

SUPREME COURT OF NIGERIA

8TH JULY, 2011. SC. 293/2010

CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F. TABAI, I. T. MUHAMMAD, B. RHODES-VIVOUR, JJSC

YUSUF APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Arraignment - Principles - Charge will be read to accused - And he will be asked if he understands same - And his plea thereto shall be taken (H1)

CRIMINAL PROCEDURE - Criminal Procedure Code - Mandatory provisions of - Compliance - Where there are such provisions - Any act stipulated therein must be strictly complied with (H2)

CRIMINAL PROCEDURE - Fair hearing - Breach - Failure to read and explain the charge of culpable homicide to accused - Constitutes a violation of the rules of fair hearing (H3)

EVIDENCE - Unchallenged evidence - Admissibility of - Such evidence is credible - And court is to rely on same in determination of the case (H4)

ORDERS OF COURT - Appeals - Retrial order - Propriety - For valid determination of the grievous offence charged against appellant - Retrial order is proper irrespective of long incarceration (H5)

FACTS

Prosecution/respondent instituted this action against accused/appellant and one Lawal Musa. Respondent stated that appellant and the other person conspired to rob one Shuaibu Lawal of his Suzuki Motorcycle and in the event killed the said Shuaibu. Consequently, appellant and the other were arraigned before the High court of Kaduna State on amended two count charges of conspiracy and armed robbery contrary to sections 5 (b) and 1(2) (b) of Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of Fed-

eration 1990, respectively. Originally, there were three count charges against accused persons. The third count charge was on culpable homicide contrary to section 22 of Penal Code, Cap. 110 Laws of Kaduna State. After the amendment, the earlier stated two count charges were read and explained to accused persons.

Each of them stated that they understood the charges. They however pleaded not guilty to the charges. At the end of the trial, the court discharged and acquitted 2nd accused person on all the counts. Appellant was also discharged and acquitted on the two count charges, but was convicted on the third count charge which was not read and explained to him as required under section 187 of Criminal Procedure Code. Dissatisfied, appellant filed an appeal to the Court of Appeal, Kaduna Division. The court allowed the appeal. However, based on the irregularity of arraignment on the third count charge, it ordered for a retrial of the case before another judge of the trial High court. Aggrieved further, appellant has appealed to Supreme Court.

ISSUE FOR DETERMINATION

“Whether from the circumstances of the facts before the honourable Court of Appeal, an order for re-trial should have been made.”

HELD (Unanimously dismissing the appeal per **MUKHTAR JSC**)
CRIMINAL PROCEDURE - Arraignment - Principles

1. In treating this issue and the argument above I will analyse and treat the principles governing re-trial set out earlier in this judgment. I will start with the first principle, on irregularity in procedure. The law is trite that at the commencement of a criminal trial, the Accused will be arraigned by the court i.e. the charge preferred against the Accused will be read to him, and he will be asked if he understands the charge, and he pleads guilty or not. As I said earlier the Accused was arraigned on the amended two counts charge. None of the counts was on culpable homicide, as is contained in the original three counts charge. The trial de novo was therefore based on the two counts charge. However, at the end of the day the Appellant was convicted of culpable homicide punishable with death. (p. 2270 F)

Criminal Procedure Code - Mandatory provisions of

2. The provision of subsection (1) supra is mandatory and being

mandatory, it requires that it be complied with *stricto sensu*. It is on record that this law was complied with, in that the two amended counts were read to the appellant and his Co-accused, in which case conviction under both or any of the counts would have been valid and regular. However, problem emerged when the appellant/accused was convicted of culpable homicide, which was seemed to have been abandoned when the charge was amended. Obviously in the circumstance, no plea was taken in respect of the abandoned count of culpable homicide. On the finding that the evidence and the case established by the Prosecution was that of culpable homicide punishable with death, the charge should have been amended again, (based on the evidence) to that of culpable homicide, and this new charge should have been read over to the Appellant and his plea taken. Omission to do so will definitely result in the trial being a nullity. This act will be done sequel to the provision of Section 208 of the Criminal Procedure Code which reads:-

“208 (1) Any court may alter or add to any charge or frame a new charge at any time before judgment is pronounced.

(2) Every such alteration or addition or new charge shall be read and explained to the Accused and his plea thereto shall be taken.”

Again the provision on the effect of subsection (1) is mandatory and must be met with and satisfied. When an enactment connotes mandatoriness, it is required that whatever act it provides to be done must be strictly complied with. In other words, it does not allow for any exercise of discretion.

