

## X-RAYING THE (UN)CONSTITUTIONALITY OF VIRTUAL LEGAL TRIALS IN NIGERIA: LESSONS FROM INTERNATIONAL HUMAN RIGHTS STANDARDS\*

### Abstract

*Virtual legal practice is gaining significant attention amongst legal practitioners and judicial officers in Nigeria. While there are expectations that this practice may enhance speedy dispensation of justice, its constitutionality has become an issue of concern amongst legal scholars. Specifically, the general perception is that virtual legal practices violate the constitutional requirement for trials to be held in public which then suggest that the likelihood of fair hearing may be compromised. However, this article argues that given the need to keep up the Covid-19 social distancing protocol and any other state of emergency, virtual trials have become a necessity and inevitable alternative to public trials. Thus, the article concludes that even though the Constitution of the Federal Republic of Nigeria 1999 (as amended) requires legal trials to be held in public, resort to virtual trials especially during state of emergency does not fall short of international human rights standards as long as the requirements for fair hearing are not compromised.*

**Keywords:** Constitution of the Federal Republic of Nigeria 1999 (as amended), Virtual Legal Practice, Covid-19 Pandemic, State of Emergency, Fair Trial, Human Rights Protection, International Human Rights Standards.

### 1. Introduction

The outbreak of Covid-19 pandemic has changed old established traditional order in global market places.<sup>1</sup> Concerning the legal profession, the Nigerian legal system faces the reality on the need to change its traditional legal order by adopting among others, virtual trials in response to the Covid-19 safety measures – particularly, the requirement for social and physical distances.<sup>2</sup> As a result, rules of legal procedures, traditional working order of the Courts, the rule of law and attitude of judicial officers, legal practitioners and litigants have been reordered.<sup>3</sup> In giving effect to the report of the Committee set up by National Judicial Council (NJC),<sup>4</sup> the Chief Justice of Nigeria (CJN), Hon. Justice I.T Muhammad issued a circular releasing the guidelines<sup>5</sup> that would guide courts proceedings and other related matters during the pandemic.<sup>6</sup> As expected, heads of Courts (Federal and States) were accordingly urged to follow suit in ‘adopting or formulating, Rules, Directives and Guidelines as appropriate to the legal and material circumstances in their courts’.<sup>7</sup> As contained in the guideline, the Nigerian Courts are directed to engage in remote or virtual court sittings in determining cases and delivery of judgments and rulings. Specifically, item 3 advised that contentious matters requiring calling of evidence in a physical court room should not be entertained during the pandemic. However, physical sittings and human physical presence could still be accommodated only in time-bound, extremely urgent and essential cases. Essentially, the health necessity caused by the occurrence of Covid-19 pandemic has demanded a range of intervention in managing courts activities - part of which is the recommendation for virtual court sessions. However, given the constitutional provisions in s. 36(3) (4) of the Constitution of the Federal Republic of Nigeria, 1999 (the constitution) requiring courts sessions to be held in public, the question whether virtual courts’ sitting is constitutional or not has become a major concern amongst scholars.<sup>8</sup> To be candid, this

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<sup>1</sup> In the context of this article, the term ‘global marketplace’ is not limited to a specific geographical location rather it involves all persons or institutions in the world who are involved in the exchange of goods, all kinds of services and labor drawing from different types of business or professional engagements which includes the legal profession.

<sup>2</sup> Social and Physical distancing form part of the Covid-19 measures aimed to reduce chances of transmission and exposure to Covid-19.

<sup>3</sup> See guidelines for court sittings and related matters in the Covid-19 period available at <http://edojudiciary.gov.ng/wp-content/uploads/2020/05/RENATIONAL-JUDICIAL-COUNCIL-POLICY-REPORTGUIDELINES-FOR-COURT-SITTING-AND-RELATED-MATTERS-IN-THE-COVID19-PERIOD.pdf> (accessed on 12 July 2023).

