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CASE REVIEW

THE POSITION OF CONCURRING JUDGMENT IN MATTERS DECIDED BY THE APPELLATE COURTS IN NIGERIA AND ITS IMPACT ON JUDICIAL PRECEDENTS: REVIEWING THE SUPREME COURT DECISION IN *MAGAJI v NIGERIAN ARMY*⁸⁸⁹

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Abstract

⁸⁸⁹Judgment delivered by Niki Tobi, JSC on the 7th day of March, 2008 reported in LPELR-1814 SC. Niki Tobi JSC was a Justice of the Supreme Court who rose through the ranks from the High Court of the Rivers State (though he hailed from the old Bendel State (present-day Edo and Delta States in Nigeria) through the Court of Appeal and finally to the Supreme Court. His academic background as a Professor of Law influenced his judicial pronouncements. He was never afraid of challenging the *status quo*; an attribute, he exhibited so powerfully in his dissenting view in the case under review.

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In the legal system, court decisions are established as "precedent," which lower court judges must adhere to when presented with similar cases. The majority opinion holds the weight of the court's judgment, while a concurring opinion aligns with the majority decision but presents alternative reasoning. Although, concurring opinions are not considered precedents and cannot be cited as such, this paper delves into the subject of concurring judgments in Nigerian appellate court decisions, specifically exploring their impact on legal precedents following the Supreme Court ruling in *Magaji v Nigerian Army*. The argument put forth is that relying on concurring opinions to establish new legal principles is not a reliable practice, and the growing trend of citing it in Nigerian courts can lead to confusion and compromise the principle of *stare decisis*. Using the doctrinal method of research, the paper underscores the significance of adhering to binding precedents and refraining from using concurring opinions as legal principles.

Keywords: Appeal, Judgment, Majority, Concurring, Leading

1.0 Introduction

In Nigeria, the Sharia Court of Appeal, Customary Court of Appeal, Court of Appeal, Supreme Court and other tribunals i.e. Election Petition Tribunals, Security and Exchange Tribunal, Tax Appeal Tribunal, etc. generally have multiple judges deciding together on appeals before the court.⁸⁹¹ Since these courts have more than one judge/justice sitting on a case, the decision of the court is usually from all the judges/justices sitting in that panel. It is the practice that one of the judges or justices sitting in the panel will be selected to deliver a lead judgment while other members of the panel will also be allowed to make their decision which may either be concurring or dissenting to the lead judgment. Where the decision of the other judges/justices in the panel agrees, complement or improves the lead judgment, it is called a concurring opinion or judgment which has the same force as a leading judgment as long as it is not inconsistent with the leading judgment.⁸⁹² If there is disagreement by the judges or justices on what the outcome of the case should be, there will be two or more decisions: a majority decision/opinion, and a dissenting decision.

Generally, the majority opinion is the decision agreed upon by the highest number of judges or justices sitting in the panel and it constitute the judgment of the court concerned⁸⁹³. Consequently, it is not only fatal but disastrous to rely on a statement

⁸⁹¹ Section 278, 283, 247 and 234 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended)

⁸⁹² *Enang v Umoh & Ors.* (2012) LPELR-8386 (CA)

⁸⁹³ *Abimbola Daramola v Wale Aribisala & Anor* (2009) All FWLR (Pt. 496)

of law (particularly, obiter dictum or concurring opinion) as precedent⁸⁹⁴. A concurring opinion on the other hand is a written [opinion](#) by one or more [judges](#) which agrees with the [majority](#) opinion but states different (or additional) reasons as the basis for his opinion or decision. Practically, like majority opinion which is the actual judgment of the court, concurring opinions are slightly less useful to legal practitioners. Having failed to receive a majority of the court's votes, concurring opinions are not [precedents](#) and cannot be cited as such. This paper examines the propriety or otherwise of the reliance on concurring decisions by legal practitioners or academics as a binding precedent.

