AMINU v. A.G OF KANO STATE & ANOR

CITATION: (2022) LPELR-58522(CA)

In the Court of Appeal
In the Kano Judicial Division
Holden at Kano

ON WEDNESDAY, 17TH AUGUST, 2022
Suit No: CA/KN/73/2021

Before Their Lordships:

ITA GEORGE MBABA	Justice, Court of Appeal
BOLOUKUROMO MOSES UGO	Justice, Court of Appeal
ABUBAKAR MUAZU LAMIDO	Justice, Court of Appeal

Between

YAHAYA SHARIF AMINU - Appellant(s)

And

ATTORNEY GENERAL OF KANO STATE & ANOR - Respondent(s)

RATIO DECIDENDI

1. **APPEAL - ISSUE(S) FOR DETERMINATION:** When an Appellate Court can refuse to consider an issue for determination
"The position of the law remains settled that when a trial is a nullity such as in the present appeal, other issues touching on the merit of the case should not be considered. See RUFAI VS STATE (2001) 7 SCNJ 122 and SADIQ VS STATE (2013) LPELR 22842."
Per LAMIDO, J.C.A. (P. 38, Paras. C-D) - read in context

2. **APPEAL - BRIEF OF ARGUMENT:** Duty of counsel as regards brief of argument in an appeal
"A lawyer confronted with the task of preparing a brief of argument would do well to ensure that there is an honest and straight forward prosecution of facts to the case; facts are sacred. The facts must be supported by the record of appeal and shall never be a figment of Counsel's imagination or what might have narrated to him off record. See YAKASAI VS HARUNA & ANOR (2021) LPELR 55880."Per LAMIDO, J.C.A. (P. 39, Paras. B-D) - read in context

3. **CONSTITUTIONAL LAW - SUPREMACY OF THE CONSTITUTION:** Nature and effect of the supremacy of the Constitution

"The basic law of this country is the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and by Section 1 (1) of the said Constitution, it is supreme and its provisions have a binding force on all persons and authorities throughout Nigeria. In KALU VS. ODILI & ORS. (1992) LPELR 1653 AT 68; Karibi-Whyte, JSC held that "It is both a fundamental and elementary principle of our law that the Constitution is the basic law of the land. It is the supreme law and its provisions have blinding force on all authorities, institutions and persons throughout the country - Section 1 (1). All other laws derive their force and authority from the Constitution". See AG BENDEL STATE VS. AG FEDERATION & ORS (1981) LPELR 605; ADEDIRAN & ANOR VS INTERLAND TRANSPORT LTD (1991) LPELR 88; BAKARE VS. LAGOS STATE CIVIL SERVICE COMMISSION & ANOR (1992) LPELR 711 and ABACHA & ORS VS. FAWEHINME (2000) LPELR 14.

Thus as a grundnoum, the Constitution's supremacy is retained, protected and safeguarded by the Constitution itself in that by Section 1 (3) thereof, if any other law is inconsistent with the provision of this Constitution, the Constitution shall prevail, and the other law shall to the extent of the inconsistency be void. The nature and effect of the supremacy of the Constitution was further explained in INEC VS MUSA (2003) LPELR 24927 AT 35 - 36 per Ayoola, JSC where stated that:

"Section 1 (3) of the Constitution provided that: "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void." I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised in consistently with the Constitution. Where it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the constitution has been enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those Constitution in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorized."

See TANKO VS STATE (2009) LPELR 3136."Per LAMIDO, J.C.A. (Pp. 14-16, Paras. B-D) - read in context

4. **CONSTITUTIONAL LAW - CONSTITUTIONAL PROVISION:** Whether the provisions of Section 10 of the 1999 constitution is justiciable

"Now, the issue here is whether the Kano State Sharia Law, 2000 is Constitutional. The Appellant argued that by the operation of Section 10 of the Constitution, the law as it stands is unconstitutional as the Constitution prohibits the adoption of a State religion. The Court below in its decision held that Section 10 of the Constitution is not justiciable. The word justiciable is defined in Black's Law Dictionary, 9th Edition at P 944 thus:

"A case or dispute properly brought before a Court of Justice. Capable of being disposed of judicially." Thus, whether a provision of a Constitution or a Statute is justiciable or not is dependent upon whether it is a dispute in respect of which a Court of law is entitled to invoke its judicial powers to determine under Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999. However, that judicial power shall extend to all matters between persons, or between Government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

There are however certain situations or aspects of our laws that a judicial power cannot be exercised in their respect. This can be seen in Section 6 (6) (c) and (d) of the Constitution. The said provisions state that the judicial powers of the Courts cannot be exercised or extended to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution. See OKOGIE VS AG LAGOS STATE (1981) 1 NCLR 218 and UGWU VS ARARUME (2007) ALL FWLR (PT 377) 807. And it shall not extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make such law. Section 6 (6) (c) and (d) limits the application of judicial powers in some matters and Section 10 of the Constitution relating to non-adoption of a State religion does not fall within the ambit of the sub-sections. Section 10 of the Constitution provides that:

"10. The Government of the Federation or of a State shall not adopt any religion as a State religion."

The Section has in clear terms prohibited the adoption of a State religion by either the Federal or State Governments. By the provision of Section 6 (6) (c) and (d) of the Constitution, it appears that the justiciability of Section 10 prohibiting the adoption of a State religion has been safeguarded. The Court below is therefore wrong to hold that the section is not justiciable."Per LAMIDO, J.C.A. (Pp. 18-20, Paras. B-D) - read in context

5. **CONSTITUTIONAL LAW - CONSTITUTIONAL PROVISION:** The import/purport of Section 10 of the Constitution as regards State Religion

"The word secular or secularism is defined in the Oxford Dictionary as the principle of separation of the State from religious institutions, or a thing not connected with religious or spiritual matters. It is to be noted that the Constitution itself did not expressly state that Nigeria is a secular State. That was the reason Tobi, JSC (of blessed memory) in Law, Religious & Justice, Essays in Honour of Justice Obaseki at page 7 stated thus:

"There is a great notion that Section 11 of the 1989 Constitution (which is similar to Section 10 of the 1999 Constitution) makes Nigeria a secular nation. That is not correct. The word secular etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular means the belief that state, morals, education etc should be independent of religion. What Section 11 is out to achieve is that Nigeria cannot, for example, adopt either Christianity or Islam as a State religion. But that is quite different from secularism." The Constitutional provision relating to religion which guaranteed the right of every citizen to practice a religion of his or her choice in a multi-religious and multi-cultural society as can be found in this country would appear to suggest that the opinion of Tobi, JSC are valid. What the Constitution did is to prohibit the adoption of any religion as a State religion by either the Federal or State Governments; It only entrenches religious neutrality of the State and this cannot be termed secularism."Per LAMIDO, J.C.A. (Pp. 20-22, Paras. F-B) - read in context

6. **CONSTITUTIONAL LAW - CONSTITUTIONAL VALIDITY OF LEGISLATION:** Whether the provision of the Sharia Law of Kano State 2000 is inconsistent with the provisions of the 1999 Constitution

"The contention of the Appellant is that the promulgation of the Kano State Sharia Law 2000 is tantamount to a declaration of Islam as a State religion in Kano State and thus offends the provision of Sections 10 and 38 of the Constitution. The Respondent argued the Sharia Law 2000 of Kano State does not offend the provision of the 1999 Constitution. Taking a holistic look at the provision of the Kano State Sharia Law 2000, what comes to mind is whether the law is inconsistent with the provisions of Sections 10 and 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The settled provision of the law is that any enactment passed by the National Assembly or a State House of Assembly which contravenes the Constitution of the Federal Republic of Nigeria shall be null and void as provided in Section 1 (3) of the Constitution. Furthermore, any law enacted by the House of Assembly of a State which is inconsistent with any Act of the National Assembly shall be void to the extent of its inconsistency as per Section 4 (5) of the 1999 Constitution. See ISHOLA VS AJIBOYE (1994) 7-8 SCNJ 1; IKINE VS EDJERODE (2001) 18 NWLR (PT 745) 446; AG FEDERATION VS AG LAGOS STATE (SUPRA) and OCHALA VS FRN (2016) 17 NWLR (PT 1541) 169.

I have earlier reproduced Section 10 of the Constitution, learned Counsel also argued that by Section 38 of the same Constitution there is a clear intendment from the framers of the Constitution to separate religion from the State and maintain the secularism of the nation with no religious interference. Section 38 of the 1999 Constitution provides thus:

38 (1) Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief, in worship, teaching, practice and observance.

From the above provision, it can be seen that every person is guaranteed a freedom of thought, conscience and religion including the freedom to manifest and spread his religion or belief in worship, teaching, practice and observance. But is the Kano State Sharia Law, 2000 inconsistent with the provision of Sections 10 and 38 (1) of the Constitution? The word inconsistent was defined by Tobi, JSC (of blessed memory) in NIGERCARE DEVELOPMENT CO LTD VS. ADAMAWA STATE WATER BOARD (2008) LPELR 1992 AT 37 as follows:

"The word "inconsistent" the verb variant of the noun inconsistency is the opposite of consistent. It means ideas or opinions which are not in agreement with each other or with something else. It also means mutually repugnant or contradictory, contrary the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other as, in speaking the repeal of a statute which is inconsistent with the constitution. See Black's Law Dictionary 6th Edition page 766. In the context of Section 1 (3) of the Constitution, it simply means the statute speaking quite a different language from the Constitution".

Also in AG. FEDERATION VS. AG. LAGOS STATE (Supra) AT 329; Muhammad, JSC (as he then was) defined inconsistency in the following way:-

"Inconsistency in law to me, can be taken to be a situation where two or more laws, enactments and/or rules are mutually repugnant or contradictory, contrary, the one to the other so that both cannot stand and the acceptance or establishment of the one implies the abrogation or abandonment of the other. It is thus, a situation where the two or more enactments cannot function together simultaneously".

For the Sharia Penal Code Law of Kano State to be inconsistent with the provisions of Sections 10 and 38 of the Constitutions, its provisions must be repugnant or must contradict the two constitutional provisions. Furthermore, in trying to interpret the provisions of the law and to the constitution, the Court must read together related provisions of the Constitution in order to discover the meaning of the provisions. The Court ought not to interpret related provisions of a law or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions. SeeOBAYUWANA VS. GOV. BENDEL STATE & ANOR (1982) 12 SC 51; SKYE BANK PLC VS. IWU (2017) LPELR 42505 and SOKOTO STATE GOVERNMENT & ANOR. VS. NAWAWI (2020) LPELR 51683. In line with the Constitutional provisions in Section 10, the import of which was earlier highlighted and Section 38 that guaranteed freedom of religion, it is axiomatic that the contention of the Appellant on the unconstitutionality of the Kano State Sharia Law is unfounded. Importantly, there are other Constitutional provisions that expressly incorporated Sharia Law in our legal system. For instance, Section 6 vests the judicial powers on the Courts established by the Constitution and by Section 6 (5) (f) and (g) the Sharia Court of Appeal of the Federal Capital Territory and the Sharia Court of Appeal of a State respectively are among the Courts expressly created and recognised by the Constitution. The Constitution also empowers States to create Courts for the purposes of exercising jurisdiction with respect to matters to which a House of Assembly of a State may make laws. See Section 6 (5) of the Constitution. In all these circumstances, since the Constitution itself has recognized Islamic Personal Law, incorporated same as part of the legal system of the country, and makes further allowance for the States to create Courts and confer jurisdiction on matters with the competence of the States, then it would appear that Islamic law cannot be regarded as unconstitutional. The law is trite that a Court will not hold an Act or Law to be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter whatsoever, expressly or impliedly by necessary implication. See AG ONDO STATE VS. AG. EKITI STATE (2001) LPELR 622 and APCON VS. REGD. TRUSTEES OF INT'L COVENANT MINISTERIAL COUNCIL & ORS. (2010) LPELR 3630. While Section 10 prohibits adoption of a State religion by the Federation or by any of the States of the Federation, Section 38 protects the rights of the citizen to practice their religion and propagate their religious beliefs in worship, practice and observance. In this sense, the promulgation of the Sharia Penal Code does not in anyway amount to the adoption of Islam as a State religion of Kano State. In the same respect, Section 38 actually confers on the people of Kano State who majorly are Muslims to have their lives regulated by sets of laws ordained by their religion. Having examined the provisions of Sections 10 and 38 of the Constitution of the Federal Republic of Nigeria, 1999 which Sections learned Counsel for the Appellant argued vociferously are breached by the Sharia Penal Code Law of Kano State, it seems that the arguments of Counsel are more of sentiments than law. Upon a calm and holistic reading of the Constitution as a whole, it cannot be said that the Sharia Penal Code Law of 2000 is contrary to its provisions."Per LAMIDO, J.C.A. (Pp. 23-29, Paras. A-B) - read in context

7. **CONSTITUTIONAL LAW - SEPARATION OF POWERS:** Doctrine of separation of powers and its essence

"Our democracy is anchored upon the principles of separation of powers between the Legislature, the Executive and the Judicial arms of Government. This provides various checks and balances on the activities of various organs."Per LAMIDO, J.C.A. (P. 22, Paras. B-C) - read in context

8. **CONSTITUTIONAL LAW - CONSTITUTIONAL PROVISION:** Whether the provisions of Section 10 of the 1999 constitution is justiciable

"...In determining the above issue, which was raised at the lower Court, their Lordships simply adopted their previous position in the case of Umar Farouk Vs Comm. of Police: K/40CA/2020, where they had opined that Section 10 of the Constitution of the Federal Republic of Nigeria is not justiciable. (See Page 10, Paragraph 5.00 of the Appellant's Brief).

That position of the Learned Justices of the High Court, with respect, was wrong, as Section 10 of the Constitution forms part of Chapter 1, Part II, of the Constitution, dealing with the powers of the Federal Republic of Nigeria, and providing for the arms of government, and specifying the limits and functions of the various arms of government - Executive, Legislature and Judiciary. The provisions therein, are mandatory and appear to form the soul of the Nation as a Union a Federation of States.

Thus, when Section 10, it says:

"The Government of the Federation or of a State shall not adopt any religion as State Religion." I believe the above provision, with the key phrase, SHALL NOT (which has mandatory interpretation) was meant to protect the multicultural composition of the various people and groups that make up the Federal Republic of Nigeria, and to check any tendency of any powerful zealot or individual, emerging to jeopardize or destabilize the unity and peace of the Nation, by introducing/or and imposing his own ideas, views and/or way of worship/religion on the Nation, or any part of it (State), as Nation/State religion. The Section 10 of the Constitution is not part of Chapter 2 (Sections 13 to 24 of the Constitution), which are specified as non-justiciable part of the Constitution, which provides for the Fundamental Objectives and Directives Principles of State Policy. The said provisions spell out why the government exists and enjoins the leaders to adopt same, as policy thrust of the government - at Federal and State levels, to translate those lofty objectives into reality, for the good of all. Thus, where a government fails to translate these policies (Chapter II of the Constitution) to action, it loses the right to remain in power. But citizens cannot take Court action against the managers of the policies (except such aspects that may have been made actionable by statute). The only remedy available is to the people would be to vote out such a government! See the Pamphlet, CITIZENSHIP RIGHTS & TRIALS: CALL FOR PATRIOTISM (2017) by Ita Mbaba, P. 9 - 12, wherein I said:

"Non-justiciable rights are not personal rights, and so cannot be enforced in a Court of law, that is, one cannot sue to enforce the application of such right by him, though he enjoys a sensual feeling of same as his right. An example of this is the understanding that the government exists for his security and protection and he has right to partake in the government. The Chapter II of the Constitution... titled:

"... Fundamental Objectives and Directive Principles of State Policy, merely reveals the Policy thrust of government, but has no way of enforcing them (causing government to translate the Policies to action). See Section 6(6)(c) of the Constitution:

"The judicial powers vested in accordance with the forgoing provisions of this Section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or persons or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive principles of State Policy set out in Chapter II of this Constitution."

As earlier stated, in this judgment, the Section 10 of the Constitution is enforceable and justiciable, and so no government, either at the Federal or State level, can declare or adopt any religion as State Religion. And any enactment of legislation by any Federal or State Legislature, which purports to declare or adopt any religion as State Religion, or any provision thereof, to suggest imposing any religious law or tenet on the State, as State religion, is and remains null and void, to the extent of its conflict with the Section 10 of the 1999 Constitution, as amended. See also Sections 1(1) and 4(5) of the 1999 Constitution, as amended." (DISSENTING)Per MBABA, J.C.A. (Pp. 122-125, Paras. B-E) - read in context

9. **COURT - DUTY OF JUDGE:** Duty of a judge not to descend into the arena
"A Court cannot descend into the arena of conflict to make a case for any party. SeeObi Vs A.G. Imo State (2014) LPELR-24280 CA:
"...A trial Judge must not be seen to descend into the arena of conflict in a trial, to generate evidence or facts not canvassed or adduced by witness(es) or apparent on the face of the records before him, to decide a case, See the case of Theophilus Ajakaiye vs. The State: CA/OW/70C/2012, delivered by this Court on 5/12/14; Ayoade vs. Spring Bank Plc (2014) 4 NWLR (Pt 1396) 93AT 128" (DISSENTING)Per MBABA, J.C.A. (P. 116, Paras. A-D) - read in context

10. **CRIMINAL LAW AND PROCEDURE - DEATH SENTENCE:** Whether an offence carrying the death penalty can be regarded as trivial
"Can an offence carrying death penalty be regarded as trivial? The word trivial is defined in Blacks Law Dictionary, 11th Edition P 1816 as "trifling; inconsiderable; of small worth or importance". In the circumstances, the offence created under Section 382 (b) of the Sharia Penal Code Law of Kano which upon conviction carries death Penalty cannot be regarded as trivial."
Per LAMIDO, J.C.A. (P. 41, Paras. D-E) - read in context

11. **CRIMINAL LAW AND PROCEDURE - PLEA OF GUILT:** Effect of a plea of guilt by an accused to a capital offence
"The law is clear that a plea of guilty by an accused person to a charge carrying capital punishment amounts to plea of not guilty imposing a duty on the Prosecution to prove the charge and every ingredients of the same, as required by law. See Section 276(3) of the ACJL Kano state.
That means no trial can possibly be conducted on the alleged plea of guilty by the Appellant at the trial Sharia Court and everything done by the trial Court amounted to a nullity, including the purported charge to which Appellant pleaded guilty, in my view." (DISSENTING)Per MBABA, J.C.A. (Pp. 114-115, Paras. E-A) - read in context

12. **EVIDENCE - EVIDENTIAL VALUE:** Whether a newspaper report/items in the news media has any evidential value
"As for learned counsel's reference to a purported CNN Report on the issue, such Report cannot be properly cited as evidence for the Court to rely on in so far it is not part of the records and no attempt was made to admit it as fresh evidence in this appeal. At any rate the said Report, even if admitted, is weightless in so far as its maker was not tested by way of cross-examination on his assertions: see Udom v. Umana (No 2) (2016) 12 NWLR (Pt. 1526) 179 @ 283 @ 284, Udom v. Umana (No 1) (2016) 12 NWLR (Pt. 1526) 243- 244. In fact, such a report is at best documentary hearsay evidence coming from the Appellant's counsel: see Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452 @ 526; Sa'eed v. Yakowa (2013) ALL FWLR (PT 692) 1650 @ 1675. The law is also well settled that Newspaper Report and other items in the news media have no evidential value: see Ojukwu v. Yar'aduda (2009) ALL FWLR (Pt. 482) 1065 @ 1118 para G; Olly v. Tunji (2012) ALL FWLR (Pt. 654) 39 @ 97 para, R.N. W.H. v. Sama (1991)12 NWLR (Pt. 171) 64 @ 77."Per UGO, J.C.A. (Pp. 67-68, Paras. E-D) - read in context

13. **ISLAMIC LAW AND PROCEDURE - ISLAMIC LAW:** Position of the law as regards the constitutionality and the extent of the application of Islamic Personal Laws/Sharia law

"Is the application of the Sharia Law and Sharia Principles, as enshrined in the Sharia Penal Code of Kano State, 2000, a declaration of State Religion and unconstitutional? I do not think so, going by the complexities of the 1999 Constitution of the Federal Republic of Nigeria, which, in my view, has many areas of internal conflicts and pretences, and which any mischievous leader can exploit to cause confusion and disaffection, where he opts to pursue selfish religious/political goals.

Whereas, the Section 10 of the Constitution forbids implosion or declaration of any religion, as State religion, either at the Federal or State level, and Sections 1(1) and 4(5) of the Constitution, automatically, strikes down any law by a State Assembly that runs counter with the Constitution (as amended) or with laws made by the National Assembly, the Sections 38 and 42 of the Constitution, dutifully, protects the rights of every individual to his faith and religion, and protects his right to worship and propagate his faith, anywhere in the Country, that being part of his basic human rights, recognized and respected all over the world. Thus, religious rights and freedom of every citizen is guaranteed in the Constitution. Moreover, various Sections of the Constitution, including 6(5) (f)(g), 237, 240, 244, 260, 261, 262, 263, 264, 275, 276, 277, 278, 279 etc, by deliberate design, expressly incorporated the concept of Sharia Law in the body of the Constitution, and provided for Sharia Courts and Sharia Court of Appeal, to observe and regulate Sharia personal laws of the adherents of Islamic Faith, and the composition of the superior Courts (including this Court) is made to reflect those with knowledge of Islamic personal law (Section 237).

In such a scenario, it would be absurd and wrong, in my opinion, to consider or see the operation of Sharia principles of law as unconstitutional in Nigeria, as the people of Islamic Faith are entitled to the protection of the law, as enjoined by principles of fundamental rights, and it would appear to be a violation of their right to faith and religious belief, to do otherwise. But then one should be concerned or worried about introduction and enforcement of religious precepts that allows for killing of a citizen of Nigeria, for insulting a religious creed leader or God, when the leader/God is always tolerant, merciful and forgiving, allowing the errant soul to repent! In the same way, the application of such principles (Sharia principles) must not be made or enforced against non-adherents of the Islamic faith, or made to put them (non-adherents) in danger/disadvantage, in any way, as they, too, are entitled to practice, observe and enjoy their religious faith/rights and obligations, without discrimination.

That is the essence of Sections 38 and 42 of the Constitution, which state:

(38) (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in Subsection (1) of this Section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.

The ultimate duty/responsibility lies with the leaders, at the various arms, particularly the Executives - President, Governors) in their practices and exercise of their individual faiths, to restrain themselves from imposing their said faith on the state/nation, or any department they serve, for personal or political gains, by turning the machinery of government to projecting and pursuing their private religions/political interests, to the detriment and annoyance of non-adherents of his/her faith.

