THE JOURNAL OF SUSTAINABLE DEVELOPMENT LAW AND POLICY

ISSN: 2467-8406 (Print) 2467-8392 (Online) Journal homepage: https://www.ajol.info/index.php/jsdlp

Advancing Online Dispute Resolution in Nigeria: Current Opportunities, Legal Challenges and the Ways Forward

Jimoh, Mujib Akanni

To cite this article: Jimoh, Mujib Akanni (2020) Advancing online dispute resolution in Nigeria: Current opportunities, legal challenges and the ways forward, Law and Policy, 11:2, 407-431,
To link to this article: https://dx.doi.org/10.4314/jsdlp.v11i2.6

Published online: 30 Oct 2020.

The Journal of Sustainable Development Law and Policy
Volume 11, No 2, 407-431, https://doi.org/10.4314/jsdlp.v10i2.6

Advancing online dispute resolution in Nigeria: Current opportunities, legal challenges and the ways forward

Jimoh, Mujib Akanni[1]

(Received 09 September 2020; final version received 24 November 2020)

> "In my view, the simplest answer to this issue is, 'It's 2020'. We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back. That is not to say that there are not legitimate issues that deserve consideration. Technology is a tool, not an answer."
>
> Arconti et. al. v. Smith et. al.[2]

The outbreak of COVID-19 has impacted the Nigerian legal system with the introduction of virtual court hearing. Currently, there is no legislation on virtual court hearings in Nigeria. The foregoing notwithstanding, this article examines the constitutionality of this type of hearing and its practicability under the extant laws. Virtual court had been discouraged because of the concern that it may not pass the test of public trial, which is constitutionally guaranteed. This article analyses the provisions of the Constitution as well as available case laws, which suggest that if certain requirements are met, virtual courts may pass the constitutional test of publicity of trial. It is also submitted that the virtual court will not offend the law on territorial jurisdiction. Nonetheless there are some legitimate concern about the issue of evidence, especially examination of witnesses, which may not be best suited for virtual court. Among these are technological inadequacy necessary for virtual court hearings in Nigeria leading to recommendations arising from practices in other jurisdictions

Keywords: Online Dispute Resolution, Virtual court, Public trial, Evidence, Technology

1. INTRODUCTION

The legal, political, social, economic, religious, and financial structures of the world have been impacted by the outbreak of

---

[1] LLB (First Class); BL (Hons); Associate, Banwo & Ighodalo, Lagos, Nigeria. mjimoh@banwo-ighodalo.com; mujibjimoh@yahoo.com.

[2] Arconti v. Smith [2020] ONSC 2782 [19], [20] .

the novel Coronavirus Disease 2019 (COVID-19).[3] Although online dispute resolution, specifically virtual court hearing[4] is not new to some jurisdictions,[5] the COVID-19 accelerated the introduction of virtual court hearings to the Nigeria legal system,.[6] The first of such hearings was held by the High Court of Lagos State on 4 May 2020, in the case of The State v. Olalekan,[7] where one Olalekan Hameed was sentenced to death by hanging.[8] Prior to that date, no virtual hearing had been held in Nigeria, because quite understandably, the law does not take notice and does not make any express provision for this type of hearing.

Authors have always maintained that Nigerian laws are mostly outdated and/or do not develop with technological advancements.[9] In Canada, for instance, as far back as 1990, the Rules of Civil Procedure, have made provisions for videoconferencing.[10] One cannot agree less with Myers J. in

---

3 Irfan Mahar, 'Impact of COVID–19 on Global Economic Structure' (Modern Diplomacy, 22 April 2020) <https://moderndiplomacy.eu /2020/04/22/impact-of-covid-19-on-global-economy-structure/> accessed 26 May 2020.

4 Online dispute resolution (ODR) is a broader term than virtual court hearing. ODR is the settlement of disputes through online mode of interaction between the parties. ODR is used as a term to refer to all online dispute resolution. Whereas virtual court is limited to the resolution of dispute which would ordinarily be instituted in a physical court room, virtually or online. See Lukman Ayinla and Taiye Oliyide, 'Juridical Perspective on the Regulation of Online Dispute Resolution in Nigeria' [2020] 7 (2) IUMJ 71. This article focuses more on virtual court hearing.

5 For instance, the United Kingdom. See 'Virtual Court First Hearings' (The Law Society, 5 December 2019) <https://www.lawsociety.org.-uk/support-services/advice/practice-notes/virtual-courts/#> accessed 26 May 2020.

6 Kolawole Mayomi, 'A Case for the Virtual Hearings of Urgent Matters During the COVID–19 Pandemic and Going Forward' (SPA Ajibade & Co Resources, 10 April 2020) <http://www.spaajibade.com/resources/a-case-for-the-virtual-hearings-of-urgent-matters-during-the-covid-19-pa-ndemic-and-going-forward/> accessed 26 May 2020.

7 The State v. Olalekan ID/9006C/2019.

8 Damilola Ekpo, 'Quick Facts about Nigeria's First Virtual Court Hearing' (Ventures, 11 May 2020) <http://venturesafrica.com/quick fact s-about-nigerias-first-virtual-court-hearing/> accessed 26 May 2020

9 See for example, Tosin Osasona 'Time to Reform Nigeria's Criminal Justice System' [2015] 3/2 Journal of Law and Criminal Justice 73, 75.

10 Arconti v. Smith, (n 1) [21].

Arconti et. al. v. Smith et. al that 'we should not be going back',[11] in the Nigerian context, there is an established principle of law that the function of the court is jus dicere non dare – that is, to state and not to make the law.[12] There is no law in Nigeria that recognizes virtual hearing,[13] and if the court cannot interpret the current laws to accommodate it, then, the court should not make one;[14] after all, a society thrives where the letters of the law are adhered to.[15] Thus, while it is desirable that we should not be going back, there are some legal issues that deserve serious consideration before virtual court hearing can stay in Nigeria.

The conventional court setting as we have it, is to have the judge, counsel, parties, witnesses, court officials, and audience in a physical courtroom. Virtual court, on the other hand, dispenses with the physical presence of these parties in the same place.[16] In addition to this, adoption of witnesses' statements on oath, tendering of documents, presentation of argument and delivery of judgment are done electronically.[17] This approach is said to be desirable for its speedy,[18]

---

[11] In view was also shared in Packer v. Packer [1953] 2 All ER I27 (Denni ngMR).

[12] Ugwu v. Ararume (2007) 12 NWLR (Pt. 1048) 365; Ojokolobo v. Alamu (1987) 3 NWLR (Pt. 61) 377 [402]; Okumagba v. Egbe (1965) 1 All NLR 62.

