) is the charge framed
10 by the Magistrate after a Preliminary Investigation. He also submitted that the proceedings in the Magistrate Court having been passed to the High Court in strict compliance with the provision of section 180 of the Criminal Procedure Code, were validly before the High Court
15 and consequently, the charge framed by the Chief Magistrate was most relevant to the entire proceedings and same was read and explained to the appellant at the commencement of the trial in the High Court in full compliance with section 187 of the Criminal Procedure Code. He urged the Court to hold that there was no contra-
20 vention of section 33(7) of the 1979 Constitution in the trial before the High Court and to dismiss issues 1 and 2 covering Ground 1 of the appeal. The trial of the appellant in the High Court resulted from a committal on a charge after a Preliminary Investigation. See Chapter 17 of the Criminal Procedure Code. In compliance with section
25 180 of the Criminal Procedure Code the learned Chief Magistrate sent the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence at the appellant's trial, to the High Court.

30 In the High Court, the record shows clearly that the charge framed by the Chief Magistrate and sent to the High Court, was read and explained to the appellant and his plea taken down in strict compliance with sections 187 and 188 of the Criminal Procedure Code.

So all the procedural rules were fully and strictly followed both
35 before and at the appellant's trial in the High Court. There is nothing in the Criminal Procedure Code showing or even suggesting that another separate copy of the charge, other than that forwarded to the High Court under section 180 of the Criminal Procedure Code, was to be forwarded to the High Court for the appellant's trial. Learned

counsel for the appellant is not complaining that the Attorney-General exercised his powers under section 181 or section 185(b) of the Criminal Procedure Code and that a copy of such charge was not read and explained to the appellant.

I agree with the submission of learned counsel for the respondent that there was no infringement of section 33(7) of the 1979 Constitution. In this regard, I entirely agree with the view expressed by the Court of Appeal on these issues when Achike, J.C.A., in his lead judgment said:-

"It is rather novel for the appellant's counsel to insist on the charge being copied by the learned trial Judge so as to reflect the same in the proceedings or to tender the deposition that contains the charge. Of course, as was expected, counsel did not rely on any authority to support his contention. It makes sense to me that the purpose of sending the charge as framed by the examining Magistrate both to the trial High Court and the appellant is to ensure that the very same charge which accompanies the record of the P.1. is to constitute the charge at the trial of the accused. This view is buttressed by the provisions of section 207 of the CPC which inter alia, empowers the trial court to amend an imperfect or erroneous charge. The cumulative effect of sections 172, 180 and 207 of the CPC strongly indicates that it is the charge framed by the examining Magistrate which had been transmitted to the trial High Court, and a copy thereof sent to the appellant that would be used at the proceedings at the High Court. To hold otherwise is to introduce matters extraneous to the express provisions of the C.P.C."

The authorities cited and relied upon by the appellant are not apposite. Where, (as in this case) proceedings are commenced by way of a Preliminary Investigation, the proceedings before the committing Magistrate will form part of the proceedings in the High Court. This is, in my view, the intendment of section 180 of the Criminal Procedure Code which provides that:-

"When the accused is committed for trial, the Magistrate shall send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence to the court which is to try the case and shall also send the charge and a copy of the record to the Attorney-General and to the accused."

There is no substance in these issues, and Ground 1 upon

which they are formulated is without merit and therefore fails.

Issue 3

Under this issue and which is related to Ground 2 of the
 5 Grounds of Appeal, learned counsel for the appellant submits that
 an omission to pronounce under section 269(2) of the Criminal Pro-
 cedure Code is not such an irregularity that the Court of Appeal can
 remedy under the blue pencil rule. He contended that since the trial
 10 court has omitted to convict the appellant and also omitted to record
 a sentence, the judgment is incurably defective. He submitted that in
 the absence of a judgment by the trial court, the entire proceedings
 are a nullity and void. He said the submission can neither be referred
 to as a clerical or accidental omission. He cited and relied on some
 15 decided cases and urged this Court to strictly construe the non-com-
 pliance with section 269 of the Criminal Procedure Code against the
 respondent and in favour of the appellant.

In reply, the learned counsel for the respondent submitted that
 the failure by the learned trial Judge to pass a sentence particularly
 20 when it is fixed by law, will not vitiate the proceedings since such an
 omission is a mere procedural irregularity that can be remedied by
 an appellate court. He too cited and relied on a host of decided cases
 and urged that the ground be dismissed.

25 The starting point here is was there any conviction by the learned
 trial Judge based on the evidence adduced before him? This answer
 is not difficult to come by. At the end of the judgment, the learned
 trial Judge concluded thus -

30 *"In the light of the findings I made above, I am satisfied be-
 yond any doubt that the prosecution had proved its case beyond
 reasonable doubt and I accordingly find the accused person Joseph
 Ejelioku guilty as charged."*

35 It is my view that the finding of guilt of the appellant as charged
 by the learned trial Judge is tantamount to convicting him of the
 offence of culpable homicide punishable with death with which he
 was charged and tried. There is no magic in using the word "convic-

tion" before it is said that accused person is guilty of the offence charged with. Although section 269(1) and (2) which are relevant to this case are mandatory in nature the application of the section to a certain extent is controlled by section 382 of the Criminal Procedure Code. For easy understanding of the two subsections, I reproduced them hereunder - 5

"269(1) Every judgment shall contain the point or points for determination, the decision thereon and the reasons for the decision and shall be dated and signed or sealed by the court in open court at the time of pronouncing it.

(2) If the judgment is a judgment of conviction it shall specify the offence of which and the section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced." 10

"382. Subject to the provisions hereinbefore contained, no findings, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or review on account of any error, omission or irregularity in the complaint, summons, warrant, charge, public summons, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Criminal Procedure Code unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity." 15 20

S. 382 of the Criminal Procedure Code specifies instances where failure to comply with a provision of the relevant subsection of Criminal Procedure Code shall not amount to failure or miscarriage of justice, unless appellate court finds otherwise. This is one of such instances. The complaint in this ground of appeal is not that there is failure on the part of the learned trial Judge to consider the evidence adduced and make proper findings. It only complains against the omission by the learned trial Judge to say that he convicted the appellant and to sentence him to death as provided in section 221 (b) of the Penal Code. 25 30

The question of a trial court's failure to record a conviction after a finding of guilt was dealt with and settled by this Court in Onyejekwe v. The State (1992) 3 NWLR (Pt.230) 444; (1992) 4 SCR (Pt.1) 19 at 29 where Uche Omo, J.S.C. in his lead judgment of 35

the court said -

Once it is clear from the evidence led and/or findings of the trial Judge, that the appellant has been found to have committed the offence charged, the failure to record the conviction should not prevent the appellate court from so holding. It should be regarded as an irregularity/slip and not an illegality."In my view, the Court of Appeal has adequately dealt with the issue when it said:

"After all, the learned trial Judge found the appellant guilty as charged. The charge as framed specified the section of the Penal Code under which the appellant was charged. Its defect, primarily, is that the lower court failed to pronounce the sentence passed on the appellant. That brings it within the decision in Ekpo's case(supra) where the omission was liberally interpreted to be an accidental error."

