

## APPRAISING THE LEGALITY OF VIRTUAL COURTS AT THE OUTBREAK OF COVID -19 PANDEMIC

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### ABSTRACT

In this paper, the legality of virtual courts at the time of COVID 19 pandemic is examined in relation to the right to a fair trial. Hearings that are held in virtual or remote courts take place in locations other than the actual courtroom. Hearings are held over the phone, over videoconferencing, on closed-circuit television, and using a variety of other electronic tools. Before COVID 19 broke out, they were already in use. However, the COVID 19 pandemic epidemic forced a rise in the usage of virtual courts. This paper emphasized court rulings on the right to a fair trial as outlined in section 36 of the Nigerian Constitution of 1999, as amended, as they relate to the usage of virtual courts during the COVID 19 pandemic. Additionally, it highlighted the views of scholars on the subject. Virtual courts do have some drawbacks, such as the possibility that only the judge, the parties involved, and their attorneys

can attend sessions. However, given that the world is growing digital, its use during the COVID 19 epidemic is highly commendable and ought to continue. The courts have ruled that its use was legal during the COVID 19 pandemic.

**Key-Words:** Virtual courts, legality, fair hearing, outbreak of COVID 19 Pandemic, Nigeria.

## INTRODUCTION

The year 2019 saw an outbreak of the coronavirus illness in Wuhan, China<sup>i</sup>. The virus originated in China and quickly spread to practically every country in the world. Nigeria is not a unique case<sup>ii</sup>. The World Health Organization (WHO) declared a public health emergency of international concern on January 30, 2020, which is an unprecedented occurrence that was serious, unusual, or unexpected, had global repercussions, and necessitated prompt international response. The WHO classified it as a pandemic on March 11, 2020<sup>iii</sup>. At various levels, policies have been established to limit its spread, such as lockdown. An entire country being under lockdown has worse effects on its economy<sup>iv</sup>. The majority of African states, where the majority of people relied on daily earnings to exist, were worse off. For these group of people, complete lockdown equated to starvation to death. Aside from the detrimental effects of total lockdown on the economy, the courts were shut down for an initially undetermined amount of time<sup>v</sup>. The COVID 19 pandemic's arrival threw the entire world into a calamity of epic proportions. Many professions were forced by the pandemic to think of original and inventive ways to provide services. At this time, the pandemic-affected active sectors that appeared to have survived were those that have relied on ICT to stay afloat. Online commerce is still humming along in full force. In the middle of the pandemic, videoconferencing and other distant appearance methods were used by courts in developed nations to administer justice. This development might be a watershed moment for the legal system. The legal profession is quite traditional. Lockdown orders, restrictions on people's freedom of movement, and social segregation prevent the majority of courts from holding hearings. A couple of few courts that sat provided minimal services. In accordance with the COVID 19 regulations on social distance, the majority of the court employees have been told to refrain from entering the courtroom for the time being. The court procedures have been significantly harmed by this. This is the point at which usage of virtual hearing became useful.

The idea of an online hearing is not brand-new. Even before the internet, closed-circuit television (or "CCTV") allowed for remote appearances. During that period, a number of unique techniques for conducting a hearing remotely emerged<sup>vi</sup>. Consequently, it is first required to make a distinction between these various categories. A remote hearing is generally understood to be one that is held, at least in part, outside of the actual courtroom. Three kinds exist: paper hearings, visual hearings, and audio hearings<sup>vii</sup>. A hearing on paper is one that uses written submissions and evidence, usually affidavits, as opposed to an oral hearing, which is done over the phone or with audio-only equipment. Video hearings also use videoconferencing software. These hearings can also be divided into totally remote and semi-remote categories. A hearing that is wholly conducted with participants presenting from remote places is referred to as a fully remote hearing. The trial is still physically held in the courtroom during a semi-remote hearing, but one or more participants, typically a witness appear from a place outside the courtroom. Before COVID-19, all remote hearings were semi-remote, with the exception of a few small-scale pilots of fully remote hearings<sup>viii</sup>.

