

CYBER STALKING OR CYBER VOYEURISM UNDER THE NIGERIAN CYBERCRIMES ACT 2015: REVIEW OF ATTORNEY GENERAL OF FEDERATION V. AYAN OLUBUNMI[®]

Abstract

This case arguably represents the first case decided on the increasing incidents of persons posting nude pictures on the internet without the victim's consent in Nigeria. From the analysis of the facts, the court may have arrived at the correct decision, but the legal ingredients and basis upon which the decision was reached do not entirely reflect the analysis and purport of section 24(1) of the Nigerian Cybercrimes Act, 2015. Arguably, the facts of the case suit the offence of cyber voyeurism. Cyber voyeurism is the electronic transmission of images of a person engaging in a private act such as sexual intimacy or sexual act in circumstances where he/she has a reasonable expectation of privacy. In the case under review, it is found that the court missed an ample opportunity to award compensation to the victim in the case. There need for Judicial Officers and cybercrime prosecutors to familiarise themselves with this provision to reduce the impact of cybercrimes on victims.

Keywords: Cyber stalking, Cyber voyeurism, Cybercrimes Act 2015, Attorney General of Federation v Ayan Olubunmi

1. Facts of Attorney General of Federation v Ayan Olubunmi

The defendant (Ayan Olubunmi) was arraigned on 23 October 2017 on a one (1) count amended charge dated 6 December 2017 before the Federal High Court of Nigeria, Ado-Ekiti Judicial Division, Ado-Ekiti, Nigeria. The defendant was alleged to have unlawfully sent grossly offensive nude photographs of one Asare Monica (victim or complainant or PW1) on Facebook contrary to section 24(1) of the Cybercrimes (Prohibition, Prevention, Etc.) Act 2015.¹ The defendant and victim were dating as lovers in an amorous affair. Sometimes the defendant spent nights at the victim's house until they started having a misunderstanding, and the victim's behaviour towards the defendant changed. Although the defendant slept with the victim in her abode on 1 January 2017, he decided to pay another visit at about 10:15 pm on 2 January 2017 without informing the victim.² Unfortunately, the defendant caught the victim having sexual intercourse with another man on the bed. The victim apologised to the defendant for her behaviour, and they both reconciled their differences and continued with the relationship. Despite the reconciliation, the victim instructed her landlord not to allow the defendant into her house. The victim insisted that she was no longer interested in the relationship and would not marry him.³ Unknown to the victim, the defendant had taken nude pictures of her while she was sleeping on one of the nights, he visited without her consent with his Techno phone. He later copied and saved the same in his HP Laptop. Armed with the victim's nude pictures, the defendant threatened to upload the same on Facebook to get back at the victim, primarily to ensure no other man marries the victim. The victim begged the defendant not to carry out his threat to avoid embarrassment. However, the defendant demanded the sum of N200,000 (Two Hundred Thousand Naira) so that he could delete the nude pictures from his devices, which the victim did not have. Other persons begged the defendant on behalf of the victim. Nevertheless, he did not yield, only for him to post the victim's nude pictures on Facebook through his Facebook account with the caption 'Asare Monica by name, tailor who choose prostitute as

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¹ *Attorney General of Federation v Ayan Olubunmi* (2018 - Unreported) being a judgment delivered on Wednesday 14 October 2018 by His Lordship, Hon. Justice Taiwo O. Taiwo of the Federal High Court of Nigeria, Ado-Ekiti Judicial Division, Ado- Ekiti, front page.

² *Ibid.* at 1 - 9, 14.

³ *Ibid.*

work' on or about 12 January 2017.⁴ Several persons called the victim to confirm the defendant's Facebook post and how her nude pictures are being viewed by the public, which she later confirmed when she logged in herself. The defendant was subsequently arrested by individuals who had viewed the post on Facebook and took him to the police station. Consequently, the Investigating Police Officers executed a search warrant in the defendant's house. They recovered Exhibit 'B' - HP Laptop, Exhibits 'C' and C1 - Nokia Phone and Techno phone, respectively. The defendant specifically opened his Laptop and showed the Police officers how he could post nude pictures of the victim on Facebook. Although the defendant made confessional statements (Exhibits 'A' & 'F') which the court admitted after conducting a trial within trial, he raised the defence of cyber hacking to his Facebook account.⁵

2. Judgement of the Court

Two issues were raised for determination before the court: '(1) Whether or not the court can rely on the admitted confessional statements of the defendant (exhibits 'A' & 'F') to convict him (2) Whether or not the prosecution has proved the offence of cybercrime against the defendant beyond reasonable doubt.'⁶ In determining the above issues, the court reproduced section 24(1) (a) & (b), the provision of the Nigerian Cybercrimes Act, 2015, the charge against the defendant, is predicated on thus:

(1) A person who knowingly or intentionally sends a message or other matter by means of computer systems or network that: (a) Is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be sent or (b) He knows to be false, for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred, ill will or needless anxiety to another or causes such a message to be sent, commits an offence under this Act and is liable on conviction to a fine of not more than N7,000,000.00 or imprisonment for a term of not more than 3 years or both..⁷

