IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE BAUCHI JUDICIAL DIVISION
HOLDEN AT BAUCHI
ON TUESDAY THE 30TH DAY OF MAY, 2017
BEFORE HIS LORDSHIP HONOURABLE JUSTICE M. SHITU ABUBAKAR

SUIT NO. FHC/BAU/CS/41/2016

BETWEEN

SANI UMAR.....APPLICANT

AND

1. **NIGERIAN ARMY**
2. **THE COMMANDANT, 33 ARTILARY BRIGADE, SHADAWANKA BARRACKS, BAUCHI**
3. **THE DIRECTOR STATE SECURITY SERVICE**
4. **THE DIRECTOR, SSS, BAUCHI STATE**

RESPONDENTS

Judgment

By a motion on notice dated and filed on 14th November, 2016 the applicant applied to enforce his Fundamental right in terms of SS. 35 & 36 of the 1999 constitution as amended. The application was filed alongside statement of facts wherein the reliefs and the grounds upon which the reliefs are sought are provided by the applicant as follows:-

-Reliefs of the applicant

1. An order of declaration that the act of arrest and detention of the Applicant by the respondents for over a period of 2 years without legal justification; amounts to the violation of the Applicants Fundamental Right to personal liberty.
2. An order of declaration that the continued detention of the applicant for over a period of 2years on a mere suspicion amounts to the violation of his constitutional rights to fair hearing, particularly, presumption of innocence.
3. An order of this Hon. Court releasing the Applicant unconditionally. **OR ALTERNATIVELY**;
4. An order of this Hon. Court admitting the Applicant to bail pending his arraignment before the court of competent jurisdiction.
5. Such order or further order or orders as this Hon. Court may deem fit to make in the circumstances.

Grounds upon which the reliefs are sought

1. Applicant as Nigerian Citizen has the right to enjoy his fundamental rights to the fullest.
2. The applicant was arrested and detained for over two years without any reasonable suspicion of committing any offence.
3. That even the court that ordered for his remand, could not receive from the respondents any single document to constitute a proof of evidence, let alone arraigning the applicant proper.

The application was also supported by a 5 paragraphed affidavit to which one Exhibit namely Exhibit A was attached to it. Learned counsel for the applicant, Muhammad Ishaq Esq. also filed a written submission and presented legal argument in favour of the applicant.

In response, the 1st and 2nd respondents filed a preliminary objection and written address and urged the court to strike

out their names on the grounds that they are not proper parties to the suit.

In the event the preliminary objection fails they also filed counter affidavit and written address as a defense on the merit.

Similarly the 3rd and 4th respondents filed joint counter affidavit and written address in defense of their names.

At hearing learned counsel for the applicant Muhammad Ishaq adopted his processes and urged the court to grant all the reliefs of the applicant. In a like manner learned counsel for the 1st and 2nd respondents J.B Ayofe Esq. and A. Tom Esq. of counsel for the 3rd and 4th respondents took turns and adopted their processes and both prayed the court to dismiss the application.

In the applicant's supporting affidavit it was deposed for him by the secretary to the law firm of G. Hassan & Co in person of Umar Akilu as follows:-

a. That applicant who has no criminal record was arrested at wunti market, Bauchi, Bauchi State by men of Nigerian Army (the 1st respondent herein) in collaboration with members of the 3rd respondent over allegation relating to membership of dreaded and lethal outlawed group popularly known as Boko Haram.

b. That the 1st respondent is an institution of Nigerian Military while the 2nd respondent is the head of its command unit in Bauchi, Bauchi State.

c. That the 3rd respondent is the institution responsible for the internal security of our country while the 4th respondent is the in charge of Bauchi State of the 3rd respondent's office.

d. That at the time the applicant was arrested he was not informed of the allegation against him until when he was taken to the 33 Artillery Brigade, Shadawanka Barracks, Bauchi from where the officers of the Nigerian Army that arrested the applicant come. The applicant was informed

orally that he was suspected to be member of Boko Haram after two days.

e. That the applicant was since his arrest been kept in detention without arraignment before any court of competent jurisdiction, let alone trial.

f. That the applicant spent about two month in detention facility of the 1st respondent at Shadawanka Barracks, Bauchi before being moved to the Nigerian Police, Bauchi.

g. Until his arrest and detention, the applicant trade in shoes at wunti market, Bauchi where he was arrested and has been consistent in his business place for years so much that his neighbours were reportedly surprised and stunned by the allegation against him.

h. That the applicant was detained in the Bauchi prison on the bases of a remand warrant signed by the then presiding magistrate court 1, Bauchi, who remanded the applicant without proof of evidence not even an F.I.R.

i. That the remand warrant was dated 4th August, 2014 and bears the Number CMCBH/0203/A/2014, copy of the said

REMAND WARRANT was shown to me marked as "Exhibit A" and at the back of it, there was endorsement of a military officer by one captain D.K. Atobatele of 33, Artillery Brigade, Shadawanka Barracks, Bauchi.

j. That now for over two years, the applicant has been languishing in the prison custody without any arraignment let alone trial.

