

The constitutional power of review of the Supreme Court of Ghana: Lesson for Nigeria

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ABSTRACT: *The common law tradition which Nigeria adheres to religiously does not permit any further appeal from the final decision of its highest appellate court which is the Supreme Court of Nigeria. Ghana a country with similar legal history in its constitution permits such a review to redress a miscarriage of justice. This work critically examines the propriety of this unique constitutional vista and recommends same for the Nigeria legal tradition.*

KEYWORDS: *Nigeria, Ghana, Supreme Court, Constitution, Review, Appeal, Decision, Jurisdiction, Precedent.*

I. INTRODUCTION

The Supreme Court of Nigeria, like similar institutions in other climes¹, is the highest decision making unit in the judicial system. As aptly put by a writer, the Supreme Court "...epitomizes the judiciary."² Mr. Justice Bhagwati of the Indian Supreme Court refers to the court as the summit Judiciary.³ As a court of last resort, the doctrine of binding judicial precedent otherwise called *stare decisis* has effectively ensured the subordination of the other tiers of the judicial hierarchy to its overall pervading influence. As the pinnacle of the judicial system and thus having the final say on any point of law, it is apposite to focus on this all important constitutional arm in the light of the following statement by Oputa, J.S.C.:

"... We are not final because we are infallible, rather because we are final".⁴

The common law tradition does not permit any further appeal from the final decision of the highest appellate court, subject to the right of the President or Governor to exercise the prerogative of mercy.⁵ This means, the finality of a decision of the Supreme Court shall not affect the right of the President or Governor to exercise the prerogative of mercy.⁶ The policy of binding judicial precedent is rooted in the Nigerian legal order as inherited from the British legal tradition and even at the apex court there is a limit to the power of the Supreme Court to overrule its previous decision.⁷ To do otherwise would be a negation of the finality of the decision of the court. Once it gives its decision on the dispute, it becomes *functus officio* and it is precluded from reviewing or varying the form of the judgment or order apart from the correction of clerical mistakes or accidental slips.⁸ But not infrequently, the Supreme Court had been urged to depart from its previous position in order to strike a proper balance between putting finality to the law and persevering in error.⁹

Giving a rationale for the preservation of the common law tradition, Justice Robert of the United States Supreme Court quipped: "Frequent reversals of earlier decisions tend to bring adjudications of the Supreme Court into the same class as a restricted rail road ticket, good for this day and train only."¹⁰ Put more poignantly, B. Cardoso said:

¹ In the United Kingdom, it is referred to as House of Lords; in the United States, it is the United States Supreme Court; while in Ghana, it is known as the Supreme Court of Ghana

² Kuti A. F. D.(1988) *Law and Policy; The Supreme Court Approach, Benin City*; Law Times Ltd. p.13

³ "Public Interest Litigation", *The Commonwealth Lawyer*, Vol. 2, No. 1986 p.61.

⁴ *Federal Civil Service Commission & Ors. v Laoye [1989] 2 NWLR (pt 106) 253.*

⁵ Constitution of the Federal Republic of Nigeria, [1999] Sec 235.

⁶ *Olatumbosun v NISER [1988] 3 NWLR (pt. 80) 25*

⁷ *Ngwo & Ors. v Chukwu & Ors. (1988) NSCC 1115*

⁸ *Architect Registration Council of Nigeria v Professor M. A. Fassassi [1987] 6 SCNJ 5: J. E. A. Shuaibi v Nigeria-Arab Bank Ltd. [1988] 4 SCNJ 109.*

⁹ Azinge E. C. J.(1990) "Power of the Supreme Court to Overrule itself: An Examination of *Johnson v Lawanson* and *Asiyamby v Adeniji*" 5 *Justice*. 71.

¹⁰ *Smith v Allwright [1944] 321 U.S. 649 at 669.*

“A jurist is not to innovate at pleasure. He is not a knight errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system and subordinated to the primordial necessity of order in the social life”.¹¹

Another reason canvassed for the preservation of the common law tradition is rooted in the doctrine of *res judicata*.¹² The potential danger of endless litigation is the basis of the doctrine. The underlying principle supporting the plea is that, it is desirable that litigation should end and that it is undesirable that a person should be vexatiously pursued in litigation in regard to a matter that has already been decided.¹³ A matter which is *res judicata* cannot be further gone into; but if the decision was obtained by fraud it can be set aside.¹⁴ The rationale for the court’s refusal to review its decision given in the same case is invigoratingly surmised in the following *dictum* of Obaseki J. S. C. thus: “It will be scandalous and suspect of a proper and corrupt motives if the court after delivering a well considered judgment reserved for about three months, were to be allowed to turn around and deliver a different decision. I have no doubt that such conduct will mark the onset of the erosion of confidence in the integrity of the court and the destruction of the courts competence to do justice. It will be death of justice which the courts are established to administer.”¹⁵

In spite of the hallowed reasons given for the continued preservation of this cherished heritage of common law, it is curious to observe that, the Republic of Ghana, a country with which Nigeria share a common colonial progenitor, in its current constitution vests in its Supreme Court, jurisdiction to review its own decisions or correct its own errors by way of review.¹⁶ Put differently, the Supreme Court of Ghana is permitted after delivering a final judgment in a case, to re-open that case in order to review that final decision for errors, with a view to doing justice which it had earlier miscarried. This work seeks to critically examine the propriety or otherwise of this unique constitutional vista with a view to recommending same for the Nigeria legal tradition.

