

SUPREME COURT OF NIGERIA
FRIDAY 1ST FEBRUARY, 2002. SC. 59/2001
CORAM:- M. L. UWAIJS CJN, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, A. O. EJIWUNMI, JJSC

SALISU YAHAYA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Arraignment - Validity - CPL s. 215 -
Non compliance with the section in criminal trial - Renders such trial
null and void ab initio (H1)

JUDICIAL PRECEDENTS - Authorities - Distinction - *Tobby v. The
State* - Present case is different from the case law - Because evidence
abound upon which - Accused can be convicted (H2)

ORDERS OF COURT - Appeals - Retrial - Principles - To order retrial
- There must be inter alia an error in law or irregularity in procedure
- And that evidence discloses substantial case against appellant (H3)

ORDERS OF COURT - Retrial - Propriety - Where trial was void ab
initio - Proper order to make is to order for proper trial to take place
- And not a retrial (H4)

ORDERS OF COURT - Retrial - Basis - *Abodundu v. The Queen* -
Factors for making the order was set out in the case law - Hence the
case law cited by appellant are merely persuasive (H5)

CRIMINAL PROCEDURE - Murder - Long incarceration - Retrial
order - Propriety - Order of fresh trial is not oppressive - As charge is
for capital offence (H6)

FACTS

PW1 - Gabriel Bereola invited accused/appellant and deceased
to his house for a Christmas celebration. While they were celebrat-
ing, argument ensued between appellant and deceased which even-
tually led to a fight. Thereafter, appellant left the scene only to return

with a machete with which he severed deceased's head from his body. Appellant was thus arrested and he made confessional statements in respect of the offence. Subsequently, he was arraigned before the High Court of Ogun State, Abeokuta for murder contrary to section 319(1) of the Criminal Code Law Cap. 29 Laws of Ogun State 1978.

At the trial, prosecution called PW1, PW2 and PW3 who were eye witnesses to the incident. The confessional statements – Exhibits C and D were tendered through PW4 and PW5 respectively. Appellant raised self defence and provocation and that the striking at deceased's head was not intentional. The learned trial judge in his judgment rejected the defences raised by appellant. Appellant was therefore sentenced to death. Being dissatisfied, appellant filed appeal at the Court of Appeal, Lagos. The appeal was dismissed which led him to appeal to Supreme Court. At the court, he sought leave to argue a fresh issue of improper arraignment pursuant to section 215 of the Criminal Procedure Law Cap. 30 Laws of Ogun State 1978.

ISSUE FOR DETERMINATION

Whether having regard to the provisions of section 215 of the Criminal Procedure Law, Cap. 29 (sic) Laws of Ogun State, there was proper and valid arraignment of the Appellant."

HELD (Unanimously allowing the appeal per **UWAIS CJN**)

Arraignment - Validity - CPL s. 215

1. As has been seen above, it has been settled by this Court by a plethora of cases that once the provisions of section 215 of the Criminal Procedure Law and those of the Constitution referred to above are not followed in a criminal trial, the trial is rendered null and void ab initio. All the other matters that follow thereafter amount to an exercise in futility and are of no significance. (p. 477 E)

JUDICIAL PRECEDENTS - Authorities - Distinction

2. It is true that in *Tobby's case* (*supra*) no fresh trial was ordered because it was considered that the evidence of the sole prosecution witness available at the aborted trial could not

sustain a conviction of the murder charged. I think this case is distinguishable from Toby's case because there are three eye-witnesses to the commission of the offence (PW1, PW2, and PW3) and their testimonies, if accepted, are cogent. Secondly there is the confessional statement of the Appellant in which he admitted to the killing of the deceased with a machete even though he set up the defences of provocation and accident.
(p. 477 G)

ORDERS OF COURT - Appeals - Retrial - Principles

3. The principles are that in ordering a retrial, the facts of the case must contain the following factors:

(a) That there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice.

(b) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the Appellant.

(c) That there are no such special circumstances as would render it oppressive to put the Appellant on trial a second time.

(d) That the offence or offences of which the Appellant was convicted, or the consequences to the Appellant or any other of the conviction or acquittal of the Appellant, are not merely trivial.

(e) That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it.

(f) That to enable the prosecution adduce evidence against the Appellant which evidence may convict him when his success at the appeal is based on the absence of that same evidence.

