EXPLORING ALTERNATIVE COMPENSATION STRATEGY FOR VICTIMS OF OIL SPILLAGE.

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Abstract

The cases of Amos v Shell B.P Nigeria Limited and Dumez Nig. Limited v Ogboli show that most times, the victims of oil pollution go home without any remedy. Also, where negotiations are carried out between the oil Companies and the victims of oil pollution, the victims go home with peanuts to nurse their wounds. Since Litigation and out of court settlement has in no way benefited the victims of oil Pollution, this paper presents an alternative remedy that will maintain the status quo of the victims in the face of oil pollution.

It is a known fact that oil pollution, whether it is due to spillage of crude oil or refined petroleum product cause damage to the environment in various ways. There is therefore, the need for liable parties to be made to pay damages to persons whose activities have been seriously affected by the pollution damages. It is informed by the fact that the degradation of the environment by oil pollution calls for compensation.

Sadly enough, Nigeria has no comprehensive system of liability and compensation for oil pollution damages. The existing statutory provisions do not adequately cater for individuals who suffer the adverse effects of oil pollution Omoregbe,(1993:147). Traditionally, persons affected by oil spill (where they have the means) seek remedies under the common law of tort and it is a common knowledge that the damages awarded by the courts are inadequate, nor do they effectively deter the oil companies in a manner that would make them take more precautionary measures to prevent oil spillages. According to McLaren,(1972:505) The torts of negligence, nuisance and the rule in Rylands v Fletcher,(1868:330) have not been of much aid to the victims of oil spill Atesegbua,(2000:82). The dictates of the giant oil companies seem to pull more force and have a better consideration in the eye of the courts. The only way available to redress these limits of the common tort law is a positive step towards judicial activism, that is the court taking a bold step to unilaterally diagnose or in connivance with experts, re-assess issues involved and break out from their conservatism.

Laws Providing for Compensation.

Some direct Laws that deal son the subject of compensation for the oil spill victims. The legislations are, the Oil Pipelines Act, the petroleum Act, (Drilling and Production) Regulations and the Convention on the Establishment of an International Fund for the Compensation for Oil Pollution enacted in 1971 among others.

The Oil Pipelines Act

This is an Act to make provision for licenses to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining, and for purposes ancillary to such pipelines. Under section 11 (5) of this Act, a holder of a pipeline license is obliged to pay compensation to any person who suffers loss or damage caused by the leakage or breakage of an oil pipeline or any ancillary installation. However, if the amount of the compensation is not agreed between the parties, it shall be fixed by a court in accordance with part IV of the Act.
Section 18, provides that “if there be any dispute as to whether any compensation is payable under any provision of this Act or, as to the amount thereof, or as to persons to whom such compensation should be paid, such dispute shall be determined by a magistrate exercising civil jurisdiction in the area concerned, if such magistrate has in respect of any other civil matter monetary jurisdiction of compensation claimed, and if there be no such magistrate, by the High Court exercising jurisdiction in the area concerned”.

Section 19(2), provides that “if a claim is made under subsection (5) of section 11, the court shall award such compensation as it considers just, having regard to the following:-
(a) The damage done to any building, crops or profitable trees by the holder of the license.
(b) Any disturbance caused by the holder in the exercise of such rights;
(c) Any damage suffered by any person of any neglect on the part of the holder or his agents, servants or workmen to protect, maintain or repair any work, structure or thing executed under license; and
(d) Any damage suffered by any person(other than as stated in subsection (5) as a consequences of any breakage, or leakage from the pipeline or an ancillary installation; and
(e) Loss (if any) in value of the land or interest in land by reason of the exercise of the right as aforesaid”

Section 19(3), states that in “determining the loss in value of the land or interest in land of a claimant, the court shall assess the value of the land or the interest injuriously affected at the date immediately before grant of the license and shall assess the residual value to the claimant of the same land or interest consequent upon and at the date of the grant of the license and shall determine the loss suffered by the claimant as the difference between the values so found, if such residual value is a lesser sum”

Also, by virtue of S.19(6) “if the total sum awarded by the court in accordance with this section exceed an amount already offered to the claimant by the holder of the licenses, the court may order such holder to pay the cost of the proceeding. If the sum so awarded does not exceed the amount offered by the claimant, the court shall either order the claimant to pay the cost of the proceeding or order each side to bear its own cost” Omotola,(1990:287). Section 20(2) also provides for valuation to take into account damages to crop, building, “economic trees” and loss in value of the land.

