

**TELECOM OPERATORS AS PERPETRATORS OF SPAMMING IN NIGERIA: REVIEW OF MTN NIGERIA COMMUNICATION LIMITED V BARR GODFREY NYA ENEYE**

**Abstract**

*The sending of unsolicited electronic messages, otherwise known as spamming is becoming rampant in Nigeria despite the Nigerian Communications Act 2003 imposition on telecom operators to ensure that their network facilities are not used to facilitate crime. Customers in this part of the world have raised eyebrows over the rampant nature of such perpetration by telecom operators. This is because apart from the fact that it eliminates quiet possession of the mobile phones owned by customers, it contributes to the increase of phone-inbox, and the ultimate act of deleting such unwanted messages, which in turn steal the time of the customers. There is hardly any customer in Nigeria who is not a victim of spamming. Following the seemingly unending speed at which this act is being perpetrated by telecom operators, there has been the question as to who really is the cause of this? This work seeks to answer this question using the case of MTN Nigeria Communication Limited v. Barr Godfrey Nya Eneye to show the use of digital evidence in revealing such acts, and also to show how telecom operators contribute to spamming in Nigeria. Again, considering the available digital evidence, is the act of MTN Nigeria Communication Limited, not a cybercrime offence capable of prosecution under the Nigerian Cybercrimes Act 2015?*

**Keywords:** Digital Evidence, Unsolicited messages, Spamming, Cybercrime, Telecom operators

**1. Summary of Facts: MTN Nigeria Communication Limited v. Barr. Godfrey NyaEneye**

In *MTN Nigeria Communication Limited v. Barr Godfrey Nya Eneye*,<sup>1</sup> Goodfrey Nya Eneye (Respondent/Applicant), a legal practitioner on the 11 July 2012 brought an application before the Federal High Court in Abuja against the giant-telecom operator in Nigeria, MTN Nigeria Communication Limited (Appellant/Respondent). In the case with Suit No: FHC/ABJ/CS/431/2012, the Respondent at the Trial Court, alleged that the Appellant/Respondent (MTN Nigeria Communication Limited) revealed without authority and or permission his registered private MTN GSM mobile phone number, 08066938235, to be accessed by organizations. He was consequently sent unsolicited text messages without his prior consent. He, therefore, brought an application before the Court for the enforcement of his fundamental human rights to privacy, liberty, and freedom of association protected by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and other relevant provisions of the African Charter on Human and Peoples' Rights.<sup>2</sup> Arguing his case, the Respondent/Applicant, among other declarations and orders sought, asked for an order compelling MTN to pay him the sum of N50,000,000.00 (fifty million naira) being general damages. The trial judge having considered the arguments on both sides, held in parts that the Appellant/Respondent's unauthorized revealing and/or permitting of the registered number with MTN to be accessed by organizations and made target of unsolicited text messages from the organizations with whom he has no relationship or contact without prior consent amounts to a violation of his right to privacy. The Court further granted an order of injunction restraining MTN from sending such messages to the Respondent/Applicant without his consent, while the sum of N5,000,000.00 was awarded to him as exemplary/aggravated damages against the Appellant/Respondent for breach of the Respondent/Applicant's right to privacy.

Not satisfied with the judgment of the trial Court, the Appellant/Respondent approached the Court of Appeal to set aside the judgment of the Court. Three issues were raised for determination; they are:

1. Whether the trial Court was right when he held that the Court has jurisdiction to entertain the matter and whether indeed the Court has jurisdiction to entertain this matter in view of the provisions of Section 73-78 ad 86-88 of the Nigerian Communications Act, CAP N97 LFN 2004. (Grounds 4 and 6)
2. Whether having regard to the facts before the trial Court, the learned trial Judge was right when he held that the Appellant/Respondent revealed without authority and or permitted the Applicant's registered private MTN GSM Mobile number 08066938235 to be accessed by organizations and made target of unsolicited

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<sup>1</sup> Court of Appeal. Abuja Judicial Division, Appeal No: CA/A/689/2013 - Judgment delivered on 12 May 2017, p.1-58.