Besides, it is a fundamental procedure in a criminal trial, and failure to adhere to the procedure renders the trial defective, null and void, and once it is declared null and void, it is as though nothing took place. (p. 2271 C)

Fair hearing - Breach

3. On the rules of fair hearing, the fact that the charge of culpable homicide was not read and explained to the Appellant, (as required by Section 187(2) of the Criminal Procedure Code for him to marshal and present his defence) constitutes a violation of the rules of fair hearing. (p. 2272 D)

Unchallenged evidence - Admissibility of

4. In the course of cross-examination P. W. 2 said he knew the 1st Accused before the fateful day. The interrogating officer (P. W. 3) testified that he interrogated the 1st Accused, and he confessed that he committed the offence together with the 2nd Accused. It was he who recorded the Accused caution statement. Now with the above overwhelming evidence adduced by the Prosecution, how can it be said that they did not disclose substantial case against the Appellant? In the first place, the pieces of evidence once put together complete the jigsaw puzzle. They are ample and uncontroverted. The pieces of evidence were neither challenged nor debunked in the course of cross-examination by the Appellant and his Co-Accused, and so they remained unshaken and credible. The position of the law is that evidence that is relevant to a matter in controversy, which has neither been attacked nor debunked, is credible and good and ought to be relied upon by a trial court in the determination of the case before it. (p. 2273 E)

Appeals - Retrial order - Propriety

5. The fourth factor supra to be considered, on special circumstances which would make it unjust to put the Accused on trial a second time, the long incarceration of the Appellant that has been canvassed by learned counsel for the Appellant as special circumstance is to my mind of no moment when one considers the gravity and seriousness of the offence the Appellant was convicted of. I agree that he had been in custody since 2002 when he was arrested, but then the charge was such that does not ordinarily allow for bail of an Accused person. The fact that the Appellant has been in prison for the period he has been does not in itself warrant his acquittal without more, because letting him loose without a proper and valid trial to determine whether he was actually guilty or innocent will be unfair to him and the society in general.

As for the seriousness of the offence for which the Appellant was charged and its consequences, the offence for which the Appellant was convicted was that of culpable homicide, and the consequence of that finding and conviction is a sentence punishable with death. When a person is sentenced to death, what else is there left? It is the worst and most devastating punishment that can be meted on a hu-

man being, because after death comes nothing. It is the limit, and nothing can be more serious than death, and to refuse an order of re-trial would occasion a greater injustice than to grant it. This will be borne out of the nature of the offence, where the life of a human being is involved. A man has been killed, and it was not by accident, but by the deliberate act of another human being, who for some selfish reasons found it absolutely necessary to snuff life out of him. The evidence adduced by the Prosecution reinforced the guilt of the Appellant, more so when no attempt was made to debunk the gory detail of the recovery of the corpse of the deceased from a river. The recovery of which would not have been possible without the assistance of the Appellant, for the knowledge of the whereabouts of the corpse rested on him only. If the Appellant hadn't taken P. W. 1 and others to the scene of the crime, there was no way they would have identified the scene, and the corpse.

Justice is a two way track. It is like a double edge sword, one for the Accused and the other for the society at large. In other words each side has to be considered carefully and given its dues. If a re-trial is not ordered, then there is the likelihood of an Accused person being executed unlawfully, and on the other hand if he is allowed to go scot-free, the public and society at large will be faced with the peril of a murderer moving freely amongst its members without facing the full wrath of the law, the consequence of which may be another re-occurrence. (p. 2274 D/2275 B)

NOTABLE POINT OF INTEREST **MUHAMMAD JSC**

1. Conditions that may warrant order of retrial

The factors listed by learned counsel for the Appellant as well as same having been set out by learned counsel for the Respondent, are, in fact conditions upon which an appeal court can order for a retrial of a case/matter in order to allow for a just and fair trial. They have been pronounced upon by this court in a number of cases. These conditions are:

- i. That there has been an error in law (including observance of the law of evidence) or irregularity in the procedure of such a character that on the one hand, the trial was rendered a nullity and on the other hand, the appeal court is unable

to say that there has been miscarriage of justice.

ii. Where leaving the error or irregularity aside, the evidence taken as a whole, discloses a substantial case against the Accused person;

iii. Where there are no such special circumstances as would render it oppressive to put the Appellant on trial a second time.

B iv. That the offence or offences for 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;

v. Where the refusal to order a retrial would occasion a greater miscarriage of justice than to grant it. (p. 2278 C)

REPRESENTATION

A. K. Kehinde with O. Arokoyo, A. Olaniyi and I. Yusuf for Appellant
Taiwo E. Taiwo with E. M. Igbokwe for Respondent

D

CASES REFERRED TO

Ariori v. Elemo (1983) 1 SCNLF

Okoduwa v. State (1988) NSCC Vol. 19 (R 1) 718

Adepoju v. Afonia (1994) 8 NWLR (Pt. 363) at 437

E Edibo v. The State (2007) 5 S.C. 135 at 149

Kajubo v. The State (1988) 3 S.C. 109

Ewe v. The State (1992) 6 NWLR (Pt. 246) 147

Abodunde & Ors. v. The Queen (1959) 4 FSC 70

F Tobby v. The State (2001) 4 S.C. (Pt. II) 160

Ogidi v. The State (2005) 1 S.C. (Pt. 1) 98

Odua Investment Co. Ltd v. Talabi (1997) 7 SCNJ 600

Yahaya v. State (2002) 2 S.C. (Pt. 1) 1

Edet Effiom v. The State (1995) 1 NWLR (Pt. 373) 507

G Madu v. The State (1997) 1 NWLR (Pt. 482) 386

Oforlete v. State (2000) 7 S.C. (Pt. 1) 80

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria 1999, s. 33

H Robbery and Firearms (Special Provisions) Act Cap. 398 LFN
1990, s. 5 (b), 1(2)(b)

