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Emerging Challenges In The Prosecution Of Terrorism Offences In Nigeria

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ABSTRACT
The aim of this paper is to consider prosecutorial duties and challenges in the prosecution of various aspects of terrorism and related offences such as money laundering. In doing this, the paper consider several decisions of our appellate courts and other jurisdictions[1]. Although there are guiding regulations to assist the prosecutor in the effective prosecution of terrorism and other related offences, there is need for further training, funding, proper investigation and manpower development on the part of the prosecutors, judges and other stakeholders in the administration of criminal justice. While the challenges in defining terrorism under its statutory definition in Nigeria as well as other jurisdiction shall be critically examined to expose how it affects prosecution of cases in Nigeria. The statutory jurisdiction to try terrorism offences such as the practice directions of the court shall be looked into. The ingredients of the offence evaluates whether a conviction will depend on the statute creating the offence and the constitutional safeguard to the trial of suspects including witness protection can also be viewed. The decisions of court in Nigeria on terrorism offences will be examined to bring out the challenges of effective prosecution, manpower, technical, and how to overcome this ugly trend shall be fully x-rayed in this paper.

1. INTRODUCTION

The courts play a crucial role in the fight against terrorism and terrorism financing. Terrorist when arrested ought to be brought before a court of law to determine the guilt or innocence of the suspect within a short time. This is based on the constitutional safeguard provided by section 36(5) of the constitution of the Federal Republic of Nigeria, 1999 (as amended), that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty. As against this constitutional safeguard is the need to prosecute suspects within the confines of the rule of law and secure conviction otherwise, an otherwise guilty defendant will go scot free. How can prosecutors effectively prosecute terrorism offences within the law and ethnics of proper persecution?

2. Definition of terrorism and problem of prosecution

There is no universal definition of Terrorism. The question of the definition of terrorism has always been the subject of controversy amongst academic writers due to lack of uniformity in perception and statutory definition[2]. This is based on the popular cliché "One man's terrorist is another man's freedom fighter".

[1] See the Federal High Court practices Direction, 2013, Court of Appeal Practice Directions 2013 and the Supreme Court Directions 2013

[2] *Kent roach: "The Case of defining Terrorism with Restraint and without Reference to political or Religion Motive" in law and liberty in the War of Terror eds. Andrew Lynch, Edina Macdonald, George Williams (Syndey: The Federation Press 2007) 39-49; Don John Omale, "Terrorism and counter Terrorism in Nigeria; Theoretical Paradigms and lessons for Public Policy" Canadian Social Science 9 no.3 (2013)96-103; Reuven Young, 'Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Definitions in Domestic Legislation' B.C int. & Comparative law Review 29 no. 23, (2006):*

While some statute attempt to define 'terrorism' others mention act of terrorism[3]. While there is a basic consensus that terrorism has the element of criminal violence intended to intimidate population or coerce a government or international organization, some of the laws have added an ulterior intention to purse a political, religious, or ideological cause[4]. Most national laws have criminalized certain acts which come within 'terrorists acts' but in the domestic implementation of international conventions, certain offences such as kidnapping, murder have been elevated to terrorism[5]. Similarly certain international conventions have been incorporated into domestic laws on terrorism[6]. According to Ben Saul[7], it was only after the terrorist attacks on the United States of America on September 11, 2001('9/11') that most States considered enacting terrorism offences, spurred on by the perceived threat of global religious terrorism, obligations imposed by the UN Security Council, gaps in existing criminal liabilities and police powers.

The search for a legal definition of terrorism is contextually important because only an offence that meets such a definition that can be so punished. According to Honourable Justice Alaba Omolaye-Ajileye, the definition establishes the threshold of terrorism[8]. Due to the legal consequences of describing someone as a terrorist or a body as a terrorist organization, there is need to have clear-cut definition of terrorism. Can we limit definition of terrorism only to non-governmental groups or individuals? Can a government or its agencies such as police or army be labelled terrorists? At what stage will a popular student agitation turn from mere student unionism to terrorism? Or agitation against removal of oil subsidy resulting in damage to government property[9]. The danger of absence of an acceptable definition in domestic law is that the state may criminalize any act or omission of persons or organizations as terrorism. It will therefore be appreciated that unless a clear-cut definition of terrorism is made, the legal framework for the war against terrorism may be political and subjective. To what extent can there be a clear-cut definition of terrorism devoid of political or religious connotation?

Where there is no clear cut definition of terrorism, it becomes impossible to decide whether to prosecute for ordinary cases of murder, armed robbery, breach of the peace or other offences not related to terrorism but labelled as terrorism. A typical example is section 46 of the Economic and Financial Crimes Commission (Establishment) Act, 2004[10] (EFCC Act) which defines terrorism as:

(a) any act which is a violation of the Criminal Code or the Penal code and which may endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or property, natural resources, environment or cultural heritage and is calculated or intended to –

i. intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act or to abandon a particular standpoint, or to act according o certain principles or

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23; Keiran Hardy & George Williams, 'What is Terrorism? Assessing Domestic Legal Definitions' UCLA Int. L & For Aff, 16 (2011) 77, Geoffery Levit, Is "Terrorism" Worth Defining? Ohio. N.U.L Rev. Volume 13 (1986) 97; Clive Walker, 'The Legal Definitions of Terrorism in United Kingdom and Beyond' (2007) Public Law 331.

