

Comparative Analysis of Gender Discrimination in Bail Suretyship in Nigeria, Ghana and Kenya: A Review of *Ken Nwafor v Economic and Financial Crimes Commission* (2021)

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Abstract

Male sureties are often preferred in bail proceedings across many African criminal justice systems, including Nigeria, Ghana, and Kenya. This preference persists despite the lack of explicit legal provisions preventing women from assuming this role. This practice is rooted in cultural biases that view women as the 'weaker sex', which is reflected in legal practices. This case review examines the legal implications of denying women the right to act as sureties, focusing on the Nigerian case of Ken Nwafor v Economic and Financial Crimes Commission (2021). It draws comparative lessons from the legal frameworks of Ghana and Kenya. The review argues that gender-based discrimination, notably the denial of women's rights to serve as sureties, is both unconstitutional and illegal, as it infringes upon fundamental rights. The constitutions of Nigeria, Ghana, and Kenya do not support gender inequality, and no international law or statute prohibits women from serving as sureties. The review adopts a doctrinal approach to emphasise the need for concrete evidence to demonstrate discriminatory practices. It calls for legal reforms that ensure gender equality and rejects the notion that gender should influence legal rights or responsibilities. It advocates for enacting stronger legal frameworks alongside grassroots advocacy and awareness campaigns regarding gender equality. The review concludes with recommendations to eliminate gender-based discrimination in the criminal justice systems of these countries, ensuring equal treatment for all individuals, regardless of gender.

Keywords

bail surety, gender discrimination, Nigeria, Ghana, Kenya

1. Introduction

In some African countries' criminal justice systems, women are often prevented from serving as surety for defendants, such as when the detained individual is the woman's

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husband. In Nigeria, Ghana, and Kenya, before an accused person or defendant can be released on bail by the court, the police, or other law enforcement agencies, they must provide a reliable surety. However, an accused person may be granted bail on their own recognisance. In this scenario, they confirm a bond of self-recognition and are granted bail under specific conditions. This applies to suretyship in all criminal institutions. The role of a surety is to secure the freedom of a defendant, an assumed innocent individual, for any necessary date. The concept of suretyship relates to the bail process as it guarantees bail for an accused person. Bail is defined as a contract in which a defendant is released to their surety to secure their attendance at an investigation or a court trial.

The primary purpose of bail in any criminal justice system is to ensure that the defendant does not fail to appear for the investigation process or the trial in court. Institutions with the power of criminal investigation and trial can grant bail. In Nigeria, bodies such as the police and the Economic and Financial Crimes Commission (EFCC), among others, have such powers. Courts with criminal jurisdiction can also grant bail to defendants. While bail is a concept, suretyship is the process of its actualisation. Additionally, while bail represents the process, the surety is the person standing for it, as both work together in the criminal law process. In the criminal law process, bail, principally so-called, is the temporary freedom granted to the defendant on the grounds of demanding their appearance to answer their case when required. The surety is the person who undertakes to take responsibility for the consequences of the defendant's presence until the matter is resolved. A surety guarantees the bail or appearance of another or others until the matter is finalised by the Court or Police, among others. The surety represents the defendant under terms and conditions set by the Institutional Authorities. The surety must possess reasonable qualifications required by the Court or the involved Institution. Such qualifications may include owning landed property and being a credible and reliable person in society. Additionally, the jurisdiction of the surety's residence, business, and personal wealth may be stipulated as a condition. A surety may be asked to attest to a bond known as recognisance. This is an undertaking of a specific financial sum to be forfeited to the Government should the defendant jump bail. All the above pertain to the character of the surety. The obligations, rights, and liabilities of a surety are outlined in criminal jurisprudence.

