

THE EVIDENCE ACT AND ITS APPLICABILITY TO CUSTOMARY COURTS IN NIGERIA: *QUO VADIS?**

Introduction

Parley is reputed to have said in his magnum opus¹, thus:

When a writer offers a book to the public on a subject which they have knowledge of, he is bound by a kind of literary justice to inform his readers distinctly and specifically what he intends to supply and what he expects to improve.

Ipsa facto, it must be appreciated that Scholars have hitherto made their worthy contributions generally in this genre of academics. However, the gap that this worthy academic voyage seeks to fill, is to examine the peculiar existence of Customary Courts in Nigeria and determine whether the Evidence Act² applies to Customary Courts in Nigeria, being native courts.

Concept of Evidence

The Oxford Advanced Learner's Dictionary³, sees Evidence in the ordinary parlance as information that gives a strong reason for believing something or proves something. In other words, Evidence is the existence of facts required for the proof of an issue. It is submitted therefore, that the mention of Evidence invokes the modus of proving or disproving a fact or facts. In so far as evidence primarily preoccupies itself with the existence of facts and the proof of same, Evidence has *ipso facto* been conceptualized as:

"The means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved"⁴.

Without mincing words, it can be gleaned from the postulations thus far that the functional word distillable from the examination of Evidence is fact. Facts are the fountain of law. All substantive principles of law are useless and legal actions cannot be successfully predicated on such principles in Court without the existence of facts⁵. The proof of such fact ultimately determines the proof of Evidence in any litigation. It is pertinent at this juncture to examine the meaning of "fact" as encapsulated in the Evidence Act⁶. Section 2(1) of the Evidence Act⁷, defines "fact" to include:

- "(a) anything, state of things or relation of things capable of being perceived by the senses;*
- (b) any mental condition of which any person is conscious".*

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¹ Principles of Morals and Political Philosophy.

² CAP E14 L.F.N., 2004

³ 5th Edition (Edited by *Jonathan Crowther*).

⁴ Will's Circumstantial Evidence (7th Edition, 1937), page 2, quoted in P.B. CARTER'S "CASES AND STATUTES OF EVIDENCE (2nd Edition, 1990), page 3.

⁵ Legal action within the realm of the torts of defamation and trespass to land or contract, etc, are bound to fail in Court without prove of the requisite facts.

⁶ CAP E14, L.F.N., 2004.

⁷ Ibid.

A fact being anything within the realm of perception and consciousness cannot be adduced in Court in a haphazard manner devoid of rules. Against this background, the nature, mode and manner of the proof of a fact or otherwise is encapsulated in the Evidence Act⁸, as follows:

“A fact is said to be:

- (a) ‘proved’ when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, in the circumstances of the peculiar case to act upon the supposition that it does exist;*
- (b) ‘disproved’ when after considering the matters before it, the Court either believes that it does not exist or considers its non existence so propable that a prudent man ought, in the circumstances of the particular case, to act upon the supposition that it does not exist,*
- (c) ‘not proved’ when it is neither proved or disproved”.*

It is of paramount importance to note that our knowledge of facts or Evidence leads safely to the concept of the law of Evidence. It is admitted herein that there exist series of inimitable academic and judicial authorities as per the meaning of the law of Evidence. *Professor Nokes* in his book on Evidence⁹, defines judicial Evidence to consist of:

“facts which are legally admissible and the legal means of attempting to prove such facts”.

Another scholar in this genre of the law, *Phipson* in his landmark work on Evidence¹⁰, submits with commendable lucidity that Evidence is:

“the testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute”.

*Professor Cross*¹¹ sees Evidence as:

“the testimony hearsay, documents, things and facts which a Court will accept as Evidence of the facts in issue in a given case”.

Whereas, the above definitions appear convincing, the Supreme Court of Nigeria, even at the risk of superfluity, had the rare privilege to expouse succinctly on the meaning of the law of Evidence in the case of *Emmanuel M. O. Chukwuogor v. Richard Obigiabo Obuora*¹², where *Oputa J.S.C. (as he then was)* stated thus:

“in its broadest sense, Evidence encompasses and includes the means employed for the purpose of proving a disputed fact”.

