

SUPREME COURT OF NIGERIA
FRIDAY 12TH APRIL, 2013. SC. 485/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC**

SEMIU GANIYU APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Aborted trial - Implication of - Where a proceeding is declared a nullity by court - Such a proceeding is legally deemed not to have existed (H1)

CRIMINAL PROCEDURE - Arraignment - Plea taking - Plea by accused upon arraignment is a matter of procedural law - And any defect therein renders proceedings a nullity - As it affects jurisdiction of court (H2)

CRIMINAL PROCEDURE - Appeals - Retrial - Principles - Appellate court will inter alia grant retrial - Where apart from irregularity in the proceeding - Evidence discloses a substantial case against appellant (H3)

CRIMINAL PROCEDURE - Murder - Retrial order - Correctness of - *Yahaya v. State* - Long incarceration cannot justify discharge & acquittal of accused - When the charge borders on murder (H4)

FACTS

Appellant and the others were alleged to have had sexual intercourse with the deceased one Maria Adeniyi a.k.a. Iya Ibeji (a labourer at appellant's block making site) before beheading her and cutting off her private parts which included her breast. They were subsequently said to have buried her body in a grave around the site. When the deceased failed to return home after close of work, her husband (PW1) organized a search party after reporting the matter to the police. Appellant and the others were later arrested in connection with the missing of deceased. Appellant made confessional state-

ments which created a nexus with the murder of the deceased.

Appellant and the others were thus arraigned before the High Court of Ogun State for conspiracy to murder and murder of the deceased contrary to sections 324 and 316 (3) and punishable under section 319(1) of the Criminal Code Law (Cap 29) Laws of Ogun State of Nigeria 2006. At trial, the confessional statement was objected to by appellant, which led to a trial within trial. After the trial within trial, the court admitted the confession in evidence. In its judgment, the court convicted and sentenced appellant and the others to death by hanging. Appellant being dissatisfied lodged an appeal at the Court of Appeal, Ibadan Division. Appellant contended that he did not plea to the charges. On this fact, the court set aside the judgment of trial court for failure to comply with section 215 of the Criminal Procedure Law. The court being of the opinion that a substantial case has been made out against appellant, ordered that the case be tried de novo by another Judge of the trial High Court. Aggrieved, appellant appealed to Supreme Court, contending that he is entitled to an order of discharge and acquittal.

ISSUE FOR DETERMINATION

“(i) Whether the court below was right in ordering a retrial of the Appellant having held that the trial of the Appellant was a nullity.”

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

CRIMINAL PROCEDURE - Aborted trial - Implication of

1. To me, only one issue calls for determination in this appeal and that issue is issue No. 1 supra. Where a proceeding is declared a nullity by a court of law, it is trite law that such a proceeding is in the eyes of the law, seen as not to have existed at all and as such nothing is expected to be founded on it. It follows therefore that if it is found that the lower court is right in its holding that the proceeding it set aside was a nullity, then it is very immaterial that the court found prima facie evidence against appellant as the whole exercise is to be carried out de novo by another court not the court below. It is equally irrelevant if appellant was referred to as “murderers”

by the said lower court since it would have no role to play in the said trial de novo. The two issues are therefore academic and hypothetical in nature and will consequently not be considered by me in this judgment. (p. 1667 B)

Arraignment - Plea taking

2. It must be pointed out that the taking of the plea of an accused person upon arraignment is a matter of procedural law, not substantive law, the defect on which renders the proceedings a nullity. Such a defect is regarded as a fundamental defect which goes to the jurisdiction of the court. (p. 1669 B)

Appeals - Retrial - Principles

3. The question that follows is what are the principles guiding the courts in a situation where a court has to consider the issue as to whether or not to order a retrial of charge? The principles include the following:-

(i) that leaving aside the error or irregularity in the proceeding, the evidence taken as a whole discloses a substantial case against the appellant;

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

(iii) that the 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;

(iv) that to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it;

(v) the reason for declaring the trial a nullity and the overall interest of justice are also relevant.

