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COMPETENT AND COMPELLABILITY OF CHILD TESTIMONY IN NIGERIAN EVIDENCE ACT

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Title Page

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A PROJECT SUBMITTED TO THE FACULTY OF LAW IN PARTIAL FULFILLMENT OF THE REQUIREMENT FOR THE AWARD OF DEGREE OF BACHELOR OF LAWS (LL.B) NATIONAL OPEN UNIVERSITY OF NIGERIA

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Certification

This is to certify that this research work was carried out by **NWAMAKA UDEANI**, an under graduate student in the Faculty of Law, National Open University of Nigeria, Enugu Study Centre with Registration Number NOU 110865587, for the award of Bachelor of Laws. The content of this work is original and has not been submitted in full or in part, for any Degree of this or any other University

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Dedication

This work is dedicated to God Almighty who made it a reality.

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The researcher is eternally indebted to God Almighty and the giver of life for His protection, guidance and sustenance all through this study. He is awesome. The researcher is greatly indebted to her supervisor, Dr. Amarachi Vivian Onuka, who inspite of her numerous commitments a still found time to offer useful criticisms and advice that helped in the completion of this study. Her scholarly direction and encouragements served as a source of inspiration to the researcher. The researcher owes unquantifiable appreciation to Dr.Timothy Ogbonna Umuahi, Dr. Anayo Nick. Edeh that took time to go through the study.

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Finally, to all her course mates, the researcher says, thanks for the good times shared together. The researcher also owes a lot of thanks to all her friends and well-wishers who in one way or the other influenced her positively and helped to make this research work a reality.

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Supreme Court Ordinance No.11 of 1863.

List of Abbreviations

A C: Appeal Cases Law Reports

All N L R: All Nigeria Law Reports

A N L R: All Nigeria Law Reports

A N S L R: Anambra State Law Reports

Cap: Chapter

Ch.: Chancery Division

FSC: Federal Supreme Court

H C N L R: High Court of Nigeria Law Reports

J S C: Justice of the Supreme Court

L L R: Lagos Law Reports

L R N: Law Reports of Nigeria

N L R: Nigeria Law Reports

N M L R: Nigeria Monthly Law Reports

N N L R: Law Report of Northern Nigeria

N S C C: Nigeria Supreme Court Cases

S C: Supreme Court

S C N J: Supreme Court of Nigeria Judgments

S C N L R: Supreme Court of Nigeria Law Reports

W A C A: West African Court of Appeal

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ABSTRACT

This study examines the adequacy of legal procedure for receiving Child's testimony under the Nigeria Evidence Act. The paper notes that vulnerability of children can have ripple effect on their testimony. They can be easily intimidated by mean looking counsels or loved ones. Yet, the innocence of a child makes it desirable for the court to believe such testimony. Consequent upon the above fact, it affirms the obvious that determination of lawsuits is highly dependent on the availability of evidence. In the eyes of the law, all persons are competent witnesses, unless a person is deprived of capacity to give testimony 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 testimony. 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 testimony. 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. Compellability on the other hands deals with the question whether as a matter of law, witnesses can be obliged to give evidence when they do not wish to do so but there are some circumstances in which competent witnesses cannot be obliged to give evidence against their will. This study therefore aims at analysing the competency and compellability of a child to give testimony as a witness with respect to how it affects availability and admissibility of testimony. Our law leaves our children who testify in court unprotected psychologically. In some jurisdictions, strategies have been adopted to minimize the effect of fright and distress on children who testify in courts especially in criminal cases. The study recommends that judges should be very careful before convicting an accused on testimony given by children. The judge should also note that in the process of trying to be careful in giving judgment as regards children testimony, there should, as much as possible, be no miscarriage of justice. When all necessary precautions have been taken, a child's testimony would certainly be as reliable as that of an adult.

CHAPER ONE

1.0 Introduction

1.10. Background of the Study

All over the entire planet, where the English law was received, competency inquiry on the eligibility of a child witness in court has been an issue running down from the period of common law till date. History revealed that common law suspiciously prevented children from testifying in count, suggesting that children are often susceptible or perhaps vulnerable, and lack the natural intelligence, and are not capable of understanding what to testify nor the nature and consequences of oath. In 1779, the English court was faced with rape case involving a seven year old girl. In the case of, *R. V. Brassier*. The accused was charged for the offence of rape involving a seven year old girl. It was held that:

> "No testimony whatsoever can be legally received expect upon oath", and "that the child will be under oath if court is satisfied that the child understand the nature and consequences of oath and the duty of telling truth".

The rule allowed children to witness in court if such a child's intellectual capacity on oath taking is satisfactorily admitted by the court. It is believed that children who could not understand the meaning of oath, and did not take an oath before giving testimony, were less likely to speak

the truth in evidence. Therefore, Judges opinion is achieved by asking children questions, usually about God, His supremacy etc. It is also important to note that this is as a result of heavy ecclesiastical influences which over shadowed the common law rules of evidence. The 1779 court rule was affected by provisions of 1885 criminal law Amendment Act, which states;[1]

> "That a child who could not understand nature and consequences of an oath should be allowed to testify in cases of sexual abuse, but the testimony must be corroborated".