The court took a critical look at the defendant's confessional statements in exhibits 'A' & 'F' to determine if he confessed to the crime in section 24(1) of the Nigerian Cybercrimes Act, 2015. In exhibit 'A' the court examined the statement of the defendant at lines 10-19 when he stated thus:

I used to go to Asare Monica house and I passed the night there. Sometimes December 2016, I was in Monica Asare house in the night when she was sleeping, I used my Techno android phone to snap her nakedness and I did not tell her when I snapped the picture. The purpose of which I snapped the pictures is for me to post same on social media if she refuses to listen to me in respect of our relationship. Later, I copy the nude picture of Asare Monica which I snap on my phone...⁸

Moreover, in exhibit 'F' the court looked at lines 29 - 50 thus: 'On 30/12/16': through her behaviors at times when I am with her, she won't attend to me, but this day through her frustration I decided to take her naked pictures. I give her money for the New Year. On January one 2017 I slept in her house, on January two 2017 I have let her know I won't come but through her behaviors I decided to check her around 10:15pm I met her with another man this night making love on her bed. We fight latter she begged me to and will continue the relationship last week Sunday she travelled to Oka but she don't come back that day and the second day, the third day I and my friend go visit her at Oko Akoko later we know her son is sick, I bought medicine for her and give little money when she come back she how plan and bargain with landlord not to let

⁴ Ibid

⁵ Ibid.

⁶ Ibid at 10.

⁷ Ibid. at 13, see also Cybercrimes (Prohibition, Prevention, Etc.) Act 2015, s.24(1)

⁸ Ibid at 14.

me come to her house without any dispute again, through her frustration because I truly love her that let me place her nakedness on the net today.⁹

Consequently, the court held that exhibits 'A' & 'F' are confessional statements freely and voluntarily given by the defendant, especially having successfully gone through trial within trial. The court also noted that exhibits 'A' & 'F' are corroborated by exhibit 'E' - (nude picture), when the defendant admitted that the nude picture of the victim was posted on his Facebook page. Hence, the court held that exhibits 'A' & 'F' could be a basis for the defendant's conviction.¹⁰

On the issue of proof beyond reasonable doubt by the prosecution, the court noted that the prosecution must prove the ingredients of the offence beyond reasonable doubt as distilled from section 24(1) of the Nigerian Cybercrimes Act, 2015 thus: "knowingly" or "intentionally" and also the time hallowed ingredient of "mens rea" and "actus reus"¹¹ In justifying the intentional act of the defendant in committing the offence, the court stated that:

PW1 is the complainant, the person whose nude pictures was posted on the defendant's Facebook page. She was his lover and from the evidence of PW1 and PW2 the defendant felt aggrieved because his lover, PW1 told him that the amorous relationship has ended and she was no longer interested in the affair. PW2 corroborated the evidence made orally by PW1 that the defendant threatened to post the nude pictures of PW1 on the internet if she refused or did not resile from her decision not to marry him. The defendant threatened to disgrace PW1 and he did.¹²

Moreover, the court discountenanced the defence of cyber hacking raised by the defendant as an afterthought considering the nature of the evidence against him. The court held thus:

After a careful analysis of the evidence of PW1 and PW2, the oral evidence of the defendant in court, exhibits tendered in court particularly exhibits 'E', 'C', and 'C1' being the pictures and the phones including the Laptop, it can be deduced that the defendant posted the picture on his Facebook which he did not deny he owned...the defendant did not at any time until in this court informed the police i.e PW3 and PW4 that his Facebook was hacked. He did not report the hacking to anyone including Facebook that has a device or platform for people whose account is hacked to complain. I find therefore as afterthought, the defence of hacking feebly put up by the defendant...¹³

In the final analysis, in convicting the defendant of the offence charged under section 24(1) of the Nigerian Cybercrimes Act, 2015, the court stated that the prosecution succeeded in proving the ingredients of the offence against the defendant when it held that:

From the totality of the evidence before me I also find that mens rea and actus reus is established. The defendant intentionally and knowingly posted the pictures of PW1 on Facebook. He did this because he was aggrieved that PW1 jilted him. He did what he was charged for, to embarrass PW1 for jilting him. In the final analysis I hold that this court can convict the defendant on exhibits 'A' and 'F' and in the circumstances of this case and the facts adduced by the prosecution the case is proved beyond reasonable doubt against the defendant.¹⁴

⁹ Ibid.

¹⁰ Ibid at 15-18.

¹¹ Ibid at 19.

¹² Ibid at 19-20

¹³ Ibid at 20

¹⁴ Ibid at 21-22.

