

## **A hostile witness, not a witness of truth**

*By Obiora Atuegwu Egwuatu*

**R**ECENT testimonies of some of the prosecution witnesses in the trial of Major Hamza Al-Mustapha, the former Chief Security Officer to Gen. Abacha and his cohorts in the alleged attempted murder of the Guardian publisher, Mr. Alex Ibru, has brought to the fore, the issue of hostile witness in a criminal trial.

It will be recalled that on the 9th of September 2008 at the resumed trial of the accused persons before Hon. Justice Olokoba of the Ikeja high court Lagos, the prosecution witness, No.5 one Mr. Mohammed Abdul (a.k.a. Institute tasks world leaders on economic stability

From Roseline Okere

AS World markets are collapsing and great countries of the world are facing global financial crises, National Institute of Marketing of Nigeria (NIMN), is of the view that the world should re-visit their first principles, go back to basics, question their fundamental ideologies and re-define their vision.

President of the National Institute of Marketing of Nigeria, Chief Lugard Aimiuwu, at his formal investiture as the president/Council chairman of the institute recently in Lagos, said the world economy was tumbling just because the world has failed to follow the necessary steps to move the economies forward.

He said, "the world is experiencing tsunamic change. The world's biggest banks are crashing like a pack of cards. Organisations formerly regarded as 'too big to fail' are setting new records in failure."

Aimiuwu added, "the world's strongest brand, Brand America, is in decline. Is this a mere hiccup, or fundamental, irreparable/incurable malady? Is this the beginning of the end of this great civilisation?"

"The sheer capacity of interconnectivity, to generate socio-economic vibrations of seismic proportions is what compels the attention globalisation receives from all comers of the earth. That was why when America was experiencing the worst pangs of Wall St ' meltdown' last week, it felt like the whole of Western Civilisation was melting down.

Even here in Nigeria when the canary sing too noisily in Niger Delta, oil prices go up in U.S.A. If the strong are having problems, what happens to the weak? Extinction."

He said whether the world likes it or not, globalisation is real, stressing that the world now has more bigger and complex markets, fewer and lower barriers, faster and better communications and transportation; freer, easier, and more global capital flows, all pointing in one direction fiercer and more vicious competition for market share globally," he added.

He said that Organisations and nations are repositioning for advantage, as product cycles and design cycles become shorter, and planning horizons become shorter, requiring faster reaction cycles.

He said marketing was the crucible of creativity, "but we will never get first class products from third class Brand managers, nor achieve cutting edge customer service from third rate sales Force."

Speaking on the actualisation of vision 2020, Aimiuwu said that for the nation to actualise its Vision 2020 development initiative and be among top industrialised nations of the world by 2020, it requires the assistance of marketing professionals to push the vision forward.

Aimiuwu stressed that the development of the country could only be hinged on the nucleus of proper marketing initiatives.

The NIMN boss said the core task that would become paramount as government, through its agencies. Seeks to introduce and get the vision 2020 to work, have to do with what the public response or reaction to it.

According to him, the response or reaction of the society to the vision 2020 would determine the success or failure of the programme.

He said, "the market for vision 2020 is the entire country, including the relevant segments of the international community. This market is, however, very heterogeneous and selling to it would be rather cumbersome.

There is therefore the need, as part of the definition of the vision 2020, to breakdown the total market into fairly homogenous submarkets, a process referred to in marketing parlance as marketing segmentation."

To attain vision 2020, Lugard emphasised the need for more creativity, innovation, and invention, all of which he said, are products of a value chain driven by marketing.

We must be able to upgrade Brand Nigeria's equity from its current abysmally low 'commodity' level to attain the Highest Brand Equity."

He explained that creativity demand that Nigeria question, old assumptions, preconceptions, and traditional orthodoxies, in the management of the economy, to achieve a paradigm shift in performance.

Katako) while being led in evidence-in-chief by the prosecution told the court to the consternation of prosecution and perhaps other members of the public, that the prosecution induced him to implicate Major Hamza Al-Mustapha in the attempted murder trial. The prosecution witness went ahead to mention the immediate past Attorney-General of Lagos State, Prof. Yemi Osibajo (SAN) and Mr. Fola Arthur - Worrey, the former Solicitor-General of Lagos State to have given him some monetary gifts. He went further to state as reported in the news media that "Former Attorney-general of the Federation, late Chief Bola Ige (SAN) visited me once and gave me N100, 000.00. Osinbajo and Arthur-Worrey also visited me many times to advise me on what to say in court and they also on some occasions gave me money"

The evidence of the witness compelled the prosecution at the resumed hearing to seek leave of court to declare the said witness a hostile witness.

