

SUPREME COURT OF NIGERIA
28TH JANUARY, 2005. SC. 217/2002
CORAM:- S. U. ONU, A. O. EJIWUNMI, N. TOBI, D.
MUSDAPHER, D. O. EDOZIE, JJSC

1. THE CHIEF OF AIR STAFF
2. THE AIR COUNCIL APPELLANTS/APPLICANTS
3. MINISTRY OF DEFENCE
4. ATTORNEY GENERAL OF THE
FEDERATION
V.
WING COMMANDER P. E. IYEN RESPONDENT

APPEALS - Grounds of appeal - Nature of - Principles that guide a court
- In deciding whether a ground - Is one of law or fact (H1)

APPEALS - Preliminary objection - To a ground of appeal - As being of
mixed law and fact - Lacks merit in this case (H2)

CRIMINAL PROCEDURE - Appeals - Retrial order - Where the trial of
an accused is declared a nullity - Principles that guide the court - In
ordering or refusing a retrial (H3)

CRIMINAL PROCEDURE - Trials - Court Martial - Stealing - Trial of
accused in absentia - And reliance on hearsay evidence - Is a sham (H4)

APPEALS - Retrial - Criminal trial - Acquittal - Where respondent has
not been tried - As his trial in absentia is a nullity - Retrial will be ordered
not acquittal (H5)

FACTS

The respondent was a Wing Commander in the Nigerian Air Force
attached to its Pay Accounting Group until April, 1996. Before then it
was discovered that he with ten other officers were involved with fraudu-

lent offences which included stealing, corruption and conspiracy to commit several civil offences. The General Court Martial (GCM) tried the nine officers that were present (excluding the respondent who was absent), found each guilty and convicted them accordingly. The GCM proceeded with the respondent's trial in his absence. The prosecutor did not call any oral evidence in support of its case. Rather it merely tendered the statements of the seven witnesses who testified against the other nine accused persons.

The Court Martial found the respondent guilty and convicted him of eleven out of the twelve count charge levelled against him. Following the conviction he was sentenced to a total of 51 years imprisonment. A restitution order was also made against him in respect of his properties and other personal assets to the value of about N34,125,000.00. This amount included interest at the rate of 15% per month for 10 months on the principal sum of about 13.6 million naira. In executing the GCM's judgment, sale of respondent's movable and immovable properties were carried out, his cash in banks and chattels were confiscated. (See TOBI JSC p. 23)

Respondent appealed to the Court of Appeal. His appeal was allowed and the judgment of the General Court Martial was set aside. He was discharged and acquitted. Appellant being dissatisfied with the order of acquittal instead of that of discharged only, has now appealed to the Supreme Court.

ISSUE FOR DETERMINATION

“Whether having held that the General Court Martial proceedings were a nullity and that it was as if the respondent was never tried, the proper order for the court to make was an order of discharge and not an order of acquittal.”

HELD (Allowing the appeal per **EJIWUNMI JSC**, Tobi JSC dissenting in part)

Grounds of appeal - Nature of

1. The question so raised is not novel as several decisions of this court have given the principles that should guide a court in its quest for the

proper determination of whether a ground of appeal is a ground of law, a ground of mixed law and facts or simply, a ground of fact. In this regard, I refer to the decision of this court in *Shanu v. Afribank* (2000) 13 NWLR (Pt. 684) 392; (2000) 10-11 S.C. 1 and at page 9 where reference was made to *Ogbechie & Ors. v. Onochie & Ors.* (1986) Vol. 7 NSCC 443 part of the judgment of Eso, JSC., at pp. 445-6 where he said thus:-

“.....what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of the law to the facts already proved or admitted, in which case it would be question of law, where however the grounds are such that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to question of mixed law and facts.” (p. 14 E)

APPEALS - Preliminary objection

2. The learned counsel for the appellant is in my view right in her submission that there was no dispute as to the facts in the case under consideration. The position in the instant case is not in dispute that the court below had on the evidence before it, arrived at the conclusion that the trial of the respondent before the General Court Martial cannot be described as a trial within the accepted principles of trials in our courts. And the appellant was not by any means challenging that conclusion reached by the court below. The only complaint canvassed in the ground of appeal in my view, is, clearly whether as the court below has reached its conclusion upon the trial of the respondent by the General Court Martial, it was open to that court to have discharged and acquitted the respondent.

Earlier in this judgment, I have set down the ground of appeal in dispute and it is not necessary to reproduce it. However, having regard to what I have said above, I am clearly of the view that the ground of appeal filed for the appellants is clearly a ground of law. With that conclusion, it follows that the preliminary objection by the respondent lacks merit, and it is hereby dismissed. (p. 15 H)

CRIMINAL PROCEDURE - Appeals - Retrial order

3. This question as to whether a court should order that an appellant be discharged simpliciter or be discharged and acquitted following the declaration that his trial was a nullity is not new to this court. Nor is the determination whether an order of retrial be made or not as a consequence of a discharge or an order of acquittal by the courts below. I think that on this point, it is appropriate to refer to the case of Eyorokoromo & Anor. v. State (1979) 6-9 S.C. 3, 9; (1979) NSCC 61, 65, where the question was exhaustively considered. In that case, Bello, JSC., after a discussion of the historical development of the power of the appellate court to order a retrial where the original trial was a nullity and a review of past cases where the court has either declined to order a retrial or had ordered one, and from which the following principles were formulated: Firstly, that the very foundation of the trial, that is, the charge or information, may be null and void; secondly, the trial court may have no jurisdiction to try the offence, and thirdly, the trial may be rendered a nullity because of some serious error or blunder committed by the Judge in the course of the trial.

As to whether an order of retrial ought to be made, it is necessary to determine that question with regard to the principles in Abodundu's case (supra), Abbot, FJ., delivering the judgment of the Federal Supreme Court in that case stated at pages 73-74 of the report thus:

"We are of opinion that, before deciding to order a retrial, this court must be satisfied (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 this court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to Section 11(1) of the Ordinance; (b) that, leaving aside the error of 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 person of the conviction or acquittal of the appel-

lant, are not merely trivial; and (e) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.”
(p. 17 G)

Trials - Court Martial - Stealing

4. It is common ground between the parties that the appellant was charged for very serious offences that clearly amount to breaches of trust and stealing the property of his employers. And it is not also in dispute that the respondent was purportedly tried in absentia by the General Court Martial. This is a procedure unknown to our procedural law. It is obviously a negation of fair trial. A trial in the absence of the accused person is a sham. As if that was not bad enough, the court relied upon evidence which were mainly hearsay. This arose from the fact that the General Court Martial, acting erroneously under Section 34(1) of the Evidence Act permitted the prosecutors to tender the copies of the proceedings of the earlier trial of other accused persons, as evidence during the trial, and upon which the respondent was convicted and sentenced. (p. 21 H)

APPEALS - Retrial - Criminal trial

5. It is manifest from what I have said above that the respondent has not been tried in any shape or form for the offences for which he was charged and convicted. It follows that this is a case in which the respondent ought to be retried as the purported trial of the respondent was due to the blunder of the trial court in allowing this trial to proceed under the circumstances described above.

It follows that the court below having held that the trial of the respondent was a nullity, was wrong to have ordered that the respondent be discharged and acquitted. That order is hereby set aside, The purported trial of the respondent by the General Court Martial is hereby declared a nullity, and the conviction and orders made thereon are hereby set-aside. In its place, the respondent is hereby ordered to be retried before the appropriate court for all the offences for which he was charged before the General Court Martial. (p. 22 C)

NOTABLE POINTS OF INTEREST

TOBI JSC (DISSENTING IN PART)

1. How to determine nature of a ground of appeal

A ground of appeal is a ground of law if the ground deals exclusively with the interpretation or construction of the law without resort to the facts. In this respect, the court is involved in the interpretation or construction of either the Constitution or a statute with no reference to any factual situation. A ground of appeal which alleges a misapplication of law to the facts of the case is a ground of law. On the other hand, a ground of appeal is one of mixed law and fact when the ground deals with both law and fact. It is a mixed grill, mixed grill of law and facts, so to say. A ground of appeal is one of fact where the ground deals exclusively with the facts of the case and the facts only.

In the determination of grounds of appeal, the courts, in most cases, refer to the particulars, if there are particulars. This will enable the court to have a full view of the ground of appeal and come to the conclusion whether it is a ground of law or one of mixed law and fact or facts simpliciter. This is because the tag name of ground of law by the appellant does not necessarily make it so. After all, the expression ‘ground of law’ is not a magic expression, that it is and must always be so. An appellant, who is sensitive to his case, may tag or brand a ground of appeal as one of law while in reality it is one of mixed law and fact. In such a situation, the court will so hold. (p. 28 D)

2. Retrial - Things court must take into consideration

It is clear from the above and some other decided cases that before an appellate court can order a retrial, it must take into consideration inter alia the following:

(a) There must be an error in law, arising from either substantive law or procedural or adjectival law, viz: the law of evidence, civil and criminal procedure. While the error in law or procedural irregularities may not nullify the trial, there could be the possibility of a miscarriage of justice.

(b) The error of irregularity apart, the totality of the evidence taken

at the trial discloses substantial case against the accused to the extent that there is a possibility of successfully prosecuting the accused. Here the court need not come to the conclusion that the accused will be convicted. That will be tantamount to jumping the gun. Once the evidence discloses a substantial case against the accused, the court should order a B retrial.

(c) The offence in which the accused was convicted is serious or grave or the effect of any conviction or acquittal of the accused is not merely trivial.

(d) The period between the time the offence was committed and the time the new or fresh charge is expected to be preferred against the accused. Here the court will take into consideration the possibility of assembling the witnesses and the possibility of witnesses experiencing D loss of memory because of the time lag.

(e) Whether there are special circumstances that would make it oppressive or unjust to put the accused on trial a second time.

(f) The court will not order a retrial to enable the prosecution repair its case with a view to obtaining a conviction. This is because the E court should not encourage the prosecutor to be a persecutor.

(g) Where refusal to order a retrial will cause greater miscarriage of justice the court will not grant a retrial.

The list is inexhaustive. There is therefore no claim that the above F guidelines are exhaustive. It must be emphasized that the above must co-exist. In other words, all the above guidelines must exist positively in a given case. (p. 36 E)

3. *Double jeopardy is against the Constitution* G

I entirely agree with the submission of Mr. Idigbe, SAN, that this is not an appropriate case for retrial order against the respondent before a civil court for the same offences charged and already tried before the GCM. I also agree with his submission that it is not the intentment of Section H 170(1) of the Decree to subject the respondent or any citizen to double jeopardy and if that was intended then the subsection will be inconsistent with the provisions of the Constitution and therefore unconstitutional,

null and void and of no effect whatsoever. Section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 is the authority for that. Happily the 1993 Decree no more has the force of a Decree and therefore has no capacity to override the Constitution.

