Trial *De Novo*: A Clog in the Administration of Criminal Justice in Nigeria*

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Abstract

Law is generally a very dynamic subject and the practice of it is also dynamic. Just as the society is changing every day the practice of law ought to change to reflect the changing nature of our society. It has, however, been observed that while the society is changing, most of our laws and the practice of same remain unchanged thereby denying law of its proper function. One area of our law practice that has suffered in this regard is the practice of starting a case de novo; that is, starting a concluded case afresh. It does not matter how many years the case may have lasted and in most cases very important witnesses or indeed parties to the suit must have died. This unfortunate procedure is as frustrating as it is expensive and the end result is definitely a denial of justice. In continental Europe and some other countries, they do not start de novo. Instead they continue the case from where the last judge that was handling it stopped. The purpose of this paper is to examine the meaning of de novo trial; the difference between it and retrial if any, the difference between de novo trial and appeal, circumstances that may necessitate de novo trial, the legal consequences of the procedure and ultimately to make suggestions for the way forward.

1. Meaning of *De Novo* Trial

De novo is a Latin phrase for "anew" which means starting over.[1] It is an order of an appellate court to begin a trial afresh. The *Black Law Dictionary*[2] defines a *de novo* trial thus:

> A new trial on the entire case – that is, on both questions of fact and issues of law – conducted as if there had been no trial in the instance.

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1 See, www. Dictionarylaw.com, visited 22nd August 2010.

2 B.A. Garner, (E-in-C), *Black's Law Dictionary,* (8th edn.), (St.Paul Minn: Thompson West, 2004), p.

The court is not restricted to hearing the evidence of the witnesses who testified at the trial and may hear any witnesses. A rehearing *de novo* is not ordered as a matter of course or without good reason.[3] The dictum of Muhammed, J.S.C in *Babatunde v Pan Atlantic Shipping and Transport Service*[4] is also apposite and is quoted verbatim thus:

> The Latin maxim "*De Novo*" connotes a "New" "fresh" a "beginning" a "start" etc. In the words of the authors of *Black Law Dictionary*, *De novo* trial or hearing means trying a matter anew, the same as if it had not been heard before and as if no decision had been previously rendered … new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which the matter was originally heard and a review of previous hearing. On hearing "*de novo*" court hears matter as court of original and not appellate jurisdiction… that a trial *de novo* could mean nothing more than a new trial. This further means that the plaintiff is given another chance to re-litigate the same matter or rather, in a more general sense the parties are at liberty, once more to reframe their cases and restructure it as each may deem it appropriate.

From the above definition, for a matter to be tried *de novo* would mean nothing less than considering the matter anew, as if it had never been heard before. In *Uguru v State*,[5] one of the issues for determination was whether the trial judge reliance on the evidence of P.W.6 who did not testify at the *de novo* trial constituted a denial of fair hearing. The Supreme Court held that though the trial judge erred because the prosecution must prove its case "anew" by calling afresh all witnesses, what he did could not constitute a contravention of the principles of fair hearing and would not be sufficient to vitiate the trial proceedings.

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3 *Atswaga v Gbakon Agena* (1964) MNLR 122.
4 (2007) 13 NWLR (pt 1050).
5 (2002) 4 SCNJ 282.

A trial *de novo* may serve as a second chance that one needs to get the outcome one desires if the initial trial runs into a defeat. In *Sanmbo v State*, the accused person was charged with the offence of murder to which he pleaded not guilty. However, in the course of proceedings, the trial judge was transferred and another judge commenced his trial *de novo* (afresh) without calling on the accused persons to enter a fresh plea. He appealed against conviction. The Court of appeal held that there must be a new plea.

The foregoing makes it clear that a *de novo* trial should examine the evidence before it afresh. Despite the above observation, however, the Supreme Court in the earlier case of *Sanyaolu v Coker*[6] stated that:

> The fact that a retrial has been ordered would render abortive not the evidence of the witness who testified in the abortive trial, where such evidence is admissible but the judgment of the court in the said abortive trial. Obviously since a retrial has been ordered and the case is to be heard *de novo*, the plaintiff must reprove his case as if there has been no earlier trial.

It is crystal clear from the above that the judgment of the Supreme Court in *Uguru v State*[7] and *Sanyaolu v Coker*[8] establish that the prosecution or claimant must prove its case afresh though previous evidence in an abortive trial is admissible as long as the ends of justice are met. What are discarded are the rulings and orders made under the first trial.

2. *De Novo* Trial and Retrial: Is there any Difference?