In the written address learned counsel for the applicant formulated a sole issue for determination which is whether from the facts and circumstances of this application, the applicant is entitle to the reliefs sought as contained in the motion papers.

Arguing the issues learned counsel argued that by the provision of S. 35(1) of the 1999 constitution a citizen of Nigeria is entitled to his personal liberty and shall not be deprived of such liberty except in accordance with the procedure permitted by law. It is also the argument of counsel under sub section (4) of S.35 of the constitution that any

person who is arrested or detained in accordance with sub section (1) of section 35 shall be brought before a court of law within a reasonable time otherwise he/she should be released unconditionally or conditionally. Counsel therefore referred to the supporting affidavit and Exhibit A and argued that since the applicant was detained by the respondents for more than 2 years without arraigning him before a court of competent jurisdiction it amounts to violation of his right to liberty as guaranteed by S.35 of the constitution. Counsel therefore urged the court to hold that the fundamental right of the applicant was violated and to release him unconditionally.

Counsel referred to the case of Akila VS Director SSS (2014) NWLR (PT. 1392)443 at 449 r.5 where the court of Appeal held as follows:-

"Section 35(3) of the 1999 constitution provides that any person who is arrested or detained shall be informed in writing within twenty-four hours (and in the language he understands) of the facts and grounds of his arrest or

detention. Furthermore, section 35(4) of the constitution provides that any person who is arrested or detained in accordance with subsection (1) (c) of this section shall be brought before a court of law within a reasonable time, and if he is not tried within a period of two months from date of his arrest or detention in the case of a person who is in custody or is not entitle to bail; or three months from the date of his arrest or detention in the case of a person who has been released on bail, he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date. In this case, the Appellants were not informed in writing within twenty four hours of their arrest of the facts and grounds of their arrest. Also though appellants were arrested on 30th July, 2010, the Appellants were not taken before the Magistrate court until 2nd August, 2010. Furthermore, the Appellants were detained for more than two months without trial before court of competent jurisdiction.

In the circumstance, the Appellants' Fundamental rights to personal liberty were breached and the Appellants are entitled to be released from detention unconditionally or upon such condition that will ensure the appellants appear for their trial at a later date".

Arguing further applicants counsel submitted that although the fact of this case is similar to Akila's case, the violation of right is worse than what happened in Akila's case. This according to him is because there was an arraignment in Akila's case and the detention was only for about 2 months but in the instant case there was no arraignment and the detention is for a period of more than 2 years.

It is the alternative prayer of the counsel for the applicant that if the court is not inclined to release the applicant unconditionally, it should release him conditionally upon such conditions as are reasonably necessary to ensure that he appears for trial at a later date. Counsel referred to the following case to support his submission:

1. ODO VS C.O.P (2004)8 NWLR (PT. 874)46 at 51 – 52 r.2
2. KAYODE OSHINAYE VS C.O.P (2004)17 NWLR (PT. 901)1 at 4 r.1.

Counsel finally referred to S. 161 of the ACJA, 2015 and the case of BOLAKALE VS STATE (2006) ALL FWLR P. 2168 at 2171 r.4 and urge the court to grant all the reliefs of the applicant.

As I have already stated elsewhere in this judgment the 1st and 2nd respondents jointly filed a preliminary objection and counter affidavit and 2 addresses one in support of the preliminary objection and the other in support of the counter affidavit.

In the preliminary objection the 2 respondents prayed the court to strike out or dismiss the case of the applicant for lack of jurisdiction. In the address learned counsel for the respondents formulated 2 issues for determination namely:-

1. Whether or not the 1st and 2nd respondents are proper parties and where the answer is in the negative whether the court can assume jurisdiction on the application.

2. Whether the affidavit of the applicant satisfies o.2 r.4 of the fundamental rights enforcement rules, 2009.

Arguing issue I counsel argued that for a court to assume jurisdiction, three conditions must be satisfied or met and he gave the conditions as follows:-

i. The subject matter of the issue, or
ii. The persons between whom the issue is joined
iii. The kind of reliefs sought.

