

**CONSTITUTIONALITY OF ABRIDGEMENT OF RIGHT OF CROSS-EXAMINATION
UNDER THE NATIONAL INDUSTRIAL COURT OF NIGERIA RULES 2017***

Abstract

Right to fair hearing within reasonable time is constitutionally guaranteed under section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). It is the bed-rock of the Nigeria's justice system such that its breach vitiates the entire proceedings. True enough, notwithstanding its fundamental nature, the right to fair hearing is not absolute or open ended. Put differently, right to fair hearing does not exist in absolute terms or without limitations in Nigeria. By Order 40 Rule 19 (2) of National Industrial Court of Nigeria (Civil Procedure) Rules, a party cross-examining a witness is not allowed more than forty (40) minutes to do so. Using the extant Constitution of the Federal Republic of Nigeria, the Evidence Act 2011 and relevant decided cases as the perimeter, this article examined the Constitutionality of limiting the time allowed a party to cross-examine a witness to a maximum of forty (40) minutes under the said Rule. It contended that Order 40 Rule 19 (2) of National Industrial Court of Nigeria (Civil Procedure) Rules 2017 is in conflict with the constitutional guarantee of fair hearing. The Article recommended that trial courts should retain the discretion to determine based on the circumstances and peculiarity of each case, the appropriate time within which cross-examination should be concluded, rather than being bound by a fixed and inflexible time limit.

Keywords: Right of Cross-Examination, National Industrial Court of Nigeria Rules 2017, Constitutionality, Abridgment

1. Introduction

The National Industrial Court of Nigeria (NICN) is a specialised Court established for a quick and efficient resolution of labour and employment related disputes in Nigeria, and thereby acting as a catalyst for industrial peace and sustainable productivity, economic growth and development¹. To this end, the Court is expected to conduct its proceedings in such manners as to avoid undue delay commonly associated with the conventional Court system². And in an attempt to promote a quicker and efficient resolution of labour and employment matters, various statutory and institutional mechanisms and reforms have evolved. These include, *inter alia*, limiting civil appeals against the decisions of the NICN to questions of fundamental human rights, the recent establishment of the NICN Alternative Dispute Resolution (ADR) Centres and the consequent enactment of the NICN ADR Centre Instrument, 2015 and NICN ADR Centre Rules, 2015.

The National Industrial Court of Nigeria (Civil Procedure) Rules 2017 (herein after the 'New Rules' or '2017 Rules') was enacted and same takes effect on the 5th of January, 2017. Order 40 Rule 19(2) of the 2017 Rules provides that a party cross-examining a witness shall not be allowed more than forty (40) minutes to do so. Using the extant Constitution of the Federal Republic of Nigeria, the Evidence Act 2011 and relevant decided cases as the barometer, this article examines the Constitutionality or otherwise of limiting the time allowed a party to cross-examine a witness to a maximum of forty (40) minutes by Order 40 Rule 19 (2) of National Industrial Court of Nigeria (Civil Procedure) Rules, 2017. This author lends its weight to the efforts of the Court and its frameworks to ensure that labour and industrial matters are disposed timeously but while the said provisions of Order 40 Rule 19(2) of the NICN Rules, 2017 is well intentioned, limiting the right of a party to cross-examine a witness to forty (40) minutes, regardless of the nature and complexity of the case, is a violent violation of Section 36(1) of the Constitution of Nigeria which guarantees the right to fair hearing and as such the provision is void to the extent of its inconsistency.

2. Appraisal of the Constitutionality of Order 40 Rule 19 (2) Of the NICN (Civil Procedure) Rules 2017

The notion of justice connotes fairness and equality. It is now settled and universally accepted that justice is not a 'one-way traffic'. Thus, there is justice only and only if the interest of the parties to a

*By Paul J. ONYENWEIFE, LLB (Hons) (NAU), BL, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria.

¹ See the National Industrial Court Act, 2016. See also Order 1 Rules 4 and 5, National Industrial Court of Nigeria (Civil Procedure) Rules, 2017.

