

SUPREME COURT OF NIGERIA
FRIDAY 16TH DECEMBER, 2016. SC. 371/2014
CORAM:- O. RHODES-VIVOUR, M. MUHAMMAD,
C. B. OGUNBIYI, C. NWEZE, A. SANUSI, JJSC

AMINA MUSA APPELLANT
V.
THE STATE RESPONDENT

CRIMINAL PROCEDURE - Arraignment - Breach - Allegation of absence of arraignment is an error of law - Which has the effect to render entire proceedings at trial a nullity (H1)

CRIMINAL PROCEDURE - Trial - Commencement - Trial of accused commences on arraignment - And taking of his plea (H2)

CRIMINAL PROCEDURE - Fair hearing - Breach of - As appellant was not properly arraigned - His right to fair hearing was breach - And as such has rendered entire proceedings of the lower Courts a nullity (H3)

APPEALS - Record of - Binding nature - Appellate Court is bound by record of appeal - Which is also binding on all parties and their counsel (H4)

ORDERS OF COURT - Retrial order - Conditions for - It is made where inter alia there is error in law - Such that trial was not rendered a nullity - And it cannot be said that there is no miscarriage of justice (H5)

ORDERS OF COURT - Fresh trial - Correctness of - As trial of appellant was vitiated ab initio - And in view of gravity of offence he is charged with - It is proper to order for a fresh trial (H6)

FACTS

The trial of accused/appellant commenced at the High Court of Jigawa State Holden at Kazaure, wherein she was arraigned upon

three counts charge of culpable homicide punishable with death contrary to section 223 and punishable under section 221(b) of the Penal Code Cap. 107 Laws of Jigawa State 1998. The initial trial did not proceed for the reason that the learned trial Judge who started the case died. At the subsequent trial de novo, appellant was again arraigned and pleaded not guilty to counts 1 and 3 of the charge. No plea was taken on count 2.

Prosecution/respondent led evidence to establish the alleged offence through the testimonies of PW1, PW2, PW3 and PW4 through whom Exhibits P1, P2 and P2A were tendered and admitted in evidence. The case as presented by respondent is that appellant caused the death of three different children, namely Yusuf Musa (m) 7 years old, Nona Dausiya Musa (f) 3 years old and Hafsatu Ya'u (f) 7 months old by poisoning them. Appellant was thus arrested in connection with the crime. At the end of the trial, appellant was despite the fact that her plea was not taken on count 2, convicted and sentenced to ten years imprisonment on each of the three counts. Dissatisfied, appellant appealed to the Court of Appeal Kaduna Division. The Court affirmed the decision of the trial Court and dismissed the appeal. Aggrieved further, appellant has appealed to the Supreme Court.

HELD (Unanimously allowing the appeal per
OGUNBIYI JSC)

CRIMINAL PROCEDURE - Arraignment - Breach

1. In a nutshell, and for the determination of the propriety or not of the arraignment, I will seek to restate quickly that the observation raised by the appellant's counsel herein is very fundamental as it touches squarely on the competence of the entire trial and also the validity of the proceedings. In other words, with an appeal being a product of a valid subsisting judgment, there can be no appeal where a proceeding before a court is held as null and void and nonexistent. Allegation of an absence of arraignment is an error in law which goes into the jurisdictional competence of the court. It is elementary also to restate the position of the law that jurisdictional is-

sues can be raised at any stage of the proceedings, even if for the first time on appeal. However, this is not to alter the well settled principle of law that new issues can be raised on appeal only by seeking and obtaining the leave of court. The nature of the error alleged by the appellant herein is that of law and the consequential effect has rendered the entire proceeding a nullity. (p. 4538 A)

CRIMINAL PROCEDURE - Trial - Commencement

2. A relevant case law in support of the issue at hand is the case of Effiom V. State (1995) 1 NWLR (Pt, 373) 507 which re-establishes the proposition that the trial of an accused person commences on arraignment and taking of his plea. At page 582 of the report, this court per Wali, JSC stated thus:-

“A trial of an accused person commences when his plea is taken.

So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken.

The concept governing the process of arraignment which must precede the taking of a plea is firmly grounded. (pp. 4540 E/4541 A)

CRIMINAL PROCEDURE - Fair hearing - Breach of

3. On the community reading of the foregoing conclusions arrived at, it is obvious that the conviction of the appellant for all the three counts, in the light of the fundamental defect, is grossly erroneous and has rendered the entire verdict by the two lower courts a nullity.

It is obvious without more that, the conviction of the appellant for all the three counts of the charge, has breached her right of fair-hearing, as rightly submitted by her learned counsel.

Our constitutional provision is very clear and unambiguous on the principle of fair hearing. There is the presump-

tion of innocence on the part of the accused and her right guarantees that she is to be well informed of the charge against her which must be laid clear and bare in terms of the language she understands. It is also her right that she should not only be told the nature of the offence leveled against her but also the relevant provision of law prohibiting the act and the punishment thereof. The purported trial of the appellant was riddled with serious fundamental flaws in the absence of proper arraignment. As a consequence, the trial is vitiated *ab-initio* and rendered a nullity. Put differently, it is obvious that the trial, conviction and sentence of the appellant without an arraignment have vitiated the entire conviction and sentence with the total proceeding having been rendered null and void. Consequently, the very commencement of the criminal trial is hereby set aside.