Based on the preceding, the court sentenced the defendant to two years imprisonment from 24 October 2018 and to pay the Federal Government of Nigeria a fine of N500,000.¹⁵ In arriving at the sentence and fine, the court reasoned thus:

I find the act of the convict highly reprehensible and very despicable and barbaric to say the least. He has behaved true to the saying that ‘hell knows no fury than a lover scorned.’ I must state that the defendant who has a wife at home and has children would tarnish, embarrass and demean a lady that was in an amorous relationship with him. I find it hard to believe but I am sure is an act of meanness on the part of the defendant to attempt to, if he has not already tarnished the image and reputation of Asare Monica. The act of the defendant is very strange in our society not to talk of in Aisegba Ekiti and Ekiti State in general, where there are very proud and educated men and women, where the society is so close knitted that almost everyone knows the other. The world has also through facebook and the internet become a global village. Who knows who may have seen the pictures and from which corner of the world? The justice of this case demands that people like the convict should be taught a lesson and this can be done if this court imposes such sentence that will send a message to people like him from which the society must be protected...it is unfortunate that this court has no power to compensate the victim as the law does not permit same. I think those who drafted the law should amend same to allow for compensation to be paid to any victim in cases like this. I say no more.’¹⁶

3. Comments

This case arguably represents the first case decided on the increasing incidents of persons posting nude pictures on the internet without the victim's consent in Nigeria. From the analysis of the facts, the court may have arguably arrived at the correct decision, but the legal ingredients and basis upon which the decision was reached do not entirely reflect the analysis and purport of section 24(1) of the Nigerian Cybercrimes Act, 2015. In the true sense, section 24(1) of the Nigerian Cybercrimes Act, 2015 proscribes the cybercrime offence of cyber stalking, which the Nigerian Cybercrimes Act, 2015 defined as ‘a course of conduct directed at a specific person that would cause a reasonable fear.’¹⁷ Based on the facts of the case under review, it does not reflect the meaning ascribed to cyber stalking, and the court did not make any reference to cyber stalking throughout her judgment. Arguably, the facts of the case suit the offence of cyber voyeurism. Cyber voyeurism is the electronic transmission of images of a person engaging in a private act such as sexual intimacy or sexual act in circumstances where he/she has a reasonable expectation of privacy. It involves the non-consensual filming and electronic transmission of these images and videos on the internet and social media.¹⁸ The problem with the Nigerian Cybercrimes Act, 2015 is that cyber voyeurism is not used to proscribe acts of persons who engage in electronic transmission of images of persons without their consent, as shown in the case under review. The court ought to have examined this and show that in the absence of any specific provision on cyber voyeurism, the application of section 24(1) of the Nigerian Cybercrimes Act, 2015 becomes germane. Furthermore, the legal ingredients of section 24(1) of the Nigerian Cybercrimes Act, 2015 seem not to have been analytically captured by the court. Recall that the charge against the defendant is unlawfully sending grossly offensive nude photographs of the victim on Facebook. Deducible from section 24(1)(a) of the Nigerian Cybercrimes Act, 2015, the court ought to have set out the following ingredients of the offence: (1) That the defendant knowingly or intentionally sent a message or other

¹⁵ Ibid at 23.

¹⁶ Ibid at 22-23.

¹⁷ Cybercrimes (Prohibition, Prevention, Etc.) Act 2015, s.58.

¹⁸ Pooja Pandey, Chaubey, ‘Cyber Voyeurism: A Critical Analysis’ [2020] 9 (6) *Mukt Shabd Journal* <https://shabdbooks.com/gallery/35-june2020.pdf> accessed 7 March 2022.

matter (2) That the message sent by the defendant was through a computer system or network (3) That the message sent by the defendant was grossly offensive.¹⁹

Again, the court missed an ample opportunity to award compensation to the victim in this case. The court declined that section 24(1) of the Nigerian Cybercrimes Act 2015 did not make provision for it and consequently advised that the provision should be amended to reflect the same. While I agree that the Nigerian Cybercrimes Act 2015 needs to be amended, it should be for conceptualizing or factoring cyber voyeurism specifically in the Act. Sadly, the court failed to take cognisance of the Administration of Criminal Justice Act 2015 which empowers her to award compensation to the victim. One of the purpose of the Act is to protect the victim's interest and right.²⁰ The provisions of the Administration of Criminal Justice Act 2015 apply to all criminal trials concerning offences proscribed under an Act of the National Assembly.²¹ The Nigerian Cybercrimes Act 2015 is an Act of the National Assembly. Hence, the Administration of Criminal Justice Act 2015 applies to all cybercrime trials under the Nigerian Cybercrimes Act 2015, including this case under review. Interestingly, section 314 of the Administration of Criminal Justice Act 2015 states that the court is empowered to award commensurate compensation to a victim against the defendant in delivering judgment in a criminal matter.²² In this regard, in determining the quantum of compensation to the victim, the court is at liberty to request additional evidence.²³ There is a need for Judicial Officers and cybercrime prosecutors to familiarise themselves with this provision to reduce the impact of cybercrimes on victims.

¹⁹ Cybercrimes (Prohibition, Prevention, Etc.) Act 2015, s.24(1)(a).

²⁰ ACJA, s.1.bid.,s.2(1).

²¹ ACJA, s.1.bid.,s.2(1).

²² Ibid., s.314(1).

²³ Ibid., s.314(2). see also s.319