And so who is a hostile witness? In what circumstances can a witness be declared a hostile witness? What are the implications or consequences of being declared a hostile witness?

In law, one of the rules governing examination-in-chief is that a party is not allowed to impeach the credit of his own witness by general evidence of bad character. This is because when a party puts forward a person as a witness he is presumed as holding that person out as being truthful. Where the witness so presented is hostile, it will be an exception to the rule, i.e. the party calling the witness can impeach the credit of the witness.

Under the Evidence Act, a witness is considered hostile when, in the opinion of the court, he bears a hostile animus to the party calling him and so does not give his evidence fairly and with a desire to tell the truth. Sections 207 and 208 of the Evidence Act Cap E14 Laws of the Federation of Nigeria 2004 cover the issue; Section 207 provides that: "The party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the court, prove hostile, contradict him by other evidence, or by leave of the court, prove that he has made at other times a statement inconsistent with his present testimony, but before such last mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement".

From the above quoted section, it can be seen that the opinion of the court in this respect is what matters. Where the court forms the opinion that the witness proves hostile, the court may allow the party calling him to contradict him by other evidence. The party calling him may prove that the witness has made at other times a statement inconsistent with his present testimony. It must be noted that before this other statement can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion must be mentioned to the witness who must be asked whether or not he has made such statement.

Where this has been met, the party is virtually allowed to cross-examine his witness. Where the witness does not admit making the statement, proof may be given that he made it, see Section 208 of the Evidence Act.

In a criminal trial, if the prosecuting counsel wants to treat a prosecution witness as hostile and has in his possession a statement by the witness which differs directly or substantially from the evidence of that witness, it is the duty of the prosecutor to show the statement to the court and ask for leave to so treat the witness as a hostile witness.

One fundamental thing to note is that a witness is not hostile merely because his evidence is unfavourable to the party that calls him.

Where two prosecution witnesses have contradicted each other on a material point, the prosecution must lay a foundation and treat one of the witnesses as a hostile witness.

The Supreme court in the case of Onubogu V. State (1974) 9 N. S. C. C. 358 - at 366 held that "where in a criminal case, one witness called by the prosecution contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before they can ask the court to reject the testimony of one witness and accept that of another witness for the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. They cannot, without showing clearly that one is a hostile witness, discredit one and accredit the other".

This decision was applied by the Court of Appeal in the case of Etumionu Vs. AG Delta State (1995) 6 NWLR pt 404 page 719.

Where the prosecution fails to treat the witness as a hostile witness and the court is faced with two contradictory evidence on a material issue of two prosecution witnesses, the proper approach is for the court to discountenance both pieces of evidence for being of low or no probative value rather than choosing or picking which of them to believe. See Obade Vs. State (1991) 6 NWLP pt 198 page 435.

In Okonkwo Vs. State (1998) 4 NWLR pt 544 page 142, the evidence of the third prosecution witness as well as his previous statement to the police at the earliest opportunity when the matter was fresh in his memory was not acted upon. The accused was discharged and acquitted.

The consequences of treating a witness as a hostile witness is that the witness sworn evidence (evidence in court) becomes unreliable as well as his previous un-sworn evidence (extra judicial statement made to the police) both of which must then be rejected.

Where the prosecution fails to so treat a prosecution witness as a hostile witness, his evidence together with the evidence of another prosecution witness which has contradicted each other will be unreliable and no evidential value will be placed on the evidences.

A hostile witness must be differentiated from a Tainted witnesses. A tainted witness has been described by the Supreme Court as one who is either an accomplice or by the evidence he gives, whether as a witness for the prosecution or defence may and could be regarded as having some purpose of his own to serve. See Olalekan Vs. State (2001) 18 NWLR pt 746 page 793. A tainted evidence on the other hand is that which on account of other extraneous interest renders the veracity suspect and therefore less credible. A witness have been held a tainted witness where his evidence in a murder charge against an appellant was rejected and the appellant discharged and acquitted because the witness was previously charged with the murder of the same deceased. It was not shown that the charge for murder against the witness was withdrawn.

In conclusion, it must be pointed out, that for the prosecution to avoid the unpleasant consequences of rendering its evidence valueless, where faced with a hostile witness, he must seek the leave of court to declare such a witness, a hostile witness and follow the procedure enumerated in the Evidence Act to so declare the witness a hostile witness.

Having done so, the testimony of the other prosecution witness will be treated as having probative value while that of the hostile witness will be of no probative value and will not be acted upon.

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