As observed by the Court of Appeal, the learned trial Judge is no longer in the state High Court to enable him remedy the accidental omission of pronouncing the appropriate sentence. Applying the provision of Section 24 of the Court of Appeal Act, 1976 and guided by the decision in Nafiu Rabiu v. State (1980) 2 NLR 11 at 146, the Court of Appeal was right to have corrected the accidental slip by providing and inserting the following words immediately after the last sentence of the judgment of the trial Judge.-

"The accused is sentenced to death and shall be hanged by the neck until he is dead."

There is no failure or miscarriage of justice in this exercise.

Section 269 of the Criminal Procedure Code does not expressly state that non-compliance with its provision shall vitiate the proceedings and render the trial a nullity. It depends on the circumstances in each case and the appeal court is to consider whether such an omission or non-compliance results in failure of justice. See Erne v. The State (1964) 1 All N.L.R. 416.

As I said earlier section 269 of the Criminal Procedure Code must be read subject to section 382 of the Criminal Procedure Code which confers on the appellate court powers of considering whether

an omission or non-compliance with the provision of the Criminal Procedure Code occasions failure of justice.

This grounds also fails.

Issue No.4

It was the contention of learned counsel for the appellant that while the medical report Exhibit I fixed the cause of death to "haemorrhage and shock" due to multiple injuries, the other witnesses attributed the cause of death as being due to the gun shot fired by the appellant. He submitted that it is the responsibility of the prosecution to give a satisfactory explanation to the contradiction which they have failed to do. It is also his submission that a solitary gun shot is not capable of causing the kind of multiple injuries contained in Exhibit 1. He urged this Court to hold that the prosecution's case is not free from doubt and that such doubt should be resolved in the appellant's favour. He cited *Onabogu v. The State* (1974) All NLR 561; *Kalu v. State* (1988) 4 NWLR (Pt.90) 503 at 510 and *Akosite v. The State* (1972) 5 S.C. 312.

In reply, learned counsel for the respondent submitted that the multiple injuries described in Exhibit 1 are very consistent with a single shot from a Mark 4 rifle delivered at point-blank range. He therefore urged this Court to hold that there are no material inconsistencies or contradictions between the injuries described in Exhibit 1 and the oral testimonies of the prosecution witnesses and to dismiss the appeal.

The main plank of the appellant's argument covering this issue is that a single gun shot is not capable of causing multiple injuries as described in Exhibit 1.

This argument, in my view, is nothing short of a misconception of Exhibit 1. The evidence in Exhibit 1 shows that the deceased was shot on the left side of the chest, the bullet going out through the right side. Exhibit 1 described the external injuries at the, point of entry of the bullet on the left side of the chest and at the point of its exit on the right side. It then went on to describe the internal injuries caused by the same bullet.

The relevant portion of Exhibit 1 reads -

"External injuries (1) A circular wound on the out chest wall on the (L) side 1.5cm in diameter with black discolouration on the skin around 3" below the (L) nipple 2" to the left of the midline in the 5th intercostal space.

5 (Entry wound): (2) Lacerated injury of the (R) lateral abdominal wall 1" below the (R) subcostal margin 2" long 1" broad vertically placed with pieces of omentum protruding through the wound (Exit wound). INTERNAL INJURIES: (R) pleural cavity contained 20 ozs of dark fluid blood.

10 (L) pleural cavity contains 8ozs of dark fluid blood there is a lacerated wound 2cm long on the (R) dome of diaphragm. Hear both sides are empty. No blood in the pericardial cavity: Lower lobe of the (R) lung has a big hematane (L) lung normal peritoneal cavity
15 contains J2 ozs of dark fluid blood. The (R) lobe of the liver is recfitedured (sic) into pieces. There is hematoma on the hepatic flexure of the colon and (R) kidney. Spleen is pale other organs normal.

All injuries are antemortem."

20 The injuries described in Exhibit 1 are consistent with a single shot with a Mark 4 rifle at the range the appellatant fired the fatal shot at the deceased.

25 PW. 2 was an eye-witness to the incident. He testified that he was standing in front of the Police Station GRA Katsina together with the deceased when the appellatant, carrying a Mark 4 rifle gun, came out of the same building and shot the deceased.

30 PW. 3 gave evidence that on the fatal day he was on duty at the Police Signals Office, Katsina when he heard a gun shot. He came out to see what was happening. It was then he saw the appellatant running to the barracks with a rifle. He also, at the same time, saw the deceased falling down. It was then that the deceased told him that it
35 was the appellatant that shot him.

PW.4 who was also present and saw what happened said in his evidence:-

"On 23/11/78, I was on duty at G.R.A. Police Station Katsina. I was on duty when the late Justine went to the office on his motorcycle which he then bought. He was showing the machine to me. I was testing it. I rode it to the main road. I left him alone standing very close to the office. I was coming back entering into the office premises I heard a gun shot. Looking up I saw Joseph the accused running with a rifle in his hand to the barracks. I saw Justine falling down with blood coming out of his body"

P.W.5 also said he saw the appellant coming towards them with a gun after he had heard the sound of a gun shot. He continued - *"I went into the office to inform the D.P.O. what happened by telephone. I came out to help the person shot. He was lying down and calling the name of the accused, Ejelioku. The o/c Crime arrived at the scene with his car. The person shot was conveyed to the hospital."*

The prosecution's evidence showed that on the day the deceased was shot by the appellant, he went to the Police Station hale and hearty. He died in the hospital about 30 minutes later after he was shot. There was no intervening event to show or suggest that he died from any cause other than the gun shot wound. His death due to this was confirmed by Exhibit 1. I find no contradiction between Exhibit 1 and the evidence of the prosecution's witnesses who observed the injuries on the deceased. Even without Exhibit 1, the evidence was so cogent and conclusive that the gun shot wound was the cause of death, as the deceased passed away before he was given any medical treatment. See *Bakuri v. The State* (1965) NMLR 163.

The learned trial Judge, after considering and evaluating the evidence concluded:-

"The shooting took place at 5.30 p.m. This piece of evidence has gone a long way to show that the accused had intended to do what he did, to shoot the deceased. The accused is a policeman. He knew that a rifle of the calibre he used to shoot the deceased is a

lethal weapon. He also chose a very vital and delicate part of the body of the deceased as the target and from the surrounding circumstances shot the deceased at a close range causing multiple injuries both external and internal on the body of the deceased. PW.1 stated that chances of survival with the type of injuries inflicted on the deceased are nil."

X X X X X X X X

"I am satisfied that the accused knew or had reason to know that death of Justine Damniyor would be the probable and not only a likely consequence of shooting Justine Damniyor with Exhibit 2 or of any bodily injury which the shooting was intended."

The findings and conclusions in the judgment are amply supported by the evidence and the Court of Appeal was perfectly right in affirming them and dismissing the appeal.

