

CASE REVIEW

WHETHER WRITTEN ADDRESSES FILED AND EXCHANGED WITHOUT READING IN OPEN COURT NULLIFIES THE ENTIRE TRIAL

AMINU MIKAILU VS. THE STATE (2001) 8 NWLR PT. 715, 469 (C.A.)*

1.1 INTRODUCTION

After the close of evidence by both sides to a case before the court, it is part of the trial process in Magistrate and High Courts etc. for counsel to both parties to deliver an address before the court.

The address by counsel is the summation of all the major and important aspects of the evidence of each party, together with the judicial and statutory authorities relied on to prove one's case.

The address is ended with a plea to the court to grant the prayers of the party in question to either uphold his claim or dismiss the case, depending on whether the party concerned is a plaintiff or a defendant as the case may be.

The address by counsel is an integral part of the trial process which the constitution requires to be held in public as shall be seen in the course of this review. Counsel are required to address the court at the close of evidence for both parties, whether in a civil or criminal trial. After the address, the court would then adjourn for judgment.

Usually, the party on the defence side addresses the court first, then the plaintiff or prosecutor addresses last.

Sometimes, the addresses are too long. The court records the addresses in long hand. One address may take the whole of the court's time. In the circumstance therefore, it is usual for the court to take the address of the defence, then adjourn to another future date for the plaintiff or prosecutor to address the court. This procedure elongates the period of trial.

In the High Court, the practice developed whereby counsel are allowed to write, file and exchange their addresses which will be deemed by the court to be read. This practice therefore means that the counsel will not orally read or deliver the written addresses so filed. The oral delivery of same is dispensed with by consensus of both parties before the court, and with the court's approval.

Section 33(1) (4) and (13) of the repealed 1979 constitution, which is the same as section 36(1) (3) & (4) of the 1999 constitution provides that civil and criminal trials shall be held in public. This trial process includes the delivery of counsel's address at the close of evidence by both parties to a case.

The question arises as to the legality of a trial where all other proceedings therein are conducted in public except the physical oral delivery before the court of the counsel's addresses.

Better still, the question may arise as to, whether the filing and exchange of counsel's address in open court without actually reading same orally to the Judge in open court makes that portion of the trial not to be in public and thereby nullifies the entire trial?

In the case under review, the Court of Appeal was called upon to decide inter-alia, whether written addresses of counsel, filed and exchange in open court without being read, nullifies the entire proceedings in the trial court.

Regrettably, the court held firmly that the practice of filing and exchanging written addresses in open court, does not satisfy the constitutional requirement to conduct trials in open court from beginning, up to, and including the delivery of judgement.

In consequence of the above, the court held that the entire trial was a nullity for failure to orally deliver written addresses in open court.

The above decision is that of the Court of Appeal. It is trite law that the Court of Appeal is next in hierarchy to the final court in Nigeria, the Supreme Court.

In the absence of a contrary decision from the Supreme Court, the doctrine of Judicial precedents which is binding on all courts in Nigeria makes this decision of the Court of Appeal final authority on the issue. This will continue to be the position of the Law until over-ruled by the Supreme Court.

Judicial precedent or case law consists of judicial decisions found in the judgements of courts of records. Judicial precedent is one of the major sources of Nigeria law. By this doctrine, decisions of superior courts in the legal order of hierarchy are binding on the lower courts in the same hierarchy. This is based on the legal maxim "stare decisis et non queta movere". That is to say, decisions that were settled should not be unsettled.

Judicial precedent is law. It is what the judges say a statute is that becomes the law that the police will enforce. In this sense whatever the courts interpret as being the intention of the legislature in enacting a statute, that is indeed the law and not the wordings that constitute the law in our statute books.

It is the courts that give the order for the enforcement of what they interpret as being the law. Thus the prophecy of what the courts would do in a case lies in the prediction of the earlier precedent on the matter by a superior court. In the absence of a decision of the supreme court therefore, in line with judicial precedent, the decision of the court of appeal takes the form of a final decree on a matter. This is true even if with due respect, the decision is wrong. In Nigeria Arab Bank Vs Barri Engineering Nigeria Ltd,¹ Ogundare J.S.C. said:

The doctrine of judicial precedent (otherwise called stare decisis) requires all subordinate courts to follow decisions of superior courts even where these decisions are obviously wrong, having been based upon a false premise; this is the foundation on which the consistency of our judicial decision is based.²

2.2 FACTS OF THE CASE

The Appellant with five other co-accused were charged with offences of conspiracy, impersonation, cheating by impersonation, and cheating contrary to sections 97, 732, 324 and 325 of the Penal Code Law.

At the trial, all the accused testified on behalf of themselves while the prosecution called seven witnesses. At the close of the case for both parties, the judge ordered for written rather than oral addresses.

