

**SUPREME COURT OF NIGERIA**  
FRIDAY 24TH JANUARY, 2014. SC. 198/2012  
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, C. B. OGUNBIYI, JJSC**

FRANCIS OMOSAYE ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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CRIMINAL PROCEDURE - Murder - Right to counsel - Failure to assign legal practitioner to appellant - Constitutes fundamental breach of CPA s. 352 - Which requires the provision of counsel where appellant could not afford one (H1)

APPEALS - Crime - Retrial - Court of Appeal - Powers of - The court being a creature of statute - Is empowered by s. 19(2) of its Act - To order acquittal or retrial of appellant - If it allows appeal against conviction (H2)

APPEALS - Crime - Retrial - Validity of - By the justice of this cases - Lower Court rightly ordered a retrial - Notwithstanding that appellant's trial had been declared a nullity (H3)

**FACTS**

Before the High Court of Ondo State, accused/appellant and three others were charged for the offence of murder contrary to section 316(6) and punishable under section 319(1) of the Criminal Code Cap 30 Vol. II Laws of Ondo State. Appellant pleaded guilty to the charge and was after prosecution/respondent had addressed the court, summarily convicted and sentenced to death by the court. Appellant was not happy with the conviction and sentence passed on him. Hence, he appealed to the Court of Appeal Akure Division.

The court considered the appeal and nullified the entire proceedings of the trial court leading to the conviction and sentence passed on appellant. The court went on to order for the retrial of appellant by another Judge of the trial court. Aggrieved with the stance of the court, appellant appealed to Supreme Court, contending that he is entitled to an order of discharge and acquittal since his

trial ab initio has been nullified by the Court of Appeal.

### **ISSUE FOR DETERMINATION**

Whether the manner the lower court's consequential order is couched, following the nullification of the entire proceedings of the trial court, should endure.

**HELD** (Unanimously dismissing the appeal per **M. D.**

**MUHAMMAD JSC**)

*Murder - Right to counsel*

**1. The issue the appeal raises is unmistakably a very narrow one indeed. Both sides rightly agreed that the entire proceedings leading to appellant's conviction and sentence, given the fundamental procedural lapses therein, cannot endure. Certainly, the trial court's failure to assign a legal practitioner to the appellant who was being tried for a capital offence constitutes a fundamental breach of the provisions of Section 36 (6) (c) of the 1999 Constitution as amended and Section 352 of the Criminal Procedure Act both of which require that the court provides a legal practitioner to defend the appellant where he could not afford one. (p. 191 E)**

*APPEALS - Retrial - Court of Appeal - Powers of*

**2. The lower court is a creature of statute. The court's powers to make whatever order must necessarily draw from statute as well. Section 19 (2) of the Court of Appeal Act which establishes the court provides thus:-**

**"19. (2)**

***Subject to the provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be entered or order the appellant to be retried by a court of competent jurisdiction."***

**The lower court is a superior court of record as well and therefore draws from Section 36(9) of the 1999 Constitution as amended which is in *pari materia* to Section 33(9) of the 1979 Constitution. The Constitution remains our supreme law and**

**by virtue of Section 36 (9) therein subsumes the powers which enure to the lower court under Section 19 (2) of the Court of Appeal Act.** (pp. 192 D/193 B)

*APPEALS - Crime - Retrial - Validity of*

**3. The Lower Court's order that the appellant be tried afresh given the clear and unambiguous words of the extant statutes is a valid exercise of the court's statutory powers. Section 36(a) of the 1999 Constitution (as amended) empowers the Court below to order, notwithstanding that appellant's trial had been declared a nullity, that the appellant "again be tried" for the very offence he was convicted in the aborted trial. From the words which make up the enabling statutes, there is hardly any difference in essence in the use of the word "trial", "re-trial" or "again be tried" by the lower court in its consequential order. The justice of the case does not permit any reasonable tribunal to discharge and acquit the appellant simply because the lower court has ordered, after nullifying the trial court's proceedings, that the appellant be "retried."**

(p. 193 F)

## NOTABLE POINT OF INTEREST

### **M. D. MUHAMMAD JSC**

#### **1. Length of prison stay does defeat the justice of a case**

It was further argued that the appellant had been in prison custody since his arrest in 1980 and his invalid arraignment on the 25th day of August, 1981. I am sorry for the length of time the appellant has been in prison custody. However, a court of law should not only temper justice with mercy but what is sometimes vitally important it should also temper mercy with justice. And this is a case calling for mercy to be tempered with justice. The natural leaning of our minds may be in favour of and in sympathy with Appellant and we may in like manner be thus tempted to sympathize 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 blemish 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.*” (p. 194 B)

**B REPRESENTATION**

C. E. Obiagwu with E. Balami, for the Appellant

G. A. Olowoporoku Director Legal Drafting/Law Reporting, Ministry of Justice Ondo State with Taiwo Olubodun Deputy Director of Civil

C Litigation, for the Respondent

**CASES REFERRED TO**

Abodunde v. The Queen (1959) SC NLR 162

Umaru v. State (2009) 8 NWLR (pt. 1142) 134

D Adeoye v. State (1999) 6 NWLR (pt. 605) 174

Okosun v. State (1979) 3-4 SC 36

Ankwa v. State (1969) ALL NLR 129

Okafor v. State (1976) 5 SC 13

Okegbu v. State (1979) 11 SC 1

E Umaru v. State (2009) 8 NWLR (pt. 1142) 134

Bassey v. State (2012) 4-5 SC 119

Madu v. State (2012) 6 SC (pt. 1) 80

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

F Ikhane v. Commissioner of Police (1977) All NLR 234

Umaru v. State (2009) 8 NWLR (pt. 1142) 134

Okoduwa v. State (1988) NWLR (pt. 76) 333

Alonge v. Inspector General of Police (1959) 4 FSC 203

**G STATUTES REFERRED TO**

Criminal Code Cap 30 Vol. II Laws of Ondo State 1978, ss. 316 (6), 319(1)