The question is whether the above reasons which are founded on the principles guiding the court in the circumstances of this case are not sound or well founded? I think they are. To discharge and acquit the appellant of a charge of murder which has not been properly tried on the merit and despite the finding of the lower court that the evidence of PW1 and PW2 on record established a nexus between the acts of the appellants

and the death of the deceased and that the appellants made confessional statements relating to the offence charged would not meet the justice of the case at all; it would, to put it mildly amount to an act of irresponsibility which this Court, or any court for that matter, would not get involved in. There is just
B no basis for an order or discharge and acquittal having regards to the facts and circumstances of this case.
 (pp. 1669 D/1670 G)

Murder - Retrial order - Correctness of
C 4. Learned Counsel for appellant has argued that an order of retrial is oppressive on appellant who had spent about eight (8) years in prison custody following his arrest, and urged the court to rescind the order and substitute the one for discharge
D and acquittal. The answer to that submission can be found in the opinion of UWAIS, CJN in the case of Yahaya vs The State 9 NSCCR at 36 as follows:-

E “I accept that to remain in prison custody for ten years awaiting trial is outrageous and is such a long period that should undoubtedly evoke sympathy and concern. However the nature of the offence with which the Appellant is accused is murder, is so grave that there is no offence under our laws which carries heavier sentence. As it has been stated elsewhere, justice is not for the accused only. Therefore, if the
F circumstances of both the accused and the victim are considered together, the order of fresh trial should not in my opinion be regarded as oppressive. Besides in our laws, a sentence of 10 years is not regarded as sufficient punishment for murder”

G This appeal is really worthless and is designed to further waste the time of the courts while the client still languishes in jail awaiting his proper trial, which would have started by now to shorten his stay in prison awaiting trial. It is a strange proposition having regards to the facts and circumstances of
H this case that a court of law should discharge and acquit an accused whose earlier trial is declared a nullity without considering the charge on the merit!! (p. 1671 B)

REPRESENTATION

Dr. Akin Onigbinde for appellant, with him Richard Baiyeshea Esq. and Deji Adeyemi, for the Appellant

B. A. Adebayo Esq., DPP Ogun with Olumuyiwa Ogunsanwo Esq. ACS Ogun, for the Respondent

B

CASES REFERRED TO

Edet vs State (2009) All FWLR (pt. 463) 1430

Solola vs State (2005) All FWLR (pt. 269) 1751

Kalu vs State (1998) 13 NWLR (pt. 583) 531

Edibo vs State (2007) All FWLR (pt. 384) 192

Kajubo vs State (1988) 1 NWLR (pt. 73) 721

Uche vs State (1999) 7 NWLR (pt. 609) 1

Edibo vs State (2007) All FWLR (pt. 384) 192

Edache v. Queen (1962) 1 SCNLR 22

Adisa v. AG Western Nigeria (1965) 1 ALL NLR 412

Ewe v. State (1992) 6 NWLR (pt. 246) 147

C

D

STATUTES REFERRED TO

Criminal Code Law Cap. 29 Laws of Ogun State of Nigeria 2006, ss. 316(3), 319(1), 324

Constitution of the Federal Republic of Nigeria 1999, s. 36(6)

Criminal Procedure Law, s. 215

E

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at IBADAN in appeal No.CA/I/367/2009 delivered on the 6th day of November 2011 in which the Court allowed the appeal of appellant and set aside the decision of the trial court in charge No.HCT/9C/2002 in which the court convicted and sentenced appellant to death on a charge of murder.

The lower court however, ordered a retrial of the charge. Appellant is not satisfied with that decision hence the instant further appeal.

F

H

Appellant, together with others, was arraigned before the High Court of Ogun State, Holden at OTA on a two counts charge of conspiracy to commit murder and murder contrary to the provisions of sections 324 and 316 (3) and punishable under section 319(1) of

the Criminal Code Law (Cap 29) Laws of Ogun State of Nigeria, 2006.

B Appellant is alleged to have conspired with others on the 15th day of July, 2000 to murder and did murder one Maria Adeniji a.k.a. Iya Ibeji; that appellant engaged the services of the deceased to work as a labourer for the accused persons in their block making site. It was appellant who went to the house of the deceased to call her out on the day in question but the lady failed to return home after close of business/work that day as a result of which her husband who testified as PW1, organised a search party to try and locate her. The matter was also reported to the police. The search yielding nothing as a result of which the lady was declared missing.

D The prosecution alleged that appellant and his co-accused persons had sexual intercourse with the deceased before killing her by cutting off her head and private part including her breasts. Her remains were then buried in a grave near the site. Following investigations, appellant led the police team to Saki town where the severed head of the deceased was recovered. Appellant is also alleged to have made a confessional statement to the police, which he later E contended was not voluntarily made but was admitted after a trial within a trial proceedings.

