IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS WEDNESDAY, THE 13TH DAY OF MAY 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/64/19

IN THE MATTER OF AN APPLICATION BY UCHENNA NWEZE FOR AN ORDER FOR THE ENFORCEMENT OF HIS FUNDAMENTAL HUMAN RIGHT

AND

IN THE MATTEROF FUNDAMENTAL RIGHT (ENFORCEMENT PRCEDURE) RULE 2009, PURSUANT TO THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA

BETWEEN:

UCHENNA NWEZE .....APPLICANT

AND

1. COMMISSIONER OF POLICE
2. ATTORNEY GENERAL OF THE FEDERATION }**...RESPONDENTS**
3. CONTROLLER OF PRISONS

JUDGMENT

This is an application brought pursuant to the Fundamental Rights Enforcement Procedure Rules, 2009. The application was filed on the 30th July, 2019.

The reliefs sought as contained in the statement accompanying the application are as follows:

i. **An order for the immediate and unconditional release of the applicant from the custody of the 3rd Respondent, having been in Suleja Prison without trial for over three years.**

ii. **An order of punitive damage of ₦900,000,000(Nine Hundred Million Naira) against the 1st and 2nd Respondents for their negligent conduct against the Applicant and for not being diligent in the prosecution of the Applicant.**

iii. **And for such order or further orders this Honourable Court may deem fit to make in the circumstance.**

The Grounds upon which the above reliefs are sought are as follows:

i. **The Applicant is a law abiding citizen of Nigeria, and a beneficiary of the mouth watering provisions of the 1999 Constitution as amended.**

ii. **The Applicant have been deprived of his liberty, movement, livelihood, dignity for over three years.**

iii. **That the Applicant needs to find his family and get reunited, having had that he lost his wife while in prison and did nothing to save her.**

iv. **That the charge before the Upper Area Court was just a plot to destroy his life.**

v. **That he is still innocent before the law, and should not suffer the fate of the guilty.**

vi. **The Respondents will not be prejudiced by the grant of reliefs sought in this application in any way.**

The application is supported by an 11 paragraphs affidavit. A brief written address as filed in compliance with the **FREP Rules** in which two (2) issues were raised as arising for determination to wit:

"
1. **Whether the continued detention/remand of the Applicant by virtue of the negligent conduct of the Respondents does not constitute a violation of the Applicant Fundament Rights.**

2. **Having regards to the circumstance of this case, whether the Applicant is not entitled to the relief sought."**

The address filed by Applicant is essentially anchored on the fact that the actions of the 1st Respondent in arresting and detaining the Applicant at Suleja Prisons for nearly three years now without been charged to court or granting him bail is a violation on the Applicant's right to personal liberty and dignity of his person as enshrined in the 1999 Constitution and accordingly entitles him to the reliefs he seeks.

At the hearing, learned counsel to the Applicant relied on the paragraphs of the supporting affidavit and the other court processes. He then adopted the submissions contained in the written address in urging the court to grant the application.

From the Records, all the respondents were duly served with the originating court processes and hearing notices all through the course of this proceedings but it was only 2nd Respondent that filed a counter-affidavit to the application. They were however not represented when the application was heard. The response they filed shall be deemed as adopted pursuant to **Order xii Rule 3 of the FREP Rules.**

As stated above, the 1st and 3rd Respondents did not appear in court and were not represented. Indeed no process was filed in opposition to the extant application by them. While the right to fair hearing is obviously critical and fundamental in any well conducted judicial proceeding, it is a right that must necessarily be circumscribed within proper limits and not allowed to run wild. See **London Borough of Hounslow V. Twickenham Garden Development Ltd (1970)3 ER 326 at 347.** The1st and 3rd Respondents here have been given every opportunity

to respond to the applicant's allegations and they have exercised their right not to respond. Nobody begrudges this election. It is only apposite to state that nobody or institution has till eternity to defend or respond to any allegation(s). I leave it at that. I move to the merits of the case.

I have carefully read the originating court processes filed by the applicant together with the written address and also considered the oral amplification by learned counsel to the applicant 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 the court, the applicant has creditably established that his Fundamental Human Rights were violated by respondents to entitle him to the reliefs sought.

This lone issue raised by court has with clarity brought out out the crux of the contest subject of the extant inquiry. It is on the basis of this issue that I will now proceed to consider the evidence and submissions of counsel.

