

NIALS Policy

Bulletin

Vol. 8 January 2019



WITHDRAWAL OF JUDGES AND LAWYERS FROM CRIMINAL PROCEEDINGS

UNDER THE ADMINISTRATION OF
CRIMINAL JUSTICE ACT 2015



Nigerian Institute of Advanced
Legal Studies

NIALS

MacArthur
Foundation

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January, 2019

Published by the
Nigerian Institute of Advanced Legal Studies (NIALS)
with support from
John D. and Catherine T. MacArthur Foundation



ABOUT THE PROJECT ON IMPLEMENTATION OF ACJA, 2015

The Project on the implementation of the Administration of Criminal Justice Act 2015 (ACJA) aims through workshops, review bulletins and digests to deepen understanding of the Act, and improve the management of criminal proceedings, including the prosecution of anti-corruption cases. The ACJA has the potential to significantly boost anti-corruption efforts through more effective investigations and prosecutions. Implementation of the ACJA can help to modernize the justice system, close loopholes, provide a common legal frame work By increasing knowledge and providing practical tools for stakeholders, the project enhances nationwide familiarity of the ACJA, improves expediency in the handling of anti-corruption cases by reducing opportunities for delays in proceedings, and promoting accountability.

The John D and Catherine T. MacArthur Foundation is supporting the Project as part of the Foundation's On Nigeria Grant Program.



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1.0 Background

Withdrawal from criminal proceedings is a recurring challenge of the Nigerian criminal justice system, owing to the possibility of prolonging the trial process when they occur. The Administration of Criminal Justice Act (ACJA) came into force in 2015 to ensure that the system of administration of criminal justice in Nigeria runs efficiently in the pursuit of the speedy dispensation of justice. One of the avenues through which ACJA seeks to address the undue delays in the dispensation of criminal proceedings is to tackle the problem associated with the discontinuance of a case due to withdrawals and elevation of judges especially at the trial courts.

This Bulletin considers incidence of withdrawals before and after the ACJA and the impact these have had on criminal proceedings. It examines the reasons for withdrawals and the procedure through an analysis of relevant case law and legal provisions before concluding with recommendations.

2.0 Withdrawal from Criminal Proceedings Pre-ACJA 2015



The conduct of criminal trials requires the commitment of the prosecutor, defence counsel, and the judge to ensure that such proceedings are conducted and concluded speedily. However, in some instances during the trial, some of these stakeholders may seek to withdraw from the proceedings. The reasons for the withdrawal from criminal trial by such stakeholders in a criminal trial are

diverse and include conflict of interest on the part of the judge or legal practitioner, petition of bias filed by the defendant, change of counsel at the instance of the defendant in the suit and elevation of the presiding judge.

2.1 Withdrawal of Defence Counsel (Pre 2015)

There are several grounds for the withdrawal of lawyers and judges from criminal proceedings prior to the enactment of ACJA in 2015. They include Sections 191(1)© of the 1979 Constitution,¹ sections 174 and 211 of the 1999 Constitution,² sections 74-75 of the Criminal Procedure Act,¹ Rules 21 and 29 Rules of Professional Conduct 2007² and Rule 12 of the Code of Conduct for Judicial Officers in Nigeria³.



The duty to accept a brief where the appropriate fee is offered [in the absence of special circumstances to justify refusal - otherwise known as the 'Cab rank' rule] is one of the cardinal duties of a legal practitioner under Nigerian law⁴.

However an attorney-client relationship is not established until the legal practitioner accepts retention as counsel in a matter⁵. The Rules of Professional Conduct provide that a legal practitioner shall not abandon such employment except it is for a good cause⁶. What amounts to 'good cause' for the purpose of terminating a counsel client relationship is arguably open-ended, following the use of the word 'including' in Rule 21(2). Hence, in the murder case of *Donatus Ndu v. The State*⁷, counsel to the defendant did not prepare for the final address and sought to withdraw from the case when he was refused an application to adjourn the matter. Although the records of proceedings did not reveal if his application to withdraw was granted by the court, the records showed that counsel did not give the final address.

