

SUPREME COURT OF NIGERIA
FRIDAY 16TH DECEMBER, 2016. SC. 57/2014
CORAM:- O. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, C. C. NWEZE,
A. SANUSI, JJSC

DEBORAH ADEWOLE APPELLANT
V.
THE STATE RESPONDENTS

CRIMINAL PROCEDURE - Trial de novo - Having found that appellant's trial on improper arraignment was a nullity - Order for fresh trial given gravity of the offence - Reflects justice of the case (H1)

APPEALS - Issues - Validity - As the entire proceedings leading to conviction of appellant is a nullity - Appellant's 2nd issue has become academic (H2)

FACTS

The arraignment of accused/appellant was before the High Court of Oyo State Ibadan. Appellant was charged before the Court for conspiring with one Kehinde Adisa to murder one Morufu Olaniyan. The offence is contrary to and punishable under section 517 of the Criminal Code, cap 38 vol. II Laws of Oyo State of Nigeria 2000. The said Kehinde Adisa was further charged with the substantive offence of murder. From the records of the proceedings of the trial Court, the charge was neither read nor explained to appellant. At the trial, to prove its case against appellant, prosecution/respondent called ten witnesses, through whom two dane guns and extra judicial statement of appellant were tendered and admitted as exhibits. Appellant testified but called no other witness to testify in her defence.

In a considered judgment delivered at the conclusion of the trial of appellant, the learned trial Judge convicted appellant and sentenced her to seven years imprisonment. Aggrieved with the decision of the Court, appellant lodged an appeal at the Court of Appeal Ibadan Division. Appellant raised the issue of whether she was

arraigned before her trial, conviction and sentence on the charge of conspiracy to murder preferred against her. The Court heard the appeal and found that appellant's trial was not based on proper arraignment. Consequently, the Court nullified the trial Court's proceedings leading to appellant's conviction and ordered for a trial de novo. Not satisfied with the order for her fresh trial, appellant has appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether the order of fresh trial was properly made by the court below."

HELD (Unanimously dismissing the appeal per
MUHAMMAD JSC)

CRIMINAL PROCEDURE - Trial de novo

1. In the case at hand, the lower court has rightly found that appellant's purported trial on an improper arraignment was a nullity. In keeping with the decisions of this Court the lower court on setting aside the null and void trial and conviction of the appellant did the needful by ordering a fresh trial. A challenge to the lower court's well founded decision must invariably fail. The nullification of appellant's purported trial by the lower court means the appellant had never undergone a trial in the eyes of the law. The order for her proper trial, given the gravity of the alleged offence, reflects the justice of the instant case. I do hereby affirm. (p. 3972 B)

APPEALS - Issues - Validity

2. Since the entire proceedings leading to the conviction of the appellant is a nullity, appellant's 2nd issue for the determination of the appeal has become academic and unworthy of our consideration. The issue is accordingly discountenanced. (p. 3972 D)

NOTABLE POINTS OF INTEREST

RHODES-VIVOUR JSC

1. Charges – Procedure for arraignment

All criminal trials start with arraignment. Section 215 of the Criminal Procedure Act stipulates that:

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

There is compliance with the above when;

1. The accused person is placed in the dock unfettered.

2. The charge is read to him in the language he understands to the satisfaction of the court.

Thereafter

3. He takes his plea. (p.3973 C)

OGUNBIYI JSC

2. Fresh trial – Conditions for

Conditions for fresh trial have been set out in the case of *Yahaya V. The State* (2002) 3 NWLR (Pt. 754) 289 wherein the factors for consideration are as follows:-

- a) The gravity of the offence;
- b) The evidence against the accused person;
- c) The interest of justice relevant and appropriate order to make. (p. 3974 H)

