

Fact and Fiction about Child's Evidence In Nigeria*

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Abstract: This paper examines the adequacy of legal procedure for receiving Child's in evidence in court's proceedings in Nigeria. The paper notes that children live in a world of imagination and vulnerable to manipulation. The paper identified key evidentiary problems, draws lessons from British jurisdictions and makes suggestions to protect Child as a witness.

I. Introduction

One of the fundamental norms in the system of administration we operate in Nigeria is the adversary system, in contradistinction to the inquisitorial system. In that adversary system, parties, their counsel and the judge have their respective roles to play. Basically it is the role of the judge to hold the balance between the contending parties, without descending into the arena of conflict, as obviously, his sense of justice will be obscured. Orality of proceedings and the use of witnesses in proof or disproof of cases are the key features of the adversary system. It has been observed that the most common vehicle for proof is the evidence of witnesses.¹

However, it may happen that the crucial evidence to be relied upon for just determination of a case is that of a child. Undoubtedly such child need to be protected against intimidation and incrimination. By the same token, there may be need to ensure credibility of evidence emanating from such child. The thrust of this article is to examine the various techniques for the reception of child's evidence in Nigeria in the light of statutory provisions and judicial pronouncements. The article will also examine the challenges and prospects of tendering child's evidence as well as suggest how one can navigate the path of admissibility of child's evidence in the light of current developments in other jurisdictions.

II. Clarification of Terms

A preliminary point to note is the silence of the Evidence Act² on who is a child. This obvious lacunae, may lead us to resort to the various local legislation in order to ascertain the status of a child. In constitutional law, the age of franchise is eighteen years³, in contract, the contractual capacity is the age of majority⁴, the Criminal Procedure Act put the age of a child at something below fourteen (14) years.⁵ Guidance may also be found in Section 2 of the Children and Young Persons Law which defines a child to mean a person under the age of fourteen years and a young person as a person who has attained the age of seventeen years. The Child Rights Act fix the age of a child at eighteen years.⁶ It is submitted that the age put in some of these local legislation may not be helpful as those ages were meant to serve a specific objective i.e. to suit the circumstances of a particular subject matter, and not necessarily on the fitness of a person to be competent to give evidence in Court.

From judicial point of view, the court has held in *Okoye V. The State*⁷ that a boy or girl of thirteen years is a child and in plethora of other decisions, the courts have taking a stand that a person below the age of fourteen years is a child.⁸ If the decision in *State V. Njokwu Obia*⁹ where the court held that a witness aged fifteen years was not a child is anything to go by, it will be safe to infer from judicial decisions that a witness who is below fourteen years is a child.

¹ Cross and Taper on Evidence 8th Edition (1995) Butterworths p. 224.

² Cap 112 Laws of the Federation of Nigeria 1990.

³ Section 77(2) and 117(2) of the Constitution of the Federal Republic of Nigeria 1999.

⁴ The age of twenty-one has been fixed at common law as that at which absolute and unlimited Capacity to contract shall commence. Persons below that age are infants for the purpose of Contractual transactions. See Sagay Nigerian Law of Contract 2nd ed. Spectrum Law Series p. 475.

⁵ Section 2(1) Cap 80 Laws of the Federation of Nigeria 1990.

⁶ Section 277 of the Child's Rights Act 2003.

⁷ (1972) 1 All NLR p. 500.

⁸ *Okon V. The State* (1988) 1 NSCC p. 157; *Mbele V. The State* (1990) 4 NWLR pt 145 p. 484; *Ogunsi V. The State* (1994)1 NWLR pt 322 p.583; *Onyebu V. The State* (1995)4 NWLR pt 391 p. 510.

⁹ Vol. 4 ECSLR p. 67.

III. Competence and Compellability of a Child

Under Section 155 of the Evidence Act, all persons are competent witnesses, unless a person is deprived of capacity to give evidence on account of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind. A competent person may therefore be described as a person who can lawfully be called upon to give evidence. He is a person who suffers no disability on account of the law or is not exempted by the provisions of the law from giving evidence.