On my part, I see no reason to interfere with the findings of fact by the two lower courts. See *Amusa Opoola Adio & Anor. v. The State* (1986) 2 NWLR (Pt.24) 581; *Ebba v. Ogodu* (1984) 1 SCNLR 372, (1984) 1 S.C. 372; *Ogbero Egri v. Edeho Ukperi* (1974) NMLR 22 and *Onyejekwe v. State* (1992) 3 NWLR (Pt. 230) 444; (1992) 4 SCR (Pt.1) 19.

On the whole, I find no merit in the appeal. The judgment of the trial court as amended by the Court of Appeal is affirmed. The appeal is dismissed.

KARIBI-WHYTE JSC

I have read the judgment of my learned brother, Wali, J.S.C. in this appeal. I agree that the appeal of the appellant be dismissed. I wish however to make some contribution in amplification of the reasoning on the issues raised in the judgment. Appellant has come to this Court on appeal against the decision of the Court below delivered on the 25th May, 1992, affirming his conviction for the offence of culpable homicide punishable by death contrary to section 221 of the Penal Code. Appellant was on the 28th November, 1980 convicted by Abdullahi J., of the High Court of Kaduna State.

THE FACTS.

Appellant, Joseph Ejeli kwu, a Policeman was charged with the culpable homicide of a fellow Policeman, Justine Damniyor on the 23rd November, 1978. The case of the prosecution was generally denied by the appellant at the trial, but not otherwise contradicted by contrary evidence.

Joseph Ejeli kwu, was on the fateful day, on duty from 1p.m. 5 as the station writer at the Government Reserved Area Police Station in Katsina. At about 5p.m. that day, the deceased, Constable Justice Damniyor arrived at the Police Station riding on his newly purchased motorcycle. He gave the motor cycle to Constable John Zar for a test 10 ride. He was standing by and chatting with others, when appellant came out from the Police Station with a Mark 4 rifle and shot at him. The deceased was hit on the right and left hand side of the abdomen, and he fell down. He kept crying aloud and repeating that it was the 15 appellant who shot at him. The deceased was immediately rushed to the Hospital, but died about 10 minutes on arrival at the hospital.

Appellant after firing the fatal shot at the deceased left the Police Station and went to his house. He was later arrested, and charged with the offence. After a preliminary investigation, the appellant was 20 on the 15th November, 1979, committed for trial in the High Court, Katsina before Abdullai J, for the offence of culpable homicide punishable with death contrary to section 221 of the Penal Code.

THE COURT OF TRIAL

Appellant was arraigned for trial on the 24th June, 1980. The 25 case was adjourned to the 25th August, 1980, and further adjourned to the 27th August, 1980. On this latter date the record of proceedings reads -

"27/8/80

Accused person present in court speaks English, M.U. Ibrahim, 30 State Counsel for State.

CHRIST: For the accused person. Charged (sic) read and explain to the accused person.

MUH: I understood the charge. I am not guilty."

It is pertinent to observe that the charge so read and explained 35 to the accused, and to which he pleaded not guilty after saying that he understood the charge, was not reproduced anywhere in the trial proceedings in the High Court. It is also relevant to observe that this is a trial on committal after a preliminary inquiry before the Chief

Magistrate. Accordingly, appellant's actual trial for the offence should and did commence when he was arraigned before the High Court on the 24th June, 1980. In opening the case for the prosecution on the 27th August, 1980 the Prosecutor stated that "This is a case of culpable homicide under section 221." It is assumed that is the offence the accused pleaded to and in respect of which he stood trial. After hearing the witnesses for the prosecution, and the accused give evidence in his own defence; (he did not call any witnesses), and addressing of Counsel, the learned trial Judge convicted the accused as charged. The learned trial Judge found that the evidence of the prosecution witnesses and the type of injury found on the deceased showed that the injuries emanated from a gun shot. He also found that from the report of the ballistics, the expended cartridge was fired from the gun used by the accused, and that the injuries which resulted in the death of the deceased were caused by the gunshot inflicted on the deceased by the accused. There was also the finding that the accused knew or had reason to know that death of the deceased, or bodily injury to him, would be the probable and not only a likely consequence of shooting at the deceased. The accused did not give any evidence suggestive of facts on which the defences of provocation or self-defence could be based. In his evidence he denied killing the deceased or anybody. He said that the prosecution witnesses told lies against him. Cross-examination merely brought out the fact that he knew some of the prosecution witnesses.

THE COURT OF APPEAL

The accused appealed to the Court of Appeal. The main challenge of the judgment was on the validity of the trial. Two of the three grounds of appeal were directed at the fact that the accused was tried without a charge, there being no evidence on the record, contrary to section 187 of the Criminal Procedure Code and section 33(6)(a) of the 1979 Constitution (Ground 1). There was the complaint of non-compliance with sections 198, 269(2) and 273 of the Criminal Procedure Code (Ground 2). The third ground was on the contradictions in and insufficiency of the evidence relied upon for the conviction. The question of the omission of the sentence after conviction of the accused was also raised.

These grounds raised the issues of the nullity of the trial and whether appellant should be discharged and acquitted because of

the contradictions in and insufficiency of the evidence against the appellant.

The Court of Appeal in a well considered and reserved judgment dealt with the issue of the absence of the charge to which the accused pleaded in the proceedings before the High Court. The Court referred to sections 172, 180 and 207 of the Criminal Procedure Code and stated that the purpose of sending the charge as framed by the examining Magistrate both to the trial High Court and the Appellant is to ensure that the very same charge which accompanied the record of the Preliminary Inquiry is to constitute the charge at the trial in the accused. Therefore, reading the above three sections together, the conclusion is that the charge framed by the examining Magistrate and transmitted to the trial High Court, and a copy thereof sent to the appellant, is the charge to be used at the trial in the High Court. The Court observed that "To hold otherwise is to introduce matters extraneous to the express provisions of the C.P.C. I will unhesitatingly decline to read into the C.P.C. word or words which are not stated therein and which may drastically change its otherwise unambiguous provisions."

The Court referred to the criticism whether the appellant actually pleaded to the charge, and acknowledged that the record of proceedings was ambiguous as to what actually transpired. The Court then resorted to the expedient of calling for the original file, to satisfy itself that the learned trial Judge discharged the duty of reading and explaining the charge to the appellant in accordance with section 187(1) of the C.P.C. and section 33(6)-(a) of the 1979 Constitution.

Adverting to the omission to pass a sentence in compliance with sections 197 and 273 CPC which learned Counsel to the appellant submitted is a vitiating irregularity which rendered the trial a nullity, the Court agreed with learned Counsel to the respondent that the omission is a curable procedural irregularity. It was not in dispute, that the learned trial Judge did not pronounce sentence on the appellant, and that there was non-compliance with section 198 of the CPC. There was non-compliance with section 273 CPC which prescribes the statutory words of sentence in respect of capital offence.

The Court of Appeal held that the omission has generally been regarded as an accidental slip remediable by remitting the case to the trial Judge with direction that the omission be supplied by passing the appropriate sentence.

The Court rejected learned counsel to the appellant's interpretation

of section 269(2) CPC which suggests that the omission is not remediable. The court referred to section 24 of the Court of Appeal Act as an enabling provision.

