

## **TRIAL IN ABSENTIA AND THE RIGHT TO A FAIR HEARING UNDER THE NIGERIAN CRIMINAL JUSTICE SYSTEM**

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### **Abstract**

*Trials are most commonly regarded as being held in the presence of the defendant. The essence of the requirement that the defendant be present throughout his trial is to guarantee fair hearing in judicial process. However, certain exceptional situations may demand that the court order the trial to proceed without the presence of the defendant. Such a situation envisages what is referred to, in common parlance, as a trial in absentia. Numerous authors have argued in favour and against the adoption of this form of trial. Nevertheless, the absence of the main actor in a court drama always entails a challenge to the due process of law, and a need for proper remedies to address such a challenge. This paper therefore seeks to analyse whether the said concept impinge the right to a fair hearing granted to the defendant by the 1999 Constitution of the Federal Republic of Nigeria as amended.*

**Keywords:** Trial in absentia, Accused, Fair hearing, violation

### **1. Introduction**

It is a duty of the judicial system to resolve and adjudicate legal disputes as fast as possible. Many important matters are implicated in this essential requirement. These include the speedy administration of the punishment awarded by the court and the effective delivery of this punishment as it would lack effect if it was administered long after the convict's conduct. Delays not only disrupt the due process of court but also erode the public's faith in the justice system. While there are many reasons which can cause delays, the absence of the defendant is one such reason, to which trials in absentia offer a working solution. Trial in absentia is a trial which is conducted in the absence of a party. It generally refers to criminal proceedings and is interpreted to refer to the defendant's right to be present in a courtroom while being tried.<sup>1</sup> In such proceedings, where the

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<sup>1</sup>J G Starkey, 'Trial in Absentia', (1979) 53 *St. John's Law Review*, 721-722.

defendant is not available to rebut and respond to the charges levelled against him, the trial is criticized to be a violation of the principles of natural justice and the concept of equality before the law. Trial in absentia is considered an exception to the general principle that a person charged with a criminal offence is entitled to take part at the hearing. Thus, the origins of the right to be present at own trial go back to the earliest days of common law when the presence of the accused was a prerequisite for the jurisdiction of the court. Although legal orders of common-law tradition in rule do require presence of the accused on trial<sup>2</sup>, over the years, American courts acknowledged the possibility, if the accused waived his right to be present at trial by voluntarily absenting himself, to continue the trial in absentia.<sup>3</sup> In the United Kingdom, the presence of a defendant is required because of the severity of the crime. On the contrary, the French Code of Criminal Procedure allows the trial to proceed in the absence of defendant only in severe cases - due to a serious need to satisfy the sense of justice. The International Criminal Tribunals are considered to have a sui generis nature that arises from the extreme gravity of the cases examined by them. They seem to follow French way of reasoning yet even among them there is no uniform approach.<sup>4</sup> The issue of a criminal trial in absentia turns out to be a conflict of two opposing values - a reminder of the goddess *Justitia* who holds a sword and scales in her hands. On one hand, deciding a fate of a person without his or her presence seems to cast a shadow on the principle of fair hearing and the concept of justice itself. On the other hand, the requirement of personal presence of the accused poses a variety of practical problems, mainly concerning executability and inevitability of the punishment. This paper therefore seeks to analyse whether the said concept impinge the right to a fair hearing granted to the defendant by the 1999 Constitution of the Federal Republic of Nigeria as amended.

## 2. The Need for Trials in Absentia

A trial in absentia entails that the defendant is not present during the trial. It has been argued that no argument against the defendant is heard by him in trial in absentia and he is unable to respond adequately to any of these arguments or to present an effective defence for himself. As such, a legally binding decision,

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<sup>2</sup>M Munivrana Reopening of Proceedings in Cases of Trial in Absentia: European Legal Standards and Croatian

Law, <<http://www.hrcaj.srce.hr/ojs/index.php/eclj/article/view/7113>> accessed on 15 October 2020

<sup>3</sup>*Ibid.*

<sup>4</sup>The concept of 'a trial in absentia resulting in a decision' within the European Arrest Warrant framework.

