

SUPREME COURT OF NIGERIA
FRIDAY 15TH FEBRUARY, 2013. SC. 151/2011
CORAM:- M. S. MUNTAKA-COOMASSIE, S. GALADIMA,
N. S. NGWUTA, K. B. AKA'AH, S. S. ALAGOA, JJSC

ALFRED ELIJAH APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Appeal - Retrial order - Is made where inter alia - There has been error in law or irregularity in procedure - That neither renders the trial a nullity - Nor was there a miscarriage of justice (H1)

CRIMINAL PROCEDURE - Justice - Retrial order - The order shall be sustained in the interest of justice - So as to know the truth of the case - And properly put appellant to trial (H2)

FACTS

Accused/appellant and one John Boye plus 10 others were arraigned for armed robbery before the Robbery and Firearms Tribunal, Ikot Ekpene, Akwa-Ibom State headed by Justice Philomena Etim. Following the credible evidence of prosecution witnesses and particularly that of the victim of the robbery incidence, the Tribunal had on the 3rd June 1999, convicted and sentenced appellant and the others of the offence of Armed Robbery contrary to section 1(2) of the Armed Robbery & Firearms (Special Provisions) Act Cap 398 Laws of Federal Republic of Nigeria. However, before the Tribunal concluded the hearing and delivered its judgment, the Federal Government passed into law, the Tribunal (certain consequential Amendment) Decree on the 28th May 1999.

Section 2(1)(2) of the said decree dissolved all Tribunals established in any of the enactments specified in the schedule thereto and transferred all the part-heard cases to the Federal High Court or High Court of a State. The legal consequence of the aforementioned provision is that as at 3rd June 1999, the Tribunal has been divested of the jurisdiction to hear and determine the matter. Not satisfied, appellant appealed to the Court of Appeal Calabar. The court al-

lowed the appeal and made an order for retrial of the case. Aggrieved, appellant appealed to Supreme Court against the retrial.

ISSUE FOR DETERMINATION

“1. Whether upon a consideration of the facts of this case, the evidence at the trial court against the appellant, the period of time that the appellant had already been in incarceration as well as the order of the Tribunal regarding the exhibits, it will not work untold hardship to subject the appellant to the rigours of a second trial as ordered by the court below”.

HELD (Unanimously dismissing the appeal per MUNTAKA-COOMASSIE JSC)

Appeal - Retrial order

1. It is a settled principle of law that an order for retrial in a criminal case is not automatic where a trial has been declared a nullity. An order for retrial de novo may be made in some circumstances, depending on the fact and nature of the case, some of the circumstances, though not exhaustive, are as follows:

1) That there has been error in law (including the absence of the law of evidence or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand no miscarriage of justice)

2) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant.

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

4) 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.

5) That to refuse an order for trial would occasion a greater miscarriage of justice than to grant it.

6) *The lapse of time since the commission of the offence.*

7) *The effect of the retrial on the quality of evidence and nature of the first trial whether substantial or not.*

My lords, I must hasten to say that these principles are not conjunctive but disjunctive; where any of the principles is not established, an order for retrial would be inappropriate. None of the above in my view was established in the appeal at hand. (p. 992 E)

Justice - Retrial order

2. In any case, and whatever is going to happen we should avoid speculations as to whether the witnesses will be readily available or not at the retrial and likelihood of loss of memory etc. That it will be in the interest of justice that truth of this case should be known and certainly if the appellant in this appeal is properly tried and found guilty he should be convicted and sentenced. Justice to be carried out by us shall be even handed justice. Justice shall not only protect appellant/appellants but should also protect victims and deceased's persons. That being the case, the order of retrial by the learned Justices of the Court of Appeal shall be sustained. (p. 995 A)

NOTABLE POINT OF INTEREST

MUNTAKA-COOMASSIE JSC

1. Retrial of appellant in the absence of prosecution's evidence contravenes s. 36 of 1999 Constitution

Particularly learned counsel to the appellant referred to the Tribunal's order that ordered for the destruction of some of the exhibits, while some were ordered burnt and some ordered to be returned to the witnesses. The learned counsel to the respondent kept silent on the availability or otherwise of the exhibits neither did he give any reply to the appellant's submissions on this point. Thus I have no option than to believe the appellant that these exhibits may no longer be in existence. I have no doubt in my mind that if exhibits, which are the pivot on which the prosecution's case lies, are no longer in existence the order of a retrial made by the lower court, with tremendous re-

spect, would amount to an order made in vain.

