

## DEVELOPING A LEGAL FRAMEWORK FOR VIRTUAL HEARING IN NIGERIA

*Avwerosuo Oghenedoro\**

### Abstract

*This research work focuses on the legal framework on virtual hearing in the Nigerian legal system. There is a vacuum in the Nigerian legal system that was brought to limelight during the corona virus pandemic and this gap relates to the issue of justice being denied and delayed in times of emergency such as the corona virus pandemic, war and even insecurity which halt the flow of human activities and smooth administration of the legal system. In the move for strict adherence to the tenets of the fundamental rights which provides that any person who is tried for a criminal charge shall be entitled to a fair hearing and be brought before a court of law within a reasonable time, it therefore becomes as a matter of urgency to seek for a way to achieve justice in such times of emergency. This article considers the viability of virtual court hearing in the Nigerian legal system especially as it relates to the provisions of section 36(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) which provides that trials should be held in public. It also focuses on the issue of the legality of evidence received through virtual hearing. The article recommends that non contentious stages in litigation such as adoption of written addresses, pleas and motion etc can be held virtually in order to decongest the court room. It also suggests that procedural rules for virtual hearing should be enacted by the various heads of courts to give full legal framework to virtual hearing in Nigeria.*

**Keywords:** Virtual, Hearing, Public, Constitutionality, Court

### 1.0. Introduction

Fair hearing has always been a human right issue and a fundamental right in almost all jurisdictions. Thus, the integrity of every trial is founded on whether or not the trial is conducted in accordance with law. To this extent, the courts have a special role in ensuring that the fundamental right to fair hearing is strictly adhered to and salient among the fundamental provisions as provided in the Constitution of the Federal Republic of Nigeria, 1999(as amended) is that any person who is arrested or detained shall be brought before a court of law and that any person charged before a court of law shall be entitled to fair hearing within a reasonable time.<sup>1</sup> Access to justice<sup>2</sup> is a fundamental pillar of democracy, which cannot be suspended or limited.<sup>3</sup> Therefore, it is important to ensure that the Nigerian judicial institutions continue to perform their functions at all times and season to enhance the right to fair trial by an independent and impartial tribunal. This implies that prevailing emergency like the corona virus pandemic,

---

\* LL.M Research Student, Faculty of Law, Delta State University, Oleh Campus, Abraka, Nigeria. Email:Oghenedoroavwerosuo@gmail.com

<sup>1</sup> Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). Hereafter the Constitution.

<sup>2</sup> B. E. Umukoro, On the Nexus Between Climate Change, Poverty and Failure of Justice' (2022) 3 *Prince Adu Abubakar University Law Journal*, 237-268

<sup>3</sup> International Commission of Jurist, 'Videoconferencing, Courts and Covid 19: Recommendations based on International Standards' ICJ blog (November 2022). <www.unodc.org> accessed on 27<sup>th</sup> December 2022

insecurity and even war ought not to be a reason to suspend judicial proceedings. In Nigeria the activities of the Indigenous People of Biafra (IPOB) in the Southeast and the Islamic State of West Africa Province (ISWA) in the northeast have all increased the insecurity concerns in the country. This has also halted the smooth running of the administration justice hence the agitations to openly establish the practice of virtual hearing in the Nigerian legal system is gaining more momentum. The corona virus pandemic is one emergency that caused a global mishap and brought all human activities to a standstill. In order to meet with the exigencies of the time, some jurisdictions sought for a solution which enabled them to carry out juridical functions. For instance, as England went into lockdown, the United Kingdom Supreme Court by a statement dated 23<sup>rd</sup> March 2022 posted on its website that it would hear all cases and deliver judgments through videoconferencing.<sup>4</sup> This brought to the limelight the necessity of virtual court hearing as a permanent and established procedure in some jurisdictions. In Nigeria, apart from the corona virus, other factors such as insecurity, kidnapping, conflicts between cattle herdsman and farmers, the Islamist movement of Nigeria (IMN) in central Nigeria, the Niger Delta Vigilante (NDA), the Indigenous People of Biafra (IPOB) in the Southeast and the Islamic State West Africa Province in the Northeast part of Nigeria have worsened the issue of insecurity in Nigeria thereby halting the smooth administration of the Judiciary. This has contributed immensely to why virtual court hearing should be welcome a part of the Nigerian legal system.