Ipsa facto, Evidence is therefore the means by which any alleged matter of fact is established and/or proved or disproved. While the law of Evidence encompasses the legal rules regulating Evidence. It is submitted therefore that no course or matter succeeds in a trial Court without proof of Evidence. Evidence is the mandatory weapon

⁸ CAP E14, Laws of the Federation of Nigeria, 2004, Section 2(2)(a),(b),(c).

⁹ An Introduction to Evidence, 4th Edition.

¹⁰ Phipson's Evidence, 11th Edition.

¹¹ Cross on Evidence, 4th Edition.

¹² (1987) 3N.W.L.R., Pt. 61, 454, 477 – 478.

in the arsenal of litigant employed in convincing a trial court and ultimately assisting the trial Judge in arriving at the proper destination of justice. In a hypothetical case of rape¹³ before a trial court, which is within the realm of criminal law, such a charge or information is *in-vacuo* without proof of evidence predicated on solid fact as to the conduct of the parties upon which the legal ingredients of rape can be gleaned. A trial Judge whose main responsibility is to adjudicate on the rights and duties of parties has the peculiar advantage of listening to the testimonies or evidence of the witnesses, sees their demeanour and general comportment in the witness box. The trial Judge therefore determines the liabilities or otherwise of parties on the basis of the Evidence placed before it. *Murtala Aremu Okunola (J.C.A.) (as he then was)* put it succinctly in the case of *Oluwole v. Abubakare*¹⁴, thus:

“although a Court of law is not an investigative body, it is empowered to evaluate evidence of facts tendered before it”.

Evidence without doubt is the fountain of the law. It is the main road to the success or otherwise of any form of litigation.

Courts in Nigeria

In the wisdom of the draftsmen of the Evidence Act¹⁵, the Act¹⁶ defines court most literally as follows: -

“court includes all Judges and Magistrates and except Arbitrators, all persons legally authorized to take evidence”.

It appears from the above definition encapsulated in the Evidence Act that any body of persons performing judicial or quasi judicial functions and empowered to take evidence pursuant to the enabling statute would fall within the ambit of the definition of a “court”. This seeming literal approach to the definition of a court foisted the problem of identity on the tribunal in the case of *Dr. Denloye v. Medical & Dental Practitioners Disciplinary Committee*¹⁷, wherein it was held at the lower court relying on the provisions of the Evidence Act¹⁸, that the Respondent being a professional tribunal was “a court”. However, the Supreme Court of Nigeria came to the rescue, when the issue came before it on appeal to the Apex Court, when it stated the better view thus:

“... we are of the opinion that it would be wrong for any court to take this view. Any enquiry cannot be looked upon as proceedings in court and unless there is relaxation of the ordinary rules with which the courts are bound, it will be difficult in many cases to conduct an enquiry”.

However, the apparent complexity in determining courts in Nigeria, has been laid to rest by the Constitution¹⁹. Section 6 of the Constitution²⁰, which side note simply states “judicial powers” clearly identify courts in Nigeria. The relevant provisions are reproduced in extensio for utter clarity. It states as follows: -

¹³ Rape is an offence in Nigeria by virtue of Section 357 of the Criminal Code, CAP E14, Laws of the Federation of Nigeria, 2004.

¹⁴ (2004) 10 N.W.L.R., Pt. 882, 549.

¹⁵ CAP E14, Laws of the Federation of Nigeria, 2004.

¹⁶ Section 2(1) of the Evidence Act, CAP E14, Laws of the Federation of Nigeria, 2004.

¹⁷ (1968) 1 All N.L.R., 306.

¹⁸ Section 2(1) of the Evidence Act, CAP E14, Laws of the Federation of Nigeria, 2004.

¹⁹ Constitution of the Federal Republic of Nigeria, 1999.

