

Remedies Available To Revenge Pornography Victims in Nigeria

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Abstract

Technology has made it possible for individuals to reach a wide audience within the twinkle of an eye. This feature has led to the faster dissemination of revenge pornography pictures and videos. The effects of revenge pornography are devastating and they range from suicide to loss of jobs and to depression. Most victims of this offence are shamed and blamed for their own abuse. This article is dependent on the qualitative research approach, adopting the doctrinal research methodology. The doctrinal method is most suitable for this work because it enables analysis of legal theories regarding revenge pornography in Nigeria. Legal instruments and data are examined in this area of study. The article reveals that there are remedies available to victims of revenge pornography in Nigeria. However, these remedies are not efficacious. Furthermore, the laws regulating cybersex offences in Nigeria are not exhaustive. The article recommends that the existing regulations on cybersex offences in Nigeria be amended to capture the concept adequately. In addition, it is recommended that institutions (government and non-governmental organisations), including law enforcement agencies, be given proper orientation on the nature, effects and practice of revenge pornography and most importantly, ways to help victims and to curb this menace. This study concludes that the failure of government to be more serious about the protection of victims of cybersex offences paints the society as a cybersex friendly environment.

Keywords: Non-consensual pornography, cybersex offences, intimate images

Introduction

The increase in the use of the internet has made life easier for people who require the space to carry out daily activities from social to business relations in Nigeria and other jurisdictions. However, there are dilemmas regarding the use of this unending cyberspace which has literally taken down borders between nations. Many teenagers and adults have smartphones or other devices for accessing the internet. Some take advantage of these devices positively, while others find it convenient for unpardonable cyber activities including hacking, identity theft, cyber-bullying and cybersex offences. These activities are often referred to as cybercrime¹ which is any illegal activity that uses a computer as a primary means of commission.² Cybersex offences are a subset of cybercrime.

Cybersex offences are illegal sexual activities done with the use of a computer and it includes revenge pornography. Revenge pornography can be defined as the non-consensual posting of sexual images and videos.

Victims of most offences are treated with empathy and the offenders, treated with disdain. However, revenge pornography victims are blamed and shamed for their own abuse. In the case of *Giller v. Procopet*,³ the Australian court ruled in favour of the victim, explaining that the posting of revenge pornography was a breach of confidence. Revenge pornography has long lasting adverse effects on the victims.

This article seeks to analyse the different remedies available to victims of revenge pornography under the Nigerian law.

The Concept of Revenge Pornography

Revenge pornography is the posting of intimate photographs or videos of an individual without permission for the purpose of humiliation.⁴ These photographs and videos are usually willingly exchanged during the course of an intimate or romantic relationship.⁵ However, it is important to state that there are cases where the images were not released by vengeful partners but by skilled hackers. Christopher Chancey was arrested in 2011 for hacking into the email accounts of female celebrities and posting the intimate photographs online.⁶ Thus, the motive is not always vengeance. Some are interested in the profit while some like posting

¹ Yvonne Jewkes And Maggie Wykes, 'Reconstructing the Sexual Abuse Of Children: 'CyberPaeds', Panic And Power' (2012) 15 Sexualities 934-952

² Ajay Tushir, 'Sexual Offences in the Cyber World: Emerging Technological Challenges' (2020) 8 International Journal Of Recent Technology And Engineering 5339-5344

³ [2008] VSCA 236

⁴ KB Bennett 'Revenge Pornography: Exploring Tortious Remedies in Texas' (2015) 46 St Marys L J 521-572,

⁵ Mary Anne Franks 'Drafting an Effective Revenge Porn Law: A Guide for Legislators' (Social Science Research Network, 17 August 2015) <<http://ssrn.com/Abstract2468823>> Accessed 29 May 2021

⁶ Connor Simpson, 'Revenge Porn King Hunter Moore Arrested for Hacking Email Accounts' (The Atlantic 23 January 2014) < <https://www.theatlantic.com/National/Archive/2014/01/Revenge-Porn-King-Hunter-Moore-Arrested-Conspiracy-Hack-Email-Accounts/357321> > accessed 29 May 2021

obscene content. It could be concluded that the inclusion of ‘revenge’ in the name of the crime is quite problematic and that is why many scholars opt for the term, ‘non-consensual pornography’.

Frank stretches the debate and opines that ‘porn’ could also be a misleading term because the practice of making explicit videos in relationships should not be deemed to be pornographic, ordinarily. However, she adds that the distribution of the material without consent should be the distinguishing factor as it transforms a private image into a spectacle for the public.⁷

Non-consensual pornography refers to sexually explicit images and video posted without consent and for no legitimate purpose. It is a term that encapsulates CCTV or hidden camera footage, images sent during the course of a romantic relationship, stolen media and even recordings of sexual assault. Some rapists and abusers make videos and take naked photographs of the victims which would later be used as a bargaining chip in case the victim wants to report to the authorities.⁸ Abusive partners,⁹ traffickers and pimps¹⁰ are also fond of engaging in this horrendous act.