## **2.0. Conceptual Clarification**

### **2.1. Virtual Hearing**

The term Virtual Hearing can be used interchangeably with the terms videoconferencing, audio virtual communication, remote hearing or hybrid hearing though they have slight variations. 'Virtual' means being able to see, hear and communicate with another individual in real time, using electronic means<sup>5</sup>. A virtual hearing therefore can be defined as a court hearing conducted by audio-visual means, including any of the available video or teleconferencing applications such as Microsoft Teams, Skype for Business, Zoom, whatsapp, telegram etc., whereby proceedings can be conducted virtually without the need for the parties or their legal representatives to attend the court physically<sup>6</sup>. This is a form of court hearings that enable Judges, Counsel, court staff, witnesses, and security personnel and other participants or stakeholders to attend court hearings online using the internet support devices. We have the Hybrid hearing where proceeding is held with some of the parties in a particular place usually the open court room or the Judge's chamber while others will join online and the fully virtual proceedings where all the parties including the judicial officer and the staff will join in from separate locations online.

### **2.2. Court**

A Court is a governmental body consisting of one or more judges who sit to adjudicate disputes and administer justice or a permanently organized body with independent judicial powers

---

<sup>4</sup> Kolawole Mayomi, 'Nigeria: A Case for the Virtual hearings of urgent matters during the Covid-19 Pandemic... and going forward' Mondaq<Mondaq.com> accessed in 23<sup>rd</sup> December 2022

<sup>5</sup> Section 258 of the Evidence Act 2023(as amended)

<sup>6</sup> Ngozika Rosemary Orji 'The Virtual/Remote hearing: The Impact of Covid-19 Pandemic on the Justice Sector in Nigeria' International Journal of the Art and Sciences (2020) 3 (4) <https://imtijotas.org.ng/node/164> accessed on 28th December 2022.

defined by law, meeting at a time and place fixed by law for the judicial public administration of justice.<sup>7</sup> Physical court hearing is the usual or normal court hearing where both the lawyers and the Judge or Magistrate as the case may be are all in the court room physically to do their matters

### 2.3. Virtual Hearing Applications

These are audio visuals platforms approved by the court to carry out virtual hearing. These platforms according to the Lagos State High Court Practice Directions 2020 for the Covid 19 Period can be either zoom, Skype or any other audio-visual platform approved by the court.<sup>8</sup> The word ‘any other audio-visual platform approved by the Court’ implies that other platforms such as whatsapp video call, telegram video call, micro soft video call and other platforms can be used for virtual hearing as long as same is approved by the Court. ‘Zoom meeting’ means a video conferencing meeting that is held, using zoom. One can join such meetings, through a webcam or phone. The access to the zoom meeting is by having the login details and the password. It has a feature where documents can be screen shared to participants and it has the mute and un-mute column.

### 3.1. The Constitutionality of Virtual Court Hearing

The Constitution of the Federal Republic of Nigeria 1999 as amended is the supreme law in Nigeria and the legality or illegality of any law; act or omission in Nigeria is subject to whether or not such law, act or omission is inconsistent with the provision of the Constitution and any law, act or omission that is inconsistent with the provisions of the Constitution shall be null and void to the extent of its inconsistency.<sup>9</sup> In the case of *Njoku v Jonathan & Ors*<sup>10</sup> the court per Abubakar Datti Yahaya (JCA) posited that the “Constitution is the grundnorm and it is sacrosanct, for it is from it that other laws are made, rights created and powers conferred. It is the source from which other tributaries emanate and the 1999 Constitution of the Federal Republic of Nigeria is the foundation upon which the democratic system of Government we practice is anchored”. The Constitution did not make any provision as it relates to virtual court hearing and as a matter of fact, the legal draftsmen never envisaged that a time will come where it will become an issue as to hearing of cases virtually. Notwithstanding whether or not virtual court hearing is provided for in the Constitution, it does not preempt an attempt to adopt this method of hearing as the Constitution did not also make any provision as to whether or not the adoption of virtual hearing in our court system is illegal. The major issue that arises is the provisions of section 36(3) & (4) of the Constitution which provides thus;

- (3) The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in subsection (1) of this section (including the announcement of the decisions of the court or tribunal shall be held in public
- (4) Whenever any person is charged with a criminal offence, he shall unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal

<sup>7</sup> Bryan A. Garner, Black’s Law Dictionary (9<sup>th</sup> edn, West Publishing Co., 2009) 405.