The most important obligation is the defendant's production when due for investigation or trial. A surety can forfeit the bail bond whenever the defendant fails to meet the bail conditions. The surety's property may be seized upon his demise. If the bond is not fulfilled, the surety has the right to withdraw from the contract, which may result in the re-arrest of the defendant he supported. The surety may be required to deposit the bail bond sum with the Authority. However, in practice, his pledge to do so is generally accepted. This case review examines the unpopular practice amongst courts and law enforcement agencies of rejecting females as sureties for the bail of accused persons in Nigeria, Ghana, and Kenya. It is found that some specific requirements or conditions may be ordered for a surety to stand for bail, but such processes are discriminatory. Utilising the doctrinal research method, this work interrogates the right of the female gender to surety detained defendants within the Court or Criminal Law Institutions in Nigeria as per the case of

Ken Nwafor v EFCC.¹ The work argues that there is no legal impediment to justify the practice in Nigeria, Ghana, and Kenya, where females are exempted from suretyship based on gender.

2. The case of *Ken Nwafor v EFCC*

2.1 Brief facts

The case involved an appellate matter concerning the final judgment of the High Court of the Federal Capital Territory (FCT), Abuja, rendered on October 28, 2015. The appellant's claims, as the applicant in the lower court, were rejected due to a lack of merit. This led to the case being brought before the Court of Appeal, FCT Division. The appellant had entered into a business arrangement to purchase contracts from Mr. Femi Gbadamosi, but the business ultimately failed. Consequently, Mr. Femi filed a petition against him with the EFCC, alleging cheating and seeking the EFCC's assistance in recovering the amount he had spent. The EFCC invited the appellant, who asserted it was a failed civil transaction. Despite this, he was arrested and detained. The appellant subsequently brought a case before the lower court to enforce his fundamental rights.

On the other hand, the respondent stated that it received a petition written by one Gbadamosi Tajudeen Femi, who alleged criminal fraud, forgery, obtaining money under false pretences, and issuing a dud cheque against the appellant. An investigation into these allegations by the EFCC revealed that the appellant received sums from the petitioner to facilitate obtaining a contract from the Millennium Development Goals Office (MDG), but failed to do so, and the petitioner was issued a forged award contract document. As a result, the appellant was invited by the EFCC for investigation and was subsequently granted bail. The applicant, now the appellant before the Court of Appeal, filed an appeal. He attempted to overturn the High Court's judgment at the appeal hearing. Despite being served with the court papers, the EFCC did not file a response or participate in the proceedings.

The two issues raised by the appellant in the appellant brief were: (a) can a citizen be rejected and discriminated against as a surety based on her marital status and sex?; and (b) whether or not, considering section 46(1) of the 1999 constitution (as amended), Order 11 and 2 of the FREP Rules 2009, the Appellant is entitled to the reliefs when his rights are likely to be contravened?

2.2 Appellant counsel's submission

On the issue of whether a Nigerian citizen can be discriminated against as a surety based on her sex and marital status, counsel for the appellant argued that the Constitution of the Federal Republic of Nigeria 1999 (as amended) safeguards the rights of citizens without regard to their status or gender. Therefore, it prohibits any discrimination based on birth status, sex, or any form of disability or marginalisation. He further submitted that in criminal law jurisprudence, bail is a right for every person, regardless of gender or sex.

1 [2021] 13 NWLR (PT 1794); See *Udeh v FRN* [2001] 5 NWLR (PT 206) 312 at 324 paras F-G; *Nwude v FGN* [2004] 17 NWLR (PT 902) 306 at 326, paras E-H; *Comptroller of Prison v Adekanye* [1999] 10 NWLR (PT 623) 40; *Suleiman & 1 Anor v C.O.D* [2008] 8 NWLR (PT 1089) 296.

Additionally, it was argued that the facts presented by the appellant were not challenged or contradicted by the EFCC. They contended that unchallenged and uncontroverted facts constitute salient evidence that can be relied upon to make appropriate findings of fact. In the record of the appeal, the appellant stated the facts in paragraph 27 of the motion in the lower court as follows:

That EFCC asked me to get 2 Civil Servants to take me on bail, so I called my wife who works with Federal Staff Hospital as a Medical Doctor and one Engr. Chris to bail me. They however said I should bring a reliable surety (2 digit level civil savant) the next day to replace my wife, but that even if I could not get one that I should still endeavor to report back at their office by 10 am the following day. I left that evening and reported back the next morning at 10 am being the 9/4/2015.²

The EFCC refuted the above claim. The Court of Appeal, in its erudite judgment, upheld the principle that both males and females are equal before the law; therefore, any practice that divides their roles into superior and inferior is unconstitutional. In legal terms, both sexes can serve as sureties for a defendant on equal terms. In this context, it is illegal and unconstitutional to deny women the right to act as sureties for bail based on their gender. The Constitution views this as an infringement of their fundamental rights and considers it discriminatory.