Do we just allow the appellant to be kept perpetually in custody while the prosecution would be fishing for exhibits that have either been burnt or destroyed by the order of the trial Tribunal? The answer is definitely in the negative. To hold otherwise would, in my
 B view, amount to contravening section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) that provides for fair hearing within a reasonable time. It should be noted that the appellant had been in custody since 1998 and only God Almighty knows
 C for how long he would remain in custody if the order for retrial made by the lower court is sustained. (p. 993 E)

REPRESENTATION

Chief Wale Taiwo, for the appellant with A. A. Salami, Esq., Miss A. A.
 D Akerele and Miss D. O. Taiwo, Esq.
 D.C. Enwelum, Esq., for the respondent.

CASES REFERRED TO

- Okeke v. The State (2001) 2 NWLR (pt. 697) 422
- E Umaru v. State (2009) 8 NWLR (pt. 1142) 145
- Odoemena v. COP. (1998) 4 NWLR (pt. 547) 697
- Ihekwoaba v. State (2004) 15 NWLR (pt. 896) 310
- Abobundu v. The Queen (1959) NSCC 56
- F Umaru v. State (2009) 8 NWLR (pt. 1142) 154
- Josiah v. The State (1985) 16 NSCC (pt. 1) 132
- Okafor v. The State (1976) 5 SC 13
- Adisa v. A-G Western Nig. (1966) NMLR 144
- Ewe v. The State (1992) 7 SCNJ 15
- G Queen v. Edache (1962) 1 All NLR 70
- Okoro v. The State (1976) 5 SC 13
- Duru v. Onwumelu (2001) 92 LRCN 3165
- Okeowo v. Migliore (1979) 11 SC 138
- Kajubo v. The State (1988) 1 NWLR 721

H

STATUTES REFERRED TO

Armed Robbery & Firearms (Special Provisions) Act Cap. 398 LFN 1990, s. 1(2)
 Tribunal (certain consequential Amendment) Decree 1999, ss. 1(b),

2(1)(2)

Criminal Procedure Law, s. 215

Constitution of Federal Republic of Nigeria 1999, s. 36

LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC

The appellant and one John Boye and 10 others were arrested before the Robbery and Fire-arms Tribunal, Ikot Ekpene, Akwa-Ibom State headed by Justice Philomena Etim, and on the 3rd June, 1999 all the accused persons were convicted of the offence of Armed Robbery contrary to Section 1(2) of the Armed Robbery and Firearms (Special Provisions) Act Cap. 398 Laws of Federal Republic of Nigeria.

Before the Trial Tribunal concluded the hearing and delivered its judgment, the Federal Government passed into law, the Tribunal (certain consequential Amendment etc Decree on the 28th day of May 1999, whilst the judgment of the Tribunal was delivered on 3rd day of June, 1999. Section 2 (1) (2) of the said decree dissolved all Tribunals established in any of the enactments specified in the schedule thereto and transferred all the part-heard cases to the Federal High Court or High Court of a state; particularly Section 1 (b) of the Decree provides as follows:-

“Where any part-heard matter is pending before any Tribunal on the date of the making of this Decree the Judge shall in a Criminal case try the matter de novo pursuant to this Decree”

The legal consequence of the above provision is that as at 3rd June, 1999 when the Tribunal delivered its judgment, it has been divested of the jurisdiction to hear and determine the matter.

Originally eleven (11) persons were charged. One of them died in the course of the trial leaving the number of the accused persons at ten (10).

CHARGE

“Useni John, Okpo Gabriel, Okon Francis, Emmanuel Johnson, Alfred Elijah, (the appellant) Joseph Gyang, John Boye, Yusuf Hassan, Anoulu Alhassan, Inelagu Adeku Gabriel, on the 30th day of August, 1997 along Ikot Ekpene/Itu High Way in the Ikot Ekpene Judicial Division while armed with offensive weapon to wit; Bayonet, robbed Effiong Edet Sampson of N54,000.00 (fifty four thousand naira) cash. Total value of property robbed N54,000.00

(fifty-four thousand Naira) property of Effiong Edet Sampson”.

