

SUPREME COURT OF NIGERIA
27TH APRIL, 2001. SC. 41/2000
CORAM:- S. M. A. BELGORE, E. O. OGWUEGBU,
S. U. ONU, U. A. KALGO, S. O. UWAIFO, JJSC.

PAULINUS TOBBY (ALIAS UDO EBBY) APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Plea - Requirements of a valid plea - Must be strictly complied with - In all criminal trials (H 1)

CRIMINAL PROCEDURE - Plea - Non compliance with the provisions of the law - As to plea taking - Will vitiate a trial and render it null and void (H 2)

FACTS

The appellant was arraigned in 1983 before the High Court of the then Cross River State on an information charging him with murder. His plea was taken before the trial judge but after the testimony of three prosecution witnesses and various adjournments, the case was started de novo and a fresh plea taken before a new trial judge - Akpapio J. (as he then was). Before the new trial judge only one of the prosecution witnesses was able to testify as others could not be traced and the accused also testified before the parties closed their cases.

The trial judge in his judgment found the appellant guilty and he was convicted and sentenced to death by hanging. His appeal to the Court of Appeal was dismissed and he further appealed to the Supreme Court. The appellant by leave of the court was able to raise two new issues not raised at the Court of Appeal on which the appeal was determined that is the issue of the procedural irregularity in taking the plea of the accused before the trial judge.

ISSUES FOR DETERMINATION

"1. Whether the entire proceedings before the Trial Court and the Court

of Appeal was (sic) not illegal, unconstitutional, null and void, having been conducted in violation of:-

(i) Section 215 of the Criminal Procedure Law of Cross River State;

(ii) Section 33 (6) (a) and (e) of the 1979 Constitution.

HELD (Unanimously allowing the appeal per lead judgment of **OGWUEGBU JSC**).

Requirements of a valid plea

1. A trial court must comply with the following essential requirements:

(a) the accused must be placed before the court unfettered unless the court shall see cause otherwise to order;

(b) the charge or information must be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court;

(c) It must be read and explained to him in the language he understand;

(d) the accused must be called upon to plead thereto unless there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in fact not been duly served therewith.

The above-stated requirements of the law as mandatory and must therefore be strictly complied with in all criminal trials. As they have been specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial, failure to satisfy any of them will render the whole trial defective and null and void. (p. 1145 A)

Plea - Non compliance with the law

2. I agree with the learned appellant's counsel that there was non-compliance with the provisions of sections 215 of the Criminal Procedure law and 33(6)(a) of the 1979 Constitution. It vitiated the trial of the appellant and rendered the whole trial null and void and also the proceedings in the court below based on that trial. (p. 1145 H)

NOTABLE POINTS OF INTEREST**UWAIFO JSC***1. When plea of guilty will not be recorded*

Obviously section 218 of the CPA is not applicable to a capital offence. In other words, if a person charged with murder pleads guilty to it, a plea of not guilty is recorded by the court on his behalf. Section 187(2) of the CPC directly provided for this as follows:

"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."

[Italics for emphasis]

It is, however, well known that by convention, although there is no equivalent of the above provision in the CPA, plea of guilty is never recorded for an accused in a murder case even when he so pleads in error. A plea of not guilty is recorded on his behalf (p. 1147 H)

2. Need for amendment of S.215 CPA

I think, therefore, that in a plea taken by virtue of section 215 of the CPA, it becomes highly academic in the case of murder trial whether the provisions of that section were fully observed before the accused pleaded to the charge. There has been no occasion on which this court has been asked to revisit its earlier decisions upon this consideration. There is no knowing if this court will be swayed to exclude plea in capital offences from the interpretation already given to section 215. Perhaps it is time to urge for an amendment to section 215 of the CPA. I say this because the technical application of that section has led a number of times to the unfortunate setting aside of convictions in murder cases arrived at upon otherwise properly conducted proceedings backed by unassailable evidence. Some of them were murders committed in very gruesome manner. I do not think section 215 was really intended to apply to capital offences. That section seems appropriate to offences where conviction can be recorded upon proper plea under it and on the fulfilment of section 218. Only an amendment will

surely reverse the way it is made to apply to murder trials in view of the decisions of this court. (p. 1148 C)

REPRESENTATION

B A. A. Kayode, Esq., (with him, Mrs. M. Z. Gabdo) for the Appellant.
The Respondent was not represented.

