

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE H. MU'AZU

ON MONDAY 4th DAY OF OCTOBER, 2021

BETWEEN:

SUIT NO. FCT/HC/CV/2850/2018

- (1) REGISTERED TRUSTEES OF ACCESS TO JUSTICE }
(2) AVOCATS SANS FRONTIERES FRANCE } PLAINTIFFS.

AND

- (1) ATTORNEY-GENERAL OF THE FEDERATION }
(2) THE CONTROLLER-GENERAL, NIGERIAN }
PRISONS SERVICE } DEFENDANTS.
(3) THE NATIONAL HUMAN RIGHTS COMMISSION }

JUDGMENT

By an Originating Summons dated the 25/9/2018 and filed on the same day, the Claimants raised the following questions for determination by the Court:-

- (1) Whether the mandatory death penalty as provided for in Section 1 (2) of the Robbery and fire arms Act violates the right to appeal a sentence of death

provided for in Sections 233 (2) (d) and 241 (1) (e) of the 1999 Constitution and Article 7 (1) (a) of the African Charter.

- (2) Whether the mandatory death penalty violates the right to a fair trial guaranteed by Section 36 (4) of the 1999 Constitution and Article 7 of the African Charter.
- (3) Whether having regard to Section 42 of the 1999 Constitution and Article 2 & 3 of the African Charter, the impugned provision discriminate against offenders who are convicted of armed robbery and infringes their right to equal protection of the law.
- (4) Whether the mandatory death penalty violates the right to human dignity guaranteed by Section 34 (1) of the 1999 Constitution and Articles 4 & 5 of the African Charter.
- (5) Whether having regard to Sections 4 (8) and 6 (1), (2) & (6) (a) of the Constitution, mandatory death penalty provisions violate the separation of powers between the legislature and judiciary.
- (6) Whether the mandatory death penalty under the aforesaid statutory provisions is reasonable and justifiable under Section 45 (1) of the Constitution.
- (7) Whether Nigeria will breach its Constitution and International obligations if it implements death sentences that are imposed under mandatory death penalty provisions.

Upon resolution of the above questions the Claimants seeks for the following reliefs:-

- (1) A declaration that Section 1 (2) of the Robbery and Firearms (Special provisions Act), Cap R 11 and similar statutory provisions that make the death penalty mandatory in Nigeria violate the right of appeal guaranteed by Sections 36, 233 (1) and 241 (e) of the 1999 Constitution and Article 7 (1) (a) of the African Charter on Human and Peoples' Rights (Ratification and Enforcement Act) (African Charter) and are unconstitutional, unlawful and void.
- (2) A declaration that the mandatory death penalty violates the right to a fair trial guaranteed by Sections 36 (4) of the 1999 Constitution and Article 7 (1) of the African Charter and is therefore unconstitutional, unlawful and void.
- (3) A declaration that the aforesaid provision perpetrates a discriminatory system for awarding the death sentence contrary to Section 42 of the 1999 Constitution and Article 3 of the African Charter; they are therefore unconstitutional, unlawful and void.
- (4) A declaration that the mandatory death penalty violates the rights to human dignity, equality before the law and equal protection of the law under Section 34 (1) of the 1999 Constitution and Articles 4 and 5 of the African Charter and is therefore unconstitutional, unlawful and void.

- (5) A declaration that the aforesaid provision and similar statutory provisions that mandate the death penalty are in violation of the separation of powers under Section 6 (6) (a) of the 1999 Constitution and therefore unconstitutional and void.
- (6) A declaration that the aforesaid provision and similar statutory provisions that mandate the death penalty are unreasonable, unjustifiable and inconsistent with Section 45 of the Constitution of the Federal Republic of Nigeria 1999 and therefore unconstitutional, null and void.
- (7) Declaration that the imposition of the death penalty by Courts of Law pursuant to Section 1 (2) of the Robbery and Firearms Act and similar mandatory death penalty provisions is unconstitutional, inconsistent with Nigeria's international obligations, and therefore null and void.
- (8) An order for the Defendants to immediately commence processes for resentencing convicts who were sentenced under Section 1 (2) of the Robbery and Firearms Act.
- (9) An order for the 2nd Defendant to immediately remove convicts who have been sentenced under the aforesaid provision from death row and reassign them to appropriate prison facilities, pending the review of their sentences.
- (10) An order directing the 3rd Defendant to examine within six months of the date of the order, the case

of death row inmates who were sentenced under Sundry mandatory death penalty laws and to commence processes for the review of their sentences.

