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COMPETENCE AND COMPELLABILITY UNDER THE EVIDENCE ACT OF NIGERIA

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Competence and compellability under the Evidence Act of Nigeria

Abstract

The issue of who is eligible to testify in any civil or criminal matter is often a front burner question for every litigation based legal practitioner. While there is a general provision that everyone is competent to testify, the question remains whether there are people who are not competent to testify and if there are such people what will affect their competency to testify.

Yet

there are people who ordinarily are competent to testify yet such people cannot be compelled to

testify. Why is this so? These are the questions this work seeks to answer. To answer these questions, this work adopts the analytical method while making reference to statutory and decided authorities. This work at the end answered most of these questions.

Keywords: competent, compellability, evidence, testify, admissibility

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INTRODUCTION:

This work seeks to explore the issues relating to competence and compellability under the Nigerian Evidence Act. The work defines the two terms and sought instances when a witness will be competent and as well when a witness might be compellable. The author shows that the

two terms go hand in hand and discussing one will certainly entail discussing the other. The author analyses the provisions of the Nigerian Evidence Act and seeks the reason for such provisions. To achieve success in this work, it becomes pertinent that key words should be defined.

DEFINITION OF TERMS

Before delving into the legal definition of the key words here viz competence and compellability,

it makes better sense to find their basic English meaning. Competence on its own implies the ability to do something well while compellability connotes the ability to use coercion on an individual to do that which he ought to do or something that is necessary for him to do.

One can therefore hold that competence can be taken to mean the ability to give evidence while

compellability becomes a legal obligation to give evidence. A distinguishing mark runs through

this definition in that whereas competence refers to the general ability of an individual to testify,

compellability connotes an obligation to testify enforceable by law. It is vital to say that though a

competent witness may not be compelled to testify subject to the exceptions to be discussed hereunder, a compellable witness presupposes that such a person is competent to testify.

Where a

person is competent and compellable, such a person may be invited to come and testify through

the use of summons if the venue is a Magistrate court and subpoena if a High court. Failure to attend after the issuance of these necessary invitations, such a person exposes himself to a possible charge for contempt of court.

COMPETENCE AND COMPELLABILITY

¹ A.S. Hornby, Oxford Advanced Dictionary (7th Edition) (Oxford, Oxford University Press) 2006, Pgs 227-228

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It is the general rule of law that every person is a competent witness in any judicial proceeding.²The question whether a person who is competent to testify is compellable to do so,

depends entirely on several different considerations. As we have stated earlier, it is obvious that

every compellable witness is a competent witness because the court will not compel any one to

give evidence if he or she is incompetent to do so. On the other hand, it is not every competent

witness that is compellable to give evidence. Competence is therefore a matter of age but intellectual capacity.³Section 175 (1) of the Evidence Act provides that,

“All persons shall be competent to testify, unless the court considers that they are prevented from

understanding the questions put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease whether of body or mind or any other cause of

the same kind”

It is necessary here to point out that once a person who is not a party to the suit is a competent

witness, the mere fact that he has listened to a part or all the evidence that has been given in the

case does not make him cease to be a competent witness. The only effect the court will attach on

his evidence is the weight that the court will attach on his evidence.⁴

A clear analysis of Section 175(1) of the Evidence Act therefore is that every person is a competent witness and only becomes incompetent by virtue of extreme old age, tender age or by

reason of diseases either of body or mind. Apart from these reasons, no other cause can render a

person incompetent to testify. These exceptions are somehow similar to the first exception under

Section 53(3) of the Youth Justice and Criminal Evidence Act 1999 of the UK in that a person is

not competent to give evidence in criminal proceedings if it appears to the court that he is not a

person who is able to understand questions put to him as a witness and give answers to them which can be understood.