ignorant of the position of the defendant, seems unfair in the least. Indeed, the process of deciding in absentia robs the defendant the opportunity to present a valid defence. While being violative of the defendant's right to do so, it is also argued to be based on one side of the story, it is particularly problematic for adversarial systems as the whole trial is based on a contest between the two sides and such a contest is futile without an opposing voice. Also, civil liberties are too precious an entity to be eliminated for a person without making sure that the facts presented are true and the decision reached is just. Thus, the accused's presence is of major importance not only in regard to the establishment of the factual circumstances of the case but also with a view to a correct assessment of the accused's personality.<sup>5</sup>As such, the problems with this process leave one to wonder why trials in absentia have ever been considered a viable option for an institution as formal as the system of adjudication in courts. Notwithstanding the above criticisms, there are many reasons for trial in absentia. They are:

1. The first most pressing issue of all calling for the need to employ trials in absentia is the one of absconders from the law. Not all those accused of criminal behaviour by the officers of the law cooperate with the procedure which follows. Imprisonment and the fear of the censure of civil liberties encourages many to avoid dealing with a process which might crystallise such possibilities. While the police and its associated personnel do try to discover suspects and force them to present themselves before the court, the results of this are not always positive. While the fugitive runs around hiding from the police, successfully evading them for days, weeks or even years, the court cannot wait for an indefinite period of time for the accused to show up and then decide his case. Speedy dispensation of justice is also a duty of the court and it cannot ignore this duty, even if it is not the primary reason for the delay. Therefore, when such occurrences happen, the courts have set a period of time after which they shall proceed with the case, regardless of the presence of the defendant.
2. Deterioration of evidence due to the passage of time is another consideration that merits a trial in absentia of a defendant.

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<sup>5</sup>T Maruhn, 'The Right of the Accused to be Tried in his or her Presence', <<http://hrlibrary.umn.edu/fairtrial/wrft-tm.htm>> accessed 15 October 2020.

3. This also presents as strategic help against those who are planning to evade the consequences of their unlawful acts by not showing up. Knowing that a trial is going to happen, despite the defendants's absence is likely to encourage defendants to show up and make a case defending their position. This in turn is likely to save the court's time spent adjudicating a particular case.
4. By not having a trial for someone who has absconded, the public can be under the impression that the defendant is being rewarded for escaping. Victim's interest may also support holding a trial in absentia especially in systems where civil parties may participate and claim compensation.
5. A theory based on the consent waiver option posits that by not showing up to his own trial, the accused has already waived his right to present his case in court. This then permits the trial to proceed without a word of defence favouring the defendant, without violating the concerns of a fair trial.<sup>6</sup>

### **3. Trial in Absentia under International Law**

#### **A. International Covenant on Civil and Political Rights**

Article 14(3) (d) of the International Covenant on Civil and Political Rights,<sup>7</sup> explicitly stated the right of the accused to be present at the trial. <sup>8</sup> From the wording of the Covenant, it may be concluded that in absentia trials are generally not permissible under the ICCPR. The meaning of article 14(3)(d) of the ICCPR is explained further in General Comment 13 of the Human Rights Committee,<sup>9</sup> which makes it clear that 'when exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary'.<sup>10</sup> Even though the HRC leaves the exact meaning of 'justified reasons' open, it is clear that, although in absentia proceedings are not per se impermissible within the sphere of the ICCPR, they are only possible in

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<sup>6</sup>R Jalahi, 'Trial in Absentia: A Violation of the Right to a Fair trial', (2018) 2(2) *PCL Student Journal of Law*, 83.

<sup>7</sup> ICCPR

<sup>8</sup>Art 14(3) of the ICCPR provides to the effect that in the determination of any criminal charge, everyone shall be entitled to be tried in his presence and to defend himself in person or through legal assistance of his own choice.

<sup>9</sup>HRC.

<sup>10</sup> HRC, General Comment 13, art 14, 13 April 1984, UN-Doc HRI/GEN/1/Rev 1 (1994) para 11.

exceptional cases.<sup>11</sup> In *Mbenge v Zaire*<sup>12</sup>, the HRC further states that trials in absentia are possible in the interests of justice, provided that the accused has unequivocally waived his right to be present. Such a waiver is, in the opinion of the HRC in *Maleki v Italy*<sup>13</sup>, only permissible if the court has fulfilled its obligations, particularly with regard to the procedures for summoning and informing the defendants, and if the court can prove that the summons to appear has, in fact, reached the accused. The lack of such proof, from the viewpoint of the HRC, constitutes a breach of the right to be present and, according to article 14 of the ICCPR, cannot be remedied by a representative that appears to speak for the accused.