Thus, where the Sharia principles advance the Islamic personal faith of the adherent, within the confines of the 1999 Constitution, as amended, I do not see any problem with that, as the same is protected by the Constitution. But where the Sharia principles extend beyond Islamic personal law, to criminal liability, I think, in so far as the principle is restricted to, and applied against only adherents of the Islamic faith, who, by election, accepts to be governed by the said legal principles, the said principles of law can be enforced on him/her, as long as he/she remains in that faith.

For the purpose of this case, I think the Appellant, being a Muslim, would be expected to abide by the principles of his religious tenets, laws/faith and subject to its laws. The trouble/problem would be where the said principles of law are applied against persons who are non-Muslims, or even where one is a Muslim, is attacked by mob-action, on allegation of infringement of any such religious tenets, creed or laws.

The decision of Hon. Justice Tanko Muhammad JCA (later CJN) on this, in the case of SHALLA VS STATE (2007) LPELR - 3034 (SC), is quite instructive, where he held:

The actual words of insult allegedly uttered by the deceased were not known. The appellants along with others (now at large) however, constituted themselves into a fanatical Islamic vanguard or a religious vigilante group and upon hearing the rumour, took it upon themselves to go in search of the deceased who was alleged to have insulted the Holy Prophet (S.A.W). Even before seeing or hearing him, they had already passed a sentence or judgment against him that he must be killed for his offence under Sharia as recommended in both the Quran and Risala. They even made a threat to kill his master PW2 by name Aliyu Magga who they believed was hiding the alleged culprit in his place if he was not found. When they went to the Village Head of Randaii to whom they reported the matter and who did not approve their plan to kill the deceased, they still proceeded in their crusade to execute their planned or premeditated murder of the said deceased. Even when they were advised by one Ustaz Mamman that it was not their responsibility but that of the Court or Judge to punish the deceased as a person who insulted the Holy Prophet, they shunned that advice and described the Ustaz as a non-muslim himself and went on with their plan to kill the deceased.

In any case, even on the assumption (although without any proof) that the deceased had in some way done anything or uttered any word which was considered insulting to the Holy Prophet Mohammed (SAW), was it open to the appellant and others with him to constitute themselves into a Court of law and pronounce the death sentence on another citizen? Plainly, this was jungle justice at its most primitive and callous level. The facts of this case are rather chilling and leave one wondering why the appellant and the others with him committed this most barbaric act. It cannot escape notice that the victim of this reckless and irresponsible behaviour is another Moslem, an Alhaji. I am greatly pained by the occurrence.

The Supreme Court further said:

"Islamic religion is not a primitive religion that allows its adherents to take the laws into their own hands and to commit jungle justice. Instead, there is a judicial system in Islam which hears and determines case including the trial of criminal offences and anybody accused of committing an offence against the religion or against a fellow Muslim brother should be taken to the (either Sharia or a Secular/Common Law Court) for adjudication. It is only when a person is convicted and sentenced by a Court of Law that he will be liable to a punishment which will be carried out by an appropriate authority (i.e. the Prison). Although it is true that there is the provision in Risala which prescribes the punishment of death on any Muslim who insults the Holy Prophet such punishment can only be imposed by the appropriate authority (i.e. the Court) rather than by any member of the society whether a Muslim or otherwise..."

Thus, there is no room for mob-action, to kill and lynch by any mob, cleric or aggrieved bystanders or persons alleging offence of blasphemy or any infraction of religious law against any person, until the Court finds him culpable, convicts and sentences him to death, and even then, the death sentence must be executed by the appropriate authority. But everybody is enjoined to be tolerant of others and show maximum respect for the feeling, belief and views of others." (DISSENTING)Per MBABA, J.C.A. (Pp. 125-134, Paras. E-D) - read in context

14. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Instances where an order of retrial will be made

"A retrial is in most cases ordered where the offence with which the accused was convicted is a capital offence. In MOHAMMED VS. THE STATE (Supra) at 13-14; Rhodes-Vivour stated that:-

"Before ordering a retrial it is mandatory that the Judge examines the evidence to see the chances of success. For example, if the charge is for an offence which carries a term of years of imprisonment if found guilty and the accused person has already spent those years or more in custody awaiting trial or for trial, a retrial should not be ordered. If on the other hand the Appellant is/was charged for a capital offence and the evidence reveals a likely conviction, a retrial ought to be ordered in the interest of justice".

Also, in ELIJAH VS. THE STATE (Supra) at p. 23; Galadima, JSC held that:-

"The offence of which the Appellant was convicted is grave and not merely trivial. It is unfair to suggest that the proper trial of the Appellant for the offence of armed robbery would be unjust and oppressive. This is a case where the wheel of justice even if rolled by gently would eventually serve the end of justice. The evidence before the lower Court in this case does not suggest that it will be unfair or unjust to subject the Appellant to a second trial from which he would eventually be acquitted.". In view of the severity of the penalty in Section 382 (b) of the Sharia Penal Code, the order of retrial made by the Court below was proper. Though the Appellant's Counsel christened it a victimless crime, a trivial offence, the sentiments expressed by learned Counsel are not in tandem with the provision of the law with which the Appellant was charged. Since the Appellant was arraigned under a written law, it is expected that the Appellant should face his trial to be either acquitted of the charge against him if there is no evidence or to be convicted accordingly where the prosecution is able to prove the charge against the Appellant beyond reasonable doubt. It is only in this situation that the justice would be seen to be done. The offence with which the Appellant is charged with relates to religion and offensive to all Muslims whose religion has been desecrated or insulted. To refuse an order of retrial would definitely occasion greater miscarriage of justice. Retrial will safeguard instances where the people in the community may choose to take laws into their hands. See SHALLA VS. THE STATE (2007) LPELR 3034."Per LAMIDO, J.C.A. (Pp. 41-43, Paras. F-F) - read in context

15. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Circumstance where an order of retrial made in respect of an accused person will not be regarded as oppressive

"From the record of appeal, the Appellant was arraigned before the trial Court on 20/03/2020 and the trial commenced by taking his plea on the same date. Judgment was delivered on 10/08/2020 convicting the Appellant and by 21/01/21 his appeal was argued and judgment delivered by the Court below. Thus, it took less than one year from the arraignment of the Appellant to the conclusion of his appeal before the Court below. In the circumstances, I do not think going by the history of this case and the period the Appellant has been in detention taking into consideration the nature of the charge against him, the order of retrial by putting him on trial for a second time would be regarded as oppressive. In ODOEMENA VS COP (1998) 4 NWLR (PT 547) 697; Tobi JCA (as he then was) held thus:

"In my view, one special circumstance is the duration of time between the first trial and the order of retrial. If there is so much time lag between the completion of the first trial and a consideration by an appellate Court to order a retrial, the Court will refrain from doing so. The consideration of the time lag will again depend on the special circumstances of the case."

There being no much time between the trial and the hearing of the appeal which is less than a year show that second trial in the form of a retrial would not be oppressive to the Appellant."Per LAMIDO, J.C.A. (Pp. 39-40, Paras. E-E) - read in context

16. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Principles that guide the court in making an order of retrial

"The principles of ordering a retrial are well stated in the locus classicus ABODUNDU & ORS. VS. THE QUEEN (1959) 1 NSCC 56 AT 60 where Abbot, FJ held thus:-

"We are of the opinion that before deciding to order for a retrial, this Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) 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 this Court 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 a trial a second time (d) that the offence or offences of 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 for retrial would occasion a greater miscarriage of justice than to grant it".

See ELIJAH VS. THE STATE (2013) LPELR 20095; MOHAMMED VS. THE STATE (2013) LPELR 19822; BUDE VS. THE STATE (2016) LPELR 40435 and KALU VS. THE STATE (2017) LPELR 42101."Per LAMIDO, J.C.A. (Pp. 32-33, Paras. C-C) - read in context

17. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Whether a Court who declared a trial at the lower Court a nullity can make an order for retrial of same

"The contention of the Appellant is that having declared the trial a nullity and consequently setting aside the decision of the trial Court, the Court below has no power to order a retrial. The reality of this contention will now be examined in line with established cases and pronouncements made by this Court and Supreme Court on the issue. In UDO VS. THE STATE (1988) LPELR 3299 1 (1988) 3 NWLR (PT. 82) 316; the Appellant was charged before the High Court for murder and at the conclusion of the trial he was convicted and sentenced to death. His appeal to the Court of Appeal was unsuccessful and he further appealed to Supreme Court. One of the issues for determination at the Supreme Court was whether the Appellant had a fair trial for failure of the Court to assign to him the Counsel who was defending him when the Counsel said he could no longer do so because he was not sure who would pay him. In the end, the Supreme Court allowed the appeal, set aside the conviction and sentence on the Appellant and ordered a retrial before another Judge. Also in YAHAYA VS. THE STATE (2002) LPELR 3508, the Appellant was charged with murder before the High Court and he was convicted and sentence to death. His appeal to the Court of Appeal was dismissed and on appeal to the Supreme Court, the Court per Uwais, JSC (later CJN) held thus:-

"Having held that the trial has been vitiated ab initio and is therefore null and void, it will not serve any useful purpose and will be academic to consider the remaining two issues for determination formulated in the Appellant's brief of argument.

The appeal therefore succeeds. The conviction and sentence passed on the Appellant are hereby quashed. I order a new trial of the Appellant before another Judge of the High Court of Ogun State other than Bode Popoola, J. to be assigned by the Chief Judge of Ogun State".

See ELIJAH VS. THE STATE (2013) LPELR 20095; LASISI VS. THE STATE (2013) LPELR 20715; OMAJAYI VS. THE STATE (2014) LPELR 22059; ADEWOLE VS. THE STATE (2016) LPELR 42801 and YAHAYA VS. FRN (2019) LPELR 46379. The authorities cited above did not suggest that where a decision of the trial Court is rendered a nullity or where it is wholly set aside an order of retrial cannot be made. It is axiomatic to think or suggest that an order of retrial can be made without rendering the earlier decision void or a nullity or without setting that decision aside. A situation would present itself where the Appellant will face a retrial with a conviction of the earlier trial hanging on his head; and that cannot in anybody's wildest imagination be the intendment of the law. The earlier decision must as a matter of law and procedure be made to give way for another trial to take place. It is only in such circumstances i.e declaring an earlier trial a nullity or setting it aside or quashing the conviction that the coast is set for a

fresh trial. Thus, I think learned Counsel had misunderstood the purport of an order of retrial and how it is to be made.

Now, was the order for retrial made by the Court below proper? This appears to be the main issue to be considered in this appeal. Learned Counsel for the Appellant cited in aid the cases of HASSAN VS. FRN (2016) LPELR 42804 and ABODUNDU & ORS. VS. QUEEN (1959) 1 NSCC 62. I have combed the entire law pavilion but could not lay my hands on the case of HASSAN VS. FRN (Supra). That notwithstanding the principles learned Counsel for the Appellant wanted to draw the Court's attention to were the same principles enunciated in the locus classicus ABODUNDU & ORS. VS. THE QUEEN (Supra) and as such those principles will be applied to the facts of this case so as to see whether the order of retrial made by the Court below is justified in the circumstances. Firstly, is there an error in law or an irregularity in procedure of such a nature that on the one hand, the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice. The Appellant argued that since the trial was rendered a nullity by the Court below, the first condition goes to favour the Appellant. The Court below found that the Appellant was not represented by a Counsel at his trial in a charge carrying death penalty contrary to Section 269 (1), (3) and (4) of the ACJL of Kano State, 2019 and voided the trial. The fact that the trial was nullified by the Court below does not inhibit its powers to order for a retrial. In MOHAMMED VS. THE STATE (2013) LPELR 19822 AT 13-14; Rhodes-Vivour, JSC held that:-

"The well settled position of the law is that when a trial is declared a nullity a retrial is ordered if and only if the interest of justice so requires. SeeQUEEN VS. EDACHE (1962) 1 ALL NLR 22;KAJUBO VS. THE STATE (1988) 1 NWLR (PT. 73)721". The Court as per the record found out that the trial was characterized with procedural irregularities in failing to afford the Appellant opportunity to engage a Counsel and also in entering a plea of guilty in a charge carrying penalty of death i.e capital offence. The position of the Court below is proper in the circumstances. It is unassailable. Thus, the mere fact that the trial was rendered a nullity by the Court below, does not extinguish its powers to order for a retrial."Per LAMIDO, J.C.A. (Pp. 33-38, Paras. D-A) - read in context

18. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Instance where an order of retrial will not amount to double jeopardy

"Finally, the Appellant's Counsel urged that the order of retrial offends the provision of Section 36 (9) of the 1999 Constitution. The Section provides that:-

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 above provision is aimed at protecting citizens from what is known as double jeopardy. For a person to benefit from the provision, he has to show that he was tried by a Court of competent jurisdiction, that he was either convicted or acquitted and the subsequent charge brought against him is similar to the charge he was either convicted or acquitted. See KALU VS. NIGERIAN ARMY (2010) 4 NWLR (PT. 1185) 433; PML SECURITIES CO. LTD. VS. FRN (2018) LPELR 47993 and THE STATE VS. ALAEFULE (2020) LPELR 49789. The plea in bar can only be successfully invoked where it can be shown that a person was either convicted or acquitted which the present Appellant cannot show. Thus, ordering a retrial by the Court below cannot offend the provision of Section 36 (9) of the Constitution. Moreso, the section specifically states that "save upon the order of a superior Court".

On the whole, the Court below was perfectly on a good footing to make an order of retrial. That order, in the circumstance is the only option open to the Court below and not to discharge or acquit the Appellant.

The Appellant shall feel free to ventilate his grievances at the trial Court if any."Per LAMIDO, J.C.A. (Pp. 43-45, Paras. F-B) - read in context

19. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Principles that guide the court in making an order of retrial

"It is almost impossible to discuss the propriety of a retrial order in a criminal appeal without mentioning the decision of the Federal Supreme Court in the locus classicus of Abiodundu & Ors v. The Queen (1959) 4 F.S.C. 70. There, the Federal Supreme Court while observing that a retrial order is discretionary so it is unwise to lay down exhaustive principles or grounds for the exercise of that power as it may not be possible to foresee all the combinations of circumstances in which the question of ordering a retrial may arise, proceeded to state that "before ordering a retrial the Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) 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 that there has been no miscarriage of justice; (b) that leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (C) that there are no 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, or the consequences to the appellant or any other person of the conviction or acquittal are not trivial; and (E) that to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it."Per UGO, J.C.A. (Pp. 61-62, Paras. B-C) - read in context

20. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Whether a Court who declared a trial at the lower Court a nullity can make an order for retrial of same

"First is the argument that the lower Court having declared the 'trial' of the Appellant by the Upper Sharia Court a nullity it means that there was nothing to retry him for so that order was wrong. This argument clearly does not represent the current state of the law. First, it must be noted that the Appellant did not join issues with the prosecution upon his arraignment. He rather entered a plea of guilty, so there was no trial, strictly speaking, before that Court in the real sense of the word, for 'trial' means "the formal examination before a competent tribunal of the matter in issue in a civil or criminal case in order to determine such issue" - see Merriam Webster's Online Dictionary. Where an accused person pleads guilty to an offence as the Appellant did, albeit wrongly, before the trial Upper Sharia Court, the Court simply proceeds to judgment and sentence without trial, because there is no matter in issue to be tried. See Oputa, JSC in Onuoha v. State (1988) LPELR-2706 (SC) p.20 and in Stephen v. State (1986) LPELR-2706 p.48, (1986) 5 NWLR (Pt. 46) 978 at 1005; Tobi JSC in Omoju v. F.R.N. (2008) ALL FWLR (Pt 415) 1656 @ 1674. See even much more recently Adamu v. F.R.N. (2020) 2 NWLR (Pt. 1707) 129 @ 163 where Eko, JSC, said that an accused person's plea of guilty to a charge is tantamount to a consent judgment. From the foregoing reasoning, it follows that any evidence produced by the prosecution after a plea of guilty - as in the case of Exhibits A and B attacked by which Mr. Alapinni as being tendered without compliance with Section 84 of the Evidence Act - is not normally put through the formalities of the law of evidence and admissibility as would be done in a contested trial. In fact, such evidence is usually simply produced from the Bar without any room for objection and marked without further ado: see Adamu v. F.R.N. (2020) 2 NWLR (Pt. 1707) 129 @ 162, Omoju v. F.R.N. (2008) ALL FWLR (Pt. 415) 1656 @ 1674 (SC); Emma Amanchukwu v. F.R.N. (2009) LPELR-455 (SC) P. 14-15. It follows, therefore, that the failure to follow strictly the procedure stated in Section 84 of the Evidence Act in admitting Exhibits A and B cannot be erected as a ground against the lower Court's retrial order. At any rate, it is not the current position of the law that once a proceeding is declared a nullity a retrial order cannot be made. Decisions abound - among them Sele Eyorokoromo & Anor v. The State (1979) 6-7 (SC) p.11 -12; Sunday Kajubo v. State (1988) NWLR (Pt. 83) 721, (1988) LPELR-1646 (SC); 721, Alfred Elijah v. The State (2013) LPELR-20095 (SC); Akpiri Ewe v. The State (1992) LPELR- 1179 (SC) - that state the contrary. In Sunday Kajubo v. The State (1988) LPELR-1646 (SC) 1, Oputa, JSC, spoke at length on this issue thus:

"This naturally leads to the questions - Can and when should a new trial or retrial be ordered after declaring a trial a nullity and allowing the appeal? If an appeal is dismissed that question will not arise. The answer to the question can a new trial be ordered is definitely yes. Part of the answer to the question when such a trial can be ordered can be found in principles (b), (c), (c) and (e) as formulated in Abodundun's case supra and part of it will be found in the reason for declaring the trial a nullity in the overall interest of justice. A trial may be declared a nullity on many grounds:

(i) the charge may be incurably defective as was the case in Okoro's case supra.

(ii) The arraignment may be irregular, null and void as happened in the case now on appeal.

(iii) The trial Court may have no jurisdiction to try the case as inR. v. Shodipo 12 WACA 374 or Oruche v. C.O.P. (1963) 1 ALL N.L.R. 262.

(iv) The trial may be null and void as a result of a serious error or blunder committed by the trial Court as was done in Adisa's case supra where there was a total failure to ask the appellant to plead to the amended charge." His Lordship rounded off on the issue by saying that:

"The general statement made in Onu Okafor's case supra at p.20 that "Retrial implies that there was a former trial and so this Court will not grant a new trial (or retrial) upon a trial which was null and void" does not now seem to represent the true legal position especially after the decision of this Court in Sele Eyorokoromo and Anor v. The State (1976) 6-9 S.C.3 at pp.11/12.

"A new trial or retrial can definitely be ordered if the interest of justice so requires: see Reid v. The Queen (1979) 2 W.L.R. 221 @ p.226. (Italics mine)

See also Alfred Elijah v. The State supra where it was said (Ngwuta, JSC) at p. 31-32 that:

"There is a general statement to the effect that: Retrial implies that there was a former trial and so the Court cannot grant a new trial (or retrial upon a trial which was a null and void." In view of the later decision in Sele Eyorokoromo & Anor v. The State (1979) 6-7 (SC) p.11-12, the position is that a new trial can be ordered if the interest of justice so requires. See Reid v. The Queen (1978) WLR 221 @ 226 applied in Sunday Kajubo v. The State (1988) 1 NWLR 721 @ 744."Per UGO, J.C.A. (Pp. 62-67, Paras. D-A) - read in context

21. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Principles that guide the Court in making an order of retrial; whether a Court who declared a trial a nullity can make an order for retrial of same

"Commenting on the case of Abodundu Vs The Queen (1959) 1 NSCC 62, the Supreme Court in the case of First Bank of Nigeria Vs May Medical Clinics and Diagnostic Centre Ltd & Anor (2001) LPELR - 1282 (SC) said:

In Duru v. Nwosu (1989) 4 NWLR (Pt. 113) 24 at 43 per Nnamani JSC, it was observed: "in Okoduwa v. State (1988) 2 NWLR (Pt.76) 333, 355 this Court accepted one of the tests postulated in Abodundu v. The Queen (1959) 1 SCNLR 162, (1959) 4 FSC 70, which is that a Court of Appeal ought to order a retrial where there has been such an error in law or an irregularity in procedure, which neither renders the trial a nullity nor makes it possible for the appeal Court to say there has been no miscarriage of' justice." This is a principle which is intended, in my opinion, to deal with situations where there have been some grotesque occurrences in the determination of a case that cannot be explained. In such a situation there may not be sufficient legal reasons to regard the trial a nullity, but the Court is unable to say that there has been no miscarriage of justice. Hence, In the Abodundu's case at page 166, Abbott F.J. who delivered the judgment of the Court said: "in formulating these principles we do not regard ourselves as deciding any question of law or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of circumstances in which the question of ordering a retrial may arise..." Per UWAIFO, JSC

See also the more recent case of State Vs Mathew (2018) LPELR-43712 (SC), where it was held:

Getting back to the order of the Court of Appeal which was for retrial or trial de novo, it has to be said that it is not an order that is to be made offhand or unadvisedly as the Supreme Court has laid down some guides on which such an order could be made and for this, I shall refer to the case of Salisu Tahaya (2002) 2 SCNJ 7 this: (a) That there has been an error in law including the observance of the law of evidence, or an irregularity in procedure of such a character that on the one hand, the trial was that not rendered a nullity and on the other hand, the Court is unable to say that there has been no miscarriage of justice. (b) That leaving aside the errors at irregularity, the evidence discloses a substantial case against the appellant. (c) That there are no such special circumstances as would render it an oppressive case against the appellant (d) That the offence or offences of which the appellant was convicted or the consequences to the appellant or any other to the conviction or acquittal of the appellant are not mere trivial (e) That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it. (f) That to enable the prosecution adduce evidence against the appellant which evidence convict him, when his success at the appeal is based on the absence of that same evidence. From the guiding principle, it is clear that a retrial would definitely be oppressive to the respondent and the interest of justice compromised. There is really no distinguishing features between the present case and that of Idowu Okanlawon v The State (2015) LPELR-284 as whether or not the Legal instrument establishing the Public Defender or citizens Rights Department did not specify that it would be or not be a Department of the Ministry of Justice." Per PETER-ODILI, JSC There is a plethora of authorities, therefore, to the effect that appellate Court cannot remit a case for a fresh trial, after it had held that the trial in the Court of first instance was a nullity. But that where the trial was not a nullity, but plagued with irregularities, each order depends on the peculiar circumstances of each case, having regards to the principles already listed above. See Elijah Vs State (2013) LPELR-20095 (SC); FRN Vs Yahaya (2019) LPELR-46379 (SC).