The above provisions shows the various process involve in the how and when compensation are to be paid to victims of oil spillage. The fact however remains that, as simple as these provisions appears, payment of compensation to victims of oil spillage remains a burning issue with no solution in sight.

It is immaterial that the affected land or interest falls outside the area for which pipeline license was granted. Compensation is to be paid for damages done to owners of fishing stake, hooks, nets and other fishing gear that may be destroyed by the holder’s activities, which occurred outside of the area granted license. Thus in Mon Igara v Shell. Bp (1970-72:71) and in Echeonwere & Ors v. Geneco and NNPC (1989:415) where a crude oil pollution which occurred in Calabar River, spread up to and across Port Harcourt Wharf, and resulted in the destruction of marine lives, raffia palms along the banks, the oil companies were held liable for damages outside the area for which the license was granted.

According to Omotola (19990:287), the judicial position on compensation arising from damages caused by oil pipeline leakages was succinctly stated by Ovie Whiskey, J. in San Ikpede v The Shell Bp Petroleum Development Company Nigeria limited, (1973:88-89) in these terms:

All companies who have been granted a license to prospect for crude oil in this country under the petroleum Decree 1969 No. 51 can only lay pipes carrying crude oil on or under the land

by virtue of a license granted to them under the provision of the oil pipeline act (cap. 145). See Section 11(1) (2) (3) and (4) of the oil pipeline act. The act also made it abundantly clear that the holder of such a license shall pay compensation to any person suffering damages as a consequence of any leakage from pipeline. Section 11(5) (c) of the Act explicitly provided that the holder of a license shall pay compensation: “To any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or stallation, for any such damage not otherwise made good”.

The Petroleum Act

This is an Act which came into effect on the 27th of November 1969, to provide for the exploration of petroleum from the territorial waters and the continental shelf of Nigeria and to vest the ownership of, and all on-shore and off-shore revenue from petroleum resources derivable there-from in the Federal Government and for all other matters incidental thereto.

Section 2 of the above Act empowers the minister of petroleum resources to grant an oil exploration license, oil prospecting license or oil mining lease to a citizen of Nigeria or a company incorporated in Nigeria under the Companies Act, 1968.

Section 2 (3) recognized the provisions of schedule 1 of the Act.

Paragraph 36 of schedule 1 provides in general terms that:-

The holder of an oil exploration license, oil prospecting license or oil mining lease shall, in addition to any liability for compensation to which he may be subject under any other provision of this Act, be liable to pay fair and adequate compensation for disturbance of surface or other rights to any person who owns or is in lawful occupation of the licensed or leased lands.

Unfortunately, there is no statutory definition of the meaning of what will amount to fair and adequate compensation, but in the case of Shell Petroleum Development Company v Farah (1995:192), the Court of Appeal, basing it judgement on an English case law, stated that compensation should “restore the person suffering the damnum (loss) as far as money can do that, to the position he was before the damnum or would have been but for the damnum.”

The Petroleum Act (Drilling and Production) Regulations.

Regulation 23 made under section 8 of the above Act provides that:-

“if the licensee or lessee exercises the right conferred by his license or lease in such a manner as unreasonably to interfere with – the exercise of any fishing rights, he shall pay adequate compensation therefore to any person injured by the exercise of those first mentioned rights.”

The above regulation obviously deals with interference with fishing rights, it is of general knowledge that water serves many other important purposes in man’s activity. Also, the Regulations does not cover damages caused by such pollutions on land. Thus the wordings of paragraph 36 of schedule 1 of the Petroleum Act gives a more comprehensive basis for payment of compensations to the oil spill victims.

The International fund for compensation for oil pollution damage enacted in 1971, was for the following purposes:

(a) to compensate victims of oil pollution who have not received full remedy from ship owners under the convention for civil liability of oil pollution damage, where the ship owners are under a strict liability to pay for damage caused by the spillage.