<sup>4</sup> As above

<sup>5</sup> The guidelines were formulated by the Committee constituted by the National Judicial Council and headed by Hon. Justice Olabode Rhodes-Vivour, JSC, CFR.

<sup>6</sup> See para. 2-8 of the guidelines signed by the Hon. Justice I.T Muhammad, CFR - Chief Justice of Nigeria and then Chairman of the National Judicial Council.

<sup>7</sup> See item 3 on the guideline available at <http://edojudiciary.gov.ng/wp-content/uploads/2020/05/RENATIONAL-JUDICIAL-COUNCIL-POLICY-REPORTGUIDELINES-FOR-COURT-SITTING-AND-RELATED-MATTERS-IN-THE-COVID19-PERIOD.pdf>

<sup>8</sup> For details, see contributions from stakeholders at the workshop organized by CRID-LawNet in collaboration with Justice Reform Project titled: ‘Ogun State Civil Justice Reform Virtual Workshop: Imperatives During and After COVID-19’ dated

concern is not out of place. As discussed in the section below, public trials in physical courts have been a permanent feature in the Constitution. This suggests that except the latter is amended, proceedings and judgments delivered virtually may be appealed on constitutional grounds.<sup>9</sup> However, at the heart of this lie the following questions: given the lockdown measures by the Nigerian Government which has made physical court sitting and attendance of parties impracticable, should administration of justice be brought to a halt while the pandemic exist? Or alternatively, should not the demand of justice be met through virtual mediums given the health danger that may stem from physical appearance in court proceedings?

This article argues that given the need to keep up with the Covid-19 social distancing protocol and any other state of emergency, virtual legal trial has become a necessity and an inevitable alternative to a physical court sitting.

## 2. Virtual Legal Trial *vis-à-vis* Lingering Constitutional Concerns

It is trite principle of law that when a law provides a particular method of doing a thing, except such law is altered or amended by a legitimate authority, only the manner specified by that law in doing that thing will suffice, otherwise, it amounts to a nullity.<sup>10</sup> In the context of this discussion, this principle leaves open the question whether virtual trials violate the constitutional provisions which require all trials to be held in public. For this, s. 36 (3)(4) of the Constitution would be most relevant. S. 36 provides thus:

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

In plain terms, the word 'shall' denotes that s. 36(3) (4) of the constitution makes it mandatory for all trials (civil or criminal) to be held in public. As neither the parties or the court can decide otherwise.<sup>11</sup> From the International human rights perspective, the requirement for public hearing is considered an essential condition for fair trial. For instance, article 5(3) of the European Convention provides that arrested persons are expected to be physically brought before a judicial officer promptly; this is similar to the provision of Art 9(3) of the International Covenant on Civil and Political Rights (ICCPR). It is reported from the 12<sup>th</sup> general report of the European Committee for the prevention of Torture and Inhuman treatment and punishment (CPT) that 'all persons detained by the police whom it is proposed to remand to prison should be physically brought before the judge who must decide that issue'.<sup>12</sup> The European Court on Human Rights has emphasized that even in the categories of cases not requiring physical present of parties (hearing of appeals or *ex parte* applications), the character of a particular hearing (where testimony and assessment of credibility is crucial) may necessitate the physical presence of the parties.<sup>13</sup> Various reasons have been offered to support physical appearance of parties, for instance, in criminal matters, it is less likely that a judge would accurately assess if there is any indicia of abuse or violation on the accused if the hearing is solely virtually based. The knowledge that an accused would always appear physically before an independent judge may provide some level of caution that could limit further abuse from detaining authorities. Essentially, physical appearance may also give leverage to accused persons to speak about any abuse and violation than exclusive exposure to the trial judge via video links.<sup>14</sup> However,

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22<sup>nd</sup> April 2020 available at <https://www.stewartslaw.com/wp-content/uploads/2020/05/CRID-LawNet-Ogun-State-Civil-Justice-Virtual-Workshop-Full-transcript.pdf> (accessed 28 March 2022).