<sup>8</sup> Section 16 of the Practice Direction for Remote Hearing of Cases in the Lagos State Judiciary 2020

<sup>9</sup> Section 1, Constitution of the Federal Republic of Nigeria ( as amended by the third Alteration) Act, 2010 (Act No 3)

<sup>10</sup> (2015) LPELR – 24496(CA)35-36

The sole issue for determination therefore is whether or not hearings conducted in a virtual space can be said to be a public hearing within the contemplation of the provision of the Constitution. It is important to note here that the Constitution did not go further to define or explain the word ‘public’ and hence it becomes difficult to ascertain what the draftsmen intended to achieve with the usage of the word public.

What is a Public Place?

In the case of *Edibo v State*<sup>11</sup> the term ‘public’ was defined by the Supreme Court per Tobi JSC; “Public means for the use of everyone without discrimination. Anything, gathering or audience which is not private is public”. It also means, "A place to which the public has access.<sup>12</sup>The literal rule is best suited for this discussion because the word ‘public place’ as used in the Constitution is not vague nor ambiguous and can be conveniently given its ordinary and dictionary meaning without leading to absurdity. The term public place using the ordinary meaning of the word implies that any enclosed places that are open to, used by, or accessible to the general public. The major factor in determining public place is whether that place can be accessible to the general public. In the case of *Oyeyipo v. Oyinloye*,<sup>13</sup> the question of what constitute a public place under section 36 (3) of the Constitution was suggested as being a question of fact. The court held in that case that a Judge may sit in Chambers without excluding members of the public and it is constitutional to sit in Chambers while in the case of *Abashi v. COP*<sup>14</sup> the court held that it is unconstitutional to sit in the chambers. The basis here is that the facts are different and that the former case was decided based on the appropriate rule of the Supreme Court. In the case of *Ovunwo & Anor v. Woko & Ors*<sup>15</sup> the Supreme Court per Olufunlola Oyelola Adekeye JSC held that the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law include amongst others that all concerned shall be informed of and have access to such place of public hearing. Muhammad JCA in the case of *Kosebinu & Ors v Alimi*<sup>16</sup> where the issue was whether or not the court of appeal was right to set aside a judgment of a trial court delivered in the Judge’s chamber in violation of section 36(3) of the Constitution, he opined that a place qualifies under Section 36(3) of the 1999 Constitution to be called “public” if it is out rightly accessible, and not so accessible on the basis of the “permission” or “consent” of the Judge”. Flowing from the above case laws, once the requirement of accessibility by the public is satisfied, such hearing can be said to be a hearing in the public as contemplated by the Constitution.

### 3.2. Does Virtual Court Hearing Violate Section 36 of the 1999 Constitution?

Virtual Hearing conducted in any videoconferencing application such as zoom qualifies within the concept of public place discussed above and therefore constitutional. The zoom application for instance is an online videoconferencing model which allows for more than 100 participants

<sup>11</sup> (2007) LPELR-1012(SC)20

<sup>12</sup> Oxford Dictionary of Law (2009) 7th Edition

<sup>13</sup> (1987) LPELR-2883 SC 38-39

<sup>14</sup> (2004) LPELR-5597 CA

<sup>15</sup> (2011)LPELR-2841(SC) pg 33 (see also *Usani v. Duke* (2004) 7 NWLR (pt.871) 116. *Fagbunle v. Rodrigues* (2002) 7 NWLR (Pt.765) pg.188 *Bamgboye v. University of Ilorin* (1999) 10 NWLR (pt.622) pg.290. *Awoniyi v The Registered Trustees of the Rosicrucian Order, Amorc(Nigeria)*(2000) 6 SC, *Okafor v. A-G Anambra State* (1991) 3 NWLR (pt.200) pg.59.