Counsel referred to ATAGUBA & CO VS GURA NIG. LTD (2005) ALL FWLR (PT. 256)1219 and AKAMGBO OKADIGBO VS CHIDI (NO.1) (2015)10 NWLR (PT. 1466)171 at 200 PARA B to support his submission. However counsel did not elaborate this point.

Counsel further argued that the 1st and 2nd respondents are undoubtedly agents of the Federal Government of Nigeria and that when principal of an agent is disclosed it is the principal and not the agent that should be sued. Counsel therefore

submitted that the 1st and 2nd respondents are not proper parties in this case and that the proper party should have been the Federal Government of Nigeria who is their disclosed principal. Consequently counsel contended that since there is no proper party in the case, this court lacks jurisdiction to hear the case and therefore the case should be struck out. Counsel referred to LEVENTIS TECH. LTD VS PETRO JESSICA ENT. LTD (1992)2 NWLR (PT. 224)259 at 468.

On issue 2, counsel contended that the supporting affidavit of the applicant did not satisfy the provision of o.2 r.4 of the Fundamental Right Rules because the applicant was not the deponent and the deponent did not state why the applicant himself could not depose to the affidavit.

Also in their joint counter affidavit, the 1st and 2nd respondents controverted paragraph 3 of the supporting affidavit and further stated that the averments therein are fabrication and are twisted to suit the applicant. It was further deposed for the 1st and 2nd respondents by one Tanimu Sule a legal practitioner in

chamber J.B Ayofe & Partners in the relevant paragraphs as follows:-

4 (b) That when the 1st respondent received the applicant's application for the Enforcement of his Fundamental Human Rights, the 1st respondent instructed the 3 Division Legal Services Jos to investigate the allegation and claims of the applicant.

(c) That in the cause of investigation it was discovered that the applicant was arrested by the DSS (the Directorate of State Security) and the Civilian JTF. Sometimes in May, 2014 on the allegation that he was a Commander of Boko Haram Terrorist, coordinated suicide bombers within the North East of Nigeria.

(d) That the Directorate of State Security brought the Applicant to 33 Brigade Shadawanka, Bauchi for safe keeping sometimes on 26th May, 2014.

(e) That sometimes in July, 2014 or thereabout the DSS through his personnel came for the applicant and that was all the respondents knew of the applicant.

(f) That the Nigerian Army or any of its command never arrested, and or investigated the applicant.

(g) That the Directorate of State Security is a proper party and not the respondents.

(h) That the respondents have no constitutional power to direct anyone to be sent to prison.

(i) That applicant remand warrant to prison is not signed by the personnel of the 1st and 2nd respondents.

(J) That the applicant's application was misdirected to the 1st and 2nd respondents who know nothing of the applicant arrest and detention in prison.

In addition to his argument canvassed in the preliminary objection, learned counsel for the 1st and 2nd respondents also formulated another issue in his address in support of the

counter affidavit which is: Whether 2nd respondent is a juristic person. Counsel referred to the Armed Forces Act Cap. A20, LFN 2004 and contended that the 2nd respondent is not a juristic person capable of suing and being sued. He cited the cases of CARLEN VS UNIVERSITY OF JOS (1994)1 S.CNJ72 at 87 and REGISTERED TRUSTEES P.A.W VS REGISTERED TRUSTEES A.P.C.C. (2003) FWLR (PT. 150)1795 where it was held that non juristic person cannot sue or be sued. Counsel therefore urge the court to strike out the case against the 2nd respondent in accordance with the decision in MAERSK LINE VS ADDIDE INV. LTD (2002)11 NWLR (PT. 778) P.377 PARAS C – E. Counsel finally urged the court to strike out the names of the 1st and 2nd respondents because according to him they did not arrest the applicant and were not instrumental to his detention.

In their counter affidavit which was deposed to by one Obaseki Iliya of the DSS Headquarters, Abuja, it was deposed

for the 3rd and 4th respondents in the relevant paragraphs as follows:-

a. That paragraph 4(a),(d),(e),(g),(i),(m),(p) and 5(f) of the 1st and 2nd respondents counter affidavit are false and hereby denied.
b. That 3rd and 4th respondent did not arrest the applicant.
c. That applicant was never remanded at the prison custody at the behest of the 3rd & 4th respondents.
d. That applicant was never brought to the office of the 3rd and 4th respondents for any reason.
e. That the 3rd and 4th respondents have nothing to do with the applicant, his alleged detention is no fault of the 3rd and 4th respondent.

