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ABSTRACT

This paper reflects on the decision in *Sikiru Alade v Nigeria* as a tool for expanding access to justice for suspects' detained awaiting trial in West Africa. To the extent that this is a challenge elsewhere in Africa, it might also be a source of inspiration for regional and national courts. In terms of structure, we shall provide brief facts of the case, issues for consideration and the decision of the court. We shall also reflect on a few lessons from the decision.

1 BACKGROUND AND CONTEXT

Relative to its population of 170 million, Nigeria's prison population of about 57,000 is remarkably small.¹ It is so small that it raises a number of questions about the capacity of the criminal justice system to address crime and criminality in Africa's largest economy.² Indeed, some have argued that the ratio of prison population to the general population might suggest that many who commit crimes in Nigeria do not get processed through the formal justice system or simply slip through the cracks.³ As disappointing as this might sound, one may be tempted to assume that those who are properly processed might have a better deal. Regrettably, this is not the case. Of the 57,121 prisoners reported on the website of Nigeria's Prisons Service,⁴ 38,842 (68%) await uncertain trial. In addition, the total number of prisoners represents 13.9% more occupants than the installed capacity of 240 prisons in existence.

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¹ At 31 points, Nigeria is ranked 215 in a list of 221 countries ranked on the World Prison Brief's Highest to Lowest Prison Population Rate available at http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All (accessed on January 26, 2016). Only three countries in Africa fare better – Congo Brazzaville, Guinea and Central Africa Republic.

² Chidi Odinkalu, immediate past chairperson of Nigeria's Human Rights Commission explains the situation in the following words: "The trajectory to Nigeria's present denouncement is a narrative of the collapse of the criminal justice system from an effective network underpinned by serviceable synergies to a system that does not work." See C. A. Odinkalu, "Synergies, Networks and Not-Works: Joined Up Arrangements for Effective Criminal Justice Administration in Nigeria." Keynote Presentation to Workshop on Networking Criminal Justice organized by the Nigerian Institute for Advanced Legal Studies in Abuja on June 14, 2012 (on file with the author).

³ In a 2013 survey, leading Nigerian non-profit, CLEEN Foundation found that 82% of crimes committed are unreported. See K. Okenyodo, "Public Presentation of Findings of the National Crime Victimization and Safety Survey 2013 by CLEEN Foundation" available at <http://www.cleen.org/Text%20Report%20of%202013%20NCVS%20Findings.pdf> (accessed on 18 April 2016), p. 10.

⁴ See <http://www.prisons.gov.ng/about/statistical-info.php> (accessed on 25 January 2016). It is important to note that the referenced figures were generated on October 31, 2014. Regrettably, they are the most recent figures on the website.



There are several reasons for the high ‘awaiting trial’ population in Nigeria.⁵ Poor policing practices, including arrest before investigations and *excessive* resort to torture; poor prosecutorial practices, including excessive delays in providing legal advice; delays in pretrial proceedings and the use of a *holding charge*⁶ to detain suspects. These factors contribute to increases in the number of pretrial detainees as well as the duration of pretrial detention. It is instructive to note that this is not a peculiarly Nigerian phenomenon.

In 2012, Africa had the unenviable record of holding the second highest average percentage of pretrial detainees in the world.⁷ The continent also had the distinction of producing six of the top ten pretrial populations of 70% or more across the world.⁸

To the extent that prolonged pretrial detention has implications for detainees, their families, communities and countries,⁹ it is a challenge that ought to be confronted and overcome. Besides, escalating pretrial detention is a symptom of a defective criminal justice system, which probably explains the rise in incidences of extra-legal dispute resolution or self-help. This dynamic also has implications for countries that have suffered from mass atrocities including Nigeria, Chad, Cameroon and Niger, especially when considered in the context of the *Boko Haram* insurgency.

⁵ For a brief reflection on why pretrial injustice persists, see S. Ibe, “Connecting the Dots: A Proposal for Linking up Early Access Projects in Nigeria.” Paper accepted for publication in S. Erugo & C. Adekoya (eds.), *Lawyering with Integrity: Essays in Honour of Professor Ernest Ojukwu*, SAN (forthcoming).

⁶ For more on the *holding charge* phenomenon, See O. Agbakoba & S. Ibe, *Travesty of Justice: An Advocacy Manual against the Holding Charge* (Lagos: Human Rights Law Service, 2004).

