

FORM 3
(O.3. r.9)

GENERAL FORM OF ORIGINATING SUMMONS

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

FHC/LCS/93/18
SUIT NO:.....

IN THE MATTER OF CONSTITUTIONALITY OF SECTION 375 OF THE CRIMINAL CODE ACT, 2004

IN THE MATTER OF CONTRAVENTION OF SECTIONS 39 AND 45 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED) BY PROVISIONS OF SECTION 375 OF THE CRIMINAL CODE ACT, 2004

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHT TO FREEDOM OF EXPRESSION GUARANTEED IN SECTION 39 OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED) BY SOLOMON OKEDARA

BETWEEN:

SOLOMON OKEDARA

APPLICANT

AND

THE ATTORNEY GENERAL OF THE FEDERATION

RESPONDENT

ORIGINATING SUMMONS

BROUGHT PURSUANT TO ORDER 3 RULE 6, 7 AND 9 OF THE FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2009 AND UNDER THE INHERENT JURISDICTION OF THIS HONOURABLE COURT

LET THE ATTORNEY-GENERAL OF THE FEDERATION of c/o of Federal Ministry of Justice, Lagos Liaison Office, Marina in the Lagos State of Nigeria within thirty days after the service of this summons on it inclusive of the day of such service cause appearance to be entered for it to this summons issued on the application of Solomon Okedara for the determination of the following questions:

WHETHER the provision of Section 375 of the Criminal Code Act, 2004 has a chilling effect on Section 39 of the 1999 Constitution (as amended) and is therefore inconsistent thereto.

WHETHER the provisions of section 375 of the Criminal Code Act, 2004 are within the permissible restrictions stipulated in section 45 of the 1999 Constitution or **ALTERNATIVELY WHETHER** section 375 of the Criminal Code Act, 2004 satisfies the requirements of Section 45 of the 1999 Constitution (as amended).

WHETHER section 375 of the Criminal Code Act, 2004 is likely going to infringe upon the Right to Freedom of Expression of the applicant and other Nigerians as provided in sections 39 of the 1999 Constitution (as amended).

WHETHER section 375 of the Criminal Code Act, 2004 should be declared unconstitutional, null and void if it is held to be inconsistent with the provisions of Section 39 and 45 of the 1999 Constitution (as amended).

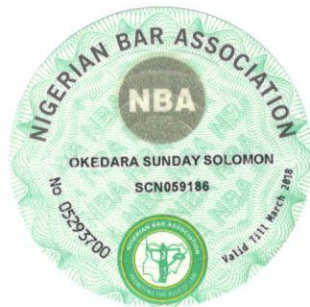
AND THE APPLICANT hereby seeks the following reliefs:

1. **A DECLARATION** that section 375 of the Criminal Code Act, 2004 has a chilling effect on Freedom of Expression as guaranteed in section 39 of the 1999 Constitution (as amended) and is therefore inconsistent thereto.
2. **A DECLARATION** that Section 375 of the Criminal Code Act, 2004 is not a permissible restriction within the contemplation of Section 45 of the 1999 Constitution (as amended) and is thereby inconsistent thereto.
3. **A DECLARATION** that in view of the inconsistency of Section 375 of the Criminal Code Act with Sections 39 and 45 of the 1999 Constitution (as amended), Section 375 of the Criminal Code Act is unconstitutional, null and void.

Dated this 23rd day of January 2018

THIS SUMMONS was taken out by Solomon Okedara Esq. of Solomon Okedara & Co., legal practitioners to the Applicant whose address for service is 3, Obasa Road, Off Oba Akran Avenue, Ikeja, Lagos. The defendant may appear hereunto by entering appearance personally or by a legal practitioner either by filing the appropriate processes (as in Order 7) in response at the Registry of the Court where the summons was issued or by sending them to that office by any of the methods allowed by these Rules.

Note: If the defendant does not respond within time at the place above mentioned, such orders will be made and proceedings may be taken as the judge may think just and expedient.




Solomon Okedara Esq.
Solomon Okedara & Co.,
Applicant's Counsel
3, Obasa Road,
Off Oba Akran Avenue,
Ikeja, Lagos
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FOR SERVICE ON:

The Attorney General of the Federation,
Federal Ministry of Justice
Lagos Liaison Office
Marina
Lagos



IN THE FEDERAL HIGH COURT OF NIGERIA
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BETWEEN:

SOLOMON OKEDARA

APPLICANT

AND

THE ATTORNEY GENERAL OF THE FEDERATION

RESPONDENT

AFFIDAVIT IN SUPPORT OF ORIGINATING SUMMONS DATED 23RD, JANUARY 2018

I, Solomon Okedara, Male, Christian, Nigerian, Legal Practitioner of 3, Obasa Road, off Oba Akran Avenue, Ikeja, Lagos do hereby make oath and state as follows:

1. That I am the Applicant in this suit by virtue of which I am conversant with the facts deposed to herein.
2. That by the reason of my Nigerian citizenship and being a practising legal practitioner I am conversant with the laws of the Federal Republic of Nigeria.
3. That the Respondent in this suit is the Chief Law Officer of the Federal Government of Nigeria and is responsible amongst others for implementation of the Criminal Code Act, 2004.

4. That I am conversant with the provisions of the Constitution of the Federal Republic of Nigeria 1999 (otherwise known and referred to as "1999 Constitution") and its provisions on the rights of all Nigerians including myself.
5. That I am conversant with the fact that the 1999 Constitution (as amended) is the supreme law throughout the Federal Republic of Nigeria and that its provisions are superior to the provisions of any other law or statute within the Federal Republic of Nigeria.
6. That I know that Section 39 of the 1999 Constitution provides for right to freedom of expression of every person using any medium without interference.
7. That by virtue of exercise of my right to freedom of expression as protected in Section 39 of the 1999 Constitution I, like the President of the Federal Republic of Nigeria, The Vice President, Ministers, Governors, Federal legislators, State legislators, Doctors, Lawyers, Engineers, Bankers, Clerics, Teachers, Traders, Business men, Expatriates, Traditional Rulers, Artisans, Journalists, Bloggers, Civil Society leaders, Businesses and Institutions, express myself through any media platforms including but not limited to print media, electronic media and social media discussing any subjects of interest ranging from Rule of Law, Economy and to Good Governance.
8. That I am conversant with the Criminal Code Act, 2004 and all its provisions and that Section 375 of the Criminal Code Act, 2004 criminalizes defamation.
9. That under the said Section 375 of the Criminal Code Act, 2004, a publisher of an alleged defamatory matter would be liable to imprisonment for two years if he or she knows the alleged defamatory matter to be false.
10. That according to the said Section 375 of the Criminal Code Act, 2004 a publisher of an alleged defamatory matter would still be liable to imprisonment for one year even when he or she does not know about the falsity of the alleged defamatory matter.
11. That the existence of Criminal Defamation is antithetical to democratic ideals in any democratic society anywhere in the world and that is the very reason the United Kingdom, Ghana, Mexico, Jamaica, Norway, Sri Lanka, Ukraine, Georgia, Montenegro, Antigua and Barbuda, Bosnia and Herzegovina, FYROM/Macedonia,

New Zealand among others have abolished criminal defamation and several other countries are working hard to abolish same.

