**THE INCORPORATED TRUSTEES OF PARADIGM INITIATIVE FOR PERFORMATION TECHNOLOGY DEVELOPMENT & ORS V THE ATTORNEY GENERAL OF THE FEDERATION & ORS**

**Nigeria, Africa**

**ON APPEAL**

**CONTRACTS EXPRESSION**

**MODE OF EXPRESSION**

Electronic/Internet-based communication

**DATE OF DECISION**

June 1, 2018

**OUTCOME**

Dismissed

**CASE NUMBER**

CA/L/556/2017

**JUDICIAL BODY**

Appellate Court

**TYPE OF LAW**

Constitutional Law

**THEMES**

Cybersecurity/Cybercrime, Privacy, Data Protection and Retention

**TAGS**

Cybercrime, Freedom of Expression, Privacy

**CASE ANALYSIS**

**Case Summary and Outcome**

The Court of Appeal in Lagos, Nigeria dismissed the appeal in the challenge of constitutionality and legality of Sections 24 and 38 of the Cybercrimes Act, 2015 for lacking in merit and affirmed the judgment of Idris J. of the Federal High Court. Sitting as a court of first instance, Justice Idris had earlier struck out the application of the Appellants when they applied to Federal High Court asking the court to declare Sections 24 and 38 of the Cybercrimes Act, 2015 unconstitutional and illegal. The Appellants had expressly argued before the lower court that Section 24 of the Cybercrimes Act is illegal, unconstitutional and violates the appellants’ fundamental rights to freedom of expression and the press guaranteed by Section 39 of the 1999 Constitution and Article 9 of the African Charter on Human and People’s Rights (Ratification and Enforcement) Act. For Section 38 of the Cybercrimes Act, the appellants did argue before the lower court that the section is unconstitutional, illegal and is indeed a violation of their fundamental rights to privacy, correspondence, telephone conversations and telegraphic communications as guaranteed under Section 37 of the Constitution of the Federal Republic of Nigeria 1999. The Court of Appeal in arriving at its decision, reasoned that contrary to the submission of the appellants that the provisions of Sections 24 and 38 of the Cybercrimes Act are unconstitutional and illegal, it rather found that while Section 24 of the Cybercrimes Act is a piece of criminal legislation enacted pursuant to Sections 4 and 45 (i) (a) of the 1999 Constitution to enhance public welfare/wellbeing, Section 38 of the Cybercrimes Act is a legislative tool that assists in detection and investigation of crime for the public good.

**Facts**

The Appellants in this case who were Applicants at the lower court, Paradigm Initiative for Information Technology Development, The EIE Project Ltd/Gte and the Media Rights Agenda, are all not-for-profit Non-Governmental Organizations. These organizations had brought the lawsuit against the Attorney General of the Federation, National Assembly and the Inspector General of Police challenging the constitutionality of Section 24 and 38 of the Cybercrimes Act, 2015 for infringement and likelihood of further infringements of their Right to Freedom of Expression and Right to Privacy as guaranteed in Section 39 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Article 9 of the African Charter on Human and People’s Rights and Section 37 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) respectively.

Section 24 of the Cybercrimes Act 2015 provides as follows:

*“Any person who, knowingly or intentionally sends a message or other matter by means of computer systems or network that*

*(a) Is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be so sent; or*

*(b) He knows to be false, for the purpose of causing annoyance, inconvenience danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent: commits an offence under this Act and shall be liable on conviction to a fine of not more than N7,000, 000.00 or imprisonment for a term of not more than 3 years or to both such fine and imprisonment”*

*2.Any person who knowingly or intentionally transmits or causes the transmission of any communication through a computer system or network:*

*a) to bully, threaten or harass another person, where such communication places another person in fear of death, violence or bodily harm or to another person…* [Pg.20]

While Section 38 of the Cybercrimes Act provides that:

*(1) A service provider shall keep all traffic data and subscriber information as may be prescribed by the relevant authority for the time being, responsible for the regulation of communication services in Nigeria, for a period of 2 years.*

*(2) A service provider shall, at the request of the relevant authority referred to in subsection (1) of this section or any law enforcement agency –*

*(a) preserve, hold or retain any traffic data, subscriber information, non-­‐content information, and content data; or*

