

**SUPREME COURT OF NIGERIA**  
FRIDAY 30TH JANUARY, 2015. SC. 15/2013  
**CORAM:- M. U. PETER-ODILI, O. ARIWOOLA,**  
**M. D. MUHAMMAD, K. A. AKA'AH, C.C. NWEZE, JJSC**

YAKUBU MOHAMMAD ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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LEGAL PRACTITIONERS - Address - Weight - Counsel's address assists the court but it is not evidence - As a case is won on credible evidence - And failure to address will not cause miscarriage of justice (H1)

MURDER - Judgment - Absence of accused - In the absence of allocutus before death sentence on appellant - Presumption is that he was not present in court - Which omission vitiated the trial (H2)

MURDER - Appeals - Fresh issue - Validity of - Although the issue of absence of appellant is fresh in SC - The court allowed same because of the criminal trial which attracted highest sentence (H3)

**FACTS**

1<sup>st</sup> accused/appellant and one other were arraigned before the High Court of Kogi State on a two count charge of criminal conspiracy and culpable homicide punishable with death and contrary to sections 97(1) and 221 (b) of the Penal Code. The case against appellant and the other is that while in the company of others (now at large) invaded the house of the deceased. The deceased and PW1 were sitting a stone throw away from the front of the house at the time of the invasion. As a result of the noise from inside the house, they proceeded to the house to find out the cause of the commotion.

On entering the house PW1 met appellant together with the others armed with guns. He tried to calm them but to no avail. Upon sighting the deceased, appellant shot the deceased on the chest. The deceased fell down and was taken to the General Hospital Okene, where he was confirmed dead. Appellant was arrested in connection

with the crime. At the trial, no evidence was adduced by appellant and his co-accused. Their counsel made a no case submission and rested their case on prosecution/respondent. At the end of trial, the court convicted and sentenced them to death. Appellant unsuccessfully appealed to the Court of Appeal Abuja. Aggrieved further, appellant appealed to Supreme Court, raising a fresh issue of his absence in court during the passing of the sentence of death.

**ISSUE FOR DETERMINATION**

*i. Whether having regards to the facts and circumstances of this case, the Court of Appeal was not wrong to affirm the judgment of the trial court which is a nullity.*

**HELD** (Unanimously allowing the appeal per  
AKA'AH'S JSC)

*LEGAL PRACTITIONERS - Address - Weight*

**1. I do not seriously share the view expressed by the Court of Appeal in Mikailu v State (2001) 8 NWLR (Pt.715) 469 that the failure to read the address of counsel in open court is tantamount to lack of fair hearing in public and thus a contravention of Section 36(1), (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). While counsel's address is ordinarily designed to assist the court, it is not evidence and no fine speech in an address can make up for lack of evidence to prove or establish a fact or else disprove and demolish a point in issue. A case is won on credible evidence and failure to address will not be fatal or cause miscarriage of justice.** (p. 107 B)

*MURDER - Judgment - Absence of accused*

**2. Where in a criminal trial a piece of evidence is capable of more than one interpretation, the court should adopt that interpretation that is more favourable to the accused. From the record, one cannot say for certain whether the appellant was present in court throughout the duration of the trial. It is however obvious that the appellant was not invited to make an allocutus before the death sentence was passed on him nor**

**did counsel plead for leniency on his behalf. The record as produced makes for more than one interpretation, one in his favour and the other against him. And since there was no allocutus it will be presumed that the appellant was not present in court when sentence of death was passed on him. This is in clear contravention of Section 154(3) CPC. The omission I am afraid has vitiated the trial.** (p. 108 E)

*Appeals - Fresh issue - Validity of*

**3. Although the appellant complained in the lower court that his trial, conviction and sentence were a nullity, learned counsel had predicated his argument on the fact that the prosecution suppressed the extra judicial statement which the appellant made that raised the defence of self defence and this made the trial not to be fair. The issue about the absence of the appellant during trial and especially during the delivery of judgment was never raised at the lower court. It was a fresh issue which learned counsel introduced in this court. We allowed the issue to be raised because it is a criminal trial which attracted the highest sentence. While the court below cannot be said to be wrong in its decision because of the issues which were presented before it, it is incumbent on this court to consider other complaints raised since it is the appellant's life that is at stake. In the circumstances, I have to allow the appeal.**

**I hereby allow the appeal. I declare the entire proceedings leading up to judgment, conviction and sentence of the trial court which were affirmed by the lower court as nullity and they are accordingly set aside. The justice of the case requires that the appellant should be arraigned immediately before another Judge of Kogi State High Court other than Okpanachi J. for expeditious trial.** (p. 109 C)

