

SUPREME COURT OF NIGERIA

11TH MAY, 2007. SC. 284\2003

**CORAM:- A. I. KATSINA-ALU, N. TOBI, I. F. OGBUAGU,
F. F. TABAI, P. O. ADEREMI, JJSC**

SIMON EDIBO APPELLANT
V.
THE STATE RESPONDENTS

APPEALS - Preliminary objection - Criminal procedure - Defences - Where defences raised on appeal are supported by evidence - Objection against them is unfounded - Seeing that an accused is entitled to any available defence - Whether raised by him or not (H1)

CRIMINAL PROCEDURE - Arraignment - Plea - Propriety of - Where plea was taken in the judge's chambers - Instead of a public place prescribed by s.33 (3) 1979 Constitution - The proceedings are null and void (H2)

APPEALS - Retrial - Criminal proceedings - Factors that justify order of retrial - Include that it will not be oppressive against appellant (H3)

CRIMINAL LAW - Arrest - Murder - Manslaughter - Where force used in effecting arrest was not excessive - But death occurred - Manslaughter would be the conviction to impose (H4)

CRIMINAL PROCEDURE - Appeals - Retrial - Propriety - Where order of retrial will be oppressive - Verdict of discharge will be made (H5)

FACTS

The appellant was one of ten persons charged with various offences including culpable homicide before the Benue State High Court, Makurdi. The appellant and some of the other accused persons were on road block duty. At about 10.30pm, they received a radio message to

intercept and arrest some fleeing robbers who had earlier dispossessed a Police Sergeant (1st accused) of his gun. They were given description of the vehicle in which the robbers were escaping. Appellant and others saw an approaching vehicle which matched the description. Deceased persons and PW8 alighted from the vehicle and started running into the bush, conveying the impression that they were the fleeing robbers. Appellant and late 4th accused fired at them resulting in the death of two persons. It turned out that the radio message was false.

The trial Judge found 1st and 2nd accused persons guilty of giving false information to the police. Appellant and late 4th accused were convicted for culpable homicide and sentenced to death. Their appeal to the Court of Appeal was dismissed. Still aggrieved appellant has further appealed to the Supreme Court. Respondent raised unfounded preliminary objection to a substantial part of the arguments in appellant's Brief as being raised without leave of Court.

ISSUES FOR DETERMINATION

1. Whether the Court below was right in affirming the decision of the trial court to the effect that the force used by the Appellant was far in excess of what was reasonably necessary to effect arrest.

2. Whether the Court below was right when it held that taking the plea of the Appellant in chambers by the learned trial judge is not unconstitutional.

HELD (Unanimously allowing the appeal per **TABAI JSC**)

APPEALS - Preliminary objection

1. It has been decided in a number of cases that counsel for an accused person cannot, in his final address, raise a fresh defence not supported by any evidence. This case is however distinguishable because learned counsel for the Appellant made copious references to the evidence on record in support of his submissions. No new issue is being raised here.

Furthermore, it is settled law that in criminal trials the court is not confined to considering only the defences raised by an accused person. An accused person in a criminal trial is entitled to any defence which, on the totality of the evidence, is available to him whether or not he specifi-

cally raised it himself. And the court including an Appellate court has a duty to carefully consider the entire evidence, and give an accused person the benefit of any defence available therein to him notwithstanding the fact that it was not raised by him. I hold that the preliminary objection was misconceived and is accordingly, dismissed for lack of merit. (p. 2116 F)

Arraignment - Plea - Propriety of

2. The arraignment and taking the plea of an accused person is the very commencement of a criminal trial. It is the stage when the accused person appears at the court, the charge explained to his understanding and pleads thereto in person and not even through his counsel. It is a Very fundamental aspect of any criminal proceedings and that underscores the need for the strict and mandatory compliance in matters relating thereto. Thus any criminal trial, no matter how well conduct, without the plea of the accused person first and properly taken is a nullity.

In the light of the foregoing, was the Court of Appeal right when it held that the arraignment and taking the plea of the appellant and other aroused persons in the chambers of the learned trial judge was proper. I answer this question in the negative. The proceeding of the 19th of January 1998 wherein the plea of the Appellant and others were taken in the judge's chambers was not only irregular; it was a fundamentally defective rendering the entire proceedings null and void.

I hold in the circumstances that this appeal succeeds on that issue. The appeal is accordingly allowed and the judgment of the court below set aside. The entire proceedings of the learned trial judge including the conviction and sentence of the Appellant and others tried along with him contravened the provisions of section 33(3) of the 1979 Constitution and same is hereby declared null and void and is set aside. (p. 2121 G)

Factors that justify order of retrial

3 . In order to justify an order of retrial, an appellate court must satisfy itself of the existence of number of factors, depending on the peculiar facts and circumstances of each case. The factors include:

(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 the appellate court is unable to say that there has been no miscarriage of Justice.

B (b) that besides the error or irregularity, the totality of evidence discloses a substantial case against the appellant.

(c) that there are no special circumstances that would render it oppressive to put the appellant on trial a second time.

C (d) that the offence or offences with which the appellant is 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 retrial would occasion a greater miscarriage of justice than to grant it. (p. 2122 E)

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Arrest - Murder - Manslaughter

4 . On the facts accepted by the learned trial judge, the Appellant and the other co-accused persons had been put on a state of alert to intercept and arrest some fleeing robbers who had earlier dispossessed a colleague of his gun. They had been given the description of the vehicle in which the robbers were escaping. The Appellant and others saw an approaching vehicle which matched the description of the one used by the alleged fleeing robbers. From this vehicle alighted the deceased persons and the PW8 who started running into the bush conveying the impression that they were the fleeing robbers. It was at this stage that the Appellant and late 4th accused person fired, resulting in the death of the deceased persons. In these circumstances, can it be said with certainty that the force used by the appellant and the 4th accused person was far in excess of what was reasonably necessary to effect the arrest of the fleeing men? I have my doubts which should be resolved in favour of the appellant. At best they can only sustain a conviction for manslaughter. (p. 2123 C)

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Appeals - Retrial - Propriety

5. The Appellant has been in prison custody for about ten years. His colleague A.S.P. David Joshua has since died in prison custody. In such

circumstances, I think it will be oppressive to order a retrial.

Besides, an order of retrial would necessarily involve the re-arrest of the other accused persons who were discharged and acquitted. 1st - 3rd accused persons were convicted of lesser offences. The result is that the consequences of such an order of retrial would not be merely trivial. B

From all the circumstances a discharge would best serve the ends of justice. Accordingly, I enter a verdict of discharge for the Appellant. (p. 2123 G)

NOTABLE POINTS OF INTEREST C

OGBUAGU JSC

1. Chambers of a Judge is not a public place

Let me dismiss with respect, and as completely misconceived and unacceptable to me, the submission at page 19 paragraph 6.2 of the Respondent's Brief, that the Chambers of a Judge, is a public place and satisfies Section 33(3) of the 1979 Constitution (as amended) and Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria. I say so because, nothing can be far from truth. If I or one may ask, can the Chambers of a Judge, be described as an "open place" which is accessible to all and sundry? I think not. This is in spite of the "strained" reference to New English Dictionary and Thesaurus page 814, New Edition as to the definition of a "Public Place", Black's Law Dictionary page 1230, 6th Edition and the case of R. v. Kane (1965) 1 All E.R. 707 cited at page 2094 of Stroud's Judicial Dictionary, 5th Edition, Vol. 4 in the respondent's Brief and other cases cited therein, I hold firmly, that a Judge's Chambers, cannot and will never be, a public place or an "open" and unrestricted place. By these references and arguments, can the learned counsel for the Respondent, in all honesty and seriousness, maintain or insist, that he/she can walk into the Chambers of any Judge or Justice, without the consent or permission of the said Judge or Justice and unrestricted? I think not. Surely and certainly, a Judge's Chambers, is not and cannot be equated to a hall in a public building that is used for formal meetings. As a matter of *fact*, a Chambers, can also be defined as or equated with a Private bedroom or private room. Even in Black's Law D

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Dictionary, 7th Edition at page, 224, a Judges Chambers; is defined as “*the private room or office of a Judge*”. (p. 2130 F)

2. Mandatory constitutional provision cannot be waived

B In effect, it is now firmly established that a breach of a mandatory Constitutional provision, is more than a mere technicality. That it touches on the legality of the whole proceedings, including, judgments, (and I will add the taking of a plea of an accused person or persons) and any incidental order or orders made thereafter.