[3] *See Article 1 (3), OAU Convention on the prevention and combating of Terrorism, 1999, section 2, The Terrorism (United Nations Measures) Order 2001, Article, International Convention for the Suppression of the Financing of Terrorism.*

[4] *S.2, The terrorism (United Nations Measures) Order, 2001, s. 5(2), Terrorism Suppression Act, 2002 (New Zealand)*

[5] See ss. 1, 3, Terrorism (Prevention) Act 2011 (as amended), sections 401, 402 Criminal Law, Lagos State 2015, Lagos State Anti-Kidnapping Law, 2017.

[6] International Convection for the Suppression of Terrorist Bombings, International Convection against the taking of Hostages, international Convection for the Suppression of the Financing of Terrorism.

[7] Ben Saul, 'Defining Terrorism: A Conceptual Minefield' *Legal Studies Research Paper No. 15/84* assessed at http://ssm.com/abstract=2664402

[8] Legal Framework for the prevention of Terrorism in Nigeria' paper presented at the 2015 Law Week programme of the Nigerian Bar Association, Lokoja Branch on Thursday 21st May, 2015.

[9] See: Ben Golder and George Williams "What is Terrorism"? Problems of Legal Definition, *UNSW Law Journal 27(2) 270.*

[10] See s. 40 which is similar to Art 1(3) of the OAU Convention on the Prevention and Combating of Terrorism, 1999. See also the Prevention of Terrorism Act, 2002 of Tanzania, Sections 4, 5, 6, 7, 8, 9 and 10 identifies « terrorist acts ». section 12 deals with 'International Terrorism'.

ii. disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or

iii. create general insurrection in a state;

(b) any promotion, sponsorship of, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organization or procurement of any person, with the intent to commit any act referred to in paragraph(a)(i), (ii) and (iii) An examination of the above provision especially section 46(a) shows that any act which is a violation of the Criminal Code or Penal Code can be terrorism in so far as it:

(a) causes serious injury or death to any person or group of persons or

(b) causes or may cause damage to public property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerce or induce any segment thereof, to do or abstain from doing any act or to adopt or abandon a particular standpoint, or to act according to certain principles, or disrupt any public service, the delivery of any essential service to the public or to create a public emergency, or create general insurrection in a state.

It is submitted that the provision can be divided into harm to individuals and harm to public interest and properties. The first part of the definition under the EFCC Act can be accommodated under the Criminal Code[11] or the penal code[12] Even damage to public interests and properties are already subject of punishment in extant criminal legislation without criminalizing them as terrorism[13].The dilemma for a prosecutor is whether to charge under the extant criminal legislation or charge under the EFCC Act.

This confusion is further exacerbated by lack of definition in Terrorism (prevention) Act 2011. The Act in section 1(1) prohibits acts of terrorism and section 1 (2) itemizes what constitutes acts of terrorism without attempting to define terrorism[14].

Acts of terrorism in this law can be classified into;

(a) Acts against the government or international organization with the aim of compelling it to do or refrain from doing an act.

(b) Intimidation whether of the government or international organization.

(c) Causing serious bodily harm or death.

(d) Destruction of public facilities or disruption of social facilities.

(e) Kidnapping

(f) Acts omission which constitutes an offence within the scope of a counter terrorism protocol and conventions ratified by Nigeria.

The unwieldy acts of terrorism will certainly pose a challenge to prosecuting terrorism offence under the Act. As argued above, some of the offence can be prosecuted under existing legislation[15]. Where any act

[11] Sections 325,319 Criminal Code Act; 223,229 Criminal Law, Lagos State 2015

[12] Sections 221,224 Penal Code

[13] Sections 76,77,451 Criminal Code Act; 351 Criminal Law, Lagos State 2015

[14] It gives a broad definition of terrorism to include acts which ma seriously harm or damage a country or an international organization; is intended or can reasonably be regarded as having been intended to- *(i)*unduly compel a government or international organization to perform or abstain from performing any act; *(ii)*seriously intimidate a population; *(iii)*seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization; or *(iv)*otherwise influence such government or international organization by intimidation or coercion; and *(c)* involves or causes, as the case may be- *(i)*an attack upon a person's life which may cause serious bodily harm or death; *(ii)*kidnapping of a person; *(iii)*destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on a continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; *(iv)*the seizure of an aircraft, ship or other means of public or goods transport and diversion or the use of such means of transportation for any of the purposes in etc

[15]For instance causing serious bodily harm or death can be tried under the criminal code or penal code. Kidnapping can be tried under the Criminal Law of Lagos, section 269, Willful Damage to property, section 348 or endangering vessel sections 253,254,256. See also the recent Lagos State Anti-Kidnapping Law, 2017 which prescribes death penalty for kidnapping if death results from the act. Pipeline vandalism, section 7, willful destruction of public property, section 3, Arson of public property, section 3, Arson of public building, ship, aircraft, railway track etc, section 4, unlawful destruction of highways, section 6 etc can all be tried under the Miscellaneous Offences Act

or omission also constitutes an offence within the scope of counter terrorism protocol and convention, it can also be tried in Nigeria as long as it has been ratified by Nigeria[16]. The dilemma for the prosecutor therefore is to determine under which legislation to try a suspect. This brings to the fore the points made by Andrew Chukwuemerie as to dual or double criminality[17]. This result is that in the exercise of prosecutorial discretion, other considerations will come into play. The prosecutor may decide to charge a pipeline vandal under the Terrorism Act rather than the, Miscellaneous Offences Act[18] or a kidnapper under the Act rather than the Criminal Code Act or Penal code[19], Criminal Law or the Anti-Kidnapping Law. Prosecutorial discretion could be colored by political considerations. While a suspect in the ruling party may be arraigned for pipeline vandalism or acts likely to cause breach of the peace or murder or culpable homicide punishable with death under the extant criminal legislation, the suspect from the opposition party will be charged under the Terrorism Act. There is need to curb this wrong use of the prosecutorial discretion[20] to avoid political victimization.