Having found and declared the entire trial in this case a nullity, I now hold a firm view that the other issues raised in this appeal would need no consideration in the absence of a valid trial and conviction. As a matter of fact, there is no valid appeal before us. It is at best purported. The court will be well advised not to engage in academic futility. (pp. 4541 B/D)

APPEALS - Record of - Binding nature

4. It is elementary to state the settled principle of law that an appellate court is bound by the record of appeal only, which same is also binding on all parties and their counsel. (p. 4541 C)

ORDERS OF COURT - Retrial order - Conditions for

5. The relevant question, to pose at this juncture is, having: declared the entire proceeding a nullity, what should be the appropriate order to make, in the circumstance?

For consideration of whether or not to order a fresh trial in this matter, I will seek recourse in the decision of this court which had set down certain factors to be considered before a re-trial order can be made. Thus Uwais, CJN in the case of

Yahaya V. State (2002) 3 NWLR (Pt. 754) P.289 enumerated the relevant factors as follows:-

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

(b) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant,

(c) That there are no such special circumstances as would render it oppressive to put the appellant on trial a second time; C

(d) That the offence or offences of which the appellant was convicted, on the consequences to the appellant or any, other person of the conviction or acquittal of the appellant, are not merely trivial; D

(e) That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it; and

(f) That to enable the prosecution adduce evidence against the appellant which evidence may convict him when his success at the appeal is based on the absence of that same evidence.” E

The law is well established further that the foregoing factors must co-exist for a retrial to be ordered. (p. 4542 B/F) F

ORDERS OF COURT - Fresh trial - Correctness of

6. It is pertinent to restate positively that the trial of the appellant before us was not vitiated on the ground of error in law and/or irregularity in procedure; a retrial order cannot therefore be made in the circumstance. The proceeding as conducted was vitiated *ab initio* right from the foundation. The only way to right the wrong was to make an order for a proper trial. The distinction is very important in deciding what consequential order is to be made. There has never been a trial in the case at hand as the purported trial had no legal force or effect. In my opinion and in view of the nature and gravity of G H

the offence which is culpable homicide punishable with death, I will order a fresh trial of the appellant.

In making the order, it is significant to highlight and re-iterate again that the charge against the appellant is serious wherein lives of three young victims were terminated. It would not therefore be proper in the prevailing circumstance for the appellant to be let off the hook without a proper trial. I will repeat again that justice should not be for the appellant alone, but the victim, the society and indeed the relations or family members of the victims. I hold the firm views therefore that an order for a fresh trial will serve the justice of this case.

On the totality, I am of the considered opinion 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, I make an order setting aside the judgment of the lower court delivered on the 12th February, 2014 in appeal No. CA/K/289/C/2013 which affirmed that of the trial court in suit No. JDU/27C/2009 delivered on the 2/12/2010. A further order is also made that the case should be sent to the Chief Judge of Jigawa State for a fresh trial by another judge other than Ahmed Isah Gumel, J. (p. 4543 H)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. Procedure for arraignment

That is to say for a valid arraignment of an accused person the following must be done.

1. The accused person shall be placed before the court unfettered unless the court shall see cause to otherwise order.

2. The charge shall be read and explained to the accused person to the satisfaction of the court by the registrar of the court, and

3. The accused person shall then be called upon to plead instantly thereto. (p. 4545 C)

REPRESENTATION

Mr. Mustapha Bulama with A. G. Abubakar for the appellant

Mr. S. H. Garin Gabbas, A.G., Jigawa State, with Musa M. Imam, DPP; Yahaya Abdullahi, Asst. Chief SC; and Muhammed L. Usman SSC for the respondent

CASES REFERRED TO

Odi v. Iyola (2004) All FWLR (pt. 207) 592	B
Michael v. State (2008) 3 NWLR (pt. 1104) 361	
Effiom v. State (1995) 1 NWLR (pt. 373) 507	
Olufeagba v. Abdulraheem (2009) 12 SCNJ 349	
Yahaya v. State (2002) 3 NWLR (pt. 754) 289	C
Yusuf v. State (2011) 18 NWLR (pt. 1279) 853	
Yerima v. State (2010) 14 NWLR (pt. 1213) 25	
Edibo v. State (2007) 13 NWLR (pt. 1051) 306	
Erekanure v. State (1993) 5 NWLR (pt. 294) 385	
Madu v. State (2012) 6 SC (pt. 1) 80	D
Mohammed v State (2015) 2 SC (pt. 1) 163	
Ewe v. State (1992) LPELR - 1179 (SC)	
Oyediyun v. The Republic (1967) NMLR 122	
Kajubo v. State (1998) 1 NWLR (pt. 73) 721	
Ajile v. State (1999) 9 NWLR (pt 619) 503	E

STATUTES REFERRED TO

Penal Code Cap. 107 Laws of Jigawa State 1998, ss. 221(b), 223	
Evidence Act 2011, s. 46	
Constitution of the Federal Republic of Nigeria 1999, s. 36(1)	F
Criminal Procedure Code, s. 215	

LEAD JUDGMENT BY OGUNBIYI JSC

This appeal is against the judgment of the Court of Appeal Kaduna Division delivered on the 12th February, 2014 wherein their Lordships dismissed the appeal of the appellant and affirmed the conviction and sentence passed by the trial court. The appellant was not satisfied with the judgment and has now filed Notice of Appeal on the 26/2/14 to this court and containing five grounds. H

The three counts charge preferred against the appellant at the trial court are as follows:-

FIRST HEAD OF THE CHARGE

That you, AMINA MUSA (f) on or about the 6th day of February, 2009 at about 0700 hours at Tsakani Fulani Settlement Area of Roni Local Government Area within the Jigawa Judicial Division committed culpable homicide punishable with death by causing the death of one Yusuf Musa 7 years old by poisoning him and thereby committed an offence contrary to section 223 of the Penal Code; Cap. 107 Laws of Jigawa State, 1998 and punishable under section 221 (b) of the penal code, Cap. 107, Laws of Jigawa State, 1998.