B Section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999 provides as follows:

C *“No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.”*

D The constitutional guarantee provides for the common law rule against double jeopardy in criminal cases. The common law rule which is generally referred to as the special plea of autrefois acquit or autrefois convict is also provided for in Section 181 of the Criminal Procedure Act and Section 244 of the Criminal Procedure Code. By the constitutional provision and the common law rule, the State is barred from instituting E criminal proceedings against its subjects ad infinitum. (p. 42 A)

4. Order of retrial - Depends on circumstances of the case

F Whether an appellate court will order a retrial will depend on the circumstances of the case. It will be most dangerous to take the position that once a trial is declared a nullity, the order that must follow is a discharge and not an acquittal. It is clear from the above cases that such is not the position of the law. There cannot be any such law and if there is any such law it must give way to the well established principles of fairness and fair G play in our jurisprudence. Appellate courts have to determine each case in the light of the facts before them.

H Learned Senior Advocate drummed into our ears that this is a case affecting fair hearing and that it will be unjust to order a retrial. I think he has a point, and a very strong one for that matter. (p. 44 F)

5. Law is not mathematics as facts do vary

It cannot invariably be the position of the law that once a court declares

a trial a nullity, the order that should follow must be one of discharge and not an acquittal. Law is not mathematics where $1 + 1$ is 2, today and forever. In law $1+1$ could be 1 in the first case, or 2 in the second case or 3 in the third case. It depends on the facts and circumstances of each case. A sweeping generalization that once a trial is declared a nullity the order that must follow is one of discharge could be dangerous and I am not prepared to give the law that burden because it cannot carry it. Again, such a decision will be tantamount to regimenting facts and circumstances of each case on the straight jackets of principles of law. While principles of law are constant and regular like the sun rising from the east, facts of cases vary from one case to the other, and they are the arrowheads of the case.

There cannot be a case unless there are facts. Judges apply the ossified principles of law to the facts and arrive at decisions which could be different even though the same principles of law are applied. That is the romance of the law. Let us not push it aside or push it away.
(p. 47 E)

6. Criminal justice - When accused should receive court's sympathy

In the administration of criminal justice, it is not only the victim of the crime or the State that should receive the sympathy of the court. There could be deserving circumstances where the accused must also receive the sympathy of the court, particularly when the mens rea and actus reus of the offence are not proved according to law, as in this case. This is one case where the accused deserves the court's sympathy. Here is an accused who was stripped of virtually his properties including cash in bank without due process. Here is an accused who was retired, again without due process. The prosecution now wants to take him to a civil court for a trial. Why should the prosecution be allowed to chase the respondent from pillar to post? Does the prosecution want the respondent to jump into the Atlantic Ocean and die? Should there be no end to the suffering of the respondent in this matter? To subject the respondent to the excruciating order of another trial, is, in my humble view, grave injustice and I am not prepared to be a party to it. Our adjectival law only

allows the prosecution to prosecute. It does not allow the prosecution to persecute. (p. 49 B)

MUSDAPHER JSC

7. Verdict of discharge and acquittal is wrong

B Now, the simple question is, was the Court of Appeal right to return a verdict of discharge and acquittal under the circumstances of this case? My answer is no. The Court of Appeal was clearly in error to have acquitted the respondent of all the allegations made against him, when it had
C no jurisdiction to try the respondent and also when the respondent was not before it. In my view, this is not a situation when a verdict of acquittal may be entered when the trial is declared a nullity. In the instant case the lower court had adjudged that the GCM had no jurisdiction to try the
D respondent, there was accordingly no trial and as such there could not be a verdict of discharge and acquittal. (p. 50 F)

EDOZIE JSC

8. Substantial irregularities vitiated the trial

E It is manifest from the foregoing observations that the purported trial of the respondent was tainted with substantial irregularities both substantive and procedural as to vitiate the trial. A decision given by a tribunal or
F court without jurisdiction is a nullity. If the State High Court gives a decision on a case which falls within the exclusive jurisdiction of the Federal High Court, that decision is null and void and cannot sustain a plea of res judicata. In the same vein, if a magistrate tries and convicts a
G person for murder for which he lacks jurisdiction to try, the person so convicted cannot successfully raise a plea of autrefois convict to prevent a subsequent trial before a court vested with jurisdiction to try him. According to Section 36(9) of the 1999 Constitution, it is a conviction or acquittal by a court of competent jurisdiction that can found a plea of
H autrefois convict or autrefois acquit. (p. 52 D)

REPRESENTATION

O. T. Adekoya (Mrs.), (with him, J. A. Adamu), for the Appellant.

CASES REFERRED TO

- Inspector-General of Police v. Igboroji (1957) NRNLR 182
R. v. Jinodu (1948) 12 WACA 368 B
R. v. Adedojin (1959) 4 FSC 185
Inspector-General of Police v. Marke (1957) NRNLR 971
Eyorokoromo & Anor. v. State (1979) 6-9 S.C. 3, 9; (1979) NSCC 61, 65
Shanu v. Afribank (2000) 10-11 S.C. 1; (2000) 13 NWLR (Pt. 684) 392; C
(2000) 10-11 S.C. 1
Ojemien v. Momodu II (1993) 1 SCNLR 18
Moses Okoro v. The Police (1953) 14 WACA 370
Nwadike v. Ibekwe (1987) NWLR (Pt. 67) 718 D
Adili v. State (1989) 2 NWLR (Pt. 103) 305
Adeoye v. State (1999) 4 S.C. (Pt. II) 67; (1999) 6 NWLR (Pt. 605) 74

STATUTES REFERRED TO

- Evidence Act S. 34(1) E
Armed Forces Decree No. 105 of 1993 Ss. 103, 168, 169(2) & (3), 170
Constitution of the Federal Republic of Nigeria, 1999 S. 36(9)
Criminal Procedure Act Ss. 100, 181, 210, 223(2) F
Criminal Procedure Code S. 244

LEAD JUDGMENT BY EJIWUNMI JSC

The question that calls for determination in this appeal falls within a very narrow compass. And it is whether a person whose trial was a nullity should be discharged or discharged and acquitted for the offences for which he was tried and convicted. The facts relevant to the appeal are straightforward and may be put thus:- The respondent who was a Wing Commander in the Nigerian Air Force was attached to its Pay Accounting Group until the month of April 1996. Before then, it was discovered that he and ten other officers of the Nigerian Air Force and all attached to the Pay Accounting Group were involved with fraudulent

offences which included stealing, corruption and conspiracy to commit several civil offences. As a result of this discovery, the ten officers were arraigned before the General Court Martial (GCM). But when the court was convened for the trial of the ten officers, the respondent was not present. The General Court Martial then earned out the trial of the remaining nine accused persons who were physically present before the court. The nine officers so tried were each found guilty and convicted accordingly.

That done, the General Court Martial then proceeded with the trial of the respondent in his absence on a 12 count charge laid against him before that court. The offences disclosed in the charge include, stealing, conspiracy to defraud, forgery and altering forged documents, receiving stolen property. For the purposes of this trial, the prosecutor did not call any oral evidence in support of his case. Rather with the consent of the court pursuant to the provisions of Section 34 of the Evidence Act, he merely tendered the statements of all the seven witnesses who testified at the earlier trial conducted by the General Court Martial, at the end of which the nine other accused persons were convicted. On the basis of that kind of evidence, and with the respondent who was never before that court, the court found him guilty and was convicted of eleven of the 12-count charge levelled against him. Following that conviction, he was sentenced to a total of 51 years imprisonment. A restitution order was also made against him in respect of his properties and other personal assets to the value of about N34,125,000.00.

As the respondent was not satisfied with the judgment of the General Court Martial, he appealed to the court below. That court, after due consideration of the arguments advanced before it, allowed the respondent's appeal and set aside the judgment of the General Court Martial. The court below further ordered that the respondent be discharged and acquitted. It is against that judgment of the court below that the appellants have appealed to this court. Pursuant thereto, the appellants, through their counsel, filed one ground of appeal which reads thus:-

“the learned Justices of the Court of Appeal erred in law when while setting aside the judgment of the General Court Martial they dis-

charged and acquitted the respondent.”

In accordance with the rules of this court, the parties thereafter filed and exchanged their respective briefs of argument. For the appellants, the only issue identified for the determination of the appeal was:

“Whether having held that the General Court Martial proceedings were a nullity and that it was as if the respondent was never tried, the proper order for the court to make was an order of discharge and not an order of acquittal.”

The first reaction of the respondent to the appeal was to file a notice of preliminary objection against the sole ground of appeal filed for the appellants. His learned counsel, A. I. Idigbe, SAN, thereafter also filed a respondent’s brief. In the brief, two issues were raised which included the ground raised in the notice of preliminary objection. The issues so raised are as follows:-

“2.1 Whether in circumstances of this case the Court of Appeal was right in discharging and acquitting the , respondent and not ordering a retrial.

2.2 Whether the appellants require leave to file their sole ground of appeal being ground of mixed law and fact.”

It is manifest from a perusal of the issues set for the determination of the appeal that both parties are agreed that the main issue for the determination of this appeal is as to whether the respondent should have been discharged and acquitted by the court below. But before considering the arguments of counsel on this issue, I need to determine first whether there is merit in the preliminary objection raised by the respondent against the appeal.

In urging that the preliminary objection be upheld, it is the contention of learned senior counsel for the respondent that appellant’s ground of appeal was merely christened a ground of law when in actual fact, it consists of mixed law and facts. It is therefore his submission that it must be borne in mind that the decision whether a ground of appeal raised a question of law alone or of facts or of mixed law and facts does not depend on the label given to it by the appellants. In other words, it is the submission of learned counsel that each ground of appeal must be

determined solely upon what is alleged therein and no reliance ought to be placed by the court on the description given to it by the appellant. And in support, reference was made to such cases as Ojemien v. Momodu II (1993) 1 SCNLR 18; Nwadike v. Ibekwe (1987) NWLR (Pt. 67) 718; B Adili v. State (1989) 2 NWLR (Pt. 103) 305; Shanu v. Afribank (2000) 10-11 S.C. 1. Now, on the basis of the above submissions, it is the contention of learned counsel for the respondent that with regard to the appellants' ground of appeal, the question that falls to be determined is whether the respondent ought to have been "*discharged*" or acquitted C involves a consideration of the facts of the case, the ground of appeal filed for the appellant cannot and ought not be regarded as a question of law.