2.3 Why the appellant failed on the first issue on appeal?

The appellant failed in this case regarding the wife's suretyship not because of substantive law, which is clear, but due to the evidence in procedural law. He could not provide the Appellate Court with documentary evidence concerning the bail refusal by the EFCC. In other words, since the appellant claimed that his wife was rejected as one of his sureties by the EFCC, the burden of proof rested on him to substantiate this allegation. In legal terms, proof is necessary to establish or deny an alleged fact. It is the responsibility of the party asserting a claim to provide evidence. In this context, he argues that the existence of a legal claim depends on presenting evidence to support it, and failing to do so results in the failure of his case in law. Therefore, the appellant was required to provide documentary proof of his wife's rejection as a surety by the EFCC. Additionally, he could have obtained an affidavit or oath from his wife, the primary party affected by the alleged discrimination by the EFCC. This is because, in law, any issue that is supported and relied upon requires documentary evidence to be proven in court. The mere presentation of oral evidence alone is insufficient to support or substantiate the claims made by a party without reference to relevant documents.

The appellant's wife did not complete any bail papers to serve as surety for him, which the respondent rejected before the lower court. Furthermore, there is no direct evidence regarding the appellant's wife, who was allegedly dismissed as a surety solely based on her gender.

2 See Pages 1-6 of the Record of Appeal of the Court of Appeal Abuja Division; R.A. Oyoru 'An Assessment of Gender Discrimination in Workplace and its Influence on Workers Performance: A Literature Review' [2023] 3(2) *International Journal of Advanced Research on Multi Disciplinary Studies* 1-9.

These are critical factual issues raised by the appellant. The burden, which by law rests firmly on him, is to provide credible evidence. As the law requires, the appellant failed to present credible and sufficient evidence to support the allegation.

2.4 Issues distilled and determined by the Appellate Court

2.4.1 Conditions guiding the granting of bail to a suspect

The Appellate Court ruled that when a defendant is detained and it is found that the investigation cannot be finalised within the stipulated time, the next option is to release him temporarily on bail upon fulfilling fair conditions.³ The illegality and unconstitutionality of rejecting a surety solely based on sex: The law does not allow for dichotomy, separation, or division between the sexes regarding the authority to act as a surety for bail. In criminal law, both possess the same capacity.

On whom does the onus of proof of assertion of denial of the right to stand as a surety lie: To prove a particular fact in law, the person who proposes it is enjoined to prove it. The onus is on him to prove to the court what he asserts as the truth of the case. It is he who asserts that must prove. In this case, the Appellant alleged that the EFCC excluded his wife from being one of his two sureties, and this allegation was firmly denied. Therefore, the onus was on the Appellant to prove this allegation, as he had made it against the respondent.⁴ This is because, under sections 131 and 132 of the Evidence Act 2011, he who asserts the reality of a fact is obligated to prove it. Section 133 of the Evidence Act then imposes the burden upon the defendant to disprove it.

2.4.2 The relationship between documentary and oral evidence

There is a connection between supporting documents and oral evidence. When a document is claimed to prove a fact in law, the absence of such a document and reliance on oral evidence to establish the facts within the document without further support is unreasonable. The appellant's wife did not complete the bail papers correctly, as one of his two sureties was rejected by the EFCC. Furthermore, there was no direct evidence from the appellant's wife, who was allegedly dismissed as a surety simply because she was female. All these were critical facts that the appellant positively alleged, and the burden of proof, by law, rested entirely on him to provide credible evidence. Therefore, as the law mandates, the appellant failed to present credible and sufficient evidence to support the allegation.