### **B. African Charter on Human and Peoples' Rights**

Article 7 of the African Charter does not expressly include a right to be present at trial. However, it recognizes rights which could not exist without the accused being present or at least on notice of the proceedings, such as the right to have one's case heard and the right to be defended by counsel of one's choice.<sup>14</sup> While the African Charter does not provide direction in this respect, it seems that the drafters of the Charter did not overlook the right of the accused to be present at trial; they rather considered it as an implied right.<sup>15</sup> Moreover, it should be noted that, according to article 60 of the African Charter, the African Commission on Human and Peoples' Rights<sup>16</sup> must take into account other international human

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<sup>11</sup> M Nowak CCPR commentary (2005) art 14 para 62.

<sup>12</sup> Comm. 16/1977 UN Doc. A/38/40, at 134 (HRC 1983)

<sup>13</sup> UN Human Rights Committee, 13 September 1999, UN Doc CCPR/C/66/D/699/1996.

<sup>14</sup> Art 7(1) of the African Charter provides that every individual shall have the right to have his cause heard. This

comprises the right to an appeal to competent national organs against acts of violating his fundamental rights as

recognised and guaranteed by conventions, laws, regulations and custom in force and the right to defence, including the right to be defended by counsel of his choice.'

<sup>15</sup> *Thomas v Tanzania* 005/2013, 20 November 2015 92.

<sup>16</sup> The African Commission is the regional treaty oversight body established under the African Charter. The

Commission has mandatory jurisdiction over inter-state (Art 54 of the African Charter) and individual (Art 55 of

the African Charter, as interpreted by the African Commission) petitions. On the African Commission generally;

R Murray 'African Commission on Human and Peoples' Rights' cited in R Wolfrum (ed) *Max Planck encyclopaedia of public international law* (2014) <<http://opil.ouplaw.com/home/EPIL>> accessed 30 October 2020.

rights instruments, a provision that enables the Commission to be inspired, inter alia, by the provisions of Article 14 of the ICCPR when interpreting the trial guarantees laid down in article 7 of the African Charter. The African Commission did this when specifying that the right to be present is part and parcel of the right to a fair trial. Thus, in the case of *Avocats Sans Frontieres v Burundi*,<sup>17</sup> the Commission held that the right to defend oneself implies an accused's presence at each stage of the proceedings. Unfortunately, this decision says little about which measures must be taken in case an accused is tried in absentia.

### **C. European Convention**

While Article 6 of the European Convention of Human Rights contains no provision that expressly requires the continuous presence of the accused, the European Court assumes that the presence requirement is an integral part of a fair trial.<sup>18</sup> This stems from the scheme of Article 6 of the ECHR according to which the process guarantees of the accused in Article 6(3) provide constitutive elements of the fair trial principle in Article 6(1) of the Convention.<sup>19</sup> Accordingly, the European Court in *Colozza v Italy* points out that it seems difficult to imagine how some of the process guarantees contained in Article 6(3) of the ECHR, such as the right of the accused to defend himself in person<sup>20</sup> or the right to examination of witnesses on his behalf<sup>21</sup> could be realized in the absence of the accused. Although the right to be present at trial traditionally is inferred from Article 6(3) of the ECHR, trials in absentia are not generally prohibited under the Convention but are recognized by European Court jurisprudence.<sup>22</sup>

### **4. Trial in Absentia under the Nigerian Criminal Justice System**

Section 266 of the Administration of Criminal Justice Act<sup>23</sup> provides that a defendant shall be present in court during the whole of his trial. However, circumstances where the defendant may be absent are:

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<sup>17</sup> (2000) AHRLR 48 (ACHPR 2000) paras 27.

<sup>18</sup> *Colozza v Italy* 9024/80 12 February 1985 27; *Poitrimol v France* 14032/88, 12 November 1993, 31. 5.

<sup>19</sup> *Goddi v Italy* 8966/80, 9 April, 1984, 28.

