

TIME LIMIT FOR CROSS-EXAMINATION – CURTAILMENT OF PARTIES' RIGHT TO FAIR HEARING?

By

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Abstract

The practice and/or procedure of Judges of setting time limits for cross-examination of witnesses in Nigerian Courts is no doubt on the increase and fast gaining ground in the trial courts. This practice manifests itself in various forms ranging from cutting short the process of cross examination of witness, asking the counsel cross-examining to round off, to actual setting or allocation of time for the cross-examination. And this is so even where the cross-examiner still has relevant and germane questions to ask from the witness. The question, however, is whether this does not infringe on the litigants' fundamental right to fair hearing as enshrined in the constitution.¹ Apart from the provision of the 1st Schedule to the Electoral Act 2015 (as amended)² which gives the Election Petition Tribunal the power to allot time for cross-examination of witnesses in election cases which is *sui generis*, there seems to be no law giving powers to the trial judges to allot time for cross-examination of witnesses at trial.

This paper seeks to examine the Law and/or Rules of Courts governing cross-examination of witnesses in our trial courts *viz-a-viz* the concept of fair hearing with a view to recommending or proffering solution so as to ensure that parties' fundamental right to fair hearing is not infringed upon.

Introduction

Setting time limits for cross-examination in Nigerian trial courts is gradually becoming an accepted practice. In Election Petition cases, one may safely argue that it is the provision of the 1st Schedule to the Electoral Act that empowers the Tribunal to allot time for cross-examination of witnesses. The rationale for this being the need for quick and timeous disposition of electoral matters so as to avoid

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¹ See generally, Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

² Paragraph 18(8) (c)

It is humbly posited that it would not supercede the provision of the law, it is the Federal Republic of Nigeria which guarantees a citizen's right to

paper seeks to examine the concept of fair hearing as well as right of citizens to hearing as enshrined in the provision of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) on fair hearing vis-à-vis the extant law(s) on cross-examination in our courts. The paper also briefly examines the practice of limiting examination of witnesses in other jurisdictions outside Nigeria. The paper concludes by proffering solutions and/or recommendation on the way forward.

hearing may be defined as the giving of equal opportunity to be heard to all parties in litigation before the court. It means that a party or an individual will be given an opportunity to present evidence to support his/her case and to discover evidence against him or her. And it has been held that where there is no evidence against a party, the principles of natural justice and the concept of rule of law cannot be applied and a party is entitled to be heard.⁴

"Fair hearing means a judicial or administrative hearing conducted in accordance with due process. In essence, fair hearing means giving equal opportunity to the parties to be heard in the litigation before the court. Where parties are given opportunity to be heard, they cannot complain of breach of the fair hearing principle."

of the fair hearing principle." It was stressed further that the consequences of breach of rule of fair hearing is that it renders the whole proceedings a nullity. Thus in the case of Salu v. The Attorney-General, the principle thus:

.....The consequences of a breach of the rule of natural justice or fair hearing is that the proceedings in the case are null and void. See *Adigun Vs. A.G., Oyo State* (1987) 1 NWLR (Pt. 53) 678. If a principle of natural justice is violated, it does not

For example, the Petition of *Aregbesola Vs. Oyintola (2011) 9 NWLR (Pt. 1253) 458* which was finally determined in 2010 after Oyintola has spent more than 3 years as a

remained in favour of Aregbesola in 2010 after Oyin...

⁽¹⁵⁾ *Ya. J.C.A.*, in *S.C. Eng. Nig. V/s. Nwosu* (2015) 11 NWLR (Pt. 1629) 1 @ pg 26, Paras A-B.

matter whether if the proper thing had been done the decision would have been the same; the proceedings will still be null and void. In other words, if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

Right to Fair Hearing

The right to fair hearing in Nigeria predates her independence in 1960 when it began to operate the concept of constitutional supremacy. The concept of fair hearing was already in existence in administrative law under the doctrine of natural justice which had its origin in the theories of Natural law.⁷

The concept is governed by two maxims, *audi alterem partem* (hear the other side) and *nemo judex in causa sua* (do not be a judge in your own cause). The two concepts cannot be separated into neat watertight compartments, and were in some cases inextricably mixed, and governed natural justice in procedural and substantive aspects.⁸

The right to fair hearing, no doubt is one of the fundamental rights guaranteed in constitutions of virtually every country of the world.