SECOND HEAD OF THE CHARGE

That you, AMINA MUSA (f) on or about the 6th day of February, 2009 at about 0700 hours at Tsakani Fulani Settlement Area of Roni Local Government Area within the Jigawa Judicial Division committed culpable homicide punishable with death by causing the death of one Nana Dausiya Musa (f) 3 years old through poisoning her and thereby committed an offence contrary to section 223 of the penal code, Cap. 107 Laws of Jigawa State, 1998 and punishable under section 221 (b) of the penal code, Cap. 107, Laws of Jigawa State, 1998.

THIRD HEAD OF THE CHARGE

That you, AMINA MUSA (f) on or about the 6th day of February, 2009 at about 0700 hours at Tsakani Fulani Settlement Area of Roni Local Government Area within the Jigawa State Judicial Division committed culpable homicide punishable with death by causing the death of one Hafsatu Ya'u (f) 7 months old by poisoning her and thereby committed an offence contrary to section 223 of the penal code, Cap. 107 Laws of Jigawa State, 1998 and punishable under section 221(b) of the same penal code.

The appellant was arraigned upon three counts charge supra wherein she was accused of causing the death of three different children, namely Yusuf Musa (m), 7 years old, Nona Dausiya Musa (f), 3 years old and Hafsatu Ya'u (f), 7 months old, by poisoning contrary to section 223 of the Penal Code Law of Jigawa State.

The initial trial did not proceed for the reason that the judge who started the case had died. At the subsequent trial de novo, the appellant was again arraigned and pleaded not guilty to counts 1 and 3 of the charge. No plea was taken on count 2. The appellant was

however convicted and sentenced to ten years imprisonment on each of the three counts.

At the said trial de novo, the prosecution led evidence to establish the alleged offence through the testimonies of PW1, PW2, PW3 and PVV4 through whom Exhibits PI, P2 and P2A were tendered and admitted. B

The lower court by a unanimous judgment delivered on the 12th February, 2014 affirmed the conviction and sentence of the appellant by the trial court. It is the dismissal of the appellant's appeal that has prompted the appeal now before us. C

In accordance with the rules of court, parties filed and exchanged their respective briefs of arguments. The appellant's brief was dated 25th July 2014 and filed 6th August 2014; it was also settled by Mustapha Bulama of Counsel.

The respondent's brief of argument was dated 17th November 2015 and deemed filed 13th January 2016 by the order of this court. The said brief was settled by one Sani Hussaini Garin Gabbas, the Hon. Attorney General Jigawa State. D

On the 13th October, 2016 when this appeal came up for hearing, counsel to both parties were in court and each adopted his respectively brief of argument and relied thereon. The learned counsel, Mr. Mustapha Bulama who represented the appellant urged the court to allow the appeal while Mr. Sani Hussaini Garin Gabbas, the Hon. Attorney General, on behalf of the respondent, submitted that the appeal be dismissed as lacking in merit. From the five grounds of appeal, two issues were distilled on behalf of the appellant as follows:- E F

ISSUE ONE

Whether the learned Justices of the Court below were right in arriving at their conclusion that the prosecution did prove its case against the appellant beyond reasonable doubt as mandatorily prescribed by the law. Grounds 2, 3, 4 and 5 G

ISSUE TWO

Were the Justices of the Court below right in setting aside the findings made by the trial court that the appellant did not cause the death of Yusuf Nana Fawziyya and Hafsatu without considering the overall effect of these findings on the entire trial and judgment passed H

by the trial court in convicting the appellant.

The lone issue formulated on behalf of the respondent is at page 2 of its brief of argument and questions thus:-

“Whether the lower court was right when it held that the prosecution had at the trial court proved its case beyond reasonable,
B (sic)”

At this point in time, I wish to state quickly that, on a careful analysis of issue 1, as formulated by the appellant, same reveals a serious challenge touching on the propriety and validity of the trial of the appellant and consequently, on the very foundation of the appeal now before us. The foregoing conclusion stems from the elementary principle of law which firmly establishes that an appeal is a product of a ratio *decidendi*. It is also true to say that there cannot be a ratio in the absence of a valid judgment. Put differently, an appeal,
D which is a complaint against a decision of a court of competent jurisdiction, presupposes the existence of such valid decision, and cannot be from an abstract. Therefore, the determination of this appeal is predicated on whether or not there is a valid and existing judgment which should give a subject or reason grounding the appeal.