A curious provision is in section 3 of the Terrorism (Prevention) (Amendment) Act 2013. It criminalizes an attack on an 'internationally protected person' without defining who is an internationally protected person. The offences created by the provision are murder, kidnap, attack on the person or liberty or carries out a violent attack on the official premises, private accommodation or means of transport of such a person in a manner likely to endanger his person or liberty[21]. It is therefore submitted that these are offences that can be tried under existing legislation. The fact that a person is regarded as an 'internationally protected person' will not make a difference as long as a crime is committed against a person within Nigeria. Stiffer punishment will not be an argument for creating this offence under the Terrorism Act. The offences under the section 3 carry life imprisonment whereas a case of murder or culpable homicide punishable with death under the criminal code or penal code respectively carries a death penalty. It is our position that the amendment to the Terrorism Act does not assist the prosecutor in any way. It suffers from the same criticism as that of the EFCC Act and the Terrorism (Prevention) Act 2011.

3. Statutory jurisdiction to try terrorism offences.

The Federal High Court located in any part of Nigeria has exclusive jurisdiction to try terrorism and related offences regardless of where the offence was committed[22]. In order to expeditiously prosecute terrorism offences, the various courts have enacted practice directions[23].The Federal High Court Practice Directions 2013[24].Was enacted with the objective of establishing a system of case management that will provide for the fair and impartial administration of criminal cases and the rules made under the practice direction. It is also to eliminate unnecessary delay and expense for the parties involved in the criminal justice system[25].

Other objectives of the practice direction include:

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[16] See section 12, Constitution of the Federal Republic of Nigeria, 1999 (as amended)

[17] See A. I. Chukwuemerie, 'International Legal War on the Financing of Terrorism': A comparison of Nigeria, UK, US and Canadian Laws' *Journal of Money Laundering Control* Vol. 9 No.1, 2006, 71, 74, and 75

[18] Cap M17 LFN 2004, section 1(7)

[19] See section 364 Criminal Code and sections 272 and 273 of the Penal Code

[20] An attempt has been made in the Code of Conduct and prosecutorial guidelines for Federal prosecutors, Federal Ministry of Justice (2013)

[21]See section 3(a)(b). The Terrorism (Prevention) (Amendment) Act 2013, does not contain the definition of internally protected person or terrorism. It only defines acts of terrorism.

[22] Section 32(1). This provision has taken care of the situation that arose in *Ibori v Federal Republic of Nigeria (2009)3 NWLR (pt. 1128) 94* where the supreme court held that although the Feral High Court has jurisdiction throughout Nigeria, territorial jurisdiction is still recognized by virtue of section 45 of the federal High Court Act. See Nasiru Tijani,' The Territorial Jurisdiction of the Federal High Court in Criminals Trials-One of Form or Substance?' (2015) Vol.7 The Justice Journal 1

[23] See the Federal High Court Practice Directions 2013, Court of Appeal Practice Directions 2013, Supreme Court Practice Directions 2013, Practice Direction by the Chief judge of the Federal Capital Territory dated July 1, 2014.

[24] Emphasis is laid on the Federal High Court because of its original criminal jurisdiction on Terrorism and related offences.

[25] This is a common feature of all the practice Directions. See labaran Shuaibu, 'Prosecuting Kidnapping Cases in Nigeria' paper presented at the 9th Africa Prosecutors Association Annual General Meeting and Conference held in Kinshasa, Democratic Republic of Congo on 23rd October, 2014

(a) Ensure that at trails, parties focus on matters which are genuinely in issue;
(b) Minimize the time spent at trails dealing with interlocutory matters;
(c) Ensure that possibilities of settlement are explored before the parties go into hearing.
(d) Ensure that trails are not stalled by unpreparedness of the Court or the parties and that the case is fully ready for trail before hearing dates are agreed; and
(e) Minimize undue adjournments and delay.

To achieve the above objective, the Practice direction made it an obligation when filing a charge to ensure the following;

a. The complaint shall not file a charge unless it is accompanied by an affidavit stating that all investigations into the matter had been concluded and in the opinion of the prosecutor, a *prima facie* case exists against the accused person;
b. The prosecutor must ensure that the accused is produced in court on the date of arraignment;
c. Where there is a preliminary objection challenging the jurisdiction of the court to hear a case before it, the court shall ensure that the ruling is delivered within 14 days;
d. No party may serve a notice of an application on another party on the date scheduled for hearing;
e. In furtherance of the need to ensure speedy dispensation of justice, Electronic mail and other electronic means may be employed by the court in order to inform counsel of urgent court and case event.

With the practice directions, the prosecution of terrorism offences is given priority by the court and the prosecutor has the responsibility to assist in ensuring that there is quick dispensation of justice by his preparedness and minimizing delays and unnecessary adjournments.