For the appellants, an appellants' reply brief was filed to deal with D the arguments raised by the respondent in the preliminary objection against their ground of appeal. The said reply brief was adopted by their counsel and reliance placed thereon for that purpose during the hearing of the appeal. The main thrust of the argument of learned counsel for the appellants in their brief and her oral submissions to this court is that the alleged E ground of appeal is a ground of law and urged the court to uphold it as one. The argument of counsel in respect of the preliminary objection against the ground of appeal, clearly depends on whether the said ground of appeal is indeed a ground of law. F **The question so raised is not novel as several decisions of this court have given the principles that should guide a court in its quest for the proper determination of whether a ground of appeal is a ground of law, a ground of mixed law and facts or simply, a ground of fact. In this regard, I refer to the decision of this court in Shanu v. Afribank (2000) 13 NWLR (Pt. 684) 392; (2000) 10-11 S.C. I and at page 9 where reference was made to Ogbechie & Ors. v. Onochie & Ors. (1986) Vol. 7 NSCC 443 part of the judgment of Eso, JSC., at pp. 445-6 where he said** G **thus:-** H

".....what is required is to examine thoroughly the grounds of appeal in the case concerned to see whether the grounds reveal a misunderstanding by the lower tribunal of the law, or a misapplication of

the law to the facts already proved or admitted, in which case it would be question of law, where however the grounds are such that would question the evaluation of facts by the lower tribunal before the application of the law, that would amount to question of mixed law and facts.”

Ayoola, JSC., then went on to explain the principles quoted above thus at pages 9-10

“These are useful guidelines but it is evident that they are not meant to be exhaustive. Where the ground of appeal complains that the tribunal has failed to fulfil an obligation cast upon it by law in the process of coming to a decision in the case such a ground would involve a question of law, namely; whether or not there is such an obligation or whether what the tribunal did amounted to an infraction in law of such obligation, provided that all the facts needed are there on the record and are beyond controversy. A ground of appeal involves a question of law alone where in answering the question raised by the ground of appeal the appellate tribunal can determine the issue on the admitted or uncontroversial facts without going beyond a direct application of legal principles. Where it is contended by the other party that the principle of law on which the complaint is based is non-existent or misconceived, that goes to the merit of the complaint and not to the threshold question as to whether or not the question involved is one of law. The question of the merit of a ground of appeal is to be distinguished from one as to the nature of question involved in the ground.”

The complaint here is that the ground of appeal as framed, involves a resolution of facts in order to determine whether the court below was right to have discharged and acquitted the respondent, rather than ordering that he be discharged only. It does seem to me from a careful reflection on the argument of counsel that there can be no question of a resolution of facts, bearing upon whether the ground of appeal is a ground of law or that of mixed law and facts. **The learned counsel for the appellant is in my view right in her submission that there was no dispute as to the facts in the case under consideration. The position in the instant case is not in dispute that the court below**

had on the evidence before it, arrived at the conclusion that the trial of the respondent before the General Court Martial cannot be described as a trial within the accepted principles of trials in our courts. And the appellant was not by any means challenging that conclusion reached by the court below. The only complaint canvassed in the ground of appeal in my view, is, clearly whether as the court below has reached its conclusion upon the trial of the respondent by the General Court Martial, it was open to that court to have discharged and acquitted the respondent. I do think that the learned counsel for the appellants was right in her submission that the court at that stage was not resolving any dispute as to facts but took a decision which it is obliged to do by law. The decision of the court may or may not be right. And it is because the appellants are of the view that the decision of the court was wrong in law that they have appealed to this court upon the ground of appeal filed against that decision of the court below.

Earlier in this judgment, I have set down the ground of appeal in dispute and it is not necessary to reproduce it. However, having regard to what I have said above, I am clearly of the view that the ground of appeal filed for the appellants is clearly a ground of law. With that conclusion, it follows that the preliminary objection by the respondent lacks merit, and it is hereby dismissed. By its dismissal, the 2nd issue raised by the respondent is also dismissed. What now remains to be considered is the only issue raised in this appeal by the appellants.

In respect of this first issue, the question is, whether the court below was right to have ordered that the respondent be discharged and acquitted, after that court has held conclusively that the General Court Martial proceedings were a nullity, and was as if he was never tried. Now, it is the view of learned counsel for the appellants that the court below was wholly wrong to have made an order of acquittal in the circumstances of the case following the trial of the respondent which learned counsel submits had been shown and indeed been accepted by the court to have been a futile exercise. Learned counsel further submits that the

proper and appropriate order that the court should have made is an order merely discharging the respondent. In support of this submission, learned counsel made reference to the following cases. *R. v. Hodge* VI Nigeria Law Reports at page 56; *N. A. F. v. Ex. Wing Commander L. D. James* (2002) 18 NWLR (Pt. 798) 295 and *I. G. P. v. Marke* (1957) NSCC Vol. B 1 page 9. Earlier in this judgment, it was mentioned that a reply brief was filed by learned counsel for the appellants. In that brief, learned counsel referred to *Tobby v. State* (2001) 4 S.C. (Pt. II) 160; (2001) 10 NWLR (Pt. 720) 23, *Adeoye v. State* (1999) 4 S.C. (Pt. II) 67 (1999) 6 NWLR (Pt. 605) 74; and *Eyorokoromo v. The State* (1979) 6-9 S.C. (Reprint) 1; C (1979) NSCC 61.

The thrust of the argument of learned counsel for the appellants is to show that they cannot be called in aid by the learned senior counsel for the respondent to support his view that the court below was right to have D discharged and acquitted the respondent. In that regard the learned senior counsel for the respondent also referred to several decisions of this court. They include the following cases. *Adeoye v. State* (1999) 4 S.C. (Pt. II) 67; (1999) 6 NWLR (Pt. 605) 74 at 91; *Okafor v. State* (1976) 5 E S.C. (Reprint) 7; (1976) 1 ANLR 307 at 311; *Moses Okoro v. The Police* (1953) 14 WACA 370; *Joseph Okosun v. State* (1979) 1 ANLR 26 at 36; *Ogboh v. FRN* (2002) 4 S.C. (Pt. II) 106; (2002) 10 NWLR (Pt. 774) 21 at p. 38 (A-G); *Yusufu Abodundu & Ors. v. Queen* (1959) NSCC 56 at F 60.

As I have earlier observed in this judgment, the crucial question that calls for determination in this appeal is, whether the court below was right to have ordered that the respondent be discharged and acquitted G following the firm conclusion of that court that his trial by the General Court Martial was a nullity. **This question as to whether a court should order that an appellant be discharged simpliciter or be discharged and acquitted following the declaration that his trial was a nullity is not new to this court. Nor is the determination whether an order of H retrial be made or not as a consequence of a discharge or an order of acquittal by the courts below. I think that on this point, it is appropriate to refer to the case of Eyorokoromo & Anor. v. State**

(1979) 6-9 S.C. 3, 9; (1979) NSCC 61, 65, where the question was exhaustively considered. In that case, Bello, JSC., after a discussion of the historical development of the power of the appellate court to order a retrial where the original trial was a nullity and a review of past cases where the court has either declined to order a retrial or had ordered one, and from which the following principles were formulated: Firstly, that the very foundation of the trial, that is, the charge or information, may be null and void; secondly, the trial court may have no jurisdiction to try the offence, and thirdly, the trial may be rendered a nullity because of some serious error or blunder committed by the Judge in the course of the trial.

As to whether an order of retrial ought to be made, it is necessary to determine that question with regard to the principles in Abodundu's case (supra), Abbot, FJ., delivering the judgment of the Federal Supreme Court in that case stated at pages 73-74 of the report thus:

"We are of opinion that, before deciding to order a retrial, this court must be satisfied (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 this court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to Section 11(1) of the Ordinance; (b) that, leaving aside the error of 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 person of the conviction or acquittal of the appellant, are not merely trivial; and (e) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it."

And after laying the above principles, the Federal Supreme Court per Abbott, FJ., added the following salutary warning:

"We have considered the cases cited by Mr. Lloyd, but have been

unable to extract from them any guiding principles. We have therefore (and as this is one of the first cases in which the exercise of the power to order a retrial has been argued in this court) endeavoured to formulate the principles of which this court should act in considering the exercise of that power. In formulating these principles we do not regard ourselves as deciding any question of law, or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise, and it may be that further experience will lead us to formulate additional principles, or to modify those we have formulated in this judgment. We wish to make it clear that the court will be free to do this without infringing the doctrine of judicial precedent.”

In *Adeoye v. State* (1999) 4 S.C. (Pt. II) 67; (1999) 6 NWLR (Pt. 605) 74, where this court had to decide whether or not to order the retrial of the appellant having concluded that his trial was a nullity, Ogundare, JSC, in his leading judgment, after referring to the principles in *Abodundu* (supra) set out above, also referred to the Privy Council case of *Dennis Reid v. Queen* (1979) 2 WLR 221, 226., from which excerpts from the judgment of Lord Diplock were quoted as follows:

“Question (4) is general in its terms and asks for a statement of the principles which should apply in considering whether or not a new trial should be ordered. Their Lordships would be very loath to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interests of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them; whereas there may be factors which in particular circumstances of some future cases might be decisive but which their Lordships have not now the prescience to foresee, while the relative weight to be attached to each one of the several factors, which are likely to be relevant in the common run of cases may vary widely from case to case according to its particular circumstances.”

And he continued thus:-

“*Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not to escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant, at the other extreme, where the evidence against the defendant at the trial was so strong that any reasonable jury if properly directed would have convicted the defendant, prima facie the more appropriate course is to apply the proviso to Section 14(1) and dismiss the appeal instead of incurring the expense and inconvenience to call witness and jurors which would be involved in another trial.*”

His Lordship continued:-

“*In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor so may its prevalence, and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution*”

tion lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.”

“The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration. Except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstance in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a new certainty that upon a second trial the defendant would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction,

‘It is in the interest of the public, the complainant, and the (defendant) himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reasons of a defect in legal machinery.’

“This was said by the full Court of Hong Kong when ordering a new trial in *Ng Yuk Kin v. The Crown* (1955) 39 HKLR 49, 60. That was a case of rape, but in their Lordships view it states a consideration that may be of wider application than to that crime alone”.

The warning given by Privy Council in Reid’s case, carefully read, does not differ from what Abbott, FJ., said therein in the Abodundu case (Supra). In the instant case, the above principles will no doubt be the focus in any determination of whether a retrial should be ordered or not. In doing so, it is necessary to advert to what facts there are in the case to bring the case within the principles adumbrated above. **It is common ground between the parties that the appellant was charged for very**

serious offences that clearly amount to breaches of trust and stealing the property of his employers. And it is not also in dispute that the respondent was purportedly tried in absentia by the General Court Martial. This is a procedure unknown to our procedural law.

B It is obviously a negation of fair trial. A trial in the absence of the accused person is a sham. As if that was not bad enough, the court relied upon evidence which were mainly hearsay. This arose from the fact that the General Court Martial, acting erroneously under
C Section 34(1) of the Evidence Act permitted the prosecutors to tender the copies of the proceedings of the earlier trial of other accused persons, as evidence during the trial, and upon which the respondent was convicted and sentenced.