Even a person suffering from mental infirmity is a competent witness whenever his mental infirmity leaves him or he enters his lucid interval. In essence, once such a person recovers his

ability to understand the questions put to him and at the same time proffers rational answers to

²Section This Section is equivalent to the provision of the principle is set out in section 53(1) of the Youth Justice

and Criminal Evidence Act 1999 which states that at every stage in criminal proceedings all persons are (whatever

their age) competent to give evidence'.

³Onyegbu v State 1995 4 NWLR Pt 391 @510

⁴Falaju v Amosu 1983 2 SCNJ 209

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the questions thereto, the person automatically becomes a competent witness. The issue of his

compellability comes second.

Thus the test for every potential witness is his/her ability to understand questions put to him and

to provide rational answers thereto. It is clear that by the foregoing provisions of the law, the court

presumes every potential witness before it as a competent witness even though this presumption

can be rebutted. This implies that the court does not, immediately a potential witness appears, begin to put questions to test his competency. However, this particular function of the court arises if the court observes that the potential witness before it may not be a competent one.

Persons who are competent but not compellable:

There are persons who are competent to give evidence yet they may not be compelled to give evidence under the Evidence Act. It is to this Class of persons that we shall turn our attention. Such persons include:

1. **THE PRESIDENT, GOVERNORS AND DIPLOMATIC AGENTS:** It is submitted that neither the President of Nigeria and his Vice, nor any of the Governors and the Deputy Governors of the 36 States in Nigeria are compellable witnesses⁶. They are however competent

witness. This is because of Section 308 of the Constitution which has clothed the above mentioned office holders with immunity. It is right to postulate that this protection is that of the

person of the holder of the office and not that of the office itself⁷. As a result, such peremptory applications like mandamus and certiorari could lie against the head of the Government.

The reason for this immunity, one may venture to state is to prevent such office holders from being harassed during their tenure in office with court processes. Apart from these political office

holders, foreign sovereigns, their ambassadors and other diplomatic agents are not compellable

witnesses though they are competent witness if they waive their immunities.⁸ S I (1) of the Act

provides that every

“Foreign Envoy and every consular officer, the members of the families of those persons, the members of their official or domestic staff and the members of the families of their official staff,

shall be accorded immunity from suit and legal process”.

It is to say that by virtue of Section 2 of the same Act, all the persons so described above may waive their immunities and where this is done, they become compellable since they are

⁵ See Section 175(2)

⁶ Section 308

⁷ShugabaDarman v President

⁸Section 1 Diplomatic Immunities and Privileges Act , See also Section 10 of the same Act

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originally competent witnesses. Such immunities derive from the sovereign immunity of the country of origin of the diplomat as without sovereign immunity, the diplomatic immunity would

not arise⁹. Subject therefore to the above provisions all aliens in Nigeria are competent and compellable witness irrespective of the fact that they may not be literate in English Language which is the official language of the Court in the present day Nigeria. To overcome this dilemma,

such persons will have an interpreter for them during the court processes.

2. CHILDREN: A child who is prevented from understanding the questions put to him or from giving rational answers to those questions by reason of tender years is not a competent witness. The first point to note here is that there is an age stated and it therefore becomes the duty of each court before whom a child appears for the purpose of giving evidence, to determine

first of all whether the child is sufficiently intelligent to be able to understand questions put to him/her and to be able to answer same rationally. For the court to discern this, it must first put preliminary questions to the child which may not have any bearing with the matter before the court. If as a result of the investigation, the court comes to the conclusion that the child is unable

to understand questions or to answer them rationally, then the child cannot be a witness at all in

the case. If however, the child passes the test, such a child should be subjected to further tests for

the determination of whether in the opinion of the court such a child understands the nature of an

oath. To ascertain this, the court puts questions to the child as to whether he/she understands the

nature of an oath. Where however the child fails this test, he will nevertheless, give evidence albeit unsworn.¹⁰

