

**ZHITSU NMA**

**V.**

**THE STATE**

**IN THE SUPREME COURT OF NIGERIA**

**HOLDEN AT ABUJA**

**SC/CR/1218/2021**

**JOHN INYANG OKORO**

**TIJJANI ABUBAKAR**

**HABEEB ADEWALE OLUMUYIWA ABIBRU**

**JAMILU YAMMAMA TUKUR**

**MOHAMMED BABA IDRIS**

*FRIDAY, 4<sup>th</sup> JULY, 2025*

*Criminal Law and Procedure: Order of Retrial- whether it is an exception to the principle of double jeopardy*

*Criminal Law and Procedure: Principles of double jeopardy - consideration thereof - section 36 (9) of CFRN 1999 considered.*

*Criminal Law and Procedure: Retrial order- when made by an appellate court- whether it becomes valid under the proviso to sec. 36(9) of CFRN,1999 - the principle in Emenuwe vs. The State (2024) LPELR -62735(SC)*

*Criminal Law and Procedure: Retrial order- where a retrial order is made by an appellate court- whether it is an exception to the Principle of double jeopardy - sec. 19(2) of the Court of Appeal Act and sec. 26 of the Supreme Court Act, considered.*

*Criminal Law and Procedure: Order of retrial- where an appellate court orders for retrial - whether it involves absolute exercise of discretion.*

*Criminal Law and Procedure: Order of retrial- relevant conditions precedent thereto*

*Court: Exercise of discretion - whether court must act judicially and judiciously - meaning of judiciously and judicially*

*Criminal Law and Procedure: Duty of court to evaluate evidence and make findings - where a trial court has evaluated evidence and make specific findings - whether a party on appeal can no longer raise the issue of substantiality of evidence*

*Criminal Law and Procedure: Order of retrial - where an accused has served his sentence or a greater portion of it - whether it will occasion miscarriage of justice for an appellate court to order a retrial.*

*Judgment and Order: Oppressive order - meaning*

*Practice and Procedure: Retrial- nature and meaning thereof*

*Words and Phrases: Miscarriage of justice - meaning*

**Issue:**

Whether the Appellant's constitutional right to fair hearing was not violated when he was tried, convicted and sentenced by the learned trial Judge who while serving as Director of Public Prosecution Niger State had knowledge and involvements in the case and indeed initiated the charge against the Appellant and others;

And upon an affirmative determination of the above question:

Whether the trial Court was competent to preside over the trial of the Appellant.

**Facts:**

The accused/appellant was one of several persons charged and arraigned before the High Court of Niger State on a two count charge of conspiracy to do an illegal act and culpable homicide punishable with death. The Accused/Appellant and his co-accused were alleged to have on or about the 19th of February, 2010 agreed to do an illegal act and to have caused the death of five persons by attacking them with sticks, dane guns and cutlasses.

In proof of their case, the prosecution, tendered the extra judicial statement of the Appellant. The Appellant gave evidence in his defence.

At the conclusion of trial, the court found the Appellant guilty as charged and convicted him to six months imprisonment with hard labor.

Dissatisfied, the Accused/Appellant unsuccessfully appealed to the Court of Appeal Abuja Judicial Division, hence this further appeal to the Supreme Court.

**Held (unanimously allowing the appeal):**

*1. On nature and meaning of retrial-*

A retrial refers to a second or a subsequent or a new trial of a case in which issues already litigated and to which the court has already rendered a verdict or decision are reexamined by the same court. It usually occurs after the first trial has been deemed improper or unfair due to procedural errors, newly discovered evidence, or other significant issues. It is essentially a do-over of the initial legal process, aiming to correct errors or address issues that arose in the first trial.

*2. On whether retrial is an exception to the principle of double jeopardy -*

An order of retrial is an exception to the doctrine of double jeopardy. It is a general principle of criminal law jurisprudence that where a person accused of committing a criminal offence or criminal offences, which are recognized by law, shows that he has been tried for the offence or offences by a Court of law or a Tribunal set up by law and convicted or acquitted and discharged or that he has been pardoned of the offence or offences by the appropriate authority, he cannot be subjected to any further trial by any Court or Tribunal for the same offence or offences. A bar to further prosecution has now been placed between him and the offence or offences. The principle is generally referred to as the doctrine of double jeopardy – **Nafiu Rabiun Vs The State** (1980) 8-11 SC 130, **Sunday Okoh Vs The State** (1984) LPELR 2459(SC), **Amaefule Vs The State** (1988) NWLR (Pt 75) 238, PML (Nigeria) **Ltd Vs Federal Republic of Nigeria** (2017) LPELR 43480(SC), **Bala Vs Nigerian Army** (2024) LPELR 62438(SC).