All the accused persons pleaded not guilty to the charge. In the course of proving its case the prosecution called a total of five (5) witnesses and tendered twenty nine (29) Exhibits, while the 10 accused persons each testified in its own defence but none of them called any witness. The evidence of the victim of the robbery was highly revealing consistent and unshakable. The Bus which conveyed the accused persons who dressed in Army uniform was brought to court and tendered as Exhibit (10) the money robbed from the victim (PW1) was recovered and tendered as an exhibit, however instead of N54,000.00 the money was found to be N53,000.00. The victim also identified all the accused persons who beat him up with a bayonet and other offensive weapons. The evidence of all the prosecution witnesses are to be found on pages 69 - 81 of the record of proceedings.

The investigation by the General Officer commanding 82 Division Nigerian Army, Enugu revealed that all the accused persons were military personnel and members of the Nigerian Army all of them, after Court Martial were found guilty and dismissed from the Army. It was also part of the evidence of Pw4 that the driver of the Bus Exhibit 10 was forced to drive the said Bus. He has no slightest knowledge of the mission of the accused persons. He was then exonerated and was used as a prosecution witness. The evidence of all the accused persons in their defence starts from pages 81 - 94 of the record.

The learned counsel for the 10 accused persons Tony Uwah Esq. addressed the court, from pages 94 - 97 of the record. Counsel then urged the court to discharge the accused persons by not framing any charge against them.

As stated above, the ten accused persons pleaded not guilty to the charge framed against them. The learned Chairman of the Special Tribunal Justice Philomena Etim has this to say at p, 68 of the record.

“...It is trite that mere denial of the offence charged is not enough if the accused cannot rebut or punch the unchallenged and concrete evidence of the prosecution. The submission by learned defence counsel that pw1 did not raise the issue of bayonet at the earliest opportunity goes to no issue, since there is no such evidence

before me. The defence had all the opportunity to tender the statement of the P.W.1 for the court to see. He cannot now in his address raise that is not in evidence before the Tribunal.”

Learned Judge of the Tribunal continued to state thus:

“On the totality of the evidence before the Tribunal and submissions of both counsel there is abundant evidence that tile offence of armed robbery was committed on 30/8/97 as charged and that the accused persons were the robbers. The three ingredients of the offence have been established and proved beyond reasonable doubt against each of the 10 accused persons by the prosecution and I so hold. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th – 9th and 10th accused are each found guilty of the offence of armed robbery as charged and are hereby accordingly convicted.” See pages 100 -101 of the record.

The learned Chairman of the Tribunal sentenced each and every accused/convicted person to death in the manner to be determined by the Governor of Akwa-Ibom state.

Being dissatisfied with the judgment of the Tribunal the appellant successfully appealed to the Court of Appeal Calabar Division, holden at Calabar. Hereinafter called the lower court. After considering the record of proceedings and listening to the addresses of counsel on 20th day of November, 2002 the lower court allowed the appeal and made an order of retrial as follows:

“Independently of the provisions of sub- section 3 (1) (b) of decree 62 of 1999 which stipulated that a part-heard trial pending before robbery and Fire-Arms Tribunal before robbery and Fire-Arms Tribunal when the decree came into force be tried de novo. It will be a disservice to our system of judicial administration if conviction for a serious crime can be upset on the lapse of the law and the convicted persons set free on a technical ground without qualms. That will run counter to the strident philosophy of this crime that justice is not one way traffic as exemplified by the Supreme Court in *The State V Albamugbu (1888) 2 NWLR (pt.84) 548* that unmerited acquittal is an antithesis of Justice. In the final analysis, the appeal succeeds and it is allowed. I set aside the conviction and sentence of each appellant delivered on 3/6/99 by Robbery and Fire-Arms Tribunal sitting at Ikot-Ekpene. In its place it is hereby ordered that in accordance with subsection 3 (1) (b) of Tribunal (certain consequential Amendments

etc Decree No. 62 of 1999, the two appellants shall be tried de novo by the High Court of Akwa-Ibom State.” See pp. 185 - 186 per Sule Olagunju, JCA of blessed memory.