Finally, the Court of Appeal rejected the submission of appellant's counsel that there were conflicts and contradictions in the prosecution's case to justify the acquittal of the appellant.

IN THE SUPREME COURT

Appellant has appealed to this Court on substantially the same grounds of appeal and issues for determination as were raised in the court below.

The grounds of appeal, excluding the particulars are as follows-

"Grounds of Appeal

Error in Law

The Court of Appeal erred in law when it held that the appellant's trial was not a nullity as he was tried on a charge and in compliance with section 187 of the Criminal Procedure Code and section

33(6)(a) of the 1979 Constitution.

2. Error in Law

The Court of Appeal erred in law when it held that the trial courts failure and or omission to record and or pass a sentence were not fatal to the entire proceedings and were in fact a mere slip on the part of the trial court.

3. Error in Law

The Court of Appeal misdirected itself on the law when it held that there was (sic) no contradictions in the evidence adduced by the prosecution sufficient to vitiate the proceedings and that the trial court was right in convicting the appellant on the evidence before it."

Counsel filed their briefs of argument, which they adopted and relied upon in amplification of the arguments therein before us. Learned Counsel to the appellant formulated four issues from the three grounds of appeal. Learned counsel to the respondent has adopted these issues. I reproduce below the issues:-

ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that the appellant was tried on a charge discernible from the real record of proceedings and in compliance with all initiatory processes of a criminal proceedings under the Criminal Procedure Code?

2. Whether in the light of the peculiar provisions of the Criminal Procedure Code the omission by a court to pronounce a sentence is not fatal to the entire proceedings particularly in this instance where the learned

trial Judge omitted to pass the mandatory sentence of death on the appellant and if answered negatively whether the Court of Appeal could in the circumstances remedy the error of the trial court?

3. Whether there were material contradictions in the evidence of the prosecution on the cause of the deceased's death as to entitle the appellant to be discharged and acquitted."

I do not consider issue 2 necessary, since it is covered in the formulation of issue 1.

I shall deal with the issues seriatim.

Submissions of Counsel -

The main thrust of the submission of learned Counsel to the appellant is that the trial was conducted in contravention of the provisions of section 187(1) of the CPC and section 33 (6) (a) of the Constitution 1979, and is therefore a nullity. In support of this submission, Mr. Daudu for the appellant relied on sections 172, 180, 187(1) of the Criminal Procedure Code and sections 33(6) (a) and 33(7) of the Constitution 1979. It was submitted that the charge framed by the examining Magistrate on committal to the High Court in accordance with S.172 is to be transmitted to the trial High Court. But it was submitted this per se did not make it a part of the proceedings of the trial High Court. It was further submitted that the charge required by section 187 CPC to be read out in court is not the charge framed by the examining Magistrate. It will be speculative to assume that it was the charge framed by the examining Magistrate that was read out. Learned Counsel submitted that compliance with section 187(1) requires.

(i) The charge read out must be copied and made part of the proceedings

(ii) The charge forwarded to the High Court or that part of the deposition that contains the charge should be tendered in evidence.

Learned Counsel contended tenaciously that the deposition before the examining Magistrate is not part of the proceedings before the trial High Court. It was therefore submitted appellant was not tried on a charge as none was discernible on the printed record. The inference therefore from learned Counsel's argument is that since the record of proceedings did not contain the charge proffered against the appellant on committal, the charge was not copied by the learned trial Judge during the trial for the purpose of appellant pleading to it. Therefore even if the record of proceedings disclosed (as in this case) that appellant pleaded to a charge at the commencement of the trial, it was a non-existent charge. The trial was therefore a nullity.

Now this contention raises a number of issues which can only be determined by the construction of the relevant provisions. But before proceeding to construe the sections of the Criminal Procedure Code, it is necessary to refer to the findings of fact from the Court's file by the Court of Appeal that the charge was read and explained to the appellant and he
 5 pleaded not guilty to it. There has been no appeal against the finding.

There is the contention that the charge before the examining Magistrate not being part of the proceeding at the trial on committal cannot be the proper charge to which appellant should plead. The trial Judge should copy the charge so framed and the appellant should plead to the charge so
 10 copied.

This submission is very attractively presented and adroitly formulated. It has however an air of artificiality and is unduly technical. I do not think a cumulative reading of the relevant provisions of the Criminal Procedure Code will result in such a construction. The sections involved are 172,
 15 180, 181, 185, 187 of the Criminal Procedure Code.

It is the function of the interpreter of a statutory provision to interpret the words of the provision where plain and unambiguous as they are, and to avoid any glosses or interpretations that will alter the intention of the statute. - See *Queen v. Oji* (1961) 1 SCNLR 350; (1961) 1 All NLR 362.
 20 The purport of these sections is to indicate the roles of the examining Magistrate and that of the trial Judge with respect to the offence with which an accused is charged on committal. I reproduce the relevant sections of the Criminal Procedure Code for ease of reference.

"172. If, after the evidence referred to in section 168 and the examination, if any, referred to in section 169 have been taken and made, the magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand declaring with what offence the accused is charged.

180. When the accused is committed for trial the magistrate shall
 30 send the charge, the record of the inquiry and any weapon or other thing which is to be produced in evidence to the court which is to try the case and shall also send the charge and a copy of the record to the Attorney-General and to the accused.

181. At any time after the completion of the inquiry and before the
 35 commencement of the trial in the High Court the Attorney-General may, by notice to the High Court, amend the charge as framed at the inquiry or substitute for that charge such other charge or charges as he may see fit.

182(1) The committing magistrate or in his absence any other Magistrate may, if he thinks fit, and shall, if required by the Attorney-General,

summon and examine supplementary witnesses after the commitment and before the commencement of trial and bind them over in manner hereinbefore provided to appear and give evidence.

(2) Such examination shall if possible be taken in the presence of the accused and if not so taken the record thereof shall be read over to the accused before the trial. 5

(3) A copy of such record shall be given to the accused free of cost.

185 No person shall be tried by the High Court unless-

(a) he has been committed for trial to the High Court in accordance with the provisions of Chapter XVII; or

(b) a charge is preferred against him without the holding of a preliminary inquiry by leave of a Judge of the High Court 187(1) When the High Court is ready to commence the trial the accused shall appear or be brought before it and the charge shall be read out in court and explained to him and he shall be asked whether he is guilty or not guilty of the offence or offences charged. 15

(2) If the accused pleads guilty the plea shall be recorded and he may in the discretion of the court be convicted thereon unless the offence charged is punishable with death when the presiding Judge shall enter a plea of not guilty on behalf of the accused."

A short paraphrase of the sections will seem to me apposite here. 20 Section 172 of the Criminal Procedure Code requires the examining Magistrate on committal to frame the charge with which the accused is to be tried in the High Court. The Magistrate is required by section 180, to send the charge, the record of the proceedings of the inquiry, and any other exhibits tendered at the trial to the court trying the accused. The copy of 25 the charge and copy of the record of proceedings shall also be sent to the Attorney-General. The Attorney-General is empowered by section 181 to amend the charge as framed by the examining Magistrate, or substitute another charge or charges. By section 187, the charges as framed by the examining Magistrate, or amended or substituted by the Attorney-General, 30 shall at the trial, be read and explained in court to the accused, who shall be asked whether he is guilty or not of the offence or offences charged.