Now it is correct as submitted by learned counsel to the Applicant that the 1st and 3rd Respondents having failed and/or neglected to file a counter affidavit, the said affidavit of Applicant ordinarily stands uncontroverted and unchallenged. It is now trite principle of general application that where averments in an affidavit are neither challenged nor controverted, the court is under a duty to take the facts deposed therein, where cogent and credible, as established. See the cases of **B.O.N. Ltd vs. Aliyu (1999) 3 NWLR (pt 612) 622 and Okonkwo vs. Onovo (1999) 4 NWLR (pt. 597) 110.**

While in law, the above position on failure to file a counter affidavit cannot be faulted, it is equally important to state that the fact that an affidavit is unchallenged does not mean that the court will simply accept the contents of the affidavit; the court has a duty to look at the unchallenged affidavit to see if it is sufficient to determine the claim made by applicant. See **Martchem Industries Nig. Ltd. vs. MF Kent West Africa Ltd. (2005) 129 LRCN 1896 at 1899.**

The point therefore which the authorities appear to emphasise is that the court will not in any given situation declare applicant's right(s) to be infringed simply because the other party to the application has neither filed a counter-affidavit nor

appeared in court. The materials supplied by the Applicant in such circumstances must 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 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; Olisa Agbakoba V. Director SSS (1994)7 N.W.L.R (pt.351)353 at 500**.

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 412.**

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 the Fundamental Rights under **Chapter IV of the 1999 Constitution**. The burden therefore was on the applicant alleging the infringement of his fundamental 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.**

Now the facts as adumbrated in the Applicant's affidavit are simple and straightforward. From the affidavit of Applicant, which is largely unchallenged, he was arrested and detained in Suleja Prison in July, 2016 on grounds that he refused to be coerced into admitting a heinous crime which he did not commit. That since his arrest and detention, he has not been granted bail or charged court. The substance of the above facts as stated earlier were not in anyway controverted by the Respondents, so the facts or averments are in law in the absence of anything to the contrary deemed to be admitted. See **Nwosu V Imo State Environmental Sanitation Authority (1990)2 N.W.L.R (pt.135)688 at 721 and 735; Honda Place Ltd. V. Globe Motors Holdings Nig Ltd (2005)14 N.W.L.R (pt.945)273 at 293-294F.D.**

This leads to the crux of this inquiry which is whether the actions of the respondents falls within the purview of constitutionality and applicable laws. The applicant as stated earlier strenuously canvassed the point that the actions of respondents were wholly unconstitutional.

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

Section 34(1) provides thus:

(a) No person shall be subjected to torture or to inhuman or degrading treatment.

(b) No person shall be held in slavery or servitude.

(c) No person shall be required to perform forced or compulsory labour.

The above for me appears clear and unambiguous. It 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 states thus:

"**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 provision is similarly clear and unambiguous. This provision places high premium on the personal liberty of every person and any deprivation of same must be consistent with the procedure permitted by law. The burden to show that the actions of arrest and detention of the applicant in this case or indeed any person in breach of this guaranteed constitutional rights to dignity, liberty, freedom of movement etc is lawful lies in law on the respondents.

In **Chief (Dr) Fajemirokun V. Commercial Bank Credit Lyonnais Nig. Ltd & Anor (2002)10 N.W.L.R (pt.774)95 at 110, t**he Court of Appeal stated thus:

"Where there is evidence of arrest and detention of an applicant which were done or instigated by the respondent in an action for enforcement of fundamental rights application, it is for the respondent to show that the arrest and detention were lawful. In other words, the onus is on the person who admits detention of another to prove that the detention was lawful". See **Skypower Airways Ltd V. Ajuma Olima & Anor (2005)8 N.W.L.R (pt.957)224 at 254; Iyere V. Duru (1986)5 N.W.L.R (pt.44)665 at 675 F; Abiola V. Abacha & 4 Ors (1998)1 HRLRA 480-481 E-B."**

The 1st and 3rd Respondents as stated earlier did not respond or file a counter affidavit. There is nothing from their end justifying the continued detention of Applicant.