Methodology

Data for the purpose of this work is collected from library and archival information drawn largely from constitutions, rules of court, textbooks, law reports, journals, reviews, biographies and autobiographies of jurists. Content analysis of judicial decisions would rely heavily on cases decided in appellate courts reports such as the Nigeria Weekly Law Reports, Nigeria Supreme Court Cases and Supreme Court of Nigeria judgments supplemented where necessary with judgments reported in law reporting columns of newspapers, since not all decisions of the Supreme Courts are reported in law reports.¹⁷ Foreign statutes and judgments are obtained through paper sources as well as electronic sources.

Practice of the Supreme Court of Nigeria

In addressing the Nigeria Supreme Court practice, it is apposite to distinguish between the power of the Supreme Court to overrule itself and the power to review its judgment. The rule of *stare decisis* is nowhere expressly provided for under the Nigeria Constitution. The only semblance or hint of it is with regards to sections 213, 215 and 251 of the 1999 Constitution. While section 213 and 215 merely established the pre-eminent position of the Supreme Court over all other courts of the land, section 251 gives a constitutional stamp of authority on judgments of the court. It compels all authorities, persons and subordinate courts to give effect to the court’s judgment and this by no means can be described as the rule of *stare decisis*. Thus, section 251 is concerned with enforcement or execution of court judgments and not establishment of the rule of *stare decisis*.¹⁸ The rule is better traced to the common law.¹⁹ Having established that the Supreme Court has jurisdiction to depart from and overrule its previous decision whether by a full court or otherwise provided there is justification

¹¹ *The Nature of the Judicial Process*. New Haven, 1921 p.141

¹² Means there must be an end to litigation and strikes at the cherished common law doctrine of *stare decisis* which is *sine qua non* to certainty

¹³ *Society of Medical Officers of Health v Hope* [1959] 1 QB 462, affirmed [1960] AC 551.

¹⁴ *Cole v Langford* [1988] 2 QB 36.

¹⁵ *Adigun v A. G. Oyo State* [1987] 2 NWLR (pt.88)197 at 218.

¹⁶ Constitution of the Republic of Ghana, 1992 Art. 133

¹⁷ For example Chief Gani Fawehinmi discovered in 1984 that a total of 1531 judgments of the Supreme Court were unreported – See Fawehinmi G.(1986) *Digest of Supreme Court Cases: General Index*, Lagos; Nigeria Law, Publications Ltd. p.xv

¹⁸ *Op. cit.*

¹⁹ Per Obaseki J. S. C. in *Paul Odi & Ors v Gbaniyi & Ors.* (1985) 16 NSCC p.24

for doing so, without any inhibition from the doctrine of *stare decisis*, it is pertinent to consider with case illustration, some instances when the power to overrule had been exercised by the Supreme Court and the *rationes d'etres*.

Jurisdiction of the Supreme Court to overrule its previous decision

The case of *Johnson v Lawanson*²⁰ is regarded as the trail-blazing case in which the Supreme Court exercised the power to overrule itself. In that case, the point arose as to the proper construction to be placed on section 129 of the Evidence Act.²¹ The section provides that recitals, statements, and descriptions of acts, matters and parties contained in deeds, instruments, Acts of Parliament, or statutory declarations, twenty old at the date of the contract, shall unless and except so far as they may proved to be inaccurate be taken to be sufficient evidence of the truth of such facts, matters or descriptions. Previous Privy Council decisions like *Goualin v Atanda Aminu* had equated “the date of the contract” in section 129 with the date of proceedings. Coker J.S.C. delivering the court’s judgment refused to be inveigled by the line of authorities and found these decisions unsupportable and held that: “...when the court is faced with the alternative of perpetuating what it is satisfied is an erroneous decision which was reached per incuriam and will, if it will be followed, inflict hardship and injustice upon the generations in the future or of causing temporary disturbances of rights acquired under such a decision, I do not think we shall hesitate to declare the law as we find it.”

Another case of note is *Bucknor-Macleans & Anor v Inaks Ltd.*,²² where the main contention of the appellants was that, the deed of lease which they granted to the respondents, not being made in the form prescribed by the Registration of Titles Act was incapable of transferring title of legal estate to them whether or not it was subsequently accepted by the Registrar of Titles. Appellants’ counsel relied on several sections of the act and especially on two Supreme Court decisions,²³ thereby urging the court to declare the deed null, void and of no effect. Idigbe, J.S.C., delivering the court’s judgment, held that to allow the parties to a deed (and in particular, the grantor of a lease) to challenge their own documents and resile from them in the manner, in effect authorized by those two decisions does not appear to accord with justice, since such astounding and alarming consequences could not have been intended by the legislature. His lordship held further that, there is no more justification for perpetuating recent errors than for retaining uncorrected any error in much older decisions of the Supreme Court.

Also in *Paul Odi v Gbaniyi Osafire*,²⁴ the Supreme Court sitting as a seven man panel considered whether it was open to it to reconsider its former decision given by another seven man panel and whether in the instant appeal, grounds existed to warrant a departure from its decision in *Chief Dominic Ifezue v Livinus Mbadugha*. Addressing the first of the two issues before the court, Obaseki J.S.C. Observed that, the Supreme Court, as a court at the apex of the judicial hierarchy in Nigeria has jurisdiction and power, sitting as a full court of seven justices, to depart from and overrule previous erroneous decisions on points of law given by a full court on constitutional questions or otherwise.²⁵

Power of review and the Supreme Court of Nigeria

The Supreme Court had been inundated with appeals to review its decision given in the same case and there has been a consistent refusal to act as an appeal court over itself. Lately, Dr Andy Uba who had earlier gone to the Supreme Court to ask for the revalidation of his alleged victory at the April 14, 2007 governorship election and return him to office after the Supreme Court threw out his case, approached a seven-man panel of the court to get the court to set aside its judgment which terminated his two weeks tenure as the Governor of Anambra State in 2007. The court in its ruling delivered by the then Chief Justice of the Federation of Nigeria, Justice Idris Kutigi observed that Dr. Uba’s attempt at luring the court into setting aside its judgment which was delivered on June 14, 2007 was a gross abuse of the court process and maintained that there must be an end to litigation.²⁶

²⁰ (1971) 7 NSCC 82.