A compellable witness is a person who can be lawfully compelled by the court to testify. The refusal or neglect on the part of a compellable witness to attend court when summoned may amount to contempt, for which he may be sanctioned. It is noteworthy that a person must be competent before being compellable, in other words, all compellable persons are competent. A competent person may however not be compellable if the person falls within the class of persons who enjoys privilege or immunity from civil or criminal proceedings.¹⁰

It flows from the above that a child is rebuttably presumed incompetent and uncompellable to act as a witness in court. But this general presumption can be rebutted, if the child is able to overcome the legal hurdles of passing preliminary tests to be conducted by the court to determine his competence. The first test is to investigate whether the child is possessed of sufficient intelligence to be able to understand the questions put to him or answer such questions rationally. This can be ascertained by putting questions which has no bearing to the matter in court across to the child. If he scale this hurdle, he is prima facie a competent witness. The second test is for the court to determine if he understands the nature of an oath against the backdrop of speaking the truth. If he passes the second test, the child will be put on oath and his evidence will be analogous to that of an adult. But where he fails the second test, but passed the first test, he is nevertheless a competent witness who will be allowed to give unsworn testimony. In *Mbele V. The State*¹¹, Nnaemeka-Agu (JSC) restated the position thus

“it is thus clear that a judge faced with the testimony of a child witness has two vital investigations to make, namely:-

(1) Is he or she possessed of sufficient intelligence to justify the retention of his or her evidence, that is, does he or she understand the duty of speaking the truth?

(2) Does he understand the nature of an Oath?

It is only after the above questions have been answered that an oath can be lawfully administered to the child.”

The issue of whether the above stated two basic tests be conducted in the open court before the reception of evidence of a child is contentions. While the case of *Omosivbe V. COP*¹² support the view that the investigation must first be made in court to justify the child's evidence on record oath, the cases of *Okoye V. The State*¹³ and *Okoyomyo V. The State*¹⁴ stated that the trial judge is not bound under section 183(1) of the Evidence Act to hold and record preliminary inquiry on the competence of a child to take an oath, if the court is of the opinion that the child is capable of understanding the nature of an oath.

IV. Corroboration of a Child's Evidence

The general rule is that except in cases whether criminal or civil where evidence of a witness is by law or judicial practice needs to be corroborated or the court need to statutorily warn itself, no particular number of witnesses is required for the proof of any fact. The truth of a particular fact is not determined by counting heads of witnesses in court but by credible evidence of a witness or witnesses. Thus, section 183(1) of the Evidence Act allows a child who does not understand the nature of an oath to give unsworn evidence in criminal cases only, provided the child is of sufficient intelligence and understands the duty of speaking the truth. Section 183(3) of the same Act provides that no conviction can be made on uncorroborated evidence admitted by virtue of section 183(1). The justification for this exception was aptly stated by Professor Nokes when he wrote

“Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expression are rudimentary. Most children are

¹⁰ See Section 308 of the 1999 Constitution of Nigeria which confers immunity on the President, Vice President, Governor and Deputy Governor. See also *Egbe V. Adefarasin* (1985) 1 NWLR Pt 3, p.519, *Onagoruwa V. IGP* (1991)5 NWLR pt 193, p. 593 which exempts judicial officers from civil and criminal proceedings in the course of performing judicial functions as well as Sections 3 and 4 of the Diplomatic Immunities and Privileges Act.

¹¹ Supra at 504 – 505 p.

¹² (1959) WRNLR 209

¹³ (1972)1 All NLR pt 2, p.500.

¹⁴ (1973) NMLR 292.

influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction."¹⁵

This reason also account for requiring the trial judge to warn itself before acting on sworn evidence of a child. In spite of the fact that sworn evidence of a child need not as a matter of law be corroborated, a judge must warn himself that there is a risk in acting on the uncorroborated evidence of young boys and girls, even if he is convinced that that the witness is telling the truth.¹⁶

It is pertinent to mention that the rule against self corroboration or mutual corroboration also apply to the child's evidence. If a piece of evidence requires corroboration, the corroboration will not be supplied by another piece of evidence which must be corroborated. In *R V. Whitehead*¹⁷ it was held that for evidence to amount to corroboration, it must be extraneous to the witness who is to be corroborated.¹⁸ Thus, the unsworn evidence of a child cannot be corroborated by another unsworn child.¹⁹