The *Pembroke Olive Downs Pty Ltd v Sunland Cattle Co Pty Ltd*<sup>ix</sup>, procedures progressed without a hitch despite having at its busiest point 14 external parties, 450 exhibits, and a concurrent evidence session with 5 experts taking place over 3 days in different locations. The Court was also able to facilitate a "virtual" site inspection utilizing helicopter footage, which supplied more information than the customary in-person inspection. It was conducted via Pexip videoconferencing and eFile document management<sup>x</sup>.

It is crucial to note that the Borno State High Court of Justice was the first to have virtual court session<sup>xi</sup>. Ali Mohammed was cleared of all charges of murder in the case of *State v. Ali Mohammed*<sup>xii</sup>, which involved Fadawu Umar J's verdict. The virtual court session, according to the chief judge of Borno State, is not merely a response by the judiciary to COVID-19. It makes it possible for state residents to access justice more easily<sup>xiii</sup>. The High Court of Lagos State held a virtual court session in the matter of case of *People of Lagos v Olalekan Hameed*<sup>xiv</sup>, in quick succession. <sup>xv</sup>. The defendant was found guilty of murder and given the death penalty. The verdict was read aloud using the Zoom app. It made it possible for Mojisola Dada J to oversee the virtual proceedings. The court ruled: "Olalekan Hameed, you are sentenced by this

court to be hanged by the neck until you are declared dead, and may the Lord have mercy on your soul. This served as the court's virtual decision.<sup>xvi</sup>

The paper in lieu of the aforementioned is divided into four connected sections, starting with the introduction. The publication of practice directives and the legality of virtual courts are highlighted in Part 2. According to the definition, a practice direction is a directive issued by the proper authority that specifies how a specific rule is to be followed, observed, or obeyed. According to court rulings, using virtual courts is acceptable. Briefly put, part 3 makes an attempt at a comparative study by stating how virtual courts are used in various countries. It can be inferred that its use is now widely accepted in these areas. Part 4 concludes that the use of virtual courts is legal, and it should be continued in the post-COVID 19 period.

### **ISSUANCE OF PRACTICE DIRECTIONS AND LEGALITY OF VIRTUAL COURTS IN HEARING CASES**

A practice directive is a form of law. It is a secondary tool to the court's rulings. It is "an instruction given by the proper authority outlining the way and manner in which a specific rule of court shall be complied with, observed, or obeyed," according to the Supreme Court<sup>xvii</sup>. In the case of *Nwankwo v Yar' Adua & Ors*<sup>xviii</sup>, *Nwankwo v. Yar' Adua & Ors*, the Supreme Court ruled that practice directions have legal authority. Parties must adhere to rigorous compliance<sup>xix</sup>. Even so, the Supreme Court acknowledged in *Nigerian Airways Authority v Okoro*<sup>xx</sup> that practice guidance is not equivalent to a statutory regulation. Practice directives won't have legal effect if they conflict with the constitution or the laws that permit them, according to the Supreme Court.<sup>xxi</sup> The cases show that the hierarchy of laws places guidelines and practice directives at the bottom.<sup>xxii</sup> The NJC/CIR/HOC/11631 circular was released on March 23, 2020, by Chief Justice of Nigeria (CJN) Ibrahim Tanko Muhammad. The main goal of the regulation was to guarantee a 2-week initial suspension of court proceedings, with the exception of urgent or time-sensitive situations. On April 6, 2020, His Lordship the CJN once more issued a directive, this time stopping court sessions indefinitely. However, His Lordship pointed out that when a case involved an urgent, crucial, or time-sensitive issue, courts were required to convene.