D It is manifest from what I have said above that the respondent has not been tried in any shape or form for the offences for which he was charged and convicted. It follows that this is a case in which the respondent ought to be retried as the purported trial of the respondent was due to the blunder of the trial court in allowing
E this trial to proceed under the circumstances described above.

It follows that the court below having held that the trial of the respondent was a nullity, was wrong to have ordered that the respondent be discharged and acquitted. That order is hereby set
F aside, The purported trial of the respondent by the General Court Martial is hereby declared a nullity, and the conviction and orders made thereon are hereby set-aside. In its place, the respondent is hereby ordered to be retried before the appropriate court for all the offences for which he was charged before the General Court Mar-
G tial.

ONU JSC

H Having been privileged to read before now the judgment of my learned brother, Ejiwunmi, JSC., just delivered. I am in entire agreement with him that the preliminary objection be and is hereby overruled while the appeal be and is here allowed by me. The respondent is only dis-

charged and I so order.

TOBI JSC (DISSENTING IN PART)

The respondent was a Wing Commander in the Nigeria Air Force. B
He worked at the Pay and Accounting Group (PAG) for some years. In
April 1996, he had some problem with the Nigerian Air Force. He was
alleged of committing fraud and stealing money, property of the Nigerian
Air Force. On 27th April 1996, the respondent was retired compulsorily C
from the service of the Nigerian Air Force, apparently with ignominy.

He was also made to face a trial. The Air Force preferred a 12-
count charge against him. He was not present. He was in Ghana at the
relevant time of the commission of the alleged offences. The respondent
absconded to Europe, apparently from Ghana. He did not call his con- D
duct as an abscondment. Both the General Court Martial and the Court of
Appeal call it so. As his conduct is so, I also call it so. But that is not
important in this appeal. The important aspect is that the respondent was
tried in absentia; a very curious procedure to adopt in the administration E
of criminal justice. He was found guilty of 11 counts and sentenced to a
total of 51 years imprisonment. Restitution was ordered.

Let me quickly read the order of the General Court Martial on
restitution: F

*“The convict is to make a restitution of N13,650,000.00. Interest
of 15% per month for 10 months is N20,475,000.00. The total restitution
is N34,125,000.00. For the avoidance of doubt, this court orders that in
furtherance of the restitution order, all the moveable and immovable prop- G
erties of the convict currently held by the NAF are to be sold to members
of the public by comparative bid to repay the N34,125,000.00. All sen-
tences and restitution orders are subject to confirmation. There is no rec-
ommendation for mercy.”*

Following the decision of the GCM (a cognomen for General Court H
Martial) the appellants swung into action by executing the judgment of
the GCM. By a letter dated 8th July, 1997, the appellants ordered the sale
of both the movable and immovable properties of the respondent. The

sale was duly earned out. That is not all. Cash in banks and chattels of the respondent were also confiscated. As the respondent was tried in absentia, he could not serve his prison term. And so what was a loss of the appellants in this regard was a gain to the respondent. After all, he enjoyed his freedom outside the country though “*incarcerated*” in Nigeria. The abscondment paid well for him.

I think the respondent was monitoring the development or progress of the case in his foreign base. Nigerians have a way of doing such things. He filed an appeal in the Court of Appeal. He raised the issue of jurisdiction of the GCM. The Court of Appeal agreed with him. That court declared the proceedings before the GCM a nullity. The respondent was discharged and acquitted. The court tried its hand on the possibility of ordering a retrial. It did not find its way clear in so ordering. The court said at page 235 of the record:

“In the final result, I hold that this appeal has merit. It is accordingly allowed. The judgment of the GCM is hereby set aside. The appellant is entitled to an order of discharge and acquittal. I accordingly so order.”

Dissatisfied with the order of discharge and acquittal, the appellants have come to us. Briefs were filed and exchanged. The appellants filed a single issue for determination. It reads:

“Whether having held that the General Court Martial proceedings were a nullity and that it was as if the respondent was never tried, the proper order for the court to make was an order of discharge and not an order of acquittal.”

The respondent formulated two issues for determination. They read:

“2.1 Whether in the circumstances of this case the Court of Appeal was right in discharging and acquitting the respondent and not ordering a retrial.

2.2 Whether the appellants require leave to file their sole ground of appeal being ground of mixed law and fact.”

Arguing the appeal on the single issue, learned counsel for the appellants, Mrs. O. T. Adekoya, submitted, the Court of Appeal ought

not have discharged and acquitted the respondent, rather the court ought to have only discharged him. She cited R. v. Hodge 6 NLR 56; Air Force v. Ex. Wing Commander L. D. James (2002) 12 S.C. (Pt. I) 1; (2002) 18 NWLR (Pt. 798) 295 and IGP v. Marke (1957) 1 NSCC (Vol. 1) 9. She urged the court to set aside the order of acquittal “*so that the respondent can be prosecuted in the civil courts if the appellants decide to file a complaint against him.*” She did not say more. She stopped.

Arguing Issue No. 1 of the respondent’s brief, learned Senior Advocate for the respondent, Mr. A. I. Idigbe, submitted that the opinion of Sanusi, JCA., at page 234 of the record to the effect that in the real sense the respondent has not been tried amounts to a mere obiter in the face of the Court of Appeal holding that the respondent’s trial was a nullity.

On the issue of a retrial, learned Senior Advocate enumerated five guidelines at page 4 of his brief. He contended that the guidelines are not exhaustive and that the five are to co-exist but a court faced with such a difficult decision may regard one or combination of them in reaching a decision, one way or the other. He cited Abodundu v. Queen (1959) NSCC 56 at 60; Mohammed v. The State (1997) 1 NMLR (Pt. 483) 536 at 546; Damina v. The State (1995) 8 NWLR (Pt. 415) 513; Abu v. Ankwa (1969) 1 All NLR 129 at 133; Sani v. The State (2000) 1 NWLR (Pt. 642) 520. Citing Adeoye v. The State (1999) 4 S.C. (Pt. II) 67; (1999) 6 NWLR (Pt. 605) 74 at 94 and Ankwa v. The State (1969) 1 ANLR 133, counsel contended that a retrial order is not made where such an order will amount to condemning the accused person to go through the rigour of another trial for no fault of his, unless the interest of justice requires that he is so tried. He cited Reid v. The Queen (1979) 2 WLR 221 at 226-227; Briggs v. Briggs (1992) 3 NWLR (Pt. 228) 128 at 150 and 151.

Learned Senior Advocate submitted that it will be unjust and oppressive to put the respondent to another trial. In order to sustain the charges against the respondent under the Armed Forces Decree No. 105 of 1993 as amended, the appellants must prove the following ingredients: (a) that the accused is subject to service law, (b) that the accused was involved in a conduct, and (c) that the conduct of the accused is prejudi-

cial to good order and service discipline. Citing *Akono v. Nigerian Army* (2000) 14 NWLR (Pt. 687) 318 at 331, learned Senior Advocate submitted that the respondent left service on the 27th day of April, 1996. He also cited Section 169(2) and (3) of Decree No. 105 of 1993. The period
 B between the date of retirement of the respondent from service and commencement of the second phase of the trial is approximately six months when he had ceased to be subject to the jurisdiction of the GCM, counsel pointed out.

C Learned Senior Advocate argued that the GCM which tried, convicted and confiscated all the movable and immovable properties of the respondent in absentia had no jurisdiction to make the orders. He contended that the respondent has suffered deprivation of his right to property and it will amount to double jeopardy to insist that he goes through
 D another process of trial before a civil court under Section 170(1) of the Armed Forces Decree, 1993 as amended. To counsel, Section 170(1) of the Decree No. 105 of 1993 will be inconsistent with the provisions of Section 33(9) of the Constitution if its intendment is to subject the re-
 E spondent to double jeopardy. He cited *Opara v. The State* (1998) 2 NWLR (Pt. 536) 108 at 119. It was the argument of learned Senior Advocate that another reason why mere discharge is inappropriate in this case is because of the limitation of time enjoyed by service personnel under Sec-
 F tion 169(1) of the Armed Forces Decree.

Learned Senior Advocate submitted that this court will not make an order of retrial: (a) Where the order would be tantamount to aiding the prosecution to correct its fundamental and serious mistakes. (b) Where it would be unjust to the accused. (c) where it would be oppressive to put
 G the accused on another trial, (d) Where the guilt of the accused is in doubt. (e) Where an opportunity will be given to the prosecution to remedy a defect in their case in order to secure a conviction of the respondent. He cited *Namsoh v. The State* (1993) 5 NWLR (Pt. 292) 129 at
 H 143-146; *The State v. Lopez* (1968) 1 All NLR 356; *Akinfe v. The State* (1988) 7 S.C. (Pt. II) 131; (1988) 3 NWLR (Pt. 85) 729; *Okoduwa v. The State* (1988) 1 NWLR (Pt. 78) 333; *Okafor v. The State* (1976) 5 S.C. (Reprint) 7; (1976) 1 All NLR 307 at 311; *Adeoye v. The State*

(1999) 4 S.C. (Pt. II) 67; (1999) 6 NWLR (Pt. 605) 704; (Pt. 605) 704; Okoro v. The Police (1953) 14 WACA 370; Okosun v. The State (1979) 3-4 S.C. (Reprint) 24; (1979) 1 All NLR 26 at 36; Ogbob v. FRN (2002) 4 S.C. (Pt. II) 106; (2002) 10 NWLR (Pt. 774) 21 at 38; Abodundu v. The Queen (supra).

Learned Senior Advocate finally submitted on Issue No. 1 that by the peculiar facts of this case and the present position of the law, it will be unjust and oppressive to make a retrial order against the respondent by simply discharging him and thereby giving the appellants a chance of a second bite in a civil court even though the GCM cannot retry the respondent and the respondent has lost substantial property as a result of the void trial before the GCM.

On Issue No. 2 learned Senior Advocate argued his preliminary objection. He submitted that the ground of appeal is a ground of mixed law and fact and therefore leave of the court was required. As leave was not obtained, learned Senior Advocate urged the court to strike out the ground, as it is incompetent. He cited the following cases. (Nsirim v. Nsirim (1990) 3 NWLR (Pt. 138) 128; Ojiemen v. Momodu II (1983) 1 SCNLR 18; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718; Adili v. The State (1989) 2 NWLR (Pt. 103) 305; Shanu v. Afribank (2000) 10-11 S.C. 1; Metal Construction (WA) Ltd. v. Migliore (1990) 1 NWLR (Pt. 126) 299 at 313; Gbadamosi v. The State (1991) 6 NWLR (Pt. 196) 182 at 200; Welli v. Okechukwu (1985) 2 NWLR (Pt. 5) 63; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 5) 63; Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67) 718,729; Oganii v. Awulor (1997) 9 NWLR (Pt. 522) 668 at 689; Trans Nab Ltd. v. Joseph (1997) 5 NWLR (Pt. 504) 176 at 190; Government of Kwara State v. Gafar (1997) 7 NWLR (Pt. 511) 51; Ifediora v. Umeh (1988) 2 NWLR (Pt. 74) 5 at 17; Griffith v. J. P. Harrison (Watford) Ltd. (1963) AC 1 at 19; and Ojiemen v. Momodu (1983) 1 SCNLR 188 at 205. He urged the court to dismiss the appeal.

