

**SUPREME COURT OF NIGERIA**  
FRIDAY 24TH MAY, 2013. SC. 483/2011  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, O. ARIWOOLA,  
M. D. MUHAMMAD, JJSC**

ISMAILA LASISI ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Nullity - Arraignment CPL s. 215 - The section which deals on taking of appellant's plea - Does not give room for exercise of discretion - And failure to comply with it - Renders the proceedings a nullity (H1)

CRIMINAL PROCEDURE - Appeal - Retrial order - Sustainability - The order is not oppressive - As appellant has explanation to make - Judging from his statement and evidence on record (H2)

CRIMINAL PROCEDURE - Bail - Consideration for - Since the error of not taking appellant's plea was caused by the trial court - It will be just if that court considers his application for bail - Pending determination of the case (H3)

**FACTS**

Before the High Court of Ogun State Ilaro Judicial Division, appellant and other accused persons were arraigned on a two count charge of conspiracy to commit murder and murder contrary to sections 324 and 316 (3) punishable under section 319 (1) of the Criminal Code Law Cap 29 laws of Ogun State of Nigeria, 1978. Prosecution/respondent in proof of his case, called two witnesses and tendered five exhibits in support. Appellant and the others testified in their own defence. At the end of trial, the learned trial Judge convicted and sentenced them to death by hanging.

Appellant was not satisfied. Hence, he appealed to the Court of Appeal Ibadan. The court found that there was non compliance with the provisions of section 215 of the Criminal Procedure Law. The court therefore held that the entire proceeding leading to the

conviction of appellant and the others was a nullity. The court in the circumstance, gave an order for a retrial of the case before another Judge of the High Court. Aggrieved, appellant filed appeal to Supreme Court challenging the retrial order and praying for an order for a discharge and acquittal.

**ISSUE FOR DETERMINATION**

Whether the order of retrial made by the lower court was justified in view of the fact that the offence involved is that of murder.

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

*CRIMINAL PROCEDURE - Nullity - Arraignment CPL s. 215*

**1. A close perusal of the record of proceeding shows clearly that the plea of the appellant was not taken before the commencement of the trial. On 9/6/2005 the trial court observed as follows:-**

***“Though I observed from the endorsement on the file that the plea of the accused persons were taken on 10/2/2005 but court does not appear that they even had legal representation. In the circumstance of the charge of murder against all the accused the public defendants (sic) should be contended to provide their legal representation.***

***There was no where the plea was recorded. What followed thereafter was the taking of the evidence of the prosecution witnesses. This is contrary to the provisions of Section 215 of the criminal procedure law and Section 36 (6) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).”***

**The lower court was therefore right to have declared the whole proceedings a nullity.**

**The provisions of section 215 of the criminal procedure law are mandatory and does not give room for the exercise of any discretion by the trial judge. Failure to comply with any of the provisions would automatically render the proceedings a nullity. (p. 2427 A)**

*Appeal - Retrial order - Sustainability*

**2. I am not un-aware that the appellant has been in custody since 2002, but when the circumstances of both the appellant and the victim are considered together, I have no doubt in my mind than to hold that the order of re-trial made by the lower court was not oppressive.**

**My lords, I have carefully gone through the appellants' statement and the evidence in the record and I believe that the appellant has some explanation to make. (p. 2428 G)**

*Bail - Consideration for*

**3. However, since the error of failing to take his plea was not made by him but by the act or omission of the trial court it will be in the interest of justice if the trial court could consider his application for bail, if any, pending the determination of the case. Finally, I hold that this appeal lacks merit and it is accordingly dismissed. The order of re-trial made by the lower court is hereby affirmed. (p. 2428 H)**

### **REPRESENTATION**

Dr. Akin Onigbinde for appellant with Chief Yomi Aliyu; Richard Baiyeshea Esq; Steward David Esq. and Adedeji Adeyemi Esq., for the Appellant

B. A. Adebayo Esq., for the Respondent, Director, P. P. Ogun State with O. O. Ariyibi (Miss) (State Counsel), for the Respondent

### **CASES REFERRED TO**

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

Solola v. The State (2005) All FWLR (pt. 269) 1751

Kalu v. The State (1998) 13 NWLR (pt. 583) 531

Adamu v. Akukaila (2008) All FWLR (pt. 428) 352

Chiegbu v. Tonimas Nig. Ltd (1999) 3 NWLR (pt. 593) 115

Eyokuromo v. The State (1979) 6 SC

Kajubo v. The State (1988) 1 NWLR (pt. 73) 721

Idemudia v. The State (1999) 7 NWLR (pt. 61) 202

Uche v. The State (1999) 7 NWLR (pt. 609) 1

Ebido v. The State (2007) All FWLR (pt. 384) 192

Ughene Yavwe v. The State (2005) All FWLR (pt. 245)

