

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS THURSDAY, THE 28TH DAY OF MAY 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

**IN THE MATTER OF AN APPLICATION BY MR. RAYMOND UDOM
FOR THE ENFORCEMENT OF HIS FUNDAMENTAL RIGHTS**

SUIT NO: CV/701/17

BETWEEN:

MR. RAYMOND UDOMAPPLICANT

AND

**1. THE NIGERIAN ARMY
2. THE CHIEF OF ARMY STAFF
3. GUARDSMAN FELIX ODEY
4. THE ATTORNEY GENERAL OF THE FEDERAL
REPUBLIC OF NIGERIA** } **.RESPONDENTS**

JUDGMENT

By an Amended originating application dated 6th July, 2018, the Applicant sought for the following reliefs as contained in the statement accompanying the application as follows:

- 1. That the torture, inhuman, degrading and dehumanizing treatment meted out to the applicant on the 29th of November, 2016 by the 3rd Respondent an officer working under the 1st and 2nd Respondents is unlawful, illegal and a gross violation of the Fundamental Rights of the Applicants as guaranteed under Chapter IV of the Constitution of the Federal republic of Nigeria 1999.**

- 2. That the invitation of the applicant by the 3rd Respondent on the trumped up allegation of breach of contract and instigation is illegal, unlawful, ultra vires and a gross violation of the Fundamental Rights of the Applicant guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria 1999.**
- 3. An Order of injunction restraining the Respondents, their agents, servants officers, privies or whomsoever whether working directly and or indirectly with or for the Respondents from further arresting, inviting, intimidating, torturing, harassing and or infringing on the Fundamental Rights of the Applicant as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria 1999.**
- 4. An Order compelling the respondents to publish in a conspicuous portion of a National Newspaper circulating within the Federal Republic of Nigeria a public apology to the person of the Applicant for the torture, inhuman, degrading and dehumanizing treatment meted out to the Applicant in gross violation of the Fundamental Right of the Applicant.**
- 5. The sum of Two Hundred Million Naira (N200, 000, 000.00) jointly and severally against the Respondents being general and aggravated damages for the unlawful violation of the Applicants Fundamental Rights as entrenched and guaranteed under chapter IV of the Constitution of the Federal Republic of Nigeria.**
- 6. And for such further order or other orders/directions as this Honourable Court may deem fit to make in the circumstances.**

The grounds on which the application is brought are as follows:

- 1. The Applicant's Fundamental rights are enshrined and provided for under the Nigerian Constitution, to be protected and/or enforced by this Honourable court.**

2. **That Respondents have no legal basis or justification for the unlawful harassment, intimidation, torture, assault and attack on the person of the Applicant.**
3. **That the 1st, 2nd, 3rd and 4th Defendants/Respondents have no power under the Constitution of the Federal Republic of Nigeria 1999 and the Armed Forces Act or any other Statute to invite or interrogate the applicant concerning a breach of contract.**
4. **The applicant did not commit any crime or offence whatsoever to warrant being severely beaten up by the 3rd Defendant resulting in grievous bodily harm and extensive injuries.**
5. **There was no reason whatsoever to warrant the 3rd defendant to torture, dehumanize and to man handle the applicant in such a degrading manner.**
6. **The applicant was molested, tortured and beaten to a point that he almost lost his life and has since been hospitalized and has been undergoing series of operations in the hospital.**
7. **The applicant has suffered severe injury to his inner and outer body parts and can no longer engage in active work to earn a living.**
8. **The applicant has suffered and sustained injuries, as well as material and financial damages as arising from the violation of his Fundamental Rights.**

The application is supported by a fifteen (15) paragraphs affidavit with seven (7) annexures marked as **Exhibits A-D4**. A further affidavit with five (5) annexures was filed by Applicant to further support his application. A written address was filed in compliance with the FREP Rules. In the address, three (3) issues were raised as arising for determination as follows:

1. **Whether the Applicant's Fundamental Rights as guaranteed under Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 has been, is being and likely to be breached by the Respondents.**

- 2. Whether the Applicant is entitled to injunctive reliefs to forestall further violation of the Fundamental Rights of the Applicant by the Respondents.**
- 3. Whether the Applicant is entitled to damages for violation of the Fundamental Rights.**

The address filed by the Applicant is anchored on the basis that the actions of the 3rd Respondent working under the 1st and 2nd Respondents in inviting, detaining and violently beating the Applicant occasioning grievous injury for no just cause constituted a violation of his fundamental human rights as enshrined in the constitution which entitles him to the reliefs sought in the application.

