

Gbemre v Shell Petroleum Development Company Nigeria Limited and Others (2005) AHRLR 151 (NgHC 2005)

Mr Jonah Gbemre (for himself and representing Iwherekan Community in Delta State, Nigeria) v Shell Petroleum Development Company Nigeria Ltd, Nigerian National Petroleum Corporation and Attorney-General of the Federation

Federal High Court of Nigeria in the Benin Judicial Division, suit FHC/B/CS/53/05, 14 November 2005

Judge: Nwokorie

Extracts.

Gas flaring in the course of oil extraction violates the right to life and a healthy environment

Environment (right to a healthy environment, 6; environmental impact assessment, 6)

Life (effect of pollution, 6)

[1.] On 21 July 2005 this Court granted leave to the applicants to apply for an order enforcing or securing the enforcement of their fundamental rights to life and dignity of human person as provided by sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999, and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9 vol 1, Laws of the Federation of Nigeria, 2004. By a further leave of Court I permitted the applicant to commence these proceedings for himself and as representing other members, individuals and residents of Iwherekan community in Delta State of Nigeria, in view of the copious unwieldy list of members contained in an earlier application for leave they brought in respect thereof, which was withdrawn by their counsel at the prompting of the Court.

[2.] The reliefs claimed by the applicants in their subsequent motion on notice filed on 29 July 2005 include:

1. A declaration that the constitutionally guaranteed fundamental rights to life and dignity of human person provided in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria, 2004 inevitably includes the right to clean poison-free, pollution-free and healthy environment.
2. A declaration that the actions of the 1st and 2nd respondents in continuing to flare gas in the course of their exploration and production activities in the applicant's community is a violation of their fundamental rights to life (including healthy environment) and dignity of human person guaranteed by sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and reinforced by articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol1, Laws of the Federation of Nigeria 2004.

3. A declaration that the failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicant's community concerning the effects of their gas flaring activities is a violation of section 2(2) of the Environment Impact Assessment Act, cap E12 vol 6 Laws of the Federation of Nigeria, 2004 and contributed to the violation of the applicant's said fundamental rights to life and dignity of human person
4. A declaration that the provisions of section 3(2)(a), (b) of the Associated Gas Re-injection Act cap A25 vol 1 Laws of the Federation of Nigeria, 2004 and Section 1 of the Associated Gas Re-Injection (continued flaring of gas) Regulations Section 1.43 of 1984, under which the continued flaring of gas in Nigeria may be allowed are inconsistent with the applicant's right to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9 vol 1 Laws of the Federation of Nigeria, 2004 and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.
5. An order of perpetual injunction restraining the 1st and 2nd respondents by themselves or by their agents, servants, contractors or workers or otherwise howsoever form further flaring of gas in the applicants said community.

[3.] It is the case of the applicants, as shown in the itemized grounds upon which the above-mentioned reliefs are sought that:

- a) By virtue of the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 they have a fundamental right to life and dignity of human person.
- b) Also by virtue of articles 4, 16 and 24 of the African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) Act Cap A9, vol 1 Laws of Federation of Nigeria, 2004, they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state of physical and mental health as well as right to a general satisfactory environment favourable to their development.
- c) That the gas flaring activities in the community in Delta State of Nigeria by the 1st and 2nd respondents are a violation of their said fundamental rights to life and dignity of human person and to a healthy life in a healthy environment.
- d) That no environmental impact assessment was carried out by the 1st and 2nd respondents concerning their gas flaring activities in the applicant's community as required by section 2(2) of the Environmental Impact Assessment Act, Cap E 12 vol 6, Laws of the Federation of Nigeria 2004, and this has contributed to the unrestrained, mindless flaring of gas by the 1st and 2nd respondents in their community in violation of their said fundamental rights.

