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Status of surety under the administration of criminal justice in Nigeria

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Abstract

The crux of this paper intensively examines the principles behind the concept of a Surety in the Nigerian legal system. The paper systemically traced and analyzed the historical evolution of surety from what was found in the oldest Hambali Code down to what we presently have in Nigeria, It also looked at the qualifications for becoming a surety as well as the several rights and corresponding responsibilities of a surety. The paper ultimately appraised several legislations and judicial pronouncements on surety and gave some recommendations on how our judicial system can best treat a surety with a view to enhancing our administration of criminal justice in Nigeria.

Keywords: Pangasius, hybrid, digestive system, histology

Introduction

Definition of terms

Surety: A surety is a person who takes responsibility for another's performance of an undertaking or for their appearance in court or paying a debt ^[1].

A surety can be a person who accepts legal responsibility for another person's debt or behavior, or money given as a promise that someone will do something that they have promised to do, such as pay their debt or appear in court. A surety is money or something valuable which you give to someone to show that you will do what you promised ^[2]. A surety is a person who assumes legal responsibility for the fulfillment of another's debt or obligation and him or herself becomes liable if the other defaults or a security given against loss or damage or as a guarantee that an obligation will be met ^[3].

A surety as defined by the Black Law Dictionary is one who at the request of another and for the purpose or securing to him a benefit, becomes responsible for the performance by latter of some act in favour of a third party ^[4].

Historical evolution of surety and Suretyship

The principles of suretyship are not new to the world while many may not even know what a surety bond is; the practice has been around us from time immemorial.

The first sign of a surety was found in Mesopotamia. Mesopotamia being an ancient civilization and one of the first notable hubs of learning, writing and religion, also has a lesser known fact about it. Mesopotamia in about 2750 BCE, was home to the first known record of contract suretyship.

It is safe to say that the practice of suretyship was included in the world's first code of law- the Hammurabi Code, which was written on Glant Stone, and placed in town centers for all to see during the reign of Hammurabi over the Babylonians from 1792-1750 BCE but the suretyship he outlined in his code certainly outlived him.

The oldest known serving surety contract is a contract of Financial Guarantee between farmers written in Babylon in 670 BCE ^[5].

In Nigeria, the practice of suretyship came into force through our received English Law. This is because the colonizing authority not only imposed its political rule over the country but also a legal regime which is made up the principles of common law, doctrines of equity and statutes of general application in existence in England as at January 1, 1900 including most of the current criminal statutes that have undergone several evolutions thereby shaping the present principles guiding surety/suretyship.

Position of surety under the Nigerian criminal justice system: A surety is a term enrobed with both criminal and civil connotations under the Nigerian legal system.

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It is a term used as a relative in the legal parlance. Having defined and most essentially traced its origin at the introductory phase of this paper, it is a crucial necessity to state at this juncture that the scope of this paper is narrowed down to the administration of criminal justice system and further posit that this sub-topic examines the various statutory laws giving legality to the use, limitations, rights and responsibilities of a surety in the administration of criminal justice system.

The term surety is synonymous to Bond, Safety, insurance, Deposit, Pledge, indemnity and warranty. A surety in common legal usage is any individual who undertakes an obligation on behalf of another individual. Having made efforts to inter-connect this subtopic to the introductory facet of this paper, it's imperative to observe its position under the ACJA, 2015.

The position of a surety in the administration of criminal Justice act, 2015

The Administration of criminal justice Act, 2015 is a centrifugal Statute that has inculcated the provisions of the two Primary Criminal Law Statutes into the closest alliance i.e. the Criminal Procedure Act (CPA) mainly applied in the Southern States and the Criminal Procedure Code (CPC) applied in the Northern States by preserving the existent criminal procedures while introducing newer provisions to fill those gaps left by the earlier legislations over such a long period of time.

In a criminal proceeding, the issue of surety prominently features in practice and procedure at the stage of bail applications, hence it is important to view bail under the ACJA, 2015.

Under Part 19 of the Administration of Criminal Justice Act, 2015 bail is thus provided for

“When a person who is suspected to have committed an offence or is accused of an offence is arrested or detained, or appears or is brought before a court, he shall, subject to the provisions of this part be entitled to bail ^[6].”