In the address learned counsel for the 3rd and 4th respondents formulated a sole issue for determination which is "Whether from the facts deposed to by the applicant there exist a reasonable cause of action against the 3rd and 4th respondents or whether the applicant from the substance of his claim, has

produced enough materials before this Hon. Court so as to enable the court grant his declaratory reliefs against the 3rd and 4th respondents.

Without much ado counsel answered the question in the negative. Giving reasons for the answer counsel referred to the applicant's affidavit and submitted that throughout all the averments therein the applicant did not complain against the 3rd and 4th respondents.

Alternatively, counsel contended that assuming without conceding that the 3rd and 4th respondents are responsible for the arrest and detention of the applicant, S.35 of the 1999 constitution permitted them to do so. Counsel submitted that by the provision of the section the rights of the applicant can be tempered with without necessarily violating his rights. He cited the cases of A.G. RIVERS STATE VS A.G. of ABIA STATE & 36 ORS (2011)8 NWLR (PT. 1248) at 172 PARAS F – H and ALAO VS AKANO (2005)11 NWLR (PT.935) at 173 PARA D – E to support his submission.

Finally counsel reiterated his submission that the 3rd and 4th respondents did not arrest nor investigate the applicant and he therefore urged the court to dismiss the case against his clients.

In his reply address learned counsel for the applicant referred to the arguments of the 1st and 2nd respondents and posited that it is beyond dispute that it was the agent of the 1st and 2nd respondents, one captain D.K. Atobatele of 33 Artillery Brigade, Shadawanka Barracks, Bauchi that took the applicant to prison facility. Counsel referred to page 2 of Exhibit A to support his submission. It is also the submission of counsel that the 1st and 2nd respondents are creation of statute as per Armed Forces Act Cap. A20 LFN 2004 which confer legal capacity on the Army.

On the issue whether the supporting affidavit complied with o.2 r.4 of the Fundamental Rights Rules, learned counsel for the applicant answered the question in the affirmative and made it clear that the applicant could not depose to the

affidavit personally because he was in prison custody and that the deponent has clearly stated this fact in the affidavit.

Finally applicant's counsel urged the court to dismiss the arguments of the respondents counsel in their entirety and grant all the reliefs of the applicant.

I have attentively read the written and oral submissions of all the counsel for the parties. Consequently, the facts of the case as distilled from their submissions are that sometime in the month of August, 2014 the applicant was arrested at wunti market, Bauchi, allegedly by the men of the Nigerian Army i.e the 1st defendant acting in concert with the officers of the 3rd respondents on the allegation of being a member of the dreaded Boko Haram terrorist group. The applicant was subsequently taken to Bauchi chief magistrate court 1 on 4th August, 2014 and the presiding chief magistrate remanded the applicant in Bauchi prison where he is currently languishing without formal arraignment before a court of competent jurisdiction. It was also deposed in the applicant's

supporting affidavit that no First Information Report or proof of evidence was filed against the applicant in the court before the chief magistrate remanded him in the prison.

Having relayed the submissions of counsel and also stated the facts of the case, in brief, the only issue that arises for determination in my view is the one formulated by the applicant counsel which is:

"Whether from the facts and circumstances of this application the applicant is entitled to the reliefs sought as contained on the face of the motion paper."

However before we determine this issue it is necessary for us to sort out the issue of jurisdiction which was raised in the 1st and 2nd respondent's notice of preliminary objection. This is in obedience to the decision of the appellate courts in plethora of cases which decided that whenever issue of jurisdiction is raised it should be determine first before the court can proceed. See

1. U.B.A. VS SKY POWER EXPRESS AIRWAYS LTD (2016)14 NWLR (PT. 1533)359
2. MUSE VS EFCC & 2 ORS (2015)2 NWLR (PT. 1473)237
3. ABIEC VS KANU (2013)13 NWLR (PT. 1370)69
4. TUKUR VS GOV'T. OF GONGOLA STATE (1989)4 NWLR (PT. 117)517.

The fulcrum of the submission of the learned for the 1st and 2nd respondents in the preliminary objection is that both respondents are not proper parties because they are agents of a disclosed principal which is the Federal Government of Nigeria and that the principal and not the agents should be sued. It is also their submission that the 2nd respondent is not a juristic person capable of suing and be sued.

I have gone through the entire arguments of the learned counsel for the 1st and 2nd respondents and I find that his arguments border on technicality and not on the substantial justice of the application. Counsel need to be properly informed that application for enforcement of fundamental

right cannot be defeated by technicality. This is because once the applicant provides evidence to show that his fundamental right is being violated, the court must act and do substantial justice in the case in order to uphold the provision of the constitution which is the grand norm of the country. See the case of DOMINIC PETER EKANEM VS ASST. INSPECTOR GENERAL OF POLICE (2008)5 NWLR (PT. 1079)97 at P. 100 r.2.