⁷ Citing the *World Prison Brief* published by the International Centre for Prison Studies, the Open Society Justice Initiative determined that 34.7% of all prisoners are pretrial detainees. This is second only to Asia, whose pretrial population constitute 40.6% of the total prison population. See M. Schoenteich, *Presumption of Guilt: The Global Overuse of Pretrial Detention* (New York: Open Society Foundations, 2014), p. 17. As the author admits, these figures have some limitations. First that not every country is surveyed and even those surveyed do not necessarily keep data consistently. Besides, the Brief relies on national prisons services for data – to the effect that the numbers are as good as those who provide them. Significantly, the figures only reflect detainees in prisons. Pretrial detainees kept in police stations are excluded. Therefore, although the numbers and percentages gives us a sense of the status of global pretrial detention, it does not necessarily present a full picture.

⁸ Benin, Central African Republic, Congo Brazzaville, Democratic Republic of the Congo, Liberia and Libya. See S. Ibe, “Changing the Narrative on Prolonged Pretrial Detention in Africa: Guidelines to the Rescue.” *African Regional Forum News* (Newsletter of the International Bar Association, Legal Practice Division), Vol. 8, No. 1, April 2014, pp. 12-13.

⁹ Excessive and arbitrary use of pretrial detention disproportionately affects the poor, who are more likely to come in conflict with the law, more likely to be detained awaiting trial and less likely to afford the services of a lawyer. The travails of a pretrial detainee also affects his/her family as they often lose employment and income and therefore are less able to support their families. This translates into losses for communities and the country as well because their contribution to the economy is reduced if not totally lost. For more on the socioeconomic impact of pretrial detention, See D. Berry, *The Socioeconomic Impact of Pretrial Detention* (New York: Open Society Foundations, 2011).



Making the connection between inefficient justice systems and resort to self-help by citizens who do not trust their systems is fairly straight-forward. Suspects, especially those accused of crimes attracting the death penalty, including mass atrocities, are often arrested and remanded on the orders of magistrates to await “conclusion of investigations” and preferment of charges. Investigations take an unduly long period to conclude so the determination of guilt or innocence is delayed leading to a situation in which even the innocent is exposed to crime in detention; prisons are congested and prisoner violence sometimes lead to jail breaks thereby raising threat levels in the communities.

The prospect of overcoming the challenge of prolonged pretrial detention often lies in deploying a variety of tools, including effective early access interventions like the *Police Duty Solicitors Scheme*¹⁰ in Nigeria, which seeks to get legal aid and assistance to criminal suspects within the first 48 hours of arrest. Building regional and sub-regional constituencies also matters. In this sense, a community of criminal justice actors across regions might facilitate shared learning, including of best practices, and better understanding of the problem as well as possible approaches to addressing them.¹¹ However there is a limit to how far any one of these interventions can go without the requisite support from the different arms of government. This is where judicial precedent – local and international – matters.

Unlike most international courts, the Community Court of Justice of the Economic Community of West African States (hereafter “ECOWAS Court or the Court”)¹² provides access to individuals,¹³ groups and governments without the need to exhaust local remedies.¹⁴ This is

¹⁰ For a review of the scheme, see S. Ibe, “Reinventing Pretrial Practice in Nigeria: A Reflection on the Police Duty Solicitors Scheme.” *National Human Rights Commission Journal*, Vol. 2, December 2012, pp. 186-203.

¹¹ To that extent, the recent adoption by the African Commission on Human and Peoples’ Rights of *Guidelines on Conditions of Arrest, Police Custody and Pretrial Detention* is critical in terms of reinforcing domestic reform agenda. For a brief synopsis of the process leading to the adoption, see S. Ibe, (op cit, 8).

¹² The Court was established in July 1991 as the principal judicial mechanism for implementing the provision of the Treaty establishing ECOWAS as well as associated Conventions and Protocols. See articles 6(e) and 15 of the Revised Treaty of ECOWAS available at http://www.courtecowas.org/site2012/pdf_files/revised_treaty.pdf (accessed on January 27, 2016).

¹³ This was not always the case. The Protocol of 1991 limited parties to contentious proceedings before the Court to member states and institutions of ECOWAS only. This was perceived as a major drawback. Therefore, the Supplementary Protocol A/SP.1/01/05 was enacted at the 28th session of the Assembly of Heads of States and Governments in Accra, Ghana in January 2005 to inter alia allow individual access to the Court.