<sup>16</sup> (2005) LPELR-11442(CA)

at a glance provided that they have the password and are able to log into the meeting or court session using the login details. Therefore, publishing the information of the website and login details becomes a condition precedent to a virtual hearing, and as soon as that is done, it qualifies as hearing in “public” and this should be seen as satisfying the constitutional requirement of public access to the court proceedings or proceedings held in public. Further points to justify the practice of virtual court hearing include the following

**a. The Ruling of the Supreme Court**

The Supreme Court has given rulings on whether virtual hearing is Constitutional and whether same can be enforced in Nigeria in the cases of *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly*<sup>17</sup> and *Attorney General of Ekiti State v Attorney General of the Federation & 2 others*.<sup>18</sup> In the former case, the Lagos State Government filed a suit at the Supreme Court of Nigeria against the Attorney General of the Federation to inquire whether virtual hearing commenced in the Lagos State High Court or any other court is Constitutional with reference to section 36(1), (3) and (4) of the Constitution which provides that court proceedings should be held in public and also challenged the power of the National Assembly to amend section 274 of the Constitution which seeks to include virtual while in the latter case, the Ekiti State Government asked an order of the Supreme Court of Nigeria to nullify an instruction by the Attorney General of the Federation made on 20th April 2020 to heads of all courts in the country directing virtual court hearing. It stated that the instruction contravened the Constitution particularly sections 1(3), 4(6), 5(2) and 6(2), 36(3 and 4), 272 and 274 of the Constitution. Ekiti State, urged the court to make an affirmative decision to remove the speculations and uncertainties being entertained about the virtual hearing by judges. On the above two suits, a seven-man panel of the Supreme court led by Justice Olabode Rhodes-Vivour held that virtual court sittings are presumed to be valid and cannot be declared unconstitutional by the apex court. The Supreme Court stated that until there is an infringement of a right by the virtual hearing, the suits are speculative and premature. It ruled that virtual court hearings are not unconstitutional. Consequent upon this ruling the two suits were withdrawn. It is submitted that though the pronouncement of the Supreme Court regarding virtual hearing is a ruling and not a judgment, it is a lead way to what the judgment of the court would be when a substantive matter regarding infringement of right as it relates to virtual hearing occurs. The likely judgment would be that virtual court hearings are not unconstitutional.

**b. Virtual Court Hearing is regarded as an emergency remedy**

The major agitation against the Constitutionality of virtual hearing is that it is against the tenet of fair hearing as provided under section 36(3) of the Constitution. On jurisprudence however, virtual hearing is regarded as a remedy in times of exigency and necessity and should therefore be accommodated to remedy specific situations. The Nigerian legal system

---

<sup>17</sup> Unreported suit no SC/CV/260/2020, ruling was delivered by Hon. Justice Rhodes-vivour JSC on the 14th of July 2020 cited in Emuobo Emudainohwo ‘Appraising the Constitutionality of Virtual Court Hearing in the National Industrial Court of Nigeria’ Nnamdi Azikiwe University Journal of International Law and Jurisprudence 12(1) 2021 <www.ajol.info> accessed on 7<sup>th</sup> February 2023

<sup>18</sup> Unreported suit no. SC/CV/261/2020, ruling was delivered by Hon. Justice Rhodes-vivour JSC on the 14th of July 2020 cited in Emudainohwo

has shown a flexibility as it relates to the issue of fair hearing when it accommodates the issue of motion ex-parte. This is an application that is brought without informing or putting the other party on notice which is derogation from the provisions of fair hearing. In the case of *Njokanma & Anor v. Uyana*<sup>19</sup> the court held that “ex-parte motion is one in which the applicant for some cogent reasons, cannot put the other party or parties on notice or awareness of its existence. Both are acceptable in law. The general practice; however is that motions are filed in Court on notice. Ex-parte motions are filed but sparingly considered by the Court in extreme or special circumstances”. It is my submission that if motion ex-parte is recognized by the Nigerian legal system to remedy emergency situations notwithstanding the fact that it runs afoul of the provisions of the fundamental right, then virtual hearing can also be accommodated as it falls into the same category of remedying emergency situations.