Now on the part of the 2nd Respondent who filed a challenge or response, I prefer to allow the counter-affidavit to speak for itself as follows:

"5. **That the Applicant has tried to suppress facts in this matter.**

6. **That the Applicant was charged with the heinous crime of rape which is prevalent in our society.**

7. **That the Applicant was charged to court for the offence of rape.**

8. **That the Applicant applied for bail but bail was refused to the applicant due to the nature of the offence and other factors.**

9. **That the Applicant was thereafter remanded in prison based on the order of court.**

10. **That none of the respondents in this suit remanded the Applicant in prison without the order/consent of court.**

11. **That the order to remand the Applicant in prison custody has not been set aside by the court that made it or any other court of concurrent/superior jurisdiction.**

12. **That the Applicant has alleged that there is/was no diligence in his prosecution but he has not applied for the suit to be struck out for lack of diligent prosecution."**

What is curious here is that the office of the Attorney General did not attach **one single piece of paper to** support the serious averments in their counter-affidavit. What the court has here are simply bare and empty averments completely lacking in value or substance. There are troubling questions that arise from the contents of this affidavit: 1) if the Applicant was indeed charged with a heinous crime of **rape** as alleged, where is the charge sheet and in which court was he charged and when? 2) what is the present position or status of the said charge? 3) if the Applicant applied for bail and it was refused and he was then remanded in prison by a court order, where is the record of proceedings or even the order remanding him in court? 4) Indeed in what court is the proceeding pending?

These critical questions were not answered at all. If the Applicant was charged to court as claimed, it meant that all the processes alluded to from the charge to the proceedings relating to bail and the remand order must be available in the court. It is strange that the office of the A.G for reasons that are not clear chose not to furnish evidence of these processes by simply procuring the certified true copies

and attaching same to this counter-affidavit. The failure to creditably establish that there is a rape charge hanging on the Applicant allows for the conclusion that no such charge exists. Furthermore, the failure of the 2nd Respondent to exhibit the charge sheet and related court proceedings allows for the invocation of the principle under **Section 167(d) of the Evidence Act** that if these processes indeed exist, then there production would have been unfavourable to the Respondents' case.

The bottom line is that there is nothing before me showing that the Applicant is facing any criminal allegation in any competent court and the failure, to in the minimum, to attach any process showing that the Applicant was lawfully detained and is facing trial is fatal.

Now the constitution itself has in clear terms defined what constitutes a reasonable time within which a person may be arrested and detained before he is taken to court. **Section 35(4) and (5) of the 1999 Constitution** provides as follows:

(4) Any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of:

(a) Two months from the date of his arrest or detention in the case of a person who is in custody or is not entitled to bail; or

(b) Three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

(5) In subsection (4) of this section, the expression "a reasonable time" means:

a. In the case of an arrest or detention in any place where there is a court of competent jurisdiction within a radius of forty kilometers, a period of one day; and

b. In any other case, a period of two days or such longer period as in the circumstances may be considered by the court to be reasonable."

Section 35(4) (a) stipulates clearly that where a person is arrested or detained in accordance with **Section 35(1) (c)** and is not tried within a period of two months from the date of his arrest or detention in the case of a person who is in custody, he shall without prejudice to any further proceeding that may be brought against him be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date.

Under **sub-section5(a)**above, the reasonable time contemplated by the constitution is stated to be a "period of one day" and there is no discretion under this ambit of subsection5(a) unlike under subsection 5(b) which provides a period of two days or such longer period as the court may consider reasonable in the circumstances.

From the unchallenged facts before me, it is clear that the Respondents have clearly not acted within the scope or purview of the above clear constitutional provisions with respect to the Applicant's right to respect for his personal liberty and dignity of his person.

In **Eda v. The C.O.P. Bended State 1982 3 NCLR 219 at 226** par 5 – 6, the Court of Appeal while interpreting **Section 32 of the 1979 Constitution** which is in pari materia with the provisions of section 35 supra laid down these instructive principles to wit:

1. That when a person is arrested or detained by the police in connection with an allegation of reasonable suspicion of a crime and they are actively pursuing investigation of the matter, the duty of the police is in appropriate case to offer bail to the suspect and or bring him to court of law within one day or two days as the case may be no matter under what sections of the **Criminal Procedure Act or Police Act 1967** the police may purport to be acting.

2. That whether the police grant a person under arrest or detention bail or not, in appropriate case, it is their duty to bring any such person in their custody before a court within one day or two days as the case may be in compliance with the relevant constitutional provision.

