**EMEKA OFFOR & ANOR**

**V.**

**COMMISSIONER OF POLICE RIVERS STATE POLICE COMMAND**

IN THE COURT OF APPEAL OF NIGERIA

THE 17TH DAY OF JANUARY, 2013

CA/PH/227M/2006

**LEX CA/PH/227M/2006**

OTHER CITATIONS

2PLR/2013/56

(2013) LPELR-21170 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LADAN TSAMIYA J.C.A

CHIOMA EGONDU NWOSU-IHEME J.C.A

UCHECHUKWU ONYEMENAM J.C.A

**BETWEEN**

EMEKA OFFOR & ANOR. Appellant(s)

AND

COMMISSIONER OF POLICE RIVERS STATE POLICE COMMAND Respondent(s)

**ORIGINATING COURT**

1. RIVERS STATE HIGH COURT SITTING IN PORT HARCOURT

2. RIVERS STATE CHIEF MAGISTRATE COURT

**REPRESENTATION**

F. A. CHUKUKA with D. O. ONYEMA - For Appellant

AND

S. C. EZE - for the 1st Set of Respondents.

Second Set of Respondent Served. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

CONSTITUTIONAL LAW - FAIR HEARING:- Meaning - Constitutional foundation for the right of any accused person charged with criminal offence under any Act or law to enjoy fair-hearing during the trial - Sections 36(4) of the 1999 Constitution – Whether the provision in section 36 (4) is mandatory in all criminal trials – Entitlement to fair hearing in public, unless the charge is withdrawn, within a reasonable time by Right to examine, in person or by his counsel, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution

CONSTITUTIONAL LAW - FAIR HEARING:- Test of determining whether there was a fair hearing in criminal cases – Whether is always the impression of reasonable people listening and present in the open court

CONSTITUTIONAL LAW - FAIR HEARING:- Criminal proceedings – Court sitting in absence of counsel to some of the accused persons – Where opportunity to cross-examine witness of prosecution who testified in the relevant session – Whether constitutional right to fair hearing of accused persons breached

**PRACTICE AND PROCEDURE ISSUES**

COURT**:-** Criminal proceedings – Court sitting and taking evidence from a witness in the absence of counsel of one of the accused persons - Where opportunity witness is granted – Whether right of fair hearing breached

**MAIN JUDGMENT**

MOHAMMED LADAN TSAMIYA, J.C.A. (DELIVERING THE LEADING JUDGMENT):

This is an appeal against the decision of Rivers State High Court sitting in Port Harcourt the capital of the State. The decision appealed against was delivered on 13/4/2006 dismissing the appellant's Motion on Notice praying for leave to apply for an order of certiorari.

The appellant along with 3 others were arraigned before the Chief Magistrate Court, in Port Harcourt Magisterial District in the charge No.PMC/284C/2004. On 12/7/2004 when the trial commences, all the 4 accused persons were present in the court but only 1st accused was represented by his counsel while appellant, being the 2nd accused person and 3rd and 4th accused were not represented by their counsel because the counsel for them left the court premises before the arrival of the Chief Magistrate, on the reason that they arranged with the court's clerk for the adjournment of the case to another date. As they left the court, the Magistrate arrived and commenced sitting, ignored the date earlier adjourned to. He sat in the absence of the counsel to the 2nd 4th accused persons. Evidence of prosecution witness was taken and then adjourned to 18/8/2004, for cross-examination. For this reason, the appellant's counsel (who was the counsel to the 3rd and 4th accused at the Magistrate Court) filed a motion Ex-parte for leave to apply for an order of certiorari to remove to the High Court for the purpose of quashing the proceedings of 12/7/2004 conducted in his absence.

On the 4/8/2004 the said Ex-parte motion was heard and granted in which leave to apply for an order of certiorari was granted pending the hearing of the substantive motion on notice. But on 13-4-2006 in its ruling on the said motion on notice, the State High Court dismissed it and sent the case back to the Chief Magistrate to continue with the case and should give the case an accelerated hearing. The 2nd and 3rd accused being dissatisfied with the ruling of the High Court filed this appeal on 21/4/2006 containing two grounds of appeal as shown on pages 52-55 of the record of this appeal (herein referred to as the record).

