

TOWARDS EXPANDING THE SCOPE OF RIGHT TO PUBLIC TRIAL IN NIGERIA

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Abstract

This paper argued that in order to engender dissemination of information in the widest possible sense, imparting transparency and accountability to the judicial process, the right to public trial guaranteed under the Nigerian Constitution should be enlarged to include giving the press a right of live broadcasts and electronic transmission of judicial proceedings. This is against the current judicial attitude that live broadcast of judicial proceedings is not feasible because there is no law or protocol authorising recourse to such procedure in Nigeria. However, it was submitted that there must be a paradigm shift to accommodate present day realities. Hence, the legal door should not be shut permanently against live broadcast of judicial proceedings in Nigeria given that public trial includes giving the public and the press a right of access to court proceedings. Public confidence in the administration of justice can be weakened by secrecy. Consequently, the paper suggested that necessary legislations should be enacted as well as amendments of Rules of Courts should be made to accommodate live broadcasts of judicial proceedings. This will among other things engender improved public confidence in judicial proceedings in Nigeria.

1.0 Introduction

Public trial or trial in public of a defendant is an irreducible minimum provision in the Nigerian adjudicatory system. That judicial proceedings should be conducted in public enjoys clear constitutional support except where it is not expedient to do so such as “in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it

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***Related declarations are provided in the final section of this article.*

may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice”. Notwithstanding this Constitutional provision, the attitude of the Courts is to refuse application for live broadcast of the Court proceedings because there is no law or Rules of Court authorising it. Hence, the law remains that there is no place under the law for live streaming of judicial proceedings in Nigeria. Against this background, given that public confidence can be weakened by secrecy, this paper will examine the constitutional provision on public trial or hearing in public as an offshoot of the right to fair hearing with a view to making a call for introduction of live streaming of judicial proceedings in Nigeria. For orderly presentation, ease of discussion and comprehension of the subject matter, the paper is further divided into segments namely: Trial in public as an offshoot of right to fair hearing and exceptions thereto; Meaning of “public trial”; Judicial response to live broadcast of court proceedings; Contemporary developments in support of live streaming of judicial proceedings; Advantages of live streaming or broadcast of judicial proceedings; Recommendations and way forward; Conclusion.

2.0 Trial in public as an offshoot of right to fair hearing and exceptions thereto

In *Abu v State*, “A public place is a place that can be accessed and used by any member of the public as of right, even if subject to certain restrictions”. Subject to reasonable restrictions and orderly conduct, the Court room is considered a public place. Trial in public is an offshoot of the right to fair hearing guaranteed under *section 36* of the Constitution of the Federal Republic of Nigeria, 1999 as amended as amended. Conduct of judicial proceedings in public is an irreducible minimum procedural standard under the Nigerian legal system. Specifically, *section 36(3) and (4)* of the CFRN, 1999 as amended contains the following provisions relating to public trial namely-

(3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public.

(4) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal

However, this right to trial in public is not absolute as it admits of certain exceptions recognised in the proviso to the above provision of *section 36(4)* to the effect that –

(a) a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it may consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice;

(b) if in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.

These constitutionally recognised exceptions to public trial entitles the Court to determine when making the proceedings public would pose a serious threat to defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties. Thus, based on the nature of the case, a Court may limit public access to the Courtroom but in no circumstance would the presence of the defendant and or his Counsel be dispensed with. However, a Judge may restrict the number of lawyers representing the defendant if their number is unwieldy or bloated. The Court may also prevent the media from attending the trial or limiting public attendance to parts of the trial. Other than these notable exceptions, judicial proceedings must be conducted in public and failure to do so may spell disaster to the entire proceedings especially where it was shown to have led to miscarriage of justice. It is often thought that public trial connotes that the public and the press have a right of access to court proceedings and that the media can transmit Court proceedings live and in real time. However, the next segments of the paper will interrogate both the meaning of “public trial” and the current judicial response to the question whether right to a public trial gives both the public and the press a right of access to court proceedings including live broadcast or streaming of judicial proceedings.

3.0 Meaning of “public trial”

Public trial is open trial where members of the public and the press have access. In *Bornu Holding Company Ltd v Bogoco*, Lewis, JSC, (as he then was) held that atrial is not an

investigation, and investigation is not the function of a court. A trial is the public demonstration and testing before a court of the cases of the contending parties. The demonstration is by assertion and evidence, and the testing is by cross-examination and argument. The function of a court is to decide between the parties on the basis of what has been so demonstrated and tested.

