

SUPREME COURT OF NIGERIA
11TH JUNE, 1993. SC.258/1991
CORAM:- M. L. UWAISE, S. M. A. BELGORE, A. B. WALI,
O. OLATAWURA, I. L. KUTIGI, JJSC

SAMUEL EREKANURE APPELLANT

V.

THE STATE RESPONDENT

APPEALS - Where appeal is not on merit - but based on fundamental irregularities - proper order to be made

CRIMINAL PROCEDURE - Trial Court - failure to comply with the law - as to the manner of reading charge to accused - legal implications

CRIMINAL PROCEDURE - Fresh trial - issues to be considered - in ordering a fresh trial

COURT - Supreme Court's previous decisions on an issue - similar issue arising-when appropriate to invite the Supreme Court-to over-rule its previous decisions

FAIR HEARING - Non compliance with s.33 (6) (a) of the 1979 Constitution-denial of fair hearing - implications thereof

FACTS

The Appellant was tried for murder before the Bendel State High Court and found guilty as charged. His appeal to the Court of Appeal was dismissed.

In Appellant's further appeal to the Supreme Court, the principal issue is the consequential order to make when a trial Judge fails to adhere strictly to the provisions of s. 215 of the Criminal Procedure Law as to the manner of reading the charge to the accused. The appeal is not on

merit but a contention that some procedural irregularities had occurred which rendered the trial a nullity. The irregularity complained of was obvious from the records.

Appellant's counsel presented three options, viz:- an order that the Appellant be discharged and acquitted, allowing the appeal simpliciter or an order for a retrial. Counsel, however, conceded that the 1st option is inappropriate as the appeal was not heard on its merits. In spite of previous Supreme Court's decisions on this issue, Appellant's counsel did not directly invite the Court to overrule its said previous decisions.

HELD (unanimously allowing the appeal and making an order for retrial)

1. From the record, there is nothing to show that the trial court fully complied with the five mandatory requirements of s.215 of the Criminal Procedure Law as to inter alia, reading the charge to the accused in the language he understands and satisfactory explanation thereof to accused, avoiding technical language. (p 184 L.15)
2. Section 33 (6) (a) of the 1979 Constitution provides for informing the accused in a language he understands and in detail of the nature of offence. In view of the supremacy of the constitution, failure to follow its provisions has rendered whatever was done in this case unconstitutional. (p. 185 L.9)
3. The man who does not understand or know the details of the nature of the offence with which he is charged and who was convicted subsequently, cannot be said to have had a fair trial. (p.185 L.32)
4. Although murder is a crime which carries the death penalty, where a retrial will amount to assisting the prosecution fill in a gap in the evidence during the abortive trial, a retrial should not be ordered. (p.187 L.8)
5. Where there has been a serious lapse of time between the commission of the offence and the subsequent retrial of the case, lapse of memory of events may affect the evidence capable of being relied upon. (p. 187 L. 13)

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6. Retrial or trial de novo can no longer be automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which form the background. (p. 187 L.19)

7. The time to assemble the witnesses, if they are still available and the time it will take to start and complete another trial are matters to be taken into account before the court can order a new trial. (p. 187 L.32)

8. The decision that the trial in this case was a nullity is based on the fact that there has never been a trial as the purported trial has no legal force or effect. (p. 188 L.30)

9. The best approach in this case would have been a direct invitation to the Supreme Court by counsel for the Appellant, to over-rule its previous decisions as it has done in some cases, for the full court to sit and see if there is any justification for such invitation. (p. 189 L.6)

10. In view of the nature and gravity of the offence, a fresh trial of the Appellant that should start not later than three months from the date of this judgment is ordered. (p.189 L.16)

REPRESENTATION

Olisa Agbakoba, for the Appellant

Respondent absent and unrepresented

CASES REFERRED TO

1. Sunday Kajubo v. The State (1988)1 N.W.L.R. (Pt. 73) 721
2. Oyorokoromo v. The State (1979) 6-9 SC 3
3. Queen v. Edache (1962) 1 SCNLR 22
4. Okon v. The State (1991) 8 NWLR (Pt.210) 424
5. Akpiri Ewe v. The State (1992) 6 NWLR (Pt.246) 147
6. Emmanuel Agbonyima v. The State (unreported) S.C. 211/1991
7. Abodundun & Ors. v. The Queen (1959) 4 F.S.C. 70
8. Grace Akinfe v. The State (1988) 2 NWLR (Pt 85) 729
9. Hussainara Khatoon v. The State of Bihar (1979) A.I. R, 1360 (S.C.)
10. Jones v. Wittenberg 330 F. Supp. 707
11. Gates v. Collier 349 F. Supp. 881
12. Nwankwo v. The State (1990) 2 NWLR (Pt. 134) 627
13. Eben v. The State (1997)7 NWLR (Pt. 160) 113