<sup>9</sup> As predicted, Olumide Sofowora, SAN stated that: 'one can confidently predict that if section 36(3) and (4) of the Constitution are left as they are without more, there will be a deluge of appeals arising out of the decisions of courts from proceedings conducted remotely/virtually just to test the waters. For this, see his contribution titled: 'The Covid-19 Pandemic & the Future of Litigation in Nigeria' available at <https://www.irglobal.com/article/the-covid-19-pandemic-and-the-future-of-litigation-in-nigeria-2/> (accessed 28 March 2022).

<sup>10</sup> *Mega Progressive Peoples' Party (MPPP) v INEC & ORS* LER [2015] SC 665/2015; *Nnonye v. Anyichie* (2005) 2 FWLR (part 268) 1213 and *Ntiero V. NPA* (2008) 10 NWLR (part 1094) 129; *FRN v Wabara & Ors* (2013) LCN/4152(SC).

<sup>11</sup> *Menakaya v Menakaya* (2001) 16 NWLR (Part 738) page 203 at 249 paragraphs A-C

<sup>12</sup> European Committee for the Prevention of Torture, 12th General Report, CPT/Inf (2002)15-part, <http://hudoc.cpt.coe.int/eng?i=p-standards-inf-2002-15-part-en-1>

<sup>13</sup> *Yevdokimov v Russia* (2016), <http://hudoc.echr.coe.int/eng?i=001-160620> paras 22-26, 33-53; *Vladimir Vasilyev v Russia* (2012), <http://hudoc.echr.coe.int/eng?i=001-108478>, paras 75-90.

<sup>14</sup> See ICJ recommendation on Videoconferencing, Courts and Covid-19 based on international standard at pg. 11 available at [https://www.unodc.org/res/ji/import/guide/icj\\_videoconferencing/icj\\_videoconferencing.pdf](https://www.unodc.org/res/ji/import/guide/icj_videoconferencing/icj_videoconferencing.pdf) (accessed on 12 July, 2023); *Medvedyev and others v France* [GC] (2010), <http://hudoc.echr.coe.int/eng?i=001-97979>, para 118.

neither the Nigerian Constitution nor any international human rights instruments provide that the right to public trial is unconditional. This then implies that state and judicial institutions may adopt measures (under certain circumstances) that could limit or derogate the enforceability of human rights (including rights to public trial) provided the criteria for limitation or derogation of human rights, which may include *inter alia* national security, public order, requirements of legality, non-discrimination, necessity, and proportionality is properly given and constitutionally compatible.<sup>15</sup>

In another perspective, it may be necessary to understand the context in which the word ‘public’ is used in the constitution. Mpamay<sup>16</sup> argued that the word ‘public’ implies the physical presence of all parties and their representatives in a public place during trials. Writing on the constitutionality of virtual trials at the National Industrial Court of Nigeria, Emudainohwo asserts that proceedings held in public implies that members of the public are granted physical access to the proceedings of the Court or ‘put in another way the court proceedings are not held in private’.<sup>17</sup> Therefore, as public access in virtual hearing is granted through electronic means (Zoom or video conferencing), the constitutional requirements for public access to court proceedings would have been met.<sup>18</sup> On his part, Sofowora, SAN argued that the requirement for public trials would have been met when a judge gives unrestricted access to all parties, judicial officers and members of the public to a trial whether in chambers or the physical court room. He further stated that ‘Same conditions when available in a remote hearing i.e. access being granted to and available to Judicial Officers, the parties and their counsel and any interested member of the public will make the venue of such remote/virtual hearing be it zoom, skype, whatsapp etc a public place in line with the provisions of S. 36(3) and (4) of the Constitution’.<sup>19</sup>

The general perception as may be drawn from the views of Sofowora, SAN and other commentators<sup>20</sup> is that the requirement for public trial would have been satisfied once unhindered access is granted to all parties, judicial officers and interested members of the public to view the entire proceedings in its entirety. This then implies that the constitutionality of virtual trials is not depended on whether the proceedings are held in the physical court rooms or through virtual mediums. Rather, it is a question whether all relevant stakeholders are given unrestricted access to the proceedings therein. This is discussed extensively elsewhere in this article. However, in the meantime, judicial decisions on this issue are discussed below. Haven’t the Courts ruled on this issue?

