

XII

Who is a Complainant for the Purposes of Criminal Prosecution: A Case for Proper Construction of Section 187 of ACJL *

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Abstract

The nature of criminal justice system is such that the presentation of the rights and liberties of citizens, among other interests, can be a double-edged sword. This is to say that much as a nation or State is interested in apprehending, arraigning and possibly securing a conviction of a criminal, it is ever cautious lest it convicts an innocent person. Therefore it considers as safer the freeing of 1000 criminals rather than convict an innocent person. This is more so since a law meant to preserve personal liberty cannot be used to impede the same without justifiable excuse. One practical implication of this nature of Criminal Justice System is that it makes it very difficult to secure a conviction because of the important threshold of proof beyond reasonable doubt which the prosecution must cross at all times. Admitting that its requirement is necessary, this essay holds that it is sufficient. It is our view that an addition of any further condition would constitute a clog and fetter to the wheel of justice. One such clog and fetter may be the misunderstanding of the provision of section 187 of the Administration of Criminal Justice Law, 2010.

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Background

The spate of kidnappings rose to unbearable heights from 2009 such that Anambra State legislation amended the Criminal Code in 2011 to provide stiffer punishment for the offense of kidnapping or threat of kidnapping as well as made same offense triable by any High Court Judge. The amended section 315 and 316 of the Criminal Code amply provided for all these such that: if you threaten anybody, you will bag 20 years jail term; and if you unlawfully imprison anybody, you will bag life imprisonment; but if you use arms, offensive weapon and violence or demand for ransom, you are liable upon conviction to be sentenced to death¹.

However, the war on kidnapers is not as swift as expected considering that intervention, possible apprehension and consequent conviction of kidnapers is difficult for certain reasons. One, a kidnapper may not wear a mask or possess any outstanding external feature as to help distinguish him. Two, our people are also slow to rise to the duty of collaborating with the Police and Law Enforcement Agencies to fight crime. Three, and very importantly, victims of kidnapping are constantly at pains and fear following the incidents. They are thoroughly traumatized. For example, if it is not general lack of protection and support for victims of crime, it is the trauma of harrowing experience in unfamiliar settings with its attendant risks. A combination of these and/or many more factors make reporting of kidnapping incidents less attractive and the victims most unwilling to appear or pursue any legal actions against any possible suspect. This is the major problem of the society.

Facts

A case of kidnapping was reported at a Divisional Police Headquarters at Obom and officers attached to SARS, putting their lives in harm's way as they usually do, for a country they love so much, acting on crucial information they have got, were able to rescue the victim and arrest three of the kidnapers after a sustained gun battle. One year later, the victim and his friends, identified and captured one of the kidnapers who escaped the police when they struck their gang, a year ago. The kidnapper 'suspect', expressly admitted committing the crime and even made further confessions to the police which helped in other investigation of related crimes in the area.

¹ The Criminal Code (Amendment) Law 2011 which came into force on 10th day of November, 2011.

The victim, once rescued, allegedly fled from the area and refused to honour any invitation by the police to come and make statements. At one time it was alleged he said to the investigating police officer, ‘you guys saw it all. They held me for six days and the experience was like six years. I can’t stand seeing any of them. The laws said they deserve death and you have the gun and the kidnapper, what are you waiting for?’ The police later claimed they informed the victim that the matter would be charged to court in 7 days time and that his presence would be required in court but the victim would not turn up . In the Magistrate Court holding in Ogba, the matter was called up for remand proceedings. The learned Magistrate inquired as to the whereabouts of the complainant and he was told the complainant was unreachable as he refused to take calls or texts from Police or visit the station despite several invitations and attempts. The police did not however tell the court what his grouse was. They didn’t say in the open court that the man was disappointed that they didn’t kill the kidnapper immediately he was arrested!

A learned counsel, who seemed not to have been properly briefed, directed the learned Magistrate to avert his mind to the relevant provisions enshrined in section 187 urging the court to strike out the suit on that authority. No counter argument came from the police prosecutor. However the magistrate exercised caution acknowledging that he lacked jurisdiction to entertain the case and/or consequently dismiss same. Your Worship rather² urged the police prosecution to amend the charge to something less so that he could probe into the matter and consequently grant the prayer of the learned counsel for the defendant, the accused. The position of this article is that the learned Magistrate was misled and consequently misdirected himself on the point of law.