REPRESENTATION

A. A. Olatunji Esq., with him, Adedayo Abass-Olisa and Yusuf Goodluck for the Appellant

O. Abimbola, Ag Oyo State with him, T. M. Abdulganiyu DPP Oyo State, for the Respondent

CASES REFERRED TO

Erekanure v. State (1993) 5 NWLR (pt. 294) 385

Abodundu v. Queen (1959) 1 NSCC 56

Okonji v. Njokanma (1999) 14 NWLR (pt. 638) 250

Egharevba v. Osagie (2009) 18 NWLR (pt. 1173) 299

Yahaya v. State (2002) 3 NWLR (pt. 754) 289

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

Chukwu v. State (2005) 1 NWLR (pt. 908) 520

Yusuf v. State (2011) 18 NWLR (pt. 1279) 853

B Eyorokoromo v. State (1979) 6-9 SC 3

Ajile v. State (1999) 9 NWLR (pt. 619) 520

STATUTES REFERRED TO

C Criminal Code, cap 38 vol. II Laws of Oyo State of Nigeria 2000, s. 517

Criminal Procedure Act, s. 215

LEAD JUDGMENT BY MUHAMMAD JSC

D The appellant was charged, tried and convicted at the Oyo State High Court sitting at Ibadan for conspiring with one Kehinde Adisa for the murder of Morufu Olaniyan. The offence is contrary to and punishable under Section 517 of the Criminal Code, CAP 38 vol. II Laws of Oyo State of Nigeria 2000. Kehinde Adisa was further
E charged with the substantive offence of murder.

To prove the charge against the appellant, the respondent called ten witnesses through whom two dagne guns and the extra judicial, statement of the appellant were tendered and admitted as
F exhibits. The appellant testified but called no other witness to testify in her defence.

At the end of trial, including exchange of addresses by counsel, the learned trial judge, in a considered judgment delivered on 3/2/2012, found the appellant guilty as charged and sentenced her to
G seven years imprisonment. Dissatisfied with her conviction and sentence, she appealed on four grounds to the Court of Appeal sitting at Ibadan, hereafter referred to as the lower court, on a Notice dated and filed on 9/4/2013.

H One of the issues the appellant canvassed and which the lower court found crucial in finding merit in the appeal reads:-

“1. Whether in view of the record of proceedings, the appellant was arraigned before she was tried, convicted and sentenced on the charges of conspiracy to murder preferred against her.”

The similar issue the respondent distilled and urged the court

below to determine the appeal before it reads:-

“(a) Whether the trial and conviction of the Appellant at the trial court was based on proper arraignment and plea.”

The lower court having found that the appellant’s trial and conviction were not based on proper arraignment and plea resolved the issue in appellant’s favour, nullified the trial court’s proceedings and ordered appellant’s trial afresh. B

Dissatisfied with the order for his retrial the appellant has further appealed to this Court.

At the hearing of the appeal, counsel having identified the respective briefs of parties to the appeal adopted and relied on same in support or opposition of the appeal. C

At page 6 of the appellant’s brief of argument; the following two issues are presented as arising for the determination of the appeal:- D

“(1) Whether the learned Justices of the court below were right in ordering fresh trial in view of the jail term being currently served by the Appellant (Grounds) 1 and 2 of the Notice of Appeal.

(2) Whether the Court of Appeal rightly determined the appeal before it on the basis of a single issue without other issues raised by parties in the appeal (Ground 3 of the Notice of Appeal).” E

The more apposite issue for the determination of the appeal formulated at page 7 of the respondent’s brief reads:-

“Whether the order of fresh trial was properly made by the court below.” F

The appeal, in my firm and considered view, is best determined by the resolution of the foregoing issue distilled by the respondent which captures appellant’s real complaint against the lower court’s judgment. G

Arguing the appeal, learned appellant’s counsel while conceding that the lower court has the power of ordering a trial de novo on pronouncing appellant’s trial a nullity, he submits that the order is not made as a matter of course. The Supreme Court’s decisions in Erekanure V. The State (1993) 5 NWLR (Pt 294) 385 and Abodundu V. Queen (1959) 1 NSCC 56 which the lower court purportedly applied, it is argued, are very clear as to the court’s powers and extent of same in such situation. Had the court considered the peculiar facts of the instant case, learned counsel submits, it would have found H

an order of fresh trial inappropriate. The order that meets the justice of the case at hand, it is further contended, is one of discharge and acquittal of the appellant. Learned counsel urges us to so resolve.