While the above position may appear logical, there have been conflicting judgments from the courts particularly as it concerns the above constitutional provisions *vis-à-vis* section 103(1) and (2) of the Matrimonial Causes Act, 1970. Section 103 provides thus:

- (1) Except to the extent to which rules of court make provision for proceedings or part of proceedings to be heard in chambers, the jurisdiction of a court under this Act shall, subject to the next succeeding subsection, be exercised in open court.
- (2) Where in proceedings under this Act the court is satisfied that there are special circumstances that make it desirable in the interests of the proper administration of justice that the proceedings or any part of the proceedings should not be heard in open court, the court may order that any persons not being parties to the proceedings or their legal advisers shall be excluded during the hearing of the proceedings or the part of the proceedings, as the case may be.

The provision of the statute is therefore very clear. The law makes it mandatory for proceedings in respect of petition for dissolution of marriage to be held in public.<sup>21</sup> Thus, given the essentiality of these provisions, the Nigerian Courts have frowned at trials conducted in judges’ chambers as not being in conformity with the provisions of the Constitution and the Matrimonial Causes Act. In *Oviasu v Oviasu*<sup>22</sup> the court held:

.... we regard the irregularity as being fundamental which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the judge’s chambers did not constitute a regular hearing of an action in a court.... We regard the irregularity as being fundamental, which touches the legality of the whole

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<sup>15</sup> See sect. 45 of the 1999 Constitution (as amended); see also, ICJ recommendation (n 14 above) 2.

<sup>16</sup> MA Chinasa ‘Legal implications of virtual technology court proceedings amidst the Covid-19 pandemic’ in TF Yerima *et al* (eds) *Emerging issues and thoughts in contemporary public law* (2020)151-162.

<sup>17</sup> E Emudainohwo ‘Appraising the constitutionality of virtual court hearings in the national industrial court of Nigeria’ (2021) 12 *Nnamdi Azikiwe University Journal of International Law & Jurisprudence* 20.

<sup>18</sup> As above

<sup>19</sup> Sofowora (n 9 above).

<sup>20</sup> See contribution from lawyers at the CRID-LawNet/Justice Reform Project at Ogun State (n 8 above).

<sup>21</sup> See also, order 1 rule 9(4) (a) of Matrimonial Causes Rules 1983.

<sup>22</sup> (1973)11 SC 187; See also, *Chime v Ude* (1996)7NWLR (Pt. 461)379; *Oyeyipo v Oyinloye* (1987) 1 NWLR (Pt 50)356.

proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the Judge's chambers did not constitute a regular hearing

In *Edibo v The State*,<sup>23</sup> the Supreme Court ruled that the taking of the appellant's plea in the trial judge's chamber was irregular, fundamentally defective and in violation of s. 36(1) (3) of the constitution. In similar vein, the Supreme Court in *Nuhu v Alh. Ogele*<sup>24</sup> set aside the decision of an Upper Area Court which was delivered in Chamber. In *Menakaya v Menakaya*, the court held that:

.... As the learned trial Judge sat in a place other than as authorised by the Constitution, the Act and the rules made thereunder, the proceedings leading to his judgment suffered from such a fundamental vice that vitiated the entire proceedings and rendered the judgment delivered null and void ....“We regard the irregularity as being fundamental, which touches the legality of the whole proceedings including the judgment and the incidental orders made thereafter. We therefore hold that all that happened in the Judge's Chambers did not constitute a regular hearing of an action in Court.<sup>25</sup>

The court stated further that: ‘indeed, for a trial Judge to accede to a request to try a divorce case in chambers except where the circumstances so warrant, is to allow a flagrant violation of the provisions of s. 103(1) and (2) of the Matrimonial Causes Act, 1970.