C In my respectful but firm view therefore, the right provided in Section 33(3) of the 1979 Constitution or 36(3) of the 1999 Constitution, on the decided authorities, is a public right for every citizen of this Country. The courts must be open to any one who may present himself or D herself for admission, or is obliged to be so presented. There are some exceptions in the proviso of the said two Sections as to the right of the public to free access to court proceedings. But being a public right, a party to any matter in the court, cannot waive the right. (p. 2133 F)

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REPRESENTATION

Mahmud Garfar for Appellant.

Vera Venda (Mrs.), Director, Public Prosecution, Ministry of Justice, F Makurdi, Benue State with her E. G. A. Hundu, State Counsel, for Respondent.

CASES REFERRED TO

EKPEYONG V State (1993) 5 N.W.R.L (Part 295) 513 at 525
G GABRIEL v THE STATE (1989) 5 N.W.L.R (Part 122) 457 at 464
WILLIAMS v THE STATE (1992) 8 N.W.L.R (Parts 261) 515
UDOFIA v THE STATE (1984) 12 SC 139
SANMABO v THE STATE (1967) N.M.L.R. 314
H ALAKE v THE STATE (1991) 7 N.W.L.R (Part 205) 567
THE STATE v MADOKOLU (1972) 2 ECSLR 426
Oba Oyeyipo & anor .v. Chief Oyinloye (1987)1 NWLR (Pt.50) 356 @ 377

OYEYIPO v OYINLOYE (1987) 1 NWLR (Part 50) 356

N.A.B. LTD v BARRI ENGINEERING (NIG.) LTD (1995) 8 N.W.L.R. (Part 413) 257 at 273 and

CHIME v. UDE (1996) 7 NWLR (Part 461) 379

ABODUNDU v R (1959) SCNL 162

B

OKODUWA v THE STATE (1988) 2 N.W.L.R. (Part 76) 333

ATTAH v THE STATE (1993) 7 NWLR (Part 305) 257 at 289

EREKANURE v THE STATE (1993) 5 NWLR (Part 294) 385 at 394-395

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STATUTES & RULES REFERRED TO

Evidence Act S. 150(1)

Constitution of the Federal Republic of Nigeria 1979 ss. 33(3) and 216

Constitution of the Federal Republic of Nigeria 1999 s. 36(3)

Supreme Court Rules 1985 (as amended) O. 6 rr. 3(1)(2), 9, O. 5 r. (1) D

High Court (Civil Procedure) Rules of Western Region O. 25 r. 3

LEAD JUDGMENT BY TABAI JSC

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The Appellant Insp. Simon Edibo was one of ten persons charged with the commission of various offences including culpable homicide. The trial was at the Benue State High Court at Makurdi and it was before late A. J. Ikongbeh J (as he then was). The trial involving the testimony of witnesses and address of counsel for the prosecution and defence ended on the 29/5/98. In his judgment on the 7/8/98 the Appellant who was the 5th accused and the 4th accused A.S.P.. David Joshua (since deceased) were each found guilty and convicted of culpable homicide and sentenced to death. They both proceeded to the Court of Appeal on appeal. F G

In its unanimous judgement on the 7th of December, 1999 the appeal was dismissed. By the Notice of Appeal dated 9/12/99 each of the convicts came on appeal to this Court. The other Appellant having died, it was the appeal of the present surviving Appellant that was heard on the 15/2/07. The Appellant and the Respondent filed and exchanged their Briefs of Argument. The Appellant's Brief was prepared by Rotimi Oguneso H

of Abdullahi Ibrahim & Co and same was filed on the 26/1/05. The Respondent's Brief was settled by. Vera Venda (D.P.P. Ministry of Justice, Benue State). The two parties agreed and formulated only two issues for determination thus:

B 1. Whether the Court below was right in affirming the decision of the trial court to the effect that the force used by the Appellant was far in excess of what was reasonably necessary to effect arrest.

C 2. Whether the Court below was right when it held that taking the plea of the Appellant in chambers by the learned trial judge is not unconstitutional.

D In addition the Respondent has raised preliminary objection to a substantial part of the arguments of the Appellant in the Appellant's Brief. He referred, in particular to the arguments in paragraphs 4.7 4.9 4.11, 4.12 4.1.10, 4.1.11 and 4.1.12 of the Appellant's Brief and argued that the points therein having been raised without the leave of court cannot be entertained and urged that they be discountenanced.

E I have examined the arguments in the said paragraphs of the Appellant's Brief and I do not, with respect, agree with the view of the learned Director of Public Prosecutions. The arguments in those paragraphs are focused mainly on evaluation of the evidence on record. It is the contention for the Appellant that had there been, a proper evaluation, F the Appellant would not have been convicted for culpable homicide. He therefore invited this Court to re-evaluate the evidence on record to see if it warrants the conviction for culpable homicide. **It has been decided in a number of cases that counsel for an accused person cannot, in his final address, raise a fresh defence not supported by any evidence.** G See EKPEYONG V State (1993) 5 N.W.R. (Part 295) 513 at 525. **This case is however distinguishable because learned counsel for the Appellant made copious references to the evidence on record in support of his submissions. No new issue is being raised here.**

H Furthermore, it is settled law that in criminal trials the court is not confined to considering only the defences raised by an accused person. An accused person in a criminal trial is entitled to any defence which, on the totality of the evidence, is available to

him whether or not he specifically raised it himself. And the court including an Appellate court has a duty to carefully consider the entire evidence, and give an accused person the benefit of any defence available therein to him notwithstanding the fact that it was not raised by him. See GABRIEL v THE STATE (1989) 5 N.W.L.R B (Part 122) 457 at 464, WILLIAMS v THE STATE (1992) 8 N.W.L.R (Parts 261) 515; UDOFIA v THE STATE (1984) 12 SC 139. **I hold that the preliminary objection was misconceived and is accordingly, dismissed for lack of merit.**

The first issue involves a detailed evaluation of the evidence to determine whether the force used by the Appellant was far in excess of what was reasonably necessary to effect the arrest of the fleeing men. But having regard to the question raised in the second issue, the ultimate resolution of same and the likely consequential order I shall first deliberate on the second issue. D

The second issue is whether the court below was right when it held that the taking of the plea of the Appellant in chambers by the learned trial judge is not unconstitutional. It is clear from the record that the plea of the Appellant who was the 5th accused person was taken on the 19th of January 1998 in Chambers. He pleaded not guilty to the charge. He was represented by his counsel J. S. Okutepa Esq. These facts are recorded at pages 37 and 38 of the record. There is therefore no dispute that the plea of the Appellant was taken in chambers. The question is the legal effect of this plea on the entire trial. E F

This issue was raised at the Court below which after detailed consideration of the submissions of counsel for the parties and section 150(1) of the Evidence Act opined at page 263 of the record: G

“Much as I fully subscribe to the view that pleas should be taken in open court, and that it is good practice and desirable my understanding of the authorities is not that except the court sits in the court hall to take plea as is now being urged upon us by the learned appellant’s counsel such plea automatically are invalid null and void and of no effect whatsoever.” H

The court then went on to examine three previous decisions of

this court namely OYEYIPO v OYINLOYE (1987) 1 NWLR (Part 50) 356; N.A.B. LTD v BARRI ENGINEERING (NIG.) LTD (1995) 8 N.W.L.R. (Part 413) 257 at 273 and CHIME v. UDE (1996) 7 NWLR (Part 461) 379 and section 187 of the Criminal Procedure Code and

B concluded thus:-

“From the foregoing analysis I think this court in the absence of contrary evidence, is entitled to assume that the correct procedure was adopted by the trial court on the issue of the Appellants’ plea having been taken in chambers. The learned counsel has not been able to establish any irregularities on the part of the trial court on the arraignment of the Appellants. I therefore find myself unable to accept the view of the learned counsel for the appellants that the proceedings, conviction and sentence of the appellants was null and void and of no effect whatsoever.”