² The exploration of the difference between Remand Proceedings and any other process was extensively considered by the Supreme Court in the case of *Lufadeju v Johnson* (2007) 8 *NWLR* p.535. In a nutshell, Remand Proceeding is simply a procedure to keep a suspect in a custody pending trial since the Police lack the power to do so for a period not exceeding 24 hours. Therefore much as Your Worship can ask a few questions just to get a bird-view of the matter before him to enable him accede to the request for Remand; it is indeed strange to ask/suggest to police to amend the charge to give him jurisdiction to grant bail to the suspect.

Section 187

Section 187 of the Administration of Criminal Justice Law, 2010 states that:

‘when the case is called the defendant appears voluntarily in obedience to the summons or is brought before the court under a warrant, and the complaint having, to the satisfaction of the court, had due notice of the time and place of hearing doesn’t appear in person or in the manner authorized by any written law, the court shall dismiss the complaint not on merits or without prejudice, unless the court, having received a reasonable excuse for the non - appearance of the complainant or his representative or for other sufficient reason, think fit to adjourn the hearing of the same to some further day upon such terms as the court may think fit’(emphasis mine).

Save a clarification that the case is dismissed ‘not on merits or without prejudice’, section 187 largely reproduced section 167 of the Criminal Procedure Law, 1986 which states:

If, subject to the provisions of section 135³, when the case is called the defendant appears voluntarily in obedience to the summons or is brought before the court under a warrant, and the complainant having, to the satisfaction of the court, had due notice of the time and place of hearing does not appear in person or in the manner authorized by any written law the court shall dismiss the complaint unless the court, having received a reasonable excuse for the non - appearance of the complainant or his representative or for other sufficient reason, think fit to adjourn the hearing of the same to some future day upon such terms as the court may think just.

It is possible to distil a few issues for determination from the provisions stated above. These issues revolve around one crucial question which shall engage the rest of the paper namely: who is a Complainant?.

³ Section 135 only relates to the defendant and is therefore not relevant for our purposes here.

Who is a Complainant?

The Criminal Justice Law 2010, like the Criminal Procedure Law 1986 clearly states in its section 1 who a Complainant is as: ‘Complainant includes: any informant or prosecutor in any case relating to a summary conviction offence.’ The informant may be the victim of the crime, a passerby, a paid agent of the police, the police and indeed any member of the general public who provides vital information that would help stop a crime, investigate a crime and/or prosecute a crime. The prosecutor on the other hand includes all law enforcement officers acting on behalf of the State: Note that nowhere in definition of complainant or the provisions of section 187 is it stated that a complainant needs necessarily be the victim and only him alone nor is there a cap on number of persons who can be a complainant for the purposes of prosecuting a criminal.

In the Northern part of Nigeria, it is the commonest practice that following the provisions of sections 117 and 118 of the CPC, a suspect arrested is usually brought before the officer in charge who listens to the complaint against the suspect usually made by the Investigating Police Officer (IPO)⁴. Note that the person making the complaint is the IPO as he formally produces a First Information Report (FIR) necessary for possible prosecution of the crime. What then is a Complainant if not the person making the complaint?

In fact, the proper complainant in every criminal matter is the Attorney General and /or whoever is acting on his behalf. For what use will a complainant be if he lacks the power to continue or discontinue any criminal proceeding against anybody? This is so, as only him can prefer, institute and undertake a charge against anybody. The authority of the attorney general is amply provided for in the constitution and more specifically in section 174 (1) which provides as follows:

The Attorney General of the Federation shall have power –

- a. To institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court - martial, in respect of any offence created by or against any Act of the National Assembly;
- b. To take over and continue any such criminal proceedings that may have been instituted by any other authority or person;

⁴ J.A Agaba, Practical Approach to Criminal Litigation in Nigeria (Pre – Trial & Trial Proceedings),(1st ed),2011, p.358.

- c. To discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by him or other authority or person⁵.

The above provision makes it clear that it is entirely up to the Attorney General to institute criminal proceedings against any person. Agaba puts it beautifully as follows:

The power of the attorney-general, whether of the Federation or of the State, to institute criminal proceedings against any person, is an absolute one. Where two or more persons commit an offence or series of offences, the Attorney- General has the discretion as to who to prosecute in respect of what offence. *This discretion is not fettered in any way.* The discretion to prosecute, who to prosecute and where to commence criminal proceedings against any person is the Attorney General's and his alone. He has no obligation to give reasons for his exercising of his discretion in a particular way⁶ (Emphasis Mine)

Note that the above citation is not just a matter of legal opinion. It is the trite law and has been confirmed by the Supreme Court on many occasions⁷. If the Attorney General has unfettered discretion to prosecute anybody in respect to crimes, the question then is what becomes of the interest of the victim who should also have legitimate concern in the matter.