<sup>2</sup> African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, Laws of the Federation of Nigeria (LFN), 2004, Art. 6, 10(1) &(2)

text messages by those organizations and consequently held the Appellant liable for violation of the Respondent's fundamental human right to privacy of his person (Grounds 3 and 5).

3. Whether in the circumstances of this case, the sum of N5, 000,000.00 (Five million naira) awarded as damages is not excessive (Grounds 1 and 2).

## **2. Judgment and Digital Evidence Relied Upon by the Court**

Thrashing every issue raised in the preliminary objection, the Court, among other things, proceeded to the issues for determination wherein it held in favour of the Respondent who was the applicant at the trial Court that the Appellant who was the Respondent at the trial Court breached his right to privacy.

In issue number one, the Respondent had relied on provisions of the Nigerian Communications Act 2003, which provides for a special procedure for the resolutions of disputes arising from or connected with the provision and of communication services and networks in whole or in part within Nigeria or on a ship or aircraft registered in Nigeria. It was the case of the Appellant that where there is a dispute between parties on items such as the one in the instant case, the parties involved should make attempts to resolve the same before notifying and requesting the Commission to resolve it.<sup>3</sup> That the Commission could be asked to review its decision<sup>4</sup> (S.86 of the Act) and if not satisfied with the review decision of the Commission, then an application can be made to the High Court for judicial review of the Commission's decision.<sup>5</sup>

As sound as the provision of the said Act may be, the Court did not see sound reason with the argument put forth. The Court thought that the provisions of the Nigerian Communications Act, 2003, does not in any way affect the unfettered right of direct access to the High Court to seek redress by an originating application for the contravention or likely contravention of a person's fundamental right. The Court finally held that the provision of the said Act does not mandatorily bind concerned parties. Part of the reasoning of the Court reads thus:

The unfettered right of direct access to the High Court to seek redress by an originating application for the contravention or likely contravention of a person's fundamental right is vested on such a person by S. 46 (1) of the 1999 Constitution. This right vested by the Constitution, the supreme law of the land, cannot be curtailed or completely taken away by the Nigerian Communication Act, an Act of the National Assembly being a law subject to the Constitution by virtue of S.1 (1) and (3) of the 1999 Constitution which provides that 'This Constitution is supreme and its provisions shall have binding force on all authorities and person through the Federal Republic of Nigeria'...The argument of learned Counsel for the appellant that an application for the enforcement of a person's fundamental right cannot lie direct to the High Court without the extrajudicial procedures for the resolution of disputes arising from the provision and use of communication services and network prescribed in parts VII and X of the Nigerian Communications Act having been first explored and exhausted amounts to applying S. 46 (1) of the 1999 Constitution subject to the said parts of the Nigerian Communications Act, without any part of the Constitution enabling or allowing such derogation and amounts to saying in other words that there is no right of direct access to the High Court for redress in respect of violations or likely violations of fundamental rights arising from the provision and use of communication services and networks. Such an application brings the said Act into conflict with the Constitution, subordinates the Constitution or a particular part of it to an Act of the National Assembly. In such conflict, the Constitution must prevail over the Act of the National Assembly and the later would to the extent of its conflict with the Constitution be null and void. So because of this supremacy and primacy of the constitution over the Nigerian Communications Act, the provisions of part VII and X of the Act or any other part of the Act cannot apply to defeat the original jurisdiction of the High Court under S. 46 (2) of the 1999 Constitution and to prevent or defeat an application to enforce fundamental rights brought in exercise of the right given to a person by S. 46 (1) of the 1999 Constitution...To subject a person who desires to seek redress for violation or threatened violation of his fundamental right in the course of the provision and use of communication services and networks to comply with extra judicial dispute resolution process prescribed in parts VII and X of the Nigerian Communications Act as a condition precedent to his filing an action in court to seek the redress, would take away the absolute right to