2.4.3 The effect of the failure of the respondent to file a respondent brief

It is the position of the law that when a defendant is served correctly and fails to respond, whether by oversight, neglect, or intentionally, it constitutes an admission under our procedural law. The failure of a respondent to counterargue the facts or arguments in an appeal suggests consent.

3 NWLR, n 8, 592 paras D-F, 600, paras A; Institute for Security Studies (ISIS), Gender Inequality of African Women [2022] 1-3.

4 Ibid, 598, paras G-C; *IGN (Nig) Ltd v Pedmar (Nig) Ltd* [2013] LPELR – 41064; *Oguche v FBN Plc* [2020] 4 NWLR (Pt1715) ratio 1 at 535; *Momoh v Umoru* [2011] 15 NWLR (Pt1270) 217; *Mbanefo v Agbu* [2014] 6 NWLR (Pt 1403) 238]; S [2017] 13 NWLR (Pt 1581) 52.

2.4.4 Failure of one party to respond to the other party's case

When one party does not answer a case presented by another, it does not automatically prove that the facts align with the Court's position. Consequently, the failure of one party to address the facts in another's case does not inherently grant merit to the other party's case, as the court is tasked with assessing arguments fairly. In the present matter, the EFCC, despite being served with the court documents in the appeal, did not file its Respondent's Brief nor participate in the entire process. Nevertheless, the Appellate Court considered the sole issue on its merits.

3. The legality of women standing as surety for bail in Nigeria, Ghana and Kenya

The position of law is that it is unconstitutional and illegal to reject a surety based on sex. Many statutory instruments are created to enhance and ensure that women's rights are protected from marginalisation and violation at the international level. Consequently, measures are enacted to curtail male dominance in law. The Convention on the Elimination of Discrimination Against Women (CEDAW) is a leading international treaty in this fight. For this reason, CEDAW defines discrimination against women as:

Any distinction, exclusion or restriction on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁵

The above definition states that the exclusion of women from acting as sureties represents an act of marginalisation of their rights. It urges state parties to combat the relegation of womanhood, addressing its various forms, content, and practices, while advocating, through all concerted efforts, sustainable policies designed to eliminate discrimination against women. Furthermore, it asserts that sustainable legislation should progress in all aspects of life, denouncing male-dominant practices related to gender from the grassroots level.

This significantly challenges the belief that women are weaker vessels. The explicit provision of CEDAW, which has evolved into international customary law, is globally enforceable, and Nigeria, as a signatory, is bound by it. The Administration of Criminal Justice Act (ACJA), 2015 of Nigeria provides thus: '[a] person shall not be denied, prevented, or restricted from entering into a recognisance or standing as surety for any defendant or applicant on the ground only that the person is a woman.'⁶

This directly addresses the discrimination against women acting as sureties in criminal cases, emphasising that they should be treated as a rule, not an exception. The provision of the 1999 Constitution of Nigeria is also very instructive. Section 42(1) provides thus:

⁵ CEDAW, Article I.

⁶ Administration of Criminal Justice Act 2015, Section 167(3).

A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not, by reason only that he is such a person (a) be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject.

The above clarifies the rhetoric surrounding the treatment of women as second-class creations of God, which subordinates their human rights under the guise of masculine control. The 1999 Constitution of Nigeria states in section 42(2) that: '[n]o citizen of Nigeria shall be subjected to any disability or deprivation merely because of the circumstances of his birth.' As a foundational legal document of the country, it prohibits any form of discriminatory treatment based on gender. Therefore, sexual preference is irrelevant, as equality before the law should be upheld. Furthermore, the Administration of Criminal Justice Act 2015 and the Administration of Criminal Justice (Repeal and Re-enactment) Law of Lagos State 2011 (ACJL) of Nigeria contain similar provisions that empower the Chief Judge to regulate the registration and licensing of individuals, corporate bodies, or persons to act as bondspersons within the jurisdiction of the Court in which they are registered.