² *Ibid.*

dispute and that of the society is recognised and taken into account in adjudication. In *Josiah v State*³, the Supreme Court, per Oputa JSC pointed this point out when the Court held thus: Justice is not a one-way traffic. It is not justice for the appellant only. Justice is not even a two-way traffic but a three-way traffic—justice for the appellant accused of heinous crime of murder, justice for the victim, the murdered man, the deceased man, whose blood is crying out to heaven for vengeance and finally, justice to the Society at large whose social norms and values had been desecrated and broken by the criminal act complained of⁴ In consonance with the immutable twin pillars of justice, the Constitution of the Federal Republic of Nigeria 1999 (as amended) guarantees the right to fair hearing. The Constitution in Section 36 (1) clearly states as follows: In the determination of his civil right 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. Section 36 of the Constitution is complemented by Sections 214 and 215 of the Evidence Act 2011 which make relevant provisions relating to examination in chief, cross examination and re-examination of witnesses.

There is a consensus that delay of justice is denial of justice. Consequently, expeditious hearing is a pivotal element of justice. Order 40 Rule 19(2) of the NICN (Civil Procedure) Rules 2007 attempts to limit the cross examination of a witness by a party or his counsel to a maximum of 40 minutes in order to avoid delay in labour matter. The said Order 40 Rule 19 (2) provides that: In any matter for cross-examination, the presiding judge or judge in the matter shall have control of the duration of the cross-examination. Provided that no party cross-examination a witness shall be allowed more than forty (40) minutes to do so. Right to cross-examination is pivotal element of fair hearing. Cross-examination is an art and a veritable tool in the hand of a skilled advocate. Cross-examination, by section 223(9) of the Evidence Act 2011, is designed mainly to test the accuracy, veracity and credibility of the witness under cross-examination. An otherwise strong case may be dismantled during cross-examination of the party's key witnesses. It is also important to appreciate the fact that failure to cross-examine a witness may be taken as an admission of the witness testimony.

It is now a settled law that cross-examination questions must relate to relevant facts⁵. Counsels admittedly sometimes use unnecessarily long cross-examinations to delay proceedings. Some insists that counsels are allowed to 'go to town' during cross-examinations even when the questions have no bearing on the matter whatsoever. On the scope and limits of the questions that can be asked during cross-examination, the Court of Appeal in *Olomosola v Oloriawo*⁶ per Tobi JCA (as he then was) had this to say: One cliché or aphorism has always worried me in the profession, and it is that in cross-examination the sky is the limit. Counsel loves it. It is almost a song in the judicial process. Apart from the fact that the judicial process has nothing to do 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 to have inhibition and limitation but relevancy as a principle of the law of evidence has to be considered. The point I am struggling 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 trial judge cannot make use of evidence procured from such questions because they are outside the live issues in the matter.

Order 40 Rule (19) (2) of the NICN 2017 Rules relates to the time frame of cross-examination and so this article shall examine its constitutionality. Unfortunately, the operative phrases 'reasonable time and fair hearing' used in Section 36(1) of the Constitution were not defined anywhere in the Constitution. What then is reasonable time and fair hearing? Our Courts have however had opportunities to pronounce and shed more lights on the meaning of the word 'reasonable time and fair hearing' within the meaning and contemplation of Section 36 (1) of the 1999 Constitution. In *Pam V Mohamed*⁷ the Supreme Court per Tobi JSC held:

The operative words for our purpose in this appeal are 'reasonable time', words which in their docile content are vague and nebulous. A reasonable time is a time justified by

³ (1995) 1 NWLR (Pt. 1) 125 SC.

⁴ See also *Okpe v Fan Milk Plc* (2017) 2 NWLR (Pt. 1549) 282 SC.

⁵ See Section 215 (2) of the Evidence Act 2011.

⁶ (2002) 2 NWLR (Pt. 750) 133 pages 123 -124, paras. H-B.

⁷ (2008) 16 NWLR (Pt. 1112) 1.

reason. Reasonable time in its nebulous content cannot be determined in vacuo but in relation to the facts of each case. This is because what constitutes a reasonable time in one case may not necessarily constitute a reasonable time in another case. Reasonable time in Section 36 presupposed the granting of an adjournment in cases. In dealing with reasonable time concept in Section 36, the Court will take into consideration the nature of the case in terms of the magnitude, intricacies, versatilities, complexities and volume of the work involved. In this respect the Court will consider the assemblage of witnesses and documents if any and the likely or possible time to get all these. Above all, the Court will take into consideration the procurement of exculpatory or inculpatory evidence as the case may be. A reasonable time is also a moderately and practically possible time within which a Court or tribunal could complete a trial and pronounce its decision. See *Effiom V State* (1995) 1 NWLR (Pt. 373) 507. A reasonable time means the period of time which in the search for Justice does not wear out the parties and their witnesses and which is required that justice is not only done but appears to a reasonable person to be done. See *Ariori V Elemo* (1983) 1 SCNLR 1, *Chief Atejiroye V Ayeni* (1998) 6 NWLR (Pt. 552) 132.