When a child is suspected to have committed an offence(s) and is brought before the court, and such offence is not a capital offence nor is it an offence punishable with imprisonment of a term more than 3 years, the statute requires that the child be released to his parents in recognizance or execute a bond for a given amount ^[7].

The provisions of sections 161-164 of the Administration of Criminal Justice Act is summarized thus

- Bail in situations where suspect is charged with capital offence.
- Bail where a defendant is charged with offence punishable with an imprisonment of more than 3 years.
- Bail where a defendant is charged with an offence whose punishment does not exceed 3 years.
- Bail in respect of matters in other offences ^[8].

Section 167 (1) of the ACJA, 2015 provides thus

“A defendant admitted to bail may be required to produce such surety or sureties as, in the opinion of the court, will be sufficient to ensure his appearance as and when required.”

A defendant/an applicant executes a bail bond and produces one or two sureties who will undertake to pay a certain

amount of stated in the bond to the court if the defendant fails to appear in court as required. The court may impose other terms or conditions on the sureties such as deposit of title deeds to landed properties areas within the jurisdiction of the court and the court may also require a specific class of persons to stand as sureties ^[9].

In the granting of an application for bail, the accused person may be required to enter into an undertaking to be available in court at any time the case comes up in court ^[10]. The undertaking may include:

- Entering into a bond for certain sum of money which the Defendant may forfeit where he decides to be absent from court for no reason cause or jump bail.
- The court may order the Defendant to make a deposit of money to the court in lieu of executing a bail bond ^[11]. It has been held that the cash deposit option should be at the instance of the defendant and not the court ^[12].
- The Defendant may in addition to the first condition above be required to produce a reliable surety who gives an undertaking to ensure the presence of the Defendant in court at all sittings of the court ^[13].

The surety may also be required to enter into a bond for a certain sum of money which he may forfeit incase the defendant absconds from his trial. The bail bond and other terms prescribed by the magistrate's court should not be excessive as to make it impossible for the applicant to comply with. If the amount or conditions are excessive, the applicant may apply to the High Court for review of such conditions ^[14].

In another condition for the grant of bail, the defendant may be required to produce a surety or sureties ^[15] who will be required to enter into a bond equally, in a specified sum usually into same sum to which the defendant has bond himself. The surety by entering into a bond undertakes to pay the sum to which he is bond if the defendant fails to appear in court or in a designated place unless he can show cause why he should not be so made to pay. Where the defendant fails to find sufficient sureties, the court may make some Orders as it considers just ^[16].

Qualifications of a surety

There is no special qualification to be possessed before a person can act as a surety, however as a matter of practice certain qualifications have been put in place from which the Administration of Criminal Justice Law, Lagos ^[17] provided that person needs to be:

1. Person of a known address
2. Person of good character
3. Acceptable to the court ^[18].

Rights of a surety

A surety is very important in bail and other legal business transaction. This is because of the risk associated with the accused being set free while his case is pending. The surety is therefore a means of ensuring that the accused enjoys his right under the constitution with a reduced risk of the accused escaping prosecution. Some of the rights enjoyed by a surety include:

1. A surety can at anytime request that he no longer desire to act as a surety to an accused person on bail. See section 177 of the ACJA, 2015.
2. A surety has a right to retrieve any money deposited by the said surety on behalf of the accused at the end of the trial so long as the accused abides by the law.

3. A surety has a right to be heard before the court forfeits his security. See section 179 (1) ACJA, 2015. Also see the case of *Amadu Tea V. Commissioner of Police-1963 NNLR 77*.

Women as surety

The woman under the law has no impediment to act as a surety in any given criminal matter, but practice in the Nigerian Criminal Justice system has excluded women from standing in as surety for anybody at any criminal trial. It is of recent that the lacuna emanating from the silence of the law on this subject matter was filled when explicit provisions were inculcated into statutes so as to give a woman the impetus to act as a surety.