F Appellant and his co-accused testified in their defence and denied killing the deceased. The trial judge delivered his judgment on 6th May, 2009 convicting and sentencing the accused persons, including appellant to death for the offence of murder.

G Upon appeal, the Court of Appeal declared the High Court's proceedings a nullity for failure to comply with section 215 of the Criminal Procedure Law, and ordered a retrial before another Judge of the High Court of Ogun State.

In the appellant brief of argument filed on 27/1/12 by learned Counsel for appellant, DR. AKIN ONIGBINDE, the following three issues have been formulated for the determination of the appeal:

H *“(i) Whether the court below was right in ordering a retrial of the Appellant having held that the trial of the Appellant was a nullity.*

(ii) Whether the court below was right in holding that there were prima-facie evidence against the Appellant having held that their trial was a nullity.

(iii) Whether the court below reference to the Appellant as

“Murderers” had not infringed the Appellant’s right to presumption of innocence thereby occasioned a miscarriage of justice against the Appellant.”

In the respondent brief filed on 19/3/12 by learned counsel for the respondent B. A. ADEBAYO, ESQ three issues were also formulated which are substantially the same as the issues formulated by learned counsel for appellant which had earlier been reproduced in this judgment. I therefore find no need to reproduce the issues by counsel for respondent in this judgment.

To me, only one issue calls for determination in this appeal and that issue is issue No. 1 supra. Where a proceeding is declared a nullity by a court of law, it is trite law that such a proceeding is in the eyes of the law, seen as not to have existed at all and as such nothing is expected to be founded on it. It follows therefore that if it is found that the lower court is right in its holding that the proceeding it set aside was a nullity, then it is very immaterial that the court found prima facie evidence against appellant as the whole exercise is to be carried out de novo by another court not the court below. It is equally irrelevant if appellant was referred to as “murderers” by the said lower court since it would have no role to play in the said trial de novo. The two issues are therefore academic and hypothetical in nature and will consequently not be considered by me in this judgment.

In arguing issue 1, learned counsel for appellant submitted that the lower court was in error when it ordered retrial rather than an order discharging and acquitting appellant; that the lower court haven found the proceedings a nullity due to the fact that the plea of appellant was never taken before the trial and conviction, the proper order according to learned Counsel, was that of discharge and acquittal; that there was no proper arraignment of appellant as envisaged under section 36(6) of the 1999 Constitution of the Federal Republic of Nigeria and section 215 of the Criminal Procedure Law. Counsel also relied on the case of Edet vs State (2009) All FWLR (pt. 463) 1430 at 1441; that failure to comply with the laid down procedure for arraignment will render the trial a nullity, relying also on Solola vs The State (2005) All FWLR (pt. 269) 1751; Kalu vs The State (1998) 13 NWLR (pt.583) 531; that by ordering a retrial after

declaring the proceedings of the trial court a nullity, the lower court infringed on the right of fair hearing of the appellant; that in the case of *Edibo vs State* (2007) All FWLR (Pt.384) 192 at 229 where the supreme court held that the taking of the plea of the accused in chambers rather than the open court rendered the proceedings a nullity, the court discharged the accused person; that it would be oppressive to subject appellant to the rigors of trial once again, that the evidence before the court does not link appellant to the Commission of the offence charged hence the call for discharge and acquittal of the appellant.

Finally, learned Counsel urged the Court to resolve the issue in favour of appellant.

On his part, learned Counsel for respondent submitted that the lower court was right in ordering a retrial following a declaration that the trial leading to the conviction and sentence of appellant was a nullity; that the non taking of the plea of appellant is a mere procedural error which does not touch on the merit of the case; that the lower court followed the principles laid down in the case of *Abodunde vs The Queen* 4 FSC 70 at 71 - 72; *Kajubo vs The State* (1988) 1 NWLR (pt.73) 721; *Uche vs The State* (1999) 7 NWLR (pt.609) 1, in coming to the conclusion that a retrial is the appropriate order to make in the circumstances of the case; that a prima facie case was made out against appellant particularly as appellant made a confessional statement which was also admitted in evidence; that the retrial was ordered due to a fundamental defect in the proceedings not as a result of insufficiency of evidence to support the conviction and urged the court to resolve the issue against appellant.

It is not disputed that appellant and others were accused of conspiracy to murder and murder and charged to court for trial; that no plea of the accused persons, including the appellant, was taken before the court proceeded to hear evidence, try, convict and sentence them for the offence charged.