**STATUTES REFERRED TO**

Criminal Code Law Cap. 29 Laws of Ogun State of Nigeria 1978, ss. 324, 316 (3), 319(1)

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

B Criminal Procedure Law, s. 215

**LEAD JUDGMENT BY MUNTAKA-COOMASSIE JSC**

C This is an appeal against the judgment of the Court of Appeal Ibadan Division.

The appellant was arraigned on a two count charge of conspiracy to commit murder and murder contrary to sections 324 and 316 (3) punishable under section 319 (1) of the Criminal Code Law Cap 29 laws of Ogun State of Nigeria, 1978.

D The prosecution, in order to prove its case called two (2) witnesses and tendered five (5) exhibits. At the close of the prosecution case, Appellant gave evidence in his defence. Thereafter, both the prosecution and the defence counsel addressed the court.

E In a considered judgment delivered by the trial Judge, appellant was found guilty and convicted as charged on the counts and was sentenced to death by hanging.

F Hon. Justice Onafowokan, Judge of the trial court holden at Ilaro delivered its judgment on 6/5/09. Dissatisfied, the appellant appealed to the court of Appeal. The Court of Appeal, now lower court held that the entire proceeding leading to the conviction of the Appellant as well as other accused persons was a nullity.

G The Judgment of the trial court was then set aside on the grounds that same is a nullity and an order of retrial was entered. See page 203 of the record of appeal. The lower court says:-

*“I therefore resolve issue one in favour of the Appellants that the whole proceeding is a nullity.*

H *Since the whole proceeding is a nullity, considering issue two will be an exercise in futility or mere academic exercise. This court will not order the acquittal of the Appellants but instead order a retrial of the Appellants before another Judge. The Case is hereby sent back to the Hon. Chief Judge of Ogun State to assign to another Judge for the trial of the appellants to begin de novo”*

Aggrieved by the above decision of the lower court as a result

the appellant lodged an appeal against that decision before us and filed a Notice of appeal containing seven (7) grounds of appeal. I reproduce them here without their particulars.

1. The learned Justices of the court of Appeal erred in law when their Lordships ordered a retrial of the Appellant by another High court of Ogun state having found that failure to take the plea of the Accused person has vitiated the trial. B

2. The Learned Justices of the court of Appeal erred in law when they held that:

*“(1) That leaving the error or irregularity in the proceeding, the evidence taken as a whole discloses a substantial case. C*

*(2) There are no such special circumstance as would render it oppressive to put the Appellants on trial second time” when in fact the entire preceding has been declared a nullity.*

3. The Learned Justices of the court of Appeal erred in Law D in ordering the retrial of the Appellant considering the surrounding circumstance of this case.

4. The Learned Justices of the court of Appeal erred in law in ordering the retrial of the Appellant by another judge of the High court of Ogun State having found that the Appellant was denied E right to fair hearing.

5. The Learned Justices of the court of Appeal erred in law when they held that prima facie case has been made against all the Appellants.

6. The Learned Justices of the court of Appeal erred in law F when they held that:

*“The fact that the Appellant has been in custody since the Date of arrest till now cannot amount to sufficient punishment for the offences to render a retrial oppressive” without considering the G surrounding circumstance of the case.*

7. The Learned Justices erred in law when they held that:

*“the Appellant’s rights to freedom has to be weighed against the security of the general Public who are entitled to be protected from murderers” when there were no admissible evidence to sup- H port conviction of the Appellant.”*

On 28/2/2013 this court heard the appeal. Both learned counsel adopted their briefs of argument.

The appellant formulated three (3) issues for the determina-

tion of this appeal thus:-

(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.

B (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.

C (iii) Whether the court's reference to the Appellant as "*murderer*" had not infringed the Appellants' right to presumption of innocence thereby occasioned a miscarriage of Justice against the Appellant.

The respondent equally formulated three (3) issues for determination as follows:-

D 1. Whether the court below was right in ordering a retrial of the Appellant having held that the trial of the Appellant was a nullity.

2. 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.