A consideration of the dicta of judges in decided cases reveal that the courts tend to favour the term "retrial" as it has been used in place of and interchangeably with "*de novo*" trial. In *Kajubo v State*,[9] Oputa JSC (as he then was) considered in great details the term "*de novo*

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6 (1983) ANLR 157 per Bello JSC, as he then was.
7 *Supra.*
8 *Supra.*
9 (1988) 1 NSCC 475.

trial" and its synonyms. In what appears to be quite a lengthy exposition he laid to rest any confusion that may arise as a result of the choice of words adopted by different judges in their judgment to describe *de novo* trial. He stated as follows:

> Can one say that there is a difference in essence between trial; new trial; retrial; trial *de novo*, *venire de novo*? …. To my mind the distinction between a retrial, a new trial or trial *de novo* or fresh hearing is neither essential, nor substantial, nor material. Each is substantially elements of a trial – that is the finding out by due examination the truth of the point in issue or question in controversy between the parties whereupon judgment may be given. To my mind, it is just a question of semantics.[10] But since neither the Supreme Court Act No. 12 Cap 89 of 1958, nor the Criminal Procedure Act cap 42 of 1958, nor the Interpretation Section (s. 277) of the 1979 constitution gave any statutory definition of retrial to help us determine whether retrial means the same thing as trial *de novo* or a new trial, one has to fall back on decided cases to discover the meaning of retrial.

His lordship considered the judgment of the Supreme Court in *Onu Okafor v State*[11] and *Raimi Adisa v Attorney General Western Nigeria*[12] and came to the conclusion that the expression "new trial" and "retrial" were used in Onu Okafor's case as if they were the same, having the same meaning. On the other hand the expression "retrial" was dropped in favour of "fresh hearing" in Adisa's case which in His Lordship's view holds the same meaning as a retrial or a trial *de novo*. He further stated that:

> The cases I have reviewed above definitely show… that the expression "trial" "new trial" trial *de novo*" "retrial" "fresh hearing" "trial a second time" have been freely used in these judgments. This suggests that these expressions are interchangeable as they relate to the same concept, that is,

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10 Now section 296, Constitution of the Federal Republic of Nigeria (CFRN), 1999.

11 (1976) ESC 13 at pp. 19 – 20.

12 (1965) 1 all NLR 412.

> finding out by due examination of witness the truth of a point in issue or a question in controversy where upon judgment may be given. Call it any name and it will make no difference for a rose by any other name smells equally sweet.

There is nothing one can add to the above explanation by the erudite jurist. The fact is very clear that a *de novo* trial must be started from the beginning as if a trial had never taken place and the matter decided on its merits. It is also clear that the expression "new trial" trial *de novo*, 'retrial', 'fresh hearing', 'trial a second time' all have the same meaning.

3. *De Novo* Trial and Appeal

Trial *de novo* is different from an appeal in some respects. One major characteristic of an appeal is that new evidence may not be presented in an appeal except in special circumstances. There are some cases when evidence just comes to light after trial and this could not have been presented in the lower court.

Again, we have it as a general rule that an appeal must be based solely on "points of law as opposed" to "points of fact." On the other hand, a trial *de novo* which is usually a complete new trial involves all issues bordering on points of law and facts. Appeals are usually based on the claim that the trial judge did not allow or appreciate all the facts. If this claim is satisfied, the appeal judge will often order a trial *de novo*. The main concern is usually protecting an individual's right against being subjected to double jeopardy. So ordering a trial "de novo" is often the exclusive right of an appeal judge when such a matter is on appeal.

4. Circumstances in which A *De Novo* Trial may be ordered

Generally, a *de novo* trial is ordered on the order of a court of appellate jurisdiction. Nevertheless there are other instances in which a matter may be tried *de novo* apart from the order from the appellate court. A *de novo* trial may be initiated in any of the following circumstances:

- Where the Supreme Court exercises its inherent power to order a *de novo* trial in the determination of an appeal.[13]

- At any stage of a proceeding but before final judgment, a Magistrate may transfer a matter before him to another magistrate whose consent must first be secured, provided that the consent of the Chief Judge is sought in any matter originally transferred to a Magistrate by a High Court.[14]

- Where there is a tie in the votes cast by the members of a Customary Court who hear a matter.[15]

- Where a Magistrate is succeeded in office by another Magistrate or is temporarily replaced after a matter has been partly heard, such a magistrate may recommence the inquiry on the reasonable demand of an accused person.[16]

- Where a trial was postponed due to the inability of an accused person to enter his defence by reason of unsoundness of mind; to enable the accused person undergo medical observation in an asylum.[17]

Where in the opinion of a presiding judge or magistrate, an offence requires a heavier sentence than the sentence agreed upon pursuant to a "Plea bargain" and duly informs the accused of such heavier sentence the accused person may withdraw from his plea agreement and the trial may be commenced *de novo* before another judge or magistrate.[18]

In addition to the above instances, a *de novo* trial may also be ordered by a court of appellant jurisdiction in circumstances laid down

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13 See s. 26 (2) of the Supreme Court Act.