See also the case of OLUFEAGBA VS ABDULRAHMAN (2009)18 NWLR (PT. 1173)384 where the Supreme Court held that technicality should be avoided in our legal system so as to pave way for the current notion of substantial justice.

In the light of the above analysis therefore I dismiss the preliminary objection of the 1st and 2nd respondents for lack merit and further hold that the 1st and 2nd respondents are proper parties in this suit. I also hold that this court has jurisdiction to entertain this case.

Having assumed jurisdiction in the case, I now proceed to determine the fundamental issue formulated by the applicant's counsel for determination.

At the expense of repetition the issue is "whether from the facts and circumstances of this application the applicant is entitle to the reliefs sought as contained in the body of the motion papers". To determine this issue it is necessary to study the submission of counsel carefully with a view to knowing their positions.

The allegation of the applicant is that on or about 4th August, 2014 he was arrested by the officers and men of the 1st respondent in collaboration with the 3rd respondent and subsequently remanded in prison custody till date.

However in paragraph 4(f) and (h) of their counter affidavit, the 1st and 2nd respondents jointly denied arresting or investigating the applicant at any time. They also denied that the applicant was remanded at their behest. They further stated in their paragraph 4(d) that it was the officers of the 3rd

and 4th respondents that arrested the applicant and brought him to them for safe keeping.

Surprisingly however the 3rd and 4th respondents in their counter affidavit controverted the counter affidavit of the 1st and 2nd respondents and averred that they did not arrest the applicant let alone take him to the 1st respondent for safe keeping. They further deposed that they have nothing to do with the applicant and that the applicant was not remanded at their behest.

Having clearly brought out the facts of this case to the fore, I find as a fact that it was the men or officers of the 1st and 2nd respondents that arrested the applicant and got him remanded in prison custody without following the due process of law. In arriving at this conclusion I relied heavily on page 2 of the Remand Warrant which is exhibited by the applicant as Exhibit A because it clearly shows that it was the officers of the 1st and 2nd respondent, one Captain D.K. Atobatele, that took the applicant to prison on 4th August,

2014. This fact cannot be denied because document cannot tell lies as it is the best and most reliable piece of evidence. It is also abundantly clear to me that the applicant was arrested on mere suspicion of being a member of Boko Haram terrorist group without iota of evidence to support the arrest let alone prosecute him, and hence the buck-passing of blame for his arrest among the respondents. It is a settled principles of law that under S. 35 (1) of the constitution as amended and the decision of the Supreme court in plethora of cases the fundamental rights of a citizen of Nigeria can be curtailed by his arrest upon reasonable suspicion of his committing an offence. However there is a proviso under S.35 (4) of the same constitution which says if a citizen is arrested under sub S. 1 of S. 35 he must be arraigned before a court of competent jurisdiction within a reasonable time otherwise he should be released conditionally or unconditionally. See

1. AHMAD VS C.O.P (2012)9 NWLR (PT. 1304)104
2. ALI VS STATE (2012)10 NWLR (PT. 1309)589

3. OLAWOYE VS C.O.P. (2006)2 NWLR (PT. 965)427 at 430 see also AKILA VS DSS (Supra) cited by the applicant counsel.

In the instant case the detention of the applicant in prison custody for 2 years without a formal charge or even First Information Report is unjustifiable in law and I so hold.

Consequently, I agree with the applicant's counsel that the detention tantamounts to violation of the applicant's fundamental right as guaranteed by SS. 35 & 36 of the 1999 constitution as amended.

I would like to state here that I refuse to follow the decision of Bauchi State High Court of Justice (Corom. Mu'azu Abubakar, J.) which the 1st and 2nd respondents exhibited as Exhibit A because it is of persuasive authority to me and I am not bound to follow it. See the case of Prof. OLUTOLA VS UNIVERSITY OF ILORIN (2004)18 NWLR (PT. 905)416.

In the final analysis therefore I grant reliefs 1, 2 and 4 of the applicant's reliefs and also order the presiding Bauchi chief magistrate under S. 32(1) of the Administration of Criminal Justice Act 2015 to admit the applicant to bail on liberal terms pending his formal arraignment before a court of competent jurisdiction. I further order the respondents to arraign the applicant before a court of competent jurisdiction within 3 months from today (if they have a case against him) and failing which the chief magistrate shall discharge him unconditionally. This shall be my Judgment in this case.

Abubakar

M. Shitu Abubakar
Presiding Judge
30/05/2017