The appellant’s counsel, for purpose of driving his point home, has drawn the attention of this court to the proceedings that took place at the trial court when the appellant was arraigned *de novo*. This, counsel submits is necessary in view of the fact that the proceedings at the initial arraignment before Justice Maigari (now deceased) is not relevant except as specified under Section 34 of the Evidence Act 2004 as amended (now section 46 of Evidence Act 2011). It is the submission of counsel that the appellant was arraigned at the trial *denovo* for two counts charge as against what was contained in the trial court’s judgment; that the court below erred in affirming the final conclusion made by the trial court in finding the appellant guilty as charged.
G

It is pertinent to state also that the learned counsel for the appellant did clearly point out the dissatisfaction expressed by the
H lower court in the way and manner the learned trial judge conducted the proceedings before him, when in a nutshell was fallen short of the Constitutional requirement of fair hearing as enshrined in Section 36(1) of the Constitution 1999. It is the submission of counsel

that the remarks made by the lower court were sufficient to cast doubt as to all conclusions recorded as well as the appraisal made by the trial court. Consequently, that in the circumstances, the court below ought to have set aside the trial; that in the absence of doing so, the counsel has now urged us to set aside the entire proceedings before the trial court and discharge the appellant herein. The learned counsel for the appellant, in his further submission is challenging critically, the method followed by the lower court, which having set aside the first findings of the judgment of the trial court again proceeded to affirm the aspect which contradicted the same finding. The method, counsel argues is tantamount to picking and choosing of evidence which should not be allowed as it was reported in the case of Odi V. lyola (2004) All FWLR (Pt. 207) at 592. The counsel has urged us to take the totality of the inconsistency, contradiction also the lapses of the trial judge into account and set aside the entire judgment passed in the interest of fair hearing while the appellant should be discharged and acquitted.

In response to the foregoing observations raised by the appellant's counsel, which sought to challenge the propriety of the appellant's arraignment, the counsel for the respondent submits summarily that it was wrong for the appellant to raise or argue an issue on appeal, which was not canvassed at the trial court; that the notice of appeal did not make the point of arraignment an issue. The learned counsel urges this court in the circumstance to discountenance the argument by the appellant's counsel in that behalf as contained in paragraph 4.02 of the appellant's brief of argument. The learned counsel in further submission, posits also that assuming the fresh issue raised and argued was accepted, a poser question is, whether that alone can vitiate the findings by the trial court which was affirmed at the lower court?

On the concurrent findings of facts by the two lower courts, learned counsel submits that this court should not interfere therewith unless a miscarriage of justice is occasioned therefrom. Counsel cites the case of Michael v. The State (2008) 3 NWLR (Pt. 1104) 361 at 384 a decision of this court.

The counsel on the totality urges that the appeal be dismissed while the conviction and sentence of the appellant by the two lower

courts should be affirmed.

In a nutshell, and for the determination of the propriety or not of the arraignment, I will seek to restate quickly that the observation raised by the appellant's counsel herein is very fundamental as it touches squarely on the competence of the entire trial and also the validity of the proceedings. In other words, with an appeal being a product of a valid subsisting judgment, there can be no appeal where a proceeding before a court is held as null and void and nonexistent. Allegation of an absence of arraignment is an error in law which goes into the jurisdictional competence of the court. It is elementary also to restate the position of the law that jurisdictional issues can be raised at any stage of the proceedings, even if for the first time on appeal. However, this is not to alter the well settled principle of law that new issues can be raised on appeal only by seeking and obtaining the leave of court. The nature of the error alleged by the appellant herein is that of law and the consequential effect has rendered the entire proceeding a nullity.

In order to resolve the controversy raised by the appellant's counsel, it is pertinent to peruse and examine closely the proceedings of the trial court as shown on the record of appeal, particularly at page 10.

The initial charge levelled against the appellant was for three counts as reproduced earlier in the course of this judgment. At page 10 of the record for instance, the charge was read out to the appellant *de novo* and her plea was taken on the 1st and 3rd counts and in respect of which she pleaded not guilty thereto. There was however no record as to whether a plea was taken at all from the appellant on that day in respect of the 2nd count. The foregoing proceeding was taken on the 10/2/2010 and the matter was thereafter adjourned for hearing on the 2/3/2010.

Also at page 12 of the record of appeal, the trial of the accused/appellant proceeded to hearing and again her plea was not taken on count 2. At page 4Q of the record of appeal further, the information records the end of the trial and the proceeding was adjourned for judgment which was read on the 2/12/2010. The trial

court's judgment spanned out from pages 42 - 50 of the record. From the totality of the judgment the reproduction of the following excerpts at pages 42, 48 and 50 are relevant as follows:-

"The accused person pleaded not guilty to the three head of counts of charges (sic) read to her....."

In essence the defence counsel failed to disprove the evidence of the prosecution. Without much Ado I hereby hold the view that the prosecution has proved its case beyond reasonable doubt against the accused person. This court hereby found the accused person guilty as charged and she is hereby accordingly convicted on the three counts of charges (sic).

ALLOCUTUS:

This court hereby sentenced the convict to 10 years on each head of count as per the charge sheet. The convict to serve the sentences to run concurrently."

I wish to re-iterate for emphasis that the charge sheet which was reproduced earlier in this judgment contains three counts charge upon which the appellant was convicted and sentenced in the judgment. To the contrary and as shown on the record, also reference supra, the appellant's plea was taken only on counts 1 and 3 on her arraignment.

As rightly submitted and argued by the counsel for the appellant, the proceeding at the initial arraignment before Justice Maigari is not relevant for the trial *de novo* except as specified under section 34 of the Evidence Act 2004 as amended, now section 46 of the Evidence Act 2011. I am quick to say also that the circumstance warranting invocation of the exception is not applicable to the case at hand.

A further error and defect on the charge sheet against the appellant which is very obvious is where the proceeding of the trial court did not state what particulars are contained in counts 1 and 3 of the charge or under which section of the Penal Code the charge or the counts were franked. The appellant's grouse in the circumstance is obvious therefore; that is to say, that she was arraigned at the trial *de novo* for two counts charge as against a three count charge which is contained in the trial court's judgment and shown at page 48 of the record of appeal reproduced earlier.