In the case of the Chief of Air Staff & Ors Vs Wing Commander P.E. Iyen (2005) LPELR-3167 (SC), it was held that the order for retrial should not be made in a manner that portends giving the prosecution a second chance to lead more credible evidence against the accused person, or to cure the deficiencies in the case it earlier led against the Accused person. It held:

I now go straight to the issue of a retrial. As it has a common law origin, I should first take what Lord Diplock said in Reid v. The Queen (1979) 2 WLR 221 at page 226 and 227 and I will quote him in great length: 'Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the Judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interest of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant... The seriousness or otherwise of the offence must always be a relevant factor, so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the Court and jury would be involved on a fresh hearing may also be relevant considerations. So too is the consideration that any communal trial is, to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for the second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless, there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and if this were so, it would be a powerful factor against ordering a new trial."

In the case of Onwe Vs The State (2017) LPELR-42589 SC, it was held:

The justice of this case demands that the appellant should not go through the ordeal of a retrial again especially when he had served a substantial part of his sentences. In the case Erekanure v. The State (1993) 3 NWLR (Pt. 294) 25, Olatawura JSC observed at page 394: 'I am of the firm view that retrial", trial", "trial de novo" or "new trial" can no longer be automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which forms the background!' As mentioned above, the right of the appellant has to be protected from prejudice, in other words, an order for retrial cannot be made in a situation where the appellant is exposed to prejudice. In the instant case, since the appellant has spent a substantial part of his sentence imposed by the trial Court, it will be oppressive for the appellant to be tried for the send time."

And in the case of Nnadike & Anor Vs Nwachukwu (2019) LPELR-48131 SC, it was held:

The Appellants' main grouse in this appeal is that there were no circumstances to warrant the order of retrial made by the lower Court since they were able to prove their case and entitled to the reliefs claimed against the Respondent. They opined that the order of retrial must be exercised judicially and judiciously. That the lower Court based on the foregoing, rather than order a retrial, it ought to have exercised its power under Section 16 of the Court of Appeal Act, to set aside the order for the transfer of the said C of O since it has the power to settle the issue finally and completely between the parties as contained in the evidence. I must align myself with the decision of my learned brother, Amina Augie, JSC, in holding that the order of retrial by the lower Court in this case was not necessary. Appellate Courts will not order retrial in the following instances: 1. A retrial will be ordered if it will satisfy the interest of justice. Therefore where a retrial will result in injustice or a miscarriage of justice, an appellate Court will not order a retrial. 2. A retrial cannot be ordered as a mere course, routine or fun; it must be based on valid procedural reason or reasons. 3. A retrial cannot be ordered to enable parties to have a second bite at the cherry to repair their case and come back in full force to present a fresh case. That will be a very smart one and appellate Courts will not encourage such smartness. 4. A retrial cannot be ordered to compensate a losing party. In other words, a retrial cannot be ordered when the plaintiff's case has completely failed or failed in toto, and there is no substantial irregularity in the conduct or the case. 5. An appellate Court will not order a retrial on the ground of irregularity or lapses in the conduct of the proceedings if the irregularity or lapses complained of can be corrected by the appellate Court. 6. An appellate Court will not order a retrial if there are no special circumstances warranting the retrial. A special circumstance will not be determined in vacuo but in the light of the fact of each case. See Per TOBI, JSC in OKOMALU V. AKINBODE & ORS (2006) LPELR-2470(SC)." (DISSENTING)Per MBABA, J.C.A. (Pp. 104-113, Paras. E-A) - read in context

22. **JUDGMENT AND ORDER - ORDER OF RETRIAL/TRIAL DE NOVO:** Instance where an order of retrial will not amount to double jeopardy

"Of Course, having held that the plea of guilty by the Appellant, amounted to a plea of not guilty, in the eye of the law (Section 276(3) of the ACJL of Kano State), and the non-representation of Appellant by a legal practitioner made the entire trial a nullity, it means no credible evidence was led at the trial, and that the alleged Exhibit A & B (which were induced and produced by the Police Command, Kano, by recording the voice of the Appellant, in line with the alleged blasphemy, and translating same into English) amounted to nothing less than illegality. There was therefore no credible evidence before the trial Sharia Court to found the Conviction and Sentence of Appellant. To subject him to fresh or another trial (or retrial) therefore would amount to going back to the drawing board, to reconstruct a valid charge, arraign the Appellant and source a legal Practitioner for him, to go through the whole process, again.

I think that would amount to Persecution and oppression, having gone through the same process, under life threatening stress, harassment, incarceration and deprivation, already, but without compliance with the requisite legal procedure. That, to me would, amount to double jeopardy and oppression. See Section 36(9) of the 1999 Constitution, as amended, which state:

"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."

?Of course, I have faulted the order for the retrial of Appellant made by the appellate High Court, as explained above, going by the decision in Chief of Air Staff & Ors Vs Iyen (supra), where the Supreme Court held:

In Ankwa v. The State (1969) All NLR 133, this Court held that a Court of Appeal will not send a case back for retrial, simply for the purpose of enabling the prosecution to adduce, as against the appellant, evidence which must convict him when his success at the appeal is based on an absence of that same evidence. In Briggs v. Briggs (1992) 3 NWLR (Pt. 228) 128, this Court held that a retrial is not ordered as a matter of favour or for the convenience of a party, but primarily to avoid a miscarriage of justice. This Court refused to order a retrial, because there was nothing on record to justify the order as the issues before the trial Court were clear. In Ikhane v. Commissioner of Police (1977) 11 NSCC 379, (1977) 6 SC 119, where the Magistrate convicted the appellant after a trial, the Supreme Court held that the case contains all the basic elements for an order of acquittal and discharge rather than an order of retrial. Obaseki, JSC, delivering the judgment of the Court made reference to the principles enunciated in Abodundu and said at page 381 of the report: "It appears to us that the learned Chief Justice did not advert his mind to these principles before arriving at the decision to order a retrial. We are in no doubt that, guided by the above principles, his critical appraisal of the judgment of the learned senior Magistrate would have led him only to a judgment of acquittal." It is clear from the above and some other decided cases that before an appellate Court can order a retrial, it must take into consideration inter alia the following: "(a) There must be an error in law, arising from either substantive law or procedural or adjectival law, viz: the law of evidence, civil and criminal procedure. While the error in law or procedural irregularities may not nullify the trial, there could be the possibility of a miscarriage of justice. (b) The error or irregularity apart, the totality of the evidence taken at the trial discloses substantial case against the accused to the extent that there is possibility of successfully prosecuting the accused. Here the Court need not come to the conclusion that the accused will be

convicted. That will be tantamount to jumping the gun. Once the evidence discloses a substantial case against the accused, the Court should order a retrial. (c) The offence in which the accused was convicted is serious or grave or the effect of any conviction or acquittal of the accused is not merely trivial. (d) The period between the time the offence was committed and the time the new or fresh charge is expected to be preferred against the accused. Here the Court will take into consideration the possibility of assembling the witnesses and the possibility of witnesses experiencing loss of memory because of the time tag. (e) Whether there are special circumstances that would make it oppressive or unjust to put the accused on trial a second time. (f) The Court will not order a retrial to enable the prosecution repair its case with a view to obtaining a conviction. This is because the Court should not encourage the prosecutor to be a persecutor. (g) Where refusal to order a retrial will not cause greater miscarriage of justice the Court will not grant a retrial." The list is inexhaustive. There is therefore no claim that the above guidelines are exhaustive. It must be emphasised that the above must co-exist. In other words, all the above guidelines must exist positively in a given case." Per TOBI, JSC

I do not think all the conditions stated above co-existed to justify sending the case back for retrial, especially as trial by the Sharia Court was declared a nullity, as stated in Ankwa Vs The State (1969) ALL NLR 133, "a Court of Appeal will not send a case back for retrial simply for the purpose of enabling the prosecution to adduce, as against the Appellant, evidence which must convict him when his success at the appeal is based on an absence of some evidence." A retrial is not ordered as a matter of favour or for convenience of a party but primarily to avoid a miscarriage of justice.

I do not see any miscarriage of justice in this case, if Appellant is not retried, especially as no named Prophet (dead or alive) was stated in the Charge, as the person blasphemed by Appellant!

Counsel for Appellant had argued that the factors or conditions as stated in Hassan Vs FRN (Supra) for returning a case for retrial do not co-exist in this case, conjunctively. I agree with him." (DISSENTING)Per MBABA, J.C.A. (Pp. 116-121, Paras. E-F) - read in context

23. **LEGISLATURE - STATE HOUSE OF ASSEMBLY:** Power of a State House of Assembly to make laws for the peace, order and good government of a State

"The legislative powers of the State House of Assembly consist of the power to make laws for the peace, order and good governance of the State or any part thereof with respect to any matter not included in the Exclusive legislative list, any matter included in the concurrent legislative list and any matter with respect to which it is empowered to make laws in accordance with the provision of the Constitution. Section 4 (6) and (7) of the Constitution provide that:

4 (6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say-

(a) any matter not included in the Exclusive Legislative list set out in part I of the second schedule to this Constitution.

(b) any matter included in the concurrent Legislative list set out in the first column of part II of the second schedule to this Constitution to the extent prescribed in the second column opposite thereto; and

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

The above Constitutional provision empowers the House of Assembly of a state to legislate for the peace, order and good governance of a State. However, the State Assembly can only legislate on matters falling under the concurrent legislative list and where a law of a State is inconsistent with an Act of the National Assembly, the provisions in the lack of the State shall be void to the extent of its inconsistency. See AIRTEL NETWORKS LTD VS AG KWARA STATE ANOR (2014) LPELR 23790; CHEVRON (NIG) LTD VS IMO STATE HOUSE OF ASSEMBLY & ORS (2016) LPELR 41563 and NWOKEDI VS ANAMBRA STATE GOVERNMENT (2022) LPELR 57033."Per LAMIDO, J.C.A. (Pp. 16-18, Paras. D-A) - read in context

24. **LEGISLATURE - STATE HOUSE OF ASSEMBLY:** Whether the enactment of the Sharia Penal Code Law 2000 of Kano State by the Kano State House of Assembly amounts to making Islam a state religion

"I must say that, while one finds a bit incongruous the involvement of a State organ like the House of Assembly in legislating for a particular religion in a secular State that Section 10 of the Constitution of this country professes it is, like my two learned brothers Mbaba and Lamido, JJ.C.A, I also think it will be going too far to suggest that by enacting that legislation Kano State Government had made Islam a State religion. Adoption of state religion suggests that only one religion is allowed in the State. That is not the case with the Sharia Penal Code Law 2000 of Kano State, as by its Section 3 it only applies to Muslims and those who consent to be tried by the Sharia Court. One cannot even close one's eyes to the fact that the same 1999 Constitution of this country recognizes not just the existence of Sharia Courts, but even an appellate Shari'a Court, it even makes it mandatory that Judges learned in Sharia Law be appointed to this Court and even the Supreme Court. I also note the pronouncement of the apex Court (LT. Mohammad, J.S.C. (Later C.J.N.) inShalla v. State (2007) 12 MJSC 53; (2007) LPELR-3034 (SC) at p. 65 -66 para G-A that blasphemy is a serious crime for any sane and adult Muslim and is punishable with death under Sharia. Juxtapose on that the obvious fact, which one must take note of (as it is common knowledge), that Kano State is a predominantly Muslim State to the point that it is even doubtful if any of its 44-member House of Assembly or its elected Governors since its creation has ever belonged to any religion other than Islam, and it becomes fairly understandable if the said predominant adherents of the Islamic faith in the state saw it fit to codify for themselves and themselves alone penal provisions of their Shari'a Law. Such a law it must be noted cannot be enforced unless codified in a written law. That much is made clear by the provisions of Section 36(12) of the same 1999 Constitution stating thus:

Subject as otherwise provided by the Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or of a Law of a State, any subsidiary legislation or instrument under the provisions of a law. That seems to be the motivation behind the enactment of the Sharia Penal Code Law 2000 of Kano State House of Assembly. It is therefore my humble opinion that in so far as the Sharia Penal Code Law of Kano State 2000 limits its application to only Muslims and persons who consent to be tried by the Sharia Court, as clearly stated in its Section 3, it cannot be said to amount to adopting Islam or Sharia Law as State Religion as contended by Mr. Alapinni for Appellant."Per UGO, J.C.A. (Pp. 58-61, Paras. E-A) - read in context

25. **LEGISLATURE - LEGISLATIVE POWER:** Extent of the legislative power of the National Assembly and State Assembly

"As a Federation, with a Federal Government and State Governments, our Constitution is designed in such a way that the Federal Legislature or the National of Assembly is empowered to legislate on all matters on the Exclusive legislative list while the State legislature or the House of Assembly of a State can also make laws concurrently with the National Assembly on matters falling under the concurrent Legislative list. Where a State Assembly exercise its powers to Legislate, the law must not be inconsistent with the provision of the Constitution as any inconsistent law is void to the extent of its inconsistency. See AG OGUN STATE VS ABERUAGBA & ORS (1985) LPELR 3164; AG ABIA STATE VS AG FEDERATION (2002) LPELR 611 and AG LAGOS STATE VS AG FEDERATION (2003) LPELR 620."Per LAMIDO, J.C.A. (Pp. 22-23, Paras. C-A) - read in context

ABUBAKAR MU'AZU LAMIDO, J.C.A. (Delivering the Leading Judgment): This is an appeal against the judgment of Kano State High Court sitting in its appellate jurisdiction delivered on 21st January, 2021 by Umar, CJ and Saminu, J. The Appellant was arraigned on a First Information Report before the Upper Sharia Court, Hausawa, Kano for an offence contrary to Section 382 (b) of the Kano State Sharia Penal Code Law 2000. The Appellant admitted to the charge on the F.I.R. and thereupon the Court advised the Appellant to engage the services of a legal practitioner to defend him in view of the nature of the charge against him. On the next adjourned date, the Appellant could not secure the services of a legal practitioner and the trial Court ordered that a letter be written to the Legal Aid Council, Kano to represent the Appellant. The matter was further adjourned. On the next adjourned date, the Legal Aid Council neither replied to the letter sent to them by the Court nor sent a Legal Practitioner to represent the Appellant. The Court thereafter ordered the contents of the F.I.R be read to the Appellant again.

The Appellant also pleaded guilty when the contents

of the F.IR. was re-read to him and the prosecution tendered in evidence an audio allegedly made by the Appellant and a transcribed audio note made by the Appellant. The Appellant admitted making the audio note. The trial Court thereafter found the Appellant guilty as charged and accordingly sentenced him to death.

Dissatisfied with his conviction and sentence, the Appellant appealed to the High Court which Court held that failure of the trial Court to ensure that the defendant was represented by a legal practitioner in a case attracting death penalty renders the proceeding a nullity and on the whole, the Court below found that the proceedings of the trial Court was characterized by procedural irregularities and thus set aside the decision of the trial Court and ordered a re-trial before another Judge.

Still dissatisfied with the decision of the Court below, the Appellant filed his notice of appeal which contained two grounds of appeal couched in the following way:

GROUND OF APPEAL

1. The learned Judges misdirected themselves in law when they annulled the judgment of the trial Court and then ordered for a retrial at the Sharia Court in

Hausawa Filin Hockey instead of granting the defendant a discharge and an acquittal.

PARTICULARS OF ERROR

A. Under Nigerian Criminal Law, where the prosecution fails to prove his case beyond reasonable doubt, the defendant is entitled to a discharge and acquittal.

B. Under Nigerian Criminal Law, nobody shall be tried twice for the offence of which he has already been tried for. An accused person can only be tried and punished once for a given offence established by law. It amounts to double jeopardy and a miscarriage of justice to allow for a multiplicity of trial for the same offence.

2. The learned justices erred in law when they ruled that the Sharia law is constitutional.

a. A Penal Sharia Code law is only applicable and permissible in Islamic theocracies or countries whose constitution allows for such laws whereas Nigeria is a secular State with constitutional democracy and the Constitution being the supreme law.

b. The constitutional principle of separation between government and religion enshrined at Sections 10 and 38 of the Constitution prohibits government from adopting religion or making laws restricting religious

freedoms and also prohibits government from making laws to advance or promote any religious interest.

c. The offence of blasphemy is inconsistent with the Constitution of the Federal Republic of Nigeria by virtue of Section 10 standing alone or in conjunction with Section 38 of the Constitution respectively.

d. The Penal Sharia Code Law 2000 of Kano State or any Penal Sharia Code Law in Nigeria is inconsistent with Section 10 and Section 38 of the Constitution of the Federal Republic of Nigeria and Section 1 (3) of the Constitution states that if any other law is inconsistent with the provisions of this constitution, this constitution shall prevail, and that other law SHALL to the extent of the inconsistency be void.

The Appellant's brief was filed on 01/04/2021 wherein two issues for determination were formulated. The formulated issues are:-

1. Whether the learned High Court Judges were right to order for a retrial instead of an acquittal after quashing and vacating the position of the Sharia Court.

2. Whether or not the decision of the High Court is right in declaring that the Kano State Sharia Penal Code Law 2000 is

Constitutional.

The Respondent's brief was filed on 11/05/2022 but deemed filed on 23/06/2022. Two issues for determination were formulated by the Respondent who modified the Appellant's first issue and adopted the second issue as formulated by the Appellant. The issues formulated are as follows:-

1. Whether the Honourable High Court Judges were right to order for a retrial when they found that the trial was characterized with procedural irregularities.

2. Whether or not the decision of the High Court is right in declaring that the Kano State Sharia Penal Code Law 2000 is unconstitutional.

The two issues formulated by parties to this appeal are similar substantially, except on issues of semantics. However, a perusal of ground one in the notice of appeal filed by the Appellant will reveal that issue one as formulated by the Respondent is more in tandem with ground one in the notice of appeal. It will therefore be adopted by the Court then followed by issue two as formulated by the Appellant. The issues for the determination of this appeal are:-

1. Whether the decision of the Court below is right in declaring that the Kano State Sharia

Penal Code Law 2000 is constitutional.

2. Whether the learned Judges of the Court below were right to order for a retrial when they found that the trial was characterized with procedural irregularities.

The issues for determination as formulated by parties will not be resolved in that order for issue two as formulated by parties ought to be resolved first in the sense that where the whole Sharia Law of Kano State, 2000 is found to be unconstitutional, the consideration of the second issue for determination will be unnecessary. It is akin to a jurisdictional issue which in most cases must be resolved first. Thus, issue two as formulated by the parties will be considered and resolved first.

On this issue, learned Counsel for the Appellant, Kola Alapinni, Esq. submitted that the Court below erred where it held that Section 10 of Constitution of the Federal Republic of Nigeria, 1999 is not justiciable when a closer look at the section will reveal that the word "shall" is used denoting a command. He stated also that the passage of the Sharia Law, 2000 is akin to an adoption of a state religion which is inconsistent with the provisions of the

Constitution. He urge the Court to hold that Section 10 is justiciable.

He also argued that by Section 4 (5) of the Constitution where a law made by a State is inconsistent with a law made by the National Assembly, the State law remains void to the extent of its inconsistency. Section 38 of the Constitution safeguards the right of a citizen to freedom of thought, conscience and religion including the freedom to change his religion or belief and freedom to propagate his religion in worship, teaching, practice and observance. These Constitutional provisions separate religion from state and leave the nation a secular state. Thus, states cannot be allowed to legislate if the object of such law is to champion the course of any given religion. He reiterated that by Section 1 (1) and (3) the Constitution of the Federal Republic of Nigeria is supreme and any law inconsistent with its provisions shall be void to the extent of its inconsistency.

On the next issue, it is the submission of learned Counsel for the Appellant that the burden of proof lies on the prosecution to prove the charge against the defendant beyond reasonable doubt. He referred to

MUSA VS THE STATE (2014) LPELR 22912; SABI VS. THE STATE (2011) 14 NWLR (PT. 1268) 421 and BAKARE VS. THE STATE (1987) 1 NWLR (PT. 52) 579. He also referred to Section 36 (5) of the Constitution of the Federal Republic of Nigeria and Section 132 of the Evidence Act 2011.

He also argued that the Court below misdirected itself in ordering for a retrial without taking into consideration the parameters set out by the Supreme Court in HASSAN **VS. FRN (2016) LPELR 42804** in that the Court should be guided by the following steps before ordering a retrial and that retrial will only be ordered where (a) there has been an error in law or an irregularity in procedure of such a character that on the one hand trial was not rendered a nullity and the Court is unable to stay 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 was no such special circumstances as would render it oppressive to put the Appellant on trial a second time (d) that the offence of which the Appellant was convicted was 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. He referred to **NNADOZIE & ORS. VS. MBAGWU & ORS (2008) LPELR (2055) and ABODUNDU & ORS. VS. THE QUEEN (1959) SCLR 162**.

Elucidating on the above guidelines, he argued that the Court below held that there were some procedural irregularities which rendered the trial a nullity and on the other hand the whole decision of the trial Court was set aside by the Court below. The reasoning of the Court below stemmed from the fact that throughout the trial of the Appellant he was not represented by a legal practitioner either of his choice or appointed by the Court and importantly, the trial Court recorded the plea of guilty on the Appellant instead of a plea of not guilty when the charge against the Appellant carries death penalty upon conviction. He referred to **OKOTOGBO VS. THE STATE (2004) ALL FWLR (PT. 222) 1625**.

He also argued that the Appellant's arrest, prosecution and sentence by the

trial Court was a well orchestrated plot by the majority Sunni Muslims against him, who is a Tijjaniyya Sect adherent and the persecution extended to denying the Appellant any legal practitioner to defend him. He also argued that the offence with which the Appellant was charged and convicted is a victimless crime and trivial in its nature that cannot be characterized as a serious crime. The order of retrial will therefore occasion a miscarriage of justice on the Appellant and will be contrary to the provision of Section 36 (9) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

He further argued that the order of retrial made by the Court below will afford the prosecution an opportunity of profiting from its blunder by tendering the electronic evidence of the recording tendered in violation of Section 84 of the Evidence Act, 2011. He referred to **UKAEGBU & ORS. VS. NWOLOLO (2009) LPELR 3337; OKEDARE VS. ADEBARA & ORS (1994) LPELR 2432 and DURU & ORS. VS. ONWUMELU & ANOR. (2001) LPELR 970**.