The appellant was dissatisfied with this order of retrial and has appealed to this court. Both parties filed and exchanged their respective briefs of argument before us on 22/11/2012.

The appellant in its brief of argument formulated only one issue for determination as follows:-

“1. Whether upon a consideration of the facts of this case, the evidence at the trial court against the appellant, the period of time that the appellant had already been in incarceration as well as the order of the Tribunal regarding the exhibits, it will not work untold hardship to subject the appellant to the rigours of a second trial as ordered by the court below”.

The Respondent also formulated a sole issue for determination in its brief of argument as follows:-

“1. Whether in the circumstances of this case, the order for retrial was proper”.

Looking at the issues formulated by all the parties the issues look the same, and they will be taken together. At the hearing the learned counsel for appellant adopted his brief of argument and urged this court to allow the appeal and discharge the accused person. It was the learned counsel’s submission that where a trial has been declared a nullity an order for retrial would be ordered depends on the circumstances of the case, such as if there has been a serious lapse of time between the commission of the crime, loss of memory of events which may affect the evidence capable of being relied upon and the credit worthiness of witness which may be affected as a result of time lapse, and the time it will take to reassemble the witness or witnesses, he relies heavily on the case of *Okeke V. The State* (2001) 2 NWLR (pt. 697) 422 at 423, and *Umaru v. State* (2009) 8 NWLR (pt.1142) 145 at 147.

Learned appellant’s counsel continued to state that if the lower court had considered the circumstances of the case, it would not have made the order of retrial as it did. The order of retrial, counsel concludes, was oppressive, arbitral and unfair, in that the appellant was arrested and charged in August, 1998, which is now more than a period of 14 years. He cited the case of *Odoemena v. COP.* (1998) 4

NWLR (Pt.547) 697 - 698 in support of his contention.

Learned counsel also referred to the order of the trial court/Tribunal that ordered the destruction of some of the Exhibits tendered in the case. He referred to the order to the effect that-

“1. Exhibit 1 - 11 to be returned to PW5

2. Exhibit 2 - to be returned to PW5

3. Exhibit 3 - 4 to be returned to PW1

4. Exhibit 5, 6 and 7 to be burnt.

5. Exhibit 8, 8a and 9 to be destroyed

6. Exhibit 10 - to be returned to PW2

7. Exhibit 11 - 30 to remain in the case file”.

It was the submissions of the learned counsel therefore that this order as it concerns the exhibits will greatly militate against or hinder a retrial of the appellant particularly when the availability of these witnesses is greatly in doubt. Learned counsel cites the case of *Ihekwoba v. State* (2004) 15 NWLR (pt. 896) 310.

The learned counsel to the respondent also adopted his brief at the hearing and urged this court to dismiss the appeal. Learned counsel conceded that an order for a retrial, once a trial has been declared a nullity, is not automatic, it depends on the circumstances of each case, the cases of *Okagbu V. The State* (1979) 11 SC. *Ankwa V. The State* (1969) 1 All NLR 133 were cited. The circumstances to be considered have been settled in the case of *Yesufu v. Abobundu v. The Queen* (1959) NSCC, 56 at 60. The case of *Umaru v. State* (2009) 8 NWLR (Pt. 1142) 154 at 147 that adopted the principles in *Yesufu Abobundu V. The Queen* (supra) was also cited.

In the instant case, the nullity trial arose from the fact that tribunals (certain consequential Amendments etc Decree came into effect on the 28th day of May 1999 whilst the judgment of the Tribunal was delivered on the 3rd June 1999 i.e. a period of five days.

Learned counsel conceded that the judgment of the tribunal delivered five (5) days after the commencement of the decree is a nullity by virtue of the provisions of Section 2 (2) of the Decree, but contended that the order of retrial was proper. It was his further contention that the only nullifying issue in the case, is the coming into effect of Section 2 (2) of the Decree, but the circumstances of this case shows a strong case of Armed Robbery by the appellant which is prevalent, there was no miscarriage of justice or any irregularity in

the proceedings. It was his contention that our system of justice administration will be compromised if conviction for a serious crime can be upset by lapse of the law and the convicted person set free on a technical ground.