The 1st and 2nd Respondents filed a counter-affidavit and a further counter-affidavit. A written address was filed in which three (3) issues were raised as arising for determination to wit:

- 1. Whether the 1st and 2nd Respondents are liable to the act complained against the 3rd respondent when there is no proof that he is a staff of the 1st and 2nd Respondents.**
- 2. Whether the 1st and 2nd respondents are vicariously liable for the offence of which was allegedly committed by the 3rd respondent when it is not shown to be in the employment database of the 1st and 2nd Respondents.**
- 3. Whether the 2nd respondent is a Juristic person to be sued by the Applicant.**

The basis of the address of the 1st and 2nd Respondents is that they cannot be liable for the actions of the 3rd Respondent who has not been proven to be their staff and that even if he was, that the 1st and 2nd Respondents cannot be vicariously liable for the criminal actions of the 3rd Respondent. Finally, it was contended that the 2nd Respondent is not even a juristic person that can be sued.

At the hearing counsel on either side adopted the processes filed and relied on the submissions in their written addresses in urging the court to grant the application and on the other side of the aisle to dismiss the application.

It is important to state before going into the merits that this matter was initially filed before the Honourable **Justice M. Balami**, now retired. On transfer of the matter to my court, I ordered for hearing notices to be served on parties. On the records, Applicant faced considerable difficulties in serving the 3rd Respondent and even when there was service via substituted means, the 1st and 2nd Respondents filed a further counter-affidavit indicating that the acceptance of service for 3rd Respondent was in error as they don't have records that he is in the service of the Nigerian Army. The Applicant however contends otherwise. A resolution of the Application would certainly involve determining the question of whether the 3rd Respondent was properly identified and served and whether the 1st Respondent can be liable for his actions. The 4th Respondent on its part never filed any process despite service of the originating processes and hearing notice.

Now to the merits.

I have given an insightful consideration to the originating court process and the various affidavits filed by parties together with the written addresses and also considered the oral amplification by respective learned counsel and it seems to me that the issue to be resolved from the materials before court falls within a very narrow legal compass and that is whether on the facts and materials before court, the applicant has proved that his fundamental rights was violated by 3rd Respondent working under 1st and 2nd Respondents to entitle him to the reliefs sought. This broad question as already alluded will involve answering the question of whether the 3rd Respondent has been properly identified as a member of the Nigerian Army and whether the 1st and 2nd Respondents can be liable for his violent actions towards the Applicant.

Now it is settled principle of general application that an applicant for the enforcement of his fundamental rights under **Chapter IV of the Constitution** has the onus of showing that the reliefs he claims comes within the purview of the fundamental rights as contained in Chapter IV and this is clearly borne out by the express provision of **Section 46 of the 1999 Constitution and Order 11 Rule 1 of the FREP Rules 2009**. In **Uzoukwu V. Ezeonu II (1991)6 N.W.L.R (pt.200)708 at 751**, the Court of Appeal in construing **Section 42 of the 1979 Constitution** which is in *pari materia* with **Section 46 of the 1999 Constitution** stated as follows:

“The Section requires that a person who wishes to petition that he is entitled to a fundamental right:

- a. Must allege that any provision of the fundamental rights under chapter IV has been contravened, or**
- b. Is likely to be contravened, and**
- c. The contravention is in relation to him”.**

The reliefs which therefore an applicant may seek under the FREP Rules are specifically limited to any of the fundamental rights prescribed and embodied in Chapter IV of the Constitution. See **Dongtoe V. Civil Service Commission, Plateau State (2001)19 WRN 125; Inah V. Okol (2002)23 WRN 78; Achebe V. Nwosu (2002)19 WRN 42.**

Now I had at the beginning spelt out the reliefs of applicant in his statement accompanying the application and they clearly come within the purview of fundamental rights under **Chapter IV of the 1999 Constitution.**

The burden therefore was on the applicant alleging the infringement of his fundamental human rights to place before the court cogent and credible facts or evidence showing the breach or infringement to put the court in a clear position to grant the reliefs sought. See **Fajemirokun V. C.B.C.I Nig Ltd (1999)10 N.W.L.R (pt.774)95.**

In resolving this dispute, it may be necessary to give a brief background facts of the matter for a proper appreciation of the issues to be resolved. The complaint of the Applicant as denoted from the affidavits he filed is that while at work, at CCECC Company laying marble tiles in the company’s premises, the 3rd Respondent, a serving military officer attached/posted to the CCECC Company site at Wuye to perform guard duties, invited him to come and see his officer in command (O.C); that a complaint was laid against him by one Ibrahim. He told the 3rd Respondent that because of the stage of his work, (he had already mixed cement and if he does not use it on time, it will solidify and get spoilt), he should be given some time to answer the call. That the 3rd Respondent after about two minutes came back in anger and started shouting at him for not immediately answering the call of his O.C and violently assaulted him, by kicking him on his

stomach and beating him with a stick. That he was then dragged to the security post with blood all over him where he was detained and interrogated over the contract he had with the said Ibrahim. That after several hours of detention and interrogation and noting that he was in terrible state of health, the 3rd Respondent threw him out of the security post. That as a result of the pains from the beatings, he could not continue work that day and had to be taken home by friends. That when he got home, he started vomiting large quantity of blood; he became cold, feverish and weak and could not talk, move or walk well and he had to be rushed to the hospital where he had to undergo about three major surgeries.