The addresses were to be filed and exchanged. After this was done, the trial judge then reserved the judgement. Seven months later Her Lordship delivered the judgement, convicting all the accused persons and sentencing them to various prison terms.

Dissatisfied, the appellant appealed to the court of Appeal, Kaduna Division.

2.2.1 ISSUES FOR DETERMINATION

Three issues were formulated for determination. The issue relevant for this paper was; whether the written addresses of counsel filed and exchanged without reading same in open court nullified the entire proceedings at the trial court.

2.2.2 JUDGEMENT OF THE COURT

The Court of Appeal unanimously allowed the appeal and set aside the judgement of the trial court containing the conviction and sentence against the appellant. The court could have ordered a retrial but it was constrained by the fact that, by the time the appeal was determined, the appellant had already served the sentence.

Abdullahi P.C.A delivering the lead judgement summarized the courts opinion as follows:

In my respectful opinion, I do not think that the addresses exchanged by the counsel and was not read in the open court can be said to have met the demand of the provisions of section 33 (13) of the (1979) Constitution. At least the address stage cannot be held to be in public.³

In consequence of the above, the court concluded that I very much regret that this issue vitiates the trials which is otherwise very well conducted.⁴

The trial in this case was nullified on two major grounds. The first is on the duty of the court to hold trials in public. The second is on the need to comply with the rules of court.

3.3 ANALYSIS OF ISSUES ARISING FROM THE DECISION

3.3.1 THE DUTY TO CONDUCT TRIALS IN PUBLIC

As seen in the above dictum of Abdullahi P.C.A, section 33(1), (4) & (13) of the 1979 Constitution was⁵ the relevant law under which this case was decided. The section provides as follows:

33(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 reasonable time by a court or other tribunal established by law and constituted in a manner as to secure its independence.

(4) Whenever a person is charged with a criminal offence, he shall unless the charge is withdrawn be entitled to fair hearing within a reasonable time by a court or tribunal.

(13) the proceedings of a court or the proceedings of any tribunal relating to matters mentioned in sub-sections (1) and (4) of this section (including the announcement of decisions of the court or tribunal). Shall be held in public.⁶

Interpreting the above provisions, the Supreme Court held that it was a constitutional right that proceedings of a trial whether in civil or criminal matters be heard in public. In this regard the court opined that addresses of counsel in a matter before a court forms an integral part of the trial.⁷ Failure therefore to conduct that part of the trial i.e. reading of counsel written addresses in open court, makes the trial not wholly in public and this the court felt vitiates the entire trial.

This breach of a constitutional provision particularly one dealing with fundamental right of citizens was held to be a very serious breach which could not be condoned.⁸ The court held that recalling counsel to give a summary of their written addresses in open court did not cure the earlier defect of filing and exchanging addresses without a formal reading in open court.⁹ The court held that at the point when the court began to breach the clear provisions to conduct trial in open court it lost jurisdiction to continue with the trial.¹⁰ This therefore made the later effort to correct the breach incompetent.

This principle of fair trial in open court was held to extend even up to the non delivery of final judgement in open court.

The court held that:

“delivery of the judgement of the court in chambers out of the full glare of the public was unconstitutional and vitiates the entire proceedings”¹¹

Ogundare J.S.C. concurring in a similar decision in an earlier case¹² held that because hearing in a case was held in public, the argument that the delivery of judgement in the judges chambers is a mere technicality does not hold. He opined that the delivery of judgement in a matter is part of the proceedings that should be held in public as provided by the constitution.¹³ Failure therefore to deliver final judgement in open court vitiates the entire proceedings.

3.3.2 THE NEED TO COMPLY WITH RULES OF COURT

In addition to observing constitutional provisions in matters before the courts, the courts are bound to observe the rules of practice and procedure as prescribed in the procedural laws of the particular courts concerned. In this case the relevant rules of practice and procedure is the High Court Procedure Rules. The Court of Appeal in the present case held that, even though it is becoming fashionable these days for judges of the High Courts (and Federal High Courts) to order for written addresses, this practice is untenable. This is because according to the court:

This practice is not provided in either the various civil procedure rules or criminal procedure laws applicable in the country.¹⁴

The court continued that even though this practice may not result in miscarriage of justice, it had grave constitutional implications. This includes the nullification of the entire proceedings.

4.4 CONCLUDING REMARKS

Following the established principle of judicial precedent in Nigeria, Mikailu's case is binding on courts below. The decision is that of the Court of Appeal. This court is next in hierarchy to the Supreme Court. In the absence of any contrary decision by the Supreme Court, Mikailu's case from the Court of Appeal is binding on all courts in Nigeria which are subordinate to the Court of Appeal. This decision is also binding on the Court of Appeal itself. This is because, following the rule of stare decisis et non quieta movere, the Court of Appeal unlike the Supreme Court is bound by its previous

decisions since the Court of Appeal cannot over rule itself.¹⁶ This therefore means that only the Supreme Court can reverse Mikailu's case.