Fundamental rights are generally regarded as those aspects of human rights which have been recognised and entrenched in the Constitution of a country. These rights are specially provided to upgrade dignity and liberty in every modern state, as they are fundamental and inalienable, except, however on some occasions where they may be subject to derogations and restrictions in the interest of defence, public safety, public order, public morality, public health or for the purpose of protecting the rights and freedom of other persons.⁹

The right to fair hearing is provided for in instruments, charters and Constitutions among others globally. It is provided for by the African Charter on Human and Peoples' Rights.¹⁰ It is also provided for in the Universal Declaration of Human Rights;¹¹ the sixth Amendment to the United States Constitution; and the European

⁷ Kehinde M. Mowoe *Constitutional Law in Nigeria* (Malthouse Press Limited 2008) p 343

⁸ L.P.D.C. Vs. Fawehinmi (1985) 2 SC. 178.

⁹ See *Mrs. Yetunde Ogunbesan & Ors Vs. Hon. Minister of Health and Social Services* (1990) *FHCLR* 168 @ 190, where

the Applicants who were nurses sued the Respondents for their right to freedom of association. In dismissing the action, the trial Judge Ukeje J. (as she then was) held that since the Applicants were engaged to provide essential services, their right to embark on industrial action had been properly derogated upon by the Trade Disputes (Essential Services) Act, Cap. 433, Laws of the Federation of Nigeria (LFN), 1990.

¹⁰ See Article 7 thereof

¹¹ See Article 10 thereof

Convention on Human Rights¹² as well as numerous other Constitutions and declarations throughout the world. Constitution of the Federal Republic of Nigeria, 1999 (as amended), which is the grundnorm of all laws in the country provides for this right as one of the fundamental Rights of citizens guaranteed in the country thus:

"36 (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality." (emphasis mine).

"36(6) Every person who is charged with a criminal offence shall be entitled to

(a)

(b) be given adequate time and facilities for the preparation of his defence;

(c)

(d) examine, in person or by his legal practitioners, 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.

The aforementioned constitutional provisions have been given judicial nod by the Supreme Court in a legion of cases among which are: *Akingbola Vs. F.R.N.*¹³ *Sule Vs. State*,¹⁴ *Okorie Vs. State*;¹⁵ *Baba Vs. N.C.A.T.C.*;¹⁶ and *Military Governor Vs. State Vs. Nwauwa*.¹⁷

It is stressed that the principle of the right to a fair hearing is so fundamental to the legal system such that once it is breached, the decision arrived at no matter how just or benevolent must be declared null and void. The historical importance and consequences of the breach of the rule of fair hearing is confirmed by the Supreme Court in *Adigun Vs. A. G. Oyo State*,¹⁸ where Eso, J.C., held as follows:

Article 6 generally

(1988) 14 NWLR (Pt. 1640) 395 @ 422

(1991) 10 NWLR (Pt. 1628) 545 @ 563

(1994) 11 NWLR (Pt. 1629) 1 @ 26

(1991) 5 NWLR (Pt. 192) 388 @ 415

(1997) 2 NWLR (Pt. 490) 675 @ 709

(1997) 1 NWLR (Pt. 53) 678 @ 721 - 722

"... Natural justice demands that a party must be heard before the case against him is determined. Even God gave Adam an oral hearing despite the evidence supplied by his act of covering his nakedness before the case against his continued stay in the Garden of Eden was determined against him...."

"Once an appellant shows that there is an infringement of the principle of natural justice against him, it is my view that he needs show nothing more. The finding that there is an infringement of the principle is sufficient to grant him a remedy. This is not a case where one, after showing *injuria* would need to proceed further to show *damnum*. The *injuria* herein, is proof positive of the *damnum*."