²¹ Cap 62, Laws of the Federation of Nigeria

²² (1980) 8-11 SC I

²³ *Shell B. P. v Jammal Engineering (Nig) Ltd.* [1974] 1 ALL NLR 542 and *Owumi v Paterson Zochonis Co (Nig) Ltd.* [1974] 1 ALL NLR (PT 2) 107

²⁴ *Supra*

²⁵ This statement implies that only a seven member panel of the Supreme Court of Nigeria can overrule any previous decision of the court. Azinge E. C. J. *op. cit*

²⁶ Andy-Uba-losses-at-Supreme Court-again <http://thepmnews/2009/06/11> (con: June 11,2009)

The apex court has always denied any jurisdiction whatsoever (constitutional, statutory or inherent), to review a judgment it had given in that same case. The admonition of Belgore J.S.C. (as he then was) in this regard is apposite:²⁷ "What this court is being asked to do is to review its judgment already given. This court has consistently refused to be dragged into this pitfall. The purpose of this application is clear, it is an appeal cloaked in the guise of a motion. From the wordings of the motion and the grounds for bringing it, it is manifestly clear that the validity of the judgment of this Court as given on 26th February 1993 is being challenged... Once the Supreme Court *has entered judgment in a case, that decision is final and will remain so forever. The law may in future be amended to affect future issues on the same subject, but for the case decided, that is the end of the matter.*" (Italics are for emphasis).

The above aptly sums up the Nigeria position which was overly reiterated by Ogwuegbu, JSC in *Igwe v Kalu*²⁸ when in the concluding part of the lead judgment his lordship stated as follows: "It must be emphasized that this is a court of final resort and under the constitution, it cannot under any guide sit on appeal over its judgment or review it except under very exceptional circumstances..."

With respect to his lordship, there is no power in the Supreme Court to set aside or review its own judgment given in the same case. The only exception relates to correction under the 'slip rule', which cannot be regarded as a review properly so called. Thus, the Supreme Court may revisit its judgment under order 8 rule 16, Supreme Rules to correct clerical errors or omissions or gabs to give meaning to the judgment or decision of the court and not to vary it. This is without prejudice to the inherent power of the Supreme Court to set aside its judgment in appropriate cases when; the judgment is obtained by fraud or deceit either on the court or by one or more of the parties. Such a judgment can be impeached or set aside by means of an action which may be brought without leave,²⁹ or where the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside,³⁰ and when it is obvious that the court was misled into giving judgment under a mistaken belief that the parties had consented to it.³¹ For example, in *Olorunfemi v Asho*³² the Supreme Court set aside its judgment delivered in January 8, 1999 on the ground that, it failed to consider the respondents cross –appeal before allowing the appellant's appeal. The court then ordered that the appeal be re-heard *de novo* by another panel of Justices of the Supreme Court. Also, a decision of the Supreme Court can only be final if the Supreme Court is validly constituted as to the number of justices and has jurisdiction over the subject matter.³³

The advantage of this stance, is that it fosters stability, enhances development of consistent and coherent body of laws, preserves continuity and manifests respect for the past, assures equality of treatment for litigants similarly situated, spares the judges the task of re-examining rules of law or principles with each succeeding case and finally it affords the law a desirable measure of predictability.³⁴ Obaseki J.S.C. surmised the rationale poignantly thus: "...it will be scandalous and suspect of improper and corrupt motives if the court after delivering a well considered judgment, reserved for about three months, were to be allowed to turn around and deliver a different decision. I have no doubt such conduct will mark the onset of the erosion of confidence in the integrity of the court and destruction of the court's competence to do justice. It will be death of justice which the courts are established to administer."³⁵

The wisdom of Obaseki J.S.C. in justifying the Nigeria Supreme Court Practice inexorably leads us to the consideration of the practice of the Supreme Court of Ghana, to which we now turn.

²⁷ *Ibero & Anor v Obioha* (1994) 14 LRCN 45 at 53; See also *Egbu v Urum* (1984) 4 S. C. 1 *Sodeinde Bros. Nig Ltd v ACB Ltd.* (1985) 2 S.C; *Enomoh v Onolepate* (1985) S.C. and *ARCON v Fassassi* [1987] 3 NWLR (pt.59) 42 at 46.

²⁸ (2002) 102 LRN 2073

²⁹ *Orthopaedic Hospital v Apugo & Sons* [1990] 1 NWLR (Pt. 129) 652; *Alaka v Adekunle* (1959) LLR 76; *Olufumise v Falana* [1990] 3 NWLR

³⁰ *Skenconsult Nig.Ltd. v Ukey* (1981) 1 SC 6; *Okafor & Ors. v Anambra State* (1991) 5 LRCN 147.

³¹ *Agunbiade v Okunuga* [1961] AII NLR 119; *Obimonure v Erinoshu* [1966] 1 AII NLR 250

³² (1999) 65 LRCN 28; See Also *Alao v ACB* (2000) 79 LRCN 1899.

³³ *Alao v ACB, supra*: Hon, S. T.(1999) *Constitutional Law and Jurisprudence in Nigeria*, Port Harcourt: Pearl Publications, p.233

³⁴ Azinge, E. C. J. *passim*.