B *“And justice is not a one-way traffic. It is not justice for the appellant accused of a heinous crime of murder. Justice for the victim, the murdered man, the deceased. ‘Whose blood is crying to heaven for vengeance’ and finally justice for the society at large - the society whose social norms and values had been desecrated and broken by the criminal act complained of. It is certainly in the interest of justice that the truth of this case should be known and that if the appellant is properly tried and found guilty, that he should be punished. That justice which seeks only to protect the appellant will not be even handed justice. It will not even be justice tempered with D mercy”.* - per Oputa, JSC in Josiah V. The State Pages 141 - 142.

Justice is not only for the accused but also for the victim and society, the case of Josiah v. The State (1985) 16 NSCC (Pt. 1) 132 at 145 was cited.

E On the issue of lapse of time, learned counsel submitted that the long delay till now is the fault of the appellant who filed his appeal out of time at the court below which shows lack of diligence on the part of the appellant.

F ***It is a settled principle of law that an order for retrial in a criminal case is not automatic where a trial has been declared a nullity. An order for retrial de novo may be made in some circumstances, depending on the fact and nature of the case, some of the circumstances, though not exhaustive, are as follows:***

G ***1) That there has been error in law (including the absence of the law of evidence or an irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand no miscarriage of justice)***

H ***2) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant.***

3) That there are no such special circumstances as would render it oppressive to put the appellant on trial a sec-

ond time.

4) 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.

5) That to refuse an order for trial would occasion a greater miscarriage of justice than to grant it.

6) The lapse of time since the commission of the offence.

7) The effect of the retrial on the quality of evidence and nature of the first trial whether substantial or not. See Umaru v. State (2009) 8 NWLR (pt.1142) 134 at 147; Okeke V. State supra; Odoemena v. COP (1979) 11 SC 1, Okafor V. The State (1976) 5 SC 13.

My lords, I must hasten to say that these principles are not conjunctive but disjunctive; where any of the principles is not established an order for retrial would be inappropriate. None of the above in my view was established in the appeal at hand.

The appellant in this appeal rests his case on three of these principles; i.e. the probable duration and expenses of the new trial, ii. the lapse of time since the commission of the offence/crime; and iii. the quality of the evidence to be adduced at the trial.

Particularly learned counsel to the appellant referred to the Tribunal's order that ordered for the destruction of some of the exhibits, while some were ordered burnt and some ordered to be returned to the witnesses. The learned counsel to the respondent kept silent on the availability or otherwise of the exhibits neither did he give any reply to the appellant's submissions on this point. Thus I have no option than to believe the appellant that these exhibits may no longer be in existence. I have no doubt in my mind that if exhibits, which are the pivot on which the prosecution's case lies, are no longer in existence the order of a retrial made by the lower court, with tremendous respect, would amount to an order made in vain.

Do we just allow the appellant to be kept perpetually in custody while the prosecution would be fishing for exhibits that have either been burnt or destroyed by the order of the trial Tribunal? The answer is definitely in the negative. To hold otherwise would, in my

view, amount to contravening section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) that provides for fair hearing within a reasonable time. It should be noted that the appellant had been in custody since 1998 and only God Almighty knows for how long he would remain in custody if the order for retrial made by the lower court is sustained.

It is for this reason that I will quote with approval the view expressed by my learned brother, Niki Tobi JCA (as he then was) in the case of *Odoemena v. COP* (1998) 4 NWLR (pt.547) 697 - 698 where he held thus -

"In my view, one special circumstance is the duration of time, between the first trial and the order of retrial. If there is so much time lag between the compilation of the first trial and a consideration by an appellate court to order a retrial, the court will refrain from doing so. The consideration of the time lag will again depend on the special circumstances of the case. In taking a decision on the issue, the court should take into consideration the possibility or otherwise of assembling the witnesses and the likelihood of memory failure on their part, as human beings, because of the length of time between the first trial and the anticipated retrial. And here, the court should consider whether key witness or witnesses are dead or will not be available to give evidence unless at heavy cost to the state. The court will also take into consideration whether witnesses will be prone to telling lies to cover a falling memory because of the length of time involved in the matter".