Cross Examination

"Cross-examination" may be said to denote a stage of a procedure in a trial court in which one counsel questions a witness called by the other opposing counsel. The two sets of advocate (or advocates where the trial involves multiple parties or defendants) may either appear for the prosecution or plaintiff, or the defendant/defendants as the case may be.

Counsel cross-examining challenge adverse testimonies with the aim of weakening or destroying it. However, the cross-examination must comply with the rules governing the relevancy and admissibility of evidence.

Cross examination is a formidable tool used by one party to destroy the case of his adversary.

And it has been held that where an adverse party fails to cross-examine a witness upon a particular fact, that in effect is an admission of the truth of that fact.¹⁹

The importance and purpose of cross-examination was aptly captured and restated by the Court of Appeal in the case of **Borishade Vs. N.B.N Ltd**²⁰ as follows:

"Cross-examination is a formidable tool in the hands of a diligent and skilful counsel. By the instrument of cross-examination counsel can either totally demolish the Plaintiff's case or fully develop the case of the defendant and vice versa. When masterly administered, cross-examination actually brings forth the best form of evidence. Purposeful cross-examination can drum up sacred truth from the stomach of an otherwise reluctant witness. When the core of the case is touched by cross-examination, the witness not only speaks with his mouth, his facial expression, his jaunty answers and gesticulations all go a long way to expose the unexpressed, the

¹⁹ See *Awopeju Vs. The State* (2000) 6 NWLR (Pt 659) 1 @ 20; *Ojiako Vs. The State* (1991) 2 NWLR (Pt. 175) 578, Garba Vs. The Queen (1959) NSCC 133 @ 135.

²⁰ (2007) 1 NWLR (Pt1015) 217 @237.

untold dark side of the whole story. A thorough cross-examination seeks to and indeed often elicits the best form of evidence, admission of the truth initially concealed by a carefully thought-out testimony guided by the skilful hands of the witnesses' learned counsel."

The Right to Cross-Examination

As noted above, the right to cross-examine witnesses is no doubt a right to fair hearing. What is more, this right is provided for by the Evidence Act, 2011. Other procedural laws such as the Administration of Criminal Justice Laws of various states in Nigeria and the High Court (Civil Procedure) Rules of the various states also provide provisions in this regard subjecting oral examination, including cross-examination of witnesses to the Evidence Act.²¹

Setting Time Limit for Cross Examination

As earlier stated, the practice of setting time limit for cross-examination by trial courts in Nigeria is fast gaining ground. This practice may lead to infringement of the fundamental right to fair hearing, unless the Constitution, and of course, the Evidence Act and other extant laws on cross-examination are reviewed. This is because the provision of fair hearing in the Constitution is so clear that one may only argue that it does not contemplate setting any time limit for cross-examination. This is because cross-examination of witnesses no doubt, is part of the right to fair hearing provided for in section 36 (6) (d)²² of the Constitution. And this provision has been given judicial backing in the case of *Akingbola Vs. F.R.N.*,²³ among others

"The principle of natural justice and fairness are crucial and sacrosanct in our judicial system and adjudicatory functions at all level of the judicial hierarchy. It must as a matter of constitutional obligation be observed by all judicial officers. This is because fairness and natural justice require that a party to a cause, or a party who ought reasonably to be a party in the suit, must be given the opportunity to put forward his case or defence freely and fully." (Emphasis mine)

It is to be noted from the aforequoted dictum in the above case that a party to a case must be given the opportunity to put forward his case or defence freely and fully. The question then is: By restricting or limiting the time for cross-examination of a witness, can it be said that a party is allowed to put forward his case, or defence fully? Does this not contravene the provision of the Constitution on fair hearing principles?

²¹ For example Order 40 Rule 1 of the Kwara State High Court (Civil Procedure) Rules, 2005; Section 261 of the Kwara State Administration of Justice Law 2018; and Section 255 of the Administration of Criminal Justice Act, 2015.

Now Section 215 (2) of the Evidence Act provides as follows:

"(2) The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination – in – chief"

The above provision of the Evidence Act, like the Constitution does, contemplate setting any time limit for cross-examination except that the cross-examination must relate to relevant facts.