On 29/6/2000 this court via motion on notice filed on 29/6/2007 struck out the name of the 2nd appellant (for being deceased). He was the 4th accused person before the Magistrate Court.

In accordance with the rules and practice of this court the appellant filed his brief on 22/3/2010 white non-of the respondents filed its respondents' brief. That on 7/6/2011 this court ordered this appeal be heard on the appellant's brief alone, the respondent's having failed or neglected to file their respective respondent's brief.

On 29/11/2012 when this appeal came up for hearing, only the appellant's only the counsel was present not withstanding that respondents were served with hearing notices against today 29/11/2012 and none of them was present or represented. The appellant's counsel argued his appeal, whereby he adopted and relied on their appellant's brief and urged this court to allow their appeal and grant the relief sought in their prayer as contained in their Notice of Appeal.

Having the respondents been served as I said above, this appeal was taken without the respondent's brief by virtue of the order of this court on 7/6/2011 to do so.

In the appellant's brief only one issue was raised for the consideration of this court in this appeal. The issue reads:

"whether the learned trial judge was right when he held on 13/4/2006 that appellant's right to fair hearing was not breached by the learned trial Chief Magistrate."

In his brief of argument on this issue, it was submitted that the High court reached a wrong conclusion to wit: "that appellant's right to fair hearing was not breached by the trial Chief Magistrate Court, rather the appellant's right to fair-hearing was enhanced by taking the evidence of PW1 and adjourning to 19/8/2004 for cross-examination of PW1'" The appellant's reason for saying so is that the trial High Court did not consider the nature of the offences charged, the fact that the appellant's counsel had been diligently attending the trial Chief Magistrate Court and the appellant's constitutional right for his counsel to be present during the trial. It was further submitted by the appellant that commencing trial in the absence of his counsel was a fundamental breach of the appellant's right to a fair hearing, and where there is such breach the trial ought to be declared a nullity. In support of his submission a number of decided cases were cited and relied on. He finally urged this court to allow the appeal and grant the relief prayed for in his notice of appeal.

From the facts and circumstance of this appeal as seen from the record, the main issue which calls for the consideration of this court is whether the trial High court was wrong in dismissing the appellant's application for certiorari, quashing the proceedings of 12/7/2004 in charge No. PHC/284/2004 - C.O.P vs. Charles Obasi and 3 Ors. The appellant alleged that in the said proceedings his right to fair hearing was breached.

The proper approach to the issue on fair hearing is to carefully examine the record of this appeal particularly in relation to the record of trial Chief Magistrate Court.

The proceedings of 12/7/2004 of the trial chief Magistrate Court among others showed that all the accused persons, appellant inclusive, were present in the Dock. Prosecution Police officer and C. C. Chikeka Esq. appeared for prosecution and the 1st accused person respectively. Chief B. O. Adeboro Esq. holds a watching brief for the complainant. That no counsel for the 2nd- 4th accused persons present in the court, and the prosecution opens its case. In short, the trial Chief Magistrate court sat and took the evidence of PW1 and adjourned to 18/8/2004 for cross-examination of PW1. The record also shows that the appellant did not pursue the order for cross-examination fixed for 18/8/2004 when the hearing was supposed to resume, rather he went to the state High court, where he filed two motions, one motion ex-parte and the other one on notice, before the High court praying for leave to apply for an order of **certiorari** to remove to the High Court for purpose of its being quashed, i.e the proceedings of the 12/7/2004 in charge No. PHC/284/2004 - C.O.P. vs. Charles Obasi, Emeka Offor; Anijekwu Vincent Chukwumeka and Barth Olomew Agada.

On 4/8/2004, the said State High Court heard the Ex-parte Motion and granted appellant leave to apply for an order of certiorari.

On 13/4/2006, the High Court heard the appellant's Motion on notice and dismissed it and returned the case to the Chief Magistrate Court with an order for accelerate hearing.

