

SUPREME COURT OF NIGERIA
FRIDAY 20TH MAY, 2016. SC. 240/2013
CORAM:- W. S. N. ONNOGHEN, C. B. OGUNBIYI,
K. B. AKA'AH, K. M. O. KEKERE-EKUN,
C. C. NWEZE, JJSC

AMOS BUDE APPELLANT
V.
THE STATE RESPONDENT

CHARGES - Amendment - Fair hearing - Failure to read and explain any alteration in the charge to accused - And to take his plea thereto - Violates the principle of fair hearing - And renders trial a nullity (H1)

ORDERS OF COURT - Retrial - Conditions - It is ordered where inter alia - That where there has been an error - Leaving aside the error - The entire evidence discloses substantial case against appellant (H2)

ARMED ROBBERY - Retrial order - Validity of - Due to the gravity of the offence - Length of time spent in prison custody by accused - May not necessarily deter court from ordering a retrial (H3)

FACTS

Accused/appellant was initially charged along with four others before the High Court of Kaduna State sitting at Kaduna on a two-count charge of conspiracy to commit armed robbery, armed robbery and receiving stolen property under sections 6(b), 1(2)(a) and 5 of the Robbery and Firearms (Special Provisions) Act Cap. R11, Laws of the Federation of Nigeria 2004. Appellant pleaded not guilty. Prosecution/respondent called four witnesses in support of its case. It subsequently asked for leave to amend the charge. Leave was granted and thus the charge was amended and trial continued without appellant's fresh plea being taken.

At the end of the trial, appellant was found guilty as charged and sentenced to death by hanging. Dissatisfied, appellant appealed to the Court of Appeal Kaduna Division. Appellant formulated two

issues for determination before the Court. The first issue challenged the validity of the proceedings before the trial Court having regard to the failure of the learned trial Judge to take a fresh plea after the amendment of the charge. The second issue questioned the evaluation of evidence. In its judgment delivered, the Court resolved the first issue in appellant's favour and held that the entire proceedings amounted to a nullity for the Court's failure to take appellant's fresh plea on the amended charge. On that basis it declined to consider issue 2 and ordered that the case be remitted to the High Court of Kaduna State for retrial before another Judge of that Court. Still not satisfied, appellant appealed to the Supreme Court.

ISSUE FOR DETERMINATION

Whether or not the Court below ought to have ordered a retrial of the appellant having regard to the position of the law, facts and circumstances of the case.

HELD (Unanimously dismissing the appeal per **KEKERE-EKUN JSC**)

CHARGES - Amendment - Fair hearing

1. This is not surprising, as it has been firmly established by a plethora of decisions of this Court that failure to read and explain any alteration or addition to a charge to an accused person and to take his plea thereto violates the principle of fair hearing and renders the trial a nullity. (p. 2627 H)

ORDERS OF COURT - Retrial - Conditions

2. The factors that guide the Court in determining whether or not to order a retrial or a hearing de novo, have been settled long ago in the locus classicus relied upon by both learned counsel in the case of: Abodundu V. The Queen (1959) NSCC (Vol. 1) 56 @ 60 lines 9 - 20. The Court must be satisfied:

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

b. That, leaving aside the error or irregularity, the evi-

dence 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 for which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant are not merely trivial; and

e. That to refuse to order a retrial would occasion a greater miscarriage of justice than to grant it. (p. 2628 D)

ARMED ROBBERY - Retrial order - Validity of

3. Having closely examined the evidence, I am unable to agree with learned counsel that a retrial would enable the prosecution repair perceived defects in its case. I am satisfied that the facts disclose a substantive case of armed robbery against the appellant.

On the gravity of the offence, learned counsel has argued that despite the fact that the appellant was charged with armed robbery, no life was lost. I am of the considered view that learned counsel for the appellant missed the point. The offences of conspiracy to commit armed robbery and armed robbery are very grave offences indeed, which attract the death penalty - the ultimate punishment any Court can impose. The punishment is illustrative of the seriousness with which the offence is regarded in society. Not only does the accused person forfeit his liberty, he forfeits his right to his very existence. The prevalence of armed robbery in the society is also a relevant consideration. The fact that no life was lost cannot diminish the grievous nature of the offence or the traumatic effect of obtaining property from a victim under the barrel of a gun. For this reason, the length of time spent in prison custody may not necessarily deter the Court from ordering a retrial or proper trial. (pp. 2630 D/2631 G)

REPRESENTATION

KEHINDE OGUNWUMIJU, ESQ. with him, ADEMOLA ABIMBOLA,

ESQ., OLUWASEYI KOLAWOLE (MISS) and LUKMAN SAADU,
ESQ., for the Appellant
M.M. NURUDEEN ESQ., for the Respondent