¹⁴ The 1991 and 2005 protocols omit the requirement of exhaustion of local remedies. However, the Court has made a clear declaration that local remedies need not be exhausted for a case to be brought before it. In *Professor Etim Moses Essien v Republic of the The Gambia & University of The Gambia* (2007) AHRLR 131 (ECOWAS 2007) available at <http://www.chr.up.ac.za/index.php/browse-by-subject/305-the-gambia-essien-v-the-republic-of-the-gambia-and-another-2007-ahrlr-131-ecowas-2007-.html> (accessed on January 27, 2016), the Court observed as follows: “the issue of local remedy (sic) as mentioned in article 50 of the said charter has no bearing on cases under the premise of article 10(d) of the Supplementary Protocol on the grounds that cases under article 10(d) made it quite clear that the bar to bringing action to this court must be those cases of *lis pendens* in another international court for adjudication” (paragraph 27). For an interesting debate on the doctrine of exhaustion of



significant given the time required to exhaust these remedies in most systems on the continent. In addition, the Court may sit anywhere within the ECOWAS region – making it fairly more accessible than other courts of similar standing, such as the Southern African Development Community (SADC) Tribunal and the Common Market for Eastern and Southern Africa (COMESA) Court. The protocol establishing the court also requires state parties to designate national implementing mechanisms for decisions emanating from the court. This is remarkable in view of the incredible challenge that implementation poses for most international courts and tribunals. Despite these, it is important to admit that there are challenges with outreach leading to light case dockets, and, states are often not as enthusiastic about implementation as they should be.

Challenges apart, the Court has produced some heart-warming decisions – one of which is the precedent-setting decision in *Sikiru Alade v Federal Republic of Nigeria*.¹⁵ In it, the Court takes on the problem of prolonged pretrial detention in a new and refreshing way. This article examines how the Court set this important pace.

2 CASE ANALYSIS

2.1 Brief Facts

Sikiru Alade, a Nigerian, was arrested and detained by a plain cloth police officer close to the toll gate in Lagos in 2003. At the time of his arrest, the officer neither identified himself nor informed Sikiru of the reason for his arrest. He ended up spending a few days in Ketu Police Station in Lagos before appearing in a magistrate court¹⁶ in Yaba. It is not clear why the case was brought before a magistrate court in Yaba, although there are magistrate courts closer to the point of arrest.¹⁷ The only plausible reason the police may have taken him to Yaba might be that the offence for which he was arrested occurred in the Yaba area.

In court, Sikiru learned that he was accused of armed robbery – an offence that attracts the death penalty in Nigeria. Magistrate courts do not have jurisdiction to try such offences but local criminal laws authorize them to remand suspects pending legal advice from the director of public prosecution. Regrettably, those laws do not specify duration of pretrial detention. Sikiru did not have a lawyer during the initial hearing before a magistrate court. He was not entitled

local remedies, see S. T. Ebovrah, “A Rights-Protection Goldmine or a Waiting Volcanic Eruption? Competence of, and Access to, the Human Rights Jurisdiction of the ECOWAS Community Court of Justice.” (2007) 7 *African Human Rights Law Journal*, pp. 307-329, especially 322-328.

¹⁵ Suit No: ECW/CCJ/APP/05/11 (on file with the author).

¹⁶ In the hierarchy of courts in Nigeria, magistrate and area courts are the lowest. Others up the judiciary rung are high courts (federal & states), Court of Appeal (with judicial divisions in several states) and a Supreme Court.

¹⁷ Lagos State has seven magisterial districts – Apapa, Badagry, Epe, Ikeja, Korodu, Lagos Island and Yaba. Ikeja is closer to the point of arrest than Yaba.



to bail on account of the offence he was charged with.¹⁸ Consequently, Sikiru was abandoned in Kirikiri maximum prison in Lagos until a team from the Open Society Justice Initiative (hereafter “OSJI”) met him in 2010. He was not alone. The team identified at least seven individuals in similar situation. Across the country, there are many more.

At this point, a perceptive reader might ask – why bring the case before a sub-regional rather than national courts? Clearly, this was a case that could have been handled by national courts. However, two reasons inspired sub-regional litigation – the first was that Nigeria’s highest court – the Supreme Court – had decided in *Lufadeju v Bayo Johnson*¹⁹ that there was nothing fundamentally wrong with the *holding charge* and courts lower in the hierarchy are bound by the principle of *stare decisis* to follow the Supreme Court’s decisions. The second and more important reason was an opportunity to develop sub-regional jurisprudence on a subject of interest.

2.2 Addressing Issues Raised By The Parties

The ECOWAS Court examined the following issues with respect to this case:²⁰

- a. Whether the indeterminate detention without trial under the holding charge constitutes violations of the following rights guaranteed under the African Charter on Human and Peoples’ Rights:
 - i. Right to fair trial within reasonable time;
 - ii. Right to presumption of innocence; and
 - iii. Right to personal liberty
- b. In the event that the Court finds a violation of the Charter, whether the applicant should be entitled to an order of release, general and pecuniary damages on account of unlawful detention and loss of earnings respectively.
- c. Whether the Court has jurisdiction over the case given that the applicant did not exhaust local remedies

¹⁸ Armed robbery is a capital offence – one which attracts the death sentence. Under Section 263(3) of the Criminal Justice Law of Lagos State, magistrate courts may not assume jurisdiction to try or grant bail for this category of offences. However, they may assume jurisdiction to remand suspects until the director of public prosecution advises one way or the other.