Even where a legal practitioner does not wish to withdraw representation⁸, his client may wish to terminate the lawyer-client relationship. Section 36(6)(c) of the 1999 Constitution provides for the right of the defendant to choose the legal practitioner to represent him/her in court. In *Ojonye v. Onu & Ors*, (supra) the Court of Appeal stated that:

'(b)y virtue of Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), for the determination of his civil rights and obligations, a citizen has the fundamental right to a counsel of his choice. He is free to change his Counsel and the Court cannot intervene under the guise that it is exercising its discretion.⁹

1999 CONSTITUTION OF NIGERIA

174(1) The Attorney-General of the Federation shall have power-

(a) to institute and undertake criminal proceedings against any person before any court of law in Nigeria, other than a court martial, in respect of any offence created by or under any Act of the National Assembly.

(b) to take over and continue any such criminal proceedings that may have been instituted by any other authority or person, and

(c) to discontinue at any state before judgement is delivered any such criminal proceedings instituted or undertaken by him or any other authority or person.

(2) The powers conferred upon the Attorney-General of the Federation under subsection(1) of this section may be exercised by him in person or through officers of his department

(3) In exercising his powers under this section, the Attorney-General of the Federation shall have regard to the public interest, the interest of justice and the need to prevent abuse of legal process.

Section 174 and 211 of the 1999 Constitution vests power in the Attorney General of the Federation (AGF) to withdraw from criminal proceedings. This power is known as *Nolle Prosequi* and was espoused in the case of *State v. Ilori*¹⁰ where the *Attorney General of Lagos State* exercised this power by discontinuing the criminal proceedings against the accused person(s). However, it must be noted that unlike withdrawal by the AG which is provided for under the Constitution, withdrawal at the instance of the client or the legal practitioner is at the discretion of the court.¹¹

2.2 Withdrawal of Judges

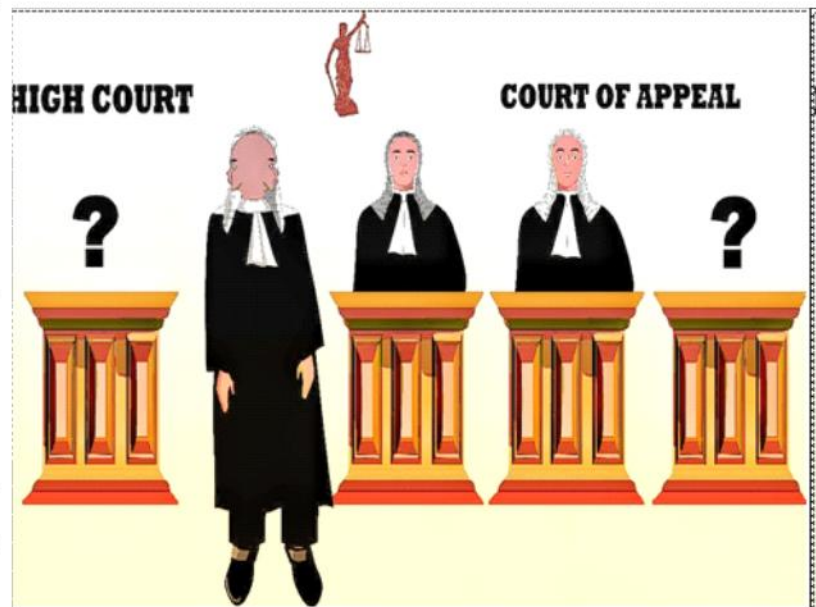
Judges are bound by the provisions of the Code of Conduct for Judicial officers. Rule 12 of the Code provides for the disqualification of self (judges) from proceedings.¹² Rule 12.1 lays down instances where a judicial officer can disqualify, recuse or withdraw himself from a particular proceeding. The Code further provides for waiver of disqualification in its Rule 12.2¹³ the implication of Rule 12 is that the judge can voluntarily withdraw when there is a personal bias or conflict of interest. On disqualification based on Rule 12.1, the judge may instead of withdrawing from the proceeding, disclose on the record of proceeding material factors motivating the withdrawal. If after such disclosure, counsel or parties find it expedient for the judge to continue with the



proceeding, then there is a waiver of disqualification under Rule 12.2. The implication therefore is that the judge can continue with the proceeding after full disclosure.