CASES REFERRED TO

- B Erekanure v. State (1993) 5 NWLR (pt. 294) 385
- Eyorokoromo v. State (1979) 6 - 9 SC (Reprint) 3
- Chief of Air Staff v. Iyen (2005) 6 NWLR (pt. 922) 496
- Abodundu v. The Queen (1959) NSCC 55
- C Lasisi v. State (2013) 12 NWLR (pt. 1367) 133
- Kajubo v. State (1988) 1 NWLR (pt. 73) 721
- Adeoye v. State (1999) 6 NWLR (pt. 605) 74
- Mohammed v. State (2013) 5 NWLR (pt. 1347) 315
- Ogboh v. FRN (2002) 10 NWLR (pt. 774) 21
- D Alabi v. State (1993) 7 NWLR (pt. 307) 511
- Ihekwoaba v. State (2004) 15 NWLR (pt. 896) 296
- Okafor v. State (1976) ALL NLR 207
- Okosun v. State (1979) ALL NLR 26
- Ewe v. State (1992) 6 NWLR (pt. 246) 147
- E Dike v. State (1996) 5 NWLR (pt. 450) 553

STATUTES REFERRED TO

- Robbery & Firearms (Special Provisions) Act Cap. R11 LFN 2004,
ss. 1(2)(a), 5, 6(b)
- F Court of Appeal Act, s. 19(2)
- Supreme Court Act, ss. 25, 26
- Constitution of the Federal Republic of Nigeria 1999, s. 36
- Criminal Procedure Code, s. 208(2)
- G Administration of Criminal Justice Act 2015, ss. 306, 396

LEAD JUDGMENT BY KEKERE-EKUN JSC

- H The appellant herein was initially charged along with four others before the High Court of Kaduna State sitting at Kaduna (the trial Court) on a two-count charge of conspiracy to commit armed robbery, armed robbery and receiving stolen property under Sections 6 (b), 1 (2) (a) and 5 of the Robbery and Firearms (Special Provisions) Act Cap. R11, Laws of the Federation of Nigeria 2004. The appellant was charged with the counts for conspiracy to commit armed rob-

bery and armed robbery only, to which he pleaded not guilty on 4/10/06. The prosecution opened its case on 23rd January 2007 and called four witnesses. Subsequently the prosecution filed a motion for leave to amend the charge. The application was granted on 6th March 2007.

The amended charge dated 22nd February 2007 reads: B
COUNT ONE

That you, AMOS BUDE (M). MOSHOOD SANUSI (M), CHARLES CHIDI IWUCHUKWU with DIVINE EBUKAM (DECEASED) and DOGAM PETER (M) (AT LARGE) on or about the 12th day of December 2005 at Nassarawa Village, Kaduna, conspired to rob at gun point, the premises of Kaduna South Local Government Education Board, Kakuri, Kaduna, and that same act was done in pursuance of the “agreement” and that you thereby committed an offence under Section 6 (b) of the Robbery and Firearms (Special Provisions) Act Cap. R11 Laws of the Federation of Nigeria, 2004. C

COUNT TWO

That you, AMOS BUDE (M), DIVINE EBUKAM (M) (DECEASED) and PRINCE OBI alias THANKGOD on or about the 12th day of December 2005 at Nassarawa Village, Kaduna, while armed with guns and other dangerous weapons, forcefully entered the office of the Head of Department Finance, and robbed the occupants of the said office of the sum of Twelve Million Naira, thereby committing an offence punishable under Section 1 (2) (a) of the Robbery and Firearms (Special Provisions) Act Cap. R11 Laws of the Federation of Nigeria, 2004. E

COUNT THREE

That you MOSHOOD SANUSI (M), CHARLES CHIDI IWUCHUKWU (M) on or about the 12th day of December 2005 at Unguwan Muazu Kaduna, dishonestly received some money from DIVINE EBUKAM (M) (DECEASED) and AMOS BUDE (M) knowing or having reason to believe the same robbed and thereby committed an offence punishable under Section 5 of the Robbery and Firearms (Special Provisions) Act Cap. R11 Laws of the Federation of Nigeria, 2004. F

After the amendment of the charge the trial continued without the appellant’s plea being taken afresh. At the conclusion of the trial,

the appellant was found guilty as charged and sentenced to death by hanging.