¹⁹ Suit No. SC./247/2001 available at <http://www.nigeria-law.org/Mrs%20E.A%20Lufadeju%20&%20Anor%20v%20Evangelist%20Bayo%20Johnson.htm> (accessed on February 3, 2016).

²⁰ The author paraphrases the issues set out by the applicant and defendants. Readers should note that not all the issues are reflected here. The author focuses on the most important issues for this paper. Interested readers may wish to know that the court also consider the questions of (i) amending pleadings when the case has been adjourned for judgment (ii) the onus of proof on either party to the case



As would be expected, the Court dealt with the question of jurisdiction first. It invoked the provision of article 9(4) of the Amended Protocol establishing it as follows: “The Court has jurisdiction to determine cases of violation of human rights that occur in any member state.” Considering that this provision did not specify what category of rights recognized, the Court had recourse to article 4(g) of the Revised Treaty of ECOWAS, which recognizes and adopts rights spelt out under the African Charter on Human and Peoples’ Rights as rights with reference to the Court.²¹ On account of this, it found as follows:

[...] an infringement on a person’s liberty as alleged by the plaintiff/applicant as stated above would fall neatly under Article 9(4) of the Protocol of the Court. On that basis, the Court finds that the ingredients of the complaint in the application have met the requirement pursuant to the said Article 9(4) of the Protocol.

Next, the Court reflected on the question of exhaustion of local remedies. It recalled the objective of this principle of customary international law, namely, that a supranational court may only assume jurisdiction over a case when it is satisfied that remedies available in the domestic legal system have been exhausted unless they are unsuitable. However, in the context of the Court, article 10(d) does not require applicants to exhaust local remedies. The court referenced a previous decision in *Mouktari Bello v Jigawa State & Others*,²² where the court found that the Supplementary Protocol establishing the Court is *lex specialis*, which applies as an exception to international customary law (*lex generale*).

Closely related to the question of exhaustion of local remedies is another issue the defendants raised as a sub-text, namely, whether the court could constitute itself into an appellate court over the decisions of domestic courts. For this, the Court had a fairly straight-forward answer – no. The Court referenced the *Moussa Leo Kaita v Republic of Mali* decision,²³ where it made clear that it “does not possess, amongst others, the competence to revise decisions made by the domestic courts of member states.”²⁴ However, the judges in *Sikiru Alade* were quick to clarify that:

*[...] there is a thin divide of not reviewing the decision but hearing the matters that flow from the decisions which allegedly pose the questions of violations of human rights particularly in this case where upon a holding charge, the applicant/plaintiff is detained with no trial.*²⁵

²¹ (n. 13), p. 9

²² ECW/CCJ/APP/02/11

²³ ECW.CCJ.JUD/03/07 reported in *Community Court of Justice of ECOWAS Law Report* (CCJELR) (2004-2009), pp. 63-74

²⁴ *Ibid*, p. 73

²⁵ (n. 13), p. 13, para. 35



In other words, although the Court is prepared to respect the decisions of domestic courts, it will nonetheless review violations arising from the implementation of those decisions. This is very interesting given that to decide otherwise will provide states with the latitude to violate the rights of their citizens with impunity.

Reflecting on the question of indeterminate pre-trial detention, the Court decided as follows:

where deprivation of liberty continues for some time, the grounds that originally warranted detention may subsequently cease to exist. We state that even though the original detention was by a competent court, the magistrate court on a holding charge ... the holding charge ceased to be effective in law because of that influx of time.

In arriving at this decision, the Court considered the objective of detention awaiting trial and concluded that the detention process “was not meant to keep the plaintiff perpetually in custody but to be tried by an appropriate court thereby making the process legal and competent.”²⁶ Therefore, to sustain a defence of lawful pre-trial detention, the duration must be reasonable and the goal must be to bring the suspect before a competent court with a view to determining his/her case one way or another.²⁷

On the final question of finding of violation of the Charter and order of release and an award of damages, the Court reiterated a well-established principle of law; “damages are generally awarded to place the claimant in the position he/she would have been, had the friction complained of not taken place.”²⁸ It found that the detention of the plaintiff from 2003 until judgment at the Court in 2012 on a *holding charge* clearly violated his rights. Therefore, it ordered his immediate release²⁹ and also awarded damages in the sum of N2,700,000 (about \$18,000 at the time of judgment).³⁰