A number of writers are of the opinion that the creation of the amateur pornography genre ushered in revenge pornography. They argue that there was no evidence to support the fact that these actors were aware that the content would be released¹¹ and despite the absence of this evidence, there were no investigations and regulations put in place to protect victims.¹²

The effects of revenge pornography are devastating, damaging and long lasting as it is quite impossible to completely eliminate graphic photographs or videos once they have been released on the internet.¹³ When an image is released on a social media platform like *Twitter*, within the twinkle of an eye, individuals are able to take a screenshot or screen record and post it on pornographic websites like *Pornhub* and the cycle continues.¹⁴ The image would also pop up when the victims’ names are inputted in search engines like Google or it could be sent to the victim’s family,

⁷ Mary Ann Franks, ‘Revenge Porn Reform: A View from the Front Lines’ (2017) 69 Fla. L. Rev. 1251

⁸ Tara Culp-Ressler, ‘16-Year-Old’s Rape Goes Viral on Social Media: No Human Being Deserved this’ (Think Progress, 10 July 2014) <<http://thinkprogress.org/Health/2014/07/10/3458564/Rape-Viral-Social-Media-Jada/>> accessed 29 May 2021

⁹ Annmarie Chiarini, ‘I was a Victim of Revenge Porn. I Don’t Want Anyone Else To Face This’ (The Guardian, 19 November 2013) <<http://www.theguardian.com/Commentisfree/2013/Nov/19/Revenge-Porn-Victim-Maryland-Law-Change>> accessed 29 May 2021

¹⁰ Ann Bartow, ‘Pornography, Coercion, and Copyright Law 2.0’ (2008) 10 VAND. J. ENT. & TECH. L. 799, 817–818

¹¹ Taylor Linkous, ‘It’s Time for Revenge Porn to Get a Taste of Its Own Medicine: An Argument for the Federal Criminalization of Revenge Porn’ (2014) 20 RICH. J.L. & TECH. 1, 10

¹² Ibid.

¹³ Sarah Bloom, ‘No Vengeance for Revenge Porn Victims: Unravelling Why this Latest Female-Centric, Intimate-Partner Offense is still Legal and Why we Should Criminalize It’ (2016) 42 Fordhamurb. L.J. 233

¹⁴ Mudasir Kamal and William Newman, ‘Revenge Pornography: Mental Health Implications and Related Legislation’ (2016) 44 J Am Acad Psychiatry Law 359–67

employers or friends which would humiliate the victim.¹⁵ Some victims are fired from their jobs¹⁶ and some have to change their schools either because of expulsion¹⁷ or the humiliation.

Offenders also include the phone numbers and addresses of the non-consenting actors and this makes them vulnerable to rapists and sexual predators. Even when the contact information is not included in the post, the victims still receive rape threats¹⁸ in the comment sections and are body shamed. Victims have ended up with low self-esteem and some have committed suicide because of the backlash and humiliation suffered.¹⁹

Both genders can be victims of non-consensual pornography, but evidence shows that women and girls are the major victims and they often suffer more consequences as a result of their victimisation.²⁰

Non-consensual pornography affects the society as a whole²¹ because it sends the wrong message. It sends the message that sexual exploitation is a type of entertainment or punishment, especially when it involves women who act in ways that displease men. Strangely, the displeasure might be because of the woman's success and that is why a lot of female celebrities and powerful women are also victims.²² Majority of the male perpetrators and revenge porn consumers attempt to put powerful and strong women 'in their place' to punish them for threatening the

¹⁵ Annmarie Chiarini, 'I was a Victim of Revenge Porn. I Don't Want Anyone Else to Face This' (The Guardian, 19 November 2013) <<http://www.theguardian.com/Commentisfree/2013/Nov/19/Revenge-Porn-Victim-Maryland-Law-Change> > accessed 29 May 2021

¹⁶ Ariel Ronneburger, 'Sex, Privacy and Webpages: Creating a Legal Remedy for Victims of Porn 2.0' (2009) 21 Syracuse Sci. &Tech. L. Rep. 1, 9

¹⁷ Eniola Akinkuotu, 'We've Expelled Students in Viral Sex Video, Says Babcock Varsity' (The Punch, 21 November 2019) <<https://Punchng.Com/Weve-Expelled-Students-In-Viral-Sex-Video-Babcock-Varsity/> > accessed 29 May 2021

¹⁸ Danielle Keats Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 Wake Forest L. REV. 345

¹⁹ Emily Bazelon, 'Another Sexting Tragedy' (Slate, 12 April 2013) http://www.slate.com/articles/double_x/doublex/2013/04/Audrie_Pott_And_Rehtaeh_Parsons_How_Should_The_Legal_System_Treat_Nonconsensual.html > accessed 29 May 2021

²⁰ Mary Anne Franks, 'Combating Non-Consensual Pornography: A Working Paper' (SSRN, 7 September 2014) <<https://deliverypdf.ssrn.com/delivery.php?ID=530112070066075000092011070099065022009056033020093009075021095091005065125007118023004010006016122030040069031105004116124107056014025055017123085071067023077124001017015016100068006030087121088009095122109107007111072114114093024113127065088125026071&EXT=pdf&INDEX=TRUE> > accessed 29 March 2022

²¹ Elizabeth Anderson and Richard Pildes 'Expressive Theories of Law: A General Restatement' (2000) 148 U. PA. L. REV. 1503, 1527

²² Salter, M. & Crofts, T. 'Responding to Revenge Porn: Challenging Online Legal Impunity' in Comella L and Tarrant S, *New Views on Pornography: Sexuality, Politics and the Law* (Westport 2015)

male gender.²³ Rape and other forms of sexual harassment reiterate the preposterous notion that men have the power to use women sexually without their consent and revenge pornography has the same result.²⁴

The victims of non-consensual pornography are shamed²⁵ and insulted for being gullible²⁶. They are accused of trusting their partners to the extent that they feel comfortable enough to exchange these images.²⁷ Are these accusers then implying that the male gender cannot be trusted since they are the major perpetrators of this offence, according to statistics? These accusers fail to understand that a lot of these victims are not aware that they are even being recorded while some had their phones hacked. Even if the victims intentionally sent the images, it still does not mean that they gave permission for the images to be released to the public²⁸ as it was sent from a place of trust.²⁹ A victim's consent in one context should not be *prima facie*, consent in other contexts.