*3. On application of principle of double jeopardy -*

Section 36 (9) of the Constitution of the Federal Republic of Nigeria 1999 which encapsulates the doctrine of double jeopardy inheres an exception by a proviso contained therein. The provision reads:

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

The Courts have held that the words "save upon the order of a superior Court" used in the provision mean that a person accused of committing a criminal offence or criminal offences who has been tried for the offence or offences by a Court of law or a Tribunal set up by law and convicted or acquitted and discharged can be subjected to a further trial by a Court or Tribunal for the same offence or offences where a Court superior to the Court or Tribunal that tried the person so orders – **Kajubo Vs State** (1988) LPELR 1646(SC), **Omosaye Vs State** (2014) 6 NWLR (Pt 1404) 484. **Joseph Vs State** (2022) LPELR 59634(SC) this Court, per Garba, JSC explained the position thus:

**"Now, by the provisions of Section 36 (9) of the 1999 Constitution (as altered/amended), a superior Court is vested with the requisite jurisdiction to make an order in appropriate cases, for the trial of person for a criminal offence for which he had earlier been tried by a Court of competent jurisdiction and whether he was convicted or acquitted by that Court for such an offence. The provisions are in the following terms "No person who shows that he has been tried by any Court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior Court".**

4. *On legal effect of a retrial order made by an appellate court -*

In **Emenuwe Vs The State** (2024) LPELR 62735(SC), this Court, per Ogbuinya, JSC, reiterated the position thus:

**'The settled position of the law is that once an appellate Court makes an order for a retrial or a new trial *de novo* or a *venire de novo*, which entails that the whole case should be retried or tried *de novo* or tried a new as if no trial had taken place, such an order, no matter the nomenclature and appellation, has the backing of the Constitution, the *fons et origo* of our laws. This is because, such an order of**

retrial falls within the perimeter of the elastic provision of Section 36(9) of the Constitution, as amended, which disowns double jeopardy/trial, as it (the order) takes shelter under the canopy of the proviso: save upon the order of a superior Court enshrined therein, in the mind of the law, the object of a proviso, an exception to the main rule which speaks the last intention of a legislator, is to cut down, modify, qualify, trim, relax or limit the powers conferred by the main section of a statute or document or exclude some possible ground of misinterpretation of its extent/scope. It restrains the absoluteness or generality of a section of a law or document, it discloses the proper meaning of a section of law that is submissive to more than one meaning.

Indubitably, the legality of the retrial order, made by the Lower Court, is preserved under the salvaging umbrella of the proviso to the provision of Section 36(9) supra without an atom of insult/injury to the doctrine of double jeopardy pontificated by the appellant"

*5. On statutory provisions that justify retrial -*

This exception in the provision of Section 36 (9) of the 1999 Constitution to the constitutional protection against the principle of double jeopardy is complemented by the provision of Section 19 (2) of the Court of Appeal Act which reads:

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

And by the provision of Section 26 of the Supreme Court Act which says:

**"On the hearing of an appeal under this Part, the Supreme Court may exercise any power that could have been exercised by the Court of Appeal or may order the case to be retried by a court of competent jurisdiction ."**

*6. On conditions for ordering a retrial -*

In exercising the power of ordering that a person who had been tried and punished or discharged and acquitted of a criminal charge or offence should be tried again

for the same offences under the excepting words in Section 36 (9) of the 1999 Constitution and/or the provisions of Section 19 (2) of the Court of Appeal Act or Section 26 of the Supreme Court Act, however, the superior Court, be it the Court of Appeal or this Court, as the case may be, is not left to its whims and caprices. This Court has laid down in several case law authorities the conditions that must exist, and co-exist, before the power can be exercised and these conditions are:

- a. That there has been an error in law, including the observance of the law of evidence or irregularity in procedure of such 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 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 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 for example the cases of **Okafor Vs State** (1976) LPELR 2408(SC), **James Ikhane Vs Commissioner of Police** (1977) All NLR 234, **Adeoye Vs State** (1999) LPELR 134(SC), **Elijah Vs State** (2019) LPELR 48946(SC), **Eseu Vs People of Lagos State** (2024) LPELR 62005(SC), **Bala Vs Nigerian Army** (2024) LPELR 62538(SC), **Emenuwe Vs State** *supra* , **Federal Republic of Nigeria Vs Nnajofofor** (2024) LPELR 62599(SC).