CASES REFERRED TO

- C Kajubo v. The State (1988) 1 NWLR (pt.73)/21
Ere Kanure v. The State (1993) 5 NWLR (Pt.294) 385
Effiom v. The State (1995) 1 NWLR (Pt.373) 507
Ewe v. The State (1992) 6 NWLR (Pt.246) 147
Kalu v. The State (1998) 14 NWLR Pt.584) 181
D Eyorokoromo v. The State (1985) 1 NELR (pt.11) 125
Oyediran v. The Republic (1967) NMLR 122
Joriah v. The State (1985) 1 NWLR (pt.1) 125
Ogunye & Ors. v. The State (1999) 5 NWLR (pt.604) 548
E R v. Kofi Mansu (1947) 12 WACA 113

STATUTES REFERRED TO

- Criminal Procedure Law of Cross River State S.215
F Constitution of Nigeria 1979 S.33 (6)(a) & (e)

LEAD JUDGMENT BY OGWUEGBU JSC

- The appellant was in 1983 arraigned before the Ikot Abasi Judicial Division of the High Court of then cross River State, now Akwa Ibom State on an information. The charge against him was that on the 10th day of October, 1980, at Ufet Ikpor, Ikot Akpan Obong village in the Ikot Abase Judicial Division, he murdered one Akin Dick Udo Udo (f) contrary to section 319 of the Criminal Code, Laws of the Cross River State.
G The case suffered delays. Even though the offence was committed on 10th October, 1980, the information was not filed until February, 1983 and he was arraigned before Nkereuwem, J. on 15-2-84 when his plea was taken.
H Hearing commenced on 16-1-85 before Nkereuwem, J. Three

witnesses testified for the prosecution between 16th January, 1985 and 27th March, 1985. It suffered four adjournments and on 21st November, 1985 fresh plea was taken before Akpabio, J. (as he then was). It is not apparent on the record why the case started de novo. Only one witness out of eleven witnesses whose names appeared on the information testified before Akpabio, J. The others could not be traced by the prosecution despite series adjournments granted by the court to enable the prosecution locate the remaining witnesses. On 13th January, 1987, Mrs. Nssien, a Senior State Counsel who appeared for the prosecution applied to the court to close the prosecution's case since she could not locate the remaining witnesses. The application was granted. The defence opened and the accused testified and closed his case. Both counsel addressed the court and judgment was reserved by the learned trial judge.

Judgment was delivered on 27-4-87. The court found that the prosecution had proved its case against the appellant and he was accordingly convicted as charged and sentenced to death by hanging. His appeal to the Court of Appeal, Enugu Division was dismissed on 30-11-94 hence a further appeal to this court. In dismissing the appeal, Akintan, J.C.A. in the leading judgment to which Tobi, J.C.A. and Ejiwunmi, J.C.A. (as he then was) concurred, held as follows:

"I am satisfied that the trial court adequately considered than evidence adduced before it and came to a right conclusion. The appeal therefore, fails and I accordingly dismiss it. The verdict and sentence of death passed on the appellant by the lower court are affirmed".

On 1-2-2001, when the appeal came up for hearing, Mr. Kayode learned appellant's counsel argued a motion filed on 9-11-2000 for leave of this court to raise fresh issues that were not raised in the court below which are the additional grounds 5 and 6. They are argued as issued (1) and (4) in the appellant's amended brief of argument. Leave was also sought to amend the appellant's brief of argument and to deem the amended appellant's brief already filed as properly filed and served. The application was granted.

The respondent was not represented at the hearing on the appeal. A respondent's brief signed by D. Archibong, Esq. Deputy Director of

Public Prosecutions, Akwa Ibom State dated 27-12-2000 was filed on 18-1-2001 fourteen days before the hearing of the appeal. Since briefs were filed by the parties, the appeal is treated as argued and it is considered as such. See Rule 6 of Order 6 of the Supreme Court Rules, 1999.

B The following five issues are identified in the appellant's amended brief as arising for determination in the appeal:

"1. *Whether the entire proceedings before the Trial Court and the Court of Appeal was (sic) not illegal, unconstitutional, null and void, having been conducted in violation of:-*

C (i) *Section 215 of the Criminal Procedure Law of Cross River State;*

(ii) *Section 33 (6) (a) and (e) of the 1979 Constitution. (Ground 5)*

D 2. *Whether the Court of Appeal was right to have affirmed the judgment of the Trial Court which convicted the appellant when the prosecution failed to prove Appellant's guilt beyond reasonable doubt. (Ground 1)*

E 3. *Whether the evidence of P.W. 1 merited the value placed on it by the Court of Appeal (and the trial court) (Ground 2)*

4. *Whether the Court of Appeal was right to have affirmed the judgment of the trial court which failed to consider all the defences open to the Appellant (Ground 6)*

F 5. *Whether the evidence of the accused person was admissible as a confession or at all (Ground 3)."*

I am of the settled view that this appeal can be disposed of on issue (1) above. That being the case, it is unnecessary for me to set out the facts of the case in full. On 10-10-80, P.W.1 and the deceased were out together. The deceased went to a Chemist shop to buy medicine for her child while P.W.1 went to visit her daughter at her sister's house, both in the same village.