STATUTES

1. Criminal Procedure Law of Bendel State 1976 Cap 49, S 215
2. The Criminal Code Laws of Bendel State 1976, S 319(1)
3. Constitution of the Federal Republic of Nigeria 1979, S 33 (6) (a), S 33 (4)
4. Supreme Court Act 1960, S26 (2) & 30

LEAD JUDGMENT BY OLATAWURA JSC

The main issue in this appeal is principally the consequential order to make when a trial Judge fails to adhere strictly to the provisions of Section 215 of the Criminal Procedure Law, Cap. 49, Laws of the Bendel State of Nigeria. It is for these reasons that the appellant has formulated two related issues. I say principally because the decisions of this court in the interpretation of Section 215 of the Criminal Procedure law are now many. Some of these will be referred to in this judgment. The issues formulated are as follows:

"1. Are the trial, conviction, and sentence passed on the appellant a nullity, in view of the failure of the learned trial Judge to comply with the express mandatory provisions of Section 215 of the Criminal Procedure Law, Cap. 49, Laws of the Bendel State of Nigeria, as well as Section 33(6) (a) of the Constitution of the Federal Republic of Nigeria, 1979 as amended?

2. In the event that it is held that the trial, conviction and sentence passed on the appellant are null, for the reasons mentioned above, what consequential order should the Supreme Court make in the circumstances of this appeal?"

The appeal is not on the merit of the case but that some procedural irregularities had occurred which, on the strict interpretation of Section 215 of the Criminal Procedure Law, rendered the proceedings or trial a nullity.

The appellant was arraigned before Maidoh, J. on 2nd December, 1982 on a charge of murder punishable under Section 319(1) of the

Criminal Code Law, Laws of the Bendel State of Nigeria 1976. The particulars of offence read as follows:

"Samuel Erekanure (m) alias Orukaisioko on or about the 9th day of November, 1980 at Orogun in the Ughelli Judicial Division murdered one Edijana Ovidje (f)."

Before the first prosecution gave evidence, the notes of the court read thus:

"M.I. Edokpayi S.C. for the State J.E. Sharkarho for the Accused. Charge read to the accused. He pleads not guilty to the Law Court. Prosecution opens its case."

Mr. Olisa Agbakoba, the learned counsel for the appellant has filed a very comprehensive brief of argument. He has submitted that the arraignment of the appellant was not in accordance with the Criminal Procedure Law of the Bendel State of Nigeria, 1976. These requirements although familiar were not followed by the trial court. These requirements which have been spelt out in Sunday Kajubo v. The State (1988) 1 NWLR (Pt.73) 721/731 and 737 are:

"1. The accused must be present in court unfettered, unless there is a compelling reason to the contrary.

2. The charge must be read over to the accused in the language he understands.

3. The charge should be explained to the accused "to the satisfaction of the court.

4. In the course of the explanation technical language must be avoided.

5. After requirements 1 to 4 have been satisfied the accused will then be called upon to "plead instantly" to the charge."

In this case on appeal, and according to the printed record, there is nothing to show that the court fully complied with these requirements. The five requirements must be satisfied. They are mandatory. The best that could be seen to have been done was that the charge was read to the accused, but in what language?

If as it has been shown that it was read, was it explained to him? No. There is nothing on record to show also that it was even read by the registrar or an officer of the court. Where for instance no officer of the court is capable of interpreting the charge in the language the accused person understands, a sworn interpreter is produced to explain the charge to the accused, as shown on page 26 of the printed record, the appellant spoke Urhobo language. The failure to comply fully or wholly with these requirements renders the trial a nullity: Eyorokoromo v. The State (1979) 6-9 S.C.3. Quite apart from the requirements of Section 215 of the Criminal Procedure of the Bendel State of Nigeria 1976, the Constitution of the Federal Republic of Nigeria in Section 33(6) (a) provides:

*"Every person who is charged with a criminal offence shall be entitled:-
 (a) To be informed promptly in the language that he understands
 and in detail of the nature of the offence."*

The Constitution safeguards the interest of those arraigned before the court by requiring strict compliance with this provision. The supremacy of the Constitution has never been in doubt and failure to follow its provision renders whatever was done contrary to it unconstitutional. It is so in this case.