The Administration of Criminal Justice Act, 2015 for instance has stated that

"A person shall not be denied, prevented or restricted from entering into a cognizance or standing as surety for any defendant or applicant on the ground only that the person is a woman" ^[19].

Surety under the Adamawa state administration of criminal justice law, 2018

Law by nature is dynamic, by demonstration and reformation of the criminal justice system in the state, the Adamawa State Legislature enacted the Adamawa State Administration of Criminal Justice Law, 2018 which is in close alignment with the Administration of Criminal Justice Act, 2015. In our opinion, this statute is so enacted to provide answers to the lacuna found in the Criminal Procedure Code hitherto applicable in the State.

On surety, this Law provides thus:

1. A defendant admitted to bail may be required to produce such surety or sureties as in the opinion of the court, will be sufficient to ensure his appearance as and when required.
2. The defendant or his surety or sureties may be required to enter into bond accordingly ^[20].

Other statutory categories of surety

It is fundamental that any statutory body saddled with the responsibility of arresting and prosecuting crime committed in its jurisdiction must follow the various statutory apparatus giving them power to carry out such functions. The Economic and Financial Crimes Commission under the EFCC Act, is endowed with powers to arrest and detain any suspect in accordance with the provisions of the law, hence the issue of bail must arise and a surety could feature at that particular instance. So also the ICPC Act and other statutes giving birth to government agencies that are saddled with powers to prosecute any crime within their exclusive jurisdiction.

Bail is a constitutional right guaranteed as part of a bundle of rights an individual is endowed with for being a citizen of this great country. Hence the categories of sureties include:

1. Individual sureties
2. Bonds persons: the law gives heads of the Federal High Court, High Court of the Federal Capital Territory, Abuja power to make regulations for the registration and licensing of corporate bodies or persons to act as bonds persons who may undertake recognizance, act as surety or guarantee the deposit of money as required by the bail condition of a defendant granted bail, within the jurisdiction of the court in which they are registered ^[21].

For a person or a corporate body to be given License to operate as a bonds person, the following conditions must be fulfilled ^[22]:

1. The person or the organization must compose of persons of unquestionable character and integrity.
2. The person or the organization must deposit with the chief Judge sufficient bank guarantee in such amount as determined by the Chief Judge.
3. The registered bonds person shall maintain with a bank or an insurance company designated in his licence such fully paid deposit to the limit of the amount of bond or recognizance to which his licence permits him to undertake.

Judicial pronouncements relating to surety

▪ Basis for courts allowing a person to stand as surety

In the case of *Olayiwola vs. FRN*, ^[23] *Ebiowei, J.C.A.*, held as follows;

"A person who is standing surety for an accused person should do so after proper consideration and personal knowledge of the accused. Standing surety for an accused based on recommendation can be very dangerous. The basis for standing surety is that the accused is personally known to the surety. It is a vote of confidence on the accused by the surety. He is saying the accused is of good character. It is based on that assurance that a Court allows the accused to go on bail. It is therefore a big responsibility on the shoulders of the surety. A surety's inability to produce the accused is therefore seen like an act of deceit on the Court and this will be taken seriously. The surety therefore has a great burden to show it did all within his power to bring the accused. Taking an accused on bail as a surety should not be seen as a business. This is also dangerous. By this, I mean a situation where people do it as a business just as others go about their business. The Court should discourage such attitude ^[24]."

Where provisions in some legislation are made on sureties, the Courts acceptance, neglect and rejection of same

Section 116 (2) of the ACJL Lagos introduces the deposit of money by sureties ^[25]. The Constitutionality of the deposit of money by accused or their sureties as a condition for bail was approved by the Court of Appeal in *Udeh v. F.R.N* ^[26], where *Olagunju, J.C.A* justified the approach in *Advance Fee Fraud* cases as follows;

"... a variant of criminal manifestations that have made advert on the psyche of this country as a component of the world community with tendency to lower or undermine the self-esteem of the country. With the strict bail conditions stipulated in sub-section 18 (1) of the degree considered to be the accomplishment of a goal of that special legislation it will be a disservice to hide under the constitutional provisions designed for the protection of personal liberty to undermine the efficacy of substantive legislation. The sanctity of constitutional right to personal liberty cannot be vindicated under a cloak or cover nor is the right meant in the words of *Iriekefe, JSC* (as he then was) to provide an accused with gratuitous escape route to freedom ^[27]."