The Applicant without any shadow of doubt has been deprived of his personal liberty and his dignity actively violated or assaulted in a manner not countenanced by the constitution or indeed any applicable law. See **Martins V. Nwachukwu & 2Ors (Supra)101; Jimoh V. A.G of the Federation (1981)1 HRLRA 513.**

I do not accept that the dignity and liberty of a citizen can be tampered with on whimsical or flimsy grounds except there are strong reasons to the contrary. If a citizen is arrested on ground of allegation of Rape which is sufficiently a serious allegation, there must be sufficient evidence upon which a charge can be based and even then, such person must be charged to a competent court to enable him ventilate his rights without any delay or granted bail as the constitution clearly provides.

Notwithstanding the difficult and challenging security challenges the law enforcement agencies deal with and we must concede that they are commendably doing their best, there is however no room for the arrest and detention of anybody for months on end without sufficient legal and factual basis and without either that person been charged to court or in the minimum that such person is granted bail to enable him face his trial at the appropriate time.

In **Fawehinmi V. I.G.P. (2002)7 N.W.L.R (pt.767)606,** The Supreme Court stated instructively as follows:

"**It is unlawful to arrest until there is sufficient evidence upon which to charge and caution a suspect. It is therefore completely wrong to arrest, let alone caution a suspect before looking for evidence implicating him.**"

The powers of the police or indeed any law enforcement agency must be exercised with circumspection and scrupulous adherence to the rule of law and legality at all times. These powers must not be subjected to the unwieldy whims and caprice of any individual. Therefore, the mere allegation of committing a crime or wrong doing against a suspect and irrespective of the seriousness cannot operate to curtail the inalienable fundamental rights of the suspect nor can it operate to justify the incarceration and ill-treatment of the suspect. See **Martins V. Nwachukwu & 2 Ors (supra).** I won't say more.

It is for the above reasons that I hold that the arrest, detention and continued detention of Applicant since July 2016 till date without charging him to court or granting him bail is a clear negation of his fundamental rights to personal liberty and respect for the dignity of his person.

I now take the claim for damages. It is clear by virtue of the express provision of **Section 35(6) of the Constitution that a person unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person.** In this case, I have already found that the applicant's right to the respect for the dignity of his person was assaulted without any legal basis and he was also unlawfully deprived of his personal liberty and therefore should enjoy some compensation or damages as provided for by the constitution. **See Odogwu V. A.G. Fed. (1996)6 N.W.L.R (pt.436)508.** These damages therefore ordinarily inures to the applicant having found that his rights have been violated and are essentially compensatory and are intended to redress the loss that applicant has suffered by reasons of the defendants wrongful conduct.

It is true that the crime of Rape is heinous and assuming alarming proportions in recent times for which all should be genuinely concerned but it is simply wrong and unacceptable that a citizen will be arrested and detained continuously without end. It is equally incomprehensible that such a person won't be charged to court or granted bail and his family and relations are kept in the dark as regards why the arrest and detention was effected in the first place and indeed why there is no explanation for the long incarceration. Such conduct or action is utterly oppressive and deplorable and does so much incalculable damage to the value and integrity of the person, his reputation, affects his friends and family, etc. Paradoxically, these actions also unfortunately serve to undermine confidence in the enforcement agencies.

As already alluded too and at the risk of prolixity, law enforcement agencies notwithstanding the challenges they face, and I reiterate that they are trying; they must however like all progressive institutions submit to the rule of law and ensure that their actions serve only to enhance the quality of the liberty and dignity of the human person as enshrined in the 1999 Constitution. This unfortunately did not happen in this case.

On the whole and on the totality of the sad facts and circumstances of this case, it follows that the applicant is entitled to damages in line with the provisions of the constitution. The damages clearly will however be available only as against the 1st Respondent and the personnel under him responsible for this unfortunate and avoidable infraction of the liberty of Applicant.

In summation and for the avoidance of doubt, the Applicant has made out a case with considerable merit and I therefore accordingly make the following orders:

1. **The Respondents are hereby ordered to release the Applicant forthwith without any further delay.**

2. **The sum of ₦5,000,000 is awarded as damages against 1st Respondent in favour of Applicant for the breach of his fundamental human rights.**

……..
Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. **Florence Markus (Miss) with Chamberlin Okere, Esq., for the Applicant**

2. **Amobi Dorcas (Mrs.) for the 2nd Respondent**