This paper is divided into six parts, part one contains the introduction and facts of the case: part two looks at the concept of judgment; part three; types of decision: majority decision, dissenting decision and concurring decision alongside leading decision: part four considers precedent; part five considers the misapplication of concurring decisions and part six contains the conclusion.

2.0 The Facts of the Case

Major Bello M. Magaji (the Appellant at both the Court of Appeal and the Supreme Court) was a commissioned officer in the Nigerian Army and held the rank of Major. He was arraigned before the General Court Martial on a charge of sodomy contrary to section 81(1)(a) of the Armed Forces Decree 1993. The particulars of the offence are that he sometime in 1996 had carnal knowledge of four men against the order of nature. He pleaded not guilty to the charge and evidence was led by the prosecution in support of the charge. Each of the four men gave evidence of their experience with Major Bello. At the close of the prosecution's case, Major Bello did not lead any evidence in his defence. Rather, his counsel informed the General Court Marital that the accused was resting his case on that of the prosecution. Major Bello was eventually convicted as charged and a seven-year sentence was passed on him. Major Bello's matter was thereafter referred to the confirming officer as required under the said Armed Forces Decree. The confirming officer reduced the 7-year term imposed on Major Bello to 5 years. Major Bello was dissatisfied with his conviction and sentence. He therefore filed an appeal to the Court of Appeal which dismissed his said appeal. Dissatisfied, Major Bello further appealed to the Supreme Court where the court dismissed the appeal and affirmed the conviction and sentence of the General Court Martial. The main issue this paper seeks to examine and address is the holding of Per Ogbuagu, JSC contained in the concurring judgment where he held *inter alia* that a photocopy of a certified true copy of a public document needs no further certification to be admissible before a court.

⁸⁹⁴ Ibid.

3.0. Concept of Decision

Nigeria operates a system of law by which judges in their constitutional role of interpreting lay down laws that guide other judges are faced with similar situations in the future. This judicial law-making process is known as *stare decisis*. For instance, where the Supreme Court makes a pronouncement on any principle of law or interprets a law, every other court in Nigeria must kowtow to it and follow its decision even where the judgment of that court was reached *per incuriam*. The only exception is where the lower court can distinguish the particular situation it is faced with as being different from the previous decision of the Supreme Court,

The Supreme Court is properly constituted when it has at least five (5) justices of that court sitting⁸⁹⁵ except in respect of matters in which it has been conferred with Original Jurisdiction or an appeal that seeks the court's interpretation or application of the Constitution or an appeal that seeks to answer the question(s) any of the provisions of Chapter IV of the Constitution has been, is being or is likely to be contravened against any person⁸⁹⁶ here there must be at least seven (7) justices of that court. Justices of appellate courts are like the proverbial blind men who were asked to describe an elephant and described it based on the part they were allowed to feel or touch; these blind men gave different descriptions based on the angle from which they felt the elephant. As a result of this, there is the real possibility that all justices of that court may not agree because they view and understand the case before them from different perceptions. Thus, there could be a leading judgment i.e. a judgment which the majority of the justices of that court agreed with. There could be a concurring judgment i.e. a judgment that agrees with the reasoning and conclusion of the leading judgment. There could also be a dissenting judgment i.e. a judgment that disagrees with the reasoning and conclusion of the leading judgment (especially the conclusion). There could also be a hybrid of concurring and dissenting judgment which automatically becomes a dissenting judgment i.e. a judgment that agrees with the leading judgment on some points but disagrees on some other points. This position was well settled in the case of **O.S.I.E.C v A.C**⁸⁹⁷ where it was observed inter alia that:

“In a case heard by a plurality of Judges, the judgment emanating therefrom is said to be unanimous when all the Judges agree on the resolution of the issue or issues presented and the ultimate decision on the respective rights and obligations of the parties thereto.... Where however all the Judges fail to agree on the resolution of the