12. That national courts and regional courts in Africa and beyond are taking the bold step in protecting freedom of expression and democratic ideals by declaring criminal defamation unconstitutional as this has happened in countries like Kenya, Zimbabwe, Burkina Faso, Argentina and Guatemala while many other courts of countries and regions are currently adjudicating lawsuits seeking to declare criminal defamation unconstitutional.
13. That the continued retention of criminal defamation as enshrined in Section 375 of the Criminal Code Act, 2004 will work untold hardship in terms of unjustifiable arrests, detentions and prosecutions of several Nigerians
14. That unless the reliefs sought in this action are granted my fundamental right to Freedom of Expression stands a risk of infringement and that of many other Nigerians will be perpetually infringed upon.
15. That I swear to this Affidavit in good faith believing same to be true according to the Oaths Act.


.....
DEPONENT

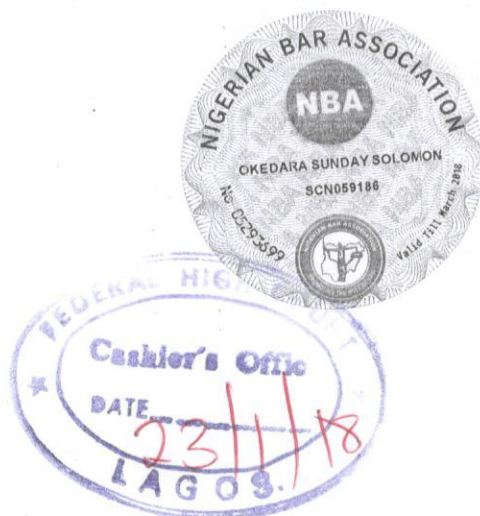
SWORN TO at the Federal High Court

Registry, Ikoyi this 23rd day of January, 2018

BEFORE ME




COMMISSIONER FOR OATHS



IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

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BETWEEN:

SOLOMON OKEDARA

APPLICANT

AND

THE ATTORNEY GENERAL OF THE FEDERATION

RESPONDENT

WRITTEN ADDRESS IN SUPPORT OF THE ORIGINATING SUMMONS
DATED 23RD, JANUARY, 2018

1.0 INTRODUCTION

- 1.1 Criminal Code Act, 2004 is a Federal Act within the Federal Republic of Nigeria that provides for criminal offenses in the Southern parts of Nigeria. Section 375 of the Criminal Code Act, 2004 criminalizes defamation and stipulates one year imprisonment and two years imprisonment if the defamatory matter is known to be false by the publisher. The said Section 375 expressly criminalizes defamation in the following words:

"Subject to the provisions of this Chapter, any person who publishes any defamatory matter is guilty of a misdemeanour, and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years"

1.2. The British Colonial administration began in Nigeria in 1861, and for about 100 years the British enacted several regulatory provisions for the regulation of the press and speeches. Under the British colonial rule, the fundamental rights of Nigerians were suppressed. The criminal ordinance provided for criminal defamation among others to prevent the natives from criticizing the abuse of powers by colonial administrators. The country though gained political independence from the British in 1960, the local political class however retained most of the repressive colonial laws in successive codifications till date and no thanks to the judges who failed to show courage required of their office and who would rather "blow a muted trumpet", particularly under the Military rule. Some of these repressive laws are still contained in some of our statute books today including the Criminal Code Act, 2004 which provides for criminal defamation in its Section 373-381 and particularly criminalizing and penalizing defamation in Section 375.

1.3. The applicant here believes that existence of Section 375 of the Criminal Code Act, 2004 is unconstitutional and constitutes infringement of his fundamental human right and that of other Nigerians and by this Originating Summons the following issues were raised:

WHETHER the provision of Section 375 of the Criminal Code Act, 2004 has a chilling effect on Section 39 of the 1999 Constitution (as amended) and therefore inconsistent thereto.

WHETHER the provisions of section 375 of the Criminal Code Act, 2004 are within the permissible restrictions stipulated in section 45 of the 1999 Constitution or **ALTERNATIVELY WHETHER** section 375 of the Criminal Code Act, 2004 satisfies the requirements of Section 45 of the 1999 Constitution (as amended).

WHETHER section 375 of the Criminal Code Act, 2004 is likely going to infringe upon the Right to Freedom of Expression of the applicant and other Nigerians as provided in sections 39 of the 1999 Constitution (as amended).

WHETHER section 375 of the Criminal Code Act, 2004 should be declared unconstitutional, null and void if it is held to be inconsistent with the provisions of Section 39 and 45 of the 1999 Constitution (as amended).

And the following reliefs were sought:

1. **A DECLARATION** that section 375 of the Criminal Code Act, 2004 has a chilling effect on Freedom of Expression as guaranteed in section 39 of the 1999 Constitution (as amended) and is therefore inconsistent thereto.
 2. **A DECLARATION** that Section 375 of the Criminal Code Act, 2004 is not a permissible restriction within the contemplation of Section 45 of the 1999 Constitution (as amended) and is thereby inconsistent thereto.
 3. **A DECLARATION** that in view of the inconsistency of Section 375 of the Criminal Code Act with Sections 39 and 45 of the 1999 Constitution (as amended), Section 375 of the Criminal Code Act is unconstitutional, null and void.
- 1.4. The Originating Summons is supported by a 15 paragraph Affidavit deposed to by the Applicant himself. The Applicant shall be relying on all the paragraphs in the said Affidavit.

2.0 ISSUE NO. 1

- 2.1. **WHETHER** the provision of Section 375 of the Criminal Code Act, 2004 has a chilling effect on Section 39 of the 1999 Constitution (as amended) and therefore inconsistent thereto.
- 2.2. **ARGUMENT OF ISSUE**
- 2.3. Section 39 of the 1999 Constitution (as amended) provides for Freedom of Expression for every person within the territorial boundaries of the Federal Republic of Nigeria. This, the constitution provides, must be enjoyed by every person without interference. In express terms, Section 39 of the 1999 Constitution provides as follows:

“(1) Every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference.

- 2.4. Freedom of Expression is one of the most important fundamental human rights to every human being irrespective of tribe, sex, color, creed, education or even nationality. It is for this reason that Freedom of Expression and some other fundamental rights are provided for in local and international bills of rights like national Constitutions, African Charter on Human and People's

Rights, Universal Declaration on Human Rights, International Covenant on Civil and Political Rights. In **ABDULKAREEM V LSG (2016) ALL FWLR (PT.850), PG.101**, the Court of Appeal held that:

"Fundamental Human rights are not ordinary rights. They are elevated rights, some of them have their origin in international conventions or treaties. They are a special class of rights and no person shall be deprived of the enjoyment of any such rights except by the proper observance of the due process of law" (p.1175,) (underlining supplied).