The appellant was dissatisfied with the decision of the trial Court and appealed to the Court of Appeal, Kaduna Division (the Court below) by a notice of appeal filed on 8/8/2011. With the leave of that Court he filed an amended notice of appeal on 21/11/2011 containing two grounds of appeal. Ground 1 of the amended notice of appeal at pages 131 - 132 of the record, which is relevant to this appeal, reads as follows:

Ground One:

The entire proceedings of the Court below is a nullity by reason of the fact that after the learned trial judge granted leave to the prosecution to amend the charge, the accused was not called upon to take his plea upon the amended charge.

PARTICULARS

i. The appellant (as 2nd accused) and five others were charged to Court on a three counts charge dated August 2, 2006.

ii. At the proceedings of November 4, 2010, the appellant pleaded guilty to the charge dated August 2, 2006.

iii. Trial commenced in the Court below on January 23, 2007.

iv. On March 6, 2007 the prosecution sought and obtained leave of the Court to amend the charge dated August 2, 2006 pursuant to a motion on notice dated February 28, 2007.

v. By virtue of the mandatory provision of Section 208 (2) of the Criminal Procedure Code, Cap. C42 Laws of the Federation of Nigeria 2004, once a charge is amended, the amended charge shall be read to the accused and his plea thereto shall be taken.

vi. After granting leave to the prosecution to amend the charge, trial continued without compliance with the provision of Section 208 (2) of the Criminal Procedure Code, Cap. C42 Laws of the Federation of Nigeria 2004.

vii. It is well settled law that failure to call on the accused person to plead to the new charge renders the whole proceedings a nullity.

The appellant formulated two issues for determination before the Court below. The first issue, distilled from Ground 1 of the amended notice of appeal, challenged the validity of the proceedings before the trial Court having regard to the failure of the learned

trial Judge to take a fresh plea after the amendment of the charge. The second issue, formulated from Ground 2, questioned the evaluation of evidence. In its judgment delivered on 28/3/2013, the Court resolved the first issue in the appellant's favour and held that the entire proceedings amounted to a nullity for the Court's failure to take the appellant's plea on the amended charge. On that basis it declined to consider issue 2 and ordered that the case be remitted to the High Court of Kaduna State for retrial before another Judge of that Court. The appellant is dissatisfied with the order for a retrial and has further appealed to this Court. B

The parties duly filed and exchanged their respective briefs of argument in compliance with the rules of this Court. At the hearing of the appeal on 3rd March, 2016, KEHINDE OGUNWUMIJU ESQ. adopted and relied on the appellant's brief deemed filed on 24/6/2014 in urging the Court to allow the appeal, set aside the judgment of the Court below ordering a trial de novo and acquit and discharge the appellant. C

M.M. NURUDDEEN ESQ., for the Respondent, adopted and relied on the respondent's brief filed on 13/11/2014 and urged the Court to dismiss the appeal. E

Learned counsel for the appellant identified a sole issue for determination as follows:

Whether or not the Court below ought to have ordered a retrial of the appellant having regard to the position of the law, facts and circumstances of the case. F

The respondent also formulated a single issue for determination thus:

Whether the learned Justices of the Court of Appeal could properly discharge and acquit the appellant when they merely dealt with the legality of his arraignment and not the evidence adduced against him at the trial Court. G

I consider the issue formulated by the appellant to be more apt in articulating the issue in contention in this appeal and accordingly adopt it for the resolution of the appeal. H

In arguing the appeal, learned counsel for the appellant submitted that where an appellate Court declares a criminal trial a nullity, the decision whether or not to order a retrial lies within the discretionary powers of the Court as provided in Section 19 (2) of the

Court of Appeal Act and Sections 25 and 26 of the Supreme Court Act respectively, In support of his submission on the discretionary power of the Court he referred to: Erekanure v. The State (1993) 5 NWLR (Pt.294) 385 @ 394 H; Eyorokoromo & Anor. V. The State (1979) 6 - 9 SC (Reprint) 3 @ 10 lines 29 - 5; Chief of Air Staff V. Iyen (2005) 6 NWLR (pt.922) 496 @ 557 F-G & 560 C-F.

On the factors to be taken into consideration by an appellate Court in determining whether or not to order a retrial, he referred to the case of Abodundu & Ors. V. The Queen (1959) NSCC 55 @ 73. He also referred to: Lasisi V. The State (2013) 12 NWLR (pt.1367) 133 @ 144 C - G, Kajubo V. The State (1988) 1 NWLR (pt.73) 721. He submitted that all the factors enumerated above must co-exist in the negative for the Court to order a retrial. He submitted further that if an appellant can demonstrate that his case falls under one or more of the five instances referred to in Abodundu's case, an appellate Court ought to refuse to make an order for retrial.