His Lordship the Chief Justice of Nigeria published a set of directions that Nigerian courts had to follow in order to control proceedings during the COVID 19 epidemic. The Guidelines included general rules to control court proceedings during the pandemic. The Guidelines' Paragraph E, which addressed hearings in virtual courts, stated in parts as follows:

### ***Remote Or Virtual Court Sitings***

1. As much as feasible during this COVID-19 time, physical courtroom sittings should be avoided. Only time-sensitive, urgent cases that cannot be considered by the court remotely or electronically may be the subject of such physical court sessions. It is the duty of heads of courts to identify the cases that fit within these predetermined parameters and to publish a list of such cases for the information of judges, litigants, attorneys, and the general public. The Head of Court may occasionally examine this list as necessary and appropriate. 2. The courts and Counsel should support and promote virtual court hearings (also known as "remote court hearings" or "online court hearings"); the courts should mandate such distant hearings for cases where taking any evidence is not necessary. The courts have the authority to deliver all judgments, orders, and directives during and through remote court sessions. 3. The courts should refrain from calling up contested cases that need the calling of evidence in a real courtroom setting at this time, unless they are exceptionally urgent and time-sensitive. 4. On a trial-run basis, the courts may gradually experiment with accepting witnesses and evidence electronically as they and the counsel grow skilled in virtual court sitting arrangements. Given that no one can predict with any degree of precision how long the COVID-19 pall will hang over humanity or when precisely a pharmaceutical cure or vaccine may be developed for the illness, this is crucial.

The main focus of the arguments made by those who are opposed to the practice of holding court hearings virtually is that the practice is in violation of sections 36(3) and (4) of the Federal Republic of Nigeria Constitution of 1999 (as amended), which state as follows: "(3) All court and tribunal proceedings pertaining to the matters stated in paragraph (1) of this section, as well as the delivery of the court's or tribunal's decisions, shall be held in public. (4) If the charge against a person is not dropped, that person has the right to a fair hearing in front of the public by a court or tribunal within a reasonable amount of time....."

In the case of *S&D Construction Company Ltd. v. Ayoku & Anor*<sup>xxiii</sup>, the Supreme Court emphasized the inalienable character of the right to a fair trial, ruling that "the right to a fair trial is a constitutional right inscribed in section 36 of the 1999 Constitution. No statute or agreement may waive this right. Everyone is guaranteed the right to a fair and public hearing before an independent and impartial tribunal established by law within a reasonable time in order to determine his or her civil rights and obligations. In the aforementioned case, the Apex Court went on to define the fundamental characteristics of a fair hearing as follows:

- i. That the court shall hear both sides on all pertinent grounds before making a decision that would be detrimental to any party in the case.
- ii. That everyone is given equal treatment, regard, and opportunity by the court or tribunal.
- iii. That everyone involved will be made aware of and have access to the location of the public hearing.
- iv. That justice must not only be done, but must clearly and unquestionably be perceived to have been done, taking into account all the circumstances in every significant case judgment. Additional information can be found in a release dated May 20, 2020 with the title: Virtual Court Hearing Does Not Pass The Test For Proceedings Conducted in Public: There is a need for constitutional amendment, according to arguments put forth by senior counsel Chief Adegboyega Awomolo, SAN, to refute the legality of virtual proceedings.<sup>xxiv</sup> He asserts that because the operative word in sections 36(3) and (4) of the Constitution is "must," the necessity for public hearings and decisions in cases is required in Nigeria. He insisted that the law is clear and that there is no space for discretion when the word "must" appears in a statute as an order to do or not to do something.

Further, the appellant's plea was entered in the trial judge's chambers in the case of *Edibo v. The State*<sup>xxv</sup>. The Supreme Court overturned his conviction on the grounds that the appellant's plea was taken in the judge's chambers. This is improper and fundamentally flawed, rendering the entire trial invalid. A judge's chambers are not a public location that permits the general public to enter and exit freely, according to the Supreme Court's justification for overturning

