

THE LEGALITY OF VIRTUAL COURT HEARING IN NIGERIA: THE WAY FORWARD*

Abstract

Over the years, court proceedings have always been conducted in an open court or in a public place in line with the principles of fair hearing. There is no doubt the recent outbreak of COVID -19 pandemic necessitated the move by courts in Nigeria to resort to virtual court hearing, having regard to the lockdown of public gatherings, including court sessions. The virtual court hearing is a revolutionary trend which has sparked a lot of controversies amongst many legal minds. It is against this backdrop that this paper examines the legality or otherwise of the virtual court hearing in Nigeria. The paper concludes that virtual court hearing is not unconstitutional. The paper also made functional recommendations.

1. Introduction

Today, our lives happen in video conferences; the big events we used to share in person with friends and, graduation, weddings and birthdays now take place in small boxes on a screen. While we should applaud effort to keep the justice system running during the pandemic, we must assess the impact of these changes and guarantee that new technologies and processes comply with the Constitution and provide equal access. If we don't, these developments will exacerbate existing power dynamics that favour the prosecution and punish the defendants.

2. Virtual Court Hearing in Nigeria

Sequel to the outbreak of COVID -19 in Nigeria, the President of the Federal Republic of Nigeria ordered for the lockdown of public gatherings as part of the measures by the federal government to curb down the spread of COVID-19 pandemic. Consequently, the Chief Justice of Nigeria, Hon. Justice Tanko Mohammed issued a Practice Direction to all heads of courts in Nigeria as follows:

Further to my earlier Circular Ref. NO. NJC/CIR/HOC/11/629 dated 20th March, 2020, on the above subject matter. In view of the reality of the COVID-19 in the country and in order to take further preventive steps, all heads of courts are from tomorrow, the 24th day of March, 2020 directed to suspend court sittings until further period two weeks at the first instance, except in matters that are urgent, essential or time bound according to our extant laws. Your Lordships are hereby directed to bring the content of this circular to the notice of all stakeholders in justice administration, please.

The NJC, in some of its guidelines, directed the Nigerian courts to provide fast-speed pervasive and reliable internet connectivity, while the end-user would provide the hardware such as desktops, laptops, tablets and smartphones. This is to serve for the virtual sittings using collaborative platforms such as MS365, Zoom, Google meetings and other tools with electronic recording functionalities. Other measures adopted by the NJC include checks at court premises, filing of court processes online, payment of filing fees, service of hearing notices on line etc.

Furtherance to the above directive, many States' Judiciaries followed suit by rolling out COVID-19 Practice Directions meant to tame the unhealthy space stricture engendered by Covid-19. The Chief

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Judge of Lagos State, Justice Kazeem Alogba in its Practice Direction adopted on 4th day of May, 2020, approved the virtual court hearing procedure to ensure that cases are heard during the lockdown period.

3. Meaning of Virtual Court Hearing

Videoconferencing is the transmission of videos, audios, and data across communication network, enabling geographically dispersed participants to meet synchronously. As an interactive medium, videoconferencing offers individuals the ability to appear and communicate from remote locations, exchange information, engage in debate, and work towards revolution of disposition. According to Riley A. Williams:

Videoconferencing is the holding of a conference among people at remote locations by means of transmitted audio and video signals. Though these conferences, individuals meet one another in a real-time virtual as if they were in the same room without the hassle and expense of travelling. While slight limitations remain depending on the quality of the equipment employed by courts, the general facial and physical expressions communicated by witness are rarely inhibited by the use of such technology.¹

In judicial process, videoconferencing facilities provides courts with the capacity to receive evidence and submissions from the witnesses or persons involved in court proceedings in circumstances where it would be expensive, inconvenient or otherwise not desirable for a person to attend a court in person. In State of *Maharashtra v Dr. Praful B. Desai*², video conferencing is an advancement of science and technology which permits seeing, hearing and talking with someone who is not physically present. The legal requirement for the presence does not mean actual presence”. Video conferencing is real time, ideally fully interactive, face-to-face communication that permits physically separated person to meet virtually as if they are in the same physical space. Such virtual meeting can be achieved using a range of video conferencing technology³. It provides an alternative to the conventional practice of presenting in-person or as a witness in a trial.