Penal Code Cap. 110 Laws of Kaduna State, s. 221

Criminal Procedure Code, s. 187 (1), 208

Criminal Procedure Law, s. 215

LEAD JUDGMENT BY MUKHTAR JSC

This is an appeal from the Kaduna Division of the Court of Appeal, which affirmed the conviction of the Appellant by the High Court of Justice of Kaduna State, where he and another were arraigned for the following amended two counts charge:-

“Count One

That you AUDU YUSUF alias UBAN VAN DABA and LAWAL MUSA on or about the 22nd February, 2002 at Maguza Village near Rigasa, Kaduna State while armed with cutlass, rope and sticks conspired to commit an illegal act to wit robbed one SHUAIBU LAWAL of his Suzuki Motorcycle and at the time of the robbery killed the said SHUAIBU LAWAL (now deceased) and same act was done in pursuance of the said agreement. You thereby committed an offence punishable under Section 5 (b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of the Federation 1990.

Count Two

That you AUDU YUSUF alias UBAN YAN DABA and LAWAL MUSA on or about 22nd February, 2002 at Maguza Village near Rigasa Kaduna State while armed with cutlass, rope and sticks did an illegal act, to wit robbed one SHUAIBU LAWAL of his Suzuki Motorcycle and at the time of the robbery you killed the said SHUAIBU LAWAL (now deceased). You thereby committed an offence punishable under Section 1 (2)(b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 LFN 1990.”

The above count charges were read and explained to the Accused persons, and each Accused said he understood and pleaded not guilty.

Originally, there were three counts charge before it was amended to only the above two counts on which the Accused were arraigned. The first two counts are virtually the same as the above. The third count reads as follows:-

“Count Three

That you AUDU YUSUF Alias UBAN YAN DABA and LAWAL MUSA on or about 22nd February, 2002 did an illegal act to wit: murdered one SHUAIBU LAWAL an Okada rider and by so doing committed the offence of culpable homicide punishable with death under Section 221 of the Penal Code, Cap. 110, Laws of Kaduna State.

The case of the Prosecution was that the Appellant with an-

other mentioned in the charge conspired to rob one Shuaibu Lawal of his Suzuki Motorcycle and in the event killed him. The two Accused persons denied knowing one another and committing the offences they were charged with. The learned trial judge evaluated the evidence adduced by both the Prosecution and the Defence, discharged the 2nd Accused on all the counts, but found against the first Accused as follows:-

“The 1st Accused however I find him guilty of the offence of murder of Shuaibu Lawal under Section 221 Penal Code on account of evidence of P. W. 1 and P. W. 2 which remained unchallenged and convict him accordingly.”

Unhappy with the conviction and the sentence that followed, the 1st Accused appealed to the Court of Appeal, Kaduna Division, which allowed the appeal and ordered a re-trial. Dissatisfied with the judgment, the Appellant has appealed to this court on two grounds of appeal. In compliance with the rules of this court the parties exchanged briefs of argument which were adopted at the hearing of the appeal. A single issue for determination was distilled from the two grounds of appeal. As can be seen from the Appellant’s brief of argument, the issue is:-

“Whether from the circumstances of the facts before the honourable Court of Appeal, an order for re-trial should have been made.”

The issue raised by the Respondents is in pari materia with above reproduced issue.

The learned counsel for the Appellant proffered argument that a person has right to fair hearing under Section 33 of the Constitution of the Federal Republic of Nigeria, 1999 which provides the following:-

“Whenever any person is charged with a criminal offence he shall unless the charge be withdrawn be entitle (sic) to a fair hearing within a reasonable time.”

Reliance was placed on *Ariori v. Elemo* (1983) 1 SCNLF. It was submitted that the Appellant’s right to fair hearing will be grossly breached if the case is sent back to the trial court to: re-trial, the fact that there was error in law and/or irregularity in procedure warranting the nullification of the entire proceeding notwithstanding. The learned counsel enumerated factors for consideration in ordering a re-trial as -

- i. That there has been such an error in law or an irregularity in procedure which renders the trial a nullity or makes it possible for the appeal court to say that there has been a miscarriage of justice.
- ii. That the rules of fair hearing appear to have been violated.
- iii. That apart from the error of law or irregularity in the procedure, the evidence before the court discloses a substantial case against the Accused. B
- iv. That the offence for which the Accused is charged and their consequences are serious in nature.
- v. That there are no special circumstances which could make it unjust to put the Accused on trial a second time. C
- vi. That to refuse an order of re-trial would occasion a greater injustice than to grant it.”