Constitution of Federal Republic of Nigeria 1999 (as amended), s. 36(6)(c)

H Criminal Procedure Act, s. 352

Court of Appeal Act, s. 19(2)

**LEAD JUDGMENT BY M. D. MUHAMMAD JSC**

In its judgment delivered on 8th day of March, 2012 allowing

appeal No.CA/B/220C/2006 against the decision of the Ondo State High Court, hereinafter referred to as the trial court, the Court of Appeal sitting at Akure, hereinafter referred to as the court below, nullified the entire proceedings of the trial court and set aside appellant's conviction for murder contrary to Section 316 (6) and the sentence of death under Section 319 (1) of the Criminal Code Cap 30 Vol. II Laws of Ondo State. The court further ordered the *"retrial of the appellant by a judge of the High Court of Ondo State other than Odunwo J."* B

Dissatisfied with the judgment, the appellant has appealed against same to this Court on a notice dated 8th but filed on the 14th day of May, 2012. The undisputed facts of the case that brought about the appeal are as briefly stated below. C

The appellant and three others were charged before the Ondo State High Court for the offence of murder. On arraignment, the appellant pleaded guilty to the charge and was, after the prosecution had addressed the court, summarily convicted and sentenced to death by the trial court. D

At the court below, the appellant contended that his trial, conviction and sentence by the trial court are a nullity. He urged the court to set aside the entire proceedings. In upholding the appeal before it, the lower court ordered appellant's retrial for the same offence by a judge of the trial court other than the judge whose decision was set aside. This appeal is against that decision of the court below. E F

At the hearing of the appeal on 31st October, 2013, parties adopted their respective briefs of argument which had earlier been filed and exchanged by and between them. They relied on the arguments canvassed in the briefs for and against the appeal. G

The two issues the appellant asserts in his brief as calling for determination of the appeal read:-

*"1. Whether an order of retrial can be made when there was no trial ab initio.*

*2. Whether the lower court ought to have made order of discharge of the appellant rather than retrial."* H

The lone issue distilled in the respondent's brief for the determination of the appeal reads:-

*"Whether in the circumstances of this case the lower appel-*

*late court was right to set aside the judgment of the trial court and order a retrial of the appellant by a judge of the High Court of Ondo State other than Odunwo J."*

On issue one, learned appellant's counsel, Chinonye Obiagwu, submits that an order for retrial presupposes that there was an initial trial. Where there was no trial at all in the eyes of the law, learned counsel contends, there cannot be an order for a retrial. In the case at hand, because of the defect intrinsic to the summary trial adopted by the trial court, it is argued, the trial of the appellant is bedeviled by a fundamental flaw which the lower court correctly held had affected the entire trial. Appellant's trial in the eyes of the law, learned counsel submits, did not occur at all given the error manifest in the trial court's proceedings. The appellant for that reason, submits learned counsel, should have been discharged and acquitted by the court below which, instead, wrongly ordered appellant's retrial. The respondent, learned appellant's counsel however concedes is at liberty to commence appellant's trial by taking the necessary step.

Relying on the decision of this Court in *Yesufu Abodundun v. The Queen* (1959) SC NLR 162 at 166 in further argument, learned appellant's counsel submits that the factors which this Court stressed must co-exist before an appellate court orders a retrial remain un-availing to the respondent. Again, seventeen years after the alleged offence had occurred and seven years after the purported conviction by the trial court, it is virtually impossible to successfully try and secure appellant's conviction. The appropriate order to make, learned counsel insists, is for the discharge and acquittal of appellant. Learned counsel further cites the decisions in *Umaru v. State* (2009) 8 NWLR (Part 1142) 134 at 145 and *Adeoye v. State* (1999) 6 NWLR (part 605) 174 at 191 and urges that the appeal be allowed.

Responding, learned counsel to the respondent submits that the lower court's decision setting aside the trial court's judgment and ordering appellant's retrial cannot be faulted. The trial court's failure to enter a plea of "not guilty" for the appellant who had pleaded guilty, contends learned counsel, is, beyond being an irregularity, a fundamental breach that rendered the entire trial of the appellant a nullity. The judgment of the lower court particularly at page 109 of the record, it is submitted, appreciates this much. The lower court, submits learned respondent's counsel, rightly applied the principle

which this Court held in *Yesufu Abodundun & Ors v. the Queen* (supra) should determine appellant's fate.

It is further contended that the trial court is also in breach of Section 36 (6) (c) of the Constitution as well as Section 352 of the Criminal Procedure Act both of which make the provision of a Legal Practitioner to an accused who is not represented by one mandatory. B The Lower Court is again right when it nullified the trial court's decision that proceeded in spite of the fact that the appellant who, though being tried for a capital offence, was not represented by a Legal Practitioner.