[13] Lukman Ayinla and Taiye Oliyide, 'Juridical Perspective on the Regulation of Online Dispute Resolution in Nigeria' (n 4).

[14] Okumagba v. Egbe (n 12). Conversely, if the current law can be interpreted to accommodate virtual hearing, Court Rules may then be made to provide for Online Dispute Resolution. This is discussed in section 5 of this article.

[15] The Military Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt.1-8) 621; Garba v. Federal Civil Service Commission (1988) 1 NWLR (Pt. 71) 449.

[16] Fredric Laderer, 'The Road to the Virtual Courtroom? A Considera- tion –of Today's – and Tomorrow's – High Technology Courtrooms' [1999] 50/799 South Carolina Law Review 800, 802.

[17] See the definition of virtual court in the Australian case of Harris Scarfe v. Ernst & Young [2005] SASC 443.

[18] Paul Kirgis, 'Cybersettle and the Value of Online Dispute Resolution' [2010] 13 Yale Journal of Commerce and Comparative Analysis 23.

effectiveness[19] and flexibility.[20] The outbreak of COVID-19 has also shown that virtual courts are better adaptable to emergency situations than the conventional court.[21]

The Nigerian "judiciary cannot operate with old models when everything around it, like the economy, or education, has radically transformed in the light of current technological realities".[22] This view relates that the law is expected to accommodate the changes.[23] This article examines the extent to which the laws in Nigeria can accommodate the reality of the virtual court "which has come to stay". This article is divided into six sections. After this introduction, section 2 examines the constitutional debates on virtual court hearing in Nigeria. Section 3 appraises the jurisdictional issues on virtual court hearing. Section 4 discusses some evidential debates that have been made on virtual court hearing. Section 5 advances a synthesis for all the debates and the ways forward. Section 6 is the conclusion.

2. CONSTITUTIONAL DEBATES ON VIRTUAL COURT HEARING

A discussion on the extent of the legality of virtual courts in Nigeria must necessarily start with its constitutionality. This is because, the Nigerian Constitution is considered the fons et

---

[19] Ibrahim Sule, 'Elawyering: Some Trends and Lessons from the USA' [2012] 2 NLPJ 120.

[20] Florence Fermanis, '6 Ways Technology is Changing Law' (Grok Learning, 30 November 2017) <https://medium.com/groklearning/6 ways technology-is-changing-law-6cc3f386754c> accessed 26 May 2020.

[21] See for example, BP v. Surrey County Council [2020] EWCOP 17 (Mr Justice Hayden).

[22] 'Using ICT to Boost Judicial Process" (The Tide, 7 February 2014) <http://www.thetidenewsonline.com/2014/02/07/using-ict-to-boost-ju-dicial-process/> accessed 26 May 2020.

[23] CMC Woodworking Machinery Pty Ltd v Pieter Odendaal Kitchens KZD [2012] 5 SA 604.

origo,[24] the grundnorm[25] and the supreme statute,[26] from which all other laws derive their validity. Further, in the case of virtual court, which no law has expressly provided for, any interpretation of the existing laws to accommodate it, must necessarily accord with the Constitution.[27] The jurisprudence on the superiority of the Nigerian Constitution is like the Rock of Gibraltar, it has never been shaken.[28]

The attitude of the Nigerian Supreme Court has always been that no matter how desirable something might be, if it does not pass the test of constitutionality, it would be declared null and void without remorse.[29] A recently exhibition of this attitude is found in the case of Orji Kalu v. The Federal Republic of Nigeria.[30] In this case, the Appellant, a former Governor of a State in Nigeria, was convicted by the Federal High Court for embezzling public funds. The trial commenced in 2007, before the enactment of Administration of Criminal Justice Act ("ACJA"), 2015. During the trial, which spanned for twelve years, the trial judge was elevated to the Court of Appeal.[31] One established principle of Nigerian law is that if a trial judge ceased to be a judge of that court, the

---

[24] Oladele v. Nigerian Army (2004) 6 NWLR (Pt.868) 166; FRN v. Osahon (2006) 5 NWLR (Pt. 973) 361.

[25] Tanko v. State (2009) 4 NWLR (Pt. 1131) 430; Attorney General On-do State v. Attorney General of Federation (2002) 9 NWLR (Pt. 772) 222; Rabiu v. State (1982) 2 NSLR 293; Tukur v Government of Gongola State (1989) 4 NWLR (Pt.117) 517.

[26] Ibid; see also Sec 1(3) Constitution of the Federal Republic of Nigeria, Cap C23, LFN, 2004 (hereinafter referred to as Nigerian Constitution or Constitution).

[27] Ibid; See also Lukman Abdulrauf and Abdulrazaq Daibu, 'New Technologies and the Right to Privacy in Nigeria: Evaluating the Tension between Traditional and Modern Conceptions' [2016], 2(5) Nnamdi Azikiwe University Journal of International Law and Jurisprudence 113.

[28] Tanko v. State (2009) 4 NWLR (Pt. 1131) 430.

[29] Kalu v. Odili (1992) 5 NWLR (pt. 240) 130 Fasakin Foods (Nig.) Ltd v. Shosanya (2006) 10 NWLR (Pt. 987) 126 at 148 -149.

[30] At the time of writing this Article, this case has not been reported in any law report. But see Bolanle Olabimtan, 'What Just Happened in the Supreme Court in Orji Kalu's Case' (The Cable, 8 May 2020) <https://www.thecable.ng/explainer-what-just-happened-in-the-supreme-court-on-orji-kalus-case> accessed 26 May 2020p.

[31] Ibid.

trial would start de novo.[32] Yet, the ACJA purposes to ensure quick dispensation of justice[33] by creating an exception to this principle. As such, Section 396(7), ACJA, 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 partly-heard criminal matter pending before him at the time of his elevation; and shall conclude the same within a reasonable time, provided that this section shall not prevent him from assuming duty as a Justice of the Court of Appeal." An application was made to the President of the Court of Appeal pursuant to this provision, to allow the elevated judge to continue the trial at the Federal High Court. This application was granted, and after the conclusion of the trial, the Appellant was sentenced to twelve years imprisonment.[34]

On the other hand, Section 253 of the Nigerian Constitution provides that "the Federal High Court shall be duly constituted if it consists of at least one Judge of that Court". The Appellant fought his conviction to the Supreme Court on the basis that the judge that heard the case and sentenced him, was no longer 'a judge of that court.' The Supreme Court agreed with the Appellant, and found that Section 396(7), ACJA was contrary to Section 253 of the Nigerian Constitution since the elevated judge had ceased to be a "judge of that court". The question before the Supreme Court was, therefore, simple – should the supremacy of the Constitution be sacrificed for quick dispensation of justice?

