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Employee Arrest and Conviction in the Course of Work: Does an Employer Owe an Employee a Duty of Care Under Nigerian Law?

Jane-Frances Terdoo Yagba[546] **Abstract**

The duty of care is recognised under Nigeria law. It arises from Nigerian statute such as the Factories Act and common law. It entails that an employer has a duty to protect an employee from harm in the course of work. Where an employee suffers a damage from a breach of the duty, an employer is held liable for the breach. It is however unclear if the duty of care extends to protection of employees from arrest and conviction arising from or in the course of work. Based on the foregoing, an assessment of the Nigerian law is done to ascertain whether an employer has a duty to protect an employee from arrest and conviction arising from performance of his duties under a contract of employment. It was found that the Nigerian law is silent on compensation of employees for financial losses. Also, there is no provision in the Nigerian law on an employer's indemnity for loss of earnings. It was recommended that the Nigerian law should extend the duty of care to cover employee arrest and conviction thereby enabling the courts to award damages for arrest and/ or conviction where it is fair and reasonable to do so.

Keywords: Duty of Care, Employment, Loss of Earning, Arrest, Conviction

1. Introduction

A contract of employment creates a relationship between an employer and an employee wherein the employee sells labour.[547] An employer is defined as an employer as any person or body corporate or unincorporated body that has entered into a contract of employment to employ another person known as an employee.[548] The employee on the other hand is any person employed by an employer under oral or written contract of employment whether on a continuous, part time, temporal, apprenticeship or casual basis and includes a domestic servant who is not a member of the family of the employer including any person employed in the federal, state, or local governments and any of the government agencies and in the formal sectors of the economy.[3]

From the definitions, it is clear that the relationship involves the performance of certain duties. On the part of the employer, it includes payment of wages, provision of a safe working environment among others. The employee has an obligation to perform work or render services to the employer in return for wages and other terms and conditions of work.

In the course of performance of the work, employees could be arrested and it may lead to a conviction and loss of a career due to withdrawal or cancellation of license or certificate. An instance of this is where a medical doctor is employed in a hospital and he conducts a caesarean

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[547] JW Budd and D Bhave, 'The Employment Relationship' Sage Handbook of Human Resource Management (2010) 51 https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.researchgate.net/publication/287374136_The_Employment_Relationship. Accessed 28 August 2023.

[548] National Industrial Court Act 2004 s

54. [3] Ibid.

section that leads to loss of life. It could happen that the medical doctor as an employee is sued because he operated the woman and it is established that there is a case of negligence on the part of the hospital to provide the required equipment. The medical doctor may have spent a lot of money from the point of arrest to conviction and maybe, there is a withdrawal of his license. In another scenario, an employee was on his way with a delivery truck at about 12: 00 am due to traffic issues, He came across a road block. The police asked of his means of identification, he produced one. The police officers also searched the vehicle. At the end, he was still arrested by the police on the grounds that there was a robbery at a particular location and they were notified and instructed to arrest any person seen along the axis for investigation. The employee is added to other hoodlums and arraigned for armed robbery. The employer does not come to the rescue of the employee but simply applies for release of the official vehicle and walks away leaving the employee on the grounds that he used a different road from that which he would have used and that he ought to have returned earlier than 12:00 am.

Another scenario could be that a person is employed as a Point of Sale (POS) operator and the worker is posted in Gboko Central Market. The worker started work and someone walked to him and made a withdrawal of N100, 000 via a transfer to his personal account because there was no network in the employer's account. The employer authorized that it can be sent to the worker's account. The worker did the transaction and handed the money to the customer. At the end of the day, the employer informed her to withdraw the money and use for the next day's transaction. After a year, the Nigeria Police Force traced her and arrested her on the grounds that the N100, 000 was part of a ransom paid for a kidnapped traditional ruler in Benue State. Since the worker's arrest and detention, the employer came once to the station, enquired about the situation and never returned.

The questions are; does an employer owe an employee a duty of care from criminal conviction from the performance of his role? Does the employer have a duty to indemnify an employee for losses resulting from convictions arising from the performance of the employee's role? The employer's duty of care will be examined in this article to ascertain if an employer owes the employee a duty of care under situations of arrest and conviction of an employee arising out of or in the course of employment. The discourse does not extend to an employee's arrest for crimes committed by him in a workplace that warrant investigation and in which the employer actually calls for his arrest. The discourse does not extend to arrest and convictions in matters not related to work.