#### *7. On discretionary powers to order retrial -*

The existence or presence of first, second and fourth conditions amongst the above laid down conditions are easily ascertainable as they do not lend themselves

to subjectivity. However, the third and fifth conditions are not so easily ascertainable and largely depend on peculiar facts of each case at hand. This is because what constitutes special circumstances as would render it oppressive to put an appellant on trial the second time and what would occasion a greater miscarriage of justice are subjective and may elicit mixed reactions or divergent perspectives from different individuals. So, a decision to order a retrial involves some exercise of discretion by an appellate Court which must be done with utmost caution, judicially and judiciously. In other words, an order of retrial stems from a discretionary power which must be exercised by an appellate Court with circumspection and it is not an exercise of raw appellate power to police courts inferior to it – **Ereifeanure Vs The State** (1993) NWLR(Pt 294) 285 at 394, **Umar Vs State** (2009) LPELR 3360(SC), **C)owe Vs State** (2017) LPELR 42589(SC).

*8. On meaning of acting "judiciously" and "judicially" -*

The Courts have held that acting judicially simply imports the consideration of the interests of both sides in a case and weighing them in line with established principles of law in arriving at a just decision. And to act judiciously means to proceed from or show sound judgment marked by discretion, wisdom and good sense – **Eronini Vs Iheuko** (1989) 2 NWLR (Pt 101) 40 at 60 – 61 and **African Continental Bank Plc Vs Nnamani** (1991) 4 NWLR (Pt 786) 486.

*9. On whether substantiality of evidence against appellant is baseless -*

It is correct that the Appellant was charged with conspiracy to do an illegal act and culpable homicide punishable with death. The High Court heard the entire evidence of the Respondent in support of the charge and, upon the evaluation of same, it made a finding that the evidence did not prove culpable homicide punishable with death, but culpable homicide not punishable with death. It was in consequence of this finding that the High Court sentenced the Appellant to five years imprisonment. The Respondent did not appeal against this finding and it accepted it as the proper outcome on the quality of evidence presented in proof of

the charge. This finding of the High Court on the substantiality of the evidence in support of the charge against the Appellant is what will guide in determining whether the order of retrial made by the Court of Appeal was proper in the circumstances. The entire contention of Counsel to the Respondent predicated on the severity of the charge against the Appellant and the substantiality of the evidence in support thereof is baseless and totally misconceived.

*10. On when an order of court is oppressive -*

An order of Court is said to be oppressive when it is unnecessary burdensome, unfair and unjust on the facts and circumstances of a case.

*11. On meaning of miscarriage of justice -*

The term "miscarriage of justice" is defined as a grossly unfair outcome in a judicial proceeding. Miscarriage of justice is a failure of justice. What will constitute miscarriage of justice varies from case to case depending on the facts and circumstances. But to reach the conclusion that such a miscarriage occurred, it does not require a finding that a different result necessarily would have been reached in the proceedings to be affected by the miscarriage. It is enough if what has happened is not justice according to law – **Tyonex (Nig) Ltd Vs Pfizer Ltd** (2020) 1 NWLR (Pt 1704) 125.

*12. On when order of retrial will occasion miscarriage of justice -*

Reading through the decisions of the Courts in matters with similar facts and circumstances as in the present case, the general consensus is that where an accused has served his sentence or a substantial part of his sentence or possible sentence, it would be oppressive and amount to a miscarriage of justice to order a retrial – **Barmo Vs The State** (2000) 1 NWLR (Pt 641) 424, **Okere Vs The State** (2001) 2 NWLR (Pt 697) 397, **Samaila Umaru Vs The State** (2009) 8 NWLR (Pt 1 174) 134, **Mohammed Vs The State** (2013) 218 LRCN (Pt 2) 48 at 59, **Okemmiri Vs Federal Republic of Nigeria** (2015) LPELR 24485(CA), **Okoye Vs Commissioner of Police** (2020) LPELR 50102(CA) and **Garba Vs State** (2021) LPELR - 55468(CA). This Court shares the views expressed in these cases and finds that the order of retrial made by the Court of

Appeal was oppressive and occasioned a miscarriage of justice. A read through the records of appeal shows that the fact of the Appellant having served the sentence imposed on him by the High Court was not brought to the attention of the Court of Appeal. This Court believes that if the fact had been brought to attention of the Court of Appeal, it would not have made the order of retrial. This Court finds merit in the appeal and it is hereby allowed.

The order for the retrial of the Appellant before another Judge of the High Court of Niger State made by the Court of Appeal, Abuja Judicial Division, in the judgment delivered on the 10<sup>th</sup> of December, 2021 in Appeal No CA/ABJ/CR/466/202C) is hereby set aside. In its stead, an order is hereby made discharging and acquitting the Appellant of the offences he was arraigned *for* before the High Court of Niger State in Charge No NS H C/N B/2 °/2010.