The Summons is supported by a 4 paragraph affidavit deposed to by one Salihu Omeiza and a Written Address of their Counsel.

In opposition to the suit of the Claimant, the 1st Defendant filed a Motion on Notice for Extension of time, a Counter Affidavit in opposition to the Plaintiffs affidavit in support all dated and filed on the 14/1/2019. He also filed a Notice of Preliminary Objection challenging the jurisdiction of this Honourable Court to hear and entertain this suit.

Further the 2nd Defendant also filed a Memorandum of Conditional Appearance, Notice of Preliminary Objection challenging the jurisdiction of this Honourable Court to hear and determine this suit and Written Address of its Counsel. The 2nd Defendant did not file a Counter Affidavit.

In further opposition, the 3rd Defendants also filed a Motion on Notice for extension of time within which to file its Memorandum of Appearance, Counter Affidavit, Written Address of Counsel and Notice of Preliminary Objection to this suit.

In its Notice of Preliminary Objection, the 3rd Respondent pray the Court to strike out the Plaintiffs suit for failure to serve the 3rd Defendants with a pre-action notice before the institution of this action.

The Plaintiff there after filed a separates reply to all the Defendants Notice of Preliminary Objection dated 29/1/2021 and filed on same day except that of the 3rd Defendant which is filed on the 20/06/2019.

After the matter was argued on the 7/7/2021 and fixed for judgment the Claimant without leave, filed a list of additional authorities dated 7/7/2021 filed on 22/7/2021 and received by the registry on 30/7/2021. They also served the Defendants.

In the affidavit in support of the summons, it was averred inter alia that the 1st Plaintiff is a non-governmental and non-profit human rights organization. They are also a justice advocacy and legal defence organization providing pro-bono legal representation services for individuals, classes and groups of Nigerian citizens, particularly the poor (this are all in their constitution) and are registered under part C of CAMA, 1990.

The 2nd Plaintiff is an International non-governmental organization with office in Nigeria. It defends human rights and access to justice in different countries of the world including Nigeria. Its work is dedicated to informing people about their rights, helping civil society and lawyers to provide better legal assistance, promoting legislative reforms that increase respect for human rights, provide legal assistance to individuals who face trial for capital crimes, among other things.

That during the course of their work the Plaintiffs provided legal services to individuals who were prosecuted for one offence or the other, including to the death row inmates who were convicted and sentenced under the Robbery and Firearms Act and they were not able to show cause for mitigation of sentence neither have they been able to appeal their sentences. They “the Plaintiffs” are unable to advise the inmates to pursue their right to appeal due to the mandatory nature of the punishment under the Robbery and Firearms Act under which they were sentenced.

That, some of them were convicted for robberies that did not involve personal injuries or the loss of human life. The Plaintiffs

are in quandary “difficult” situation when advising these inmates about their full fair trial rights because of the uncertainties they have regarding the constitutionality of mandatory death sentence provisions in Nigeria.

That a judicial interpretation of the constitutionality of the law will provide clarity and help the Plaintiffs give accurate advice about the nature of their client rights of appeal.

The Plaintiffs Counsel adopted the seven (7) questions for determination by the Court as his seven (7) issues for determination and he argued succinctly in urging the Court to resolve all the issues in their favour.

In response to the affidavit in support, the 1st Defendant filed a 4 paragraphs Counter Affidavit deposed to by Yaga Benjamin. He averred that the facts as presented by the Plaintiffs in its affidavits are untrue, misleading and do not reflect the exact facts. That the Plaintiffs suit seeks to challenge the validity/constitutionality of all laws which makes provision for mandatory death sentence and which the Plaintiffs claimed that those provisions for death sentences violates the provisions of Sections 36, 42, 233 (2) (d) and 241 (e) of the 1999 Constitution (as amended), Articles 4, 5, and 7 (1) (a) of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement Act).

