

SUPREME COURT OF NIGERIA
21ST MARCH, 2009 SC. 52/2008
CORAM:- D. MUSDAPHER, G. A. OGUNTADE,
I. F. OGBUAGU, F. F. TABAI,
M. S. MUNTAKA-COOMASSIE, JJSC

SAMAILA UMARU APPELLANT
V.
THE STATE RESPONDENT

CONSTITUTIONAL LAW - Fundamental rights - Fair hearing - Breach
- When the trial judge proceeded to hear the evidence of the appellant - In the absence of his counsel - He breached his right to fair hearing (H1)

ORDERS OF COURT - Crime - Retrial - Propriety - The order cannot be made in a situation where the appellant is exposed to prejudice - As in this case where the appellant has served a substantial part of his sentence (H2)

FACTS

The appellant, as 3rd accused person, was arraigned and tried alongside other accused persons before the High Court of Niger State for the offences of criminal conspiracy, robbery and culpable homicide. At the end of the hearing, the learned trial judge found the accused persons guilty as charged and sentenced them accordingly.

There was evidence that the appellant testified and was cross-examined by the prosecution in the absence of his counsel. Aggrieved, appellant appealed to the Court of Appeal which held that there was a breach of his right to fair hearing. Consequently, it allowed the appeal and ordered a retrial before another judge. Still dissatisfied, appellant has brought this further appeal to the Supreme Court contesting against the order for retrial.

ISSUES FOR DETERMINATION

“ 1. Considering the finding of the Honourable Court below that the appellant was denied a fair hearing and the fact that the appellant has spent substantial part of his sentence, whether the Court of Appeal was right to have ordered a retrial.

2. Whether the damning statements of the Hon. Court of Appeal as to the guilt of the appellant, will not prejudice him during the retrial.

3. Whether the Court of Appeal was right to have refused to and or failed to address all the issues raised in the appeal.”

HELD (Unanimously allowing the appeal per **MUSDAPHER JSC**)
Fundamental rights - Fair hearing

1. There is no doubt that the appellant under the undisputed facts of this case, when the trial judge proceeded to hear the evidence of the appellant in the absence of his counsel, suffered a miscarriage of justice and his right to fair hearing entrenched in the Constitution was breached. The trial of the appellant was indeed a nullity. (p. 748 A)

ORDERS OF COURT - Crime - Retrial - Propriety

2. The justice of this case demands that the appellant should not go through the ordeal of a trial again especially when he had served a substantial part of his sentences.

The right of the appellant has to be protected from prejudice, in other words, an order for retrial cannot be made in a situation where the appellant is exposed to prejudice. In the instant case since the appellant has spent a substantial part of the sentence imposed by the aborted trial, it will be oppressive for the appellant to be tried for the second time, more so, when according to the learned counsel for the respondent, the witnesses may not be easily found. Thus the retrial ordered will not only spell more hardship on the appellant, but will present difficulties for the prosecution. Both ways, it will be unjust. (p. 750 A/B)

NOTABLE POINT OF INTEREST
OGUNTADE JSC

1. Trial court should have adjourned

The trial judge made a grave error in proceeding with trial of the appellant in the absence of his counsel having regard to the fact that the charges brought against him included one which was punishable with death. It seems to me that in the particular circumstances in which the trial court found itself, it should have adjourned the matter or ordered that another counsel be brought in to defend the appel-

lant. (p. 750 H)

REPRESENTATION

Chukuma Machukwu-Ume Esq., with him, C.U. Ekomaru and I. M. Njaka for the Appellant.

Muazu Shehu, Ag. D.D.L.C. Niger State for the Respondent.