Learned counsel for the appellants, in her reply brief, maintained that the appellants have not sought an order before this court that the respondent be tried before the civil courts for the same offences before the GCM as alleged by the respondent, rather the appellants merely con-

tend that they have a right to prosecute the respondent in the civil courts in view of the fact that the trial by the GCM was a nullity. On the issue of double jeopardy raised by the respondent, learned counsel submitted that double jeopardy only applied when there has been a trial on the merit. She
B cited *Kajubo v. The State* (1988) 1 NWLR (Pt. 73) 721.

On Issue No. 2, learned counsel cited *Shanu v. Afribank Nigeria Plc.* (2000) 10-11 S.C. 1; (2000) 13 NWLR (Pt. 684) 392; *Mumuni v. The State* (1975) 6 S.C. (Reprint) 66; (1975) NSCC Vol. 9 at page 331; *Metal Construction (WA) Ltd. v. Migliore: In re Ogundare* (1990) 1 NWLR
C (Pt. 126) 299; and *Gbadamosi. v. The State* (1991) 6 NWLR (Pt. 196) 182 and submitted that the ground of appeal is one of law.

Learned counsel pointed out that in *Adeoye* the court had jurisdiction hence the decision, but in this case the GCM had no jurisdiction. She
D urged the court to allow the appeal.

Let me take the preliminary objection first. A ground of appeal is a ground of law if the ground deals exclusively with the interpretation or construction of the law without resort to the facts. In this respect, the
E court is involved in the interpretation or construction of either the Constitution or a statute with no reference to any factual situation. A ground of appeal which alleges a misapplication of law to the facts of the case is a ground of law. On the other hand, a ground of appeal is one of mixed law
F and fact when the ground deals with both law and fact. It is a mixed grill, mixed grill of law and facts, so to say. A ground of appeal is one of fact where the ground deals exclusively with the facts of the case and the facts only.

In the determination of grounds of appeal, the courts, in most
G cases, refer to the particulars, if there are particulars. This will enable the court to have a full view of the ground of appeal and come to the conclusion whether it is a ground of law or one of mixed law and fact or facts simpliciter. This is because the tag name of ground of law by the appel-
H lant does not necessarily make it so. After all, the expression ‘ground of law’ is not a magic expression, that it is and must always be so. An appellant, who is sensitive to his case, may tag or brand a ground of appeal as one of law while in reality it is one of mixed law and fact. In

such a situation, the court will so hold.

The ground of appeal the respondent is quarreling with is in the following terms:

“The learned Justices of the Court of Appeal erred in law when while setting aside the judgment of the General Court Martial they discharged and acquitted the respondent.” B

The Particulars of Error read:

“1. Having held that the respondent had not been tried and that a retrial would have been the proper order to make in the appeal, the respondent ought to have been discharged alone and not acquitted.” C

2. Having held that the decision of the General Court Martial was nullity having given without jurisdiction, the proper order to make was one discharging the respondent and not an order of acquittal.”

The two operative words both in the ground of appeal and the D particulars are “*discharged*” and “*acquitted*”. A discharge in the context does not mean to pay a debt or satisfy some other obligation including monetary obligation. A discharge, in the context means to cancel the original provisional force of court order by way of a charge or to free E from confinement. On the other hand, acquittal means a setting free or deliverance from the charge of an offence by verdict of a court. As a matter of law, the two words on the one hand and facts on the other hand, are very strange bedfellows and they cannot enjoy the same bed F space with comfort and convenience. When a judge decides to discharge or acquit or discharge and acquit an accused person, he deals exclusively with law and law only. He deals with the offence as contained in the charge and sees whether the prosecution has proved its case in the light G of the section or sections of the offence alleged to have been convicted by the accused.

Learned Senior Advocate submitted that the trial Judge is involved in the exercise of discretion when he determines whether an accused H person should be discharged or acquitted. With respect, I am not with him. When a trial Judge determines whether an accused should be discharged or acquitted, he looks at the section of the enabling law the accused is charged with. The provisions of the section will tell him what

to do and what not to do, and not the facts of the case. If in the light of the provisions of the section, the accused should be discharged, the trial Judge will do so, ditto in respect of an acquittal. The fact element in the matter, if it is there at all, is most insignificant and myopic to the extent
B that one cannot blow it to gain the sympathy of mixed law and fact to justify the objection of learned Senior Advocate. The objection therefore fails.

I now go to Issue No. 1. In criminal proceedings, an accused
C person who is discharged can be made to face a criminal trial at the whims and discretion of the prosecution. In other words, he does not breathe the freedom of air forever or for all times. The prosecution has the power and the discretion to return him to the dock the second time. The position is however different, if an accused person is discharged and
D acquitted. Such a person cannot normally be made to face criminal trial on the same offence or offences. He will adequately meet such a charge with plea of *autrefois acquit*.

Let me first deal with what happened at the GCM. The prosecution applied to the GCM to try the respondent in absentia. Purportedly relying on Section 34 of the Evidence Act, the GCM on the application of the prosecution, admitted SOE of 11 pages in the case of the respondent as Exhibit 1. The GCM also admitted Exhibits 2 to 13 and the list of
F prosecution witnesses of seven members of the Nigerian Air Force. In the course of evidence, the GCM admitted Exhibit 14 through P.W.7. Exhibit 14 was the list of assets of the respondent. Although the prosecution listed seven witnesses, only P.W.7 gave evidence. Thereafter the prosecution closed its case and addressed the GCM. The court thereafter
G convicted the respondent in his absence. That was the basis of the Court of Appeal discharging and acquitting the respondent.

Both counsel have cited two decisions of this court. One is *Adeoye v. The State* (Supra). The other is *NAF v. Ex-Wing Comdr. James*, (supra) I should deal with the cases in turn. In *Adeoye*, the appellant was
H charged with the murder of one Gabriel Nwosu. He was arraigned before the High Court of Lagos State. On the day his plea was taken, the prosecution called two witnesses after which the trial was adjourned to 10/3/

94. On 10/3/94, although the appellant was not produced in court the trial court proceeded with the trial in the absence of the appellant. The prosecution called the other witnesses one of whom (P.W.3) was a vital witness. At the conclusion of the trial, the learned trial Judge convicted the appellant of murder and sentenced him to death. His appeal to the Court of Appeal was dismissed. B

Allowing the appeal, this court held that by virtue of Section 210 of the Criminal Procedure Act, every accused person shall, subject to the provisions of Section 100 and subsection (2) of Section 223, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable. The court discharged and acquitted the appellant. C

On the issue of a retrial, Ogundare, JSC, in his leading judgment said it page 91: D

“I take into consideration that the offence was allegedly committed in 1991 and the appellant has been in prison custody since then, I also take into consideration the fact given in evidence by the prosecution that since the occurrence of the event leading to the death of the deceased, all the tenants living in the appellant’s premises had moved away to unknown places and it may now be difficult to locate them to give evidence. Bearing all these factors in mind I think the interest of justice demands that I make no order of retrial in this case. Consequently, therefore I allow the appeal, set aside the conviction and sentence of death passed on the appellant and declare his trial null and void. I, however, do not order that he be retried for the same offence again. I therefore discharge and acquit him of the charge of murder.” E F G

Achike, JSC., in his concurring judgment, said at page 95 and I quote him in extenso:

“The order of second trial, personally, might not easily appeal to me in the overall consideration of the interests of justice, particularly if the offence is a grievous one like murder or rape. So also, if the guideline urging a refusal of a new trial is predicated on the fact that the appellant has long been incarcerated in prison. The fact of the appellant’s H

long incarceration in prison could be taken into consideration in determining the period of the prison term should the appellant be convicted after due trial. But, in contrast, the question of absence of witnesses to field in the event of a new trial might weight heavily on me. Thus in the instant case, there is evidence by the prosecution that since the incident of the deceased's demise, all the tenants in the appellant's residence had taken their exit and their whereabouts may not be possible to be located. Such exodus of witnesses will surely make an order for a new trial cosmetic and the court would be least prepared for a mere routine formality which should be much depreciated. In other words, in the interest of justice. I would not make an order for a new trial in the instant case. I too, would allow the appeal, set aside the conviction and sentence of death passed on the appellant and declare his trial a nullity. I do not order a retrial but I substitute an order of discharge and acquittal."

In James, which to some extent affected the respondent in this appeal, James, the respondent, one of the new pay officers who held financial appointment at the headquarters of the Pay and Accounting Group (PAG) and others were charged inter alia with stealing N63 million. The respondent called fourteen witnesses. The GCM found him and his colleagues guilty of all the counts and sentenced the respondent to 50 years imprisonment and ordered him to make a restitution of some money to the Nigerian Air Force.

On appeal the Court of Appeal declared the orders of the GCM a nullity. The respondent was discharged. An appeal to this court succeeded. Perhaps the only seemingly relevant aspect of this court's decision to the first issue in this matter is what Onu, JSC., said at page 326 of the judgment. His Lordship relevantly said:

"Having erroneously found that the proceedings of the GCM were a nullity in the absence of jurisdiction the court below ought not to have discharged the respondent and acquitted him as it did, the more so, as it found the respondent was correctly convicted on counts 9 and 10."

The impression was created during oral argument that the two cases give conflicting decisions. With respect, I do not see the slightest conflict. It is good law that cases are decided, not in vacuo, but in rela-

tion to the facts. It is also good law that the ratio of a case or a dictum of a case should be read along with the facts of the case. It is then that it makes all the meaning in our well cherished principles of stare decisis.

Let me enumerate the differences between the two cases. First, the issue of jurisdiction raised in both cases is different. In Adeoye, the appellant was not present only once when the case was tried. In James the respondent was present all through the proceedings. The issue of Jurisdiction brought out by the Court of Appeal was that the GCM was not properly constituted. That was not the issue in Adeoye. Second, in Adeoye the respondent asked for a retrial in the light of the proceedings being a nullity. In James there was no issue of a retrial and this court did not go into it. Third, in James the Court of Appeal held that the respondent was guilty of two counts viz: counts 7 and 9. In Adeoye there was no such split position by the Court of Appeal. That court totally affirmed the conviction of the High Court on the charge of murder.

And so I ask the million naira question: where lies the relevance or applicability of James in this appeal? With respect, I do not see any. And what is more, fair hearing was involved in Adeoye. Fair hearing was not involved in James because he was given fair hearing and so did not raise it. The relevant case in this appeal is Adeoye; not James. James is a far cry from this case and I do not want to strain my ears to hear the cry.