- 2.5. The import of the holding of the Court of Appeal above is that fundamental human rights can only be limited or restricted by applicable statutory provision, which in this case is the provision of the 1999 Constitution (as amended). Emphasizing the importance of Freedom of Expression to an individual and to the society, the Supreme Court of Nigeria in **DIM V AFRICAN NEWSPAPER LTD (1990) 3NWLR (PT.139), PG. 392** per Karibi-Whyte JSC at pages 408-409, held that:

"The right to comment freely on matters of public interest is one of the fundamental rights of free speech guaranteed to the individual in our constitution. It is so dear to the Nigerian and of vital importance and relevance to the rule of law which we so dearly treasure for our personal freedom"

- 2.6. In the Indian case of **BENNETT COLEMAN & CO. & ORS. V. UNION OF INDIA & ORS., [1973] 2 S.C.R. 757 AT 829** the Supreme Court of India held that freedom of speech and of the press is the *Ark of the Covenant of Democracy* because public criticism is essential to the working of its institutions. In **SAKAL PAPERS (P) LTD. & ORS. V. UNION OF INDIA, [1962] 3 S.C.R. 842 AT 866**, a Constitution Bench of the Indian Supreme Court held that *"freedom of speech and expression of opinion is of paramount importance under a democratic constitution which envisages changes in the composition of legislatures and governments and must be preserved"*

- 2.7. To put it simply and succinctly, Freedom of Expression helps in discovery of truth via open discussions; aids in expressing beliefs and political opinions and is an important tool in active participation in democracy. Above all, Freedom

of Expression is indeed required for self-fulfilment and development. This explains why the English poet **John Milton** declared that *"Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"*.

- 2.8. The acceptance as "first among equals" in the league of fundamental human rights ascribed to "Freedom of Expression" is the very reason, Section 39 of the 1999 Constitution (as amended) expressly provides that the right (Freedom of Expression) must be enjoyed without interference. What then is interference? The **Black's Law Dictionary** (10th Edition) defines the word "Interference" as *"The act of meddling in another's affairs...an obstruction or hindrance"*.
- 2.9. A judicial interpretation of the word interference can be gleaned from the decision of the court in **AVOP PLC V THE ATTORNEY GENERAL OF ENUGU STATE (2000) 7 NWLR (PT.664)**, when the court defined the act of interference as *"to meddle....to get in the way...hinder...come into collision or opposition..."* Clearly, offence of criminal defamation as enshrined in Section 375 of the Criminal Code Act, 2014 constitutes an interference to Freedom of Expression as enshrined in Section 39 of the 1999 Constitution (as amended) as the said Section 375 of the Criminal Code Act, 2004 criminalizes publication of defamatory matter. Section 373 of the Criminal Code Act, 2004 defines "Defamatory matter" as follows:

Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt, or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation.

Such matter may be expressed in spoken words or in any audible sounds, or in words legibly marked on any substance whatever, or by any sign or object signifying such matter otherwise than by words, and may be expressed either directly or by insinuation or irony.

It is immaterial whether at the time of the publication of the defamatory matter, the person concerning whom such matter is published is living or dead;

Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Attorney-General of the Federation.

(a) in the case of spoken words or audible sounds, the speaking of such words or the making of such sounds in the hearing of the person defamed or any other person;

(b) in other cases, the exhibiting it in public, or causing it to be read or seen, or showing or delivering it, or causing it to be shown or delivered, with intent that it may be read or seen by the person defamed or by any other person.

(2) Sounds where recorded shall, if defamatory, be deemed to be published if reproduced in any place to the hearing of persons other than the person causing it to be reproduced.

(3) In this section

"recorded" means sounds collected or stored by means of tape, disc, cylinder or other means whatsoever, where the sounds are capable of being reproduced or are intended for reproduction by electrical or mechanical means at any time or from time to time thereafter, and includes the matrix, and cognate expressions shall have the like meaning;

"sound" includes speech and mere noise.

2.10. Section 375 of the Criminal Code Act, 2004 however criminalizes defamation in the following words:

"Subject to the provisions of this Chapter, any person who publishes any defamatory matter is guilty of a misdemeanour, and is liable to imprisonment for one year; and any person who publishes any defamatory matter knowing it to be false is liable to imprisonment for two years"

- 2.11. It is a known fact that defamation exists under civil law and remedies are offered to damage done to a person's reputation by a defamatory matter, in terms of monetary damages, specific performances and injunctive reliefs. However, criminal defamation by its nature essentially seeks to punish the accused person without necessarily offering any compensation to the defamed person, financial or otherwise.
- 2.12. The fact that criminal defamation attracts investigation, threat of arrest, actual arrest, detention, charge, prosecution, remand in prison custody and the rigorous ordeal of trial creates chilling or stifling effect on Freedom of Expression. Invocation of criminal defamation reinforces fear on media practitioners and general public. Frankly, criminal defamation has a chilling effect on freedom of expression as the thought of being arrested by law enforcement agencies and being detained for unjustifiably long period before being charged to court is enough to serve as discouragement from expressing even the truth, particularly, about government, its officials or some dignitaries on any media platform. Of course, it is clear that a law enforcement agency cannot determine criminal liability in an alleged offence including criminal defamation, but it can incarcerate a suspect for as long as it wishes under the guise of investigation, which may be at the detriment of the health or even life of such suspect.
- 2.13. My Lord, it is a known fact that we live in a country where the Police and other Security agencies detain accused persons unlawfully and indefinitely even after a court of competent jurisdiction has given an order of release of such accused persons-this they do with untenable reasons or even no reason at all. The cases of Dasuki, El-Zakzaky and many others readily come to mind in this respect.
- 2.14. Generally, criminal defamation is used by government officials, politicians and bigwigs in the Nigerian society to gag their victims who are generally commoners, however, our courts, regional courts and courts in other jurisdictions have, in strong terms, condemned the invocation of criminal defamation or any other legislation limiting freedom of expression. In **ARTHUR NWANKWO V. THE STATE (1985) 6 NCLR 228** the defendant was charged with sedition under section 51 of the Criminal Code before an Onitsha High Court for publishing a book which had exposed corrupt practices under Governor Jim Nwobodo of former Anambra state. The appellant was

convicted and sentenced to one year imprisonment. But the conviction and sentence were set aside by the Court of Appeal on the grounds that the offence of sedition is illegal and unconstitutional, Speaking for the court, **Olatawura JCA** held inter alia:

"We are no longer the illiterates or the mob society our colonial masters had mind when the law was promulgated...To retain S. 51 of the Criminal Code, in its present form, that is even if not inconsistent with the freedom of expression guaranteed by our Constitution will be a deadly weapon to be used at will by a corrupt government or a tyrant...Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose."

- 2.15. The laws enacted by "our colonial masters" and imposed on the country include the Sedition law, Official Secrets Act and the provisions of the Criminal Code relating to sedition and criminal defamation. In asserting the immutability of Freedom of Expression, **Olatawura JCA** (as he then was) strongly condemned the use of the offence of criminal defamation in suppressing Freedom of Expression, when he went further to hold that:

"The decision of the founding fathers of this present constitution which guarantees freedom of speech which must include freedom to criticize should be praised and any attempt to derogate from it except as provided in the Constitution must be resisted. Those in public office should not be intolerant of criticism. Where a writer exceeds the bounds there should be a resort to the law of libel where the plaintiff must of necessity put his character and reputation in issue."