Trial in public is the opposite of secret trial. A trial is open if the proceedings of a court or the proceedings of any tribunal relating to the matters including the announcement of the decisions of the Court or Tribunal is made in open court where members of the public have access. In *Nigeria - Arab Bank Ltd v. Barri Engineering (Nig) Ltd*, Ogundare, JSC, held as follows concerning the importance of trial in the open

The right to be present at public trial of cases which publicity entails and not to be excluded therefrom is a right which belongs to the public. The right derives from public interest in due and even-handed administration of justice which secrecy can only impair. Public confidence in the administration of justice can be weakened by secrecy. Even handed justice is best done when it is done in the public gaze. The right to publicity is thus not a right which belongs only to the parties and which they can waive by consent or conduct. In *Nagle Gillman v. Christopher* (1876-77) 4 Ch.D 173 Jesse M.R. (p.174) considered that: 'The High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Courts or where a public trial would defeat the object of the action ... Section 33(3) of the Constitution of the Federal Republic (1979) provides that: the proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in Subsection (1) of this section (including the announcement of the decisions of the court...These enactments lend high statutory force to what had already been a fundamental characteristic of administration of justice in our legal system which accepts that publicity is generally, barring well defined exceptions, of the essence of dispensation of justice. In *Scott v Scott* (1912) P. 241, 260 Vaughan Williams L. J. described the rule as a 'precious characteristic of English Law' while at page 287 Farwell L. J. said'... the open and public hearing and determination of suitors' rights and complaints is the salt of the constitution... 'When the principle of publicity of court hearing came for consideration in the case of *Oviasu v Oviasu* (1973) 11 S.C. 315; the Supreme Court relying on the Privy Council decision in *McPherson v Mcpherson* (1936) A.C. 177 regarded the decision of the trial Judge to

hear proceedings in chambers in that case an irregularity of such a fundamental nature as to vitiate the proceedings, and set aside the judgment and orders made by the trial Judge, it is thus undoubted, both at common law and by statute, that to deliver judgment in circumstances that publicity is denied, except the case falls within clearly stated exception, is a fundamental irregularity sufficient to vitiate the proceedings.

4.0 Judicial response to live broadcast of court proceedings

The current judicial attitude in Nigeria is that trial in the open does not include live streaming or broadcast of Court proceedings and that a legal framework or policy must be put in place before a court proceeding could be live-streamed/broadcasted/televised. In *Abubakar Atiku & Anor v INEC & 2 Ors*, the Court of Appeal handed down the ruling that live-streaming, broadcasting or televising of Court Proceedings is a policy matter. That the Court of Appeal functioning as Election Petition Court has no vires or authority to formulate that policy for the judiciary. In the similar case of *Obi & Anor v INEC & Ors*, the substantive matter was an election petition filed by the Petitioners/Applicants over the outcome of the 2023 Presidential election in Nigeria which held on the 25th day of February, 2023. However, by a Motion on Notice filed on the 9th day of May, 2023, the Petitioners/Applicants sought an Order of Court “permitting, allowing or directing the live-streaming or broadcasting of the proceedings of this Election Petition and the sittings of this Honourable Court thereon by the media, till final judgment is delivered.” The grounds upon which the motion was premised were among other things that an overwhelming majority of Nigerians and the comity of Nations are eagerly awaiting the outcome of this litigation. It is the constitutional right of all Nigerians (including the Applicants' millions of supporters, home and abroad) and even non-Nigerians, from the express wording of *section 36(3)* of the 1999 Constitution (as amended), to have these proceedings live-streamed or broadcast live and that the Honourable Court has even commenced limited live-streaming of the said proceedings, by connecting some cameras installed in the Courtroom to some television screens within the immediate foyer of the Court, where not more than 50 members of the public and counsel who could not access seats in the Courtroom watched the proceedings. The 1st -3rd respondents opposed the application by filing counter-affidavits. The sole issue nominated and considered in the application was whether "From the grounds in support of the Application, the facts deposed in the Supporting Affidavit and the exhibits attached thereto, complied with the settled position of the law, is the said Application grantable?" The Court of Appeal held that the application lacked merit and it was unanimously dismissed on the grounds and reasons which

included among other things that it is without dispute that none of the parties cited any law that prescribes, permits or supports live-streaming or broadcasting of the proceedings of the Court. A cursory consideration of the facts supplied from other jurisdictions and relied upon by the Applicants will show that, even in those jurisdictions, live-streaming was not commenced from the blues. There was always the legal framework set in place for such purpose as informed by their judicial policy. Live-streaming or broadcasting where it was allowed had to be planned and budgeted for. The kernel of the decision was that a legal framework/policy must be put in place before a court proceeding could be live-streamed/broadcasted/televised.