The term Virtual means “near enough”, as against its opposite, “physical or absolute. Virtual means artificial reality, artificial environment or computerized simulation. virtual court hearing therefore means court hearings that enable Judges , Counsel, court staff ,witnesses , security personnel and other participants or stakeholders attend court hearings online by means of Zoom, , Skype and such other computer /internet devices.

A Zoom meeting means video conferencing meeting that is held, using zoom. One can join the meeting, through a webcam or phone. There is usually provided a “zoom room”, which is the physical hardware setup which allows the conferees launch a Zoom meeting from the zoom conference room, or used as a hybrid service.

The first virtual court session in Nigeria tagged ID/9006C/2019 ,was held at Ikeja High Court in Lagos where one Olalekan Hameed was sentenced to death by hanging for the murder of a 76- year old Mrs. Jolasum Okunsanya. Justice Mojisola Dada of Ikeja High Court blazed the trial. The issue that has thrown up debate is whether the virtual hearing does not qualify as public hearing under section 36(1),

¹ Reley A. Williams, “ Videoconferencing : Not a Foreign Language to International Courts(2011) 7(1)(3) Oklahoma Journalmof Law and Technology , available at <http://digitalcommons.law.ou.edu/okjolt/vol7/iss1/3>

² AIR 2003 SC 2053

³Boyd W, ‘What is it Good For? Using Interactive Video in Legal Education and Law Practice’(1999)3 The Journal of Information , Law and Technology (JILT)

(3) (4) of the constitution. The attempt to clear this issue at the Supreme Court in *Lagos State v Ekiti State Government*⁴ further created a vista for other arguments, as the decision of the Supreme Court was an advisory opinion.

4. Legality of Virtual Court Session Under the Constitution

In considering the legality of virtual court proceedings in Nigeria, it is pertinent that we look at constitutional provisions with a view to finding whether it is right for courts in Nigeria to resort to virtual court hearing, instead of the usual courtroom practice. The Constitution of the Federal Republic of Nigeria (1999) as amended states thus:

3. The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court of tribunal shall be held in public.
4. Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn be entitled to a fair hearing in public within a reasonable time by a court or tribunal

The major challenge posed by section 4 of the Constitution is that it failed to define the meaning of the word, "public". However, **Fidelis Nwadialo** in his book defines public as:

hearing in public entails a situation where the public is not barred- a trial is sufficiently public if members of the public may have access to where it is taking place. The actual presence of the public is, however, not necessary.⁵

The cardinal point on the above definition is the accessibility of the venue where the court proceeding is taking place and whether the general public is barred from participating in the meeting/hearing. To resolve this poser, we should consider the operation of the virtual court session to know whether it is accessible by the general public. Experience has shown that Zoom or Google Classroom are specifically meant for members of a particular group who have been given the ID or the password with which to connect and participate in the Zoom meeting. Unarguably, virtual platforms are restrictive on the number of participants it may admit at a time.

There is no doubt the virtual court hearing is restrictive to the persons concerned –the parties, their Counsel and Court personnel. In *Onochie v Odogwu*⁶, it was held that the requirement for public hearing is mandatory. Similarly, in *Edibo v the State*⁷, the appellant and others were charged with culpable homicide punishable with death. Plea was taken in chambers. The Supreme Court in its judgment in quashing the conviction held that in judge's chambers is defective, since the proceeding was not held in public.

The same is the position in *Oviasu v Oviasu*⁸, where judgment in a case of dissolution of marriage was held in Chambers. The Supreme Court set aside the judgment on the ground that it was not held in public. Given that section 36(3)2(4) have expressly stipulated that the proceedings of court, including

⁴ SC/CV/260/2020 (unreported)

⁵ Civil Procedure in Nigeria 2nd Edition, page 674

⁶ (2006) 6NWLR (Pt. 975) 65

⁷ (2007) 13 NWLR(pt.1051) p.306

⁸ (1973)11 SC 315

announcement of its decision shall be held in public. This clearly and automatically excludes any other implied forum for holding cases not open for participation by the general public. The US constitutional has long held that the courts must provide a fair opportunity for indigent defendants to present their defence in criminal trial. The increased demand for an opportunity to have access to expensive technology and broadband connectivity to defend their liberty goes against this well-trod constitutional principle.