Although Mr. Agbakoba has not invited us to overrule our previous decision wherein we ordered fresh trials, he was indirectly asking us to reconsider those decisions. The decisions relied on for his submissions are:

1. Eyorokoromo v. The State (1979) 6-9 S.C. 3.
2. Sunday Kajubo v. The State (1988) 3 S.C. 132; (1988) 1 NWLR (Pt.73) 721.
3. Queen v, Edache (1962) 1 SCNLR 22
- 4: Okon v. The State (1991) 8 NWLR (Pt.210) 424.
5. Akpiri Ewe v. The State (1992) 6 NWLR (Pt.246) 147
6. Emmanuel Agbonyima v. The State (unreported) S.C. 211/1991.

Judgment was delivered on 22nd October, 1992.

It is true that a man who does not know or understand the details of the nature of the offence with which he is charged and who was subsequently convicted cannot be said to have had a fair trial. The reason for ordering a fresh trial in these cases of nullity is the interest of justice where the facts presented were such to allow the appellant to walk out of

the court as a free man may amount to a miscarriage of justice more so where the facts showed that an offence had been committed. This has however not whittled down the proof required in criminal trials - proof beyond reasonable doubt. Oputa, J.S.C. put it succinctly in Sunday Kajubo v. The State (1988) 3 S.C. 132, 154; (1988) 1 NWLR (Pt.73) 721 when
5 the learned Justice said:

*"These cases show that what is important is whether evidence as a whole discloses a substantial case against the appellant, and whether
10 there are or are no such special circumstances as would render it oppressive to put the appellant on a trial a second time or to order him to be retired, or order fresh hearing"*

I believe this dictum has restated the requirements for a retrial in Abodundu & 4 ors v. The Queen (1959) 4 F.S.C. 70/7-72; (1959) SCNLR
15 162. Although I had earlier stated this appeal was not heard on its merits, it will for a better understanding of the issue to state the salient facts relied upon by the prosecution. On 9/11/80 the deceased, one Edijana Ovedje left her place of abode at Okpe for Orogun market to sell her locally brewed gin. She rode a bicycle. After the sale of her drinks she
20 was on her way back home when she was attacked by the appellant who inflicted several cuts with a knife on her shoulder. One Terelin Ovedje who was at the time of the incident in primary IV was present at the time of the attack by the appellant. She was carried on the bicycle by the deceased. The accused suddenly emerged, from so to say, no where
25 along the road and started the unprovoked attack with the knife. Terelin Ovdje abandoned and ran for her dear life. She lodged a report with the mother of the deceased. She in turn reported to the police at Orogun. As the time of the attack, the deceased was carrying her child. Both the deceased and her child were taken to the Eku hospital where she eventually
30 died the next day. It was the girl i.e. Terelin Ovdje who identified the accused at the identification parade carried out by the police. The police investigated the case. They found the deceased and her child tied to her side. Although she was still alive at the time the police got to the scene
35 she could only mutter her name because she had serious injuries on her head and face. The baby boy had bruises. When she died on 10/11/80 the body was removed to Mairiere Hospital Mortuary, Ughelli where the post mortem examination was performed by Dr. Etefia. It was not until 20/11/80 that the accused was arrested at Ilutitun Okitipupa. The accused was

brought to Ughelli where he was eventually charged. The appellant's defence was a complete denial and he also set up a defence of alibi in that he was no where near the scene of crime on the alleged day of incident. He denied the ownership of Exhibit B, the pair of shoes found at the scene of the crime as he was at Iluodo comp in Okitipupa division, Ondo state. It appears to me that these facts as stated are facts relied upon by the prosecution and not the findings which must of necessity be made before reaching a conclusion. Murder is a crime which carries the death penalty. Are we to merely declare the trial a nullity without a consequential order? Where however a retrial will amount to assisting the prosecution to fill in a lacuna in the evidence during the abortive trial, a retrial should not be ordered: *Grace Akinfe v. The State* (1988) 3 NWLR (Pt.85) 729/747. But where there has been a serious lapse of time between the commission of the offence and the subsequent retrial of the case, it will be idle not to admit that lapse of memory of events may affect the evidence capable of being relied upon. The credit worthiness of witness may be affected by the time lag.