According to Labaran Shuaibu[26], a classic example of the speed by which terrorism cases can be speedily tried is the case of *Federal Republic of Nigeria v Mustapha Fawaz & Others*[27] . The case commenced on 29th July, 2013 with the prosecution calling ten witnesses and tendering 27 Exhibits. The prosecution closed its case 3 days later while the defence opened on 2nd November, 2013. Dissatisfied with parts of the judgment of the trial court, the 3rd defendant appealed to the Court of Appeal Abuja Division[28] and the Appeal was heard on 12th June, 2014 and Judgment was delivered on 18th July, 2014. The matter is pending at the Supreme Court[29].

In the case of *Charles Ododo v Peoples Democratic Party*[30] , the Supreme Court in considered the guiding principles of the Supreme Court Practice Direction 2013 especially section 2(a) and held that terrorism and other mentioned offences[31] shall be given priority in the preparation and publication of the weekly cause list.

4. Power of prosecuting of terrorism offences

Sections 174 and 211 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) confer the Federal Attorney General and the State Attorney General respectively with the powers to institute and undertake criminal proceedings in all courts except a court martial. These powers can be exercised by the Attorney General himself or through officers of his Department. Private Legal Practitioners can also exercise this power provided they obtain the fiat of the Attorney General[32].

However, with respect to prosecution of terrorism offences, only the Attorney General of the Federation has the legal authority to prosecute. Section 2 of the Terrorism (Prevention) (Amendment) Act 2013 provides that the Attorney General of the Federation is the authority for the effective implementation and administration of the Act (Terrorism (Prevention) Act) and shall strengthen and enhance the existing framework to ensure the effective prosecution of terrorism matters. It is submitted that nothing stops the Attorney General from delegating the power to institute and undertake criminal prosecution on his behalf

[26] Labaran Shuaibu, "Prosecuting Kidnapping Cases in Nigeria " ibid; see also Mohammed Bello Adoke, 'Prosecuting Terrorism Offences and Crimes against
[27] *FHC/ABJ/CR/112/2013 (Unreported)*
[28] *Appeal No: CA/A/197C/2014*
[29] *Appeal No: SC.418/2014.*
[30] *(2015) LPELER 24738*
[31] Offences such as Rape, Kidnapping, Corruption, Money Laundering and Human Trafficking.
[32] *Federal Republic of Nigeria v Adwunmi (2007) 10 NWLR (pt. 1043) 399*

to a state Attorney General or private legal practitioner[33]. In the case of *David Amadi v Attorney General of Imo State*[34] the Supreme Court held that the Attorney General can delegate the power to initiate and undertake criminal proceedings to officers of his department and in *Olusola Abubakar Saraki v Federal Republic of Nigeria*[35], held that it can even be delegated to private legal practitioners. In the recent case of Ibrahim *Shehu Shema & Ors v Federal Republic of Nigeria*[36] the Supreme Court restated the principle of powers of delegation of the people of the Attorney General under section 211 of the 1999 Constitution.

5. Ingredients of the offence of terrorism and decisions of courts.

A critical aspect of the offence of terrorism which is said to distinguish it from other offences of similar nature is the impact of the force used which is not directed at a specific person but is meant to create intense fear and anxiety, both physical and psychological in the minds of members of the public which has the effect of coercing, forcing, intimidating them to do or abstain from doing any act or to adopt or abandon a particular view, policy or position to act according to certain principles. This was the decision of the Supreme Court in the case of *Musa Abdulmumini v Federal Republic of Nigeria*[37]. In the case, the appellant was one of several persons arraigned before and tried at the Federal High Court Jos, for conspiracy to commit terrorist acts PURNISHABLE UNDER Section 5 of the Criminal Code Act Cap. C38 LFN 2004; illegal possession of firearms punishable under Section 5 of the same Criminal Code Act, and the commission of terrorist acts punishable under Section 15(2) of the Economic and Financial Crimes Commission (Establishment) Act, 2004. The alleged criminal acts were committed on or before the 8th day of March, 2008 in and around Jos and its environs, including Mangu Local Government Area of Plateau State. The appellant featured in the first and third counts, which respectively accused him and others of conspiracy to commit terrorist acts and committing terrorist acts. In these two charges, he was the 7th and 9th accused. All the accused persons, including the appellant, were convicted for the two offences alleged in the 1st and 3rd charges. They were each sentenced to 2 years and 10 years imprisonment for committing the said offences of criminal conspiracy to commit terrorist acts and the commission of terrorist acts respectively. The appellant appealed his conviction and sentence to the Court of Appeal sitting at Jos. He was unsuccessful. The said Lower Court dismissed his appeal and affirmed the conviction and sentences imposed on him by the trial Federal High Court. On further appeal to the Supreme Court, the concurrent findings of the lower courts that the conduct of the appellant and his group while armed with dangerous weapons and going about menacingly in the area was calculated to instill fear in the members of the public and intimidate them within the meaning of terrorism in Section 46 of the EFCC Act38[38].