The above rule gave less attention to the rule of intellectual reasoning of a child and presented the issue of corroboration, that the unsworn evidence of a child must be corroborated with particular material fact. It is imperative to note that corroboration is not a technical term but a confirmation that the accused committed the offence as alleged. Therefore, the criminal Act made an improvement on the 1779 provisions, in order to accommodate cases of children who for one reason or the other cannot understand the true meaning of oath as required under the common law proceedings. In 1933 when the world saw the need to protect children who were sexually abused and abandoned, children and young persons Act was enacted. The Act stated that children, who could not pass the test, should be allowed to testify, and provided their testimony is corroborated with material

[1] Law Amendment Act 185, 48 49 vict c 69. s.4

evidence.[2] The rule was affirmed by Chief Justice Hewart (as he then was), while making his decision in the case of *R.V. Manser*[3] remarked that "in truth and in fact the evidence of the girl Doris ought to have been obliterated altogether from the case, inasmuch as it was not corroborated". Nigeria followed the children and young persons Act 1933. In 2004 Evidence Act was enacted. The Act provided for competent and compellability of all persons in the country including children, giving them the right to give unsworn evidence if in the opinion of the court the child possesses sufficient intelligence to justify the reception of his or her testimony, and understands the duty of speaking the truth. Section 155 and 183 Evidence[4] Act 2004. The combine effect of section 155 and 183 left a controversy as to the necessity or otherwise of the provisions. The problem lies with section 183 which provides that[5]:

> "In any proceeding for any offence the evidence of any child who is tendered as a witness and does not, in the opinion of the court, understanding the nature of an oath, may be received, though not given upon oath, if in the opinion of the court, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

The core problem with the above provision was the emphasis on the opinion of the court in assessing child responses to questions about "nature of an oath, intelligence and duty of

[2] Children and Young Persons Act 1933 Section 38(1)
[3] (1934) 25 Cr. App. R 18 @ 20
[4] Evidence Act Cap 112 2004 Laws of Federation Nigeria
[5] (1990) 4 NWLR, part 45, p.484.

speaking the truth", without necessarily providing for a uniform procedure. The opinion of courts have varied since then in Nigeria. In the case of *Ngwuta Mbele v. the state.* Supreme Court held that: [6]

> Once there are clear indication in the record of proceedings that a trial judge carried out the preliminary investigation envisaged by section 155 and 183 of the Evidence Act before taking the evidence of a child or an infant, that, in my view, would mean, at least prima facie, that the said inquiry was carried out even though the actual questions and answers in the course of the investigations are not recorded. It will then be up to counsel for the appellant to rebut this prima facie opinion by showing either that there was no investigation at all or that what the trial judge called an investigation under section 155 and 183 was a parody or travesty of the investigation envisaged.

Comparatively, one may ask whether these controversies against the provisions of Section *155 and 183* have been resolved or are still parading their egos under the 2011 Evidence Act. *Section 175, 208 and 209* of 2011 evidence Act, introduced new innovation into the challenges of competent and compellability of child testimony in Nigeria as envisaged by 2004 Evidence Act.

Specifically, the main thrust of this project is to critically examine the

legal framework of competent and compellability of a child testimony under the Nigerian evidence Act. This essay, shall highlight, the social and legal effect of the structures, procedures and attitudes of court proceedings and legislation to the competent and compellability of child testimony. The challenge they pose in the admissibility of testimony in criminal and civil matters and the right of a child.

1.11. Statement of the Problem

The crux of this project is the overall view of competent and compellability of a child testimony in Nigerian Evidence Act. Obviously, the procedure for assessing the credibility of child testimony within the purview of our legal processes frequently discount, hinder, restrain or better still silence children from witnessing in court. The procedure gives little or no effect, most often to serious testimonies of child that are significant to the determination of a case.

Act puts a child with material evidence to a corner for the all time controversial assessment of response to question of intellectual reasoning. The premise is the presumption that, if a child could not understand questions and give rational answer to the questions is less likely to tell the truth. Notably, standing in a witness box for most adults can be traumatic let alone for children. Inevitably, most young children who think in an abstract terms, will find it difficult to answer questions about this complicated concept.

Furthermore, the matter is made worst when a child witness or victim is to appear before the perpetrator of the crime if a criminal matter, or the matter is ordered for retrial, as stressful as it could be. Children with shortest attention span and are most prone to confusion may loose focus. Some will be withdrawn by their parents to save the kid from the

traumatic effect of undergoing trail again.

Most often litigation based practitioners rely on competency inquiry of a child witness to achieve the issues above. In the case of *Sambo v. state*,[6] where the supreme court upheld the appeal of the appellant who was charged and sentenced for the offence of raping a 10 years old girl, on grounds that the records shows that her evidence was not in conformity with section 182(1) of Evidence Act (now section 209 of 2011 Evidence Act) as there was nothing to show how she was examined .....; it ought to have stated how the learned trial Judge came to the conclusion that she knows the nature of an oath but does not know the consequence of telling a lie"

This research work therefore aims at analyzing the issues confronting the competency and compellability of child testimony under the Evidence Act, and at the end suggests possible solutions.

Also, attention will be paid to the effect of giving evidence in court and why most children may feel reluctant to give testimony in court as well as the risk of hysterical invention, childish imagination and collisions which may be inherent in the testimony of a child in Nigerian courts.