The above reasoning and conclusion, though seemingly attractive, does not with respect, represent the correct state of the law. The decision did not satisfy the Appellant who has therefore brought the complaint here. It is the submission of Rotimi Oguneso for the Appellant that OYEYIPO v OYINLOYE (supra) and CHIME v UDE (supra) do not apply in this case. In his view, it is the decisions of this Court in NIGERIA-ARAB BANK LTD v BARRI ENGINEERING NIGERIA LTD (supra) OVIASU v OVIASU (1973) 11 SC 315 and NUHU v OGELE (2003) 18 NWLR (Part 852) that apply.

The learned D.P.P on the other hand referred to some dictionary definition of “Public Place” and argued that, the chambers of a judge is, within the meaning of those definitions of public place and that taking the plea of the Appellant therein satisfies section 33(3) of the 1999 Constitution particularly having regard to the fact that members of the public were not restricted therefrom. It was submitted that taking the plea in the judges’s chambers is a judicial and official act substantially regular by virtue of the provisions of section 150(1) of the Evidence Act. It was his further submission that reliance on N.A.B. LTD v BARRI ENGINEERING (NIG.) LTD, OVIASU v OVIASU and NUHU v OGELE will amount to leaving room for technicality to triumph while substantial justice pros-

trates.

In the first place the lower court appeared to have laboured under the misapprehension that OYEYIPO v OYINLOYE and CHIME v UDE on the one hand and N.A.B. v BARRI ENGINEERING and NUHU v OGELE on the other are two sets of conflicting decisions of this Court and preferred the former because they were decisions of the full court. There is no conflict between the two sets of decisions. In OYEYIPO's case there was an application dated 24/10/06 by the Respondent in an appeal for the appeal to be dismissed for want of diligent prosecution, the Appellant having failed to file the Appellant's Brief of Argument within the period prescribed by the Supreme Court Rules. The Application was served on the Appellant. The Appellant did not file any counter affidavit opposing the application for dismissal of his appeal. Nor did he file any motion for extension of time to file the Appellant's Brief. On the 12/11/06 this Court, in exercise of its powers under Order 6 Rule 3(1) and (2) and 9 took the application in chambers and dismissed the appeal. Subsequent thereto the Appellant brought an application to the court to set aside its dismissal of the appeal on the ground that the hearing of the application and dismissal of the appeal in chambers instead of the proceedings being conducted in open

court was contrary to section 33 of the 1979 Constitution and therefore null and void. The application was refused and dismissed since this court derived its powers under Order 6 Rule 3(2) to hear the application for and dismissal of the appeal in chambers.

CHIME v UDE (supra) was also to the same effect as OYEYIPO v OYINLOYE (supra). The Appellants filed their Notice of Appeal to the Supreme Court on 21/4/93. The record of proceedings was transmitted to the Supreme Court on the 29/12/93. Under Order 6 Rule 5(1)(a) of the Supreme Court Rules 1985 (as amended) the Appellants should have filed their brief of argument on or before the 14/3/94. They failed to file their brief. On the 8/3/95 this court *suo motu* and sitting in chambers dismissed the appeal by recourse to its powers under Order 6 Rule 5(2) of the Rules of the Supreme Court. On the 6/11/95 the appellants brought an application for the court to set aside its dismissal of the appeal. The

application was dismissed.

These two cases were predicated on the powers specially vested on the Supreme Court under the Rules of the Supreme Court to sit in chambers to dismiss an appeal either on its own motion or upon the application by the Respondent. And the said Rules having been made pursuant to section 216 of the 1979 Constitution are not unconstitutional arid indeed made to achieve the very fair hearing guaranteed in section 33 of the 1979 Constitution. Even this authority of the Supreme Court to sit in chambers is limited in scope, and restricted only to non-contentions applications or circumstances. Once there is an indication, on good cause, that the order sought to be made is contested the matter has to betaken in open court. -

Let me now consider the other set of cases. In *OVIASU v OVIASU* (1973) 11 SC 187 the hearing of the matrimonial case took place in the chamber of the trial of judge. Neither the parties nor their counsel requested for the hearing in chambers.. In his judgment at the conclusion of the hearing the learned trial judge dissolved the marriage. On appeal this court allowed the appeal set aside the judgment and ordered a trial de novo. The Court (per Sowemimo, JSC) after referring to section 22, subsections 1 and 3 of the Constitution of the Federation Order 25 Rule 3 of the High Court (Civil Procedure) Rules of Western Region then applicable in Mid Western Region and *MACPHERSON v MACPHERSON* (1936) AC 177 at 220 concluded in the following terms:

“The hearing of this divorce case in the chambers of the learned trial judge was not made a specific issue in the grounds of appeal filed before us but during the arguments however, our attention was drawn to it by learned counsel for appellant as being irregular. As the counsel for the Respondent did not apply for the hearing of the case in chambers there was nothing he could say. On the record it seems that the decision to take the case in chambers was the decision of the learned trial judge himself. We regard the irregularity as being fundamental, which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the judge’s chambers did not constitute a regular hearing of an

action in a court.”

NIGERIA-ARAB BANK LTD v BARRI ENGINEERING NIGERIA LTD (supra) presented a similar scenario. The Appellant was the Defendant at the High Court in a claim for damages. At the close of evidence and address of counsel for the parties, the matter was adjourned to the 29/8/91 for judgment. On the 29/8/91 the learned trial judge, for no reasons advanced to the parties and on his motion invited counsel for the parties into his chambers and delivered the judgment wherein he granted all the reliefs claimed by the Plaintiff/Respondent. His appeal to the Court of Appeal was dismissed, the court relying on OYEYIPO v OYINLOYE (supra) which it thought overruled OVIASU v OVIASU (supra). On further appeal this Court relying on section 33 of the Constitution 1979 Order 36 Rule 1 of the High Court Rules Lagos State and after distinguishing OVIASU v OVIASU and OYEYIPO v OYINLOYE, allowed the appeal, set aside the judgment on the ground of nullity and ordered a retrial. In his concurring judgment Ogundare, JSC had this to say in conclusion:

“The conclusion I reach is that in the delivery of the judgment in this case the learned trial judge has committed a fundamental breach of the provisions of section 33(3) and (13) of the 1979 Constitution and of Order 36 Rule 1 of the High Court Rules of Lagos State. The breach vitiates the entire proceedings before him. There must be no room at any stage of the hearing of a cause for cloistered justice.”

(see pages 290-291)

The principle in OVIASU v OVIASU and N.A.B. v BARRI ENGINEERING was again applied in NUHU v OGELE.

As I pointed out earlier the plea of the Appellant and other accused persons were taken in the judge’s chambers on the 19th of January 1998. **The arraignment and taking the plea of an accused person is the very commencement of a criminal trial. It is the stage when the accused person appears at the court, the charge explained to his understanding and pleads thereto in person and not even through his counsel. It is a Very fundamental aspect of any criminal proceedings and that underscores the need for the strict and manda-**

tory compliance in matters relating thereto. Thus any criminal trial, no matter how well conduct, without the plea of the accused person first and properly taken is a nullity. See SANMABO v THE STATE (1967) N.M.L.R. 314, ALAKE v THE STATE (1991) 7 N.W.L.R (Part B 205) 567 THE STATE v MADOKOLU (1972) 2 ECSLR 426.