*(b) release any information required to be kept under subsection (1) of this section.*

*(3) A law enforcement agency may, through its authorized officer, request for the release of any information in respect of subsection (2) (b) of this section and it shall be the duty of the service provider to comply.*

*(4) Any data retained, processed or retrieved by the service provider at the request of any law enforcement agency under this Act shall not be utilized except for legitimate purposes as may be provided for under this Act, any other legislation, regulation or by an order of a court of competent jurisdiction.*

*(5) Anyone exercising any function under this section shall have due regard to the individual’s right to privacy under the Constitution of the Federal Republic of Nigeria, 1999 and shall take appropriate measures to safeguard the confidentiality of the data retained, processed or retrieved for the purpose of law enforcement.*

*(6) Subject to the provisions of this Act, any person who contravenes any of the provisions of this section commits an offence and shall be liable on conviction to imprisonment for a term of not more than 3 years or a fine of not more than N7,000,000.00 or to both fine and imprisonment.* [Pg.30-31]

The plaintiffs requested five reliefs with the primary being:

1. Declaration of Sections 24 and 38 of the Cybercrimes Act 2015 illegal and unconstitutional for violating the fundamental rights to privacy and freedom of expression, striking out the impugned Sections 24 and 38 of the Cybercrimes Act, 2015; and
2. Order of a perpetual injunction restraining the respondents, their agents, officers or representatives from further giving effect to or enforcing the impugned sections 24 and 38 of the Cybercrimes Act 2015.

The Federal High Court per Idris J. in striking out the appellants’ application at the lower court reasoned in respect of Section 24 of the Cybercrimes Act that the Section seeks to protect the society at large “regardless of fundamental rights of the citizens” while the Applicants (now Appellants) only sought to put the right of the individual over that of the “larger society”. In respect of Section 38 of the Cybercrimes Act, the learned judge emphasized that the essence of the Section is to provide for “circumstances where information may be released at the request of a law enforcement agency” The trial court therefore concluded that the action was baseless and without merit and consequently struck out the suit.

Dissatisfied with the judgment of the Federal High Court, the appellants herein appealed to the Court of Appeal by a Notice of Appeal dated April 11, 2017 and filed their Appellants’ Brief on August 10, 2017 but deemed properly filed on February 15, 2018. The 1st and 2nd respondents were served the Appellants’ Brief but refused to file Respondent’s Brief. The 3rd Respondent refused service of the Appellants’ Brief. All the respondents were served Hearing Notices but did not make representation before the court (Court of Appeal).

**Decision Overview**

Joseph Shagbaor Ikyegh (JCA) delivered the unanimous judgment of the panel. The panel comprised the trio of Joseph Shagbaor Ikyegh, Biobele Abraham Georgewill, and Jamilu Yammama Tukur (JJCA). The court noted that the respondents did not file any briefs so the appeal was decided solely on the brief filed by the Appellants. In setting the tone for its decisions, the first issue the Court of Appeal considered was whether the court below misapplied the cases of *Badejo V Minister of Education (1996) 9-10 SCNJ 51* and *Medical & Dental Practitioners’ Disciplinary Tribunal V Emewule & Anor (2001) 3SCNJ* in arriving at its decision. In responding to this issue, the Court of Appeal held that the lower court rightly applied the decisions in the cases of *Badejo* and *Medical & Dental Practitioners’ Disciplinary Tribunal* to establish overriding interest of the public above any fundamental right. Justice Joseph Shagbaor Ikyegh held that the lower court applied the two decisions to establish the restriction placed on fundamental right by section 45 of the 1999 constitution in the interest of defence, public safety, public order, public morality or public health and the protection of rights and freedom of other persons. The court further held that the court below did not err in this regard.