This indicates that any individual or corporate body duly registered and licensed is empowered to act as a surety or bondsperson. A female or a male may own the above institution, as women have equal participatory rights under Nigerian law. Bail granted by law is usually closely related to securing the accused's attendance at his trial before the Court or being available to the Police for further investigation. It is for the protection of the accused person's rights guaranteed under the 1999 Constitution of Nigeria. Section 36(5) provides that '[e]very person who is charged with a criminal offence shall be presumed innocent until he is proven guilty.' Section 35(1) of the foregoing Constitution equally provides that '[e]very person shall be entitled to his liberty and no person shall be deprived of such liberty save in the following cases and in accordance with a procedure permitted by law'... (a) in the execution of the sentence or order of a Court in respect of a criminal offence of which he has been found guilty' respectively. Strictly speaking, bail in criminal jurisprudence is curtailed at the altar of creation status. It deprives women of equal participatory rights to men.

There is no legal impediment preventing women in Nigeria from acting as sureties for bail. To underscore this point, the Administration of Criminal Justice Act, 2015 of Nigeria, for instance, provides that: '[a] person shall not be denied, prevented or restricted from entering into a cognisance or standing as surety for any defendant or applicant on grounds of gender.' This provision is gender-sensitive and prohibits discriminatory practices against women. It is a settled issue that women legally are not exempt from suretyship in the Nigerian criminal justice system. This practice also operates in Ghana, where a woman can lawfully stand as surety. The above provisions suggest that issues bordering on gender are not a determining factor for suretyship in Nigeria.

The Constitution of Ghana is clear and explicit on this matter as it provides thus: '[I]f a person arrested, restricted or detained, is not tried within a reasonable time, he shall be released either unconditionally or upon a reasonable condition, necessary to ensure

his appearance at a later date for trial or proceedings'. The above implies that there is no dichotomy or segregation regarding sexual class as it relates to surety in law. Compared to section 42(2) of the 1999 Constitution of Nigeria, which is not specific on bail but prohibits segregation due to birth conditions, the Ghanaian constitutional provision mentioned above is non-selective regarding sex class for a surety. Since the law is firmly against discrimination based on gender in Ghana, why then does equality elude women in their role as sureties within the criminal justice system of the courts and law enforcement agencies in Ghana?

The above question also represents jurisprudential rhetoric in Kenya. The country has legal provisions like those in Nigeria and Ghana that entail gender mainstreaming in the criminal justice system. In the criminal regulatory and institutional Practice Direction, the Kenya Bail and Bond Policy Guidelines define bail as:

Agreement between an accused person or his or her sureties and the Court that the accused person will attend court when required and that should the accused person abscond, in addition to the Court issuing warrants of arrest, a sum of money or property directed by the Court to be deposited, will be forfeited to the Court.⁷

The phrase 'his or her surety' indicates that the above regulatory bail and bond guideline is gender-sensitive regarding the sex class of a surety. Simply put, a surety can be male or female, signifying that the Kenyan Criminal Administration of Justice permits both sexes to stand as sureties. Underscoring the previous assertion, the same regulatory policy defines a surety thus: '[a] person who undertakes to ensure that an accused person will appear in Court can abide by bail conditions. The surety puts up security such as money or title to a property, which can be forfeited to the court if the accused fails to appear in court'.

The term 'any person' refers to the concept of surety, which does not favour the male sex but encompasses all human beings, denoting both male and female. To support the equality provisions mentioned, the Constitution of Kenya states that a detained person shall be released conditionally on bond or bail to a surety by the court or law enforcement agencies unless there are compelling reasons to the contrary.

The above provision for releasing an arrested person does not signify that the surety must be male; however, 'any person' symbolises or includes both sexes as a qualification for suretyship in the Kenyan criminal justice system. Despite the comprehensive equality provisions and ongoing efforts by the Government of Kenya to reduce gender discrimination, the barriers remain persistently difficult. Like Nigeria and Ghana, the law must be applied to confront and dismantle the entrenched discrimination within the cultural and religious spheres in Africa.