---

[32] In Ogbuanyinya & 5 Ors v. Obi Okudo (1979) 9 SC 32, the trial jud-ge, Hon. Justice Nnaemeka – Agu, was held to have been wrong to deliver judgement on the case after he had been elevated to the Court of Appeal. See also Bichi v. Shekarau (2009) 7 NWLR (Pt. 1140) 311.

[33] See the Explanatory Memorandum to the ACJA. See also 'The Role of the Administration of Criminal Justice Act in the Speedy Dispensation of Justice in Nigeria' (Hurilaws, 14 April 2019) <https://hurilaws.org-/the-role-of-the-administration-of-criminal-justice-act-in-the-speedy dispensation-of-justice-in-nigeria/> accessed 26 May 2020).

[34] Olamide Fadipe, 'Court sentences Orji Kalu to 12 years in prison for fraud' (Premium Times, 5 December 2019) <https://www.premi-umtime-sng.com/news/headlines/366707-breaking-court-sentences-orji-kalu-to-12-years-in-prison-for-fraud.html> accessed 26 May 2020

The court answered in the negative, quashed the conviction and ordered a retrial.

It would seem that the Supreme Court did not care about the purport of Section 396(7), ACJA. As desirable as quick dispensation of justice is, the Supreme Court did not sacrifice the supremacy of the Constitution it. Therefore, there appears to be no reason to believe that the Supreme Court would, in the case of virtual courts, despite its desirability, sacrifice the supremacy of the Constitution, if the court finds virtual courts inconsistent with the Constitution. The major constitutional argument against virtual court hearing is that such hearing is a violation of the right to public trial guaranteed under Sections 36(3) and (4) of the Nigerian Constitution. This argument is critically analysed below.

2.1 Right to public trial

The Nigerian Constitution provides that the determination of the civil rights and obligations of a person, including the announcement of the decision of the court,[35] as well as criminal proceedings,[36] shall be held in public. It is important to emphasize the mandatory nature of this provision since the modal verb used is "shall". The law is almost beyond doubt[37] that, when the word "shall" is used, it is mandatory, that is, it leaves no room for discretion.[38] It is therefore not surprising that cases like –

i Manakaya v. Manakaya,[39] where proceedings were held in the judge's chambers;
ii Edibo v. The State,[40] where the plea of the accused was taken in the judge's chambers; and

---

[35] See Sec 36(3), Nigerian Constitution.
[36] See Sec 36(4), Nigerian Constitution.
[37] There are certain situations when "shall" may be interpreted as directory and not mandatory. See Amadi v. NNPC (2000) 10 NWLR (Pt. 674) 76.
[38] Agbih v. Nigeria Navy (2011) 2 SCNJ 1 [5]; Amokeodo v. IGP (1999) 6 NWLR (Pt. 607) 457; Katto v. CBN (1991) 9 NWLR (Pt. 214) 126 [147].
[39] Manakaya v. Manakaya (2001) 43 WRN 138; See also Oviasu v. Ovia-su (1973) 1 ALL NLR 73; Nuhu v. Ogele (2003) 18 NWLR (Pt. 852) 251.
[40] Edibo v. The State (2007) 13 NWLR (Pt. 1051) 306

iii Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd,[41] where judgement was delivered at the judge's chambers – were all voided on the ground that they did not pass the test of 'public trial'.

It is doubtful if the virtual death sentence passed in The State v. Olalekan,[42] as a result of the lockdown order made by the President[43] and direction by the Chief Justice,[44] due to COVID-19, will not be voided if it is appealed, unless Section 36(4) of the Constitution can be interpreted in a way to accommodate virtual court as a public trial. This is because the exceptions listed in Section 36(4)(a) are not inclusive of public health.

It would appear the draftsman did not intend to include public health as an exception to public trial. This argument is further reinforced by the fact that Section 45 of the Constitution, which contains general derogation,[45] includes 'public health' as a ground for derogation from the rights contained in Sections 37, 38, 39, 40 and 41. It may thus, be argued that in the context of Section 36, which is not included in the general derogation, the interest of 'public health' may not be a sufficient reason to conduct a trial secretly. If the foregoing argument is taken seriously, decisions like The State v. Olalekan, and in general, virtual courts, can come to stay, if Section 36(3) and (4) are interpreted in a way to accommodate virtual hearing, rather than if virtual hearings can fall within the exceptions.

Perhaps, the greatest argument against virtual court hearing is the proposition that it does not qualify as a public trial.[46] What is public trial within the context of the Nigerian

---

41 Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd (1995) 8 NW LR (Pt. 413) 257.

42 The State v. Olalekan (n 7).

43 'Nigeria: Buhari to Unwind COVID–19 Lockdown in Key States' (Aljazeerah, 27 April 2020) <https://www.aljazeera.com/news/2020-/04/nige-ria-buhari-unwind-covid-19-lockdown-key-states 20042720-0057949.ht-ml > accessed 26 May 2020.

44 Halimah Yahaya, 'Coronavirus: Nigeria Shuts All Courts' (Premium-Times, 23 March 2020) <https://www.premiumtimesng.com/news/he-adlines/383446-just-in-coronavirus-nigeria-shuts-all-courts.html> accessed 26 May 2020.

45 Dokubo-Asari v. FRN (2007) 12 NWLR (Pt. 1048) 331.

46 Tobi Soniyi, 'Judges Oppose Virtual Court Sitting, say it's Unconstitutional' (Thisday, 17 May 2020) <https://www.thisdaylive.com/in-

Constitution? Interestingly, no Nigerian court has ever defined a public trial as one conducted exclusively in a public physical place[47] or a place with four walls.[48] Rather, authors[49] and judicial authorities agree that a trial will qualify as public if "the public have the right to ingress and egress as of right"[50] or if "it is outrightly accessible and not so accessible on the basis of the permission or consent of the judge".[51] Some proponents have argued that virtual court will fail the test of publicity, not because it is not conducted in a physical courtroom, rather, because is not affordable to a lot of Nigerians.[52] This Affordability Test is supported with facts that due to the poverty level in Nigeria, most Nigerians cannot afford smartphones, laptops, data and electricity.[53] However, as persuasive as the Affordability Test is, it does not hold water when subjected to critical analysis. If a trial was conducted in a physical courtroom in Lagos, would it be right to void the trial because a seventy-year old woman said she could not afford the cost of transportation to attend the trial? If a trial would be voided because a lot of people cannot afford the technology for virtual hearing, then, so should a physical trial, for people a lot of people cannot afford to be at the trial courtroom.[54] The Affordability Test, from this analysis,

---

dex.php/2020/05/17/judges-oppose-virtual-court-sitting-say-its-unconstitutional/> accessed 26 May 2020.