Further, it was averred that the Robbery and Firearms Act and other related Acts/Laws which made provisions for mandatory death sentence are laws made by the National Assembly and every person convicted under such Laws have the right to appeal the decision. The death penalty under the Nigerian criminal justice is recognized under the Nigerian legal system. The provisions of mandatory death penalty under the Firearms Act and other relevant laws is not discriminatory.

The Plaintiffs in this suit have not been convicted pursuant to any section that made the provision for mandatory death sentence. It is in the interest of justice to dismiss the claims of the Plaintiffs.

Counsel for the 1st Defendant formulated a sole issue for determination to wit:-

“Whether the provisions for mandatory death sentence under Section 1 (2) of the Robbery and Firearms Act and similar provisions in other Acts/Laws violate the provisions of Section 36, 42, 233 (2) (d) and 241 (e) of the 1999 Constitution (as amended) Articles 4, 5, and 7 (1) (a) of the African Charter on Human and People’s Rights (Ratification and Enforcement Act)”

Counsel for the 1st Defendant argued the issue in urging the Court to so hold and dismiss the entire claims of the Plaintiffs.

In his Preliminary Objection brought pursuant to Section 6 (6) (B) of the 1999 Constitution, the 1st Defendant challenged the jurisdiction of this Honourable Court to hear and entertain this suit. The grounds upon which the objection is sought is that the Plaintiffs while challenging the validity/constitutionality of all laws for mandatory death sentence for violating the provisions of Section 36, 42, 233 (2) (d) and 241 (e) of the 1999 Constitution (as amended), Articles 4, 5 and 7 (1) (a) of the African Charter on Human and Peoples’ Rights (Ratification and Enforcement Act), the Plaintiffs have not established how the subject matter of the instant suit affects its right personally over and above other members of the society. That the matter of this suit does not affect the Plaintiff personally and have not linked the subject matter of this suit with any factual situation which warrants a cause of action in relation to the Plaintiffs suit.

That none of the Plaintiffs have been sentence to death pursuant to any law which provides for mandatorily death sentence and neither is the Deponent to the affidavit in support of the Plaintiffs originating summons a victim of any law which made provision for mandatory death sentence.

That the Plaintiff have not revealed any special damages suffered in relation to it in this suit. The Plaintiffs lack the locus standi to institute this suit and also have no cause of action to institute this suit. Therefore this Court lacks the jurisdiction to hear and determine the Plaintiffs suit.

In his reply to the 1st Defendant Notice of Preliminary Objection, it was argued that the Plaintiffs have locus standi to institute this suit and that the Plaintiffs filed this action in the public interest.

In further response to the suit of the Claimants, the 2nd Defendant did not file a Counter Affidavit but only file its Memorandum of Conditional Appearance, Notice of Preliminary Objection and Written Address of its Counsel. In its Preliminary Objection it was contended that this Honourble Court lacks the jurisdiction to her and determined this suit and same should be dismissed “in limine”. The ground upon which the objection is sought is that nothing in the Originating processes filed by the Plaintiffs disclosed any action or any reasonable cause of action against the 2nd Defendant.

In their reply to the 2nd Defendants Notice of Preliminary objection, the Plaintiffs raise an issue for determination that is:-

“Whether the 2nd Defendant is properly deemed a party to this action.”

Counsel for the Plaintiffs argued the above issue in urging the Court to discountenance any arguments of the 2nd Defendants raises and uphold the issue in their favour.

In its Counter Affidavit filed by the 3rd Defendant and deposed to by Mariam Kadiri it was averred inter alia that the 3rd Defendant is a creation of the Human Rights Commission Act 1995 as amended and its functions and powers are broadened. That in line with its mandate of protection and enforcement, it's receive and investigate complaint alleging Human Rights violations and make appropriate determination that maybe deemed necessary in each circumstances.