²⁰ *Ibid.*

Section 6(1):

The Judicial Powers of the Federation shall be vested in the courts in which this section relates, being Courts established for the Federation;

Section 6(5):

This Section relates to: -

- (a) The Supreme Court of Nigeria;*
- (b) The Court of Appeal;*
- (c) The Federal High Court;*
- (d) The High Court of the Federal Capital Territory, Abuja,*
- (e) A High Court of a State;*
- (f) The Sharia Court of Appeal of the Federal Capital Territory, Abuja;*
- (g) A Sharia Court of Appeal of a State;*
- (h) The Customary Court of Appeal of the Federal Capital Territory, Abuja;*
- (i) A Customary Court of Appeal of a State;*
- (j) Such other Courts as may be authorized by law to exercise jurisdiction on matters with respect to which the National Assembly make laws; and*
- (k) Such other Court as may be authorized by law to exercise jurisdiction at first instance or on appeal on matter with respect of which a House of Assembly may make laws”.*

Customary Courts in Nigeria

Customary Courts in some cases are also known as Native Courts. Customary Courts are established where necessary under the relevant state law²¹. In the former Bendel State, now Edo and Delta States, the law established two levels of Customary Courts, viz: District and Customary Court²². It is pertinent to note that every Customary Court is a court of record. They exist in all the states of Southern Nigeria.

It is submitted that the extant Customary Court Law of the different states of Southern Nigeria are deemed to be existing laws by virtue of the clear provisions of the Constitution²³. *Ipsa facto*, the Constitution which is the grundnorm of the land saves and protect such laws and are deemed to be properly enacted by the respective State Houses of Assembly²⁴. In many States of the Nigeria Federation, Customary Courts have both civil and criminal jurisdiction. Notionally, the courts are to dispense justice in matters relating to custom, as correctly enunciated in the Supreme Court case of *Ogiugo v. Ogiugo*²⁵:

“The Customary Court is presumed to know the Customary Law of the area of its jurisdiction...”

²¹ In Imo and Abia States – Customary Courts Edict, No. 7 of 1984 of the then Imo State (now applicable in both States). In Anambra and Enugu States – the Customary Courts Edict No. 6 of 1984 of the then Anambra State (now applicable to both States). In Edo and Delta States – the Customary Courts Edict No. 2 of 1984, of the then Bendel State (now applicable to both States). The present extant law is the Amended Customary Court Law of 1985.

²² Section 3(1) of the Customary Court Law of 1984.

²³ Section 315 of the Constitution of the Federal Republic of Nigeria, 1999.

²⁴ See: Section 315(1)(a)(b).

This position of the law was reiterated in the case of *Okeke v. President & Members of Customary Court*²⁶, relying on the Supreme Court decision in *Ehigie V. Ehigie*²⁷, when the Court stated unequivocally thus:

Customary Courts have their practice and procedure as embodied in the Customary Courts Law and Rules of the State in the country where they are applicable. By virtue of the native of form of customary laws they relate to the traditional unwritten law of the people handed down from generation to generation. Where members of the Courts are familiar with the custom of a community they can apply it without first requiring evidence.

It is submitted without fear of ambiguity that the *rationale* for the existence of Customary Courts in Southern Nigeria is to do substantial justice in consonance with the customs and tradition of the people. However, the legally admissible custom must not be repugnant to natural justice, equity and good conscience. The pivotal motive is substantial justice associated with custom. This was judicially endorsed in the case of *Arum v. Nwobodo*²⁸, where the court espoused the principles governing proceedings of Customary Court as follows:

... The cardinal principle governing the Court's proceeding is the attainment of substantial justice based on the reasonable practice, tradition and custom of the local people.

Does the Evidence Act Apply to Customary Courts?