³⁵ *Adigun v A.G. (Oyo State) supra* 213

Practice of the Supreme Court of Ghana

The authority of the Supreme Court Ghana to review its own decision is entrenched in article 133(1) of the constitution of the Republic Ghana,³⁶ which provides that the Supreme Court may review any decision made or given by it on such grounds and subject to such conditions as may be prescribed by rules of court. Rule 54 of the Supreme Court Rules, 1996 (C1 16) made pursuant to the authority of the Constitution, spells out the grounds for review as:

- a) Exceptional circumstances which have resulted in a miscarriage of justice;
- b) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given.

Before the extant Constitution, the review jurisdiction of the court derived from the inherent jurisdiction of the court as expounded in the case of *Fosuhene v Poma*,³⁷ which held that the Supreme Court had jurisdiction to correct its own error by way of review and that application for review must be founded on compelling reasons and exceptional circumstances dictated by the interest of justice. The term "exceptional circumstances" is not defined in rule 54 of C1 16 or in the Rules of the Supreme Court, 1996 (C1 16). However, some guidance can be obtained from judicial pronouncements in cases that have come up for review both before and after rule 54 came into force. In *Republic v Numapaw, President of the National House of Chiefs, ex parte Ameyaw*,³⁸ it was held that what constitutes exceptional cases cannot be comprehensively defined. But Taylor JSC in the case of *Mechanical Lloyd Assembly Plant Ltd. v Nartey*,³⁹ valiantly suggested some criteria indicative of exceptional circumstances, which may necessitate a review provided it resulted in a gross miscarriage of justice, thus:

- (i) Matters discovered after judgment; these must be relevant, exceptional and capable of tending to show that if they had been discovered earlier, their effect would have influenced the decision;
- (ii) cases falling within the principle enunciated in *Mosi v Bogyina (1963) 1 GLR 337 SC* that is, where a judgment is void either because it is not warranted by any law or rule of procedure; and
- (iii) the class of judgment which can legitimately be said to have been given *per incuriam* because of failure to consider a statute or case law or fundamental principle or procedure and practice relevant to the decision and which would have resulted in a different decision.

Distinction between review and appeal.

A review jurisdiction is not an appeal. It is not meant to be resorted to as an emotional reaction to an unfavourable judgment.⁴⁰ On this note, Wiredu, JSC observed:

"... the review jurisdiction of the court, being special, will not and must not, be exercised merely because counsel for the applicant refines his appellate statement of case, or thinks up more ingenious argument, which, he believes, might have favoured the applicant had they been so presented in the appeal hearing. An opportunity for a second bite at the cherry is not the purpose for which the court was given the power of review."⁴¹ Adade, JSC while advising prospective applicants intending to ask for a review of the Supreme Court's decision, cautioned thus:

"... the mere fact that a judgment can be criticized is no ground for asking that it should be reviewed. The review jurisdiction is a special jurisdiction to be exercised in exceptional circumstance. It is not an appellate jurisdiction. It is a kind of jurisdiction held in reserve, to be prayed in aid in the exceptional situation where a fundamental and basic error may have inadvertently been committed by the court, which error must have occasioned a gross miscarriage of justice. The review jurisdiction is not intended as a try-on by a party after losing..., nor is it an automatic next-step..., neither is it meant to be resorted to as an emotional reaction to an unfavourable judgment."⁴²

In *Mechanical Lloyd Assembly Plant Ltd. v Nartey*,⁴³ the Supreme Court in declining the application for review, held that, the review jurisdiction was to be exercised at the discretion of the court in exceptional circumstances, where a fundamental and basic error might have been inadvertently committed by the court resulting in a grave miscarriage of justice. The court further held that, there were no definitions as to what

³⁶ Constitution of the Republic of Ghana, 1992.

³⁷ [1987-88] 2 GLR 105 (SC)

³⁸ [2000] SC GLR 59.

³⁹ [1987-88] 2 GLR 598 (SC) *Wasali v Addy* [1987-88] 2 GLR 286-288

⁴⁰ *Mechanical Lloyd v Nartey*, *supra*

⁴¹ *Nyamekye (No. 2) v Opoku* [2002] SC GLR 567 at 570.

⁴² *Mechanical Lloyd v Nartey*, *supra*.

⁴³ *Supra*

constituted “exceptional circumstance” or sufficient grounds and that, it was for the court to determine the matter on the facts and circumstance of each case and as dictated by the ends of justice. In *Bisi v Kwakye*,⁴⁴ the court in rejecting an application to review its earlier judgment, held that the exceptional circumstance relied upon must be of such a nature, as to convince the court that the previous judgment had led to the creation of miscarriage of justice and that it should be reversed in the interest of justice. In *Numapaw, President of the National House of Chiefs ex parte Ameyaw II (No.3)*,⁴⁵ Wiredu JSC (As then was) reading the six to one Majority opinion of the court, adopted the definition of ‘miscarriage of justice’ in the revised 4th edition of the *Blacks Law Dictionary*, which means, “prejudice to the substantial rights of a party” and posited that, it was incumbent on the applicant for review to show that his substantial rights in the matter that came before the court have been prejudiced by some fundamental or basic error made by the majority.⁴⁶

It has also been held that, where a party in a review application merely seeks to reiterate the arguments made during the hearing at the ordinary bench, the effect is to reopen the appeal under the guise of a review, a factor not constituting exceptional circumstance.⁴⁷ In *Darbah v Ampah*,⁴⁸ the Supreme Court unanimously dismissed the application for a review, as a mere invitation to the court to receive fresh submission on points already canvassed at the earlier hearing, so as to arrive at a different conclusion. The court thus held that, re-arguing matters already adjudicated upon did not constitute a patent error, the existence of which would justify a grant of review to correct such mistakes. An opportunity for a second bite at the cherry is not the purpose for which the Supreme Court is given the power of review, it was added.⁴⁹ Also review-ability of a case or judgment is not dependent on numerical factors. Thus, a split decision of the Supreme Court is not enough reason for reviewing a majority decision of the Supreme Court. In *Nyamekye (N.2) v Opoku*,⁵⁰ the application was for a review of the split-decision of the Supreme Court by a three to two majority decision. The appellant contended in his statement of case that, the split meant therefore that there may very well be good reasons for reviewing the majority decision of the Supreme Court. The court in dismissing the application held that by virtue of rule 54 of C1 1, what is in issue in an application for review, is not a matter of head count.