On the contrary, in the case of *Oyeyipo v Ogundare*<sup>26</sup> the Supreme Court took a different position where Obaseki J.S.C. (as he then was) pointed out that:

When the Court sits in Chambers, all that it means is that the judges of the court are transacting the business of the court in Chambers instead of open court.... It does not mean that the court is not sitting in public. A court can sit in open court and yet decide to exclude members of the public other than the parties or their legal representatives from the hearing in exercise of its statutory powers...A judge may sit in Chambers without excluding members of the public. It is therefore not unconstitutional to sit in Chambers.

Similarly, in *Godwin Chime & Ors v Nelson Ude & Ors*<sup>27</sup> the Supreme Court held:

As a matter of fact, the provisions of the rules enabling the Supreme Court to sit in chambers and hear matters without argument were challenged in *Oyeyipo & Anor. v. Oyinloye*, and this Court, sitting as a full Court, held that it is not unconstitutional for the Supreme Court to sit in chambers and deal with applications without orally hearing the parties thereto. Furthermore, since it is constitutional for the court to sit in chambers under the specific provisions of section 213 subsection 2(4) of the 1979 Constitution and deal with an application without oral hearing, then, I do not see the reason or the logic why similar procedure under the Supreme Court Rules, 1985, and in particular under Order 6 Rule 3(2), can be said to be unconstitutional for being inconsistent with the provisions of section 33 subsection (13) of the Constitution.<sup>28</sup>

Recently, the original jurisdiction of the Supreme Court was invoked with respect to the constitutionality or otherwise of virtual trials. In *Attorney General of Lagos State v Attorney General of the Federation & the National Assembly*<sup>29</sup> and *Attorney General of Ekiti State v Attorney General of the Federation & 2 others*,<sup>30</sup> the primary issue for determination was whether virtual trial is constitutional given the purport of s. 36 (1) (3) & (4) and other related provisions of the Constitution. In striking out these suits as being premature and speculative since no right has been violated by virtual hearings, Justice Rhodes-Vivour however in his ruling held that ‘As of today virtual sitting is not unconstitutional’<sup>31</sup>. While the question concerning the constitutionality of virtual

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<sup>23</sup> (2007) 13 NWLR (Pt.1051) 306.

<sup>24</sup> (2003) 18 NWLR (Pt. 852)251; see also the case of *Nigerian-Arab Bank Limited v Barri Engineering Nig. Ltd* (1995) 8 NWLR (Pt. 413) 257 where the Supreme Court held that judgment delivered in chamber raises questions of illegality of the entire proceedings.

<sup>25</sup> (n 11 above).

<sup>26</sup> (1987) 1 NWLR (Part 50) page 356

<sup>27</sup> (1996) 7 NWLR (Part 461) page 379 at 417 paragraphs B-C.

<sup>28</sup> *Chima's case* (n 18 above).

<sup>29</sup> SC/CV/260/2020 (Unreported), ruling was delivered by Hon. Justice Rhodes-Vivour JSC on the 14th of July 2020.

<sup>30</sup> SC/CV/261/2020 (Unreported), ruling was delivered by Hon. Justice Rhodes-Vivour JSC on the 14th of July 2020.

<sup>31</sup> See Prime Times Report on: ‘Supreme Court dismisses suits challenging Courts’ Virtual Sitting’ dated July 14<sup>th</sup> 2020 available at <https://www.premiumtimesng.com/news/headlines/402813-supreme-court-dismisses-suits-challenging-courts-virtual-sitting.html> (accessed 28 March 2022).

hearings is yet to be determined on the merit, the submission of Justice Rhodes-Vivour can be cautiously taken as a positive signal to lower courts to avoid the path of technicality and validate the constitutionality of virtual proceedings.

