IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT WUSE ZONE 2
HIS LORDSHIP HON. JUSTICE A. S. ADEPOJU
AND
HIS LORDSHIP HON. JUSTICE Y. HALILU
ON THE 30TH DAY OF OCTOBER, 2018
APPEAL NO: CVA/51/15

BETWEEN:

MARTINA ONYELEKWE ----------APPELLANT

AND

COMMISSIONER OF POLICE ----------RESPONDENT

S. O. ABANG *for the appellant.*
Respondent not in court and not represented.
Respondent served with hearing notice.

JUDGEMENT

This is an appeal against the ruling on no case submission and the final decisions of the trial Chief Magistrate Oba sitting at Wuse Zone 2, delivered on 19th March, 2014 and 6th August 2015 respectively. The appellant was convicted by the trial Chief Magistrate for the offence of abetment of abduction contrary to Section 83 (C) of the Penal Code and sentenced to Three (3) years imprisonment.

In the notice of appeal dated 4th April 2018, the appellant formulated twenty three (23) grounds of appeal with the particulars thereof. And further filed a brief of argument dated 16th April, 2018. The entire appeal with the appellant's notice of appeal were filed out of time and an application for extension of time was granted vide an order of court dated 26th of March, 2018. The appellant's counsel adopted his brief of argument while the respondent did not.

We noted with dismay that the particulars of the appeal are too onerous, full of repetitions of arguments that ordinarily ought to have been embedded in the brief of arguments. The learned counsel should note that particulars of appeal are meant to be concise, and straight to the point. This is imperative in

order to save the precious judicial time of the court. Be that as it may, we have taken the pains to summarize the crux of the appeal as could be extracted from the notice of appeal and the brief of arguments.

The appellant and two other persons were arraigned on allegation of criminal conspiracy, abduction and selling of minor contrary to Section 97, 272, 273 and 275 of the Penal code law before Her Worship Chief Magistrate Ramatu Gulma. The accused person denied all the allegations, the matter went into trial, but before the case came into conclusion, the Chief Magistrate declined jurisdiction to try the suit, consequent upon which the matter was reassigned to His Worship Chief Magistrate Oba for a trial denovo. The trial started on the 17th of June 2013. On that day the prosecution and the 1st and 3rd defendants were not in court while the appellant was in court with his counsel and matter was subsequently adjourned to 20th June 2013.

On 20th June 2013, the Chief Magistrate issued bench warrants against the 1st and 3rddefendants and their sureties to show cause. Between 20th June and 30th October, 2013 the sureties to the 1st and 3rd defendants were discharged and on the 31st of October the prosecution applied for a separate trial of the appellant. The prosecution based its application on Section 184 CPC and urged the court to rely on the testimony of the witnesses before the former court.The prosecution further based his argument on the provision of Section 167 of the Evidence Act 2011. The defence counsel stated that before the former trial Chief Magistrate declined jurisdiction, PW1 –PW4 had testified and were duly cross-examined while the PW5 only gave evidence but was not cross-examined before the trial Chief Magistrate Oba started with the cross-examination of the PW5 by the defence counsel. After which the prosecution closed its case and matter adjourned for adoption of written address on no-case submission on the 5th of December 2013. The appellant was in court to adopt his written submission on no-case but the prosecution sought for a date to file a reply. The trial court adjourned to 23rd December 2013 for the prosecution to reply.

On 23rd December 2013, the prosecution orally replied on point of law and the matter was adjourned to the 10th of March 2014 for ruling. On 10th March, 2014, the learned trial Magistrate stated that the record of proceeding from the former court had not been given to him from the central registry. He

directed the prosecution to follow-up and ensures that the record are available, thus adjourned the ruling to 19th March 2014. The Ruling was delivered on the 19th March 2014 and the defendant was charged with the offence of abetting abduction.

The counsel to the defendant applied for a recall of all the prosecution witness for further cross-examination, the prosecution did not object but placed the burden of providing the prosecution witness on the defence counsel. The defence counsel objected, trial court adjourned to 30th June, 2014 for the prosecution to recall its prosecution witness for further cross-examination by the appellant's council. It is on record that despite the adjournment, the prosecution could not locate any of the witnesses for further cross-examination.That the Investigating Police Officer in particular was on annual leave. The appellant's counsel urged the court to expunge the testimony of all the witnesses from the record of the court. The application was refused and the court called upon the appellant to open defence.

Before the defendant finally closed her case, the PW5 (ASP Gideon) was produced by the prosecution for further cross-examination by the appellant's counsel. Finally the appellant was cross-examined by the prosecution. And the defence closed its case. The appellant filed a written address which was adopted by her counsel while the prosecution did not file any address but relied on the evidence before the court, and judgement delivered accordingly.

In the instant appeal, the court is left with the appellant's brief to contend with. In the brief, the appellant formulated three (3) issues for determination to wit;

1. Whether the appellant's fundamental and constitutional rights as provided by Section 36 (1), (5) and 6 (a) and (b) of the Constitution of the Federal Republic of Nigeria (1999) as amended were breached by the trial court and same renders the trial conviction and sentencing of the appellant as null, void and of no effect?
2. Whether there was lack of jurisdiction in the entire proceeding which renders the trial, conviction and sentencing of the appellant null, void and of no effect?