3 DRAWING LESSONS FROM THE DECISION

It should be clear from the outset that this paper does not advocate for abolition of pre-trial detention. There are circumstances in which pre-trial detention is inevitable and in nearly every legal system, there is some scope for that. However, prolonged pre-trial detention is a huge challenge. The decision in *Sikiru Alade v Federal Republic of Nigeria* sends a clear signal to states within the ECOWAS sub-region and elsewhere that prolonged pre-trial detention will not be condoned. In terms of lessons, we can identify the following:

²⁶ Ibid, p. 21, para. 55

²⁷ Ibid, p. 20, para. 55-56

²⁸ Ibid, p. 21, para. 58

²⁹ Ibid, p. 24, para. 64.7

³⁰ Ibid, p. 23, para. 63



- a. States need to establish benchmarks by which to ensure that pre-trial detention is used only where absolutely necessary and for the shortest possible time. Most states operate a system where criminal suspects are detained pending appearance before an appropriate court – often within a 24-48 hours timeframe. However, the challenge is that several create exceptions to the rules for several reasons, including safety and security as well as poor coordination between justice institutions. While these might be good reasons, it is important that the judiciary continue to retain the power to regulate pre-trial detention.
- b. States need to provide some guidance for their criminal justice institutions to guarantee some checks and balances in the performance of their duties. Where they do not already exist, sub-regional or regional frameworks may be adopted and adapted to suit domestic circumstances. One of such regional frameworks could be the Guidelines on Conditions of Arrest, Police Custody and Pre-trial Detention³¹ adopted by the African Commission on Human and Peoples’ Rights in 2014 (hereinafter the “Guidelines”). The Guidelines are designed to “strengthen the criminal justice system in state parties with regards to police custody and pre-trial detention, and to ensure compliance with international laws and principles by the police and other law enforcement agencies.”³²
- c. Prolonged pre-trial detention almost always serves no useful purpose other than to clog the criminal justice system. States might wish to consider alternatives to prolonged pre-trial detention such as expediting trials³³ and ensuring that only people who are considered to be of flight risk or likely to interfere with investigations are detained awaiting trial but only for a reasonable time. In Nigeria, a few states have adopted “judicial practice directions,”³⁴ which essentially sets the limit for pre-trial detention and makes it obligatory for magistrates issuing remand warrants to supervise execution of those warrants by requiring detaining and prosecuting authorities to keep to stipulated time-limits, for example 30 days in the first instance, subject to one renewal of another 30 days or risk release of suspects.

³¹ Available at

http://www.achpr.org/files/instruments/guidelines_arrest_detention/guidelines_on_arrest_police_custody_detention.pdf (accessed on February 3, 2016). For more on the guidelines, see S. Ibe, “Africa’s Rights Commission Targets Arbitrary Arrest and Detention.” OSF Voices, May 6, 2015 available at <https://www.opensocietyfoundations.org/voices/africas-rights-commission-targets-arbitrary-arrest-and-detention> (accessed on February 3, 2016).

³² Ibid, p. 8

³³ There are several obstacles to expediting criminal trials – poor investigative capacities within the police forces; inadequate court rooms and magistrates; corruption, lack of access to legal representation for suspects; abuse of the right to appeal by lawyers, etc. With the appropriate political will and improved investments in the justice system, most of these obstacles can be overcome.

³⁴ Lagos (South West) and Ondo (South West) States have these practice directions limiting duration of pretrial detention.



States elsewhere in Africa might wish to adopt this system with necessary modifications.

- d. The primary sites for cases alleging violations of human rights ought to be domestic courts and tribunals. Supranational courts exist to offer remedies where the primary sites do not function optimally or are simply unwilling or unable to function like they should. States owe an obligation to their citizens and other persons living within their territories to create and sustain structures for victims of rights violations to find effective remedies thereby making it unnecessary to approach the supranational courts except where absolutely necessary.

4 CONCLUSION

Prolonged pre-trial detention is a problem that Africa continues to grapple with. There are tools within and beyond our domestic systems to address this. However, often there are too many obstacles to using these tools effectively. These obstacles need to be identified and overcome because otherwise victims who have the resources or access will approach supranational courts for remedies that could easily be obtained domestically. The challenge for states in Africa is to create, and where they already exist, strengthen justice institutions in such a way that they might live up to the expectations of the public. Efficient justice institutions often serve as antidote to intractable crisis in that they offer an opportunity for aggrieved persons to seek and obtain justice. In a context in which many states are dealing with one form of conflict or the other, it makes economic and political sense to invest in building virile justice systems.