Concluding, learned respondent's counsel argues that the facts of the case at hand satisfy the requirements the Supreme Court held in *Yesufu Abodundun & Ors v. The Queen* (supra), *Joseph Okosun v. The State* (1979) 3-4 SC 36 and *Abu Ankwa v. the State* (1969) ALL NLR 129 at 133 must co-exist before a retrial is ordered D in the event a trial is declared a nullity following a fundamental error in law or irregularity in procedure. Learned counsel further relies on *Okafor v. The State* (1976) 5 SC 13 *Okegbu v. The State* (1979) 11 SC 1 and *Samaila Umaru v. The State* (2009) 8 NWLR (Part 1142) 134 in urging that the unmeritorious appeal be dismissed. E

***The issue the appeal raises is unmistakably a very narrow one indeed. Both sides rightly agreed that the entire proceedings leading to appellant's conviction and sentence, given the fundamental procedural lapses therein, cannot endure. Certainly, the trial court's failure to assign a legal practitioner to the appellant who was being tried for a capital offence constitutes a fundamental breach of the provisions of Section 36 (6) (c) of the 1999 Constitution as amended and Section 352 of the Criminal Procedure Act both of which require that the court provides a legal practitioner to defend the appellant where he could not afford one.*** F G

Secondly, both sides are correct in the postulation that the lower court is right to have held that the appellant could not, in spite of Section 218 of the Criminal Procedure Act, be convicted summarily H for murder. Decisions of this Court on these appear legion. The authorities also justify the lower court's nullification of the judgment of the trial court that has arisen in spite of these lapses. See *Yesufu Abodundun & Ors v. The Queen* (Supra); *Okegbu v. The State* (1979)

11 SC 1; Joseph Okosun v. The State (1979) 3-4 SC 36; Edet Asuquo Bassey v. The State (2012) 4-5 SC 119; Sabina Chikaodi Madu v. The State (2012) 6 SC (Part 1) 80 and Sumanya Issah Torri v. The National Park Service of Nigeria 6-7 SC (part 3) 171.

B The narrow issue to consider in the determination of the appeal, therefore, is whether the manner the lower court's consequential order is couched, following the nullification of the entire proceedings of the trial court, should endure.

C It has lavishly been contended by learned appellant's counsel that the appellant cannot be "retried" since in the eyes of the law, with the lower court's declaration that the trial court's entire proceedings are null and void, is as if the trial of the appellant had never occurred in the first place. It is further contended that the appellant should not be "retried" because of the long period it would take to D try him. These arguments are totally unacceptable as the law does not provide for the indulgence so canvassed on appellant's behalf.

***The lower court is a creature of statute. The court's powers to make whatever order must necessarily draw from statute as well. Section 19 (2) of the Court of Appeal Act which E establishes the court provides thus:-***

***"19. (2)***

***Subject to the provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction quash the conviction and direct a judgment and verdict of acquittal to be F entered or order the appellant to be retried by a court of competent jurisdiction."***

In Kajubo v. State (1988) 1 NWLR (part 73) 721 this Court in dealing with strikingly similar facts to those in the instant case concluded at pages 733-734 of the law report per Wali, JSC thus:- G

*"However with the coming into operation of the 1979 Constitution, section 33 (9) of Chapter IV of that Constitution seems to have restored that power. Section 33 (9) reads:-*

*'(9) No person who shows that he has been tried by any H court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior court.'*

*It is common knowledge that this Court is a Superior Court*



*of record, in fact the highest Superior Court. Since the whole trial has been declared a nullity, which in short means that the appellant has never been tried, the relevant and appropriate order to make in the circumstance, taking ... the gravity of the offence and the interest of justice into consideration is the one for a fresh trial of the appellant. By the power conferred on the Court by section 33(9) of the 1979 Constitution, it is hereby ordered that the case be remitted to the High Court of Lagos State for a fresh trial of the appellant by another Judge of that court...."*

**The lower court is a superior court of record as well and therefore draws from Section 36(9) of the 1999 Constitution as amended which is in pari materia to Section 33(9) of the 1979 Constitution. The Constitution remains our supreme law and by virtue of Section 36 (9) therein subsumes the powers which enure to the lower court under Section 19 (2) of the Court of Appeal Act.** The judgment of the lower court which learned appellant counsel insists should have otherwise ordered the discharge and acquittal of the appellant, see pages 115-116 of the record, inter-alia reads:-

*"In the present case the irregularities highlighted in this judgment are of such a nature that render the trial a nullity. There is no unique circumstances/factor that would make it oppressive of the appellant to put him to a fresh trial. The appellant is charged with the offence of murder with a very serious consequence on conviction - death. More in justice will be done if the order for retrial is not granted having regard to the proof of evidence filed by the prosecution."*

**The Lower Court's order that the appellant be tried afresh given the clear and unambiguous words of the extant statutes is a valid exercise of the court's statutory powers. Section 36(a) of the 1999 Constitution (as amended) empowers the Court below to order, notwithstanding that appellant's trial had been declared a nullity, that the appellant "again be tried" for the very offence he was convicted in the aborted trial. From the words which make up the enabling statutes, there is hardly any difference in essence in the use of the word "trial", "re-trial" or "again be tried" by the lower court in its consequential order. The justice of the case does not permit any reasonable tribunal to discharge and acquit the appellant simply be-**

***cause the lower court has ordered, after nullifying the trial court's proceedings, that the appellant be "retried."***

The concurring judgment of Oputa, JSC in Kajubu's case (supra), the relevant portion of which I hereby adopt is hereinunder reproduced from pages 738-739 of the law report for its relevance:-

B *"Now, how can an appellant who in the contemplation of the law, had not even been tried, be on appeal acquitted and discharged from the serious charge against him involving a sentence of death?..."*

C *It was* further argued that the appellant had been in prison custody since his arrest in 1980 and his invalid arraignment on the 25th day of August, 1981. I am sorry for the length of time the appellant has been in prison custody. However, a court of law should not only temper justice with mercy but what is sometimes vitally important it should also temper mercy with justice. And this is a case calling for mercy to be tempered with justice. The natural leaning of our minds may be in favour of and in sympathy with Appellant and we may in like manner be thus tempted to sympathize 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 blemish 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.*"

F The lower court's judgment which abides the decision of this Court remains unassailable. In the result, the appeal which has failed is hereby dismissed and the lower court's judgment accordingly affirmed.

