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## TEMPLARS ThoughtLab

# Penal Sanctions for Erring Prosecutors and its Implication on Corporate Defence - Can Nigeria Borrow a Leaf?

## Introduction

On Tuesday, 8 October 2024, news broke that a court in Italy had sentenced two of its prosecutors - Sergio Spadaro ("**Sergio**") and Fabio De Pasquale ("**Fabio**") - to jail terms following their failure to disclose crucial documents that could have bolstered the defence of Eni, the largest Petroleum Company in Italy, and Shell Petroleum Development Company ("**Shell**") in a high-profile US\$ 1,300,000,000 (One Billion, Three Hundred Million Dollars) corruption case levelled against them.<sup>1</sup> In reaching its sentence, the Brescia Court<sup>2</sup> in Italy highlighted that both prosecutors had intentionally omitted key evidence, including a video file, that could have assisted the defence of Eni and Shell in the litigation suit. What was Eni's US\$ 1,300,000,000 (One Billion, Three Hundred Million Dollars) corruption trial about? How does the Italian court's decision impact it? Are there similar penal sanctions for Nigerian prosecutors who fail in their obligation to file documents that may be useful to a defence? These and other related questions will be addressed in this publication.

## Background

The US\$ 1,300,000,000 (One Billion, Three Hundred Million Dollars) Corruption case against Eni and Shell arose from the OPL 245 oil prospecting licence issued by the Federal Government of Nigeria ("**Federal Government**") to Malabu Oil & Gas Limited, often dubbed the Malabu Saga. On 29 April 1998, the Federal Government awarded OPL 245 – a licence covering a defined deep-water offshore area off Niger Delta – to Malabu Oil and Gas Limited ("**Malabu**").<sup>3</sup>

<sup>1</sup> Reuters, 'Two Italian Prosecutors Convicted for Hiding Documents in Eni-Shell Nigeria Trial', (Reuters, 8 October 2024), <https://www.reuters.com/world/europe/two-italian-prosecutors-convicted-hiding-documents-eni-shell-nigeria-trial-2024-10-08/> accessed 11 October 2024.

<sup>2</sup> This is the court of first instance in Italy.

<sup>3</sup> Cyrus Ademola, 'Italian Court Jails two Prosecutors for hiding documents in \$1.3 billion Eni-Shell Nigeria Oil Field Case', (Nairametrics, 9 October 2024), <https://nairametrics.com/2017/04/16/the-malabu-saga-timeline-of-major-events/> accessed 11 October 2024.

On 29 April 2011, Eni and Shell entered into a resolution agreement with Malabu, transferring the rights to OPL 245 to Eni and Shell. Eni and Shell paid a consideration of US\$ 1,100,000,000 (One Billion, One Hundred Million Dollars) as the purchase price and US\$ 210,000,000 (Two Hundred and Ten Million Dollars) as a signature bonus to the Federal Government. The nature of the transaction, particularly the payment of the purchase price into Federal Government-Domiciliated escrow accounts from which significant sums were disbursed to Malabu, a company owned by a former petroleum Minister, Dan Etete, sparked allegations of fraud, bribery and corruption.<sup>4</sup> These allegations have since formed the core of legal proceedings involving Eni and Shell.

In the string of suits that followed, Eni and Shell were investigated for their roles in the OPL 245 transaction. Among these legal actions, one criminal action was filed in Italy by Fabio in 2018. The Federal Government joined, seeking US\$ 1,300,000,000 (One Billion, Three Hundred Million Dollars) in compensation for the OPL 245 deal (the “**Suit**”)<sup>5</sup>. During that trial, Italian prosecutors, Sergio and Fabio, pursued penalties against Eni and Shell, advocating for fines and the imprisonment of their executives for knowingly participating in a transaction where a large portion of the purchase price was allegedly intended for the bribery of Nigerian politicians.<sup>6</sup>

In the suit, both Eni and Shell denied the alleged wrongdoings, and in March 2021, Judge Macro Tremolada acquitted Eni and Shell on the basis that there was no case for them to answer.<sup>7</sup> Following the acquittal, the two prosecutors who tried the 2020 case were subsequently charged with concealing material evidence that could have supported the defence. After a separate criminal trial, both prosecutors were convicted and sentenced to eight months in prison for failing to disclose crucial documents.<sup>8</sup>

## A Prosecutor's Duty of Disclosure

The crux of the Italian court's decision was the question of whether a legal obligation rests on a prosecutor to ensure transparency by presenting all evidence discovered during the course of investigating and prosecuting a criminal case, regardless of whether such evidence strengthens or weakens its case against the defence<sup>9</sup>. In Italy, a prosecutor is bound by the principle of impartiality during the preliminary investigation stage.<sup>10</sup> This duty requires the prosecutor to present both inculpatory and exculpatory evidence uncovered during investigations, ensuring a fair legal process<sup>11</sup>. Failure to disclose such evidence, particularly that which may favour the defence, is seen as a breach of this critical duty<sup>12</sup>.