The Court also followed the above decisions in *Ekwenigbo v. F.R.N* ^[28]: In *Echeazu v. Commissioner of Police* ^[29], *Mohammed JCA* (as he then was) in his lead judgment, also upheld the constitutionality of the pecuniosity test embraced by the *Advanced Fee Fraud Act*.

In *Nwude v. FGN* ^[30], the Court also held

“For ease of reference the provisions of section 16 of the Advance Fee Fraud and Other Fraud Related Offences Decree No. 13 of 1995 as amended by Decree No. 62 of 1999 and the provision of section 341(2) of the Criminal Procedure Code, the enabling laws under which the application giving rise to this appeal are produced hereunder;

Section 16 of Decree 13 of 1995 (as amended)

"1. The High Court of the State concerned shall have power to grant bail to an accused person charged with an offence under this Decree or any other law triable by the High Court upon such terms and conditions as the High Court of the State concerned may deem fit including;

- a. The payment deposit of one-quarter of the amount of money involved in the offences;
- b. The provision of a surety or such manner of sureties who shall deposit adequate security for the balance of the amount involved in the offence; and
- c. The handing over of his passport to the High Court of the State concerned for the duration of the bail"

From the provisions of S. 18 (supra) a person charged for offences under the Decree is entitled to bail provided he meets the condition as stipulated, that is, the payment of deposit or one quarter of the money involved, the provision of surety or sureties for the balance of the amount involved and the handing over of his passport to the court and any other conditions the court may deem fit to give."

In this matter, the court acknowledged that the Appellant had showed in his affidavit that he will produce substantial persons of irreproachable and substantial character to stand surety for him and also that he will conform to whatever practicable conditions to be imposed on him by the Court ^[31]. The Court however refused bail on risk that the appellant would attempt to bribe the witnesses or fail to turn up for his trial and neglected that the Appellant had undertook to produce a surety of reproachable character and to pay any sum practicable. The Court in this matter accepted the provisions of the Advanced Fee Fraud Act and did not fault it. However, the Court in *Onyirioha v. IGP* ^[32], criticized the provisions of the Act and past decisions in matters related where it held as follows;

"In *Comptroller of Prisons v. Adekanye* (1999) 10 NWLR (Pt. 623) 400, the provisions of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994 which amongst others ousted the supervisory jurisdiction of High Courts over the Tribunal set up pursuant to the Decree and in particular section 26(2) thereof which stated thus: -

"(2) Notwithstanding subsection of this section, the tribunal may grant bail for an amount equal to that involved in the offence, if the person charged with the offence:

- a. Deposits half the amount in the tribunal as security for the bail
- b. Provides surety for the balance of the amount; and
- c. Hands over the passport to the tribunal for the duration of the bail."

The above provisions are exact replica of the provisions of section 16(1)(a-c) of the Advance Fee Fraud and Related Offences Act (as Amended) which is the subject of this appeal.

In the *Comptroller of Prisons v. Adekanye*'s case, one of the issues that called for resolution in the Court of Appeal Lagos

Division, was whether the Decree under which the accused persons were charged and the conditions for bail were not in breach of the African Charter on Human and Peoples' Right or even the constitutionally guaranteed presumption of innocence.

Oguntade J.C.A (as he then was) delivering the lead judgment of the Court of Appeal put it beyond peradventure inter alia: - "I am satisfied that section 26 of Decree No. 18 in its effect is oppressive and totally destroys the presumption of innocence in favour of an accused. It is too harsh and ensures that a person accused of committing an offence under the Decree does not get bail at all. It is a bad legislation and clearly offends Article 7(1)(b) of African Charter on Human and Peoples' Rights, Cap. 10, Laws of the Federation, 1990."