- 2.16. In **MALLAM ISMAILA ISA & 5 ORS. V. PRESIDENT (2009-10) CHR 166** the Federal High Court struck down several provisions of the Nigerian Press Council Act on the grounds that they were censorial and capable of being used by the authorities to restrict the right to freedom of expression guaranteed by Section 39 of the Constitution. In the 2016 Kenyan case of **ANDARE V. ATTORNEY GENERAL (PETITION NO 149 OF 2015)**, **Ngugi J.** in condemning the existence of Section 29 of the Communications Act of Kenya which limits freedom of expression, the learned judge held that:

"If the intention is to protect the reputations of others, the prosecution of mean spirited individuals who post defamatory statements on social media does not achieve that. I believe that libel laws provide for less restrictive means of achieving this purpose- See the case of Arthur Papa Odera V Peter O. Ekisa, Civil Suit No 142 of 2014 in which the reputation of the plaintiff, who alleged defamation in postings on social media by the defendant, was vindicated in a civil process by an award of Kshs.5m in damages to the plaintiff against the defendant for libel" See OKUTA V. ATTORNEY GENERAL [2017] eKLR (PETITION NO. 397 OF 2016) , CUMPANA AND MAZARE V. ROMANIA (33348/96)

- 2.17. In **LOHÉ ISSA KONATÉ V. THE REPUBLIC OF BURKINA FASO (APPLICATION NO. 004/2013)**, African Court on Human and People's Rights, held that:

"The chilling effect of criminalizing defamation is further exacerbated by the maximum punishment of two years imprisonment imposable for any contravention of section 194 of impugned section. This penalty, in my view, is clearly excessive and patently disproportionate for the purpose of suppressing objectionable or opprobrious statements. The accomplishment of that objective certainly cannot countenance the spectra of imprisonment as a measure that is reasonably justifiable in a democratic society."

- 2.18. In **the Action Challenging the Constitutionality of the Offense of Criminal Defamation in Guatemala (1122-2005)** the Constitutional Court of Guatemala declared that articles criminalizing threats, defamation and insult of public officials were unconstitutional and violated freedom of expression guarantees. Guatemala's Criminal Code contained three articles namely articles 411, 412, and 413 of the Criminal Code of Guatemala that imposed criminal penalties for threatening, defaming and insulting the dignity of public servants or the exercise of their public duties

The Court in a judgment delivered on February 1, 2006 reasoned that the Articles created a strong incentive for individuals to self-censor and to avoid making statements or publishing information that could offend public officials. Therefore, the impugned provisions penalized constitutionally protected forms of expression.

The chilling effect created by Section 375 of the Criminal Code Act, 2004 is further heightened by the fact that the section criminalizes publication of defamatory matter even when the publisher does not know about the falsity of the defamatory matter and the section provides for one year imprisonment as the penalty. It must be further stated that this one year imprisonment is without option of fine. This, my Lord, is indeed most unfortunate as the realization on the part of a member of the public or journalist that he may land himself in a criminal defamation charge while expressing himself even without knowing about falsity of a defamatory matter would indeed drive the said individual to withdraw from publishing any matter irrespective of what positive impact the proposed publication could have on the society and this therefore creates a chilling or stifling effect on Freedom of Expression ultimately.

- 2.19. In the Colombian case of **GONZÁLEZ V. SERRANO (RAD. NO. 38.909)** the director of a local newspaper wrote an editorial containing several accusations against a former senator who had been governor of the province. As a result of these accusations, the journalist was accused of the offenses of defamation (injuria) and false accusation of a crime (calumnia). The trial Court convicted him of both offenses. In the second instance, his conviction for the offense of defamation was upheld and his conviction for false accusation of a crime was overturned. Finally, when the Supreme Court heard the case on appeal, it quashed the judgment and acquitted the defendant. The Court on the one hand, stated that the right to **freedom of opinion** refers to the "constitutional protection afforded to value judgments, without corroborating them from an objective point of view." On the other hand, the right to inform protects the dissemination of information that "is close to the truth and was published in good faith."
- 2.20. In **STEEL AND MORRIS V. UNITED KINGDOM (68416/01)**, The European Court of Human Rights (ECtHR) found that Steel and Morris's right to a fair trial was violated under Article 6 of the European Convention on Human Rights (ECHR) in the original U.K. trial, and that their publication of a partially libelous leaflet critical of McDonald's was protected under Article 10's freedom of expression. This case offers protection for the distribution of leaflets that generate public debate and educate the general public. The protection extends to the distributors themselves, who should not have to bear the burden of the truth contained in the content of the leaflets. This allows non-governmental organizations to campaign without fear of action based on the potentially

defamatory contents of a leaflet, removing the effect of chilling speech that the original fine imposed by the U.K. courts had.

2.21. If it is therefore established that Criminal defamation has a chilling effect on Freedom of Expression, does the chilling effect now constitute an interference according to Section 39 of the 1999 Constitution (as amended)? As defined above by both the **Black's Law Dictionary** and in **AVOP PLC V THE ATTORNEY GENERAL OF ENUGU STATE (Supra)** that "interference" means "to meddle....to get in the way...hinder...come into collision or opposition..." criminal defamation therefore "gets in the way of, hinder or meddle in with Freedom of Expression as long as members of the public and journalists are being put in a situation of fear and are being prevented from exercising their constitutionally protected right to Freedom of Expression.

2.22. Turning to the regional sphere, the African Commission on Human and Peoples' Rights, in Resolution 169 adopted on 24th November 2010, condemns criminal defamation in the specific context of journalism and the media, by emphasizing that:-

"criminal defamation laws constitute a serious interference with freedom of expression and impedes on [sic] the role of the media as a watchdog, preventing journalists and media practitioners to practice [sic] their profession without fear and in good faith;"

2.23. If criminal defamation constitutes an interference then the provision of Section 375 of the Criminal Code Act 2004 providing for criminal defamation is simply inconsistent with the provision of Section 39 of the 1999 Constitution (as amended). The word "inconsistent" as used in Section 1 (3) of the 1999 Constitution could mean any of the following phrases: "incompatible with, conflicting with, in conflict with, at odds with, at variance with, differing from, different to, in disagreement with, disagreeing with, not in accord with, contrary to, in opposition to, opposed to, irreconcilable with, not in keeping with, out of keeping with, out of place with, out of step with, not in harmony with, incongruous with, discordant with, discrepant with; antithetical to, diametrically opposed to; rare disconsonant with, inconsonant with, repugnant to, oppugnant to"

2.24. Accordingly, the Commission calls upon States Parties to the African Charter on Human and Peoples' Rights:

"to repeal criminal defamation laws or insult laws which impede freedom of speech, and to adhere to the provisions of freedom of expression, articulated in the African Charter, the Declaration, and other regional and international instruments."

2.25. It is therefore humbly submitted that Section 375 of the Criminal Code Act 2004 has a chilling effect on Section 39 of the 1999 Constitution (as amended) and is therefore inconsistent thereto.

2.26. This honourable court is respectfully urged to resolve **ISSUE NO 1** in favour of the Applicant.

3.0 ISSUE NO. 2

3.1. **WHETHER** the provisions of section 375 of the Criminal Code Act, 2004 are within the permissible restrictions stipulated in section 45 of the 1999 Constitution or **ALTERNATIVELY WHETHER** section 375 of the Criminal Code Act, 2004 satisfies the requirements of Section 45 of the 1999 Constitution (as amended).