Learned Counsel for the Respondent, M.A. Lawan, Esq., Hon. Attorney General, Kano State submitted on issue one that the Sharia

Law 2000 of Kano State is constitutional as the fact that Section 38 guarantees the freedom of religion, thought and conscience does not preclude a State Assembly from making laws for the protection of sanctity of any given religion and it is in that regard the Kano State Sharia Law was promulgated. In this regard, the mere fact that a law creates an offence relating to a religion and prescribing a penalty thereof does not amount to adoption of a state religion. The mere fact that Nigeria is described as a secular State does not mean that religious practices are encouraged or discouraged as all citizens are free to propagate, profess or practice their own religion as there can be no discrimination on the basis of any religion.

The offence with which the Appellant was charged and convicted with is insulting or inciting contempt of religious creed contrary to Section 382 (b) of the Sharia Penal Code which existed even under the Penal Code Law applicable in the whole Northern States of Nigeria as can be seen in Section 210 of the Penal Code Law. The differences mainly in the penalty and application of the laws. Whereas, the offence as created under the

Sharia Penal Code carries death penalty the offence under Penal Code carries a penalty of imprisonment. Importantly, the Sharia Penal Code applies to Muslims only upon a careful examination of the laws, it can be seen that they are all aimed towards preservation and protection of religious beliefs which are sacred and not to declare a State religion.

He argued that Section 382 (b) of the Sharia Penal Code Law which the Appellant was charged and convicted carries a mandatory death penalty upon conviction. Under Islamic Law, a person found guilty of the offence is sentenced to death. He referred to**SHALLA VS. THE STATE (2007) 12 MJSC 53**. Thus, the Sharia Law is constitutional and the Appellant's submissions on the unconstitutionality of the Sharia Law are sentiments rather than law since creating an offence relating to religion and prescribing punishment thereof does not amount to adopting a State religion.

On issue two, learned Counsel submitted that where an appellate Court declares a trial a nullity, the natural order to make is a retrial of the case. Having found that the Appellant was not represented by a legal practitioner at his trial, the trial

was therefore characterized with procedural irregularity. Furthermore, the Appellant's admission to the contents of the F.IR. was recorded verbatim by the trial Court which is contrary to the provision of the Administration of Criminal Justice Law Kano State. The trial Court ought to have entered plea of not guilty on the appellant's behalf. The Court below was therefore right to hold that the trial of the Appellant was riddled with procedural irregularities and order for a retrial. The use of the word "shall" in Section 269 (1), (3) and (4) signifies a command or mandatoriness. He referred to **BALONWU VS. GOV. ANAMBRA STATE & ORS. (2008) 16 NWLR (PT. 1118) 236**.

He also argued that an order of retrial is made where the trial is characterized with a procedural irregularity or an error in law. He referred to **ABODUNDU VS. QUEEN (1959) 1 NSCC 56 and MOHAMMED v. STATE (2019) LPELR 47632**. The trial Court is therefore right to order a retrial in view of the irregularities identified in the proceedings of the trial Court and leaving the issues of irregularities aside, there appears to be a prima facie evidence against the Appellant.

In

resolving the issue on the constitutionality or otherwise of the Sharia Law 2000 of Kano State, the Appellant maintained that the law is unconstitutional and ought to be declared so by this Court; whereas the Respondent argued that the law is constitutional.

The basic law of this country is the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and by Section 1 (1) of the said Constitution, it is supreme and its provisions have a binding force on all persons and authorities throughout Nigeria. In **KALU VS. ODILI & ORS. (1992) LPELR 1653 AT 68**; Karibi-Whyte, JSC held that?

"It is both a fundamental and elementary principle of our law that the Constitution is the basic law of the land. It is the supreme law and its provisions have blinding force on all authorities, institutions and persons throughout the country – Section 1 (1). All other laws derive their force and authority from the Constitution".

See **AG BENDEL STATE VS. AG FEDERATION & ORS (1981) LPELR 605; ADEDIRAN & ANOR VS INTERLAND TRANSPORT LTD (1991) LPELR 88; BAKARE VS. LAGOS STATE CIVIL SERVICE COMMISSION & ANOR (1992) LPELR 711 and ABACHA & ORS VS. FAWEHINMI**

(2000) LPELR 14.

Thus as a grundnoum, the Constitution's supremacy is retained, protected and safeguarded by the Constitution itself in that by Section 1 (3)thereof, if any other law is inconsistent with the provision of this Constitution, the Constitution shall prevail, and the other law shall to the extent of the inconsistency be void. The nature and effect of the supremacy of the Constitution was further explained in **INEC VS MUSA (2003) LPELR 24927 AT 35 - 36** per Ayoola, JSC where stated that:

"Section 1 (3) of the Constitutionprovided that: "if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void." I take as my starting point some interrelated propositions which flow from the acknowledged supremacy of the Constitution and by which the validity of the impugned provisions will be tested. First, all powers, legislative, executive and judicial must ultimately be traced to the Constitution. Secondly, the legislative powers of the legislature cannot be exercised in consistently with the Constitution. Where

it is so exercised it is invalid to the extent of such inconsistency. Thirdly, where the constitution has been enacted exhaustively in respect of any situation, conduct or subject, a body that claims to legislate in addition to what the Constitution had enacted must show that it has derived the legislative authority to do so from the Constitution. Fourthly, where the Constitution sets the condition for doing a thing, no legislation of the National Assembly or of a State House of Assembly can alter those Constitution in any way, directly or indirectly, unless, of course the Constitution itself as an attribute of its supremacy expressly so authorized."

See**TANKO VS STATE (2009) LPELR 3136.**

The legislative powers of the State House of Assembly consist of the power to make laws for the peace, order and good governance of the State or any part thereof with respect to any matter not included in the Exclusive legislative list, any matter included in the concurrent legislative list and any matter with respect to which it is empowered to make laws in accordance with the provision of the Constitution. Section 4 (6)and (7) of the Constitution provide that:

4 (6) The legislative powers of a State of the Federation shall be vested in the House of Assembly of the State.

(7) The House of Assembly of a State shall have power to make laws for the peace, order and good government of the State or any part thereof with respect to the following matters, that is to say-

(a) any matter not included in the Exclusive Legislative list set out in part I of the second schedule to this Constitution.

(b) any matter included in the concurrent Legislative list set out in the first column of part II of the second schedule to this Constitutionto the extent prescribed in the second column opposite thereto; and

(c) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.

The above Constitutional provision empowers the House of Assembly of a state to legislate for the peace, order and good governance of a State. However, the State Assembly can only legislate on matters falling under the concurrent legislative list and where a law of a State is inconsistent with an Act of the National Assembly, the provisions in the lack of the State shall be void

to the extent of its inconsistency. See **AIRTEL NETWORKS LTD VS AG KWARA STATE ANOR (2014) LPELR 23790; CHEVRON (NIG) LTD VS IMO STATE HOUSE OF ASSEMBLY & ORS(2016) LPELR 41563 and NWOKEDI VS ANAMBRA STATE GOVERNMENT(2022) LPELR 57033**.

Now, the issue here is whether the Kano State Sharia Law, 2000 is Constitutional. The Appellant argued that by the operation of Section 10 of the Constitution, the law as it stands is unconstitutional as the Constitution prohibits the adoption of a State religion. The Court below in its decision held that Section 10 of the Constitution is not justiciable. The word justiciable is defined in Black's Law Dictionary, 9th Edition at P 944 thus:

"*A case or dispute properly brought before a Court of Justice. Capable of being disposed of judicially.*"

Thus, whether a provision of a Constitution or a Statute is justiciable or not is dependent upon whether it is a dispute in respect of which a Court of law is entitled to invoke its judicial powers to determine under Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999. However, that judicial power shall extend to all matters between persons, or

between Government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person.

There are however certain situations or aspects of our laws that a judicial power cannot be exercised in their respect. This can be seen in Section 6 (6) (c)and(d) of the Constitution. The said provisions state that the judicial powers of the Courts cannot be exercised or extended to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of the Constitution. See **OKOGIE VS AG LAGOS STATE(1981) 1 NCLR 218 and UGWU VS ARARUME(2007) ALL FWLR (PT 377) 807**. And it shall not extend to any action or proceedings relating to any existing law made on or after 15th January, 1966 for determining any issue or question as to the competence of any authority or person to make such law.

Section 6 (6) (c) and (d) limits the application of judicial powers in some matters and

Section 10 of the Constitution relating to non-adoption of a State religion does not fall within the ambit of the sub-sections. Section 10 of the Constitution provides that:

"*10. The Government of the Federation or of a State shall not adopt any religion as a State religion.*"

The Section has in clear terms prohibited the adoption of a State religion by either the Federal or State Governments. By the provision of Section 6 (6) (c) and (d) of the Constitution, it appears that the justiciability of Section 10 prohibiting the adoption of a State religion has been safeguarded. The Court below is therefore wrong to hold that the section is not justiciable.

The second limb of the Appellant's argument on this issue is on the legality of the Sharia Law of 2000. He argued that Nigeria being a secular nation on the strength of Section 10 of the Constitution the promulgation of the Sharia Law 2000 by Kano State is unconstitutional. The Respondent argued to the contrary and stressed that the law promulgated is within the legislative competence of the State.

The word secular or secularism is defined in the Oxford Dictionary as the principle of separation

of the State from religious institutions, or a thing not connected with religious or spiritual matters. It is to be noted that the Constitution itself did not expressly state that Nigeria is a secular State. That was the reason Tobi, JSC (of blessed memory) in Law, Religious & Justice, Essays in Honour of Justice Obaseki at page 7 stated thus:

"*There is a great notion that Section 11 of the 1979 Constitution (which is similar to Section 10 of the 1999 Constitution) makes Nigeria a secular nation. That is not correct. The word secular etymologically means pertaining to things not spiritual, ecclesiastical or not concerned with religion. Secularism, the noun variant of the adjective, secular means the belief that state, morals, education etc should be independent of religion. What Section 11 is out to achieve is that Nigeria cannot, for example, adopt either Christianity or Islam as a State religion. But that is quite different from secularism.*"

The Constitutional provision relating to religion which guaranteed the right of every citizen to practice a religion of his or her choice in a multi-religious and multi-cultural society as can be

found in this country would appear to suggest that the opinion of Tobi, JSC are valid. What the Constitution did is to prohibit the adoption of any religion as a State religion by either the Federal or State Governments; It only entrenches religious neutrality of the State and this cannot be termed secularism.

Our democracy is anchored upon the principles of separation of powers between the Legislature, the Executive and the Judicial arms of Government. This provides various checks and balances on the activities of various organs.

As a Federation, with a Federal Government and State Governments, our Constitution is designed in such a way that the Federal Legislature or the National of Assembly is empowered to legislate on all matters on the Exclusive legislative list while the State legislature or the House of Assembly of a State can also make laws concurrently with the National Assembly on matters falling under the concurrent Legislative list. Where a State Assembly exercise its powers to Legislate, the law must not be inconsistent with the provision of the Constitution as any inconsistent law is void to the extent of its inconsistency.

See **AG OGUN STATE VS ABERUAGBA & ORS (1985) LPELR 3164; AG ABIA STATE VS AG FEDERATION (2002) LPELR 611 and AG LAGOS STATE VS AG FEDERATION (2003) LPELR 620.**

The contention of the Appellant is that the promulgation of the Kano State Sharia Law 2000 is tantamount to a declaration of Islam as a State religion in Kano State and thus offends the provision of Sections 10 and 38 of the Constitution. The Respondent argued the Sharia Law 2000 of Kano State does not offend the provision of the 1999 Constitution. Taking a holistic look at the provision of the Kano State Sharia Law 2000, what comes to mind is whether the law is inconsistent with the provisions of Sections 10 and 38 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The settled provision of the law is that any enactment passed by the National Assembly or a State House of Assembly which contravenes the Constitution of the Federal Republic of Nigeria shall be null and void as provided in Section 1 (3) of the Constitution. Furthermore, any law enacted by the House of Assembly of a State which is inconsistent with any Act of the National Assembly shall be void to the extent of its

inconsistency as per Section 4 (5) of the 1999 Constitution. See **ISHOLA VS AJIBOYE (1994) 7-8 SCNJ 1;IKINE VS EDJERODE(2001) 18 NWLR (PT 745) 446; AG FEDERATION VS AG LAGOS STATE (SUPRA) and OCHALA VS FRN (2016) 17 NWLR (PT 1541) 169**.

I have earlier reproduced Section 10 of the Constitution, learned Counsel also argued that by Section 38 of the same Constitution there is a clear intendment from the framers of the Constitution to separate religion from the State and maintain the secularism of the nation with no religious interference. Section 38 of the 1999 Constitution provides thus:

38 (1) Every person shall be entitled to freedom of thought, conscience and religion including freedom to change his religion or belief and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief, in worship, teaching, practice and observance.

From the above provision, it can be seen that every person is guaranteed a freedom of thought, conscience and religion including the freedom to manifest and spread his religion or belief in worship, teaching, practice and observance.

But is the

Kano State Sharia Law, 2000 inconsistent with the provision of Sections 10 and 38 (1) of the Constitution? The word inconsistent was defined by Tobi, JSC (of blessed memory) in **NIGERCARE DEVELOPMENT CO LTD VS. ADAMAWA STATE WATER BOARD (2008) LPELR 1992 AT 37** as follows:

"*The word "inconsistent" the verb variant of the noun inconsistency is the opposite of consistent. It means ideas or opinions which are not in agreement with each other or with something else. It also means mutually repugnant or contradictory, contrary the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other as, in speaking the repeal of a statute which is inconsistent with the constitution. See Black's Law Dictionary 6th Edition page 766. In the context of Section 1 (3) of the Constitution, it simply means the statute speaking quite a different language from the Constitution*".

Also in **AG. FEDERATION VS. AG. LAGOS STATE (Supra) AT 329**; Muhammad, JSC (as he then was) defined inconsistency in the following way:-

"*Inconsistency in law to me, can be taken to be a situation where two or more laws,*

enactments and/or rules are mutually repugnant or contradictory, contrary, the one to the other so that both cannot stand and the acceptance or establishment of the one implies the abrogation or abandonment of the other. It is thus, a situation where the two or more enactments cannot function together simultaneously".

For the Sharia Penal Code Law of Kano State to be inconsistent with the provisions of Sections 10 and 38 of the Constitutions, its provisions must be repugnant or must contradict the two constitutional provisions. Furthermore, in trying to interpret the provisions of the law and to the constitution, the Court must read together related provisions of the Constitution in order to discover the meaning of the provisions. The Court ought not to interpret related provisions of a law or Constitution in isolation and then destroy in the process the true meaning and effect of particular provisions. See **OBAYUWANA VS. GOV. BENDEL STATE & ANOR(1982) 12 SC 51; SKYE BANK PLC VS. IWU (2017) LPELR 42505 and SOKOTO STATE GOVERNMENT & ANOR. VS. NAWAWI (2020) LPELR 51683**.

In line with the Constitutional provisions in Section 10, the import of

which was earlier highlighted and Section 38 that guaranteed freedom of religion, it is axiomatic that the contention of the Appellant on the unconstitutionality of the Kano State Sharia Law is unfounded. Importantly, there are other Constitutional provisions that expressly incorporated Sharia Law in our legal system. For instance, Section 6 vests the judicial powers on the Courts established by the Constitution and bySection 6 (5) (f) and (g) the Sharia Court of Appeal of the Federal Capital Territory and the Sharia Court of Appeal of a State respectively are among the Courts expressly created and recognised by the Constitution. The Constitution also empowers States to create Courts for the purposes of exercising jurisdiction with respect to matters to which a House of Assembly of a State may make laws. See Section 6 (5) of the Constitution. In all these circumstances, since the Constitution itself has recognized Islamic Personal Law, incorporated same as part of the legal system of the country, and makes further allowance for the States to create Courts and confer jurisdiction on matters with the competence of the States, then it would appear that

Islamic law cannot be regarded as unconstitutional. The law is trite that a Court will not hold an Act or Law to be inconsistent with the Constitution where there is no provision of the Constitution relating to the matter whatsoever, expressly or impliedly by necessary implication. See **AG ONDO STATE VS. AG. EKITI STATE (2001) LPELR 622 and APCON VS. REGD. TRUSTEES OF INT'L COVENANT MINISTERIAL COUNCIL & ORS. (2010) LPELR 3630**. While Section 10 prohibits adoption of a State religion by the Federation or by any of the States of the Federation, Section 38 protects the rights of the citizen to practice their religion and propagate their religious beliefs in worship, practice and observance. In this sense, the promulgation of the Sharia Penal Code does not in anyway amount to the adoption of Islam as a State religion of Kano State. In the same respect, Section 38 actually confers on the people of Kano State who majorly are Muslims to have their lives regulated by sets of laws ordained by their religion.

Having examined the provisions of Sections 10 and 38 of the Constitution of the Federal Republic of Nigeria, 1999 which Sections learned Counsel for the

Appellant argued vociferously are breached by the Sharia Penal Code Law of Kano State, it seems that the arguments of Counsel are more of sentiments than law. Upon a calm and holistic reading of the Constitution as a whole, it cannot be said that the Sharia Penal Code Law of 2000 is contrary to its provisions. This issue is resolved against the Appellant and in favour of the Respondent.

On the second issue on whether the Court below was right to order for a retrial after annulling the decision of the trial Court instead of acquitting the Appellant, learned Counsel argued that having quashed the conviction of the Appellant, it was wrong of the Court below to order for retrial. The Respondent on the other hand maintained that the order made was proper in the circumstances.

I think the nature of the case against the Appellant and the conduct of the trial need to be examined for a proper appreciation of argument of Counsel on both sides. The Appellant was arraigned before the trial Court and charged with an offence contrary to Section 382 (b) of the Sharia Penal Code Law of Kano State and the offence carries a mandatory death penalty upon conviction. The

F.I.R. was read to the Appellant wherein he admitted its contents and the trial Court recorded the plea of guilty. The Appellant was not represented by a legal practitioner and the trial Court did not inquire whether he wished to be represented by a legal practitioner before his plea was taken. However, the trial Court recorded the evidence of two witnesses to the admission made by the Appellant.

On the next adjourned dated the trial Court asked the Appellant to appoint a Counsel of this choice and he could not do so. The trial Court wrote to the Legal Aid Council, Kano to represent the Appellant but they did not. The F.I.R was re-read to the Appellant and his plea was taken afresh. He still pleaded guilty and the prosecution proceeding to tender in evidence the Appellant's recorded audio statement; they were marked as Exhibits A and B. At the conclusion of the trial, the trial Court convicted the Appellant and sentenced him to death.

On appeal, the Court below considered the fact that the trial was conducted without affording the Appellant an opportunity to be represented by a legal practitioner and thus held as follows:-

In this case, the

defendant was not represented by a legal practitioner, the offence with which the defendant was charged is a capital offence attracting death penalty, he did not refuse to be represented by a legal practitioner. He merely said he could not get one. At that point, it is the duty of the Court to ensure that the defendant is represented by a legal practitioner in view of the nature of the charge against him and the severity of the punishment ... Therefore, failure of the trial Court to ensure that the defendant was represented by a legal practitioner in a case attracting death penalty is a serious omission which renders the entire proceeding a nullity no matter how beautifully conducted".

The Court below also considered the recording of "plea of guilty" made by trial Court and found that it offends the provision of Section 276 (3) of the ACJL Kano State, 2019. On the two infractions, the Court below finally held thus:-

"*On the whole, we find that this trial is characterized with some procedural irregularities which shall tie resolved in favour of the defendant. Consequent upon this, the trial is hereby set aside. Instead, the defendant shall be tried*

before another Judge other than the trial Judge...".

Now, I have deliberately reproduced part of the judgment of the Court which spurred the contentions in this issue. The Appellant's Counsel argued that having declared the trial a "nullity" and also having "set aside" the decision of the trial Court, the Court below erred in ordering for a retrial instead of acquitting the Appellant. Learned Counsel for the Appellant cited many authorities in support of his contention.

The principles of ordering a retrial are well stated in the locus classicus **ABODUNDU & ORS. VS. THE QUEEN(1959) 1 NSCC 56 AT 60** where Abbot, FJ held thus:-

"We are of the opinion that before deciding to order for a retrial, this Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) 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 this Court 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 a trial a second time (d) that the offence or offences of 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 for retrial would occasion a greater miscarriage of justice than to grant it".

See **ELIJAH VS. THE STATE (2013) LPELR 20095; MOHAMMED VS. THE STATE (2013) LPELR 19822; BUDE VS. THE STATE (2016) LPELR 40435 and KALU VS. THE STATE (2017) LPELR 42101**.

The contention of the Appellant is that having declared the trial a nullity and consequently setting aside the decision of the trial Court, the Court below has no power to order a retrial. The reality of this contention will now be examined in line with established cases and pronouncements made by this Court and Supreme Court on the issue. In **UDO VS. THE STATE(1988) LPELR 3299 1 (1988) 3 NWLR (PT. 82) 316**; the Appellant was charged before the High Court for murder and at the conclusion of the trial he was convicted and sentenced to death. His appeal to the

Court of Appeal was unsuccessful and he further appealed to Supreme Court. One of the issues for determination at the Supreme Court was whether the Appellant had a fair trial for failure of the Court to assign to him the Counsel who was defending him when the Counsel said he could no longer do so because he was not sure who would pay him. In the end, the Supreme Court allowed the appeal, set aside the conviction and sentence on the Appellant and ordered a retrial before another Judge. Also in **YAHAYA VS. THE STATE (2002) LPELR 3508**, the Appellant was charged with murder before the High Court and he was convicted and sentence to death. His appeal to the Court of Appeal was dismissed and on appeal to the Supreme Court, the Court per Uwais, JSC (later CJN) held thus:-

"Having held that the trial has been vitiated ab initio and is therefore null and void, it will not serve any useful purpose and will be academic to consider the remaining two issues for determination formulated in the Appellant's brief of argument.

The appeal therefore succeeds. The conviction and sentence passed on the Appellant are hereby quashed. I order a new trial of the

Appellant before another Judge of the High Court of Ogun State other than Bode Popoola, J. to be assigned by the Chief Judge of Ogun State".

See**ELIJAH VS. THE STATE (2013) LPELR 20095; LASISI VS. THE STATE(2013) LPELR 20715; OMOSAYE VS. THE STATE (2014) LPELR 22059; ADEWOLE VS. THE STATE (2016) LPELR 42801 andYAHAYA VS. FRN(2019) LPELR 46379.**

The authorities cited above did not suggest that where a decision of the trial Court is rendered a nullity or where it is wholly set aside an order of retrial cannot be made. It is axiomatic to think or suggest that an order of retrial can be made without rendering the earlier decision void or a nullity or without setting that decision aside. A situation would present itself where the Appellant will face a retrial with a conviction of the earlier trial hanging on his head; and that cannot in anybody's wildest imagination be the intendment of the law. The earlier decision must as a matter of law and procedure be made to give way for another trial to take place. It is only in such circumstances i.e declaring an earlier trial a nullity or setting it aside or quashing the conviction that the coast is set for a

fresh trial. Thus, I think learned Counsel had misunderstood the purport of an order of retrial and how it is to be made.