2. Employer's Duty of Care

The duty of care arises from the tort of negligence. It places an obligation on a person to be responsible for other people's health, wellbeing and safety by taking reasonable care to ensure that a person is not exposed any risk of injury.[549] The principle was established in the case of *Donoghue*

[549] E Emudainohwo, 'Analyzing the Duties of Employer and Employee in the Nigerian Law' *Beijing Law Review* (2021)(12) 310 https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.scirp.org/ pdf/blr_2021040810472458.pdf Accessed 28 August 2023.

v Stevenson[550]and till date, it is applied to establish liability on a person even where there is no direct contractual relationship.

Negligence is stated to be a breach of a legal duty of care which causes damages to a person.[551] The whole idea is that one must take reasonable care to avoid acts or omissions that he or she can reasonably foresee that would likely injure another who is closely or directly affected by the act or omission.[7] For an action to succeed for negligence, the claimant must establish that;

A. The defendant owed a duty to the claimant
B. The defendant breached the duty owned to the claimant
C. The breach of duty led to the claimant's injury or loss.

Where a claimant successfully proves the above, the appropriate remedy in this regard is damages.

Though *Donoghue v Stevenson* relates to consumer protection, the principle of law (duty of care) established in the case is extended to other areas of the law such as in labour and employment law. In the realm of labour law, the duty of care applies under Nigerian law by virtue of the application of common law. Where an employer fails to take reasonable care and an employee sustains an injury, the employer will be held liable to pay for damages for the injury suffered.[552] The duty also applies where the employees of the employer cause injuries to other co- employees.[553] Vicarious liability will arise in such cases.

The Nigerian courts have applied the principle in *Donoghue* in many cases inclusive of employment/ labour related cases. For example, in the case of *Ojike v Annsed Ltd*,[554] the court determined the issue whether the injury sustained by the claimant was caused by the defendant's breach of duty as an employer of the claimant and whether the employer (defendant) owed the employee a duty of care. The court after analysing evidences before it, held that the employer owed the employee a duty of care and the duty was breached. Though, the court also held that the claimant contributed to the negligence that resulted to the injuries.

The basis of the duty of care is foreseeability. Typically, in a workplace, an employer will likely not be held liable if he did not reasonably expect that an employee will suffer injuries or death. One would wonder if foreseeability will apply where an employee faces arrest and conviction while performing his duties at work or while rendering services to the employer?

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[550] [1932] AC 562.

[551] CC Nwabachili 'The Legal Implications of Duty of Care' Global Journal of Politics and Law Research (2017) (5)(4)https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.eajournals.org/wp content/uploads/The-Legal-Implications-of-Duty-of-Care.pdf accessed 7 May, 2023. [7] *Donoghue v Stevenson* (n 4).

[552] E Emudainohwo, 'Analyzing the Duties of Employer and Employee in the Nigerian Law' *Beijing Law Review* (n 4).

[553] Ibid.

[554] (2018) JELR 87539 (NICN).

[11] [2014] LPELR-23614 (CA).

There is a Nigerian case bordering on arrest of an employee while out from his abode to a foreign land to perform work. The case is *Kabo Air Ltd v Mohammed.*[11] The facts of the case are as follows: The respondent was employed by the appellant as a flight attendant. On the 6th day of January, 2008, he was part of the crew that conveyed pilgrims from Ilorin to Jeddah in Saudi Arabia. The flight arrived Jeddah on the 7th day of January 2008 at about 8am. The respondent checked into the Jeddah Trident Hotel that was reserved for crew members. In the evening of same day, accompanied by two drivers of the appellant namely; Usman and Jameel, the respondent went to a shopping mall to purchase toiletries. After he purchased the items, the drivers dropped him at a safe walking distance from the hotel. As he was walking to the hotel, he was stopped by a man who was addressing him in a foreign language (Arabic). He told the man that he did not understand him. That the man prevented him from going to the hotel. This caused a commotion and the police came to the scene and arrested him. He was taken to the police station and forced into signing some papers written in Arabic. After two days, he was allowed to make a call and he called the Cabin Services Manager of the appellant, Aminu Imam who came to the police station and assured him that he would inform the management of the appellant who were in Jeddah at that time.

The respondent was later questioned by four men in English language and he gave them his details and showed them his identity card and they informed him that he was arrested for wearing a lady's trouser with lady's shoes and for having a lipstick in his pocket and that he was soliciting for money for sex. The men assured the respondent that he would be released once the management of the appellant came and identified him. However, no member of the management nor Aminu Imam came to identify him.