⁸⁹⁵Section 234 of the CFRN

⁸⁹⁶Ibid section 234

⁸⁹⁷*O.S.I.E.C v A.C* (2010) 19 NWLR (Pt. 1226) 273 at 345–347

issues and the ultimate decision on the rights and obligations of the parties, then the decision of the majority (made up of the lead and concurring opinions) represents the judgment of the court or tribunal and which alone is binding on the parties. As the same connotes, a concurring opinion or judgment must perforce agree with and support the lead judgment on all the material issues of law and facts deliberated upon and decided. On the other hand, the decision of one or more of the Judges in a case denoting explicit disagreement with and contrary to the decision of the majority is the minority or dissenting judgment and no matter how well-researched and written it has no binding force on the parties.... The question now is whether, on this specific issue, the minority judgment can be held to represent the binding judgment of the court simply because the lead judgment of Kutigi happens to be one of them? I shall answer this question in the negative.”

It should be borne in mind that judgment that constitutes the judgment of any Court is its majority judgment.⁸⁹⁸

Also, the Supreme Court in ***Emeka Nwana v Federal Capital Development Authority & 5 Ors***, per Niki Tobi JSC noted that:

“A concurring judgment has equal weight with or as a leading judgment. A concurring judgment compliments, edifies and adds to the leading judgment. It could at times be an improvement of the leading judgment when the justices add to it certain aspects which the writer of the leading judgment did not remember to deal with.... However, a concurring judgment is not expected to deviate from the leading judgment.... A concurring judgment which does its own thing in its way outside the leading judgment is not a concurring judgment but a dissenting judgment.”⁸⁹⁹

It is clear from the above holding of the court that a dissenting judgment cannot bind the parties in that case let alone lower courts unless and until its reasoning is accepted by that Court. Thus, a dissenting judgment aims to bring to the notice of the court and more importantly to a later court, ‘faults’ in the reasoning of the majority judgment so that the court may perhaps adopt the reasoning in the dissenting

⁸⁹⁸ Ibid.

⁸⁹⁹ *Emeka Nwana v Federal Capital Development Authority and 5 Ors* (2004) 13 NWLR (Pt. 889) 128 at 140–141; *Akpobolokemi & Ors v Ihenacho & Ors* (2015) LPELR-40563 (CA) per Oseji JCA on pages 36–37.

judgment. A dissenting judgment may disagree on the relevant facts as in this case⁹⁰⁰ or on the relevant principle of law. Dissenting judgments are derived from sections 294 (2) and (3) of the 1999 Constitution of Nigeria which provides:

(2) Each Justice of the Supreme Court or the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion. Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when the judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.

(3) A decision of a Court consisting of more than one Judge shall be determined by the opinion of the majority of its members.

It is not in doubt that the Constitution of the Federal Republic of Nigeria, 1999 as evident in the above provisions contemplates that in the discharge of judicial duty, an appellate court could not always be unanimous in its reasoning on its judgments. The Constitution endorses the necessity to write dissenting judgments. A judge or judges driven into writing dissenting judgments is/are acting to the letters of the grundnorm of Nigeria. In “words and legal phrases, judgments and orders are usually determinations of rights in the actual circumstance of which the court has cognizance and give some particular relief capable of being enforced. There are different ways of classifying a judgment depending on the nature of the dispute before the court and the relief sought. And, these are:

- a. **Declaratory judgment:** This is a judgment that declares or confirms the existence of a legal right of a party in an action by defining the rights of the parties regarding legal question presented. Though, declaratory judgment differs from other judgments as it does not order a party to take any action or award any damages for violations of the law. Instead, declaratory judgment determines the rights without consequential relief. However, declaratory judgment can be highly useful for litigants, but also somewhat deficient in clarity, raising number of questions that go to the core of the judicial role. What does it mean to have a legal right, or to declare the existence of a legal right, if that right, is not enforced in law? It has been held that a declaratory judgment is available only when there is a real dispute between the parties, but what is a real legal dispute without enforceable legal rights?

⁹⁰⁰ Concerning whether or not the Plaintiff/Respondent announced that he would no longer call evidence.