In the light of the foregoing, was the Court of Appeal right when it held that the arraignment and taking the plea of the appellant and other aroused persons in the chambers of the learned trial judge was proper. I answer this question in the negative. The proceeding of the 19th of January 1998 wherein the plea of the Appellant and others were taken in the judge's chambers was not only irregular; it was a fundamentally defective rendering the entire proceedings null and void.

I hold in the circumstances that this appeal succeeds on that issue. The appeal is accordingly allowed and the judgment of the court below set aside. The entire proceedings of the learned trial judge including the conviction and sentence of the Appellant and others tried along with him contravened the provisions of section 33(3) of the 1979 Constitution and same is hereby declared null and void and is set aside.

Having come to this conclusion the next question is the appropriate order to make. Should it be one for retrial of the appellant? In order to justify an order of retrial, an appellate court must satisfy itself of the existence of number of factors, depending on the peculiar facts and circumstances of each case. The factors include:

(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 the appellate court is unable to say that there has been no miscarriage of Justice.

(b) that besides the error or irregularity, the totality of evidence discloses a substantial case against the appellant.

(c) that there are no special circumstances that would render it oppressive to put the appellant on trial a second time.

(d) that the offence or offences with which the appellant is

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 retrial would occasion a greater miscarriage of justice than to grant it.

See ABODUNDU v R (1959) SCNLR 162; OKODUWA v THE STATE (1988) 2 N.W.L.R. (Part 76) 333; ATTAH v THE STATE (1993) 7 NWLR (Part 305) 257 at 289; EREKANURE v THE STATE (1993) 5 NWLR (Part 294) 385 at 394-395.

In this case, there is no doubt that there was an error in law and/or irregularity in procedure warranting the nullification of the entire proceedings. However, for the purpose of whether or not to order a retrial there are a number of factors for consideration. **On the facts accepted by the learned trial judge, the Appellant and the other co-accused persons had been put on a state of alert to intercept and arrest some fleeing robbers who had earlier dispossessed a colleague of his gun. They had been given the description of the vehicle in which the robbers were escaping. The Appellant and others saw an approaching vehicle which matched the description of the one used by the alleged fleeing robbers. From this vehicle alighted the deceased persons and the PW8 who started running into the bush conveying the impression that they were the fleeing robbers. It was at this stage that the Appellant and late 4th accused person fired, resulting in the death of the deceased persons. In these circumstances, can it be said with certainty that the force used by the appellant and the 4th accused person was far in excess of what was reasonably necessary to effect the arrest of the fleeing men? I have my doubts which should be resolved in favour of the appellssant. At best they can only sustain a conviction for manslaughter. The Appellant has been in prison custody for about ten years. His colleague A.S.P. David Joshua has since died in prison custody. In such circumstances, I think it will be oppressive to order a retrial.**

Besides, an order of retrial would necessarily involve the re-arrest of the other accused persons who were discharged and ac-

quitted. 1st - 3rd accused persons were convicted of lesser offences. The result is that the consequences of such an order of retrial would not. Be merely trivial.

From all the circumstances a discharge would best serve the ends of justice. Accordingly, I enter a verdict of discharge for the Appellant.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my learned brother Tabai JSC. I agree with it and, for the reasons he gives I too allow the appeal and set aside the judgments of the two courts below. I also enter an order of discharge of the appellant.

TOBI JSC

The facts of this appeal are pathetic. They relate to a mistaken identity. Wrong persons were shot dead, taking them to be the culprits or criminals. Let us hear the story.

The appellant was a Police Officer serving in Makurdi in the Benue State Police Command. On 11th January, 1997 he was on duty together with five others under the command of Mopol David Joshua, ASP (4th accused) at Wurukurn Round about for “stop and search”. At about 10.30p.m they received a radio message on their Walkie talkie that some men had attacked some Policemen from the Daudu Police Station who were on a similar duty of “stop and search”. The men were said to have seized from a Police Sergeant (1st accused) a service pistol revolver and they were said to be headed towards Makurdi in a pick-up van with Registration No. AE 6120 MKD.

Upon receiving the message, the appellant’s group positioned themselves to intercept the men who allegedly attacked their colleagues and dispossessed one of them of his fire arm. Soon after, a vehicle matching the only described in the radio message was sighted by the appellant’s group. On sighting the fortified checkpoint, the men got out of their

vehicle and ran towards the bush, whereupon the appellant and his colleagues pursued them while shooting at them. Two of them were shot dead while a third one (PW 8) escaped. The dead men were taken to the Police State Headquarters, Makurdi and later to the mortuary. It turned out that the radio message was false. B

Subsequently, the appellant and his colleagues were charged with conspiracy and culpable homicide punishable with death before the High Court of Benue State. The appellant was the 5th accused. Also charged along with them were some men of the Daudu Police Station who were charged *inter alia*, with the offence of giving false and misleading information to the Benue State Police Command to the effect that the two deceased persons and one other were armed robbers who had attacked them and seized a service pistol revolver from a Police officer. C

The learned trial Judge found two of the Policemen (1st and 2nd accused persons) guilty of giving false information to the Police with intent to mislead them. He also found the appellant guilty of culpable homicide punishable with death. They were sentenced to death. The learned trial Judge discharged and acquitted the others. His appeal to the Court of Appeal was dismissed. He has come to this court. D E

Two issues are formulated in the appellant's brief. So too in the respondents brief. The issues formulated by both parties are similar. They are: F

“(1) Whether the Court of Appeal was right in confirming the decision of the learned trial Judge that the force used by the appellant was far in excess of what was reasonably necessary to effect arrest.

(2) Whether the Court of Appeal was right when it held that the taking of the plea of the respondent in chambers by the learned trial Judge is not unconstitutional.” G

I will take the second issue first. It is the taking of the plea in the chambers of the learned trial Judge. Relying on section 33(3) of the 1979 Constitution and some cases, learned counsel submitted that the taking of the plea in the chambers of the trial Judge was unconstitutional. Counsel for the respondent takes the opposite view. He submitted that the taking of the plea in the chambers of the trial Judge was not unconstitutional, as H

the trial Judge did not restrict or exclude members of the public from being present in the chambers. He cited cases to buttress his submission.

By section 33(3) of the 1979 Constitution, the proceedings of a court or tribunal shall be held in public. Public means, for the use of everyone without discrimination. Anything, gathering or audience which is not private is public. In Oviasu v. Oviasu (1973) 11 SC 315 a case involving the hearing of a petition for dissolution of marriage in chambers, this court held that the learned trial Judge should not have decided on his own to hear the matter in chambers. This court said:

“The hearing of this matrimonial case took, place in the Judge’s Chambers. Neither the counsel nor the parties requested for the hearing of the divorce proceedings in camera. A Judge’s Chambers is not a court hall to which the public will normally have any right of access. The petition and answer did not contain such matters, which by law, ought to be heard in camera in a court room.”

The court held that the hearing of toe petition in chambers occasioned a fundamental irregularity. The appeal was allowed. In Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd. (1995) 8 NWLR (Pt. 413) 257, judgment was given in chambers. Relying on, Oviasu, this court held that the delivery of the judgment in chambers occasioned an irregularity which touched on the legality of the whole proceedings. This court said at pages 290 and 291:

“Coming back to the case on hand, it is my respectful view that sitting in chambers to deliver judgment is not, on the facts before us, sitting in public or in open court. A Judge’s Chambers is not one of the regular courtrooms nor is it place to which the public have right to ingress and egress as of right except on invitation by or with permission of the Judge... There is in this case a clear breach of the mandatory provisions of section 33(3) and (13) of the 1979 Constitution and Order 36 rule 1 of the High Court Rules of Lagos State... The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental... The breach vitiates the entire proceedings before him.”

Like Oviasu this court ordered a retrial.