The importance of cross-examination has always been pronounced upon by the courts over the years. Indeed, when a witness testifies on a material fact in controversy in a case and the other party fails to cross-examine him, the court will construe this as an acceptance/admission that the party does not dispute the fact.²³ In *Oforlete Vs. The State*,²⁵ the Supreme Court, Per Achike, J.S.C., held inter alia

"After all, the noble art of cross-examination constitutes a lethal weapon in the hands of the adversary to enable him effect the demolition of the case of the opposing party.... Plainly, it is unsatisfactory if not suicidal bad practice for counsel to neglect to cross-examine a witness after his evidence – in – chief in order to contradict him or impeach his credit while being cross-examined but attempt at doing so only by calling other witness or witnesses thereafter..."

On the need to allow a party to cross-examine a witness without restricting him, the Court of Appeal, Per Edozie, J.C.A., in *Iwuoha Vs. Okoroike*,²⁶ held inter alia

"...It seems to me therefore that the course taken by the learned trial Judge in restricting the appellant's counsel to cross-examination only on question of damages without allowing him establish through the respondent the defences of justification and privilege is an act which seriously undermine the Appellant's right to fair hearing."

In further substantiation of the point being made, Eso, J.S.C., in *Ibrahim Shagari*²⁷ captured it in the following scintillating manner:

"Indeed, during cross-examination the defendant is at liberty to put as many questions as are material to his case. He could even be "Cross" with the witness in his examination as the word cross-examination implies." (Emphasis mine).

²⁴ See *Patrick Vs. State* (2018) 16 NWLR (Pt. 1645) 263 @ 283. See also *Simon Vs. State* (2013) 119

NWLR (Pt. 1566)

119.

²⁵ (2000) 12 NWLR (Pt. 681) 415 @ 439

²⁶ (1996) 2 NWLR (Pt. 429) 231 @ 250

²⁷ (1983) NSCC 431 @ 445

from the above, one would therefore have no difficulty in asserting that setting time or setting time limit, for cross examination of witnesses is not backed by any law governing or regulating evidence. Even in election petition cases where by virtue of paragraph 18 (b) (c) of the First Schedule to the Electoral Act, 2016 (as amended), the tribunal could afford time or set time limit for cross examination, one could still argue that this provision is inconsistent with the provisions of sections 36(1), 6(d) of the Constitution on fair hearing.

Limiting Cross Examination in Jurisdictions Outside Nigeria

In other jurisdictions outside Nigeria, where the right to cross-examine would be limited, this would be supported or backed by the existing laws or rules in that regard. For example, Rule 90 (F) of the ICTY Rules¹⁰ in the case of *Prosecutor Vs. Jadranko PRILIC & 5 others*¹¹ wherein, after considering that the right to cross-examine witnesses is a fundamental right law¹² and resolved Article 21(4) of the statute of ICTY (the Tribunal); the Trial chambers adopted a sufficiently flexible approach, which preserves the right of cross examination by each of the parties counsel and complied with the right to cross examine witnesses as stipulated under Article 21(4) of the statute. The court also held that the decision in that case complies with rule 90(F) of the Rules, and therefore the existence of a discretionary act or of an abuse of its discretionary power by the Trial Chamber has not been established.

In the United Kingdom, there is no time limit set for cross examination of witnesses in the trial courts. Rather, the Rules, Rule 32.1 (3) provides that "the court may limit cross-examination."¹³ What this means is that while the courts do not set time limits for cross examination, they can actually regulate or control the cross-examination of witnesses by ensuring that time is not wasted on questions that are not relevant to the proceedings, without unnecessarily infringing upon parties' right to cross-examine, and *a fortiori*, right to fair hearing.

In the United States, by virtue of the Federal Evidence Rule, a trial Judge is required to "exercise reasonable control over the mode and order" of witness interrogation and evidence presentation.¹⁴ The scope of cross-examination in the U.S. is broad. Rule 611 (b) allows cross-examination "On any matter relevant to any issue in the case, including credibility." And in *State Vs. Whaley*,¹⁵ the North Carolina Supreme Court reversed a conviction based upon limitations imposed on cross-

¹⁰ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY).