### **REPRESENTATION**

A. Kalu Esq. with C.B. Onwuekwe and O. Egwu for the Appellants  
N. Nwanodi Esq. for the Respondents

**CASES REFERRED TO**

- Adeoye v. State (1999) 6 NWLR (pt. 605) 74  
 Asakitikpi v. State (1993) 5 NWLR (pt. 296) 641  
 Ogunsanya v. State (2011) 6 SCNJ 190  
 Ogunsanya v. State (2011) 6-7 SC (pt. 11) 56  
 B Obade v. State (1991) 6 NWLR (pt. 198) 435  
 Ejuren v. C.O.P. (1961) ALL NLR 478  
 Essien v. State (1966) NWLR 229  
 Ochiba v. State (2011) 12 SCNJ (pt. 2) 526  
 C Eya v. Onuoha (2011) 3 SCNJ 302  
 Garko v. State (2006) 6 NWLR (pt. 977) 524  
 Igabele v. State (2006) 6 NWLR (pt. 975) 100  
 Udeh v. State (1999) 7 NWLR (pt. 609) 1  
 Adeoye v. State (1996) 6 NWLR (pt. 605) 74

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**STATUTES REFERRED TO**

- Penal Code, ss. 97(1), 221(b)  
 Constitution of the Federal Republic of Nigeria 1999, s. 36(1)(3)(4)  
 Criminal Procedure Code, ss. 153, 382  
 E Evidence Act 2011, s. 168(1)

**LEAD JUDGMENT BY AKA'AHs JSC**

- The appellant who was 2<sup>nd</sup> accused was arraigned with Yakubu  
 F Audu on a two count charge of Criminal Conspiracy and Culpable  
 Homicide punishable with death contrary to Sections 97(1) and 221  
 (b) of the Penal Code. They pleaded not guilty to the charge and the  
 prosecution called two witnesses to prove its case.

- The case of the prosecution is that about 6.00am on 14<sup>th</sup> De-  
 G cember, 2006, the appellant and Yakubu Ahmed Audu who was  
 tried with him together with Sule Opotu, Jimoh Shuaibu and Abdui  
 Nwaha (now at large) invaded the family house of Ozovehe Yusufu  
 Abdulkareem (now deceased). As the deceased and PW1 sat in front  
 of the deceased family house, they heard shouts and gun shots com-  
 H ing from inside the house. They also noticed that some of the occu-  
 pants in the house were running towards their direction. They de-  
 cided to find out the cause of the commotion. The deceased who  
 was wearing a towel went into his room to change while PW1 pro-  
 ceeded to the house. On entering the house PW1 met the appellant

together with the others armed with guns. He tried to calm them but to no avail. When the appellant sighted the deceased, he exchanged his gun with that of a member of the gang and shot the deceased on the chest and the latter fell down. He was taken to the General Hospital Okene where he was confirmed dead.

The appellant neither gave evidence nor called any witnesses to testify on his behalf. The 1<sup>st</sup> accused did likewise. The learned counsel for the defence made a no case submission and rested their case on the prosecution. The trial court found the accused guilty and sentenced them to death by hanging. The appellant appealed to the Court of Appeal, Abuja which dismissed the appeal. He has appealed further to this court and submitted the following two issues for determination:-

*i. Whether having regards to the facts and circumstances of this case, the Court of Appeal was not wrong to affirm the judgment of the trial court which is a nullity.*

*ii. Whether having regards to the facts and circumstances of this case, the Court of Appeal was not wrong in holding that the case against the appellant was proved by the prosecution beyond reasonable doubt.*

The respondent also formulated two issues. The issues are the same as those formulated by the appellant except that learned counsel for the respondent took up the issue of proof beyond reasonable doubt first.

Learned counsel for the appellant submitted that the entire proceedings leading to the conviction and sentence of the appellant and the judgment of the court below which affirmed the judgment of the trial court are nullities. He pointed out that there are fundamental constitutional and procedural breaches inherent in the trial and the proceedings and judgment cannot be saved citing *Adeoye v State* (1999) 6 NWLR (Pt. 605) 74 in support. He contended that by permitting counsel for the parties to file written addresses and proceed to adopt the said written addresses without reading them in open court whereupon the learned trial judge delivered his judgment in the absence of the appellant, this is in breach of Section 36(1), (3) and (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). He argued that every accused person must be present during the whole of his trial unless he misconducts himself by inter-

rupting the proceedings or otherwise at any point during the trial. He submitted that the Contents of the record of proceedings of a court are binding on the court and parties and an appellate court has no jurisdiction to go outside the record to draw conclusions that are not supported by the record nor read into the record what is not contained therein.

He argued that there was no allocutus by the appellant at the end of the judgment and this supports the contention that the judgment was not delivered in his presence and sought to distinguish this case from the decision in *Asakitikpi v State* (1993) 5 NWLR (Pt. 296) 641 on the ground that at the tail end of the Judgment before the court passed sentence the following notes were made. “*ALLOCUTUS: The accused begs for leniency*” which indicated that the appellant was present when the judgment was delivered.