CASES REFERRED TO

ERONINI Vs. QUEEN 14 WACA 360

ADISA Vs. A. G. WESTERN NIGERIA 1966 NMLR P. 144

ADEOYE Vs. STATE [1999] 6 NWLR (Pt. 605) 74 at 87

KIM Vs. THE STATE [1992] 4 NWLR (Pt. 233) 17

UDO Vs. THE STATE [1988] 1 NSCC 1163

YANOR AND ANOTHER Vs. THE STATE [1965] 1 ALL NLR 193 at 196

YESUFU ABODUNDU AND OTHERS Vs. THE QUEEN (1959) 1 NSCC 56 at 60 or 4 FSC 70 at 73 -74

JOSEPH OKOSUN Vs. THE STATE [1979] 3 - 4 S.C. 36

R Vs. OGUNREMI (1961) 2 SCNLR 198, R Vs. OWO [1962] 2 SCNLR 409

STATUTE REFERRED TO

Penal Code, ss. 97, 221 & 298

LEAD JUDGMENT BY MUSDAPHER JSC

The appellant herein, Samaila Umaru was the 3rd accused person in a trial before the High Court of Niger State, in the Kontagora Judicial Division holden at Kontagora in charge NSHC/KG/IC/2002. The accused persons were arraigned before the court on a three count charge of Criminal Conspiracy, Robbery and Culpable Homicide respectively contrary to Sections 97, 298 and 221 of the Penal Code law of Niger State, At the conclusion of the trial, the learned trial judge found the accused persons guilty and sentenced the appellant to various terms of imprisonments.

The appellant felt unhappy with the decision of the trial court and appealed to the Court of Appeal Abuja. On the 9/1/2008, the Court of Appeal allowed the appeal of the appellant but ordered a retrial of the appellant before another judge. The grounds upon which

the appeal was allowed can best be understood by reproducing the part of the judgment of Aboki JCA who read the lead judgment. In the judgment the learned Justice said at page 126 of the printed record:-

B *“In the present case, when the appellant testified in his defence and was cross-examined by the prosecution, his counsel was not in court and no words were sent to explain his absence. The learned trial judge did not ask the appellant about the where about of his counsel or the reasons for the failure of the appellant’s counsel to be*
 C *in court on that day. When the learned trial judge asked the appellant whether he can enter his defence in the absence of his counsel and he said yes, the accused/appellant should have been reminded of his constitutional right to counsel has not been extinguished and whether he still want to take advantage of the said right, considering*
 D *the fact that the appellant was standing trial for capital offence and he was to enter into a defence of his life,*
xx.”

The learned justice proceeded to hold that the trial was marred by breach of fair hearing in that in absence of the counsel to the
 E accused, the trial ought to have been adjourned.

It is for the above, that the Court of Appeal ordered a retrial before another judge. It must be mentioned that the Court of Appeal only considered this issue of fair hearing and did not discuss the other
 F issues raised by the parties. The appellant felt unhappy with the decision and has now appealed to this Court on four grounds of appeal.

The grounds of appeal bereft of the particulars read;-

G *“1. The Honourable Court of Appeal erred in law when after finding as a fact that the appellant was denied of fair hearing went ahead to order a retrial.*

2. The Honourable Court of Appeal erred in law when it ordered a retrial of the appellant on the ground that the evidence (sic) showed that the appellant played a vital role in the crimes for which he was charged.

H *3. The Honourable Justices of the Court of Appeal erred in law when they held that the confessional statements of the other two accused persons points to the fact that the appellant knows the cause of the deceased’s death and ordered a retrial.*

4. The Court of Appeal erred in law when it failed to deter-

mine all the issues raised in the appellant's brief of argument."

In the appellant's brief three issues have been identified and submitted to this court for the determination of the appeal; the issues read as follows:-

"1. Considering the finding of the Honourable Court below that the appellant was denied a fair hearing and the fact that the appellant has spent substantial part of his sentence, whether the Court of Appeal was right to have ordered a retrial.

2. Whether the damning statements of the Hon. Court of Appeal as to the guilt of the appellant, will not prejudice him during the retrial.

3. Whether the Court of Appeal was right to have refused to and or failed to address all the issues raised in the appeal."

The learned counsel for the respondent adopted the above issues in the respondent's brief.

In this judgment I have reproduced the crucial decision of the Court of Appeal in this matter. It was as the result of the continuation of the trial of the appellant in this capital case in the absence of his counsel. Bello JSC [as he then was] in the case of EYOROKOROMO Vs. THE STATE [1979] 6-9 SC 3 at 9 recognized the circumstances under which a criminal trial may be a nullity. He observed:-

"It is pertinent, however, to point out that a trial may be a nullity on one of the following grounds. 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 a serious error or blunder committed by the judge in course of the trial."

The effect of the non-compliance with the constitutional provisions on the right of an accused person to counsel in a Criminal trial is to render the trial a nullity. See also ERONINI Vs. QUEEN 14 WACA 360; ADISA Vs. A. G. WESTERN NIGERIA 1966 NMLR P. 144.