See *Okoduwa v. State* (1988) NSCC Vol. 19 (R 1) 718; *Adepoju v. Afonia* (1994) 8 NWLR (Pt. 363) at 437; *Edibo v. The State* (2007) 5 S.C. 135 at 149. D

The learned counsel for the Respondent has in reply referred to Section 187 (1) of the Criminal Procedure Code which provides for the proper arraignment of Accused persons in a criminal trial. According to him the provision is mandatory and goes to the root of the trial, non-compliance of which affects the outcome of the trial adversely. He placed reliance on the cases of *Kajubo v. The State* (1988) 3 S.C. 109; (1988) 1 NWLR (Pt. 73) 721, where section 215 of the Criminal Procedure Law which is similar to section 187 was considered. The case of *Ewe v. The State* (1992) 6 NWLR (Pt. 246) 147; was also relied upon. The learned counsel argued that in the instant case the lower court found that the charge of culpable homicide was not read over and explained to the Appellant and his plea thereto was not taken accordingly and that made the trial and conviction a nullity. It was submitted that where a trial is declared a nullity, an appellate court can order a re-trial if the five conditions or principles set down in the case of *Abodunde & Ors. v. The Queen* (1959) 4 FSC 70; are present. These conditions are basically the same as the ones reproduced above. E
F
G
H

It is on record that when the trial commenced de novo the appellant's plea was taken on the amended counts charge of conspiracy and armed robbery only, and not the original third count of culpable homicide punishable with death. According to learned counsel

this was a procedural irregularity which cannot be said to have occasioned a miscarriage of justice in the strictest sense. He submitted that the whole evidence of the Prosecution witnesses which were neither challenged nor shaken under cross-examination disclosed a substantial case against the Appellant and it was sufficient to ground a conviction. It was further submitted that there was no such special circumstances as would render a second trial of the Appellant oppressive, as the trial before the first judge went on retirement was inconclusive and cannot pass as a trial. On whether the offence of culpable homicide punishable with death which he was charged with was trivial, the learned counsel argued that the offence is not such that the court can ask the Appellant to walk away without an inquiry to ascertain his guilt or otherwise. It was submitted that the overriding principle guiding the decision to order a re-trial or not must be borne out of the justice of the case, and that the demands of justice in this appeal is not for the Appellant to be discharged on the mere reason that the charge was not read and explained to him and his plea not taken in spite of the evidence disclosing a substantial case against him, for to do so would amount to exalting technicalities over and above justice and merit of the case. Cases where the courts had cause to discharge the Appellants instead of ordering a retrial depended on the circumstances of the case which did not justify an order of re-trial. The learned counsel stated that in the case of *Tobby v. The State* (2001) 4 S.C. (Pt. II) 160; (2001) 10 NWLR (Pt. 720) 23; the Appellant was discharged by the Supreme Court on the ground that the evidence of the single witness was not reliable and did not disclose substantial case, and so it is distinguishable from the present case.

In treating this issue and the argument above I will analyse and treat the principles governing re-trial set out earlier in this judgment. I will start with the first principle, on irregularity in procedure. The law is trite that at the commencement of a criminal trial, the Accused will be arraigned by the court i.e. the charge preferred against the Accused will be read to him, and he will be asked if he understands the charge, and he pleads guilty or not. As I said earlier the Accused was arraigned on the amended two counts charge. None of the counts was on culpable homicide, as is contained in the original three counts charge. The trial

de novo was therefore based on the two counts charge. However, at the end of the day the Appellant was convicted of culpable homicide punishable with death.

Section 187 of the said Criminal Procedure Code makes the following provisions:-

“187(1) When the high court is ready to commence the trial the Accused shall appear or be brought before it and the charge shall be read out in court and explained to him and he shall be asked whether he is guilty or not guilty of the offence or offences charged. B

(2) If the Accused pleads guilty the plea shall be recorded and he may in the discretion of the court be convicted thereon unless the offence charged is punishable with death when the presiding judge shall enter a plea of not guilty on behalf of the Accused.” C

The provision of subsection (1) supra is mandatory and being mandatory, it requires that it be complied with stricto sensu. It is on record that this law was complied with, in that the two amended counts were read to the appellant and his Co-Accused, in which case conviction under both or any of the counts would have been valid and regular. However, problem emerged when the appellant/accused was convicted of culpable homicide, which was seemed to have been abandoned when the charge was amended. Obviously in the circumstance, no plea was taken in respect of the abandoned count of culpable homicide. On the finding that the evidence and the case established by the Prosecution was that of culpable homicide punishable with death, the charge should have been amended again, (based on the evidence) to that of culpable homicide, and this new charge should have been read over to the Appellant and his plea taken. Omission to do so will definitely result in the trial being a nullity. This act will be done sequel to the provision of Section 208 of the Criminal Procedure Code which reads:- D E F G

“208 (1) Any court may alter or add to any charge or frame a new charge at any time before judgment is pronounced. (2) Every such alteration or addition or new charge shall be read and explained to the Accused and his plea thereto shall be taken.” H

Again the provision on the effect of subsection (1) is

mandatory and must be met with and satisfied. When an enactment connotes mandatoriness, it is required that whatever act it provides to be done must be strictly complied with. In other words, it does not allow for any exercise of discretion. See

Ogidi v. The State (2005) 1 S.C. (Pt. 1) 98; (2005) All FWLR (Pt. 251) 202; Olanrewaju v. Governor Oyo State (1992) 9 NWLR (Pt. 265) 335, and Odua Investment Co. Ltd v. Talabi (1997) 7 SCNJ 600.