Learned counsel for the respondent conceded to the point that a cursory look at the entire record of proceedings of the trial court from commencement of the trial of the appellant to judgment, there was no consistent record of the presence of the accused persons. He nevertheless submitted that the accused persons were present in court and pointed to the proceedings of 21<sup>st</sup> January, 2003 on page 41 lines 9 -11 and those of 19<sup>th</sup> November, 2008 at page 85 lines 15 - 24. He submitted that a case is won on credible evidence and not on address and that failure to address will not be fatal or cause miscarriage of justice. He relied on *Ogunsanya v. State* (2011) 6 SCNJ 190 at 220 for this submission. He also argued that since the appellant was represented by counsel all through the trial, the duty fell on him to raise objection to the continuation of any proceedings in the absence of the accused/appellant especially when faced with such serious charges for which the appellant’s presence is required under Section 153 of the Criminal Procedure Code. He therefore urged this court to discountenance the appellant’s contention since the Learned Trial Judge could not have pronounced that “...the 1<sup>st</sup> and 2<sup>nd</sup> accused are hereby convicted as charged...” if the accused were not present in court.

I have carefully scrutinized the record and I agree with learned counsel for the respondent when he said that there was no consistent record of the appellant’s presence and the co-accused throughout the trial. From 7<sup>th</sup> January, 2008 (the date the case was first men-

tioned in court), there were a total of twenty-eight (28) appearances and out of this number it is in eight (8) appearances that accused were recorded present. On 28<sup>th</sup> January, 2008 and 19<sup>th</sup> November, 2008 when the accused pleaded to the charge and amended charge respectively the court did not reflect their presence until their plea was being taken but on 3<sup>rd</sup> March, 2008; 28<sup>th</sup> May, 2008; 17<sup>th</sup> June, 2008; 21<sup>st</sup> July, 2008; 25<sup>th</sup> February, 2009 and 5<sup>th</sup> May, 2009 the court recorded their presence. The presence or absence of counsel was however meticulously recorded.

***I do not seriously share the view expressed by the Court of Appeal in Mikailu v State (2001) 8 NWLR (Pt.715) 469 that the failure to read the address of counsel in open court is tantamount to lack of fair hearing in public and thus a contravention of Section 36(1), (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). While counsel's address is ordinarily designed to assist the court, it is not evidence and no fine speech in an address can make up for lack of evidence to prove or establish a fact or else disprove and demolish a point in issue.*** See: Niger Construction Ltd v Okugbeni (1987) 4 NWLR (Pt. 67) 787; BFI Group Corporation v Bureau of Public Enterprises (2012) 18 NWLR (pt. 1332) 209. ***A case is won on credible evidence and failure to address will not be fatal or cause miscarriage of justice.*** See: Ogunsanya v. State (2011) 6-7 SC (Pt. 11) 56; Obade v. State (1991) 6 NWLR (Pt.198) 435. If this appeal concerned only the issue of not reading the address of counsel in open court, I would have had no hesitation whatsoever in dismissing the appeal as a mere storm in a tea Cup. Learned counsel for the appellant raised the spectre of the appellant's absence in Court at allocutus before the sentence of death was passed on him. Sections 153 and 154 CPC deal with the presence of the accused at trial. The sections state as follows-

*"153. Every accused person shall, subject to the provisions of Section 154, be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings or otherwise as to render their continuance in his presence impracticable.*

*154 - (1) Process to compel the attendance of the accused person shall ordinarily be a summons or a warrant according as in the opinion of the court a summons or a warrant should according to*

*the fourth column of the Appendix A issue in the first instance.*

(2) *When a summons is issued the court may if it sees reason to do so dispense with the personal attendance of the accused Provided that:-*

(a) *he is represented by counsel; or*

B (b) *he pleads guilty in writing.*

(3) *Notwithstanding the provision of Sub-Section (2), the court shall not without adjourning for his personal attendance sentence the accused to any term of imprisonment or to any other form of detention or order him to be subject to any disqualification.*