the lower court's ruling. The learned senior advocate also brought up the case of *Oviasu v. Oviasu*<sup>xxvi</sup>, in which the court held a hearing in his chambers to hear a petition for divorce. The trial court's ruling was overturned on appeal by the Supreme Court, which found that the petition hearing in the judge's chambers was fundamentally irregular because it wasn't held in the open. According to the Court, "public" is defined as "open to everyone without prejudice. He also brought up the court's ruling in the matter of *Nigeria-Arab Bank Limited v. Barri Engineering Nig.*<sup>xxvii</sup> The Supreme Court overturned the trial court's ruling based on its decision in *Oviasu case*, concluding that the delivering of the judgment in the judge's chambers caused an irregularity that called into question the legitimacy of the entire process. The learned silk came to the conclusion that virtual sessions do not satisfy the constitutional requirement of sitting in public based on the aforementioned rulings. He emphasized once more that the following must be present for virtual communication of any kind to occur: an appropriate technology device (such a smart phone), access to the internet, and registration with a virtual communication service provider. Furthermore, he asserted that only the judge, the parties involved in the case, and their attorneys would be permitted access to virtual court proceedings. He claimed that allowing anyone else access to virtual court proceedings would violate sections 36(3) and (4) of the Constitution because any "justice" that was rendered would be cloistered justice.

In fact, a close examination of the NJC Guidelines for remote hearing would show that they contained sufficient safeguards for the right to a public hearing. According to Rules 12 and 13 of the Guidelines, " In order to meet the conditions for holding a public hearing on matters:

- A. Court administrators must make sure that all virtual court hearings are streamed live so that the public can see them. This can be done through the court's official website, a public Uniform Resource Locator (url), or any other social media platform.
- B. The information about the virtual court sessions shall be published in the same way that the court typically publishes information about its regular sessions, provided that such publications specify the nature of the sessions, that is, remote proceedings rather than the typical in-person sittings and specify the website or social media channel where live streaming of the sessions would be available. Depending on the needs and demands of each judiciary, the Heads of Courts may publish additional rules and/or practice directives for the conduct of online court sessions. According to the aforementioned

provisions, you can log in to the court's website and access the live streaming portal to observe the proceedings as they happen virtually. The Nigerian Supreme Court has also approved the use of technology to improve the administration of justice. The Supreme Court made the following ruling in the matter of *C.M. & E.S. Ltd v. Pazan Services Nig. Ltd*<sup>xxviii</sup>. In the instant appeal, there is evidence that the court's registry sent a text message to the GSM numbers submitted by counsel to both parties advising them that the matter had been adjourned until March 15, 2016, and the message was received. I firmly believe that the court's registrar's distribution of hearing notice through text message in this day and age of pervasive information technology is appropriate and sufficient.

The Judiciary further affirmed its commitment to the development of a remote justice system while considering the legal challenge to the constitutionality of virtual hearings in *Attorney General of Lagos State v. Attorney General of the Federation & Anor*<sup>xxix</sup> and *Attorney General of Ekiti State v Attorney General of the Federation*<sup>xxx</sup>. In the first case, the plaintiff asked the Supreme Court to rule on the constitutionality of remote hearings of any kind by the Lagos State High Court (or any other courts in Nigeria) in order to hear and decide cases. These remote hearings could be conducted via Zoom, Microsoft Teams, WhatsApp, Skype, or any other audio-visual or video conference platform. The direction of the Minister of Justice and the Attorney General of the Federation to the heads of courts at the federal and state levels to implement virtual court sittings was contested by the plaintiff in the second case. When the plaintiffs realized from the Supreme Court's response that the cases were viewed as speculative and pre-emptive, they later withdrew both of them. However, the Supreme Court noted that "as of now virtual sitting is not unconstitutional" in its decision to dismiss the first case.<sup>xxxi</sup>

## **VIRTUAL COURTS HEARINGS IN OTHER JURISDICTIONS**

The European Court of Human Rights has held that participation by videoconferencing may generally be acceptable in criminal appellate hearings<sup>xxxii</sup> and hearings in civil matters<sup>xxxiii</sup>, if certain requirements and protection are met (a secure method of private communication between the affected person and his or her attorney being especially crucial in this regard). In fact, the UN Human Rights Council declared in a July 2020 resolution that was unanimously approved: urged States to make certain that their judicial systems have the resources and ability