It is unfortunate, I reckon that the lower court should have fallen easily also into the same trap as the trial court and thereby concurring and endorsing the proceeding conducted erroneously, without question. For instance, at the lower court, their Lordships in their opening judgment at page 112 of the record of appeal were quick to say that “Appellant was convicted in the three counts charge of culpable homicide punishable with death,” and proceeded to re-state the three counts. I further wish to stress that their Lordships were well informed as it was re-echoed in their judgment at page 112 of the record that the appellant was arraigned for a trial *de novo* on 10/2/2010.

In affirming the conviction of the appellant and finding her guilty also of the offence of culpable homicide as charged, their Lordships were at a cross road and following which they questioned and expressed utter dismay as to why the trial court should mete a lesser punishment on the appellant under section 225 of the Penal Code as against death sentence and thus reducing same to 10 years imprisonment. The lower court proceeded and dismissed the appeal by endorsing the trial court’s judgment.

A relevant case law in support of the issue at hand is the case of Effiom V. State (1995) 1 NWLR (Pt, 373) 507 which re-establishes the proposition that the trial of an accused person commences on arraignment and taking of his plea. At page 582 of the report, this court per Wali, JSC stated thus:-

“A trial of an accused person commences when his plea is taken. See unreported judgment of the Court in SC. 68/1966 delivered on 17th October, 1966. Oyejemi V. Commissioner for Local Government, Kwara State (1992) 2 NWLR (Pt. 226) 661 and Asakitikpi V. The State (1993) 5 NWLR (Pt.296) 652. So the right to fair hearing will commence from the time an accused person is brought before a court and his plea is taken. The period does not include the pre-trial stage to wit: the period covering the time he was arrested to the time he was arraigned in court and his plea taken. See Sofekun V. Akinyemi (1981) 1 NCLR 135.”

Further still and also in the same foregoing authority Onu, JSC at page 555 of the report re-iterates and said:-

“Where pleas of an accused person are taken before two trial judges successfully, the plea that is material is the plea taken before the very judge who conducted the trial to finality.”

The concept governing the process of arraignment which must precede the taking of a plea is firmly grounded. See also the case of Adio V. State (1986) 3 NWLR (Pt. 31) 714 a B decision of this court.

On the community reading of the foregoing conclusions arrived at, it is obvious that the conviction of the appellant for all the three counts, in the light of the fundamental defect, is grossly erroneous and has rendered the entire verdict by the two lower courts a nullity. It is elementary to state the settled principle of law that an appellate court is bound by the record of appeal only, which same is also binding on all parties and their counsel. See the case of Olufeagba V. Abdulraheem (2009) D 12 SCNJ 349 at 383. **It is obvious without more that, the conviction of the appellant for all the three counts of the charge, has breached her right of fair-hearing, as rightly submitted by her learned counsel.**

Our constitutional provision is very clear and unambiguous on the principle of fair hearing. There is the presumption of innocence on the part of the accused and her right guarantees that she is to be well informed of the charge against her which must be laid clear and bare in terms of the language she understands. It is also her right that she should not only be told the nature of the offence leveled against her but also the relevant provision of law prohibiting the act and the punishment thereof. The purported trial of the appellant was riddled with serious fundamental flaws in the absence of proper arraignment. As a consequence, the trial is vitiated *ab-initio* and rendered a nullity. Put differently, it is obvious that the trial, conviction and sentence of the appellant without an arraignment have vitiated the entire conviction and sentence with the total proceeding having been rendered null and void. Consequently, the very commencement of the criminal trial is hereby set aside.

Having found and declared the entire trial in this case a

nullity, I now hold a firm view that the other issues raised in this appeal would need no consideration in the absence of a valid trial and conviction. As a matter of fact, there is no valid appeal before us. It is at best purported. The court will be well advised not to engage in academic futility. The relevant question, to pose at this juncture is, having: declared the entire proceeding a nullity, what should be the appropriate order to make, in the circumstance?

The learned counsel for the appellant has urged this court to acquit and discharge his client in the face of the nullity trial conducted. For the appellant to be obliged the prayer sought by her counsel, it will be within reason to recapitulate carefully the nature and gravity of the allegation leveled against her. In other words, all the three head counts are very grievous as they are contrary to section 223 and punishable under section 221 (b) of the Penal Code. The nature of the offence is culpable homicide punishable with death.

Suffice it to say that no trial has been conducted in this case at all. In the absence of same, another question to pose is, would it be in the interest of justice to concede to the submission by the counsel for the appellant for her discharge and an acquittal? The justice of this case will require the taking into account several interests groups which are: the accused/appellant, the victims and their family members as well as the security of the society whose perception of what constitutes justice should not be undermined.

For consideration of whether or not to order a fresh trial in this matter, I will seek recourse in the decision of this court which had set down certain factors to be considered before a re-trial order can be made. Thus Uwais, CJN in the case of Yahaya V. State (2002) 3 NWLR (Pt. 754) P.289 enumerated the relevant factors as follows:-

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

(b) That leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against

the appellant,

(c) That there are no such special circumstances as would render it oppressive to put the appellant on trial a second time;

(d) That the offence or offences of which the appellant was convicted, on the consequences to the appellant or any, other person of the conviction or acquittal of the appellant, are not merely trivial;

(e) That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it; and

(f) That to enable the prosecution adduce evidence against the appellant which evidence may convict him when his success at the appeal is based on the absence of that same evidence.”

The law is well established further that the foregoing factors must co-exist for a retrial to be ordered. See the view held in the case of Yusuf V. State (2011) 18 NWLR (Pt. 1279) P853 at 878; Yerima V. State (2010) 14 NWLR (Pt. 1213) P25 at 47 and Edibo V. State (2007) 13 NWLR (Pt. 1051) P306 at 327.