C As I pointed out earlier, the learned trial Judge was not meticulous in recording the daily attendance of the appellant in court during his trial and no reason has been given for this lapse. Learned counsel for the appellant has impressed on this court not to go outside the record to draw conclusions that are not supported by the record nor to read into the record what is not contained therein but learned counsel for the respondent argued strongly that since the appellant was represented by counsel, he should have raised objection to the continuation of the trial anytime the appellant was absent from court. ***Where in a criminal trial a piece of evidence is capable of more than one interpretation, the court should adopt that interpretation that is more favourable to the accused.*** See: Obade v State supra at page 453; Clark Ejuren v Commissioner of Police (1961) ALL NLR 478; Udo Akpan Essien v State (1966) NWLR 229. ***From the record, one cannot say for certain whether the appellant was present in court throughout the duration of the trial. It is however obvious that the appellant was not invited to make an allocutus before the death sentence was passed on him nor did counsel plead for leniency on his behalf. The record as produced makes for more than one interpretation, one in his favour and the other against him. And since there was no allocutus it will be presumed that the appellant was not present in court when sentence of death was passed on him. This is in clear contravention of Section 154(3) CPC. The omission I am afraid has vitiated the trial.*** In Asakitikpi v State (1993) 5 NWLR (Pt.296) 641 Uwais, JSC (as he then was) echoed the remarks of Lord Atkin in the Privy Council in B.R. Lawrence v The Kino (1993) AC. 699 at 708 thus:-



*"It is an essential principle of our criminal law that the trial for an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence ...on trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that the sentence passed for felony in the absence of the accused is totally invalid."*

The conviction in the Asakitikpi's case however was allowed to stand because the allocutus taken in that case cleared any doubt about the presence of the accused when the judgment was delivered.

***Although the appellant complained in the lower court that his trial, conviction and sentence were a nullity, learned counsel had predicated his argument on the fact that the prosecution suppressed the extra judicial statement which the appellant made that raised the defence of self defence and this made the trial not to be fair. The issue about the absence of the appellant during trial and especially during the delivery of judgment was never raised at the lower court. It was a fresh issue which learned counsel introduced in this court. We allowed the issue to be raised because it is a criminal trial which attracted the highest sentence. While the court below cannot be said to be wrong in its decision because of the issues which were presented before it, it is incumbent on this court to consider other complaints raised since it is the appellant's life that is at stake. In the circumstances, I have to allow the appeal.***

***I hereby allow the appeal. I declare the entire proceedings leading up to judgment, conviction and sentence of the trial court which were affirmed by the lower court as nullity and they are accordingly set aside. The justice of the case requires that the appellant should be arraigned immediately before another Judge of Kogi State High Court other than Okpanachi J. for expeditious trial.*** And because of this order, I cannot go into the second issue which deals with the merit of the appeal.

**PETER-ODILI JSC**

I am in agreement with the judgment just delivered by my learned brother Kumai Bayang Aka'ahs JSC and in support of the reasoning I shall make some comments.

This is an appeal against the decision of the Court of Appeal, Abuja Judicial Division delivered on the 14th day of December, 2012 which court below affirmed the conviction and sentence of the appellant by the High Court of Justice of Kogi State for the offence of criminal conspiracy and culpable homicide punishable with death contrary to Sections 97(1) and 221(b) respectively of the Penal Code.

**FACTS BRIEFLY STATED**

The appellant along with one other person was arraigned on two count charge of Criminal Conspiracy and culpable homicide punishable with death contrary to sections 97(1) and 221(b) of the Penal Code. The prosecution called two witnesses in proof of their case at the close of which case for the prosecution, appellant along with his co-accused rested his case on the case for the prosecution and never testified in his own defence nor called any witness.

The case put forward for the prosecution is that on the 14th day of December, 2006, the appellant together with four others viz, Yakubu Ahmed Audu (tried along with the appellant), Sule Opotu, Jimoh Shaibu and Abdul Nwaha (all at large) invaded the family house of the deceased Ozovehe Yusufu Abdulkareem at about 6 am in the morning. The deceased lived as a tenant in the house of the PW1 before the incident of that fateful day. On that day, the deceased and the PW1 sat in front of the deceased's house when they heard shouts and sounds of gunshots coming from the deceased's family house a stone throw away. That they saw some occupants of the deceased's family house running towards their direction. They decided to go and see what was happening. The deceased who tied a towel around his waist had to go and change into a shirt and trousers while the PW1 went ahead to the deceased's family house.

That the PW1 on reaching the deceased's family house met the appellant and Yakubu Ahmed Audu, Opotu Sule Jimoh Shaibu and Abdul Nwaha all armed with guns. The PW1 tried pacifying the appellant and his co-accused persons not to harm anyone but to no avail and when they sighted the deceased, appellant exchanged his gun with a member of his gang who shot the deceased on the chest

whereupon the deceased fell down. The deceased was taken to the General Hospital, Okene where he was confirmed dead.