He submitted that the appellant having already spent nine years in custody since his arrest in 2006, it would be oppressive to order his retrial. He referred to Adeoye v. The State (1999) 6 NWLR (Pt. 605) 74 @ 91D; Mohammed Vs The State (2013) 5 NWLR (Pt.1347) 315 and Ogboh Vs FRN (2002) 10 NWLR (Pt.774) 21 where the appellants, whose trials were declared nullities, had spent 8, 14 and 11 years respectively in custody and this Court discharged and acquitted them rather than order a retrial. In addition he submitted that the appellant's personal property seized by the police and intended to be tendered at the trial as proceeds of crime, which includes four motor vehicles, would by now have depreciated to the point of being of no value at all.

Learned counsel submitted that being a criminal charge where the standard of proof is beyond reasonable doubt, the evidence upon which the appellant's fate would depend must be qualitative. He referred to Alabi v. The State (1993) 7 NWLR (pt. 307) 511 @ 527 A. He also contended that the appellant's right to fair hearing, guaranteed by Section 36 (6) of the 1999 Constitution, includes the ability to adequately prepare and canvass his defence and to field witnesses to testify in his defence. He argued that it would amount to miscarriage of justice if the appellant is subjected to a retrial where the prosecution's witnesses cannot give the necessary qualitative evidence

or where the appellant cannot call evidence to exonerate himself. He referred to the proceedings before the trial Court which showed that there were several adjournments at the instance of the prosecution to call the Investigating Police Officer (IPO) who was repeatedly absent due to various official assignments and the fact that it might be difficult to secure the attendance of some of the prosecution witnesses who were civil servants working at the Kaduna South Local Government Education Board where the offence occurred and who might have retired from service and might be unwilling to testify again for the prosecution. Referring to the appellant's evidence under cross-examination at page 86 of the record, he submitted that the appellant's aunt, who could have substantiated his alibi, is deceased. He argued further that having regard to the passage of time, it is unlikely that the witnesses would recall the precise facts of the case and it would lead to a miscarriage of justice if they were called to testify. He relied on the case of: *Ihekwoaba V. The State* (2004) 15 NWLR (pt. 896) 296 @ 311 B - D, where this Court refused to order a retrial because a period of eight years had passed between the commission of the crime and when the retrial would have taken place.

On the seriousness of the offence, learned counsel submitted that although the appellant is charged with armed robbery, the facts before the trial Court show that no life was lost during the robbery incident and there was no evidence that he shot at anyone even though he was alleged to have been armed. He referred to: *Okafor v. The State* (1976) ALL NLR 207; *Adeoye v. The State* (supra) and *Mohammed V. The State* (supra): *Joseph Okosun V. The State* (1979) ALL NLR 26; *Ihekwoaba V. The State* (supra).

On the reason for setting aside the judgment and the overall interest of justice, learned counsel submitted that where an appellate Court, as in this case, finds that an accused person's trial is a nullity, the proper order to make is one discharging and acquitting him and not one ordering his retrial because a trial that is declared a nullity is deemed to have never taken place whereas the word "retrial" implies that an actual trial took place. He referred to: *Okafor Vs The State* (supra) @ 311 lines 17 - 21; *Mohammed Vs The State* (supra) @ 329 A - E.

It is the learned counsel's contention that from the prosecution's case, already fully presented at the trial Court, a case of criminal

conspiracy and armed robbery had not been made out against the appellant. He analysed the evidence of all the prosecution witnesses and contended that the evidence was not of the quality that would make it compelling to order a fresh trial.

B On the other hand, it is the contention of learned counsel for the respondent that having regard to the fact that the lower Court did not evaluate the evidence at all once it had declared the trial a nullity, ground 2 of the notice of appeal, which contends that the judgment of the lower Court is unreasonable, unwarranted and cannot be supported having regard to the evidence, does not arise from the said judgment. He submitted that in the circumstances the respondent's issue for determination is more apt. I have earlier determined that the appellant's issue is more apposite for the determination of the appeal.

D Learned counsel acknowledged that the procedure for the arraignment of an accused person is as provided for under Section 187 (1) of the Criminal Procedure Code and that the procedure is mandatory such that non-compliance would render the entire proceedings a nullity. See: *Kajubo V. The State* (1988) 1 NWLR (pt.73) 721; *Ewe Vs The State* (1992) 6 NWLR (Pt. 246) 147. He noted that the lower Court declared the appellant's trial a nullity and ordered a retrial for the failure of the trial Court to read and explain the amended charge to him. He also referred to the guidelines for ordering a retrial laid down in: *Abodundu & Ors. v. The Queen* (supra) @ 73. He also referred to: *Kajubo Vs The State* (supra), *Linus Dike & Ors. V. The State* (1996) 5 NWLR (pt. 450) 553; *Umuolo v. The State* 2003) 3 NWLR (Pt.808) 493 @ 513 - 514.

