

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA, ABUJA
ON THE 5TH DAY OF MAY, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH
PRESIDING JUDGE.

SUIT NO. FCT/HC/CR/864/2020

MOTION NO. M/2962/2022

FEDERAL REPUBLIC OF NIGERIA.... COMPLAINANT/APPLICANT

AND

ALIYU OVA DEFENDANT/RESPONDENT

RULING

Before the Court is a Motion on Notice No. M/2962/2022 filed on 14th March, 2022 praying the Court for

- 1. An Order of this Honourable Court directing the Defendant/Respondent in this suit to submit to a Deoxyribonucleic Acid (DNA) test at any hospital where such services are rendered with a view to ascertaining paternity of the victim's child.*
- 2. An Order of this Honourable Court directing a Deoxyribonucleic Acid (DNA) test be conducted on the victim's child in order to determine the paternity.*
- 3. An Order of this Honourable Court directing National Agency for the Prohibition of Trafficking in Persons (NAPTIP) to conduct a Deoxyribonucleic Acid (DNA) test on the victim's child and the Defendant/Respondent in this suit.*
- 4. And for such further orders as this Honourable Court may deem fit to make in the circumstances.*

In support of the motion is an affidavit of 7 main paragraphs deposed to by Ogba Otokpa a legal practitioner in the law firm of Counsel to the

Complainant/Applicant. A written address by Counsel to the Complainant/Applicant accompanied.

In reaction to the application, the Defendant/Respondent filed a Counter affidavit of 3 main paragraphs also accompanied by a Written Address to which the Complainant/Applicant filed a Further and Better Affidavit of 14 paragraphs.

Having considered the aforementioned processes and the submissions of Counsel, I am of the view that the main issue arising herein for determination is;

Whether the application vide the motion on notice ought to be determined and granted as prayed by the Applicant.

The records before this Court in this case show that the Defendant/Respondent was arraigned before this Court on a charge of rape of one Miss Faith Andrew under **Section 1 of the Violence Against Persons (Prohibition) Act 2015**.

The facts which the Applicant deposed to in its affidavit in support of the instant application is that the Respondent was reported to have put some substance into Miss Faith Andrew's water and had carnal knowledge of her after she had slept off upon drinking the water and she is 6 months pregnant as a result of the Respondent's act. That the Deoxyribonucleic Acid (DNA) test is being sought to determine the paternity of the victim's child.

In his Counter Affidavit, the Respondent deposed that the Applicant's instant case against him is purely criminal and not a civil proceeding which involves a paternity claim.

In its Further and Better Affidavit, the Applicant averred that the Respondent is aware that by the time the DNA is conducted, the hidden truth which the Respondent is trying to conceal will be revealed to this Court and it would further prove the Applicant's case by identifying the

true paternity of the victim's child. That this Court has the power to compel the Defendant to undergo the DNA test to prove his innocence as this is the only evidence before this Court to establish same.

Referring this Court to Section 6(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), learned Counsel to the Applicant submitted that this Court has the power/discretion to grant the reliefs sought by the Applicant. He contended that the determination of the paternity of a child or person could be by a medical report under Section 63(1)(A) of the Child's Right Act (Cap. C.50) Laws of the Federation of Nigeria 2010. He posited that DNA test is usually applicable and relevant where there is dispute as to paternity of a child. He relied on the case of *OLAYINKA V. ADEPARUSI & ANOR* (2011) LPELR 8691 CA. Counsel argued that the reason for the application is to ascertain the paternity of the victim's child. He urged the Court to grant the reliefs sought.

For his part, learned Counsel to the Respondent submitted in his address that none of the provisions under which the instant application was brought empowers this Honourable Court to make the orders sought in the application. He contended that the application asking the Court to direct a DNA test to determine paternity of a child is misconceived in law and fact because the issues of paternity or conducting DNA test is not the subject matter of the proceedings in the substantive case. He submitted that this Court thus lacks the judicial power or jurisdiction to make the orders sought in this application. He posited that neither 63(1)(A) of the Child's Right Act (Cap. C.50) Laws of the Federation of Nigeria nor Section 6(6)(b) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) operates to vest power on this Court to entertain or grant the Complainant/Applicant's motion. He submitted that the motion is strange and has no relevance to the instant criminal proceedings.

The Defendant has in his address raised objection to this Court's power to grant the instant application which seeks to direct DNA test and compel him to submit to DNA test.

For avoidance of doubt, the instant application to compel the Defendant to undergo DNA test was brought under the provisions of Section 6(6) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 63(1)(a) of the Child's Right Act (Cap. C.50) Laws of the Federation of Nigeria 2010.