The above reasons adduced in the considered ruling by the Court for refusing to grant the motion remain unassailable although the ruling cannot be said to have diminished the importance of live streaming of judicial proceedings as a veritable tool to "promote openness and transparency which would reinforce public faith in the judicial system". The need to fill this vacuum then forms the thrust of this paper and the call for the necessary legislative amendments and protocols to be set in motion to enable live streaming or broadcast of judicial proceedings in Nigeria.

5.0 Contemporary developments in support of live streaming of judicial proceedings

Aside the need to catch up with modern trends around information technology which permit live and real time broadcast of sundry events, a number of developments in the adjudicatory ecosystem support the introduction of live streaming or broadcast of judicial proceedings in Nigeria. These include but are not limited to the following-

(a) Live broadcast or streaming of judicial proceedings can be accommodated in a broad interpretation of the provision of *section 36(3)* of the CFRN, 1999 as amended which provides that "the proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal) shall be held in public."

(b) Digital or electronic adjudication has come to stay in Nigeria as both the Evidence Act, 2011 and the Evidence (Amendment) Act, 2023 provide copiously for electronic evidence. These revolutionary legislations support the wholesale application of technology in *section 258* of the Evidence Act, 2011 provides for the admission of Computer-generated evidence while the Evidence (Amendment) Act 2023 made additional revolutionary provisions relating to application of technology in adjudication process.

(c) Rules of Courts and Practice Directions in Nigerian Court provide for involvement of technology via virtual proceedings and e-processes. For example, the Supreme Court Rules, 2024 in *Order 3 Rule 2*, explicitly states that a Notice of Appeal shall be served on the respondent(s) either personally, on their legal practitioner who represented them at the Court of Appeal, or through electronic mail or other electronic means. To clarify, the Rules further assert that while personal service of a Writ of Summons in the Court's original jurisdiction or a notice of appeal is generally required, once these updated provisions have been complied with- whether by serving the respondent's legal practitioner or using electronic methods- no objection shall lie on the ground only that the Notice of Appeal was not served personally. This enhancement aims to streamline the appellate process and mitigate procedural challenges arising from service disputes, thereby fostering a more efficient judicial system. Furthermore, electronic filing and virtual hearing is provided for under the Supreme Court Rules, 2024. Detailed provisions for electronic filing and virtual proceedings which are contained in *Orders 17 and 18* showcase the procedures for filing court processes through the NCMS E-filing portal as well as for conducting virtual hearings, respectively. Furthermore, under *Order 17 Rule 4(2) and Order 18 Rule 8* of the Supreme Court Rules, 2024, the Chief Justice of Nigeria is authorised to periodically issue Practice Directions to specify the manner and form of e-filing and to regulate virtual hearings.

Courtesy of the COVID 19 Practice Direction 2020 applicable to the High Court of the FCT, Magistrates and District Courts in the Federal Capital Territory, these Courts can have e-proceedings or remote hearing on virtual platforms such as Zoom, Microsoft Teams, Skype or other audio or video platform as may be approved by the Chief Judge although the difference between virtual trial or proceedings and live streaming was clearly and correctly accentuated in the ruling *Obi & Anor v INEC & Ors (supra)*.

Against the foregoing, it is therefore strongly submitted that subject to reasonable restraints, introduction of live streaming or broadcast of court proceedings will not be alien or antagonistic to the adjudication process.

6.0 Advantages of live streaming or broadcast of judicial proceedings

In the *Obi & Anor v INEC & Ors* case, the Court quoted the Indian Supreme Court to the effect that "Sunlight is the best disinfectant". Live-streaming as an extension of the principle of open Courts will ensure that the interface between a Court hearing with virtual reality will result in the dissemination of information in the widest possible sense, imparting transparency, and

accountability to the judicial process. It is unarguable that live streaming of important judicial proceedings will "promote openness and transparency which would reinforce public faith in the judicial system". Justice is rooted in confidence. How will a reasonable man or woman perceive live broadcast of an important case like a Presidential election petition?