¹¹ Case No. IT-04-74-AR71.2

¹² Article 14(1) (c) International Covenant on Civil and Political Rights, Article 41(1) (b) European Convention on Human Rights.

¹³ Rule 32.1 (3) American Convention on Human Rights.

¹⁴ Part 12 - Evidence - The Rules & Practice Direction on Evidence.

¹⁵ See Rule 611 (b) N.C. EVID. 611 (b).

examination of the victim. In that case, the defence sought to cross-examine the victim about her answers to a questionnaire she completed during her visit to the counselling centre. The defence argued that the evidence was relevant to the issue of the victim's credibility. The trial court excluded the evidence based on the absence of proof that the victim suffered from a mental defect, among others. In reversing the decision, the Supreme Court emphasised the broad scope of cross examination, the importance of the testimony on the key issue in the case, and the presence of contradictory evidence.

It could be seen from the above that in U.S. the trial court's discretion to limit cross examination must be exercised carefully, even though restrictions of cross examination of witnesses based on sound exercise of discretion would be upheld.³⁴

Conclusion

From the foregoing, it is deducible that, apart from where the extant rules of the courts make express provisions for setting time limit for cross-examination,³⁵ cross examination can only be controlled or limited by the trial Judges, exercising the power to do this judicially and judiciously even in other jurisdictions outside Nigeria. The provisions on limiting or controlling cross-examination in the UK and US are virtually the same. For example, Rule 611 (b) of the United States on cross examination is akin to the provision of Section 215 (2) of the Evidence Act, 2011 which says that:

“the examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination – in – Chief.”

Thus, it is glaring from the above provisions of the Evidence Act that the intendment of the law makers is far from being that of setting time limit(s) for cross-examination. It is only that such cross-examination must be relevant. *See Vs. Oloriawo*³⁶.

“One Cliché or aphorism has always worried me in the profession, and it is that in cross-examination the sky is the limit. Counsel love it. It is almost a song in the judicial process. Apart from the fact that the judicial process has nothing to do with the sky, which is not within the reach of the ordinary man, the Statement is not correct in law. In law it is not cross-examination which is said not to have any inhibition or limitation but relevancy as a principle of the law of evidence, has to be considered. The point I am struggling

³⁴ See State Vs. Cook, 672 S.E. 2d 25 (N.C. App. 2009)

³⁵ Like the provision of paragraph 18(8) (c) of the ICJY (supra) and Rule 90 (f) of the ICJY (supra)

³⁶ (2002) 2 NWLR (Pt. 750) 113 @ 123-124 Para H-B.

to make is that evidence procured from cross-examination can only be admitted if it is relevant to the live issues before the court. Counsel may decide to ask irrelevant questions (and some do) but the trial Judge cannot make use of evidence procured from such questions because they are outside the live issues in the matter."

In addition to the above, the Evidence Act itself indirectly limit the nature of questions that may be asked during cross-examination, by giving the trial court the discretion to decide whether a particular question shall be asked and when a witness may be compelled to answer.³⁷ Also, questions may not be asked a witness unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.³⁸ Indecent and scandalous questions shall also be forbidden by the court³⁹, as well as questions intended to insult or annoy a witness.⁴⁰ It should be noted that despite the powers given to the trial court by the above provisions of the Evidence Act with regard to controlling, forbidding and/or limiting the scope of questions that may be asked during cross-examination, there is no provision whatsoever in the Evidence Act which purports to set, or envisages the setting of, any limit for cross-examination of witnesses.

It is therefore suggested that our Judges should as much as possible nip this practice in the bud and confine themselves to limiting, and/or restricting examination and cross-examination of witnesses to relevant facts. This is to avoid the impending danger inherent in this practice which has the potency of curtailing the fundamental right to fair hearing of parties in our trial courts.

Section 224
Section 225
Section 227.
Section 228.