I am aware that all these factors must exist conjunctively for a retrial to be ordered. (p. 478 B)

ORDERS OF COURT - Retrial - Propriety

4. However, a retrial is ordered only where there has in fact

been a previous trial that was properly conducted but which is vitiated by reason of an error in law or procedure. In the present case there has been no trial because the purported trial whatsoever was vitiated ab initio. Therefore, the order to be made is for a proper trial to take place and not a retrial.

B This distinction is very important in deciding the consequential order to be made. See Erekanure’s case (supra) where Olatawura, JSC observed as follows:

C “My decision that the trial of this case was a nullity is that there has never been a trial as the purported trial had no legal force or effect. 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) (a) of the 1979 Constitution of the Federal Republic of Nigeria. In view of the nature and gravity of the offence, I will order a fresh trial of the appellant. The appellant’s trial shall start not later than three months from today.” (p. 478 G)

E ORDERS OF COURT - Retrial - Basis

5. The English authorities cited by the Appellant are not binding but only persuasive authorities. They can persuade us where our laws and decisions are silent on the point of law in question. The factors which will make our court order a retrial have been established by a long line of our authorities beginning with the case of Yusufu Abodundu & Ors. v The Queen (supra). The reason given in Curtin’s case as to why no retrial would be ordered was because there was a lapse of four years between the commission of the murder in 1992 and the time of quashing the conviction in 1996 when the trial could be ordered. It can be seen that the reason can, if at all, only satisfy one of the factors stated above under (c). It is, therefore, with respect, not an authority which will persuade us not to order a fresh trial in this case. Similarly, in Doheny’s case a retrial was not ordered by the Court of Appeal because a retrial might jeopardize the appellant’s alibi and his evidence against the result of the DNA. Again these points have not met all the principles laid down in Yusufu Abodundu’s case.

There is no alibi in the present case to be affected by a retrial nor any DNA or medical report that could be rendered unhelpful to the Appellant by a new trial. (p. 479 C)

Murder - Long incarceration - Retrial order - Propriety

6. I accept that to remain in prison custody for ten years awaiting trial is outrageous and is such a long period that should undoubtedly evoke sympathy and concern. However, the nature of the offence with which the Appellant is accused - murder, is so grave that there is no offence under our laws which carries heavier sentence. As has been stated elsewhere justice is not just for the accused person but for the victim as well. Therefore, if the circumstances of both the accused and victim are considered together the order of fresh trial should not in my opinion be regarded as oppressive. Beside in our laws a sentence of ten years is not regarded as sufficient punishment for murder. (p. 479 H)

NOTABLE POINT OF INTEREST

EJIWUNMI JSC

1. Fulfillment of s. 215 CPL gives jurisdiction to court

It is the fulfillment of the provisions of the said section that gives jurisdiction to the court to try accused persons arraigned before it. Having not done that in the appeal under consideration, it is manifest that the appeal will be allowed and the accused person sent down for trial before another judge in the jurisdiction of the court where the offence took place. (p. 482A)

REPRESENTATION

A. Fashanu, Esq. for the Appellant

N. I. Agbelu, D. P. P. Ogun State with Y. Oresanya (Mrs.) Principal State Counsel for the Respondent

CASES REFERRED TO

Eyorokoromo v. State (1979) 6-9 SC 3

Kajubo v. The State (1988) 1 NWLR (Pt. 73) 721

Kalu v State (1998) 13 NWLR (Pt. 583) 531

Remidia v. The State (1999) 7 NWLR (Pt. 610) 202

Samuel Erekanure v. The State (1993) 5 NWLR (Pt. 294) 385

Yusufu Abodundu & 4 Ors. v. The Queen 4 FSC 70

Tobby v. The State (2001) 10 NWLR (Pt. 720) 23

B STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979, s. 33 (6)(a)

Criminal Procedure Law, Cap. 30 Laws of Ogun State, 1978, s. 215

Criminal Code Law, Cap. 29 Laws of Ogun State 1978, s. 319(1)