The 1st and 2nd Respondents vigorously denied these allegations. They contend that they have searched the Army Records and the data base of serving and retired Army Personnel but they don't have any person by the name of 3rd Respondent. That neither the said **Corporal Fidelix** earlier used on the originating process or Corporal Felix Odey now being used exist and that his identity is very much in doubt. That if he was not fake, he ought to have his name tag and force number firmly affixed to his breast pocket if he was indeed a force man. That the Nigerian Army never posted any soldier to CCECC Company for any work and no such work is shown in the schedule of duties of the Nigerian Army in Abuja.

I have sought above to capture the essence of this dispute through the narrative on both sides of the aisle as streamlined in their affidavits.

Now it is not in doubt that the provisions of **Section 34(1) and 35(1) of the 1999 Constitution** provides for the right to dignity of the human person and the right to personal liberty.

The Sections provides as follows:

“34(1) Every individual is entitled to respect for the dignity of his person, and accordingly:

- a. No person shall be subjected to torture or to inhuman or degrading treatment;**
- b. No person shall be held in slavery or servitude; and**
- c. No person shall be required to perform forced or compulsory labour.”**

“35(1) Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law...”

The above sections appear to me clear and unambiguous such that the task of interpretation can even hardly be said to arise. **Section 34(1)** emphasises treatment of the human person with respect and therefore any act which makes people lose their sense of self respect, value or worth would be degrading. **Section 35(1)** on the other hand places premium on the personal liberty of every person and any deprivation of same must be consistent with the procedure permitted by law. The court obviously serves as a necessary bulwark in the protection of these fundamental rights and any transgression or proved violation of these constitutional provisions are met with necessary legal consequences.

The task before me now is to apply the above clear provisions in relation to the alleged infractions and determine whether these infractions were proved.

I start with the critical element of whether the 3rd Respondent has been properly identified and a clear nexus established with Nigeria Army. Now on the affidavit of Applicant, the case made out is that both he and 3rd Respondent were at work at CCECC Company’s premises at Wuye. Applicant was at the premises to lay marble tiles while the 3rd Respondent was at the security post of the company.

If that is the case, it would appear that the **company** had knowledge of their presence. Now the 1st Respondent has categorically stated that they never posted any soldier to CCECC Company for any work vide paragraph 7 of the counter-affidavit. This critical averment was nowhere denied or challenged. If indeed **soldiers** were sent there to serve as Security Guards, it certainly must be to the knowledge of the company who must have demanded or required their services. It is strange here that the company who engaged Applicant to lay marble tiles has not filed any process showing that they engaged the services of the Nigerian Army to provide security for them. The failure of either Applicant or the company to controvert this clear assertion by 1st and 2nd Respondents meant in law that the contention of the 1st and 2nd Respondents that they never posted any soldier to the CCECC premises stands uncontroverted.

In law uncontradicted depositions in an affidavit are deemed correct. Indeed it is the duty of an adversary to controvert facts in an affidavit as in this case otherwise it is regarded as established. See **Kotoye V Saraki (1993) 5 NWLR (pt.296) 710 at 723 H; Long John V Blakk (1998) 6 NWLR (pt.555) 524 at 547 H.**

This critical point has **direct bearing** with the streamlined duties of the **Nigerian Army** which absolutely has nothing to do with providing security for private companies such as the CCECC. Indeed **Section 1(3) of the Armed Forces Act, Cap, A20 LFN 2004** provides clearly that:

“The Nigerian Army shall be charged with the defence of the Federal Republic of Nigeria by land, sea and air and with such other duties as the National Assembly may from time to time prescribe or direct by Act.”

There is no suggestion here that the National Assembly has prescribed by any Act that the Army can provide security or engage in guard duty for private companies. The provision of such security service can equally not by any stretch of the imagination tantamount to act in defence of the country.