In *Alhaji Nuhu v. Alhaji Ogele* (2003) 18 NWLR (Pt. 852) 251, where the Upper Area Court delivered judgment in chambers, this court, relying on the above two cases, held that the procedure adopted was a fundamental breach of the Constitution which rendered the judgment delivered null and void. A different decision was reached in *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356 based on the facts of the case and the enabling rules. This court held that the power of the Supreme Court to sit and determine applications in chambers is derived under the Supreme Court/Rules 1985 and was thus not inconsistent with Section 33(13) of the 1979 Constitution. The point should be made that Oyeyipo was decided on the rules of the Supreme Court and specifically Order 6 Rules 3 and 9, rules made under section 216 of the 1979 Constitution. It was in that circumstance this court held that the dismissal of the matter in chambers was not unconstitutional.

Belgore, JSC (as he then was) made the point in *Nigeria-Arab Bank Limited* when he said at page 274:

“The aforementioned constitutional provisions and rules of court made thereunder are peculiar to the Supreme Court; they do not extend together superior courts of record. Therefore the provisions of S.33(3) of the Constitution are fundamental and must be adhered to strictly by all courts of record subject to the exception explained above in respect of certain applications before the Supreme Court. The Supreme Court itself is confined to such applications as enumerated in Order 6 rule 2(1) (2) (3) and (4) and also Order 6 r. 3(1) (2) and (3) to decide on documents filed...”

Learned counsel for the respondent urged the court to follow *Oyeyipo* and submitted that there was no miscarriage of justice by taking the plea of the appellant in chambers. With respect, learned counsel is not correct. If there is a breach of fundamental right, it does not lie in the mouth of the party in breach to canvass that there was no miscarriage of justice arising from the breach. The breach of the fundamental right being fundamental overrides and overtakes the common law principle of “no miscarriage of justice”. This is because by the breach, the doctrine

of technicality is gone as the adherence to technicality is receptive of the concept of miscarriage of justice. In *Nigeria-Arab Bank Limited. Ogundare, JSC*, correctly made the point at page 290:

“To suggest that because the hearing was in open court, the delivery of judgment in chambers is a technicality as no miscarriage of justice was occasioned thereby, is to beg the issue. The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of a mandatory constitutional provision is more than a mere technicality; it is fundamental. And it is no argument that there has been no miscarriage of justice. This is borne out by the decision of this court on Section 258(1) of the Constitution before the amendment of 1985. See Ifezue v. Mbadugha (1984) 1 SC NLR 427; (1984) All NLR 256.”

If this court came to the conclusion in the two cases cited above that delivery of judgment should be held in public, an act which does not involve any of the parties, how much less is plea, which emanates from the accused? In my humble view, unless this court overrules itself in *Nigeria-Arab Bank Ltd. v. Barri Engineering Nig. Ltd. (supra)* and *Alhaji E Nuhu v. Alhaji Ogele (supra)*, it cannot, with the greatest respect, dismiss this appeal. This is because the dismissal of this appeal means that the court has, by necessary implication, overruled the two decisions. That will be a dangerous precedent, and I will not go that way.

It is in the light of the above and the more comprehensive reasons given by my learned brother, Tabai, JSC in his judgment, I allow this appeal. The appellant is hereby discharged. I do not see any reason to order a retrial in the circumstances of the case. I do not see the need to order a retrial in the circumstance of the case. I do not see the need to take Issue No.1

OGBUAGU JSC

Originally, ten (10) accused persons who were all members of the Police Force, were charged at the High Court of Benue State holden at Makurdi with the offence of culpable homicide punishable with death. After the trial, the learned trial Judge, Ikongbeh, J., (as then was and of

blessed memory), found the 2nd, 6th to 10th accused persons Not **Guilty** and acquitted and discharged them. He convicted the 1st accused person for receiving unlawfully, money from PW8 and causing hurt to one Cyprian Okpala (now deceased) who was the owner of the 504 Pick-up with registration No. AE 610 MKD and was in the said vehicle with his driver B – PW8 and had been shot on his buttocks by the 1st accused person for refusing, with his driver, to pay the balance of ten (N10,000) naira. Some of the accused persons had demanded and insisted that thirty naira (N30.00) must be paid by the PW8. The learned trial Judge convicted the C 3rd accused person for giving false information to the police with intent to mislead them. But he found the 4th and 5th accused persons guilty of culpable domicile punishable with death. The 4th accused person is now reported dead. He sentenced them to death.

Dissatisfied with the decision, the said two accused persons, ap- D pealed to the Court of Appeal, Jos Division (hereinafter called “the court below”) which affirmed their conviction and sentence hence the present appeal to this Court.

I note that originally, ten (10) Grounds of Appeal were filed by E each of the Appellants. However, the instant appeal, is that of the 5th accused person. In his Notice of Appeal dated 29th June, 2004 and filed in the court below, on 1st July, 2004 and received in this Court, on 22nd July, 2004; there are three (3) Grounds of Appeal. The Respondent, filed on 1st F February, 2006 a Notice of Preliminary Objection in respect of Grounds one (1) and two (2) which Notice, is incorporated in its Brief of Argument at page 4 and in paragraph 4.0 thereof.

I note that the Appellant, filed a Reply Brief on 21st September, G 2006 in respect of the said Objection. I also noted during the hearing of this appeal on 15th February, 2007, that the learned counsel for the Respondent, told the Court that in the Reply Brief, reference was made and that they were referred to pages 123 and 201 of the Records, but that H there is nothing in these pages to support the submissions in the said Reply Brief. That rather, the contents of the said pages, support the Respondent’s case. I noted that the learned counsel for the Appellant, made no reference to the said Preliminary Objection. Be that as it may, in

my respectful view, what the learned counsel for the Appellant has done, is perhaps, to raise new/additional arguments and not new issues not previously raised or argued at the court below. In respect of Ground 2, I think that the points form part of the argument made in respect of issue No. 1 and this issue, is related to or distilled from Ground 1 of the appeal. I think that my going into the main appeal, is more paramount in the circumstances of one of the crucial issues formulated in the Appellant's Brief. I therefore, overrule the Preliminary Objection.

The Appellant has formulated two (2) issues for determination, which have been adopted in the Respondent's Brief. They read as follows:

"1. Whether the court below was right in affirming the decision of the trial court that the force used by the Appellant was far in excess of what was reasonably necessary to affect arrest.

2. Whether the court below was right when it held that the taking of the plea of the Appellant in Chambers by the learned trial Judge is not unconstitutional".

I note that in both Briefs of the parties, the ground or grounds from which these two (2) issues were distilled or formulated from are not stated. I note however, that at page 18 paragraph 6.0 of the Respondent's Brief, it is stated that Issue two (2), relates to grounds (sic) 2 of the Grounds of Appeal. I will therefore, ignore the irregularity in Issue No. 1 and deal with the said issues. I will take Issue two first because, it is very fundamental. If it succeeds, that is the end of the appeal.

Let me dismiss with respect, and as completely misconceived and unacceptable to me, the submission at page 19 paragraph 6.2 of the Respondent's Brief, that the Chambers of a Judge, is a public place and satisfies Section 33(3) of the 1979 Constitution (as amended) and Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria. I say so because, nothing can be far from truth. If I or one may ask, can the Chambers of a Judge, be described as an "open place" which is accessible to all and sundry? I think not. This is in spite of the "strained" reference to New English Dictionary and Thesaurus page 814, New Edi-

tion as to the definition of a “Public Place”, Black’s Law Dictionary page 1230, 6th Edition and the case of R. v. Kane (1965) 1 All E.R. 707 cited at page 2094 of Stroud’s Judicial Dictionary, 5th Edition, Vol. 4 in the respondent’s Brief and other cases cited therein, I hold firmly, that a Judge’s Chambers, cannot and will never be, a public place or an “open” B and unrestricted place. By these references and arguments, can the learned counsel for the Respondent, in all honesty and seriousness, maintain or insist, that he/she can walk into the Chambers of any Judge or Justice, without the consent or permission of the said Judge or Justice and unre- C stricted? I think not. Surely and certainly, a Judge’s Chambers, is not and cannot be equated to a hall in a public building that is used for formal meetings. As a matter of *fact*, a Chambers, can also be defined as or equated with a Private bedroom or private room. Even in Black’s Law Dictionary, 7th Edition at page, 224, a Judges Chambers; is defined as D “*the private room or office of a Judge*”.