E 3. Whether the court below's reference to the Appellants as "*murderers*" had not infringed the Appellant's right to presumption of innocence thereby occasioned a miscarriage of justice against the Appellant.

F On issue No. 1 learned counsel submitted that the learned justices of the lower court came into wrong conclusion when they entered an order of retrial as against an order of discharge and acquittal of the appellant. The lower court having found that the whole proceedings before the trial court was a nullity, based on the important fact that the appellant's plea was not taken before he was tried G and convicted with other accused persons before the trial court the proper order and or appropriate order was to discharge and acquit the appellant instead of ordering a re-trial considering the totality and the peculiar circumstances of the case.

H He again submitted that it is trite law that every person who is charged with criminal offence shall be entitled to be informed promptly in the language that he understands and in details of the nature of the offence. He refers to section 36 (6) (a) of the Constitution of the Federal Republic of Nigeria 1999. See also section 215 of the criminal Procedure Law. It contains the same condition. Section 215 of

the criminal procedure law provides thus:-

*“The person to be tried upon charge or information shall be placed before the court unfettered unless the court shall see cause otherwise to order’ and the charge or information shall be read over and explained to him to the satisfaction of the court by the registrar or other officer of the court and such person shall be called ‘upon to plead instantly thereto, unless where the person is entitled to service of a copy of the information he objects to the want of such service and the court finds that he has not been duly served therewith”*

Learned counsel argued that for there to be a proper arraignment in terms of the procedure laid down in section 36 (6) of the 1999 constitution of the Federal Republic of Nigeria, Section 215 of the Criminal Procedure Law certain conditions/essential requirements must be satisfied. These requirements were enunciated in the case of *Edet v. State* (2009) All FWLR (pt. 463) page 1430 at 1441 as follows:-

- a. The accused must be placed before the court unfettered unless the court shall see cause other wise order;
- b. The charge or information must be read over and explained to the accused to the satisfaction of the court by the Registrar or other officer of the court and
- c. The accused must be called upon to plead thereto unless exists any valid reason to do otherwise.

All these requirements, counsel further submitted, are mandatory and not directory, and not amenable to approximation and must therefore be strictly complied with in all criminal trials, to achieve and guarantee the fair hearing of an accused person. Failure to satisfy any of these requirements will render the whole trial incurably defective, null and void. He cited *Solola v. The State* (2005) All FWLR (Pt.269) 1751. *Kalu v. The State* (1998) 13 NWLR (pt.583) 531.

Learned counsel contended that the trial court did not observe or comply with the above conditions and the court of Appeal has confirmed that the trial court violated the above conditions. The lower court actually pronounced on lack of compliance in its decisions at page 198 of the record of appeal. Learned counsel in a nutshell, urged us to set aside the decision of the trial court in which the principles of fair hearing was breached by the trial court. It was clearly stated in the case of *Adamu v. Akukaila* (2008) All FWLR (PT.428)

352 at 455 when an accused's right to fair hearing is breached, the entire proceedings is null and void.

Learned counsel then contended that there is no legal justification in ordering a retrial in this appeal. He urged the Supreme Court to substitute an order of discharge and acquittal for the appellant. He urged this court to resolve issue one in favour of the appellant and to allow the appeal.

The 2nd issue reads thus:-

*"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".*

In arguing this issue, learned counsel for the appellant contended that the learned justices of the lower court erred in law when they held that there was prima-facie evidence against the appellants having found that the entire proceedings and the judgment of the court was a nullity.

Under issue II, it was submitted that this court should resolve in favour of the appellant. He referred to page 193 of the record of proceeding. See pages 10 - 15 for the arguments on issue No: 2.

On Issue 3. Whether it was right for the learned justices to refer to the appellants as murderers:- whether by so doing it infringes the appellants' right to presumption of innocence thereby occasioning miscarriage of justice.

Learned counsel under issue II - submitted that the appellant is still entitled to his fundamental right of presumption of innocence as enshrined in the constitution until the contrary is proved. The lower court's comment that the appellants are murderers cannot be justified and it is unwarranted. See *Chiegbu v. Tomimas Nig. Ltd (1999) 3 NWLR (pt.593) 115*.

In conclusion the appellants counsel urged this court to allow this appeal and set aside the judgment of the court below ordering the re-trial of the appellant and substitute an order of discharge and acquittal for the appellant.

In arguing the respondent brief, learned counsel before making his submission clarified some points thus:-

The trial court convicted and sentenced the appellant to death. The appellants were aggrieved and filed an appeal to the court of Appeal. The latter allowed the appeal in part and ordered a re-trial of



the case before another High court judge of Ogun State.