The sworn evidence of a child can corroborate the sworn evidence of a child.²⁰ But where the sworn evidence relate to a charge of defilement or any of the offences listed in Section 179(5) of the Evidence Act²¹, such sworn evidence requires corroboration as a matter of law. A sworn evidence cannot be corroborated by unsworn evidence. In *State V. Osayande*²², a child-complainant in a charge of defilement had given sworn evidence against the accused. Her sister (also a child) who saw her being defiled gave unsworn evidence. The court held that evidence which requires to be corroborated cannot be corroborated by another evidence which also requires corroboration. It has however been argued that the decision in *Osayande* may have stand on weak wicket in view of the decision in *DPP V. Hester*, where it was held that sworn evidence can corroborate unsworn evidence since sworn evidence would qualify as "some other material evidence."²³

However, the case of *Kufi V. Queen*²⁴ is the authority for the view that unsworn evidence of a child which requires corroboration as a matter of law can be corroborated by the sworn testimony of an adult which in the circumstance of the case required corroboration as a matter of practice. In that case, the charge against accused was that he had unlawful carnal knowledge of a girl without her consent. The victim gave an unsworn testimony that she did not consent to the carnal act. The victim gave an unsworn testimony that she did not consent to the carnal act. The victim's father gave sworn testimony that the accused confessed to him that he committed the offence and gave him a promissory note as compensation for the wrong committed. The court accepted the evidence of the victim's father as corroboration of the unsworn testimony of the daughter. Ordinarily, the evidence of the father of the victim could have been regarded as tainted because of their blood relationship. The requirement that a trial judge should in a case of tainted witness warn himself, as one would do in the case of accomplices is one dictated by prudence, not by law and failure of a judge to do so does not vitiate a conviction.²⁵

V. Agenda for Reform

Under the existing law, a conviction cannot be secured based on the unsworn evidence of a child, unless such evidence is corroborated in every material particular.²⁶ Appreciation of religious consequence of lying under oath is evidently the underlying basis for allowing a child to testify under oath.²⁷ One rather finds it incongruous that the Evidence Act draws a distinction between sworn and unsworn evidence of a child, when the Constitution of Nigeria does not recognize any religion as state religion. Oath taking is evidently a test of religious belief of a child. Therefore, the evidence of a child who has religious instructions should not be superior to that of another child who lacks religious instructions, provided the latter can give an accurate

¹⁵ Nokes *An Introduction to Evidence* (1967) p.513.

¹⁶ *Arebamu V. The State* (1972)4 SC 35 at pp. 41 – 43; *Onyegbu V. The State* (supra) at p. 530.

¹⁷ (1929)1 KB 99 at 102.

¹⁸ See also *R V. Christie* (1914) A.C p. 545 where it was held that a person cannot corroborate himself.

¹⁹ *R V. Manser* (1934) 25 CAR p. 18; *Jos Native Authority V. Allah Na Gani* (1968) NMLR p.8.

²⁰ *Akpan V. The State* (1967) NMLR 185; *Ekelagu V. Queen* (1960)5 FSC 217.

²¹ These offences are defilement of girls under 13 years, 13 – 16 years and of idiots and procuring The defilement of women by threat or fraud or administering drugs.

²² (1972) UILR 385.

²³ *Osinbajo, Y and Akomolafe, T.* "Reform of the Criminal Law of Evidence (1991) *Justice* Vol. 2 No. 4, Journal of Contemporary Legal Problems published by the Federal Ministry of Justice at p. 92.

²⁴ (1960) WRNLR p. 1.

²⁵ *Adekunle V. The State* (1989)5 NWLR pt 123 p. 505 at 514, *Udo V. Eshiet* (1994)8 NWLR Pt 363 p. 485 at 501.

²⁶ Section 183(3) of the Evidence Act *ibid.*

²⁷ Osipitan, T.A. "Competence and Compellability of Witness" an unpublished paper prepared for The Department of Public Law, University of Lagos, Lagos Nigeria.

account of the fact in issue.²⁸ Although both sworn and unsworn evidence of a child need corroboration, the former as a matter of judicial practice and the latter as a matter of law, it is suggested that unsworn evidence should be removed from the realm of corroboration as a matter of law, so that the law will be not seen to lean in favour of any religion. Both sworn and unsworn evidence of a child should be subject to corroboration as a matter of judicial practice.

