

You may not refuse a blood transfusion if you are a Nigerian child: A comment on *Esanubor v Faweya*

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Summary

This comment examines a decision of the Nigerian Court of Appeal that a Nigerian child is not entitled to refuse a blood transfusion. The comment notes that the decision was handed down at a time when the Child Rights Law was in operation and that, had this legislation been taken into consideration, the best interests of the child would have led to a more nuanced interpretation and guidance on conditions under which a Nigerian child, in furtherance of the right to freedom of religion, may refuse a blood transfusion.

In *Esanubor v Faweya* (*Esanubor case*),¹ the Nigerian Court of Appeal ruled that a Nigerian child cannot refuse a blood transfusion. The events giving rise to this case occurred in Lagos, Lagos State, Nigeria. The Child Rights Law of Lagos State, 2007, was operational at the time the Court of Appeal delivered its decision.² The facts of the case are as follows: A child, a Jehovah's Witness, sued through his mother because of his young age. He claimed that he had been ill and admitted to a hospital. He was diagnosed with a severe infection leading to acute

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¹ [2009] All FWLR (Pt 478) 380 (CA).

² The case began in 1997 at the chief magistrate's court, Lagos. The application for an order of *certiorari* was made to the Lagos State High Court and judgment was delivered on 30 May 2001. An appeal was filed at the Nigerian Court of Appeal in 2003 and the judgment of the Court of Appeal was handed down in 2008. This judgment is subject to appeal to the Nigerian Supreme Court.

blood shortage for which a blood transfusion was recommended. His mother withheld her consent to the transfusion on the ground that her faith as a Jehovah's Witness compelled her to do so. The matter was reported to the Nigerian police, who applied for and obtained an order from a chief magistrate's court authorising the hospital to do everything necessary to save the child's life. Consequently the child was given a transfusion; his condition improved and he was discharged. The child sought a reversal of the order of the Magistrate's Court on the grounds of fraud, which was rejected. Thereafter he applied to the High Court seeking judicial review of the order as well as damages for the unlawful transfusion of blood (without his own or his mother's consent). After the High Court had dismissed the claim, the child's mother appealed to the Court of Appeal.

The Court of Appeal dismissed the appeal as well and held that the magistrate's court was right to have issued an order to save the life of the child and protect his right to life.³ The Court held that it was proper to overrule the refusal of consent to a blood transfusion by the mother on the grounds of her faith since the infant was incapable of giving consent to die on account of the religious belief⁴ of the mother. The Court further held that the mother's desire to sacrifice her son's life 'is an illegal and despicable act which must be condemned in the strongest terms'.⁵ In effect, the Court held that the right to life of the child trumped the religious right of the mother, which the Court conceived gave her the right to determine whether the son should receive a blood transfusion. The Court relied on a decision of the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (*Okonkwo case*),⁶ where the Court held:⁷

The right of freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of

³ See sec 33(1) of the Constitution of the Federal Republic of Nigeria 1999: 'Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria.'

⁴ See sec 38 of the Nigerian Constitution 1999: '(1) Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others, and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance. (2) No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction ceremony or observance relates to a religion other than his own, or religion not approved by his parent or guardian. (3) No religious community or denomination shall be prevented from providing religious instruction for pupils of that community or denomination in any place of education maintained wholly by that community or denomination. (4) Nothing in this section shall entitle any person to form, take part in the activity or be a member of a secret society.'

⁵ *Esanubor case* (n 1 above) 397.

⁶ (2001) 7 NWLR (Pt. 711) 206.

⁷ *Okonkwo case* (n 6 above) 245.

one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms in all cases are where they impinge on the right of others or where they put the welfare of society or public health in jeopardy. The sum total of the right to privacy and of the freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course of life, unless a clear and compelling overriding state interest justifies the contrary if a decision to override the decision of a patient not to submit to blood transfusion or medical treatment on medical grounds, is to be taken on grounds of public interest or recognised interest of others, such as dependant minor children, it is to be taken by the courts.

It appeared throughout the judgment that no allowance was made for the fact that the child had a right to refuse the transmission. The Court proceeded on the assumption that the child's mother was the person who could give surrogate consent. It was therefore a clash of the mother's belief and the son's right to life. Framed in this way, it is not surprising that the Court was emphatic that the mother had no right to decide the future of the son's life. There was no discussion of the wishes or desires of the son. Clearly, the Court's decision is that under no circumstances can a Nigerian child refuse a blood transfusion since it is not possible for the child to raise attenuating circumstances to justify such a refusal.