Now **Section 63(1) of the Child's Right Act** provides as follows;

63(1) In any civil proceedings in which the paternity or maternity of a person falls to be determined by the Court hearing the proceedings, the Court may, on an application by a party to the proceedings, give a direction for-

- (a) the use of scientific tests, including blood tests and Deoxyribonucleic acid tests, to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person; and*
- (b) for the taking within a period to be specified in the direction, of blood or other samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons.*

Yes, the above provisions of the Child's Right Act empowers the Court to make orders directing scientific tests such as DNA tests to be conducted and samples of persons taken for such purpose. Such power as conferred by that provision can however only be exercised in civil proceedings in which the issue of the paternity or maternity of a person is to be determined. It is therefore inapplicable in the instant suit which is strictly criminal proceedings (not civil proceedings).

Further to the above, it is a matter of common knowledge that judicial powers are vested in the Court by virtue of **Section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)**. See **IKECHUKWU V. NWOYE & ANOR (2013) LPELR-22018(SC) AT**

P. 8 PARAS. C-F. Thus, the inherent power of the Court (both substantive and procedural) is given Constitutional force under the provision. See **CHIME & ANOR V. UDE & ORS (1996) LPELR-848(SC) AT P. 18 PARAS. D-F.** The judicial powers of the Court can however only be invoked where there is cause of action or it is justiciable. Thus, where there is no cause of action or the matter is not justiciable, the Court would lack the competence to invoke its judicial powers under **Section 6 of the Constitution.** – see **NIGERCARE DEVELOPMENT CO. LTD V. ADAMAWA STATE WATER BOARD & ORS (2008) LPELR-1997(SC) AT PP. 31 – 32 PARAS. F-B.**

See also **OWURU & ANOR V. ADIGWU & ANOR (2017) LPELR-42763(SC) PP. 24 – 25 PARAS. F-A.**

The question to ask at this stage is, can this Court invoke its inherent judicial powers to grant the instant application?

I have observed from a careful perusal of the processes before this Court particularly the prayers sought, the grounds for the application and the reasons advanced in the affidavits in support and argument of the Applicant's Counsel that the instant application is essentially by the Applicant (the Prosecution) for the purpose of discovering forensic evidence to use against the Respondent (Defendant) in the trial of the charge against him.

Now, generally speaking, the law allows the use of forensic evidence in any trial. Forensic evidence could be tendered and admitted in evidence at trial through the evidence of a person specially skilled in such area of science in which the forensic evidence is to be given. See **Section 68 of the Evidence Act 2011.** See also the case of **SHONUBI V. PEOPLE OF LAGOS STATE (2015) LPELR-24807(CA) AT PP. 60 – 63 PARAS. E-A.**

What the Prosecution (Applicant) wishes this Court to do in this application is not to admit forensic evidence in accordance with the

provisions of the law. What the Prosecution (Applicant) wants this Court to do is to conduct DNA tests for the purpose of using the results against the Defendant (Respondent) to prove the charge against him. In other words, the Prosecution wants this Court to discover and obtain forensic evidence (DNA) from the Defendant to use against the Defendant in his criminal trial.

Let me state the obvious. Discovering and obtaining evidence against a defendant suspected of committing a criminal offence is part of investigative procedure and not trial procedure. Investigative procedure involves discovering and obtaining evidence establishing that the suspect committed the offence. Trial procedure involves using such evidence obtained to establish in a court of law that the suspect who has been charged did commit the offence charged. Investigative procedure thus comes before trial procedure. A criminal investigation is not a criminal trial. The two may be related but they are totally and fundamentally different and distinguishable from each other.

On what investigation of crime entails, the Court of Appeal held in **OYINBO V. IGP (2019) LPELR-47788(CA) AT PP. 32 – 33 PARAS. F-D** per Ogunwunmiju JCA (as his lordship then was);

“The process of investigation involves an inquiry so as to gather evidence in relation to a set of facts. Generally, sufficient evidence must have been gathered by way of a thorough investigation before a suspect should be prosecuted. Also, investigations are carried out based on the strength of the information available at the disposal of the investigator. Usually, the manner of carrying out the said investigation is often left at the discretion of the prosecuting agency involved. See IGP & Anor v. Ubah LPELR-23968 (CA); Fawehinmi v. IGP (2002) 7 NWLR, Pt. 767, Pg. 606. Investigations are often aimed at procuring a hands-on evidence to be used in grounding a person's conviction for an offence. i.e. any evidence gathered from the investigation of a case can be used in proof of a criminal offence or to ground a charge.”