#### **History of the case:**

#### **Supreme Court:**

Names of Justices who say on the appeal: JOHN INYANG OKORO, TIJJANI ABUBAKAR, HABEEB ADEWALE OLUMUYIWA ABIBRU, JAMILU YAMMAMA TUKUR, MOHAMMED BABA IDRIS

Appeal No. SC/CR/1218/2021

Date of Judgment: Friday, 4th July, 2025

Names of Counsel: Victor U. Udeh with Ekere E. Bassey for the Appellant and Nasara DanMallam with C. P. Ocheja, C. P. Emezube, N. M. Efobi and M. I. Kyemang for the Respondent

**HABEEB, JSC (delivering lead Judgment):** This appeal is against the judgment of the Court of Appeal, Abuja Judicial Division, delivered on the 10<sup>th</sup> of Decernber, 2021 in Appeal No CA/ABJ/CR/466/2020, and which set aside the judgment of the High Court of Niger State delivered on the 30<sup>th</sup> of January, 2017 in Charge No NSHC/NB/2°/2010 wherein the High Court had convicted the Appellant *for* the offences of conspiracy and culpable homicide not punishable with death. The Court of Appeal declared that

the judgment of the High Court was a nullity as the proceedings leading up to the judgment were conducted in breach of the right of the Appellant to fair hearing and it remitted the case file to the Chief Judge of Niger State *for* reassignment to another Judge to hear the matter *de novo*.

The Appellant was one of seven persons arraigned before the High Court of Niger State on a two-count charge of conspiracy to do an illegal act and culpable homicide punishable with death. The Appellant and his coaccused persons were alleged to have on or about the 19<sup>th</sup> of February, 2010 agreed to do an illegal act and to have caused the death of five persons, Mohammed Idris, Suleiman Abubakar, Gbogi Idris, Fatimatu Abubakar and Mallam Ndagana, by attacking them with sticks, dane guns and cutlasses. The Appellant pleaded Not Guilty to the two counts and the matter proceeded to trial.

The Respondent called ten witnesses and tendered the extra judicial statement of the Appellant as well as the extra judicial statements of the six co-accused persons in proof of its case against the Appellant and his co-accused persons. The Appellant and each of his co-accused persons gave evidence in their defence. At the conclusion of trial and after the rendering of final addresses by the Counsel to the parties, the High Court delivered a considered judgment wherein it found the Appellant and his co-accused persons guilty of criminal conspiracy and culpable homicide not punishable with death. The High Court convicted the Appellant and his co-accused persons and sentenced them to prison terms of six months with hard labour and five years with hard labour respectively with effect from 30<sup>th</sup> of January, 2017 and the sentences were to run concurrently.

The Appellant was dissatisfied with the judgment and he caused his Counsel to file a notice of appeal against to the Court of Appeal. One of the issues raised *for* the determination of the Court of Appeal was:

**Whether the Appellant's constitutional right to fair hearing was not violated when he was tried, convicted and sentenced by the learned trial Judge who while serving as Director of Public Prosecution Niger State**

**had knowledge and involvements in the case and indeed initiated the charge against the Appellant and others;**

**And upon an affirmative determination of the above question:**

**Whether the trial Court was competent to preside over the trial of the Appellant.**

In resolving this issue, the Court of Appeal deliberated thus:

“ In this appeal, it is the contention of the Appellant that the learned trial Judge breached the nemo judex principle as he was the officer who signed and filed the application to prefer the charge against the Appellant, and when elevated to the Bench as a High Court Judge he was also the Judge that heard the case, tried and convicted the Appellant. He noted that the case was assigned to Amina Wambai J. before the trial Judge was elevated to the High Court and after his elevation, the case was assigned to him. The learned Counsel for the Respondent chose to be silent on this allegation. Although he conceded to the fact that the learned trial Judge was at one time the Director of Public Prosecutions in the State, he argued that the learned trial Judge did not participate in the conduct of the case.

In the records of appeal before me is an application for leave to prefer a charge in the High Court under Section 185 (b) of the Criminal Procedure Code. The application was signed by Alhaji Musa B. Abdul, Director Public Prosecution, for the Attorney General and Commissioner for Justice. Also ,, in the records is an untitled process signed by Alhaji Musa B. Abdul, Director Public Prosecution, for the Attorney General and Commissioner for Justice. The said process is vital and will aid in the resolution of this issue. It reads thus:

'04. It is considered that the case is not a complicated one and that to occasion an unnecessary delay.

05. It is considered desirable and expedient to dispose of the said case without further delay.

09. The evidence shown in the trial and disclosed by the proofs of evidence is to the best of my knowledge and information a true case.

The above reproduced paragraphs of the untitled process attached to the application to prefer a charge is conclusive in the sense that Alhaji Musa B. Abdul who authored the same had already concluded the outcome of the case by upholding the veracity of the evidence and noting that the offences of conspiracy and culpable homicide which is a capital offence is not a complicated one based on his already disclosed opinion. The law has always been that an accused person is assumed innocent until found guilty by a competent court, but from the learned trial Judge's comment as DPP, he had made up his mind as to the guilt of the Appellant before he assumed the seat of a Judge over the case."