The learned law Lord had earlier held that when a Nation State for the collective good surrenders part of its sovereignty its true import is that it takes the assertion of the Nation State to limit its sovereignty. Therefore by Article 7(1)(b) and of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Laws of the Federation of Nigeria, 1990, every person is presumed innocent until proven guilty by a competent court and to be tried with a reasonable time by an impartial tribunal. Furthermore, he maintained, by the voluntary subscription to the Charter, the provisions thereof bind Nigeria and accordingly, any municipal law like the Failed Bank Decree which is in conflict with the Charter on Human and Peoples' Rights shall to the extent of it's inconsistency be null and void. See *Eyu v. The State* (1988) 2 NWLR (Pt. 78) 602.

In the case at hand, section 16(1)(a-c), is patently a draconian piece of legislation crafted hurriedly by the 'ancient' regime prior to their exit albeit to check the nefarious activities of fraudsters who had become a serious trouble to gullible Nigerians during and after the said regime. One is also not unmindful of the peculiar circumstances under which the Advance Fee Fraud Act was enacted particularly as Nigerians have been traumatized both nationally and internationally and indeed had acquired the notoriety of being tagged the most corrupt nation in the universe with the attendant pariah status on account of this unwholesome practices by some of her citizens. There is also no doubt that the last regime and the succeeding one had made anti-corruption and transparency as the bastion of their policy. Notwithstanding the foregoing, our new democratic dispensation cannot brook draconian and uncivilized modes of enforcing our laws.

I am not oblivious of what Olagunju, JCA said in *Ekwenugo v. F.R.N.* (2001) 6 NWLR (Pt. 708) 171 at 190 paras. G-H that:

"It suffices it to say that the Advance Fee Fraud Decree is a special legislation designed to combat certain enormities in the society with international repercussion. Therefore, I venture to say that for the efficacy of the policy underlying the creation of offences under the Decree, the conditions for bail stipulated by subsection 18(1) thereof provide guidelines for exercise of the court's discretion, the bench-mark from which grant of bail cannot wander too far away without undermining the fabric of the Legislation."

With the greatest respect to the learned D.P.P. the African Charter on Human and Peoples' Rights was not brought to the attention of their Lordships of the Court of Appeal in the above cited case. I am of the candid view that, where a statute provides for such stringent terms and conditions of bail for a bailable offence, there is the presumption that the accused is guilty, otherwise if he is presumed innocent, where for

instance he has not committed the offence, how does he afford one quarter of the amount allegedly stolen or fraudulently received to be deposited in court?.....
I am of the view that the learned counsel for the appellant was on sound ground when he submitted that section 18(1) now 16(1) of the Advance Fee Fraud is in breach of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, Cap. 10, Laws of the Federation, 1990 and accordingly that section - nay the order of the trial Judge, is null and void and of no effect whatsoever ^[33].”

On whether civil servants or public officers can be involved in bail of accused persons -

In the case of *Dasuki v. D-G, SSS* ^[34], ADAH, J.C.A.held as follows:

“Let me quickly say that of concern it is to us that as a court we must be ready and sensitive enough not to allow or do anything that will run foul of the law. The issue of involving civil servants or Public Officers in the Public Service of the Federation and the State in bail of people accused of criminal offences has never been the practice in Nigeria or any part of the civilized world. It was an oversight on our part to allow it in. Our Civil and Public Service Rules do not have any room for it. Expecting a Level 16 Servant to own property worth N100,000,000, will be running counter to the Public Service Rules and by extension the war against corruption. It is in this respect that I will act *ex debito justitiae* to ensure that the aspect of involving serving Public Servant not below the status of Level 16 Officer in either the state or Public Service of the Federation or any of its agencies be removed and I so order ^[35].”