The respondent was later transferred to another police station where he was locked up for nineteen days without seeing the appellant or any member of the crew. He contacted the Nigerian Embassy in Jeddah, Saudi Arabia. An official of the embassy, Mohammed Dawood came to see him and after hearing from him, he assured him that all will be well if the appellant write to the Nigerian Consul and the embassy will get him released. The respondent informed the cabin services manager, Aminu Imam and the representative of the appellant in Jeddah, Farouk and also contacted the Executive Director of Operations of the appellant, Alhaji Aminu Aliyu, the then General Manager operations, captain Ibrahim Dilli and the chief pilot, captain Machimu Joseph who were all present in Jeddah at that time but they did nothing and because the appellant did not do the needful, Mohammed Dawood informed him that there was nothing the Nigerian Embassy could do in the circumstances. The respondent was later transferred to the prison and thereafter charged to court five times and eventually convicted. He was sentenced to six months imprisonment and four hundred and twenty lashes of the cane. He spent seven months in prison and he was released. While he was arrested, the appellant stopped his salary and he was placed on indefinite suspension. Upon his return to Nigeria, the appellant requested that he responds to the letter of indefinite suspension which he did so but nothing happened for many months thereafter.

The appellant by a letter dated 16th February, 2009 invited the respondent to appear before its disciplinary committee on 19th February, 2009. He appeared before the committee. On 10th March, 2009, his contract of employment was terminated and on 14th July 2009, he was paid the backlog

of his salaries and gratuity but the appellant did not compensate him for the severe disgrace, humiliation, insult and torture, both mentally and physically that he suffered in Jeddah, Saudi Arabia by reason of neglect and abandonment by the appellant. He claimed that he honestly believed that he would have been released if the appellant had written a letter identifying him as its legitimate staff.

The respondent sued the appellant at the High Court of Kano State claiming damages (special, general and punitive damages) for the actions of the appellant for neglecting and abandoning him during his detention and imprisonment in Jeddah and for the beating and humiliation he faced in Jeddah. The trial court entered judgment for the respondent for the negligent and abandonment. The court awarded the sum of two million naira as general damages, two million naira as punitive damages and 10% court interest until judgment sum is liquidated. Dissatisfied with the judgment of the trial court, the defendant, now appellant appealed against the judgment of the court. The court of appeal found no merit in the appeal. The appeal was dismissed. The judgment of trial court was affirmed. The sum of one hundred thousand naira (N100, 000) was awarded against the appellant as cost of the action.

Kabo's case is premised on the appellant's negligence to ensure the respondent's release by simply identifying the respondent as its staff and the subsequent abandonment which led to his conviction in Saudi Arabia. The scope of this article is beyond abandonment. It extends to situations where the employee losses his license to practice his occupation or where the employee was not abandoned by the employer but he was convicted for an act arising out of or in the course of employment. Performance of the work which is in one way or the other is seen as an offence warranting the employee's arrest and subsequent conviction and loss of license to practice.

Two views could arise where there is an issue of an employee's conviction or loss of license to practice for acts arising out of or in the course of employment. On the one part, it could be argued that an employee is not bound to carry out instructions or orders of the employers that are unlawful or improper as such, an employee is not under an obligation to obey orders of the employer that will expose his life to danger or involve commission of a crime. On the other hand, it could also be argued that an employee acts for the employer and any liability arising out of or in the course of work should be borne by the employer. Thus, where an employee is arrested and convicted for an act committed in the course of work, the employee should adequately compensate the employee. The second view appears to be better than the first because the employees are in a disadvantaged position as compared to the employer and the employee did act for himself but on behalf of the employer for the employer's interest and the employer could be better informed of the circumstances in which the work to be done. Some employments could be disguised. If the employer can be entitled to benefits then liabilities such as matters related to the arrest and conviction of the employee in the course of work too should be borne by the employer.

Loss of license to practice one's profession is not a minor issue. It is an issue that cripples one's ability to earn. It is worrisome that there is no law that cater for economic losses of employees arising from arrest and conviction of an employee while rendering services to the employer. What

is clear in Nigeria is that where there is an abandonment and negligence to aid the freedom of the employee, *Kabo's* will apply.

The England and Wales Court of Appeal (Civil Division) have made a pronouncement on a matter in which an employee sought to recover earnings lost as a result of his conviction. This was done in the case of *Benyatov v Credit Suisse (Securities) Europe Ltd*.[555] The appeal raised an issue about the circumstances in which an employer may be liable to compensate an employee for loss of earnings caused by the act of a third party in consequence of the employee doing their job. The facts giving rise to the issue are as follows: The Appellant was employed by the Respondent, Credit Suisse Securities (Europe) Ltd. In 2005, he became a Managing Director in the respondent's Investment Banking Department, based in London. In April 2006, he became Head of European Emerging Markets. He was evidently an able and successful professional.