G Learned counsel submitted that the amendment of the charge was merely to reflect the correct names of the accused persons and that the appellant was neither prejudiced nor did he suffer any miscarriage of justice thereby. He argued that not calling on him to plead thereto is a procedural irregularity that could not be said to have occasioned a miscarriage of justice in the strictest sense.

H On the nature of the evidence before the trial Court, he submitted that the evidence adduced met the required standard of proof beyond reasonable doubt. On whether there are special circumstances that would render it oppressive to put the appellant on trial a second time, he relied on the dictum of Mukhtar, JSC (as he then was) in

Yusuf V. The State (2011) 18 NWLR (pt.1279) 853 @ 875 C - E to the effect that justice is a two-way track and that each side must be considered carefully bearing in mind the fact that if a retrial is not ordered there is the likelihood of an accused person being convicted unlawfully while on the other hand, if allowed to go scot free the public could be faced with the peril of, in this case, an armed robber moving freely in society without facing the wrath of the law, which could result in a re-occurrence of the offence. He also referred to: Kajubo's case (supra) per Oputa, JSC.

Learned counsel submitted further that the offences of criminal conspiracy and armed robbery, which are punishable with death, cannot be described as trivial. He argued that a retrial would enable the prosecution to establish its case and the appellant to defend his innocence on the merit. He referred to Yusuf V. The State (supra). On the final guiding factor, he submitted that in considering the justice of ordering a retrial, regard must be had to the victims of the offence, who were thrown into psychological trauma as a result of the actions of the appellant and the interest of the State whose laws were broken. He submitted that it would not be just for the appellant to be discharged and acquitted without being tried for such a heinous crime. He contended that refusal to order a retrial would occasion a greater miscarriage of justice than to grant it, as it would amount to exalting technicalities over and above the justice and merit of the case. He submitted that the lower Court was right in ordering a retrial before another Judge.

It must be noted at the outset that neither of the parties has challenged the order of the Court below nullifying the entire proceedings at the trial Court for failure to comply with Section 208 (2) of the Criminal Procedure Code, which provides, in relation to the amendment of a charge, that:

208 (2) Every such alteration or addition or new charge shall be read and explained to the accused and his plea thereto shall be taken.

This is not surprising, as it has been firmly established by a plethora of decisions of this Court that failure to read and explain any alteration or addition to a charge to an accused person and to take his plea thereto violates the principle of fair hearing and renders the trial a nullity. See: Yusuf Vs The

State (2011) 18 NWLR (Pt.1279) 853 @ 871 D - H; Adisa Vs A.G. Western Nigeria (1965) 1 ALL NLR 412 @ 416; Joves vs I.G.P. (1960) 5 FSC 38 @ 43; Okosun vs The State (1979) All NLR 26; Eronini Vs The Queen 14 WACA 366 @ 368.

B The bone of contention in this appeal is the proper order to make in consequence of the lower Court declaring the trial a nullity. The power of the Court of Appeal to order a retrial in certain circumstances is conferred by Section 19 (2) of the Court of Appeal Act Cap. C36 Laws of the Federation of Nigeria (LFN) 2004, which provides:

C 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 appellant to be re-tried by a Court of competent jurisdiction.

D ***The factors that guide the Court in determining whether or not to order a retrial or a hearing de novo, have been settled long ago in the locus classicus relied upon by both learned counsel in the case of: Abodundu V. The Queen (1959) NSCC (Vol. 1) 56 @ 60 lines 9 - 20. The Court must be satisfied:***

E ***a. That there has been an error in law (including the observance of the law of evidence) or irregularity in procedure of such a character that on the one hand the trial was not rendered a nullity and on the other hand the Court of Appeal is unable to say that there has been no miscarriage of justice.***

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

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

H ***d. That the offence or offences for which the appellant was convicted, or the consequences to the appellant or any other person of the conviction or acquittal of the appellant are not merely trivial; and***

e. That to refuse to order a retrial would occasion a greater miscarriage of justice than to grant it. See also: Adeoye V. The State (1999) 6 NWLR Pt.605 74 @ 88.