In spite of lofty illustrations gleaned from opinions of the Supreme Court Justices, case law on what, when and how the jurisdiction of the Supreme Court in the matter of review is determined is still recondite. For instance, in substance and intent, it is difficult to sustain the view that, review jurisdiction is different from an appellate jurisdiction properly so called. The constitution specially provides that, the bench or panel to hear and determine a case on review must be enhanced by a minimum of two justices. It is our opinion that, the two or more ‘additional’ justices to be empanelled cannot painstakingly exercise their duty without examining and considering the whole of the previous proceedings which is under review and furthermore, the enhanced bench or panel as a whole, must deal with all the arguments and submissions of counsel for the parties even if this duty by counsel was discharged by repeating earlier arguments and submissions.⁵¹

The scope of the Supreme Court’s review jurisdiction was tested in *A.G. (No.2) v Tsatsu Tsikata (No.2)*,⁵² a case which epitomized the highs and lows of the brethren of the apex court. This case is so important to our work that, we cannot, but discuss it.

A.G. (No.2) v Tsatsu Tsikata

The plaintiff on February 11 2002, approached the Supreme Court of Ghana seeking inter alia, a declaration that the Fast Track Court before which criminal charges has been preferred against him by the Attorney-General of Ghana was an unconstitutional court with no legal mandate to try him. The Supreme Court on February 28, 2002 by a five to four majority agreed that the Fast Track Court was an unconstitutional court and restrained the Attorney General from proceeding with the prosecution of the plaintiff before the court. A day after the decision, the Attorney General filed for the review of the decision pursuant to the Supreme Court Rules 1996 (C116). In support of the application, the Attorney General averred that, the review was rife because in an earlier case of *Selormey v The Republic*,⁵³ the Supreme Court conceded the constitutionality of the Fast

⁴⁴ [1987-88] 2 GLR 295

⁴⁵ *Supra*

⁴⁶ The same view is re-emphasised by the Supreme Court in *Koglex Ltd (No.2) v Field* [2000] SC

⁴⁷ Per Aday JSC in *Mechanical Lloyd v Nartey*, *Supra*

⁴⁸ [1989 – 90] 2 GLR 163.

⁴⁹ Per Wiredu JSC in *In Re Krobo Stool (No.2)*, *supra*

⁵⁰ [2000] SC GLR 567

⁵¹ See similar sentiments expressed by *Lamptey, JSC in AG v Tsatsu Tsikata No. 2* [2001 -02] SC GLR 620 at 668

⁵² *Supra*

⁵³ [2001-2002] SC GLR 848

Track High Court and for the same court to now by a narrow majority decide otherwise calls for a second hard look at the matter. Moreover, the Supreme Court as the highest court of the land has a duty to ensure certainty in the law and in the present uncertainty and apparent confusion that the decisions in the two cases show, an exceptional circumstance as contemplated by the extant rules, has arisen which has occasioned miscarriage of justice and therefore the justice of the situation demands that, the matter be looked at again so that the speedy computer-based records transcription system, geared towards efficient case management and speedy disposal of cases for which the Chief Justice established the Fast Track Court, becomes a permanent feature of the administration of justice in Ghana. Granting the application for review, the Supreme Court by a majority of six to five held inter alia:

(1) The authority of the Supreme Court to review its own decision is now firmly entrenched in article 133(1) of the Constitution, which authorizes the exercise of this jurisdiction on grounds spelt out by Rule 54 of the Supreme Court Rules, 1996 (C1 16).

(2) The review jurisdiction would be exercised only in exceptional circumstances, where an applicant has satisfied the court that there has been some fundamental or basic error which the court inadvertently committed in the course of its judgment; and which fundamental error has thereby resulted in a gross miscarriage of justice.

(3) A judge who concedes the constitutionality of a court in one case and turns round in another case to deny the constitutionality of that court must certainly have his latter opinion reviewed.

(4) By article 139(3) of the Constitution, the establishment of divisions in the High Court including the Fast Track High Court is at the complete discretion of the Chief Justice.

Comments on the Case

In the common law tradition, the regular admonishment has been that judges must never be knight errants in the exercise of their discretionary powers, of which the review jurisdiction is one. Certainty of law is undermined, when under the guise of review, parties are allowed to re-open for hearing *de novo*, effectively concluded matters on the compulsion or inspiration of second thoughts or the belated discovery of errors. It is certainly not in the public interest that a case be heard *ad infinitum* or without litigation ceasing. As was cautioned by the Earl of Selborne in *Bowell v Cooks*,⁵⁴ courts should not be ready to permit unsuccessful parties to attempt to overturn judgment by raising new considerations. But we are persuaded by the philosophy that allows an aggrieved party who is dissatisfied with a judgment of the apex court, the constitutional right of review to a court with enhanced review jurisdiction and enhanced number of justices. In exceptional circumstances and to avoid irreparable damage to an applicant, the *interest reipublicae ut sit finis litium* principle, would yield to the greater interest of justice. We are not by this submission, advocating the granting of review application as a matter of course, because the maxim, *interest reipublicae ut sit finis litium* is so important in the administration of justice that, it can only give way, if a strong case of exceptional circumstance which results in a gross miscarriage of justice has been made by the applicant in the review application and such a proceeding is neither intended to be an occasion for a marshalling of fresh arguments often couched in flowery language; nor is it intended as an opportunity for merely attracting the reasoning of the judges of the court in the hope of securing a review of the decision. In this respect we wish to recall the *dictum* of Taylor JSC as a guide:

“The jurisdiction is exercisable in exceptional circumstances where the demands of justice make the exercise extremely necessary to avoid irremediable harm to an applicant. In this connection all persons who have lost a case are likely to complain of miscarriage of justice, but in my view in the absence of the exceptional circumstances such complaints are a poor foundation for the exercise of the review power, for it is only in exceptional circumstances that the *interest reipublicae ut sit finis litium* principle yields to the greater interest of justice.”⁵⁵

Thus, the review jurisdiction is to be called in aid in exceptional circumstances where justice for which, the court exists will be sacrificed if the decision is not reviewed. Through the review jurisdiction, the question of the constitutionality of the Fast Track High Court was laid to rest.⁵⁶ A dismissal of the application for review would have thwarted if not delayed efforts at technological modernization of the old inefficient court processes in Ghana

⁵⁴ (1894) 86 LT 365

⁵⁵ *Nasali v Addy, supra*

⁵⁶ In *Tsatsu Tsikaka v Attorney General* (No. 1) Writ No. 2/2002 of March 20, 2002, the Supreme Court had declared by a majority of five to four that, the Fast Track High Court was unconstitutional.

Imperative of the Review Jurisdiction for the Supreme Court of Nigeria

Although judges are expected to exhibit certain universal qualities as faithfulness to the law, impartiality, objectivity and professionalism,⁵⁷ the judicial process has been found to be a product of socio-economic, demographic and psychological disposition of the judges, operating within a sociological context rather than a mechanistic application of legal rules. A model of judicial behavior is thus conceived as a function of variables internal and external to the judicial system which consists of local political culture, local elite environment, national political environment and socialization experiences, all of which produce judicial attitudes, which mix with legal factors and case-specific factors to produce judicial action.⁵⁸ This view is unequivocally supported by Kalven and Ziesel who posited that, the final output of the judicial conversion process is a product of rational persuasion, sheer social pressure and the psychological mechanism.⁵⁹

In an attempt to understand why judges decide cases the way they do, scholars have paid attention to the attitudes, prejudices and values of judicial officers on the theory that, there is a positive correlation between such factors and judicial behavior.⁶⁰ William A. Welsh identified three main types of background characteristics, viz: (a) attributes acquired at birth, for example sex, ancestry, nationality, age; (b) conditions of early childhood involvement of the family, religious practice of the family and membership held in youth organization; and (c) adult career experiences.⁶¹ These characteristics are important for understanding the decisional behavior of judges because a judge is a product of his experience. Judicial attitudes and roles perceptions, thus, are reflections of the social background and life experiences of the judges and both cannot be wholly shut out of the judicial process.⁶²

We are not by foregoing positing that attitudinal model renders unimportant legal rules and principles in judicial decision making, but rather we hold that, judges decide disputes in the light of the fact of the case *vis-à-vis* the ideological attitudes and values of the justices.⁶³ What ultimately emerge as judicial decisions are thus, complex interactions including but by no means limited to the attitudinal dispositions and values of the judicial decision makers as well as various environmental influences on the judiciary.

Socio-environmental influence on the Supreme Court

The Supreme Court does not exist *in vacuo*. It is subject to influence which though external to it are of considerable importance in any attempt to understand the factors that condition the working of the court. Notable among the various environmental influences on the judiciary is the recruitment of judges. Although some judicial officers tend to deny this,⁶⁴ political affiliation, seniority at the bar, experience, social/family ties, geographical/ethnic origins are some of the factors that are often brought into the selection process.⁶⁵ Depending on traditions and needs, considerations such as legal ability, probable behavior in office and relationship to the government in power, are among the major criteria for securing appointment into the higher bench. Of all these, the influence of the government in power is the most decisive and selection process itself does not provide opportunities for representation of popular attitudes.⁶⁶ In the words of Adenekan Ademola JCA, “it will be unrealistic to expect that political considerations would not weigh in the minds of an appointing body”.⁶⁷ Nigeria is a stratified society composed of persons of diverse socio-economic backgrounds and interests and hence characterized by inequality of access to power and economic resources. All the different interest groups attempt to translate regional power into federal power in order to meet the revenue and resource needs of their

⁵⁷ Goldman, S. and J. Jahnige(1976) *The Federal Courts as a Political System*, 2nd ed. New York: Harper and Row, p.34.

⁵⁸ Kritzer, H. M.(1978) “Political Correlates of the Behavior of Federal District Judges: A Best case Analysis”, *Journal of Politics*, Vol. 40 No. 1 . Pp.27-28.

⁵⁹ Quoted in Goldman and Jahnige *op. cit.*, p. 76

⁶⁰ Pritchett C. H., *The Roosevelt Court: A Study of Judicial Values and Votes, 1937-48*, New York: Macmillan, 1948.

⁶¹ *Leaders and Elites*(1979) New York: Rinehart and Winston, p.66.

⁶² Frankfurter, “John Marshall and the Judicial Function”, *Havard law Review*, Vol. 69 p.217, 229.

⁶³ Segal, J. A. and Spaeth H. J.(1993) *The Supreme Court and Attitudinal Model*, New York: Cambridge University Press, p. 65.

⁶⁴ Franker Further, (1957). “The Supreme Court in the Mirror of Justices”, 105 *Pennsylvania Law Review*, p.55.