Besides, it is a fundamental procedure in a criminal trial, and failure to adhere to the procedure renders the trial defective, null and void, and once it is declared null and void, it is as though nothing took place. See Yahaya v. State (2002) 2 S.C. (Pt. I) 1; (2002) 3 NWLR (Pt. 754) 289; Edet Effiom v. The State (1995) 1 NWLR (Pt. 373) 507; and Madu v. The State (1997) 1 NWLR (Pt. 482) 386.

On the rules of fair hearing, the fact that the charge of culpable homicide was not read and explained to the Appellant, (as required by Section 187(2) of the Criminal Procedure Code for him to marshal and present his defence) constitutes a violation of the rules of fair hearing.

I will now peruse the evidence of the Prosecution witnesses and reproduce salient pieces of evidence here below. P. W. 1 the brother of the deceased, Shuaibu, gave the following evidence:-

“He said further that the corpse of Shuaibu is at Magobawa Village in Rigasa. He stated further that he can take us to where the corpse is deposited. It was in the evening that the 1st Accused took us to several places and the corpse was not found. It was decided by the police that because it was getting dark we will continue the following day. The following day 1st Accused took us somewhere and around the area we saw the said Shuaibu’s head facing cap. It was on 27/2/02, the facing cap I recognized was mine and near the cap was a sign of struggle. At the scene the 1st Accused stated that it was at the scene they struggled (sic) the deceased Shuaibu with a cable.... We came to the scene with a driver. He went inside the river and came out with one of the legs of the deceased and his trouser which I recognized because it was my trouser. We tried to bring whole corpse out but we couldn’t. We then asked the 1st Accused and he told us that after killing the said Shuaibu they placed a heavy stone on his chest so that

he will not flow upwards; the stone was tied to a rope. The police asked the 1st (sic) with what they used in killing the said Shuaibu and he said they used sticks and cutlass and were kept in a bushy area... when he was brought out (the corpse of the deceased) we find (sic) cable tied to his neck it even cut up his throat and almost cut off his head. There were wounds on his face and his mouth way (sic) was cut up to his ear... The police then asked the 1st Accused, where (sic) the motor cycle late Shuaibu was riding and he stated that the motorcycle was at Zaria Road Rigasa in Kaduna in his sister's house. The motorcycle was found in the 1st Accused sister's inner room in the house he mentioned. The 1st Accused stated that they killed the said Shuaibu together with one Lawal..."

The deceased's friend who saw him last on 22/2/02 gave the following testimony:-

"I was with my friend Shuaibu when we get (sic) to fulkanizer (sic) to get his motorcycle tubes patched. It was there we met the 1st Accused. I was the one riding the motor cycle and he asked me if it was ready for hire and I told him that the motorcycle belongs to the said Shuaibu. It was then the said Shuaibu offered to take 1st Accused to Rigasa and they agreed at N150. I asked the said Shuaibu where he was taking the 1st Accused (sic) he suddenly abused me. That was the last I was him I understand he is dead (sic)."

In the course of cross-examination P.W.2 said he knew the 1st Accused before the fateful day. The interrogating officer (P. W. 3) testified that he interrogated the 1st Accused, and he confessed that he committed the offence together with the 2nd Accused. It was he who recorded the Accused caution statement. Now with the above overwhelming evidence adduced by the Prosecution, how can it be said that they did not disclose substantial case against the Appellant? In the first place, the pieces of evidence once put together complete the jigsaw puzzle. They are ample and uncontroverted. The pieces of evidence were neither challenged nor debunked in the course of cross-examination by the Appellant and his Co-Accused, and so they remained unshaken and credible. The position of the law is that evidence that is relevant to a matter in controversy, which has neither been attacked nor debunked, is credible and good and ought to be relied upon by a trial

court in the determination of the case before it. See Oforlete v. State (2000) 7 S.C. (Pt. 1) 80; (2000) 12 NWLR (Pt. 681) 415; Buhari v. Obasanjo (2005) 7 S.C. (Pt. 1) 1; Okike v. L.P.D.C. (2005) 7 S.C. (Pt. 111) 75; (2005) 15 NWLR (Pt. 949) 471.

On the face of the reproduced evidence above, I am satisfied
 B that the Prosecution proved substantial case against the Appellant.
 On the non-evaluation of the evidence of the Appellant raised and
 argued by the learned for the Appellant I find no merit in the argu-
 ment, for there was nothing in the appellant's evidence to evaluate.
 C His evidence was a total denial of the incident, and when one puts it
 side by side the evidence of the Prosecution witnesses one will be
 convinced that there was nothing to evaluate. Indeed, the learned
 trial judge did not just ignore the Appellant's defence, he considered
 it, and made the following finding:-

D *"I find the defence of D. W. 1 unacceptable because the evi-
 dence of P.W. 1 and P.W. 2 has not been challenged in anyway."*