Under appellant's 2nd issue, learned counsel submits that the lower court's determination of the appeal before it on the basis of
 B appellant's issue 1 only has occasioned miscarriage of justice. The court's refusal to consider and determine the appeal on the basis of all the issues urged on it learned counsel contends, is a fundamental flaw. Relying on *Okonji & 2 ors V. George Njokanma & 2 ors* (1999) 14 NWLR (Pt 638) 250 at 270, *Egharevba V. Osagie* (2009) 18
 C NWLR (Pt 1173) 299 at 310 and *Irolo Vuka* (2002) 14 NWLR (Pt 786) 195, learned counsel submits that the appeal be allowed on this further ground. On the whole, learned counsel concludes, with the appeal pronounced meritorious, the appellant should be dis-
 D charged and acquitted.

Responding under their lone issue, learned respondent's counsel submits that appellant's insistence that he be discharged and acquitted consequent upon the lower court's decision nullifying his trial is misconceived. The lower court's order of appellant's fresh trial
 E which is founded on the criteria the Supreme Court proclaimed courts should, argues learned counsel, cannot be faulted. Learned respondent's counsel cites and relies on *Yahaya V. The State* (2002) 3 NWLR (Pt 754) 289 and *Kajubo V. State* (1988) 1 NWLR (Pt 73) 721.

Further arguing the appeal, learned respondent's counsel submits that although, appellant was not charged for, murder, the offence of conspiracy she is charged for carries very stiff punishment on conviction. Still, the offence of murder was committed as a result
 G of the common intention with her co-accused who was tried and convicted for murder. By the evidence of 6 out of the 10 prosecution witnesses and appellant's extra judicial statement the justice of the case requires that appellant be tried afresh. Otherwise, it is argued, greater injustice will be occasioned. Further relying on *Chukwu V. The State* (2005) 1 NWLR (Pt 908) 520, learned counsel insists that
 H the lower court's decision is unassailable and that it should be upheld.

The very narrow issue to determine in this appeal is whether given the facts of the matter at hand the lower court, on nullifying

the trial court's proceedings, is legally right to have ordered the trial of the appellant de novo.

At page 192 - 193 of the record of proceedings of the instant appeal is the conclusion of the lower court's decision and order thereon learned appellant's counsel insists justifies an intervention by this court. B

The court had reasoned firstly thus:-

"In the instant case, it has been found that there has been a total neglect or failure to comply with the requirements of Section 215 of the Criminal Procedure Act and Section 36(6)(a) of the 1999 Constitution. The effect is that the trial was void ab initio. It is as if no trial had been conducted. In that respect, and following the authorities cited above, the proper order to be made is that of a fresh trial. In making that order, I have borne it in mind that, the offence the Appellant is accused of committing; being conspiracy to commit murder D is a serious one.... It would therefore not be proper for the appellant to be let off the hook without a proper trial." C

The court ordered as follows:-

"On the whole therefore, I am of the view that this appeal should be allowed on the sole ground that the trial was a nullity ab initio. The appeal therefore succeeds and is hereby allowed. Consequently, the judgment of the trial court delivered on the 3^d day of February, 2012 in Suit No. I/73C/2006 is hereby set aside. I order that the case be returned to the Chief Judge of Oyo State for a fresh trial by another Judge other than M. O. Olagunju, J." E F

Learned appellant's counsel insists that the lower court is wrong in the foregoing order it made and its reasoning for making same. I disagree.

In *Erekanure V. State* (1993) 5 NWLR (Pt 294) 385 a case in G which the principle the lower court applied in justifying its order for appellant's trial afresh was restated, this Court per Olatawura JSC of blessed memory held as follow:-

"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 non-compliance 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 H

of Nigeria. In view of the nature and gravity of the offence, I will order a fresh trial of the Appellant.”

See also *Yahaya V. The State* (2002) 3 NWLR (Pt 754) 289 also alluded to by the lower court where in this Court cited with approval the decision in *Erekanure V. State* (supra) in its disposal of a case on the same facts with the instant matter.

In the case at hand, the lower court has rightly found that appellant’s purported trial on an improper arraignment was a nullity. In keeping with the decisions of this Court the lower court on setting aside the null and void trial and conviction of the appellant did the needful by ordering a fresh trial. A challenge to the lower court’s well founded decision must invariably fail. The nullification of appellant’s purported trial by the lower court means the appellant had never undergone a trial in the eyes of the law. The order for her proper trial, given the gravity of the alleged offence, reflects the justice of the instant case. I do hereby affirm.

Since the entire proceedings leading to the conviction of the appellant is a nullity, appellant’s 2nd issue for the determination of the appeal has become academic and unworthy of our consideration. The issue is accordingly discountenanced.