In 2002, the Appellant was involved in privatization consultancy work being carried out by the Bank in Romania (though he was never based there). From 2005-2006, he worked on a project in which it was advising a company called Enel SpA ("Enel") relating to the purchase of a stateowned electricity company called Electrica Muntenia Sud ("EMS"). On the 22nd day of November 2006, while the Appellant was on a visit to Romania, he was arrested on suspicion of criminal wrongdoing in connection with the EMS privatisation. He was held in custody until on the 23rd of January 2007 and thereafter kept under house arrest and prohibited from leaving the country until August 2007, when he returned to England.

On the 7th day of January,2007 he was charged by Romanian prosecutors, along with two other Credit Suisse employees (Mr Flore and Mr Susak), with "economic or commercial espionage" and "the initiation and establishment of an organised criminal group". In broad terms, the alleged wrongdoing consisted of obtaining for Enel confidential information about the first-round bids of its competitors in the EMS privatisation. The Claimant maintained, that he did nothing wrong, as a matter either of international banking practice or of Romanian law and that his prosecution was politically motivated.

The allegations against the Claimant were thoroughly investigated by the Bank. They were satisfied that he and the other employees charged had indeed done nothing wrong. The Bank supported the appellant fully in the ongoing criminal proceedings in Romania, which were prolonged, and instructed lawyers at their expense to conduct his defence. He remained employed by the Bank.

The High Court dismissed the case and held that it was not reasonably foreseeable that the appellant would be exposed to the risk of conviction in the performance of his duties as such no duty was owed by the Bank to the appellant.

What can be seen from the case is that the neighborhood principle or the reasonable foreseeability test has limited the scope of the duty of care and more particularly, it does not cover the arrest and

[555] [2023] EWCA Civ 140.

conviction of an employee in the course of employment. Even the indemnity claim was refused and it could be safely stated that the court was being cautious not extend the employer's indemnity beyond expenses or liabilities incurred in the course of work to loss of earnings due to the employee's conviction.

The approach of the court in *Benyatov*[556] is not fair. This is because, the employer owes the employee a duty of care; a duty to protect the employee from harm that may arise in the course of work. From this duty, an employer is to ensure that the employee does not suffer any damage whether in the form of arrest or an economic loss. Where the employee suffers a loss not for his personal action but while working for the employer, is he not entitled to any remedy? It is ideal that the employer compensates the employee for the present and future loss of income if the conviction affects the employee's career that prevents him from working in his profession. What will a lawyer or doctor be when the license or certificate is withdrawn? Will the doctor or lawyer whose license or certificate is withdrawn get jobs within the profession? The answer is in the negative.

A remedy for an employee's financial loss is not captured under the Nigerian law. The Nigerian law relates to occupational disease, injuries and death arising out of or in the course of work, as provided under the Employee Compensation Act.[14]

3. Indemnity in Labour Relations

Indemnity means a promise to protect a person from a loss or financial liability.[557] It also means to reimburse a person for a loss suffered because of a third party's or a person's own act or default.[16] The latter definition is more appropriate in this discourse as the work revolves around paying the worker a sum of money as damages for arrest and conviction or loss of license to practice arising from performance of the lawful orders of the employer or reimbursement for expenses incurred to get his freedom from arrest and detention.

In labour relations, the duty of indemnity is an implied duty with its roots in common law. This duty applies where an employee's act falls within the reasonable performance of his/ her duties. This entails that where an employee's act is in breach of the contract of employment, the employee cannot rely on the duty of indemnity to recover any cost or liabilities from the employer for example, if an employee is sent from Makurdi to Abuja, Nigeria to transact on behalf of the company, the company is liable for all costs and expenses for the trip. Usually, such cost and expenses are contained in the policies of the companies or in some other document of the company. Cost and expenses not covered by the company's policies or documents may be unlikely paid for by the company.

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[556] *Benyatov* (n 12).

[14] ECA, 2010.

[557] F Elliot, ' Indemnity: Construction Law Terms, A to Z' https://www.google.com/url?sa=t&source=web&rct=j&opi=89978449&url=https://www.fenwickelliot.com/sites/default/files/i_indemnity.pdf Accessed 28 August 2023. [16] BA Garner, *Black's Law Dictionary* (9thEdn, West Publishing Company 2004) 837.

In Nigeria, it appears the scope of indemnity is tied to injuries committed by a worker to other persons in the course of work while carrying out the lawful orders of the employer.[558] Considering the emergence and complexities of informal work and generally the changes in the world of work, it is necessary that the duty of care should be extended to cover arrest and conviction of employees that arise from work and possibly indemnity for workers for loss of earnings where the employee loose the license to practice or expenses incurred to aid his freedom should be incorporated.