**A close perusal of the record of proceeding shows clearly that the plea of the appellant was not taken before the commencement of the trial. On 9/6/2005 the trial court observed as follows:-**

***“Though I observed from the endorsement on the file that the plea of the accused persons were taken on 10/2/2005 but court does not appear that they even had legal representation. In the circumstance of the charge of murder against all the accused the public defendants (sic) should be contended to provide their legal representation.***

***There was no where the plea was recorded. What followed thereafter was the taking of the evidence of the prosecution witnesses. This is contrary to the provisions of Section 215 of the criminal procedure law and Section 36 (6) (a) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).”***

**The lower court was therefore right to have declared the whole proceedings a nullity.** See Eyokuromo v. The State (1979) 6 SC at 3, Kajubo v. The State (1988) 1 NWLR (Pt. 73) at p. 721, Idemudia v. The State (1999) 7 NWLR (Pt. 61) 202, Uche v. The State (1999) 7 NWLR (Pt. 609) 1.

**The provisions of section 215 of the criminal procedure law are mandatory and does not give room for the exercise of any discretion by the trial judge. Failure to comply with any of the provisions would automatically render the proceedings a nullity.**

The only important issue to decide in this appeal is whether the order of retrial made by the lower court was justified in view of the fact that the offence involved is that of murder.

The appellant has submitted that it would be oppressive and unjust to subject the appellant to the rigour of trial for the second time, the case of Ebido v. The State (2007) All FWLR (Pt.384) 192.

It was further contended that the totality of the evidence adduced did not link him to the allegation hence there is no legal justification to order a re-trial. He referred to Ughene Yavwe v. The State (2005) All FWLR (Pt.245). In my view the principles laid down for ordering a re-trial have been stated in the following cases:

“1. *Yesufu Abodunde v. The Queen* 4 FSC 70 at 71 - 72 and *Kajubo v. The State* (1988) 1 NWLR (PT.75) 721 at 723 and these are:-

1. That leaving aside the error or irregularity in the proceedings, the evidence taken as a whole discloses a substantive case against the appellant.

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

3. That the offence or offences of which the appellant was convicted or the consequences to the appellant or any other person of the conviction or acquittal of the appellant are not merely trivial.

4. That to refuse an order of re-trial would occasion a greater miscarriage of justice than to grant it.

5. Also the reason for declaring the trial a nullity and overall interest of justice are also relevant”. In a case similar to this case this court per Uwais CJN (as he then was) in *Yahaya v. The State* 9 NSCQR at 36 held as follows:-

“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 just for the accused person but for victim as well. Therefore, if the circumstances of both the accused and 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”.

I completely and entirely agree with the principles as stated above. **I am not un-aware that the appellant has been in custody since 2002, but when the circumstances of both the appellant and the victim are considered together, I have no doubt in my mind than to hold that the order of re-trial made by the lower court was not oppressive.**

**My lords, I have carefully gone through the appellants’ statement and the evidence in the record and I believe that the appellant has some explanation to make. However, since the error of failing to take his plea was not made by him but by the**

***act or omission of the trial court it will be in the interest of justice if the trial court could consider his application for bail, if any, pending the determination of the case. Finally, I hold that this appeal lacks merit and it is accordingly dismissed. The order of re-trial made by the lower court is hereby affirmed.***

B

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**ONNOGHEN JSC**

I have had the benefit of reading in draft the lead judgment of my learned brother, MUNTAKA-COOMASSIE, JSC just delivered.

C

I agree with his reasoning and conclusion that the appeal has no merit and should be dismissed.

We have already dealt with the sister appeals arising from the same facts, which involved other co-accused persons, in which he held that the lower courts having agreed with counsel for appellant that the trial was a nullity due to the fact that the plea of appellant (and his co-accused) was not taken on arraignment, the court made the right order of retrial or trial de novo before another Judge so that the case of appellant, who by the way confessed to the commission of the crime charged, could be determined on the merit.

E

In the circumstance, I too dismiss the appeal.

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**ARIWOOLA JSC**

F

I had the opportunity of reading in draft the lead judgment of my learned brother, Muntaka-Coomassie, JSC. I agree with the conclusion reached that the appeal lacks merit and should be dismissed. I dismiss the appeal and affirm the judgment of the court below which remitted the case to the trial court for retrial afresh in the interest of justice.

H