47 Kemi Pinheiro, 'Is a Constitutional Amendment for Virtual Court Hearings Really Required?' (Thisday, 19 May 2020) <https://www.thisdaylive.com/index.php/2020/05/19/is-a-constitutional-amendment-for-virtual-court-hearings-really-required/> accessed 26 May 2020.

48 Harold Benson, 'COVID-19: The Legality of Virtual Court Proceedings in Nigeria' (The Nigeria Lawyer, 8 May 2020) <https://thenigerialawyer.com/covid-19-the-legality-of-virtual-court-proceedings-in-nigeria-by-harold-benson/> accessed 26 May 2020.

49 Fidelis Nwadialo, Civil Procedure in Nigeria, (2nd ed, MIJ Professional Publishers 1990) [674]; James Agaba, Practical Approach to Criminal Litigation in Nigeria, (3rd ed, Renaissance Law Publishers 2017) [524].

50 Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd, (n 40)

51 Kosebinu & Ors v. Alimi (2005) LPELR-11442 (CA).

52 Harold Benson, 'COVID-19: The Legality of Virtual Court Proceedings in Nigeria' (n 48).

53 Tobi Soniyi, 'Judges Oppose Virtual Court Sitting, say it's Unconstitutional' (n 46.

54 According to the National Bureau of Statistics, the poverty rate in Nigeria is 40.1%. This means 82.9 million people are poor in Nigeria as of

cannot therefore be the proper test to determine whether virtual courts qualify as public trial.

An alternative arguent arises from Case law, which has shown that the proper test to determine whether a trial qualifies as public trial is the Accessibility Test.[55] This test makes sense for the very fact that, a court may sit in a physical courtroom and yet, decide to exclude members of the public; while a judge may sit in chambers or virtually, without excluding members of the public.[56] The Accessibility Test is a test of circumstances and reasoning. Should a physical courtroom where the word 'private' was written on the outer door of the room qualify as a public trial,[57] while a court session held virtually, where the link for the session was made available to the public, not so qualify? There is a strong reason to believe that the Supreme Court would adopt the Accessibility Test rather than the Affordability Test in determining whether virtual court hearings qualify as public trial. In Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd, the Supreme Court held extensively that:

> "Whether a Judge sitting in chambers to conduct proceedings which should be conducted in open court is sitting in public or in camera seems in the final analysis to be a question of fact. A trial in camera is one in which the public has been expressly excluded. Where there is no express exclusion and the trial was not described as in camera, whether inference of implied exclusion can be drawn depends on the circumstances. The words 'open court' do not include a court where the public are. Now, when in the case the learned judge sat in chambers to deliver his judgment, was he sitting in a place where the public are excluded? Or put in another way, was he sitting in a place where the public have a right to be present? But for the fact that I am trammeled by authority, I would have felt

2019.<https://nigerianstat.gov.ng/elibrary?queries[search]=poverty< ac -cessed 26 May 2020.

[55] Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd, (n 40).

[56] Ibid.

[57] McPherson v. McPherson (1936) AC 177.

> grave hesitation in holding that a sitting held in the Judge's chambers is one held in public.
>
> The trammeling authority in Oyeyipo v. Orinloye said (sic): '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. See Hartmont v. Foster (1881) 8 QBD 82, 84. 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. The determinant factor is the exclusion of the public and that is a matter of fact. It therefore behooves a party who contends that proceedings are not held in public to show that the public have been excluded."

The foregoing authority is to the effect that the publicity of a trial is not determined by place or platform, rather, it is determined by accessibility to the public.[58] After all, the Nigerian law has never mandated a judge to sit within the four walls of a courtroom.[59]

Notwithstanding the reasonability of the Accessibility Test, some proponents believe that even if the link for a virtual court hearing is made available to the public, there is still a lacuna in the test. Argument has been made that videoconferencing platforms to be used for virtual hearing

---

[58] Amy Salyzyn, '"Trial by Zoom": What Virtual Hearings Might Mean for Open Courts, Participants Privacy and the Integrity of Court Proceedings' (Slaw, 17 April 2020) <http://www.slaw.ca/2020/04/17/-trial-by-zoom-what-virtual-hearings-might-mean-for-open-courts-participant-privacy-and-the-integrity-of-court-proceedings/> accessed 26 May 2020.

[59] The provisions on visit to the locus in quo is an example. By Sec 127(2) of the Nigerian Evidence Act (hereinafter referred to as Evidence Act), the court may proceed with hearing at the locus upon visit. See Commissioner of Police v. Olaopa (1959) WRNLR 22.

have limits on the number of participants.[60] Prima facie, this argument might defeat the Accessibility Test – for instance, the electronic messaging application, WhatsApp, can only accommodate eight participants for a video call at a time.[61] However, it must be emphasized that the underlying jurisprudence on publicity of a trial has never been on the number of people at the trial, rather, on whether the public was given the opportunity to access the trial. The Supreme Court seemed to have endorsed this view when it held that "a judge may sit in chambers without excluding members of the public. It is therefore not unconstitutional to sit in chambers".[62] Despite the apparent fact that a judge's chambers is a private office, which ordinarily cannot accommodate a lot of people, the Supreme Court was not prepared to hold that it was not a public place, if there was no extrinsic clog in accessing the chambers.

The sense in the Supreme Court's view may be illuminated in two ways. First, if a trial was held in a courtroom having a ten thousand capacity, but only attended by the parties and their counsel, would such trial cease to be a public trial? Secondly, if a trial was held in a courtroom having a capacity of thirty people, but a thousand people attended the hearing and were all unable to enter the courtroom due to the capacity,[63] would such trial cease to be a public trial? In these two situations, there cannot be any compelling argument that the trials were not public since opportunity was afforded to the public. One should not be chided for inferring from the decision of the Supreme Court in Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd that sufficiency of opportunity is not relevant in determining the test of publicity, but the provision of the opportunity itself.

---

[60] Generally, the maximum participant on Zoom is 100, though this may be increased up to 1000. See 'Zoom Meeting Plan for your Business' (Zoom) <https://zoom.us/pricing> accessed 26 May 2020.

[61] 'How to video call' (WhatsApp) <https://faq.whatsapp.com/en/iphone/26000028/> accessed 26 May 2020.

[62] Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd, (n 40).

[63] Generally, Nigerian courts have small capacity. See Ibe Uwaleke et al, 'A Tale of Nigerian Courts, Infrastructure Deficit' (The Guardian, 29 March 2016) <https://guardian.ng/features/law/a-tale-of-nigerian-courts-infrastructure-deficit/> accessed 26 May 2020.