4. Relevance of the Extension of the Duty of Care to Employee Arrest and Conviction

It is essential that the duty of care is extended to cover circumstances in which an employee could be arrested and/ or convicted for acts committed in the course of work. The duty should be made to apply where employees are sent by employers to high- risk areas to work or the work involve risk of arrest and conviction. Working as a POS operator or attendant is a work with risk attached and such arrest are common. There is a likelihood of abandonment of such workers in custody. In high- risk areas, the risk could mean likelihood of physical harm to the body and political or corruption issues. The emphasis here is not on physical harm but the risk of arrest and conviction that can arise from an area that is dominated by political crises and corruption issues that a person could be easily framed for a crime.

The duty of care in this regard entails that an employer should carry out an assessment in the community to ascertain the risk before sending the employee to work there. This is because, laws vary and it is important that it is ascertained that the employee's role in the country is not against the law. An act may be legitimate in country A but unlawful in country B. An employee who unknowingly goes out to work there may end up arrested and convicted if there is no prior assessment. If the assessment is done and an employee is advised accordingly on how to carry out his duties and he does otherwise without compliance with the law of a country, then it will then be a fault of the employee and not the employer's fault. It will amount to willful disobedience and liability will not lie on the employer. A typical example is where a cattleman who has never been in Benue State is employed to rear cows and the cattleman encroaches on the Benue soil from Nassarawa State and he is arrested for open grazing in Benue State. It may be that he is not informed of the law against open grazing in Benue State and may not know the boundary between Nassarawa and Benue State. It is very likely that the employer who has been in the business over the years has the details of the issues and may have presumed that the cattleman knows. Such employers may react differently. Some may follow up the case. Others may pay fines for the release of their cows and abandon the workers in custody.

A risk assessment when done will keep the employer in an informed position to adequately protect employees from such risk. An employee will not suffer any damage in the course of work and the issue of the employer's liability will not arise**.** Where an employer fails to guarantee the safety of an employee from risk, it should be viewed as a breach of duty of care.

[558] *Imarsel Chemical v National Bank of Nigeria* [1974] ECSLR 355.

An extension of the duty of care to an employee's arrest and conviction in the course of work would imply that damages will accrue where an employee is convicted for acts related to the work.

The aim of the damages would be to put the employee in the position he or she would have been if he was not convicted and he did not loss his license or certificate to practice his profession.

The discourse does not in any way suggest that all liabilities for loss of income arising from an arrest and conviction should be borne by the employer. The area in focus here is arrest and convictions or loss of career arising from lawful performance of an employer's instructions or directives. This does not extend to arrest and convictions arising from acts done by an employee in total disregard of the employer's instruction or carrying out of the duties in an unlawful way without the employer's knowledge of such illegality or an employee acting in his or her capacity, not based on the instruction of the employer.

5. Conclusion

An arrest and conviction of an employee while performing his duties or for acts linked to his work could be reasonably foreseeable or not reasonably foreseeable by the employer. From the assessment of the law, the duty of care does extend to an arrest of an employee and the employer fails to do what is required of him to aid the release of the employee from police custody. This is based on the decision in *Kado*.[559] However, it is unclear whether the duty of care would extend to situations where the arrest and conviction of an employee arises from the work.

Though there is no Nigerian case on that, it is likely there are such incidence in Nigeria that are not reported. Such incidences will most likely emanate from informal work which the most victims are POS workers. It is known that such workers are vulnerable and the issue of arrest and conviction is just an angle of the vulnerability.

The case of *Benyatov*[560] covers the sphere of this work but unfortunately the court refused to extend the duty of care to arrest and conviction of an employee or indemnify an employee for lost earning. The court's holding in *Benyatov* that an employer will not have any liability for such arrest and conviction is unfair to the employee who is performing the work based on the employer's directive as well as for the employer's benefit.

The employers control the work and specify how work is to be done. In line with that, it is imperative that employers reap the good and bad impact of the work. If the result is profit, it should be fine. If the employee has suffered a physical and/ or financial harm, the employer should as well share the burden and not leave it for the employee. The employer should take the burden of the liabilities just like the profits.

The basis of such decision should be on whether an employee could refuse to obey and still be protected under the Nigerian law and whether the employee was adequately protected from such risk by the employer.

[559] *Kabo Air Ltd v Mohammed* (n 10).
[560] *Benyatov v Credit Suisse (Securities) Europe Ltd* (n 12).

6. Recommendations

It is recommended that the Nigerian courts if faced with arrest and convictions or withdrawal of license or certificate of employees arising from work should consider adequate compensation of the employee particularly where the consequences result to loss of career.