<sup>4</sup> Pietro Maria Sabella, 'Eni & Shell acquitted in Italian bribery court case', (Corporate Crime Observatory, 23 July 2022),

<https://iris.luiss.it/retrieve/66e4ccad-33f7-4a59-81af-a3e648dbe38f/ENI%20%26amp%3B%20SHELL%20ACQUITTED%20IN%20ITALIAN%20BRIBERY%20COURT%20CASE.pdf> > accessed 10 October 2024.

<sup>5</sup> Daily Watch, 'Eni & Shell win Nigeria Bribery Case in Italy', (SB Morgen, 18 March 2021), <https://www.sbmintel.com/2021/03/daily-watch-eni-shell-win-nigeria-bribery-case-in-italy-covid-gets-magufuli/> accessed 12 October 2024.

<sup>6</sup> Daniel Neilson, "Italian Prosecutors Jailed for Withholding Evidence in Eni-Shell Nigeria Case", (The Guardian, 8 October 2024), <https://guardian.ng/energy/italian-prosecutors-jailed-for-withholding-evidence-in-eni-shell-nigeria-case/> accessed 11 October 2024.

<sup>7</sup> Ibid

<sup>8</sup> We note that an eight-month suspended sentence was handed down to the prosecutors, meaning that they will not be jailed unless they commit a similar offence in the future.

<sup>9</sup> Emmanuel Agbo, 'Malabu Saga: Court Convicts two Italian Prosecutors for Withholding Evidence in Eni-Shell Case', (Premium Times, 9 October 2024), <https://www.premiumtimesng.com/news/top-news/743462-malabu-saga-court-convicts-two-italian-prosecutors-for-withholding-evidence-in-eni-shell-case.html> > accessed 10 October 2024.

<sup>10</sup> Nicola Canestrini, 'The Italian Public Prosecutor', (Canestrinilex, 23 December 2011), <https://canestrinilex.com/en/readings/the-italian-public-prosecutor> accessed 11 October 2024.

<sup>11</sup> Article 51 of the Italian Code of Criminal Procedure: <https://canestrinilex.com/assets/Uploads/pdf/cf70b10e21/Italian-Code-of-Criminal-Procedure-canestrinilex.pdf>

<sup>12</sup> Article 124, 415-bis, and 416 of the Italian Code of Criminal Procedure. We note that we have not found the precise provision that prescribes custodial punishment, nor have we seen the full text of the judgment of the Brescia Court sentencing Fabio and Sergio. However, we presume that the court's decision is premised on a law that imposes custodial punishment.

Under Nigerian Law, the justification for disclosure rests on the constitutional rights of a defendant to be presumed innocent until he is proven guilty.<sup>13</sup> While the Administration of Criminal Justice Act, 2015 (“**ACJA**”) does not impose any direct obligation on a prosecutor to disclose exculpatory evidence, the Rules of Professional Conduct (“**RPC**”) imposes this obligation to disclose on legal practitioners engaged in public prosecutions.<sup>14</sup> According to the RPC, a public prosecutor's primary aim should be to promote justice, rather than securing a conviction at all costs.<sup>15</sup>

Specifically, a lawyer engaged in public prosecution in Nigeria is prohibited from suppressing facts or concealing witnesses who may have the ability to establish the innocence of the accused/defendant; and should make timely disclosure to the lawyer for the defendant, or to the defendant regarding the existence of evidence that may exonerate the accused, mitigate the severity of his offence, or lessen his potential punishment.<sup>16</sup>

Consequently, it becomes a breach of professional ethics or professional misconduct for a lawyer engaged in public prosecution to withhold exculpatory evidence or conceal a witness. However, such misconduct renders the lawyer liable to disciplinary action under the Legal Practitioner Act, 2004<sup>17</sup> for professional misconduct. That is as far as it goes. It does not give rise to criminal sanctions.