However, the foregoing notwithstanding, there is a legitimate concern that the platform to be used for the virtual hearing should be able to accommodate, at least, a member of the public, other than the judge, counsel, parties and court officials. Though it is true that most of the courtrooms in Nigeria are small,[64] it is doubtful if there exists any courtroom in Nigeria or a judge's chambers that cannot accommodate at least, a member of the public, other than the judge, counsel, parties and court officials. In the era of technology where there are different videoconferencing platforms like Zoom, Skype and Microsoft Team, which can accommodate more than a hundred participants,[65] the adoption of a platform that cannot accommodate more than the judge, parties and their counsel would seem to be no opportunity to the public at all.

The analysis of the available case law and jurisprudence shows that, whether virtual court hearing will amount to a public trial is a matter fact, rather than that of law. It is improbable, if not impossible, for a virtual hearing which satisfies the conditions –

i the link to the hearing is made available to members of the public; and

ii the videoconferencing platform adopted accommodates at least a member of the public, other than the judge, counsel, parties and the court officials – to be held to violate the right to public trial under the current legal regime.

3. JURISDICTIONAL DEBATES ON VIRTUAL COURT HEARING

The jurisdictional concern about virtual court hearing may be illuminated thus: Suppose a judge of the High Court of Lagos State travelled to Abuja for their daughter's wedding but was unable to travel back to Lagos on Sunday due to cancellation of flight. Suppose the judge had a matter slated for commencement of hearing on Monday, and they opted to virtually sit for the session while in Abuja, would it be valid to raise an objection to the jurisdiction of the court?

The foregoing raises an issue of territorial jurisdiction. Case law has been proliferated on what jurisdiction is.

---

[64] Ibid.

[65] 'Zoom Meeting Plan for your Business' (n 62).

Jurisdiction is seen as the authority which a court has, to entertain matters presented to it.[66] It is so important that it has been described as the "basic foundation and life wire of access to court".[67] A decision of the court without jurisdiction is vanitas vanitatum – a nullity – no matter how beautifully conducted the trial was.[68] As such, the issue of jurisdiction may be raised at any time during trial, even for the first time at the Supreme Court.[69] Case law recognizes that jurisdiction may be substantive or territorial.[70] On the one hand, substantive jurisdiction refers to matters over which a court may adjudicate as expressly stipulated by the Constitution or by enabling statutes.[71] On the other hand, territorial jurisdiction implies a geographical area within which the authority of the court may be exercised and outside which the court has no power to act.[72]

Further, courts have held that when it comes to territorial jurisdiction, it must be viewed from two perspectives.[73]
The first is that territorial jurisdiction may refer to the geographical area of a court. For example, it is well settled that a High Court in one State cannot have jurisdiction to hear and determine a matter which lies exclusively within the territorial limits and thus, jurisdiction of the High Court of another State. Ergo, where the facts that gave rise to the cause of action occurred entirely within the territorial or geographical limits or confines of one State, the High Court of another State cannot have the jurisdiction to hear and determine that suit.[74]

---

66 Mobil v. LASEPA (2002) 18 NWLR (Pt. 798) 1; Obiuweubii v. CBN (2011) 7 NWLR (Pt. 1247) 465.

67 Rear Admiral Agbiti v. Nigeria Navy (2011) 4 NWLR (Pt. 1236) 175

68 Odom v. PDP (2015) 6 NWLR (Pt. 1456) 527; Lawani v. Shettima (2001)FWLR (Pt. 71) 1870).

69 Petrojessica Enterprises Ltd & Anor v. Leventis Technical Company Ltd (1993) 5 NWLR (Pt. 244) 675; APGA v. Oye (2019) 2 NWLR (Pt. 1657) 472.

70 Abraham v. FRN (2018) LPELR-44136 (CA).

71 Idemudia v Igbinedion University, Okada (2015) LPELR-24514 (CA); Patil v FRN (2015) All FWLR (Pt. 775) 228; Ibori v FRN (2009) All FWLR (Pt. 487) 157.

72 Dariye v FRN (2015) LPELR-24398 (SC) 29.

73 Lemit Engineering Ltd v. RCC Ltd (2017) LPELR-42550 (CA); Muhammed v. Ajingi (2013) LPELR-20372 (CA).

74 Anon Lodge Hotels Ltd v. Mercantile Bank (1993) LPELR-14725 (CA); Rivers State Government v. Specialist Konsult (2005) 7 NWLR

The second perspective refers to the venue of the court.[75] Thus, even if a matter was rightly instituted at the High Court of Lagos State, it may still be fatal to the case, if the matter was instituted and heard in a wrong judicial division of the High Court of Lagos State,[76] especially if the Defendant raises this issue timeously.[77]

Generally, the venue in which a suit may be heard and determined is an aspect of the jurisdiction of the court.[78] The various Courts Rules have provided for the proper venue to institute and hear different actions.[79] For land matters, the action should be commenced in the judicial division where the land is situated;[80] for breach of contract or specific performance, the action should be commenced in the judicial division in which the contract ought to have been performed or in which the defendant resides or carries on business.[81] In the context of virtual court, if a matter was properly commenced at the High Court of a State and in the proper judicial division, say, Lagos, would evidence of the fact that the judge travelled and conducted the trial in another State affect the jurisdiction of the court? This is a legitimate concern, because if the question were answered in the negative, the use of virtual court hearing becomes restrictive. One of the greatest benefits of virtual hearing is the ability of the judge to proceed with adjudication in a "world they cannot travel to or in a world they may choose not to travel for other reasons."[82] Should the fact that a judge was unable to be within their State of jurisdiction prevent them for hearing

---

(Pt.923) 145; Dairo v. Union Bank of Nigeria Plc & Anor (2007) 16 NWLR (Pt.1059) 99.

75 International Nigerbuild Construction Co v. Giwa (2003) 13 NWLR (Pt.836) 69.

76 The various High Courts have different judicial divisions in Nigeria

77 Ogigie v. Obiyan (1997) 10 NWLR (Pt. 524) 179.

78 Ajibola v. P.S.T.S.C. Ekiti State (2007) All FWLR (Pt .350) 1357 [1345]

79 See for instance, Order 4, High Court of Lagos State (Civil Procedure) Rules, 2019.

80 Order 4, Rule 1(1) High Court of Lagos State (Civil Procedure) Rules, 2019.

81 Ibid, Order 4, Rule 1(3).

82 Anuj Moudgil et al, 'Virtual Hearings: Are they Really the Answer' (CMS Law, 17 April 2020) <https://www.cmslawnow.com/ealerts-/2020/04/virtual-hearings-are-they-really-the-answer> accessed 26 May 2020.

virtually? There is authority to the effect that the jurisdiction of a court should not be affected because the court is not sitting in its normal habitat. In Awoyegbe v. Ogbeide,[83] it was held that "the court does not cease to be a court merely because it is sitting in some other place other than its normal habitat." Thus, there is reason to believe wherever a judge may be, is not relevant to determine the venue of virtual court. It appears the important thing is that the judge hearing the case virtually is the judge of the State High Court and judicial division where the matter ought to be commenced.