3.2. ARGUMENT OF ISSUE

3.3. It is a known fact that Freedom of expression is not absolute but subject to some permissible **constitutional** restrictions as contained in section 45 of the 1999 Constitution. Section 45 of the 1999 Constitution (as amended) that stipulates the said permissible restrictions provides that:

"Nothing in sections 37, 38, 39, 40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society-

a. In the interest of defence, public safety, public order, public morality or public health

b. For the purpose of protecting the rights and freedom of other persons"

- 3.4. The foregoing statutory provisions constitute the hurdles a restriction that tends to limit Freedom of Expression must pass. Clearly, it is for the court to declare if a restriction passes these hurdles. In **CHIKE OBI V DIRECTOR OF PUBLIC PROSECUTION (No.2) (1961) All NLR 458**, the Federal Supreme Court held that its role was not merely to *"rubberstamp the acts of the Legislature and the Executive, that the court must be the arbiter of whether or not any particular law is reasonably justifiable"*
- 3.5. In interpreting the restrictions listed above, the court in **OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA [1961] 1 All NR**, held that a restriction upon a fundamental right before it may be considered justifiable must (a) be necessary in the interest of public morality and (b) not to be excessive or out of proportion to the object which it is sought to achieve.
- 3.6. In the Ugandan case of **OLUM V. ATTORNEY GENERAL [2002] 2 E A** the court held that a Court is required to look at both the purpose of the legislation and its effect in determining whether a provision is constitutional (para. 21-23). This therefore takes us to the point that the purpose or objective of the legislation (restriction) and the effect on fundamental human rights must be under judicial scrutiny. Such judicial scrutiny therefore determines if the legislation (restriction) will be constitutional or permissible.
- 3.7. For a restriction (law) to be permissible under Section 45 of the 1999 Constitution, such a restriction must therefore have the following characteristics:
- 3.8. Defined by a law: The restriction must be defined by a law. See **ABDULKAREEM V LSG (Supra)**. To satisfy the first requirement, the law or regulation, which should be formally adopted by law-making authorities, must be sufficiently clear and precise; vague or unclear provisions will not suffice. See **THE SUNDAY TIMES V. UNITED KINGDOM, 26 APRIL 1979, APPLICATION NO. 6538/74, PARA. 49**.
- 3.9. Pursue a constitutionally recognized objective: The restriction must be in pursuit of ONLY any of the itemized objectives in the constitution which are (i)the interest of defence, (ii)public safety, (iii)public order, (iv)public morality or (v)public health, (vi)right and (vii)freedom of other persons. A restriction will therefore be impermissible if it is solely critical of government or political

ideology of a government or party. See **THE PUNCH NIGERIA LTD. V. ATTORNEY-GENERAL OF THE FEDERATION. (1998) 1 HRLRA 488**, **SAKAL PAPERS (P) LTD V UNION OF INDIA AIR 1962 SC 305**.

3.10. Be necessary and Proportionate: It must be shown that the restriction is one necessary or required and be the least restrictive means to protect constitutionally recognized objectives. In **ABACHA V FAWEHINMI (2001) 51 WRN 29**, the Supreme Court per **Achike JSC** held that:

"I agree with learned cross-appellant's view that where a statute tends to encroach on, curtail or abridge the freedom or the liberty of an individual, that statute is generally construed very strictly and narrowly against anyone claiming benefit therefrom" (Page 113. Paras. F-G). (underlining supplied).

3.11. In **OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA (Supra)** the court held that the restriction must not be excessive or out of proportion to the object which it is sought to achieve.

3.12. Bringing Section 375 of the Criminal Code Act, 2004 on the legislative cum judicial barometer as presented above, there is no doubt that Section 375 of the Criminal Code Act, 2004 is a law within the definition of Section 45 of the 1999 Constitution (as amended). However the restriction in section 375 of the Criminal Code Act, 2004 leaves a number of vital questions unanswered:

(i) *What particular itemized objective or objectives in section 45 of the 1999 Constitution, does section 375 of the Criminal Code Act, 2004 seek to protect or pursue?*

(ii) *Is the restriction proportional to the itemized objective? If not are there less restrictive means to achieve the purpose of the itemized objective.*

3.13. It is clear that Section 375 of the Criminal Code Act, 2004 does not specify any particular itemized objective or objectives it seeks to protect or pursue. Does it seek to pursue or protect ANY or ALL of (i) the interest of defence, (ii) public safety, (iii) public order, (iv) public morality or (v) public health, (vi) right and (vii) freedom of other persons. It is further clear that what Section 375 seeks to

protect is reputation of an individual as can be seen from definition provided in Section 373 of the Criminal Code Act, 2004. Unfortunately, reputation is NOT one of the itemized objectives in Section 45 of the 1999 constitution (as amended). In this regard, it is clear that whatever is not expressly mentioned is excluded. It is therefore humbly submitted that section 375 of the Criminal Code Act, 2004 does not seek to protect or pursue any objective in Section 45 of the 1999 Constitution (as amended). In **ACHIMU V HON. MINISTER FOR INTERNAL AFFAIRS (2005) 2 F.H.C.L.R 401** per *Mustapha J.* held that:

“the right conferred by Section 37 of the 1999 Constitution is not absolute as it is circumscribed by the provision of Section of 45 (1) of the same constitution which provides that the right to family life can be interfered with the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons....The Respondents have not to my mind, established the interest of defence, public safety, public order, public morality or public health that the directive is serving or intended to serve. Whose right and freedom is it intended to serve?” (Underling supplied) See **THE PUNCH NIGERIA LTD. V. ATTORNEY-GENERAL OF THE FEDERATION (Supra), THE GUARDIAN NEWSPAPER LTD V ATTORNEY-GENERAL OF THE FEDERATION (1999) 9NWLR (PT.618) 187**

(iii) *Can we say that the restriction in 375 of the Criminal Code Act, 2004 is proportional to any itemized objective in Section 45 of the 1999 Constitution (as amended)?*

3.14. It is clear that reputation is not an itemized objective in Section 45 of the 1999 Constitution (as amended) as the reason for that is clear, protection for reputation of other persons exists under the Civil law (tort) and our courts have consistently enforced the protection of reputation of others effectively. It is therefore clear that Section 375 of the Criminal Code Act, 2004 has no connection whatsoever with any itemized objectives in Section 45 of the 1999 Constitution (as amended). In Swazi case of **MASEKO V. PRIME MINISTER [2016] SZHC 180**, it was held that there was no nexus between the provision and the purpose of the limitation to the right to freedom of expression and the offence was therefore an unjustifiable limitation of that right.