### c. No express prohibition of virtual Court hearing

Upon colossal reading of the Constitution, there is no express prohibition of virtual court hearing in the Constitution. Furthermore, as at the time of writing this research work, there is no statute prohibiting the hearing of cases virtually in the court. That said, the principle of law has remained inviolate to the effect that, whatever is not prohibited is permitted. See the case of *Theophilus v FRN*.<sup>20</sup> Furthermore in the case of *Inec v Advance Congress of Democrats (Acd) & Ors*<sup>21</sup>, it was held that what is not expressly prohibited is impliedly allowed. Consequently, in the context of our extant 1999 Constitution (as amended), virtual hearing having not been prohibited, is impliedly permitted

### d. Practice Directions and Guidelines

In other to accommodate virtual court hearings in Nigeria and several heads of courts issued practice directions for virtual court hearing and thereby providing bedrock upon which virtual court can be practicable. Though there are no substantive provisions in the statutes establishing the various courts on videoconferencing or Virtual court hearing generally, there is no doubt that the heads of the various courts which issued the Practice Directions have the Constitutional powers to do so.<sup>22</sup>The issuance of the practice directions on virtual hearing during the corona virus pandemic and the subsequent execution of same where different Judges gave rulings and Judgment virtually connotes that this practice is constitutional

## 3.3. Is a Constitutional Amendment Required to Accommodate Virtual Court Hearing?

<sup>19</sup> (2006) LPELR-9805 CA. See also the case of *SPDC v, Government of Bayelsa State* (2017) LPELR-45224 CA. In that case, the mode of commencement of the action by motion ex parte as against an originating process was challenged. The Court held that it can be permissible in deserving circumstances. Also see *Broron Oil and Gas Ltd v. Petromarine Nig LTD* (2023) LPELR-61012 CA

<sup>20</sup> (2016) LPELR- 45478 CA

<sup>21</sup> (2022) LPELR- 58824 SC 32

<sup>22</sup> Section 236 of the 1999 Constitution of the Federal Republic of Nigeria empowers the Chief Justice of Nigeria to make rules for the Practice and Procedure of the Supreme Court. Section 248 of the Constitution empowers the President of the Court of Appeal to make rules for the Practice and Procedure of the Court of Appeal. Section 254 of the Constitution empowers the Chief Judge of the Federal High to make rules for Practice and Procedure of the Federal High Court. Section 254 F (1) of the Constitution empowers the President of the National Industrial Court to make rules for the regulating Practice and Procedure of the National Industrial Court (NIC) and Section 274 of the Constitution empowers the Chief Judge of a State to make Rules for the regulation of Practice and Procedure of the State High Court

First, it is important to understand what a Constitution is and what should be contained in the Constitution. In ascertaining the above, I shall rely on the case of *F.C.D.A. v Ezinkwo*<sup>23</sup> where the court held per Mary Ukaego peter-Odili JCA thus

The Constitution being the organic law of the country and the fons et origo from which all other laws derive their validity...no part of it can be described to be adjectival or procedural law...The Constitution is a substantive law”. Clearly, matters of procedure cannot be found in the Constitution

The argument that arises from this definition is whether or not the Constitution is a substantive law and cannot be said to be procedural or adjectival in order to determine whether amending it is required for virtual hearing which is a matter of procedure. According to Hedding thus:<sup>24</sup>

A Constitution is not meant to provide laws and regulations, for every aspect of a functioning society. It is usually neither practical nor beneficial for a Constitution, when envisioned as a long-term, general framework for operation of the State, to go into details. It is impossible to predict how society will look in the future and what its specific circumstances and needs will be

According to Pinheiro,<sup>25</sup> the Constitution did not provide for the procedures on how the executive and the legislative arm of government should perform their administrative functions such as how the Executive Arm of Government is to hold its meetings or for how the Legislature would hold parliamentary sessions because such issues are easily dealt with, by the rules set up by the Legislative and Executive houses and it should therefore not be necessary to amend the Constitution to specify how the Judiciary should hold court sessions. He further stated that virtual hearing relates to how the courts carry out their judicial function in delivery justice and therefore a matter of procedure. It is not all true to state that the constitution is not procedural. Upon a colossal look of the Constitution, there are so many procedural issues especially as it affects the operation of the Judiciary such as the issue of the jurisdiction of court.<sup>26</sup>In the place of amending the Constitution to reflect or provide for virtual court hearing, the heads of court can issue practice directions enabling courts to hold hearings virtually and this is what the several head of courts have done. Further, rules of court for virtual hearing should be enacted in each court within the Federation.