needed to support the maintenance of functionality, accountability, transparency, and integrity, as well as to ensure due process and the continuity of judicial activities, including effective access to justice consistent with the right to a fair trial and other fundamental rights and freedoms, during extraordinary circumstances, such as the COVID-19 pandemic and other crisis situations.<sup>xxxiv</sup> To begin with, whenever all parties freely and voluntarily consent to the use of videoconferencing in any given court hearing, it would appear that neither international human rights law nor standards of the rule of law would be raised by such usage in such circumstances. In hearings other than those for which international law and standards contemplate a right of physical presence, the non-consensual imposition of videoconferencing on a judicial hearing may be permitted if it is based in law, non-discriminatory, time-limited, and demonstrably necessary and proportionate in the local circumstances of the COVID-19 pandemic and the unique characteristics of the individual case, and is implemented with safeguards to address the other fair hearing rights<sup>xxxv</sup>. Any decision to implement a system for non-consensual imposition of videoconferencing for judicial proceedings, as well as decisions to use it in specific cases, should be within the exclusive jurisdiction and operational oversight of the judiciary itself and not persons or entities within the executive branch of government in order to ensure the independence of the judiciary and avoid issues with perceived security of communications with counsel.

Furthermore, *The Attorney-General No. 2 v. Tsatsu Tsikata (No.2)*<sup>xxxvi</sup> case in Ghana was the first to integrate technology into the court system (No.2) The Fast-Track High Court of Ghana (FTC) is a high court with computers, audio recording, and case management facilities designed for speedy and effective trial. The Republic of Ghana's then-Chief Justice established it<sup>xxxvii</sup>. The constitutionality of the FTC was a concern for Ghana's Supreme Court in 2002<sup>xxxviii</sup>. The main issue was that no court's designation as FTC was recognized by Ghana's Constitution, which is found in Article 126 (1). The FTC was initially declared unconstitutional by the Supreme Court in a 5-4 majority judgment. On June 26, 2002, the Supreme Court overturned its prior ruling and ruled by a 6-5 majority that the FTC is constitutional. The FTC is merely a division of the high court, and the chief justice has the authority to establish a division of the court of appeal or high court even without legislative endorsement or consent, which is the firm foundation for the decision. It can be safely assumed that virtual court sessions can be based on the 2002 decision without the need for additional legislative action or judicial interpretation

because virtual court sessions fundamentally depend on technology and the Supreme Court of Ghana already upheld, albeit implicitly, the introduction of technology to the judicial system as constitutional.

For instance, civil court proceedings are being conducted remotely in Wales and England of the UK in accordance with the "Protocol Regarding Remote Hearings" issued on March 20, 2020<sup>xxxix</sup>. The Supreme Court of the UK decided to conduct all hearings and decision-making via video conference until further notice. The Delhi High Court in India delivered its first ruling via videoconference on May 6, 2020. It resolved a writ petition stemming from the fact that the Central Government's compliance advisory to wear a mask in Covid-19 situations had been broken. The petition was rejected, and the court ordered that the ruling be posted on its website within 24 hours and sent by email to the parties' attorneys<sup>xl</sup>. The area surrounding the intersection of law and technology is expanding. To meet the demands of an IT-based digital society, the law should take on new dimensions and play a significant function similar to a live organ<sup>xli</sup>. Virtual courts won't have a courtroom or set court times, but they will have an environment where lawyers, judges, parties, and witnesses can meet and exchange documents using video conferencing technology, electronic document interchange, and digital signatures<sup>xlii</sup>. By using technological advancements like Skype and FaceTime, as well as other methods like discussions and dialogues, it is now possible to exchange documents using the existing legal tools of discoveries, interrogatories, and admissions while also having one-on-one conversations with multiple stakeholders at once<sup>xliii</sup>. The best example of an e-court system is found in Singapore, where the court is a creative synthesis of numerous ideas, tools, and services, including the eChambers, the Electronic Filing System, Technology Courts, LawNet, and Justice Online. Imagine entering a courtroom carrying an electronic notebook rather than stacks of papers, affidavits, bundles of papers, and volumes of authority<sup>xliv</sup>.