This evidence of a child though not sworn is admissible as if it was sworn. It is relevant to say

that keeping strictly to this procedure laid down by Sections 155 and 183 of the Evidence Act has been emphasized by the courts in a number of cases¹¹. It is also important to note that where

such evidence is unsworn, a person shall not be liable to be convicted of the offence unless; such

evidence is corroborated by some other material evidence in support thereof implicating the accused.¹²

3. OLD PERSONS AND PERSONS SUFFERING FROM DISEASE OF BODY OR MIND OR OTHER AFFLICTION

⁹Oluwalogbon v Government of UK 2005 14 NWLR Pt 946 @760 pp 792; Dimitrov v Multichoice 2005 13 NWLR

Pt 943 @575

¹⁰Section 209 EA, Solola&anor v State 2005 11 NWLR Pt 937@460, Mbele v State (1990) 4 NWLR (Pt.145) 484

¹¹Sambo v State 1993 7 SCNJ Pt 1 @128

¹²Section 209(3) Evidence Act

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It will be right for us to restate that an old person no matter how old is a competent witness, if he is able to understand questions put to him and to give rational answers to those questions.¹³ For the court to find out whether a person of a particularly old age is a competent witness, the court ought to consider such a person by putting questions to him to test his comprehension of the questions and his answers thereto. Thus the simple fact is that such a person is a competent witness unless the Court declares otherwise by way of its own test conducted on the potential witness. The same may be stated for a person suffering from disease whether of body or mind. Such a person at all times material is a competent witness unless he was prevented by virtue of the said disease. It is vital to note that a person does not become incompetent to give evidence merely because he is drunk; he must be so drunk as to be unable to understand the questions put to him or to answer them rationally. Where the court is of the view that the disease or intoxication or even the unsoundness of mind is only of a temporary nature and likely to disappear, it is posited that the court may be justified in granting an adjournment in the case for purposes of receiving such a person's evidence provided it will not work injustice against any of the parties. It is our opinion that reference should also be made of dumb witness as a dumb person in literally speaking suffering from a disease. However Section 176(1-2) of the Evidence Act has made ample provisions for such a person. Thus once such a person can give his evidence in any other intelligible manner apart from speaking; such a person shall be a competent witness for all intents and purposes. We agree with the provision of the Act that for the court to find such a person competent, it must put questions to him/her and be satisfied that such a person has passed the test. It is then and only then that such a person may be allowed to testify in the manner provided for by the Act¹⁴.

4. ACCUSED PERSON:

It is pertinent here to refer to the Constitution which provides that no person who is being tried for an offence shall be compelled to give evidence at the trial.¹⁵ This is a fundamental right of an accused person guaranteed under the Constitution. It forbids that an accused person shall be compelled to be a witness whether for the prosecution or for the defence in the same trial. However, an accused person may be a witness for the prosecution but for this to arise, there must be one or more accused person charged along with the particular accused person who is

¹³ Section 175

¹⁴ Section 176 (1-2)

¹⁵ Section 36(11)

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intending to testify. It is right to say that such an accused person who is intending to testify for

the prosecution against other accused persons, he must himself have pleaded guilty.¹⁶ Further, a

witness who is not on trial in the particular case but is facing trial for other related offences to those which are the subject of trial at hand is also a competent witness.¹⁷ For all intent and purposes an accused person is a competent witness but however not a compellable witness.

This

is contained Section 180 of the Evidence Act. This is however subject to the proviso in that section especially the proviso in Section 180 (a) which provides that such a person shall not be

called as a witness except upon his own application. This is further strengthened by the proviso

in Section 180(b) to the extent that where he chooses to exercise his fundamental right to keep

silent; such an action shall not be the subject of any comment or inference by the adjudicating authority.