The trial in this case is vitiated on an account of total absence of arraignment which is the kick starting point of every criminal trial. In considering what consequential order to make in such a situation, the learned jurist Uwais, CJN drew a clear distinction between an order of “retrial” and an order for “a fresh trial.” In following the decision laid down Erekanure v. State (1993) 5 NWLR (Pt. 294) 385 therefore his Lordship said as follows:-

“A retrial is ordered only when there has in fact been a previous trial that was properly conducted, but which is vitiated by reason of an error in law or procedure. Where, however, there has been no trial in the sense that the purported trial has been vitiated ab initio and is therefore null and void, the proper order to make is not an order of retrial but of a fresh trial. In the instant case, there has been no trial because the purported trial whatsoever was vitiated ab initio. Therefore, the order to be made is for a proper trial to take place and not a retrial.”

It is pertinent to restate positively that the trial of the appellant before us was not vitiated on the ground of error in

law and/or irregularity in procedure; a retrial order cannot therefore be made in the circumstance. The proceeding as conducted was vitiated *ab initio* right from the foundation. The only way to right the wrong was to make an order for a proper trial. The distinction is very important in deciding what consequential order is to be made. There has never been a trial in the case at hand as the purported trial had no legal force or effect. In my opinion and in view of the nature and gravity of the offence which is culpable homicide punishable with death, I will order a fresh trial of the appellant.

In making the order, it is significant to highlight and reiterate again that the charge against the appellant is serious wherein lives of three young victims were terminated. It would not therefore be proper in the prevailing circumstance for the appellant to be let off the hook without a proper trial. I will repeat again that justice should not be for the appellant alone, but the victim, the society and indeed the relations or family members of the victims. I hold the firm views therefore that an order for a fresh trial will serve the justice of this case.

On the totality, I am of the considered opinion 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, I make an order setting aside the judgment of the lower court delivered on the 12th February, 2014 in appeal No. CA/K/289/C/2013 which affirmed that of the trial court in suit No. JDU/27C/2009 delivered on the 2/12/2010. A further order is also made that the case should be sent to the Chief Judge of Jigawa State for a fresh trial by another judge other than Ahmed Isah Gumel, J.

Appeal is allowed and a fresh trial is ordered.

RHODES-VIVOUR JSC

I have had the benefit of reading in draft the leading judgment of my learned brother Ogunbiyi, JSC I agree that the judgment is a nullity as a result of a badly conducted arraignment of the appellant at the trial court, In view of the fundamental nature of arraign-

ment of an accused person I shall add a few words.

Section 215 of the Criminal Procedure Act provides as follows:

“215. The person to be tried upon any charge or Information shall be placed before the court unfettered the court shall see to order; and the 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 served therewith.”

That is to say for a valid arraignment of an accused person the following must be done.

1. The accused person shall be placed before the court unfettered unless the court shall see cause to otherwise order.
2. The charge shall be read and explained to the accused person to the satisfaction of the court by the registrar of the court, and
3. The accused person shall then be called upon to plead instantly thereto.

A criminal trial commences with the arraignment of the accused person. The arraignment is thus the foundation of a criminal trial. It cannot be over emphasized that when the arraignment of an accused person is fundamentally defective in that it failed to comply with any of the conditions alluded to, the whole trial no matter how well, the proceedings after the faulty arraignment were conducted is a nullity. See Yusuf v State (2011) 6.7 SC (Pt. v) p.190, Torri v National Park Service of Nig. (2011) 6-7 SC (Pt. III) p.171, Timothy v FRN (2012) 6SC (Pt. III) p. 159 Madu v State (2012) 6SC (PU) p.80 Mohammed v State (2015) 2SC (Pt. 1) P80, Mohammed v State (2015) 2 SC (Pt. 1) p. 163.

I shall now examine the Record of Appeal to see where the arraignment of the appellant and the taking of his plea was recorded.

On 10/2/2010 the appellant was arraigned before a Kazaure High Court in Jigawa State.

After the appearances were taken, to wit: Aminu Abdullahi for the State and Louisa M. for the accused person.

Proceedings on page 10 runs as follows:

Aminu Abdullahi - We apply that the charge be read to the accused person.

Court - Read the charge to the hearing and understanding of the accused.

B Court - Do you understand the charge read against you?

Accused - I do.

Court to accused - On 1st head of charge. Are you guilty or not guilty?

C Accused person - I am not guilty.

Court to accused - On the 3rd charge is you guilty or not guilty?

Accused person - I am not guilty.

D Aminu Abdullahi - Since the charge is read and it was fully understand by the accused person, she not guilty. We apply for W/summon to call our witnesses.

Court - Yes.

And with the above the arraignment of the appellant was concluded.

E Now, that the charged on three counts of culpable homicide contrary to section 223 of the Penal Code. The appellant was convicted on the three counts and sentenced to 10 years imprisonment on each count.

F It is so clear that Count 2 was never read to the appellant, yet she was; convicted and sentenced to 10 years on the said count.

The appellant was denied a fair hearing; and the entire arraignment was badly done, consequently the whole trial is a nullity.

G Finally it must be said again and again that trial fudges must record the arraignment in detail, so that a judge sitting on appeal would be in no doubt that the arraignment was done in accordance with the provisions on section 215 of the Criminal Procedure Act. Sadly this was not done in this suit.