Learned counsel for the appellants submitted in the reply brief that the appellants have not sought an order that the respondent be tried before the civil courts for the offences charged before the GCM, rather what the appellants are simply stating is that under the law they have a right to prosecute the respondent in the civil courts in view of the fact that the trial by the GCM was a nullity. With respect, this is very cunningly and craftily put. Paragraph 1 of the particulars of Error reads:

“Having held that the respondent had not been tried and that a retrial would have been the proper order to make in the appeal, the respondent ought to have been discharged alone and not acquitted.”

Does the above really vindicate the position taken by the appellants in their Reply Brief? That apart, will it not dawn on any rational human being that the aim behind this appeal is to prosecute the respondent in a

civil court, if the appeal succeeds? Let us call a spade its proper name of a spade and not call it a cutlass or machet. It is very clear to me from the particulars of error that the appellants' desire and want is to prosecute the respondent in a civil court. In the circumstances, the respondent is correct in taking up the issue of retrial in his brief.

Litigation is a straightforward legal matter of adjudication which does not, or better, should not admit pretence or tricks. Litigation is not game of vain rhetoric or insincere polemics but one of reciprocal sincerity of the parties by placing their cards openly before the court for adjudication and final decision. The principles of equity and justice will not allow any party to play pranks in litigation in court. I have made the point. I will say no more.

I now go straight to the issue of a retrial. As it has a common law origin, I should first take what Lord Diplock said in *Reid v. The Queen* (1979) 2 WLR 221 at page 226 and 227 and I will quote him in great length:

"Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case a reason for setting aside the verdict is that the evidence adduced at the trial was sufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved on a fresh hearing may also be relevant considerations. So too is the consideration that any communal

trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for the second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, B though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tendered to support the defence at the first trial would not be C available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial."

I should now take the decision of the Federal Supreme Court in Abodundu v. The Queen (supra), our locus classicus on retrial in criminal cases. Abbott, FJ., in his judgment said at pages 73 and 74 of the D report:

"We are of opinion that, before deciding to order a retrial, this court must be satisfied that there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of E such a character that on the one hand the trial was not rendered a nullity and on the other hand this court is unable to say that there has been no miscarriage of justice, and to invoke the proviso to Section 11(1) of the Ordinance, (b) that leaving aside the error of irregularity; the evidence F 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 G appellant or any other person of the conviction or acquittal of the appellant are not merely trivial, and (e) that to refuse an order for a retrial would occasion a greater miscarriage of justice than to it."

See also Attah v. The State (1993) 7 NWLR (Pt. 305) 257.

In Akwa v. The State (1969) All NLR 129. This court held that a H Court of Appeal will not send a case back for retrial simply for the purpose of enabling the prosecution to adduce, as against the appellant, evidence which must convict him when his success at the appeal is based

on an absence of that same evidence.

In *Briggs. v. Briggs* (1992) 3 NWLR (Pt. 228) 128 this court held that a retrial is not ordered as a matter of favour or for the convenience of a party but primarily to avoid a miscarriage of justice. This court
B refused to order a retrial because there was nothing on record to justify the order as the issues before the trial court were clear.

In *Ikhane v. Commissioner of Police* (1977) 6 S.C. (Reprint) 78; (1977) 11 NSCC 379, where the magistrate convicted the appellant after
C a trial, the Supreme Court held that the case contains all the basic elements for an order of acquittal and discharge rather than an order of retrial. Obaseki, JSC., delivering the judgment of the court made reference to the principles enunciated in *Abodundu* and said at page 381 of the report:

D “It appears to us that the learned Chief Justice did not advert his mind to these principles before arriving at the decision to order a retrial. We are in no doubt that, guided by the above principles his critical appraisal of the judgment of the learned Senior Magistrate would have led
E him only to a judgment of acquittal.”

It is clear from the above and some other decided cases that before an appellate court can order a retrial, it must take into consideration inter alia the following:

F (a) There must be an error in law, arising from either substantive law or procedural or adjectival law, viz: the law of evidence, civil and criminal procedure. While the error in law or procedural irregularities may not nullify the trial, there could be the possibility of a miscarriage of justice.

G (b) The error of irregularity apart, the totality of the evidence taken at the trial discloses substantial case against the accused to the extent that there is a possibility of successfully prosecuting the accused. Here the court need not come to the conclusion that the accused will be con-
H victed. That will be tantamount to jumping the gun. Once the evidence discloses a substantial case against the accused, the court should order a retrial.

(c) The offence in which the accused was convicted is serious or

grave or the effect of any conviction or acquittal of the accused is not merely trivial.

(d) The period between the time the offence was committed and the time the new or fresh charge is expected to be preferred against the accused. Here the court will take into consideration the possibility of B assembling the witnesses and the possibility of witnesses experiencing loss of memory because of the time lag.

(e) Whether there are special circumstances that would make it oppressive or unjust to put the accused on trial a second time.

(f) The court will not order a retrial to enable the prosecution C repair its case with a view to obtaining a conviction. This is because the court should not encourage the prosecutor to be a persecutor.

(g) Where refusal to order a retrial will cause greater miscarriage D of justice the court will not grant a retrial.

The list is inexhaustive. There is therefore no claim that the above guidelines are exhaustive. It must be emphasized that the above must co-exist. In other words, all the above guidelines must exist positively in a given case.

I should now apply the above guidelines to the facts of the case before us. I will take the guidelines above in turn:

(a) There is an error in procedural or adjectival law and it is the requirement of our law that the accused must be present to take his trial. F Section 210 of the Criminal Procedure Law of Lagos State provides that "Every accused person shall, subject to the provisions of Section 100 and subsection (2) of Section 223 of this law, be present in court during the whole of his trial unless he misconducts himself by so interrupting G the proceedings otherwise as to render their continuance in his presence impracticable. The irregularity arising from non-compliance, with Section 210 of the Criminal Procedure Law nullified the proceedings, and Court of Appeal so held.

(b) This guideline cannot be justified in favour of the appellants, as H the respondent was not given an opportunity to defend himself by stating his side of the case. As the trial was one sided, it cannot be said that the evidence taken at the trial disclosed substantial case against the accused.

(c) The seriousness or gravity of an offence is relative. In the instant case, the offence was basically stealing. When compared with the offence of murder, stealing is not relatively serious or grave. However, when compared with a traffic offence which is a misdemeanour, it is a serious and grave offence. This dichotomy notwithstanding a conviction of stealing will not certainly be trivial to either the accused or to any other person.

(d) I should go into raw dates here. The Air Vice Marshall ordered that the respondent be tried on 22nd July, 1996. The trial was commenced by the GCM four days later, precisely on 26th July, 1996. The Court of Appeal gave its judgment on 10th December, 2001 discharging and acquitting the respondent. Today is 28th January, 2005. Between the time the respondent was tried and this day, a period of almost nine years has elapsed. What has happened to the seven witnesses named at page 9 of the Record? Where are they? Are they still in the Air Force? I know as a matter of fact that some have left the Air Force. How do I know this? I take judicial notice of the fact that some of them had their cases concluded in this court. The first witness on the list, Wg Cdr. L. D. James is one. He was the only one involved in the case which learned counsel for the appellants cited as *NAF v. James* (2002) 19 NWLR (Pt. 798) 295. I can still point at one or two persons on the list of witnesses that this court has taken appeals on.

That apart, a period of almost nine years is quite a period in terms of memory lapse or memory failure. In *Erekanure v. The State* (1993) 5 NWLR (Pt. 294) 365, Olatawura, JSC., said at pages 394 and 395:

“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 witnesses may be affected by the time lag..... 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 August, 1988. The appellant has been in both police and prison custody since his arrest

on 19th November, 1980. 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 or a fresh trial.”

Although the Supreme Court ordered a new trial, it was based on the fact that the offence was murder. But in the instant case, the charge was not murder but stealing.

(e) In my humble view, there are special circumstances that will make it oppressive or unjust to put the accused on trial a second time. Let me refer to the affidavit of the respondent dated 26th October, 1999. Paragraphs 7, 11, 15 and 16 of the affidavit are relevant:

“7. That I was shocked beyond belief to learn while still in Ghana that the Air Force had violently taken possession of my family’s houses and chattels, and were looking for me for execution and or assassination.....

11. That my premature retirement was designed to rob me of the opportunity to hand over my books and to explain whatever discrepancy, if any, that might have appeared hazy in the accounts.....

15. That I further learned from friends who are still in service that following my conviction in absentia all my properties were ordered to be sold by Chief of Air Staff and that a letter to the effect had been written to me.

16. That on a further enquiry from the Air Force guards in my premises, I was given a letter dated the 8th day of July, 1997 and titled “Order for Enforcement of Judgment on Wing Commander P. E. Iyen (NAF 840)”. A copy of the said letter is hereby attached and marked Exhibit B.”

Perhaps apart from paragraph 5 in respect of looking for the respondent for execution and or assassination, which was denied in the counter-affidavit, all the other paragraphs were not denied. Accordingly, they are deemed to have been admitted. The above apart, the order of the GCM on restitution is clear. As I have reproduced it above, I need not repeat the exercise.

After the retirement of the respondent from the service and the

sale of his property, it will be most oppressive and unjust to put the respondent on trial a second time. Both are heavy penalties and to think of a retrial will be an exercise in persecution and not prosecution.

(f) What the prosecution intends or wants to do is to prosecute the respondent in a court of competent jurisdiction in view of the fact that the GCM no longer has jurisdiction to try the respondent. As this will enable the prosecution to repair its bad case, I shall not order a retrial. The object of ordering a retrial is not to give the prosecution a field day to repair its case and return to court with the repaired case to prosecute the accused to conviction. That is certainly not the object of ordering a retrial. Like in (e), that will make or turn the prosecutor as persecutor. Let me not think that such is what the appellants want to do in this matter.

(g) In my humble view, refusal to order a retrial will not cause greater miscarriage of justice. On the contrary, it is my view that ordering a retrial will cause greater miscarriage of justice.

It is a fundamental principle of law that courts of law, like nature, cannot act in vain. They must act for a purpose and for a purpose only. In other words, courts of law cannot make an order in vain. Let me show why an order of retrial, if made, will be in vain.

In virtue of Section 103(1) of Decree No. 105 of 1993 as amended, in order to sustain the charges in a civil court, the appellants must prove the following ingredients: (a) that the respondent is subject to service law, (b) that the respondent was involved in a conduct, and (c) that the conduct of the respondent was prejudicial to good order and service discipline. That was the decision in *Akon v. The Nigerian Army* (2000) 14 NWLR (Pt. 687) 318 at 331. In view of the fact that the respondent was retired from service on 27th April, 1996, the appellants cannot prove their case, even if a retrial is ordered.