In the case of *Musa Abdulmumini v Federal Republic of Nigeria*, the defendant relied on the defense of self defence and private property under Section 59 of the Penal code Law of Plateau State[39]. While the a court agreed that the appellant was entitled to and in fact the court was bound to consider all defences available to the defenece[40], the question was wether a defence under a state law could avail a defendant when charged for a federal offence. The Supreme Court stated a principle of law that the appellant cannot, ordinarily resort to the provisions of a State law and invoke the defence therein to plead a statutory

[33] *See Serah Ekundayo Ezekiel v Attorney general of the Federation (2017) LPELER 41908 SC, Olusola Abubakar Saraki v Federal Republic of Nigeria (2016) LPELR 40013, Ibrahim Shehu Shema v Federal Republic of Nigeria (2018) LPELR 43723, Okon Bassey Ebe v Commissionerof Police (2008) 4 NWLR (pt. 1076) 189, Marcel Nnakwe v The State (2013) LPELR 20941, Godwin Pius v The State (2016) LPELR 40657*

[34] *(2017) LPELR 42013*

[35] *(2016) LPELR 40013*

[36] *(2018) LPELR 43723 SC*

[37] 2017) *LPELR 43726 Sc ; see also Adamu Alli Karumi v Federal Republic of Nigeria (2016) LPELR 40473*

[38] The definition of terrorism in section 46 of the EFCC Act includes any act which is a violation of the Criminal Code or Penal Code but intended to endanger the life, physical integrity or freedom of, or cause serious injury or death to, any person, or number or group or persons or causes or may cause damage to public property, natural resources, environmental or cultural heritage and is calculated or intended to intimidate, put in fear, force, coerse or induce any government body or institution, etc.

[39] The section provides that 'Nothing is an offence which is done in the lawful exercise of the right of private defence'

[40] See Ahmed v the State (1999) 7 NWLR (pt. 612) 641 at 681, the supreme court restated the principle that a trial court has the duty to consider every defence open to an accused on the evidence whether or not the accused person specifically puts up such a defence.

defence against a federal offence for which he stands on trial. While affirming this principle, the court agreed with counsel for the appellant that insofar as section 46(a) of the EFCC Act defines terrorism to incorporate violations of the criminal code and penal code, the defences in those statuses is also incorporated by implication. While we agree with the Supreme Court on the incorporation of defences in other statutes, it is submitted that this is a challenge to prosecutors who prosecute under the EFCC Act for terrorism. They have to constantly look into those other statutes in preparing the charge rather than concentrating on the Act alone.

The case of *Adamu v Karumi v Federal republic of Nigeria*[41] is significant on the interpretation of the commencement date of Terrorism (Prevention) (Amendment) Act 2013. In this case, the Appellant with three others were arraigned before the trial court for the offences of conspiracy to commit felony i.e. terrorism, concealing information about acts of terrorism, committing acts preparatory to or in furtherance of acts of terrorism and being in possession of prohibited firearms and ammunition. Initially about 17 persons were arraigned but in the course of the trail, 13 others were discharged pursuant to a *rolle prosequi* filed by the Attorney General of Lagos State and trial proceeded against 4 of them including the Appellant. The Respondent called six witnesses and tendered 34 exhibits in its case against the Appellant while the Appellant testified for himself. At the end of the trail, the Court found the Appellant guilty, convicted and sentenced him, thus the appeal to the Court of Appeal. One of the grounds of appeal was that the trial judge erred in convicting the appellant under the Terrorism (Prevention) (Amendment) Act 2013. That the commencement date is not indicated on the face of the Terrorism Act, 2013 and the omission would make the commencement date the 24th day of May, 2013, the date the book Haram Sect was proscribed as a terrorist organization and brought to the notice of the public/the Appellant who is to be affected by it. Consequently, that the Act cannot be applicable because the Appellant was arrested on the 21st of March, 2013 before the Act came into effect. Furthermore, that the trial judge ought not to have relied on the Interpretation Act to find that the commencement date can begin from the date the Act was signed into law by the President because such reasoning can only be applicable to civil legislation conferring benefit and not a criminal legislation like the Terrorism (Prevention) (Amendment) Act which has heavy penalties. The Court of Appeal, in dismissing the appeal, agreed the application of the interpretation Act to the determination of the commencement date of the Amendment Act. It held that the Act has no commencement date but had been assented to by the President on the 21st of February, 2013. This was about a month before the arrest of the Appellant. The interpretation Act applies to all Statutes in the country and that where no commencement date is named in any legislation, then such legislation comes into effect on the day the president assents to it. It is not in contention that, in this case, the Terrorism (Prevention) (Amendment) Act was assented to on the 21st day of February, 2013, a month before the Appellant was arrested. Furthermore, the argument that the Terrorism (Prevention) (Amendment) Act came into effect on the 24th may, 2013 is not supported by evidence, since assent is done once, and it was on the 21st day of February, 2013. The Act did not say so[42].

6. Constitutional Safeguards to right of Accused persons in terrorism offences: bail applications and prosecution of terrorism offences.

One of the constitutional safeguards to a fair trial of an accused is the right to enjoy his personal liberty pending trial pursuant to section 35(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) by way of bail. However, the courts have been circumspect in granting bail applications in cases of terrorism irrespective of the constitutional right to personal liberty and presumption of innocence under section 35 and 36 (1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) respectively. The cases show that the national security implication of terrorism outweighs the right to personal liberty. Hence, the refusal of bail. In the case of *Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria*[43] THE Supreme Court considered the appeal against the refusal of bail by the trail court and affirmed by the Court of Appeal. The appellant was arraigned on a five count charge of

[41] (2016) LPELR 40473 CA

[42] The same conclusion was arrived at in the case of *Ibrahim Usman Alli v federal republic of Nigeria (2016) LPELR 40472 CA;* Alli Mohammed Modu v Federal Republic of Nigeria (2016) LPELR 40471 CA.