To curb revenge pornography, there has to be both precautionary and reactionary measures. Frank recommends that social media platforms should have artificial intelligence technologies that would be able to detect these images or videos and immediately, send a pop up message to the user to confirm if he or she is the person in the post. She believes that revenge porn is usually posted impulsively and in the heat of jealousy so minimal measures could force the user to pause and may be, desist.³⁰ Though, it is possible for users to lie or to be innocently mistaken. Most platforms treat copyright infringement very seriously to avoid being parties to law suits. These platform owners should take revenge pornography more seriously and remove posts that have been reported as revenge porn until the actual actors disclose that their permission was actually sought first.

²³ Jill Filipovic, 'Revenge Porn is about Degrading Women Sexually and Professionally' (The Guardian, 28 January 2013) <<https://www.theguardian.com/Commentisfree/2013/Jan/28/Revenge-Porn-Degrades-Women> > Accessed 29 May 2021

²⁴ Mary Anne Franks, 'Drafting an Effective Revenge Porn Law: A Guide for Legislators' (Social Science Research Network, 17 August 2015) < <http://ssrn.com/Abstract2468823> > Accessed 29 May 2021

²⁵ Peter Cooper, 'The Right to be Virtually Clothed' (2016) 91 *Washington Law Review* 817

²⁶ E Sleath and R Bull 'Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample: Differences between Police Officers with and without Special Training' (2012) 39 *Criminal Justice and Behaviour* 646-665

²⁷ S Bothamley and R Tully 'Understanding Revenge Pornography: Public Perceptions of Revenge Pornography and Victim Blaming' (2017) 10 *Journal of Aggression, Conflict and Peace Research*. 1-10

²⁸ Danielle Citron and Mary Anne Franks, 'Criminalizing Revenge Porn' (2014) 49 *Wake Forest Law Review* 345

²⁹ Tegan Starr and Tiffany Lavis, 'Perceptions of Revenge Pornography and Victim Blame' (2018) 12 *Cybercrime Journal* 427-438

³⁰ Mary Ann Franks, 'Revenge Porn Reform: A View from the Front Lines' (2017) 69 *Fla. L. Rev.* 1251

The Response of the Nigerian Society to Revenge Pornography

The existence of laws to curb revenge pornography has not reduced the rate of this image based sexual violence. In one of the first revenge porn cases in Nigeria; the victim who was gang raped by five men in an hour long video³¹ was said to have ‘consented to the rape’. This was the official opinion of the then Assistant Commissioner of Police in charge of the command.³² The attitude of the Nigerian society towards victims of revenge pornography and other forms of sexual crime victimization could be said to be responsible for the growth of sexual crime.³³

Nigeria indeed has a rape culture.³⁴ A rape culture refers to a sociological concept that explains a situation where rape and other forms of sexual assault are prevalent as a result of society’s perception about gender and sexuality.³⁵ Attributes of a society with a rape culture include; ‘victim blaming, denial of widespread rape, sexual objectification, slut-shaming, trivializing rape and refusing to acknowledge the harm caused by sexual violence’. All these and more are the reasons victims are scared to go through the reporting channels.³⁶ Structural powers within the Nigerian society have also contributed to creating sexist norms and inequalities that are connected to the perception of men as dominant and controlling, and women as passive and vulnerable.³⁷ Due to this, men are reported to have a sense of entitlement towards their female partners and may resort to revenge pornography or other forms of

³¹ Jonah Fisher, ‘Cyber Anger at Nigeria Gang Rape Footage’ (BBC 23 September 2011) <https://www.bbc.com/news/world-africa-150328> accessed 21 March 2022

³² Uduma Kalu, ‘ABSU gang rape: Victim agreed to be raped –Police’ (Vanguard, 8 October 2011) <https://www.vanguardngr.com/2011/10/absu-gang-rape-victim-agreed-to-be-raped-police/> accessed 21 March 2022

³³ OC Ezechi, ZA Musa et al, ‘Trends and Patterns of Sexual Assaults in Lagos South-Western Nigeria’ (2016) 24 *The Pan African Medical Journal* 261

³⁴ Vanni Amaka-Okafor, ‘Nigeria has a Rape Culture too’ (Guardian Africa Network, 14 January 2013) <http://www.theguardian.com/world/2013/jan/14/nigeria-rape-india-culture> accessed 22 March 2022 C Nwafor and W Akhiwu, ‘Medicolegal Analysis of Sexual Assault Victims in Benin Nigeria’ (2019) 8 *Nigerian Journal of Clinical Research* 10–17

³⁵ WH George and LJ Martínez, ‘Victim blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism’ (2016) 26 *Psychology of Women Quarterly* 110–119.

³⁶ R Aborisade and F Vaughan ‘The Victimology of Rape in Nigeria: Examining Victims’ Post-Assault Experiences and Adjustment Patterns’ (2014) 17 *African Journal for the Psychological Study of Social Issues*, 17(2), 140–155 R Aborisade, ‘The Influence of Rape Myth Acceptance and Situational Factors in Defining Sex and Labelling Rape among Female University Students in Nigeria’ (2016) 9 *African Journal of Criminology and Justice Studies* 154–170.