Furthermore, what is curious about the deposition of Applicant is that the company that employed **both his service and that of 3rd Respondent** ought to and must know about the alleged brutal treatment he went through in their premises. A lot of questions then arise: How come there is absolutely no corroboration by either the company itself or any other person in the premises about this unwarranted assault which occasioned severe injuries on Applicant? Is it possible that Applicant will be beaten mercilessly and detained at the security post for hours without anybody knowing or intervening? Particularly when Applicant said that at the time 3rd Respondent called him, he was at work for the same company mixing the cement for the marble preparation which ought to be done quickly so that it does not **“solidify”** and get **“spoilt”**.

Indeed how come no report was made to the police within Wuye where the company premises is located? All these questions with no clear answers served to undermine the credibility of the narrative of Applicant that the 3rd Respondent was indeed from the Nigerian Army posted to guard or offer security for a private

company. This is a job more within the remit and ambit of the Nigerian police. I say no more.

To further add a lack of clarity to the case of the Applicant, it should be noted that in the original action filed, the 3rd Respondent was identified as **“CORPORAL FIDELIX”**. This process was filed on 24th January, 2017 some few months after the alleged incident on 29th November, 2016. I take it as given that the facts stated by Applicant then as to the identity of the person who assaulted must have been fresh on his mind. It is settled principle that the court is *suo motu* allowed to make reference to the case file before it and make use of any document and relevant evidence. See **Famudoh V. Aboro (1991)9 N.W.L.R (pt.214)210 at 229 para E, Onagornwa V. Adeniji (1993)5 N.W.L.R (pt.293)317 at 33 G-H.**

Now about two years after the filing of the originating process, the name of 3rd Respondent was now amended to read **“GUARDSMAN FELIX ODEY”**

The 1st Respondent contends that whether the 3rd Respondent’s name is **Corporal Fidelix** or **Guard-mans Felix Odey**, the said names do not exist in the data base of Nigerian Army after an extensive search. The Applicant who asserted that the 3rd Respondent is an army officer could not really creditably prove this assertion. In the further affidavit filed by Applicant on 6th November, 2019, about three (3) years after the incident, the Applicant claimed it was one H. Mohammed, Chief Clerk at Nigeria Army, 102 Guards Battalion who informed him that the 3rd Respondent was posted to the 102 Guards Battalion, Suleja Niger and that he also went through orderly room trial and was sentenced accordingly.

Now there is no real clarity as to when and where this information was obtained and who even offered the information. The said **Chief Clerk** in a further and better counter-affidavit categorically denied giving applicant any such information. He stated that he has never met Applicant and reaffirmed that neither **“corporal Fidelix or Guard-man Felix Odey”** exist in their records so he could not have supplied the purported information to Applicant.

The questions that follows from these contested assertions is at what point did Applicant receive this information? Where did they meet? Did he meet him on his way to the Barracks or did they meet at the 102 Guards Battalion, Zuma Barracks?

Indeed beyond challenged averments and or speculative posturing, where is the real evidence disclosing that **Guardsmen Felix Odey** was “**posted to Nigeria Army 102 Guards Battalion Suleja**” as contended by Applicant. Unfortunately on the materials, there is no hard or clear evidence supporting that representation and the court cannot speculate. Also if he was sentenced in an orderly room trial as alleged by Applicant, where is the evidence of the conviction and sentence? **The impression** I get from the materials is that the Applicant is clearly not sure of who really assaulted him in such a brutal manner as described. As stated severally, the onus was on Applicant to prove the existence of **Corporal Fidelix** or **Guardsmen Felix Odey** as a soldier under the employment of 1st and 2nd Respondents. There is in this case from the trajectory of the narrative of Applicant no full, clear name(s) and particulars of who assaulted Applicant, his unit of work or department, his force number, or even rank and address if indeed he was a military officer or personnel.

Now from the Records the bailiff of court may have equally sought to serve the originating process, but the person he served originally said he was not the person named on the process and won't accept service. What this again goes to show in my opinion is the lack of proper identification of the person who attacked Applicant. The unavoidable conclusion from the trajectory of the history of this case is that the Applicant is engaging in an exercise of guess work. Before cases of this nature are filed, an Applicant must be sure of his facts and the person accused of the infraction of his fundamental rights.

To make matters worse for the Applicant, **Section 289 of the Armed Forces Act (Supra)** provides clearly for the corresponding structure of ranks in the Armed Forces. These are clearly set out or streamlined in the **third and fourth schedule**. In the structure of rank for the Army, there is absolutely no rank described as “**GUARDSMAN** “ We have the lowest rank as **Recruit**, then **Private, Lance-Corporal, Corporal, Sergeant and so on**. There is therefore no nomenclature known as “**Guardsmen**” and this again fatally undermines the claims of Applicant with respect to the real identity of who assaulted him. If a soldier is to be referred to as a “**Guardsmen,**” the Act would have provided for it. The structure of the ranks in the Army as streamlined in the Act cannot be altered or any interpolations made to it to suit a particular purpose. See **Section 128(1) of the Evidence Act**.