On the first issue, I had earlier referred to the plethora of deci-

sions by the this Court to the effect that the omission of the trial Court to read and explain the amended charge to the appellant and to take his plea, amounted to a breach of his right to fair hearing and rendered the trial a nullity. In the case of Erekanure V. The State (1993) 5 NWLR (Pt.294) 385 @ 395 G - H, this Court per Olatawura, JSC held that in a situation where the trial is declared a nullity the effect is that there was never a trial, as the purported trial has no legal force or effect. B

In order to determine whether the evidence, taken as a whole discloses a substantial case against the appellant, it is necessary to consider the facts briefly. The prosecution called 6 witnesses in support of its case and tendered 16 exhibits, which included one AK47 rifle, 28 magazines containing rounds of live ammunition, 3 locally made pistols, cartridges and charms. The facts relied upon by the prosecution are that on 12/12/2005 while teachers' salaries were being paid to staff of Kaduna South Local Government Education Department, the appellant and two others forced their way into the office armed with guns and demanded the money with a threat that one of them (staff members) must die. They carted away N12 million in sacks and fired a further six gunshots as they escaped in a Mercedes Benz 190 car. The empty shells were recovered from the scene by the Police. PW1 was able to identify the appellant and described the clothes he wore. PW2 stated that the appellant carried a silver coloured pistol. PW1 and PW2 also stated that they were able to identify the appellant because the robbers were not masked. PW3 and PW4 who were also in the office waiting to collect salaries for their staff also recognised the appellant as being one of the robbers. PW5 (one of the Investigating Police Officers) testified that the appellant was arrested based on information received by the police about those behind the robbery and that he made a confessional statement, admitting his part in the crime and in a series of other robberies. C D E F G

The statement was admitted in evidence as Exhibit A after a trial within trial was conducted. PW 6, another I.P.O. testified that the appellant was arrested in respect of a different case and that it was during the investigation into that case that he confessed to taking part in the robbery at Kaduna South Local Government on 12/12/2005. H

In urging the Court to set aside the order for retrial, learned counsel for the appellant submitted that none of the prosecution wit-

nesses identified the appellant as being one of the robbers. This is incorrect. It is important to note that when the trial commenced, the appellant was the 2nd out of five accused persons. However, in the course of trial, after the conclusion on the evidence of PW4, the prosecution amended the charge on account of the death of the 1st accused, DEVINE EBUKAM and the fact that the 5th accused, DOGARA PETER, was at large. The appellant thereafter became the 1st accused. Thus, reference to the 2nd accused in the testimonies of PWs 1, 2, 3 and 4 as being one of the robbers is reference to the present appellant and his position in the case before the amendment of the charge.

The appellant denied committing the offence and claimed that he was arrested for possession of Indian Hemp.

It is contended on behalf of the appellant that not only is the evidence led by the prosecution not substantial enough to warrant an order of retrial, but that a retrial would unfairly afford the prosecution an opportunity to repair alleged defects in its case, which would result in a miscarriage of justice for the appellant.

Having closely examined the evidence, I am unable to agree with learned counsel that a retrial would enable the prosecution repair perceived defects in its case. I am satisfied that the facts disclose a substantive case of armed robbery against the appellant.

I shall consider the remaining three factors together. I have considered the various reasons advanced by learned counsel for the appellant on why it would be oppressive to order a retrial. It is pertinent to note that each case will be determined in light of its own peculiar facts. See: Erekanure Vs The State (1993) 5 NWLR (Pt.294) 385 @ 394 - 395 H - A. One of the main arguments against the order for retrial is the fact that the appellant has already spent nine years in prison custody, that it might be difficult to secure the attendance of witnesses, who may no longer have an accurate recall of the facts of the case and that his personal property seized by the Police must have deteriorated beyond repair by now. I have also considered the authorities cited by learned counsel. It is true that in the case of Mohammed V. The State (supra), which was a case of culpable homicide punishable with death, the appellant had spent 14 years in custody and this Court refused to order a retrial. However, in reach-

ing that decision this Court considered the evidence that had been led in the nullified trial and was not convinced that a prima facie case had been made out against the appellant having regard to evidence of extreme provocation. The Court also took into account the fact that the appellant was an elderly man of about 80 years of age and the unlikely prospect of his being able to withstand the rigours of a B
 retrial. In Okafor's case (supra), having found that the trial was a nullity because the information was preferred without jurisdiction, the Court stopped at quashing the conviction and setting aside the sentence. The Court left it to the prosecution to determine what, if C
 any, further step to take. In Erekanure's case (supra) notwithstanding the fact that the appellant had spent up to twelve years in custody, the Court considered the gravity of the offence and was of the view that an order of retrial would meet the justice of the case. It was so ordered with a further order that the trial should commence not D
 later than three months from the date of the judgment. In Adeoye's case (supra), the appellant was charged with murder. This Court held that his trial was a nullity having regard to the fact that he was absent from Court when some of the prosecution witnesses testified. In determining whether or not to order a retrial, the Court considered not E
 only the length of time spent in custody by the appellant, but also the fact that it was given in evidence by the prosecution that all the tenants living in the appellant's premises had moved away to unknown places and it would be difficult to locate them to give evidence. Thus F
 in Adeoye's case, as in the other cases cited by the appellant, the Court took all the surrounding circumstances into account in reaching its decision.