4. EVIDENTIAL DEBATES ON VIRTUAL COURT HEARING

Of the various concerns already analyzed in this article, the evidential concern is the most alarming. While virtual court may pass constitutional and jurisdictional tests, there is a serious doubt if it will pass some evidential tests. Although, the evidential tests do not necessarily affect the legality or otherwise of virtual court, it raises a legitimate concern on its practicability within the current legal regime. Some of them are analyzed below.

First, a judge,[84] especially a trial judge, is expected to consider the demeanour of witnesses in ascribing a probative value to their testimony.[85] It has been held that:

"My Lords, since trial court's ascription of probative value was based on the credibility of witnesses, I have an obligation to remind Your Lordships that every trial judge is in a better position than the appellate Court to decide the issue of credibility of the witnesses. The reason is not farfetched. He (the trial Judge) has the singular advantage of seeing and observing the witnesses. He watches their demeanour; candour or partisanship; their integrity and manners. What is more, as a vital area of credibility, it is only the trial court which saw and watched the demeanour of the witness that has

---

[83] Awoyegbe v. Ogbeide (1988) 1 NWLR (Pt. 73) 695.

[84] The appellate judges do not ordinarily evaluate evidence unless they findings of the trial judge them perverse. See Olaniyan & Ors v. Fatoki (2013) 17 NWLR (Pt. 1384) 477; Balogun v. Labiran (1998) 3 NW-LR (Pt.80) 66.

[85] Makanjuola v. Balogun (1989) 3 NWLR (Pt. 108) 192 [218]; Atolagbe v. Shorun [1985] 1 NWLR (Pt. 2) 60.

the exclusive role of watching the mannerism, habits and idiosyncrasies of the witness and attach probative value to the evidence presented before it"[86]

Thus, while virtual court may scale through this test at the appellate court because they rarely evaluate evidence,[87] it is not convincing to say it would for the trial court.[88] The demeamour, mannerism, habits, and idiosyncrasies of witnesses are better evaluated when the witnesses are 'seen and watched' by the trial judge.[89] Although witnesses will be seen and watched during virtual hearing held by videoconference, there is a legitimate concern that such onscreen seeing and watching may not be sufficient for the judge, to study the demeanour, candour, partisanship, mannerism, habits and idiosyncrasies of the witnesses to form an opinion on the credibility and strength of their evidence.[90] To this extent, virtual court may not be desirable for examination of witnesses.

Trial is an adversary process, and not limited only to examination of witnesses.[91] Civil trial usually involves filing of pleadings, case-management conferences, mentioning of the case, examination of witnesses, adoption of final written address, delivery of judgement, and within these, series of applications could be made by the parties which must be ruled upon before judgement.[92] It is submitted that virtual hearing

---

[86] See also Nwankpu & Ors v. Ewulu & Ors (1995) LPELR-2107 (SC) 32; Kaydee Ventures Ltd v. The Hon. Minister, FCT and Ors (2010) LPELR-1681 (SC) 60.

[87] See (n 86).

[88] In the Nigerian context, the trial court is where the action is instituted, hear evidence, evaluate the evidence, believe or disbelieve a witness or witnesses, make findings of fact based on the credibility of the witness or witnesses who testified and decide the merits of the case based on the findings. See The State v. Aigbangbee & Anor. (1988) 3 NWLR (Pt. 84) 548; Grace Akpabio & Ors. v. The State (1994) 7 - 8 SCNJ (Pt. 111) 429.

[89] Ali v. The State (2015) All FWLR (Pt. 796) 559.

[90] Janet Walker, 'Virtual Hearings – the New Normal' (Global Arbitration Review, 27 March 2020) <https://globalarbitrationreview.com/article/1222421/virtual-hearings-%E2%80%93-the-new-normal> accessed 26 May 2020.

[91] Kajubo v. The State (1988) 1 NWLR (Pt. 73) 721; Jimoh v. The State (2014) 10 NWLR (Pt. 1414) 105 SC.

[92] Fredric Laderer, 'The Road to the Virtual Courtroom? A Consideration of Today's – and Tomorrow's – High Technology Courtrooms' (n

may be held for every stage of a trial, except examination of witnesses. This is because in the examination of witnesses, cross-examination is a serious business, which may be defeated by tricks that could be used by the other party in a virtual trial.[93] In Borishade v. NBN Ltd[94] the court espoused that:

> "Cross-examination is a formidable tool in the hands of a diligent and skillful counsel. By the instrument of cross-examination, counsel can either totally demolish the plaintiff's case or fully develop the case of the defendant and vice versa. When masterly administered, cross-examination actually brings forth the best form of evidence. Purposeful cross-examination can drum up sacred truth from the stomach of an otherwise reluctant witness. When the core of the case is touched by cross-examination, the witness not only speaks with his mouth, his facial expression, his jaunty answers and gesticulations all go a long way to expose the unexpressed, the untold dark side of the whole story. A thorough cross-examination seeks to and indeed often elicits the best form of evidence, admission of the truth initially concealed by a carefully thought-out testimony guided by the skillful hands of the witness's learned counsel".

No doubt, virtual court hearing will deal a severe blow on this important part of a trial. Not all cases involve examination of witnesses, as some proceedings rely on affidavit evidence.[95] However, if the formidable tool of cross-examination is to be maintained in cases where witnesses will be examined, other parts of the trial may be heard virtually, save for examination of witness.

---

15) [803]; Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587 SC; Nalsa and Team Associates v. NNPC (1991) 7 NWLR (Pt. 212) 652.

[93] Some of the tricks expressed are the possibility of the witness to be coached off-camera or reading from a script hidden from the judge's view. See Janet Walker, 'Virtual Hearings – the New Normal' (n 92).

[94] Borishade v. N.B.N Ltd (2007) 1 NWLR (Pt. 1015) 217 [237].

[95] Nwosu v. Imo State Environmental Sanitation Authority (1990) 2 NWLR (Pt. 135) 688; Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423.

Secondly, there is a legitimate concern on the extent to which the principle of out of court and out of hearing will be applicable to virtual court hearing. The Evidence Act provides that on the application of either party, or of its own motion, the court may order witnesses on both sides to be kept out of court; but this provision does not extend to the parties themselves or to their respective legal advisers.[96] This provision is to ensure that the testimony of a witness is not shaped by the testimony of another witness.[97] Although, if a witness remains in the court while another witness is giving testimony, such does not affect the admissibility of the testimony.[98] However, the weight to be attached to such testimony is impaired.[99] In the context of virtual court, this principle of out of court and out of hearing will, if not finally jettisoned, be reduced to a mere redundant rule. The point has been made that the major test to pass before virtual court can qualify as a public trial is the accessibility of the link to everybody.[100] How the judge would be able to analyze each participant and monitor that throughout the testimony of a witness, another witness does not join the virtual proceedings, is vague.