### 3.4. Evidential Issues on Virtual Court Hearing

<sup>23</sup> (2007) LPELR- 9015 CA pp 21, see also the case of *FRN v Osahon* (2006) 5 NWLR (Pt. 973) 361

<sup>24</sup> Nora Hedding of the Institute for Democracy and Electoral Assistance cited in Kemi Pinheiro ‘Is a Constitutional amendment for Virtual Court hearing really required?’ Thisday Newspaper, www.thisdaylive.com accessed on 2<sup>nd</sup> march 2023

<sup>25</sup> Ibid

<sup>26</sup> Section 232 – 236 of the Constitution provides for the jurisdiction of the Supreme Court, section 240-248 provides for the jurisdiction of the Court of appeal, section 251-253 covers the jurisdiction of the Federal High Court, section 272 provides for the jurisdiction of the State High Courts, section 262 deals with the jurisdiction of the Sharia High Court, section 267 of the Constitution deals with the jurisdiction of the customary court of appeal and Section 254(c) of the 1999 Constitution (as amended) by the 3<sup>rd</sup> alteration Act provides for the Jurisdiction of the National Industrial Court

The Evidence Act is the statute that regulates evidence in the Nigeria court proceedings. It sets out the procedures for giving evidences, tendering of evidences, relevancy, admissibility and other provisions. Certain provisions of the Evidence Act shall be considered. The Evidence Act (2011) provides that<sup>27</sup> ‘In any proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall on production of the original document, be admissible of that fact’. The question that arises therefore is: Can the original document envisaged by section 83(1), as cited, be produced and confirmed in a virtual hearing? Furthermore, the Act defines primary evidence as the document itself produced for the inspection of the court.<sup>28</sup> The question that arises here is can such primary document be presented during virtual hearing? It is my view that the issues raised above has been dealt with by the provision of Section 84 of the Evidence Act which recognizes documents that are stored in electronic form provided it means the requirement stated in (2) of that section. Therefore, original documents can be stored in electronic form and tendered or same can be frontloaded during the filing stage and the photocopy is tendered in virtual hearing by using the requisite function of the platform used for that hearing.

The provisions of the new Evidence Act 2023(as amended) have gone further to show that virtual hearing is not prohibited. The Act provides that any affidavit sworn before any Judge, officer or other person duly authorized to take affidavits in Nigeria whether in person or through audio visual means may be used in the courts in all cases where affidavits are admissible.<sup>29</sup> The use of audio visual means for affidavit is further provided for under sections 110 and 119(2) of the Act. The term ‘audio visual communication’ was interpreted to mean being able to see, hear and communicate with another individual in real time, using electronic means.<sup>30</sup>The above amendments have proven that evidence can be taken through audio visual means. The above provisions of the new Evidence Act 2023 (as amended) as paved way for evidence through virtual means and is therefore not against the provisions of the Act.

### **3.5. Virtual Hearing in the Administration of Criminal Justice**

In Nigeria, the Administration of Criminal Justice Act (ACJA) enacted in May 2015 provides for the administration of criminal justice and for related matters in the courts. It is the substantive and procedural law that deals on the guidelines to be adhered to in criminal trials. The ACJA does not however have any provisions expressly prohibiting criminal trials been held virtually. The Act expressly provided for video hearing of witness in specific instances where the court deems it necessary to protect the identity of the victim or a witness, the court may take receive evidence by video link.<sup>31</sup>The newly enacted Administration of Criminal Justice law of Delta State 2022 expressly provided for video conferencing and this move shows the willingness in the legal terrain to adapt to the trend of technology in justice delivery and above all, reflects the fact that the judiciary learnt some new dimension of law during the covid-19 period. The Law provides that in any proceeding, a Judge or Magistrate may either *suo moto* or upon an application of a party direct that witness evidence be given in the ordinary way or in an

