

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA ON THE 22ND DAY OF SEPTEMBER, 2021

BEFORE HIS LORDSHIP, HON. JUSTICE U. P. KEKEMEKE

SUIT NO.FCT/HC/CV/1360/18

COURT CLERK: JOSEPH ISHAKU BALAMI & ORS.

BETWEEN:

BARR. EZUGWU EMMANUEL ANENE.....PLAINTIFF

AND

MTN NIG. COMMUNICATIONS LTD.....DEFENDANT

JUDGMENT

The Claimant's Writ of Summons and Statement of Claim is dated 29th March, 2018. It seeks for the following reliefs:

- (a) A declaration that the numerous unsolicited text messages sent to the Claimant as weekly child clarion guidance and counseling by the Defendant without the Claimant's subscription to same and N50 weekly deductions made therein by the

Defendant from the Claimant's airtime constitutes a breach of the Claimant's right to privacy and quiet enjoyment of the airtime the Claimant paid for and an unlawful interference with or deduction of the Claimant's airtime.

- (b) A declaration that the Defendant's imposition of callertunez on the Claimant's mobile number without the Claimant's subscription to same and N20.00 weekly deductions made on the Claimant's airtime by the Defendant consequent upon the callertunez services breached the Claimant's right to privacy and quiet enjoyment of the airtime the Claimant paid for and an unlawful interference with or deductions of the Claimant's airtime.
- (c) A declaration that the eighty eight needless calls at odd hours made by the Defendant to the Claimant caused the Claimant embarrassment, inconvenience, distractions and anxiety and as such breached

- Claimant's Right to Privacy and quiet enjoyment of the Claimant's mobile number 08030735301.
- (d) An order of Court awarding the sum of One Hundred Million Naira only (N100,000,000.00) as general damages for the disturbing unsolicited messages sent to the Claimant as weekly child clarion guidance by the Defendant without the Claimant's subscription to same, breaching thereby the Claimant's right to privacy and quiet enjoyment of the airtime the Claimant paid for.
- (e) An Order awarding the sum of N100Million as general damages for the Defendant's imposition of callertunez on the Claimant's mobile number 08030735301 without subscription to same and for the subsequent deductions made on the Claimant's airtime by the Defendant and the breach of Claimant's right to privacy and quiet enjoyment of the airtime the Claimant paid for.

- (f) A order of Court awarding the sum of N100 Million as general damages to the Claimant against the Defendant for the embarrassment, inconvenience, distractions and anxiety the Claimant was subjected to when the Defendant placed the 88 needless calls at different odd hours which breached the Claimant's right to privacy and quiet enjoyment of the Claimant's mobile number.
- (g) A Perpetual Injunction restraining the Defendant from further sending unsolicited text messages, placing further needless calls, callertunez and charges on the Claimant on account of all these unsolicited services.
- (h) N1 Million as cost of Litigation.
- (i) 10% interest on the Judgment sum until it is finally liquidated.

The Defendant's Amended Statement of Defence is dated 02/10/2019 but filed on 03/10/19. The Claimant filed an

Amended reply to the Defendant's Statement of Defence dated 14/10/19.

The Claimant opened his case and called only one witness in proof thereof. The Claimant states that he is Barrister Ezugwu Anene. He deposed to two Witness Statements on Oath on 29/03/18 and 25/09/18. He adopts same as his oral evidence in this case. The witness also adopted his Further Witness Statement on oath. He also tendered Exhibits A – A10:

- (1) Bunch of Notice of Clarion guidance and counselling.
- (2) Bunch of Notice of deductions for the weekly clarion child guidance and counselling.
- (3) Notice of deduction from MTN callertunez.
- (4) Certificate of compliance.
- (5) MTN starter pack.
- (6) Claimant's letter to Defendant dated 20/05/18.
- (7) 2 replies from Defendant dated 9/9/19 and 4/06/19.
- (8) Judgment of FCT High Court.

- (9) Judgment of Court of Appeal.
- (10) Enrolled order of leave to Appeal.
- (11) Notice of Court of Appeal to Supreme Court.