³⁷ A Babalola, ‘A Gender Inequality: Nigerian and International Perspectives’ (2014) 17 *British Journal of Arts and Social Science* 167–174

electronic abuse if they feel their unlimited right over their partner is being threatened.³⁸

The lady whose sex videotape was leaked by Chris Omatsola told *Punch* in an interview that upon the release of the tape, he reached out to her and said, ‘no man would want to look your way again, it is best if we get married’.³⁹ His statement is premised on the belief that a woman whose sexual image has been posted on the internet will become unattractive and unacceptable to other men. This is as a result of social stigmatization. Boys and men are celebrated and praised for heterosexual sexual contacts while women and girls are derogated and stigmatized for the same actions.⁴⁰

In the words of Chimamanda Ngozi Adichie, ‘we teach girls that they cannot be sexual beings in the way that boys are’.⁴¹ Between October 2021 and March 2022, two Nigerian entertainers had their sex tapes leaked. The first was *Tiwa Savage*, a popular female musician. When her tape was leaked, she was attacked and accused of being a bad influence to young girls. The other entertainer was *Oxlade*, a musician that recently had his first big break. Upon the release of his sex tape, he was applauded for his sexual prowess.⁴²

All these go a long way to show that the reaction of society to revenge pornography is one of the major reasons revenge pornography is on the rise. If society condemns the people who post revenge pornography and protect the victims of cybersex offences, people would be scared to post revenge pornography because they know that they stand a lot to lose if they do. For example, loss of jobs, expulsion from school and insults on social media.

Remedies Available to Revenge Pornography Victims in Nigeria

Law helps to regulate human conduct⁴³ and it is extremely important in any society. Laws have to be enacted to regulate every transaction, relationship and communication to prevent people from acting ultra vires and infringing on the rights of the other person. The internet is an abstract world where people can choose to

³⁸S Edinyang and LA Angiating, ‘Gender Discernment and the Implication on Nigerian Policy; (2018) 17 Global Journal of Educational Research 113–119 CJ Onwutuebe, ‘Patriarchy and Women Vulnerability to Adverse Climate Change in Nigeria’ (2019) Sage Open, 1-7.

³⁹ Oluwakemi Abimbola, ‘Tamara and I had More than 10 Sex Tapes, Pastor Omatsola claims’ (The Punch, 4 January 2019) <https://punchng.com/tamara-and-i-had-more-than-10-sex-tapes-pastor-omatsola-claims/> accessed 22 March 2022

⁴⁰ R Aborisade, ‘Barriers to Rape Reporting for Nigerian women: The case of Female University Students’ (2014) 7 International Journal of Criminology and Sociological Theory 1–14.

⁴¹ Kate Torgovnick May, ‘Beyoncé Samples Chimamanda Ngozi Adichie’s TEDx Message on Surprise Album’ (TED Blog, 13 December 2013) < <https://blog.ted.com/beyonce-samples-chimamanda-ngozi-adichies-tedx-message-on-surprise-album/> > accessed 20 March 2022

⁴² ‘Sex tape scandal: Like Tiwa Savage, unlike Oxlade’ (Vanguard, 9 February 2022) <<https://www.vanguardngr.com/2022/02/sex-tape-scandal-like-tiwa-savage-unlike-oxlade/>> accessed 20 March 2022

⁴³ Abiola Sanni, *Introduction to Nigeria Legal Method*, (2edn OAU Press Ltd 2006) 7

remain anonymous; this feature makes individuals believe that they could do anything and still get away with it. The following are the remedies available to victims:

The 1999 Constitution of the Federal Republic of Nigeria as Amended in 2011

The Constitution is the ultimate law of the land. Section 1 of the Constitution establishes its supremacy as it states that the constitution is supreme and binding on all Nigerian residents. Any law in contravention with the provisions of the constitution shall be null and void. Chapter 4 of the constitution provides for fundamental human rights. These rights ought to be enjoyed by every human being by virtue of their existence irrespective of their race, tribe, sexuality or religion.

Right to Privacy

The court in *Olmstead v. U.S.*,⁴⁴ described this fundamental human right⁴⁵ as the 'right to be left alone'. It is a person's right to control his or her personal information⁴⁶ and maintain secrecy about his personhood.⁴⁷ The innovation of the internet has made it easier for this right to privacy to be breached. Some people on the internet post private information or images of a person and because of the uniqueness of the internet, the information and images are able to reach a large number of people. Thus, it is not farfetched to conclude that the internet has led to an increase in terrible privacy violations.⁴⁸

Every human being ought to have the right to choose what part of their life they want to keep private and the part they want the public to know or see. This also applies to celebrities; they are used to having their pictures taken at random places and posted on the internet but they also believe that there should be a limit to what is being posted. Many of them do not want their children to be photographed⁴⁹ or their private and intimate images to be released on the internet.⁵⁰ Privacy with regards to a person's sexual life is considered more essential than privacy in other aspects of a person's life.⁵¹ It is because it changes how a person is viewed in the society especially

⁴⁴ US 277 US .438 [1928]

⁴⁵ Article 17 of the International Covenant on Civil and Political Rights

⁴⁶ Robert Hahn and Anne Layne-Farrar, 'The Benefits and Costs of Online Privacy Legislation' (2002) 54 ADMIN. L. REV. 85, 88-89

⁴⁷ Daniel Solove, 'Conceptualizing Privacy' (2002) 90 California Law Review 1087-1151

⁴⁸ Caroline Drinnon, 'When Fame Takes Away the Right to Privacy in One's Body: Revenge Porn and Tort Remedies for Public Figures Revenge Porn and Tort' (2017) 24 William and Mary Journal of Women and the Law 209-230