In the above case the learned justices of the Court of Appeal presided by Akpabio, JCA as he then was of blessed memory delivered the lead judgment and concurred by Niki Tobi and Chukwuemeka Ubaezonu, JJCA as they then were. Niki Tobi continues and state that

"in this case the appellants were charged in 1968 and were convicted on 12 January 1990, at the Magistrate Court. They appealed to the High Court the learned appellate Judges ordered a retrial on 28th July, 1995. This is 1998 and this court gives a decision. The case has taken ten years from the year of trial to this year. That is quite a period in a criminal matter, where he require proof beyond reasonable doubt. Can there be no possibility of memory failure on the part of the witnesses if they are available at all to give evidence? If

there is such a possibility, will it not result in miscarriage of justice in the criminal processes, thus materially affecting the truth searching processes?"

In any case, and whatever is going to happen we should avoid speculations as to whether the witnesses will be readily available or not at the retrial and likelihood of loss of memory etc. That it will be in the interest of justice that truth of this case should be known and certainly if the appellant in this appeal is properly tried and found guilty he should be convicted and sentenced. Justice to be carried out by us shall be even handed justice. Justice shall not only protect appellant/appellants but should also protect victims and deceased's persons. That being the case the order of retrial by the learned Justices of the Court of Appeal shall be sustained.

Appeal is hereby dismissed.

D

GALADIMA JSC

I have had the privilege of reading in draft, the lead Judgment of my learned brother, Coomassie, JSC. He has aptly Taken time to expose the real facts in issue and also analysed the case law relevant in this case. While I need not repeat that exercise, I shall delve into some key legal principles to be considered before remitting a case to the trial court for a retrial. There is a plethora of authorities where the appellate court remitted the case for a fresh trial after it had held that the trial in the court of first instance was a nullity.

However, whether the appellate court will order a trial or not on declaring a previous trial a nullity depends on the peculiar circumstances of each case, having regard to the guiding principles laid down in the classicus of *Yesuf Abodundu v. The Queen* (1959) SCNLR 162; (1959) 4 FSC 70.

The conditions or pre-requisites are as follows:

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

(b) that leaving aside the error of irregularity, the evidence

taken as a whole discloses a substantial case against the appellant:

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

(d) that the offence or offences of which the appellant was convicted or the consequences to the appellant or any person of the conviction or acquittal of the appellant, are not merely trivial; and

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

Applying the above principles the then Federal Supreme court, declined to make an order for a retrial in Abodundu case (*supra*).

I shall now consider a few authorities. In *Rotimi Adisa v. Attorney-General Western Nigeria* (1966) NMLR 144, a charge was amended in a murder case. The Appellant duly pleaded to the amended charge but when his counsel applied to recall the three witnesses, who had earlier testified, the learned trial Judge refused.

On appeal this court held that the right to recall witnesses after amendment pursuant to sections 164 and 165 of the Criminal Procedure Act was a right which could not be taken away from the Appellant.

The case was sent to the High Court for a fresh hearing. However, in *Akpiri Ewe v. The State* (1992) 7 SCNJ 15; (1992) 6 NWLR (pt.246)

147 this court held that failure of the trial court to comply with the mandatory provisions of section 215 of Criminal Procedure Law and the 1979 Constitution as regards plea of an accused person to the charge rendered the trial a nullity. It was held further that from 'the

record proceedings as a whole the evidence in the purported trial disclosed a substantial case against the Appellant. The Court ordered for retrial. See also cases of *Queen v. Edache* (1962) 1 All NLR 70: (1962) 1 SCNLR 122 and *Okoro v. The State* (1976) 5 SC 13.