On the 13<sup>th</sup> day of November, 2014 date of hearing learned counsel for the appellant, Mr. W.Y Mamman adopted his Brief of Argument filed on 15/5/2014 and deemed filed on 8/7/14. Learned counsel identified two issues for determination which are as follows: B

i. Whether in the entire circumstances of this case, it was not wrong for the Court of Appeal to affirm the judgment of the trial court which is a nullity (Ground 5)

ii. Whether having regards to the facts and circumstances of this case, the Court of Appeal was not wrong in holding that the case against the appellant was proved by the prosecution beyond reasonable doubt (Ground 4). C

Mrs. Ruth Alolo Alfa, learned counsel for the respondent adopted its Brief of Argument filed on 25/8/2014. She formulated D two issues for determination, viz:

1. Whether the prosecution has proved the case against the appellant beyond reasonable doubt as required by law. (Ground 4)

2. Whether the trial, conviction and sentence of the appellant as affirmed by the court below was a nullity. (Grounds 1, 2, 3 and 5) E

I see no difficulty in taking the two issues as raised by the respondent as they seem more aptly crafted and I think it is proper to handle them together.

#### ISSUES 1 & 2

The issues pose the questions whether the prosecution proved F its case as required by law and secondly if the trial, conviction and sentence of the appellant as affirmed by the court below was not a nullity.

Learned counsel for the appellant contended that the trial was G vitiated by the manner in which the final addresses of counsel were rendered. That the learned trial judge by permitting the counsel for the parties to file written addresses breached the right to fair hearing of the appellant as the trial judge permitting counsel to the parties to adopt their written addresses and subsequently delivered its judgment in the absence of appellant's counsel. He referred to Section H 36(1), (3) and 4 of the Constitution.

For the appellant was submitted that it is trite that every accused person such as the appellant in the case at hand must be present

during the whole of his trial as provided for in Section 153 of the Criminal Procedure Code applicable to Kogi State. That the provisions of S. 153 of Criminal Procedure Code which deals with dispensing with the presence of the accused at the trial are inapplicable to the present case. That there was nothing to show a misconduct like  
 B interrupting the proceeding by the appellant at any point of the trial justifying rendering the judgment at the trial in the absence of the appellant or that of the addresses of counsel taking place in appellant's absence as happened here thus creating a fundamental constitutional  
 C breach. He cited *Adeoye v State* (1999) 6 NWLR (Pt. 605) 74.

It was contended that the extenuating circumstances in the case of *Asakitikpi v The State* (1993) 5 NWLR (Pt. 296) 641 are not present here as nothing in the record would bear out a justification for deviating from the provisions of Section 153 CPA imposing on the court  
 D of trial a duty to ensure that accused was present in court throughout every aspect of the trial. That a miscarriage of justice had occurred.

Learned counsel for the appellant submitted that the court below was wrong to have held that the prosecution proved its case against the appellant beyond reasonable doubt which led the lower court to  
 E affirm the conviction and sentence of the appellant by the trial court. He stated so because according to counsel there were substantial contradictions on material points in the evidence of prosecution witnesses or witness or between the extra-judicial statement of a witness and his evidence in court and so there cannot be said to be proof  
 F beyond reasonable doubt.

In response, learned counsel for the respondent contended that for the prosecution to prove the case of culpable homicide punishable with death against the accused/appellant it must establish the  
 G ingredients of the offence beyond reasonable doubt, that is that the deceased had died and the death caused by the accused with the intention that death or grievous bodily harm would be the probable consequence of the accused. She cited *Ochiba v The State* (2011) 12 SCNJ (Pt 2) 526 at 539 etc.

H For the respondent was submitted that the Supreme Court should not interfere with the concurrent findings of the two courts below since the findings are not perverse and have not been shown to be unsupported by credible evidence or not properly evaluated whereby it can be said a miscarriage of justice had occurred. He re-

ferred to *Eya v. Onuoha* (2011) 3 SCNJ 302 at 323.

It was contended further for the respondent that the minor inaccuracies and discrepancies that have not touched the substance of the case at hand should not be allowed to disturb the judgment. She relied on *Garko v. the State* (2006) 6 NWLR (Pt. 977) 524; *Igbele v. The State* (2006) 6 NWLR (pt. 975) 100 at 120 etc. B

Learned counsel for the respondent stated that the conviction and sentence of the appellant as affirmed by the court below were not a nullity. That although the presence of the accused persons was not recorded, it was that same day the plea of the accused persons including the appellant to the amended charge was taken and so it cannot be safely concluded that on the day the written addresses were adopted, the accused persons were not in court. She submitted further that nothing on the record showed appellant and co-accused being granted bail and so he was in custody throughout and so the presumption can be made that the prison officials brought appellant to court for trial as they ought to. That since failure to address is not fatal and so if appellant was not in court on the day the addresses were adopted it is not fatal. She referred to *Ogunsanya v The State* (2011) 6 SCNJ 190 at 220. That since appellant was represented by counsel any fundamental breach would have been objected to by that counsel and so that court should take it that appellant and counsel were in court when the judgment, conviction and sentence were made. C D E F

She stated on for the appellant that the trial court's omission to maintain a consistent record of the appellant's presence at trial is a mere irregularity curable by Section 382 of the CPC. That the presumption of regularity as provided by Section 168(1) of the Evidence Act 2011 applied. She referred to *Udeh v. State* (1999) 7 G NWLR (pt. 609) 1.