- b. **Final Judgment:** This is the type of judgment that determines the rights and obligation of the parties in a suit.
- c. **Interlocutory judgment:** This Judgment decides procedural matter or intermediate substantive issue but not terminating the proceedings are termed interlocutory judgments. This is a judgment that determine a certain or particular issue in the proceedings.
- d. **Judgment *in personam*:** This judgment imposes a personal liability or obligation upon a person or group of persons to some other person or group of persons , which obligation may be to pay sum of money, to perform certain act, or to do or refrain from doing certain act.
- e. **Judgments *in rem*:** The judgment imposes no personal liability on anyone but adjudicates the interests of all persons in a specific matter in the court's custody or subject of its jurisdiction. The designation *quasi in rem* describes a judgment that affects the interests of a particular party, rather than all parties, in a matter within the jurisdiction of the court. This is a judgment which is conclusive only against the parties to the suit e.g. judgment in civil cases.

The necessity to write a dissenting judgment in any of the above variants of judgments does arise and the duty to render the different types of judgments stated above arises in the exercise of the judicial power vested in the Superior Courts in Nigeria by section 6 of the Constitution of the Federal Republic of Nigeria, 1999.

The section provides:

1. The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.
2. The judicial powers of a State shall be vested in the courts to which this section relates, being courts established, subject as provided by this Constitution, for a State.
3. The courts to which this section relates, established by this Constitution for the Federation and for the States specified in subsection (5)(a) to (i) of this section shall be the only superior courts of record in Nigeria; and save as otherwise prescribed by the National Assembly or by the House of Assembly of a State each court shall have all the powers of a superior court of record.
4. Nothing in the foregoing provisions of this section shall be construed as precluding-
 - (a) The National Assembly or any House of Assembly from establishing courts, other than those to which this section relates, with subordinate jurisdiction to that of a High Court;
 - (b) The National Assembly or any House of Assembly, which does not require it, from abolishing any court which it has brought into being.

5. This section relates to:
- (a) the Supreme Court of Nigeria;
 - (b) the Court of Appeal;
 - (c) the Federal High Court;
 - (d) the High Court of the Federal Capital Territory Abuja;
 - (e) a High Court of a state;
 - (f) the Sharia Court of Appeal of the Federal Capital Territory, Abuja;
 - (g) a Sharia Court of Appeal of a State;
 - (h) the Customary Court of Appeal of the Federal Capital Territory;
 - (i) a Customary Court of Appeal of a State;
 - (j) such other courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly may make laws; and
 - (k) such other courts as may be authorized by law to exercise jurisdiction at first instance or on appeal on matters with respect to which House of Assembly may make laws;
6. The judicial powers vested in accordance with the foregoing provisions of this section:(a) shall extend, notwithstanding anything to the contrary in this constitution, to all inherent powers and sanctions of a court of law; (b) shall extend to all matters between persons, or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person;

3.1 Majority Decisions

Majority decisions are the ones where a majority of the judges/justices agree. For example, there are seven Justices of the Supreme Court of Nigeria. What the majority of the Justices of the Court decides and/or agrees on becomes the majority decision. For example, if five justices out of seven agree on a matter, their decisions become the majority decision. This occurred in the *Magaji v Nigerian Army*⁹⁰¹. The majority decision delivered represented the decisions of the Court. If all the seven Justices agree and reach the same conclusion, then a unanimous decision is delivered.

3.2 Concurring Decisions

In addition to the majority and dissenting decisions, there is a third type of decision a court can deliver called a concurring decision. These decisions result when a judge agrees with the ultimate conclusion made by the majority of the court but disagrees