It is well established principle of law that a trial is not an investigation and investigation is not the function of a court. See **UDOH V. STATE (2020) LPELR-51330(CA)**.

See also **UKO & ORS V. GOVT OF THE FEDERATION OF NIGERIA & ORS (2021) LPELR-56069(CA) AT PP. 24 - 25 PARAS. F-A** where the Court of Appeal held per Owoade JCA that;

“For the umpteenth time, I must say that a trial is not an investigation and investigation is not the function of a Court. The function of a Court is to examine and decide on evidence that has been demonstrated and tested by the parties.”

The Prosecution in this case could have acted under **Section 11 of the Administration of Criminal Justice Act 2015** to obtain whatever DNA sample from the Defendant’s person when he was taken into lawful custody in order to discover or obtain forensic (DNA) evidence against the Defendant. This option was available to the Prosecution under the Administration of Criminal Justice Act 2015 during the investigation of the offence for which the Defendant would eventually be charged before this Court in this case. There is nothing to show that the Prosecution attempted to make use of this option. The Prosecution rather waited till after the Defendant had been charged before this Court and his trial had commenced before attempting to carry out investigation procedure (by bringing the instant application) to use this Court to discover and obtain possible evidence against the Defendant.

As stated earlier, it is trite law that trial is not an investigation and investigation is not the function of a Court. See **UDOH V. STATE (SUPRA)** and **UKO & ORS V. GOVT OF THE FEDERATION OF NIGERIA & ORS (SUPRA)**. It therefore follows, that this Court cannot possibly invoke its inherent judicial powers to entertain the instant application which seeks to engage the Court beyond its normal duties in criminal trials and engage the Court in criminal investigation of the

Defendant. It is not justiciable. It would amount to a breach of the principles of fair hearing and the Defendant's Constitutional right to same should this Court engage in criminal investigation as sought by the instant application. Criminal investigation is the function of the Prosecuting authorities and not the Court's. A Court must maintain its impartiality at all times be it in civil or criminal matters. – see **NERC V. ADEBIYI (2017) LPELR-42902(CA) AT PP. 28 – 29 PARAS. F-A.**

In sum, there is no applicable provision of the law under which the instant application to direct DNA test can be granted by this Court in the instant circumstances. Essentially being for the purpose of further investigating the Applicant, it is not an application for which this Court can invoke its inherent judicial powers under **Section 6 of the Constitution of the Federal Republic of Nigeria 1999 (as amended)** as it is not justiciable.

Consequently, this Court lacks the power or capacity to make the orders sought in the instant application brought by the Complainant/Applicant.

Even if this Court had the power to make the orders directing DNA test as sought by the Complainant/Applicant, is there sufficient affidavit evidence before this Court to convince this Court to grant such an application?

As stated earlier, the Defendant/Respondent was arraigned before this Court on a charge of rape of one Miss Faith Andrew under Section 1 of the Violence Against Persons (Prohibition) Act 2015.

I will not at this stage comment on the evidence so far led by the Prosecution at the trial of the substantive matter so as not to prematurely determine substantive issues at this interlocutory stage.

I have however carefully considered the facts and reason given by the Applicant in its affidavit and further affidavit in support of the instant application. The Applicant says the DNA test is being sought to determine the hidden truth about the paternity of the victim's child which the Respondent is trying to conceal. That compelling the Defendant to

undergo the DNA test is to prove his innocence as this is the only evidence before this Court to establish same.

With deference, the Prosecution in this case has turned the law on its head. In criminal trials the onus is always on the prosecution to prove the criminal charge against the defendant. The defendant bears no burden to prove his innocence because the law presumes him innocent until proven otherwise (by the prosecution). – See **STATE V. ONWUERIAKU & ANOR (2017) LPELR-42613(CA) AT PP. 13 – 15 PARAS. D-E.**

The purpose of the instant application which appears to be for the Respondent to establish his innocence in his criminal trial is therefore improper and cannot be said to be *bona fide*. The application ought to be refused as it has no merit.

Be that as it may, as stated earlier in this Ruling, this Court lacks the power or capacity to make the orders sought in the instant application by the Complainant/Applicant. It is therefore hereby dismissed.

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Honourable Justice M. E. Anenih

APPEARANCES:

A.O. Ochogwu Esq appears for the Prosecution.

Aliyu Saiki, SAN appears with M.I. Akande for the Defendant.