3.15. Essentially, and distilling from the **OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA (Supra)** proportionality is very critical in determining a restriction that is reasonably justifiable in a democratic society. Leading authors **G. HUSCROFT, B MILLER and G WEBBER (EDS)** have authoritatively stated the jurisprudence of proportionality includes this 'serviceable—but by no means canonical—formulation' of the test:--

- i. *Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right"*.
- ii. *Are the means in service of the objective rationally connected (suitable) to the objective"*
- iii. *Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective"*
- iv. *Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right"*

3.16. In the Zimbabwean case, **NYAMBIRAI VS NATIONAL SOCIAL SECURITY AUTHORITY & ANOTHER (1995 (2) ZLR 1 (S) at 13C-F)** Gubbay CJ elaborated the test as follows:-

"In effect the court will consider three criteria in determining whether or not the limitation is permissible in the sense of not being shown to be arbitrary or excessive. It will ask itself whether:-

(i) the legislative objective is sufficiently important to justify limiting a fundamental right;

(ii) the measures designed to meet the legislative object are rationally connected to it; and

(iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

3.17. Therefore, even if a statutory criminal provision seeks to protect an objective not recognized in the constitution by restricting or limiting a Fundamental

human right guaranteed in the constitution such criminal provision other than being sufficiently defined as a law must meet the following requirements:

- (a) (i) **The law (restriction) must seek to achieve a significantly important objective having such justification to limit a fundamental human right.** The implication of this is that the objective must be what is such significant that the fundamental right can be visibly and justifiable restricted for. In **ASARI DOKUBO V FEDERAL REPUBLIC OF NIGERIA (CA/A/245/M/2005)**, *Rhodes-Vivour JCA* (as he then was) held that “*My Lords, where National Security is threatened or there is the real likelihood of it being threatened Human Rights or individual rights of those responsible take second place. Human rights or individual rights must be suspended until National security can be protected or well taken care of*” The import of this holding therefore is that “National Security” is a significantly important objective having justification to limit human rights. See the Venezuelan case of **USÓN RAMÍREZ V. VENEZUELA (SERIE C NO. 207)**
- (a) (ii) In the Canadian case of **R V OAKES [1986] 1 SCR 103 [69]–[70]** the court was considering whether **Section 8 of the Narcotic Control Act** which had been found to be unconstitutional for violating **Section 11 of the Canadian Charter of Rights and Freedoms**, was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society. The court held that “*First, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”* **R V Big M Drug Mart Ltd.**, *supra* at p.352 *The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s.1 protection....*”
- (a) (iii) In the Colombian case of **GONZÁLEZ V. SERRANO (Rad. No. 38.909)**, The director of a local newspaper wrote an editorial containing several accusations against a former senator who had been governor of the province. As a result of these accusations, the journalist was accused of the offenses of defamation (*injuria*) and false accusation of a crime (*calumnia*). The trial Court convicted him of both offenses. On appeal his conviction for the offense of defamation was upheld and his conviction for false accusation of a crime was overturned. Finally, when the Supreme

Court heard the case on appeal, it quashed the judgment and acquitted the defendant. Delivering its landmark judgment, the Supreme Court held that to restrict Freedom of Expression, six established criteria have to be met and they are: (1) be specifically and exhaustively provided by law; (2) seek to achieve compelling objectives; (3) be necessary to achieve these objectives; (4) be subsequent, not prior to, the speech; (5) not constitute censorship in any form, which includes the requirement to remain neutral with regard to the content of the speech in question; and (6) not have an excessive impact on the exercise of this fundamental right, that is, they shall be proportional. The objective to be protected has been expressly interpreted to be an objective of public interest. In **MEDIA RIGHTS AGENDA, CONSTITUTIONAL RIGHTS PROJECT, MEDIA RIGHTS AGENDA AND CONSTITUTIONAL RIGHTS PROJECT V NIGERIA (Communication No. 105/93-128/94-130/94-152/96, para 69)**, the African Commission on Human and Peoples Rights noted that restrictions on freedom of expression should be based on a legitimate public interest and the disadvantages of limitation should be strictly proportionate to and absolutely necessary to achieve the desired benefit.

(b) **Relationship between restriction (law) and purpose.** In the Kenyan case of **GEOFFREY ANDARE V THE ATTORNEY GENERAL & ORS (Supra)** where e and Technology Act of Kenya *Ngugi J* in pronouncing Section 29 of the Act unconstitutional, the learned judge held that *"the respondents were under a duty to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended. They have not done this"*

(c) (i) **The restriction (law) impairs or restricts the fundamental right or freedom as little as possible bearing in mind a less restrictive means.** In this regard, it has been held that custodial penalties including imprisonment and fines are excessive and out of proportion to the objective "protecting reputation" of persons moreso when defamation under civil law (tort) is less restrictive of Freedom of Expression and same sufficiently takes care of the defamed person with monetary compensation, specific performances and injunctive reliefs. In **OLAWOYIN V ATTORNEY GENERAL OF NORTHERN NIGERIA (Supra)** the court held that the restriction must not be excessive or out of proportion to the object which it is sought to achieve. In **GEOFFREY ANDARE V THE**

ATTORNEY GENERAL & ORS (Supra) the court held that *"the respondents were under a duty to demonstrate the relationship between the limitation and its purpose, and to show that there were no less restrictive means to achieve the purpose intended. They have not done this"* the court went further to hold that:

"If the intention is to protect the reputations of others, the prosecution of mean spirited individuals who post defamatory statements on social media does not achieve that. I believe that libel laws provide for less restrictive means of achieving this purpose- See the case of Arthur Papa Odera V Peter O. Ekisa, Civil Suit No 142 of 2014 in which the reputation of the plaintiff, who alleged defamation in postings on social media by the defendant, was vindicated in a civil process by an award of Kshs.5m in damages to the plaintiff against the defendant for libel".

- (c) (ii) In **LOHÉ ISSA KONATÉ V. THE REPUBLIC OF BURKINA FASO (Supra)**, the African Court of Human and Peoples' Rights, on 5 December 2014 delivered a landmark judgment in its first case concerning freedom of the press. The judgment overruled the conviction of the journalist Lohé Issa Konaté who had faced harsh criminal penalties levied by Burkina Faso following charges of defamation for publishing several newspaper articles that alleged corruption by a state prosecutor. The Court's final judgment was the Burkina Faso had violated its duties under Article 9 of the African Charter on Human and Peoples' Rights, Article 19 of the International Covenant on Civil and Political Rights, and Article 66(2)(c) of ECOWAS. Accordingly, the Court held that Burkina Faso must amend its domestic law to reflect that criminal penalties for defamation are not allowed. The court specifically held that the defamation laws themselves were not in accordance with the freedom of expression rights protected in the above mentioned treaties and charters since they imposed a disproportionate penalty. As such, all African states who are parties to African Charter on Human and Peoples' Rights are essentially disallowed from using criminal charges for defamation without violating freedom of expression rules guaranteed by the Charter.

- (c) (iii) In **MADANHIRE V. ATTORNEY GENERAL (CCZ 2/14)**, The Constitutional Court of Zimbabwe declared the offense of criminal defamation as unconstitutional and inconsistent with the protection of freedom of expression under the country's former Constitution. In November 2011 a journalist and an editor were charged with criminal defamation after the publication of an article critical of a medical aid company. Pursuant to Section 96 of the Criminal Law Code of Zimbabwe, dissemination of false information with intent to cause harm to the reputation of another person amounts to criminal defamation, punishable by fine or maximum of two years imprisonment. The Court was of the opinion that the criminalization of defamatory statements lacked proportionality, and was not a necessary means to accomplish such objective.
- (c) (iv) However, in **MISA-ZIMBABWE, ET AL. V. MINISTER OF JUSTICE, ET AL (CCZ/07/15)**. In a landmark ruling, the Constitutional Court of Zimbabwe declared the offense of criminal defamation as unconstitutional and inconsistent with the protection of freedom of expression under the country's current Constitution. This case expands expression because it puts an end to criminal defamation in Zimbabwe which was often been used against journalists. This put an end to the uncertainty about the status of criminal defamation in Zimbabwe and built upon an earlier judgment wherein the Constitutional Court had held that criminal defamation was unlawful but only under the former constitution.
- (c) (v) In **ALAI V. ATTORNEY GENERAL (PETITION NO 147 OF 2016)**, The High Court of Nairobi held that an offense which criminalized the bringing into contempt or exciting defiance to the lawful authority of a public officer was unconstitutional and invalid because it was an unjustifiable limitation of the right to freedom of expression. See also the popular Argentine case of **KIMEL V. ARGENTINA (Serie C No. 177)**
- (d) **There must be fair and reasonable balance between the public interest and private right.** The restriction must not destroy the essence of the rights guaranteed under the constitution. In **ZIMBABWE LAWYERS FOR HUMAN RIGHTS & ASSOCIATED NEWSPAPERS OF ZIMBABWE C.**

ZIMBABWE (COMMUNICATION NO. 284/03, PAR. 176); by raising these issues when considering the case, the Commission was therefore of the view that the closing of the Newspaper of the Complainants amounted to a violation of their right to the Freedom of Expression *ibid.*, par. 178.