Now, was the order for retrial made by the Court below proper? This appears to be the main issue to be considered in this appeal. Learned Counsel for the Appellant cited in aid the cases of HASSAN **VS. FRN (2016) LPELR 42804 and ABODUNDU & ORS. VS. QUEEN (1959) 1 NSCC 62**. I have combed the entire law pavilion but could not lay my hands on the case of HASSAN **VS. FRN (Supra**). That notwithstanding the principles learned Counsel for the Appellant wanted to draw the Court's attention to were the same principles enunciated in the locus classicus **ABODUNDU & ORS. VS. THE QUEEN (Supra**) and as such those principles will be applied to the facts of this case so as to see whether the order of retrial made by the Court below is justified in the circumstances.

Firstly, is there an error in law or an irregularity in procedure of such a nature that on the one hand, the trial was not rendered a nullity and on the other hand the Court is unable to say that there has been no miscarriage of justice. The Appellant argued that since the trial was

rendered a nullity by the Court below, the first condition goes to favour the Appellant. The Court below found that the Appellant was not represented by a Counsel at his trial in a charge carrying death penalty contrary to Section 269 (1), (3) and (4) of the ACJL of Kano State, 2019 and voided the trial. The fact that the trial was nullified by the Court below does not inhibit its powers to order for a retrial. In **MOHAMMED VS. THE STATE (2013) LPELR 19822 AT 13-14**; Rhodes-Vivour, JSC held that:-

"*The well settled position of the law is that when a trial is declared a nullity a retrial is ordered if and only if the interest of justice so requires. See****QUEEN VS. EDACHE (1962) 1 ALL NLR 22;KAJUBO VS. THE STATE (1988) 1 NWLR (PT. 73)721***".

The Court as per the record found out that the trial was characterized with procedural irregularities in failing to afford the Appellant opportunity to engage a Counsel and also in entering a plea of guilty in a charge carrying penalty of death i.e capital offence. The position of the Court below is proper in the circumstances. It is unassailable. Thus, the mere fact that the trial was rendered a nullity by the Court

below, does not extinguish its powers to order for a retrial.

Secondly, apart from the plea of guilty made by the Appellant, the offensive materials were tendered without objection by the Respondent in Exhibits A and B. The Appellant admitted making the said exhibits. The Appellant's Counsel though argued that the elements of the offence were not proved. I doubt if this is his argument at the Court below. Howbeit, the position of the law remains settled that when a trial is a nullity such as in the present appeal, other issues touching on the merit of the case should not be considered. See **RUFAI VS STATE (2001) 7 SCNJ 122 and SADIQ VS STATE (2013) LPELR 22842**.

On the third condition of the presence of a special circumstance as would render it oppressive to put the Appellant on trial the second time, learned Counsel for the Appellant argued that the Appellant's arrest, trial, conviction and sentence was characterized by oppression from majority Sunni Sect on the Appellant who is of Tijjaniya Sect. That Muslim lawyers were forbidden from acting for the Appellant at the trial Court, that the trial Court refused to cooperate with the NBA Investigative

Panel and finally learned Counsel made reference to a CNN interview granted by Kano State Governor who signified his intention to sign the death warrant once the Appellant was convicted. I have gone through the record of appeal and could not find where all the facts stated by Appellant's Counsel emanated from. A lawyer confronted with the task of preparing a brief of argument would do well to ensure that there is an honest and straight forward prosecution of facts to the case; facts are sacred. The facts must be supported by the record of appeal and shall never be a figment of Counsel's imagination or what might have narrated to him off record. See **YAKASAI VS HARUNA & ANOR (2021) LPELR 55880**. I think learned Counsel for the Appellant was overtaken by sentiments in making the arguments not borne out of the record of appeal.

From the record of appeal, the Appellant was arraigned before the trial Court on 20/03/2020 and the trial commenced by taking his plea on the same date. Judgment was delivered on 10/08/2020 convicting the Appellant and by 21/01/21 his appeal was argued and judgment delivered by the Court below. Thus, it took less than one year from

the arraignment of the Appellant to the conclusion of his appeal before the Court below. In the circumstances, I do not think going by the history of this case and the period the Appellant has been in detention taking into consideration the nature of the charge against him, the order of retrial by putting him on trial for a second time would be regarded as oppressive. In **ODOEMENA VS COP (1998) 4 NWLR (PT 547) 697**; Tobi JCA (as he then was) held thus:

"In my view, one special circumstance is the duration of time between the first trial and the order of retrial. If there is so much time lag between the completion of the first trial and a consideration by an appellate Court to order a retrial, the Court will refrain from doing so. The consideration of the time lag will again depend on the special circumstances of the case."

There being no much time between the trial and the hearing of the appeal which is less than a year show that second trial in the form of a retrial would not be oppressive to the Appellant.

The fourth condition is that the offence with which the Appellant was convicted is not merely trivial. The Appellant's Counsel

argued that the offence is a trivial as it is a victimless crime and cannot be characterized as a serious offence moreso, it was not committed in public.

The Appellant was charged with an offence contrary to Section 382 (b) of the Sharia Penal Code Law, 2000. The Section provides that:

Whoever by any means publicly insults by using a word or expression in writing or verbal by means of gesture which shows or demonstrates any form of contempt or abuse against the Holy Qur'an or any Prophet shall on conviction be liable to death.

From the above provision, death penalty is imposed upon a conviction. Can an offence carrying death penalty be regarded as trivial? The word trivial is defined in Blacks Law Dictionary, 11th Edition P 1816as "*trifling; inconsiderable; of small worth or importance*". In the circumstances, the offence created under Section 382 (b) of the Sharia Penal Code Law of Kano which upon conviction carries death Penalty cannot be regarded as trivial.

A retrial is in most cases ordered where the offence with which the accused was convicted is a capital offence. In **MOHAMMED VS. THE STATE(Supra) at 13-14**; Rhodes-Vivour stated

that:-

"*Before ordering a retrial it is mandatory that the Judge examines the evidence to see the chances of success. For example, if the charge is for an offence which carries a term of years of imprisonment if found guilty and the accused person has already spent those years or more in custody awaiting trial or for trial, a retrial should not be ordered. If on the other hand the Appellant is/was charged for a capital offence and the evidence reveals a likely conviction, a retrial ought to be ordered in the interest of justice*".

Also, in **ELIJAH VS. THE STATE (Supra) at p. 23**; Galadima, JSC held that:-

"*The offence of which the Appellant was convicted is grave and not merely trivial. It is unfair to suggest that the proper trial of the Appellant for the offence of armed robbery would be unjust and oppressive. This is a case where the wheel of justice even if rolled by gently would eventually serve the end of justice. The evidence before the lower Court in this case does not suggest that it will be unfair or unjust to subject the Appellant to a second trial from which he would eventually be acquitted.".*

In view of the severity of the

penalty in Section 382 (b) of the Sharia Penal Code, the order of retrial made by the Court below was proper. Though the Appellant's Counsel christened it a victimless crime, a trivial offence, the sentiments expressed by learned Counsel are not in tandem with the provision of the law with which the Appellant was charged. Since the Appellant was arraigned under a written law, it is expected that the Appellant should face his trial to be either acquitted of the charge against him if there is no evidence or to be convicted accordingly where the prosecution is able to prove the charge against the Appellant beyond reasonable doubt. It is only in this situation that the justice would be seen to be done. The offence with which the Appellant is charged with relates to religion and offensive to all Muslims whose religion has been desecrated or insulted. To refuse an order of retrial would definitely occasion greater miscarriage of justice. Retrial will safeguard instances where the people in the community may choose to take laws into their hands. See **SHALLA VS. THE STATE (2007) LPELR 3034**.

Finally, the Appellant's Counsel urged that the order of retrial offends

the provision ofSection 36 (9) of the 1999 Constitution. The Section provides that:-

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 above provision is aimed at protecting citizens from what is known as double jeopardy. For a person to benefit from the provision, he has to show that he was tried by a Court of competent jurisdiction, that he was either convicted or acquitted and the subsequent charge brought against him is similar to the charge he was either convicted or acquitted. See **KALU VS. NIGERIAN ARMY (2010) 4 NWLR (PT. 1185) 433; PML SECURITIES CO. LTD. VS. FRN(2018) LPELR 47993 and THE STATE VS. ALAEFULE (2020) LPELR 49789.**

The plea in bar can only be successfully invoked where it can be shown that a person was either convicted or acquitted which the present Appellant cannot show. Thus, ordering a retrial by the Court below cannot offend the provision of Section 36 (9) of the Constitution.

Moreso, the section specifically states that "*save upon the order of a superior Court*".

On the whole, the Court below was perfectly on a good footing to make an order of retrial. That order, in the circumstance is the only option open to the Court below and not to discharge or acquit the Appellant. The Appellant shall feel free to ventilate his grievances at the trial Court if any.

In the circumstances, with the resolution of the two issues against the Appellant and in favour of the Respondent, this appeal is devoid of merits and it is accordingly dismissed. The decision of the Court below in Appeal No. K/37CA/2020 be and is hereby affirmed.

BOLOUKUROMO MOSES UGO, J.C.A.: This appeal is from the decision of the appellate Division of the High Court of Kano State ordering a retrial by an Upper Sharia Court of a blasphemy charge brought against the Appellant by Respondent in the said Upper Area Court. The said charge that was brought pursuant to Section 382(B) of the Sharia Penal Code of Kano State 2000 attracts death penalty upon conviction and so is a capital offence. The charge reproduced at page 1 of the records of appeal read as

follows:

"Complainant - COMMISSIONER OF POLICE

Vs.

Defendant - YAHAYA SHARIFF AMINU

Offence - Balsphemy (sic) Against the Prophet Muhammad (P. B. U. H.)

That on the 23/2/2020 between 8.00 to 11050 p.m, you Shariff Yahaya Aminu, 30 years old, resident of No 26 Sharifai Quarters Kano with intent to touch the heart of Muslims as a whole, recorded an audio which you sent to a website called Gidan Umma Amina which you used foolish words wherein you called the prophet (P.B.U.H) as devil and his position does not reach that of Inyass.

(Emphasis mine)

Appellant who was not represented by a legal practitioner and was also not provided one by the Sharia Court pleaded guilty, repeatedly, on the 20th day of March 2020, 28th day of April 2020, the 24th day of June 2020 and on the 27th of July 2020, to the said charge. On each occasion, he was asked if he was a Muslim, sane and knew what he was doing. He repeatedly answered in the affirmative. In fact, on the 24th day of June 2020 he was even further informed, verbally, by the Court that the particular Prophet he is charged with blaspheming was Prophet Mohammed (P.B.U.H.). This is shown by

the following excerpt of the proceedings of the trial Upper Shari'a Court spanning pages 5 and 6 of the records of appeal where it is recorded thus:

Court: I hereby order that the F.I.R. be read to him again.

Court: Do you understand what was read to you?

Answer: Yes.

Court: Do you understand fully well what was read to you?

Court: You are being charged with blasphemy against prophet Muhammad (P.B.U.H.) which is an offence contrary to Section 382(b) KSSL Law 2000, is it true that you have committed the offence?

Answer: it is true that I committed but I am pleading for leniency.

Court: You heard that he still admitted that he committed the offence."

Even after the foregoing, the trial Shari'a Court did not immediately convict him but adjourned, once again, to 27/7/2020 for the prosecution to produce his said blasphemous statements. On the said 27/7/2020, Appellant again admitted that the audio and written versions of the said statements which were produced and subsequently marked as Exhibits A and B by the Court were made by him. Apparently struck by the solemnity of what was unfolding before him, particularly the plea of

guilty entered by the Appellant to a charge that attracts a mandatory death sentence upon conviction, the Upper Shari'a Court Judge took it upon himself to again read to the Appellant the purport of what he was accused of, including the fact that the allegations that the blasphemous words were made against Prophet Muhammad (P.B.U.H.). That is again shown at page 9 of the records stating:

I, Aliyu Muhammad Kani Upper Sharia Court Judge, Hausawa, found you Shariff Yahaya Sharifai guilty of the offence of blasphemy against Prophet Muhammad (P.B.U.H.) which is an offence contrary to Section 38(b) of Kano State Sharia Penal Code Law 2000 which the punishment for whoever committed it is to kill him until he is dead.

Court: Defendant - Do you hear the punishment provided by law against you, do you understand?

Answer: I understand.

Court - Defendant - So what do you say?

Answer - I am pleading for the leniency of the Court in mitigation.

Court - Defendant - are you taking intoxicants?

Answer - No.

Court - Are you in your sense?

Answer - Yes I am sane.

ALLOCUTUS (IZAR)

Court - Defendant - Do you have any cause, ground or

reason which the Court will consider in mitigation of the punishment provided by law.
Answer - There is none. I am seeking for leniency.

Again the Court still did not immediately convict the Appellant but rather adjourned judgment further to 10/8/2020, on which date it pronounced its judgment convicting him and passed on him the mandatory sentence of death as provided by the statute.

Now, I am not unaware of the fact that the said guilty plea that was entered by the Appellant was invalid in law or that it behoved the Shari'a Court by the provisions of ACJL of Kano State to record a plea of not guilty for him and to also provide counsel to represent him given the nature of the offence. The point I am trying to make is that, contrary to the argument of Mr. Alapinni for the Appellant, not only did the charge state clearly that the Appellant blasphemed against Prophet Muhammad in particular (P.B.U.H.), that fact was even further brought to appellant's attention directly on more than one occasion by the Court before his conviction and sentence.

Appellant appealed that decision to the High Court of Kano State and there posed the following three questions for

determination:

1. Whether the trial Court was right to sentence him to death.

2. Whether the procedure which the trial Judge directed himself in law to arrive at his death sentence was constitutional, fair, right and just.

3. Whether it is constitutional to have a Shari'a Penal Code in a secular State like Nigeria.

The High Court in its judgment of 21st January 2021 decided issue 3 of the Constitutionality of the Shari'a Penal Code of Kano State against the Appellant. In respect of issues 1 and 2 however, it posed the following two questions for determination:

1. Whether in view of the nature of the offence with which the defendant was tried, convicted and sentenced, to wit capital offence, attracting death penalty, it is right to conduct the trial without the defendant being represented by a legal practitioner.

2. Whether in view of the nature of the offence being capital offence it is right for the trial Court to enter a plea of guilty against the defendant and proceeded to convict and sentence him based on his admission.

It ended up resolving both questions in Appellant's favour and founded its decision on Sections 269(1) (3)

and (4) and 276(3) of the Administration of Criminal Justice Law (ACJL) of Kano State which provide respectively that in a trial for a capital offence the Court shall provide the accused person with a legal practitioner and that where the defendant pleads guilty to a capital offence a plea of not guilty shall be recorded for him. On the basis of that, it declared the entire proceeding before the Upper Sharia Court a 'nullity' and made an order for Appellant's retrial before another Judge of the same Upper Sharia Court, his previous trial, in its words, having been 'characterized with the said procedural irregularities'.

Appellant is still dissatisfied with that judgment hence this appeal. He contends in this appeal that he was after all not guilty of the blasphemy charge he repeatedly affirmed before the Upper Sharia Court that he understood, so he ought to have been discharged and acquitted and not retried on it. He erected his appeal on the following two grounds of appeal:

Ground 1:

The learned trial Judge misdirected themselves in law when they annulled the judgment of the trial Court and then ordered for a retrial at the Sharia Court in

Hausawa Filin Hockey instead of granting the defendant a discharge and acquittal.

Particulars of error:

a. Under Nigerian Criminal law, where the prosecution fails to prove his case beyond reasonable doubt the defendant is entitled to a discharge and acquittal.

b. Under Nigerian Criminal law, nobody shall be tried twice for the offence of which he has already been tried for. An accused person can only be tried and punished once for a given offence established by law. It amounts to double jeopardy and a miscarriage of justice to allow for a multiplicity of trial for the same offence.

2. The learned Justices erred in law when they ruled that the Shari'a Law is constitutional.

Particulars of error:

a. A Shari'a Penal Code Law is only applicable and permissible in Islamic theocracies or countries whose constitution allows for such laws whereas Nigeria is a secular state with Constitutional democracy and the Constitution being the supreme law.

b. The Constitutional principle of separation of powers between government and religion enshrined at Sections 10 and 38 of the constitution prohibits government from adopting religion or

making laws restricting religious freedoms and also prohibits government from making laws to advance or promote any religious interest.

c. The offence of blasphemy is inconsistent with the Constitution of the Federal Republic of Nigeria by virtue of Section 10 standing alone or in conjunction with Section 38 of the Constitution respectively.

d. The Penal Sharia Code Law 2000 of Kano State or any other Penal Code Law in Northern Nigeria is inconsistent with Section 10 and S.38 of the Constitution of the Federal Republic of Nigeria and Section 1(3) of the Constitution states that 'if any other law is inconsistent with the provisions of the Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void'.

Mr. Kolawole Alapinni Esq., leading three other lawyers for the Appellant posed the following two questions in Appellant's brief of argument for determination by this Court:

1. Whether the learned High Court judge (sic) was right to order for a retrial instead of an acquittal after quashing, annulling and vacating the position of the Shari'a Court.

2. Whether the decision of the High

Court was right in declaring the Kano State Shari'a Court Penal Code Law 2000 constitutional.

In arguing issue 1, Mr. Alapinni first noted that by Section 36(5) of the 1999 Constitution of this country every person charged with a criminal offence is presumed innocent until he is proved guilty. The evidence to prove that guilt he submitted must be beyond reasonable doubt and the burden to discharge it is on the prosecution. He submitted that the ingredients of the offence of blasphemy under Section 382(B) of the Shari'a Court Penal Code Law 2000 are:

(1) That there was an expression in writing or verbally by the appellant;

(2) That such expression was made in public;

(3) That the expression was abusive or made in contempt and;

(4) That it was made against the Holy Quran or any person recognized as a prophet.

These ingredients, counsel submitted without elaborating, were not proved by the prosecution against Appellant so the High Court ought to have entered a verdict acquitting and discharging him and not the retrial order it made. Learned counsel next cited Hassan **v. Federal Republic of Nigeria (2016) LPELR-42804 (SC)** for the

principles guiding the making of an order for retrial in criminal cases as stated in**Abiodundu & Ors v. The Queen (1959) 4 F.S.C. 70 @ 73** and followed in subsequent cases including Hassan **v. Federal Republic of Nigeria (2016) LPELR-42804 (SC**), where it was said that a retrial is the proper order where among others (a) there has been an error in law (including the observance of the law of evidence) 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 that there has been no miscarriage of justice; (b) that leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (c) that there are no 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, or the consequences to the appellant or any other person of the conviction or acquittal are not trivial; and (e) that to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it; (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. Counsel then canvassed arguments in respect of each of these issues serially. In respect of its limb (a), counsel argued that the lower Court having declared the trial of the Appellant before the Sharia Court a nullity, an order for retrial cannot be made.

On the second limb, counsel argued that "all the elements of the offence charged against the defendant were not proved."

On limb (c), counsel referred us to a purported CNN Report and other information said to be available to him, which he said indicated that the Kano State Government is unduly interested in the matter in favour of the prosecution so a retrial would be oppressive to the Appellant.

On limb (d), counsel argued that the offence with which the Appellant is charged is 'trivial' and is in fact a victimless one.

On limb (e), counsel argued that the lower Court having declared the trial before the lower Court a nullity, its order for retrial would infringe his right under Section 36(9) of the 1999 Constitution of this country not to

be subjected to a second trial for an offence he has been tried and acquitted. The appropriate order in the circumstances of that finding, he submitted, is one acquitting and discharging the Appellant. He cited in support of that three civil cases of**Ukaegbu & Ors v. Nwololo (2009) LPELR- 3337(SC), Okedare v. Adebara & Ors (1994) LPELR-2432(SC), Duru & Ors v. Onwumelu & Anor (2001) LPELR-970 (SC).**

On issue 2, counsel argued that the Sharia Penal Code 2000 of Kano State under which the charge was laid against the Appellant is unconstitutional having regard first to Section 10 of the 1999 Constitution of the Federal Republic of Nigeria stating that 'The Government of the Federation or of a State shall not adopt any religion as State Religion," and Section 38 of the same Constitution also stating that "Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private to manifest) and propagate his religion or belief in worship, teaching, practice and observance. Counsel argued that the said two

provisions reveal the intent and purpose of the draftsman to separate religion from state and leave the nation as a secular one without religious interference whatsoever; that the legislative powers bestowed on the State Houses of Assembly by the Constitution are only to the extent that Laws made by them do not offend the provisions of the Constitution, otherwise they would become void by virtue of Sections 1 (1) and (3) of the same Constitution. Counsel on behalf of the Appellant thus urged us to declare the Shari'a Penal Code Law of Kano State 2000 unconstitutional.

Resolution of issues

Like my learned brother Lamido, J.C.A., I also wish to consider issue 2 of the Constitutionality of Shari'a Penal Code Law 2000 of Kano State first, for the resolution of that issue in favour of the Appellant will automatically render unnecessary issue 1. On this issue, I must say that, while one finds a bit incongruous the involvement of a State organ like the House of Assembly in legislating for a particular religion in a secular State that Section 10 of the Constitution of this country professes it is, like my two learned brothers Mbaba and Lamido, JJ.C.A, I also think

it will be going too far to suggest that by enacting that legislation Kano State Government had made Islam a State religion. Adoption of state religion suggests that only one religion is allowed in the State. That is not the case with the Sharia Penal Code Law 2000 of Kano State, as by its Section 3 it only applies to Muslims and those who consent to be tried by the Sharia Court. One cannot even close one's eyes to the fact that the same 1999 Constitution of this country recognizes not just the existence of Sharia Courts, but even an appellate Shari'a Court, it even makes it mandatory that Judges learned in Sharia Law be appointed to this Court and even the Supreme Court. I also note the pronouncement of the apex Court (LT. Mohammad, J.S.C. (Later C.J.N.) in **Shalla v. State(2007) 12 MJSC 53; (2007) LPELR-3034 (SC) at p. 65 -66 para G-A** that blasphemy is a serious crime for any sane and adult Muslim and is punishable with death under Sharia. Juxtapose on that the obvious fact, which one must take note of (as it is common knowledge), that Kano State is a predominantly Muslim State to the point that it is even doubtful if any of its 44-member House of Assembly

or its elected Governors since its creation has ever belonged to any religion other than Islam, and it becomes fairly understandable if the said predominant adherents of the Islamic faith in the state saw it fit to codify for themselves and themselves alone penal provisions of their Shari'a Law. Such a law it must be noted cannot be enforced unless codified in a written law. That much is made clear by the provisions of Section 36(12) of the same 1999 Constitution stating thus:

Subject as otherwise provided by the Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or of a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

That seems to be the motivation behind the enactment of the Sharia Penal Code Law 2000 of Kano State House of Assembly. It is therefore my humble opinion that in so far as the Sharia Penal Code Law of Kano State 2000 limits its application to only Muslims and persons who consent to be tried by the Sharia Court, as

clearly stated in its Section 3, it cannot be said to amount to adopting Islam or Sharia Law as State Religion as contended by Mr. Alapinni for Appellant. In the event, I hereby resolve issue 2 against Appellant.