**The fourth factor supra to be considered, on special cir-
 cumstances which would make it unjust to put the Accused
 on trial a second time, the long incarceration of the Appellant
 E that has been canvassed by learned counsel for the Appellant
 as special circumstance is to my mind of no moment when
 one considers the gravity and seriousness of the offence the
 Appellant was convicted of. I agree that he had been in cus-
 tody since 2002 when he was arrested, but then the charge
 F was such that does not
 ordinarily allow for bail of an Accused person. The fact that
 the Appellant has been in prison for the period he has been
 does not in itself warrant his acquittal without more, because
 G letting him loose without a proper and valid trial to determine
 whether he was actually guilty or innocent will be unfair to
 him and the society in general.** In this vein I will re-echo the words
 of Oputa JSC., in the Kajubo case supra, when he posited thus:-

H *"The natural leaning of our minds may be in favour of and in
 sympathy with the Appellant and we may in like manner be thus
 tempted to be sympathetic with any prisoner in the position of the
 present Appellant. But one has to sound a note of serious warning
 against giving away too easily to mere formal objections on behalf of
 Accused persons. Such extreme facility may constitute a great blem-*

ish on the judicial process, owing to which more offenders may escape than by the manifestation of their innocence. The danger here is that by such 'leniency' we (the courts) may imperceptibly loosen the bands of society which is kept together by the hope of reward and the fear of punishment"

As for the seriousness of the offence for which the Appellant was charged and its consequences, the offence for which the Appellant was convicted was that of culpable homicide, and the consequence of that finding and conviction is a sentence punishable with death. When a person is sentenced to death, what else is there left? It is the worst and most devastating punishment that can be meted on a human being, because after death comes nothing. It is the limit, and nothing can be more serious than death, and to refuse an order of retrial would occasion a greater injustice than to grant it. This will be borne out of the nature of the offence, where the life of a human being is involved. A man has been killed, and it was not by accident, but by the deliberate act of another human being, who for some selfish reasons found it absolutely necessary to snuff life out of him. The evidence adduced by the Prosecution reinforced the guilt of the Appellant, more so when no attempt was made to debunk the gory detail of the recovery of the corpse of the deceased from a river. The recovery of which would not have been possible without the assistance of the Appellant, for the knowledge of the whereabouts of the corpse rested on him only. If the Appellant hadn't taken P.W. 1 and others to the scene of the crime, there was no way they would have identified the scene, and the corpse.

Justice is a two way track. It is like a double edge sword, one for the Accused and the other for the society at large. In other words each side has to be considered carefully and given its dues. If a re-trial is not ordered, then there is the likelihood of an Accused person being executed unlawfully, and on the other hand if he is allowed to go scot-free, the public and society at large will be faced with the peril of a murderer moving freely amongst its members without facing the full wrath of the law, the consequence of which may be another re-occurrence.

The court below after stating the rules I have analysed above

made the following findings:-

“In view of the aforesaid, the conviction and sentence of the Appellant by Hon. Justice A. A. Othman of the Kaduna State High Court Kaduna in Suit No. KDH/KAD/29C/2003 delivered on 2nd day of June, 2008 is a nullity and therefore void. Applying the guidelines provided by the Supreme Court of Nigeria in Abodundu (supra) the said Suit KDH/KAD/ 29C/2003 is hereby remitted to the Chief Judge of the Kaduna State High Court for a re-trial before another Judge other than Hon. Justice A. A. Othman of the Kaduna State High Court.”

I subscribe to these findings and in this respect resolve the sole issue in favour of the Respondent. The grounds of appeal to which it is married fail and they are dismissed.

In the final analysis I dismiss the appeal, and affirm the judgment and order of the Court of Appeal, Kaduna Division, ordering a re-trial of the Appellant.

ONNOGHEN JSC

I have had the benefit of reading in draft the leading judgment of my learned brother, Mukhtar JSC., just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

The trial, conviction and sentence of the Appellant without arraignment known to law renders the proceedings null and void and of no effect whatsoever. The nullity of the trial, conviction and sentence of the Appellant in the circumstance does not amount to acquittal on the merits of the case made out against him, neither does it mean that Appellant cannot be retried in accordance with the provisions of the law so as to determine the merit of the charge against him, particularly having regards to the gravity of the offence charged - murder. It is unfortunate that the learned counsel for the Appellant decided to appeal to this court on the facts and circumstances of this case instead of proceeding to the trial court for the retrial as ordered by the lower court. Meanwhile, Appellant's fate remains undetermined by the courts as he awaits his proper trial.

In the circumstance and having regards to the detailed reasoning of my learned brother, Mukhtar JSC., I too dismiss the appeal for lack of merit.

TABAI JSC

I have read, in advance, the leading judgment of my learned brother, Mukhtar JSC., and I agree with the reasoning and conclusion therein. The order of retrial by the court below is, in the circumstances of this case, most appropriate. I do not see any reason for interfering with the decision ordering a retrial. I affirm the decision of the court below and the appeal is accordingly dismissed for lack of merit.