In the instant case, any perceived difficulty in securing the attendance of the prosecution witnesses is speculative. As for the G
 appellant's aunt, she was already deceased as of 29/4/2010 when he testified (see page 86 of the record).

***On the gravity of the offence, learned counsel has argued that despite the fact that the appellant was charged with H
 armed robbery, no life was lost. I am of the considered view that learned counsel for the appellant missed the point. The offences of conspiracy to commit armed robbery and armed robbery are very grave offences indeed, which attract the death penalty - the ultimate punishment any Court can impose. The***

punishment is illustrative of the seriousness with which the offence is regarded in society. Not only does the accused person forfeit his liberty, he forfeits his right to his very existence. The prevalence of armed robbery in the society is also a relevant consideration. See: Adeoye V. The State (supra) at page 90
 B where Ogundare, JSC referred to guidelines laid down by Lord Diplock in: Reid V. The Queen (1979) 2 WLR 221 at 226. **The fact that no life was lost cannot diminish the grievous nature of the offence or the traumatic effect of obtaining property from a victim under the barrel of a gun. For this reason, the length of**
 C **time spent in prison custody may not necessarily deter the Court from ordering a retrial or proper trial.** See: Yahaya V. The State (2002) 9 NSCQR 36 @ 48 D - E; Erekanure v. The State (supra) at 398 C. In Kajubo v. The State (1988) 1 NSCC 475 @ 485
 D lines 29 - 40, the concurring opinion of Oputa, JSC is most instructive. His Lordship stated thus:

"I am sorry for the length of time the appellant had been in prison custody. However, a Court of law should not only temper justice with mercy, but what is sometimes vitally important it should
 E *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 the 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*
 F *warning against giving way 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*
 G *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."*

Having regard to the facts and circumstances of this case, I am of the considered view that it would not be in the interest of justice to
 H acquit and discharge the appellant without a proper trial. In Erekanure's case (supra), it was held that having regard to the length of time already spent in prison custody by the appellant, the justice of the case would best be met by an order for a speedy trial. I am guided by the wisdom of the Court in the instant case. With the com-

ing into effect of the Administration of Criminal Justice Act, 2015, the appellant's trial is likely to be concluded expeditiously without the delays previously associated with criminal trials. See, for example, Sections 396 and 306 of the Act. No special circumstances have been shown that would render it oppressive for the appellant to face a proper trial. B

The sole issue for determination in this appeal is accordingly resolved against the appellant. The appeal is hereby dismissed. The order of the lower Court ordering a retrial (or trial de novo) before another Judge of the High Court of Kaduna State is affirmed. C

ONNOGHEN JSC

I have had the benefit of reading in draft the lead Judgment of my learned brother, KEKERE-EKUN JSC just delivered. D

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The sole issue in the appeal is “whether or not the Court below ought to have ordered a retrial of the Appellant having regard to the position of the law, facts and circumstances of the case.”? E

It should be pointed out that appellant contested his conviction add sentence by the trial Court before the lower Court on two grounds viz:

(a) that the trial was a nullity because he was not called upon by the trial Court to take a fresh/another plea after the charges preferred against him were amended, and, F

(b) that there was no evidence to prove the charges beyond reasonable doubt.

The lower Court allowed the appeal on the first issue, supra G and declined rightly in my view to consider the second issue, which went to the merit of the case. Consequently the Court, having declared the trial a nullity, ordered a retrial of appellant. It is against the order of retrial in the circumstance that appellant has appealed to this Court. H

It is my considered view that the lower Court was right, having regard to the facts and circumstances of the case to have ordered a retrial of appellant. Once a trial is declared a nullity, without going into the merits of the case, the proper order to be made in the cir-

cumstance is that of retrial so as to do justice to the case and parties concerned. See *ABODUNDE VS. THE QUEEN* (1959) 4 FSC 70 at 73; *KAJUBO V. STATE* (1988) 1 NWLR (Pt 73) 721; *DIKE V. STATE* (1996) 5 NWLR (Pt 450) 553; *UMUOLO V. STATE* (2003) 3 NWLR (pt. 808) 493 at 513 - 514.

B It is for the above reasons and the more detailed reasons contained in the said lead Judgment that I too find no merit in the appeal and accordingly dismiss same. Appeal dismissed.

C

OGUNBIYI JSC

My learned brother Kekere-Ekun, JSC has resolved the lone issue comprehensively and I also endorse the lead judgment as mine. In other words, I agree also that the appeal has no merit and should D be dismissed.