⁹⁰¹ Ibid

on how they reached that decision. In law, a concurring opinion is in certain legal systems a written [opinion](#) by one or more [judges](#) of a [court](#) which agrees with the decision made by the [majority of the court](#) but states different or additional reasons as the basis for their decision. When no absolute majority of the court can agree on the basis for deciding the case, the decision of the court may be contained in several concurring opinions, and the concurring opinion joined by the greatest number of judges is referred to as the [plurality opinion](#). As a practical matter, concurring opinions are slightly less useful to legal practitioners than majority opinions. Having failed to receive a majority of the court's votes, concurring opinions are not [precedents](#) and cannot be cited as such. But concurring opinions can sometimes be cited as a form of [persuasive precedent](#) (assuming the point of law is one on which there is no binding precedent already in effect). The conflict in views between a majority opinion and a concurring opinion can assist a legal practitioner in understanding the points of law articulated in the majority opinion. Occasionally, a judge will use a concurring opinion to signal openness to certain types of [test cases](#) that would facilitate the development of a new legal rule, and in turn, such a concurring opinion may become more famous than the majority opinion in the same case. A well-known example of this phenomenon is *Magaji v Nigerian Army*.⁹⁰² In other words, a concurring decision is an opinion that supports the majority's decision of the court but with different reasons or arguments. A judge providing a concurring opinion agrees with the outcome reached by the majority but may have a different perspective or different arguments in support of that decision. Concurring opinions can offer additional viewpoints or more detailed arguments regarding the case. The main difference between a dissenting opinion and a concurring opinion is that the former expresses disagreement with the majority, while the latter agrees with the majority but for different reasons. Both types of opinions can provide a deeper understanding of various perspectives and arguments involved in a court case. Sometimes some judges do not agree with the majority of the Court. Judges who reach a different conclusion can deliver a dissenting opinion. For example, if six judges/justices agree on a matter, the single judge who disagrees would write their dissenting decision. An example of this occurs in the case of *Toronto-Dominion Bank v Young*⁹⁰³. In this case, Chief Justice Wagner wrote the majority decision for the Court, which represented his decision, and that of Justices Abella, Moldaver, Karakatsanis, Brown, Rowe, Martin, and Kasirer. However, Justice Cote who was also a member of the panel disagreed with the majority decision and wrote her own dissenting decision.

⁹⁰² Ibid

⁹⁰³ (2019) CanLII 127841 (SCC)

3.3 Dissenting Decisions

Dissenting opinion" and "Concurring opinion" are two types of opinions that judges/Justices can issue when deciding a case in court. The differences between them are as follows: Dissenting Opinion (also known as Minority Opinion) is a viewpoint that disagrees with the majority opinion of the court. A Judge providing a dissenting opinion expresses his disagreement with the majority's decision and states reasons why he disagrees. Dissenting opinions may involve different legal interpretations, factual considerations or ethical views on the case. In an epoch-making British case, *Liversidge v. Anderson*⁹⁰⁴, that somehow delineated and streamlined the relationship between the State and the courts in terms of national emergency, Lord Atkin, made his now oft-quoted profound opinion in a dissenting judgment. This was a situation that called for the interpretation of the Emergency powers in respect of the Defence (General) Regulations 1939, which somehow circumscribed the rights of citizens in times of national emergency. Lord Atkins, who felt it was wrong to give uncontrolled power of detention of citizens to the Home Secretary, stated:

“In England, amidst the clash of arms, the laws are not silent. They may be changed but they spell the same language in war and peace. It has always been the pillar of freedom, one of the principles of liberty for which on recent authority, we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments in his liberty by the executive alert to see that any coercive action is justified in law.”

The Constitution of the Federal Republic of Nigeria, 1999 (as amended) has envisaged and anticipated the fact that our appellate court justices may deliver dissenting judgments. Section 294(2) and (3) provides:

- (2) “Each Justice of the Supreme Court or the Court of Appeal shall express and deliver his opinion in writing or may state in writing that he adopts the opinion of any other justice who delivers a written opinion. Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when the judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.
- (3) A decision of a court consisting of more than one Judge shall be determined by the opinion of the majority of its members.