On a calm consideration of the instant case, I find that the circumstances leading to the court below for ordering a retrial are to some extent, similar to some of the above cases. I recapitulate the fact of the section 1(2) of the Armed Robbery and Fire-arms (Special Provisions Act Cap 398 Laws of the Federation, under which the accused persons were convicted, as amended by section 2 (1) (2) of the Tribunal (Certain Consequential Amendment) Decree, No. 62 of 1999. The Decree provides in Section 3(1) thus:

"Where any part-heard matter is pending before any Tribunal on the date of the making of this Decree the judge shall in a criminal

case try the matter de novo, pursuant to this Decree.”

The said Decree was passed on 28th May, 1999. Whilst the Judgment of the trial Tribunal was delivered on 3rd June, 1999. The legal effect of the above provision on the judgment of the Tribunal is that it had divested the Tribunal of the jurisdiction to hear and determine the case. Hence in its well considered judgment the court below considering the consequential Amendments of the said Decree No.62 of 1999, ordered the retrial of the two appellants at the Akwa Ibom State High Court. B

One of the Appellants at the court below, one Alfred Elijah C further appealed to this court raising same issue for determination as follows:

“Whether upon a consideration of the facts of this case, the evidence at the trial court against the Appellant, the period of time that the Appellant had already been in incarceration as well as the order of the tribunal regarding the exhibits, it will not work untold hardship to subject the Appellant to the rigours of a second trial as ordered by the court below.”

Respondent’s sole issue is formulated thus:

“Whether in the circumstances of this case the order for retrial E was proper.”

Learned Counsel for the Appellant has submitted that where a trial has been declared a nullity an order for retrial would not be automatic as the court would consider the circumstances of each case. F That if the lower court had considered the circumstances and merit of the instant case, it would not have made the order of retrial as it did. It is submitted that an order of retrial will result in oppression and result in cause miscarriage of justice to put the appellant on trial for the second time considering the fact that the Appellant was arrested G and charged to court in August 1998, which by now is more than a period of 14 years. Reliance was placed on the case of Odoemena v. COP (1998) 4 NWLR (pt. 547) 680 at 697 - 698.

It is also argued that since it has become very clear that the trial Tribunal has ordered the destruction of most important exhibits it is another factor this court should take into consideration in making an order of retrial. Reliance was placed on the case of Ihekwoaba v. State H (2004) 15 NWLR (pt.896) 310.

Learned Counsel for the Respondent has conceded to the point

that once a trial has been declared a nullity by the court, the order for a retrial that follows is not automatic but it will depend largely on the circumstances and peculiarity of a particular case. He refers to such circumstances as enunciated in the guiding principles in the case of *Yesuf Abodundu v. The Queen* (supra). Learned Counsel observed
B that the nullity of the trial of the appellant arose because the judgment of the Tribunal was delivered on the 3rd June, 1999 whilst the Decree came into effect on 28th day of May, 1999 a period of 5 days after the commencement of the said Decree. It was contended that
C the need to do justice according to established principle of justice in criminal cases, will be highly compromised if the conviction of the Appellant for such a serious crime can be upset on a technical ground. He cited to buttress this point the case of *Josiah v. The State* (1985) 16 NSCC (pt.1) 132 at 145.

D On a calm consideration of the principles enunciated in a number of cases, discussed above, the most important of these principles which must exist to warrant the sending back of a case to the court below for a retrial is (leaving aside the error or irregularity) that the evidence taken as a whole must disclose a substantial evidence against
E the accused (the Appellant herein). In the instant case the evidence taken as a whole that led to the conviction of the appellant and his co-accused who did not appeal was substantial. The offence of which the appellant was convicted is grave and not merely trivial. It is unfair
F to suggest that the proper trial of the appellant for the offence of armed robbery would be unjust and oppressive. This is a case where the wheel of justice even if rolled by gently would eventually serve the end of justice. The evidence before the lower court, in this case, does not suggest that it will be unfair or unjust to subject the appellant to a second trial from which he would eventually be acquitted, I
G cannot at this stage speculate on the difficulties prosecution would face in the event of retrial; such as the possibility of loss of Exhibits, possibility of memory failure on the part of witnesses considering the period of years, criminal charge has been hanging over the head of
H the Appellant “like the sword of Damocles.” He came here on appeal searching or looking for justice. In the truth searching process, justice and nothing more would be meted to him, no matter how long.