⁴⁹ Hilary Lewis, 'George Clooney Lashes Out at Paparazzi Photos of Twins' (The Hollywood Reporter, 28 July 2017) < <https://www.hollywoodreporter.com/news/general-news/george-clooney-lashes-at-paparazzi-photos-twins-1024969/> > accessed 4 June 2021

⁵⁰ Justin Pitcher, 'The State of the States: The Continuing Struggle to Criminalize Revenge Porn' (2015) 10 BYU Law Review 1435, Curtis Jackson v. Lastonia Levinson

⁵¹ Marthe Goudsmit, 'Revenge pornography: A Conceptual Analysis Undressing a Crime of Disclosure' (Research gate, February 2017) < <https://www.researchgate.net/publi>

in cases where the person's private images are leaked.⁵² The victim is objectified, humiliated and will always remember that members of the public have seen her in her most vulnerable state.⁵³

Solove's classification of the right to privacy establishes that this right only covers and protects information that the individual wants to keep private.⁵⁴ Section 37 of the constitution provides that 'the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected'. This provision also prohibits hacking into a person's computer to release email correspondence and conversations. The term, 'privacy' is not defined.

The court in *Grosse v. Purvis*,⁵⁵ explains that the objective test should be used to explain privacy breaches as opposed to the subjective test. This means a person would be able to successfully prove a privacy breach if he can show that the intruder's invasive acts would be deemed to be offensive by a reasonable man and if he can also prove that the breach caused him mental and emotional harm or distress. Every reasonable man ought to see revenge pornography and child pornography as offensive and demeaning as the effects it has on the victims are catastrophic.

Megwara breaks down section 37 of the constitution and asserts that the right to private life includes the right to live away from others, the right to guard and hide one's, personal relationships (inclusive of sexual and marital relationships) and the right of 'concealment of one's nudity', from the eyes of the public.⁵⁶ It follows that the right to privacy protects revenge porn and child porn victims because it implies the right to guard one's body from unapproved intrusion or invasion. The right to privacy is one that has been overlooked by many Nigerians because no Nigerian legislation expressly defines it and Nigerians also tend to tolerate acts that ordinarily ought to be a violation of their privacy.⁵⁷

Right to Dignity⁵⁸

The right to dignity is a person's right to be treated as a human being and the right to be respected. Article 1 of the Universal Declaration of Human Rights provides for

cation/324360144_Revenge_pornography_A_conceptual_analysis_Undressing_a_crime_of_disclosure > accessed 4 June 2021

⁵² Justine Mitchell 'Censorship in Cyberspace: Closing the Net on Revenge Porn,' (2014) 25(8) Entertainment Law Review Journal 283

⁵³ Miha Sepec, 'Revenge Pornography or Non-Consensual Dissemination of Sexually Explicit Material as a Sexual Offence or as a Privacy Violation Offence' (2019) 13 International Journal of Cyber Criminology 417-438

⁵⁴ Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008)

⁵⁵ [2003]QDC, 151

⁵⁶ Lloyd Megwara, *The Law and Practice of Human Rights in Nigeria*, (Olive Printing and Publishing House 2010)

⁵⁷ Yinka Olomajobi, 'Right to Privacy in Nigeria' (SSRN, 31 October 2017)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062603 > accessed 6 June 2021

⁵⁸ Section 34 of the 1999 constitution

the equality of all men in rights and dignity. It further states that men are born with reason and conscience, so they should act kindly towards one another in brotherhood.

This provision makes it clear that every man who is sane knows what would hurt his neighbour or what act of his would be so disrespectful to his neighbour to the extent of violating his right to dignity. The right to privacy can be said to have its basis from the right to human dignity.⁵⁹ The law does not permit a person's private information, images or videos to be released to the public without his consent because he is respected. Furthermore, the government cannot invade his privacy without due cause because he has the right to dignity.

Section 34 of the 1999 constitution of the Federal Republic of Nigeria states that no Nigerian citizen shall be subject to degrading treatment and the Cambridge dictionary defines the verb, 'degrade' as the act of causing people to feel worthless or without value. When nude images are posted on the internet without the victims' consent, they feel worthless and less dignified. The comments and offensive jokes made by the viewers make the victims feel even worse. Release of these images and videos is disrespectful and degrading and it makes people value themselves less.⁶⁰ Therefore, it could be said to be a breach of the right to dignity of the human person.

Tort Law

The law creates a right and such right is followed by a corresponding duty in the other party to ensure that his actions do not infringe on the right of the other party. An infringement would give rise to tortious liability. Tortious liability means that the tortfeasor has breached another person's right or has caused harm to the victim and he is expected to reimburse the victim.⁶¹ Tort law has been stretched to take up a public social justice role in addressing prevalent societal issues without tampering with inflexible government bureaucracy.⁶² Victims of revenge pornography could rely on tort theories to make their claims.

Nervous Shock

Nervous shock is a term used to describe a psychiatric illness or injury caused to somebody due to the act or negligence of another person.⁶³ Before an individual can claim nervous shock, some conditions have to be met as seen in the case of *Alcock v. Chief Constable of Yorkshire*⁶⁴ where the court held that conduct giving rise to the psychiatric injury must have been so serious and outrageous enough to cause shock.⁶⁵ Furthermore, the event must have been likely to cause shock to a reasonably strong

⁵⁹ *Australian Broadcasting Commission v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 227

⁶⁰ *AGF v. Ayan Olubunmi* FHC/AD/17/2017

⁶¹ Kodinlinye and Aluko, *The Nigerian Law of Torts* (Spectrum Book Ltd, 2003)pg. 2

⁶² Thomas Koenig and Michael Rustad, 'Hate Torts to Fight Hate Crimes' (2007) 51 *American Behavioural Science* 2, 302

⁶³ Ahmad Tabrez, 'Nervous Shock Development & Dilemma: A Comparative Study of UK, USA & Canada' [2009] *Torts and Products liability Law eJournal*, 2

⁶⁴ [1992] 1 AC 310

⁶⁵ *Rahemtulla v. Vanfed Credit Union*, [1984] B.C.J. No. 2790

nerved person. In *Clark v. Royal Canadian Mounted Police*,⁶⁶ it was further explained that the intent to cause harm is fulfilled where the emotional damage was objectively foreseeable. This means that the prosecution does not have to prove that the offender knew that his actions would cause psychological harm as the reasonable man's test would be used.