See also ADEOYE Vs. STATE (1999] 6 NWLR (Pt. 605) 74 at 87. This court held in the case of BAWA JIBRIL Vs. THE STATE [1968] NMLR 7, that the calling of evidence under certain circumstances in the absence of the accused's counsel was irregular and may render the trial a nullity. See also KIM Vs. THE STATE [1992] 4

NWLR (Pt. 233) 17; UDO Vs. THE STATE [1988] 1 NSCC 1163; Section 186 of the Criminal Procedure Code of the former Northern Region of Nigeria applicable to Niger State and the case of YANOR AND ANOTHER Vs. THE STATE [1965] 1 ALL NLR 193 at 196.

There is no doubt that the appellant under the undisputed facts of this case, when the trial judge proceeded to hear the evidence of the appellant in the absence of his counsel, suffered a miscarriage of justice and his right to fair hearing entrenched in the Constitution was breached. See UDO Vs. THE STATE supra. ***The trial of the appellant was indeed a nullity.***

The Court of Appeal ordered a retrial of the appellant before another judge. Now the question is whether having regard to all the circumstances of this case, the Court of Appeal exercised its discretion properly in ordering a retrial that is considering issues 1 and 2 together.

At the hearing of this appeal, the learned counsel for the respondent appears not to support the order for retrial. He stated that the witnesses who testified at the trial may not be found.

Now, what are the principles governing order of retrial in criminal proceedings? In the ease of YESUFU ABODUNDU AND OTHERS Vs. THE QUEEN (1959) 1 NSCC 56 at 60 or 4 FSC 70 at 73 -74. ABBOT FJ observed.

"We are of the 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 that retrial 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 or irregularity, the evidence taken as a whole discloses a substantial case against the appellant (e) that there are no such special circumstances as would render it oppressive to put the appellant on a 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 (c) that to refuse to order for a retrial would occasion a greater miscarriage of justice than to grant it"

See also JOSEPH OKOSUN Vs. THE STATE [1979] 3 -4 S.C.

36 R Vs. OGUNREMI (1961) 2 SCNLR 198, R Vs. OWO [1962] 2 SCNLR 409.

In the case of ADEOYE Vs. STATE supra Ogundare, JSC further stated:-

‘This court dealt exhaustively with this issue in the EYOROKOROMO Vs. THE STATE (Supra), there BELLO JSC, after a discussion on 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 the past cases where the court had either declined to order a retrial or had ordered one, discerned the principles (1) that a retrial may not generally be granted where there is no valid charge or information and (2) that in the class of cases, wherein in the course of the trial the trial judge committed an error which rendered the trial null, retrial will be ordered unless there is no merit in the case, xxxxxxxx.’

But the learned justice continued further :-

“Now the power of the Court of Appeal to order a retrial in Criminal cases is conferred by section 20(2) of the Decree in identical words with section 26 (2) of The Supreme Court Act. It follows therefore, that the principles in YESUFU ABODUNDU & OTHERS Vs. THE QUEEN (supra) which are the guiding principles under which this court will order a retrial, are applicable in the Court of Appeal in the exercise of their discretion under section 20 (2) of the Decree. To exercise that discretion judicially call for the examination by the Court of Appeal of the whole record of proceedings of the trial court to ascertain whether or not the evidence and the circumstances of the case came within those principle.”

There is no doubt the charges against the appellant and his co-accused were grave and serious and the evidence is rather strong. It is true that the learned trial judge misapplied the fundamental principle of the constitutional law when the trial proceeded in the absence of the appellant’s counsel and I agree that the approach of the learned trial judge had rendered the trial a nullity. In my view, considering all the circumstances of this case and in the overall interest of justice including the fact that the appellant had been in prison custody since August 2001 together with the fact as pointed out by the learned counsel for the respondent, that the witnesses who testified may not be found to testify; a retrial will be oppressive on the appellant.