(b) To spread the financial burden beyond ship owners, to importers and, or receivers of crude oil.

The recently Enacted National Environmental Standard and Regulation Enforcement Agency (Establishment) Act, which repealed the Federal Environmental Protection Agency Act (FEPA) has the responsibility for the protection and development of the environment, biodiversity conservation
and sustainable development of Nigeria natural resources in general and environmental technology including coordination and liaison with relevant stakeholders regulations, rules, laws, policies and guidelines. Sadly, this acclaimed savior of the environment did not provide for any form of compensation for the victims of environmental pollution. The penalties provided under sections 20(3) and (4), 21(4), 22(3) and (4), 23(3) and (4), 24(4) and (5), 26(3) and (4), 27(2) and (3) and 31, are penal in nature. This means using the concept of Criminal Law to prosecute environmental infringements where as in the above legislation, the sanctions are criminal, criminal sanctions in the nature of fines and or terms of imprisonment are imposed on the environmental offenders. Although the place of criminal sanction cannot be ruled out in addressing the evil of environmental pollution, what however is more important to the person who suffered injury is compensation, restoration and the prevention of further environmental degradation rather than the punishment of the offender as such Nlerum (2005:333). Where criminal conviction occurs, the victim of environmental pollution goes without remedy and thus, no personal satisfaction because criminal wrongs are strictly crime against the state for which sanctions act as deterrent to discourage the perpetrator and not to assuage the pollution victims (s). Where for example, the environmental damage is the destruction of the living resources both on land and water that the community depends on, it pays the community nothing if the culprits have been prosecuted, found guilty and sentenced to life imprisonment while the living resources are totally lost.

Although the Nigerian Law Incorporates the Common Law Tort of Trespass, Nuisance, Negligence and the Rule in Ryland v. Fletcher, to address damages to the victims of oil pollution, there exist some obstacles on the part of the victims. For example, under negligence, the plaintiff must prove a breach of the duty of care. The question is how will a victim of pollution prove for instance that an oil spill occurred because the operator did not observe the so called “standard and good oil field practice” Ogbuigwe,(1985:5). The problem of private and public nuisance has also not helped issues. The rule in Ryland v Fletcher with its many exceptions and qualification has not been able to effectively hold the polluter strictly liable to its action. In view of the above difficulties faced by the oil spill victims under the Common Law, one is tempted to agree with Uchegbu,(1988:58) that the common law remedies could seldom help a victim of oil spill”.

Interestingly, the oil companies have claimed that they pay compensation at uniform rates for oil spillages, where such is not attributed to sabotage and that such claims are calculated at ongoing market prices including loss of revenue for the period and inconveniences also incorporated in paying such compensation. (Shell:1998) In September 1997, oil companies in Nigeria announced that they were increasing the rates of compensation paid in case of oil spillage or land acquisition by over 100 percent, that is N500,000 per hectare, ELF Petroleum Limited particularly on the other hand, stated that “compensation are paid either to the individual or family who owns the property or to representatives with power of attorney in case of community property” (ELF:1998). Sadly enough, even when compensation is agreed in principle at the oil company rates, the compensation rarely reflect the true value of the loss to the local communities, there are constant disputes as to what is included and to the rates paid. Oil Companies allege that local communities greatly inflate their claims including old equipment among items that are damaged by a spill. Communities on the other hand, claim that the compensation they receive when a claim is finally agreed is nothing compared to the loss they suffer and that the oil companies refuse to take into account the particular circumstances of each case, applying uniform rates whatever the loss suffered may be while villagers are often unaware of the full environmental consequences of oil pollution, they are well aware of the economic effect of spills on their income derived from farming or fishing. It is also probable that the amount theoretically paid out by the oil companies are plundered along the way by claims agents and others and do not reach the people who have actually suffered from the oil companies activity. For instance, land owners affected by the construction of an airport for Shell in 1997-98 were reportedly (EAB:1999) paid sums ranging from N20 to N200 for nut and rubber trees what several thousands of naira annually to their owners. In any event, cash payments can rarely compensate for the continuous income from assets such as economically valuable trees which have been destroyed.
The claims of sabotage on the other hand, are hotly disputed by the communities concerned. Community leaders point out that, given the fact that compensation sums are paid late and are inadequate even if it proved the company at fault, there is little for them to gain from polluting their own drinking water and destroying their own crops, though they agree that this argument may not apply to those who are contractors involved in cleaning up spills. Statistics from the Department of Petroleum Resources, (NDES: Vol.1, 14:253) indicates that only 4 percent of all spills in Nigeria were caused by sabotage during the period 1976 to 1990. These statistics include offshore spills which are by far, the largest and are unlikely to be caused by sabotage. Where sabotage occurs, the oil companies do not pay compensation for spills, on the grounds that to pay compensation creates an incentive to damage oil installations and harm the environment. However, even if a spill is caused by sabotage, the person carrying out the sabotage is not necessarily the person who suffers the damage. In many cases, it appears that sabotage is carried out by contractors likely to be paid to clean up the damage, sometimes with the connivance of oil company staff. A former adviser to a Minister of State for Petroleum (who does not want his name in print) commented as follows, Repeating the gist of many similar reports to Human Right Watch (HRW)