1.12. Research Questions

This study will address the following research questions:

1. What is the legal framework of the court in sustaining the credibility of child testimony under the Nigeria Evidence Act?
2. What is the effect of the court in sustaining the credibility of child testimony from local and international conventions?

[6] (1992)6 NWLR (p.300) S.C

1.13. Aims and Objectives of Study

The main reason for this project is to critically analyze the Nigerian Evidence Act in relation to competent and compellability of child testimony, procedural effect of assessing intellectual capacity of a child to ensure credibility, lapses if any, in the Act geared at protecting the Right of child witness.

Hence, the objective of this study is to explain competency and compellability as regards child testimony and examines the conditions which a child must satisfy before he or she becomes a competent and/or compellable witness in courts of law. The essay focuses mainly on the relevant approaches of the courts as it relates to the competent and compellability of a child and the methods to be adopted.

1.14. Research Methodology

The study adopted the descriptive design. And for a thorough exposition of the subject of the work the study would source its materials from both primary and secondary sources of law. The primary sources include basically the Evidence Act 2011), Children and Young Persons Act Cap C4 LFN, 2004, Criminal Procedure Act Cap. C 41 LFN, 2004 and Case laws. The secondary sources include textbooks both foreign and local textbooks, journal articles and lecture notes on evidence.

1.15. Significance of the Study

The study has both theoretical and practical significance. Theoretically, this study will be useful to both students and scholars who wish to advance their knowledge on the meaning of competent and compellability of child testimony under the Nigeria Evidence Act.

On the other hand, it also has a practical significance to the management of the council of legal education, as it will help them improve their juridical relations, competency, and formulation of policies that will enhance

professionalism in law practice. Significantly, it will also provide practicing lawyers with knowledge on the meaning of competence and compellability of child testimony under the Nigeria Evidence Act. Adding to the above, the study will contribute substantially to already existing knowledge and literature available in judicial proceedings.

1.16. Scope and Limitation

This study is writing basically within the ambit of its title. There were also the problems of time and financial constraints and weather condition which did not enable the researcher travel far and wide and as frequent as necessary. However, the researcher was able to scale through the hurdle in availing herself of the relevant data contained herein. Notwithstanding the foregoing limitation associated with this study, the study was well conceived and concluded to serve the purpose for which it is intended for.

1.17. Synopsis of Chapters

Chapter one is on the background of the study, problem under investigation, aims and objectives of the study, research method, and significance of the study, scope and limitation of the study, synopsis of chapters then, followed by conceptualization of terms having peculiar meaning.

Chapter two reviewed related and relevant literature which includes definitions and principles relating to competence and compellability of child testimony, oath, corroboration and the provisions of the Evidence Act thereon and the exceptions to the general rule.

Chapter three shall assess the legal framework of a child and the competent and compellability of child testimony in Nigeria. It shall look into the explicit, tacit and implicit procedure for assessing child competency. The chapter shall also

look into the survey questions as raised.

Chapter four deals with the effect of procedure for obtaining child testimony, credibility, challenges and resolutions from local and international conventions while chapter five dwells on the summary, conclusion and recommendations.

1.18. Definition of Terms

Competent: A competent witness is a witness who is legally qualified to testify.[7]' This means that a competent witness is one with sufficient knowledge of a material fact and can understand and proffer a logical sound answer to questions put before him in court. This type of witness, differ in material way from competence of a person to give evidence in the context of opinion evidence.

Compellability: 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.[8]' This is usually the powers of court to course ne with useful information about a case to enter appearance for the purpose of testimony were the person refuse to do so willingly.

Child: A child means any person, who has not attained the age of fourteen years'[9] This definition is in line with the provisions of section 209 Evidence Act 2011. Which means, that a child is male or female below the age of fourteen years.

Testimony: Evidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition.[10] Literally, it is the oral statement of what one either heard or witnessed that is of a material importance to the case before a court.

[7] Black's Law Dictionary. 9th Edition [2009]

[8] A.S. Hornsby, Osford Advanced Dictionary . 7th Edition. (Oxford University Press).2006, pgs 227-228

[9] Section 2 Criminal Procedure Act c41 Laws of the Federation, 2004.

[10] Black's Law Dictionary. 9th Edition [2009]

CHAPTER TWO

2.0 Literature Review

In this chapter the law as it relates to competence and compellability is examined. An accused is competent but not compellable. The situation with co-accused can vary but they are generally not compellable. Hence, the conceptual clarifications.

2.1 Conceptual Clarification

A competent witness is one considered in law as a fit and proper person to testify".[1] Accordingly. Cross and Tapper on evidence said,[2] 'A witness is competent if he may lawfully be called to give evidence". From Tracy Aquino's[3] point of view "competency is the legal test of an individual's ability to testify as a witness in court. While compellability ensures that a potential witness can be forced to testify, even though he may be reluctant or unwilling to do so. Blacks law dictionary defined competency[4] of a witness as a basic or minimal ability to do something, and compellable, as capable of or subject to being compelled, especially to testify. While Oxford Dictionary of Law[5], defines competency of a witness to mean "the legal capacity of a person to be a witness 'it further noted that since the abolition in 19th century of certain ancient grounds of incompetency, every person of sound mind and sufficient understanding is generally competent as a witness.