4. Conclusion and recommendations

Nigeria, Ghana, and Kenya are democratic countries that uphold equality before the law within their legal systems. Any law or practice that demeans or discriminates against gender

⁷ See National Council on the Administration of Justice 'Kenya Bail and Bond Policy Guidelines' (2015) 1.

equality is considered barbaric and undermines the fundamental principles of equality before the law. The Constitution of the Federal Republic of Nigeria 1999 (as amended) states in section 2(2) that no one shall be subjected to any form of discrimination based on their circumstances of birth. In the same vein, section 1(3) also indicates that any law found inconsistent with the provisions of the Constitution shall be null and void to the extent of its inconsistency. These clauses suggest that all legislation and practices in Nigeria must strictly adhere to the spirit and letter of the Constitution. Therefore, the practice of gender inequality that downgrades the status of women concerning bail processes or as sureties contravenes existing laws and hinders human development in Nigeria. Such an unequal stance should be eradicated from any legislation worldwide, as it undermines the fundamental principles of equality before the law. Nevertheless, there are specified conditions in bail processes for a surety; qualification for suretyship should not be based on gender, as this would constitute discriminatory practices that violate the rights of the person standing as surety.

In Nigeria, Ghana, and Kenya, the process and risks of jumping bail may lead to discrimination against women in the bail process. This issue is compounded by the complex obligations, rights, and liabilities of suretyship within the legal system. The obligation to produce the accused on schedule is not straightforward. A surety may risk forfeiting the bail bond if the accused fails to appear. Additionally, the court can attach her property to recover the bond if the woman's surety dies before the bail bond payment is made. Failing to meet the financial requirements of bail could also be a factor. If the woman surety fails to produce the accused at the required time, she may be liable to pay the specified amount. While she may be allowed to show cause, if her justification is insufficient before the court, she risks forfeiture of finances, property, or a jail term not exceeding six months.

Suretyship is associated with several rights. She can recant her suretyship at any time, which requires the surety to provide a new one. If he fails, he may face a bench warrant or remand. She can collect a security bond to support the bail bond whenever necessary. A surety has the right of audience in court before the bond sum or deposited security is forfeited. Regarding the surety, she has the right to be informed of the court's intention to forfeit her bail bond and the right to appeal this decision, among other rights.

The above conditions apply to Nigeria, Ghana, and Kenya. Denying a woman her rights to bail constitutes a clear violation of two fundamental human rights principles. It implies a denial of freedom for both the accused and the woman involved and represents a retrogressive assault on womanhood. It also amounts to injury to the feminine world, positioning it as inferior to the male counterpart. As mentioned earlier, various arguments have been made against this abhorrent practice of denying a woman the power of suretyship based on her sex. Some have suggested that rejecting female sureties stems from remnants of traditions incompatible with the law and natural justice.

Another reason is to protect women from losing their bond, which may include imprisonment. This chauvinistic approach is unhealthy and unconstitutional. In light of gender mainstreaming, such practices should be discarded as barbaric, especially since women now work in the courts and law enforcement agencies in these countries. Additionally, anyone qualified to serve as surety should be utilised. This work examines

the case of *Ken Nwafor v EFCC* and connects it to the statutory laws that condemn the practice of denying women the right to act as sureties. It concludes that denying women this right in any criminal process is baseless and unconstitutional.

Considering the above, this paper makes the following six recommendations: First, explicit implementation structures should be established to ensure non-discrimination against women in all criminal law statutes in Nigeria, Ghana, and Kenya. Second, advocacy and awareness policies should focus on sustainability and equality in all aspects of life. Third, discrimination against women serving as sureties should be punishable under all criminal legal frameworks. Fourth, government policies should incorporate gender mainstreaming. Fifth, gender education should be integrated into primary and university curricula. Finally, women should assert their rights by providing documentary evidence to support oral claims of discrimination in suretyship.

How to cite:

Obinna N Okereke, Uche Nnawulezi and Septhan E Adiyatma 'Comparative Analysis of Gender Discrimination in Bail Suretyship in Nigeria, Ghana and Kenya: A Review of *Ken Nwafor v Economic and Financial Crimes Commission* (2021)' (2025) 5 *Turf Law Journal* 1-10.