[43] (2007) 12 *WRLR (pt. 1048) 320 at 358-359; (2007) LPELR 958 SC*

conspiracy; treasonable felony; forming, managing and assisting in managing an unlawful society; publishing of false statement and being a member of an unlawful society. After stating the general principles for grant of bail, the court stated thus:

> ….. entirely agree with the court below that a charge of treasonable felony is a very serious offence and is prejudicial to national security. I believe neither the appellant nor his counsel would sit down to fold up his hands, if on the seat of power, to allow any citizen to put his reign into terror and utter hopelessness or despondency while dancing to the music of a citizen who plots a *coup d'état* against him. He will certainly fight it to the end[44]

The case was followed in *Ogwu Achem v Federal Republic of Nigeria*[45] where the appellant was charged on two counts of willfully providing money with intent that it be used for an act of terrorism contrary to and punishable under section 15(1) of the Economic and Financial Crimes Commission (Establishment) Act 2004; and providing economic resources in order to facilitate the commission of a terrorist act contrary to and punishable under Section 15(3) of the Economic and Financial Crimes Commission (Establishment) Act 2004. He was convicted. He appealed against the conviction, relied on the case of *Alhaji Mujahid Dokubo-Asari v Federal Republic of Nigeria* and held that:

> It should be mentioned that the applicant was convicted and sentenced for offences relating to terrorism which in recent times have grown in intensity and magnitude, and have become a threat to our national security. Courts should therefore be very circumspect in granting bail pending appeal to a person convicted for any offence relating thereto. In the case of DOKUBO-ASARI V FEDERAL REPUBLIC OF NIGERIA (2007) 12 NWLR (1048) 320, 358-359, the Supreme Court gave its nod of approval to the refusal to grant bail pending trial to the appellant on the ground, *inter alia* of threat to national security[46].

In the case of *Musa Umar v Federal Republic of Nigeria*[47] the appellant was charged with two others for breach of several provisions of the Terrorism (Prevention) (Amendment) Act, 2013. He applied for bail pending the hearing and determination of the charges against him. The trial judge refused the application. In furtherance, on appeal, the Court of Appeal recognized that being a case of terrorism which carries severe penalty, the court must be cautious in granting bail. The court owes a duty to protect the society with proper regard to the security. The appeal was thus dismissed. The court of Appeal held that the lower court was right in refusing the application for bail because of the nature of the offence. It held that the court, in an application for bail, owes a duty to protect the society and no principle of law demands that crime of terrorism.

7. Witness Protection Program and Prosecution of terrorism cases

Witness protection is a system whereby potential witnesses are shielded from the members of the public so as to protect their identity and therefore presumably allow them freely give evidence. In that case, members of the public will be excluded from the hearing in open court.

The challenge with the witness protection program is that it tends to conflict with the constitutional safeguard in section 36(4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) that whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal. The contention is that shielding witness and not allowing members of the public to be present except legal practitioners and parties is unconstitutional[48]. However, section 36(4) proviso expressly provides that: "a court or such a tribunal may exclude from its proceedings persons other than the parties thereto or their legal practitioners in the interest of defence, public safety, public order, public morality, the welfare of persons who have not attained the age of eighteen years, the protection of the private lives of the parties or to such extent as it consider necessary by reason of special circumstances in which publicity would be contrary to the interests of justice'[49].

[44] Per Muhammed JSC
[45] (2014) LPELR 23202 CA
[46] Per Ekanem JCA
[47] (2015) LPELR 24051
[48] See the proviso to section 36(4)
[49] See section 36(4) proviso (a)

In the trial of terrorism offences, statute has expressly provided for witness protection as an exception to trial in open court. Section 232 of the Administration of Criminal Justice Act, 2015, (ACJA, 2015) provides that trial for offences of terrorism, offences relating to economic and financial crimes and trafficking in persons and other related offences may not be held in open court. In such cases, the names, addresses, telephone numbers and identity of the victims of such offences or witnesses shall not be disclosed in any record or report of the proceedings and it shall be sufficient to disguise the names of the victims or witnesses with a combination of alphabets. The court is enjoined in such proceeding, where it deems it necessary to protect the identity of the victim or a witness, take any or all of the following:

(a) receive evidence by video link;
(b) permit the witness to be screened or masked;
(c) receive written deposition of expert evidence; and
(d) any other measure that the Court considers appropriate in the circumstance.

The constitutionality of witness protection in criminal trials has been considered by our court. In the case of *Col. Mohammed Sambo Dasuki (Rtd) v Federal Republic of Nigeria*[50], the Complainant had brought an application at the trial court for orders granting leave to the prosecution witnesses to start enjoying witness protection by giving evidence behind screen to be provided by the court; directing that the identities of all prosecution witnesses be not disclosed in any record or report of proceedings which are accessible to the public; permitting all prosecution witnesses to be addressed with pseudonyms in the course of proceedings. The grounds for the application were *inter alia* that the prosecution witness whose tour of duty involves carrying out covert operations for the security of the country will have their cover blown if made to testify publicly without ant protection hence endangering public security of the country and that exposing the prosecution witnesses to the public will make them easy target of possible attacks from those sympathetic to the defendant who are feared to be in passion of some of the highly sophisticated arms and ammunitions imported by the defendant during his tenure as the National Security Adviser.

