

IN THE FEDERAL HIGH COURT
HOLDEN AT LAGOS NIGERIA
ON FRIDAY THE 20TH DAY OF JANUARY, 2017
BEFORE THE HONOURABLE JUSTICE
M.B. IDRIS
JUDGE

SUIT NO: FHC/L/CS/692/16

BETWEEN:-

- | | | |
|--|---|------------|
| 1. THE INCORPORATED TRUSTEES OF
PARADIGM INITIATIVE FOR INFORMATION
TECHNOLOGY DEVELOPMENT | } | APPLICANTS |
| 2. THE EIE PROJECT LTD/GTE | | |
| 3. THE INCORPORATED TRUSTEES
OF MEDIA RIGHTS AGENDA | | |

AND

- | | | |
|--|---|-------------|
| 1. THE ATTORNEY GENERAL OF THE
FEDERATION | } | RESPONDENTS |
| 2. THE NATIONAL ASSEMBLY OF THE
FEDERAL REPUBLIC OF NIGERIA | | |
| 3. THE INSEPCTOR GENERALOF POLICE | | |

JUDGMENT

This is an Originating Motion dated 23rd May, 2016 for the enforcement of fundamental rights. The grounds upon which the reliefs are sought are as follows:-

RELIEFS SOUGHT

- a. A DECLARATION that section 38 of the Cybercrime (Prohibition, prevention, etc) Act 2015 is illegal and unconstitutional as it violates and likely to further violate the Applicants' fundamental rights to privacy of citizens, correspondence, telephone conversations and telegraphic communications as guaranteed by section 37 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004
- b. A DECLARATION that section 24 of the Cybercrime (Prohibition, prevention etc) Act 2015 is illegal and unconstitutional as it violates and likely to further violate the Applicants' fundamental rights to freedom of expression and the press as guaranteed by section 39 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Article 9 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (Cap A9) Laws of the Federation of Nigeria, 2004.
- c. AN ORDER striking out the constitutionally inconsistent sections 24 and/or 38 of the Cybercrime (Prohibition, prevention etc) Act 2015 for being null and void.

- d. A PERPETUAL INJUNCTION restraining all the Respondents, their agents, officers and/or representatives from further giving effect and/or enforcing the provisions of sections 24 and/or 38 of the Cybercrime (Prohibition, prevention etc) Act 2015 for being unconstitutional null and void.
- e. AND SUCH OTHER ORDER (S) as this Honourable Court may deem fit to grant in the circumstance.

The application was supported by an Affidavit, a Statement and a Written Address.

The 1st Respondent filed a Counter Affidavit and a Written Address in opposition. The 1st Respondent in its written address contended that the Applicants did not have a reasonable cause of action to institute this suit against the 1st Respondent. The ground of the foregoing contention is that the making, drafting and amendment of laws rest with the National Assembly and not with the office of the Attorney-General.

I have read the addressed filed and reviewed the submissions made. Is the application meritorious?

The application before me seeks to enforce a fundamental right pursuant to Order 2 Rule 1, 3, 4 & 5 of the Fundamental Rights (Enforcement Procedure) Rule 2009, Section 37, 39 and 46 of the 1999 Constitution of the Federal Republic of Nigeria and Article 9 of the African Charter on Human and People's Right Act, it is for this purpose that I find

it pertinent to proffer the meaning of a fundamental right. What is a fundamental right? In the case of **RANSOME-KUTI VS. ATTORNEY-GENERAL OF THE FEDERATION** (1985) 2 NWLR (PT. 6) 211, Eso JSC (as he then was) described a fundamental right thus:

“It is a right which stands above the ordinary laws of the land and which in fact is antecedent to the political society itself. It is a primary condition to a civilized existence and what has been done by our constitution, since independence.... is to have these rights enshrined in the Constitution so that the rights could be “immutable” to the extent of the “non-immutability” of the Constitution itself”.

In the case of **ODOGU VS. A.G. FEDERATION** (2002) 2 HRLRA 82 at 102, Adio JSC (as he then was) defined a fundamental right as “a right guaranteed in the Nigerian Constitution and it is a right which every person is entitled, when he is not subject to the disabilities enumerated in the Constitution, to enjoy by virtue of being a human being”.

In other words, fundamental rights are those rights that are fundamental to the very existence of a particular country that they stand above all the ordinary human rights and laws of such a country. because of how fundamental these rights are, they are guaranteed under the Constitution of the Federal Republic of Nigeria. However, this does not mean that fundamental rights are above the country and its Constitution and people. In **BADEJO VS. MINISTER OF EDUCATION** (1996) 9-10 SCNJ 51, Kutigi, JSC (as he then was), held thus:

"A fundamental right is certainly a right which stands above the ordinary laws of the land, but I venture to say that no fundamental right should stand above the country, state or the people".