That is not all. By Section 169(2) of Decree No. 105 of 1993 as amended, a person shall not be triable by virtue of Section 168(1) of the Decree unless his trial is begun within three months after he ceases to be subject to service law, under the Decree, or the trial is for a civil offence committed outside Nigeria and the Attorney-General of Nigeria consents to such trial, but the subsection shall not apply to the offences of mutiny

and failure to suppress mutiny and desertion under the decree. In view of the fact that the respondent ceased to be an Air Force officer and therefore ceased to be subject to service law on 27th April, 1996 he cannot be prosecuted three months after 27th April, 1996. In other words, time ran out from 28th July, 1996.

Again, that is not all. By Section 169(3) of Decree No. 105 of 1993 as amended, a person shall not be arrested or kept in custody by virtue of Section 168(1) of the decree for an offence at any time after he has ceased to be triable for the offence. In view of the fact that the respondent ceased to be triable for the offences as from 27th April, 1996 he can neither be arrested nor kept in custody for the offences. It is a fact that the respondent is at large, in the sense that he is neither arrested nor kept in custody. In order to bring him before a civil court, he has to be arrested and Section 169(3) forbids such arrest.

The Court of Appeal was conscious of Section 169(2) of Decree No. 105 of 1993 as amended on a possible order of a retrial. The court said at page 234 of the Record:

“Actually I would have answered his prayer and order a retrial in this appeal if not because of the provisions of Section 169(2) of the AFD which provides a three months limit within which to try the accused persons who are no more subject to the service law. For that reason my hands are tied even if I wanted to make an order for retrial in this case.”

Can this court really fault the above dictum? I do not think so, without doing violence to the provision of Section 169(2) Decree No. 105 of 1993 as amended. And I am not prepared to violate the provision.

Let me look at Section 170(1) of Decree No. 105 of 1993 as amended which is seemingly or apparently favourable to the appellants but which the appellants in their very brief and unhelpful brief did not refer to. The subsection provides as follows:

“Subject to the provisions of this Decree prohibiting retrial where conviction is quashed, nothing in this Decree shall restrict the offences for which a person may be tried by a civil court or the jurisdiction of a civil court to try a person subject to service law under this Decree for an offence.”

I entirely agree with the submission of Mr. Idigbe, SAN, that this is not an appropriate case for retrial order against the respondent before a civil court for the same offences charged and already tried before the GCM. I also agree with his submission that it is not the intendment of Section 170(1) of the Decree to subject the respondent or any citizen to double jeopardy and if that was intended then the subsection will be inconsistent with the provisions of the Constitution and therefore unconstitutional, null and void and of no effect whatsoever. Section 1(3) of the Constitution of the Federal Republic of Nigeria, 1999 is the authority for that. Happily the 1993 Decree no more has the force of a Decree and therefore has no capacity to override the Constitution.

Learned Counsel for the appellants submitted in her reply brief (and I repeat it here for ease of reference) that double jeopardy only applies when there has been a trial on the merit. She cited *Kajubo v. The State* (supra). I have carefully examined the case and I do not see where this court said what counsel credited to the decision. If anything, what Oputa, JSC., said in that case is seemingly against the case of the appellants. He said as follows:

“When as in this case, a trial is declared a nullity, it does not mean that the factum of the trial did not exist. There was a de facto trial, call it a purported trial if you please. But because there was a failure to observe the legal and constitutional rules relating to arraignment and the taking of the plea of the appellant, this court declared that, de jure, that in the contemplation of law, the trial amounted to no trial.”

I think this is an appropriate place to take the issue of double jeopardy. Section 36(9) of the Constitution of the Federal Republic of Nigeria, 1999 provides as follows:

“No person who shows that he has been tried by any court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.”

The constitutional guarantee provides for the common law rule against double jeopardy in criminal cases. The common law rule which is

generally referred to as the special plea of *autrefois acquit* or *autrefois convict* is also provided for in Section 181 of the Criminal Procedure Act and Section 244 of the Criminal Procedure Code. By the constitutional provision and the common law rule, the State is barred from instituting criminal proceedings against its subjects *ad infinitum*. See generally Inspector-General of Police v. Igboroji (1957) NRNLR 182; R. v. Jinodu (1948) 12 WACA 368; R. v. Adedojin (1959) 4 FSC 185; The State v. Chukura (1964) NMLR 64; Inspector-General of Police v. Marke (1957) NRNLR 971.

In view of the decision of discharge and acquittal by the Court of Appeal, the respondent can avail himself of Section 36(9) of the Constitution and the common law plea of *autrefois acquit*. In my humble view, it will be begging the straightforward issue to say that the respondent should meet the prosecution at the retrial with the defence. Considering the many sufferings of the respondent in this matter at the GCM stage, it will be unjust to subject him to another trial where he will have the opportunity to raise the plea. Why should the sufferings of the respondent not end in this matter, I ask?

It has been argued strongly that since the trial at the GCM was a nullity, an order of discharge and acquittal was wrong and that the order should have been one of discharge only. I should take a few cases to drown that contention. In Okoro v. The Police (1953) 14 WACA 370, the accused was tried under Section 100 of the Criminal Code. The charge should have alleged that he was a person employed in the public service, but it did not so allege. The West African Court of Appeal held that the trial was a nullity but did not order a fresh trial because the only charge before the court was the one that was bad.

In Okusun v. The State (1979) 3-4 S.C. (Reprint) 24; (1979) 1 All NLR 26, this court refused to order a retrial though the trial was declared a nullity on the ground that the appellant was not allowed to enter a fresh plea to an amended charge. I think this court refused to order a retrial because it did not want to give the prosecution a second chance to regularize its position in order to facilitate the conviction of the appellant.

In Okafor v. The State (1976) 5 S.C. (PReprint) 7; (1976) NSCC

259 the information on which the defendant was convicted was preferred after the Edict came into force but made in accordance with Section 340(2)(a) and (b) as amended by the Edict. On appeal by the defendant, the State applied for the proceedings to be quashed on the ground
 B that the trial was a nullity but alternatively prayed for a retrial. This court held that the application for a new trial must be refused as the trial was a nullity and the court will not grant a new trial (or retrial) upon a trial which was null and void. Delivering the judgment of the court, Idigbe, JSC, said at page 262.

C *"In the case in hand the information was preferred without jurisdiction and the trial was a nullity. On that ground alone that application for a new trial will be refused. Retrial implies that there was a former trial and so this court will not grant a new trial (or retrial) upon a trial*
 D *which was null and void. (See Moses Okoro v. The Police (1953) 14 WACA 370)."*

In Adeoye v. The State, a case I have taken, this court refused to order a retrial. Belgore, JSC., said at page 91:

E *"The trial of the appellant in the trial court was a nullity. The accused must be present in court to hear all the allegations of crime against him. I find merit in this appeal and to order a retrial will not only*
 F *spell more hardship on the accused person but will put more burden on the prosecution, both ways it will be unjust. I allow this appeal and as my learned brother, Ogundare, JSC., has held in the lead judgment, I also enter a verdict of discharge and acquittal for the appellant."*

G Whether an appellate court will order a retrial will depend on the circumstances of the case. It will be most dangerous to take the position that once a trial is declared a nullity, the order that must follow is a discharge and not an acquittal. It is clear from the above cases that such is not the position of the law. There cannot be any such law and if there is any such law it must give way to the well established principles of
 H fairness and fair play in our jurisprudence. Appellate courts have to determine each case in the light of the facts before them.

Learned Senior Advocate drummed into our ears that this is a case affecting fair hearing and that it will be unjust to order a retrial. I think he

has a point, and a very strong one for that matter. In *Ogboh v. The Federal Republic of Nigeria* (2002) 4 S.C. (Pt. II) 106; (2002) 10 NWLR (Pt. 774) 21, the appellant's rights to fair hearing were breached. This court refused to order a retrial. In his leading judgment, Ogwuegbu, JSC., said at page 38:

"The conclusion I have reached is that the trial of the appellate was in breach of Section 33(6)(c) of the Constitution of the Federal Republic of Nigeria, 1979, then applicable, and it is therefore, a nullity. The appeal is allowed. As to what order to make, I will take into account the provisions of Section 36(9) of the 1979 Constitution and Section 30 of the Supreme Court Act which gave the court power in hearing a criminal appeal to order the case to be retried by a court of competent jurisdiction. After considering all the circumstances of the case a retrial will be an exercise in futility; Abieke v. State (1975) 9-11 S.C. 97 and Lori v. State (1980) 8-11 S.C. 81. The appellants are hereby acquitted."

The burden of proof that this is a case in which this court should order a retrial is on the appellants because they are the parties urging this court to order a retrial. Counsel for the appellants has cited three cases. Let me quickly look at them. In *R. v. Hodge* 6 NLR 56, the case had to do with holding of a preliminary investigation and the plea of *autrefois acquit*. It is not apposite. The next case is *IGP v. Marke* (1957) 1 NSCC 8. The Federal Supreme Court held that where the dismissal of a complaint is stated to be on the merits, it is to all intents and purposes an acquittal. That is good law but how does that decision help the appellants? I do not know.

The third and last case is *NAF v. Ex-Wing Comdr, James* (supra). I have examined this case earlier and I do not really see the necessity of repeating the exercise. In my view, James and the two other cases cited by counsel for the appellants do not really avail the appellants' case. And so I come to the conclusion that the appellants did not discharge the burden placed on them to prove that this is a case for a retrial.

In some of the cases examined above, the courts invoked the interest of justice principle. In *Reid v. The Queen* (supra) the Privy Council invoked the interest of justice principle. So too in *Adeoye v. The State*

(Supra) and a large number of cases. What is the role of the court in doing justice or in doing substantial justice, I asked. Lord Wright in his book. *The Future of the Common Law*, said at page 114:

B *“I am not afraid of being accused of sloppiness of thought when I say that the guiding principle of a judge in deciding cases is to do justice, that is justice according to law, but still justice. I have not found any satisfactory definition of justice. What is justice in any particular case is what appears to be just to the just man, in the same way as what is reasonable to the reasonable man.”*

C Lord Denning, one of the greatest protagonists of the judge doing justice in a case before him, said in his book, *The Family Story* at page 174:

D *“My root belief is that the proper role of a judge is to do justice between the parties before him, If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule or even change it so as to do justice in the instant case before him. He need not wait for the legislature to E intervene, because that can never be of any help in the instant case. I would emphasize however, the word ‘legitimately’; the fudge is himself subject to the law and abide by it.”*

F In *Willoughby v. International Merchant Bank (Nig.) Ltd. (1987) 1 NWLR (Pt. 48) 105*, this court held that the primary function of a court is to do justice between the parties to a dispute and not to do abstract justice. In *Edun v. Odan Community (1980) 8-11 S.C. 103*, It was held that the moment a court ceases to do justice in accordance with the law and procedure laid down for it, it ceases to be a regular court to become G a kangaroo court.