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<sup>3</sup> Nigerian Communications Act 2003, s. 74 (1)

<sup>4</sup> Ibid., s.86

<sup>5</sup> Ibid., ss.87 & 88.

seek redress in the High Court for such violation or threatened violation expressly given to the said person by S. 46 (1) of the Constitution and would take away the special original jurisdiction vested in the High Court by S. 46 (2) of the 1999 Constitution, supplant it with only the power to judicially review the decision of the commission....It is clear from the provisions of S. 75 (1) of the Communication Act, No 13 of 2003, that parties to a dispute arising from the provision and use of communication services and networks are not mandatorily bound to refer their dispute to the commission or that the commission must entertain and determine every such dispute. The parties have a choice of referring their disputes to the commission or pursuing their resolution by other means. It is only when either or both parties notify and request it to intervene that it can resolve a dispute.<sup>6</sup>

On issue number two, the Appellant argued that the Applicant did not state or prove that the Appellant directly interfered with his privacy. That he did not prove by any scintilla of evidence that it was the Appellant that divulged or released or disclosed his GSM number to the organizations or bodies that sent texts to him. They had argued that the Respondent usually gave his numbers to third parties through which his number may have been accessed to be sending such messages. The Court in determining the issue before it relied on some digital evidence such as the digital print-out copy of the Appellant's advertised Bulk SMS Service subscription, terms and conditions for its use, BULK SMS account set-up and other relevant information as published by the Appellant online in her website, [www.mtonline.com](http://www.mtonline.com) attached and marked as Exhibit C 1-3. The Respondent further demonstrated that through digital evidence that the Appellant's website contains a directory of subscribers, which the Respondent is one of such. In it, is also a list of particulars of their subscribers. It was the position of the Respondent that it was within the knowledge of the Appellant how the various bodies or organizations obtained his number, stressing that, it is akin to a plea of *res ipsa loquitur* which is that the facts speak for itself. Moreover, there was digital evidence of unsolicited text messages sent to the Respondent's private MTN GSM mobile phone number 08066938235 at virtually any time of the day, including working hours and late at night when he is at sleep by these bodies and organizations. The Appellant had also made their argument based on a conventional practice in E-marketing. Rejecting the argument, the Court held that the Appellant did not adduce any evidence of customs, practices, and usage of the telemarketing or telecommunication world that permits a communications services and network providers like the Appellant to use or permit the use of subscribers' mobile phone line for marketing without the subscriber's knowledge and consent. The holding of the court reads:

The Consumer Code of Practice Regulations 2007 and the General Consumer Code of Practice Rules, particularly Rule 14 (1) b (2) and (3) require the appellant to maintain a directory enquiry facility containing information of all its subscribers in Nigeria, and allow access to same by 3<sup>rd</sup> parties but subject to the prior notification of the subscriber, the appellant did not show or even suggest that it notified the respondent before giving access to his line to senders of the text messages. ..I agree with the holding of the trial court that the defences raised by the appellant in paragraph 5 of his counter-affidavit are evasive. In paragraph 5 (a) he relied on electronic marketing as world accepted business practice of sending text messages to mobile phone line without the prior notification or consent of the owner of the line. In paragraph 5 he stated that the respondent's phone line is not confidential as he has been giving his number to friends and other persons. The appellant, who did not adduce evidence to prove any of the above assertions, avoided answering specifically the depositions in the respondents' affidavit concerning its provision of Bulk SMS service to organizations and persons by which they have entry into the phone line of subscriber without first notifying the subscriber or obtaining his consent. By giving those unknown persons and organizations access to respondents MTN GSM phone number, to send text messages into it, the appellant violated the respondent's fundamental right to privacy guaranteed by S. 37 of the Constitution which includes the right to the privacy of a person's telephone line. The said S. 37 of the 1999 Constitution provides that 'the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected'. The innumerable text messages without his consent at all times is a violation of his fundamental right to the privacy of his telephone conversations, correspondence and his person and telephone line and telephone message inbox. This court in *Nwali v. EBSIEC & Ors* (2015) 2

<sup>6</sup>*MTN Nigeria Communication Limited v. Barr. Godfrey NyaEneye*, Court of Appeal. Abuja Judicial Division, Appeal No: CA/A/689/2013 - Judgment delivered on 12 May 2017 at 26 – 31.