MUHAMMAD JSC

I read before now the judgment of my learned brother, Mukhtar JSC., just delivered. I am in agreement with my Lord Mukhtar's reasoning and conclusion that the appeal lacks any merit and it should be dismissed. It is the general law that where there is an irregularity in a proceeding which is capable of affecting the validity of the proceeding, the only remedial way is to re-hear the case/matter with a view to complying with the laid down procedure(s). In this case, it is clear from the record of appeal that when the amended charge of criminal conspiracy and armed robbery was read to the Accused/Appellant and his plea of "not guilty" was recorded, no charge of culpable homicide was read to the Appellant. At the end of the trial, the Appellant was discharged and acquitted of the charge of criminal conspiracy and armed robbery. The trial court, however, went ahead to convict the Appellant for the offence of culpable homicide punishable with death when no corresponding charge thereof was read to the Appellant and no plea was taken from him on this charge. On appeal, the court below found that the trial of the Appellant amounted to an irregularity and it ordered the case to be retried. Hence, his appeal.

The bone of contention in this appeal as submitted by the learned counsel for the Appellant is that by the re-trial as ordered by the court below, Appellant's right to fair hearing will be grossly breached. The learned counsel, however, admitted that there was an error in law or irregularity in the procedure adopted by the trial court. He stated, inter alia:

"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."

Learned counsel for the Appellant mentioned about six factors (i) an irregularity which renders the trial a nullity, (ii) rules of fair hearing appear to be violated (iii) evidence before the court discloses a substantial case against the Accused (iv) no special circumstances which would make it unjust to put Accused on trial a second time (v) offence charged and consequences thereof are serious in nature (vi) refusal of an order for retrial would occasion a greater injustice than its grant. He cited in support several cases including: Okoduwa v. The State (1988) NSCC Vol. 19 (Pt. 1) 718; Edibo v. The State (2007) 5 S.C. 135.

The factors listed by learned counsel for the Appellant as well as same having been set out by learned counsel for the Respondent, are, in fact conditions upon which an appeal court can order for a retrial of a case/matter in order to allow for a just and fair trial. They have been pronounced upon by this court in a number of cases. These conditions are:

- i. That there has been an error in law (including observance of the law of evidence) or irregularity in the procedure of such a character that on the one hand, the trial was rendered a nullity and on the other hand, the appeal court is unable to say that there has been miscarriage of justice.
- ii. Where leaving the error or irregularity aside, the evidence taken as a whole, discloses a substantial case against the Accused person;
- iii. Where there are no such special circumstances as would render it oppressive to put the Appellant on trial a second time.
- iv. That the offence or offences for 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;
- v. Where the refusal to order a retrial would occasion a greater miscarriage of justice than to grant it.

See Abodunde & Ors. v. The Queen (1959) 4 FSC 70 at 73; Kajubo v. The State (1988) 1 NWLR (Pt. 73) 721; Dike & Ors. v. The State (1996) 5 NWLR (Pt. 450) 553 at 561-10 562; Umuolo v. The State (2003) 3 NWLR (Pt. 803) 493 at 513-514; Edibo v. The State (2007) 5 S.C. 135.

Now, considering the totality of the circumstances surrounding this case, it would appear to me, that refusal of an order for retrial would, certainly, occasion a greater injustice than granting it. Not only

the victim's relations, the society in general and of course, the Appellant himself, will not have their conscience clear on why the Appellant should die on a count/ charge for which he was never arraigned or tried. Thus, the only way to clear away such lingering doubt and uncertainty as to which offence did the Appellant commit and for which he is sentenced to death is to order for a retrial which will, with certainty and finality resolve such issues. In addition to the above conditions for a retrial order; it is pertinent to re-emphasize that the overriding principle guiding the appellate court to order for a retrial or not must be borne out of the justice of the case. This court in 1985, per Oputa JSC., marshaled the effect of such justice as follows:

"Justice for the Appellant/Accused of the heinous crime of murder; justice for the deceased whose blood is crying to heaven for vengeance and finally justice for the society at large - the society whose solid norms and values have been desecrated and broken by the criminal act complained of..."

See: Josiah v. The State (1985) 1 NWLR (Pt. 1) 125.

Therefore, let the Accused/Appellant and the society at large, including the families of the deceased (victim), appreciate that there was a proper arraignment, trial, conviction and sentence of the Accused on offences which are known to law and for which the Accused stands answerable before a court of law. I agree with the learned counsel for the Respondent that the demands of justice in this appeal is not for the Appellant to be discharged on the mere technicalities as doing so would amount to discharging and acquitting an Accused person who, in the eyes of the law has not been tried of the heinous crime of culpable homicide punishable with death. Although he stood for a trial, it was irregular. What is worth doing at all is always worth doing well. Re-trial in this case will not amount to going to trial for the second time, it is rather, to ensure all and sundry that the right thing has been done.