3. Whether the trial court denied the appellant fair hearing which renders the trial, conviction and sentencing of the appellant null, void and of no effect?

The issues formulated for determination by the appellant can be approached from a narrow compass to wit;

Whether the whole proceedings leading to the conviction of the appellant was in breach of the provision of Section 36 (1), (5) and 6 (a) and (b) of the Constitution and the Administration of Criminal Justice Act?

From the available record of proceedings the trial court held in its judgement;

"Upon the denial of the allegation by the accused person in the bid to prove the offences alleged applied to the court that the evidence of the prosecution witnesses (PW1-PW4) which were given before the former/earlier court should be adopted. The defence counsel had no objection based on the fact that the said witnesses could not likely be traced again. This court granted the application in reliance on Section 46 (1) Evidence Act."

The prosecution also sought to adopt the evidence of the former court based on Section 184 CPC and Section 167 of the Evidence Act 2011.

It is imperative to consider the provision of Section 46 (1) of the Evidence Act as applied by the learned Chief Magistrate;

"Evidence Given by a witness in a judicial proceeding or before any person authorised by law to take it, is admissible for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in Section 39 or is kept out of the way by the adverse party.

Provided that;

- ***a. The proceeding was between the same parties or their representatives in interest.***
- ***b. The adverse party in the first proceeding had the right and opportunity to cross-examine and***

c. ***The question in issue wassubstantially the same in the first as in the second proceeding.***
2. ***A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the defendant within the meaning of this Section."***

The provision of Section 46 (1) takes its foundation from Section 39 of the Evidence Act. it must be established that the conditions stated in Section 39 of the Evidence Act exists before the invocation of Section 46 (1) of the Evidence Act.

Section 39 of the Evidence Act Provides:

"Statements whether written or oral of facts in issue or relevant facts made by a person (a) who is dead (b) who cannot be found (c) who has become incapable of bringing evidence or (d) whose attendance cannot be procured within an amount of delay or expuse which under the circumstance of the case appears to the court unreasonable are admissible under Section 40 and 50."

There is nothing from the entire gamut of the prosecution's case that prosecution witness could not be procured without unreasonable delay or that any of the conditions stated in paragraph a-c of Section 39 of the Evidence Act was complied with. The prosecution urged the trial court to rely on Section 184 CPC which provides thus;

"Whenever any magistrate after having heard and recorded the whole or any part of the evidence in an inquiry is succeeded or temporarily replaces in his office by another magistrate the magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded himself or he may on his own motion or on the reasonable demand of the accused summon all or any of the witness or recommence the inquiry."

On the meaning of an inquiry, the Criminal Procedure Code defines an inquiry as *"any inquiry other than a trial."* It is very obvious that what transpired in the appellant's case was a trial and not an inquiry. The provision of Section 184 of the Criminal Procedure Code is therefore inapplicable and we so hold.

The trial of the appellant was *"denovo"* meaning afresh. The implication is that whatever transpired before the 3rd of October2013, when the trial Chief Magistrate granted a separate trial of the appellant could no longer stand. The failure of the trial court to take a fresh plea of the appellant is also a fundamental error. And as such it infringes on the right of presumption of innocence of the appellant as enshrined in the provision of Section 36 (1) (5) 6 (a) (b) of the Constitution of the Federal Republic of Nigeria 1999 as amended.

The Supreme Court in the case of **BABATUNDE V PAN ATLANTIC SHIPPING AND TRANSPORT AGENCIES LTD (2007) 13 NWLR PT. 1050, 113 @ 147** held;

"The consequence of a trial denovo is that an order that the whole case should be retried or tried anew as if no trial whatsoever has been had in the first instance. The case must be proved anew or rather reproved denovo and therefore the evidence and verdict given are completely inadmissible on the basis that Prima facie they have been discarded or got rid of. In this case it was wrong of the trial court to say that earlier part heard trials were part of the records before the court. This was because the suit started by Agoro and Desalu J. J. were truncated and upon transfer to Adeyinka J. a fresh hearing had commenced. The proceedings and evidence taken before Agoro and Desalu J. J. were got rid of and of no legal consequence in the new trial."

See **KAFUBO V STATE (1955) 1 NWLR (PT. 73, 72), FADIRE V GBADEBO (1975) 3 SC 219per Muhammed JSC.**

From the foregoing, we do not find it difficult to hold that the entire proceedings with the attendant rulings, conviction and sentencing of the appellant is a nullity. The appeal succeeds, the conviction and sentencing of the appellant is hereby set aside. And the appellant discharged and acquitted.

S. O. ABANG: We shall be applying for cost. The appellant has served the three (3) years jail term. She was a civil servant and suspended at her place of work by virtue of the conviction. She is a widow. We are asking for **₦5,000,000 (Five Million Naira)** cost to assuage the time she has lost.

COURT: We have listened and considered the application of counsel to the appellant. Cost follows event and in this circumstance the respondent have not

deemed it necessary to prosecute this file. We are of the considered opinion that in as much as no amount of money can assuage the freedom and the dignity of the appellant, the law allow her to be compensated. We hereby award the sum of **₦200,000 (Two Hundred Thousand Naira)** as cost.

HON JUSTICE A. S. ADEPOJU	**HON JUSTICE Y. HALILU**
Presiding Judge	**Hon. Judge**
30/10/2018	**30/10/2018**