The plank on which this appeal is contested stems from the appellant's contention that the whole proceedings which led to the conviction and sentence of the appellant amounted to a nullity in that the final written addresses of counsel for the parties were rendered violated the constitutional right of the appellant to fair hearing since the adoption thereof was in his absence. Also that the judgment of the trial court was done in the absence of the appellant. H

In reaction the respondent contends that assuming but not

conceding that the accused/appellant's adoption of the written addresses of counsel and the day the judgment was delivered a miscarriage of justice has not been shown to have occurred. He relied on Section 382 of the Criminal Procedure Code submitting that the trial court's omission to maintain a consistent record of the accused/appellant's presence at the trial is a mere irregularity curable by Section 382 of the CPC. With the contending positions of the parties shown above, it is necessary to quote the provisions of Section 382 of the Criminal Code which provides thus:

*"Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or reviewed on account of any error, omission or irregularity in the complaint, summons, order, judgment or other proceedings before or during trial or any inquiry or other proceedings under this Criminal Procedure Code unless the appeal court or reviewing authority thinks that a failure of justice has in fact been occasioned by such error, omission or irregularity."*

Of note is the fact that there is nothing in the Record to show that on the day the written addresses of counsel for the parties were adopted that appellant as accused was in trial court. Also absent in the Record is a recording of appellant's presence when the judgment of the trial court was rendered, this all the more crucial as no allocutus was recorded before the conviction and sentence to death of the appellant. These facts are when taken in context with Section 36(1), (3) and (4) of the 1999 Constitution of the Federal Republic of Nigeria as amended would be taken as non compliance with the Constitutional provisions thereof. I would want to restate it here for clarity and it is as follows:

*"36(1) in the determination of his civil rights and obligations, including any questions or determination by or against any government or authority, a person shall be entitled to fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."*

*(3) The proceedings of a court or the proceedings of any Tribunal relating to the matters in subsection (1) of their section including the announcement of decisions of the court or tribunal shall be held in public."*

*(4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal.”*

In light of the above constitutional provisions, those parts of the proceedings done in the absence of the appellant cannot be classified as proceedings held in public and also if the right to fair hearing of the appellant had not been compromised on account thereof. In that wise I shall call to mind the Court of Appeal decision in *Mika'ilu V The State* (2001) 8 NWLR (pt. 715) 469 at 484 & 485 per Abdullahi PCA and I quote:

*“The learned trial judge did not take oral speeches of counsel in open court. Rather the learned trial judge ordered written addresses which were exchange amongst counsel representing the parties in the matter before her. The addresses that were filed and exchanged consequent upon the order of the court were not subsequently read in open court. Can this said to be in compliance with clear and unambiguous or unequivocal provisions of the constitution? I do not think so. In the case of *Ogbaji v Arewa Textiles Plc* (2000) 11 NWLR (Pt. 678) 322, it was observed that the practice or procedure of submitting written addresses in the High court is not known to any of the court's procedure. It is however, becoming fashionable for the High Courts to demand to be addressed in writing but this practice is not provided in either the various civil procedure rules or criminal procedure laws applicable in the country.*

*The learned justice, however, entertained a forlorn hope that the practice would not result in miscarriage of justice, little knowing then that it could have constitutional implications. In my respectful opinion, I do not think that the addresses exchanged by counsel and was not read in the open court can be said to have met the demand of the provisions of Section 33(13) (sic) 33(3) of the Constitution. At least, the address stage cannot be held to be in public. It follows that the trial is not wholly in public. I am aware of the case of *Oyeyipo v Oyinloye* (1987) 1 NWLR (Pt. 50) 356, 377 which has been held to be a mere obiter in *N.A.B Ltd v Barri Eng. (Nig.)* (1995) 8 NWLR (Pt. 413) 257, 271 - 2. The court then recalled- the case of *Oviasu v Oviasu* (1973) 11 SC 315 and affirmed same. In the latter case, the Supreme Court held that delivery of the judgment of the court in chambers out of full glare of the public was unconstitutional and viti-*

ates the entire proceedings and ordered a trial *de novo*. The case *N.A.B Ltd v Barri Eng. (Nig.) (supra)* was a civil case and therefore, came under the provisions of section 33(3) of the Constitution. The present case is a criminal proceedings and equally taken care under a section 33(3) of the Constitution which is already recited in this judgment. But in this case the issue involved is different, it does not raise the question of announcement of the decision of the court rather that of addresses of counsel which is rather peripheral. Is it therefore, not a mere technicality? I do not think so because the right to fair hearing comprehends and includes the right to be heard in open court in defence of one's good character and good name. Constitutionally entrenched provisions should not be lightly trampled upon. See *FCSC v Laoye (1989) 2 NWLR (Pt. 106) 653* and *Aiyetan v NIFOR (1987) 3 NWLR (Pt. 59) 48 at 50*. The trial, being one, is not of the nature the law permits to be truncated, for a part to be heard in public and the balance submitted by learned counsel representing the parties. See also the case of *Awoniyi v Eletu (1963) 2 ALL NLR 99, 101* where *Lestang C.J* in basing his decision on the recovery of property observed thus:

"Now Section 7 requires that the notice shall state the landlord's intention to proceed to recover possession on a date not less than seven days from the date of service of the notice. The notice in 'the present case did not comply with this requirement because a wrong date was inserted in it. Can this defect be considered a mere technicality which the court could disregard? In my view, no, because of the provisions of Section 10. That Section provides that a landlord cannot apply to the court until the time stated in the notice has expired. Effect cannot be given to S.10 when the date in the notice is obviously wrong as in the present case. Although this is a very technical decision, the words of Lord Atkin in *Ohene Moore v Akese Tayee* 2 WACA 43 apply very aptly in my view. There, His Lordship said:

"It is quite true that their Lordships, and every other court attempt to do substantial justice and to avoid technicalities, but their Lordships, like any other court are bound by the statute law, and if the statute law says there shall be no jurisdiction in a certain event, and that event has occurred, then it is impossible for their Lordships or for any other court to have jurisdiction." (*Italics mine*)



*See also Oranye v. Jibowu 13 WACA 41.*

The learned trial Judge having breached constitutionally entrenched provision particularly one protecting individual rights has lost jurisdiction notwithstanding the belated effort to strengthen matter by requesting counsel to give summary of their respective addresses in open court. I very much regret that this issue vitiates the trial which is otherwise very well conducted. (Underlining mine for emphasis) B

The said exception on which the presence of an accused can be dispensed with as provided in section 154 of the CPC is not in existence in this case since there is nothing to show that the appellant was disrupting the proceedings by some savory behavior or misconducted himself. Therefore it is essential that the appellant had to be present all through the entire proceedings and not partly so. This is to ensure that he himself followed everything done or said about him in the course of the trial irrespective of the legal representation. D

Also to be said is the import of a properly recorded proceedings showing what transpired in court as an appellate court is bound by the record having no jurisdiction to go outside the record to draw conclusions. Along the same line is the fact that an appellate court cannot read into the record what is not contained therein nor can read out of the record what is contained therein. In short, an appellate court is not to go into the realm of conjecture or speculation outside the Record of what transpired in the court below. See *Ogolo v Fubara* (2003) 11 NWLR (Pt. 831) 231 at 264; *Sapo & Anor v Sunmonu* (2010) 11 NWLR (Pt. 1205) 374 at 395; *Garuba & Drs v Omokhodion & Ors* (2011) 15 NWLR (Pt. 1269) 145 at 180; *Adeoye v State* (1996) 6 NWLR (Pt. 605) 74. To underscore the essence of the record of proceedings I shall cite *Wali JSC in Shyllony v Asein* (1994) 6 NWLR (Pt. 353) 670 at 688 where he said thus: E

*“The situation in the case might be and could be a genuine mistake but should not be allowed otherwise the door will be left wide open for gaps in the records of proceedings to be filled in judgments or rulings. Wali JSC followed Belgore JSC (as he then was) in Otapo v Sunmonu (1997) 2 NWLR (Pt. 58) 587 when he said “It is in the interest of justice that all that is said or raised in court during* H

*hearing be taken in writing i.e. be properly recorded”.*

I dare say it is not helpful for the respondent to seek refuge in *Asakitikpi v The State* (1993) 5 NWLR (Pt. 296) 641 where the judgment of the trial court was not vitiated on account of the absence in the record of the appellant being present when the judgment was delivered. This court in the *Asakitikpi* case (*supra*) held that the judgment was not vitiated since the recording of the allocutus and sentence thereafter were sufficient proof of the presence of the accused/appellant. I shall quote that instance thus:

*“ALLOCUTUS: The accused begs for leniency*

*SENTENCE: The sentence of the court upon you is that you be hanged by the neck until you be dead and may the lord (sic) have mercy on your soul”*

Therefore, Uwais JSC (as he then was), who delivered the lead judgment of this Hon. Court in *Asakitikpi’s* case (*supra*) at page 656, stated:

*“Surely there could not have been an allocutus by the appellant as the record has shown, if the appellant were not in court when the judgment was delivered, as alleged in the appellant’s brief of argument and as submitted by learned counsel Mrs. Doherty. Similarly, there could not have been the pronouncement of sentence as was done by the learned trial judge if the appellant were not present in court at the time the sentence was passed. In view of this, I am disposed to thinking that there was a slip made by the learned trial judge in omitting to note in the record of proceedings that the appellant was present in court”*