The Court of Appeal concluded that the conduct of the trial of the Appellant by the learned trial Judge violated the natural justice rule of *nemo iudex in causa sua* and the fundamental right of the Appellant to a fair trial. The Court of Appeal declared the judgment of the High Court convicting and sentencing the Appellant to be a nullity and it remitted the case file to Chief Judge of Niger State for retrial before another Judge.

The Appellant was unhappy with the order of the Court of Appeal remitting the case file to the Chief Judge of Niger State for retrial and he caused his Counsel to file a notice of appeal to this Court against the order. The notice of appeal contained four grounds of appeal and it was filed on the 22<sup>nd</sup> of December, 2021. In arguing the appeal, Counsel to the Appellant filed an undated brief of arguments on the 3<sup>rd</sup> of February, 2022 while Counsel to the Respondent filed a brief of arguments dated the 22<sup>nd</sup> of February, 2022 on the 23<sup>rd</sup> of February, 2022. At the hearing of the appeal, Counsel to the parties relied on and adopted the arguments contained in their respective briefs of arguments.

In arguing the appeal, Counsel to the Appellant distilled one issue for determination in the appeal and this was:

Whether it was proper for the Court of Appeal to have ordered a retrial of the Appellant having regard to the entire circumstances of the case.

In arguing the issue *for* determination, Counsel recalled that upon convicting the Appellant *for* the offences of criminal conspiracy and culpable homicide not punishable with death, the High Court sentenced him to prison terms of six months with hard labour and five years with hard labour respectively with effect from 30<sup>th</sup> of January, 2017 and the sentences were to run concurrently. Counsel noted that the running of time/the calendar *for* the purpose of calculating the period to be spent in prison in fulfillment of terms of imprisonment is different from the running of the normal calendar. Counsel noted that period the Appellant was to spend in prison *for* the sentence of the *five* years imprisonment with effect from 30<sup>th</sup> of January, 2017 elapsed on or about the 30<sup>th</sup> of May, 2020, meaning that as at the 10<sup>th</sup> of December, 2021 when the Court of Appeal delivered judgment, nullified the judgment of the High Court and ordered a retrial, the Appellant had completed the sentence imposed on him.

Counsel noted that the power to a retrial is discretionary and he referred to the cases of **N.B.N Ltd Vs P.B. Olatunde Co. Ltd** (1994) 3 NWLR(Pt 334) 512, **Imonikhe Vs A. G. Bendel State** (1992) 6 NWLR (Pt 248) 396, **University of Lagos Vs Olaniyan** (1985) 1 NWLR (Pt 1) 156 in reiterating the general principles governing interference with exercise of discretion by an appellate Court. Counsel further referred to the cases of **Abodundu Vs The Queen** (1 959) SCNLR 162 and **Mohammed Vs The State** (2013) 5 NWLR (Pt 1347) 315 on the principles that a Court should consider in ordering a retrial. Counsel stated that the order of retrial made by the Court of Appeal in the circumstances of this case amounted to injustice and occasioned a miscarriage of justice and he referred to several case law authorities, including **Pam Vs Moharnmed** (2008) LPELR 2895(SC) and **Gbadarnosi Vs Dairo** (2007) 3 NWLR (Pt 1021) 282 as well as **Bunge Vs Gov. Rivers State** (2006) LPELR 816(SC) on meaning of and when a miscarriage of justice occurs and on the need for the appellate Court to ensure that justice is not miscarried.

Counsel urged the Court to be persuaded by the decisions of the Court of Appeal in **Garba Vs State** (2021) LPELR 55468(CA) and **Barmo Vs State** (1999) LPELR 5708(CA) where the Court refused to order a retrial under siluilar circumstances as in the instant case. COLInsel proceeded to repeat and I-estate his arguments on

miscarriage of justice over and over again and cited many more case law authorities in support thereof. Counsel concluded his arguments by praying the Court to resolve the sole issue for determination in favour of the Appellant and to allow the appeal, set aside the order of retrial made by the Court of Appeal and discharge and acquit the Appellant.

Counsel to the Respondent also formulated one issue for determination in the appeal and it was:

Whether, having regards to the peculiar facts and circumstances of this case, the Court of Appeal was right in ordering the retrial of the Appellant after nullifying his trial and conviction.

In arguing the issue for determination, Counsel referred to the case of **Mohammed Vs State** (2013) LPELR 19822(SC) in reiterating the principles governing the grant of an order of retrial by an appellate Court and emphasized the importance of the severity of the charge and the strength of the evidence led in its proof. Counsel stated that the charge against the Appellant in the instant case was conspiracy and culpable homicide punishable with death and that the evidence adduced before the trial Court revealed the likelihood of a Court and he thus implored the Court not to disturb the findings and conclusions of the Court of Appeal. Counsel referred to the cases of **Abodundu Vs The Queen** (1959) SCNLR 162 and **Elijah Vs State** (2014) LPELR 20095(SC) wherein the conditions that must exist before an appellate Court can grant an order of retrial were laid down and restated and stated that whether or not an appellate Court would order a retrial depends on the peculiar circumstances of each case.