Now, Section 33(3) of the Constitution of the Federal Republic of Nigeria, 1979 now Section 36(1) of the 1999 Constitution, provides as follows: E

“*In the determination of the civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other Tribunal established by law constituted in such F manner as to secure the independence and impartiality*”.

More importantly, sub-section (3) thereof, and this is the relevant sub-Section that is applicable to this appeal, provides as follows:

“the proceedings of a court or the proceedings of any Tribunal relating to the matters mentioned in subsection (1) of this Section (including) the announcement of the decisions of the court or Tribunal shall be held in G public”.

[the underlining mine]

This provision, is clear and unambiguous and it does not there- H fore, require, any interpretation. It did not say/provide/add “*or in Cham- bers*”.

In the case of *Oviasu v. Oviasu (sic) (it is Oviasu v. Dr. Oviasu)*

& anor.) (1973) 11 S.C. 315; (1973) 1 ANLR 730; (1973) NSCC. (Vol. 8) 502; (1973) 11 S.C. (Reprint) 187 @193, 197, cited and relied on in the Appellant's Brief, it was held that a Judged Chambers, is not a court hall to which the public will normally have any right of access. In this case leading to this appeal, neither the parties nor their counsel, requested/ applied to the learned trial Judge that the Petition be heard in Chambers, it was the learned trial Judge, who on his *own/suo motu*, decided to hear it in his Chambers. At page 32 thereof, the application to prefer charge against the accused persons, was heard and granted in the Chambers of the learned trial Judge on 16th October, 1997. On 10th January, 1998, when the plea was taken, it is shown therein that it was also in His Lordship's Chambers. This Court in the above case referred to and consider Sections 22 (1) & (3) of the 1960 Constitution which is *in pari materia* with Section 33 (1) & (3) of the 1979 Constitution and Order 25 Rule 3 of the High Court Rules, 1959 of the former Western Region of Nigeria and the English case of *Macpherson v. Macpherson* (1936) A.C. 177@230 (P.C.) - per Lord Blanesburgh as to the principle of publicity of court hearing. The irregularity was regarded and treated by this Court, as being fundamental. It ordered a retrial.

In the case of *Nigeria Arab Bank Ltd. v. Ram Engineering Nig. Ltd.* (1995) 8 NWLR (Pt.413) 257 @ 273-274. (not Pt. 413) 247 as appears in the Appellant's Brief It is also reported in (1995) 9 SCNJ. 147 @ (155), the decision in Oviasu's case (supra), was adopted, re-stated and followed Ogundare, JSC, (of blessed memory) stated inter alia:

"..... A Judges Chambers is not one of the regular court rooms nor is it a place in which the public have right to ingress and egress as of right except on invitation by or with permission of the judge..... ...".
[the underlining mine]

A retrial, was ordered,

In the case of *Menakaya v Dr. Menakaya* (2001) 9 SCNJ. 1 @19; (2001) FWLR (Pt.76) 742, Section 114 of the Matrimonial Causes Act, 1970, provided that the hearing of a Petition, must be in the open court otherwise, the hearing will be void and a nullity. This Court - per Mohammed, JSC, held that a mandatory statutory provision directing a

procedure to be followed in the performance of a duty, is not a party's personal right to be waived, Ogundare, JSC (of blessed memory) in his concurring Judgment at page 29 - 30, referred to Oviasu's case (supra) and Section 33(3) of the 1979 Constitution and Section 36(3) of the 1999 Constitution. At page 33, he stated that parties, cannot, by conduct or consent, alter the Constitutional or Statutory provision. That by sitting in Chambers rather than in the open court, the irregularity was not a mere one, but fundamental. The case of Nigerian Arab Bank Ltd. v. Barri Engineering Nig. Ltd, (supra), was also referred to.

Ayoola, JSC, in the case of Maersk Line & anor v. Addide Investment Ltd. & anor. (2002) 4 SCNJ. 433 @ 461 - referred to NAB v. Barri Engineering Nig. Ltd, (supra) and stated that proceedings in Chambers, is invalid and that any order made therein, is null and void.

Recently, in the case of Alhaji Nuhu v. Alhaji Ogele (2003) 18 NWLR (Pt.852) 251 also cited in-the Appellant's Brief without supplying the page of the Report (it is also reported in (2003) 12 SCNJ. 158 @ 173 - per Pats Acholonu, JSC, (also of blessed memory), it was held that the provisions of Sections 33(3) of the 1979 Constitution and 36(3) of the 1999 Constitution, are fundamental and must be adhered To strictly by all courts of record. That apart from the exceptions where pursuant to this Court's Rules, made under the Constitution, where decisions on certain applications, are permitted to be made in Chambers, a breach of the Constitution such as delivering a judgment in Chambers, renders the entire proceedings relating thereto, null and void, The cases of Oviasu v. Oviasu and NAB Ltd, v. Barri Engineering Ltd, (supra), were also referred to.

In effect, it is now firmly established that a breach of a mandatory Constitutional provision, is more than a mere technicality. That it touches on the legality of the whole proceedings, including, judgments, (and I will add the taking of a plea of an accused person or persons) and any incidental order or orders made thereafter.

As regards the case of Oba Oyeyipo & anor .v. Chief Oyinloye (1987)1 NWLR (Pt.50) 356 @ 377 also referred to in the Appellant's Brief (it is also reported in (1987) 2 SCNJ. 53), in NAB Ltd, v. Barri Eng. Nig. Ltd, (supra), it was held that the main rationes decidendi of the

Oyeyipo's case (*supra*), was/is that the right of this Court to sit in Chambers as provided in its Rules, was derived from Section 213 (6) and 216 of the 1979 Constitution which gave the Rules, constitutional validity. That in any case, it was not an issue in the case. That the case, has not
 B derogated from the provisions of the Constitution and the decision in *Oviasu v. Oviasu* (*supra*). That it was decided in the light of the provisions of the Constitution and the Rules of this Court as to certain matters that could be dealt with in Chambers. This is why when motions or
 C matters are heard in the Conference Room or "*joint Chambers*" of the Justices of this Court, parties and/or their counsel, are not invited to appear even though the court is transacting its business therein.

In my respectful but firm view therefore, the right provided in Section 33(3) of the 1979 Constitution or 36(3) of the 1999 Constitution,
 D on the decided authorities, is a public right for every citizen of this Country. The courts must be open to any one who may present himself or herself for admission, or is obliged to be so presented. There are some exceptions in the proviso of the said two Sections as to the right of the
 E public to free access to court proceedings. But being a public right, a party to any matter in the court, cannot waive the right See the case of *Priori v. Elemo* (1933) 1 All NLR 1: (1983) 1 SCNR. 1 @12-15 per Esq, JSC, also cited and relied on in the Appellant's Brief.

F In the cast of *Chime & anor. v. Ude & 2 ors.* (1996) 7 NWLR (Pt.461) 379 @ 417; (1926) 7 SCNJ. 31, this Court, followed Oyeyipo case (*supra*).

G In the circumstances I hold that on the above decided authorities of this Court, the learned trial Judge, unfortunately and perhaps, inadvertently, by taking the pleas of the accused persons including that of the Appellant breached the said mandatory provisions of Section 33 (3) of the 1979 Constitution. With respect, it will be idle and a complete misconception, to suggest that the taking of the plea, was/is a technicality
 H and that no miscarriage of justice, was occasioned thereby. Such an argument or contention, will, with the greatest respect and humility, amount to begging the issue. I therefore, with the utmost respect, reject the submission in paragraph 6.3 of the Respondent's Brief, that the taking of the

plea by the Appellant in the Chambers of the trial Judge,

“in so far as the trial judge did not restrict or exclude members of the public from being present in his Chambers, does not violate the rule of public trial, fair hearing or any of his fundamental human rights”.