Before proceeding to discuss some of the issues in *Esanubor*, it is important to draw attention to the possibility that the parties to the case may decide to appeal to the Nigerian Supreme Court. One of the issues that the judgment raises is the lack of consideration of the child's wishes. There is no evidence that the desires, wishes and opinions of the child were taken into consideration by the Court of Appeal. In this regard, the Court did not inquire into whether the child understood his faith and whether he also understood the implications of refusing a blood transfusion. Furthermore, there was no indication of the age of the child from the reports or that this was in any way considered important by the Court. In fact, the involvement of the Nigerian police was lauded as they were considered to be discharging the obligations of the state to protect its citizens and infants.

Until Nigeria's ratification of the United Nations (UN) Convention on the Rights of the Child, 1989 (CRC),⁸ the African Union (AU)'s African Charter on the Rights and Welfare of the Child, 1990 (African Children's Charter)⁹ as well as the domestication of these conventions at the fed-

⁸ Nigeria ratified this Convention in 1991.

⁹ Nigeria ratified this Convention in 2000.

eral¹⁰ and state¹¹ levels, it appeared that on the question of religion the child had no status and depended on its parent's choice. A few facts buttress this point. First, section 38(2) of the Nigerian Constitution, 1999, endows parents with some control over the choice of religion of their children.¹² Secondly, in the case of *Omosebi v Omosebi*,¹³ a Nigerian High Court held that marriage created a corporate entity and that a married woman could not during the pendency of the marriage change her religion without her husband's consent. It is the implications of this ruling for children that concern us here, since it appears likely that such a ruling will extend to these children. Thirdly, the Infants Law of some Nigerian states¹⁴ endows a court in custody proceedings with the power to order that a child should be brought up in the religion of a parent if it discovers that the child is being brought up in a religion different from that of the parent.

The promulgation of the Child Rights Act (2003) in Nigeria and the Child Rights Law (2007) in Lagos State enhanced the ability of a child to choose her religion and enjoy the consequences of this choice. Article 9(1) of the African Children's Charter recognises that every child has the right to freedom of thought, conscience and religion. Parents and legal guardians have the duty to provide guidance and direction in the exercise of these rights, having regard to evolving capacities and the best interests of the child.¹⁵ State parties are expected to respect the duty of parents and legal guardians to provide guidance and direction in the enjoyment of these rights. Section 7 of the Child Rights Act recognises the child's freedom of thought, conscience and religion:

- (1) Every child has a right to freedom of thought, conscience and religion.

¹⁰ In 2003 the Child Rights Act was promulgated into law by the National Assembly of Nigeria. However, since 'children' is under the Residual Legislative List of the Constitution of the Federal Republic of Nigeria, 1999, and therefore within the competence of state governments, it became necessary that state Houses of Assembly pass similar legislation. Accordingly, many state Houses of Assembly have passed a Child Rights Law which is identical to the Child Rights Act. In the 1999 Nigerian Constitution, the distribution of legislative powers between the federal state and local governments is found in the Exclusive List (first part Second Schedule) and the Concurrent List (second part Second Schedule). According to constitutional theory, all matters that are neither in the Exclusive or Conclusive List, nor reserved for Local Governments (Fourth Schedule) are reserved for the states.

¹¹ The Child Rights Act has been promulgated into a Child Rights Law in at least 16 of the 36 states of Nigeria: Abia, Anambra, Akwa Ibom, Bayelsa, Ebonyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers and Taraba States.

¹² 'No person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if such instruction, ceremony or observance relates to a religion other than his own, or a religion not approved by his parent or guardian.'

¹³ (1985) HCCLR 666.

¹⁴ See eg sec 18 of the Infants Law of Bayelsa State 2006, Cap A13 Laws of Bayelsa State, 2006.

¹⁵ Art 9(2) of the Convention.

- (2) Parents, and where applicable, legal guardians, shall provide guidance and direction in the exercise of these rights having regard to the evolving capacities and best interest of the child.
- (3) The duty of parents and, where applicable, legal guardians to provide guidance and direction in the enjoyment of the right in subsection (1) of this section by their child or ward shall be respected by all persons, bodies institutions and authorities.
- (4) Whenever the fostering, custody, guardianship or adoption of a child is in issue, the right of the child to be brought up in and practice his religion shall be a paramount consideration.