14 Lagos State Magistrates Courts (Civil Procedure) Rules, Rule 31. 93

15 Customary Courts Law, chapter G9 Laws of Lagos State, s. 7 (3).

16 Criminal procedure code, s. 84. See also *Uchenna Nwachukwu v State* (2001) SC 399.

17 Criminal Procedure Act, s. 226; see also *R v Ogor* (1961) All NLR 75.

18 *ibid*.

by the Supreme Court in the case of *Aigbe & Anor v State.*[19] In that case, the Supreme Court quoted with approval the Federal Supreme Court in *Yesufu Abodunde & Ors v The Queen.*[20] In Yesufu Abodunde's case, the Federal Supreme Court posed a question as follows. "*What are the guiding principles under which this court will order a retrial when an appeal has been allowed…..?*" They went further to state the circumstances as follows:

> (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 a miscarriage of justice….
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> (b) That, leaving aside the error or irregularity, the evidence taken as a whole discloses a substantial case against the appellant;
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> (c) That there are no such special circumstances as would render it oppressive to put the appellant on trial a second time;
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> (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 appellants, are not merely trivial; and
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> (e) That to refuse an order for a retrial would occasion a greater miscarriage of justice than to grant it.

In the observance of these guiding principles, the courts have ordered a retrial in the following circumstances:

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19 (1976) NSCC 489; see Administration of Criminal Justice Law of Lagos State, s. 768 (c).

20 (1959) 4FSC 70 at p. 73 – 74.

- Where an accused person is absent at his trial.[21] The Supreme Court in *Adeoye v State*[22] held that 'it is not part of our criminal jurisprudence to try a defendant in absentia. Section 210 of Criminal Procedure Act requires a defendant to be present throughout his trial except in two cases provided for in sections 100 and 223 of the Act". The provision of section 210 is mandatory and "a breach of it renders a trial a nullity."

- Failure to comply with the procedure for the arraignment of an accused person as laid down in section 215 of the Criminal Procedure Act.[23]

- Where a Magistrate or Judge does not deliver his judgment in writing in consonance with the provisions of sections 268 and 269 on the Criminal Procedure Code.[24]

- At trial, where a prima facie case has been made against a defendant who is unrepresented by Counsel and he would be required to enter a defence and the court neglects to inform him of the option open to him.[25]

Notwithstanding the foregoing, there are still other circumstances which may give rise to a *de novo* trial. They include:

i) On the emergence of fresh evidence.

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21 See Criminal Procedure Act, s. 210.

22 (1999) 6 NWLR (Pt. 605) 74; s. 154(2) of the Criminal Procedure Code.

23 See *Kajubo v State* (1988) 1 NSCC 475; see also *Yahaya v State* (2002) 3 NWLR (Pt.) 754.

24 See *Lopez v State* (1968)1 All NLR 356. See also s. 245 of the Criminal Procedure Act. However, the courts held in *Osayande v Commissioner of Police* (1985) 3 SC 154, that failure to comply *stricto sensu* with provision of s. 245 would not vitiate the proceedings. See also *Aigbe & Anor v state* (*supra*), note 19 above.

25 S. 287(1) (a) of the Criminal Procedure Act; see *Josiah v State* (1985) I NSCC 132. See also s. 288 of the Criminal Procedure Act; *Saka v State* 1980 (1) NCR 322. Contrast *Kajola v Commissioner of Police* (1973)1 All NLR 31.

ii) Where a no case submission is wrongly upheld, the prosecution may appeal and the court may order a retrial so as to enable the accused to enter a defence. In *Police v Ossai in Re: Bassey*,[26] the Supreme Court held that the proper order to be made where an appellate court finds that a no case submission has been wrongly upheld would be an order for the matter to be heard *de novo*.