- e) That no valid ministerial gas flaring certificates were obtained by any of the 1st and 2nd respondents authorizing the gas flaring in the applicant's said community in violation of section 3(2) of the Associated Gas Re-Injection Act, Cap A25 vol 1, Laws of the Federation of Nigeria, 2004.
- f) That the provisions of section 3(2) of the Associated Gas Re-Injection Act, Cap A25, vol 1, Laws of the Federation of Nigeria, 2004 and section 1 of the Associated Re-Injection (Continued Flaring of Gas) Regulations, 43 of 1984, under which gas flaring in Nigeria may be continued are inconsistent with the provisions of sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria 1999 and articles 4, 16 and 24 of African Charter on Human and Peoples' [Rights] (Ratification and Enforcement) are therefore unconstitutional, null and void.
- g) That the provisions of both sections 21(1) and (2) of the Federal Environmental Protection Agency Act (FEPA) Cap F10 vol 1 Laws of the Federation of Nigeria, 2004 makes the gas flaring activities of the 1st and 2nd respondents a crime, the continuation of which should be discouraged and restrained by the Court.

[4.] It is also, in the case of the applicants (as summarised in their affidavit in verification of all the above-stated facts that they are *bona fide* citizens of the Federal Republic of Nigeria [and]

- 1. That the 1st and 2nd respondents are oil and gas companies in Nigeria who are engaged jointly and severally in the exploration and production of crude oil and other petroleum products in Nigeria.
- 2. That in further support of their rights to life and dignity of their persons they have the right to respect for their lives and dignity of their persons and to enjoy the best attainable state physical and mental health as well as right to a general satisfactory environment favourable to their development.
- 3. That the 1st and 2nd respondents have been engaged in massive, relentless and continuous gas flaring in their community and that the 2nd respondent is a joint venture partner with the 1st respondent in its oil exploration and production activities, which includes gas-flaring in Nigeria.
- 4. That the activities of the 1st and 2nd respondents in continuing to flare gas in their community seriously pollutes the air, causes respiratory diseases and generally endangers and impairs their health.
- 5. That the 1st and 2nd respondents have carried on gas flaring continuously in their community without any regard to its deleterious and ruinous consequences concentrating only on pursuing their commercial interest and maximizing profit.
- 6. That the 1st and 2nd respondents do not like to find gas together with oil in their oil-fields (ie associated gas, AG), but prefer to find gas without it being mixed up with oil - so called non-associated gas (non AG), and that the attitude of the 1st and 2nd respondents whenever they find oil mixed with gas is to dispose of the associated gas in order to profit from the oil (which is the more lucrative component) and this process of gas flaring is unrestrained and mindless.
- 7. That burning of gas by flaring same in their community gives rise to the following: a. Poisons and pollutes the environment as it leads to

the emission of carbon dioxide, the main green house gas; the flares contain a cocktail of toxins that affect their health, lives and livelihood. b. Exposes them to an increased risk of premature death, respiratory illness, asthma and cancer.

c. Contributes to adverse climate change as it emits carbon dioxide and methane which causes warming of the environment, pollutes their food and water. d. Causes painful breathing chronic bronchitis, decreased lung function and death. e. Reduces crop production and adversely impacts on their food security. f. Causes acid rain, their corrugated house roofs are corroded by the composition of the rain that falls as a result of gas flaring saying that the primary causes of acid rain are emissions of sulphur dioxide and nitrogen oxides which combine with atmospheric moisture to form sulphuric acid and nitric acid respectively. The acidic rain consequently acidifies their lakes and streams and damages their vegetation.

8. That the emissions resulting from the 1st and 2nd respondents burning of associated gas by flaring in their community in an open uncontrolled manner is a mixture of smoke more precisely referred to particulate matter, combustion by-products including sulphur dioxide, nitrogen dioxides and carcinogenic substances, all of which are very dangerous to human health and lives in particular.
9. That no Environmental Impact Assessment (EIA) whatsoever was undertaken by any of the 1st and 2nd respondents to ascertain the harmful consequences of their gas flaring activities in the area to the environment, health, food, water, development, lives, infrastructure etc.
10. That if the 1st and 2nd respondents had carried out environmental impact assessment in their community concerning this gas flaring as required by law, they would have known or found out that it is most dangerous to their health, life and environment and refrained from gas flaring and that they deliberately failed to do so out of their selfish economic interest.
11. That so many natives of the community have died and countless others are suffering various sicknesses occasioned by the effects of gas flaring by the 1st and 2nd defendants.
12. That their community is thereby grossly undeveloped, very poor and without adequate medical facilities to cope with the adverse and harmful effects on their health and lives occasioned by the unrestrained gas flaring activities in the area.
13. That the 1st and 2nd respondents have not bothered to consider the negative unhealthy and very damaging impact on their health, lives, and environment of their persistent gas flaring activities and have made no arrangements to provide them with adequate medical attention and facilities to cushion the adverse effects of their gas flaring activities.
14. That the constitutional guarantee of right to life and dignity of human person available to them as citizens of Nigeria includes the right to a clean, poison-free and pollution-free air and healthy environment conducive for human beings to reside in for our development and full enjoyment of life; and that these rights to life and dignity of human person have been and are being wantonly violated and are continuously threatened with persistent violation by these gas flaring activities.
15. That unless this Court promptly intervenes their said fundamental