I also respectfully, reject, the additional submission in paragraph B 6.5 thereof that,

“Counsel has failed to show that the taking of plea by the Appellant in the Chambers of the learned trial Judge occasioned a miscarriage of justice”.

I note that *“miscarriage of justice”* is defined in this said paragraph. I hold that, it is a non-issue. C

I had the privilege of reading the lead Judgment of my learned brother, Tabai, JSC, just delivered. I agree with his conclusion and I abide with the consequential order of discharge of the Appellant. D

ADEREMI JSC

The appeal here is against the judgment of the Court of Appeal E (Benin Division) delivered on the 7th of December 1999 affirming the judgment of the court of first instance (High Court of Justice, Benue State holden at Makurdi) convicting the appellant in this appeal who was charged at the court of first instance as 5th accused and one ASP David F Joshua (now deceased) and some others of the offence of culpable homicide punishable with death contrary to Section 221 (b) of the Penal Code.

I shall hereunder wish to preface the consideration and determination of this appeal with the facts leading to it; according to the appellant, G he and his colleague were on duty on the 11th of January 1997 at Wurukum end of River Benue Bridge Police check-point on the way to Markurdi when they got a message through walkie talkie that some men believed to be armed robbers had beaten up a policeman who was on a stop-and-H search duty at Ukpiam-Daudu road and had snatched a revolver pistol with six rounds of live ammunition from him and that they were heading for Makurdi. They mounted an emergency roadblock for them. When a

vehicle believed to be carrying the suspected armed robbers came on sight, they (appellant and his colleagues) had a gun shot from the said vehicle and immediately on sighting the road block mounted, they (suspected armed robbers) jumped out of the vehicle and started running away; to effect their arrest, the appellant and his colleagues opened gun fire on them. As a result, two of the suspects died while one escaped. A search conducted on the vehicle in which the suspects rode revealed a revolver pistol with live ammunition and two expended ammunition all tendered in evidence as Exhibits 30A, 30B, 28-29E respectively. On the other hand, the case of the prosecution was that on 11th January 1997 one Emmanuel Yaga, who testified as PW8, and a driver by profession was returning with his master, Cyprian Okpala in a 504 pick-up vehicle which he was driving; also in that vehicle on that day was his motor-boy by name Chi Dio. The said vehicle belonged to Cyprian Okpala. They had all encounter with two policemen at a Police check-point on Ukpiam-Daudu-Road. One of the policemen by name David Joshua, the first accused in the case before the trial judge demanded N30.00 from him rejecting the N20.00 he offered. When he refused to meet the demand for N30.00 and the was about to move away, David Joshua, shot his gun which, hit Cyprian at the buttocks. Infuriated by the action of Joshua, he (PW8) and others beat up the 1st accused and seized the gun (tendered as Exhibit 8) from him. All efforts to report the matter immediately at the Police Station yielded no fruit as, according to him, they were not given the desired attention. They then proceeded to the Police Headquarters at Makurdi to report the incident; of course carrying the gun they had seized along with them. At Wurukum end of the River Benue in Makurdi on their way to the Police Headquarters, they were stopped by some mobile policemen (the appellant being one of them) who took them (PW8 Cyprian Okpala and Chi Dio) into a police van after firing some gun shots they contended that they were driven to a place on the outskirts of Makurdi where they were fired at. They claimed that both Cyprian Okpala and Chi Dio died from the gunshots.

Both the prosecution and the defence, called evidence to substantiate their different cases. Sequel to the addresses of counsel for both

parties, the learned trial judge, in a reserved judgment delivered on the 7th of August 1998, in finding the 4th and 5th accused persons (David Joshua and Simon Edibo - present appellant), guilty of culpable homicide, he sentenced them to death by hanging by the neck until they died (having earlier sentenced 1st and 3rd accused persons to terms of imprisonment B and fines and after discharging and acquitting the 2nd, 6th - 10th accused persons).

Dissatisfied with the conviction, both David Joshua, and Simon Edibo appealed against the judgment to the court below by two separate C Notices of Appeal each dated 10th August 1998. Four issues were formulated from their grounds of appeal before the court below. Of course, in compliance with the rules of court, they both filed a joint appellants' brief of argument. The respondent filed its own brief of argument. After taking arguments of counsel, in a reserved judgment delivered on 7th De- D cember 1999, the court below dismissed the appeal. In so doing, it held inter alia: -

"From the foregoing analysis, I think this court in the absence of contrary evidence, is entitled to assume that the correct procedure was E adopted by the trial court on the issue of appellants (sic) having been taken in chambers. The learned counsel has not been able to establish any irregularities on the part of the trial court on the arraignment of the appellants. I therefore find myself unable to accept the view of the learned F counsel for the appellants that the proceedings conviction and sentence of the appellants was null and void and of no effect whatsoever. Issue No.1 is accordingly resolved against the appellants. The matter that falls for determination is whether the shooting and killing of the deceased was G justified in law."

After reviewing the evidence led by both sides on the issue of justification, the court below held: -

"With respect to the learned counsel for the appellants, I am unable to share his views on the defence of justification. I hold that the H learned trial judge did a thorough job on this issue and I do not intend to disturb his thorough findings on it. Another defence in law that is canvassed by the appellants is the defence of self-defence."

Again after reviewing the evidence led by the parties on the issue of self-defence, the court below held inter alia: -

“Again, with the utmost humility, I agree with the learned trial judge. PW8 and Cyprian Okpala and Chi Dio were shot dead by the accused persons who themselves admitted shooting the deceased. With this evidence medical report fades into insignificance The defence of self-defence led the appellants to contend and vehemently that the fact that PW8 fired the first shot put the accused persons in fear of their lives. This proposition even though thoroughly unfounded, looks like an attempt by the learned counsel to pull wool across the eyes of the court. The facts before the court do not show and no one can believe the accused persons that PW8 and the deceased fired any gun. From the genesis of this case, there is abundant evidence that the gun that PW8 had seized from the 1st accused originally had 6 rounds of ammunition in it.....

It is clear that the particular gun has not been fired since the shooting at Daudu check point. No other gun was found in Ex 13A and there is no evidence that any gun was found on PW8 or even on the deceased when they allegedly left the vehicle in a bit (sic) to escape I am afraid, this issue cannot sustain this appeal and it hereby fails on this issue;.....”

On issue No.3 which poses the question as to whether the prosecution has proved its case beyond reasonable doubt as required under the law; after reviewing the totality of the evidence led, the court below, in the leading judgment Held, inter alia: -

“In any case this issue, with respect, borders on finding of fact by the trial court as it turned on what the court believed and what it did not believe to constitute proof beyond reasonable doubt. I consider that the learned trial judge properly used Exhs 36, 37 and 38 plus other direct evidence such as given by DW4 that they (police) conveyed the bodies of the two men to the police head quarters on the instruction of DW2. In the final result, and for all the reasons I have given above, this appeal lacks merit; it fails and is hereby dismissed. Their convictions and sentences on each of the two counts charged are hereby affirmed.”

Dissatisfied with the said judgement, the two accused/appellants had earlier appealed to this court by separate notices of appeal each dated 10th December 1999 Each notice contains ten grounds of appeal. It must be observed that the 4th accused/appellant' (David Joshua) died after the conviction. The present appellant the remaining appellant engaged the services of another counsel, who with the leave of court; filed on his behalf, another Notice of Appeal dated 29th June 2004 but filed in the Registry of the court below on the 1st of July 2004. That Notice has only three grounds of appeal. Distilled from the said three grounds of appeal and set out in the brief of argument of the appellant dated 24th January 2005 but filed on 26th January 2005; they are as follows: -

“(1) Whether the court below was right in affirming the decision of the Trial court that the force used by the appellant was far in excess of what was reasonably necessary to effect arrest.”