This however means that before the abolition act of 1843 to that of 1898, certain persons were not competent to

[1] Timothy F. Yerima Global Journal of Aguino social science volume 12, 2013.
[2] Modern Nigeria Law of Evidence by Fidelis Nwadialo @ P. 465
[3] R. Cross and C. Tapper (eds) 1995 cross on evidence @ 224.

[4] Black Law Dictionary 9th Edition @322 and 321
[5] Oxford Dictionary of Law 6th Edition by Elizabeth A. Martin Jonathan Law

give evidence in court. But with the abolition Act large categories of persons are competent to give evidence- in court. And defines compellable witness as "A winters who may lawfully be required to give evidence".

Consequent upon the above facts, law of evidence opined that competence governs the ability of a witness to give evidence at trial. It has to be determined that a witness standing in a court of law is qualified to be 'heard' by the court. Compellability is a state of a competent witness to be forced to give evidence in court even when he is not willing to do so. Competence is the legal ability to give evidence. It is obvious that every compellable witness is a competent witness because the court will not compel anyone to give evidence if he is incompetent to do so. On the other hand it is not every competent witness that is compellable. Any compellable witness who refuses to give evidence can be punished for contempt of court. Yet, a compellable witness may be excused from answering certain questions. For a person to be called as witness he must be someone considered in law as fit and proper before his testimony can be received in evidence. Thus, he must be a competent person. The general rule is that in criminal and civil proceedings, every person is presumed to be competent to give evidence.

As rightly observed, 'the most common vehicle for proof is the evidence of witnesses[6]. Therefore, testimony of a witness is only competent to be admissible if that witness is competent to testify. Hence, there are rules regulating the competence and admissibility of witnesses as well as circumstances under which such competent witness may be compelled to testify. A witness in a court of law has no protection. He comes there unfed, without hope of guidance, to give such assistance to the state in repressing crime and assisting justice

[6]See Cross and Tapper on Evidence (8th ed. Butterworth, London 1995)224.

as his knowledge in a particular case may enable him to afford, and justice, in order to ascertain whether his testimony be true, subjects him to torture...One will naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose mind was not harassed but this is not the fact, to turn a witness to good account he must be badgered this way and that until he is nearly mad, he must be made a laughing stock for the court. His very truths must be turned into falsehood so that he may be falsely ashamed...he must be made to feel that he has no friend near him. That the world is all against him. He must be confounded till he forgets his right hand from the left, till his mind is turned into chaos and his heart into water and then let him give his evidence. No member of the humane society interferes to protect the wretch.[7]

2.1.1 Competence and Compellability of Witness Explained

It is a matter of common knowledge that, the English common law rules of evidence as at 1943 form the basis of Nigerian Evidence Act[8] and since 1945, when the Act (then ordinance) became operational, it has not undergone any major reform, whereas some of the rules which form the basis of our Evidence Act, have either been reviewed or totally discarded in England. It is also of historical interest that the rule on competence of witness was in the 18th century negatively stated in England as exclusion of most of the potential witnesses were then the order of the day. For example, parties, their spouses, persons with financial interests in the outcome of proceedings, accused persons and persons with past criminal convictions, were generally prevented from testifying in court proceedings.

[7] Anthony T, The Evidence of Children, Law and Psychology(Cavendish Publishing Ltd London)1988

[8] Cap E14 Laws of the Federation of Nigeria 2004.

The unreliable status of convicts and the need to avoid tempting parties to commit perjury while testifying accounted for the general exclusion of testimonies of such potential witnesses.

By the 19th century however, there was a change arising from the coming into operation of the universal rules on competence which in the main provides that all persons is competent to testify as witness. Incompetence to testify consequently became an exception rather than a rule. Wiles J. succinctly stated the Universal rule thus:

> Every person in the United Kingdom except the sovereign evidence to the best of his knowledge upon any question of fact material and remay be called upon and is bound to give relevant to an issue in any of the Queens Court unless he can show some exceptions in his favour.[9]

The above Judicial pronouncement finds written expression in section 175(1) of 2011 the Nigerian Evidence Act provides that:

> All persons shall be competent to testify unless

[9] See *Ex parte Fernandez*[1861] 10 CBNS 39,*Hoskyn v Commissioner of Police of Metropolis*[1899] AC 474

the court considers that they are prevented from understanding questions put to them or from giving rational answers to those questions by reason of tender years, disease whether of the body or mind or of any other cause of the same kind.

By virtue of the above provision of the Act, all persons are competent to testify unless they fall within the scope of the specific exceptions listed therein. It follows therefore, that a competent witness is a person who can lawfully be called to give evidence. He is fit, proper and qualified to give evidence. He is neither exempted by the provisions of the Act nor deprived of this capacity

to testify as a witness. A compellable witness is a person who can be lawfully compelled by the court to testify. Unlike a competent but non-compellable witness, who can elect to testify or otherwise, a compellable witness has no option on whether to attend court when summoned or subpoenaed. A person must be competent before being compellable. However, not all competent witnesses are compellable.

A fundamental distinction thus exists between competence and compellability on one hand and privilege on the other hand. In competence and compellability, the focus is on whether a person may testify or can be compelled to testify as a witness. With respect to the privilege on the other hand the issue of concern is whether the witness can refuse to answer questions on a particular document or decline to tender such a document. In other words, what type of evidence may be given or withhold is the focus under privilege. A compellable witness is consequently not at liberty to refuse to attend court or judicial proceedings merely because the evidence he is expected to give is privileged. He must attend the proceedings and claim his privilege there. It is only when the court or the tribunal upholds the privilege that his presence in court is excused and/or he may be allowed not to give particular evidence or not to tender a particular document.