The justice of this case demands that the appellant should not go through the ordeal of a trial again especially when he had served a substantial part of his sentences. In the case of EREKANURE Vs. THE STATE (1993) NWLR (Pt. 294) 285 OLATAWURA JSC observed at 394:-

B *“I am of the firm view that “retrial”, “trial”, “trial de novo” or “new trial” can no longer be automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which forms the background.*

C As mentioned above, ***the right of the appellant has to be protected from prejudice, in other words, an order for retrial cannot be made in a situation where the appellant is exposed to prejudice. In the instant case since the appellant has spent a substantial part of the sentence imposed by the aborted trial,***
D ***it will be oppressive for the appellant to be tried for the second time, more so, when according to the learned counsel for the respondent, the witnesses may not be easily found. Thus the retrial ordered will not only spell more hardship on the appellant, but will present difficulties for the prosecution. Both***
E ***ways, it will be unjust.***

Having so decided, it will only amount to an academic exercise for me to discuss the other issues formulated and submitted for the determination of the appeal. To discuss the other issues will serve no useful purpose.

F Consequently, therefore, I allow this appeal, set aside the order for retrial as made by the Court of Appeal, set aside the conviction and sentences imposed by the trial court and declare the trial null and void. I however order that the appellant shall not be retried
G for the same offences again. I therefore, enter a verdict of discharge and direct that the appellant shall not be tried again on the same charges preferred against him.

OGUNTADE JSC

H I have had the advantage of reading in draft a copy of the lead judgment by my learned brother Musdapher J.S.C. I am in agreement with his reasoning and conclusion that the trial judge made a grave error in proceeding with trial of the appellant in the absence of his counsel having regard to the fact that the charges brought against

him included one which was punishable with death. It seems to me that in the particular circumstances in which the trial court found itself, it should have adjourned the matter or ordered that another counsel be brought in to defend the appellant.

The court below ordered a retrial of the appellant. My learned brother reasons that it would be oppressive to put the appellant through another trial given the circumstances of this case. I also think the same and rely on the reasoning of Abbot FJ in *Yesufu Abodundun & Ors. V. The Queen* (1959) NSCC 56 at 60 or 4 FSC 70 at 73 - 74.

I would also allow this appeal and discharge the appellant.

OGBUAGU JSC

This is an appeal against the decision of the Court of Appeal, Abuja Division (hereinafter called “the court below”) delivered on 9th January, 2008, allowing the appeal of the Appellant but ordered a retrial.

Dissatisfied with the said order of retrial, the Appellant has brought the instant appeal on four grounds of appeal. He has formulated three issues for determination which have been adopted by the Respondent.

In my respectful view, the pertinent and crucial issue to be determined, is whether in the circumstances of the finding of the court below, the order of retrial, was/is justified. At pages 129 to 130 of the records, the court below stated inter alia, as follows:

“In the present case, the charges against the Appellant are indeed grave, conspiracy, robbery and culpable homicide contrary to Sections 97, 298 and 221 of the Penal Code respectively. The penalty for culpable homicide under Section 221 of the Penal Code is death by hanging. From the evidence present (sic) before the trial Court as contained in the Record of Appeal, the Appellant took a very active part in the commission of all the offences, which he was charged along with others As to whether the case against the Appellant is substantial to justify a retrial, I can say that from the evidence contained on the Record of Appeal there is a prima facie case against the Appellant as disclosed in the earlier trial.”

The court below, before making the order of retrial, had referred to the case of *Okoduwa & Ors. v. The State* (1988) 1 NSCC

718 @728 - per Nnamani, JSC where the following appear as partly reproduced by it, from the holding of this Court, in the case of Okegbu v. The State (1979) 11 S.C. 1 :-

“..... an order for retrial must depend on the circumstances of the particular case, matters to be considered include, the seriousness
 B and prevalence of the offence, the probable duration and expense of the new trial, the ordeal to be undergone for a second time by the prisoner, the lapse of time since the commission of the offence and its effect on the quality of evidence and the nature of the first trial, whether
 C substantial or not. See *Ankwa v. State (1969) 1 All NLR 133: Okafor v. State (1976) 5 S.C. 13; Okegbu v. State (1979) 11 S.C. 1.*”

The principles guiding the order of retrial whether in criminal or civil cases, have been stated and restated in a line of decided authorities by the two Appellate Courts. I note from the Records, that
 D the Appellant, has been in custody since 2001. In my humble and respectful view, since some of the circumstances to be considered for ordering a retrial, include the probable duration and expense of a new trial, the ordeal to be undergone for a second trial by the accused person, the lapse of time since the commission of the offence
 E and its effect on the quality of evidence, and that there are no such circumstances as would render it oppressive to put the accused person or the Appellant on a trial a second time, the court below, in the circumstances, should and ought not to have made the order of retrial. See the cases of *Okegbu v. The State, Okoduwa & ors. v. The State* (supra), *Abodundu & ors v. The State (1959) 1 NSCC 56 @ 60; (1959) 4 FSC 70 @ 73-74; (1959) SCNLR 162; Barmo v. The State (2000) 1 NWLR (pt. 641) 424 @ 440 C.A. and Okere v. The State (2001) 2 NWLR (pt. 697) 397 @ 422-423 C.A. - per Onalaja,*
 F
 G JCA just to mention but a few.