I am of the firm view that "retrial", "trial", "trial de novo" or "new trial" can no longer be automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which form the background. Since this court has a discretion in the application of sections 26 (2) and 30 Of the Supreme Court Act 1960, I will now consider the consequential order to be made having relied on the earlier authorities that the decision is a nullity.

The offence was committed on 9th day of November 1980. The trial started on 2nd day of December, 1982; the appellant was convicted and sentenced to death on 30th March 1984. The appeal to the Court of Appeal was dismissed on 19th April, 1988. The appellant has been in both police and prison custody since his arrest on 19th November, 1980. The times to assemble the witnesses if they are still available and the time it will take to start and complete another trial are matters to be taken into account before the court can order a new trial or a fresh trial.

Mr. Agbakoba has mentioned three options:

- (1) An order that the appellant be discharged and acquitted
- (2) An order allowing the appeal simpliciter

(3) An order for a retrial.

He has however conceded in his brief that option (1) above is inappropriate as the appeal was not heard, on its merits. The second option appears to me meaningless without a consequential order.. The last one, i.e. the
 5 order for a retrial which according to counsel's analysis will be oppressive. In his consideration of Abodundu's case (supra), the learned Counsel in his consideration of the five conditions laid down therein said:

*"That all must co-exist, as borne but by a consistent flow of
 10 Supreme Court decisions, has, in our submission, only one clear implication; the accused person's right to be protected from prejudice cannot be ignored even where other considerations favour the making of a re-trial order. In other words, if a retrial order can be made without exposing the accused person to prejudice, then a retrial order is appropriate if, how-
 15 ever, a retrial order cannot be made without exposing the accused person to some form of prejudice, then a retrial order should not be made."*

He has placed emphasis on "prejudice". I cannot with respect see how that will arise if a retrial is ordered. That the five conditions in
 20 Abodundu's case must co-exist is rather to ensure a fair trial which invariably involves a fair hearing. It is true that in Kajubo's case the length of time the accused had been in custody was considered and did not carry much weight with the court - See the judgment of Nnamani, J.S.C. We are now faced with Section 33(4) of the Constitution of the Federal
 25 Republic of Nigeria 1979. The section provides:

"Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to a fair hearing within a reasonable time by a court or tribunal."

30 My decision that the trial in this case was a nullity is that there has never been a trial as the purported trial had no legal force or effect. When one however goes back to the date the alleged offence was committed then a trial which takes place after 12 years may be caught by this
 35 Section 33(4) of the 1979 Constitution.

What this court can do is to order a speedy trial, Mr. Agbakoba has also directed our attention to other jurisdictions where the court provides for

effective remedies to meet what learned counsel called "peculiar circumstances"; Hussainara Khatoon v. The State of Bihar (1979) A.I.R. 1360 (S.C.). He also cited two cases from the United States of America: Jones v. Wittenberg 330 F. SUPP. 707 and Gates v. Collier 349 F.SUPP. 881.

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The best approach in my view is a direct invitation to overrule our previous decisions. This we have done in some cases. As at that stage the full court will sit to see if there is any justification for such an invitation. The argument of learned counsel about length of time since arrest, trial and conviction was considered in Kajubo's case, but the court was still of the opinion that a retrial would meet the justice of the case.

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In sum, and for the avoidance of doubt, I will repeat that the first trial was a nullity for non-compliance with Section 215 of the Criminal Procedure Law of Bendel State and also a clear breach of Section 33(6) of the 1979 Constitution of the Federal Republic of Nigeria. In view of the nature and the gravity of the offence, I will order a fresh trial of the appellant. The appellant's trial should start not later than three months from today.

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Although the appellant's brief which was filed on 25th May, 1992 was served on the Director of Public Prosecutions, Ministry of Justice, Asaba, Delta State on 17th September, 1992 no brief was filed on behalf of the respondent and neither was the respondent represented at the hearing of this appeal.

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UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother, Olatawura, J.S.C. I agree that the trial in the High Court was aborted by reason of the charge not being explained to the accused, or if explained, not recorded - see Kajubo v. The State (1988) 1 NWLR (Pt.73) 721.

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Accordingly, the appeal is hereby allowed and the trial by Maidoh, J. is hereby declared a nullity.