Looking deeply, it seems much attention has been on the constitutionality or otherwise of virtual trials with little or no focus on the potential human rights implication that may arise on account of improper application of virtual devices especially during criminal trials. This article presents a different approach in arguing that the constitutionality of virtual trial should not only be measured on the basis of the constitutional requirement for public accessibility. Rather the concern should be whether constitutional protection of human rights - particularly fair trial - would not be jeopardized by the adoption of virtual hearings.

### **3. The Dawn of Virtual Hearing in Nigerian Courts: The Hopes and Fears Concerning Constitutional Rights to Fair Trial**

Admittedly, the Covid-19 pandemic resulted to an inevitable preference for virtual proceeding to complement the conventional practice of court-room sittings. The fact that the new order departed from the 'traditional order' does not generally 'upset the balance and dynamics of a trial'.<sup>32</sup> However, this new approach raises a number of questions concerning its compatibility with key principles of fair trial – in relation to: respect for privacy especially for cases of women in *pudah*<sup>33</sup>, and more particularly with respect to right to fair hearing,<sup>34</sup> right to defence,<sup>35</sup> right to an interpreter,<sup>36</sup> right to silence<sup>37</sup> and other components of fair trial - namely arraignment, oath and plea taken, assessing the demeanor of witnesses and so forth.<sup>38</sup> To be honest, the choice of virtual trial could be beneficial in many ways: improve speedy dispensation of justice, save cost of appearance in court, grant more access to parties and members of the public to view proceedings, reduce hazards associated with traveling and logistics, reduce likely court-room phobia, complying with modern trend and so forth.

Despite its positive side, there are downsides that may be associated with the use of virtual trial. These include: (a) there are no designated and tested virtual tool approved by legislature that is compatible with court trials. This increases the risk of resorting to multiple devices that may produce poor output (b) possible lack of knowledge on the use of videoconferencing devices (c) poor network especially in rural jurisdictions (d) lack of confidentiality between lawyers and parties as the entire proceedings is being recorded and publicly viewed. Taking all these into consideration, is there no possibility that improper use of videoconferencing devices during court trials might violate the above constitutional principles of fair trial and thus, raises questions of its constitutionality? This aligns with the claim (in this article) that the constitutionality of virtual trial should be gauged more broadly to include question of its compatibility with key fundamental principle of fair trial as enshrined in s. 36 (1)-(12) of the 1999 constitution. Doing otherwise (as seen in literature and judicial decisions) by limiting it only to the requirement for public access as provided by s. 36 (3) (4) of the Constitution would undermine the saliency of fair trial as an indispensable pre-condition for effective human rights adjudication.

### **4. Constitutionality of Virtual Trial in Nigeria: Extracting the Essentials**

As observed from a number of cases,<sup>39</sup> the constitutionality of fair trial entails a fair account of the totality of the procedure followed in the process of adjudication of cases leading to attainment of justice to all parties in any civilized society.<sup>40</sup> In determining what amounts to fair trial, the SC *Okoro v State*<sup>41</sup> stated *inter-alia* that the accused must be placed before the court unfettered, he must be given adequate opportunity, time and facility that would aid his defence, he must be given an interpreter when needed and above all, parties must be given equal opportunity to be heard in line with the twin pillars of natural justice and rule of law – *audi alteram partem* (hear the other side) and *nemo iudex in causa sua* (no one may be a judge in his own case).<sup>42</sup> Continuing, the SC in *Orugbo v Onu*<sup>43</sup> stated that if in the view of a reasonable man (who keeps his mind and reasoning within the

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<sup>32</sup> P Gori & A Pahladsingh 'Fundamental rights under Covid-19: an European perspective on videoconferencing in court' (2021) *ERA Forum* 563.