C

LEAD JUDGMENT BY UWAIS CJN

On 31st March, 1994 the Director of Public Prosecutions of Ogun State applied by a letter addressed to the then Chief Judge of Ogun State seeking his consent, under the provisions of section 340 subsection (2) (b) of the Criminal Procedure Law, Cap. 30 of the Laws of Ogun State of Nigeria, 1978, to institute criminal proceedings against the appellant without holding a preliminary inquiry before a Magistrate's Court. The consent was granted and the appellant appeared before Popoola J. on 20th March, 1995 on a charge of murder for causing the death of Kayode Bereola at Bereola village in Abeokuta Judicial Division contrary to section 319 subsection (1) of the Criminal Code Law, Cap. 29 of the Law of Ogun State, 1978. No plea was taken as the prosecution were yet to trace their witnesses. The case was adjourned to 11th April, 1995 for trial. On that date the appellant as accused person was present in court but the counsel assigned to defend him was absent. Again no plea was taken and the case was adjourned to 24th May, 1995 for trial.

On the date in question both the appellant and his counsel were present in court. The learned trial judge's record of proceedings reads thus:

"Accused person in present (sic) Mr. A. O. Jiboku SSC with O. A. Ibikunle for the State. Mr. B. T. A. Akintubuwa appears for the accused. Prosecution case began with:

H *PW1- GABRIEL BEREOLA:"*

The first and second prosecution witnesses testified and were each cross-examined by Mr. Akintubuwa, learned counsel for the accused. The trial was then adjourned to 20th July 1995 for continuation. Other adjournments followed until the appellant testified on

6th October 1995 and counsel for both parties addressed the court on the same day. Judgment was reserved to 15th December, 1995 and was delivered on the same day. The learned trial judge found the accused person guilty as charged and sentenced him to death by hanging.

The facts which gave rise to the charge against the accused are as follows. Mr. Gabriel Bereola (P.W.1) who was a farmer and lived in Bereola village invited the villagers including the accused and the deceased - Mr. Kayode Bereola, to his house to celebrate Christmas on 25th December, 1991. The invite including the accused and the deceased attended the celebration. While they were there argument ensued between the accused and the deceased which resulted in a fight. The fight was stopped by the other invite who separated them. The accused went to his house and returned later holding a machete. On arriving at the scene he struck the deceased with the machete on the neck thereby severing the deceased's head from his body.

The prosecution called three eye-witnesses to the incident, namely, Mr. Gabriel Bereola, Mr. Olufemi Bereola and Mrs. Mulikatu Bereola (PW1, PW2, and PW3 respectively), who testified at the trial. The prosecution also called Police Sgt. Sunday Peter (P.W.4), Police Inspector Saobana Debowale (P.W.5) and Assistant Police Superintendent Francis Sowole, who gave evidence about the two confessional statements made by the accused person on 30th December 1991 and 2nd January, 1992 which were tendered and admitted as exhibits C and D respectively. Exhibit C was made by the accused in Hausa through an interpreter (PC Tajudeen Adigun) and was taken down in writing in English by P.W.4, while Exhibit D was made by the accused person in English and was written down in English by PW5 and endorsed by PW6.

In both the statements (Exhibits C and D) and his testimony, the accused confessed that there was fight between him and the deceased and that he struck the latter with a machete in the neck while his intention was to strike him on the hand in retaliation. He claimed that happened because the deceased bent down while the accused aimed at his (deceased's) hand.

The learned trial judge rejected exhibit C as hearsay evidence since the interpreter was not called by the prosecution as a witness to

testify. However, he accepted exhibit D as proper evidence. He believed the testimonies of all the prosecution witnesses. He did not find any evidence of provocation or self-defence in favour of the accused person. He consequently found the charge proved beyond reasonable doubt and convicted the accused person accordingly.

B The accused person appealed against the conviction to the Court below. His contention thereat was stated under two issues for determination, viz:

C *“1. Whether the learned trial judge was right to have relied on Exhibit “D” in convicting the appellant.*

2. Whether the evidence of P.W.1, P.W.2 and P.W. 3 were sufficient to support the conviction of the Appellant without further corroboration.”

D The Court of Appeal (Onalaja, Adamu and Tabai, JJ.C.A.) Unanimously rejected the argument of the appellant’s counsel in support of the appeal and affirmed the conviction of the appellant of the offence charged and the sentence of death passed upon him.

E The accused person then appealed further to this Court. He sought leave, which was granted, for him to argue a point of law which was not raised in the Court of Appeal. The point being whether the provisions of section 251 of the Criminal Procedure Law, Cap. 30 of the Laws of Ogun State, 1978, had been properly followed when the accused person was arraigned before the learned trial judge.