The principle of nervous shock recognises both primary and secondary victims. Primary victims are the individuals directly affected by the actions of the offender while secondary victims refer to the relations of the victim. However, there must be proof of the existence of love and affection in the relationship to the extent that the injury caused to the victim would also affect him or her psychologically.⁶⁷

A person whose private sexual images have been released by another without his or her consent can rely on the tort of nervous shock if he or she can prove that the release of such images or videos caused him/her emotional distress⁶⁸ or psychiatric injury such as depression or post-traumatic stress disorder.⁶⁹ 'Mere anguish or fright is not sufficient.'⁷⁰

This principle has been successfully used to institute legal actions in Nigerian courts.⁷¹

Defamation

Defamation focuses on injury caused to one's reputation as a result of words written or spoken by others.⁷² The words complained of must tend to disparage the plaintiff in the minds of right-thinking members of the society and not just a particular section of the community. In *Egbuna v. Amalgamated Press of Nigeria Ltd*,⁷³ the court explained that a particular section of the community means a group of persons who subscribe to standards of conducts which are not those of the society.

With the advent of the internet and social media, defamatory statements can be published and communicated with seamless ease.⁷⁴ Defamation is no longer a 'sin' that only journalists are capable of committing; with the invention of the internet and

⁶⁶ [1994] F.C.J. No. 576

⁶⁷ *Alcock v Chief Constable of the South Yorkshire Police* [1992] 1 AC 310

⁶⁸ Emily Laidlaw and Hilary Young, 'Creating a Revenge Porn Tort for Canada' (SSRN, 9 March 2020) <

<https://poseidon01.ssrn.com/delivery.php?ID=117092085029102123127004102092118025001036072042032045097099078112078017086065098126121012006000005059110081106107100085016094023029059042041105008019029117025068101035073045090097066010090127102081076119109070110090064120005120084006081122073099102096&EXT=pdf&INDEX=TRUE>> accessed 8 June 2021

⁶⁹ *Jane Doe 464533 v. D. (N.)* [2016] O.J. No. 6876, 2016 ONSC 4920

⁷⁰ *Clark v. Royal Canadian Mounted Police* [1993] F.C.J. No. 1321

⁷¹ *Nigerian Breweries Plc v. David Audu CA/A/235/05*

⁷² *Kodinlinye and Aluko, The Nigerian Law of Torts* (Spectrum Book Ltd, 2003)pg. 136

⁷³ (1967) 1 All NLR 25, 29

⁷⁴ Marcus Araromi, 'Determining Legal Responsibilities in Defamation: Crossing the Dividing Line between Real World and Internet jurisdiction', (SSRN, 28 November 2018)

< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3286611> accessed 2 January 2020.

social media, it is now possible for anybody to post information without necessarily being a media practitioner.⁷⁵ The impact of internet activity is felt in the real world and thus the resolution of internet defamation cases must occur in a real world jurisdiction.⁷⁶

There are two forms of defamation; libel and slander. Libel is defamation in a permanent form while slander is defamation through spoken words and gestures. The defamation on social media can be said to be libel because it is in permanent form. Defamation is also in permanent form if it is contained in cartoons.⁷⁷

Libel is actionable per se, a person need not prove actual damage. When a publication or information has been proved to be libel, the court would assume that the victim has suffered damage⁷⁸ but if the victim can prove actual damages, he would be able to recover a further sum in addition to the general damages.⁷⁹

The plaintiff in a defamation action must establish three requirements. The defamatory statement must refer to the claimant. In *Dalumo v. The Sketch Publishing Co Ltd*,⁸⁰ it was held that the defamatory words do not necessarily have to refer to the plaintiff or claimant by name. The court further held that it is sufficient for the plaintiff to prove that the words could lead persons that knew him to believe the plaintiff was the person being referred to.

The words must be defamatory. It is left to the discretion of the court to decide whether the words complained of are reasonably capable of being defamatory, Usually the judge would construe the words according to the fair and natural meaning which would be given by reasonable persons of average intelligence.⁸¹

The words must be published. For a claim of libel to be successfully established, the plaintiff must prove that the words were published to at least one person other than the plaintiff. The tort of defamation seeks to protect a person from injury to his reputation among other people and not injury to his feelings about himself.⁸²

Defamation is not totally viable because it is usually impossible to prove that the posted images falsely represent the victim.⁸³ The victims even agree that they are the ones in the photograph; the images just portray them in an 'unfavourable or

⁷⁵ Ibid.

⁷⁶ Rolf Weber, *Shaping Internet Governance: Regulatory Challenges* (Springer 2010)pg. 10

⁷⁷Kodinlinye and Aluko, *The Nigerian Law of Tort* (Spectrum Book ltd 2003)pg. 139

⁷⁸ *Williams v. The West African Pilot*, [1961] All N.L.R. 866.