The appellate court went further to assert that there is a presumption of regularity in favour of any Act by the legislature and in case any party asserts to the contrary like in this instant case, the onus therefore lies on such party to prove the alleged irregularity. In approval, the appellate court cited the decision of the Supreme Court in *Osawe and Ors V Registrar Of Trade Unions (1985) 1 NWLR Pt.4 755 At 770.* To this extent, the court held that it is the duty of the appellants in this case who has alleged that the provisions of Sections 24 and 38 of the Cybercrimes Act are not reasonably justifiable in a democratic society to establish same and not the duty of the respondents. The court on this note therefore held that the *“contention of the Appellants that it is for the respondents to establish that the Act is reasonably justifiable in a democratic society, is accordingly, untenable and is hereby rejected”* [pg.18]

The Court of Appeal then went further to reiterate the provisions of section 45 of the Constitution which empowers the legislature to make laws to limit fundamental rights including rights to Privacy and Freedom of Expression entrenched in Sections 37 and 39 of the 1999 Constitution respectively. The court further noted that fundamental rights are not absolute but qualified and indeed limited by provisions of Section 45 of the 1999 Constitution and that making the provisions of Section 45 come after these rights in the arrangement of the constitution shows the limiting powers the drafters of the constitution endowed Section 45 with. The appellate court therefore opined that the National Assembly of the Federal Republic of Nigeria is empowered to make an Act that will limit the rights to privacy and freedom of expression just as provisions of Sections 24 and 38 of the Cybercrimes Act have done to provisions of Section 39 and 37 of the 1999 Constitution respectively. For the purpose of emphasis, the court reproduced Sections 4 and 45 of the 1999 Constitution and Sections 24 and 38 of the Cybercrimes Act (which have been reproduced here above):

*4* ***(1)*** *The legislative powers of the Federal Republic of Nigeria shall be vested in a National Assembly for the Federation which shall consist of a Senate and a House of Representatives.*

***(2)*** *The National Assembly shall have power to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the Second Schedule to this Constitution.*

***(3)*** *The power of the National Assembly to make laws for the peace, order and good government of the Federation with respect to any matter included in the Exclusive Legislative List shall, save as otherwise provided in this Constitution, be to the exclusion of the Houses of Assembly of States.*

***(4)*** *In addition, and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say-*

***(a)*** *any matter in the Concurrent Legislative List set out in the first column of Part 11 of the Second Schedule to this Constitution to the extent prescribed in the second column opposite thereto; and* [Pg.19]

***45****. (1) 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; or*

*(b) for the purpose of protecting the rights and freedom of other persons* [Pg.19]

The Court of Appeal then stated that it is clear that the appellants in their case do not deny the constitutional powers of the 2nd respondent to make laws to limit fundamental rights just like the Cybercrimes Act has done through its sections 24 and 38 but the main appellants’ question before the lower court, which the Court of Appeal believed was not “adequately” answered, was “whether the Sections 24 and 38 of the Cybercrimes Act indeed meet the requirements of criminal legislation, and in essence, that of constitutionality?” In resolving this question, the Court of Appeal noted with admiration the efforts of the appellants in citing foreign judicial authorities, constitutions and conventions in their brief. The court however reiterated the position of judicial precedent that foreign authorities are not binding but only persuasive. The court however clarified that it is only when there are no indigenous materials and the foreign authorities are on all fours with the case at hand that the court will apply the foreign authorities. In support, the court cited the cases of *Osafile V Odi 3NWLR (Pt.137) 130* and *Sifax Nigeria Limited and Ors. V Migfo Nigeria Limited and Anor. (Unreported, Appeal No SC 417/2015 delivered on 16-02-18)*.

The court noted the provision of Section 36 (12) of the 1999 Constitution where it is provided that

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| “*subject as otherwise provided by this constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and in this subsection, a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provisions of a law.”* [Pg.23-24] |
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 The court observed that the materials cited from the foreign jurisdictions do not contain the same words as Section 36(12) and opined that the absence of equivalent provisions in the constitutions of those jurisdictions gave rise to the trinity requirements. The court further observed that the international protocols and conventions relied on by the Appellants are yet to be domesticated by an enactment in Nigeria and therefore does not have any force of law in Nigeria. With regard to the appellants’ argument as to vagueness of the words used in Section 24 of the Cybercrimes Act the court stated that in the absence of definition in the statute the words will bear their ordinary, natural and literal meaning assigned to them in the English Dictionary. The court noted that the courts as impartial arbiter are also guided by canons of interpretation and will not stand by and allow the law enforcement institutions to abuse the provision of the law. Besides, the court acknowledges civil remedies in effect of abuse of the law either by way of arbitrary arrest or unlawful prosecution initiated under Section 24 of the Cybercrimes Act.