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### **I. T. MUHAMMAD JSC**

H My learned brother, M. D. Muhammad, JSC, has permitted me a review of his judgment, just delivered. I agree with my learned brother, that the appeal lacks merit and it should be dismissed.

As it is clear from the printed record of appeal before this court, the appellant, along with three others were arraigned before

Ondo State High Court (trial court) for the offence of murder. They were asked to make their pleas and the appellant pleaded guilty while each of the remaining three accused persons pleaded “not guilty”. That was on the 17th day of February 2004. Below is what transpired in the court on that same day:

‘The accused persons are present.

B

Mrs. Uche-Anansoh-Anabuyi (PLO) appears for the State and with him is Mr. Sile Akinnibosun (SLO).

Chief H. C. Kuewumi appears for the 1st, 3rd and 4th accused persons. The 2nd accused person is not legally represented. The 2nd accused on the question as to his counsel tells the court that he has no means of taking the service of a counsel and that he would like that the hearing is expedited so as to know his fate.

C

COURT: This case is to be heard de-novo by this court. The case was being heard by my learned brother Justice Obaremo (Rtd.). There is need for the plea of the accused persons to be taken before me and I hereby call for the plea of each of the accused persons to the information preferred against them.

D

The information is read to each of the accused person in the language they understand (Yoruba) by the Court Clerk. The first accused pleads not guilty to the charges in the information. The 2nd accused person pleads guilty to the counts in the information.

E

The 3rd accused person pleads not guilty to the counts in the information. The 4th accused person pleads not guilty to all the counts in the information.

F

COURT: The pleas above were made after the counts were read and explained properly to all the accused persons and they quite understood. The 2nd accused was also extensively questioned as to the implication of the plea he made. This 2nd accused person Francis Omosaye admits the guilt and confirms that he is the person who killed the deceased in this case. He speaks clearly with a clear understanding of the punishment that may follow his plea of guilt. This court is satisfied that the 2nd accused person Francis Omosaye is a person of very sound mind and he quite knows and appreciates the implications of his plea of guilt. I hereby call on the prosecution to give the facts of the case to the hearing of the 2nd accused person.

H

Mrs. Uche-Anansoh-Anabuyi (PLO) leading prosecuting Counsel states the facts as follows:-

That the deceased in this case one Maria Joseph Erhiyorie was an Oil Palm dealer prior to her death. She had arranged with the first accused person Ayodele Ekuemonisan to supply her with some kegs of palm oil. They also arranged as to where to meet the first accused person. On 2/6/95, the said deceased left her house with some empty  
 B kegs of palm oil and a sum of N13,500.00 to meet with the 1st accused person as pre-arranged. She boarded a 504 Saloon Car from her house at Okitipupa to Ode-Erinje. On getting to Ode-Erinje, she dropped at Community Bank, Ode-Erinje as earlier arranged and  
 C also instructed the driver of the Saloon Car to drop the empty kegs at the Erinje Motor Park. That unknown to the deceased the 1st accused had arranged with the other accused persons viz: Francis Omosaye, the 2nd accused person, Oluwatimilehin Ifaranmaye, the 3rd accused person and Sunday John, the 4th accused person to  
 D take her money without the supplying of any palm oil. The first accused, Ayodele Ikuemonisan took the deceased Maria Joseph Erhiyorie to the house of the 2nd accused person, Francis Omasaye where both the 3rd accused persons Oluwatimilehin Ifaranmaye and the 4th accused person, Sunday John were already waiting for them.  
 E Immediately they got to the house of the 2nd accused person the four accused persons pounced on the deceased. They tied the deceased hands with ropes, her mouth and throat were covered with cloths. The deceased was raped in turn by each of the accused persons and the deceased died in the process of the continuing raping.  
 F The N13,500.00k with the deceased was removed and shared by the four accused persons. The 2nd accused person took N4,000.00 and the 3rd accused person took N2,500.00. The deceased was subsequently buried in a shallow pit toilet with her hands, mouth and still  
 G tied behind the house of the 2nd accused person, Francis Omosaye. These are the facts as given by the prosecution.

The court after the facts above, interpreted the facts in Yoruba language to the 2nd accused person and he admits that he understand clearly. The 2nd accused, Francis Omosaye also tells the court  
 H that the facts were true and that he is guilty as explained.

#### JUDGMENT:

The information in this case was read to the four persons viz: Ayodele Ikuemonisan, Francis Omosaye, Oluwatimilehin Ifaranmanye and Sunday John for the purpose of taking their pleas. This case is

being heard de-novo before me hence the need to take a fresh plea.

The 1st, 3rd and 4th accused persons pleaded not guilty to the counts contained in the information. The 2nd accused person, Francis Omosaye pleaded guilty to the counts.

