

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT HIGH COURT 29, GUDU – ABUJA**

**DELIVERED ON WEDNESDAY THE 3<sup>RD</sup> DAY JUNE 2020.**

**BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE .R. OSHO-ADEBIYI**

**SUIT NO.CR/522/2019**

**MOTION NO.M/5730/2020**

**BETWEEN**

**COMMISSIONER OF POLICE -----COMPLAINANT/RESPONDENT**

**AND**

**ALEXANDER IKHINE OJEME-----DEFENDANT/APPLICANT**

**RULING**

Learned Counsel to the Defendant/Applicant filed a motion on notice with motion number M/5730/2020 dated 25/02/2020 pursuant to Section 182 of the Evidence Act. It is seeking for an Order striking out the name of the spouse of the Defendant, Doris Ojeme from the list of prosecution witnesses. The grounds upon which this motion is brought are:

- (a) That Defendant is still legally married to the said witness.
- (b) That the said witness cannot testify against the Defendant whilst they are still married.
- (c) That it will be against the spirit of two but one as envisaged by the Marriage Act.
- (d) That in Common Law, the Defendant is entitled to spousal privilege as provided by the Evidence Act.

Attached is a 50-paragraph affidavit, deposed to by the Applicant himself and also attached is a written address and Exhibits, which includes;-Marriage

Certificate with number 143 dated 29/01/2015 as Exhibit A; Statement of Defendant's wife "Doris Ojeme" attached to the charge against Defendant as Exhibit B; A CTC of a Charge of false statement against the proposed witness with proof of evidence, list of witnesses, statement of the defendant and statement of Doris Ojeme (Defendant's wife) as Exhibit C.

Prosecution did not file a response but addressed the Court orally. Prosecution Counsel replying on points of law, submitted that the Applicant's application was brought pursuant to Section 182 of the Evidence Act, however, Section 182 (1) makes exceptions where a spouse can testify against the other.

The application in a nutshell is hinged on Section 182 (2) and 3 of the Evidence Act, which in effect is to prevent Defendant's duly and lawfully wedded wife from testifying against the Defendant in Court during Defendant's trial on the charge of having unlawful sexual intercourse with their child as both are still duly married under the Act. That Applicant's wife's willingness to testify against the Applicant is due to her malicious nature and intention to smear Applicants' character.

I have read through the Applicant's application and considered the oral argument of the Prosecution Counsel and the issue for determination in my view is :-

**"Whether Section 182 (2) and (3) of the Evidence Act applies to this particular case?"**

The Defendant/Applicant in this case was charged before this Court on a one count charge of having unlawful sexual intercourse "several times" with his 3 years old daughter contrary to Section 31 of the Child's Right Act. Defendant pleaded not guilty and has been granted bail. Prosecution's main witness is

the mother of the child who is the lawfully wedded wife of the Defendant/Applicant. Both Applicant and wife got married under the Act. Section 182 (2) of the Evidence Act 2011 states,

*“when a person is charged with a criminal offence other than those mentioned in subsection (1) of this Section the husband or wife of such person is a competent and compellable witness but only upon the application of the person charged”.*

Prior to this Section is Section 182 (1) (a), (b) and (c) which makes an exception to Section 182 (2) and the exceptions under Section 217, 218, 219, 221, 222, 223, 224, 225, 226, 231, 300, 301, 340, 341, 357-362, 369, 370, 371 of the Criminal Code.

In essence, a spouse can testify against the other if the crime charged falls under any of the above sections of the Criminal Code. In the Federal Capital Territory, Abuja, it is the Penal Code and not the Criminal Code that is in operation as regards criminal cases.

Learned Counsel to the Defendant/Applicant submitted that Section 182(1) (a) (b) and (c) which lists out the exceptional cases where a spouse can testify against the other all falls under the criminal code. Counsel to the Defendant/Applicant submitted that prosecution cannot rely on Section 182(1) (a) (b) and (c) for the simple reason that it is the Penal Code and not the Criminal Code that is in force in FCT, Abuja.