<sup>33</sup> Pudah is an Islamic practice relating to seclusion of women inside their homes; see s. 37 of the 1999 Nigerian Constitution

<sup>34</sup> S.36

<sup>35</sup> S. 36 (6) (b) and (c).

<sup>36</sup> S. 36 (6) (e).

<sup>37</sup> S. 35 (2).

<sup>38</sup> Bob Osamor *Fundamentals of criminal procedure law in Nigeria* (2004) 230-257.

<sup>39</sup> *Tari v Gundiri & Anr*; *Okoro v State* (2012) LPELR -7846(SC); *Sunday v State* (2016) LPELR-41325

<sup>40</sup> *Arije v. Arije & Ors* (2018) LPELR -44193(SC)

<sup>41</sup> *Okoro* (n 39).

<sup>42</sup> *Keystone Bank Ltd v A. Anco Enterprises Nigeria Ltd & Anr* (2019) LPELR-47857(CA)

<sup>43</sup> (2002) LPELR-2778(SC)

bounds of reason and not extreme) who watched the proceedings, the principle of fair trial has been breached, an appellant court will nullify the entire proceedings.<sup>44</sup>

On the importance of fair trial, the Court of Appeal (CA) stated that fair trial or hearing as mostly synonymous with natural justice is at the threshold of the Nigerian legal system and any breach therefrom amounts to a nullity of the entire proceedings<sup>45</sup> and a party cannot argue that the proceedings should be saved because it was properly conducted.<sup>46</sup> This implies that during virtual proceedings, all virtual devices must be fashioned or properly applied to ensure that these constitutional safeguards are not violated otherwise the constitutionality of the entire virtual hearings would be questioned. This situation begs for a number of questions: Could proper usage of virtual devices be guaranteed in the course of virtual trials in Nigeria? And whose duty to ensure strict compliance: the court registry, the lawyers or parties? The next sub-session discusses the essential conditions that could enhance or affect constitutional rights during virtual hearings.

#### ***Essential measures in determining the constitutionality of virtual court sessions***

The law is trite that any proceedings conducted in violation of any of the essential components of fair trial would amount to a nullity and bound to be set aside notwithstanding the correctness of the decision reached by the court.<sup>47</sup> To this extent, certain precaution must be taken during virtual court sessions in ensuring that constitutional principles guiding right to fair trial are not compromised. First, these precautionary steps may require the proper set up of the technological platform for virtual trial especially given the fact that most of the devices often used for virtual proceedings are commercial products not specifically designed for legal trials. Thus, it is possible that the configuration of such devices may impair credibility in the trial process especially as the role of participants (for example, the defendants, counsels, judges, the court officials, prosecutors, witnesses, etc) is taken into account in ensuring equal protection of rights, substantial justice, effective remedy and fair trial. As a result, technological devices configured to be more compatible with legal proceeding may be needed in order to increase the possibility that the rights to a fair trial would be better guaranteed.<sup>48</sup> Second, lack of knowledge (by parties) about the use of the devices might become a serious impediment to complying with the requirements for fair trial. For instance, (a) a trial involving many parties - complainants and defendants/accused persons, interpreters, counsels and witnesses – would imply connection of devices working simultaneously from different locations with varying degree of network signals. Given the fluctuating network situation and poor signals (and taking into account rural areas when communication network may be non-existent) in Nigeria, the chances of ensuring fair trial during virtual hearings is uncertain (b) Another concern is how the parties would cooperate and exercise speaking discipline to avoid parties speaking at the same time. Third, virtual trial may affect proper judicial assessment of the credibility or otherwise of witnesses' testimony during cross-examination as judges may not be able to assess their demeanor and internal coherence of the content of each statement. In addition, one needs to be sure that witnesses are not communicating with their counsel or not being fed with possible answers (by someone else) during cross-examination.