The circumstance in the case at hand are different as no allocutus was recorded before the conviction and sentence. Even the manner or recording of the sentence left in doubt as to whether or not the accused persons including appellant were present. The infraction cannot be categorized as an irregularity as counsel for the respondent is positing. See excerpt of the judgment of the trial court:

*It is hereby adjudged that the prosecution has proved its case beyond reasonable doubt and the 1<sup>st</sup> and 2<sup>nd</sup> accused are hereby convicted as charged under Section 97(1) and Section 221(b) of the Penal Code and are therefore sentenced to death by hanging.”*

From the above pronouncement of the trial court in this case it

seems to me more consistent with the conviction and sentence done in the absence of the appellant and co-accused as from the wordings, trial judge did not address his pronouncement to the accused rather, it would look like words said to others who would later communicate to the accused/appellant. That is certainly a situation not within the contemplation of either Section 36 of the Constitution 1999 as amended or Section 153 of the CPC, and so the conclusion that follows is that a miscarriage of justice was occasioned. In that I have followed what my learned brother, Rhodes-Vivour JSC said in *Mpama v First Bank of Nigeria Plc* (2013) 5 NWLR (Pt. 1346) 176 at 204. B C

From the foregoing, I do not hesitate in finding merit in the appeal which I allow and going along with the better reasoning in the lead Judgment I hereby order a retrial by a judge other than the judge who first handled this matter.

I abide by the consequential orders as made by my learned brother Aka'ahs JSC. D

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### **MUHAMMAD JSC**

The succinct treatment of issue in the lead judgment of my learned brother Kumai Bayang Aka'ahs, JSC necessitates my adopting same in allowing the appeal. I abide by the consequential orders made in the very judgment. E

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### **NWEZE JSC**

I had the advantage of reading the draft of the leading judgment which my noble Lord, Aka'ahs JSC, just delivered now. I entirely endorse His Lordship's conclusion declaring void the entire proceedings of the trial court (Coram Okpanachi J), which the Court of Appeal [lower court] affirmed in its judgment under appeal. F G

An intimate reading of the said proceedings would reveal that they constitute an un-mitigated embarrassment to the criminal trial process. Before that court, the appellant (as second accused person), was arraigned with one Yakubu A. Audu on a two count charge of criminal conspiracy and Culpable Homicide punishable with death contrary to section 97 (1) and 221 (b) of the Penal Code. H

Somewhat, most curiously, the trial court, due perhaps to incompetence, negligence or a combination of both vices, found it difficult to keep a consistent record of the appellant's presence through-

out the trial. As shown in the leading judgment, there were a total of twenty eight appearances. Most embarrassingly, the records, clearly, show that the appellant was only present on eight occasions.

B It would seem obvious that appellant was condemned to the gallows in absentia as there was no record of his allocutus before death sentence was passed on him! Even in the face of all these glaring irregularities, the lower court still affirmed judgment of trial court.

C On our part, we abjure it as a strange development in our criminal jurisprudence, Adeoye v State (1999) LPELR -134 (SC) 8, D-E. Indeed, such a procedural blunder amounts to a negation of fair trial, Adeoye v State (supra) 24, D-G; Gozie Okeke v State (2003) LPELR -2436 (SC); Alake v State (1992) LPELR -403 (SC). The trial court, like all courts envisaged in section 6 (3) and (5) of the Constitution of the Federal Republic of Nigeria (as amended), is a superior D court of record, Egharevba v Eribi and Ors (2010) 9 NWLR (pt. 1199) 411. The implication of its said status is that all proceedings thereat must be evident on its record, Shyllon v Assein (1994) 6 NWLR (pt 353) 670; Otakpo v. Sumonu (1987) 5 SCNJ 57.

E This must be so for such a record is the only indication of what transpired before the court, Fawehinmi Construction v. O.A.U. (1998) 6 NWLR (pt 553) 171, 182. Above all, the record must be ample, especially, at first instance such that it neither leaves any important matter out nor lends itself to conjecture, Ezeakabekwe and Ors. v. F Emenike (1998) LPELR -1197 (SC) 20- 21, paragraphs F-G.

Due to the lackadaisical approach of the trial court, the very important question whether the appellant was, consistently, in attendance throughout the proceedings culminating in his conviction and sentence, has been left to conjecture, Ezeakabekwe and Ors v Emenike G (supra). This is, completely, antithetical to its status as a court of record, Shyllon v Assein (supra). The lower court failed to appreciate this point and, in consequence, its judgment affirming the judgment of the trial court cannot stand.

H It is for these, and the more detailed, reasons in the leading judgment that I, too, shall enter an order setting aside the judgment of the lower court. Like the leading judgment, I hereby order the immediate re-arraignment of the appellant before another Judge of the Kogi State High Court for a trial de novo.