⁹⁰⁴(1942) A.C. 206

It's based on this arrangement that the composition of the appellate panel of justices is usually in odd numbers i.e. three, five or seven. This is with a view that there would not be a tie in terms of dissenting judgment. Every appellate justice is bound to look at issues from his perspective. In *Awolowo v Shagari*, on what constituted two-thirds of 19 states, the Supreme Court in its wisdom decided in favour of Alhaji Shehu Shagari as the elected president of the Federal Republic of Nigeria by a majority of six to one. The dissenting Justice, Honourable Justice Kayode Eso disagreed with his brother Justices and decided in favour of Chief Obafemi Awolowo as the validly elected President. Also, in *Gani Fawehinmi v Col. Haliru Akilu and Lt-Col. A. K. Togun*, on the issue of the right to private prosecutor, the landmark decision was six to one in favour of Fawehinmi at the Supreme Court on the right to private prosecution. Justice B. Craig dissented. In *Mohammed Abacha v the State* the Supreme Court, in a decision of six to one, freed Mohammed Abacha and Justice Akintola Ejiwunmi, in his lone dissenting judgment, described the decision of his brother justices as "tyranny of the majority." The most recent of dissenting judgments at the apex court is that of former Chief Justice of Nigeria, Walter Onnoghen, over the suit filed by the Cross River State Government, over the mode of his removal as the Chief Justice of Nigeria and trial at the Code of Conduct Tribunal. The appeal was dismissed by majority judgment but Hon. Justice Mary Peter-Odili, declared Onnoghen's removals by an ex-parte order of the Code of Conduct Tribunal as illegal and that the Tribunal lacked jurisdiction to try him because of the subsisting Court of Appeal judgment in respect of Justice Nganjiwa.

4.0 Precedent

A precedent is set by a decision from a higher court which is binding a lower court judge when facing a case with similar facts and circumstances.⁹⁰⁵ It is now apparent that the law is that the majority decisions of a court constitutes the judgment of the court as well as a precedent the lower courts must follow in dealing with a case of similar facts and/or circumstances.⁹⁰⁶ For example, the High Court of the Federal Capital Territory or any other State of the federation as well as other courts of co-ordinate jurisdiction are bound by the decisions of the Court of Appeal, which is a higher level of court, as well as the decisions of the Supreme Court of Nigeria.⁹⁰⁷ The Supreme Court being the apex court has the jurisdiction to depart from its previous decisions,⁹⁰⁸ the Court however often follow those previous decisions to allow for consistency and certainty in legal interpretations as a policy court.

⁹⁰⁵ Ibid.

⁹⁰⁶ *CBN & Ors. v Okojie* (2015) LPELR-24740 (SC)

⁹⁰⁷ *Peter v State* (2022) LPELR-58260(CA)

⁹⁰⁸ *Yonwuren v Modern Signs (Nig.) LTD* (1985) LPELR – 3529(SC)

5.0 Misapplication of Concurring Decisions

It has been stated earlier that a concurring decision has the same binding effect and force in law as the lead or majority judgment. Where however the concurring judgment is in direct conflict with the lead judgment, the concurring judgment will give way for the lead judgment to the extent of its inconsistency.⁹⁰⁹ It is clear as crystal from the case in view (*Magaji v Nigerian Army*) that the lead judgment never made a pronouncement on the issue of admissibility of photocopy of certified true copy (CTC) of a document or shared a similar position with that of Per Ogbuagu, JSC, that photocopy of a certified true copy (CTC) document is admissible. This is without a doubt an aberration from the lead judgment which renders that part of the decision a dissenting judgment and therefore not a valid authority for that principle.⁹¹⁰

6.0 Conclusion

This work has carefully examined the different types of judgments and identified the clear-cut difference between a lead judgment and a concurring judgment. The work has demonstrated circumstances where a concurring judgment can have the same force as a lead judgment, as well as circumstances where a concurring judgment will not be considered as an authority for a principle of law or precedent for the lower courts. All of these scenarios have been analyzed in detail in this work. This work has also clarified the misconception among law teachers, legal practitioners, and the general public that the reviewed cases supports the admissibility of a photocopy of a certified true copy of a document.

⁹⁰⁹*O.S.I.E.C & Anor v A. C. & Ors.* (2010) 19 NWLR (PT. 1226) 273 SC.

⁹¹⁰*Sifax Nigeria Limited & Ors. v Migfo Nigeria Limited & Anor* (2018) LPELR-49735(SC)