There has been divergent views on the legality or otherwise of the virtual court hearing. Those opposed to the remote hearing of cases without prior amendment of section 36(3) & (4) of the Constitution rely on *Menakaya v Menakaya*⁹ and *Edibo v State supra*:

Section 33(3) of the Constitution of the Federal Republic of Nigeria 1979(now section 36(3) of the 1999 Constitution enjoined proceedings of a court or tribunal for the determination of civil rights and obligations to be in open court and that their learned trial judge set in a place other than as authorized in the constitution, the proceedings leading to business judgment therefore suffered from a fundamental vice which rendered the judgment delivered null and void.

From the above decision of the Supreme Court, one can safely surmise that the access to the place where a court or tribunal is conducting its proceedings. In both decisions a courtroom was considered to be the judge chambers for the simple reason that judicial officers, parties and their counsel and any other interested member of the public had unrestricted access to it.

One will day to venture with all due respect that the decisions in the above two cases would have been different if only the judge granted unrestricted access to his chambers to the parties and their counsel and any interested member of the public. If that had been the case, the chambers would move from being described a private place to a public place.

Same conditions where available in remote hearing i.e access is being granted to and available to individual, officers, the parties and their counsel and any other interested members of the public will make the venue of such remote hearing be it zoom, skype, whatsapp etc a public place in line with the provisions of section 36(3) and (4) of the Constitution.

One can find support in this line of reasoning in *Oyeyiop v Ogudane*¹⁰ where it was held thus:

When the court sits in chamber all that it means is that the judge of the court is transacting the business of the court in chamber instead of open court. *Hartmount V Foster (1881)8 QBD 82, 84*. It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives,

In considering this same provision under the South African Constitution¹¹, in the case of *MK v Transnet Ltd t/aPotner*¹², the court held that , the hearing with the aid of a video link conference will be a public hearing in a court of law, where all the parties will be appearing before a Judge seized law'. In *Esso West African Inc v T. Oyegbola*¹³ , the Supreme Court pronounced that, “the law cannot be and is not

⁹ (2001) 16 NWLR (part 738)

¹⁰ 1987) 1NWLR (pt50) pt 356

¹¹ Section 34 of the Constitution of South Africa

¹² Reported at <http://m.polity.org.za/article/video-conferencing-2020-03-16> accessed 16th January,2020

¹³ (1969) NMLR 198

ignorant of the modern business methods and must not shut its eyes to the mysteries computer". The court should not in this 21st century, a century of digitalization reject the use of video conference. The court should be open to new development else the law will stand still while the rest of the world goes on. In the words of Lord Denning M.R in *Packer v Packer*¹⁴, if we never do anything which has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on: and that will be bad for both". Thus, the court should not be against the use of modern technology in judicial proceedings.

I align myself with the submissions of Olumide Olusoga Sofowora SAN¹⁵ that the apprehension whether remote hearings are in conformity with the constitutional requirement that the proceedings be in public ought to be allayed by the fact that the constitution did not say physical structure called courtroom. Once the virtual hearing is made accessible, there is compliance with section 36(3) (4).

5. The Constitution and Practice Direction

There seems to be a conflict between the above judicial authorities and section 294 of the Constitution which empowers the heads of courts to make Practice Direction .subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a State may make rules for regulating the practice and procedure of the High Court of the State. From the above constitutional provision, it is obvious that the Chief Judge of a State has the powers to make regulations regarding practice and procedure of courts in Nigeria. Literally speaking, if a Chief Judge of State can issue Practice Direction, it means he can as well approve the adoption of virtual court session as was the case in *Ikeja Judicial Division of Lagos State*.