Issue 1: *The propriety of the retrial order made by the lower Court.*

It is almost impossible to discuss the propriety of a retrial order in a criminal appeal without mentioning the decision of the Federal Supreme Court in the locus classicus of **Abiodundu & Ors v. The Queen (1959) 4 F.S.C. 70**. There, the Federal Supreme Court while observing that a retrial order is discretionary so it is unwise to lay down exhaustive principles or grounds for the exercise of that power as it may not be possible to foresee all the combinations of circumstances in which the question of ordering a retrial may arise, proceeded to state that "before ordering a retrial the Court must be satisfied (a) that there has been an error in law (including the observance of the law of evidence) 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 that there has been

no miscarriage of justice; (b) that leaving aside the error of irregularity, the evidence taken as a whole discloses a substantial case against the appellant; (C) that there are no 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, or the consequences to the appellant or any other person of the conviction or acquittal are not trivial; and (E) that to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it."

I shall now apply these principles to the facts of this case to see whether the argument of the Appellant against the retrial order of the lower Court is well founded. First is the argument that the lower Court having declared the 'trial' of the Appellant by the Upper Sharia Court a nullity it means that there was nothing to retry him for so that order was wrong. This argument clearly does not represent the current state of the law. First, it must be noted that the Appellant did not join issues with the prosecution upon his arraignment. He rather entered a plea of guilty, so there was no trial, strictly speaking,

before that Court in the real sense of the word, for 'trial' means "the formal examination before a competent tribunal of the matter in issue in a civil or criminal case in order to determine such issue" - see Merriam Webster's Online Dictionary. Where an accused person pleads guilty to an offence as the Appellant did, albeit wrongly, before the trial Upper Sharia Court, the Court simply proceeds to judgment and sentence without trial, because there is no matter in issue to be tried. See Oputa, JSC in **Onuoha v. State (1988) LPELR-2706 (SC) p.20 and in Stephen v. State (1986) LPELR-2706 p.48, (1986) 5 NWLR (Pt. 46) 978 at 1005;** Tobi JSC in **Omoju v. F.R.N. (2008) ALL FWLR (Pt 415) 1656 @ 1674.** See even much more recently **Adamu v. F.R.N. (2020) 2 NWLR (Pt. 1707) 129 @ 163** where Eko, JSC, said that an accused person's plea of guilty to a charge is tantamount to a consent judgment. From the foregoing reasoning, it follows that any evidence produced by the prosecution after a plea of guilty - as in the case of Exhibits A and B attacked by which Mr. Alapinni as being tendered without compliance with Section 84 of the Evidence Act - is not normally put through the

formalities of the law of evidence and admissibility as would be done in a contested trial. In fact, such evidence is usually simply produced from the Bar without any room for objection and marked without further ado: see**Adamu v. F.R.N. (2020) 2 NWLR (Pt. 1707) 129 @ 162, Omoju v. F.R.N.(2008) ALL FWLR (Pt. 415) 1656 @ 1674 (SC); Emma Amanchukwu v. F.R.N. (2009) LPELR-455 (SC) P. 14-15**. It follows, therefore, that the failure to follow strictly the procedure stated in Section 84 of the Evidence Act in admitting Exhibits A and B cannot be erected as a ground against the lower Court's retrial order. At any rate, it is not the current position of the law that once a proceeding is declared a nullity a retrial order cannot be made. Decisions abound - among them **Sele Eyorokoromo & Anor v. The State (1979) 6-7 (SC) p.11 -12; Sunday Kajubo v. State (1988) NWLR (Pt. 83) 721, (1988) LPELR-1646 (SC); 721, Alfred Elijah v. The State (2013) LPELR-20095 (SC); Akpiri Ewe v. The State (1992) LPELR- 1179 (SC**) - that state the contrary. In **Sunday Kajubo v. The State (1988) LPELR-1646 (SC) 1,** Oputa, JSC, spoke at length on this issue thus:

"This naturally leads

to the questions - Can and when should a new trial or retrial be ordered after declaring a trial a nullity and allowing the appeal? If an appeal is dismissed that question will not arise. The answer to the question can a new trial be ordered is definitely yes. Part of the answer to the question when such a trial can be ordered can be found in principles (b), (c), (c) and (e) as formulated in Abodundu's case supra and part of it will be found in the reason for declaring the trial a nullity in the overall interest of justice. A trial may be declared a nullity on many grounds:

(i) the charge may be incurably defective as was the case in Okoro's case supra.

(ii) The arraignment may be irregular, null and void as happened in the case now on appeal.

(iii) The trial Court may have no jurisdiction to try the case as in **R. v. Shodipo 12 WACA 374 or Oruche v. C.O.P. (1963) 1 ALL N.L.R. 262**.

(iv) The trial may be null and void as a result of a serious error or blunder committed by the trial Court as was done in Adisa's case supra where there was a total failure to ask the appellant to plead to the amended charge."

His Lordship

rounded off on the issue by saying that:

"The general statement made in Onu Okafor's case supra at p.20 that "Retrial implies that there was a former trial and so this Court will not grant a new trial (or retrial) upon a trial which was null and void" does not now seem to represent the true legal position especially after the decision of this Court in **Sele Eyorokoromo and Anor v. The State (1979) 6-9 S.C.3 at pp.11/12**.

"A new trial or retrial can definitely be ordered if the interest of justice so requires: see **Reid v. The Queen (1979) 2 W.L.R. 221 @ p.226**. (Italics mine)

See also **Alfred Elijah v. The State supra** where it was said (Ngwuta, JSC) at p. 31-32 that:

"There is a general statement to the effect that: Retrial implies that there was a former trial and so the Court cannot grant a new trial (or retrial upon a trial which was a null and void." In view of the later decision in **Sele Eyorokoromo & Anor v. The State (1979) 6-7 (SC) p.11-12**, the position is that a new trial can be ordered if the interest of justice so requires. See **Reid v. The Queen (1978) WLR 221 @ 226** applied in **Sunday Kajubo v. The State (1988) 1**

NWLR 721 @ 744."

On the facts of this case, I am of the opinion that the retrial order made by the lower Court is proper and in the interest of justice for several reasons. First, contrary to the argument of Mr. Alapinni for Appellant, the charge against Appellant is not by any means trivial; it rather attracts capital punishment upon conviction. The seriousness of a charge is not determined by its name but by the punishment it attracts. Secondly, Appellant, it should be noted, pleaded guilty, either wrongly or rightly, to the said charge. It cannot therefore be seriously asserted that the evidence against him was not substantial.

The charge cannot also be properly described as defective let alone 'incurably defective', to use the very words of Oputa JSC in **Kajubo v. The State supra**, to warrant its dismissal. I have shown that it directly mentioned Prophet Mohammad (P.B.U.H.) as the prophet blasphemed by the Appellant.

As for learned counsel's reference to a purported CNN Report on the issue, such Report cannot be properly cited as evidence for the Court to rely on in so far it is not part of the records and no attempt was made to admit it as fresh

evidence in this appeal. At any rate the said Report, even if admitted, is weightless in so far as its maker was not tested by way of cross-examination on his assertions: see **Udom v. Umana (No 2) (2016) 12 NWLR (Pt. 1526) 179 @ 283 @ 284, Udom v. Umana (No 1) (2016) 12 NWLR (Pt. 1526) 243- 244**. In fact, such a report is at best documentary hearsay evidence coming from the Appellant's counsel: see **Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452 @ 526; Sa'eed v. Yakowa(2013) ALL FWLR (PT 692) 1650 @ 1675**. The law is also well settled that Newspaper Report and other items in the news media have no evidential value: see**Ojukwu v. Yar'aduda (2009) ALL FWLR (Pt. 482) 1065 @ 1118 para G; Olly v. Tunji(2012) ALL FWLR (Pt. 654) 39 @ 97 para, R.N. W.H. v. Sama(1991)12 NWLR (Pt. 171) 64 @ 77**. In the result, I also resolve this issue against the Appellant.

In sum, I agree with the leading judgment of my learned brother Abubakar Muazu Lamido, J.C.A.; accordingly, I also dismiss this appeal and affirm the order of the High Court that the Appellant be retried or properly tried by another Judge of the Upper Sharia Court on the charge of blasphemy brought against him by

Respondent.

ITA GEORGE MBABA, J.C.A. (DISSENTING): I have had the privilege of reading the draft of the lead judgment by my learned brother A.M. Lamido JCA, resolving the appeal against the Appellant. I, respectfully, disagree with his reasoning and conclusions in respect of the 1st Issue on the order of retrial, which I consider to be wrong. Below are my views:

This appeal emanated from the judgment of Kano State High Court, in its appellate jurisdiction, in Appeal No. K/37CA/20, delivered by Hon. Justice N.S. Umar (Presiding) and Hon. Justice Nasiru Saminu, being appeal against the judgment of the Sharia Court, in Charge No. CR/43/2020, which decision the learned High Court Judges reversed, annulled, quashed and nullified. The said judgment of the Sharia Court had convicted and sentenced the Appellant to death, for blasphemy. But in conclusion, their Lordships ordered for retrial of the Appellant by another Sharia Judge.

At the Sharia Court, Hausawa Filin Hockey, Appellant (as accused) was charged, as follows:

That on the 23/2/2020 between 8:00 to 11:05pm, you Shariff Yahaya Aminu, 30 years old, resident of No. 26 Sharifai Quarters Kano,

with intent to touch the heart of Muslims as a whole, recorded an audio which you sent to a website called GIDAN UMMA AMINA, which you used foolish and disgraceful words wherein you called the prophet (P.B.U.H) as a full devil and his position does not reach that of Inyass. Hence you are arraigned before this Court on this charge against you. (See pages 1 and 2 of the Records of Appeal)

The Sharia Judge had caused the charge (F.I.R) to be read to the Defendant (Appellant) on 20/3/2020, when he was arraigned, pursuant to Section 129(7) of Kano State Administration of Criminal Justice Law (KACJL) 2019. After reading the First Information Report (FIR) or charge to the Accused Person and he said he understood the same fully, the Judge asked the Defendant:

"So you heard that you are charged with offence of blasphemy against the prophet (P.B.U.H.) that is, you uttered some words against him as contained in the FIR and doing this is contrary to Section 382 (b) Kano State Sharia Penal Code Law 2000.

Is it true that you uttered those words?

Answer: It is true I committed.

Court: Defendant - that is to say, you posted in a web that Prophet

Mohammad (P.B.U.H.) is a full devil.

Answer: I committed that.

Court: Defendant - The Statement that Inyass is superior to the Prophet (P. B. U. H.) you also posted it?

Answer: I committed that.

Court: Prosecutor - You have heard that he admitted the offence?

Answer: I want the Court to establish to him the witness of admission/utterance.

Court: Defendant - As the Court is talking to you now, are you fully sane?

Answer: I am sane.

Court: Defendant - How old are you?

Answer: I am 30 years old.

Court: Defendant - Are you a Muslim?

Answer: I am a Muslim

Court: Musa Mohammad - do you heard (sic) what he said?

Answer: I heard him saying that what he is being accused of posting in his web is true.

Court: Malam Abdullahi - Do you heard (sic) what he said?

Answer: I heard what he said.

Court: The Court has established the witnesses of admission relying on the authority of MUKHTASAR KHALID...

ARABIC TEXT

Meaning: If a person made an admission, it is necessary that witness of an admission be established

against him.

Court: Prosecutor - Have you heard?

Answer: Being that

what he wrote and posted was in audio, I am applying for time so as to present it before the Court to further prove what he committed.

Court: I stopped (sic) and hereby ordered (sic) the defendant be remanded at correctional center within Kano metropolitan till 28/4/2020 relying on Section 171 Kano State Administration of Criminal Justice Law 2019 and considering the nature of the charge he should engage the service of a legal practitioner." See pages 2 to 4 of the Records of Appeal.

The case was adjourned to 28/4/2020 for the Defendant (Appellant) to secure the services of a lawyer to defend him but on that date, Appellant said he did not get a lawyer to defend him. The trial Court ordered that a letter be sent to the Legal Aid Council, Kano, to get a lawyer to represent the Appellant in Court on the next adjournment date - 17/6/2020.

On 24/6/2020 when the case was further called, the Registrar told the Court that a letter had been sent to the Legal Aid Counsel, but no reply came from the Council and no legal practitioner came for defendant. Thereupon, the Court ordered that the FIR (charge) be read again to the Defendant for plea, and it was done.

The Defendant still said he fully understood the charge - that he was:

"being charged for blasphemy against Prophet (P.B.U.H.) which is an offence contrary to Section 382 KSSPC Law 2000.

Appellant answered: "It is true that I committed but I am pleading for leniency. ”

The Court again, ask the Defendant:

"Are you sane?

He answered: "I am sane built (sic) (but) I am pleading for leniency." (See Page 5-6 of the Records)

At this stage, the prosecutor, prayed the Court again for another chance to present the voice message or audio of the Appellant, which he (prosecutor) said the Police Command, Kano had since caused to be made and reduced into writing, so that both could be produced in Court, the case was therefore adjourned to 27/7/2020.

On that date, 27/7/2020, the audio message was played in Court and the Defendant (Appellant) said he recognized his voice and still admitted to committing the offence and still asked for leniency. The said audio and the written translation were admitted as Exhibits A and B.

After all the trial, the Sharia Court found the Defendant guilty of the offence of blasphemy against Prophet

Mohammad (P.B.U.H.) contrary to Section 382(b) of Kano State Sharia Penal Code 2000 and sentenced him to death by hanging.

See page 14 of the Records of Appeal, where the Sharia Court said:

"Finally, relying on the grounds above the Court was satisfied that the Defendant in his capacity as a sane Muslim has committed this offence. Base (sic) on this, relying on Section 382(b) Kano State Sharia Penal Code Law 2000 and the case of Dan Shalla VS The State (2007) 12 MJSC at P. 53, where the Supreme Court held:

"The trite position of the law under Sharia is that who insults, defames or utters words or acts which are capable of bringing into disrespect... such a person has committed a serious crime which is punishable by death."

I hereby sentence him to death by hanging."

The above decision was the subject matter of the appeal at the Court below, which after taking all the arguments and considering the evidence on the Records, the lower Court held, as follows:

"The Appellant filed a brief... wherein he raised 3 issues for the determination of this Court viz:

(1) Whether or not the trial Court was right to sentence the

Appellant to death.

(2) Whether or not the procedure which the trial Judge directed himself in law to arrive at the death sentence on the accused, was constitutional, fair, right and just.

(3) Whether or not it is constitutional to have a Sharia Penal Code Law in a secular state like Nigeria.

The respondent... adopted the same issues raised by the Appellant... We shall treat the 3 issues formulated by the parties on both sides...

As for the 3rd Issue as to whether or not it is constitutional to have a Sharia Penal Code Law in a secular state like Nigeria, we shall adopt our findings, reasoning and conclusions reached in the Appeal No. K/40CA/2020 between Umar Farouk Vs Comm. of Police, as if same are considered in this appeal.

While we shall treat the 1st and 2nd issues for determination together... Section 269(1)(3) and (4) of the ACJLL, Kano State 2019 provides:

"(1) the complainant and the defendant shall be entitled to conduct their case by a legal practitioner or in person except in a trial for a capital offence punishable with death.

(3) where the defendant elects to defend himself in person, the Court shall

inform him of his right within the trial and the consequences of his election.

(4) the Court shall ensure that the defendant is represented by a counsel in capital offence provided that a defendant who refuses to be represented by a counsel shall after being informed of the riofks (sic) (risk) defending himself in person, be deemed to have elected to defend himself in person and this shall not be a ground to void the trial"

In this case, the defendant was not represented by a legal practitioner, the offence with, which the defendant was charged is a capital offence attracting death penalty, he did not refuse to be represented by a legal practitioner. He merely said he could not get one. At the point it is the duty of the Court to ensure that the defendant is represented by a legal practitioner in view of the nature of the charge against him and the severity of the punishment. Yet did not ensure that he was represented by a legal practitioner nor informed the defendant of the risks of defending himself in person. This is in clear violation of Section 269(1)(2) and (4) of the ACJL.

The requirement of legal representation for a defendant charged

with capital offence attracting death penalty is mandatory, because the word used in the ACJL is 'shall which is mandatory. In Balonwu Vs Gov. Anambra State & Ors (2008) 16 NWLR (Pt 1118) P. 236 the Court of Appeal per Alagua JCA held that "There is absolutely no doubt that the word 'shall' connotes a command, it imposes an obligation to do something"

Therefore, failure of the trial Court to ensure that the defendant was represented by a legal practitioner in a case attracting death penalty is a serious omission which renders the entire proceeding a nullity no matter how beautifully conducted. We so hold.

On the 2nd Issue... the defendant was repeatedly been (sic) asked by the Court to plea (sic) to the charge and he repeatedly recorded his plea of guilty. This contravenes the provisions of Section 276(3) of the ACJL Kano State 2019 which provides thus:

"Where the defendant pleads guilty to a capital offence, a plea of not guilty shall be recorded for him"

The essence of all these provisions is to save life and guide the Courts against falling into an error by convicting an innocent person. That is the essence of the Blackstone's

ratio propounded by Williams Blackstone to wit: It is better that ten guilty persons escape than one innocent suffer" cited in Nnadi Vs State (2016) LPELR-41032 (CA) per Yakubu JCA. This principle got its root from the famous prophetic Hadith (Tradition) of the noble Prophet Muhammad, peace be upon him, where he said "

ARABIC CONTENTS:

That you should suspend capital punishment where there is doubt. This tradition is in tandem with the requirement of provision of a legal practitioner for the defendant under Section 269 of the ACJL, it is also in tandem with the requirement of recording the plea of not guilty for a defendant charged with capital offence, putting (sic) the burden of proof on the prosecution so that justice should not only be done but should manifestly be seen to have been done.

On the whole, we find that this trial is characterized with some procedural irregularities which shall be resolved in favour of the defendant. Consequent upon this, the trial is hereby set aside. Instead, the Defendant shall be tried before another judge other than the trial judge, Alkali Aliyu Muhammad Kani."

The case is remitted back to the same

U.S.C. Hausawa sitting at Filin Hockey now presided over by Alkali Mallam Abdullahi Halliru and shall ensure that the defendant is duly represented by a legal practitioner throughout the trial." (See pages 118, 119, 122 to 125 of the Records of Appeal).

This appeal appears to be mainly against the part of the decision remitting the case for retrial, though in the Notice of Appeal, Appellant's Counsel stated that the appeal is against the whole decision. See the Notice of Appeal on pages 127 to 129 of the Records, which disclosed 2 grounds of Appeal, as follows (without their particulars):

(1) The learned trial Judges misdirected themselves in law when they annulled the judgment of the trial Court and then ordered for a retrial at the Sharia Court in Hausawa Filin Hockey instead of granting the defendant a discharge and an acquittal.

(2) The learned justices erred in law when they ruled that the Sharia Law is constitutional.

Appellant filed his Brief of arguments on 1/4/2021 and distilled two issues for the determination of the appeal, as follows:

(1) Whether the learned High Court Judges were right to order for a retrial instead of an

acquittal after quashing, annulling and vacating the position of the Sharia Court?
(2) Whether or not the decision of the High Court is right in declaring that the Kano State Sharia Penal Code Law 2000 is constitutional.

Appellant did not formally relate the issues to the grounds of appeal, but even a casual look at the issues and the 2 grounds of the appeal, would show that Issue one derived from ground one and Issue two from ground two.

The Respondents filed their Brief on 11/5/2022, which was deemed duly filed on 23/6/2022, the date this appeal was heard. The Respondent adopted the two Issues, as distilled by the Appellant, to argue the appeal.

Arguing the appeal, Appellant's Counsel, Kola Alapinni Esq, who settled the brief, on Issue 1, said that the law is trite, that the burden of proof lies on the prosecution in criminal cases, to show the Court that the defendant did, in fact, commit the offence. He relied on **Musa Vs State (2014) LPELR-22912 CA** to the effect that where the prosecution fails to establish the commission of the offence or "***the Court is left in a state of doubt, the prosecution would have failed to***

discharge the burden of proof which the law lays upon it and the defendant... will be entitled to an acquittal'

Counsel also relied on**Sabi Vs State (2011) 14 NWLR (Pt 1268) 521; Bakare VS State (1987) 1 NWLR (Pt 52) 579**, on what proof beyond reasonable doubt connotes. He also relied on Section 36(5) of the 1999 Constitution of the Federal Republic of Nigeria, as amended, on the presumption of innocence of an accused person, until he is proved guilty. He added that by the above provisions, every ingredient of the offence has to be proved by the prosecution, which alleges the commission of the offence. He relied on Section 132 of the Evidence Act.

Counsel reproduced Section 382 (3) of the Sharia Penal Code Law Kano State, 2000, which states:
"Whoever by any means publicly insult, by using words or expression, in writing or verbal by means of gesture which shows or demonstrates any form of contempt or abuse against the Holy Qur'an or any prophet, shall on conviction be liable to death."

Counsel said the ingredients of the above provision, which the prosecution has to prove or establish, are that there was:
1) expression

either in writing or verbal;

2) such expression was made in public;

3) that expression was made against the Holy Qur'an or any person recognized as a prophet.

Counsel said that from the Court recordings, it was abundantly clear that these ingredients of the offence were not proved, and the burden of proof was therefore not discharged accordingly by the prosecution. Therefore, the High Court, which heard the appeal, ought to have vacated the position of the trial Sharia Court, and granted the Appellant a discharge and acquittal.

Counsel said that the appellate Court, therefore, misdirected itself in law to have arrived at their decision to remit the case for retrial. He relied on the case of Hassan **VS FRN (2016) LPELR-42804 (SC**), where his Lordship, Uwais (CJN) succinctly laid down the steps to guide a Court in making an order of retrial, thus:

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

b) that leaving aside the error or irregularity, the evidence

taken as a whole discloses a substantial case against the appellant;

c) that there was 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 or any other person of the conviction or acquittal of the appellant are not namely 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.