The learned trail a judge granted the application. The defendant appealed to the Court of Appeal. The court in dismissing the appeal held that the provisions of the ACJA, 2015 and in particular, Section 232 is meant to further amplify the provision of Section 36(4) (b) with respect to certain enumerated crimes therein, and does not in any way seek to annul nor prevent the protective stipulations covered by subsections (5) and (6) of the Constitution, and do not conflict at all[51].

In the later case of *Chidiebere Onwudiwe v federal republic of Nigeria*[52], the defendant and others are alleged to be members of the Indigenous people of Biafra (IPOB) and were charged for acts of terrorism. The Complainant brought an application for leave to the prosecution witnesses to be protected by giving evidence behind screen to be provided by the Court; directing that the identities of all prosecution witnesses not to be disclosed in any record or report of proceedings which are accessible to the public and permitting all prosecution witnesses to be addressed with pseudonyms in the course of proceedings. The trial judge granted the application. The appeal to the Court of Appeal was dismissed. The court relied on the earlier case of C*ol. Mohammed Sambo Dasuki (Rtd) v Federal Republic of Nigeria* and dismissed the appeal. It is pertinent to note that the Terrorism (Prevention) (Amendment) Act 2013 empowers the court to protect witness by virtue of Section 34. An examination of the section shows:

(a) an application to protect a witness may be made by the court *suo motu* or by the Attorney General of the Federation[53] or other relevant law enforcement or security agencies such as the EFCC or the national Security Adviser.

(b) the section does not state the nature of the motion whether it will be *ex parte* or on notice. It is submitted that if the application is before the arraignment of the defendant, it can be made *ex parte*

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[50] (2018) LPELR 43969 (CA)

[51] See the decision of Barka, JCA. The foreign cases of *R vDavies and Ackerman J.S v Leepile (1-3) 1986(2) S. A. 33 were not followed.*

[52] (2018) LPELR 43969

[53] This will include officers in his department under section 174(2), constitution of the federal republic of Nigeria, 1999 (as amended)

with liberty to the defendant to apply to set it aside. However, if the application is made after arraignment, the principle of fair hearing that the defendant be put on notice. This will be so even if the court intends to make the order *suo motu*. In that case, the court must hear the parties to ensure fair hearing[54].

(c) The overring consideration for the court in making the witness protection order is to be satisfied that the life of the person or witness is in danger and take such measures as it deems fit to keep the identity and address of the witness or person secret.

(d) The possible orders the court can make to achieve the purpose of the witness protection are:

(i) holding of the proceeding at a place to be decided by the court;

(ii) avoidance of the mention of the *real* name and address of the witness or person in its orders, judgments or records of the case, which are accessible to the public; or

(iii) issuing of a direction for ensuring that the identity and address of the witness or person are not disclosed;

(iv) undertaking the proceeding in camera in order to protect the identity and location of witnesses and other persons.

Further to this, the Act also gives the court the discretion to decide, in the public interest and national security that:

(a) All or any of the proceedings pending before the court shall not be published in any manner; and

(b) that such proceeding shall be adjourned and the accused persons detained pending when the Attorney-General is able to guarantee the safety of the witnesses and other persons involved in the matter.

As part of the witness protection program, the Act empowers the court to exclude all members of the public, except the parties and their legal practitioners, at the hearing in the interest of public safety or order[55]. When a court issues any relevant order, an act of contravention is an offence and the person is liable on conviction to imprisonment term of not less than five years[56].

The above examination shows that witness protection is an available tool for an effective prosecution of terrorism cases.

8. Sentencing and Sentencing Guidelines in terrorism cases

By Section 34(2) of the terrorism (Prevention) (Amendment) Act, 2013, the court shall have jurisdiction to impose any penalty provided for an offence under the Act or any other related law. Also, whenever any person is convicted of an offence under the court in passing sentence shall, in addition to any punishment which the court may impose in respect of the offence, order the forfeiture of any terrorist' funds with accrued interest, terrorists' property, article, substance, device or material by means of which the offence was committed, or conveyance used in the commission of the offence, which is reasonably believed to have been used in the commission of the offence or for the purpose or in connection with the commission of the offence and which may have been seized or is in the possession or custody or under the control of the convicted person, to the federal Government of Nigeria[57].

It is submitted that the implication of this provision is that the penalty under the Act is not exhaustive. If a law of a State provides for punishment for terrorism, the court will be empowered to impose the said punishment[58].

The Administration of Criminal justice Act 2015 has also given general guidelines as to sentencing which, it is submitted will be applicable to sentencing for terrorism offences. It is provided that the court in imposing punishment shall have regard for the objectives of sentencing which include the principles of reformation and deterrence, the interest of the victim, the convict and the community; the appropriateness of non-custodial sentence or treatment in lieu of imprisonment and previous conviction of the convict[59].

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[54] See generally the cases of *Poroye v Makarfi (2017)* LPELR 42738 SC; *Alioke v Oye (2018)* LPELR 45153

[55] Section 34(4) of the Act. This is similar to the proviso to section 36(4), constitution of the federal republic of Nigeria, 1999 (as amended)

[56] Section 34(5)

[57] See section 32(3) and 33(1)

[58] See *Wagbatsome v Federal Republic of Nigeria (2018)* LPELR 43644; *Musa Abdulmumini v Fedral Republic of Nigeria (*2017) LPELR 43723

[59] Sections 311 and 312. See generally, Code of Conduct and Prosecutorial Guidelines for Feeral Prosecutors, Abuja, Federal Ministry of Justice, 2013: 23-29

Nigerian courts have taken a firm position in imposing stiff punishment for terrorism offences. The rationale is based on the nature of the offence, its severity and the national security implications.