The exception to the rule concerns children, persons of unsound mind and in certain circumstances the defendant and his or her spouse. Issues as to the competence and compellability of witness are decided by the court but if it involves the case of prosecution witnesses, they should be decided at the outset of the trial and this may necessitate the hearing and consideration of evidence at a procedure referred to as trial within a trial. The burden of establishing the competence of a prosecution witness is upon the prosecution if the issue of

the competence of such a witness is raised. The prosecution must satisfy the Court of the witness's competence beyond reasonable doubt. Conversely, in the unusual event of a challenge by the prosecution to the competence of a defense witness, it would seem that they are matters of principle that the prosecution should bear the burden of establishing incompetence. Meanwhile, establishing the stance of oat taking of a child before testifying in a court of competent jurisdiction calls for a child to understand the duty of speaking the truth. Hence, the need to understand the nature of an oath.

2.1.2 The Nature of an Oath

By virtue of section 183(1) of the Evidence Act which provides that:

> In any proceeding for any offence, the evidence of any child who is tendered as a witness and does not in the opinion of the court understands the nature of an oath, may be received though not given upon oath, if, in the opinion of the Court, such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

This section permits the admission of the evidence of a child not on oath:

1) If in the opinion of the court the child does not understand the nature of an oath.

2) Provided the child is possessed of sufficient intelligence to justify the reception of the evidence.

3) Understands the duty of speaking the truth.

However, if the child passes this test and is subjected to a further test for the determination of a further question whether he is able to understand the nature of an oath. He is asked about God and what will happen to one who tells lies after being sworn etc. If he fails in this respect, he will nevertheless be able to give his evidence but it will not be sworn provided he has passed the first test under *section 154(1)* and understands the duty of speaking the truth. *Section 175(1)* such unsworn testimony is admissible evidence as in the case of sworn testimony of adults section 209(1). It appears that section 182 is identical with the provisions of section 209(2).

Children and Young Persons Act 1993 of England. *Lord Goddard C.J,. R v Reynolds* said that:

> ...when a child is put into a witness box, the presiding judge has to decide first whether the child in his opinion understands the nature of an oat

h. If the child does not possess sufficient intelligence to understand the nature of an oath, the Judge must further consider whether he is sufficiently intelligent to justify the reception of an unsworn evidence on the ground that he understands the duty of speaking the truth.

These preliminary questions must be put to the child in an open court in the presence of the accused as was held in *R v Dunne* where it was held that the examination of the judge out of court of a child to determine competency to take an oath was illegal and

insufficient to validate a conviction and the investigation cannot be determined after the child has given his evidence. In the case *Williams Omosivbe v. Commissioner of police*, Kester, J. said:

> There was nothing on the record to show that an investigation was first made to justify admitting the child's evidence on oath. This is a serious omission. The fact that in his judgment the learned trial magistrate said that after learning the evidence of the child in the witness box, he came to the conclusion that she may be mentally capable of understanding and giving intelligent account of the case to

his satisfaction cannot justify this condition precedent nor cure its irregularity.

As to whether the trial court is bound to hold and record preliminary investigation as to the competence of a child to give evidence on oath, the supreme Court *in John Okoye v. The state* ruled to the effect that a trial Court is bound to hold and record preliminary enquiry as to the competence of a child to give evidence on oath, therefore, he is allowed to take oath, if the Court is of the opinion that the child is capable of understanding the nature of an oath. The same principle was held in *Okoyomon v. State*[10] and retreated in the leading case of *NgwutaMbele v. State*[11].

Except for *NgwutaMbele's* case, in each of the two former cases, the child witness was sworn before giving evidence and without a preliminary enquiry by the Judge as a condition precedent to the oath. In each case, the appellant contended there was thus non-compliance with the provision of the section 182(1). Rejecting this argument, the courts held in the latter case that the provision of the section contemplates or deals with the unsworn evidence of a child. In other words, it is only when a child is prevented from understanding the nature of an oath that a preliminary inquiry is required in keeping with the provision of section 182(1) and if in the affirmative of section 179 Evidence Act.

However, in *Mbele's* case, the trial Judge of first instance, from records did point out accordingly that, *NwankoMbele* (Prosecution Witness 4)

[10](1973)NMLR 292.

[11](1990) 4 NWLR(Pt.145)484.

was examined by him in line with sections 182 and 154 "she is aged 10years, she gave rational answers to my questions and appears quite intelligent although she says she did not attend school, she understands the duty of speaking the truth and is possessed of sufficient intelligence to justify the reception of her evidence.

The Supreme Court rejected the submission that the learned trial Judge did not carry out the preliminary investigation and went further to expand the principles in preliminary inquiry and the dichotomy of understanding the relevant sections relating to the evidence of the child.

2.1.3 Corroboration of Child Evidence:

The word corroboration is connected with the latin word "*Robur*" and the English word "*Robust"* and it means "strengthen", perhaps the best synonym is support.[12] "A piece of Evidence which confirms, reinforces or supports another piece of evidence of the same fact is a corroboration of that other one".[13] Another definition offered by Lord Reading CJ in the celebrated case of R. v. Baskerville[14], he said:

> "We hold that evidence in corroboration must be an independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, i.e. which confirms in some material particular not only

[12] (DPP v. Hester 1973 AC 296 at P. 312 as sited by Lawrence Atsegbu Law of Evidence

[13] Nwadialor Fidelis at pg. 431.