F The Appellant filed a brief of argument as well as a reply brief on the brief of argument filed by the Respondent. The Appellant raised three issues in his brief for us to determine. They are:

G *“1. Whether the learned Justices of the Court of Appeal were right in holding that the learned trial judge was right to have relied on Exhibit D.*

2. Whether the learned Justices of Appeal (sic) are not hostile witnesses and if no, whether their Lordships were right in their view on the weight attached to the evidence of those witnesses.

H *3. Whether having regard to the provisions of section 215 of the Criminal Procedure Law, Cap. 29 (sic) Laws of Ogun State, there was proper and valid arraignment of the Appellant.”*

The respondent contends in its brief of argument that having regard to ground of appeal no. 3 contained in the Appellant’s notice of appeal, the only issue for determination is “*Whether in the circum-*

stance of this case, this Honourable Court should not order a retrial.”

In view of the nature of issue no. 3 in the Appellant's brief of argument, which is fundamental and capable of disposing of the appeal, I propose to consider it first.

The Appellant contends in his brief of argument that the learned trial judge failed to take his plea at the beginning of the trial and that there was no compliance with the provisions of section 215 of the Criminal Procedure Law. He submits that his trial before the High Court is a nullity and cites the following cases in support of his contention - Eyorokoromo v. State, (1979) 6-9 S.C. 3; Kajubo v. The State (1988) 1 NWLR (Part 73) 721; Okon v. The State (1991) 8 NWLR (Part 210) 424, Peter v. State (1997) 12 N.W.L.R (Part 531) 1; Kalu v. State (1998) 13 N.W.L.R (Part 583) 531; Ogunye v. The State (1999) 5 N.W.L.R (Part 604) 548 and Remidia v. The State, (1999) 7 N.W.L.R. (Part 610) 202.

In its brief of argument the Respondent has conceded that the record of trial has not indicated that the charge was read to the accused person nor did he plead thereto so as to have a proper and valid arraignment under the law. The effect of this, it is further conceded, is that the trial is a nullity and these cases were cited in support - Kajubo's case (supra); Ewe v. The State (1992) 6 N.W.L.R. (Part 246) 147 at pp. 152-153; Samuel Erekanure v. The State, (1993) 5 N.W.L.R (part 294) 385 at pp. 329-393 and 396 and Udeh v. The State, (1999) 7 NWLR (part 609) 1 at p. 22. It also concedes that there was non-compliance with the provisions of section 36 subsection (1) of the 1999 Constitution (sic).

However, it is contended that all the principles laid down for ordering a re-trial in the cases of Yusufu Abodundu & 4 Ors. v. The Queen, 4 FSC 70 at pp. 71-72; Abu Ankwa v. The State, (1969) 1 All NLR 133 and Kajubo's case (supra) at pp. 740-741 have been satisfied in the present case and therefore the consequential order to be made by us is that of a re-trial since there are no special circumstances disclosed at the trial in the lower court to render such an order oppressive against the Appellant.

In his reply brief of argument, the Appellant argues that it is now not the law that all the factors mentioned in Yusufu Abodundu case (supra) must co-exist before a retrial could be ordered. Rather, if the requirements under section 215 of the Criminal procedure Law

are met it is enough for an appeal court to order a retrial. Reference is being made to the case of Erekanure, (supra) at pp. 390-395 where this Court stated-

B *“Once a trial has been declared a nullity, the order of retrial or trial de novo is not automatic. Whether the appellate court will order a retrial depends on the peculiar circumstance which form the background of each case. Matters that will be taken into consideration are:*

C *(a) Whether there has been a serious lapse of time between the commission of the offence and the subsequent nullification of trial, the loss of memory of events may affect the evidence capable of being relied upon. The credit worthiness of witnesses may be affected as well as by time lag.*

D *(b) The time it will take to reassemble the witnesses if they are available and the time it will take to start and complete another trial.”*

E Further, the decision of this Court in the case of *Tobby v. The State*, (2001) 10 N.W.L.R (Part 720) 23, that a re-trial would be an exercise in futility having regard to the testimony of the sole witness in the case, has been cited to buttress the submission that a retrial in this case should not be ordered.