iii) Where the trial court lacks jurisdiction to adjudicate upon a matter. In *Ogbunyinya and Ors. v Okudo and Ors*.,[27] the principal question for determination was whether the judgment delivered by the trial court judge two days after his appointment to the Federal Court of Appeal was null and void when he had no jurisdiction to do so. The court held in the affirmative and ordered a retrial.

iv) Where a trial judge fails to convict an accused before sentencing, on appeal, the court may order a retrial.

v) Where on appeal, the court finds other evidence in the record that the decision of the trial court must have been swayed by the wrongful admission of a piece of evidence but is incapable of declaring that the decision in question would reasonably have been at variance without that piece of inadmissible evidence, then it may order a retrial.[28]

vi) Where the appellate court finds that the trial Judge misdirected himself and gave a verdict against the weight of evidence or awarded excessive or inadequate damages.

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26 (1962) 1 All NLR 189; see also *Commissioner of Police v Agi* 1980 (1) NCR 234.

27 (1979) NSCC 77. See also *Olutola v University of Ilorin* (2005) 3 MJSC, 151.

28 See *Ajayi v Fisher* (1956) 1 NSCC 82 at 84; (1956) SCNLR 279 at 282BF. See also *obidiozo v State* (1987) 4 NWLR (pt. 67) 746 at 765. See also s. 227(1) of the Evidence Act.

vii) Where a trial is founded on a defective charge, and such a defect is fundamental, the charge will be dismissed. For a retrial to be ordered, it must be shown that the defect in the charge prejudiced the accused in the conduct of his defence; brought about his conviction; or occasioned a miscarriage of justice.

viii) A Judge must be an impartial umpire in any matter before him. Thus, where the neutrality of the Judge is improbable, on appeal the matter will be remitted to a court of competent jurisdiction for retrial. In *Umenwa v Umenwa*,[29] the trial Judge had formerly appeared as Counsel for the defendants in the same parties as in the present suit. Counsel for the appellants argued that the judgment of the lower court should be declared void because the learned trial Judge had foreknowledge of the facts of the case consequently his adjudication in the matter was a breach of the rule of natural justice. The court noted that the trial Judge must have been briefed on the party's case and had or was deemed to have foreknowledge from the respondents' point of view. It was held that the impartiality of the learned trial Judge could not be guaranteed hence his decision cannot stand, and ordered a retrial.

5. Other Considerations that could lead to *de novo* trial

Apart from the instance laid down by the various statutory provisions for a trial to be commenced *de novo*, whether or not an appellate court would order a retrial when it discovers a fundamental procedural irregularity in the proceedings of a lower court is dependent on further consideration such as: the seriousness and prevalence of the offence, the amount of time that has elapsed between the commission of the offence and the subsequent vacation of the judgment of the trial court, and where the trial was lengthy and complicated, the time and expense it would involve to commence another trial; and the

[29] (1987) 4 NWLR (pt. 65) 407.

psychological effect a second trial on the same issues would have on the defendant through no fault of his.

Other points to consider would be: the strength of the case put forward by the prosecution and whether or not the witness who testified at the abortive trial would be available to testify, the time it would take to reassemble such witnesses and the effect the lapse of time would have on their memory of events and their overall credibility.[30]

6. Consequences of Retrial or Rehearing *De Novo*

Whatever the outcome may be on the merits of each case, an order for a *de novo* trial has the legal effect of affording a defendant an opportunity of a fair hearing in consonance with the provision of section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 thus resulting in the final determination of his guilt or otherwise in the interest of all the parties concerned-the public, the prosecution and the defendant himself. Despite this advantage however, the consequences of retrial or rehearing *de Novo*, resulting from an order that the whole case should be retried or tried anew as if no trial whatsoever has been had in the first instances are far reaching and serious. The main consequence of a trial *de novo* is that all the time and energy spent on the earlier trial is wasted. In *Fadora v Gbadebo,* [31] Idigbe JSC (as he then was) observed.

> We think that in trials *de novo* the case must be re-proved *de novo* and therefore, the evidence and verdict given are completely inadmissible on the basis that *prima facie* they have been discarded or got rid of.[32]

The implication of the foregoing is that the outcome of the prior trial cannot be considered in the new trial and the court must reach an entirely new decision on its own. Conducting an entirely new trial can be a very costly endeavor for all parties concerned. The

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30 See *Adeoye v State*, *supra*, note 22, *Erekanure v State* (1993) 5 NWLR (pt 294) 385.

31 See *Kajubo v the State* (1988) INSCC 475.

32 (1978) M.S.C.L.C vol 1 121.

clients must pay legal fees to the lawyer and the cost of procuring the attendance of witnesses to testify again from the beginning is so enormous.