It is general knowledge that fundamental rights are not only those rights guaranteed in the Nigerian Constitution, but also those rights stipulated in the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act. Where the redress being sought by the Applicant is in relation to a breach of the applicants fundamental human right, he is entitled to a redress. The Applicant is praying this Honourable Court to declare that section 38 and 24 of the Cybercrimes Act is illegal and unconstitutional because it violates the fundamental rights to privacy and the right to freedom of expression and the press.

The provisions of section 24 of the Cybercrimes Act provide that:

"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 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...

The provisions of section 38 of the Cybercrimes Act provide 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 the 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 rights 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 ₦7,000,000.00 or to both fine and imprisonment”.

After reading the provisions of the Cybercrime Act above, it will be apposite to review the provisions of the Constitution of the Federal Republic of Nigeria, 1999 especially at sections 37 and 39. Section 37 of the Constitution provides:

“The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected”.

Section 39 provides thus:

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. Without prejudice to the generality of subsection (1) of this section, every person shall be entitled to own, establish and operate any medium for the dissemination of information, ideas and opinions:

Provided that no person, other than the Government of the Federation or of a state any other person or body authorised by the President on the fulfillment of conditions laid down by an Act of the National Assembly, shall own, establish or

operate a television or wireless broadcasting station for, any purpose whatsoever.

3. Nothing in this section shall invalidate any law that is reasonable justifiable in a democratic society-

- a. for the purpose of preventing the disclosure of information received in confidence, maintaining the authority and independence of Courts or regulating telephony, wireless broadcasting, television or the exhibition of cinematograph films; or
- b. imposing restrictions upon persons holding office under the Government of the Federation or of a State members of the armed forces of the Federation or members of the Nigeria Police Force or other Government security services or agencies established by law".

However, the above suffer limitations and restrictions pursuant to section 45 of the Constitution, which provides thus:

"Nothing in section 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 rights and freedom or other persons

Pursuant to the provisions of the section 45 of the Constitution as provided above, subsection (1) of this section ranks superior to sections 37, 38, 39, 40 and 41. But such restrictions are only constitutional when they are made by a law duly enacted:-

- a. In the interest of defence, public safety, public order, public morality or public health or
- b. For the purpose of protecting rights and freedom or other persons

While the phrase "interest of defence" comes into play during war or chaotic times, it also entails national security. The phrase public safety, public order, public morality or public health mean the same thing; the rights of other members of the public to conducive living. To that extent, therefore, the phrase should be interpreted with paragraph (b), which talks of "protecting the rights and freedoms of other persons. In the case of **BADEJO VS. MINISTER OF EDUCATION (1996) 9-10 S. C. N. J. 51**, the complaint of the appellant was that though she had passed her common entrance examination very well, she was denied admission on the ground of "quota system" which ensured preference for candidates from educationally disadvantaged states. At the Supreme Court, it was argued on her behalf that all the interviews conducted for admission of students into schools from the date the appellant was denied admission be cancelled, as they were based on wrong premises. The Supreme Court

rejected this prayer, saying that putting the Federal Republic of Nigeria at the mercy of the appellant would amount to a total brutalisation of other people's fundamental rights in favour of one person's right. The Court concluded that although a fundamental right stands above the ordinary laws of the land, no fundamental right stands above the country, State or the people. In the case of **MEDICAL & DENTAL PRACTITIONERS' DISCIPLINARY TRIBUNAL VS. EMEWULE & ANOR (2001)3 SCNJ 106**, the Supreme Court held that all freedoms are limited by state policy or overriding public interest; but that it is only the courts that can enforce such limitations and not private persons.

Under section 37 of the Constitution of the Federal Republic of Nigeria, the privacy of citizens, their homes, correspondences, telephone conversations and telegraphic conversations is hereby guaranteed and protected. However, it must be borne in mind that the right protected under section 37 does not stop the forceful entry of law enforcement agents into otherwise private quarters to effect lawful arrests, or to prevent commission of crimes, or to execute processes of court or of other ministerial departments. In **MEDICAL & DENTAL PRACTITIONERS' DISCIPLINARY TRIBUNAL VS. EMEWULE & ANOR (SUPRA)**, the Supreme Court held that all fundamental rights are subject to overriding public interest. The right to private and family life cannot be an exception. Further, section 39 of the Constitution guarantees and protects the right to freedom of expression and of the press. I will say that this right is the most cherished rights to individuals. However, the most enormous limitation to

these is the right of the state to regulate free speech and the rights of other members of the society not to be defamed by persons exercising freedom of speech. In **AKILU VS. FAWEHINMI (NO. 2) (1989) 2 NWLR (PT. 102) 122**, it was held that the right to freedom of speech is limited or circumscribed by the duty of the person exercising to watch against infringing on the rights of other persons. Also, in **SOLARIN VS. I.G.P & ORS (1983) 1 FNLR 415**, the applicant had complained that in his numerous lectures at the Campus Square, Lagos, he faced numerous and endless police arrests, detentions and harassment. He contended that this was an infringement on his right to freedom of speech, amongst other things. It was however, the contention of the respondents, that the applicant's lectures were always held contra legem that is without obtaining Police licence in accordance with the Public Order Act, 1979. The respondent further contended that the applicant's lectures were a security threat to the Federal Government. The Lagos High Court refused to grant the applicant's prayers, saying that the Public Order Act being a law validly enacted by the National Assembly, applicant was under an obligation to always obtain a permit before embarking on those his lectures. Further, I refer Counsel to the case of **UKAEGBU VS. ATTORNEY GENERAL OF IMO STATE (1983) 1 FNLR 14**, in this case, the respondent herein had challenged the right of the appellant to establish a private school in Imo State without the prior consent or approval of the State's Commissioner for Education. He also prayed the Court to declare the university established by the appellant as being illegal. The learned trial Chief Judge granted the respondent's prayers. Appellant's appeal to the