The Constitution of Nigeria 1999 made fundamental basic provisions for the right of any accused person charged with criminal offence under any Act or law to enjoy fair-hearing during the trial.  These fundamental basic provisions are contained in sections 36(4) and (b) of the said Constitution relied upon by the appellant in his brief of argument. It is not in doubt that, the provision in section 36 (4) is mandatory in all criminal trials, and that the accused shall be entitled to, unless the charge is withdrawn, a fair hearing in public, within a reasonable time by - a court or tribunal. The phrase "fair-hearing" is further expounded in the same section 36 (6) (b) and (d) in that, an accused person must be given adequate time and facilities for the preparation of his defence. Paragraph 6 (d) of section 36 (supra) is saying that the accused person is entitled to examine, in person or by his counsel, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution.

In the instance appeal, the fact that the trial commenced in public is not in doubt. The question to ask is, in view of the facts, and circumstances of this appeal, whether the appellant was denied his constitutional right to fair hearing which is right to defend himself in person or by any counsel of his own choice or denied his constitutional right to examine, in person or by his legal practitioner, the witnesses called by the prosecution before the trial Chief Magistrate court.

During his trial at the Chief Magistrate court on 12/7/2004 it is clear at pages 29-32 of the records that the appellant was present in the dock but his counsel was absent because the trial Magistrate did not arrive up to 11.00a.m. and arranged with the court's clerk for adjournment. Soon after he left the court's premises the trial Chief Magistrate arrived, sat and took the evidence PW1 in the absence of his counsel. After that, the trial Chief Magistrate adjourned the matter to 18/8/2004 for cross-examination of PW1. (see page 32 L. 1 of the record.) But the appellant never went back to pursue the offer.  By adjourning the trial to a mentioned date for cross-examination, I am of the view that the trial chief Magistrate court offered the appellant and his counsel opportunity to examine the prosecution witness who gave evidence in the absence of the appellant's counsel, but the offer was utilised by the appellant. At page 50 of the record lines 24-29, the learned trial Judge of the state High court had this to say:

"I have considered the overall circumstances of this application, and the processes filed and I am of the firm but regretful view, that the non-participation of the applicant's (appellant's) counsel in the proceedings of 12/7/2004 is harmless omission, since their right to cross-examination was reserved for 18/8/2004 by the learned Chief Magistrate, and did not scuttle or abridge but rather enhance and maintained their right to fair hearing."

From the above findings made by the learned trial judge of the High court, l am in total agreement with his finding that appellant was given a necessary opportunity to cross-examine the only witness called by the prosecution but the appellant clearly refused to accept the offer to cross-examination PW1. In my considered view, the entire proceedings of the Chief Magistrate Court was conducted in strict compliance with the golden rules of fair hearing within the meaning of section 36 (4) of Nigeria 1999. The test of determining whether there was a fair hearing in criminal cases is always the impression of reasonable people listening and present in the open court. See Mohammed vs. Kano N.A. (1968) 1 All NLR 424; Gaji vs. The State (1975) 1 All NLR 266 and Uguru vs. The State (2002) 9 NWLR (Pt.771) 90.

Having reached the above decision, I am also of the view that the learned trial judge of the High Court was right when he held that the appellant's right to fair hearing was not breached by the learned trial Chief Magistrate.

In the final analysis, the appeal No.CA/PH/227/2006 has no merit whatsoever and is hereby dismissed. The judgment of the learned trial judge, affirmed.

**CHIOMA NWOSU-IHEME, J.C.A.:**

I read before now the judgment just delivered by my learned brother M. L. Tsamiya, JCA. I agree with the judgment.

The learned trial Chief Magistrate gave the appellant the opportunity to cross-examine the only witness called by the prosecution, but he failed to take advantage of it.

The learned judge of the High Court of Rivers State who heard the matter on appeal, was right when he held that the appellant's right to fair hearing was not breached by the Chief Magistrate.

The appeal lacks merit. I also dismiss the appeal and affirm the judgment of the High Court acting in its appellate jurisdiction.

**UCHECHUKWU ONYEMENAM, J.C.A.:**

I have had the privilege of reading in draft the judgment just delivered by my learned brother MUHAMMED LADAN TSAMIYA JCA. I agree with his reasoning's and conclusions.