In the light of the above conflict, we are constrained to raise and resolve the issue as to whether the Practice Direction by the Chief Judge of Enugu State on virtual court hearing is inconsistent with sections 36 (3) and (4) of the Constitution of the Federal Republic of Nigeria 1999 (As amended), having regard to section 294 of the Constitution which empowers the Chief Judge to make rules for practice and procedure of issue Practice of the High Courts of States. The position of the law as held in *Buhari v INEC*¹⁶ is that Practice Direction which is inconsistent with sections 36(3) and (4) of the Constitution is null and void. Now back to the main issue which is whether the Practice Direction approved by the various heads of courts for virtual hearing is not constitutional , having regard to section 36(3) and (4) of the Constitution.

The Supreme Court in resolving the constitutionality of virtual court hearing in *Lagos State v Ekiti State Government* supra held that judges across the country should confine to conduct virtual court proceedings, until such time the National Assembly concludes amendment to accommodate virtual proceedings. Having submitted that the position of the Supreme Court on this issue is an advisory opinion, the issue is whether an advisory opinion has any binding effect or whether an advisory opinion is recognized by the Constitution.

Unlike the 1960 Constitution of Nigeria, the present Constitution of the Federal Republic of Nigeria 1999 (As Amended) does not empower the Supreme Court to make such advisory opinion. The 1960 Constitution gave the Supreme Court the power to render advisory opinion on any question upon which

¹⁴ (1953) 2 ALL E.R.127 at 129

¹⁵ Olumide Olusoga Sofowora SAN, 'The Covid -19 Pandemic and the Future of Litigation in Nigeria' WWW. Irglobal.com

¹⁶ (2008) 3NWRL 465

the Governor General desired the advise of the court for the purpose of deciding whether or not any power was vested in or could be exercised by virtue of section 94 of the same constitution relating to prerogative of Mercy. Similarly, the 1963 Constitution empowers the Supreme Court to render opinion to the President or Governor of a Region.

Decree N0. 1 of the 1966 suspended the right to Advisory Opinion and upon return to civil rule, both the 1979 and 1999 failed to capture this important provision. We respectfully submit that though the constitution does not specifically make provision for Advisory Opinion, we submit that it is within the inherent powers of the Supreme Court to render an Advisory opinion.

5. The Challenges of Virtual Court Hearing

In the rush to manage the fallout of the pandemic, courts overlooked a body of evidence showing that virtual hearings are connected to potential constitutional violations and worsen outcomes for defendants. In places with remote hearings, researchers found that they may undermine a defendant's right to legal representation.

Adding to the troubles, defendants face in remote hearings, in –person testimony is seen as more believable than its virtual counterparts. This is the case for a number of reasons, including that the technology or connection does not always function properly. The video takes away the fact –finders ability to access nonverbal clues, and that conferencing technology cannot actually filter out voice frequencies associated with human emotion, which are critical to assessing credibility.

Collectively, these detrimental aspects of virtual hearings affect the defendants' ability to fully participate in their proceedings, a key component to procedural justice. Recently, a majority of virtual hearing participants surveyed in the United Kingdom reported the experience was worse than in-person hearing at facilitating participation. Not only does this indicate that an individual's right to participate in their own defense is being eroded, but virtual hearings threatens to undermine the justice system.

These demonstrable problems are significant, but they also assume the defendant has access to the appropriate technology and the internet. Disconcertingly, those that argue virtual court hearings will make a more equitable justice system do not acknowledge the digital divide in the country. Many do not have access to internet and smart phones.

6. Conclusion

Law is a tool of social engineering and as such, must grow /develop at par with the society. Technological advancement and the pandemic outbreak has made the law evolve to virtual hearings and the judiciary must embrace the development. The introduction of virtual court hearing in Nigerian legal system is a welcome development. The law is dynamic and as such needs to grow to meet with the global trend. Though, the constitution does not specifically provide for a virtual court hearing, but in as much as the same constitution empower the heads of courts to make practice direction, virtual court hearing cannot be said to be unconstitutional. However, the National Assembly should specifically amend the Constitution to capture the virtual court hearing. It is further recommended that the law if amended should make it mandatory for the courts to ensure that the facilities need by parties, their Counsel and the general public are provided for before such could hold. Meanwhile, resort to virtual hearing should not be applicable in all cases, except in certain exceptional circumstances.