5.SPOUSE OF AN ACCUSED PERSON:

In *Stein v. Bowman*¹⁸ while recognizing the 'general rule that neither a husband nor wife can be a

witness for or against the other,' noted that the rule does not apply 'where the husband commits

an offence against the person of his wife.' To appreciate this subheading, we shall adopt a two way division. One will be to the position on the side of the prosecution while the other will be towards the part of the defence. We shall start with prosecution first.

a. **PROSECUTION:** The basic principle here is that the spouse of an accused person is not a competent and by logic a compellable witness for the prosecution unless upon the application of

the other spouse who is on trial¹⁹. The requirement of this provision is simple. The spouse is not

competent except a particular thing occurs. That particular occurrence is the application of the

other spouse charged with the offence. Thus the requirement is not that that the spouse not on trial shall apply nor that the spouse shall consent to an application by such spouse not on trial to

testify. Simply it is left for the spouse who is facing trial to inform the court that he/she wishes the

other spouse not on trial to testify in his case for the prosecution. As such the prosecution cannot

compel the spouse not on trial to testify on trial for them. It is right to say that this provision avails only the husband and wife of a monogamous or Christian marriage. We shall leave this argument on the fate of polygamous marriages or customary law marriage for another time.

¹⁶ *Umole v IGP* 1957 NRNLR

¹⁷ *R v Omisade* & ors 1964 NMLR 67

¹⁸ 13 Pet. 209, 10 L.Ed. 129, @221

¹⁹ Section 182 (2)

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There are however exception to this provision as the section is not absolute. These exceptions are

contained in Section 182(1) (a-c) of the Evidence Act. Therefore where a person is charged with

an offence under any of the following sections of the Criminal Code viz²¹⁷, 218, and 219,221,

222,223, 224, 225 226, 231, 300, 301, 340, 341, 357 to 362, 369, 370 and 371. ²⁰Such offences include defilement of girls under 13, indecent practices between males etc. In any of such charges framed against the spouse of a monogamous marriage, such spouses are prevented from taking cover under the umbrella of Section 182 (2) Evidence Act. This exception seems to arise on the ground of public policy. Further, reference shall be made to other barriers contained in Section 182 (1) (b and c) which also operate to deprive spouse of this important protection as it stripes them of this legislative immunity. It is right for us to say that where a spouse of an accused person wishes to testify against a person co accused with the other spouse, such a person does not need the application of the person on trial. Be that as it may, where the evidence is such as to incriminate the other spouse charged, the spouse not charged can only be called on the application of the spouse charged. It is also the provision of the Law that even where a spouse is a competent and compellable witness, such a spouse cannot be compelled to disclose any communication made by the other spouse to him/her during the existence of the marriage.²¹ This exception does not abate even where the marriage has been terminated.

b. DEFENCE:

The position of a spouse for the defence is a lot simpler. A spouse of an accused person is a competent and compellable witness for the accused if he/she is called as a witness by the accused person. This remains irrespective of the offences for which the accused is standing trial. It is also important for us to say that this is subject to the provisions of Section 182(3) of the Evidence Act in respect of communications during the existence of the marriage. May we add here that in a proceeding instituted in consequence of adultery, the husbands and wives of the parties shall be competent witnesses in such proceedings.²²

6. PARTIES TO A CIVIL SUIT, THEIR RELATIONS AND SPOUSE:

In all civil proceedings, the parties to the suit and invariably their spouses are competent witnesses. They are not only competent witnesses for themselves but they are also competent witnesses for the opponent notwithstanding that a subpoena is issued to bring him/her to court as

²⁰ Criminal Code Cap C38

²¹ Section 182(3) Evidence Act

²² Section 186

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the fact of absence of a subpoena is immaterial to the question of competence.²³ Section 178 of the Evidence Act further provides that “subject to the provisions contained in Section 165 of this Act, (in respect of birth during marriage) in all civil proceedings, the parties to the suit and the

husband or wife of any party to the suit shall be a competent witness”

Thus, there is nothing in the Act to prevent the spouse of parties to a civil suit from being both

competent and compellable witnesses for or against their spouses. However, it is vital to point out that the provision in Section 184 of the Act will still apply unless the person who made it or

such a person’s representative in interest consents. This clearly does not apply to suits brought

between the spouses. One more thing need to be said and that is the fact that relationship by blood

be is not sufficient to disqualify the evidence of a witness.²⁴ What this implies is that blood relations of parties to a suit if in a civil proceedings or accused person if in a criminal case are both competent and compellable witnesses.