From the foregoing, while there are several reasons to justify the claim that virtual trial and remote participation of parties in legal proceeding is compatible with constitutional requirements for fair trial and international standards for human rights adjudication,<sup>49</sup> certain preconditions must be observed. Essentially, proper guideline must be put in place by the administration of justice system to ensure that all relevant actors (judges, parties, counsels, the court officials, witnesses and members of the public) use the devices as technically advised and properly utilize the capacity of the wideband to enjoy a greater frequency range of the audio spectrum in order to sustain the stream of information. For this, the requirement for technical assistance and regular safe point connection (which must comply with relevant privacy regulation) cannot be taken for granted particularly in a case where the witnesses and experts are not conversant with legal procedure and are connected from different facilities (perhaps with devices produced by different manufacturers). Ultimately, it must not only be ascertained that parties understand the use of this technology equipment but the recommended software should be configured to suit legal trials with high inbuilt visual capacity which could aid (a) operability of the devices and speech intelligibility (b) compatibility between video and audio data transmission to avoid any possible risk of speak-over (c) all participants to have a clear visual in seeing and recognizing one another (d) participants to hear each other clearly, observe parties reactions to questions without missing words all through the session (d)

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<sup>44</sup> See also *Keystone Bank Ltd* (n 42 above).

<sup>45</sup> *Dio – Global Concepts (Nig.) Ltd v. Access Bank (Nig) Plc.*

<sup>46</sup> (n 42 above).

<sup>47</sup> *Ariori v Elemo* (1983) 1 SC 81; *Kotoye v CBN* (1989) 1 NWLR (Pt. 98) 419.

<sup>48</sup> (n 32 above) 576-577.

<sup>49</sup> (n 32 above) 575-577.

transparency and privacy requirements wherein extraneous interference and unauthorized recording can be avoided.<sup>50</sup>

## 5. Conclusion

The task of this article is to address the lingering issue concerning the constitutionality (or otherwise) of virtual court trials during the Covid-19 pandemic and any other situation necessitating a declaration of state of emergency. This issue stems from the provisions of s. 36 (3) (4) of the constitution which requires that all legal trials should be held in public which then implies that all parties and their legal representatives and the public should have physical access to the court room during judicial hearings. This article has argued that while the requirement for public trials is *sine qua non* to fair trials, there is yet no compelling basis to stick to the old regime of physical appearance in a physical court room during a pandemic outbreak that poses threat to human health and life security. The article further argues that the emphasis on the constitutionality (or otherwise) of virtual legal trials is not misplaced in its entirety. Rather, it seems to have overshadowed a more critical aspect of judicial adjudication – the right to fair trials.

As has been demonstrated in previous sections of this article, the parameter for determining the constitutionality of a virtual trial is better suited when considered against the background of the human rights protection of the parties and the entire case management from the beginning to the end. In other words, drawing lessons from international human rights instruments, virtual proceedings can only be adjudged unconstitutional when relevant constitutional safeguards for human rights protection as specified in chapter 4 of the constitution are undermined during trials – both civil and criminal. In ensuring the suitability and compatibility of virtual trial *vis-à-vis* human rights protection, this article has suggested different measures including particularly, the configuration of virtual devices to align with legal proceedings, rules of court and practice direction. It is also important that judges, judicial officers, parties (and their witnesses) and legal representatives are given proper orientation on the use of virtual devices. Above all, the consent of the parties must be sought and obtained in writing. However, this is not to imply that physical court room appearance should be dispensed with completely. The argument is that virtual trials can serve as a complimentary option when there are situations that make physical court sitting and parties' physical appearance impracticable. In this sense, the option for a virtual court trial should be considered on a case-by-case basis. With compelling institutionalised practices in other jurisdictions earlier discussed and in conformity with human rights standards, it may well be time for a redirection of focus from a mere debate on the (un)constitutionality of virtual trials and to deepened efforts towards ensuring that the requirement for a fair trial is not compromised at any stage of the trial.

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<sup>50</sup> (n 32 above) 575.