The court explained to him through the Court Registrar who was doing the interpretation in Yoruba of the implications of his plea of guilt and the consequences of the plea of guilt. The 2nd accused person, Francis Omosaye admitted that he perfectly understood and appreciated the implications and consequences of his plea of guilt. B

The court called on the leading prosecuting counsel Mrs. Uche-Anansoh-Anabuyi (PLO) to state the facts of the case. The learned Principal Legal Officer stated the facts of the case in open court and to the hearing of the accused persons including the 2nd accused person who pleaded guilty. C

This Honourable Court also directed that the facts as stated by the leading prosecuting counsel be explained again to the 2nd accused person in Yoruba language. The facts as stated were interpreted in Yoruba and the 2nd accused person admitted that he properly understood the facts and also admitted that the facts are true and correct. On the question as to whether he still wanted to admit his guilt on the facts as stated, the 2nd accused person, Francis Omosaye still admitted that he is guilty of the charge of the murder of the deceased in this case, one Maria Joseph Erhiyorie (female) on 2nd day of June, 1995 at Ode-Erinje in Okitipupa Judicial Division. D E F

On the plea of the 2nd accused person, Francis Omosaye that he is guilty of the information in Charge No. HOK/1C/96 and on the admission of the facts of the case after same had been properly explained to him, I am satisfied that the 2nd accused person, Francis Omosaye is actually guilty of the offence as charged. I hereby pronounce that Francis Omosaye is guilty of the offence as contained in the information in charge No. HOK/1C/96 and he is convicted accordingly. On allocutus, the 2nd accused says that he did not know what pushed him to kill. G

The offence of murder carries the highest punishment which is death in our law. The 2nd accused person is a faceless wicked and dangerous element in our society who should not be allowed to remain in the society. I hereby sentence the 2nd accused person to death by virtue of Section 319 of the Criminal Code Cap. 30 Vol- H

ume II Laws of Ondo State, 1978. The 2nd accused person shall be hanged until he gives up the ghost. The Sentence shall not be executed until evidence for and against the other accused persons shall have been concluded as the 2nd accused person is a vital witness.

The hearing of this case is further adjourned to 25/2/2004.

B The 1st, 3rd and 4th accused persons are to remain in Prison Custody. The 2nd Accused person shall also be kept in prison custody, Okitipupa from where he will be brought at all adjourned dates to give evidence in this case.”

C The appellant was thereafter committed to Ibara Prison, Abeokuta in the condemned prisoner’s cell.

The appellant appealed to the court below contending that his conviction and sentence in the purported summary trial by the trial court was a nullity. He asked the court below to set aside the trial  
D court’s judgment. At the court below, the appeal was allowed in part and the court ordered for a re-trial. The appellant, dissatisfied again, appealed further to this court.

From the facts of the case, the proceedings of the trial court, that of the court below and the submissions of learned counsel for  
E the respective parties, it is clear from the out set, that the learned trial judge went off-tangent by conducting a summary trial on a capital offence simply because the appellant was said to have pleaded guilty to the offence charged. In our adversarial system of trial, whether  
F civil or criminal, it is always better to place the parties on a proper, though imaginary scale of justice with a view to weighing where the pendulum tilts.

The appellant (along with others) were taken to the trial court under the provision of the Ondo State Criminal Code Law, Cap. 30  
G Vol. II Laws of Ondo State of Nigeria, 1978. Although by Section 218 of the Criminal Procedure Act (CPA), if an accused pleads guilty to any offence with which he is charged, the trial court shall record his plea as nearly as possible in the words used by him and if satisfied that he intended to admit the truth of all the essentials of the offence  
H to which he has pleaded guilty, the court shall convict him of the offence and pass sentence upon or make an order against him unless there shall appear sufficient cause to the contrary, it is the convention of the courts that even where an accused person pleads guilty in a capital offence, the trial judge shall record that the accused pleaded

“not guilty”. This is in tandem with International Criminal Justice System. It is equally in tandem with our Constitution (Section 36(5) of the Constitution (1999) as amended) which covers an accused with garment of presumption of innocence. The trial court must, at all times, presume a person accused of committing a crime or crimes, innocent until proved guilty, the onus of which squarely rests on the shoulders of the prosecution. In other words, it is quite irregular or even wrong for a trial court to conduct a summary trial piloted to conviction and sentence of a person accused of committing an offence which attracts a capital punishment. Certainly, there is no fair trial (if at all) and if there is, it must be set aside.

A full trial in our adversarial system of trying a person charged with an offence is where the court, after the necessary arraignment, subjects the parties to the processes of calling evidence (where available); allowing the parties to test the veracity of the evidence led by the respective parties; allowing for final addresses by the parties; assessing or evaluating the evidence; making a finding and finally, sentencing or discharging/acquitting the accused. Although Section 218 of the Criminal Procedure Act applicable in Southern States, makes no provision for recording of “not guilty” for a person arraigned on an offence with capital punishment, it is conventional, as I said earlier, for the court to record ‘not guilty’ for such an accused person in order to allow the prosecution to establish its case beyond reasonable doubt. In the Criminal Procedure Code applicable in the Northern States, it is clearly provided in Section 187(2) that even where a person accused of committing an offence with capital punishment, the judge shall enter a plea of not guilty for the accused. I agree entirely with the court below when it held as follows:

“Supreme Court has, however, held that Section 218 of the Criminal Procedure Act, which is in pari material with Section 218 of the Criminal Procedure Law of Ondo State is not applicable to a capital offence. That by convention, a plea of “Not Guilty” must be entered for an accused person charged with a capital offence even when the accused person pleads guilty... this point has been made clear in a plethora of cases, including *TOBI v. THE STATE* (Supra) at 33 where the Supreme Court, per UWAIFO, JSC stated thus:

‘Obviously section 218 CPA is not applicable to a capital offence. In other words, if a person charged with murder pleads guilty

to it, a plea of not guilty is recorded by the court on his behalf. Section 187(2) of the CPC directly provides for this as follows:

*"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."*

*It is, however, well known that by convention, although there is no equivalent of the above provision in the CPA, plea of guilty is never recorded for an accused in a murder case even when he so pleads in error. A plea of not guilty is recorded on his behalf."*

Further, in order to ensure that all possible assistance and opportunities are given to the accused person, such as the appellant, the Constitution and other procedural statutes require that where an accused in a capital offence is not represented by a counsel, the court shall assign a legal practitioner for his defence. See: Section 36(6)(c) of the Constitution (1999 as amended): Section 352 of the Criminal Procedure Act etc. Thus, the court below was quite right when it held that the learned trial judge ought to have postponed the trial of the appellant and His Lordship should have directed that a learned counsel be provided for the appellant, more particularly when the appellant made it clear to the trial court that he could not retain the services of a counsel because of his impecuniosity. See the case of *Ananchukwu v The Federal Republic of Nigeria* (2009) 8 NWLR (Pt.1144) 475 at 484 B.