2.3 Elevation of Judges (Pre-2015)

Pre- ACJA 2015, trial de novo characterised the Nigerian criminal justice system especially the trial courts. Though, this may not be so with the appellate courts as section 294(2) of the 1999 Constitution partly addressed this issue as it relates to judgments pending before the



Courts of Appeal and Supreme Court with the proviso that another justice of the court can deliver and pronounce the judgment of his learned brother who is absent. However, this is not the case with trial courts considering the fact that once a serving judge of a state High Court or of the Federal High Court, is elevated to the higher bench, usually, the Court of Appeal, matters which had been handled by these judicial officers, more particularly judgments written but yet to be delivered by them in open court, suffer the ill fortune of a de novo trial. This is so because there are no provisions in the Nigerian Criminal Justice laws that permits another judge of the same trial court to conclude the trial in their stead. This gap in the criminal justices laws no doubt occasion injustice and has played out in quite a number of decided cases in Nigeria some of which shall be examined below.

Akingbola's case¹⁴ where the N5billion corruption charges brought against Dr. Erastus Akingbola, former Managing Director of defunct Intercontinental Bank Plc., by the Economic and Financial Crimes Commission, EFCC terminated abruptly after it was adjourn by the then presiding judge to November 15, 2012 for adoption of written addresses of parties and Justice Habib Abiru of High Court Ikeja was elevated to a higher bench two weeks before November

15,2012. The case was abruptly terminated and re-assigned to another judge for retrial.

Also in *Ogbunyiya & Ors v. Okudo & Ors*¹⁵, which came up before the Supreme Court for determination, the Respondents in 1958, filed their claims for title to land at Aboh in Ogidi, seeking damages for trespass thereon and injunction in the High Court of Onitsha in the former Eastern Nigeria (part of which is now Anambra State) after the Nigerian civil war and the creation of States, the suit was eventually heard by Justice Nnaemeka-Agu who after listening to the address of counsel on both sides on the 13th day of June, 1977, adjourned the matter to 17th June, 1977, when he duly delivered judgment as already stated. Subsequent to this judgment, Justice Nnaemeka-Agu was appointed a Judge of the Court of Appeal with effect from the 15th day of June, 1977. The Appellants unsuccessfully appealed to the Court of Appeal, from the said judgment of Justice Nnaemeka-Agu. The Appellants again appealed to the Supreme Court contending as they did at the Court of Appeal that the judgment of the High Court of Anambra State was null and void same having been delivered by the learned Judge when he had no jurisdiction to do so. The appeal was allowed and the judgments of Justice Nnaemeka-Agu as well as that of the Court of Appeal were set aside. Trial de novo resulting from elevation of judicial officers characterised the Nigerian Criminal Justice system pre-2015 and is the major cause of undue delays which occasioned injustice to the society, victims and litigants.

3.0 Withdrawal from Criminal Proceedings under the ACJA 2015

Section 349 of the ACJA contains express provisions on how withdrawals may be conducted. ACJA acknowledges that the discontinuance of representation by a legal practitioner can occur at the instance of the court on its own motion, the practitioner or the client/defendant. The Act also contains to a large extent, express provisions relating to how withdrawals may be conducted.

3.1 Withdrawal Due to Defendant's Request

Section 349(2) provides that where the legal practitioner who has appeared for the defendant ceases to appear in court in two consecutive sessions of the court, the court shall inquire from the defendant if he wishes to engage another lawyer himself or have a lawyer engaged for him by way of legal aid. The law



mandates the court to make the options available to the defendant¹⁶. The effect is to ensure there is adequate representation for the defendant and also to elicit information whether the lawyer has informed the defendant or the court of his non-appearance or withdrawal from his case. Where the defendant wishes to engage another legal practitioner of his choice, the court shall allow him to do so in a reasonable time but not exceeding 30 days¹⁷. This is in consonance with the provisions of section 36(6) (c) of the Constitution.