The answer to this question can only be properly adumbrated with proper reference to the evidence Act²⁹ itself. It is submitted without any fear of contradiction that the provisions of the Evidence Act³⁰ itself, determines with utter finality the Courts, where the Evidence Act³¹ applies. Against this background, it is pertinent to examine the Evidence Act³² with a historical perspective. Consequently, a reference to Section 1 (2)(a)(b) of the Evidence Act³³ is fundamental. The provision is herein reproduced in extensio:

Section 1(2)

This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria, but it shall not apply: -

- (a) to proceedings before an Arbitrator or*
- (b) to a field general court martial*

It is pertinent to state that this was the old legal order in Evidence Law. However, there was an amendment to the Evidence Act³⁴ by degree number sixty-one of 1991³⁵.

²⁹ CAP E14, 2004.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ CAP 112, Laws of the Federation of Nigeria, 1990.

³⁴ Ibid

³⁵ Decree number sixty-one of 1991 is now an Act deemed to have been duly enacted by the National Assembly by virtue of the provisions of Section 316 of the Constitution of the Federal Republic of Nigeria, 1999.

Whereas the amendment was in 1991, the commencement date as per the amendment was 1st of January, 1990. It is therefore also necessary to reproduce in extensio the relevant provisions as amended.

Section 1(2)

- (a) *to proceeding before an Arbitrator, or*
 - (b) *to a Field General Court Martial, or*
 - (c) *to judicial proceedings in any civil cause or matter, in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless the President, Commander-in-Chief of the Armed Forces or the Military Governor or Military Administrator of a State, by order published in the Gazette, confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory, Abuja, or a State as he case may be, power to enforce any or all the provisions of this Act;*
- (3) *In judicial proceedings in any criminal cause or matter in or before an Area Court, the Court shall be guided by the provisions of this Act and in accordance with the provisions of the Criminal Procedure Code Law;*
- (4) *Notwithstanding anything in this section, an Area Court shall , in judicial proceeding in any criminal cause or matter be bound by the provisions of Sections 138, 139, 140, 141, 142 and 143 of this Act.;*

What is distillable from the foregoing is that the position of the law as per the applicability of the Evidence Act is now different from the position before the amendment that became extant and operative on the 1st of January, 1990. It is submitted that the provisions encapsulated in the old legal order³⁶, is clear and unambiguous. The purport of the provisions is that the Act was applicable

to all judicial proceedings in or before any court established in the Federal Republic of Nigeria

Ipsa facto, the only exceptions, where the Act could not apply was the arbitrator and field general court martial. It is there unequivocal that in the aforesaid legal ordinance in the law of Evidence in Nigeria, the Evidence Act was applicable to all courts in Nigeria, subject to the exceptions provided by the Act itself.

What, therefore, is the legal implication of the aforesaid amendment? The amendment incorporated an additional paragraph to Section 1(2) of the Act, which is now Section 1(2), paragraph (c). By virtue of Section 1(2)(c) of the Act, the Evidence Act applies to the Customary Court of Appeal, Sharia Courts of Appeal or Area Courts, only when the Governor or President as the case may be, confers power on the courts to enforce any or all the provisions of the Evidence Act.

The Supreme Court of Nigeria took this view in the case of *Adeyemi Ogunnaike v. Taiwo Ojayemi*³⁷, when it held, per Kawu J.S.C. (as he then was):

³⁶ S. 1(2)(a) & (b) of the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990.
³⁷ (1987) 1N.W.L.R., Pt. 53, 760.

“now in my view, the clear wordings or provisions of Section 1(4)(c) of the Evidence Act leaves no room for an *doubt that the provisions of the Act do not apply to judicial proceedings before Native Courts ... as there is no evidence to show that the Act was made applicable to the trial Customary Court when it gave its judgment. I am of the view that the Court of Appeal was right in their decision that the appellate High Court was in error to have applied the provisions of Sections 45 and 54 of the case.*”

*Obaseki J.S.C.*³⁸ (as he then was), while concurring with the leading judgment of *Kawu J.S.C. (as he then was)* on the vexed issue of the applicability of the Evidence Act to Customary Court, laid the argument to rest thus:

it is erroneous to argue that the provisions of the Evidence Act applies to Customary Court when the Evidence Act has expressly excepted the application of the Act from judicial proceedings before a Native Court.