In *Kajibo v The State* (1988) 1 NWLR (Pt.73) 721 at p.732, this court, held, inter alia, as follows:

*"A strict compliance with a mandatory statutory requirement relating to the procedure in a criminal trial is a prerequisite of a valid trial, and where a trial judge proceeded to try the accused without strictly complying with the provisions of section 215 of the Criminal Procedure Law and Section 33(6) (a) of the 1979 Constitution, the trial would be declared a nullity by an appeal court."*

Where a trial is a nullity, it does not mean that the factum of a trial does not exist... But, because there was a failure to observe the legal and Constitutional rules relating to arraignment and the taking of the plea of the appellant, this court declared that, de jure, that in contemplation of law the trial amounted to a no trial at all. What the appellant is urging this court to do, as per his Notice of Appeal (p.122



of the record), is that this court should set aside the order of re-trial made by the court below and that the appellant should be discharged. The relevant question here is that, was there any trial of the appellant at all by the trial court? The finding and conclusion made by the court below provide an answer. The court below stated:

*“The errors committed by the learned trial judge, namely: B failure to enter a plea of “Not guilty” when the appellant pleaded guilty to a capital offence; failure to direct that a learned counsel be assigned to the appellant when he complained that he could not retain one because of his impecuniosity; and failure to undertake a C full and proper trial of the accused for the offence of murder, vitiated the entire proceedings which are, therefore, a nullity. However, an order for a fresh trial, new trial, trial de novo or retrial is not automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which form the background of the case. See D Samaila Umaru v. The State (2009) 8 NWLR (Pt.1142) 134; Okegbu v. The State (1979) 11 SC 1 and Okafor v The State (1976) 5 SC 13.”*

Thus, before deciding to order a retrial an appellate court must consider the following factors: E

1. *“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 no miscarriage of justice.”*

2. *That apart from the error of law or irregularity in procedure the evidence before the court discloses a substantive case against the accused.* F

3. *That there are no special circumstances which would make it unjust to put the accused on trial a second time;* G

4. *That the offence for which the accused is charged and their consequences are serious in nature; and*

5. *That to refuse an order of retrial would occasion a greater injustice than to grant it.”*

All the above factors must co-exist before a case is sent back H for retrial. See: Yesufu Abodundun & Ors v The Queen (1959) SCNLR 162 at p.166; Okosun v The State (1979) 3 - 4 SC. 36; Ogunmeri v. Queen (1961) 2 SCNLR, 198; Owoh v. Queen (1962) 2 SCNLR 409; Umaru v. The State (2009) 8 NWLR (1142) 143.

In the case of Yahaya v State (2002) 3 NWLR (Pt.754) 289 at p.304 - 305, this court, per Uwais, (CJN), pointed out the distinction between the terms/terminologies of “re-trial” and “fresh trial”. He stated, inter alia, as follows:

“However, a retrial is ordered only where there has in fact been a previous trial that was properly conducted but which is vitiated by reason of an error in law or procedure. In the present case there has been no trial because the purported trial whatsoever was vitiated ab initio. Therefore, the order to be made is for a proper trial to take place and not a retrial. This distinction is very important in deciding the consequential order to be made. See Erekanure’s case (supra) where Olatawura, JSC observed as follows:

‘My decision that the trial of this case was a nullity is that there has never been a trial as the purported trial had no legal force or effect...

In sum, and for the avoidance of doubt, I will repeat that the first trial was a nullity for noncompliance with Section 215 of the Criminal Procedure Law of Bendel State and also a clear breach of section 33(6)(a) of the 1979 Constitution of the Federal Republic of Nigeria. In view of the nature and gravity of the offence, I will order a fresh trial of the appellant. The appellant’s trial shall start not later than three months from today.”

It is for these and the fuller reasons given by my learned brother, M. D. Muhammad, JSC, in his leading judgment that I agree there is no way the appellant can be discharged of the offence charged and that the proper order to make is that of “fresh trial” which I so direct. I abide by all consequential orders made by my learned brother in his judgment.

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### **FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, M. D. Muhammad, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and should be dismissed.

The appellant and three others were arraigned for the offence of murder. Other accused persons who were represented by counsel pleaded not guilty. The appellant who was not represented

by counsel due to impecuniosity, pleaded guilty. The trial judge *brevi manu*, summarily tried, found him guilty, convicted and sentenced him to death by hanging. He appealed to the Court of Appeal, Akure Division where the appeal was heard and allowed with an order of retrial before another judge of Ondo State High Court other than Odunwo, J. B

The appellant has decided to further appeal to this court to try his chance; as it were.