3.2 Withdrawal by the Legal Practitioner:

Under the ACJA, a legal practitioner may choose to withdraw his representation of a client. The ACJA, mandates the legal practitioner to conduct the case on behalf of his client until final judgment¹⁸. Section 349 (7) specifically provides that 'A legal practitioner, other than a law officer engaged in any matter shall be bound to conduct the case on behalf of the prosecution or defendant until final judgment...' But this duty can be discontinued by the practitioner at any time during the proceeding, for any special reason¹⁹. What amounts to special reason is not explicitly provided. However, as alleged in Chukwudumeme Onwamadike's case special reasons may include threat to life²⁰.

The Billionaire Kidnappers Case

*The State of Lagos v.
Chukwudumeme Onwamadike &
Ors ID/5970C/17*

June 13, 2018, lead counsel to Chukwudumeme Onwamadike a.k.a Evans, applied to withdraw himself from representing the defendant against the criminal charges pending before the Lagos High Court. The legal practitioner withdrew for personal interests and argued that he acted according to the provision of Rule 21 RPC 2007 by disengaging from the employment as his life and that of other defence lawyers were repeatedly threatened. Proceedings were adjourned to enable the defence engage a new counsel and on June 22, a new counsel announced appearance.

3.2.1 Procedure for Withdrawal

The ACJA has laid down procedures for withdrawal from proceedings by counsel either at his instance or at the instance of the defendant. Section 349(7) provides that where a legal practitioner indicates withdrawal from a case, he must make an application to the court to this effect, showing special reasons. The legal practitioner is mandated to notify the court not less than three days before the date fixed for hearing and such notice shall be served on the court and all parties²¹. This is also given credence to by the RPC which indicate that he must give reasonable notice to the client allowing him to engage another legal practitioner²². The implication of this procedure is to give the court and the defendant prior knowledge of counsel's intending withdrawal.



the court and the defendant prior knowledge of counsel's intending withdrawal before the date fixed for hearing. This prior information also gives the court an opportunity to rule on the application. This position is unlike the pre-ACJA situation exemplified in the case of *Donatus Ndu v Eze*, supra where the lawyer to the defendant did not give any notice but merely informed the court of his intention to withdraw during the proceeding. This can occasion a miscarriage of justice. For instance, one of the grounds of appeal to the Supreme Court in Ndu's case was that the lack of final oral submission of the defence counsel as a result of withdrawal was detrimental to the accused who was sentenced to death.

Curiously, the legal practitioners withdrawing representation in Maryam Sanda's case made their application pursuant to section 492(3) rather than 349(7)²³ and (8) of the ACJA. Section 492(3) of the ACJA gives the judge broad powers to ensure justice where there are no express provisions in the Act. No reason was stated in the notices of withdrawal. However to the extent that the Act specifically provides in section 349(7) that "A legal Practitioner, other than a law officer, engaged in any matter shall be bound to conduct the case ... until final judgment, unless allowed for any special reason to cease from acting by the court of its own motion or upon application by the legal practitioner," the reliance by the court on section 492(3) is erroneous.

3.3 Withdrawal by a Judge:

The ACJA does not expressly require Judges to withdraw from presiding over criminal proceedings. However, section 492(3) ACJA provides that where

Nnamdi Kanu's Case: Charge No. FHC/Abj/CR/383/2015

The defence counsel filed a petition against Justice Tsoho, the presiding judge of the criminal proceedings at the National Judicial Council. The Defence Counsel alleged bias and lack of confidence in the court.

Justice Tsoho in highlighting a lack of personal interest in the matter however returned the case file to the Chief Judge of the Federal High Court for reassignment.

there are no express provisions in this Act, the court may apply any procedure that will meet the justice of the case. This general provision can



serve as the basis for withdrawal of a judge from a criminal matter before it.

3.4 Elevation of Judges

Section 396 (7) of the ACJA laid to rest the aged long issue of trial de novo which characterised the Nigerian criminal justice system and also occasioned hardship on litigants and undue delay in the prosecution of criminal cases. Before the enactment of the ACJA, a judge of a court by reason of being elevated to the appellate court automatically withdraws from any matter before him at the trial court. By the provision of section 398(7) of the ACJA, what was obtainable in the trial courts before the enactment of the

Procedure under section 396(7)

A procedure for actualising section 367(7) ACJA is gradually evolving. The appropriate procedure is for counsel to apply to the head of the Court where the judicial officer has been elevated to for a fiat to enable the Judge conclude the case. A letter by counsel suffices.