The court in analyzing the ambit of proportionality, noted that the appellants argued that the penalty of 3 -10 years’ imprisonment and N7 million to 10 million fine are not proportional. The appellant argued specifically that custodial penalties proportional. This court noted that this argument was also premised on foreign cases. In resolving this, the court reiterated the position of the Supreme Court in *Amoshima V State (2011) 14 NWLR (Pt.1268) 530 at 551and 555* where the apex court held that the argument against death sentence as being cruel and degrading, which is premised on what has been held in other countries, is not tenable. The Supreme Court emphasized the fact that Nigeria is a sovereign nation with its own constitution and laws, practices in other nations therefore shall not be foisted on Nigeria when there are statutory penalties for such offences. The court notwithstanding believes that when confronted with matters under Section 24 of the Cybercrimes Act, judges will exercise their discretion judiciously and judicially.

On the last ambit of the trinity requirements which bother on clear objectives of the criminal legislation, the court held that Section 24 of the Cybercrimes Act was enacted in pursuance of public welfare by fostering good conducts among the citizens. The court therefore concluded that there is no reason to resort to foreign jurisprudence in resolving the issues in this case given rich indigenous case law in Nigeria. The court therefore held that contrary to the argument of the appellants, Section 24 of the Cybercrimes Act is a valid piece of legislation and it is not unconstitutional, null and void.

In respect of Section 38 of the Cybercrimes Act, the court adopted its position and holding as made out on constitutionality or otherwise of Section 24 of the Cybercrimes Act. The court further reiterated that Section 37 of the Constitution that provides for privacy is not absolute but limited by Section 45 (i) of the 1999 Constitution. The court held that Section 38 of the Cybercrimes Act is a “veritable tool of assisting the detection and investigation of crime for the common good” and that internet service providers are stakeholders in the administration of criminal justice in this regards. The court cited the case of *Fawehinmi V Akilu and Anor. (1987) 4 NWLR (Pt.67) 797 at 825-826* to establish that all persons in the society have a duty to assist in the process of arrest, prosecution and bringing a criminal to justice. The court found that the provision of Section 38 of the Cybercrimes Act is consistent with the provision of Section of 44(i)(k) of the 1999 Constitution which authorizes law enforcement agencies to take temporary possession of property for the purpose of investigation or enquiry. Consequently, the court held that Section 38 of the Cybercrimes Act is not unconstitutional, null and void. The court unanimously held that the Appellant’s appeal was devoid of merit and deserved to be dismissed. It accordingly dismissed the appeal and affirmed the judgment of the lower court delivered by Idris J. of the Federal High Court.

In his concurring judgment, Justice Biobele Abraham Georgewill while noting that Sections 24 and 38 of the Cybercrimes Act are neither unconstitutional nor illegal, remarkably noted that there is however a need for an amendment of section 38 of the Cybercrimes Act to include a requirement of an *ex parte* order of a court of competent jurisdiction before access could be had to personal information under the Cybercrimes Act. His lordship’s reason for this opinion is that without such check or safeguard *“citizens would be left at the whims and caprices of the “relevant authority” and or “law enforcement agency” and which undoubtedly would lead to impunity in derogation of these right as guaranteed by the constitution to the citizenry of this great Nation of ours which is not and cannot be the intention of the framers of the Constitution”* [Pg.1 of Concurring Judgment]

The Appellants herein have consequently appealed this judgment which is now pending before the Supreme Court.

**DECISION DIRECTION**

**Contracts Expression**

The Court of Appeal contracts rights to freedom of expression and privacy guaranteed under sections 39 and 37 of the Constitution of the Federal Republic of Nigeria 1999 respectively, when it dismissed the appellants’ appeal and upheld the judgment of January 20, 2017 delivered by the Federal High Court that earlier found that sections 24 and 38 of the Cybercrimes Act are not unconstitutional and illegal.