Let me observe it briefly that the trial judge goofed in two instances. He failed to observe the lone established practice of recording a plea of 'not guilty' for the appellant notwithstanding the fact that he pleaded guilty. He convicted the appellant summarily for a capital offence in breach of his right to fair hearing as dictated by section 36 (6) of the 1999 Constitution (as amended). C

As well, Odunwo, J failed to be guided by the provision of D section 352 of the Criminal Procedure Act which mandates that a legal practitioner should be assigned to the appellant for his defence in the charge of murder - a capital offence.

It hardly needs any gainsaying that the trial by the trial judge entailed crass procedural irregularity as well as utter breach of constitutional provision as pin-pointed above. In short, the entire proceedings is a nullity. E

The appellant has axe to grind with the fact that the lower court ordered that the charge against him be retried. The appellant needs to appreciate that factors guiding order of retrial have been laid down by this court in many cases. In the case of *Yesufu Abodundu v. The Queen* (1959) SCNLR 162 at 166; 4 FSC 70 at 71-2; (1959) 1 NSCC 56 at 60, the factors as stated by Abbot, FJ are:- F

1. That there has been an error in law (including the observance of the law of evidence) or an irregularity in procedure of such character that on the one hand the trial was rendered a nullity and on the other hand, the court is unable to say that there has been no miscarriage of justice. G

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

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

4. That the offence or offences 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 of retrial would occasion a greater miscarriage of justice than to grant it.

B In the case of *Abu Ankwa v. The State* (1969) 1 All NLR 133, this court per GBA Coker, Ag. CJN maintained that all the factors must co-exist before an order of retrial can be made. See also *Yahaya v. The State* (2002) 3 NWLR (Pt. 754) 284 and *Damina v. The State* (1995) 8 NWLR (Pt. 415) 513 at 539.

C In situating the factors set out by this court, Adumein, JCA found, creditably as follows:-

*“In the present case, the irregularities highlighted earlier in this judgment are of such a nature that renders the trial a nullity. There is no unique circumstance/factor that would make it oppressive of the appellant to put him to a fresh trial. The appellant is charged with the offence of murder with a very serious consequence of conviction-death. More injustice will be done if the order for retrial is not granted having regard to the proof of evidence filed by the prosecution in this case.”*

E There is nothing left out to be stated by me. I endorse same totally.

F For the above reasons and the detailed ones ably advanced by my learned brother which I hereby adopt, I too feel that the appeal lacks merit and should be dismissed. The order of retrial made by the court below is hereby affirmed by me without any shred of equivocation.

G **ARIWOOLA JSC**

I had the privilege of reading in draft the lead judgment of my learned brother, Dattijo Muhammad, JSC just delivered. I am in entire agreement with the reasoning therein and the conclusion arrived thereat in the said lead judgment.

H As clearly stated in the lead judgment, having pleaded guilty to the offence charged amongst his co-accused persons who pleaded not guilty to the same charge, the appellant who was not represented by counsel was summarily tried, found guilty, convicted and sentenced to death by hanging. Upon an appeal by him to the court

below, his appeal was allowed but with an order of retrial before another Judge of Ondo State other than Odunwo, J. who first tried him.

Retrial means to conduct a new trial of an action that has already been tried. Whereas, trial de novo is a new trial on the entire case, that is, on both questions of fact and issues of law, conducted as if there had been no trial in the first instance. See: Black's Law Dictionary Ninth Edition pages 1431 and 1645. B

This is a further appeal by the appellant who thought that he ought to have been discharged and acquitted by the court below but not ordered to be retried. He had contended that there had never been a trial by the High Court, properly so called to warrant a retrial order, made by the court below. C

Generally, it is trite law that if on the whole evidence at the conclusion of trial, the court is left in a state of doubt, the prosecution would have failed to discharge the onus of proof which the law lays upon it and the accused shall be entitled to an acquittal. See; Joshua Alonge Vs. Inspector General of Police (1959) 4 FSC 203 at 2004 per Ademola, CJN, Woolmington Vs DPP (1935) AC 462 at 481; Emmanuel Ibeziako Vs. COP (1963) 1 All NLR 61. E

But where the trial court is found to have failed to act in compliance with the procedural law and the Constitution such as Section 215 of the Criminal Procedure Law and Section 36(6) of the Constitution, 1999 the trial would be a nullity and be so declared, on appeal. See: Kajibo Vs The State (1988) 1 NWLR (Pt.73) 721. F

However, where an appellate court found that a trial was not properly carried out and it will not be justice to discharge the convict, the principles which should guide the courts in making an order of retrial has been well settled in a long line of cases. The locus classicus is Abodunde & Ors Vs. The Queen 4 FSC 70 at 73. In that case this court restated the guiding principles as follows:

*"We are of the opinion that before deciding to order a retrial, this court must be satisfied:-*

*(a) that there has been an error in law (including) 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 that there has been no miscarriage of justice and to invoke Section 11 (1) of the Ordinance;* H

(b) *that leaving aside the error or 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 other 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.*" See *James Ikhane Vs. Commissioner of Police* (1977) All NLR 234; (1977) 6 SC 78; *Samaila Umaru Vs. The State* (2009) 8 NWLR (Pt.1142) 134.

In *Sunday Okoduwa & Ors Vs. The State* (1988) NWLR (Pt.76) 333, this court after restating the rules to guide an appeal court in ordering a retrial as stated above held that the said guiding principles are not exhaustive and may therefore be added to or modified from time to time. The said case was followed by this court in *Okegbu Vs. State* (1979) 11 SC 1, where it was decided that an order for retrial must depend on the circumstances of the particular case. Matters to be considered by the court, included the seriousness and prevalence of the offence, the probable duration and expense of the new trial, the ordeal to be undergone for a second time by the prisoner, the lapse of time since the commission of the offence, and its effect on the quality of evidence and the nature of the case of the prosecution against the prisoner as disclosed in the evidence of the first trial; whether substantial or not. See; *Ankwa Vs State* (1969) 1 All NLR 133; *Okafor v. State* (1976) 5 SC 13.