In *EFCC v. Rashid Ladoja* for example, towards the conclusion of hearing on the 11 year old trial, the trial judge Justice Idris Mohammed was elevated to the Court of Appeal on 21 June 2018. However, in compliance with section 396(7) of the ACJA, the elevated trial Judge was issued a fiat by the President of Court of Appeal Justice Zainab Adamu Bulkachuwa to conclude the case.

On February 8, 2019, Justice Idris concluded the 11 year old trial by delivering the Judgment which acquitted Rashidi Ladoja

Act²⁴ is no longer the law. The Act now permits a trial court judge elevated to the appellate court to continue with cases that were part heard before his elevation. However, some doubt has been expressed about the constitutionality or practicability of this section²⁵, as the elevated judge is perceived to be *functus officio* any such part heard proceedings in the lower court.

It is noteworthy that section 284(2) of the 1999 Constitution provides that -

“Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may state in writing that he adopts the opinion of any other Justice who delivers a written opinion: Provided that it shall not be necessary for the Justices who heard a cause or matter to be



present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing.”

In *Anyaoke v. Adi*,²⁶ the Supreme Court construed section 294(2) of the Constitution as enabling a justice of the Court of Appeal or Supreme Court to read the written opinion of another justice who is absent at the delivery of judgment but expressed his opinion before death, retirement and elevation. See also *Wulge v. Olayinka* where a similar decision was reached at the Court of Appeal²⁷. While therefore section 294(2) of the Constitution facilitated the delivery of judgment this section is limited to appellate courts and not applicable where judgment or opinion is yet to be expressed or to proceedings in a High court.

Section 396(7) of the ACJA is no doubt revolutionary and far-reaching. It provides that -

“Notwithstanding the provision of any other law to the contrary, a Judge of the High Court who has been elevated to the Court of Appeal shall have dispensation to continue to sit as a High Court Judge only for the purpose of concluding any part-heard criminal matter pending before him at the time of his elevation and shall conclude the same within a reasonable time: Provided that this subsection shall not prevent him from assuming duty as a Justice of the Court of Appeal.”

Despite misgivings about the provision and its novelty, there appears to be no constitutional reason why an elevated trial court judge cannot by administrative dispensation of the Head of the higher court be allowed to conclude part heard matters at the trial court after his elevation to a higher bench.

4.0 Commentary on the Withdrawal Process under the ACJA

Regrettably the ACJA did not prescribe procedures for withdrawal by judges from criminal proceedings. Although section 492(3) (ensuring justice delivery) can fill the lacunae nevertheless, the absence of the appropriate procedure



remains a problem. The Act ought to provide for a procedure for withdrawal taking into consideration situations where the intended withdrawal was as a result of a petition from a litigant and his counsel or on the judge's volition.

Furthermore, considering that one of the powers of a judge is to require counsel to conduct themselves in a manner that promotes effective disposition of case²⁸, what options are open to counsel if the court refuses an application for withdrawal? Can the court impose an unwilling counsel on a client or vice-versa? Since the ACJA does not provide for the effect of a refusal by the court, it would appear that the judges have discretion in such matters. Nevertheless, in entertaining a motion for withdrawal by the lawyer, the court should put into consideration the provision of Rule 21 of the RPC 2007 which provides for 'good cause.' Rule 21(2) RPC provides that 'good cause' includes: conflict of interest between the lawyer and the client, where the client insists on an unjust or immoral course in the conduct of his case among others. The court should determine if the reason for the withdrawal from the case falls into the category of good cause under the RPC before ruling on the application. Considering that the court reserves the right to deny or grant a motion to withdraw from a case³⁰, such motions should be treated on a case by case basis.

Another critique of the process of withdrawals under the ACJA is with respect to the time frame for a notice of withdrawal by the legal practitioner. Section 349(8) provides for notice of not less than 3 days before the next hearing. Although described as the minimum, the stipulated time frame which does not refer to 'working days' is arguably insufficient to enable a defendant engage another lawyer.