Counsel stated that the Appellant has not shown any hardship the order of retrial is likely to cause him or how the order of retrial is oppressive to him as to bring his case within the narrow spectrum of the exceptional circumstances that will require his discharge and acquittal. Counsel stated that the fact that the Appellant has served the sentence passed on him by the High Court does not constitute a special or exceptional circumstance and cannot automatically render the order of retrial made by the Court of

Appeal a nullity in view of the severity of the offence with which the Appellant was charged and the weight of the evidence against him. Counsel stated that it is not in the best interest of justice to allow the Appellant to continue roaming the streets without facing his full trial before a proper forum. Counsel stated that the effect of the order of the Court of Appeal nullifying the trial and the judgment of the High Court and ordering a retrial was that the Appellant has not been properly tried before a competent Court for the offences of conspiracy and culpable homicide punishable with death and he referred to the cases of **Mohammed Vs State** (2019) LPELR 47632(SC) and **Elijah Vs State** *supra*.

Counsel stated that, contrary to the assertion of Counsel to the Appellant, there was no miscarriage of justice of whatever nature done to the Appellant by the order of retrial and that the order of retrial better served the best interest of justice. Counsel repeated his arguments on severity of the charge and quality of evidence and the need for the Appellant to answer the charge before a competent forum. Counsel concluded his contentions by urging the Court to resolve the issue for determination in favour of the Respondent and to consequentially dismiss the appeal and affirm the order of retrial made by the Court of Appeal.

This appeal is against the order of retrial made by the lower Court and the contention of the Appellant is that the lower Court ought to have acquitted and discharged him instead of ordering a retrial. A retrial refers to a second or a subsequent or a new trial of a case in which issues already litigated and to which the court has already rendered a verdict or decision are reexamined by the same court. It usually occurs after the first trial has been deemed improper or unfair due to procedural errors, newly discovered evidence, or other significant issues. It is essentially a do-over of the initial legal process, aiming to correct errors or address issues that arose in the first trial.

An order of retrial is an exception to the doctrine of double jeopardy. It is a general principle of criminal law jurisprudence that where a person accused of committing a criminal offence or criminal offences, which are recognized by law, shows that he has been tried for the offence or offences by a Court of law or a Tribunal set up by law and convicted or acquitted and discharged or that he has been pardoned of the offence or offences by the appropriate authority, he cannot be subjected to any further trial by any

Court or Tribunal for the same offence or offences. A bar to further prosecution has now been placed between him and the offence or offences. The principle is generally referred to as the doctrine of double jeopardy – **Nafiu Rabi** Vs **The State** (1 980) 8-11 SC 130, **Sunday Okoh Vs The State** (1984) LPELR 2459(SC), **Amaefule Vs The State** (1988) NWLR (Pt 75) 238, PML (Nigeria) **Ltd** Vs Federal Republic of Nigeria (2017) LPELR 43480(SC), **Bala Vs Nigerian Army** (2024) LPELR 62438(SC).

Section 36 (9) of the Constitution of the Federal Republic of Nigeria 1999 which encapsulates the doctrine of double jeopardy inheres an exception by a proviso contained therein. The provision reads:

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

The Courts have held that the words "save upon the order of a superior Court" used in the provision mean that a person accused of committing a criminal offence or criminal offences who has been tried for the offence or offences by a Court of law or a Tribunal set up by law and convicted or acquitted and discharged can be subjected to a further trial by a Court or Tribunal for the same offence or offences where a Court superior to the Court or Tribunal that tried the person so orders – **Kajubo Vs State** (1988) LPELR 1646(SC), **Omosaye Vs State** (2014) 6 NWLR (Pt 1404) 484. **Joseph Vs State** (2022) LPELR 59634(SC) this Court, per Garba, JSC explained the position thus:

"Now, by the provisions of Section 36 (9) of the 1999 Constitution (as altered/amended), a superior Court is vested with the requisite jurisdiction to make an order in appropriate cases, for the trial of person *for* a criminal offence for which he had earlier been tried by a Court of competent jurisdiction and whether he was convicted or acquitted by that Court for such an offence. The provisions are in the following terms "No person who shows that he has been tried by any Court of competent jurisdiction or tribunal for a criminal offence and either convicted or acquitted shall again be tried for that offence or for a criminal offence having the same ingredients as that offence save upon the order of a superior Court".