I note that at the hearing of this appeal on 15th January, 2009, Shehu. Esq. - the learned counsel for the Respondent, told the Court that they will find it difficult to get the witnesses.

I have had the privilege or reading before now, the lead Judgment of my learned brother, Musdapher, JSC just delivered. I agree
 H with his reasoning and conclusion. I too allow the appeal and I abide by the consequential order of my said learned brother, Musdapher, JSC.

TABAI JSC

I was privileged to read, in draft, the lead judgment of my learned brother Musdapher JSC and I entirely agree with his reasoning and conclusion. I also allow the appeal and adopt the consequential order contained in the lead judgment as mine. B

MUNTAKA-COOMASSIE JSC

The Appellant herein, Samaila Umaru, together with three others pleaded not guilty to the three count-charge of criminal conspiracy, Robbery and culpable Homicide respectively contrary to Sections 97, 298 and 221 of the penal code applicable in Niger State of Nigeria. C

Trial commenced in earnest, counsel submitted their respective addresses and in a reserved judgment learned trial judge EVUTI J' found the accused persons guilty and sentenced them to various prison terms. The Appellant was sentenced some terms of imprisonment. Aggrieved by the decision of the trial court he filed an appeal to the Court of Appeal Abuja. Other convicted persons did not appeal against their sentences. After considering the record of proceedings and the submissions of both counsel in their respective Brief of argument, the court of Appeal, hereinafter called the court below, unanimously allowed the appeal. It did not stop there. The court below ordered a retrial of the appellant before another Judge of the High Court, Niger State. The appellant's grounds of Appeal are four in number. D E F

To refresh ones memory, is necessary to state that in the trial court the appellant was allowed to testify in his defence and was cross-examined in the absence of his counsel. The learned trial judge asked the appellant whether he can enter his defence in the absence of his counsel the appellant answered in affirmative. The trial court went ahead and allowed the appellant to enter into his defence and be cross-examined all without his counsel present in court knowing fully well that the appellant was facing a capital offence. It was clear as held, unanimously by the learned Justices of the Court of Appeal that "the trial" was marred by breach of fair hearing in that in the absence of the counsel to the accused; the trial court ought to have G H

adjourned the matter. The Court of Appeal apparently disturbed by what had happened in the trial court ordered a retrial before another judge.

Still the appellant herein was not happy with the order of retrial appealed to this court. Notices of appeal containing four grounds of appeal were filed. Briefs were filed by both counsel on behalf of their respective clients. Issues were formulated by both counsel and arguments were canvassed.

I have read in advance the lead judgment delivered by my learned brother Musdapher JSC, and I am in complete agreement with the reasoning and conclusions reached therein, that the appeal is meritorious and should be allowed. It is clear that there is breach of the constitutional provisions on the right of an accused to counsel in a criminal trial, notwithstanding that the appellant agreed to render his defence and to be cross-examined without his counsel being present in it. This breach of the provisions of the constitution is capable of rendering the whole trial a nullity. The learned justices of the Court of Appeal should have considered the length of time the appellant had been incarcerated, the difficulty or near impossibility of procuring vital witnesses if retrial was to be ordered in line of the case of Abodundu V. The Queen 4 FSC 70; (1959) SCNLR 162. The respondent's counsel, Muazu Shehu Ag. DDLc, Niger State has indicated that it may be difficult for them to assemble their witnesses if retrial shall take place. See Adeoye V. The State (1999) 6 NWLR (pt. 605) 74 at 87 per Ogundare JSC.

The decision of the Court below cannot therefore stand. Same is allowed by me. The order of retrial is therefore set aside. The conviction and sentences meted out by the trial court are null and void. I agree with my learned brother that the appellant shall not be retried again for the same offence. The appellant is therefore discharged and acquitted of the charges preferred against him at the trial court.