**GLOBAL PERSPECTIVE**

**Related International and/or regional laws**

African Charter on Human and People’s Rights, Article 9

African Commission on Human and People’s Rights’ Declaration of Principles on Freedom of Expression, 32nd Session (17-23, October 2002, Banjul, The Gambia), Principle 11(2)

**National standards, Laws or Jurisprudence**

Nigeria, Constitution of the Federal Republic of Nigeria, 1999 (as amended), Sections 36 (12), 37, 39 and 45

Nigeria, Cybercrimes (Prohibitions, Prevention, Etc) Act, 2015, Sections 24 and 38

Nigeria, Badejo V Minister of Education (1996) 9-10 SCNJ 51

Nigeria, Medical & Dental Practitioners’ Disciplinary Tribunal V Emewule & Anor (2001) 3SCNJ

Nigeria, Akilu V Fawehinmi (No.2) (1989) 2 NWLR (Pt.102) 122

Nigeria, Ukaegbu V Attorney General of Imo State (1983) 1FNLR 14

Nigeria, Solarin V IGP & Ors (1983) 1 FNLR 415

Nigeria, Edet Akpan V State (1986) 3 NWLR Pt. 27, 225

Nigeria, Fawehinmi V Akilu and Anor. (1987) 4 NWLR (Pt.67) 797 at 825-826

Nigeria, Kabirikim and Anor V Emefor and Ors (2009) 14 NWLR 602 at 641

Nigeria, Amoshima V State (2011) 14 NWLR (Pt.1268) 530 at 551and 555

Nigeria, Tanko V State (2009) 4 NWLR (Pt.1131) 430 at 452

Nigeria, Osafile V Odi 3NWLR (Pt.137) 130

Nigeria, Sifax Nigeria Limited and Ors. V Migfo Nigeria Limited and Anor. (Unreported, Appeal No SC 417/2015 delivered on 16-02-18)

Nigeria, Eliochin (Nig) Ltd V Mbadiwe (1986) 1 NWLR (Pt.14) 47

Nigeria, Osawe and Ors V Registrar of Trade Unions (1985)

Nigeria, Skye Bank Plc V Iwu (2017) 16 NWLR (Pt.1590) 24

Nigeria, Rabiu V State (1980) NSCC 291 at 300-301

Nigeria, Akaighe V Idama (1964) All NLR (Reprint) 317 at 322

Nigeria, Adebayo V AG Federation (2008) All FWLR (Pt.412) 1195

Nigeria, Mbani V Bosi (2006) 11 NWLR (Pt.991) 400 at 417

Nigeria, Adegbuyi V APC (2014) All FWLR (Pt.761) 1486 at 1504

**United Kingdom**

UK, Parker V Parker (1954) All ER 22

UK, Norwich Pharmacal Co. and Others V Customs and Excise Commissioners (1974) AC 133

UK, Asworth Hospital Auhtority V MGN Ltd (2002) 1 WLR 2033, Par.60

UK, R (Mohammed) V Secretary of State for Foreign and Commonwealth Affairs (No.1) (2009) 1WLR 2579, pa 94

UK, Rugby Football Union V Consolidated Union Services Limited (formerly Viagogo Limited in liquidation), (2012) 1WLR 3333, Par. 17

**Canada**

Canada, King V Power (2015) NLTD (G) 32, Par. 17

Canada, Warman v Fournier(2010) ONSC 2125 par.34

Canada, Commissioner of Canada Elections V Nation 110 C.R.R (2d.) 160 (C.J) par.20 and 21

**United States**

US, Dendrite Intern., Inc V Doe No.3, 775 A.2d 756 (2001) p.760 at 761

US, Mclntyre V Ohio Elections Commission, 514 US 334 (1995)Pg 357,id, pg 342

US, Rosenbloom V Metromedia Inc. S.ct 1811, (1971), p.1820

US, Digital Music News V Superior Court of Los Angeles, 226 Cal. App. 4th 216 (2014) p.228

US, Krinsky V Doe 6, 159 Cal. App. Par.17

US, Clumbia Ins. Co. V Seescandy.com 185 FRD (N.D Cal.1999)

Delfi V Estonia, Application No. 64569/09 (2015) par. 149

KU V Finland, Application No.2872/02 (2008) par.49

**CASE SIGNIFICANCE**

The decision establishes binding or persuasive precedent within its jurisdiction.

**OFFICIAL CASE DOCUMENTS**

The Judgement