The truth is that there is a presumption which underlines any exercise of any discretion or prerogative. It is the presumption that the exercise of such discretion is and will always be guided by public interest. That the Queen has the power to dissolve the government and constitute another does not mean that she may do so arbitrarily. The same implies to the Attorney General's power to start, take over and /discontinue any prosecution. It is indeed safe to

⁵ The State Attorney General has similar power and is equivalently provided for in section 211 of the constitution.

⁶ J.A Agaba, Practical Approach to Criminal Litigation in Nigeria (Pre – Trial & Trial Proceedings),(1st ed),2011, p.313.

⁷ *Bagudu v Federal Republic of Nigeria* (2004) 1 NWLR (pt.853) 183; *Attorney General of Ondo State v Attorney General Federation* (2002) FWLR (pt.111) 1972; *Akpa v State* (2008) All FWLR (pt. 420) 644.

assume that the Attorney General will exercise the discretion in the utmost public interest.

It goes without saying therefore that consideration of public interest and policy which the Attorney General's discretion represents subsumes the interest of the victim and remarkably, where the context so necessitates override it. Otherwise the concept of unfettered discretion of the Attorney General becomes merely nugatory. It is in this regard and in the interest of the State that even a victim of crime can be charged with perversion of the course of justice⁸.

The question then is what becomes of a criminal proceeding where one of the complainants (the victim) would not like the prosecution of the suspect? It is my considered opinion that section 187 does not provide the answer. The victim/complainant cannot stop a criminal proceeding! In fact, it is a crime, punishable under section 155 and 156 of the criminal code, to do so. The provision of section 187 is only a legal safeguard to ensure fair trial of an accused person. It simply serves to ensure a diligent prosecution and satisfy section 280 of the Criminal Code. The rationale is that there is no point in going on with a prosecution where there is no witness or complainant as it will be impossible to convict a suspect, who is presumed innocent, if nobody appears to indict him. Like the other safeguards, section 187 is not absolute in itself.⁹ This is even more so in specific instances, such as the above, where the police and other informants have firsthand experience of the crime and therefore can serve as complainants. Thus, dismissing the case under section 187 is tantamount to using court process to fetter access to justice.

Apart from the fact that the court was misled and/or misdirected himself when he considered the provisions of section 187 and read a narrow meaning into same, the consideration of section 187 is premature in the Chief Magistrate's court considering that the business of the court in that case was just to Remand the accused – after taking cognizance of the offence¹⁰ and or inquire to get a bird-view of the case and then transfer the case for want of jurisdiction¹¹. Where this consideration is appropriate and even then, the

⁸ See section 155 and 156 of the Criminal Code, 1986, (Cap 86).

⁹ According to Uwaifo JSC, Justice does not mean justice to the accused alone but to all. See *Bamaiyi v Stat* [2001] 4 SCNJ 103. See also *Dokubo – Asari v Federal Republic of Nigeria* (2007) All FWLR (pt.375) 588.

¹⁰ *Police v Jime & Ors* (Unreported, MD/145/85 delivered on 13th August, 1985).

¹¹ See *Lufadeju v Johnson* (2007) 8 NWLR (pt. 1037) p.535. See also section 134 of Administration of Criminal Justice Law, 2010.

section can only apply where the Attorney General and/or any other person acting on his behalf fail to appear or bring witness to help the case. The Attorney General and/or even the court can and usually does invite anybody whose presence is considered vital to the determination of the case before the court. The victim who is a witness can be compelled to appear in the matter where the court so desires and refusal to attend such proceedings is not without consequences.¹²

Conclusion

The provisions of section 187 when properly read and understood cannot be considered as intended to constitute a clog or fetter the cause of justice. It is intended to further it. Therefore, it is in the public interest to, where the context so permits, understand the complainant as who he is: person in whom a right to a relief exists.¹³ As seen above, the Attorney General, for and on behalf of the State has this right to a relief in the interest of justice. Other complainants who include the victim, police, informants and indeed the general public are all partnering with the first and proper complainant, the Attorney General, to make our society safer and better. It therefore goes without saying that any reading of section 187 which does not take into consideration the interest of the State, may amount to perversion to the course of justice.

¹² See section 155 and 156 of the Criminal code, 1986, (Cap 86). There are also specific offenses punishable by law for refusal to appear as a witness on the invitation of the court.

¹³ High court Rules, 1988 explicitly defines a complainant also.