it is true that there is a lot of sabotage, but often it is the chiefs who do it. The oil companies then settles the chiefs (i.e. pays them off) by giving them the contract to clean up, but they will tell the youth that they receive nothing. Then the youths protest and cause damages and the chief gets more money. If the government and the oil companies did development projects properly, it would not happen” (HRW:1997). It is to be noted that the quantum of compensation depends on the magnitude of ecological disturbance from oil pollution. However, the factors usually taken into account in this respect include the following:

(a) Population and the type of the community impacted.
(b) The size of the crop affected, whether they are seedling, medium or mature; the amount of money put in their care and the farm-gate price of the items.
(c) The area polluted; whether it is an area of high value of land or not.
(d) Time of the year, whether the pollution occurs in the dry or rainy season.
(e) The fact that pollution at times acts as fertilizer and would thus be to the advantage of the victims in future. Uduehi, (1987: 119)

However Omotola, (1990) is of the view that Disturbance and Injurious Affection are two different heads of compensation, which must be claimed separately, even though they may coexist in a particular claim. The most important distinction between these two heads of compensation is that, in the case of “injurious affection” there is usually a need for proof of loss of use of the subject matter of the claim alleged to be affected. For instance, land, which may or may not be a part of the acquired. But in the case of disturbance, the subject matter of the claim is usually “loss of business or trade”.

The claim in disturbance is strictly depreciation in land value or a depreciation in an interest or a right in or over the land arising from damages consequent on the taking thereof under statutory powers or operations carried out by virtue of such statutory powers. Losses included in disturbance compensation are:-
(i) All consequences of eviction from the land:
(ii) Legal costs of purchase of comparable property:
(iii) Increased rental or other outgoing:
(iv) Loss of goodwill:
(v) Loss of profits during establishments.

For a claimant to succeed in disturbance compensation, he must prove that the subject matter of the claim is going concern, this was the view of the Supreme Court in Williams v. Kamson (1968:399) where “a claimant who is to be compensated for disturbance had to prove loss resulting from that disturbance. The disturbance consists in the alteration of something that would otherwise
have continued”. Thus the compensation for disturbance is either the replacement cost or cost of resettlement and this cost must be the “cost” of something that is to take the place of what is taken away. The cost must, however, be the reasonable cost. The reasonable cost, depending on the facts of a particular case, will be the actual reasonable cost which a claimant has incurred or can be expected to incur it will be such cost at the time when equivalent reinstatement does or should take place.”

As for injurious affection, it connotes some anticipated depreciation in the value of the land due to the exercise of statutory powers or operations arising from the exercise of such power. In National Electric Power Authority v Amusa & another, (1976) the land in question was rendered useless by powerful transmission lines by the N.E.P.A as a result of which the claimant incurred a loss of use of the land in the circumstance. The Supreme Court held that the land was injuriously affected and therefore qualified for compensation. In all the above cases of disturbance and injurious affection the quantum of compensation must still be based on the open market value as proved by the parties.

