THE JUDICIAL APPROACH TO ENVIRONMENTAL PROTECTION IN NIGERIA: AN OVERVIEW

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Abstract

The Nigeria experience in the sphere of environmental litigation reveals that quite apart from the different tort Law remedies, there are several legislations aimed at ensuring environmental quality. However, the rules of evidence, and of course the dispositions of the Judge towards roof of Cases in environmental litigation play dominant roles in non-realization or ensuring environmental quality. The Court reliance on technicalities is anathema to a human friendly environment, it affords the polluters an escape route from liability. The Court is therefore called upon to adopt a more proactive approach aimed at assessing issues of the environment based on its own peculiar circumstance.

The judiciary is an arm of the government and by the provisions of section 6 of the 1999 Constitution, it was established with powers to exercise judicial functions vested in the Courts of record. But by virtue of section 257(1) of the Constitution, all matters relating to Oil, Minerals, Mines, Seismic Operations are within the exclusive jurisdiction of the Federal High Court to hear and determine same. This means that the state High Courts have no jurisdiction in such matters. This position has been judicially recognized as depicted in the case of Emejuru v Abraham:((2008) among others. In this case, the Plaintiff sued the Defendant for massive destruction to his Cash crops, farmland, ancestral land marks and building during the laying of Gas pipeline by the Defendant. The High Court in which the action was instituted found for the plaintiff, but on appeal at the Court of Appeal it was held that the High Court had no jurisdiction to try the matter.

The statistics of prosecution and conviction or otherwise of environmental crimes are still not available in Nigeria, unlike in the United States of America where during the 1992 fiscal year, the Ministry of Justice completed the prosecution of 64 environmental crimes resulting in the conviction of 99 defendants out of which 44 received jail sentences.
In the United States of America, fines between $5,000 to $50,000 per day and up to 3 years imprisonment can be imposed. Subsequent offenders can be fined up to $100,000 US dollars per day and imprisonment for up to 6 years Atsegbua,(2000:165).

In Nigeria, the maximum statutory fine for Environmental crime is a fine, not exceeding N1,000,000.00 or imprisonment for a term not exceeding 5 years for an individual, and N1,000,000 and an additional fine of N50,000 for every day the offence subsists for a body corporate (S. 27 (2) & (3) of the NESREA Act) while there is life imprisonment for dealing in toxic or hazardous Waste (S. 1-6 of the Harmful Waste Act).

The Nigerian experience in the sphere of environmental litigation, reveals that quite apart from the different tort law remedies, there are several legislations aimed at ensuring environmental quality. One striking feature of these domestic environmental legislations aside from their criminal sanctions, is that they also impose statutory duties on certain persons and organizations or agencies. Significantly, there has been more or non-realization of these legally protected rights in the various environmental law suits. The rules of evidence, and of course the dispositions of the judges towards proof of cases in environmental litigation play dominant roles in realization of these legally protected rights. Omotola, (1990:112) alluded to this assertion when he observed that “One striking problem of environmental litigation is the operation of the rules of burden of proof, he who asserts must prove, if at the end of the case, the Plaintiff cannot prove his Case, the Court must decide against him….” Nigerian Courts over the years have insisted dangerously in deciding environmental pollution cases on high standard of proof on the side of the Plaintiff.

The defendants whose wrongful conducts are directly in issue because of their economic powers encounter no difficulty in procuring the services of the experts to testify on their behalf in a manner indicating that they are not liable. The evidence of the experts, invariably go unchallenged or un-contradicted.

The worrisome plight of the Plaintiff in such litigation is that the Court as in the case of Seismograph Services v Kwarbi Ogbeni, (1776) must act on such unchallenged and un-contradicted evidence. This position of the Court has led Keenton,(1968:94) to caution as follows; …whatever may be achieved as a result of this great disaster, those who suffer by oil pollution must be relieved of the extremely difficult task of establishing liability as a condition precedent to securing redress. The financial burden necessary to procure the services of such experts are seldom at the disposal of genuinely aggrieved plaintiffs and these experts are easily at the disposal of the defendants. The battle between the forces of deterioration and their victims remains an uneven one.

In the case of Seismograph Service Ltd v Akporovo,(1974:106 ) the trial judge in spite of the unchallenged experts evidence, held the oil company liable. Unfortunately
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this was reversed on appeal by the Supreme Court. Sowemimo JSC (as he then was) with respect expressed the unfortunate position of the court as follows: “The evidence of the 4th defense witness is that of an expert. He knows the soil and therefore his opinion is relevant and deserved consideration. We think that, since such expert opinion has not been challenged, it could have been considered as the only evidence on the issue of liability so far as the seismic operations are concerned.”