In **Emenuwe Vs The State** (2024) LPELR 62735(SC), this Court, per Ogbuinya, JSC, reiterated the position thus:

'The settled position of the law is that once an appellate Court makes an order for a retrial or a new trial *de novo* or a *venire de novo*, which entails that the whole case should be retried or tried *de novo* or tried a new as if no trial had taken place, such an order, no matter the nomenclature and appellation, has the backing of the Constitution, the *fons et origo* of our laws. This is because, such an order of retrial falls within the perimeter of the elastic provision of Section 36(9) of the Constitution, as amended, which disowns double jeopardy/trial, as it (the order) takes shelter under the canopy of the proviso: save upon the order of a superior Court enshrined therein, in the mind of the law, the object of a proviso, an exception to the main rule which speaks the last intention of a legislator, is to cut down, modify, qualify, trim, relax or limit the powers conferred by the main section of a statute or document or exclude some possible ground of misinterpretation of its extent/scope. It restrains the absoluteness or generality of a section of a law or document, it discloses the proper meaning of a section of law that is submissive to more than one meaning. Indubitably, the legality of the retrial order, made by the lower Court, is preserved under the salvaging umbrella of the proviso to the provision of Section 36(9) supra without an atom of insult/injury to the doctrine of double jeopardy pontificated by the appellant"

This exception in the provision of Section 36 (9) of the 1999 Constitution to the constitutional protection against the principle of double jeopardy is complemented by the provision of Section 19 (2) of the Court of Appeal Act which reads:

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

And by the provision of Section 26 of the Supreme Court Act which says:

"On the hearing of an appeal under this Part, the Supreme Court may exercise any power that could have been exercised by the Court of Appeal or may order the case to be retried by a court of competent jurisdiction ."

In exercising the power of ordering that a person who had been tried and punished or discharged and acquitted of a criminal charge or offence should be tried again *for* the same offences under the excepting words in Section 36 (9) of the 1999 Constitution and/or the provisions of Section 19 (2) of the Court of Appeal Act or Section 26 of the Supreme Court Act, however, the superior Court, be it the Court of Appeal or this Court, as the case may be, is not left to its whims and caprices. This Court has laid down in several case law authorities the conditions that must exist, and co-exist, before the power can be exercised and these conditions are:

- a That there has been an error in law, including the observance of the law of evidence or irregularity in procedure of such character that on the one hand the trial was not rendered a nullity and on the other hand the Court of Appeal is unable say that 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 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 *for example* the cases of **Okafor Vs State** (1976) LPELR 2408(SC), **James Ikhane Vs Commissioner of Police** (1977) All NLR 234, **Adeoye Vs State** (1999) LPELR 134(SC), **Elijah Vs State** (2019) LPELR 48946(SC), **Eseu Vs People of Lagos State** (2024) LPELR 62005(SC), **Bala Vs Nigerian Army** (2024) LPELR 62538(SC), **Emenuwe Vs State** *supra* , **Federal Republic of Nigeria Vs Nnajofofor** (2024) LPELR 62599(SC).

The existence or presence of first, second and fourth conditions amongst the above laid down conditions are easily ascertainable as they do not lend themselves to subjectivity. However, the third and fifth conditions are not so easily ascertainable and largely depend on peculiar facts of each case at hand. This is because what constitutes special circumstances as would render it oppressive to put an appellant on trial the second time and what would occasion a greater miscarriage of justice are subjective and may elicit mixed reactions or divergent perspectives from different individuals. So, a decision to order a retrial involves some exercise of discretion by an appellate Court which must be done with utmost caution, judicially and judiciously. In other words, an order of retrial stems from a discretionary power which must be exercised by an appellate Court with circumspection and it is not an exercise of raw appellate power to police courts inferior to it – **Ereñanure Vs The State** (1993) NWLP\ (Pt 294) 285 at 394, **Umar Vs State** (2009) LPELR 3360(SC), **C)owe Vs State** (2017) LPELR 42589(SC).

The Courts have held that acting judicially simply imports the consideration of the interests of both sides in a case and weighing them in line with established principles of law in arriving at a just decision. And to act judiciously means to proceed from or show sound judgment marked by discretion, wisdom and good sense – **Eronini Vs Iheuko** (1989) 2 NWLR (Pt 101) 40 at 60 – 61 and **African Continental Bank Plc Vs Nnamani** (1991) 4 NWLR (Pt 786) 486. The necessary question that arises in this appeal is whether the Court of Appeal acted judicially and judiciously in ordering for the retrial of the Appellant in the circumstances of this case.

Counsel to the Appellant contends that the order of retrial was oppressive to the Appellant and occasioned him a miscarriage of justice because he had finished serving the sentence of a term of imprisonment imposed on him by the High Court at the time the order was made by the Court of Appeal. Counsel to the Respondent did not contest the assertion that the Appellant had finished serving his sentence at the time of the making of the order of retrial. The contention of Counsel to the Respondent revolved around the severity of the charge against the Appellant, conspiracy

and culpable homicide punishable with death, and the substantiality of the evidence in support of the charge. Counsel to the Respondent did not however display the substantiality of the evidence in any portion of his brief of arguments.