In deciding whether a trial was conducted and concluded within a reasonable time, the facts involved in each case, its peculiarities and the amenities within the disposal of the state to conduct such a trial must be taken into consideration. What is a 'reasonable time' in England or United States of America and such other developed countries with modern equipment and better amenities at their disposal, may not and cannot be the same or equated with a 'reasonable time' in a developing country like Nigeria⁸. Whether a trial is conducted within a reasonable time, is a question of fact and will depend on the circumstances in each case. Moreover, as the question of what is a 'reasonable time' within which to conduct and complete a hearing of a case, whether criminal or civil, is not provided in Section 36(1) and (4) of the Constitution, it is not practicable in construing the provisions to fix a time limit⁹. It is therefore not possible to lay down any hard and fast or fixed rule as to what a 'reasonable time' is in the trial of every case. But on a balance the term 'reasonable time' must mean, among other things, the period of time which, in all the circumstances of a case, is necessarily required to ensure that justice is not only done but appears to reasonable persons to have been done to all concerned in a case. It means such length of time as may fairly properly and reasonably be allowed in the trial of a case having regard to the surrounding circumstances and the overall interest of justice¹⁰. A reasonable time is such length of time as may fairly, properly and reasonably be allowed or required, having regard to the nature of the act or duty to be carried out or the nature of the subject-matter and also to the attending circumstances. What amounts to a reasonable time is a mixed question of law and fact and this is left to the discretion of the judges¹¹.

Like reasonable time, the term 'fair hearing' is a broad concept and its end result is justice. Fair hearing has been stated to involve a fair trial and the true test of it is the impression of a reasonable man who having been present throughout the trial is satisfied from his observation that justice has been done in the case. The essential elements which go to make up fair hearing include -(a) easy access to the court; (b) the right to be heard; (c) the impartiality of the adjudicating process especially that of *forum competens*; (d) the principles of *nemo iudex in causa sua*; and (e) whether there was inordinate delay in delivering judgment¹².

On the strength of the above stated theoretical judicial frameworks, it is urged that, any provision of a Rule of Court seeking to limit the right of a party or his counsel to cross examine a witness can be said to be a fetter on his right to fair hearing guaranteed by the Constitution. In *Igomu v Ibrahim*¹¹ the Court of Appeal, per Sanusi JCA, held as follows:

By virtue of Section 215 of the Evidence Act, 2011, cross-examination is a right available to parties in litigation. Thus, where the right to cross-examination is taken away

⁸ *Effiom v. State* (1995) 1 NWLR (Pt. 373) 507.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² *Ibid.*

¹¹. (2014) ALL FWLR (Pt. 719) 1162 CA Page 117. 5 paras E-F.

for whatever reason, it amounts to breach of fair hearing and fair trial and any judgement arising from that proceeding will be perverse and will amount to a nullity, having breached the rules of natural justice which is enshrined in Section 36(1) of our Constitution and must be set aside. See also *INEC v Ifeanyi* (2009) 38 WRN 145.

3. Conclusion

This article lends its weight to the efforts of the Court to ensure that labour and industrial matters are disposed timeously. Because of the centrality of labour to sustainable productivity, national economic growth and development, it is important that labour and employment related disputes are resolved expeditiously. Trade and labour disputes in particular have drastic effects on the economy of any nation, when labour disputes culminate into strikes and other forms of industrial actions, the economy suffers. This fact notwithstanding, this author is of the view that Order 40 Rules 19 (2) of the NICN Rules, 2017 which purports to restrict the right of a party to cross-examine a witness to a maximum of forty (40) minutes, regardless the volume and nature of the cases is a violent violation of the provisions of Section 36 (1) of the Nigerian Constitution 1999. What is reasonable in relation to the question whether a party has a fair trial within a reasonable time depends on the circumstances of each particular case. It is unjust to use the standard or the situation of things in one or a particular case to determine what is reasonable in another matter¹³. The Court is therefore urged to reconsider this provision in its Rules during future amendments. Fair hearing is a fundamental pillar of justice and same cannot be sacrificed on the alter speed and judicial expedience.

¹³ *Effiom v. State supra.*