I do agree with Learned Counsel to the Defendant/Applicant that it is the Penal Code and not the Criminal Code that is in force in FCT, Abuja but Defendant was not charged before this Court under the Penal Code;

Defendant was charged before this Court under the Child's Right Act (CRA) 2003.

Section 1 of the Child Right Act makes it mandatory that the "best interest of a child to be of paramount consideration in all actions'. The Child's Right Act is a Federal Law and the said law was promulgated to protect and preserve children's rights and responsibilities in Nigeria.

The Child's right Act, 2003 was adopted by Nigeria to domesticate the convention on the rights of the child. The United Nations Convention on the Rights of the child is not isolated to Nigeria alone but is an international human rights treaty that grants children all over the globe their fundamental rights. Prior to the Child's Right Act, there had been a global consensus for the protection of children from all forms of violence, which includes but not limited to all forms of cruelty, inhuman and degrading treatment and all forms of child abuse. Consequently, the Child's Right Act incorporates the child's right to survival and development as well as right to dignity. The Child's Right Act makes it unlawful to have sexual intercourse with a child; in essence, the Child's Right Act, 2003 adopts all fundamental human rights as enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The right of the Nigerian child as it relates to legal issues is properly enshrined in the Act and this includes duty of the State to protect children and investigate the plight of children in line with and upholding the rights of the child, in essence, the Child's Right Act, 2003 embraces and expands the human right bestowed on every citizen of Nigeria in Chapter IV of the 1999 Constitution.

The Charge before the Court is peculiar in the sense that a child's right has been allegedly violated by her father via the offence of unlawful sexual intercourse. The mother of the child and the lawful wife of the

Defendant/Applicant is the prosecution's main witness and also a viable witness to enforce the rights of the child not only as provided under the Child's Right Act but also as enshrined in the Constitution of the Federal Republic of Nigeria 1999 (as amended). In the case of THE ADMINISTRATORS/EXECUTORS OF THE ESTATE OF GEN. SANI ABACHA VS. SAMUEL DAVID EKE-SPIFF (2009) LPELR-SC 344/2002 P.64 Para E-G, the Supreme Court Per OGBUAGU JSC reiterated their long-standing position on how cases are to be decided by the lower courts

*"it need be stressed that each case must be determined upon its own peculiar circumstances as no two cases can be identical. They can be similar. The facts of the instant case in my respectful view, are not the same with the above named decided authority".*

From the above-decided case, application of the law in all cases is not a one rule fits all situation, rather, each case should be decided on its own peculiar circumstances. The peculiar circumstances surrounding this charge borders on the alleged violation of the right of a child by a parent, in this case, the Applicant who is alleged to have violated his child by allegedly having sexual intercourse with his child. Denying the mother who is a willing prosecution witness and also the Complainant/next friend of the child the opportunity to testify against the husband/applicant is denying the child the opportunity to enforce her rights as provided under the Child's Rights Act and enshrined under the Constitution of the Federal Republic of Nigeria. Upholding this objection of the Defendant is not only a violation of the child's right but unconstitutional and I am of the view that Section 182 (2) of the Evidence Act does not apply in this circumstance.

The Constitution of the Federal Republic of Nigeria is supreme and all other laws are subject to the Constitution. It is my respectful view and I SO HOLD

that denying the mother the opportunity to give evidence in this case is denying the child her constitutional right. Consequently, Applicant's motion on notice is hereby struck out and the mother of the child is hereby called upon to testify on behalf of her child.

**Parties:** Defendant/Applicant present.

**Appearances:** P. A. Ogele, Esq., for the Prosecution. Chukwunonso C. Nwadike. Esq., for the Defendant/Applicant.

**HON. JUSTICE MODUPE R. OSHO-ADEBIYI**

**JUDGE**

**3<sup>RD</sup> JUNE 2020**