The above case among others, point to the fact that the evidence of an expert witness is an indispensable element in environmental litigation in Nigeria, and showcases the difficulties and in some instances outright despair a plaintiff may face. The result is that victims of pollution who lack scientific knowledge and strong financial backing will hardly have their injuries redressed.

Thus, it was suggested that a pride of place be accorded to “Implied Warranties” in environmental protection matters. The advantage of this concept lies in the fact that if injury is proved to have been caused by the action of the defendant, the legal system should and must adjust to fit the available facts with the result that the defendant will be adjudged liable to the Plaintiff. For Erhonsele, (2000:164) instead of allowing a Plaintiff who has suffered losses from actions of pollution to go without remedy because of inadequate proof on the part of the Plaintiff, our Courts should fall back on the doctrine of res ipsa loquitur in aid of such Plaintiff. The doctrine, which literally means, “the facts speaks for themselves” is known to our law. In this way, a Plaintiff who grounds his action on any of the common law torts for example can succeed even if such Plaintiff cannot prove that the Defendant was responsible for the damage. This suggestion finds support in the case of Man v Shell-BP,(1970-1972:71) where the Court held as follows “Negligence on the part of the Defendant has been pleaded, but there is no evidence of it. None in fact is needed for they must naturally be held to be responsible for the results arising from an escape of oil which they have kept under control.”

Where also, a particular legislation or administrative regulation imposes Statutory responsibility on a defendant, the defendant is expected to strictly comply with the provisions, and no amount of expert evidence should absolve him from liability for non-compliance with such regulations. The general trend vis-à-vis the rules of evidence should lie in the shifting of burden of proofs in environmental litigation from the plaintiff to the defendant. Reitze,(1972:30) in upholding the above position observed that “there had been a shift from bias against victims of environmental pollution to a more sympathetic treatment of their cases. Therefore in matters of environmental protection, national legal systems of countries are shifting the burden of proof to the accused once minimum standard of evidence is provided. In other words, based upon minimum acts, the presumption of guilt shifts to the accused to prove innocence.”

Shifting the burden of proof to the defendant will undoubtedly assist the plaintiff in proving his claim against a defendant in environmental law suit. Thus, while the Harmful Waste(Special Criminal Provisions) Act is viewed as a welcome piece of
legislation in spite of its punitive outlook, the Act significantly affected the rules on burden of proof with respect to damages arising from the depositing or dumping of harmful wastes, there is still reason to suggest that evidential rule of proof be adjusted to meet the modern challenges of environmental litigation. Also, the delay experienced in environmental litigation simply supports the fact that “justice delayed is justice denied.” For example, the cases of Eboiagh v NNPC,(1994:62 ) and SPDC v Isaiah,(1997:148) commenced in 1971 and 1979 respectively and got to the Supreme Court in 1994 and 2001. Our crave is that the Court should protect and safeguard the rights of the Nigerian citizens in the face of environmental abuses.

The Court reliance on technicalities is anathema to a human friendly environment. It affords the polluters an easy escape route from liability while it is obvious that the consumer who has suffered the injury had no means of knowing what goes on in the defendant’s activity. He is therefore, in a disadvantaged position by his lack of familiarity with the defendant’s nature of activity where the defendant successfully makes an affirmative showing of proper care, compliance and non-abuse of the environment. Kats,(1970:332) The ease with which our Courts lend weight and credence to the defenses put forward by the defendants of environmental claims is alarming , disappointing and an easy match into the wide gate of doom.

Functions of the Judiciary
For proper enforcement of environmental protection laws, the Court performs three major functions which are:
(a) adjudicatory
(b) Interpretative and
(c) Supervisory

Adjudicatory
The chief function of the courts is to reach decisions on the merits of the cases. The main function of law is all about regulation of human activity. The courts are called upon to adjudicate on disputes to force those persons responsible for environmental degradation for example, to face the music, pay compensation and clean up the pollution where necessary. Once the courts have adjudicated on an environmental action be it criminal or civil, it will on conviction in a criminal prosecution (which is a very rare occurrence in Nigeria) impose penalty, and in the case of civil action, make an award of compensation or any other relief. The sentencing and enforcement policy of the courts play an important role in ensuring compliance with environmental protection laws.