F With regard to the contention of the learned counsel for the Respondent that the Appellant had been in custody so far for only ten years, two English authorities have been cited in the Appellant’s reply brief of argument to show that it will be oppressive to put the Appellant on a second trial. In *Curtin*, (1996) Criminal Law Report 831, the alleged offence of murder was committed in 1992 and the conviction took place in 1993. The conviction was quashed in 1996. G No retrial was ordered in the light of lapse of time. In *Doheny*, (1997) 1 Criminal Appeal Report 369 at p. 381, a case involving rape and buggery, there was a lapse of about 6 years. The Court of Appeal in England held:

H *“Having regard to the strength of the case against the appellant we would be minded to order a retrial.”*

However, the retrial was not ordered because:

“A retrial would involve balancing the appellant’s alibi evidence and his own testimony against the DNA result”

Now both the Appellant and the Respondent are at ad idem

that there has been an infraction of the provisions of section 215 of the criminal procedure Law, Cap. 30, which provides:-

“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.”

At the time the trial purportedly commenced on 24th May, 1995, the applicable provisions of the Constitution were those of the Constitution of the Federal Republic of Nigeria, 1979. Section 33 subsection (6) (a) thereof states:

“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.”

So that not only were the provisions of section 215 of the Criminal Procedure Law, Cap 30 not complied with but also those of section 33 subsection 6(a) of the 1979 Constitution (which are the same as those of section 36(6) (a) of the 1999 Constitution). **As has been seen above, it has been settled by this Court by a plethora of cases that once the provisions of section 215 of the Criminal Procedure Law and those of the Constitution referred to above are not followed in a criminal trial, the trial is rendered null and void ab initio. All the other matters that follow thereafter amount to an exercise in futility and are of no significance.**

The only issue that is therefore contentious in this case, is whether a retrial should be ordered. **It is true that in *Tobby’s case* (supra) no fresh trial was ordered because it was considered that the evidence of the sole prosecution witness available at the aborted trial could not sustain a conviction of the murder charged. I think this case is distinguishable from *Tobby’s case* because there are three eye-witnesses to the commission of the offence (PW1, PW2, and PW3) and their testimonies, if accepted, are cogent. Secondly there is the confessional state-**

ment of the Appellant in which he admitted to the killing of the deceased with a machete even though he set up the defences of provocation and accident.

The principles laid down for a retrial, beginning with the case of Yusufu Abodundu & Ors. (supra) and the later authorities, seem to me to have been met in this case. ***The principles are that in ordering a retrial, the facts of the case must contain the following factors:-***

(a) ***That there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice.***

(b) ***That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the Appellant.***

(c) ***That there are no such special circumstances as would render it oppressive to put the Appellant on trial a second time.***

(d) ***That the offence or offences of which the Appellant was convicted, or the consequences to the Appellant or any other of the conviction or acquittal of the Appellant, are not merely trivial.***

(e) ***That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it.***

(f) ***That to enable the prosecution adduce evidence against the Appellant which evidence may convict him when his success at the appeal is based on the absence of that same evidence.***

I am aware that all these factors must exist conjunctively for a retrial to be ordered. However, a retrial is ordered only where there has in fact been a previous trial that was properly conducted but which is vitiated by reason of an error in law or procedure. In the present case there has been no trial because the purported trial whatsoever was vitiated ab initio. Therefore, the order to be made is for a proper trial to take place and not a retrial. This distinction is very important in deciding the consequential order to be made. See

Erekanure's case (supra) where Olatawura, JSC observed as follows:

"My decision that the trial of this case was a nullity is that there has never been a trial as the purported trial had no legal force or effect."

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) (a) of the 1979 Constitution of the Federal Republic of Nigeria. In view of the nature and gravity of the offence, I will order a fresh trial of the appellant. The appellant's trial shall start not later than three months from today."

The English authorities cited by the Appellant are not binding but only persuasive authorities. They can persuade us where our laws and decisions are silent on the point of law in question. The factors which will make our court order a retrial have been established by a long line of our authorities beginning with the case of Yusufu Abodundu & Ors. v. The Queen (supra). The reason given in Curtin's case as to why no retrial would be ordered was because there was a lapse of four years between the commission of the murder in 1992 and the time of quashing the conviction in 1996 when the trial could be ordered. It can be seen that the reason can, if at all, only satisfy one of the factors stated above under (c). It is, therefore, with respect, not an authority which will persuade us not to order a fresh trial in this case. Similarly, in Doheny's case a retrial was not ordered by the Court of Appeal because a retrial might jeopardize the appellant's alibi and his evidence against the result of the DNA. Again these points have not met all the principles laid down in Yusufu Abodundu's case. There is no alibi in the present case to be affected by a retrial nor any DNA or medical report that could be rendered unhelpful to the Appellant by a new trial.