H What will be the justice in this matter? Will it be justice for this court to hold that because the trial before the GCM was a nullity, the respondent should only be discharged and not acquitted? Will that be justice, after the respondent has been deprived of his property and gone through all other deprivations and humiliations? What type of justice is that?

The so-called dichotomy or cleavage between discharge and ac-

quittal as contended by learned counsel for the appellants will be regarded by the respondent in his suffering circumstances as a mere nicety of the law which does not mean anything to him. He will regard, and rightly too for that matter, the distinction as a mere technicality or abstract or arid legalism, which will cause him, grave injustice. That is not my sense of justice. That is certainly my sense of injustice and I am not prepared to do injustice.

In Adeoye, the Supreme Court's decision by implication is to the effect that a court of law cannot act in vain. I too cannot see my way clear acting in vain in this appeal, as ordering a retrial will result in that. And what is more, Adeoye was a murder case, which carries capital punishment, and yet this court refused to order a retrial in the circumstances of the case. This is a case of stealing which does not carry capital punishment. Why the furore? I am not even quite sure whether the respondent can be retried, as there was not trial in the first place. In my humble view, a retrial presupposes a previous trial which was declared a nullity. That was the decision of this court in Okafor v. The State (supra) a case I have earlier taken in this judgment.

It cannot invariably be the position of the law that once a court declares a trial a nullity, the order that should follow must be one of discharge and not an acquittal. Law is not mathematics where $1 + 1$ is 2, today and forever. In law $1+1$ could be 1 in the first case, or 2 in the second case or 3 in the third case. It depends on the facts and circumstances of each case. A sweeping generalization that once a trial is declared a nullity the order that must follow is one of discharge could be dangerous and I am not prepared to give the law that burden because it cannot carry it. Again, such a decision will be tantamount to regimenting facts and circumstances of each case on the straight jackets of principles of law. While principles of law are constant and regular like the sun rising from the east, facts of cases vary from one case to the other, and they are the arrowheads of the case.

There cannot be a case unless there are facts. Judges apply the ossified principles of law to the facts and arrive at decisions which could be different even though the same principles of law are applied. That is

the romance of the law. Let us not push it aside or push it away.

Reference is made to the case of Eyorokoromo v. The State (1979) 6-10 S.C. 3. In that case, the appellant was tried and convicted for murder without a plea taken by the trial Judge. This court held that a retrial
B was a proper order in the circumstances.

Eyorokoromo can be distinguished from this case. In this case there was in law and in fact no trial but in Eyorokoromo there was a trial technically as the appellant was heard. It was because no plea was taken that the trial was declared a nullity. There is yet another aspect. In
C Eyorokoromo, counsel for the appellant urged the court to order a retrial. He said:

“We have no objection to the case being sent back for retrial. We would ask that order be made for the case to be tried expeditiously.”

D There is no such situation here. The situation here is quite the opposite and it is that counsel for the respondent has rightly opposed a retrial.

In Eyorokoromo, this court cited the Privy Council decision of
E Reid v. The Queen (Supra) profusely. I had earlier cited that case and I come to the conclusion that the totality of the decision is against ordering a retrial. As a matter of law, the Privy Council refused to order a retrial on the ground that another chance will be given to the Crown *“to fill the*
F *gaps in its evidence.”*

I have made the point that it is dangerous for a court to come to the conclusion that once a trial is declared a nullity, the order that must follow is invariably one of a retrial. The facts of each case have to be considered as was done by this court in Eyorokoromo. In delivering the
G judgment of the court. Belle, JSC., considering the concession of counsel for the appellant for an order of a retrial, said at page 15:

“It is reasonable to infer that before conceding to a retrial, learned counsel for the appellants had read the records of the retrial and was
H *satisfied that all the facts warranting a retrial existed. We have read and considered the evidence adduced at the trial in the High Court and we are satisfied that it is a proper case to order a retrial.”*

This court did not make a blanket statement in Eyorokoromo that

once a trial is a nullity what must follow is an order of a retrial. In the circumstances of Eyorokoromo, I am in entire agreement with the judgment of this court. But the circumstances of Eyorokoromo are clearly different from the circumstances of this case.

In the administration of criminal justice, it is not only the victim of the crime or the State that should receive the sympathy of the court. There could be deserving circumstances where the accused must also receive the sympathy of the court, particularly when the mens rea and actus reus of the offence are not proved according to law, as in this case. This is one case where the accused deserves the court's sympathy. Here is an accused who was stripped of virtually his properties including cash in bank without due process. Here is an accused who was retired, again without due process. The prosecution now wants to take him to a civil court for a trial. Why should the prosecution be allowed to chase the respondent from pillar to post? Does the prosecution want the respondent to jump into the Atlantic Ocean and die? Should there be no end to the suffering of the respondent in this matter? To subject the respondent to the excruciating order of another trial, is, in my humble view, grave injustice and I am not prepared to be a party to it. Our adjectival law only allows the prosecution to prosecute. It does not allow the prosecution to persecute. I have said this earlier.

I have painstakingly looked at this matter from all angles and facets and I do not see my way clear in subjecting the respondent to another trial because in my view his cup is full. Let the water not overrun the cup. Enough is enough.

In sum, I hold that in the peculiar circumstances of this case, the Court of Appeal correctly discharged and acquitted the respondent. Accordingly, I am unable to go along with the majority judgment and so I dissent on Issue No. 1. I agree with the leading judgment just delivered by my learned brother, Ejiwunmi, JSC., on Issue No. 2. The appeal is dismissed as it lacks merit.

my Lord Ejiwunmi in this matter. I accordingly allow the appeal and set aside the decision of the Court of Appeal in acquitting the respondent of all the charges leveled against him. The respondent is only discharged and I accordingly so order.

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EDOZIE JSC

I was privileged to have read in draft the leading judgment of my learned brother, Ejiwunmi, JSC., and I agree with him that the appeal should be allowed. The purported trial of the respondent is vitiated by substantial irregularity that it hardly can be described as a trial.

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Firstly, the court or tribunal that purportedly tried him, that is, the General Court Martial (GCM) had no jurisdiction to try him. In this regard, the Court of Appeal had this so say at p. 225 of the record:-

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"It follows, therefore, from what I have said above, that the GCM lacked jurisdiction to try the appellant since the GCM was not convened by the Chief of Air Staff or any of the officers mentioned in Section 131(2) of AFD. As a corollary, the decisions or orders made by the GCM was a nullity and of no effect."

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And at p. 228, the court further held:-

"Thus, by virtue of the provisions of Section 169(2) read with Section 168 of the AFD No. 105 of 1998, a person shall not be tried unless the trial is commenced within three months after he ceased to be subject to service law."

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I am, therefore, in total agreement with the submissions of the learned appellant's counsel that the GCM had acted without jurisdiction when it tried, convicted and sentenced the appellant. The trial, conviction and sentence having been made by the GCM without jurisdiction are nullity."

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Secondly, the respondent was tried in absentia as he appeared to have absconded when his accomplices were being tried. In this connection, the court below at pages 232,233 of the record held thus:-

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"I must say with regret that the decision of the GCM to try the appellant in absentia is most unfortunate. At best the trial can be re-

garded or described as a “mockery trial”.....The trial or mock-trial (If I may call it so) can hardly be described as a trial in real sense the principle of fair hearing had not been completed with from whatever angle one looks at it..... It is a trial which must be condemned with all emphasis. It should not be conducted in the present civilized age.”

Thirdly, the evidence relied upon by the GCM to convict the respondent was inadmissible as it consisted mainly of evidence of witnesses who testified in the previous trial of the respondent’s accomplices. On this point, the lower court opined as follows:-

“In the light of all that I have said above, I share the views of the learned appellant’s counsel that the evidence tendered by the prosecution which was ultimately used by the GCM in convicting the appellant was wrongly admitted. The reliance on same by the GCM to convict him was also wrong. The judgment cannot be sustained. It ought to be quashed and it is hereby accordingly so quashed.” (page 232)

It is manifest from the foregoing observations that the purported trial of the respondent was tainted with substantial irregularities both substantive and procedural as to vitiate the trial. A decision given by a tribunal or court without jurisdiction is a nullity. If the State High Court gives a decision on a case which falls within the exclusive jurisdiction of the Federal High Court, that decision is null and void and cannot sustain a plea of *res judicata*. In the same vein, if a magistrate tries and convicts a person for murder for which he lacks jurisdiction to try, the person so convicted cannot successfully raise a plea of *autrefois convict* to prevent a subsequent trial before a court vested with jurisdiction to try him. According to Section 36(9) of the 1999 Constitution, it is a conviction or acquittal by a court of competent jurisdiction that can found a plea of *autrefois convict* or *autrefois acquit*.

In the instant appeal, as rightly pointed out in the leading judgment, the narrow issue raised in this appeal is whether having regard to the patent and substantial irregularities in the trial of the respondent, he ought to have been discharged and acquitted or discharged *simpliciter*. In my view, an order of “*discharge and acquittal*” presupposes that there

has been a valid trial in which the respondent was not found guilty, but that is a far cry from the situation in this case. I take the view that having regard to the irregularities associated with the purported trial of the respondent as highlighted above particularly the want of jurisdiction on the part of court that purportedly tried him, an order of “discharge” would have been appropriate. The court below appreciated this when at page 234 of the record it reasoned as follows:-

“The learned counsel for the respondent Mr. J. A. Adamu urged me to allow the appeal or in the alternative order a retrial. In the real sense, the appellant had not been tried at all as his other nine colleagues were. This was due to his abscondment which was most unfortunate since his other colleagues have suffered the agony of trial, detention and were even convicted and sentenced by the GCM even though some of them were discharged and acquitted in the sister cases I cited earlier and some of them have even served part of the imprisonment terms. Actually, I would have answered his prayer and ordered a retrial in this appeal if not because of the provisions of Section 169(2) of the AFD which provides a three months time limit within to try accused persons who are no more subject of the service law. For that reasons, my hands are tied even if I wanted to make an order for retrial in this case.”

From the above excerpt, the court below appears to have agreed that the respondent ought to be retried but it declined to make an order to that effect because of the time bar imposed by Section 169(2) of the AFD. But the lower court did not consider nor was its attention drawn to Section 170(1) of Decree No. 105 of 1993 as amended which enacts-

“Subject to the provisions of this decree prohibiting retrial where conviction is quashed, nothing in this decree shall restrict the offences for which a person may be tried by a civil court or the jurisdiction of a civil court to try a person subject to service law under this decree for an offence.” Although both parties have expressed opinions in their briefs on this provision, its consideration now does not appear to me relevant having regard to the narrow issue for determination in this appeal.

It is for the foregoing and the more detailed reasons articulated in the leading judgment that I also allow the appeal and endorse the conse-

54 Chief of Air Staff v. Iyen (2005) 1 KLR Edozie JSC
quential orders contained in the aforesaid judgment.

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