The generous use of the word "shall" in all the sections suggest the mandatory nature of the provisions. It seems to me that the performance of the duties imposed on the examining Magistrate by sections 172 and 35 180 are mandatory, the noncompliance with which affects the proceedings adversely. It is not the same with section 181 which is merely directory. Thus the proceedings will not be affected by the failure of the Attorney-General to exercise his discretion to amend the charge framed, or substitute

other charges. Thus the Attorney-General may leave the charge as framed by the examining Magistrate, for trial on committal.

The words of section 187(1) appear to me free from any ambiguity whatsoever. But they must be read together with sections 180 and 181 for a proper appreciation and understanding of the section. This is because as
 5 distinct from the provisions of section 185(b), section 185(a), refers to the case where the accused has been committed for trial. In such a case, the charge referred to in section 187(1) can only be referable to the charge in section 172 framed at the conclusion of a preliminary inquiry and by section 180 transmitted to the trial court for the purposes of a committal in
 10 section 185(a). Learned counsel to the respondent's construction appears to me to accurately represent the true position.

The words of section 187(1) are very clear and unambiguous. The charge framed by the examining Magistrate and transmitted to the trial court, "shall be read and explained to him" (i.e. the accused).

15 It is relevant to observe that whilst section 181 gives the Attorney-General; powers to amend, or substitute charges other than that framed by the examining Magistrate, section 187 gives no similar powers to the trial Judge. His duty is only to read out and explain the charge to the accused and to ask him whether he is guilty or not of the offence or offences charged.

20 Section 207 of the Criminal Procedure Code will seem to me to be applicable only where the accused has been committed for trial without a charge or with an imperfect charge. I concede that the Court is empowered to alter or amend charges before it in such circumstances under powers vested in section 208 of the CPC. This is not what is in issue in the appeal
 25 before us. The Court can only amend charges properly before it. The issue is that the charge framed by the examining Magistrate is not the charge to which the accused would plead under section 187(1) C.P.C.

There is no doubt, as contended by learned Counsel to the appellant, that the proceedings before the examining Magistrate is not part of the
 30 proceedings before the trial High Court. This is because trial of the accused begins only at the High Court. Learned Counsel to the respondent seems to have misconceived the point of law in construing committal proceedings to include trials in the High Court. It must be kept in mind that there is no plea before the examining Magistrate concluding a preliminary inquiry. This is
 35 because the accused was not then on trial. The trial commences at the High Court on committal.

There is a specific requirement of section 171 of the CPC that the charge framed by the examining Magistrate contains the offence with which the accused is charged at his trial. By section 180, the charge is among the

things to be transmitted to the trial court. Hence, besides the proceedings, the charge framed by the examining Magistrate or as amended or substituted by the Attorney-General, is the charge on which the committal of the accused for trial is based. The trial court can rely on it at the trial. Section 185(a) of the CPC supports this view. These enabling statutory provisions do not make trials extension of the preliminary inquiry.

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I do not consider it an essential requirement of the trial for the trial Judge to copy the charge so framed into the proceedings. This could be done for use of reference and convenience of the court. Otherwise the framing of the charge is the statutory duty of the examining Magistrate in section 172 CPC or the Attorney-General, in Section 180 CPC,

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Learned Counsel to the appellant had submitted that where the charge has not been so copied, it will be speculative to presume that it was the charge framed by the examining Magistrate that was read out in court. I do not accept this argument as correct. The case before us was a trial upon committal by a Magistrate. There is a statutory duty to frame the charge in respect of which the accused will be tried on committal to the High Court. It follows therefore that where a charge was read and explained to the accused who pleads, it is the charge so framed in compliance with the statutory duty, - *Omnia praesumuntur rite esse acta*. Section 33(6) (a) of the Constitution 1979 has been satisfied.

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The submission that it is mandatory for the trial Judge to incorporate the charge against the accused by copying it into the proceedings is not supported by any provision of the Criminal Procedure Code. It is reading into the section a requirement not authorised by its words.

Learned Counsel to the appellant has referred to section 33(7) of the Constitution 1979 and submitted that the section has been contravened by the failure of the trial Judge to keep an accurate record of the proceedings. It was submitted that the provision is mandatory and that non-compliance rendered the proceedings thereunder null and void. He referred to *Howard & Ors. v. Bodington* (1977) 2 P.D. 203 at p.210. Counsel relied on the use of the word "shall" which he said was peremptory. It was submitted the contravention cannot be waived.

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He referred to the definition of "record of proceedings" by Denning L.J. In *R v. Northumberland Compensation Appeal Tribunal Ex Parte Shaw* (1952) KB at p.352 to have the "charge" as an essential requirement. He submitted that the failure to record the charge occasioned a miscarriage of justice, and its absence from the record vitiated the proceedings. He relied on the proposition that a person should not be punished for an offence in respect of which there is no complaint or charge and cited *Dzakpe v. Tiv*

NA (1958) NRNL R 135.

It was finally submitted that in the absence of a recorded charge, the ingredients of the offence of culpable homicide could not have been read and explained to the appellant. What was read to the appellant must have been grossly insufficient falling far short of the constitutional requirements in section 33(6)(a). Counsel cited and relied on *Ema v. State* (1964) 1 All NLR 416 at 418 and *Kajubo v. The State* (supra).

Learned Counsel to the respondent took the opposite view and supported the reasoning of the Court below. Conceding that section 33(1) of the Constitution 1979 is mandatory, it was submitted that there was no failure to keep record of the proceedings in this case. The charge was explained to the appellant who in any event was represented by Counsel. There was nothing on the record to show that appellant did not understand the charge against him.

Learned Counsel submitted that the record of proceedings at the preliminary inquiry is part of the record of the proceedings in the High Court and therefore contains the charge which initiated the proceedings in the High Court. It was then argued that since the First Information Report preliminary inquiry, charge, committal, plea, trial and judgment of the High Court were all in the record, there is no defect. The case of *R. v. Northumberland Compensation Appeal Tribunal Ex Parte Shaw* (supra) supports the respondent.

Dzakpe v. Tiv NA (1958) NRNL R 135, where there was neither a complaint nor charge, was distinguished.

Learned Counsel then made two alternative submissions if we hold that there was an error in not reproducing the charge in the proceedings or that there was noncompliance with the mandatory provisions of the law in the institution of proceedings. In the first case, the omission should be regarded as an accidental slip and apply *Eme v. The State* (supra) and hold that it is a mere irregularity, which did not render the proceedings null and void. In respect of the latter, the non-compliance should be regarded as trivial and not sufficient to vitiate the proceedings. In both cases, it was submitted that no miscarriage of justice will be occasioned thereby.