The trial by the High Court was held a nullity by the lower Court. The proper order to make in this circumstance is a trial de novo before another High Court of Co-ordinate jurisdiction?

E The decision arrived at requires the taking into consideration the entire circumstance of this case where the nature and gravity of the offence does not render it oppressive to subject the appellant on trial for the second time. Justice is a two way track and like two edged sword, each side must be taken into account and considered. The nature of the offence against the accused/appellant is in no way trivial. F It is not such that the Court could ask the appellant to simply walk away. It is the interest of the larger society that is at stake and should not be trivialized.

G The appellant is accused of a heinous crime of armed robbery punishable with death. His trial before the High Court was set aside by the lower Court as a nullity. There was, therefore no trial at all. See *Yusuf v. The State* (2011) 18 NWLR (Pt. 1279) 853.

H The punishment in the instant case is death. This is an indicator of the gravity of the offence committed, and which should be of a serious consideration.

Justice demands that the victim of the robbery needed to be avenged. Hence an order for trial de novo made by the lower Court is also affirmed by me. The appeal is hereby dismissed and I abide by the order made in the lead judgment.

AKA'AH'S JSC

I had a preview in draft of the judgment of my learned brother, Kekere-Ekun JSC in dismissing the appeal and affirming the order for a re-trial before another Judge of the Kaduna State High Court. My Lord assiduously analysed the evidence adduced during the trial and rightly reached the conclusion that a re-trial is the only option left that will meet the justice of the case. If the avoidable faux pas of failing to call the appellant to take his plea on the amended charge had not been committed by the learned trial Judge, what this Court would have been called upon to decide now would have been whether the accused was properly convicted or acquitted of the charge.

I therefore endorse the conclusion that the appellant be arraigned for trial de-novo before the Kaduna State High Court on the amended charge.

NWEZE JSC

My Lord, Kekere-Ekun, JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with the reasoning and conclusion that this appeal is, wholly, unmeritorious.

It would seem not only preposterous but also absurd for the appellant to approbate and reprobate at the penultimate, and final Courts, respectively. At the lower Court, he impugned his conviction and sentence by the trial Court on the ground that, sequel to the Prosecution's amendment of the charge preferred against him, he was not invited to take a fresh plea.

The lower Court, rightly, found in his favour by declaring the said trial a nullity. It could not have been otherwise for what crystallizes from the decisions of this Court is that, where in the course of trial, a charge or information is amended, a fresh plea must be taken. Failure to do so would render the trial null and void, *Eronini v. The Queen* (1953) 14 WACA 366, 369; *R. v Fox* (1947) 12 WACA 215; *H R v Ogunremi* (1961) ANLR 467; *A. G. Western Region v. Raimi Adisa* (1966) NWLR 144, 146; *Joseph Okosun v Stafe* [1979] 3-4 SC 36, 52; *Okwechime v. Police* (1956) 1 FSC 73; *Jones v. Police* (1960) 5 FSC 38, approvingly, cited per Irikife JSC (as he then was)

in Nwafor Okegbu v. State (1979) LPELR-SC 9/1977; Yusuf v The State [2011] 18 NWLR (pt 1279) 853, 871.

Having thus held that the trial was a nullity, the lower Court, boldly, resisted the temptation of broaching any question verging on the merit of the case. On the other hand, it proceeded to order a
B retrial of the case. That was the only appropriate order in the circumstance, Kajubo v. The State [1988] 1 NWLR (pt 73) 721; Abodunde v. The Queen (1959) 4 FSC 70, 73.

Curiously, the appellant, whose valid complaint yielded the
C above order, in this further appeal, sought to mock the administration of criminal justice by imploring this Court to discharge and acquit him on the amended charge on which his plea was not taken. Wonders shall never end! Suffice it, however, to note here that the offence of armed robbery is a serious one. He must, therefore, re-
D turn to the trial Court for a trial de novo, Abodundu v. The Queen (1959) Vol 1 NSCC 56, 60; Adeoye v. The State [1999] 6 NWLR (pt 605) 74, 88.

At his re-trial on the amended charge, he would have the option of denying it by pleading, (by word of mouth - "not guilty"). If he
E takes this option, the issue (to be joined) would be a wager of the prosecution to proof. In other words, *"he [would be] deemed to put himself upon his country for trial and wages the prosecution to the proof of every fact and circumstance constituting the offence or of-*
F *fences in the charge or information,*" per Aniagolu JSC (of the Blessed Memory) in Nwafor Okegbu v. State (supra).

It is for the above, and the more detailed, reasons in the leading judgment that I, too, shall enter an order dismissing this appeal. I abide by the consequential orders in the leading judgment.

G

H