Conducting an entirely new trial also takes the precious time of the court. Witnesses used in the first trial may not be willing to testify again. All these indirectly lead to congestion of the already crowded court rooms.

In any action sent back by an appeal court to be tried *de novo*, any findings made in the first trial do not constitute *res judicata* that is binding on the new trial court. The rationale is this, in trials *de novo* the case must be proved *de novo* and therefore the evidence and verdict given as well as the judge's finding at the first trial are completely inadmissible on the basis that *prima-facie*, they have been discarded or gotten rid of.

Since the proceedings before the trial court that heard the matter before is of no legal consequence in the new trial,[33] it will be wrong of the trial court to say that the earlier part-heard trials were part of the records before the court. Based on the adage that justice delayed is justice denied, one is compelled to say that this procedure in our system is a clog in the administration of criminal justice. A matter that is supposed to be completed within one year could take as much as 10 years. I have stated at the beginning of this work that in Continental Europe and some other countries they do not start *de novo*. They rather continue from where they stopped.

7. The Way Forward

In finding out the way out of this problem of delaying cases in court as a result of starting all over, one should borrow a leave from the examples of other countries. There is an Indian authority that is most interesting on this point and we are of the opinion that the Nigerian court should follow the same procedure. It is the case of *Dalim Kumar Sain v Sat Nandanbi Dassi.*[34] In that case trial started in the High Court before Mr Justice Law on the 21st of April 1965. The hearing was concluded on the 28th of April 1965. Most unfortunately, however, Mr.

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33 See *Rose v Maylor* (1918) 77 LJ, KB. 958.

34 1970 A.I.R Cal 292 at p. 297.

Justice Law died before he was able to deliver judgment. Ultimately, the suit appeared in the list of another judge Mr. Justice Mukherji. Both counsel for the plaintiff as well as counsel for the defendant applied and submitted that Mr. Justice Mukherji should treat the evidence led before the late Mr. Justice Law as proper evidence to be acted upon by the present judge Mr. Justice Mukherji and that the case should not start *de novo*. The new judge in consequence, therefore used the said evidence and delivered judgment. Later, one of the counsel appealed and the appellate court held that the consent of the parties or indeed their counsel made the evidence before the late Mr Justice Law admissible before Mr. Justice Mukherji. The appellate court relied on section 33 of the Indian Evidence Act which is in *pari material* with our section 34 of the Evidence Act 1990. Section 33 of the Indian Evidence Act provides as follows:

> Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant for the purpose of proving in subsequent judicial proceeding or in a later stage of the same judicial proceeding the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or if his presence cannot be obtained without an amount of delay or expenses which under the circumstance of the case, the court considers unreasonable.
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> Provided the proceeding was between the same parties or their representative in interest that the adverse partly in the first proceeding had the opportunity to cross examine, that the questions in issue were substantially the same in the first as in the second proceedings.

As pointed out above, the foregoing provisions are exactly what we have in our present evidence Act, section 34. If we follow the Indian example as stated above a lot of our cases will not need to be started *de novo*. It could be argued that one of the best attribute of a court of first instance is the presence of a judge who watched the demeanour and candour of witnesses, and if any evidence is tendered

before another judge and he is required to give judgment only on the tendered evidence, then the said most important attribute of our adversary system of justice must have been lost. Sound as though the above argument might seem, section 34 of the Evidence Act 1990 does admit such evidence and it is meant for emergency situations when a witness is dead, or cannot be found or kept out of the way by the adverse party or delay will be occasioned.

Surely a dead person cannot be brought from the grave to testify so that the judge can watch his demeanour and candour. In such circumstance the Act has provided a common sense safety valve to admit such evidence if the provision of section 34 is complied with. As a matter of fact even if the witness is alive and had lost his memory for example he cannot be brought to give evidence. The only way out is section 34 aforesaid whereof his previous evidence would be tendered without the judge seeing him to watch his demeanour.

Aside from the provisions of section 34 of the Evidence Act which is capable of being used to reduce the problem usually created by trial *de novo*, there is also an order of the court that can be used to solve the problem. This order is known as an "Assignment Order".

An assignment order is one usually granted to a judge by the Chief Judge of the High Court upon request to complete an existing trial which he had started before transfer. Our judicial system should constantly use this order to reduce the number of cases that should be started *de novo*. In this way, the number of cases will be reduced thereby decongesting our courts that are already overcrowded.