Likewise, the National Policy on Prosecution (the “**Policy**”) reinforces this duty by requiring that prosecutors respect the defendant's right to a fair hearing and ensure that evidence or other materials favourable to the defence is disclosed to them<sup>18</sup>. The Code of Conduct for Prosecutors (the “**Code**”) also allows the Office of the Attorney General to take disciplinary measures against erring prosecutors<sup>19</sup>. However, the act of failing to disclose is not criminalised, neither are there clear consequences attached to its breach.

As an additional point, the Evidence Act of 2011 tries to safeguard against instances where it is discovered that vital evidence that could have changed the course of proceedings was withheld.<sup>20</sup> However, this safeguard is applicable only when a party refuses to produce evidence in its possession during trial. Under such circumstances, the court may presume that the withheld evidence is unfavourable to the party that chose not to disclose it, thereby, suggesting that the refusal to produce the evidence is indicative of its detrimental nature. Again, that is as far as it goes, namely, the invocation of a presumption of withholding evidence in favour of the defendant. It does not give rise to criminal liability for the prosecutor involved to compel compliance.

In **A.N.T.S v. Atoloye**<sup>21</sup>, the Respondent sued the Appellants for colliding with his vehicle while it was stationary in a queue. The court observed that the appellant's failure to summon the mechanic who repaired his vehicle before the accident to testify regarding the last servicing and the brake conditions implied that the mechanic's evidence, if produced, would have been detrimental to the appellants. A similar situation arose in **Bakari v. Ogundipe**,<sup>22</sup> where the Supreme Court held that when a piece of evidence can

<sup>13</sup> Section 36 (5) of the 1999 Constitution of the Federal Republic of Nigeria (as amended).

<sup>14</sup> The Rules of Professional Conduct for Legal Practitioners, 2023.

<sup>15</sup> Rule 37 (4) of the Rules of Professional Conduct for Legal Practitioners, 2023.

<sup>16</sup> Rule 37 (6) of the Rules of Professional Conduct for Legal Practitioners, 2023.

<sup>17</sup> Rule 74 of the Rules of Professional Conduct for Legal Practitioners, 2023. The punishment can range from admonition, suspension from practice, or a striking off from the roll of legal practitioners depending on the nature of the misconduct.

<sup>18</sup> Paragraph 8 (5) of the National Policy on Prosecution, 2016.

<sup>19</sup> Paragraph 7 (1) of the Code of Conduct for Prosecutors, 2016. The disciplinary measures may be commenced under the Public Service Rules or erring prosecutors may be referred to the Legal Practitioners Disciplinary Committee.

<sup>20</sup> Section 167 (d) of the Evidence Act, 2011 (as amended).

<sup>21</sup> *A.N.T.S v. Atoloye* [1993] 6 NWLR (Pt. 298) 233 at 253 [E] – [F].

<sup>22</sup> *Bakari v. Ogundipe* [2021] 5 NWLR (Pt. 1768) 1 at 63 [A] – [C]; See also *N.A.S. Ltd v. UBA Plc* [2005] 14 NWLR (Pt. 945) 421 at 437 [D] – [F].

be produced but is not presented, it is presumed to be adverse to the interests of the party that withholds it.

## Non-Lawyer Prosecutors

Beyond the provisions of the RPC, which apply exclusively to legal practitioners acting as public prosecutors, there appears to be a notable lack of comprehensive laws/regulations governing disclosure obligations in criminal proceedings in Nigeria. At the Magistrates' Court level, the Police possess the authority to prosecute alleged offenders.<sup>23</sup> This raises an important question – are there other laws that impose an obligation of disclosure?

As previously mentioned, the National Policy on Prosecution and the Code of Conduct for Prosecutors serve as a guiding framework for prosecutors, especially non-lawyer prosecutors in Nigeria, having been adopted in 2016 by the Body of Attorneys-General in Nigeria.<sup>24</sup> However, there is a significant gap in the enforcement and implementation of both policy and code. Although the code recognises the potential for disciplinary measures against erring prosecutors,<sup>25</sup> it lacks any criminal sanctions for non-adherence to the duty of disclosure. Consequently, both the policy and the code function primarily as instruments of moral suasion.