Succinctly the Claimant's testimony is that he is a legal practitioner and a Nigerian residing in Abuja. That the Defendant is a limited liability company carrying on the business of telecommunication network services having its corporate address within jurisdiction. That since he subscribed to the Defendant's network services, he never subscribed for weekly clarion child guidance and counselling or callertunez services rendered by the Defendant but the Defendant inundates him with chunk of messages and deducts monies from his airtime for messages that were not solicited for from July 2016 - 21/03/18 at unholy hours sometimes. The Defendant also placed calls to the Claimant with its numerous code numbers particularly 55227 to his number 08030735301 at odd hours between 5/11/16 - 12/12/17 and when picked was banging of

music, advertisement of different products and cracking of needless nauseating Jokes.

That his refusal to pick the calls with the code numbers denied him the opportunity of picking important business calls whereas the strange calls are embarrassingly reoccurring. That the said strange calls by the Defendant using different numbers have caused him needless embarrassment, inconvenience, distraction and anxiety as the calls usually come at odd hours and when utmost concentration is needed.

The calls by the Defendant using different numbers whose content are banging of odd music, advertisement of commercial products and cracking of needless jokes invade his right to privacy and quiet enjoyment of the usage of his airtime and mobile number 08030735301. That the unsolicited messages and calls caused him untold anxiety. Every effort so far made to stop the embarrassing calls and messages or airtime deduction proved abortive as the

Defendant is making huge monies from the deductions and adverts.

He further stated in reply to Defendant's defence that he was not issued with a sim starter pack indicating tips or recharging the line, checking balances and packages and how to subscribe to Defendant specially designed offers. He never subscribed to or saw the terms. That he wrote a letter of complaints to the Defendant against the unlawful deductions made on his airtimes for unsubscribed callertunez, urging the Defendant to stop such actions which letter the Defendant replied and undertook to deactivate but never did. He also sent DND (DO NOT DISTURB) Stop message when introduced but it never worked. He also complained to the customer care at Maitama to no avail.

The Defendant also entered its defence and gave evidence via DW1. He is Emmanuel Itade of No.1 Falomo Street,

Ikoyi, Lagos. He is a customer support. He adopted his Witness Statement on Oath dated 15/03/19 & 3/10/19.

He tendered Exhibit B – B4:

1. MTN prepaid terms and conditions.
2. Itemised VAS subscription.
3. Complaint/Service request log.
4. MTN SIM starter pack.

He states that when a prospective subscriber purchases a SIM starter kit, the prepaid terms and conditions is visibly placed in the kit to enable a careful study. That by buying and activating an MTN SIM card Claimant agreed to be bound by the Defendants terms and conditions governing the sale and use of Defendant's SIM card. That Defendant did not recklessly or unlawfully or in any manner whatsoever deprive or deduct money from Claimant's account nor breached the Claimant right to privacy and quiet enjoyment of the airtime the Claimant paid for. The Defendant did not make any fraudulent/illegal deductions

from Claimant's account. All deductions made from Claimant's account were in line with subscriptions to the Defendant's products and services. That opportunities to opt out of services were availed the Claimant which he failed to utilize. That Defendant activated a DO NOT DISTURB facility.

That all services complained about by Claimant were subscribed to by him and the Defendant merely debited him for the services. That the calls which the Claimant described as needless were made on him on the presumption that he wanted the services as he made no effort to opt out of it. That the services provided Claimant were based on his negligent omission to opt out of same as stipulated by the terms and conditions. That Defendant did not deprive Claimant of any money whatsoever or caused him untold embarrassment, inconvenience, physical and emotional stress whatsoever. No loss was occasioned to Claimant as a result of any deprivation of Claimant's

money. That Defendant keeps records of all subscriptions made by Claimant for any of the services, date, time, channel and phone used. That call logs and history are also kept. That Defendant did not only use Samsung Grand Prime Plus but also used Blackberry. The total value charged Claimant by the Defendant for value added service and device data from 2016 to May 2018 was N14,520.00. Claimant did not report or lodge Complaint of service inconveniences.

The Defendant's Final Written Address which he adopted as his final oral argument is dated and filed on 10/12/20.

Learned Counsel raised two issues for determination:

- (1) Whether the Claimant led credible evidence to establish any breach of his right to privacy by the messages and notifications sent to the Claimant's sim card even if unsolicited as well as alleged unlawful deductions.

- (2) Has the Claimant made out any case either by his Statement of Claim or by his viva voce testimony as to entitle him to the reliefs sought.

The Claimant posited one issue for determination which is whether the Claimant proved his case on the balance of probabilities as to be granted the reliefs sought.