[14] (1916)2 KB 658

> the evidence that the crime has been committed but also that the prisoner committed it".

It flows from the above definitions that corroborations is an independent testimony which not only confirms the performance of the act but that the accused committed the act. The general rule in a criminal proceeding permits a court to act on the evidence of a single uncorroborated credible witness. In *Uluebeka v. State*[15], it was held that a court can and is entitled to act on the evidence of one single witness if the witness is believed, given all the circumstances of the case.... unless where the law requires corroboration. In every general rule, there is always an exception. Corroboration is an exception to the rule which empowers the court to convict on the evidence of one credible witness. A preliminary point to note is the fact that the Act did not define corroboration. Summarily, corroboration as stated above from different writers put together is the piece of evidence that confirms, validates or better still ratifies another evidence of same occurrence. The evidence corroborating another must be a credible one, and must be acceptable by Court. Corroborative evidence must be independent which means that the evidence must come from another source other than the one it is corroborating. In the case of *Amina Musa v. the State*[16].

In which the accused admitted that the second prosecution witness was her co-wife and both of them were not living in harmony. She stated that she prepared *"Fura"* on Thursday and gave a part of it to the second prosecution witness and that it was on Friday morning that children of the second prosecution witness drank "Fura", fell

[15] (2011) 4 NWLR, Part 1237, P. 360

[16] (2014) LNELR 2014/16/LPELR-229 12(CA) CA/K/189/C/2013

ill and thereafter died. She stated that she did not see the second prosecution witness prepare any other "Fura" for her children on Friday morning and that the children were physically fit before they took the "Fura" and that the children died as a result of the "Fura" that they drank.

The court of appeal held that these pieces of evidence along with the evidence of second and third prosecution witnesses were evidence facts outside the confessional statement of the Appellant that point to the truth of the facts contained in the confessional statements. They corroborate the facts in the confessional statements.

2.1.3.1 Corroboration in Unsworn Evidence of a Child

It is worthy to note that a child like every other person is a competent witness in law unless the court considers otherwise by reasons of his tender years he is prevented from understanding the questions put to him or from giving rational answer to those questions. We observed in course of this research that section 209 (1) of Evidence Act 2011 made a clear distinction on the age that shall not be sworn and it states thus:

> "In any proceeding in which a child has not attained the age of 14 years is tendered as a witness, such

child shall not be sworn and shall give evidence otherwise than an oath or affirmation, if in the opinion of the court, he is possessed of "sufficient intelligent to justify the reception of his evidence and understand the duty of speaking the truth".

Invariably, the requirement of sufficient intelligence and ability to understand the duty of speaking the truth is subject to the opinion of

court. For instance, in *Arthur James Kendall v. The Queen*[17], Judson J. held that the basis for the rule is the mental immaturity of the child. The difficulty, he said is expressed in fourfold:

1. His capacity of observation.
2. His capacity of recollection.
3. His Capacity to understand questions put and frame intelligent answers.
4. His moral responsibility.

Whether or not, the above dictum is followed in the determination of sufficient intelligence, the fact remains that what matters is the opinion of the court seating.

Furthermore, subsection 3 of section 209 provides that no one should be convicted unless the testimony admitted by virtue of subsection (1) from the prosecution is corroborated by material evidence implicating the accused. This therefore means that an unsworn evidence of a child requires corroboration. According to the Malaysian case of *Attan b, Abdul Ghani v. PP*[18], Sharma J. relaying on R. v. Baskerville, puts corroboration rules together as follows.

1. That there must be some additional evidence rendering it probable that the story of the complainant is true and that it is reasonably sure to act upon it.
2. The evidence must come from independent sources.
3. It must implicate the accused in the material particular. It confirms that the accused committed the crime.

Here the court did not state who should be allowed to give such evidence implicating the accused whether same shall be received under oath or unsworn. In *R v. Manser*[19] it was held that evidence that required corroboration cannot corroborate another requiring corroboration. Meaning that a blind cannot lead a blind. Although, the court in DPP v.

[17] (1962) S.C.R. 469

[18] (1970) 2 MLJ 143

[19] Supra 1934

Hester[20] upturns the former decision in which it was held that the unsworn evidence of a child was found corroborative by a sworn evidence of younger sister aged (9) nine, which ordinarily requires corroboration.

Therefore, owing to the fact that sworn evidence can corroborate unsworn evidence of a child the judge should warn himself of the risk involved in acting on the evidence without corroboration. The basis of the rule being is matter of common knowledge not scientifically proved, that children most often find it difficult to distinguish between the reality and self imagination. They after a long time find it difficult to distinguish between the real occurrence and result of imagination.