It was on this note of moral adjuration that the Supreme Court, in **Atanda v. Attorney General**,<sup>26</sup> emphasized that:

*“We have to remind prosecuting counsel that they ought to look on themselves not as advocates but as ministers of justice, and their task is not to secure convictions but to help in the administration of justice.”*

The court's decision in Italy is laudable as it demonstrates that prosecutors can be held to a high standard and criminally accountable even after the prosecution process. Likewise, in the United Kingdom, similar disclosure obligations bind prosecutors.<sup>27</sup> Specifically, UK prosecutors are mandated to fulfil the duties of initial disclosure and continuing disclosure as the trial unfolds. Additionally, prosecutors are required to provide unused material evidence to the defence, provided that such evidence is relevant to the offence charged and the surrounding circumstances of the case.<sup>28</sup>

In **R v. Ward**<sup>29</sup>, the court elaborated on the scope of a prosecutor's duty in the UK, emphasizing that it encompasses the obligation to provide not only evidence that may bolster the accused's case, but also any relevant evidence that enables the accused to consider all the material evidence gathered by the prosecution. This includes evidence from which the prosecution may choose what it intends to present at trial.<sup>30</sup> Should a prosecutor fail to meet this duty, the court may impose sanctions, especially costs against the prosecutor.<sup>31</sup>

<sup>23</sup> Section 66 (2) of the Police Act, 2020.

<sup>24</sup> National Policy on Prosecution, 2016 and Code of Conduct for Prosecutors, 2016:

[https://nesgroup.org/download\\_policy\\_drafts/NATIONAL%20POLICY%20ON%20PROSECUTION\\_2016\\_1661855893.pdf](https://nesgroup.org/download_policy_drafts/NATIONAL%20POLICY%20ON%20PROSECUTION_2016_1661855893.pdf)

<sup>25</sup> According to Paragraph 7 (c) of the code, erring non-lawyer prosecutors may be proceeded against by the Office of the Attorney General for misconduct in accordance with disciplinary proceedings of the prosecutor's organization.

<sup>26</sup> *Atanda v. Attorney General* [1965] NMLR 225 at 232.

<sup>27</sup> Part I and Part II of the Criminal Procedure and Investigations Act 1996 amended by the Criminal Justice Act 2003.

<sup>28</sup> Attorney General Guidelines on Disclosure, 2020:

[https://assets.publishing.service.gov.uk/media/5fdca7fd8fa8f514967c62b7/Attorney\\_General\\_s\\_Guidelines\\_2020\\_FINAL\\_Effective\\_31Dec2020.pdf](https://assets.publishing.service.gov.uk/media/5fdca7fd8fa8f514967c62b7/Attorney_General_s_Guidelines_2020_FINAL_Effective_31Dec2020.pdf)

<sup>29</sup> *R v. Ward* [1993] 2 All ER 577

<sup>30</sup> Julie Norris, 'Disclosure: Responsibilities of a Prosecuting Authority', (Kingsley Napley)

<https://www.kingsleynapley.co.uk/resources/download/107/disclosure-responsibilities-of-a-prosecuting-authority.pdf> accessed 11 October 2024.

<sup>31</sup> *R v DS and TS* [2015] EWCA Crim 662. We note that in this case, the court held a view that an award of costs lacked proportionality to the acts of the prosecutor.

For Nigeria to evolve into a nation where prosecutors are held to a high standard of professional conduct, it is essential to enact clear legislation mandating the disclosure of relevant evidence to the defence. Furthermore, there must be defined consequences—criminal sanctions or at the very least, costs as in the UK—against prosecutors who fail to fulfil this duty.

## Concluding Remarks

On 8 October 2024, the Italian Court delivered an interesting ruling that reaffirms the necessity of holding prosecutors accountable for their conduct during trial proceedings. The case, an offshoot of the Eni-Shell case, offers numerous lessons that can inform best practices in prosecutorial conduct and the broader legal framework.

Without doubt, in Nigeria, the policy objective to hold prosecutors to a high standard of accountability is clear from the provisions of the Evidence Act, the RPC, the Policy, the Code and the judicial pronouncements considered above. However, the obligation created by these instruments does not attract criminal sanctions or costs. Cases of breach may only lead to disciplinary action by the professional body involved which may not be sufficient deterrence to forestall occurrence and to prevent the grave injustice that may be suffered by an innocent defendant as a result of such breach.

It behoves Nigerian legislators to take decisive action to ensure that defendants have access to all evidence that could be beneficial to their case. To achieve this, it is recommended that these obligations on a prosecutor to disclose be incorporated into the Administration of Criminal Justice Act and Laws (of the respective states) in Nigeria with appropriate criminal sanctions or costs attached to cases of breach.