<sup>20</sup> ECHR, article 6(3)(c)

<sup>21</sup> *Ibid*, article 6(3)(d),

<sup>22</sup> *Krombach v France* 29731/96, 13 February 2001 85..

<sup>23</sup> 2015

- (a) he misconducts himself in such a manner as to render his continuing presence impracticable or undesirable; or <sup>24</sup>
- (b) at the hearing of an interlocutory application.

The above provisions, however are made subject to section 135 of the ACJA which empowers a magistrate to dispense with personal attendance of a defendant where a summons is issued and the offence has a penalty of fine not exceeding N10, 000 or Imprisonment for a term not exceeding 6 months where:

- (a) the offence is punishable by fine or imprisonment or both; and
- (b) the offence is punishable by fine only if the defendant pleads guilty in writing or appears and so pleads by his legal practitioner.

Moreover, where the defendant fails to appear and no sufficient cause is given for his absence, then if the court is not satisfied that the defendant was duly served with the summons or that a warrant issued in the first instance was not executed, the court may adjourn the hearing to another day until the service is effected or warrant executed. Conversely, if the court is satisfied that the summons was duly served or that the defendant had notice of hearing, the court may issue a bench warrant for his apprehension. Upon arrest, the defendant shall be committed to prison or custody to be produced for trial.<sup>25</sup>

However, Section 352(4) of the Administration of Criminal Justice Act<sup>26</sup> provides thus:

Where the Court, in exercise of its discretion, has granted bail to the defendant and the defendant, in disregard for the court orders, fails to surrender to the order of court or fails to attend court without reasonable explanation, the court shall continue with the trial in his absence and convict him unless the court sees reasons otherwise, Provided that proceedings in the absence of the defendant shall take place after two adjournments or as the court may deem fit.

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<sup>24</sup> Administration of Criminal Justice Law of Anambra State 2010, s 300; *State v Lawal* (2013) 7 NWLR (Pt 1354) 565, 573.

<sup>25</sup> ACJA, s 352(1) (a) (b); 2 281 Criminal Procedure Act, Cap C41, LFN, 2004; s188(2) & (2)of Administration of

Criminal Justice Law, Anambra State

<sup>26</sup> 2015.

The ACJA by the above provisions provides for trial in the absence of the defendant where the court, in exercise of its discretion, has granted bail to the defendant and the defendant, in disregard for the court orders, fails to surrender to the order of court or fails to attend court without reasonable explanation, the court shall continue with the trial in his absence and convict him unless the court sees reason as otherwise, provided that proceedings in the absence of the defendant shall take place after two adjournments or as the court may deem Under this section, trial had actually commenced, the defendant was granted bail and he has jumped bail by refusing to attend court on the date fixed for hearing without any reasonable explanation. The court will give at least two adjournments to give the defendant a chance to appear before the court. If he still fails to appear before the court. The Court will proceed with the trial in his absence and convict him unless the court sees reason otherwise. The writers are of the view that this is a welcome development and a defendant can no longer stall proceedings against him just by refusing to turn up for his trial. If he does, the trial will continue and he will be convicted but sentencing will be kept in abeyance until he is arrested or submits to court.<sup>27</sup>Hence, while bail and conviction may be in the absence of the defendant, sentence can only be in the presence of the defendant. As such, section 352(4) of the ACJ Aauthorized trial in absentia under the Nigerian Criminal Justice System.

However, the question is, what happens at trial where bail is refused for capital offence and the defendant escapes from detention. Should trial continue? The writers are asking whether the provisions of section 352(4) of the ACJA be invoked to defend continuation of trial in the absence of the defendant in such circumstances. the writers are of the view that the said provision could not be invoked since the said provision provides for trial in absentia in cases where bail has been granted to the defendant but fails to turn up for his trial. As such, this is a lacuna in the ACJA and the writers therefore recommends the amendment of ACJA to cover cases where the defendant has absconded from detention.