On the whole, I see no merit in the appeal. I dismiss same. The case is remitted to the Chief Judge of Oyo State for same to be tried expeditiously by a judge other than M. Olagunju J.

RHODES-VIVOUR JSC

I have had the advantage of reading a draft of the leading judgment of my learned brother, Muhammad, JSC and I am in complete agreement with his lordships reasoning and conclusions. I intend to: add a few words of mine on the mandatory nature of section 215 of the Criminal Procedure Law. The Court of Appeal ordered that the case be returned to the Chief Judge of Oyo State for a fresh trial by another Judge other than M. Olagunju J. Before the Court of Appeal made this order it found that the appellant was not arraigned.

The court said:

“The ultimate conclusion I have arrived at is that there was no arraignment of the appellant at all, at least as the record has re-

vealed. It is not a case of improper arraignment of the appellant but a total failure or want of arraignment. The law is that, where there has been failure to comply with the conditions stipulated for a proper arraignment under the law, the effect is that, the trial is a nullity. Thus, the trial, conviction and sentence of the appellant without arraignment known to law or in accordance with the law, renders the proceedings null and void and without effect whatsoever B
...

The appellant and another person were charged with conspiracy and Murder before an Ibadan High Court Trial commenced on 28/5/2008 with the testimony of PW1. Nowhere in the Record of Appeal was the appellant arraigned, or the charge read to her. C

All criminal trials start with arraignment. Section 215 of the Criminal Procedure Act stipulates that:

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

There is compliance with the above when;

1. The accused person is placed in the dock unfettered. F
2. The charge is read to him in the language he understands

to the satisfaction of the court.

Thereafter

3. He takes his plea. See Yusuf v State (2011) 18 NWLR (Pt.1279) p.853 Eyorokoromo v State (1979) 6-9 SCp.3 Ajile v State (1999) 9 NWLR (Pt.619) p. 520, Kajubo v State (1988) 1 NWLR (Pt.73) p. 721. G

When this is properly done and properly recorded by the trial judge there is not only compliance with section 215 supra, but also with section 36 (6) of the Constitution which states that; H

“36(6). Every person who is charged with a criminal offence shall be entitled to:

- (a) *be informed promptly in the language that he understands*

and in detail of the nature of the offence.”

These sections (supra) guarantee the fair trial of the accused/appellant. Compliance is mandatory.

My lords, in this case there was no arraignment of the appellant. The charge/s for conspiracy and Murder were never read to her, neither were they explained to her. The learned trial judge never complied with section 215 of the Criminal Procedure Act, and so the trial, conviction, and sentence of the appellant is a nullity. In the course of trial, if a trial judge suddenly realises that the accused person was not arraigned, trial should be stopped immediately, and started all over again, (de novo). The accused person shall then be arraigned in strict compliance with section 215 of the Criminal Procedure Act. The Record of Appeal must reflect that the charge was read and explained to the accused person in the language he understands and his plea taken. It is only after a proper arraignment is conducted that the prosecution can open its case. An improper or no arraignment results in the court declaring the trial a nullity. A clear waste of precious judicial time. I agree with the order proposed by Muhammad, JSC. Appeal dismissed.

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OGUNBIYI JSC

I read in draft the lead judgment of my brother Dattijo Muhammad, JSC. I agree that this appeal has no merit and is hereby dismissed.

The background history of this case has been well introduced in the lead judgment and the crucial issue before us is:- Whether the lower court was right in ordering fresh trial of the appellant in view of the jail term being currently served.

It is the submission of the appellant's counsel that his client ought to have been set free and not be ordered for a fresh trial.

The entire trial in this case had been declared a nullity and the effect is that the appellant had never been tried at any time and at all. Conditions for fresh trial have been set out in the case of Yahaya V. The State (2002) 3 NWLR (Pt. 754) 289 wherein the factors for consideration are as follows:-

- a) The gravity of the offence;
- b) The evidence against the accused person;

c) The interest of justice relevant and appropriate order to make.

The appellant was charged with conspiracy to commit murder, which carries the supreme punishment of death. Although she was not charged with murder, the offence of murder was committed as a result of her alleged common intention with her co-accused, who was convicted of murder. The section 324 of the Criminal Code under which appellant was charged prescribes a maximum sentence of fourteen years and not seven years. The court also needs to take into consideration the interest of all concerned and affected by the criminal act. In as much as the accused is presumed innocent until proved otherwise, the victim as well as his relations are crying for justice while the society in general needs protection against an unguarded and unwholesome violence.