In the instant case, the appellant was charged with the offence of murder, punishment of which upon conviction, is death. As the court below alluded to, more injustice will be done if an order of retrial is not made by the court in the circumstances of the instant case.

For the above reason and the detailed and fuller reasoning in the lead judgment, I also hold the view that this appeal lacks merit and should be dismissed. Accordingly, I dismiss it and affirm the judgment of the court below given on 8th March, 2012 allowing the appeal with an order for retrial.

I abide by the consequential order in the said lead judgment.

**OGUNBIYI JSC**

The appellant at hand was at the trial High Court Ondo charged, found guilty and convicted of murder. He was sentenced to death. The Court of Appeal allowed the appeal against the judgment of the trial court and ordered a retrial of the matter. Hence the further appeal now before us wherein the appellant raised two issues for determination as follows:-

1. Whether an order of retrial can be made when there was no trial ab initio.

2. Whether the lower court ought to have made order of discharge of the appellant rather than retrial.

It is the appellant's contention that the absence of a proper trial in accordance with the law automatically vitiates his conviction and sentence, which he further contends should result in his discharge and acquittal.

It is not in controversy that the appellant's trial for murder was, by the trial court conducted summarily. This procedure is, without more, not known to our law; this is notwithstanding the fact that the appellant pleaded guilty to the charge of murder. The absence of a trial according to law had automatically vitiated the entire proceeding which the respondent's counsel on the one hand submits ought to subject the appellant for a retrial. On the other hand however, the contrary view was fielded on behalf of the appellant. This, his counsel submits and gave the reason that on a cautious review of the entire circumstance of the case, in the light the guidelines laid down and governing retrials of cases, that the conditions necessary to warrant such have not been met; that the case of the appellant justifies for an order of a discharge rather than retrial. The appellant's counsel in support cited the case of *Yesufu Abodunde V. The Queen* (1959) SC NLR 162 at 166 wherein it was held that the factors enumerated therein must all co-exist before a retrial is to take place. In the said authority, this court at page 166 held the view that as a pre-requisite to ordering a retrial, an appellate court has the duty and must therefore consider the following factors:-

*"a) 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 no miscarriage of*

justice;

*b) That apart from the error of law or irregularity in procedure, the evidence before the court discloses a substantive case against the accused;*

*c) That there are no special circumstances which would make it unjust to put the accused on trial a second time;*

*d) That the offence for which the accused is charged and its consequence are serious in nature, and*

*e) That to refuse an order of retrial would occasion a greater injustice than to grant it.”* per Abbot. FJ.

The same principle was also enunciated in the cases of Joseph Okosun v. The State (1979) 3 - 4 SC 36 and Samaila Umaru v. The State (2009) 8 NWLR (Pt.1142) 134 at 143. In addition, Coker, Ag. CJN in the case of Abu Ankwa V. The State (1969) All NLR 129 D at 133 also held and said:-

*“All these factors must co-exist so that a case may be sent back for retrial.”*

I wish to state that the appellant’s Constitutional right to fair hearing is guaranteed as provided for under section 36 (6)(c) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) and states:-

*“Every person who is charged with a criminal offence shall be entitled to defend himself in person or by a legal practitioner of his own choice.”*

The foregoing Constitutional provision (supra) should be read along with Section 352 of the Criminal Procedure Act which state that:-

*“Where a person is accused of a capital offence, the state shall, if practicable, be represented by a law officer, a legal practitioner and if the accused is not defended by a legal practitioner the court shall, if practicable, assign a legal practitioner for his defence.”*

The Court of Appeal in my view therefore rightly held when it said:-

*“...the learned trial judge ought to have postponed the trial of the appellant and His Lordship should have directed that a learned counsel be provided for the appellant. The appellant made it clear in the trial court that he could not retain the services of a counsel because of his impecuniosity.”*



The trial court, as rightly held by the lower court, greatly erred in failing to warn itself that the appellant ought to have been assigned a counsel to represent him at the trial. There is no evidence indicating that it was impracticable for the court to do so.

At this juncture, I wish to re-iterate that, while endorsing the authority of the case of *Yesufu Abodundun & Ors. v. The Queen* (supra) as applicable to the case in issue, it is relevant to say that the lower court, in making the order for a retrial as it did, is indicative that the justice of this case will only be met if the appellant is properly tried in accordance with law, for the offence of murder levied against him. The move in the direction for retrial did not however denote the quest that the appellant must be convicted by all means. Rather, it is for the just determination of the accusation i.e. whether or not the appellant in fact committed the offence with which he was charged. The order of retrial made will not in any way enhance either the prosecution's ability to prove the guilt of the appellant, or render the appellant at a disadvantage, if he is subjected to a trial in proof of his innocence. It would rather serve the interest of all stake holders involved.

This is especially in view of the gravity of the offence alleged and the threat it poses to the society within which the appellant resides; there is also the need to appease or ameliorate the injury caused the relations of the victim, who is yearning in the grave for the vengeance of his blood and the evil done to him. The fresh trial could further ensure and establish the innocence of the appellant, who, without which, would have had to live the rest of his life with the stigma of suspicion, uncertainty and deprivation if he was found to be innocent.

On the totality of this appeal therefore, I would in the same vein as my learned brother Dattijo Muhammad, JSC also dismiss same as lacking in merit. The judgment of the lower court wherein it ordered a retrial of the appellant is hereby also endorsed by me.