H For this, and the detailed reasoning in the leading judgment the trial is a nullity and the appeal is allowed. A fresh trial is hereby ordered as directed by Hon. Justice C. B. Ogunbiyi JSC.

MUHAMMAD JSC

I was obliged a preview of the lead judgment of my learned brother Ogunbiyi JSC just delivered. I entirely agree with my lord's reasoning and conclusion that the appeal being meritorious succeeds. The Court of Appeal, the lower court, in a judgment it delivered on 12th February 2014, in appeal No. CA/K/289/C/2013 affirmed the decision of the Jigawa State High Court, the trial court, in Suit No. JDU/27C/2009 dated December 2010. The appellant, from the record of appeal, was arraigned before the trial court on a three count charge of culpable Homicide punishable with death contrary to Section 223 and punishable under Section 221(b) of the Penal Code CAP 107, Laws of Jigawa State. The three counts preferred against the appellant are as reproduced in the lead judgment.

The appellant, the record of appeal clearly shows, stands convicted as affirmed by the lower court for the three counts even though his plea was taken only in respect of counts 1 and 3. None was taken by the trial court in respect of the 2nd count of the charge. The instant appeal begrudges the lower court's affirmation of the trial court's conviction of the appellant in spite of the fact; that the entire proceedings leading to the conviction are a nullity.

I agree with learned appellant counsel that a trial that proceeded on the basis of the appellant's faulty arraignment, on appeal, should be set-aside. The lapse in such proceedings conducted in breach of Section 36 of the 1999 Constitution and Section 215 of the Criminal Procedure Act being fundamental and goes to the root of the entire proceedings. This Court along a seemingly endless line of its decisions, has held that the trial of an appellant is vitiated on the basis of an improper arraignment. In law, an arraignment consists of charging the accused and reading over and explaining the charge to him to the satisfaction of the court see *Akpiri Ewe V. State* (1992) LPELR - 1179 (SC); (1992) 7 SCNJ 15 and *Oyediyun V. The Republic* (1967) NMLR 122. In the former case, Kutigi JSC (as he then was) restated the position of this Court on the effect of non compliance with the provision of Section 215 of the Criminal Procedure Act with respect to arraignment thus:-

"The record did not show that the trial judge directed the

registrars or any officer of the court to read and explain the charge to the appellant. Neither did the record show that the charge was even read to the appellant talk less of explaining the same to him in the language he understood. It is beyond doubt that strict compliance with the mandatory provision of Section 215 of the Criminal Procedure Act above is a prerequisite of a valid trial, and where a trial court proceeded to try an accused person without strictly complying with the provision of the Section as in this case, the trial will be declared null and void... I have therefore no hesitation whatsoever in declaring the proceedings in the trial High Court and the Court of Appeal, Enugu as null and void. See Kajubo V. The State (supra)”. (Underlining supplied for emphasis).

Beyond Section 215 of the Criminal Procedure Act, Section 36(6) a 2 the 1999 Constitution as amended requires as follows:-
D “(6) Every person who is charged with a criminal offence shall be entitled to:-

(a) be informed promptly in the language that he understands in detail of the nature of the offence.”

In the case at hand, the 2nd count of charge the appellant was purportedly tried for was not read and explained to him by the trial court. This lapse stands in clear breach of the Constitution and the law. The lower court’s failure to appreciate the fundamental nature of the appellant’s grouse having occasioned miscarriage of justice renders the concurrent decisions of the two courts perverse. See; .V.E.P.A V. Ososanya (2004) 5 NWLR (Pt 867) 601 and FRN V. Iweka (2011) LPELR -9350 (SC). It is for the foregoing and more so for the detailed reasons contained in the lead judgment that I allow the appeal and set aside incompetent decisions of the two lower courts. I abide by the consequential orders made in the lead judgment.

NWEZE JSC

My Lord, Ogunbiyi, JSC, obliged me with the draft of the leading judgment just delivered now. I, entirely, agree with the reasoning and conclusion.

The trial court, namely, the High Court of Jigawa State, Holden at Kazaure, like all courts envisaged in section 6 (3) and (5) of the

Constitution of the Federal Republic of Nigeria (as amended), is a superior court of record, *Egharevba v Eribi and Ors* (2010) 9 NWLR (pt 1199) 411. As such, 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.

This must be so for such a record is the only indication of what transpired before the court, *Fawehinmi Constructions 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 Emenike* (1998) LPELR -1197 (SC) 20-21, paragraphs F-G.

Regrettably, from the transcript on page 10 of the record, the trial court left the question whether the appellant took his plea in respect of the second count to conjecture, *Ezeakabekwe and Ors v Emenike* (supra): a procedure, completely, antithetical to its status as a court: of record, *Shyllon v Assein* (supra).

In very simple terms, the record of the trial court of February 10, 2010, did not evince its compliance with the mandatory requirements for the proper arraignment of accused persons, *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 State* (2011) 18 NWLR (pt 1279) 853.

It is worrisome that a High Court Judge could, in this day and age, fall into this sort of grievous error having regard to the numerous decisions of this court on the point. The cases are numerous, too numerous indeed that only a handful of them would be cited here, if only, to accentuate my genuine perturbation, *Josiah v. State* (1985) 1 NWLR (pt 1) 125; (1985) 1 SC 406; *Kajubo v. State* (1988) 1 NWLR (pt. 73) 721, 731; (1988) 3 SCNJ (pt. 1) 1179; *Ebem v. G State* (1990) 7 NWLR (pt. 160) 113; *Idemudia v. State* (1999) 5 SCNJ 47; *Onuoha Kalu v. The State* (1998) 13 NWLR (pt, 583) 531; *Erekanure v The State* (1993) 5 NWLR (pt. 294) 385; *Omokuwajo v FRN* (2013) LPELR -20184 (SC); *Sharfal v The State* (1992) LPELR -3038 (SC) 11.