H When P.W.1 was returning from her sister's house, she again met the deceased coming out from the Chemist Shop. They joined each other and walked homewards. At a point, the deceased started sneezing and stopped. P.W.1 walked on for a distance and stopped when she noticed

that the deceased was not following her. As she turned round, she heard the deceased shouting "iya mi" (oh me!). P.W.1 saw the back view of the appellant as he was running away from the scene. She recognised him as her brother. By this time, the victim was lying on the ground. P.W.1 approached her and saw machet cuts on her neck and she was no longer breathing. She raised an alarm and the villagers came out. A complaint was made to the police and the accused was later arrested and charged. The appellant was convicted on the evidence of P.W.1. The investigating police constable was dead and the medical officer who performed the post mortem examination on the deceased was said to be overseas. C

The plea which is the subject of the first issue for determination was taken on 21-11-85 before Akpabio, J. Part of the record of proceedings for that day reads:

"Accused present. Mrs. Nssien SSC (with her Mr. Omodora) for the State. No counsel for accused. Fresh plea taken and accused pleads not guilty. D

The case is adjourned to 14th and 15th January, 1986 for definite hearing de novo. Fresh witness summons to be issued to all the witnesses. The defence counsel, Mr. S. Albert to be informed by letter. Accused remanded in prison custody. E

Sgd.

Judge,

21-11-85," F

It was submitted by the learned appellant's counsel that the trial court failed to comply with the mandatory provisions of section 215 of the Criminal Procedure Law of the Cross River State and section 33(6)(a) & (e) of the 1979 Constitution. He contended that non-compliance with the said provisions vitiated the entire trial together with the proceedings in the court below based on that trial. It was submitted in the respondent's brief that there was substantial compliance with the requirements of section 215 of the Criminal Procedure Law. It was further argued in the respondent's brief as follows: G H

"We concede that it is not stated on the record that the charge was read and explained to the appellant in any other language than the

language of the court, i.e. English language. But we submit that it will be speculative to say that this was not done, and that appellant was a person of no education and thus did not understand English language as Appellant's counsel has contended. There is nothing on record to suggest or support this contention The fact that the appellant elected to testify in Ibibio without more is not sufficient to assume that he could not read or understand English, or that he is illiterate. (See the case of *Oyebode v. Oloyede* (1999) 2 N.W.L.R. Part 592 page 523 at 525.....)

The above submission of learned respondent's counsel is a display of ignorance of the heavy responsibility placed on the court and other officers of the court by section 215 of the Criminal Procedure Law of the Cross River State and section 33(6)(a) of the 1979 Constitution. Counsel does not appear to appreciate the purport of these provisions. Section 215 of the Criminal Procedure Law Cap. 32 laws of Cross River State which came into force on the 30th day of September, 1979 provides as follows:

"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 of 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."

I had earlier in this judgment set out the purported plea of the appellant as recorded by the learned trial judge. It does not pretend to satisfy the conditions laid down in section 215. If anything, it is a mockery of what a plea under the law should be.

There is also the provision of section 33(6)(a) of the 1979 Constitution. 36(6)(a) of the 1999 Constitution provides thus:

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

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

The learned trial judge did not also comply with the above constitutional provision.

There are numerous decisions of this court as to requirements of a valid plea and since it appears that trial courts do not advert to them, I will repeat them. **A trial court must comply with the following essential requirements:** B

(a) the accused must be placed before the court unfettered unless the court shall see cause otherwise to order;

(b) the charge or information must be read over and explained to the accused to the satisfaction of the court by the registrar or other officer of the court; C

(c) It must be read and explained to him in the language he understand;

(d) the accused must be called upon to plead thereto unless there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has in fact not been duly served therewith. D

The above-stated requirements of the law as mandatory and must therefore be strictly complied with in all criminal trials. As they have been specifically provided to guarantee the fair trial of an accused person and to safeguard his interest at such a trial, failure to satisfy any of them will render the whole trial defective and null and void. E

See the cases of Kajubo v. The State (1988) 1 NWLR (pt.73./21, Ere Kanuze v. The State (1993) 5 NWLR (pt.294)385, Effiom v. The State (1995) 1 NWLR (pt.373) 507, Ewe v. The State (1992) 6 NWLR (pt.246) 147, Kalu v. The State (1998) 14 NWLR pt.584) 181 and Ogunyie & Ors. v. The State (1999) 5 NWLR. (pt.604)548. F

The above decided cases are there for the trial courts to read. The requirements are so elementary now that those courts should not continue to ignore them. H

I agree with the learned appellant's counsel that there was non-compliance with the provisions of sections 215 of the Criminal

Procedure law and 33(6)(a) of the 1979 Constitution. It vitiated the trial of the appellant and rendered the whole trial null and void and also the proceedings in the court below based on that trial.