It is in the light of the foregoing and the fuller reason in the lead judgment of my learned brother, Coomassie, JSC, I also dismiss

the appeal. I also affirm the order of retrial of the appellant made by the court below.

NGWUTA JSC

I read in draft the lead judgment of my learned brother, B Muntaka-Coomassie, JSC. I entirely agree with the reasoning and conclusion reached.

The appellant and others were tried by Fire-arms Tribunal, Ikot Ekpene, Akwa Ibom State. The appellant was convicted and sentenced latter the relevant law had been amended ousting jurisdiction in armed Robbery from the Tribunal and vesting same in the Federal High Court or High Court of a State. Part heard matters were to be tried de novo by the High Court. Perhaps, unaware of the amendment ousting jurisdiction from it and vesting same in the High Court, the Tribunal delivered its judgment in the matter in which it no longer has jurisdiction to deal with. C D

On appeal to the lower Court, the judgment was set aside and a retrial ordered. The issue here is the propriety vel non of the order for retrial in the light of the circumstances of the case. E

In Abodundu v. The Queen (1959) SCNLR 162 (also reported as (1959) 4 FSC 70) the Court laid down the conditions for ordering a retrial as follows:

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

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

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

(d) That the offence or offences of which the appellant was convicted or consequences to the appellant or any person of the conviction or acquittal of the appellant are not merely trivial; and H

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

The appellant was convicted of armed robbery, one of the

most heinous crimes bedeviling the Nation. The evidence on record discloses a substantial case against the appellant. The nature of the offence is such that the acquittal of the appellant will have a serious effect on the society.

B On the undisputed facts of the case it is my view that a greater miscarriage of justice to society will result from refusing the order for retrial than granting it. See *Ezeanye Duru v. Peter Onwumelu & Ors* (2001) 92 LRCN 3165, 3166, 3174 and 3174; *Onyenma v. Amah* (1988) 1 NWLR (Pt. 73) 772; *Okeowo v. Migliore* (1979) 11 SC 138.

C There is a general statement to the effect that:
“Retrial implies that there was a former and so the Court cannot grant a new trial (or retrial) upon a trial which was null and void.”

D In view of the later decision in *Sele Eyorokoromo Anor v. The State* (1979) 6-9 SC 3 at p. 11-12, the position is that a new trial or retrial can be ordered if the interest of justice so requires it. See *Reid v. The Queen* (1972) 2 WLR 221 at 226 applied by *Oputa, JSC* in *Sunday Kajubo v. The State* (1988) 1 NWLR 721 at 744.

E In view of the above and the fuller reasons in the lead judgment, I also dismiss the appeal and affirm the order of retrial made by the court below.

AKA’AHS JSC

F I read the draft of the judgment of my learned brother, Muntaka-Coomassie JSC. I entirely agree with the conclusion that the order of retrial should not be tampered with. The judgment of the lower court was declared a nullity on account of the fact that at
 G the date of the delivery of judgment, the Tribunals (Certain Consequential Amendments etc) Decree 1999 had come into operation which required all part heard cases to be transferred to either the Federal High Court or the High Court of a State for continuation of hearing. It will occasion greater injustice if the appellant is allowed to
 H go free because of the lapse of time since the commission of the offence. After all it is the appellant who brought this situation about. As at 20th November, 2002 when the lower court made the order for retrial, the length of time the alleged offence was pending was only 5 years. If the trial had not been nullified there would have been

justification for the appellant to appeal to this Court since the death penalty was imposed on him by the trial High Court.

It is my view that the evidence taken discloses a substantial case against the appellant; consequently to refuse an order of re-trial will occasion a greater miscarriage of justice than to grant it.

I find no merit in the appeal and same is hereby dismissed. B

ALAGOA JSC

I read before now in draft the lead judgment just delivered by my brother, Muntaka-Coomassie, JSC and I am in agreement with him that the order of retrial is apt and should not be disturbed as a refusal to make such an order of retrial will lead to a greater miscarriage of justice than to grant it. C

The Appellant should not be made to benefit from the fact that at the date when judgment was delivered the Tribunals (Certain Consequential Amendments etc) Decree 1999 had become operative. I also dismiss the appeal as lacking in merit. D

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