---

<sup>27</sup> Section 83 of the Evidence Act 2011

<sup>28</sup> Section 86 of the Evidence Act 2011

<sup>29</sup> Section 109 of the Evidence Act 2023(as amended)

<sup>30</sup> Section 258 of the Amended act

<sup>31</sup> Section 232 of the Administration of Criminal Justice Act 2015



alternative way.<sup>32</sup>The law further provides the alternative way to give evidence to include any practical and technical means to enable the judicial officer and the legal practitioner to see and hear the witness giving evidence.<sup>33</sup>It is our submission that there is no other technical or practical way for a person to give evidence outside the court but the judicial officer can see or hear the person if not video conferencing. To settle the ambiguity that may arise from the above provision, the ACJL 2022 went further to state that the Judge or Magistrate must give each party an opportunity to be heard either in chambers or if the Judge or Magistrate deems it expedient, through a video link.<sup>34</sup>

#### **4.0 Factors to be considered in Adaptability of Virtual Court Hearing**

##### **4.1. Challenges of Virtual Court Hearing**

###### **4.1.1. Lack of Technological Know How**

This stems from the fact that virtual hearing requires high level of technological knowhow in accessing and participating in the proceedings. The fear has been expressed that virtual court hearing may shutout litigants who are not tech savvy or who cannot afford the requisite facilities. Some of the technological knowhow should include how to operate the computer or phones as the case may be, proper acquaintance with the video conferencing platform so as to understand its workings and styles during hearing. This challenge is a burden on the court, the staffs, the lawyers and even the litigants. The institute of continuing legal education is a body that can help to ameliorate this challenge by organizing lectures and seminars where lawyers and court staff can be taught on how to be acquainted with this technology.

###### **4.1.2. Hacking and Cyber security**

There are fears too that hackers can break into the process. Hackers may breach the video conferencing process with the purpose of stalling the hearing and or even ruling or judgment which they feel might be injurious to them. Furthermore, documents and recordings from virtual hearings that are stored in the website of the court can be tampered with and even formatted by high internet infiltrators and thereby make these items unavailable for the use of the court and the public. Technological experts should be employed to provide high cyber security to the virtual hearing platforms to be used by the court.

###### **4.1.3. Lack of Technological Infrastructure**

Technological Infrastructural requirements such as the desktop, laptop, smartphone, internet connectivity, printer, device ensuring uninterrupted power supply, camera, microphones, speakers, display unit, document visualize and adequate lighting, are necessary for virtual hearing. The challenge of infrastructure is on the court, the litigants and the legal practitioners who are to participate in the virtual hearing as some of these. In a report to premium times newspaper<sup>35</sup> the Chief Information Officer of the Federal High Court, Catherine Nwandu, in corroborating this challenge above stated that lack of funds had hampered the installation of

---

<sup>32</sup> Section 52(2) of the Administration of Criminal Justice Law of Delta State 2022

<sup>33</sup> Section 54(1)(b) ACJL 2022

<sup>34</sup> Section 53(a) ACJL 2022

<sup>35</sup> Ameh Ejekwonyilo 'Why Virtual Court hearing is difficult for Federal High Court' Premium Times Newspaper (May 19, 2021) <https://www.premiumtimesng.com/news/top-news/462512> accessed on 7th July 2023

virtual court facilities across all its jurisdictions. The infrastructure requirements of the courts can be addressed by ensuring budgetary allocation for development of designated website for live court streaming, provision of internet and power supply for courts.

#### **4.1.4 Inadequate laws regulating virtual court hearing**

This is another challenge that is faced by virtual court hearing. Laws are needed for the effective running of any proceedings and when we talk about law here, we mean the rules of court that governs the workings of the court. Just as the normal court proceedings rules, there should be rules of court expressly regulating the virtual proceedings so as to ensure that virtual hearing proceedings are in order and well governed. It should be noted however that where there is no law regulating an act in the high court on civil matters, recourse can be made to the civil procedure rules to govern such proceedings.