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CAR 477 @ 508 – 510 laid down the law on the expansive scope of this right as couched in S. 37. In the light of the foregoing issue No 2 is resolved in favour of the respondent.<sup>7</sup>

From the foregoing, it is clear that the sending of unsolicited messages to any Nigerian without his or her consent amounts to a violation of the person's right to privacy. This judgment strengthens the fact that a party can enforce his fundamental human rights under the Fundamental Rights Enforcement Procedure Rules, 2009, anytime there are experiences of cases of spamming. As exciting as this approach may seem, one wonders if the commencement of the said suit is the right step to take considering other provisions of the law. For instance, section 146(1) of the Nigerian Communications Act 2003 provides that: 'A licensee shall use his best endeavor to prevent the network facilities that he owns or provides or the network services, applications service or content application service that he provides from being used in, or in relation to, the commission of any offence under any law in operation in Nigeria.' The reference to 'commission of any offence under any law in operation in Nigeria' also includes the Nigerian Cybercrimes Act 2015 which has been in force since 15 May 2015.<sup>8</sup> It needs to be asked if the sending of unsolicited text messages as demonstrated and perpetrated in *MTN Nigeria Communication Limited* case is a cybercrime which ordinarily should have warranted prosecution of the Appellant under the Nigerian Cybercrimes Act 2015?

Although the Nigerian Cybercrimes Act 2015 did not define what a cybercrime is, Felix Eboibi notes that 'cybercrime is an unlawful act or default which is an offence involving the use of or relating to computers, computer networks or virtual reality, especially the internet which is an offence against the public and render the person guilty of the act liable to legal punishment.'<sup>9</sup> Part III of the Act makes spamming a cybercrime offence.<sup>10</sup> Section 58 of the Act defines spamming as 'an abuse of electronic messaging systems to indiscriminately send unsolicited bulk messages to individuals and corporate organizations.' The implication is that Spamming has been criminalized in the current cyber regime. According to Section 32 (2) of the Act, any Person who engages in spamming with intent to disrupt the operations of a computer be it public or private or financial institutions shall be guilty of an offence and liable upon conviction to 3 years imprisonment or a fine of N1,000,000.00 or both.

The above-mentioned provision of the law has shown that criminal action can be maintained against a perpetrator of spamming. From the facts of the case of *MTN Nigeria Communication Limited* an offence of spamming was committed against the Respondent by the Appellant itself being the one responsible for transmitting the unsolicited text messages to the Respondent on behalf of her clients (telemarketers). That a Corporation, in this case, *MTN Nigeria Communication Limited*, can be held corporately liable for the criminal acts is no longer in doubt particularly under the explicit provisions of the Nigerian Cybercrimes Act, 2015. Section 32(2) of the Act opens with the sentence 'a person who engages in spamming...' In Section 58 of the Act, a person is defined as 'person includes an individual, body corporate, organisation or group of persons.' Thus, the spirit and intendment of the Act contemplate the conviction of a body corporate under these provisions. Lending further credence to the foregoing view is the fact that the punishment for the offence created under Section 32 of the Act is for both imprisonment and fine. This leaves the Court with the leeway to impose fines on the Company when found culpable.

However, it is submitted that a fundamental rights enforcement of the right to privacy is better employed in this regard than maintaining a criminal action. Below are some reasons:

1. Crimes, when committed, are committed against the state and not the individual; therefore, victims may find it challenging to maintain an action against the perpetrator except with the permission of the state.
2. Fundamental Human Rights actions can be instituted by the person involved just as it is with the case under review. Not only so, any other person can file an action against the telecom-operators for spamming since the issue of *locus standi* goes to no issue under the FREP rules.