In the case of *Ngwuta Mbele v. The State, Offiah, J.* As he then was delivering judgment stated as follows; it was therefore urged on behalf of the accused that I should treat the evidence of *P.W. 3 and P.W.4* who where obviously children of tender years with caution as there can be lapses of memory. it is now settled law that the sworn evidence of a child need not be corroborated as a matter of law, but a jury should be warned not that they must find corroboration but that there is a risk in acting on the uncorroborated evidence of young boy or girls though they may do so if convinced that the witness is telling the truth (Cross on Evidence, 4th Edition, P. 182 and *Anebamen v. The State*, (1972) 4 S.c. 35 at 38. Great caution is of course required in accepting their evidence because although children may be less likely to be acting from improper motives than adults, they are more susceptible to the influence of third persons and may allow their imaginations to run away with them[21].

Hence, their evidence requires corroboration if given unsworn by a child below 14 years. As stated by

[20] *Ibid.*

[21] Cross on Evidence p 183.

Lawrence Atsegbua Law of Evidence P. 170. There is a danger that the law may become enmeshed in technicalities concerning what amounts to corroboration of the testimony of an unsworn child. The full effect of section 209(3) is that unsworn evidence of a child must be corroborated no matter how many children that are involved. It is a general believe that children are inclined to telling the truth than adults and the Child Right Act 2003 was enacted to protect the Right of a Child whether 14 or below. Therefore, if the above section 209(3) is allowed to still raise its ugly head, the accused may walk away from the corridor of justice. We in our research is of the view that section 209 (3) should be amended to include that evidence of a child unsworn shall be admitted like every other sworn evidence if in the opinion of the court the child/children possesses sufficient intelligence to understand questions put to them and to give rational answer to same and understands the duty of telling the truth.

2.1.3.2Provision of the Evidence Act on Competence and Compellability

Section 175 (1) of the evidence Act states that:

> All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the

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The Section in its sub section 2 states that a person of unsound mind is not necessarily incompetent to testify unless he is prevented from understanding the questions put to him and giving rational answers to them as a result of his situation. The learned author of Law and Practice Relating to Evidence in Nigeria correctly interprets the provisions of section 154, 179 and 182 of the Evidence Act in so far as they relate to the taking of the evidence of a child. The relevant part of the well known text states as follows:

> A child who is prevented from understanding the question 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 is that, there is no age stated and it is therefore the duty of each Court before which a child appears for the purpose of giving evidence, to determine whether the child is competent to give evidence by putting him through series of test...[22]

Thus, in *Mbele v The State*[23], the appellant was charged with murder and the only eye-witness was a ten years old child who gave evidence on oath. The contention of the appellant was that the procedure adapted by the trial judge in allowing the sworn evidence of that child was in contravention of sections 154 and 181 of the Act. It was contended that before a child of tender years is allowed to give evidence, it is the duty of the trial judge to satisfy himself as to whether or not the child is in a position to be sworn[24]. In order to form this opinion, preliminary questions must be put to the child in open court in the presence of the accused and in a trial by jury also before the panel of jury. In *R v Dunne*[25], it was held that the examination by the judge out of court of a child to determine competency to take an oath was illegal and sufficient to invalidate a conviction. A court would also be wrong to exclude the evidence of a child merely because the

[22]T. A. Aguda, *Law and Practice Relating to Evidence in Nigeria*(2nd ed.MIJ Publisher Ltd , Lagos 1998)299.
[23] [1990]4 NWLR(Pt 145)484.

[24]*R v Surgenor* 27Cr A.R 175.
[25]21 Cr. A.R 176.

child does not understand the nature of an oath. Before the court can properly do so it must be satisfied that the child as a result of tender age is unable to understand questions or answer them rationally or to understand the duty of speaking the truth. In the case of *Inspector General of Police v SuaraSumonu*[26], the matter was about a child who does not understand the nature of an oath. Before admitting such evidence, however it is the duty of the judge to satisfy himself that the child is sufficiently intelligent to appreciate what he is saying and understand the duty of speaking the truth. This is also a statement of law under the Act as provided in section 183 (1) of the evidence Act which states thus:

> In any proceeding for any offence, the evidence of any child who is tendered as a witness and does not, in the opinion of the Court, understand the nature of an oath may be received, though not given upon oath, if in the opinion of the Court such child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

As regards Compellability, the general rule is that every person is compellable, but the President, Vice-president, Governors and Deputy Governors are not compellable witnesses[27], they are however

[26] (1957)WRNLR 23.

[27] See section 308Constitution of the Federal Republic of Nigeria 1999 Cap C23,LFN 2004.

competent witnesses. In the same vein, foreign sovereigns, their ambassadors and other diplomatic agents are not compellable witness but are competent witnesses if they waive their immunities by virtue of Section 1(1) of the Diplomatic Immunities and Privileges Act 1962 which provides thus;' Foreign envoy and every consular officer, the members of the families of their official staff, shall be accorded immunity from suit and legal process'. However, by section 2 of the same Act, all the persons described above may waive their immunities. Sections 3 and 4 of the same Act makes similar provisions with respect of High Commissioners from the Commonwealth countries, their officials and their families. But subject to the above, all aliens are competent and compellable witnesses. And if they cannot speak English language which at present is the language of the Courts, they are entitled their evidence through sworn interpreter just as a Nigerian who is unable to speak that language.