Counsel also relied on the case of **Nnadozie & Ors Vs Mbagwu & Ors (2008) LPELR-2055 (SC); Yusuf Abodundu & Ors Vs The Queen (1959) SCLR 162**.

Counsel added that the factors stated in Hassan **Vs FRN (supra**) must co-exist conjunctively for a retrial to be ordered. He stated that quite remarkably the High Court rendered the decision of the trial Sharia Court a nullity. He referred us to pages 125 and 123 of the Records of Appeal, where the lower Court said, respectively:

"On the whole, we

find that this trial is characterized by some procedural irregularities, which shall be resolved in favour of the defendant. Consequently, upon this, the trial is hereby set aside."

"Therefore, failure of the trial Court to ensure that the defendant was represented by a legal practitioner in a case attracting death penalty is a serious omission which renders the entire proceedings a nullity no matter how beautifully conducted. We so hold."

Counsel asserted that the Appellant was not given legal representation at the Sharia Court when the charge carried capital punishment, and a plea of "not guilty" was not entered for him as the law directs (**Okotogbo Vs State (2004) ALL FWLR (Pt.222) 1625**); that such failure to provide Appellant with legal representation was a miscarriage of justice and rendered the trial a nullity.

Counsel said that the lower Court was in error, when it ordered for the retrial, on the ground that:

"***... leaving aside the error or irregularity, the evidence taken as a whole disclosing a substantial case against the appellant.***"

Counsel said that cannot be correct, when the elements of the offence charged was in no way

proved, at all. He said that there was no robust evidence canvassed by the prosecution and the charge substantiated.

On the issue of there being no special circumstances as would render the order of retrial oppressive, to get the Appellant tried a second time, Counsel said the entire proceeding from the time of the arrest of Appellant, leading to his sentence, was characterized by oppression from the Sunni Majority Sect of Islam over the Appellant, who is of the Tijanniya Minority Sect of Islam. Counsel referred us to letters said to have been written to the Attorney General of the Federation by one Mohammed Lawal Gusau, the proprietor of MaahadWa Masjid Li Marhoom Mohammed Lawal Gusau Islamic School, a notable cleric in Northern Nigeria, through his lawyers of Abubakar A. Ashat & Co, seeking the grant of a fiat to prosecute the Appellant to see to his conviction and death. Counsel also referred to a circular said to have been published in Kano, wherein he said Muslim lawyers were warned against representing Appellant, to risk being met with the wrath of Islamic adherents. Counsel said that might have accounted for why Appellant had no lawyer to

represent him! He (Counsel) further recounted the difficulties the team led by the Vice President of Nigerian Bar Association (NBA) had in the course of investigating to gain access to get the English proceedings of the Sharia Court, to facilitate the appeal of his matter; that there was poor co-operation of the Sharia Court officials, which resulted in delays that would have caused the 30 days window of appeal to lapse. Counsel also cited the assurance of the readiness of the Governor of Kano State to sign the death warrant, upon conviction of Appellant, and referred us to a CNN report of 29th September, 2020 by Eion Me Sweeney and Stephanie Busari titled "The WhatsApp Voice note that led to a death sentence."

Counsel therefore said that the circumstances leading up to the order of retrial was surrounded by oppression, as such it would be abysmal to subject Appellant to retrial. He added that the offence with which Appellant was tried and convicted was trivial; being offence related to religion, and is a victimless crime, as such it cannot be reasonably characterized as serious, hence trivial; more so, Counsel said that the alleged offence was not made

in public but in a WhatsApp group, during debate. He said that a retrial would occasion even a further miscarriage of justice, as Appellant would be subjected to a second wave of trial for the same offence that was settled in his favour. He relied on Section 36(9) of the 1999 Constitution of the Federal Republic of Nigeria, as amended, which states:

"***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 an order of a superior Court.***"

Counsel said that the order for retrial was unfair and unjust, as it will afford the prosecution opportunity of profiteering from its blunder, by tendering the electronic evidence of the recording that was ill tendered in violation of Section 84 of the Evidence Act, 2011. Counsel also relied on **Ukaegbu & Ors Vs Nwololo (2009) LPELR-337 (SC); Okedare Vs Adebara & Ors (1994) LPELR-2432 (SC); Duru & Ors Vs Onwumelu & Anor (2001) LPELR-970 (SC**), on when an order of retrial can be made; that

it cannot be done, where it would appear that the Court was giving a party an unjustified opportunity to re-litigate a case which has either truly failed or truly succeeded. He urged us to resolve the Issue for Appellant.

On Issue 2, whether it is constitutional to have a Sharia Panel Code Law in Nigeria as law that regulates criminal activities, Counsel answered in the negative, and referred us to Section 10 of the 1999 Constitution, as amended, which states:

"***The Government of the Federation or of a State shall not adopt any religion as State Religion.***"

Counsel said the lower Court erred, when it adopted the decision in the K/40CA/20: **Umar Faruk Vs C.O.P**. where it held that Section 10 of the Constitution of the Federal Republic of Nigeria is not justificiable. Counsel said that the Section says what it means and means what it says, and it was a command, using the phrase SHALL NOT. Counsel urged us to hold that the passage of the Sharia Panel Code, 2000, by Kano State into law is an adoption of a State religion and that is inconsistent with the constitution. Counsel further urged us to hold that Section 10 of the Constitution, which falls

into/under Chapter one, Part II of the Constitution (Powers of the Federal Republic of Nigeria) is justificiable and should not be confused with the Chapter II of the Constitution, which is Fundamental Objectives and Directive Principles of State Policy.

He added that Nigeria is a multi-religious, multi-ethnic, multi-cultural and multi-ethnic State. It is not a theocracy, like the Vatican, Iran, Afghanistan or Saudi Arabia; he said that the Constitution seeks to protect peculiarity of Nigeria, as a diverse and multi-religious Country, that the enforcement of one religious creeds, values, beliefs and conduct MUST NOT and SHALL NOT, directly or indirectly, interfere or affect another religion.

Furthermore, Counsel said it is on record that Kano State Governor, His Excellency Abdullahi Ganduje, has donned the uniform of the Kano State Islamic Police, Hisbah, to supervise the destruction of alcoholic drinks in Kano State, despite payment of Value Added Tax (VAT) to the Government of Kano State.

Counsel also relied on Section 4(5) of the 1999 Constitution (supra), to the effect that:

"***If any law enacted by the House of Assembly of a State is***

inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other law shall, to the extent of the inconsistency, be void."

He further relied on Section 38 of the 1999 Constitution (supra) which allows every person freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom to manifest and propagate his religion or belief in worship, teaching, practice and observance!

Counsel added that the powers of the State Assembly to make laws, does not permit it to make laws that offend the provisions of the Constitution of Nigeria, or laws in conflict with laws made by the National Assembly. He relied on Section 1(1) of the Constitution, which makes the Constitution Supreme and Section 1(3), which makes every other law, running contrary to the Constitution, a nullity, to the extent of its inconsistency with the Constitution.
Counsel urged us to resolve the Issue too for Appellant, and to allow the appeal.

Responding, M.A. Lawan, Esq, Hon. A.G. Kano State, who settled the brief for Respondent, on Issue 1, said that, when the Court

declares a trial a nullity, the natural order to make is order for retrial. He said that Appellant was charged for "insulting or inciting contempt of religious creed", contrary to Section 382(b) of the Sharia Panel Code, 2000; that the Sharia Court found him liable and sentenced him to death, though Appellant had no legal representation. Counsel said the lower Court set aside the decision of the Sharia Court; that ***failure of the trial Court to ensure that the defendant was represented by legal practitioner in a case attracting death penalty is a serious omission which renders the entire proceeding a nullity***.

Counsel submitted that an order for retrial is made, where there has been an error in law or an irregularity in procedure to be followed. He relied on the case of **Yusufu Abodundu & Ors Vs The Queen 1959 1 NSCC 59 at 60**, where he said it was stated in deciding to order for retrial; that the Court must be satisfied:

(a) that there has been an error in law (including the observance of the law of evidence) 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 this Court

is unable to say that there has been no miscarriage of justice, and to invoke the provision of Section 11(1) of the Ordinance.

(b) that leaving aside the error or irregularity, the evidence takes (sic) 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 a trial a second time.

(d) that the offence or offences of 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 (sic) trial; and

(e) that to refuse an order for a retrial would occasion a greater miscarriage of justice (sic) to grant it.

Counsel said the above position was further affirmed in the case of Shehu Mohammed v. State **(2019) LPELR-47632 (SC)**, in which the error was failure to take plea before the commencement of trial in a case of armed robbery and the evidence taken disclosed a substantial case against him; that such factors and other attendant reasons made it justifiable to allow the retrial, as allowing him to roam the streets without first

trying him properly, was dangerous.

Counsel cited the content of the Section 382(b) of the Sharia Panel Code, and said that the law was trite that an accused person must be represented by a Counsel at every stage of the proceedings in a trial for capital offence; that that was a fundamental right, guaranteed by Section 36 of the Constitution, 1999, as amended. And it was on the basis of that irregularity (of non-representation of Appellant at the trial by a legal practitioner) that the lower Court ordered a retrial of the Appellant. Counsel said that leaving the irregularity aside, that there was evidence that disclosed a substantial case against Appellant; that he confessed to the commission of the offence and even pleaded guilty to the charge; that a written text of the Appellant's speech, along with the audio recording, were tendered and admitted in evidence as Exhibits A & B during the trial.

Counsel added that there was no special circumstances as would render it oppressive to put the Appellant on a trial a second time; he said that the trial commenced on 20/2/2020 and the judgment of the trial Court was given on 10/8/2020 and notice of

Appeal against the judgment was given on 3/9/2020. He urged us to resolve the 1st Issue against the Appellant.

On the 2nd Issue, Counsel answered in the affirmative, saying that the Kano State Sharia Court Law is Constitutional. He said that the fact that the Constitution of the Federal Republic of Nigeria, 1999, as amended, guarantees freedom of religion, thought and conscience, under Section 38, makes it imperative for the legislature to make laws for the protection of the sanctity and activity of that religion; he said that based on this, the House of Assembly of Kano State, by virtue of Section 4(7) of the Constitution, has power to make laws for the peace, order and good government of the State or any part thereof; that the State Assembly had exercised that power, rightly, by the enactment of the Sharia Penal Code, 2000, and same was made as a result of the desire of the people of Kano State.

Counsel said that it was misconception, to think that Sharia Penal Code 2000 was an adoption of State religions, and consistent with the Constitution of Nigeria. He said that a law creating an offence, relating to a religion and prescribing punishment, thereof,

does not amount to adopting a state religion. He said that a secular state is an idea pertaining to secularity, whereby a state is or purports to be officially neutral in matters of religion, supporting, neither religion or irreligion; that what it means is that secular state does not have any official religion; that it neither encourages nor discourages the practice of any religion. All citizens are free to propagate, profess or practice their own religion and no discrimination is made among citizens on the basis of religion.

Counsel said that the offence for which Appellant was charged, convicted and sentenced is "***insulting or inciting contempt of religious creed***" contrary to Section 382(b) of the Sharia Penal Code and the offence is predicated on the Penal Code Laws of Northern Nigeria, 1963, Section 210, thereof which says:

"Whoever by any means publicly insults or seeks to excite (sic) contempt of any religion in such a manner as to be likely to lead a breakdown of the peace, shall be punished with imprisonment for a term which may extend to two years or with fine or with both."

Counsel said Section 382(b) of the Sharia Penal Code

is a replica of the above quoted Section of the Penal Code Law of Northern Nigeria 1963. However, the Sharia Penal Code applies to persons of Islamic Faith as provided under Section 3 of the Law, which says:

"Every person who professes the Islamic faith and/or every other person who voluntarily consents to the jurisdiction of any Sharia Court, established under the Sharia Courts Law 2000, shall be liable to punishment under the law."

Counsel also reproduced Section 382(a) and (b) of the Sharia Penal Code, 2000, as follows:

(a) "Whoever by any means publicly insults or seeks to incite contempt of any religion in such a manner as to be likely to lead to a breach of peace shall be punished with imprisonment for a term which may extend to one year or with fine of N20,000 or all."

(b) "Whoever by any means publicly insults by using word or expression in written or verbal by any means of gesture which shows or demonstrate any form of contempt or abuse against the Holy Qur'an or any Prophet shall on conviction be liable to death."

Counsel said that the above law aims at preserving and protecting religious beliefs, which are

sacred in a multi¬religious communities, like ours, and not to declare a state religion, as misconceived by Appellant's Counsel. He added that the death penalty is prescribed, because such act of insulting the Qur'an or any Prophet, publicly, will incite religious unrest, anarchy and a total breakdown of law and order, which may even lead to collapse of the State. He said that in Islamic faith, Holy Qur'an and all the Prophets are sacred, and insulting any one of them attracts death penalty; that this is settled law under Islamic Law. He relied on the Supreme Court case of**SHALLA Vs STATE (2007) 12MJSC 53**, which held:

"The trite position of the law Linder Sharia is that any sane adult Muslim who insults, defames or utters words or acts which are capable of bringing into disrepute, odium, contempt the person of Holy Prophet Mohammed (peace be upon him) such a person has committed a serious crime which is punishable by death."

Counsel also relied on the above case and repeated the position of the Sharia Court, which said:

"One may wonder, if the Apex Court of the land recognizes by its pronouncement the well

***established principle of Islam, who will then castigate and argue against it and even calling on this Court to declare Sharia Penal Code as unconstitutional. We refuse to do so. And we hold, thus, the argument calling for that is untenable, baseless and lacking in merit...*"**

Counsel said that the submissions of Appellant on this issue are rather more sentiments, than law. He urged us to resolve the Issue against the Appellant and to dismiss the appeal.

RESOLUTION OF THE ISSUES

I shall consider this appeal on the two Issues distilled by the Appellant, and adopted by the Respondent, and shall take them serially.

The facts of the case at the lower Court, were already disclosed in the course of presenting the facts of this appeal and the arguments of Counsel on both sides. Appellant was tried by the trial Sharia Court, for blasphemy, under Section 382(b) of the Sharia Penal Code Law of Kano State 2000, which says:

"Whoever by any means publicly insult by using word or expression in writing or verbal by means of gesture which shows or demonstrates any form of contempt or abuse against the Holy Qur'an or any Prophet shall, on

conviction, be liable to death."

Appellant was tried on the charge:

"That on the 23/2/2020 between 8:am to 11:05pm, you Shariff Yahaya Aminu, 30 years old, resident of No. 26 Sharifai Quarters, Kano, with intent to touch the heart of Muslims as a whole, recorded an audio, which you sent to a website called GIDAN UMMA AMINA, which you used foolish and disgraceful words wherein you called the Prophet (PBUH) as a full devil and his position does not reach that of Inyass."

When he was arraigned on 20/3/2020, before the Sharia Court, he was not represented by Court, but upon the charge read and explained to him, he said he understood the same and admitted committing the offence.

The fact that Appellant needed to be represented by a legal practitioner, in view of the fact that the offence carried capital punishment, was brought to the notice of the trial Sharia Court, and it adjourned the case and told the Appellant to get a lawyer to represent him. On the next adjournment date, Appellant still did not have a Counsel, and the trial Court directed the Register to write to the Legal Aids Council, to avail Appellant legal representation, and

it adjoined the case. On the next adjournment date, Appellant still had no legal representation, and the Legal Aids Council did not respond to the Registrar's letter. The trial Court went ahead with the trial; caused the charge to be read, again, to the Appellant (who still pleaded guilty, and asked for leniency!) The Prosecution (the Police) presented two witnesses, who were merely asked whether they heard the plea of the Appellant, and they answered in the affirmative and the trial Court said:

"Court has established the witness of admission, relying on the authority of MUKHTASAR KHALID," Arabic principle, which means:

"If a person made an admission, it is necessary that witnesses of an admission be established against him."

On 24/6/2020, when the matter came up and the legal Aids Council failed to respond to send Counsel to represent the Appellant, and the charge was again read to Appellant and he pleaded guilty, the trial Judge asked him whether he (Appellant) was sane (the same question the Court asked on the previous dates the Appellant admitted committing the offence). Appellant affirmed his sanity, each time, and asked for leniency. The

Prosecution then asked for adjournment to present what the Appellant actually said, to warrant the charge, saying that "***the Police Command had since caused Appellant's voice to be reduced into writing***", and opted to present the two (the audio and the written translation), on the next date of the case.

On 27/7/2020 the alleged audio was played in Court and Appellant said he recognized his voice, and said he was the one that made the statement; again he asked for leniency. The audio and the written translation were admitted as Exhibits A & B, respectively. The trial Sharia Court, thereafter, convicted Appellant and sentenced him to death, by hanging, for blasphemy. The trial Sharia Court said:

"***Initially, it was the Police Force, Kano Command, that presented the case on FIR on 20/3/2020, where they are charging one Shariff Yahaya resident of Sharifai Quarters, Kano with the offence of blasphemy against Prophet Mohammed (PBUH) wherein he made those speeches and posted same to their group in whatsapp called Gidan Umma Amina where he was saying that "there is no great pagan like Prophet Mohammad (PBUH), he is a complete pager he brought an***

unforgivable sin to the world" and he was saying:

“I will not hold Prophet Muhammad (P.B.U.H) and leave Inyass "which is an offence contrary to Section 352 (b) Kano State Sharia Penal Code Law, 2000…

After the Court received the FIR as provided by Section 126(a) of Kano State Administration of Criminal Justice Law 2019, the Court read to him the content of the charge as provided by Section 129(7) of KSAC J 2019, wherein the Defendant after Court turned to him, he made an admission as provided by the authority of JAWAHIRUL IKLIL VOL 2 SH226-

(ARABIC TEXT) Meaning:

"If a person made an admission witness be established against him"

Later the Court read to the Defendant the contents of the Charge again and he confirmed that he made those statements but by mistake lastly, the prosecutor has presented the voice of the defendant which was contained in audio and the one that was reproduced into writing as Exhibits A&B, from there, the Court made an allocutus as provided by law.

The issue in this case are:

1. The ways of establishing the offence charged against the defendant

2. The position of his admission in this

case

3. Whether uttering these statements as slip of tongue or mistake can be excuse in law?

…. This offence can be proved by 2 ways:

1. Evidence of 2 persons;

2. Admission… Regarding the second issue in law, any person who admitted committing something, this admission has a strong ground than presenting witnesses… It is the saying of the Defendant that he made those statements by mistake together with positing them at their whatsapp group, this will not be an excuse, because a case of blasphemy against Prophet Muhammad (PBUH) is among the things that a person who made item shall not be excused…

Finally, relying on the grounds above the Court was satisfied that the Defendant in his capacity as a sane Muslim has committed this offence. Base (sic) on this, relying on Section 382(b) Kano State Sharia Penal Code Law 2000 and the case of DAN SHALLA VS THE STATE (2007) 12 MJSC at P.53, where the Supreme Court held that:

"The trite position of the law under Sharia is that who insults, defames or utters words or acts which are capable of bringing into disrespect… Such a person has committed a serious crime which is

punishable by death."

I hereby sentence him to death by hanging." (See Pages 11-14 of the Records of Appeal)

The Appellate High Court had nullified the above decision of the trial Sharia Court, but remitted the case back for retrial by another Sharia Judge.

Was the Appellate trial Court right to remit the case for retrial, in the circumstance of the case? That appears to be the main issue to be considered in this appeal. Counsel on both sides, had cited the cases which have laid down principles for ordering a retrial of a case. While Appellant relied on the case of Hassan **Vs FRN (2016) LPELR - 42804 SC**, the Respondent, relied on **Yusufu Abodundu & Ors Vs The Queen (1959) 1 NSCC 56**, (and other related cases). The two cases carry the same principles, which have been earlier reproduced in this judgment. I have already stated how Counsel on each side related the said principles to his case.

Commenting on the case of **Abodundu Vs The Queen (1959) 1 NSCC 62**, the Supreme Court in the case of **First Bank of Nigeria Vs May Medical Clinics and Diagnostic Centre Ltd & Anor (2001) LPELR - 1282 (SC)** said:

In Duru v. Nwosu (1989) 4 NWLR

*(Pt. 113) 24 at 43 per Nnamani JSC, it was observed: "in **Okoduwa v. State** (1988) 2 NWLR (Pt.76) 333, 355 this Court accepted one of the tests postulated in **Abodundu v. The Queen** (1959) 1 SCNLR 162, (1959) 4 FSC 70, which is that a Court of Appeal ought to order a retrial where there has been such an error in law or an irregularity in procedure, which neither renders the trial a nullity nor makes it possible for the appeal Court to say there has been no miscarriage of' justice." This is a principle which is intended, in my opinion, to deal with situations where there have been some grotesque occurrences in the determination of a case that cannot be explained. In such a situation there may not be sufficient legal reasons to regard the trial a nullity, but the Court is unable to say that there has been no miscarriage of justice. Hence, In the **Abodundu's case** at page 166, Abbott F.J. who delivered the judgment of the Court said: "in formulating these principles we do not regard ourselves as deciding any question of law or as doing more than to lay down the lines on which we propose to exercise a discretionary power. It is impossible to foresee all combinations of*

circumstances in which the question of ordering a retrial may arise..." Per UWAIFO, JSC

See also the more recent case of **State Vs Mathew (2018) LPELR-43712 (SC**), where it was held:

Getting back to the order of the Court of Appeal which was for retrial or trial de novo, it has to be said that it is not an order that is to be made offhand or unadvisedly as the Supreme Court has laid down some guides on which such an order could be made and for this, I shall refer to the case of Salisu Yahaya (2002) 2 SCNJ 7 this: (a) That there has been an error in law including the observance of the law of evidence, or an irregularity in procedure of such a character that on the one hand, the trial was that not rendered a nullity and on the other hand, the Court is unable to say that there has been no miscarriage of justice. (b) That leaving aside the errors at irregularity, the evidence discloses a substantial case against the appellant. (c) That there are no such special circumstances as would render it an oppressive case against the appellant (d) That the offence or offences of which the appellant was convicted or the consequences to the appellant or any other to

the conviction or acquittal of the appellant are not mere trivial (e) That to refuse an order of retrial would occasion a greater miscarriage of justice than to grant it. (f) That to enable the prosecution adduce evidence against the appellant which evidence convict him, when his success at the appeal is based on the absence of that same evidence. From the guiding principle, it is clear that a retrial would definitely be oppressive to the respondent and the interest of justice compromised. There is really no distinguishing features between the present case and that of Idowu Okanlawon v The State (2015) LPELR-284 as whether or not the Legal instrument establishing the Public Defender or citizens Rights Department did not specify that it would be or not be a Department of the Ministry of Justice." Per PETER-ODILI, JSC

There is a plethora of authorities, therefore, to the effect that appellate Court cannot remit a case for a fresh trial, after it had held that the trial in the Court of first instance was a nullity. But that where the trial was not a nullity, but plagued with irregularities, each order depends on the peculiar circumstances of each case,

having regards to the principles already listed above. See **Elijah Vs State(2013) LPELR-20095 (SC); FRN Vs Yahaya (2019) LPELR-46379 (SC**).