In *Pam & Anor v Mohammed & Anor*, Tobi, JSC, held that there is a legal personality known as the reasonable man. He is sometimes also known as a reasonable person or a reasonable citizen. His opinion is usually consulted in Courts to solve legal problems. He is an ubiquitous fictional figure of the law. That reasonable man in some English authorities is the man in the Clapham Omnibus. For those of us in Nigeria who may not know anything about the Clapham Omnibus and the sort of man that takes a regular ride in it. The reasonable person and the impartial observer mean the same. They mean a complete stranger, an unbiased person to the proceedings. A reasonable person is a person with reason having a faculty of the mind by which he distinguishes truth from falsehood, good from evil. A reasonable person is a fair, proper and just and unbiased person. An impartial observer is not partial. He favours neither the plaintiff nor the defendant. He is disinterested in the matter, as he treats both the plaintiff and the defendant alike. He is an unbiased person. Both the reasonable person and the impartial observer are the hypothetical legal standard for determining or judging fairness, fair play and equity. The test of the reasonable man in Nigerian Courts is no more the man at the Clapham junction in London but one in anywhere in the Nigerian cities. The Nigerian equivalent of that reasonable man was given by Eso, JSC in *Adigun v Attorney-General of Oyo State* as follows:

A reasonable person here may be a pleasant housewife shopping for meal in Sandgrouse ..., he may be the ordinary worker in the Kano Native city living on his "Tuwo" or he is the plain woman in "Okrika dress". Now it is what a reasonable man in the class indicated above thinks about the Appellant's case in the lower Court while observing the proceedings before that Court that will be the true test of whether or not the Appellant is having a fair hearing or fair trial. The statement of Ademola CJN in *Mohammed vs. Kano NA* (1968) 1 ALL NLR 422 encapsulated the guiding principle. In that case, Nigeria's first Chief Justice of Nigeria said: 'We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing ... 'The true test of a fair hearing it was suggested by counsel is the impression of a reasonable person, who was present at a trial whether from his observation, justice has been done in the case. We felt obliged to agree with him'.

From the above statement of the law, it is not in doubt that the reasonable man will give thumbs up for a judicial proceeding that is streamed live as it will remove or reduce doubts about the fair hearing that the parties will get. It should be appreciated that the reasonable man who was not physically present in court but has the opportunity to follow important court proceedings through live broadcast will form his impressions. It is the impression he gets from his observations at the trial that is the determinant of whether or not there has been a fair hearing or a fair trial. In *Daniel v FRN*, it was held that the Courts cannot fail to do justice just because simpletons, fickle minded people and credulous folks believe everything they read in newspaper. Justice is based on evidence presented before the Court and a reasonable man in Court observing that proceedings follow the proper standards of adjudication cannot query the fairness of a hearing or trial. "The reasonable man is no moron or fool."

7.0 Recommendations and way forward

In *Obi & Anor v INEC & Ors* (supra), it was held that "Allowing cameras in the Courtroom for live televising of Court proceedings is a major judicial policy which must be provided for by the law and/or rules of Court." This judgment was forthcoming on things that should be done as a prelude to having in place live broadcast or streaming of judicial proceedings. It is against that background that the following are recommended

(a) Relevant and enabling laws or legislations should be enacted by both federal and state legislatures created under *section 4* of the CFRN, 1999 as amended to expressly prescribe, permit or support live-streaming or broadcasting of the proceedings of federal and state Courts respectively.

(c) Heads of Courts should amend the Rules of the various superior Courts including Practice Directions to allow or permit live-streaming or broadcasting of the proceedings of Court.

(d) Budgetary provisions should be made at both the Federal and State levels to accommodate the acquisition and continuous upgrade of the technology required for live-streaming or broadcasting of the proceedings of Court.

(e) Training and retraining of judicial officers and judiciary on protocols and usages required for live-streaming or broadcasting of the proceedings of Court should be routinely and regularly undertaken.

8.0 Conclusion

Public confidence in the administration of justice can be weakened by secrecy. Hence, live streaming or broadcast of judicial proceedings in Nigeria is a destination that must be reached. The Press in Nigeria has a constitutional duty to educate, enlighten and inform. Live broadcast will help to improve accountability, responsibility and transparency in adjudication process. Aside from removing Nigeria from analog justice dispensation system. it will also help to restore public trust and rejig the sagging image of the judiciary. The compelling necessity to put in place legislations, rules policies and protocols as already recommended in this paper for live-streamed or televised Court proceedings cannot be over-emphasised.

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