Further, the Evidence Act enjoins the court, during trial, to ensure that proper step is taken "to prevent communication with witnesses who are within the courthouse or its precinct awaiting examination".[101] If, as argued, virtual court qualifies as a "courthouse", it is impossible for the court to ensure compliance with this provision. Virtual court, in its current form, cannot prevent communications that may occur among witnesses and between parties and their witnesses.[102] These evidential issues are therefore a legitimate concern to be taken into considering when provisions are made for virtual court hearing in Nigeria.

---

[96] Sec 212, Evidence Act.

[97] Falaju v. Amosu (1983) 2 FNR 375.

[98] Ibid; Moore v. Registrar of Lambeth County Court (1969) 1 W.L.R. 141 at 142; Abasi v. The State (1992) NWLR (Pt. 260) 383.

[99] Ibid.

[100] Nigeria-Arab Bank Limited v. Barri Engineering Nig. Ltd, (n 40).

[101] Sec 213, Evidence Act.

[102] Janet Walker, 'Virtual Hearings – the New Normal' (n 92).

5. A SEARCH FOR SYNTHESIS THROUGH ADVANCING ONLINE DISPUTE RESOLUTION IN NIGERIA

Notwithstanding that virtual court hearing may pass the constitutionality test of publicity of trial,[103] technological availability is a serious impediment to this type of hearing in Nigeria. Without proper and adequate technology, virtual hearing cannot be effective in Nigeria. Most Nigerian courts lack the necessary courtroom technology to meet up with the reality of virtual hearing.[104] A lot of reasons have been attributed to the lack of technology in the dispensation of justice, from filing, to hearing, and delivery of judgement. Some authors opine that the unwillingness of lawyers[105] and lack of judicial administration enthusiasm to adopt the use of technology in the legal profession is one of the impediments to the availability of technology in legal practice.[106] Others say inadequate funding,[107] high cost of technology[108] and

---

[103] See section 2 of this article for arguments on the constitutionality of virtual court hearing.

[104] Ayobami Olaniyan and Ifeoluwa Olubiyi, 'The Role of Technology in the Advancement of Legal Education and Practice in Nigeria' (Academia) <https://www.academia.edu/24786186/The_Role_of_Technology_in_the_Advancement_of_Legal_Education_and_Practice_in_Nigeria> accessed 22 October 2020.

[105] John Iyang Okoro, 'Technology and Law Practice in Nigeria' Remarks made at a webinar organised by the Nigerian Law Publications Ltd <https://nwlronline.com/uploads/Hon_Justice_Okoro_JSC.pdf> accessed 23 October 2020.

[106] Halima Kutigi and Bridget Anigbogu, 'ICT Enhanced Courtrooms in Nigeria – Are the Conditions for Effectiveness Met?' (Research Gate, May 2017) <https://www.researchgate.net/publication/341090-111_ICT_ENHANCED_COURTROOMS_IN_NIGERIA ARE_ THE_ CONDITIONS_FOR_EFFECTIVENESS_MET > accessed 23 October 2020.

[107] Adelowo Asonibare and Halimat Akaje, 'E- Path to Effective Justice Delivery: The Nigerian Courts in Perspective' <http://eprints.covenantuniversity.edu.ng/5276/1/Amended%20copy%20of%20reviewed%20paper%20titled%20E%20Path%20to%20Effective%20Justice%20Delivery%20The%20Nigerian%20Courts%20in%20Perspective.pdf> accessed 23 October 2020 [11].

[108] Ayobami Olaniyan and Ifeoluwa Olubiyi, 'The Role of Technology in the Advancement of Legal Education and Practice in Nigeria' (n 106)

insufficient know-how[109] have hindered the development and use of technology in the dispensation of justice and virtual hearing in Nigeria.

In 2012, the Judicial Information Technology Policy Committee was inaugurated "to enhance the operational processes of the judiciary and eliminate undue delays in the dispensation of justice".[110] The key mission of the policy is to establish a computerization foundation for the dispensation of justice in Nigeria.[111] Although the policy is already operational in 16 pilot sites,[112] it appears that the objectives of the policy did not cover the implementation of virtual court hearing in Nigeria. While the policy makes provision for "E-court Systems"[113], an analysis of its objectives on the E-court Systems reveals that it relates to the use of technology in the presentation of exhibits and documents in court, rather than the adoption of virtual hearing. Therefore, to meet up with the reality of virtual hearing, Nigerian laws need to be dynamic, innovative and technology driven.[114]

The first step in the legal reforms necessary to cement virtual hearing in Nigeria is dynamism and innovation in Nigerian laws to accommodate virtual hearing. Till date, there is no specific legislation on the regulation of Online Dispute Resolution in Nigeria.[115] Most Nigerian laws were drafted prior to the digital revolution and have not been updated to

---

[109] Halima Kutigi and Bridget Anigbogu, 'ICT Enhanced Courtrooms in Nigeria – Are the Conditions for Effectiveness Met? (n 108)

[110] 'Nigerian Judiciary Information Technology Policy Document' (JIP-T O, July 2012) <https://nji.gov.ng/images/PDF/JITPO_Policy_Docume nt .pdf> accessed 23 October 2020 [6].

[111] Halima Kutigi and Bridget Anigbogu, 'ICT Enhanced Courtrooms in Nigeria – Are the Conditions for Effectiveness Met? (n 108).

[112] Ibid.

[113] 'Nigerian Judiciary Information Technology Policy Document' (JIPT O, July 2012) [29].

[114] Oladimeji Rahman, 'Courts Mustn't Return to Analogue Documentation Post COVID-19' (Punch, 11 June 2020) <https://punchng.com/courts-mustnt-return-to-analogue-documentation-post-covid-19-olawuyi/> accessed 20 October 2020.