Court of Appeal was referred to the Supreme Court for the determination, the appeal having been held to have raised a "substantial point of law". The Supreme Court held that the appellant had a right under section 36 of the 1979 Constitution to establish a university as a means of receiving and imparting ideas and information, hence no law can validly take away that right, save as justified under section 41 of the 1979 Constitution. Finally, that although a citizen had the right to establish a school, once established, the school had to be regulated by the State.

At this juncture, I find that it is pertinent to ask, what rights the Applicant is seeking to protect and how have sections 24 and 38 of the Cybercrimes Act violated these rights? The Applicant is seeking a declaration that section 24 of the Cybercrimes Act is in violation of section 39 of the Constitution which protects the right to freedom of expression and information. It is my firm view that the wordings of section 24(1)(a) of the Cybercrimes Act is clear, straightforward and unambiguous. In simpler terms, all that section 24 is saying is that if anyone who causes to be sent or is found sending an offensive message or a message with pornographic or obscene content which is of a menacing character, such a person shall be liable to a term of not more than 3 years and a fine not more than ₦7,000,000.00. Section 24 (1) (b) of the Cybercrimes Act provides that any person who knowingly transmit or causes transmission of any communication in order to bully, threaten or harass another person or places the person in fear of death, violence or bodily harm commits an offence under the Act.

Further, the applicant contended that section 38 of the Cybercrimes Act is in violation of section 37 of the Constitution which protects and guarantees the right to privacy of citizens, correspondence, telephone conversations and telegraphic conversations. Section 38 of the Act states that a service provider shall at the request of relevant authority or any law enforcement agency preserve, hold or release any information required. It further states that a law enforcement agency may through its authorized officer request for the release of any information and the service provider shall comply.

According to section 45 of the Constitution and from the authorities cited above, I presume Counsel understands that the fundamental rights of citizens as guaranteed and protected under the Part IV of the Constitution are not ultimate. They suffer certain derogations, restrictions and limitations. Therefore, the question I find myself asking is whether the provisions of sections 24 and 38 of the Cybercrimes Act fall within the said exceptions? The answer to the foregoing has to be a resounding YES! I urge Counsel to understand that the provisions of section 39 of the Constitution grants the right to freedom of expression and information, it also places a condition precedent which protects other members of the large society from defamation and false information. It is for this reason that the State needs to regulate the practices of the citizen by bring into force Acts of assembly such as the one being challenged, that is the Cybercrimes Act. Hence, I find the Applicant's argument that this section seeks to hinder the press and freedom of opinion and to send Nigerians back to the military

era, to be baseless and it lacks substance. Moreover, one of the protection that section 45 of the constitution aims to provide is public safety, public order, public morality or public health and for the purpose of protecting rights and freedom of other persons. It seems to me that the provisions of the section 24 of the Cybercrimes Act seek to protect the society at large regardless of the fundamental rights of the citizens. Further, I have cited the case of **BADEJO VS. MINISTER OF EDUCATION**, where the Supreme Court rejected the prayer of the appellant on the ground that it will be putting the Federal Republic of Nigeria at the mercy of the appellant which would amount to a total brutalisation of other people's fundamental rights in favour of one person's right. I firmly believe that this is what the Applicant is urging the Court to do.

Furthermore, section 37 of the Constitution protects the privacy of citizens, their telephone conversations, correspondences and telegraphic conversations. Where the Applicant is contending that section 38 of the Cybercrimes Act is infringing its right to privacy and family life as provided under section 37 of the Constitution, this argument will fail because it lacks merit and it is baseless. It has been mentioned and Counsel should bear it in mind that this right does not stop the forceful entry of law enforcement agents into otherwise private quarters to effect lawful arrest or to prevent commission of crimes, or to execute processes of Court or of another ministerial. Again, section 38 of the Cybercrimes Act only provides for circumstances where information may be released by the request of a

law enforcement agency. It goes further to say that the service provider must provide such information to the law enforcement agency.

I find nothing complicated in this Application. I do not understand how Counsel to the Applicant was able to arrive at his arguments. In any event, the application is frivolous and lacks merits. In light of the above, the action is hereby struck out.



M.B. IDRIS
JUDGE
20/1/2017

O. Babalola for the Plaintiff

I.O. Obi Makinde for the Respondent

for Babalola at the
bar of Kwana 480