That the National Human Right Commission Act, 1995 as amended also gives the commission the mandate of examining legislation, administrative provisions and proposed bills or bye-laws to ensure that the laws are consistent with human rights norms and has always ensure that the rights of Nigerian citizens are guaranteed and protected.

Further, it was averred that the 3rd Defendant was served with the Court processes in this suit wherein the Plaintiffs sought for the intervention of the 3rd Defendant to examine within six months of the date of orders the cases of death row inmates who were sentenced under sundry mandatory death penalty laws and to commence processes for the review of their sentences. That the Plaintiffs did not serve the 3rd Defendant with pre-action notice to commence this action against it. That its powers of protection, promotion and enforcement under the National Human Right Commission Act does not extend to reviewing the sentence of Court of competence jurisdiction. The 3rd Defendant does not have the power to review Court sentences. The claim of the Claimant does not disclose any cause of action against the 3rd Defendant who is not a Court of competent jurisdiction. It will be in the interest of justice to dismiss the Plaintiffs claim against the Defendant.

The 3rd Defendant Counsel then raised a sole issue for determination to wit:-

“Whether the 3rd Defendant is empowered to review or has the power to review sentences, decisions, orders or judgment of competent Court of jurisdiction in line with the National Human rights Commission Act 1995 as amended.”

Counsel argued the issue in urging this Court to strike out the name of the 3rd Defendant for not being a desirable, proper and necessary party in this suit.

In its Notice of Preliminary Objection brought pursuant to Sections 18 (3) of the National Human Rights Commission Act 1995 as amended and under the inherent jurisdiction of this Honourable Court the 3rd Defendant prays the Court to strike out the Plaintiffs suit for failure to serve the 3rd Defendant with a Pre-action Notice before the institution of this action therefore dismiss the Applicants suit for want of jurisdiction. The grounds upon which the Preliminary Objection is based is that by provision of Section 18 (3) of the National Human Rights Commission Act as amended, it is a condition precedent for the Plaintiff to give a pre-action notice before instituting this action in this Court. Therefore this Court cannot assume jurisdiction in this matter and this suit is an abuse of Court processes.

Counsel for the 3rd Defendant distils a singular issue for determination to wit:-

“Whether this suit is not incompetent in view of failure/ refusal of the Plaintiffs to serve the 3rd Defendant with the requisite pre-action notice provided for in Section 18 (3) of the National Human Rights Commission (Amendment Act), 2010 before instituting this action and thereby rubbing this Honourable Court the adjudicatory jurisdiction over this matter”.

The Learned Counsel for the 3rd Defendant argued succinctly in urging the Court to hold that this Court lacks the jurisdiction to entertain this suit.

In their reply to the 3rd Defendant Notice of Preliminary Objection, it was argued that the 3rd Defendant prayers in both the Counter affidavit and Notice of Preliminary Objection are frivolous and misconceived. That Section 18 (3) & (4) of the National Human Right Commission (Amendment Act), 2010 which talk about Pre-action Notice will only arise when the contemplated action is against a member of the council of the commission, its Executive Secretary or an officer or employee of the commission. The Defendant is joined in this suit in its capacity as a Body Corporate with perpetual succession that may sue and be sued in its corporate name as clearly stated in Section 1 (2) of the National Human Rights Commission Act which affirms a legal personality that is quite distinct from the persons mentioned in Section 18. Counsel argued succinctly in urging this Court to dismiss the Preliminary Objection of the 3rd Defendant.

I have read and digested the Originating Summons, the affidavit in support, the Notice of Preliminary Objection filed by the Defendants, the Counter affidavits of the 1st and 3rd Defendants.

Considering the matter was commenced by way of Originating Summons, where, procedurally Preliminary Objections are taken

alongside the substantive suit, and having taken same together, I shall consider the Preliminary Objections first being a threshold issue which touches on the jurisdictional competence of the Court to hear and determine this suit. Because it is settled where the Court lacks jurisdiction, it acts in vain.

In its Preliminary Objection, the 1st Defendant contends that the Court lacks the jurisdiction to entertain the matter as the Plaintiffs in this suit lack the Locus Standi to institute the suit.