With the few words of mine and more particularly on the fuller reasoning and conclusion arrived thereat by my brother in his lead judgment, I concur with the view that this appeal lacks merit and is dismissed. I also align with the conclusion that the case should be remitted to the Chief Judge, Oyo State for trial expeditiously by an other Judge of that Court.

NWEZE JSC

My Lord, M. D. MUHAMMAD, JSC, obliged me with the draft of the leading judgment just delivered now. I entirely, agree with His Lordship that this appeal is devoid of any merit and ought to be dismissed.

As shown in the leading judgment, this court was invited to determine a very narrow question. The record of the trial court did not evince its compliance with the mandatory requirements of Section 215 of the Criminal Procedure Act dealing with arraignment of accused persons. Notwithstanding this fundamental defect, the said court convicted and sentenced the appellant.

The Court of Appeal, Ibadan Division (hereinafter, simply, referred to as “the lower court”), sequel to its finding that the trial court was remiss in not complying with the above requirements, allowed the appellant’s appeal, set aside his conviction and sentence and remitted the case to the trial court for re-trial by another Judge.

The appellant's counsel, at the hearing of this appeal before this court, strove very vigorously to overturn the judgment of the lower court. With respect, he was, merely, attempting the impossible! Since the major premise of his disparagement of the judgment of the trial court, before the lower court, was that the trial was a nullity on the ground of improper arraignment, the only logical corollary was his re-trial on a proper arraignment.

It is therefore, difficult to appreciate the rationale of his complaint against the lower court's order remitting the case to the trial court for re-trial. Surely, the said court was on sure grounds in making the said order of re-trial, *Erekanure v The State* [1993] 5 NWLR (pt 294) 385; *Yahaya v The State* [2002] 3 NWLR (pt 754) 289; *Kajubo v State* [1988] 1 NWLR (pt 73) 721.

It is, actually, surprising that trial courts could still fall into this error, in this day and age, notwithstanding the numerous decisions of this court on what constitutes a proper arraignment under Section 215 (supra). The cases are too numerous to be over-named here. Only one or two of them would suffice, *Kajubo v State* [1998] 1 NWLR (pt 73) 721; *Ajile v state* [1999] 9 NWLR (pt 619) 503; *Eyorokoromo v State* [1979] 6 -9 SC 3; *Sani v State* [2000] 1 NWLR (pt 642) 520; *Yusuf v State* [2011] 18 NWLR (pt. 1279) 853.

All said and done, I agree with the leading judgment that the lower court, rightly, quashed the judgement of the trial court and remitted the case for re-trial before another Judge, of that court. I, too, hereby enter an order dismissing this appeal. Appeal dismissed.

SANUSI JSC

The judgment just rendered by my learned brother Musa Dattijo Muhammad JSC, was served on me in draft form. Having perused same, I am at one with his reasoning and conclusions that this appeal is bereft of merit and deserves to be dismissed. It is hereby accordingly dismissed by me.

In the present appeal, the grouse of the appellant is that since the lower court had found that she was improperly arraigned before the trial court, her trial was a nullity. Therefore, having found that, the appellant's learned counsel felt that the appellant should have been discharged and acquitted instead of her being ordered to face

fresh trial.

The lower court in this instant appeal truly found that since the arraignment of the appellant was improper, then her trial was a nullity. To my mind, and as rightly held by the lower court, there was no trial at all, then the most ideal order to make in the circumstance was to order that the appellant should face a fresh trial because the purported one she faced was improper and a nullity. Moreso, considering the circumstance of the case and the nature and gravity of the offences, this is a clear example of a case where the justice of the case should be an order of fresh hearing as made by the lower court in the circumstance. See *Erekanure v State* (1993) 5 NWLR (pt. 294) 385.

On the whole, I endorse the reasoning and conclusion of my learned brother Musa Dattijo Muhammad JSC, that this appeal lacks merit and should be dismissed. I accordingly dismiss it and order its remittance to the High Court of Oyo State for the appellant to face fresh trial by a differently constituted court or judge. Appeal dismissed.

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