While many judges at present recognize the benefit of exercising their discretion as to the way in which evidence may be taken in court to ensure that certain vulnerable witnesses, such as young children, give their evidence in an informal, non-threatening atmosphere, the practice is by no means universal. In order to protect a child witness from psychological harm and trauma, it is recommended that special rules be evolved to deal with child witness or other vulnerable witnesses. Among the practices recommended for consideration are the positioning of a child witness at a table in the well of the court rather than in an isolated position in the witness box and permitting the presence of supporting adult beside the child while giving evidence in court. The adult must however not interfere in the evidence the child is giving. In addition, it is suggested that any case in which a vulnerable witness is to give evidence should be heard in the least intimidating court room available, and, where the court is not acoustically efficient, adequate sound amplification should be provided.

In some jurisdictions, to ensure that a child witness or other vulnerable witnesses are not subjected to unnecessary distress which might have a lasting effect on the witness, as a result of the proximity with the accused person in court, they have adopted the means of concealing the accused from the witness. The evidence of the witness may be given from a room near the court through a live closed circuit television link, live video links and television screens. In England for instance, a home circular²⁹ encourages the use of screens in cases of rape and terrorism. Similarly the Scottish Law Commission recommended the use of screens shielding device like live closed circuit television links to protect child witness or vulnerable witnesses from the accused.³⁰ The use of television link to enable the child give evidence from a room adjoining the court room was judicially approved in *XY & Z*.³¹ The use of close circuit television ensures that the child witness is televised when giving his evidence from a separate room. The child's image and voice are transmitted to a series of television monitors in the court room. The child is seen and heard giving his evidence but physical contact between the child and the accused is avoided.³²

In *R V. Bimallie*³³, the accused was arraigned for cruelty to children. His eleven year old daughter testified as a witness. During the testimony, the accused was evacuated from the dock and made to sit on the stairs leading to the dock. The accused was therefore out of sight but not out of hearing. He was convicted. He appealed against the conviction and argued that his being out of sight operated unfairly against him during trial. The criminal court of appeal rejected his contention.

As the court put it

"if the judge considers that the presence of the prisoner will intimidate a witness, there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter."

However, the use of the above stated method may rob the court the opportunity of physically watching the demeanour, outward manner or behaviour of a witness who may assist it in forming an opinion as to the truth or otherwise of the oral testimony given.³⁴ But if the benefit of protection to be offered to child witness is considered against the backdrop of the rule on assessment of demeanour of the witness, the court should lean in support of protecting children who may break down out of fright on sighting the accused in dock. The judge may still watch the demeanour of a child witness, although not physically but through a technological device. In addition, the overall interest of protecting the society against criminals who may escape justice on account of frightful witnesses, justify the adoption of new procedure in reception of child's evidence.

It is observed that the implementation of these reforms in Nigeria would largely depend on the availability of electricity and funds to equip the courts with close circuit television, video and television screens. Thus, incessant power cut and lack of funding for the judiciary need to be addressed vigorously.

²⁸ Osipitan *ibid* at p. 9.

²⁹ Home office circular (61/1990) Osipitan *op. cit.* p. 11.

³⁰ See The Report On the Evidence of children and other potentially vulnerable witness (Sct Law Com. No. 125).

³¹ (1990) 91 CAR p. 36.

³² Osipitan *op. cit.* p. 11.

³³ (1991) 92 CAR 128.

³⁴ *Mohammed V. The State* (1997) 9 NWLR pt 530 p. 169, *Onyekwe V. The State* (1988) 1 NWLR Pt 72 p. 565.

VI. Conclusion

It has been shown in this paper that one of the areas that need to be reformed in the Evidence Act is the reception of child's evidence. Evidently, no major amendment has been made to the Evidence Act since its enactment in Nigeria more than sixty years ago. Even the report of the workshop on the reform of Evidence carried out ago since 1995 is still gathering dust at the Law Reform Commission. It is therefore hope that no effort will be spared by all the stakeholders to ensure the invigoration of administration of justice through law reforms.