While it is again suggested that the sentencing policy with regard to environmental pollution offences be reviewed, the courts should also base the culpability of environmental polluters on the actual facts of the case before them and on the devastating effects of the environmental degradation faced by the Plaintiffs. Court pronouncement on Environmental matters should be such that will have real economic impact on the defendant which together with the attendant bad publicity resulting from
the prosecution will create sufficient pressure on the environmental Managers, Stakeholders and Polluters to tighten regulatory compliance and enforcement. In addition, community service, probation, suspended sentences and imprisonment are all possible penalties if the fight against the wanton destruction of our environment is to be checked and brought to the barest minimum.

**Interpretative.**

It is also the role of the courts to interpret and apply the words and phrases which appear in common law principles and legislations. Interpretation simply put, is the act or process of discovering and expounding the intended signification of the language used. That is, the meaning which the authors of law designed it to convey to others. There is generally more to interpretation than the discovery of the meaning attached by the author to his words. Even if, in a particular case that meaning is discoverable with a high degree of certitude from external sources, the question whether it has been adequately expressed remains. Thus our Courts should be more responsive and strict in interpreting provisions that border on environmental issues. They are advised to borrow from other jurisdictions where the fight for environmental protection is on top gear. For example, the boldness of the House of Lords in the case of Empress Cars (Arbertillery) Ltd v MRA,(1998:396) in giving the meaning of “causing” a very strict interpretation should be emulated. The Court in that case, interpreted the word “causing in the context of criminal offence, for the purpose of punishing any person who causes pollution no matter the situation or circumstances.

**Supervisory**

The Courts (superior Courts of records) exercise supervisory jurisdiction over public bodies. This role is essentially by way of judicial review. It is a process whereby a civil law action is employed to challenge the legal validity of the decisions and actions of public authorities and bodies charged with duties and responsibilities under an Act. This review may either be on findings of fact, law or both. The result of this process is normally to quash a decision, stop unlawful action, require the performance of a public duty, declare legal position of litigants give monetary compensation and maintain the status quo.

In bringing a judicial review action, the person, individuals or company must demonstrate ‘sufficient interest in the matter to which the application relates’. Thus, a person whose direct personal interests have been affected by the decision of a public body will have standing to challenge such decision. The Court may also allow a group or organization acting in the public interest to challenge the decision and actions of public authorities acting under an established Act. The Court in considering the issue of the standing of an applicant, puts the following factors into consideration;

(a) The importance of the legal issue at stake
(b) The absence of any other responsible challenge
(c) The nature of the alleged breach of duty against which the challenge is made.
The previous actions and reputation of the applicant with regard to the issue/s which forms the basis of the challenge.

For the Court to act, the judicial review application must be made ‘promptly’. This means that the application must be lodged within three months of the decision or action. This is to enable for example, developments with environmental impacts proceed without the constant threat of challenge at a later stage in the project completion. Upon a successful challenge by the applicant the Court makes the necessary orders.

**Conclusion**

The place of the judiciary in the development and advancement of the legislations of any nation cannot be over-emphasized, the judiciary is not just the last hope of the common man, it is also the hope of any nation, for no nation can exist without the presence of the judicial arm. For this, our judiciary is expected to live above board, face the onerous task before it squarely and stand up to the obvious challenges.

The Courts should adopt a more proactive approach aimed at assessing issues of the environment based on its own peculiar circumstance. They should not be cowed and overwhelmed by the near flawless presentation or defense most often done by environmental polluters, nor should they be made to bow or kowtow to the overbearing influence of the Government and the larger-than-life economic size of most of the environmental polluter companies who aim at profit maximization instead of the paramount interest of the citizen and his protection. They should take note of the fact that judicial activism which is now the order of the day, is nothing else than the departure of the court from the normal and strict age of technicalities and do justice as the need arises. There is therefore, the need for proper re-orientation of the judiciary to enable it perceive and absorb the gospel truth, and believe the fact that environmental abuses are abuses on our basic or fundamental human rights.

**References**

Atsegbua, L. (2000) *Selected essays on petroleum and environmental laws*, University of Benin, Benin City.


Emejuru, V. Abraham (2008) 496


Erhonsele, (2000) *The onus of proof in cases of environmental degradation, in elected essays on petroleum and environmental law*, Faculty Law, University of Benin, Benin City.


National Environmental Standards Regulations and Enforcement Agency, 2007


Seismograph Service Ltd v Akporovo (1974) 106.

Seismograph Services v Kwarbi Ogbeni (1976) 113.