One very important issue settled by this case is that, all practices of filing and exchanging written addresses of counsel in court without reading or orally delivering same in open court is unconstitutional. Although this practice has helped in reducing the length of time spent in court trials, it has been declared to be unconstitutional. The practice is also declared to be unknown to the High Courts and indeed all other courts that have original jurisdiction to conduct trials of cases at the first instance.

This decision also has pro-active as well as retroactive effects. It prohibits future non oral delivery of written addresses by counsel. It as well places all other cases in which there was non oral delivery of written addresses in a very precarious position, which is capable of rendering such decisions unconstitutional. The Court of Appeal has declared it to be illegal and contrary to the constitution, for any court to conduct public trials in which written addresses are filed and deemed to be delivered instead of being actually read in open court.

This decision means that, from the commencement of the 1979 Constitution and up till the commencement of the 1999 Constitution, it was unlawful to file and deem written addresses of counsel to be read without being actually read in open court. This means for example that litigants who had their cases earlier concluded before Mikailu's case could now file an appeal to set aside the concerned decision of court if it violated the requirement of the constitution to file and deliver written addresses in open court.

It would not be a defence that such cases were concluded before Mikailu's case and therefore only matters concluded after Mikailu's case will be caught up with the precedent in the Mikailu's case.

It is respectfully submitted that, the effect of Mikailu's case is that, all cases before or after the case which violated the constitutional requirement to deliver counsel's addresses orally in open court were illegal and unconstitutional. This is provided such cases were commenced within the period in which the particular constitution was operational.

Once a court declares an issue to be unconstitutional, it means that such issue and all similar issues before or after the court's declaration are unconstitutional, right from the commencement of the said constitution, and not from the date of the said decision.

In as much as one respects the decision of the Court of Appeal, it is respectfully submitted that this particular decision of the said court deserves a second look.

Addresses by counsel are a summation of their various clients case before the court. The filing and exchange of written addresses which are adopted in open court ought to be held to be done in public. The mere fact therefore that the written addresses

are not read in open court should not invalidate the trial. It is respectfully submitted that it is in such cases as, where the addresses are filed and not exchanged, or adopted in open court that they could be faulted.

The decision of the Court of Appeal though well intentioned is too draconian. It is akin to killing a fly with a sledge hammer. The judicial zeal to enforce the fundamental rights of citizens should not be taken to extreme. It should be exercised with reasonable caution as to serve the relevant purpose without being too fanatical.

Our judges still take down court proceedings in long hand. The practice of resorting to written address was in response to the need to reduce the judges work. Written addresses solves the problem of taking too much time to record very lengthy counsel addresses. Where parties do not object but infact embrace an order to file and exchange written addresses, such addresses should be held to be within the interpretations of the law on conduct of trial in open court. The same should apply to instances where counsel themselves apply to file and exchange written addresses.

However a better way is to comply with the precedent without stopping the filling and exchange of written addresses. This could be done by reading the said addresses without the necessity of the judge taking down the addresses in long hand. All he could do is to adopt the written address and incorporate them into his record of the proceedings for the day. In this case the judge listens to the addresses in open court and adjourns for judgement. By this means, the proceedings at address stage would still be in public. The time which would have been wasted in taking down the address in long hand too would have been saved.

In this way, the provisions of law on holding trials in open court would be complied with, without taking away the practice of written addresses in the court.

END NOTES AND REFERENCES

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(1995) 9 SCNJ 147.

Ibid. at 175 Paragraph 40.

Mikailu V. State (2001) 8 NWLR Pt. 715, 469 at 484 paragraph G.

Ibid. at 485 paragraph G.

This provision is the same as S. 36 (1) (3) & (4) of the 1990 constituti
Ibid.

Mikailu's case op.cit p. 483 paragraph H.

Ibid. at p. 485 paragraph A-B.

Ibid. at p. 485 paragraph G.

Ibid. at p. 485 paragraph F.

Ibid. at p. 485 paragraph G-H. also NAB Ltd. V. Barri Engineering Ltd.
NWLR Pt. 413, 257, 271-2 or (1995) 9 SACNJ 147 at 155 paragraphs 30-
NAB Ltd. V. Barri Engineering. See footnote 11.

Section 33 (13) 1979 Constitution similar to section 36 (3) (4) of t
Constitution.

Mikailu's case supra P. 484 paragraph E-F.

Okeke V. The State (1995) 4 NWLR Pt. 392 at 712.