7. COUNSEL AS A WITNESS:

Like the preceding sub topic, we shall also take this in two sub divisions. Division one will deal

with the counsel as a witness for the opposing party while division two will deal with the counsel

as a witness for the client.

Under division one, there can be no doubt that counsel appearing for one party cannot give evidence for the opposing party. This clearly is contrary to the ethics of the profession²⁵.

Thus, a

counsel instructed on a matter cannot give evidence for the party opposing his instructor even where he has not appeared and does not infact intend to appear in the court proceedings.

Thus,

the best thing for such a counsel to do is not to receive such instructions from such a client, if he

has instructions of testify on behalf of the other party. Nothing more needs be said under this division.

Under the second division, there is no specific direct provision of the Evidence Act which debars

a counsel appearing in a case from giving evidence in the case. In other words a counsel just like

any other person is a competent witness in a case he is to handling for a client. Thus the issue of

whether to give or not to give evidence in a case counsel is handling is governed by rules of

²³Jinadu v Esurombi-Aro 2005

²⁴Akpan v State 2001 7SCNJ 567@576

²⁵Alfred Crompton Amusement Machines Ltd, v Customs and Excise Commissioners (1972) 2 All ER 353,

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common sense and ethics of the profession²⁶ as the statutory provision in existence deals with professional communications between counsel and client²⁷.

Generally speaking, counsel is not that free to give evidence for his client because of two reasons. The first is that every litigant must feel safe when making disclosures to his counsel and

secondly, the counsel must be detached and impersonal in his attitude to the case so that his judgment in the case be not clouded by personal feelings.²⁸All these notwithstanding, there can

be no basis for objection to a counsel giving formal evidence on behalf of his client. It is also

irregular but not illegal for a counsel to swear to affidavits in the course of the proceedings in a case which he is appearing if the facts deposed to are material to the determination of the facts in issue between the parties.

In concluding this issue, we find it necessary to say that in as much as no law prevents a counsel from so testifying, ethics of the profession and common sense should guide a counsel in taking decision relating to such issues and thus prevent the counsel from beclouding this reasoning by virtue of personal attachment to the client's case

8. BANKER

Generally speaking, a banker is a competent and compellable witness, in a matter relating to his banking profession. However, such a banker cannot be compelled in any proceeding to which the bank is not a party. He may not also produce any banker's book the contents of which can be proved in any manner provided in Section 89 of the Evidence Act or to appear as a witness to prove the matter, transactions and accounts therein recorded unless by order of the court made

for a special cause²⁹. It is our opinion that this provision of the law is geared towards maintaining the privity of contract between a bank and its customer and as well as retain the comradeship of confidentiality in the banker customer relationship. Be that as it may, the banker in his personal capacity is competent and a compellable witness subject only to the provisions of the Act. As a professional, he however becomes competent but not compellable with regards to his banking profession subject to the order of court made for special cause.

CONCLUSION

To conclude this topic it therefore serves us well to make a few more general comments on the topic. Competence and compellability as a subject makes sense to be treated jointly as they walk

²⁶ Rule 19 Rules of Professional Conducts of Nigerian Legal Practitioners

²⁷ Section 192

²⁸ Hon v Rickard 1962 2 ANLR 41

²⁹ Section 177

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hand in hand. All the sub topics under this topic we treated are the specific instances where competence and compellability are the exception rather than the rule. We have made efforts to show that while every man is a competent witness not every man is a compellable witness.

On the other hand, once a person is compellable a fortiori such a person is presumed a competent witness for one cannot be compellable if he is first and foremost not competent though one can be competent without being compellable.

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