⁶⁵ Alabi, MOA(2002) *The Supreme Court in the Nigeria Political System 1963-1997*, Ibadan: Demyaxs Press Ltd. p.33

⁶⁶ Eisenstein, J. *Politics and the Legal Process*, New York: Harper and Row p.32.

⁶⁷ Independence of the Judiciary: Problems and Prospects in Nigeria” *Sir Louis Mbanefo Memorial Lectures No.4*, Enugu Faculty of Law, University of Nigeria, 1987.

particular states and constituents and each federal government tends to plan its economic strategies and policies around ethnic and regional concerns in order to retain its own constituency.⁶⁸ Thus, the geo-political character of the Nigeria society cannot but, be a very relevant factor to be considered in any attempt to understand the nature and working of its judicial institution, structure and process.⁶⁹

In an attempt to tackle the problem of profound distrust and jealousy among the various geopolitical zones in the Nigeria, the federal character and quota system as a mechanism for ensuring “balanced development of all units” is formally entrenched in the constitution. Section 14(3) of the Constitution of the Federal Republic, 1999 provides that, the composition of the government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that government or in any of its agencies.

The implication of this federal character policy is to ensure that every major group in the federation is represented in all national institutions, including the Supreme Court of Nigeria, and thereby preventing “monopolistic exercise of power by any single element or group”, in the pluralistic, highly segmented and heterogeneous society.⁷⁰ The quota system is therefore reflected in appointments of high judicial offices at the federal level such as those of the Chief Judges of the Federal High Court, the President and Justices of the Court of Appeal and the Chief Justice of Nigeria and Justices of Supreme Court.⁷¹

Against this background, it highly impossible to completely insulate a Justice of the Supreme Court from having passive interest in matters that concern his geo-political base. The majority decisions in cases like *A.G Federation v A.G. Abia State & Ors*⁷² and *Abacha v The State*,⁷³ amongst many others may well support this assertion. In the former, the prayer was for determination by the Supreme Court of the seaward boundary of a littoral State within the Federal Republic of Nigeria for the purpose of calculating the amount of revenue accruing to the federation account directly from any natural resources derived from the State pursuant to the proviso to section 162(2) of the Constitution of the Republic of Nigeria, 1999. Eleven out of the thirty-six defendants who were many oil producing states raised preliminary objections in their Statement of Defense challenging the jurisdiction of the Supreme Court to hear the case. But the objection was overruled by a 6 to 1 majority of the court, with Justice Karibi-Whyte who incidentally is from an oil producing state being only old man out. Similarly, in *Abacha v The State*, the appellant the son of a former Head of State was the third accused on a four count indictment, which included conspiracy to commit murder ,that is, facilitating escape from arrest after murder. He was charged jointly with others for conspiracy to commit murder and alone for being accessory after the fact of murder. The learned trial judge in a considered ruling refused the application to quash the indictment. Dissatisfied, the appellant appealed to the Court of Appeal, which upheld the decision of the trial court and thus, this further appeal. In spite of proofs of evidence, disclosing a prima facie evidence calling for explanation at the trial, for example, statements of two other accused persons and admissions made by the appellant himself in his statements to the police, where he readily admitted that, he gave ten thousand dollars to each of them to flee the country and escape justice, the Supreme Court by a majority of 4 to 1 allowed the appeal and ruled that the appellant must not face trial. The majority decision had the effect of giving capricious interpretation to settled principles laid down by the Supreme Court in *Ikomi v State*.⁷⁴ The four Justices who ruled in favour of the appellant were all from the northern part of the country, from where the appellant hailed, while the dissenting voice was that of a Justice from Southwest of Nigeria, the same geographical area as the victim.

Incidences like illustrated cannot be attributed to mere happenstance and has a lot to do with how cases are assigned and how Justices are empanelled and who assign cases and empanel justices.

⁶⁸ Khan, S. (1994) *Nigeria: the Political Economy of Oil, Economy of Oil*, New York: Oxford University Press, pp.5-6

⁶⁹ Alabi, MOA *op. cit.*, p. 85

⁷⁰ Akande, J.(1992) “Constitutionalism and Pluralism” in Bello and Ajibola (eds) *Essays in Honour of Judge Taslim Olawale Elias*, Netherlands: Martinus Nijhoff Publishers, p.671

⁷¹ Alabi, MOA *op. cit.*, p.89

⁷² (2001) 89 LRCN 2413

⁷³ (2002) 100 LRCN 1588

⁷⁴ [1986] 3 NWLR (pt.28) p.314

Politics of assignment of case and empanelling of justices

Although the Supreme Court when fully constituted shall consist of the Chief Justice of Nigeria and Justices not exceeding twenty-one,⁷⁵ it sits in panels to hear and determined appeals before it. A panel comprises five justices of the court, but sits as a full court of seven justices: when it is exercising its original jurisdiction; when the appeal involves questions as to the interpretation or application of the constitution; when construing provisions of fundamental rights; and when it is considering overruling its previous decision.⁷⁶ The power to constitute the various panels resides in the Chief Justice of Nigeria. It is a potent weapon which can be deployed to suit the leadership style and orientation of the particular Chief Justice. It is in matters of Sharia/Customary laws in respect of which special attention is paid to areas of specialization at the Court of Appeal but the Supreme Court is largely a court of general as opposed to specialized jurisdiction. Accordingly, there is nothing to suggest that the Chief Justice does pay special attention to the specialization of the justices. However, since the Chief Justice knows or is expected to know the value preferences and ideological orientations of his fellow justices, he can as well use power to assuage or dissuade a particular policy preference of his choice and this can be good or bad. Thus the Chief Justice can use his power of assigning cases or empanelling the court to shape the decisions of the court along preferred goals. In the words of Oputa, JSC (Retired), “the legal social philosophies of the Chief Justice might influence his decision in picking members of a particular panel and this power can be wisely used or else abused, that it may be used to pack the court”.⁷⁷