BELGORE JSC

Fundamental principle in the Constitution as provided under S.33 (6) thereof is that the person accused must be informed promptly of the charge against him so that he will understand it. Should the accused not understand English, which is the language of the court, the charge must be read and explained to him in the language he understands, presumably through an interpreter. S.215 of Criminal Procedure Law of Bendel mandatorily requires the charge to be read and explained to the accused person so that he will understand the accusation against him. It appears that in the instant case trial court never adhered to these requirements and as we held in Sunday Kajubo v. The State (1988) 1 NWLR (Pt.73) 721-731,737, the trial was a nullity. So has this court held in several other cases that the requirements of S.215 Criminal Procedure Law of Bendel State and S.33(6) of 1979 Constitution are not cosmetic, they are fundamental and must be strictly adhered to or else the trial will be vitiated. Okon v. The State (1991) 8 NWLR (Pt.210) 424; Akpiri Ewe v. The State (1992) 6 NWLR (Pt.246) 147; Eyorokoromo v. The State (1979) 20 6-9 S.C. 31

Because of failure to comply with S.215 (supra) the trial was a nullity and I hereby so declare it.

For the foregoing reasons and for the fuller reasons in the judgment of Olatawura, J.S.C., I allow this appeal and order a trial as in the lead judgment.

WALI JSC

I have read in advance a copy of the lead judgment of my learned brother, Olatawura, J.S.C. I agree with his reasoning and conclusion for allowing the appeal.

I also share his opinion that it is high time that this court should consider its decisions on the appropriate order to be made where the original trial in a criminal case is declared a nullity on appeal in order to harmonize it with the provision of Section 33(4) of the Constitution of Nigeria, 1979 which lays emphasis on a "fair hearing within a reasonable time."

For the reasons stated in the lead judgment with which I have already agreed. I also allow this appeal and abide by the consequential order made therein.

KUTIGI JSC

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The issue here is whether or not the learned trial Judge complied with the mandatory provisions of Section 215 of the Criminal Procedure Act as well as Section 33(6)(a) of the 1979 Constitution. They read as follows:- 10

"215. The person to be tried upon any charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order, and the charge or information shall be read over and explained to him to the satisfaction at the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith." 15 20

"33(6) Every person who is charged with a criminal offence shall be entitled:

(a) to be informed promptly in the language that he understands and in detail of the nature of the offence." 25

The record of proceedings shows on page 4 how the plea of the appellant was taken thus:

"M.I. Edokpayi Senior Counsel for the state, J.E. Sharkarho for the accused. Charge read to the accused. He pleads not guilty to the law court. Prosecution opens its case." 30

The prosecution called a total of nine witnesses and closed its case. The record then shows on page 26: 35

"Defence: Accused sworn on iron and state in Urhobo"

It is evident from above that the charge was neither read to the appellant in the Urhobo language which was the language understood by him nor was the charge explained to him. Furthermore there was nothing

on record to show that the court satisfied itself that the appellant understood what he was being charged for. This is therefore a clear case of failure to comply with the mandatory requirements of Section 215 of the Criminal Procedure Act. In the same vein there had also been a contra-
5 conviction of the appellant was therefore a nullity See Eyorokoromo v. The State (1985) 1 NWLR (Pt.1) 125; Kajubo v. The State (1988) 1 NWLR (Pt.73) 721; Nwankwo v. The State (1990) 2 NWLR (Pt.134) 627; Eben v. The State (1990) 7 NWLR (Pt.160) 113.

10 The appeal therefore succeeds and it is hereby allowed. Conviction and sentence are set aside.

The only question left for consideration is that of consequential order. There is no doubt that this court has a general power to order a
15 retrial in criminal cases and in cases of this nature too. See for example the cases of Eyorokoromo v. The State (supra); Kajubo v. The State (supra); Okon v. The State (1991) 8 NWLR (Pt.210) 424; Ewe v. The State (1992) 6 NWLR (Pt.246) 147.

In this case clearly the evidence taken as a whole discloses a
20 substantial case against the appellant and there are no special circumstances which would render it oppressive to put him on trial a second time the fact that the offence was committed in November, 1980 notwithstanding. See Abodundu v. The Queen (1959) 4 F.S.C. 70; (1959) SCNLR 162. The appellant is not serving any prison sentence when he is
25 kept in prison custody all these years. Apart from the fact that people accused of capital offences are not normally granted bail, the appellant is being kept in custody for his own safety too. I cannot therefore decline to order a retrial because of that. If on the other hand because of this
30 factor, prosecution witnesses are no longer available, then the authorities in the State's Ministry of Justice should know what to do.

For the above reasons and for the fuller reasons set out in the lead judgment of my learned brother, Olatawura, J.S.C. which I read before now, I allow the appeal and order a fresh trial of the appellant
35 before another Judge of the High Court.