### **5. Trial in absentia and the Right to Fair Hearing**

At the International plane, the right to a fair trial is a norm of international human rights law which is designed to protect individuals from the unlawful

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<sup>27</sup> ACJA, s 352 (5). This provides that the Court shall impose a sentence only when the defendant is arrested or surrenders to the custody of the court.



and arbitrary curtailment or deprivation of their basic rights and freedoms. It is guaranteed under Article 14 of the International Covenant on Civil and Political Rights<sup>28</sup> which provides that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. With regard to criminal matters in Nigeria, section 36 (1) of the 1999 Constitution<sup>29</sup> provides that in the determination of civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality. Although, the 1999 Constitution does not define the term, 'fair hearing,' yet the courts of law have proffered some judicial definitions to it. For instance, in *Ezechukwu v Onwuka*,<sup>30</sup> the Court of Appeal pointed out that fair hearing is a hearing which is fair to all parties to the suit, whether the plaintiff, defendant, the prosecutor, or the defence. It is a doctrine of substance and the question is not whether injustice has been done because of lack of fair hearing, rather whether a party entitled to be heard has been given an opportunity of being heard. Fair hearing entails during the course of a trial all that will make an impartial observer to believe that the trial has been balanced to both sides.

Thus, fair hearing is synonymous with fair trial and requires that every party to the dispute be given an opportunity to state his case. Each party must know the case being made against him, and given an opportunity to react thereto.<sup>31</sup> Commenting on the relationship between fair hearing and fair trial, the Supreme Court in *Mohammed v Kano Native Authority*<sup>32</sup> noted that although it has been suggested that a fair hearing did not amount to a fair trial, yet that the court was of the firm view that 'fair hearing must involve a fair trial, and a fair trial of a case consists of the whole hearing.'<sup>33</sup> The principle of fair hearing as enshrined in the 1999 Constitution is often illustrated by the twin pillar of justice<sup>34</sup>

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<sup>28</sup> ICCPR

<sup>29</sup> As amended

<sup>30</sup> (2005) All FWLR (Pt. 280) 1514, 1542, 1553; *Ogundoyin v Adeyemi* [2001] FWLR (Pt 71) 1741,1754.

<sup>31</sup> *Gyang & Anor v COP Lagos State & Ors* (2014) 3 NWLR (Pt 1395) 547, 532.

<sup>32</sup> [1968] 1 All NLR 424.

<sup>33</sup> *Kotoye v. Central Bank of Nigeria* (2001) FWLR (Pt. 49) 1667 at p.1600; *Adigun v. Attorney-General of Oyo State* (1987)1 NWLR (Pt. 53) 678.

<sup>34</sup> *Olakunri v Oba Ogunoye* (1985) 1 NWLR (Pt. 4) 652.

expressed in the Latin maxims: *nemo iudex in causa sua*<sup>35</sup> and *audi alteram partem*.<sup>36</sup> In this regard, it is submitted that these principles expressed in these Latin maxims are an integral and inseparable part of the fair hearing provision guaranteed by section 36(1) of the 1999 Constitution. The fact being that the rule of fair hearing is not a technical doctrine. It is one of substance as it overrides all contrary provisions in any law of the land, be it substantive or adjectival. A breach of the doctrine of fair hearing in a judicial enquiry renders the action unconstitutional, illegal and liable to be set aside.<sup>37</sup>

Thus, the question is whether the provisions of section 352(4) of the ACJA violates the constitutional right of fair hearing of a defendant. There have been various arguments that the provisions of section 352(4) of the ACJA is a gross violation of the constitutional rights to fair hearing of an accused as contained in Section 36(1) of the 1999 Constitution as amended.<sup>38</sup> The writers are of the view that the underlying rationale for holding a trial in absentia is to ensure that the accused cannot delay the administration of justice by opting to be absent from the court. Section 352(4) of the ACJA therefore allows the court to proceed with the trial and convict the defendant if after two adjournments or as the court deems fit, the defendant fails to surrender to the order of the court upon grant of bail. In *Ezechukwu v Onwuka*,<sup>39</sup> the Court of Appeal pointed out that fair hearing is a doctrine of substance and the question is not whether injustice has been done because of lack of fair hearing, rather whether a party entitled to be heard has been given an opportunity of being heard. The question is whether section 352(4) of the ACJA gives a defendant an opportunity of being heard before proceeding

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<sup>35</sup> Meaning that a person shall not be a judge in his own cause; *Gani Fawehinmi v Legal Practitioners Disciplinary Committee*(1985) 2 NWLR (Pt.7) 300 at 308; *Alakija v. Medical and Dental Practitioners Disciplinary Committee* (1959) 4 FSC 38. The principle that the Judge who presides over a matter should not himself be interested in the subject matter of the litigation is intended to ensure that decisions are taken purely on judicial grounds uninfluenced by motives or self-interest.