Learned 1st Defendant's Counsel argued that while the Plaintiffs are challenging the validity/constitutionality of all laws for mandatory death sentence for violating the provisions of Sections 36, 42, 233 (2) (d) and 241 (e) of the 1999 Constitution of the Federal Republic of Nigeria CFRN (as amended) Articles 4, 5 and 7 (1) (a) of the African Charter on Human & People's Rights, the Plaintiff have not established how the subject matter of the instant suit affects it right personally over and above other members of the society which warrants a cause of action on their part.

Learned Counsel placed reliance on Section 6 (6) (b) of the 1999 Constitution of the Federal Republic of Nigeria CFRN (as amended) and authorities in **SHIBKAU V. AG ZAMFARA STATE (2010) NWLR Pt.1202 at 312 AND UWAZU RUONYE V. GOVERNOR IMO STATE (2013) 8 NWLR (Pt.1355) 28 SC.**

In response, the Counsel for the Plaintiff maintained that the Plaintiffs have the Locus Standi to institute this suit being an action filed in the public interest.

Relying on the authority in **ADESANYA V. PRESIDENT OF NIGERIA (1981) 2 NCLR 358, FAWEHINMI V. AKILU (1987) 4 NWLR (Pt.67) Page 797 & FAWEHINMI V.**

**PRESIDENT OF FEDERAL REPUBLIC OF NIGERIA (2002)
14 NWLR (Pt.1054) 275 CA.**

I have carefully read the arguments on both sides and wish to ask this question.

“Whether the Plaintiff have the Locus Standi to institute this suit.”

A community ready of the Section 6 (6) (b) of the 1999 Constitution and many decisions of the Court of Appeal and Supreme Court requires that a person instituting an action must be able to show that he has a right or vested interest to protect or enforce legally which must be disclosed in the originating process to have locus standi to maintain such action or suit.

The decision of the Court of Appeal in **DILLI V. ADAMU & ANOR (2016) LPELR-40227 (CA)** is most instructive on the guiding principle on locus standi where the Court held.

“It has been held that different principles apply to the determination of the issue of locus standi in the realms of public law and private law. In the realms public law, for an individual to invoke the judicial powers to decide on the constitutionality of legislative or executive actions, the person must demonstrate that either his personal interest will be, has been or is likely to be adversely affected by the legislative or executive actions. Alternatively, the person can demonstrative injury sustained presently or such as he is likely to suffer over and above the interest or injury suffered by the general public”

The Plaintiffs on this case, being a non Governmental Organisation, providing legal advice and services to inmates and person convicted under the Robbery and Firearms Act have not established a personal right or interest that will enable them to maintain this suit in line with the decision in **DILLI V. ADAMU** (supra) I so hold.

In the 2nd Defendants Preliminary Objection it was contended that this Court lack the jurisdiction to hear and determine this suit on the ground that the originating process filed by the Plaintiff did not disclosed any cause of action against the 2nd Defendant.

The Learned Counsel argued that the 2nd Defendant being an agency of Government having no power to make laws or convict or sentence inmates but to execute orders of Court as provided under Section 3 (3) of the Prison Act (now Section 1 of C S Act).

Finally Counsel submitted that the totality of the Plaintiffs' claimed did not disclose a cause of action against the 2nd Defendant and urges the Court to strike out the matter.

In reply, the Plaintiff's Counsel submitted that though the constitutionality of Section 1 (2) of the Robbery and Firearms Act can be resolved without hearing the 2nd Defendant, as custodians of inmates on death row, the 2nd Defendant would be directly affected and bound by the consequential orders of this Court as such the 2nd Defendant must be deemed a proper and desirable party.

I must agree with the Counsel for the Plaintiffs here. The 2nd Defendant is a proper party to this suit. In **AMOS & ORS V. OKOYA & ORS, (2014) LPELR 22527 (CA)** proper parties was defined as "those who, (though not actually interested in the claim) are joined as parties for some good reason. Relief No.9 on the face of the Originating Summons seek "an order for the 2nd Defendant to immediately remove convicts who have been sentenced under the provision of the Robbery and Fire Arms Act from death row and re

assigned them to appropriate prison facilities, pending the review of their sentences.