rights being breached by the 1st and 2nd respondents will continue unabated and with impunity while its members will continue to suffer various sicknesses, deterioration of health and premature death.

16. And that the 1st and 2nd respondents have no right to continue to engage in gas-flaring in violation of their right to life and to a clean, healthy, pollution-free environment and dignity of human person. Finally, that the 1st and 2nd respondents have no valid ministerial certificates authorizing them to flare gas in the applicant's community.

...

[5.] Upon a thorough evaluation of all the processes, submission, judicial and statutory authorities as well as the nature of the subject matter together with the urgency which both parties through their counsel have observably treated the weighty issues raised in the substantive claim, I find, myself able to hold as follows (after a thoroughly painstaking consideration):

1. That the applicants were properly granted leave to institute these proceedings in a representative capacity for himself and for each and every member of the Iweherekan Community in Delta State of Nigeria.
2. That this Court has the inherent jurisdiction to grant leave to the applicants who are *bona fide* citizens and residents of the Federal Republic of Nigeria, to apply for the enforcement of their fundamental rights to life and dignity of the human person as guaranteed by sections 33 and 34 of the Constitution of the Federal Republic of Nigeria, 1999.
3. That these constitutionally guaranteed rights inevitably include the right to clean, poison-free, pollution-free healthy environment.
4. The actions of the 1st and 2nd respondents in continuing to flare gas in the course of their oil exploration and production activities in the applicants' community is a gross violation of their fundamental right to life (including healthy environment) and dignity of human person as enshrined in the Constitution.
5. Failure of the 1st and 2nd respondents to carry out environmental impact assessment in the applicants' community concerning the effects of their gas flaring activities is a clear violation of section 2(2) of the Environmental Impact Assessment Act, cap E12 vol 6, Laws of the Federation of Nigeria 2004, and has contributed to a further violation of the said fundamental rights.
6. That section 3(2)(a) and (b) of the Associated Gas Re-Injection Act and section 1 of the Associated Gas Re-Injection (Continued Flaring of Gas) Regulations section 1.43 of 1984, under which gas flaring in Nigeria may be allowed are inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, cap A9, vol 1, Laws of the Federation of Nigeria, 2004) and are therefore unconstitutional, null and void by virtue of section 1(3) of the same Constitution.

[6.] Based on the above findings, the reliefs claimed by the applicants as stated in their motion paper as 1, 2, 3, 4 are hereby granted as I make and repeat the specific declarations contained there as the final orders of the Court:

[for reliefs 1-4 see para 2 above – eds]

5. I hereby order that the 1st and 2nd respondents are accordingly restrained whether by themselves, their servants or workers or otherwise from further flaring of gas in applicants' community and are to take immediate steps to stop the further flaring of gas in the applicant's community

6. The Honorable Attorney-General of the Federation and Ministry of Justice, 3rd respondent in these proceedings who, regrettably, did not put up any appearance, and/or defend these proceedings is hereby ordered to immediately set into motion, after due consultation with the Federal Executive Council, necessary processes for the Enactment of a Bill for an Act of the National Assembly for the speedy amendment of the relevant sections of the Associated Gas Re-Injection Act and the Regulations made there under to quickly bring them in line with the provisions of chapter 4 of the Constitution, especially in view of the fact that the Associated Gas Re-Injection Act even by itself also makes the said continuous gas flaring a crime having prescribed penalties in respect thereof. Accordingly, the case as put forward by the 1st and 2nd respondents as well as their various preliminary objections are hereby dismissed as lacking merit.

7. This is the final judgment of the Court and I make no award of damages, costs or compensations whatsoever.