<sup>36</sup> That is, no man shall be condemned unheard or without having an opportunity of being heard; *PR P v Independent National Electoral Commission* (004) All FWLR (Pt. 209); *Akande v The State* (1988) 7 SCNJ (Pt. 2) 314. <sup>37</sup>*Oyakhere v The State* (2006) All FWLR (Pt. 305) 703, 716.

<sup>38</sup><http://www.abelnewsng.com/2019/02/06/lawyer-challenges-acja-says-clause-providing-trial-absentia-unconstitutional/> accessed 16 November 2020.

<sup>39</sup> (2005) All FWLR (Pt. 280) 1514, 1542, 1553; *Ogundoyin v Adeyemi* (2001) FWLR (Pt. 71) 1741 , 1754.

with trial in the absence of the defendant. The answer is in the affirmative because according to the said section, the court can only try a defendant in his absence after two adjournments have been given to a defendant or as the court may deem fit, thereby affording the defendant an opportunity of being heard. Writers are of the view that the provisions of the said section 352(4) of ACJA are very unequivocal and indeed self-explanatory and seem to toe the line of the new trend even in advanced democracies of the world, including the United Kingdom.<sup>40</sup> As such, the section provides a situation where the defendant voluntarily chooses not to attend trial further without any reasonable explanation.<sup>41</sup> Writers are therefore of the view that section 352(4) of the ACJA does not violate the constitutional right of fair hearing. Fair hearing is therefore a doctrine of substance and the question is not whether injustice has been done because of lack of fair hearing, rather whether a party entitled to be heard has been given an opportunity of being heard.<sup>42</sup> The writers thereby recommend the amendment of the Administration of Criminal Justice Law of Anambra State to incorporate the provisions of the said section 352(4) of the ACJA which allows the court after two adjournments or as the Court may deem fit to proceed with trial of a defendant in his absence where the court granted bail to the defendant pending trial and he jumps bail and fails to appear or attend the Court without reasonable explanation.

## **6. Conclusion and Recommendations**

Trial in absentia is indeed an important principle of law, and must not be absolutely dismissed, as it has been proved to be beneficial under specific circumstances. The defendant often has to wait for excessive amounts of time for his fate to be decided in court. The same requirement under the law also applies to the victim, who awaits justice and requires retribution and closure through the legal machinery. Such delays defeat the purpose of an efficient court proceeding as time is of the essence in every fair trial, and may thus prove to be

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<sup>40</sup>*R v Jonnes* (2002) 2 All ER 112.

<sup>41</sup>Justice Ahmed Mohammed of the Abuja Division of the Federal High Court Charge in No: FCT/HC/CR/43/2015:

Between FRN v Sambo Dasuki (RTD Ordererd that Sambo Dasuki (RTD) be tried in absentia in compliance with

section 352 of ACJA. <<http://www.punching.com/court-orders-dasuki-trial-to-proceed-in-his-absence>> accessed

16 November, 2020

<sup>42</sup>*Ezechukwu v Onwuka, supra.*

detrimental to both the parties involved, as well as the administration of the very proceedings. The judicial system therefore would continue unfettered in the absence of the defendant and speed up significantly, thereby bringing about efficiency in the functioning of the criminal courts of the country. Consequently, the Nigerian judicial system would benefit from the provisions of Section 352(4) of the ACJA provided it is used with the utmost care and caution, and only in situations where access to justice is being obstructed due to the accused's absence, and there exists no reasonable way of presenting him in court. Such a principle of conducting trial in the absence of the accused would not lead to a violation of either the principles of natural justice or the defendant's right to a fair hearing. Writers therefore recommend the amendment of the Administration of Criminal Justice Law of Anambra State to incorporate the provisions of the said section 352(4) of the ACJA which allows the court after two adjournments or as the Court may deem fit to proceed with trial of a defendant in his absence where the court granted bail to the defendant pending trial and he jumps bail and fails to appear or attend the court without reasonable explanation. Section 352(4) of ACJA should also be amended to cover cases where the defendant has absconded from detention.