In view of the forgoing I hold that the 9th relief as endorsed on the Originating Summons makes the 2nd Defendant a proper parties. The Preliminary Objection of the 2nd Defendant accordingly failed and is hereby dismissed.

In the Preliminary Objection of the 3rd Defendant premised on the provision of Section 18 (3) of the National Human Rights Commission Act 1995 (as amended), the Objector prays the Court to strike out the Plaintiff's suit for failure to serve the 3rd Defendant with pre action Notice before the institution of the matter and urge the Court to dismiss the suit for want of jurisdiction.

Learned Counsel contended that this Court lacks the jurisdiction to entertain this suit because of the failure of the Plaintiffs to comply with the provisions of Section 18 (3) and (4) of the NHRC Act (as amended) before commencing the action against the 3rd Defendant.

Learned 3rd Defendant Counsel formulated a sole issue for determination to wit:

“Whether this suit is not incompetent in view of failure/refusal of the Plaintiffs to serve the 3rd Defendant with the requisite pre action notice provided for in Section 18 (3) of the NRH Commission Act (as amended) before instituting this action and thereby robbing this Honourable Court the adjudicatory jurisdiction over this matter.”

In response, Learned Plaintiff Counsel submitted that Section 18 (3) & (4) of the NHRC Act which provides for pre-action notice is only relevant where the action is against a member of the Council of the

Commission, its Executive Secretary or an officer or employee of the Commission. The 3rd Defendant is sued here in its capacity as a body Corporate with perpetual succession that may be sued in its name as clearly stated in Section 1(2) of the Act.

I have read and digested the Preliminary Objection of the 3rd Defendant and the response of the Plaintiffs. It is pertinent to answer two questions in determining the issue of whether the Preliminary Objection succeeds or not.

What is the provision of Section 18 (3) of the NHRC Act as amended and are the Plaintiffs legally obligated to issue a Pre-action Notice to the 3rd Defendant.

For clarity I shall reproduce the provision of Section 18 (3) of the Act. It provides thus:-

“No suit shall be commenced against any member of the Council, the Executive Secretary, Officer or Employee of the Commission before the expiration of one month after written notice of intention to commence the suit shall have been served upon the Commission by the intending Plaintiff or his agent.”

This brings me to the question of whether by the above provision the Plaintiff's are obligated to issue a pre action notice to the 3rd Defendant.

It is settled and the parties agree that

- (a) No pre action notice was issued. The provision is to the effect that no suit shall be commenced against.

1. A member of the Council
2. The executive Secretary
3. Officer
4. Employee of the Commission.

Without issuing a one month pre action notice prior to instituting the action.

It is the argument of the Plaintiffs that the Commission has a legal personality as provided under Section 1 (2) of the Act and was not mentioned among those requiring Pre action notice as such the Court should hold that the pre action notice was not required.

It is clear and obvious to me that the commission was not listed amongst those that Section 18 (3) refer to and like the Plaintiffs' Counsel has argued, were it the intention of the legislators, they would have included it. The express mention of the four mentioned automatically excludes any other one unmentioned. See **W. A. UTILITIES MOTORING & SERVICES LTD V. AKWA IBOM PROPERTY & INVESTMENT CO (2019) LPELR-47089 (CA)**.

In line with the foregoing, I find that the provision Section 18 (3) of the Act does not relate here and the action was validly filed. Accordingly, the Preliminary Objection of the 3rd Defendant fails and is hereby dismissed.

Having found and held in the earlier part of this judgment that the Plaintiffs in this matter lacked the locus standi to institution and maintain this action, thereby robbing the Court of jurisdiction to hear and determine the matter, this action is hereby struck out.

Accordingly, I will not delve into the merit of this suit and I make no order as to cost.

This is the decision of the Court.

**SGND
HON. JUDGE
4/10/2021.**

LEGAL REPRESENTATION

- (1) Grace Ehusani, Esq. holding the brief of Dr. Agade Elochi, Esq. for the Claimants.
- (2) Counsels for the Defendants was absent.