The bottom line is that the case of Applicant stands or falls on the basis of establishing clearly the person who assaulted him. It cannot be a matter of guess work or speculation or a matter for address of counsel. Unfortunately that hurdle has not been crossed by Applicant in this case and that is fatal.

Let me also quickly add that even if the 3rd Respondent was properly identified as an Army Officer (and he was not so identified), in the light of the streamlined duties of the Army which I had earlier highlighted under the **Armed Forces Act**, it will be difficult to situate how the Nigerian Army can be held vicariously liable for the actions of 3rd Respondent acting as a guards man for a private company, an assignment clearly outside the remit of its duties or official functions and a duty which he was not assigned by the Army as earlier stated. In common law, a master is taken to be liable for any wrong or misdeed, whether criminal or tortuous act committed by his servant in the course of his official duty. See **A.G Fed. V. Ajayi (200)12 N.W.L.R (pt.682)509 at 528D-E**. The purported action(s) of 3rd Respondent if indeed he is a military officer cannot be said to be in the course of his official duties. He was without any iota of doubt on a frolic of his own and the Nigerian Army cannot in the circumstances be even vicariously liable.

The Applicant may indeed have been viciously assaulted by someone and this assault the court in no uncompromising terms condemns totally. It cannot be right that the Applicant was brutally beaten for any reason for that matter and left with life threatening injuries which culminated in three surgeries. No individual or indeed any security person or agency in Nigeria has such unlimited powers to inflict unmitigated pain and assault the dignity of any person. In this century, that is intolerable and unacceptable. These true sentiments notwithstanding, the case of Applicant has many gaps and unclear issues left hanging in the air which I have demonstrated above and it will be difficult to secure a decision on infraction of human rights in such unclear and fluid situation. I only need add here that the business of court does not include that of speculating. A court of law qua justice only acts or decides on the basis of what has been clearly demonstrated and creditability proved. I must also add that bare averments of infractions in an affidavit cannot suffice especially here where they are seriously controverted or challenged. I do not think that the assertions of applicant can stand or be accepted as correct without proof. The mere stating of a fact does not prove the correctness

or credibility of that fact without cogent evidence to substantiate same. In as much as the assertion does not relate to any fact which the court can take judicial notice, it behoves applicant to substantiate same with proof.

The point therefore is that in a fundamental rights enforcement matter, which is a serious matter, the court will not declare an applicant's right(s) to be infringed simply because he says so and in the absence of credible evidence or proof. The materials also supplied by applicant in the circumstances must also not be such that is incredible, improbable or sharply falls below the standard expected in a particular case. It must establish that the rights claimed exist and has been infringed upon or is likely to be infringed. See **Neka B.B.B Manufacturing Co Ltd. V. ACB Ltd. (2004)2 N.W.L.R (pt.858) 521 at 550 – 551.**

The only point to perhaps underscore here is to remind all Nigerians to keep strict fidelity to the rule of law. That is the only way to have an orderly and progressive society and country. There is therefore no room for highhandedness or arbitrariness by any individual or institution. Everyone must ensure that their actions at all times serve only to enhance the quality of liberty and dignity of the person as enshrined in the 1999 Constitution. I leave it at that.

I have here carefully considered the materials before me and I cannot locate any violation of the relevant constitutional provisions by the Respondents. There is absolutely no evidence of such quality and cogency beyond controverted speculative averments showing that the Applicant rights were violated as stated by Applicant by an army officer working for and under the 1st Respondent. Unfortunately, the conclusion I reach is that Applicant has not properly identified the person who cruelly assaulted him and the other Respondents cannot be liable for the action(s) of this unknown individual.

It is a fundamental principle of our legal system in respect of facts averred that where they are weak, tenuous, insufficient or feeble, then it would amount to a case of failure of proof. A plaintiff whose affidavit does not prove the reliefs he seeks must fail. See **A.G. of Anambra State V. AG of Fed. (2005)AII F.W.L.R (pt.268)1557 at 1611; 1607 G-H.**

In the final analysis, the issue raised as arising for determination is answered in the negative. All Applicant's claims or reliefs on the alleged violation of his fundamental human rights are not availing. The Applicant's claims therefore fail and same are accordingly dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

- 1. Chris Iloka, Esq., for the Applicant.**
- 2. S.M. Attah, Esq., for the 1st and 2nd Respondents.**