In the case of *Edibo vs The State* (2007) All FWLR (pt.384) 192 at 211, this Court held as follows:-

“The arraignment and taking of the plea of an accused person is the very commencement of a criminal trial. It is the stage when the accused person appears at the court, the charge explained to his understanding and pleads thereto in person and not even through

his Counsel. It is a very fundamental aspect of any criminal proceedings and that underscores the need for the strict and mandatory compliance in matters relating thereto. Thus any criminal trial, no matter how well conducted, without the plea of the accused person first and properly taken is a nullity."

It must be pointed out that the taking of the plea of an accused person upon arraignment is a matter of procedural law, not substantive law, the defect on which renders the proceedings a nullity. Such a defect is regarded as a fundamental defect which goes to the jurisdiction of the court.

Though both parties agree that the proceedings in question was a nullity as rightly declared by the lower court, counsel for appellant contends that the consequential order that court ought to have made is that of discharge and acquittal of the appellant not retrial. On the other hand, learned Counsel for the respondent has contended that the lower court was right in the order of retrial it made in the circumstance.

The question that follows is what are the principles guiding the courts in a situation where a court has to consider the issue as to whether or not to order a retrial of charge? The answer can be found in very many cases including Abodunde vs The Queen 4 FSC 70 at 71 - 72; Kajubo vs The State (1988) 1 NWLR (pt.73) 721 at 727 etc. ***The principles include the following:-***

(i) that leaving aside the error or irregularity in the proceeding, the evidence taken as a whole discloses a substantial case against the appellant;

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

(iii) that the 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;

(iv) that to refuse an order for retrial would occasion a greater miscarriage of justice than to grant it;

(v) the reason for declaring the trial a nullity and the overall interest of justice are also relevant.

It should be noted that the issue of the proper order to make

upon finding out that the proceeding leading to the conviction and sentence of appellant was a nullity was raised and considered by the lower court. In deciding the matter, the lower court at page 202 of the record, held as follows:-

B *“Having gone through the record of proceedings, it is clear from the evidence of PW1 and PW2, that there is nexus between the acts of the Appellants and the death of the deceased. Appellants made confessional statements admitting committing the offence. In my humble opinion a prima facie case has been made against all the Appellants and this has satisfied condition (a).*

C *On condition (b), the fact that the Appellants have been in custody since the date of arrest till now cannot amount to sufficient punishment for the offence to render a retrial oppressive. If the circumstances of both the Appellant and the deceased are considered together, the order of retrial should not be regarded as oppressive.*

D *On condition (c), the offence or offences of which the Appellants have been convicted and sentenced are not trivial. The offence of murder carries capital punishment. The years stayed in custody awaiting trial cannot be regarded as sufficient punishment for the offence of murder.*

E *On condition (d) to order their acquittal will not meet the justice of the case.*

F *On condition (e) the Appellant rights to freedom has to be weighed against the security of the general public who are entitled to be protected from murderers. Justice is not to the appellants alone, it is also for the deceased who is crying in her lonely grave for justice to be done to those who killed her in a gruesome manner and also to the public at large.”*

G *The above are the reasons for the lower court ordering retrial instead of discharge or discharge and acquittal of the appellants.*

H ***The question is whether the above reasons which are founded on the principles guiding the court in the circumstances of this case are not sound or well founded? I think they are. To discharge and acquit the appellant of a charge of murder which has not been properly tried on the merit and despite the finding of the lower court that the evidence of PW1 and PW2 on record established a nexus between the acts of the appellants and the death of the deceased and that the ap-***

pellants made confessional statements relating to the offence charged would not meet the justice of the case at all; it would, to put it mildly amount to an act of irresponsibility which this Court, or any court for that matter, would not get involved in. There is just no basis for an order or discharge and acquittal having regards to the facts and circumstances of this case. B

It should be noted also that appellant has not challenged the finding by the lower court that appellant made a confessional statement in relation to the offence charged.