Determinations of the Supreme Court

The Supreme Court is duly constituted if it consists of not less than five justices of the court in non-constitutional matters and seven justices as a full court in constitutional matters. In the determination of cases, a single majority vote suffices. These constitutional requisites for the constitution of the court has been panned unrelentingly by many jurists of note. Kayode Eso, JSC was particularly irked by the mandatory provision in respect of the full court in constitutional matters when he argued as follows:

My own objection, however, even goes deeper than that, while in very important constitutional matters only seven members of the present thirteen are obliged to sit, the decision of the court only requires a majority of the seven which mathematically gives four. Viewed from another stance, while four give the judgment of the court and the three sitting with that majority and the six who are not sitting, might not agree with the constitutional interpretation given by the majority, the day is carried by those four against the remaining nine. But assume the entire thirteen must sit and I have not been persuaded why not, then the majority of the thirteen is mathematically seven, a more satisfying situation for the law. I submit that if we are going to have tyranny of number, then let it be a mathematical tyranny.⁷⁸

The situation seems even more incongruous, when it is realized that a majority decision of four justices in a non-constitutional matter cannot be overruled by the Supreme Court itself even when it sits, as is the usual practice as a full court of seven justices. A decision given by such a panel could not truly be said to be the decision of the Supreme Court.⁷⁹ The practice of empanelling the court may seem justified when one considers that, sitting in panels allow for division of labour among the justices and enables the court to dispose of greater number of cases than would have been the situation, if all the justices were to partake in the hearing and determination of all the appeals within the constraints of time and other resources. However, the mandatory provision on the sitting of the full court still leaves much to be desired. Oputa, opines that in vital and controversial constitutional appeals, all Supreme Court Justice should sit as the full court.⁸⁰

Conclusion

The idea of a society without *res judicata* or finality in litigation is unthinkable. Under our dispensation, once the Supreme Court has reached a determination in or of an appeal, that determination becomes final and by the doctrine of precedent and the principle of *stare decisis*, the decision may in some future date be reviewed, if it is then sought to apply the principles of the decision to a subsequent case. But the court cannot either under section 6(6)(a) of the 1999 Constitution or under the nebulous umbrage of inherent jurisdiction do so. The interest *rei publicae ut sit finis litium* is the rationale behind this rule which has survived

⁷⁵ Section 230(2), Constitution of the Federal Republic, 1999

⁷⁶ *Odi Ors v Gbaniyi Osafire and Ors Supra*

⁷⁷ Oputa, C(1993) *Our Temple off Justice*, Orlu Friends’ Law Publishers Ltd. pp.42-43

⁷⁸ Eso, K *Thoughts on Law and Jurisprudence*, Lagos: MIJ Professional Publishers Ltd. p.111

⁷⁹ Oputa *op. cit.*, p.43

⁸⁰ Oputa, *Ibid*

sustained assaults as epitomized by cases like *Asiyanbi v Adeniyi*; *Igwe v Kalu* ; *Ibero v Obioha* ; *Chukwuka v Ezulike*; *Oyeyipo v Oyinloye*; *FCSC v Laoye*; *Adigun v AG (Oyo State)* and lately *Andy Uba v INEC*.⁸¹

Burrowing the Ghanaian Supreme Court cases and taking hints from jurists like Oputa and Eso, we are left with no doubt that the course of justice will be better served if tyranny of number is to be avoided. Oputa suggests that, in vital and controversial constitutional appeals, all Supreme Court Justices should sit as the full court and not seven justices as constitutionally provided and thus solving the problem of what Eso termed tyranny of number in controversial constitutional cases. But the suggestion does not take care or find elixir for exceptional circumstances where the demands of justice make a review exercise extremely necessary to avoid irremediable harm to the aggrieved. We have argued that, although judges are expected to exhibit certain universal qualities as faithfulness to the law, impartiality, objectivity and professionalism, the judicial process has been found to be a product of socio-economic, demographic and psychological disposition of the judges, operating within a sociological context, rather than a mechanical application of legal rules. In a stratified society like Nigeria, composed of persons of diverse ethno/sociological backgrounds and interests, tackling the problem of profound distrust and jealousy is not solved by a total adherence to final decisions of five or seven judges sitting as a final appellate panel. The course of justice is better served, we submit, if in exceptional cases, decisions are subjected to review within a reasonable period by an enhanced panel of at least fifteen but not less than eleven justices of the apex court. Such a large number of panelists may serve as a bulwark against manipulation by the empanelling authority.

The Ghanaian example as contained in Article 133(1) of the Constitution of the Republic of Ghana, read alongside Rule 54 of the Supreme Court Rules 1996 (C1 16), commends itself to Nigeria, based on our argument that, the principle of *res judicata*, although an apron string of justice may in exceptional cases yield to the greater interest of justice, if the review jurisdiction is not exercised capriciously but in accordance with settled rules and principles of law. A similar enactment must be made in the Nigeria constitution allowing an enlarged panel of the Supreme Court, where a fundamental and basic error may have inadvertently been committed by the court and such error had occasioned a gross miscarriage of justice, to review the case *suo motu* or on the application of an aggrieved party. The prospects of review may also act as check on the justices. Delivery of substantial justice may remain forlorn in some cases, so long as they are delivered by a panel of five or a full court of seven as provided for under the extant constitution. More so, when the justices have admitted themselves that, they are not final because they are infallible.

⁸¹ Some of these cases have been discussed in this work.