From the totality of issues raised. It is my view that only one issue arises for determination in this suit, which is, Whether the Claimant proved his case on the preponderance of evidence and balance of probabilities. The law is trite that in civil cases the burden of first proving the existence or non existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side regard being had to any presumption that may arise on the pleadings, Sections 132 and 133 of the Evidence Act. The burden of proof shall be discharged on the balance of probabilities in

all Civil Cases. See Section 134 of the Evidence Act. In a plethora of cases, the Court have held that the burden of proof is on the party who asserts a fact to prove same, for he who asserts must prove. The standard of proof required is on the balance of probabilities. The onus is on the Claimant and it does not shift until he has proved his claim on the preponderance of evidence and balance of probabilities. It is after the burden of proving the case has been discharged in accordance with the above principle of law that the burden shifts and continues to shift. Where a party fails to discharge this burden, then the opponent needs not prove any fact and the party alleging cannot rely on the opponents case. A party must prove the case on credible evidence of its witness.

See IGBI VS. STATE (2000) 2 SC 67.

KALA VS. POTISKUM (1998) 3 NWLR (PT. 540) 1 SC.

DAODU VS. NNPC (1998) 2NWLR (PT.538) 355 SC.

BRAIMAH VS. ABASI (1998) 13 NWLR (PT. 581) 167 SC.

ALHAJI OTARU & SONS LTD VS. IDRIS (1999) 6 NWLR (PT. 606) 330 SC.

Both Learned Counsel in their final argument agreed with the above legal principles.

The Claimant's Counsel contends that the Claimant's case is that he did not subscribe to the Defendant three specific value added services viz weekly child clarion guidance and counselling, callertunez and unnecessary calls at odd hours. That these unsolicited services violated his right to privacy. He refers to Section 37 of the 1999 Constitution. That unsolicited text messages as churned out by the Defendant are in direct violation of his constitutional right. That the numerous unsolicited text messages violated the Claimant's right to quiet enjoyment of his mobile phone and the airtime the claimant paid for.

The Defendant on the other hand contends that the facts are founded on contract. That Claimant must lead evidence to prove that the Defendant breached MTN

prepaid terms and conditions for purchase and use of a SIM starter pack. That the instruction on the SIM pack directing the purchaser to see the terms and conditions of purchase contained therein suffices as notice of the terms and conditions of the service agreement regarding the use of the SIM card by the Claimant.

The case of the Claimant is clear and unambiguous, he is aggrieved by the alleged barrage of unwarranted, unsolicited messages and calls by the Defendant even at odd hours which amounts to an invasion and intrusion into his privacy, contrary to Section 37 of the 1999 Constitution.

In proof thereof, Claimant gave evidence and tendered Exhibit A, a bundle of 187 unsolicited messages, sent between 27th July 2016 – 23rd March 2018.

Exhibit A1 is a bundle of 76 messages stating thus “Your subscription to weekly clarion child guidance and counselling has been renewed successfully and N50.00

deducted from your account. Your service will be renewed on 2016-08-2019. To cancel text, STOP CHW... Thank you MTN. 12 Aug. 2016.

Exhibit A2: A bundle of 54 documents/text messages from Feb. 2017 – March 2018 renewing the subscription of the Claimant's callertunez and deducting N20.00 each from his account. Exhibit A4 is the Claimant's MTN starter pack.

The Claimant wrote Exhibit A5 dated 20/05/14 addressed to the Defendant complaining of wrongful deductions.

Exhibit A6 is a letter from MTN dated 9/06/2014 addressed to Claimant stating that the complaint was noted.

That a refund of N700.00 which represent total deductions made on Claimant's line for callertunez service from the date of service subscription till date. That Claimant's allegation of extortion is wrongful and that there was never any arbitrary deduction.

Exhibit A7 is the judgment of the High Court of the Federal Capital Territory while Exhibit A8 is a judgment of the Court of Appeal.

The evidence is that every efforts so far made to stop the embarrassing calls and messages or airtime deductions proved abortive.

Section 37 of the 1999 Constitution as amended states “The privacy of citizens, their homes, correspondence, telephone, conversations and telegraphic communications is hereby guaranteed and protected. The Claimant herein alleged that he was the holder of a registered mobile telephone number on the operator’s network on which he received unsolicited short messaging service even when DND Service was activated which ought to automatically exclude him from such messages.