⁷⁹ *Okolo v. Midwest Newspaper Corporation* (1974) 2 CCHCJ 203 at p.205

⁸⁰ [1972] 1 All N.L.R. 130.

⁸¹ *Akurefe v. The Sketch Publishing Co Ltd*.1971) 1 U.I.L.R. 13 at p.15

⁸² *Dickson v. Enwere* [1967] F.N.L.R. 163

⁸³ Alix Iris Cohen, 'Non-consensual Pornography and the First Amendment: A Case for a New Unprotected Category of Speech' (2016) 70 U.MIAMI L.REV.300, 322

undesirable light.⁸⁴ However, they can institute legal action for the defamatory captions that are usually posted with the photograph. Most times, the offenders include insulting captions like ‘harlot’ and ‘prostitute’ in a bid to injure the reputation of the victim.⁸⁵

Intentional Infliction of Emotional Distress

This tort provides the opportunity for victims to be compensated for the emotional damage caused by the posting of the nonconsensual pornography which could lead to the financial ruin of the perpetrators.⁸⁶

Intentional infliction of emotional distress involves the defendant acting abominably and outrageously with the intention of causing the plaintiff emotional distress or harm and the claimant need not prove physical harm before bringing a claim before the court. There are certain requirements that have to be met before a claim of intentional infliction of emotional distress can be successfully established.

The conduct must be intentional and reckless.⁸⁷ The onus is on the plaintiff to prove that the defendant intended to cause distress or disregarded a high risk through which distress would occur. The conduct must be extreme and outrageous. This is because the law expects people to have some certain thickness to deal with the usual rude and obnoxious behavior.⁸⁸ In addition, the conduct must be gravely indecent. Nevertheless, there are times when ordinary insults could constitute extreme and outrageous behavior. An example is if the actor knew that the plaintiff was easily susceptible to emotional distress due to a mental condition.

Furthermore, the plaintiff must show that he suffered emotional distress. It is not enough that the defendant intended to cause distress, there must be proof that the plaintiff actually suffered emotional distress as seen in *Abiola v. Abubakar*.⁸⁹ Victims of nonconsensual pornography can successfully bring an action against their bullies for intentional infliction of emotional distress as seen in *Doe et al v. Hoffsetter*.⁹⁰ In this case, the plaintiffs were awarded damages for the intentional infliction of emotional distress caused by the release of their intimate photographs. Apart from the release of the intimate photos or videos, if the bully also threatened to cause physical harm, an action for assault can be instituted against the bully.

The tort of intentional infliction usually arises as a ‘gap filler’ when other theories of liability are inaccessible to the plaintiffs. There are cases⁹¹ where the court held that

⁸⁴ Alexis Fung Chen Pen, ‘Striking Back: A Practical Solution to Criminalizing Revenge Porn’ (2015) 37 T.Jefferson L.Rev. 427

⁸⁵ AGF v. Ayan Olubunmi FHC/AD/17/2017

⁸⁶ Lindsay Holcomb, ‘The Role of Torts in the Fight against Non-consensual Pornography’ (2021) 27 University of Pennsylvania Carey Law School

⁸⁷ *Wilkinson v. Downton*, Q.B. 57 (Eng. 1897)

⁸⁸ *White v. Monsanto Co.* 585 So. 2d 1205 (La. 1991)

⁸⁹ 267 F. Supp. 2d 907 (N.D. Ill. 2003)

⁹⁰ (2012) 11-cv-02209

⁹¹ *Patel v. Hussain*, 485 S.W.3d at 158

victims of revenge porn could not recover damages under an intentional infliction of emotional distress claim because some other tort theories could be used. The writer of this paper was unable to find revenge porn cases in Nigeria where this claim was allowed or denied. However, in *Ken Saro Wiwa v. Brian Anderson*, the United States district court for the southern district of New York recognised that the activities of the defendant constituted intentional infliction of emotional distress according to the laws of Nigeria.

Intellectual Property

Intellectual property refers to intangible creations of the mind and includes but is not limited to inventions, designs and artistic works. Intellectual property is protected in law.

Copyright

Section 1 of the Nigeria Copyright Act provides the works that are eligible for copyright protection. They are: literary works, musical works or artistic works, cinematographic films, sound recordings and broadcasts. For a work to be eligible for copyright, the creative must have put in enough effort to make the work original and the work must have been fixed in a specific medium of expression from which it can be duplicated. That is, it must not just be in the brain of the idea conceiver. By virtue of section 51 of the Copyright Act, photographs that are not cinematographic are classified under artistic works which are eligible for copyright protection. Videos fall under cinematographic films which are equally eligible for copyright protection.

In Nigeria, the general rule states that the copyright of a photograph belongs to the photographer. However, there are two major exceptions to this rule; If the photograph was taken by a photographer in his employee status, the copyright would belong to the company he is representing and if the photographer, through a written contract, assigns the right to another person.

The court in *Joseph Ikhuoria v. Campaign Services Ltd* held that when a person commissions the taking of a photograph and pays the money's worth of the photo, the copyright belongs to the person who commissioned the work.

Advocates of using copyright to combat revenge pornography have opined that intellectual property would help to encourage the production of consensual media or pornography. This is not to suggest that copyright is a perfect solution, it is just a powerful tool victims of revenge pornography have used.

According to the polls taken by some revenge porn victims in America, most of these images are 'selfies' they took by themselves. Copyright law protects any novel work of authorship fixed in a specific medium of expression, including photographs. Since the victims are the creators of their selfies, they own the copyright in the images. There have been court's decisions and treatise that have corroborated and recognised that the author of a sexual piece enjoys copyright protections if it meets

the basic requirements. Thus, the author of a book and the creator of a 'sexy selfie' retain exclusive rights to their works including the right to reproduce. The reproduction and exhibition of copyrighted images of revenge porn victims without their permission constitutes copyright infringement.