[115] Lukman Ayinla and Taiye Oliyide, 'Juridical Perspective on the Regulation of Online Dispute Resolution in Nigeria' [2020] 7 (2) IUMJ 71, 74.

meet up with the modern realities.[116] In other jurisdictions, their laws had for a long-time recognized videoconferencing in dispute resolution. For instance, in Canada, the Rules of Civil Procedure, 1990 made provisions for videoconferencing.[117] In the United States, the Federal Rules of Civil Procedure allow for the use of videoconferencing in civil trials.[118] In the UK, the use of technology in dispute resolution was traced to 1992.[119]

Although, the UK Supreme Court held its first virtual hearing in March 2020, there were already active steps taken in the UK to introduce virtual hearing prior to the outbreak of COVID-19.[120] In 2015, the Civil Justice Council, a body responsible for advising the Lord Chancellor on civil justice and procedure in England and Wales, submitted the following recommendations:[121]

1. The establishment of an internet court to be known as HM Online Court;
2. The HM Online Court should establish an online Evaluation Platform where parties would be advised on their rights and obligations prior to proceeding with an online trial;
3. The HM Online Court should establish an online Facilitation Platform where the dispute would be settled online through mediation and negotiation without involving judges;

---

[116] Uchenna Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunities for Dispute Resolution' [2012] 5 CTLR <https://-www.researchgate.net/publication/322083244_Technology_Mediated_Dispute_Resolution_Challenges_and_Opportunities_for_Dispute_Resolution_in_Nigeria> accessed 22 October 2020 [131].

[117] See (n 10).

[118] Uchenna Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunities for Dispute Resolution' (n 118) [129].

[119] Jeremy Barnett, 'The Virtual Courtroom and Online Dispute Resolution' (2003) <https://www.mediate.com/Integrating/docs/Barnett(1).pdf> accessed 23 October 2020.

[120] Derrick Wyatt, 'Will There be Virtual Court Hearings in the UK after the Exceptional Circumstances of Lockdown and Social Distancing Have Been Put Behind Us' (Fide) <https://www.fidefundacion.es/In-the-UK-the-Covid-19-lockdown-has-accelerated-the-use-of-virtual-court-hearings-but-will-it-bring-permanent-changes_a1359.html> accessed 22 October 2020.

[121] Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims (Online Dispute Resolution Advisory Group, 2015) <https://www.judiciary.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf> accessed 19 October 2020 [6].

4. The HM Online Court should make provisions for Online Judges who are specially trained and adequate funding made to the court;
5. The HM Online Court should have jurisdiction on claims not exceeding £25,000 and for family dispute.

It is submitted that pending a legislative step by the appropriate authority, the various High Courts can make provisions for Online Courts in their respective Court Rules. Since it has already been argued that virtual hearing, subject to some conditions, will pass the constitutionality test of publicity of trial, there is nothing under the law that prevents the Chief Judges of the High Courts to make rules on Online Courts. In fact, the Constitution empowers the Chief Judge to make rules for regulating the practice and procedure of the High Court of the State subject to the provisions of any law made by the House of Assembly of the State.[122] The recommendations of the Civil Justice Council are very useful and may be adopted by the courts whilst formulating rules on virtual hearing. The provisions in legislations and rules of courts for virtual hearing is a fundamental step to cementing virtual hearing in Nigeria.

Secondly, a recommended legal reform which may help reduce the unwillingness of lawyers to adopt this type of hearing is the provision of incentives. For instance, in Korea, courts filing fees were reduced by 10 per cent for lawyers who use electronic filing.[123] If this incentive were provided for the adoption of virtual hearing, it would help limit the unwilling attitude of lawyers to jettison their insistence on traditional court model. Thirdly, Nigerian courts need to be technology driven to accommodate virtual hearing. To achieve this, the courts need to be adequately funded to set up this type of hearing. One reason why the UK courts were able to hold virtual hearing speedily during COVID-19 is the £1 billion

---

[122] Sec 274 Nigerian Constitution.

[123] Julien Vilquin and Erica Bosio, 'Improving Court Efficiency: The Republic of Korea's E-Court Experience', (Doing Business, 2014) <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB14-Chapters/DB14-Improving-court-efficiency.pdf> accessed 23 October 2020.

technological reform programme launched in 2016.[124] Also, the Civil Justice Council recommended an annual budgetary allocation £75 million for a duration of five years to set up the Online Court.[125] The current technology available in Nigerian courts cannot meet up with the demand of virtual hearing. There is a need for adequate budgetary allocation to acquire and set up the technology needed for virtual hearing in Nigerian courts.

Despite the desirability of virtual hearing, the evidential concerns raised in this article deserve serious consideration while formulating rules on this type of hearing.[126] It has been argued that maintaining eye contact when evidence is being given is a "nearly ubiquitous subconscious method of affirming trust"[127] and that "judges may not be able to properly ascertain the credibility of a witness as if such a witness were in the witness box".[128] In fact, it has been submitted that "advanced technology cannot be substitute for physical human contact".[129] Notwithstanding the foregoing, it is recommended that virtual hearing may be held for small claims matters as defined by the Rules of Court from filing till judgement. With respect to cases where affidavit evidence is used rather than witnesses, virtual hearing may also be conducted for such hearing from filing till judgement. However, with respect to contentious cases, it is recommended that parties should be allowed to examine and cross-examine witnesses in open court, except if a party chooses to examine and cross-examine virtually.

---

[124] Derrick Wyatt, 'Will There be Virtual Court Hearings in the UK after the Exceptional Circumstances of Lockdown and Social Distancing Have Been Put Behind Us' (n 122).

[125] Civil Justice Council, Online Dispute Resolution for Low Value Civil Claims (n 122).

[126] See section 4 of this article.

[127] Jaron Lanier, 'Virtually There: Three-Dimensional Tele-Immersion May Eventually Bring the World to Your Desk' (Scientific American, April 2001) <http://www.jaronlanier.com/cocodexintro/lanier01sciam.pdf> accessed 14 June 2012 [68] Uchenna Orji, 'Technology Mediated Dispute Resolution: Challenges and Opportunities for Dispute Resolution' (n 118) [127].

[128] Ibid.

[129] Ibid.

6. CONCLUSION

Under the current legal regime, and without the need for any constitutional amendment, virtual court hearings will pass the test of constitutionality insofar as the link to access the hearing is made available to the public. This means the constitutionality or otherwise of virtual court hearing is determined by facts, rather than law. The territorial jurisdictional issue has also been analyzed. The point is made that the fact that a judge is sitting virtually outside their State of jurisdiction does not offend the rule on territorial jurisdiction. However, legitimate concern has been raised on the practicability of some evidential principles. Virtual court, in its current form, cannot afford the judge sufficient opportunity to see and study the demeanor and idiosyncrasies of witnesses in ascribing probative value to their testimonies. Also, the art of cross-examination will be greatly handicapped by virtual court. This article also highlights the technological challenges faced by virtual hearing in Nigeria. It is therefore submitted, by reference to the practice in other jurisdictions, that rules should be made on virtual hearing through legislation and/or through Rules of Court. It is also recommended that the courts should be adequately funded through substantial budgetary allocation for the technology needed to conduct and cement virtual hearing in Nigeria. In the final analysis, it is recommended that parties should be given the latitude to decide whether they want to examine and cross-examine witnesses for contentious matters in open court rather than virtually.