“(2) Whether the court below was right when it held that the taking of the plea of the appellant in chambers by the learned trial judge is not unconstitutional.”

For its part, the respondent also raised two issues for determination and they are: -

“(1) Whether the court below was right in affirming the decision of the trial court to the effect that the force used by the appellants was far in excess of what was reasonably necessary to effect arrest.”

“(2) Whether the court below was right when it held that the taking of the plea of the appellant in chambers by the learned trial judge is not unconstitutional.”

The two issues raised by the appellant are, undoubtedly, similar in all material particulars to the two issues also identified by the respondent. I shall now proceed to treat issue No.2 in each of the two briefs first; for if this issue succeeds, that will put an end to the whole case ab initio. For the umpteenth time, issue No.2 reads:-

“Whether the court below was right when it held that the taking of the plea of the appellant in the chambers by the learned trial judge is not unconstitutional.”

That the plea of the appellant was taken in Chambers by the learned

trial judge admits of no argument. The court below after taking the arguments of counsel on this issue in its conclusion, reasoned: -

“From the foregoing analysis, I think this court in the absence of contrary evidence is entitled to assume that the correct procedure was adopted by the trial court on the issue of the appellants (sic) having been taken in chambers. The learned counsel has not been able to establish any irregularities on the part of the trial court on the arraignment of the appellants. I therefore find myself unable to accept the view of the learned counsel the appellants, that the proceedings, conviction and sentence of the appellants was null and void and of no effect whatsoever.”

The appellant, in his brief, has argued that the view expressed by the court below on this issue is not the correct position of the law; relying on Section 33 (3) of the 1979 Constitution now Section 36 (1) of the 1999 Constitution. He contended that by virtue of Section 33 (3) of 1979 Constitution, applicable here, it is a constitutional requirement that the proceedings of a trial court must be held in the open court and not in the chambers, as, according to him, the taking of a plea is part and parcel of the proceedings. He called in aid of his submission, the decision in *NAB Ltd, v. Barri Eng. Nig. Ltd* (1995) 8 NWLR (pt.413) 47 at 273; *Oviasu v. Oviasu* (1973) 11 S.C. 181; both decisions of this court where it was held that it is unconstitutional to conduct the proceedings of the court in chambers. But, he alluded to the decisions in *Oyeyipo v. Oyinloye* (1987) 1 NWLR (pt.50) 356 at 377 and *Chime v. Ude* (1996) 7 NWLR (pt.461) 379 at 417; again the decisions of this court where it was held that it was not unconstitutional to hold proceedings in chambers. However, in distinguishing the last two decisions from the first two, the appellant argued that the latter decisions were founded on the provisions of Order 6 Rule 3 (2) of the Supreme Court rules which gives the right to this court to dismiss an appeal in chambers for want of prosecution. It was finally contended that the whole proceedings leading to the judgment is a nullity. The respondent argued to the contrary contending that since accessibility to the chambers of a judge is not blocked to that extent, it is a public place and satisfies the provisions of Section 33 (3) of the 1979 Constitution as amended by Section 36 (L) of the 1999 Constitution; reliance was

placed on the decision in Chime v. Ude (1996) 7 NWLR (pt.461) 379; Oyeyipo v. Oyinloye (1987) 1 NWLR (pt.50) 356. It was finally contended on, this issue that the taking of the plea in the chambers occasioned miscarriage of justice; he urged that the appeal be dismissed on this issue. B

The four decisions referred to by the parties are those of this court. While the decisions in Oviasu v. Oviasu (1973) S.C. 187 and NAB Ltd v. Barri Eng; Nig. Ltd. (1995) 8 NWLR (pt.413) 247 were handed down by the ordinary panel of this court; the decisions in Oyeyipo v. Oyinloye (1987) 1 NWLR (pt.50) 356 at 377 and Chime v. Ude (1996) 7 NWLR (pt.461) 379 at 417 were those of the full court. In the OVIASU case which dwelt on divorce matter, the proceedings of which were conducted in the Chambers of the judex, the Supreme Court reasoned at page 197 thus: - D

“The hearing of this divorce case in the Chambers of the learned trial judge was not made a specific issue in the grounds of appeal filed before us, but during the arguments however, our attention was drawn to it by the learned counsel for the appellant as being irregular. As the counsel for the respondent did not apply for the hearing of the case in Chambers there was nothing he could say. On the record it seems that the decision to take the case in Chambers was the decision of the learned trial judge himself. We regard the irregularity as being fundamental, which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the judges’ chambers did not constitute a regular hearing of an action in a court.....” E F

The trial held in the Chambers of the judge is not in accordance with the law and we shall therefore set aside the judgment and orders made by the trial judge.” G

This is the verdict of the regular court of three justices (as allowed by the Supreme Court Rules in force at that time). In the Nigeria-Arab Bank Ltd case delivered by the regular court of five justices in accordance with the Supreme Court Rules in force as at then, which turned on the interpretation of Section 33 (3) of the 1979 Constitution dealing with H

the requirement of public hearing of court proceedings thereunder the trial of the case for damages for negligence was heard in the open court but on the day of judgment, the learned trial judge invited the counsel to his chambers and delivered the judgment. On appeal, the Court of Appeal dismissed the appeal and on the issue of delivering the judgment in the chambers, that court of Appeal) in dismissing the complaint, held the view that the decision in OYEYIPO v. OYINLOYE supra, the ratio of which I shall reproduce ANON has overruled the decision in OVIASU supra. After referring to the High Court of Lagos State (Civil Procedure) Rules 1972 as they relate to proceedings before the judge in chambers, Belgore. JSC delivering the judgment of the court reasoned: -

“From the above quoted rules of High Court there is nothing covering a case that was heard ab initio in open court in the full glare of the public that permits the judgment to be given out of public view in chambers, hearing in public entails a situation where the public is not barred. A Judge’s chambers is not, open court or in public because only those invited by the judge are permitted to be present.”

These two decisions declare that sitting in chambers to transact court business is unconstitutional. However, in OYINLOYE case, supra which deals with the issue of determination of an application to dismiss an appeal in the chambers of a judge, the Supreme Court (the Full Court) per the judgment of Karibi-Whyte, JSC reasoned: -

“The other point strongly canvassed by Chief Williams for the applicant was that the hearing of the application to dismiss the appeal in the chambers was not a public hearing and was a violation of Section 33 (3) of the Constitution 1979.....

The purpose of hearing in chambers is to enable the hearing of the application before the court on the material before it. Where it is required to hear arguments from the parties, the application would be adjourned into the open court..... the court sitting in chambers was considering whether the applicant’s appeal ought to be dismissed for want of prosecution. All the materials for so deciding was (sic) before the court.

.....
The power exercised by this court to sit in chambers is derived

under the Rules of this court made under Section 216 of the Constitution 1979. The power is therefore constitutional and valid.”

The OYINLOYE case turned on the interpretation of the provisions of Section 216 of the 1979 Constitution under which the Rules of Court granting authority to the Supreme Court to sit in Chambers were made. It must be said that matters which will not generate arguments by counsel are what are envisaged under the aforesaid Supreme Court Rules. However taking of a plea of a suspect in a criminal case does not come with the category of cases envisaged in the decisions in OYINLOYE case and CHIME case. Criminal cases do affect the liberty of the citizens and the need to conduct same from the beginning i.e. taking of the plea in the open court as opposed to the Chambers of the judex, to the end cannot be overemphasised. That is why I do hold the view, very strongly, that the principles of law enunciated in OVIASU case and NAB case supra are very applicable to this case. It is for this reason that I hold that proceedings in this matter, of the reason of taking the plea In the Chambers is a nullity. I need not go to deal with issue No.2 any longer. All I need say is that the appellant is hereby discharged only.

The appeal, therefore to the extent to which I say the whole proceedings is a nullity, hereby succeeds and the appellant is accordingly, discharged.

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