Learned Counsel for appellant has argued that an order of retrial is oppressive on appellant who had spent about eight (8) years in prison custody following his arrest, and urged the court to rescind the order and substitute the one for discharge and acquittal. The answer to that submission can be found in the opinion of UWAIS, CJN in the case of Yahaya vs The State 9 NSCCR at 36 as follows:- C D

"I accept that to remain in prison custody for ten years awaiting trial is outrageous and is such a long period that should undoubtedly evoke sympathy and concern. However the nature of the offence with which the Appellant is accused is murder, is so grave that there is no offence under our laws which carries heavier sentence. As it has been stated elsewhere, justice is not for the accused only. Therefore, if the circumstances of both the accused and the victim are considered together, the order of fresh trial should not in my opinion be regarded as oppressive. Besides in our laws, a sentence of 10 years is not regarded as sufficient punishment for murder" E F

This appeal is really worthless and is designed to further waste the time of the courts while the client still languishes in jail awaiting his proper trial, which would have started by now to shorten his stay in prison awaiting trial. It is a strange proposition having regards to the facts and circumstances of this case that a court of law should discharge and acquit an accused whose earlier trial is declared a nullity without considering the charge on the merit!! G H

In the circumstances I find no merit in issue 1 which is accordingly resolved against appellant.

In conclusion and having resolved the only relevant issue against appellant, it is obvious that the appeal is grossly without merit

and is accordingly dismissed by me.

The judgment of the lower court delivered on the 6th day of November, 2011 in appeal No. CA/I/367/2009 is hereby affirmed by me. Appeal dismissed.

B

MUNTAKA-COOMASSIE JSC

This is an appeal against the judgment of the Court of appeal Ibadan.

C In this matter the accused/Appellant was convicted and sentenced to death on a charge of murder, the court of appeal, on an appeal by the appellant the Court of Appeal Ibadan Division now Court below, allowed the appeal but ordered a retrial of the appellant before another trial court for the same charge which read in D effect was that Appellant together with others, were charged with conspiracy to commit murder and murder contrary to Sections 324 and 316 (3) and punishable under section 319 (1) of the Criminal Code Law (Cap.29) Laws of Ogun State of Nigeria, 2006.

E The appellant successfully appealed to the Court of Appeal (court below) Ibadan Division.

The court below allowed the appeal but ordered a retrial. Appellant was not satisfied and appeal to this Court.

F I read before now the lead judgment of my learned brother Onnoghen JSC. I also hereby agree with his lordship that this appeal like the sister appeal, in SC.486/2011, has no merit, same is hereby dismissed. The decision taken by the Court below is affirmed.

G

ARIWOOLA JSC

H I had the privilege of preview of the lead judgment of my learned brother, Onnoghen, JSC just delivered. I am in total agreement with the reasoning and the conclusion arrived thereat. His Lordship dealt with the main issue admirably that I have nothing more to add. The appeal is indeed lacking in merit and should be dismissed. I also dismiss same and will abide by the consequential order in the said lead judgment.

MUHAMMAD JSC

My learned brother Onnoghen, JSC, obliged me a preview of his lead judgment and I agree with him that this appeal lacks merit and do join him in dismissing same.

The appellant was tried and convicted by the Ogun State High Court on a two count charge of conspiracy to commit murder and murder contrary to Sections 324 and 316 (3) and punishable under Section 319 (1) of the Criminal Code Law (CAP 29) Laws of Ogun State 2006. Following his appeal to the court below, proceedings at the trial court leading to his conviction and sentence for the offences were nullified. Appellant's plea, in breach of Section 215 of the Criminal Procedure Law, was not taken. The court below ordered a retrial.

The crucial issue the appeal raises is whether or not the lower court is right in ordering retrial of the case at trial court by a judge other than the one whose judgment was declared a nullity by the court below.

The principles guiding the court in ordering a retrial have been stated in very many cases as being dependant on the circumstances of the particular case. Generally, it is the consensus that an appellate court will order a retrial where the trial of an accused person is invalid in the sense that the procedural requirements of the law are not complied with by the trial court and the appeal is allowed on that ground and it is clear from the record of proceedings as a whole that the evidence led in the purported trial discloses a substantial case for a proper trial of the accused. See *Edache v. Queen* (1962) 1 SCNLR 22; *Adisa v. AG Western Nigeria* (1965) 1 ALL NLR 412 and *Ewe v. State* (1992) 6 NWLR (Part 246) 147 at 154.

In the case at hand the trial of the appellant was rightly nullified by the court below for the trial court's failure to take appellant's plea which lapse is a fundamental irregularity that goes to the root of the court's proceedings. The court's order for his retrial on the face of the evidence on record which is substantial cannot, on principle, be faulted. It is for the foregoing and the fuller reasons contained in the lead judgment that I also dismiss the appeal and affirm the decision of the court below.