The Supreme Court of Nigeria had no difficulty in restating this position of the law with certainty in the case of *Chief Awara Osu v. Ibor Igiri & 3 Ors.*³⁹ *Belgore J.S.C. (as he then was)* delivering the leading judgment held:

the Governor of South-Eastern State as former Cross River State was not known and never conferred this power on district Court or Customary Court (which nomenclature Native Courts later came to be known). Had the Court of Appeal adverted to this section, its decision might have been difficult. For Customary Courts are not bound by Evidence Act unless subsequently so conferred with the power to apply it...

However, *Ogebe J.C.A.*, delivering the leading Judgment in the case of *Alhaji Ahmadu Alao v. Alhaji Oba Alabi*⁴⁰, respectfully allowed himself to be misled, when His Lordship held as follows:

“with the greatest respect to both Counsel in this case, it would appear that they are behind in the development of the law. Section 1 of the Evidence Act, Cap. 112 of the Laws of the Federation, 1990, sets out the relevant portion of the Evidence Act. It reads: -

- (1) *This Act may be cited as the Evidence Act.*
- (2) *This shall apply to all judicial proceedings in or before any Court established in the Federal Republic of Nigeria, but, it shall not apply:*
 - (a) *to proceedings before an arbitrator, or*
 - (b) *to a field general court martial.*

This Section now make the Evidence Act to apply to all judicial proceedings in or before a Court established in the Federal Republic of Nigeria. The only exceptions are proceedings before an arbitrator or a field general court martial. The Upper Area Court, Omu-Aran is certainly a Court established in Nigeria and the retrial before it started on the 28th of October, 1992, when the Evidence Act, 1990, had already come into operation. The law as it is now is that the Evidence Act applies to all Courts established in Nigeria.

³⁸ In the case of *Adeyemi Ogunnaike v. Taiwo Ojayemi* (Supra).

³⁹ (1988) 1 N.W.L.R., Pt. 69, 221.

⁴⁰ (1997) 6N.W.L.R., Pt. 508, 351, 356.

It is clear from the above, that the retrial of the case under consideration started on the 28th of October, 1992. Prior to the aforesaid date, Decree⁴¹ number sixty-one of 1991 that came into operation on the 1st of January, 1990, had amended Section 1(2), by incorporating paragraph (c) and subsections (3) and (4). Clearly the Evidence Act as amended was applicable to the trial. If His Lordship had considered the amendment in the Judgment delivered on Thursday, 27th of February, 1997, he would have reached a different conclusion. In other words, if His Lordship had adverted his mind to the present Section 1(2)(c), he would not have, with due respect, reached a wrong legal conclusion. Against this background therefore, it is the position of the writer with due respect, that the position of the law stated by *Ogebe J.C.A.* in the case of *Alhaji Ahmadu Alao v. Alhaji Oba Alabi*⁴² was held per incuriam and is no good law with due difference to the express provisions and the combined effect of Section 1(2)(a),(b) & (c), (3) & (4) of the Evidence Act as amended.

Conclusion

The position of the law today as can be clearly gleaned from the foregoing is that the Evidence Act⁴³ is not absolutely inapplicable to Customary Courts in Nigeria, same is only inapplicable in civil cause or matter before Customary Court in Nigeria, subject to the conferment of its applicability by the Governor or President as the case may be, by an order published in the Gazette.⁴⁴ It is also submitted that the clear provisions of the Evidence Act,⁴⁵ invokes the entire provisions of the act to guide and guard judicial proceedings in criminal cause or matter before Area or Customary Courts. This does not make the provisions of the Act to apply in such matters, rather, it assist the court to a good path to criminal justice. The provisions of the Act that the Area or Customary Courts is bound to apply in criminal cause or matter are Sections 138, 139, 140, 141, 142 and 143 which deals with burden of proof.

⁴¹ Supra note 34.

⁴² Supra note 38.

⁴³ Cap E14 L.F.N., 2004.

⁴⁴ See S. 1(2) (c) of the Evidence Act.

⁴⁵ See S. 1(3) of the Evidence Act.