Victims, sometimes, give their partners permission to make intimate videos of them with a stern warning not to disclose it public. Copyright claims can only be brought by the person who created the image. Thus, such images are excluded from copyright protection.

The Cybercrimes Act

The Act⁹² mentions that people who intentionally send pornographic or obscene messages using information communication technologies or contribute to the sending of the messages despite them knowing that it is false. It goes on to state that the act must have been done to cause anxiety, hatred, injury or inconvenience. The punishment is conviction to a fine not exceeding 7 million naira or a prison sentence of not more than three years or both. Section 24 is titled 'cyber stalking'.

Arguments have arisen as to whether this section is actually making reference to revenge pornography since the images are not necessarily sent as messages but are sent as posts to the internet. Messages do not have to be sent to just one person, thus, the upload of an intimate pictures to the internet serves as a message to the victim with the intention of either complimenting or humiliating the victims.⁹³ However, it would be more expedient if the act is improved upon to capture the concept of revenge pornography more clearly. Section 24 does not take into consideration the terrible effects of posting revenge pornography as it mentions the sending of pornographic content as opposed to the posting of the intimate photographs of the victim. The latter has more devastating effects.

A major criticism of this act has been the failure of the provisions to provide for sufficient compensation for the victims. Section 31 bestows on the court the discretion to make an order requiring the convicted person to pay monetary compensation to the victim in addition to any penalty imposed on them by the act for any damage caused to his computer or data or program or to recover money lost or expended by such persons as result of the offence the accused omitted.

This section only provides compensation for physical damage suffered by the victims and not the psychological damage (even though examples of psychological damage are listed in section 24). The victims can file a civil suit, relying on the criminal conviction. During the trial for the civil suit, the victim just has to prove the quantum of damages as the crime has already been established by the criminal court that adjudicated on the matter.

⁹² Section 24

⁹³ AGF v. Ayan Olubunmi FHC/AD/17/2017

Recommendations

Revenge pornography does not only have terrible effects on the victims but also on the society at large. The following are the recommendations proffered by the writer:

The 2015 Cybercrimes Act is a great innovation but it seems to focus more on online financial crimes. Section 24 impliedly discussed revenge pornography. However, the provision is not elaborate and it could be improved upon. It states that:

Any person who knowingly or intentionally sends a message or other matter by means of computer system or network that:

- (a) is grossly offensive, pornographic or of an indecent, obscene or menacing character or causes any such message or matter to be sent.

‘sending’ implies that the message was sent privately and not shared on the internet. Furthermore, the section does not adequately capture the concept of revenge pornography. Revenge pornography should be a subsection under section 24(which has the heading ‘cyber stalking’) and it should be amended to:

Any person who knowingly or intentionally:

- (a) sends an intimate photograph or a video recording of a private person engaged in sexual activity to another or posts it on the internet without the consent of the person in the photograph or video for the purpose of humiliation or such other purposes shall be liable on conviction to a fine not exceeding seven million naira or imprisonment for a term not more than 3 years or to both such fine and imprisonment.

Nothing in this section shall be construed as applying to actors in pornographic films; however they can rely on copyright for reliefs.

It is not uncommon for employers to dismiss employees whose nudes and videos have been released on social media. The Labour Act can prohibit discrimination based on the release of private information that does not affect the victim as an employee. The National Universities Commission should urge institutions not to expel victims of revenge pornography especially if such acts were not committed on school premises during the school year.

As stated earlier on, victims of revenge pornography are treated terribly. This is due to society’s perception that they had a role to play in the crime perpetrated against them. Non-governmental agencies and well informed individuals should educate the public on the fact that despite the high moral values they might possess, making intimate videos or photographs is not a crime and thus, people who do this do not deserve to be punished. The public also needs to understand that ‘consent in one context is not consent in another context’.

The Nigerian Police should be trained on how to handle cybersex crimes. The Nigerian Police is a reflection of the society. If the society shames victims then the police would also shame victims. Officers should be trained to keep their morality aside and help the victims get justice first. Also, the police force should have a police officer that also doubles as a counsellor. This counsellor would be able to obtain information from children victims without scarring them and help them get 'closure'. The police should know how to track IP addresses of people who post revenge pornography anonymously.

It is impossible to tell people what they can or cannot do with their lives. One cannot tell a person not to take intimate pictures or videos but can, however, recommend that they ensure that the devices where the media is stored or exchanged are secured by the use of stronger passwords, face identification and fingerprints. This would make it difficult for people to hack and obtain these pictures and videos. For example, *Whatsapp* allows users have a Two-Step Verification Pin and that pin is needed to be inputted at random times and when registering the phone number on *Whatsapp* again. This means that even if a person steals another's *sim card* and is able to receive the one time password (OTP), they would not be able to access the media files or chats without inputting the Two-Step verification pin that the original owner had set up. The actors should also be careful when choosing who they send the media to and the mode of sending (only secured applications and websites should be used).

Conclusion

Sexual crimes have terrible effects on the victims and it is no different when these crimes are done in the virtual world or through the use of technology. No human is ever accused for contributing to his own murder so it is preposterous that victims are attacked for contributing to a crime perpetrated against them. This is in no way trying to encourage the sending of intimate photographs or the recording of intimate moments but rather trying to explain that in all other areas of law, 'consent in one context is never taken as consent in another context'.