In ***EMERGING MARKETS TELECOMUNICATION SERVICES LTD VS. ENEYE (2018) LPELR 46193*** as cited by Learned Counsel to the Claimant, the Court of Appeal held

that unsolicited messages were violation of the Respondents right to privacy. That case is on all foresh with this case.

Section 1(1) of the 1999 Constitution as amended states “This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria. By sub section 3, if any other law is inconsistent with the provision of this Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void. A contract that takes away the fundamental right of a citizen as in this case is void to the extent of its inconsistency with the Constitution.

The Learned Senior Counsel to the Defendant argued that the relationship between the Claimant and the Defendant is governed by law of contract. That the Defendant pleaded the terms and conditions. Under Cross-examination, the defence witness said that there is a reference in Exhibit B4 (Starter Pack) directing customers to their terms and

conditions on the website. He said the reference is so tiny, he cannot read it. This evidence was elicited by the Claimant during Cross Examination. It is potent.

In ***IKOMI VS. BANK OF WEST AFRICA LTD (1965) 1 ANLR 39***, the Supreme Court held that the judicial task is not to discover the actual intention of each party, it is to decide what each was reasonably entitled to conclude from the attitude of the other. The intention of the parties to an oral or written contract is to be gathered from the agreement to which they have set their hands. In the instant case there is no such document, however where any term is expected to form part of the agreement, it should be brought to the notice of the other party.

In ***RAJENDRAM VS. MADRAS MANUFACTURING CO. LTD (1976) II CCHCJ/2601*** – It was held that a standard form document containing the terms and conditions of engagement and scale of professional fees to be binding must be brought to the notice of the party to be bound.

Terms of contract must be legible to a reasonable person in order for them to be enforceable. If printed in the manner described by DW1 such that no ordinary reasonable person would be able to read them, the Claimant is not bound. The Claimant can also not be said to have waived his right to privacy as enshrined in the Construction by virtue of his alleged acceptance of the terms and conditions of the contract. I find as a fact that:

- (1) The Defendant sent unsolicited messages and callertunez to the Claimant.
- (2) The Claimant complained to the Defendant via Exhibit A5 and personal complaint to the customer care of the Defendant.
- (3) That Claimant also activated his Do Not Disturb (DND) option.
- (4) That despite the complaints and activation of Do Not Disturb or opting out option, the Defendant persisted in sending the messages.

It is my humble view and I so hold that the Claimant has proved his case on the preponderance of evidence and balance of probability in that his right to privacy was invaded by the Defendant. The Claimant however failed to prove that the Defendant made 88 calls to him at odd hours. Relief C and F therefore fails. Cost of litigation as couched in relief (h) is special damages. It is not pleaded and particularised neither was it strictly proved. It also fails.

General damages are those damages which the law implies in every breach and every violation of a legal right. It is the loss which flows naturally from the Defendant's act and its quantum need not be pleaded or proved as it is generally presumed by law. The manner in which it is quantified is by relying on what could be the opinion and judgment of a reasonable person in the circumstances of the case.

I must therefore make the assessment in the light of the evidence before me. Litigation is not a business or a profit

making venture and it should not appear to be so. It is to ameliorate injury suffered by the aggrieved.

See *ODULAJA VS. HADDAO (1973) 11 SC 337.*

OSUJI VS. ISIOCHA (1989) 3 NWLR (PT. 111) 623.

In my humble view the general damages claimed by the Claimant are wide colossal and bogus. The claims are also unnecessarily unwieldy. I have also noted that Exhibit A7 & A8 show that the Claimant was awarded general damages for a similar suit.

Judgment is entered in favour of the Claimant against the Defendant as follows:

- (1) It is declared that the numerous unsolicited text messages, callertunez made to the Claimant's phone without the Claimant's subscription to them and the subsequent deductions made on his airtime constitute a breach of the Claimant's right to privacy and quiet enjoyment of his airtime and phone.

- (2) Three Hundred Thousand Naira only (N300,000) is awarded as general damages.
- (3) A perpetual injunction is hereby issued restraining the Defendant from further sending unsolicited text messages or imposing callertunez and deductions and charges on the Claimant's airtime forthwith.
- (4) The Defendant shall pay 10% interest per annum on the judgment sum from the date of judgment until it is finally liquidated.

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HON. JUSTICE U.P. KEKEMEKE
(HOH. JUDGE)

22/09/2021