3.18. In **CHINTAMAN RAO V. THE STATE OF MADHYA PRADESH, [1950] S.C.R. 759**, the Supreme Court of India held that "the phrase "reasonable restriction" connotes that the limitation imposed on a person in enjoyment of the right should not be arbitrary or of an excessive nature, beyond what is required in the interests of the public. The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in article 19(1)(g) and the social control permitted by clause (6) of article 19, it must be held to be wanting in that quality." (at page 763)

3.19. In final analysis, It is clear that the objective of "reputation" that Criminal defamation as enshrined in Section 375 of the Criminal Code Act, 2004 seeks to protect is not a sufficiently important objective to warrant limiting a fundamental human right or is not in the class of significantly important objective like "National Security" which objective was held to be important enough to limit fundamental human right as held in **ASARI DOKUBO V FEDERAL REPUBLIC OF NIGERIA (Supra)**.

3.20. It is also very clear that the offence of criminal defamation is excessive, disproportionate and does not impair Freedom of Expression as little as possible in that it creates a chilling effect on Freedom of expression by way of threat of arrest, actual arrest, detention, charge, prosecution, remand in prison custody and the rigorous ordeal of trial and sometimes unjustifiable detention after the grant of a release order.

3.21. The chilling effect is further exacerbated by the fact that under Section 375 of the Criminal Code Act, 2004 a person can be arrested, prosecuted, convicted and sentenced to one year imprisonment without even knowing the falsity of the alleged defamatory matter.

3.22. Conclusively, Civil law (tort) provides a less restrictive and more effective means of limitation or restriction to protect the objective of reputation without impairing Freedom of Expression.

3.23. It is therefore humbly submitted that neither do provisions of Section 375 of the Criminal Code Act, 2004 as to Criminal defamation stand permissible by Section 45 of the 1999 Constitution (as amended) nor Section 375 of the Criminal Code Act 2004 satisfies the requirements of Section 45 of the 1999 Constitution (as amended).

3.24. We therefore urge Your Lordship to resolve **ISSUE NO. 2** in favour of the Applicant.

4.0 ISSUE 3

4.1. **WHETHER** section 375 of the Criminal Code Act, 2004 is likely going to infringe upon the Right to Freedom of Expression of the applicant and other Nigerians as provided in sections 39 of the 1999 Constitution (as amended).

4.2. ARGUMENT OF ISSUE

4.3. Section 46 (1) of the 1999 Constitution provides that:

"Any person who alleges that any of the provisions of this chapter has been, is being or likely to be contravened in any State in relation to him may apply to a High Court in that state for redress"

4.4. As deposed to in paragraph 7 of the Affidavit in support of the Originating Summons, the applicant exercises his right to freedom of expression as provided in Section 39 of the 1999 Constitution (as amended) via any media platforms including but not limited to print media, electronic media and social media. With the chilling or stifling effect of section of 375 of the Criminal Code Act, 2004 by the custodial punishments that come with it and more importantly, with the fact that a person could be made to face allegation of criminal defamation when he is not even aware of the falsity of alleged defamatory matter makes it very likely to have the applicant's **Right to Freedom of Expression** infringed upon.

4.5. Likelihood of infringement of the applicant's Right to Freedom of Expression is ordinarily established by mere existence of section 375 of the Criminal Code Act, 2004. As long as the section 375 of the Criminal Code Act, 2004 is still retained in our laws, the applicant, like many other Nigerians is likely to be arrested, detained or arraigned for criminal defamation without knowing the alleged defamatory matter published by him is false even while expressing his fundamental **right to freedom of expression**. According to **Professor Nwabueze (1982)** enforcement provision puts it beyond doubt that the mere likelihood of contravention of a guaranteed right confers a right of access to court. In **ISUAMA V GOVERNOR OF EBONYI STATE (2007) 20 WRN 170**, the Court of Appeal held that:

"Section 46 of the 1999 Constitution is a special provision which deals with matters of fundamental rights...In short, a person whose fundamental right is breached, being breached or about to be breached may apply to a High Court or Federal High Court in that State for redress". JACK V UNIVERSITY OF AGRICULTURE, MAKURDI (2004) 5 NWLR (PT.865) 208.

4.6. It is respectfully submitted that section 375 of the Criminal Code Act 2004 is likely going to infringe upon the Right to Freedom of Expression of the applicant and other Nigerians.

4.7. We urge Your Lordship to resolve **ISSUE NO. 3** in favour of the Applicant.

5.0. **ISSUE 4**

5.1. **ARGUMENT OF ISSUE**

5.2. Section 1 (1) of the 1999 Constitution provides that *"This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria"* and Section 1 (3) provides that *"If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void."* In **ABACHA V FAWEHINMI (Supra)**, it was held that *"the constitution is the Supreme Law of the land; it is the grundnorm. Its supremacy has never been called to question in ordinary circumstances"* In **NPP V GBC (Supra)** it was held that *"An attempt to abrogate or suspend the constitution in whole or in part would be visited with the sanction for higher treason"*

5.3. Having submitted earlier under **ISSUES NO.1** that Section 375 of the Criminal Code Act, 2004 is inconsistent with section 39 of the 1999 Constitution and as submitted under **ISSUE NO. 2** that section 375 of the Criminal Code Act, 2004 does not satisfy the requirements of Section 45 of the 1999 Constitution, the said Section 375 of the Criminal Code Act should therefore be declared null and void. In **SANI V PRESIDENT, FRN (2016) ALL FWLR (PT. 860), PG. 1172 AT PAGE 1197**, the court held that Section 1 of the Students' Union Activities (Control and Regulation) Act to the extent that it restricts students' union activities in Nigerian Universities/higher institutions is inconsistent with Section 40 of the 1999 Constitution (as amended) and held expressly that "*The constitution of the Federal Republic of Nigeria, 1999 is superior to other legislations in the country and any legislation which is inconsistent with the constitution is rendered inoperative to the extent of such inconsistency. Section 1 (1) is in conflict with the constitution. It is null and void to the extent of its inconsistency*". See **OSHO V PHILIPS (1972) 4 SC 259, ATTORNEY-GENERAL, ABIA STATE V ATTORNEY GENERAL, FEDERATION (2002) FWLR (PT.101) 1419, (2002) 17 WRN 1, IGP VANPP & 11 ORS (2008) ALL FWLR (PT.441) 870, (2008) 2 CCRLS 48, INEC & ANOR V MUSA & ORS (2008) 1SC (PT.1) 106, FAWEHINMI V NBA (NO.2) 1989 2 NWLR (PT.105)**.