It is clear, therefore, that had the Court in the *Esanubor* case reverted to the Child Rights Act and the Child Rights Law of Lagos State, it may have come to a different conclusion or at least shown more sensitivity to the best interests of the child. The age of the child would have been material in the proceedings; so too would have been the question of the manner in which the right of the child to his religion should be expressed. The Court would have acknowledged that the first line of inquiry is to acknowledge that the child has the freedom to choose a religion and thereafter inquire if the child's religion is the same as that of her parents. If this is so, it would appear that the duty of the parent to guide the child in the exercise of this right has been discharged. If the child maintains a faith different from that of her parents, the court needs to examine closely why this is so. The fact that a child has the right to freedom of religion does not automatically mean that the child is to be regarded as having full status with respect to the manifestation of that belief in all its ramifications, including the question of whether to refuse a blood transfusion. Much will depend on the age of the child, the child's ability to understand the consequences of such a refusal, including the risk of death. If a child professes a faith where the rejection of blood is fundamental to that faith, as in the case of Jehovah's Witnesses, it is incumbent upon the court to clearly satisfy itself that the child understands and appreciates the finality of a decision to refuse a blood transfusion. It may be important to take in evidence of parents and other adults as to the maturity of the child in this regard. It is also important that the duty of guidance of parents and legal guardians is properly appreciated by the court. To do this, a court ought to find that the decision of the child is not taken in complete obedience to the parent's wishes, but as a result of a well-considered personal judgment.

Of course, in many instances, the duty to provide guidance is one which is difficult to distinguish from a fact of undue influence. If a child is introduced to a particular religious faith in the course of her formative years, it is not easy to determine at what stage the child is supposed to have reflected and decided to continue with the choice made by the parents. The court could even rule that children of a particular age range are incapable of refusing blood transfusions, while within another age range this decision will be made after due consideration of a number of factors. This would accord with the need to ensure the best interests of the child declared by section 1 of the Child Rights Act

as the primary consideration in every action concerning a child. It will therefore be wrong to hold that under no circumstances can a Nigerian child reject a blood transfusion. A nuanced approach strikes a balance between the recognition of the bodily autonomy of the child and the duty of the state to protect vulnerable persons, including children. This is the approach that the Court ought to have taken in the *Esanubor* case. To have relied only on the *Okonkwo* dictum was insufficient, especially when the question of the capacity of children who are Jehovah's Witnesses to refuse a blood transfusion was not directly at issue in that case.¹⁶

The Court's complete reliance on the wishes of the mother is perhaps symptomatic of a cultural context in which the child has no status and all decisions concerning the child are taken by the parents. The fact that the Child Rights Law has not been promulgated in some parts of Nigeria is a consequence of this cultural context. In many parts of Nigeria, including some of the Islamic states in the northern part of the country as well as other areas where customary law is dominant, children have very limited or no rights with respect to their religion and or its manifestation. The Child Rights Law is therefore a novel and fundamental challenge to these normative systems. The depth of opposition to the Act is evident in the way the Court proceeded in *Esanubor* without even a mention of the Child Rights Law. It is therefore important to state that the domestication of CRC and the African Children's Charter by the federal and state governments in Nigeria is not enough and that more work, especially in raising awareness, needs to be done to ensure that the provisions of the Child Rights Law are operationalised and become the legislative framework determining the rights of the Nigerian child.¹⁷ As Professor Uzodike observed long before the passage of the Child Rights Law:¹⁸

[T]he less it is accepted within the Nigerian society that children are the property of their parents, the more the authorities will take these laws seriously and actually interfere in the exercise of certain rights which are inimical to the interests of children.

¹⁶ The *Okonkwo* case (n 6 above) dealt with the professional negligence of a medical doctor who had respected the wishes of a Jehovah's Witness to refuse a blood transfusion and who had died thereafter. The Nigerian Supreme Court held in this case that the medical doctor was not guilty of professional misconduct because in respecting the wishes of the patient, the doctor was acting in furtherance of patients' rights to freedom of religion and privacy guaranteed by the 1979 Constitution of the Federal Republic of Nigeria.

¹⁷ It is worth noting that family courts at the High and Magistrate's Court levels, as required by the Child Rights Law, have not been so established. See, eg, sec 149 of the Child Rights Act, which requires the establishment of a family court to hear and determine matters relating to children. It seems to follow that such a court will strive to uphold the provisions of the Child Rights Law.

¹⁸ EN Uzodike 'Implications and limits of parental rights in Nigeria' (1990) 2 *African Journal of International and Comparative Law* 282 297.