In the case of the **Chief of Air Staff & Ors Vs Wing Commander P.E. Iyen (2005) LPELR-3167 (SC**), it was held that the order for retrial should not be made in a manner that portends giving the prosecution a second chance to lead more credible evidence against the accused person, or to cure the deficiencies in the case it earlier led against the Accused person. It held:

I now go straight to the issue of a retrial. As it has a common law origin, I should first take what Lord Diplock said in Reid v. The Queen (1979) 2 WLR 221 at page 226 and 227 and I will quote him in great length: 'Their Lordships have already indicated in disposing of the instant appeal that the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the Judge in the conduct of the trial or in his summing up to the jury. Save in circumstances so

exceptional that their Lordships cannot readily envisage them it ought not to be exercised where, as in the instant case, a reason for setting aside the verdict is that the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury even if properly directed. It is not in the interest of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant... The seriousness or otherwise of the offence must always be a relevant factor, so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the Court and jury would be involved on a fresh hearing may also be relevant considerations. So too is the consideration that any communal trial is, to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for the second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered

may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless, there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and if this were so, it would be a powerful factor against ordering a new trial."

In the case of **Onwe Vs The State (2017) LPELR-42589 SC**, it was held:

The justice of this case demands that the appellant should not go through the ordeal of a retrial again especially when he had served a substantial part of his sentences. In the case Erekanure v. The State (1993) 3 NWLR (Pt. 294) 25, Olatawura JSC observed at page 394: 'I am of the firm view that retrial", trial", "trial de novo" or "new trial" can no longer be automatic once the trial is a nullity. Each case must be considered in the peculiar circumstances which forms the background!' As mentioned above, the right of the appellant has to be protected from prejudice, in other words, an order for retrial cannot be made in a situation where the appellant is

exposed to prejudice. In the instant case, since the appellant has spent a substantial part of his sentence imposed by the trial Court, it will be oppressive for the appellant to be tried for the send time."

And in the case of **Nnadike & Anor Vs Nwachukwu (2019) LPELR-48131 SC**, it was held:

The Appellants' main grouse in this appeal is that there were no circumstances to warrant the order of retrial made by the lower Court since they were able to prove their case and entitled to the reliefs claimed against the Respondent. They opined that the order of retrial must be exercised judicially and judiciously. That the lower Court based on the foregoing, rather than order a retrial, it ought to have exercised its power under Section 16 of the Court of Appeal Act, to set aside the order for the transfer of the said C of O since it has the power to settle the issue finally and completely between the parties as contained in the evidence. I must align myself with the decision of my learned brother, Amina Augie, JSC, in holding that the order of retrial by the lower Court in this case was not necessary. Appellate Courts will not order retrial in the

following instances: 1. A retrial will be ordered if it will satisfy the interest of justice. Therefore where a retrial will result in injustice or a miscarriage of justice, an appellate Court will not order a retrial. 2. A retrial cannot be ordered as a mere course, routine or fun; it must be based on valid procedural reason or reasons. 3. A retrial cannot be ordered to enable parties to have a second bite at the cherry to repair their case and come back in full force to present a fresh case. That will be a very smart one and appellate Courts will not encourage such smartness. 4. A retrial cannot be ordered to compensate a losing party. In other words, a retrial cannot be ordered when the plaintiff's case has completely failed or failed in toto, and there is no substantial irregularity in the conduct or the case. 5. An appellate Court will not order a retrial on the ground of irregularity or lapses in the conduct of the proceedings if the irregularity or lapses complained of can be corrected by the appellate Court. 6. An appellate Court will not order a retrial if there are no special circumstances warranting the retrial. A special circumstance will not be

determined in vacuo but in the light of the fact of each case. See Per TOBI, JSC in OKOMALU V. AKINBODE & ORS (2006) LPELR-2470(SC).

The main ground upon which the Appellate High Court ordered a retrial of the Appellant was/is revealed in the finding it made, as follows:

"In this case, the defendant was not represented by a legal practitioner, the offence with which the defendant was charged is a capital offence attracting death penalty, he did not refuse to be represented by a legal practitioner. He merely said he could not get one. At that point, it is the duty of the Court to ensure that the defendant is represented by a legal practitioner in view of the nature of the charge against him and the severity of the punishment. Yet did not ensure that he was represented by a legal practitioner nor informed the defendant of the risks of defending himself in person. This is in clear violation of Section 269(1)(3) and (4) of the ACJL. Therefore failure of the trial Court to ensure that the defendant was represented by a legal practitioner in a case attracting death penalty is a serious omission which renders the entire proceeding a nullity no

matter how beautifully conducted... the defendant was repeatedly been (sic) asked by the Court to plea (sic) to the charge and he repeatedly pleaded guilty and the Court repeatedly recorded his plea of guilty. This contravenes the provisions of Section 276(3) of the ACJL Kano State, which provides thus:

"Where the defendant pleads guilty to a capital offence a plea of not guilty shall be recorded for him.'

...On the whole, we find that this trial is characterized with some procedural irregularities which shall be reserved in favour of the defendant. Consequent upon this the trial is hereby set aside... the case is remitted back to the same USC Hausawa sitting at Filin Hockey now by the Alkali Mallam Abdullahi Halliru and shall ensure that the defendant is duly represented by a legal practitioner throughout the trial. "See pages 122-125 of the Records

The law is clear that a plea of guilty by an accused person to a charge carrying capital punishment amounts to plea of not guilty imposing a duty on the Prosecution to prove the charge and every ingredients of the same, as required by law. See Section 276(3) of the ACJL Kano state.

That means no

trial can possibly be conducted on the alleged plea of guilty by the Appellant at the trial Sharia Court and everything done by the trial Court amounted to a nullity, including the purported charge to which Appellant pleaded guilty, in my view.

The charge itself, appeared defective, and deficient of requisite particulars, envisaged in the law on which it was predicated as it failed to mention the object/subjector person insulted, defamed and/or blasphemed. The charge merely speculated that Appellant, that:

"***recorded audio, which you sent to a website called GIDAN UMMA AMINA which you used foolish and disgraceful words wherein you called the prophet (P.B.U.H.) as a full devil and his position does not reach that of Inyass.***"

The above charge, used small letter 'P' for Prophet and did not mention the revered name of PROPHET MUHAMMAD (P.B.U.H) to suggest the inference made by the trial Judge, who said:

"***It is the saying of the Defendant that he made those statements by mistake, together with posting them at their whatsapp group, this will not be an excuse because a case of blasphemy against Prophet Muhammad (P.B.U.H) is among the things that a***

person who made them shall not be excused..." (Page 13 of the Records)

I cannot also see where Appellant said that he made the statement by mistake! A Court cannot descend into the arena of conflict to make a case for any party. See **Obi Vs A.G. Imo State (2014) LPELR-24280 CA**:

"...A trial Judge must not be seen to descend into the arena of conflict in a trial, to generate evidence or facts not canvassed or adduced by witness(es) or apparent on the face of the records before him, to decide a case, See the case of Theophilus Ajakaiye vs. The State: CA/OW/70C/2012, delivered by this Court on 5/12/14; Ayoade vs. Spring Bank Plc (2014) 4 NWLR (Pt 1396) 93AT 128"

Of Course, having held that the plea of guilty by the Appellant, amounted to a plea of not guilty, in the eye of the law (Section 276(3) of the ACJL of Kano State), and the non-representation of Appellant by a legal practitioner made the entire trial a nullity, it means no credible evidence was led at the trial, and that the alleged Exhibit A & B (which were induced and produced by the Police Command, Kano, by recording the voice of the Appellant, in line with the alleged

blasphemy, and translating same into English) amounted to nothing less than illegality. There was therefore no credible evidence before the trial Sharia Court to found the Conviction and Sentence of Appellant. To subject him to fresh or another trial (or retrial) therefore would amount to going back to the drawing board, to reconstruct a valid charge, arraign the Appellant and source a legal Practitioner for him, to go through the whole process, again.

I think that would amount to Persecution and oppression, having gone through the same process, under life threatening stress, harassment, incarceration and deprivation, already, but without compliance with the requisite legal procedure. That, to me would, amount to double jeopardy and oppression. SeeSection 36(9) of the 1999 Constitution, as amended, which state:

"***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.***"

Of course, I have faulted the order

for the retrial of Appellant made by the appellate High Court, as explained above, going by the decision in **Chief of Air Staff & Ors Vs lyen (supra)**, where the Supreme Court held:

In Ankwa v. The State (1969) All NLR 133, this Court held that a Court of Appeal will not send a case back for retrial, simply for the purpose of enabling the prosecution to adduce, as against the appellant, evidence which must convict him when his success at the appeal is based on an absence of that same evidence. In Briggs v. Briggs (1992) 3 NWLR (Pt. 228) 128, this Court held that a retrial is not ordered as a matter of favour or for the convenience of a party, but primarily to avoid a miscarriage of justice. This Court refused to order a retrial, because there was nothing on record to justify the order as the issues before the trial Court were clear. In Ikhane v. Commissioner of Police (1977) 11 NSCC 379, (1977) 6 SC 119, where the Magistrate convicted the appellant after a trial, the Supreme Court held that the case contains all the basic elements for an order of acquittal and discharge rather than an order of retrial. Obaseki, JSC, delivering the judgment of the Court

made reference to the principles enunciated in Abodundu and said at page 381 of the report: "It appears to us that the learned Chief Justice did not advert his mind to these principles before arriving at the decision to order a retrial. We are in no doubt that, guided by the above principles, his critical appraisal of the judgment of the learned senior Magistrate would have led him only to a judgment of acquittal." It is clear from the above and some other decided cases that before an appellate Court can order a retrial, it must take into consideration inter alia the following: "(a) There must be an error in law, arising from either substantive law or procedural or adjectival law, viz: the law of evidence, civil and criminal procedure. While the error in law or procedural irregularities may not nullify the trial, there could be the possibility of a miscarriage of justice. (b) The error or irregularity apart, the totality of the evidence taken at the trial discloses substantial case against the accused to the extent that there is possibility of successfully prosecuting the accused. Here the Court need not come to the conclusion that the accused will be

convicted. That will be tantamount to jumping the gun. Once the evidence discloses a substantial case against the accused, the Court should order a retrial. (c) The offence in which the accused was convicted is serious or grave or the effect of any conviction or acquittal of the accused is not merely trivial. (d) The period between the time the offence was committed and the time the new or fresh charge is expected to be preferred against the accused. Here the Court will take into consideration the possibility of assembling the witnesses and the possibility of witnesses experiencing loss of memory because of the time tag. (e) Whether there are special circumstances that would make it oppressive or unjust to put the accused on trial a second time. (f) The Court will not order a retrial to enable the prosecution repair its case with a view to obtaining a conviction. This is because the Court should not encourage the prosecutor to be a persecutor. (g) Where refusal to order a retrial will not cause greater miscarriage of justice the Court will not grant a retrial." The list is inexhaustive. There is therefore no claim that the above guidelines are exhaustive. It

must be emphasised that the above must co-exist. In other words, all the above guidelines must exist positively in a given case." Per TOBI, JSC

I do not think all the conditions stated above co-existed to justify sending the case back for retrial, especially as trial by the Sharia Court was declared a nullity, as stated in ***Ankwa Vs The State (1969) ALL NLR 133, "a Court of Appeal will not send a case back for retrial simply for the purpose of enabling the prosecution to adduce, as against the Appellant, evidence which must convict him when his success at the appeal is based on an absence of some evidence." A retrial is not ordered as a matter of favour or for convenience of a party but primarily to avoid a miscarriage of justice***.

I do not see any miscarriage of justice in this case, if Appellant is not retired, especially as no named Prophet (dead or alive) was stated in the Charge, as the person blasphemed by Appellant!

Counsel for Appellant had argued that the factors or conditions as stated in Hassan **Vs FRN (Supra**) for returning a case for retrial do not co-exist in this case, conjunctively. I agree with him. I therefore resolve the

Issue 1 for Appellant.

On the Issue 2, whether or not the learned High Court Judges were right in declaring that the Kano State Sharia Penal Code Law 2000 is constitutional?

In determining the above issue, which was raised at the lower Court, their Lordships simply adopted their previous position in the case of **Umar Farouk Vs Comm. of Police: K/40CA/2020**, where they had opined that Section 10 of the Constitution of the Federal Republic of Nigeria is not justiciable. (See Page 10, Paragraph 5.00 of the Appellant's Brief).

That position of the Learned Justices of the High Court, with respect, was wrong, as Section 10 of the Constitution forms part of Chapter 1, Part II, of the Constitution, dealing with the powers of the Federal Republic of Nigeria, and providing for the arms of government, and specifying the limits and functions of the various arms of government - Executive, Legislature and Judiciary. The provisions therein, are mandatory and appear to form the soul of the Nation as a Union a Federation of States.

Thus, when Section 10, it says:

"The Government of the Federation or of a State shall not adopt any religion as

State Religion." I believe the above provision, with the key phrase, **SHALL NOT** (which has mandatory interpretation) was meant to protect the multi¬ethnic, multi-religious and multi-cultural composition of the various people and groups that make up the Federal Republic of Nigeria, and to check any tendency of any powerful zealot or individual, emerging to jeopardize or destabilize the unity and peace of the Nation, by introducing/or and imposing his own ideas, views and/or way of worship/religion on the Nation, or any part of it (State), as Nation/State religion.

The Section 10 of the Constitution is not part of Chapter 2 (Sections 13 to 24 of the Constitution), which are specified as non-justiciable part of the Constitution, which provides for the Fundamental Objectives and Directives Principles of State Policy. The said provisions spell out why the government exists and enjoins the leaders to adopt same, as policy thrust of the government - at Federal and State levels, to translate those lofty objectives into reality, for the good of all. Thus, where a government fails to translate these policies (Chapter II of the Constitution) to action,

it loses the right to remain in power. But citizens cannot take Court action against the managers of the policies (except such aspects that may have been made actionable by statute). The only remedy available is to the people would be to vote out such a government! See the Pamphlet, CITIZENSHIP RIGHTS & TRIALS: CALL FOR PATRIOTISM (2017) by Ita Mbaba, P. 9 - 12, wherein I said:

"Non-justiciable rights are not personal rights, and so cannot be enforced in a Court of law, that is, one cannot sue to enforce the application of such right by him, though he enjoys a sensual feeling of same as his right. An example of this is the understanding that the government exists for his security and protection and he has right to partake in the government. The Chapter II of the Constitution... titled:

"... Fundamental Objectives and Directive Principles of State Policy, merely reveals the Policy thrust of government, but has no way of enforcing them (causing government to translate the Policies to action). See Section 6(6)(c) of the Constitution:

"The judicial powers vested in accordance with the forgoing provisions of this Section shall not,

except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or persons or as to whether any law or any judicial decision is in conformity with the Fundamental Objective and Directive principles of State Policy set out in Chapter II of this Constitution."

As earlier stated, in this judgment, the Section 10 of the Constitution is enforceable and justiciable, and so no government, either at the Federal or State level, can declare or adopt any religion as State Religion. And any enactment of legislation by any Federal or State Legislature, which purports to declare or adopt any religion as State Religion, or any provision thereof, to suggest imposing any religious law or tenet on the State, as State religion, is and remains null and void, to the extent of its conflict with the Section 10 of the 1999 Constitution, as amended. See alsoSections 1(1) and 4(5) of the 1999 Constitution, as amended.

Is the application of the Sharia Law and Sharia Principles, as enshrined in the Sharia Penal Code of Kano State, 2000, a declaration of State Religion and unconstitutional?

I do not

think so, going by the complexities of the 1999 Constitution of the Federal Republic of Nigeria, which, in my view, has many areas of internal conflicts and pretences, and which any mischievous leader can exploit to cause confusion and disaffection, where he opts to pursue selfish religious/political goals.

Whereas, the Section 10 of the Constitution forbids implosion or declaration of any religion, as State religion, either at the Federal or State level, and Sections 1(1) and 4(5) of the Constitution, automatically, strikes down any law by a State Assembly that runs counter with the Constitution (as amended) or with laws made by the National Assembly, the Sections 38 and 42 of the Constitution, dutifully, protects the rights of every individual to his faith and religion, and protects his right to worship and propagate his faith, anywhere in the Country, that being part of his basic human rights, recognized and respected all over the world. Thus, religious rights and freedom of every citizen is guaranteed in the Constitution.

Moreover, various Sections of the Constitution, including 6(5) (f)(g),237, 240, 244,260, 261, 262, 263,264, 275, 276,277,

278, 279 etc, by deliberate design, expressly incorporated the concept of Sharia Law in the body of the Constitution, and provided for Sharia Courts and Sharia Court of Appeal, to observe and regulate Sharia personal laws of the adherents of Islamic Faith, and the composition of the superior Courts (including this Court) is made to reflect those with knowledge of Islamic personal law (Section 237).

In such a scenario, it would be absurd and wrong, in my opinion, to consider or see the operation of Sharia principles of law as unconstitutional in Nigeria, as the people of Islamic Faith are entitled to the protection of the law, as enjoined by principles of fundamental rights, and it would appear to be a violation of their right to faith and religious belief, to do otherwise. But then one should be concerned or worried about introduction and enforcement of religious precepts that allows for killing of a citizen of Nigeria, for insulting a religious creed leader or God, when the leader/God is always tolerant, merciful and forgiving, allowing the errant soul to repent!

In the same way, the application of such principles (Sharia principles) must not be

made or enforced against non-adherents of the Islamic faith, or made to put them (non-adherents) in danger/disadvantage, in any way, as they, too, are entitled to practice, observe and enjoy their religious faith/rights and obligations, without discrimination.

That is the essence of Sections 38 and 42 of the Constitution, which state:

(38) (1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian.

(3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that

community or denomination.

(4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.

1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person-

(a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions are not made subject; or

(b) be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.

(2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.

(3) Nothing in Subsection (1) of this Section

shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the State or as a member of the armed forces of the Federation or member of the Nigeria Police Force or to an office in the service of a body corporate established directly by any law in force in Nigeria.

The ultimate duty/responsibility lies with the leaders, at the various arms, (particularly the Executives - President, Governors) in their practices and exercise of their individual faiths, to restrain themselves from imposing their said faith on the state/nation, or any department they serve, for personal or political gains, by turning the machinery of government to projecting and pursuing their private religions/political interests, to the detriment and annoyance of non-adherents of his/her faith.

Thus, where the Sharia principles advance the Islamic personal faith of the adherent, within the confines of the 1999 Constitution, as amended, I do not see any problem with that, as the same is protected by the Constitution.

But where the Sharia principles extend beyond Islamic personal law, to criminal

liability, I think, in so far as the principle is restricted to, and applied against only adherents of the Islamic faith, who, by election, accepts to be governed by the said legal principles, the said principles of law can be enforced on him/her, as long as he/she remains in that faith.

For the purpose of this case, I think the Appellant, being a Muslim, would be expected to abide by the principles of his religious tenets, laws/faith and subject to its laws. The trouble/problem would be where the said principles of law are applied against persons who are non-Muslims, or even where one is a Muslim, is attacked by mob-action, on allegation of infringement of any such religious tenets, creed or laws.

The decision of Hon. Justice Tanko Muhammad JCA (later CJN) on this, in the case of **SHALLA VS STATE (2007) LPELR - 3034 (SC**), is quite instructive, where he held:

The actual words of insult allegedly uttered by the deceased were not known. The appellants along with others (now at large) however, constituted themselves into a fanatical Islamic vanguard or a religious vigilante group and upon hearing the rumour, took it upon themselves to go in search

of the deceased who was alleged to have insulted the Holy Prophet (S.A.W). Even before seeing or hearing him, they had already passed a sentence or judgment against him that he must be killed for his offence under Sharia as recommended in both the Quran and Risala. They even made a threat to kill his master PW2 by name Aliyu Magga who they believed was hiding the alleged culprit in his place if he was not found. When they went to the Village Head of Randaii to whom they reported the matter and who did not approve their plan to kill the deceased, they still proceeded in their crusade to execute their planned or premeditated murder of the said deceased. Even when they were advised by one Ustaz Mamman that it was not their responsibility but that of the Court or Judge to punish the deceased as a person who insulted the Holy Prophet, they shunned that advice and described the Ustaz as a non-muslim himself and went on with their plan to kill the deceased.

In any case, even on the assumption (although without any proof) that the deceased had in some way done anything or uttered any word which was considered insulting to the Holy Prophet Mohammed (SAW), was it

open to the appellant and others with him to constitute themselves into a Court of law and pronounce the death sentence on another citizen? Plainly, this was jungle justice at its most primitive and callous level. The facts of this case are rather chilling and leave one wondering why the appellant and the others with him committed this most barbaric act. It cannot escape notice that the victim of this reckless and irresponsible behaviour is another Moslem, an Alhaji. I am greatly pained by the occurrence.

The Supreme Court further said:

"Islamic religion is not a primitive religion that allows its adherents to take the laws into their own hands and to commit jungle justice. Instead, there is a judicial system in Islam which hears and determines case including the trial of criminal offences and anybody accused of committing an offence against the religion or against a fellow Muslim brother should be taken to the (either Sharia or a Secular/Common Law Court) for adjudication. It is only when a person is convicted and sentenced by a Court of Law that he will be liable to a punishment which will be carried out by an appropriate authority (i.e. the

Prison). Although it is true that there is the provision in Risala which prescribes the punishment of death on any Muslim who insults the Holy Prophet such punishment can only be imposed by the appropriate authority (i.e. the Court) rather than by any member of the society whether a Muslim or otherwise..."

Thus, there is no room for mob-action, to kill and lynch by any mob, cleric or aggrieved bystanders or persons alleging offence of blasphemy or any infraction of religious law against any person, until the Court finds him culpable, convicts and sentences him to death, and even then, the death sentence must be executed by the appropriate authority. But everybody is enjoined to be tolerant of others and show maximum respect for the feeling, belief and views of others.

The 2nd Issue is therefore resolved in part for the Respondent.

On the whole, I see merit in this appeal and therefore allow it. I set aside the Order for retrial of the Appellant, made by the lower Court, and Order his discharge and acquittal.

Appearances:

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