At the expense of repeating myself, which I do in this instance for emphasis, I have already pointed out in this judgment that the grounds of appeal and issues for determination are substantially the same as those in the Court below. Again the same arguments that was addressed to the Court below has been made to us at least in respect of the first issue.

I have also already pointed out that appellant has not appealed against the finding in the Court below that the learned trial Judge read and

explained the charge to the accused/appellant, who stated that he understood the charge and pleaded not guilty. The finding was as a result of the contention that the record of proceedings at p.20 lines 30-35 suggests that appellant never answered the trial court and did not make a plea. These it was argued, are steps in the proceedings so crucial that their absence is so fundamental and vitiates the proceedings. The Court below resorted to the expedient of calling for the original court file of the proceedings and satisfied itself from the record of the proceedings that the learned trial Judge discharged the duty of reading and explaining the charge to the appellant. - See *Gwonto & Ors. v. The State* (1983) 1 SCNLR 1. There is no ground of appeal in support of the argument. I therefore ignore the submissions. 10

The more pertinent contention and is the subject-matter of the first issue is the submission that there was no charge properly before the court to which appellant could have pleaded, since the proceedings before the examining Magistrate is not part of the proceedings before the trial court, and the charge before the examining Magistrate cannot be relied upon as the charge before the trial Judge. 15

As much as I recognise the ingenuity in this contention, I fear that counsel did not appreciate the real issue. The issue is whether appellant was on committal to the High Court tried on a charge of culpable homicide punishable with death. First, one of the methods of initiating a prosecution in the High Court in accordance with section 185 is by committal for trial in accordance with the provisions of Chapter XVII - See S.185(a). This is committal by a Magistrate after a preliminary inquiry. Secondly, the charge on a committal is framed by the examining Magistrate at the end of the preliminary inquiry, and when he is satisfied that there are sufficient grounds for committing the accused for trial - S.172 CPC. it is not the function of the trial court. Thus although the charge so framed is not part of the proceedings in the preliminary inquiry, but framed for declaring with what offence the accused is charged and the offence to bear his trial in the High Court. It initiates the proceedings in the court of trial. 20 25 30

Now section 173 of the Criminal Procedure Code provides that the charge when framed shall be read and explained to the accused and a copy of it shall be given to him if he requires. Again section 180 requires the examining Magistrate to send the charge to the court which will try the case and to the Attorney-General. 35

Learned Counsel to the appellant has not told us that any of these provisions have not been satisfied. It is therefore assumed that they have been satisfied and that appellant was given by the examining Magistrate on committal, a copy of the charge against him at his trial in the High Court.

Accordingly, I consider it sufficient compliance with the provisions for initiating proceedings in the High Court, as soon as there is compliance with section 185(a) of the CPC. It is therefore not correct to contend as learned Counsel to the appellant has done in this case, that until the trial Judge copied the charge, into the proceedings it is not part of the proceedings at the trial. The trial in the High Court is initiated by committal, which is based upon the charge framed by the examining Magistrate. It is for this purpose part of the trial.

Learned Counsel to the appellant has submitted that there is violation of section 33(7) of the Constitution 1979 for failure to keep a record of the proceedings. It is contended that since the charge was not in the record of proceedings, it is a failure to comply with the mandatory provisions of section 33(7) renders the proceedings null and void - Howard & ors. v. Bodington (1877) 2 P.D. 203 and R. v. Northumberland Compensation Appeal Tribunal, Ex P. Shaw (1952) 2 KB. 338 were cited in support. I think Mr. Daudu has adopted an interpretation of the words of section 33(7) of the 1979, Constitution which is hardly acceptable. The section enables parties to obtain the judgment of the proceeding within 7 days of the conclusion of the case. It neither defines what constitutes a record of proceedings nor does it provide for the production of records of proceedings. The Court is enjoined to keep a record of proceedings which in this case includes the judgments.

Section 33(7) referred to is irrelevant to this case.

With due respect to learned Counsel to the appellant Dzakpe v. Tiv NA. (1958) NRNL 135, cited in support is distinguishable and not applicable also. In that case there was neither a complaint nor a charge. There is clearly a charge in this case.

I have already held that there was a charge against the appellant, which was read and explained to him and to which he pleaded guilty. It is therefore unnecessary to consider the arguments predicated on the absence of a recorded charge.

I am bound by the arguments in this appeal to resolve the first issue against the appellant.

I now turn to the second issue, which is the effect of the failure to pronounce sentence after conviction. Learned Counsel referred to the passage at p.53 of the record of proceedings where the learned trial Judge stated the conviction as follows-

"In the light of the findings I made above I am satisfied beyond reasonable doubt and I accordingly find the accused person Joseph Ejelioku guilty as charged."

It was submitted that no sentence was passed as mandatorily required by law, and the judgment was therefore incomplete without a sentence.

Learned Counsel called in aid the provisions of sections 198 and 273 of the CPC. Section 198 requires that the sentence be announced in open court after conviction. Section 273 is the special sentence on capital cases which provides for the use of specific words. 5

Mr. Daudu referred to *Gano v. The State* (1975) 1 UILR. 311 at p.312; *Nlibuka & Anor. v. The State* (1984) 1 SC. 71 at 75 and *Adetokunbo v. The State* (1984) 2 SC. 7: In all these cases the omission was regarded as a clerical error which could be corrected by the Judge who made the slip. 10 *Ekpo v. The State* (1972) 2 SC. 26 is different where there was neither a conviction nor sentence. In *Gano*, it is the failure to pronounce sentence in the prescribed statutory language.

Mr. Daudu then referred to the provisions of section 26(2) of the CPC and the particular requirements of a judgment of conviction prescribed therein, and submitted that it is mandatory. Learned Counsel argued that the sentence of the court together with the fact of conviction make up the judgment. Accordingly in the instant case where both conviction and sentence are absent, the judgment is incomplete, incurably defective and deficient, and cannot be referred to as a judgment. In the absence of a judgment the proceedings are a nullity. 20

The omission is fatal, and cannot be referred to as a clerical or accidental error which can be corrected by the trial or appellate court - section 275 CPC is relied upon for this submission. Learned Counsel referred to clerical error as error in expressing the manifest intention of the court and does not include a mistake of law- *Bakare v. Apena* (1986) 4 NWLR (Pt.33) 1 and *Obiara v. COP* (1990) 7 NWLR (Pt.161) 222 were cited. It was submitted that the omission to record a sentence constitutes an error in law; outside the application of the slip or blue pencil rule. By section 269(2) appellate courts cannot rectify a judgment given in contravention of an express provisions of a penal procedural statute. The Court of Appeal was wrong to have reopened the judgment. It has occasioned a miscarriage of justice. 30

On her part learned Counsel to the respondent submitted that the failure of the learned trial Judge to pronounce a sentence after conviction did not vitiate the proceedings. It is a curable irregularity which can be remedied by the Judge or by an appellate court as has been done in this case by the Court of Appeal under section 24 of the Court of Appeal Act 1976.

Learned Counsel referred to sections 197 and 198 CPC cited by appellant's Counsel and submitted that they are not applicable to the facts of this case, which carries a mandatory sentence. Sections 197 and 198 envisage circumstances of mitigation.