B The issue of non-compliance with section 215 of the Criminal Procedure Law and section 33(6)(a) of the 1979 Constitution was not raised in the court below. It was raised and argued for the first time in this court after leave was granted. I have no doubt that the court below would have decided otherwise had the issue been argued before it.

C In the final result, the appeal succeeds and I hereby allow it. The conviction and sentence of death imposed on the appellate are hereby set aside. I would have considered an order of retrial but having regard to the evidence of the sole witness, I am afraid that such a retrial with be an exercise in futility. The appellant is accordingly acquitted and discharged.

D

BELGORE JSC

I agree that this appeal has great merit. For the reasons fully adumbrated by Ogwuegbu, J.S.C., which I adopt I allow the appeal.

E

ONU JSC

Having been privileged to read before now the judgment of my learned brother Ogwuegbu, JSC just delivered, I am in full agreement therewith that the appeal be allowed for the reasons set out therein.

F Consequently, the appellant is hereby discharged and acquitted.

KALGO JSC

G I have read in draft the judgment of my learned brother Ogwuegbu JSC just delivered. I agree with his reasoning and conclusions to the effect that there is merit in the appeal. It is a clear case of failure on the part of the trial judge to comply with the mandatory requirements of section 215 of the Criminal Procedure Act and contravention of section H 33(6) (a) of the 1979 Constitution. The trial and conviction of the appellant is therefore null and void. See Kajubo V State (1988) 1NWLR (pt.73) 721 at 731; Eyorokoromo V The State (1985) 1 NELR (pt.11) 125. Erekanure V State (1993) 5 NWLR (pt.294) 385.

In the result, I allow the appeal set aside the conviction and sentence passed on the appellant by the trial court and abide by the consequential orders made in the leading judgment.

UWAIFO JSC

I agree with the judgment of my learned brother Ogwuegbu JSC. The plea was recorded by Akpabio, J as follows:

"Fresh plea taken and accused pleads not guilty."

There are several decisions of this court which consider such a plea as not in conformity with the requirements of section 215 of the Criminal Procedure Law (or Act) and that it renders the proceedings a nullity: see *Oyediran v. The Republic* (1967) NMLR 122, *Eyorokoromo v. The State* (1979) 6-9 SC 3, *Jorlah v. The State* (1985) 1 NWLR (pt.1) 125; *Kajubo v. The State* (1988) 1 NWLR (pt.73) 721.

I consider I should refer to sections 215 and 218 of the Criminal Procedure Act (CPA). Section 215 reads:

"The person to be tried upon any charge or information shall be plead 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 of the court by the registrar or other officer of the court, and such person shall be called upon to plead instantly thereto"

Section 218 provides:

"If the accused pleads guilty to any offence with which he is charged the court shall record his plea as nearly as possible in the words used by him and if satisfied that he intended to admit the truth of all the essentials of the offence of which he has pleaded guilty, the court shall convict him of that offence and pass sentence upon or make an order against him unless there shall appear sufficient cause to the contrary."

See also sections 161(2) & (3) of the Criminal Procedure Code (CPC) for similar provisions; as well as section 187(2).

Obviously section 218 of the CPA is not applicable to a capital offence. In other words, if a person charged with murder pleads guilty to it, a plea of not guilty is recorded by the court on his behalf. Section

187(2) of the CPC directly provided for this as follows:

"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."

[Italics for emphasis]

It is, however, well known that by convention, although there is no equivalent of the above provision in the CPA, plea of guilty is never recorded for an accused in a murder case even when he so pleads in error. A plea of not guilty is recorded on his behalf: see *R v. Kofi Mansu* (1947) 12 WACA 113. I think, therefore, that in a plea taken by virtue of section 215 of the CPA, it becomes highly academic in the case of murder trial whether the provisions of that section were fully observed before the accused pleaded to the charge. There has been no occasion on which this court has been asked to revisit its earlier decisions upon this consideration. There is no knowing if this court will be swayed to exclude plea in capital offences from the interpretation already given to section 215. Perhaps it is time to urge for an amendment to section 215 of the CPA. I say this because the technical application of that section has led a number of times to the unfortunate setting aside of convictions in murder cases arrived at upon otherwise properly conducted proceedings backed by unassailable evidence. Some of them were murders committed in very gruesome manner. I do not think section 215 was really intended to apply to capital offences. That section seems appropriate to offences where conviction can be recorded upon proper plea under it and on the fulfilment of section 218. Only an amendment will surely reverse the way it is made to apply to murder trials in view of the decisions of this court.

In the present case, the proceedings must be declared a nullity. I hold that there is no need for a retrial since I do not find the evidence adduced by the prosecution inspiring. I therefore order the discharge of the appellant.