I accept that to remain in prison custody for ten years awaiting trial is outrageous and is such a long period that should undoubtedly evoke sympathy and concern. However, the nature of the offence with which the Appellant is accused

- murder, is so grave that there is no offence under our laws which carries heavier sentence. As has been stated elsewhere justice is not just for the accused person but for the victim as well. Therefore, if the circumstances of both the accused and victim are considered together the order of fresh trial should not in my opinion be regarded as oppressive. Beside in our laws a sentence of ten years is not regarded as sufficient punishment for murder -see Kajubo’s case (supra) per Nnamani JSC at p.734 D-E and Erekanure’s case at p. 396 per Olatawura, JSC.

Having found that the trial has been vitiated ab initio and is therefore, null and void, it will not serve any useful purpose and will be academic to consider the remaining two issues for determination formulated in the Appellant’s brief of argument.

The appeal, therefore, succeeds. The conviction and sentence passed on the Appellant are hereby quashed. I order a new trial of the Appellant before another Judge of the High Court of Ogun State other than Bode Popoola J. to be assigned by the Chief Judge of Ogun State. The Director of Public Prosecutions of Ogun State shall initiate the trial within three months from today.

OGUNDARE JSC

I agree with the judgment of the Honourable Chief Justice of Nigeria just delivered. For the reasons given by him I, too, allow this appeal and set aside the conviction for murder and the sentence of death passed on the Appellant. As the trial is a nullity, I order that the Appellant be properly tried according to law and the new trial to be conducted expeditiously.

OGWUEGBU JSC

I had a preview of the judgment just delivered by my learned brother Uwais, CJN and I agree entirely with his reasoning and conclusions. I too would allow the appeal and remit the case for retrial by another judge of the High Court of Ogun State.

In this case, there was no arraignment let alone a valid one. This is apparent on page 24 of the record of appeal. The purported trial is a nullity.

After considering the circumstances of the case and applying the principles formulated by this court in *Abodundu & Ors. v. the Queen* (1959) 4 FSC 70, I have come to the conclusion that an order for a retrial will not be oppressive and no great miscarriage of justice will be occasioned. I therefore allow the appeal and quash conviction and sentence of death imposed by the courts below. It is ordered that the case be heard de novo, by another Judge other than Bode Popoola, J.

ONU JSC

I had the privilege of a preview of the judgment of my learned brother Uwais, CJN just delivered. I am in entire agreement with him that issue No. 3 therein which is: “*Whether in the circumstances of the case this Honourable Court should not order a retrial*” having been answered on the decided authorities in the negative, I am also of the firm view that this appeal be and is hereby allowed by me.

The trial having indeed been demonstrated to have been vitiated ab initio, is also declared null and void by me. Accordingly, I too quash the conviction, order a new trial of the Appellant before another Judge of the High Court of Ogun State other than Bode Popoola, J. to be assigned by the Chief Judge of that State, for the DPP of that State to have it initiated within three months from today.

EJIWUNMI JSC

Having read in advance the judgment of my learned brother, Uwais CJN, I agree entirely with his reasoning and conclusion for allowing the appeal.

It is not necessary to now review the facts of this case, which have been consistently set out in the said judgment. Suffice it to say that this case would have to be heard de novo because of the failure of the trial court to comply with the provisions of Sec. 215 of the criminal Procedure Law. It cannot be over emphasized of the necessity for all trial courts engaged in criminal trials and counsel involved in the prosecution of cases that it is a sine qua non for the provisions of the said section of the Criminal Procedure Law to be complied with before the commencement of the trial of an accused person.

It is the fulfillment of the provisions of the said section that gives jurisdiction to the court to try accused persons arraigned before it. Having not done that in the appeal under consideration, it is manifest that the appeal will be allowed and the accused person sent down for trial before another judge in the jurisdiction of the court where
B the offence took place.

I therefore also allow the appeal for the above reasons and the fuller reasons given in the leading judgment of my brother, M. L. Uwais the Chief Justice of Nigeria.

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