It has been generally accepted that one striking problem of environmental litigation is the operation of the rule of burden of proof Osipitan, (1990:113). Burden of Proof has two connotations. Firstly, it refers to the legal or persuasive burden of establishing a case, whether on the balance of probabilities or beyond, reasonable doubts. Secondly, it is associated with the evidential burden of adducing evidence, in proof of issues which arise in a case. Aguda, (1980:240)

The required standard of proof depends on whether a case is a criminal or civil one. In criminal cases, the prosecution must establish its case beyond reasonable doubt. (Section:137 of the Evidence Act) The standard required in civil cases is proof on the preponderance of evidence Francis Odiete Omawujehwe v Okorie:(1973). The significance of the evidential rules of burden of proof lies in the fact that, if at the end of the trial, the party on whom the ultimate burden lies, fails to discharge the burden, the court must decide against such party. Murphy&Beaumont, (1982:73) Experience has however shown that, in most environmental tort litigation, the plaintiff on whom, lies the ultimate burden of establishing a case, seldom successfully discharges the burden.

The Alternative Approach

As a result of the above problems, it is been advocated that an alternative compensation approach be applied to the problem of compensation of the oil spill victims as it will provide a better framework for dealing with oil pollution. Atsegbua,(2000:83)

The items for assessment for compensation as could be inferred from paragraph 36 of schedule 1 of the Petroleum Act and Regulation 23 of the Petroleum (drilling and production) Regulations, are economic trees, structures affixed to the land, fishing rights, shrines, venerable objects. It will also include compensation for injurious affection and disturbance of the surface rights of the claimant. It is obvious from above that compensation should cover both the loss of use of the subject matter and “loss of business or trade” In all this, damages have occurred and the victim needs to be compensated. It is general knowledge that the courts which assessed damages (where the victims are able to prove their case) do not adequately compensate the victims whose land had been polluted. In the light of the above, we suggest that an alternative approach be adopted in compensating the oil pollution victims. The Supreme court in the case of Williams v Kamson (In Omotola: 1990) seems to have recognized the need for this approach when it stated as follows:

“A claimant who is to be compensated for disturbance, has to prove loss resulting from that disturbance. The disturbance consists in the alteration of something that would otherwise have continued”. Thus the compensation for disturbance is either the replacement cost or cost of resettlement. And this cost must be “the cost” of something that is to take the place of what is taken away. That cost must however, be the reasonable cost. The reasonable cost, depending on the facts of particular cases, will be the actual reasonable cost which a claimant has incurred or can be expected to incur; It will be such cost at the time when equivalent
Based on the above foundation, we proffer that a Reciprocated Compensation Cost (RCC) Approach should be adopted. What this means is that victims of oil spill should be willing to bear the damage caused them by the oil companies, if the oil companies are ready to pay them a sum of money that would be greater than the loss of income as a result of the pollution of their farm land, streams and rivers. The oil companies on the other hand, should be willing and ready to pay the sum because the compensation they would have to pay will definitely be cheaper for them at the long run when compared to the benefits they derive from their oil operations. This compensation must be either the replacement value or value of resettlement and must be the value for something that is to take the place of what is taken away. This compensation however must the reasonable depending on the facts of particular cases and reasonable compensation will be the actual reasonable loss which the victims will incur or are expected to incur. The process will be a privately negotiated bargain between the oil companies and the would-be victims in case of oil spill. This initiative would for-stall the rigors of litigation and mitigate the little or no compensation which is normally the outcome of litigation. This means that where oil spill occurs, the victims fallback on the already paid compensation and where there is no oil spill, the position of the would-be victims are further enhanced with the compensation which is already in place. Either way, the oil companies are still in an advantageous position.

Conclusion

The adoption of the above approach will go a long way in putting smiles in the face of victims of oil pollution. However, this approach should not be an island thus, other alternatives such as the imposition of tax on oil companies for damages caused by oil pollution, regulatory mechanisms through the promulgation and enforcement of environmental regulations and government induced publicly negotiated settlement among all individuals affected by the pollution creating activity as suggested by Cheung (in Atsegbua:2000) should all be incorporated in the fight against oil pollution. The incidences of oil pollution is on the increase in Nigeria. Every applicable approach should be employed in finding a lasting solution to this obvious problem that is sending the victims of oil spill to their early graves. Sustainable development of all natural resources is now a cry of the global village, Nigeria should not be left out.

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