Learned Counsel conceded the desirability of the trial Judge pronouncing sentence after conviction, in view of the mandatory nature of the sentence. It was submitted that the omission is a technical irregularity, which ought to be ignored on the grounds of doing substantial justice. The evidence against the appellant establishing his guilt is overwhelming. The procedural defect is insubstantial, curable, and does not occasion a miscarriage of justice. Learned Counsel relied for these submissions on the same cases cited by learned Counsel to the appellant.

It seems to me clear that the submissions of Mr. Daudu for the appellant relies essentially on the provisions of section 269(2) of the CPC which he regards as, mandatory and contravention or non-compliance with which renders the proceedings null and void. Let us now examine the words of the section.

Section 269(1) provides for the contents of judgments generally. Subsection (2) thereof relied upon by appellant refers to convictions and provides-

"If the judgment is a judgment of conviction, it shall specify the offence of which and the section of the Penal Code or other law under which the accused is convicted and the punishment to which he is sentenced."

It is important to observe here that the judgment referred to in section 269 is the entire reasoning culminating in the finding of guilt, the conviction and the pronouncement of the punishment which is the sentence. It is not merely the conclusion of the trial Judge which in this case has been attacked by learned Counsel to the appellant. There seems to be no doubt that the judgment has specified the offence as culpable homicide punishable with death, and section 221 of the Penal Code as the section with which the appellant was charged. It has also found appellant guilty as charged; which is a conviction for the offence. Now the only omission is the punishment to which he is sentenced. It is this omission which is conceded, learned counsel refers to as a violation of the mandatory provision of section 269 which ought to render the trial null and void. I do not think the submission is supportable in law. Before I discuss the applicable decided cases, I venture to suggest that for a condition to nullify judicial proceedings it must be a substantive provision which affects the jurisdiction or competence of the court, or a procedural defect in the proceedings which

would result in a miscarriage of justice - See Kajubo v. State (1988) 1 NWLR (Pt.73) 721.

The locus classicus of *Madukolu & ors. v. Nkemdilim & ors.* (1962) 2 SCNLR 341; (1962) 1 All NLR 587 has remained unshaken for more than thirty years and remains good law. The omission to pronounce the sentence after conviction per se which comes after the pronouncement of a valid verdict; cannot retrospectively affect the validity of a properly conducted proceedings. The verdict has been made. So be it.

It may be asked what the position will be in cases of finding of guilt and verdict without accompanying sentence? In this regard sections 196, 197, 198, 269, 273, 381 and 382 of the Criminal Procedure Code are relevant.

Section 196 requires the court to make and announce its findings, whether of guilt or acquittal. Section 197 enables the court to consider circumstances of mitigation. Section 198 provides for determination of sentence after section 197 has been complied with. The sentence shall be announced in open court. Section 269 which I have already discussed above provides for the contents of a judgment. Section 273 provides for the mandatory sentence of death, and directs the court as to the manner it shall be carried out. Thus on conviction for the offence of culpable homicide punishable by death, it follows that section 273 will apply mandatorily - See *Ekpo v. State* (1972) 2 SC. 26.

There are statutory provisions which ameliorate procedural omissions and irregularities not resulting in failure of justice. Section 381 provides for the effect of omission to prepare a charge. It provides that a finding or sentence pronounced shall not be deemed invalid, unless in the opinion of an appeal court a failure of justice has been occasioned thereby. Again, even where the appellate court has observed that a miscarriage of justice may be occasioned by the failure to frame a charge, the trial may be recommenced and a proper charge framed. - 381(2). Section 382 saves the finding or sentence of a court of competent jurisdiction, unless the court of appeal is of the view that a failure of justice has in fact been occasioned by such error or omission, or irregularity. The burden to show that there has been such a miscarriage of justice is on the appellant - *Ajayi & anor. v. Zaria* NA (1964) NNLR 61. Not a mere possibility. *Ubi Yola v. Kano* NA (1961) NNLR. 103.

In *Gano v. The State* (1969) NMLR 316, this court construing S.269(2) held that failure to pronounce sentence as prescribed under the subsection may be corrected under the provisions of section 275. In a similar circumstance but under the Criminal Procedure Act, this court in *Oyediran*

& ors. v. The Republic (1967) NMLR. 122, suggested that this is possible.

The position taken by this court in Gano v. The State (supra) has been followed in Ntinhunka & anor. v. The State (1972) 1 SC. 71 at 75, and Adetokunbo v. The State (1984) 2 SC. 7, Ekpo v. State (1972) 2 SC. 26.

5 I turn now to the submission that the omission being an error in law and not a clerical error or accidental slip cannot be cured. He therefore submitted that appellate courts are powerless to rectify a judgment that has violated express provisions of a penal procedural statute. I have already referred in this judgment to the provisions of sections 381 and 382 of the
10 Criminal Procedure Code and some cases decided on the interpretation of the sections. I think learned Counsel appears to have ignored the constitutional and statutory powers of appellate courts. I agree with the Court of Appeal that this case falls entirely within the decision in Ekpo's case, where the omission was construed as accidental. It also falls within the decision of
15 this Court in Ntinbunka v. The State where also the sentence was omitted.

In Mallam Gano v. The State (supra) Ademola C.J.N. gave the guiding principle in such matters when he said,

*"In our view, the provision of section 26(3) of the Supreme Court Act gave this court very wide powers and we think this Court could invoke
20 this section to supply that part of the sentence which the learned Judge inadvertently left out;"*

The Court continued despite section 275 of the CPC to say that -

*"...but it appears to us that this is an error within the competence of the Judge himself, whose judgment could properly be said to suffer from an
25 accidental slip or omission to correct. In other words it is a clerical error which the Judge himself can put right and the court has an inherent power to deal with and put right such clerical error."*

The Court of Appeal regarding the omission of sentence as an accidental slip and exercising powers under section 24 of the Court of Appeal
30 Act 1976 decided to rectify the judgment of the learned trial Judge by inserting the appropriate words of sentence in the judgment. I think they have exercised their power correctly and in the interest of justice. The reasons for the exercise of the powers and not remitting the case to the trial Judge for sentence are perfectly valid. At the time of the judgment of the
35 court below Abdullahi, J. was no longer a High Court Judge, having been elevated to the Court of Appeal. He had therefore lost the jurisdiction to rectify the error.

I do not think that there will be a greater respect for technicality which results in injustice than allowing the appeal before us. There is no

substantive or procedural defect to the trial of the appellant. The evidence of the appellant's guilt of the charge against him is overwhelming. He offered no defence apart from the general plea of not guilty. The learned trial Judge found him guilty and convicted him accordingly. The omission to pronounce a mandatory statutory sentence cannot in the circumstance affect the conviction. 5

I consider the observation of Ademola C.J.N. in *Gano v. The State* (1968) NSCC.285 apposite also to the circumstance of this case. He said; at p.286.