### **4.2. Advantages of virtual hearing**

#### **4.2.1. Expert Evidence**

The evidence Act provides that when the court has to form an opinion of point of foreign law, customary law or custom, or science or art, or as to identity of handwriting or finger impressions, the opinions upon of any person skilled in that area in question shall be admissible as expert evidence.<sup>36</sup> In many criminal and civil proceedings it is usually expedient to have testimony from expert in areas where the court needs clarifications. There are circumstances however where this expert may not be within the jurisdiction of the court and also considering the nature of their job, they are usually not less busy. There are instances where trials have suffered series of adjournment because the expert is not available. If video conferencing is permitted, the expert could still fully focus on work and join the screen for the virtual hearing and give evidence without delay and from any location.

#### **4.2.2. Probono Services**

Virtual hearing would be of immense benefit to *probono* lawyers. Free legal services are seen as an aspect of social commitment by lawyers as a way of giving back to the society. One of the key requirements for lawyers in Nigeria to be inducted as a Senior Advocate is to have offered free services to indigent citizens that could not afford legal fees which are known as ‘Pro bono services.’<sup>37</sup> The Rules of professional conduct further mandates that a lawyer assigned to defend an indigent prisoner must not refuse such task except for substantial reasons.<sup>38</sup> Free legal services to indigent accused can be enhanced by the adaptation of virtual court hearing where a lawyer can be at liberty to represent the accused from the comfort of his home or office without necessarily going through the huddles of heavy traffic and risk of insecurity especially since nothing is expected in return for such brief.

#### **4.2.3. Witness Protection**

Witnesses may refuse to come and give evidence for several reasons such as safety concern, health and other excuses that make it inconvenient for the witness to come and testify. The

---

<sup>36</sup> Section 68, Evidence Act 2011

<sup>37</sup> Article 19(7) Guidelines for the conferment of the rank of Senior Advocate of Nigeria 2011

<sup>38</sup> Rule 38, Rules of Professional Conduct for Legal Practitioners 2007

Administration of Criminal Justice Act 2015 allowed evidence to be taken through videoconferencing where the court deems it necessary to protect the identity of the witness in matters relating to some special offences such as kidnapping, anti terrorism and other high risk offences.<sup>39</sup> I am of the opinion that this provision envisaged that the witness might not want to give evidence for fear of been attacked by the defendants or his gangs and hence it becomes necessary to hide the identity of the witness.

#### **4.2.4. It saves time and reduces cost of litigation**

One of the most significant benefits of a virtual hearing is the amount of time and money it saves. It is a known fact that the cost of living in Nigeria is on the increase and as a matter of fact, with the current removal of fuel subsidy by the Nigeria government, the cost of transportation is currently on the increase to the tune of almost 200% of the initial rate of transportation. Therefore, with the practice of virtual hearing, rather than driving to the courthouse and waiting in the hallway for the hearing to start, one can just login in to the phone or computer from the comfort of the home or office. There's no need to pay for transportation to get to the courthouse, no need to pay for parking, and will automatically reduce the cost of litigation especially the appearance fees which is charged putting into consideration the distance to be travelled before getting to the court premises.

#### **5.0. Conclusion/Recommendation**

This article has been able to consider the existing legal frameworks and how they influence the practicability of virtual hearing in Nigeria. It is settled during the course of the research relying on the rulings of the Supreme court, the extant provisions in the new Evidence Act 2023(as amended) and even the Administration of criminal justice Act and the Administration of criminal justice law of Delta State that virtual hearing is constitutional and same should be adopted especially in emergency situations or even as an alternative to the normal physical court hearings for the purpose of decongesting the court rooms. The work finds that there no procedural rules regulating the operation of virtual hearing in Nigeria. Furthermore, the work reveals that access to justice is a fundamental right and same should not be suspended or delayed irrespective of the situation. Therefore since it is a known and acceptable fact that information communication technology has become the trend in a contemporary society and even other facets of the economy has delve into same, the legal society should not be left behind and all efforts should be made to embrace the practice of virtual hearing. It is therefore recommended that non contentious aspects in litigation such as motions, plea, and adoption of written addresses, rulings and judgments should be held virtually whether or not in emergency situation. It is further recommended that procedural rules should be made by the various heads of court to regulate virtual hearing within their jurisdictions. However it is not necessary to amend the Constitution to accommodate virtual hearing as the Constitution does not in any way prohibit virtual hearing.

---

<sup>39</sup> Section 232 of the Administration of Criminal Justice Act 2015