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<sup>7</sup>*MTN Nigeria Communication Limited v. Barr. Godfrey NyaEneye*, Court of Appeal. Abuja Judicial Division, Appeal No: CA/A/689/2013 - Judgment delivered on 12 May 2017 at 51 - 52.

<sup>8</sup> Cybercrimes(Prohibition, Prevention Etc) Act 2015.

<sup>9</sup> F.E Eboibi, Chapter 2 – Introduction to Law & Cybercrime, 23 in F.E Eboibi (ed) (2018). *Handbook on Nigerian Cybercrime Law*. Benin: Justice Jeco Printing & Publishing Global

<sup>10</sup> Cybercrimes (Prohibition, Prevention Etc) Act 2015, s.32(2).

3. The alternative penalty for committing the crime of spamming as stated in the highlighted provision of the Act is N1,000,000.00 (One million naira). By instituting an action under the Fundamental Human Rights enforcement procedure Rules, the victim of the unsolicited messages was awarded an award of N3,000,000.00 (Three million naira) against a statutory one million naira which when paid is to be given to the federal government being an action committed against the state.
4. Fundamental Human Rights Enforcement cases carry a fast-track procedure, which means that they are paid serious attention. Apart from that, they do not go through the rigorous processes of trial but are instituted via simple application by way of a motion or any other originating processes, after which adoption of addresses follow forthwith. This is not the same with criminal cases that go through a full-blown hearing process, which is time-consuming.
5. Also, the *mensrea* to be proved in the offence of spamming is *the intent to disrupt the operations of a computer*, as provided in S. 32 (2) of the Nigerian Cybercrimes Act, 2015. The law, therefore, is that for the offence to be complete, there must be such intent. Although the Appellant was held liable for the messages sent to the Respondent by the said organizations, proving the intent to disrupt the operations of the computer of the Respondent would have been difficult. It must be noted that the disruption must be not just that of the computer, but the disruption of *the operations* of the computer. Thus where there is no such intent to disrupt the *operations of the computer*, an action under the said provision will not succeed.
6. Finally, the acts of the Appellant that constituted spamming arose sometime in 2013, before the enactment of the Nigerian Cybercrimes Act 2015; hence, a cybercrime prosecution for the offence of spamming cannot lie against the Appellant.<sup>11</sup>

### 3. Conclusion

The Court of Appeal has through the judgment in *MTN Nigeria Communication v. Barr. Godfrey Nya Eneye*, laid down a good precedent which will ease the combat against spamming in Nigeria. It has expanded the frontiers on the enforcement of Human Rights in Nigeria. While it is good to say that spamming is criminalized in Nigeria, one cannot say that it is better taking up action under the Nigerian Cybercrimes Act 2015 as against the FREP rules. As for which is better, the analysis above suggests that fundamental human rights enforcement is a better option. That does not, however, affect the institution of both processes side by side. In all, a criminal action can be brought against such perpetrators while the victim maintains a fundamental human rights action at the same time. Moreover, the success in prosecuting cases of unsolicited text messages or spamming requires credible digital evidence being produced before the Court, which may require the ingenuity of a forensics expert.<sup>12</sup>

<sup>11</sup>Constitution of the Federal Republic of Nigeria, 1999(as amended), s.36(8) & (12). See generally, F.E. Eboibi. Cybercrime Prosecutors and Non-Retroactivity of The Nigerian Cybercrimes Act 2015: Implication For The Administration Of Cybercrime Justice (2018) *Revista Acadêmica Escola Superior do Ministério Público do Ceará*, 237-251, available at <http://www.mpce.mp.br/wp-content/uploads/2018/10/13-ARTIGO-ED-3.pdf>, accessed 3 November 2019.

<sup>12</sup> See Ikenga K.E. Oraegbunam, 'Towards Containing the Jurisdictional Problems in Prosecuting Cybercrimes: Case Reviews and Responses', *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 7, 2016, pp. 26-40. Available at <http://www.ajol.info/index.php/naujilj/article/view/136238>.