To end the backlog of cases in our courts, countries like the UK, Singapore, India, etc. are currently successfully resolving cases by utilizing technology that could be advantageous to other procedures like ADR, negotiation, mediation, arbitration, etc<sup>xlv</sup>. Our crowded courtrooms lack a number of modern amenities including internet connection, video conferencing management, an electronic cause list, an online submission system, and a modern database, which results in case delays, mismanagement, corruption, and excessive costs<sup>xlvi</sup>. When all

other options have failed, persons whose rights have been infringed turn to the courts as a final resort<sup>xlvii</sup>. Effective justice, specifically predictability in judicial operations and services, swift case determination, and service provision to those who need it most, are among the justice sector's increasing concerns<sup>xlviii</sup>. It is difficult for the poor and vulnerable groups to access justice due to costs, corruption in all facets of the system, and intervention from the political and more powerful segments of society. The lack of swift and effective case dispositions is one significant barrier that many stakeholders have noted.<sup>xlix</sup> In comparison to the Executive and the Legislative, the Judiciary has fallen short of expectations. Why not digitalize the legal system if all other government departments are doing so? <sup>1</sup>. Additionally, if done online using a digitalized system, the case filing and management procedure will become more open and automatic, limiting the chance of individual negative effects on a single case<sup>li</sup>.

The United States Judicial Conference declared on March 31, 2020, that it had "temporarily permitted the use of video and teleconferencing for some criminal cases and access via teleconferencing for civil processes during the COVID-19 national emergency." <sup>lii</sup>. The US Supreme Court announced in April 2020 that it will "hear oral arguments by telephone conference on May 4, 5, 6, 11, 12, and 13 in a limited number of previously postponed matters."<sup>liii</sup>." CSPAN streamed the arguments' audio, but no footage was made available<sup>liv</sup>. Trial courts in New York initially concentrated on using remote techniques to handle "arraignments, bail petitions, orders of protection, and other vital and emergency criminal, family, and civil proceedings."<sup>lv</sup>. However, by the end of April 2020, New York State Courts had increased the scope of that initiative to cover ongoing tort, asbestos, commercial, matrimonial, trusts and estates, felony, family, and other cases<sup>lvi</sup>. Many courts across the nation have used widely popular videoconferencing technologies in the early weeks of transferring hearings online. By the end of April, GoToMeeting, Microsoft Teams, New York, Oregon, and Puerto Rico, WebEx, Colorado, New Hampshire, Oregon, Pennsylvania, Tennessee, Utah, and Virginia, Oregon and Wyoming, and Alabama, Michigan, New Jersey, Tennessee, and Texas were the other options<sup>lvii</sup>. When using technology in the courtroom, the legal community must work to ensure justice to all parties and the integrity of the procedure. An AI-powered piece of software has been used by Palm Beach County, Florida, to categorize and docket e-filed documents. Over time, as their use of the programme has grown, the system is currently docketing about 12,000 filings every week.<sup>lviii</sup> Courts in Michigan have begun employing

Matterhorn, a cloud-based platform, to provide online dispute resolution for traffic and civil violations, warrant resolution, for small claims cases, to determine financial capability, and for domestic/family issues<sup>lix</sup>. In Jefferson Parish, Louisiana, courts use Documate to assist remote plea entry and a text-based chatbot supported by LawDroid to check in on probationers.<sup>lx</sup>

However, some demerits of virtual court hearings are that the quality of the attorney-client relationship may be significantly lowered if communication is done remotely from the start since in-person interactions help to create the trust and rapport required for effective support. Both nonverbal indications and the ability to properly assess a client's mental and emotional state in person are essential for efficient communication. However, neither party is able to do so during a proceeding<sup>lxi</sup>. It can be challenging for many courts to provide remote hearings with the same level of availability to the public as in-person sessions in a public courthouse.

## CONCLUSION

The courts gave rulings that it was acceptable to employ virtual courts during the COVID 19 epidemic. Given that the world is becoming more digital and technologically oriented in the post-COVID era, its use should be continued and promoted. In the post-COVID 19 era, several countries' judiciaries, like those of the United States, Singapore, and others, are still employing virtual courts. Nigeria should adopt this model and do the same.

## ENDNOTES

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