5.4. My Lord, as the applicant deposed to in his affidavit in support of this application, the existence of Criminal Defamation is antithetical to democratic ideals in any democratic society anywhere in the world and that is the very reason the United Kingdom, Ghana, Mexico, Jamaica, Norway, Sri Lanka, Ukraine, Georgia, Montenegro, Antigua and Barbuda, Bosnia and Herzegovina, FYROM/Macedonia, New Zealand among others have abolished criminal defamation and several other countries are working hard to abolish same. It is however so appalling that as a people we represent a generation journeying into the future without leaving the past. The fact that the United Kingdom, from whom we inherited most of our statutes and whose officials as colonial administrators enacted most of our early laws including the Criminal Code of 1916 which metamorphosed into the current Criminal Code Act 2004, in 2010 abolished sedition, seditious libel, obscene libel and defamatory libel in its body of laws and we the beneficiary of UK's colonial bequests still parade those repressive laws in 2018, shows that we as a people have a culture of crying more than the bereaved. It is also remarkable that Ghanaian parliament cited

the judgment of the Nigerian Court of Appeal in **NWAKWO V THE STATE (Supra)** when the nation's criminal defamation law was to be abolished.

5.5. That national courts and regional courts in Africa and beyond are taking the bold step in protecting freedom of expression and democratic ideals by declaring criminal defamation unconstitutional as this has happened in countries like Kenya, Zimbabwe, Burkina Faso, Argentina and Guatemala while many other courts of countries and regions are currently adjudicating lawsuits seeking to declare criminal defamation unconstitutional.

5.6. In upholding the sanctity of constitution and its provisions, the Supreme Court of Ghana per **Francois JSC** in **NPP V GBC (Supra)** in page 177 held that:

"It is clear that the dictates of experience have compelled the constitution makers to draw on the amplitude of our past history, to lay down strictures that would arrest the slightest deviations from constitutionalism. Manifestation that would have the potential burgeoning into intractable evils which would ultimately undermine the constitution and toll the knell of the fourth brave democratic effort, must be placed under the judicial microscope....this court must view with the gravest suspicion if our duty as defenders of the constitution to be honourably discharged"

5.7. In **LAFIA LG V EXECUTIVE GOVERNMENT OF NASARAWA STATE (2013) ALL FWLR (PT.668)**, In quashing the Policy statement against the appellants, Supreme Court per **Rhodes-Vivour JSC** held that:

"I am in full agreement with the Court of Appeal which held that the Policy does infringe the constitutional rights of the appellants (3rd-6th respondents) against discrimination based on ethnicity or place of origin. Courts should assume an activist role on issues that touch or concern the rights of individuals and rise as the occasion demands to review with dispatch acts of government or its agencies and ensure that the rights of the individual guaranteed by the fundamental rights provided in the constitution are never trampled upon"

5.8. It is hereby submitted that section 375 of the Criminal Code Act 2004 is inconsistent with the provisions of the 1999 constitution (as amended)

particularly Section 39 and 45, my lord is respectfully urged, as advised by your learned brother **Rhodes-Vivour JCA(as he then was)** in **LAFIA LG V EXECUTIVE GOVERNMENT OF NASARAWA STATE (Supra)**, *to assume an activist role and rise to the occasion* and declare the said section 375 of the Criminal Code Act 2004 unconstitutional, null and void.

5.9. We therefore urge Your Lordship to resolve **ISSUE NO.4** in favour of the Applicant.

6.0. **CONCLUSION**

6.1. My Lord, should we refuse, omit or generally fail to take a stand against criminal defamation in our society at this point in history, for the purpose of constitutional enjoyment and protection of our rights and freedoms and preservation of democratic values for the coming generation, ours will then be the fate of the man described by the literary icon, Professor Wole Soyinka in his classic-The Man Died that *"The man dies in all who keeps silent in the face of tyranny"* Your Lordship; it has been clearly established herein that the continued retention of criminal defamation as enshrined in Section 375 of the Criminal Code Act, 2004 will work untold hardship in terms of unjustifiable and unlawful arrests, detentions and prosecutions of several Nigerians.

6.2. From the foregoing, we urge this Honourable Court to declare as follows:

A DECLARATION that section 375 of the Criminal Code Act, 2004 has a chilling effect on Freedom of Expression as guaranteed in section 39 of the 1999 Constitution (as amended) and is therefore inconsistent thereto.

A DECLARATION that Section 375 of the Criminal Code Act, 2004 is not a permissible restriction within the contemplation of Section 45 of the 1999 Constitution (as amended) and is thereby inconsistent thereto.

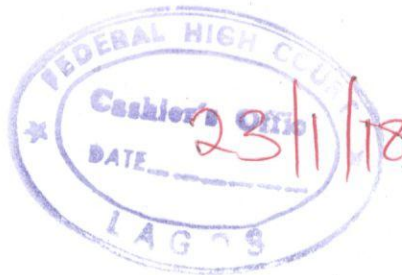
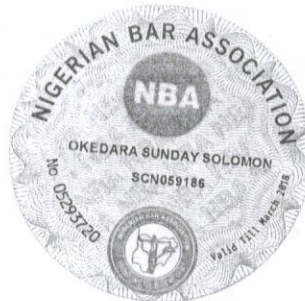
A DECLARATION that in view of the inconsistency of Section 375 of the Criminal Code Act with Sections 39 and 45 of the 1999 Constitution (as amended), Section 375 of the Criminal Code Act is unconstitutional, null and void.

Dated this 23rd day of January 2018

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FOR SERVICE ON:

The Attorney General of the Federation,
Federal Ministry of Justice
Lagos Liaison Office
Marina
Lagos



IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE LAGOS JUDICIAL DIVISION
HOLDEN AT LAGOS

FHC/LCS/93/18
SUIT NO:.....

IN THE MATTER OF CONSTITUTIONALITY OF SECTION 375 OF THE CRIMINAL CODE ACT,
2004

IN THE MATTER OF CONTRAVENTION OF SECTIONS 39 AND 45 OF THE CONSTITUTION
OF THE FEDERAL REPUBLIC OF NIGERIA, 1999 (AS AMENDED) BY PROVISIONS OF
SECTION 375 OF THE CRIMINAL CODE ACT, 2004

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHT TO FREEDOM OF
EXPRESSION GUARANTEED IN SECTION 39 OF THE CONSTITUTION OF THE FEDERAL
REPUBLIC OF NIGERIA, 1999 (AS AMENDED) BY SOLOMON OKEDARA

BETWEEN:

SOLOMON OKEDARA

APPLICANT

AND

THE ATTORNEY GENERAL OF THE FEDERATION

RESPONDENT

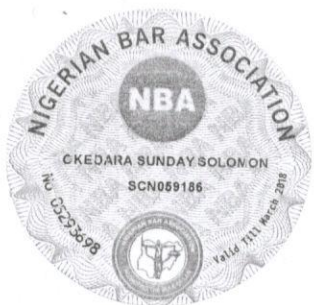
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5. ANDARE V. ATTORNEY GENERAL (PETITION NO 149 OF 2015)
6. ARTHUR NWANKWO V. THE STATE (1985) 6 NCLR 228
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