Despite these issues, it is important to emphasize that the withdrawal by judges and defence counsel from criminal proceedings is a worthy innovation of the ACJA. Withdrawals ultimately create delays in the dispensation of justice. Although the ACJA does not eliminate the possibility of withdrawals, the provisions ensure that withdrawals by counsel and in cases where the judge is elevated do not disrupt proceedings.

5.0 Recommendations and Conclusion

In view of the analysis above, the following recommendations are imperative:

- i. The ACJA should expressly provide for the procedure to be adopted for cases of withdrawal by the judge; how such cases will be treated, the



duration of time for transfer or reassignment of the case to another judge.

- ii. The 3-day notice required to be given to the parties and court in ACJA section 349(8) is arguably insufficient. The Act should provide for a more reasonable time frame of 7 working days as the minimum requirement;
- iii. In ruling on the notice to withdraw, the judge may state that the lawyer delivers to the client all documents and property to which the client is entitled, and comply with applicable laws and rules. The judge may further rule that the lawyer shall refund promptly any part of a fee paid in advance that has not been earned.



END NOTES

1. CAP C41 LFN 2004.
2. Rules of Professional Conduct For Legal Practitioners 2007 (RPC).
3. Code of Conduct of Judicial Officers of the Federal Republic of Nigeria, in force February 2016, <<http://www.njc.gov.ng/code-of-conduct>> accessed on 26 November 2018.
4. RPC, Rule 24(1).
5. Joseph A. Woodruff, 'Withdrawal of Counsel in Criminal Cases' (1980-1981) 5 *Journal of the Legal Profession* 243.
6. RPC, Rule 21.
7. **SC 120/1989.8.**
8. *Akoh Dickson Ameh Ojonye v. Dr. Innocent Onu & Ors* (2018) LPELR-44212(CA), *Pam v ANPP* (2007) LPELR- 9000(CA).
9. *Akoh Dickson Ameh Ojonye v. Dr. Innocent Onu & Ors* (2018) LPELR-44212(CA), per **Jummai Hannatu Sankey**, JCA.
10. **S.C. 42/1982.**
11. *People v. Jacobs* at 540, 27. Cal. App. 3d at 253 A US case in Woodruff (n 8).
12. Rule 12 (1) (a-d), Code of Conduct (n 6).
13. Rule 12.1 A Judicial Officer should disqualify himself in a proceeding in which his impartiality may genuinely and reasonably be questioned, including but not limited to the instances where:
(a) he has a personal bias or prejudice concerning a party or personal knowledge of facts in dispute.
14. Charge No: FHC/L/443C/2013
15. (1979) LPELR-2295(SC)
16. ACJA, Section 349 (3-5).
17. ACJA, Section 349 (3).
18. ACJA, Section 349 (7).
19. Ibid.
20. 'Onozure Dania Evans lawyer, Ogungbeje withdraws from case', June 15, 2018 <<https://www.vanguardngr.com/2018/06/evans-lawyer-ogungbeje-withdraws-case/>> accessed on 22 November, 2018.
21. ACJA, section 349 (8).
22. RPC Rule 21(3).
23. ACJA 2015, Section 349 (7)
24. Administration of Criminal Justice Act , 2015
25. Peter Olaoye Olalere, and Other, Elevating Trial Judges To A Higher Bench: Impact On Part- Heard Matters <<http://www.spaajibade.com/resources/wp-content/uploads/2018/07/effects-of-elevation-of-a-judge-to-the-court-of-appeal-olalere-niyi.pdf>> accessed 17 February 2019
26. (1985) 4 SC 213
27. (2017) LPELR-43356 (CA)\
28. Woodruff, (n 8) 245.
29. See Rule 21(2) (a-d).
30. Woodruff (n 8), 246.



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This Policy Brief is one of the outputs under a Project that aims to facilitate implementation of the Administration of Criminal Justice Act 2015 by increasing understanding and awareness about the Law. The project is supported by the John D. and Catherine T. MacArthur Foundation.

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