"...it is the duty of the Judge, under the law, to pronounce the manner in which the sentence was to be carried out, and failure to do so might raise apprehension that the execution could be carried out by an other means, as for example by poisoning, drowning or any other means: but as it is clear that the only mode of execution known to our law is by hanging by the neck till the convict is dead, we are unable to accept that any other mode of execution was contemplated by the Judge." 15

It is apposite to refer to sections 381 and 382 of the Criminal Procedure Code which were designed to save procedural omissions and irregularities not resulting in failure of justice. I therefore hold that the judgment is not a nullity because of the omission of the sentence. The appellant having been found guilty and convicted of the offence of culpable homicide, punishable with death, the mandatory statutory sentence prescribed in Section 273 follows. I resolve this issue again against the appellant. 20

In the third issue appellant complained of material contradictions in the evidence of the prosecution witnesses as to the cause of deceased's death which the Court of Appeal refused to recognise. It is also relevant to refer to *Umoru Kurma v. Commissioner of Police* (1969) NNLR. 55, where the complaint was in respect of non-compliance with section 269. In that case the Magistrate did not in his judgment record his reason for convicting. The omission which was regarded as an irregularity will not occasion a miscarriage of justice and was curable. 25

It is conceded that the provisions of section 392 adumbrated above cannot save an illegality. *Adam Shiwa v. Bornu NA* (1964) NNLR 66, It will also not protect against a violation of any of the provisions of the fundamental rights enshrined in the Constitution - *Sherif Amadu v. Kano NA* (1966) NNLR 167. 35

There is overwhelming evidence that the judgment appealed against is right. I do not think therefore that the omission of the charge in this proceedings at the trial occasioned a miscarriage of justice. I shall for this purpose adopt the definition of "failure of justice" in *Abdu Dan Sarkin*

Noma v. Zaria NA (1963) NNLR 97, where it was said;

"There is a failure of justice not only where the Court come to the conclusion that the conviction was wrong, but also when it is of opinion that the error or omission in the court below may reasonably be considered to have brought about the conviction and when, on the whole facts and in the absence of error or omission the trial court' may fairly and' reasonably have found the appellant not guilty."

The material contradiction in the case of the 'prosecution is attributed to the evidence of the Medical Doctor, P.W.1 whose evidence was that death was due to haemorrhage and shock due to multiple injuries. The other prosecution witnesses stated that death of the deceased was caused by the gun shot fired by the appellant.

Learned Counsel submitted that this is the material contradiction of the evidence of the cause of death. Again counsel referred to the intervening period between the shooting of the deceased and his being taken to the hospital. He submitted the discrepancy between the evidence of gun shot wound by the witnesses, who were at the locus criminis and of multiple injuries, and witnesses who saw the deceased later in the hospital has not been explained. The onus is on the prosecution to explain this discrepancy. Appellant has denied shooting.

It was finally submitted, on the authority of Onubogu v. The State (1974) 9 SC. 1. That the failure of the prosecution to explain away this contradiction is fatal to their case.

In her reply to the above submissions, learned counsel to the respondent referred to the nature of the injuries to the deceased caused by the gun shot. It was submitted that the Medical evidence given by P.W.1 indicated the entry and exit point of the bullet through the body of the deceased. The evidence of P.W.2 was an eye witness account of the shooting of the deceased by the appellant. P.W.3 gave evidence of the dying declaration of the deceased. P.W.3 arrived at the scene within minutes of the shooting. Learned Counsel submitted that the evidence was consistent with the shooting of the deceased by the appellant, and that the deceased died as a result of injuries arising from the shooting. There are therefore no contradictions in the evidence of P.W.1. P.W.2 and P.W.3. It is important to observe at once that P.W.1 gave medical evidence of the cause of death. This is technical evidence couched in technical medical language. P.W.2, P.W.3 gave evidence of the injury to the deceased arising from gun shot wounds. There is no doubt a logical nexus between the gun shot wound inflicted on the deceased by the appellant, and the haemorrhage and shock through which the deceased died. It appears to me somewhat simplistic to argue that the

cause of death as "due to haemorrhage and shock due to multiple injuries" is contradictory with the evidence that cause of death was "due to the gun shot fired by the appellant." The only opinion of the cause of death was that in the medical evidence. Evidence of P.W.1, P.W.2, P.W.3 and P.W.4 did not give any opinion of the cause of death. Their evidence was based on eye witness account of the act resulting in death of deceased and the dying declaration of the deceased. It is difficult in this circumstance to speak of contradiction in their testimonies. There can only be contradiction where the witnesses have given evidence about the same fact. P.W.1's evidence is an expert opinion. P.W.2, P.W.3, P.W.4 gave evidence of the facts, not opinion. The two sets of evidence are therefore not contradictory. 5 10

The Court of Appeal was correct to have rejected the submission of learned Counsel to the appellant. I entirely agree that there is no contradiction much less material contradiction in the evidence of P.W.1 as against the evidence of P.W.2, P.W.3 and P.W.4. These are concurrent findings of facts by the courts below. Learned Counsel has not shown them to be perverse and has not given reasons why they should be interfered with. I therefore accept the facts as found. - See *Adio & Anor. v. The State* (1986) 2 NWLR (Pt. 24) 581, *Onyejekwu v. The State* (1992) 3 NWLR (Pt.230) 444. 15

The confidence placed on the decision of *Onubugu v. The State* (1974) 9 SC. 1, as authority for the contention seems to me misplaced. 20

This issue is also resolved against the appellant. The appeal therefore fails and is accordingly dismissed. The judgment of the Court of Appeal delivered on the 25th May, 1992 is hereby affirmed. 25

OLATAWURA JSC

I had a preview of the judgment delivered by my learned brother, Wali, J.S.C. I agree with his reasoning and conclusion. I will also dismiss the appeal. 30

OGUNDARE JSC

I have had the advantage of reading in draft the judgment just read by my learned brother Wali, J.S.C. I agree with his reasonings and conclusion and I have nothing more to add. I too dismiss the appeal. 35

ONU JSC

I had before now been privileged to read in draft the comprehensive

lead judgment of my learned brother Wali, J.S.C. I am in entire agreement with him that the appeal lacks merit and ought to fail.

I wish however to comment briefly on what seemed to be an ancillary but misconceived argument on issue 2 proffered on behalf of the appellant to the effect that section 269 of the Criminal Procedure Code requires that the conviction and sentence of an accused person should be expressly pronounced i.e. set down in writing and the section thereto fully set out. While the argument may be more appropriate to issue 3 (which is not admitted) in view of the full treatment already given to it in the lead judgment in which it was rightly jettisoned, it is enough here to say that had the learned counsel wanted seriously to canvass the point along those lines, such an argument would be futile and so not avail him in any way since it would go to no issue. The contention if indeed, it is any contention worth considering at all therefore, is accordingly discountenanced.

Suffice it to conclude here that for the fuller reasons set out in the lead judgment of my learned brother Wali, J.S.C. with which I have already expressed my concurrence, I too will dismiss this appeal, affirm the conviction of the appellant by the trial Court and confirm the sentence of death, which the Court of Appeal by way of amendment endorsed.

Appeal dismissed.

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