The dictum in the above case is generally baseless in our opinion. Contrary to the dictum, it has always been the practice to recommend senior civil/public servants as sureties. The reason, I think, is that they (civil/public servants sureties) cannot afford to gamble with their jobs by standing for defendants of questionable character. If the court now says that the practice of recommending civil/public servants as sureties was an oversight on their part, so be it. The advice one could glean from the judgment is that civil/public servants are poor, and cannot legitimately afford landed properties in choice areas of big cities like Abuja, Lagos, etc, or large bail bonds. If they do, they would be exposing themselves to the prying eyes of the EFCC, ICPC, Police, etc. There is no law, to our knowledge, not even the Public Service Rules that discriminates against civil/public servants in standing sureties to applicants for bail in criminal trials. We can take a hint from section 42 as amended 1999 constitution of Nigeria which envisages non discrimination. The section 42 of the amended 1999 constitution deals specifically with right to freedom from discrimination of the Nigerian citizens, that is, the right to equality of citizens which is one of the cornerstones of human rights not only in Nigeria but also everywhere in the world.

Conclusion/recommendation

- Citizens, including private and public servants (men and women) reserve the right and liberty to stand as a surety for anyone accused of a crime who has not yet been convicted of the offence.
- Judges especially those in the inferior courts of record and even some in the superior courts of record should be reoriented in their interpretation of the several extant laws on surety. Seminars, lectures and symposiums

should be organized for them with a view to helping them better appreciate the status of a surety under our criminal justice system. They should be discouraged from attaching stringent conditions to the grant of bail simply with the notion of making life harder/difficult for the surety and with the ultimate aim of punishing the offender whose surety is unable to meet up with the stringent conditions.

- Legislations, especially those that promote self bail (on recognizance) should be readily resorted to and judges encouraged to grant same, provided the offence is not capital in nature and where especially the data of the offender is fully captured by the court. With the use of technology, the data of most offenders can be readily available especially in Nigeria where premium is now being place on sim and NIN registrations. Once the data of such an offender is adequately captured, his where about at all times is fairly certain and this will encourage such a person to make himself available for his trial.
- The provision for deposit of excessive sums in some of our legislations relating to a surety should be completely jettisoned as it in most cases encourages and promotes corruption of court officials who are interested in the monies at the expense of true justice. This usually makes it easier for offenders to deposit money and disappear into tin air and escape prosecution.

References

1. Oxford Dictionary, www.lexico.com/surety, 2021 lexico.com
2. Cambridge English Dictionary, Cambridge University press 2021
3. Collins Dictionary, Collins 2021
4. Black Law Dictionary, 2016 legal dictionary
5. The law of suretyship and Indemnity in the United Kingdom of Great Britain and Northern Ireland and Ireland
6. Section 161 (1)ACJA, 2015
7. Section 166 ACJA, 2015
8. Sections 161, 162, 163 and 164 ACJA, 201
9. Page 431, Practice & Procedure of Criminal Litigation in Nigeria by Y.D.U HAMBALI
10. Page 192, Criminal Litigation in Nigeria, by AF AFOLAYAN
11. Section 165 (1) ACJA, 2015
12. Section ACJL, Lagos
13. Section 118 (1) ACJL, LAGOS
14. A.F. AFOLAYAN (Supra) page 192
15. Section 167 (1) ACJA, 2015, Section 118 (1) ACJL, Lagos
16. Section 181 ACJA, 2015
17. Section 118 (1) ACJL, Lagos
18. Page 300, Practical Approach to Criminal Litigation in Nigeria by J.A. AGABA
19. Section 167 (3)
20. Section 168 (1)(2), Adamawa State Administration of Criminal Justice Law, 2018
21. Section 187(1) ACJA, 2015
22. Section 187 (6)(7)
23. 2018. LPELR-46772(CA)
24. At Pages 17-18, Paras. F-D.
25. Similar provisions are provided for in the Advanced Fee Fraud Act and Failed Banks Recovery of Debt and Financial Malpractices in Banks Act.

26. 2001 5NWLR (Pt. 706) 312 at 324 para F-G;
27. Supra.
28. 2001 6 NWLR (Pt. 708) 171 at 190 paras. G-H .
29. 1974 NWLR 308 at 314,
30. 2004 17 NWLR (Pt. 902) 306 At 326-327, paras E-H,
Paras. E.
31. See Page 329, paras H.
32. 2009 3 NWLR (Pt. 1128) 342
33. 365-367, Para G-G.
34. 2020 7 NWLR (1731) 136 at 153, para 153, F-H
35. at page 153, paras. F-A