It is correct that the Appellant was charged with conspiracy to do an illegal act and culpable homicide punishable with death. The High Court heard the entire evidence of the Respondent in support of the charge and, upon the evaluation of same, it made a finding that the evidence did not prove culpable homicide punishable with death, but culpable homicide not punishable with death. It was in consequence of this finding that the High Court sentenced the Appellant to five years imprisonment. The Respondent did not appeal against this finding and it accepted it as the proper outcome on the quality of evidence presented in proof of the charge. This finding of the High Court on the substantiality of the evidence in support of the charge against the Appellant is what will guide in determining whether the order of retrial made by the Court of Appeal was proper in the circumstances. The entire contention of Counsel to the Respondent predicated on the severity of the charge against the Appellant and the substantiality of the evidence in support thereof is baseless and totally misconceived.

Now, an order of Court is said to be oppressive when it is unnecessary burdensome, unfair and unjust on the facts and circumstances of a case. And the term "miscarriage of justice" is defined as a grossly unfair outcome in a judicial proceeding. Miscarriage of justice is a failure of justice. What will constitute miscarriage of justice varies from case to case depending on the facts and circumstances. But to reach the conclusion that such a miscarriage occurred, it does not require a finding that a different result necessarily would have been reached in the proceedings to be affected by the miscarriage. It is enough if what has happened is not justice according to law – **Tyonex (Nig) Ltd Vs Pfizer Ltd** (2020) 1 NWLR (Pt 1704) 125.

Reading through the decisions of the Courts in matters with similar facts and circumstances as in the present case, the general consensus is that where an accused has served his sentence or a substantial part of his sentence or possible sentence, it would be oppressive and amount to a miscarriage of justice to order a retrial – **Barmo**

**Vs The State** (2000) 1 NWLR (Pt 641) 424, **Okere Vs The State** (2001) 2 NWLR (Pt 697) 397, **Samaila Umaru Vs The State** (2009) 8 NWLR (Pt 1 174) 134, **Mohammed Vs The State** (2013) 218 LRCN (Pt 2) 48 at 59, Okemmiri **Vs** Federal Republic **of** Nigeria (2015) LPELR 24485(CA), Okoye Vs Commissioner **of** Police (2020) LPELR 50102(CA) and **Garba Vs State** (2021) LPELR - 55468(CA). This Court shares the views expressed in these cases and finds that the order of retrial made by the Court of Appeal was oppressive and occasioned a miscarriage of justice. A read through the records of appeal shows that the fact of the Appellant hiding served the sentence imposed on him by the High Court was not brought to the attention of the Court of Appeal. This Court believes that if the fact had been brought to attention of the Court of Appeal, it would not have made the order of retrial, This Court finds merit in the appeal and it is hereby allowed.

The order for the retrial of the Appellant before another Judge of the High Court of Niger State made by the Court of Appeal, Abuja Judicial Division, in the judgment delivered on the 10<sup>th</sup> of December, 2021 in Appeal No CA/ABJ/CR/466/202C) is hereby set aside. In its stead, an order is hereby made discharging and acquitting the Appellant of the offences he was arraigned for before the High Court of Niger State in Charge No NS H C/N B/2 /2010.

**JAMILU, JSC:** I had the advantage of reading before now, the lead judgment just delivered by my learned brother HABEEB ADEWALE OLUMUYIWA ABIRU JSC and I agree with the reasoning and the conclusion arrived at in the judgment.

I adopt the judgment as mine with nothing further to add.

**TIJJANI, JSC:** My lord and learned brother, HABEEB ADEWALE O. ABIRU, JSC, granted me the privilege of reading in draft the comprehensive leading judgment prepared and rendered in this appeal. I endorse the reasoning and conclusion and adopt the judgment as mine, I have nothing extra to add.

I join my learned brother in holding that the Appellant's appeal is richly meritorious. The appeal therefore deserves to be and is hereby allowed.

I abide by the order of discharge and acquittal.

Appeal allowed.

**IDRIS, JSC:** I had a preview of the judgment delivered by my learned brother, Lord Justice Habeeb Adewale Olumuyima Abiru, JSC. I completely agree with the reasoning, conclusions, decisions and orders therein.

**INYANG, JSC:** I have had a preview of the lead judgment delivered by my learned brother, Habeeb Adewale Olumuyiwa Abiru, JSC. I am in total agreement with both the reasoning and conclusion in the judgment. The appeal is meritorious and is hereby allowed by me. I abide by the order of acquittal and discharge made in the judgment.

Appeal Allowed.