For this and the more detailed reasons given in the leading judgment of my learned brother, Mukhtar JSC., I too, dismiss this appeal and affirm the court's below order of retrial.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment prepared by my learned brother, Mukhtar JSC. I agree with

the reasons and conclusion therein. I endorse the order for a fresh trial of the Appellant. A trial in the high court starts with the arraignment of the Accused person. The arraignment is conducted in accordance with clear rules and well laid down procedures. Section 187 (1) of the Criminal Procedure Code applicable in the North, B Section 215 of the Criminal Procedure Act applicable in the South of Nigeria are similar and they are mandatory. For there to be a valid arraignment of an Accused person, the following conditions contained in the sections earlier alluded to must be complied with:

- C 1. The Accused person shall be brought before the court unfettered, unless the trial judge otherwise directs (e.g. if the Accused person is violent, the judge may order that he be brought before the court fettered).
- D 2. The charge shall be read and explained to the Accused person in the language he understands.
3. The Accused person shall then be called upon to plead instantly.

Where there has been failure to comply with any of the above conditions the trial is a nullity. The record of the court must show that there was compliance with all of the above. All of the above are E provided to ensure that Accused person has a fair trial. See *Kajubo v. State* (1988) 3 S. C 109; *Eyoro Koromo v. State* (1979) 6-9 S.C. 3

During trial if there is cause to amend the charge, the Accused person must be called upon once again to enter a plea to the amended charge. Where the Accused person did not plead to an amended F charge the trial is a nullity.

The Facts.

Originally there were three counts. They read:

Count 1:

G That you Audu Yusuf alias Uban Yan Daba and Lawal Musa on or about the 22nd February, 2002 at Maguza Village near Rigasa, Kaduna State while armed with cutlass, rope and sticks conspired to commit an illegal act to wit: robbed one Shuaibu Lawal of his Suzuki Motorcycle and at the time of the robbery killed the said Shuaibu H Lawal (now deceased) and same act was done in pursuance of the said agreement. You thereby committed an offence punishable under Section 5 (b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of the Federation, 1990.

Count 2

That you Audu Yusuf alias Uban Yan Daba and Lawal Musa on or about the 22nd February, 2002 at Maguza Village near Rigasa Kaduna State while armed with cutlass, rope and sticks did an illegal act, to wit: robbed one Shuaibu Lawal of his Suzuki Motorcycle and at the time of the robbery you killed the said Shuaibu Lawal (now deceased). You thereby committed an offence punishable under Section 1 (2)(b) of the Robbery and Firearms (Special Provisions) Act, Cap. 398 Laws of the Federation, 1990. B

Count 3

That you Audu Yusuf alias Uban Yan Daba and Lawal Musa on or about 22nd February, 2002 did an illegal act to wit: murdered one Shuaibu Lawal an Okada rider and by so doing committed the offence of culpable homicide punishable with death under Section 221 of the Penal Code, Cap. 110 Laws of Kaduna State. C

Counts 1 and 2 were read and explained to the Appellant, and he pleaded not guilty. The learned trial judge found against the Appellant in these words:

“That 1st Accused however find guilty of the offence of murder of Shuaibu Lawal under Section 221 Penal Code on account of evidence of P. W. 1 and P.W.2 which remained unchallenged and convict him accordingly.” E

The Appellant’s plea was not taken for Count 3, but he was convicted on Count 3 and sentenced to death.

My Lords, where there is a laid down procedure for the arraignment in a criminal trial, viz Sections 187 (1) of the Criminal Procedure Code, and/or 215 of the Criminal Procedure Act, and the law says there should be no infraction and section states what the infractions are, once there is only one infraction the entire proceedings is a nullity. Failure to ensure that the Appellant entered a plea to Count 3 renders the trial a nullity. F

Whether the Appellant had a fair trial/hearing. G

Section 36 (6)(a) of the Constitution states that every person who is charged with a criminal offence shall be entitled to be informed promptly in the language that he understands and in detail of the nature of the offence. This, and the provisions of Sections 187 (i) or 215 supra are to ensure a fair trial for an Accused person. It is the primary responsibility of the trial judge to see to it that there was compliance. In *Isiyaku Mohammed v. Kano N. A.* (1968) 1 ALL NLR H

42 Ademola CJN., explained fair hearing as follows:

“It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation, justice has been done in the case.”

Despite overwhelming evidence, the Lord gave Adam an oral hearing before sentence was delivered. The test for fair hearing is the impression of a reasonable man who was present at the trial. The underlining requirement is that an Accused person must be heard before he is condemned. In this case Count 3 was not read, or explained to the Appellant. He was convicted and sentenced to death in clear violation of the provisions of Section 36 (6) (a) of the Constitution and Section 187 (1) of the Criminal Procedure Code. Anyone who sat in court would wonder why the Appellant was sentenced to death for an offence that was not read or explained to him and to which he did not enter a plea of guilty or not guilty. The Appellant was denied a fair hearing because Count 3 was never read to him and his plea was not taken. That would be the impression of a reasonable man.

What Should Be Done.

A new trial should be ordered if the interest of justice so requires. See Sele Eyoro Koromo and Anor. v. State (1979) 6-9 S.C. 3; (1979) 6-9 S.C. (Reprint) 3; Reid v. The Queen (1979) 2 WLR 221.

There are three sides to justice. Justice for the Accused/ Appellant, justice for the public and justice for the court. In this case a man died, and the Appellant was accused of killing that man. The interest of justice requires that the Appellant be properly tried.