In the case of *Adamu Ali Karumi v Federal Republic of Nigeria*[60], the appellant was arraigned *inter alia* for acts of terrorism, committing acts preparatory to or in furtherance of acts of terrorism punishable under the Terrorism (Protection) (Amendment) Act. 2013. He was convicted and sentenced to a total term of imprisonment of 25 years, some of the terms to run consecutively. The appellant appealed *inter alia* against the sentence urging that the sentence was excessive. The court of Appeal in dismissing the appeal stated as follows:

The gravity of the offence of terrorism which involves the use of violence or force to achieve something, be it political or religious, is a grave affront to the peace of society with attendant unsalutary psychological effect on innocent and peaceful members of the society who may be forced to live in perpetual fear. It is an offence that may even threaten the stability of the state. The sophisticated planning and execution of the acts of terrorism show it is an offence that requires premeditated cold-blooded organization. The circumstances under which such a crime is organized calls for appropriate sentencing to deter its recurrence by potentials or prospective offenders[61].

The effects of this decision and similar ones is that sentence for acts of terrorism will invariably be strict. It is suggested that non-custodial sentences with the aim of deracialising terrorist convicts can be explored by the court.

9. Code of Conduct for the Prosecution of terrorism offences

Federal prosecutors have a code of conduct in the prosecution of offences including terrorism offences.

A general principle of conduct by prosecuting counsel is in Rules of Professional Conduct for Legal Practitioners (RPC). It is the primary duty of the prosecutor to see that justice is done not to convict at all cost.[62] The prosecutor is obliged not to institute or cause to be instituted a criminal charge, including a terrorism charge, if he knows or ought reasonably to know that the charge is not supported by the probable evidence[63]. Most importantly, a lawyer engaged in public prosecution shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused person. If there was any evidence that will negate the guilt of the accused, mitigate the degree of the offence or reduce the punishment, the prosecutor must disclose the existence of the evidence to the accused or his counsel, if represented by counsel[64]. Some of these provisions have been captured in the Code of Conduct and Prosecutorial Guidelines for Federal prosecutors[65]. Another challenge is the manpower deficiency in the investigation and prosecution of terrorism cases. The nature of terrorism requires specialists in investigation and prosecution. Lawyers in the Ministry of Justice are not adequately trained to handle these cases.

One area that has been highlighted is the lack of funds for investigation and other financial implications to successful prosecution. Interagency rivalry also hinders investigation and prosecution. Some of the agencies responsible for arrest of the terrorists' suspect may not cooperate with the police and may withhold evidence.

10. Challenges to Prosecution of terrorism cases in Nigeria

One major challenge to the prosecution of terrorism cases is the absence of institutional framework for the protection of the prosecutors of these crimes. Terrorists have supporters who are invariably not visible. A prosecutor and his family can be the subject of attack by fellow terrorists of sympathizers of the terrorists. In the performance of their responsibilities as prosecuting counsel, there should be no reprisal on his person or his family or beloved ones.

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[60] *(2016) LPELR 40473*

[61] Per Ikyegh, JCA see also the dictum of Nimpar JCA.; *Ibrahim Usman Alli v Federal Republic of Nigeria (*2016) LPELR 40472; *Ogwu Ackem v federal republic of Nigeria (2014) LPELR 23202*

[62] Rule 37(4) RPC. *Omisade v Queen (1964)* NMLR 67, *Odofin Bello v State (1967)* NMLR 1

[63] Rule 37(5) RPC

[64] Rule 37(6) RPC

[65] Office of the Attorney General of the federation & minister of Justice, Abuja (2013) 12. The only set back to the Code of Conduct which is comprehensive has no force of law as that Rules of Professional Conduct for Legal Practitioners which is made by the Attorney general of the Federation as a subsidiary legislation. See *Adeboye Amusa v State (2003)* 4NWLR (pt. 811) 595; *Abubakar v B. O. & A.P. ltd (2007)* 18 NWLR (pt. 1066) 319

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11. CONCLUSION AND RECOMMENDATIONS

Effective prosecution of terrorism suspects is a major plank in the fight against terrorism. Mechanisms for this should be in place in form of not only the legal framework but also the necessary manpower and political will to carry it out. Hence, the need to have a unified definition of terrorism rather than the present situation, where different statutes attempt to proffer divergent definitions. This will greatly assist the prosecutor and investigation agencies. Presently, there are several bodies or agencies that can charge a suspect for terrorism- ranging from the Attorney General of the state such as Lagos where the Criminal law makes provision for punishing terrorism to the Economic and Financial crimes commission under the EFCC Act and the Attorney general of the federation under the Terrorism (Protection) Act.

12. RECOMMENDATIONS

i. There should be coordination and synergy amongst these agencies and prosecutorial authorities. Manpower challenges to effective prosecution in the form of prosecutors or judges will pose a setback;

ii. There is therefore the need for continuous training of prosecutors and judges;

iii. Finances for forensic investigation should be provided as the instruments of terrorism become more advanced. In fact we now have cyber terrorism. Without necessary funds and know how, the investigation and prosecution will be fruitless.

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