Others include: *Ogunye v The State* (1999) 5 NWLR (pt 604) 548, 567; *Ewe v The State* (1992) LPELR -1179 (SC); *Debie v The State* (2007) 9 NWLR (pt 1038); *Lufadeju and Anor v The State*

(2W7) LPELR -1795 (SC); Olabode v The State (2009) LPELR -2542 (SC); Amako v The State (1995) LPELR -451 (SC); Olabode v The State (2009) LPELR -2542 (SC); Amako v The State (1995) LPELR -451 (SC); Josiah v The State (1985) 1 SC 400, 416; Eyorokoomo v The State (1979) 8-9 SC 3; Dibia v The State (2007) B 9 NWLR (pt 1038) 30, 61-62; Edibo v The State (2007) LPELR -1012 (SC); Adeniji v The State (2001) LPELR -126 (SC); Madu v The State (2012) LPELR -7867 (SC); Oguniye v The State (1999) 5 NWLR (pt 604) 548, 555; Rufai v The State (2001) LPELR -2963 (SC); Effiom v The State (1995) 1 NWLR (pt 373) 507; Adeniji v The State (2001) FWLR (pt 57) 809; Omokuwajo v FRN (2013) LPELR -20184 (SC); Ogunye v The State (1999) 5 NWLR (pt 604) 548, 567.

It is, truly, unfortunate! That said, suffice it to observe that D the said trial was a complete nullity. Appeal allowed. I abide by the consequential orders in the leading judgment.

SANUSI JSC

E The judgment of my learned brother Clara Bata Ogunbiyi JSC was made available to me before now. Having perused same, I find myself in entire agreement with her reasons and conclusions that this appeal has merit and should be allowed as the trial of the F appellant was a nullity.

The appellant stood trial before the Jigawa State High Court (the trial court), on three counts charge of separate culpable homicides punishable with death, each, Contrary to Section 221 (b) of the Penal Code.

G The appellant was arraigned before the trial court on allegation, of causing the death of some young children, Yusuf Musa (M) 7yrs, Nana Fausiya Musa (F) 3yrs and Hafsat Yau (F) 7months old, by poisoning them, Contrary to Section 223 of the Penal Code.

H The antecedent of the trial of the appellant at the trial court is that the accused/appellant was first arraigned before a judge who passed on before the conclusion of her trial. She was then arraigned before another judge for trial de novo.

On arraignment her plea was taken only in respect of the first

and third counts while her plea was not-taken on the second count. At the end of the trial however, the trial court convicted her on all the three counts including the second count in which her plea was not taken. Yet the learned trial judge convicted and sentenced her to ten years imprisonment on each of the three counts she was accused of committing. During the trial, the prosecution called four witnesses B and tendered three exhibits.

Aggrieved by the judgment of the trial court, the appellant appealed to the Court of Appeal (the lower court) which affirmed the judgment of the trial court. She further appealed to this court C being aggrieved.

I think the narrow issue in this appeal which does not even call for going into the merit of the appeal, is whether the appellant was, ab initio properly arraigned before the trial court in accordance with Section 215 of the Criminal Procedure Code. D

Section 215 of the Criminal Procedure Code has made elaborate provisions on arraignment of an accused before a trial court. The provisions provided the stages of arraignment as below:-

(a) The charge shall be read and explained to the accused or suspect to the satisfaction of the court. E

(b) Such charge shall be read by either the court register or clerk of the court.

(c) The accused shall be asked to plead instantly.

It should also be noted, that in addition to the above, the F suspect or accused person must be placed unfettered, except if the court feels otherwise for any other reason. It needs to be emphasised here, that arraignment in trial is very fundamental because it is the bed rock of any criminal trial. Once there is no valid arraignment or that the arraignment is in breach of the provisions of Section 215 of G the CPC, then such trial is defective and will be declared a nullity regardless to how well conducted the rest of the trial or proceedings were handled or conducted. See *Madu vs State* (2012) 6 SC (pt.1) 80; *Mohammed v State* (2015) 2 SC (Pt.1) 163.

H As I said supra, and as borne out by the record of proceedings, the appellant's plea was taken on counts 1 and 3 only. Then, afterward hearing in the case commenced in earnest. In the long run, the trial court, after concluding taking evidence, in its judgment convicted the appellant on all the three counts and also sentenced her to

ten years jail term on each of the three counts. That is to say, including count No.2 on which her plea was never taken. This is a very vital fundamental error which renders the trial a nullity. The record also shows that count No.2 was never even read and explained to the accused/appellant not to talk of her plea being taken on it.

B It is my judgment therefore that this anomaly or lapse being so fundamental, made the trial defective and renders it null and void and it can not be remedied or waived. It is a nullity ab initio, to say the least. It is more or less like no trial of the accused /appellant was ever conducted, as the whole purported trial was vitiated by that
C serious and fundamental vice.

Thus, for this and the fuller and more detailed reasons contained in the lead judgment of my learned brother, I see merit in this appeal and I accordingly allow it. I am at one with my lord Ogunbiyi
D JSC, that this is a clear example of a case where a fresh trial would appropriately be ordered in the circumstance and in the interest of justice. I also hereby order that the appellant be freshly tried by a different judge of the Jigawa State High Court.

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