2.2. Exception to the General Rule

A rebuttable presumption of competence exists in favour of all witnesses. In other words, every person is presumed competent to testify unless and until the contrary is proved. The basis for this legal proposition is the section 155(1) of the Evidence Act. Apart from the evidence of children which has attracted judicial attention, there is virtually no judicial authority on the competence of persons of old age and persons suffering from the diseases of the body or mind but these classes of witnesses are also caught in the web of the exceptions to section 155(1) of the Act. Each of these classes of witnesses will now be examined in turn namely:

2.2.1. 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. A question worthy of note however is: at what age does a witness remain or ceases to be a child? The Criminal Procedure Act for example, regards any person below the age of 14years as a child[28] and while the case of *Okoye v The State*[29] supports the position that a person of 13years is a child, while the decision in *State v NjokuObia*[30] supports the view that a witness aged fifteen years is not a child. From the decision of the Supreme Court in *Okon v The State*[31], it is evident that the judicial approach is to regard any person below the age of 14 years as a child. It has however been argued that competency of a child is not so much of a matter of age as of understanding. That the test is more of the understanding of the child rather than of his age.

To determine the competence of a child, the court is expected to perform two basic tests. It is trite that a child who is prevented from understanding questions put to him or from giving rational answers by reason of his age is not a competent witness. The Court is by virtue of sections 175, 180 and 183 of the Evidence Act expected to investigate whether the child is possessed of sufficient intelligence to be able to understand questions put to him or to answer such questions rationally.

2.2.2. Old Persons and Persons Suffering from Disease of the Body or Mind or other Afflictions

By virtue of Section 175(1) of the Evidence Act, an old person, no matter how old is a competent witness as in the case of a child of tender years, if he is able to understand questions and give the rational answers to those questions. Similarly, a person suffering from disease of the body or mind is a competent witness, unless the Court considers that he is

[28] Cap C43 LFN 2004.
[29][1972]1 All NLR 500.
[30]4 ESCLR 67.
[31] [1988]1 NWLR(Pt.76) 172.

prevented from understanding questions put to him by virtue of the said disease. The procedure of determining this is similar to that used in determining the same issue in the case of a child. A person who is of an unsound mind and even is so certified, is not ipso facto incompetent to give evidence because Section 175(1) provides that:

> A person of unsound mind is not incompetent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them.

Finally, reference must be made to section 176 relating to dumb witnesses. It is submitted that this provision must be applicable mutatis mutandis to such witnesses. Thus, preliminary questions are first put to determine if the witness could understand questions and give rational answers through a sworn witness who is able to communicate with such deaf and dumb witness, if

the Court is satisfied that he passes this test, then he can be allowed to give evidence.

2.2.3. Evidence of Spouses (wives and Husband)

The nature of the marriage between the accused and a witness as well as the offence charged are vital factors in the determination of the competence or otherwise of a spouse to testify in Court or Judicial proceedings. Generally, the spouse of an accused person is only competent to testify on the application of the accused. The spouse envisaged under the Act is the spouse of a monogamous marriage. In other words, under section 2(1) of the Act husband or wife is synonymous with spouse of monogamous marriage. Consequently, spouses of non-monogamous marriages are competent and compellable witness without the application of the accused persons.

Criticizing the evident discrimination against spouses of non-monogamous marriages, the learned author of the Law and Practice Relating to Evidence describes it as a relics of old colonial days when the so called Christian marriage was regarded as being superior to the indigenous Customary and Muslim marriages of Nigerians which relics should have disappeared with the colonial era. But a rebuttable presumption of monogamy exists in favour of every marriage thereby making the spouse of the accused to be prima facie incompetent to testify except on the application of the accused. The burden of proving non-existence of a monogamous marriage is therefore on the prosecution, unless the burden is discharged, the spouse remains an incompetent witness. However, where the spouse witness is sworn on the Holy Bible, he or she will be regarded as a spouse of a monogamous marriage[32]. But the mere fact that the witness is sworn on the Quran has been held insufficient to rebut presumption of a monogamous

[32] *Idiong and Anor v The King*(1950) 18 WACA 30.

marriage between that witness and the accused[33].

Where the offence committed is within the scope of section 161 of the Evidence Act, the spouse is a competent and compellable witness regardless of the absence of consent of the accused. According to section 161 when a person is charged with an offence under any of the enactments contained in sections 217, 218,129, 221, 223, 224, 225, 226, 231, 300, 301, 340, 341 to 362, 370, 371 of the Criminal Code or subject to the provisions of section 36 of the Criminal Code with respect to offences against the property of a spouse or inflicting violence on such spouse, the spouse of the accused person charged shall be a competent and compellable witness for the prosecution or defense without the consent of the person charged. The above are the exceptions to the general rule on the incompetence of spouses of accused persons.

Hence, it is necessary to show a clear distinction between competence and compellability, It has been established that every person is a competent witness in any judicial proceeding and it is shown clearly that every compellable witness is a competent witness to give evidence. On the other hand, it has been established that it is not every competent witness that is compellable. A compellable witness is consequently not at liberty to refuse to attend court or judicial proceedings merely because the evidence he is expected to give is privileged. He must attend the proceedings and claim his privilege there. It is only when the court or the tribunal upholds the privilege that his presence in court may be excused be allowed not to give particular evidence or not to tender a document.

All defendants are competent but not compellable, as witness in their own defense or for the defense of the co-accused. If a defendant fails to give evidence in his or her own defence, he

[33]*Lamu v The State*(1967) NMLR 228.

cannot be compelled. A defendant's spouse is competent to give evidence for the prosecution, for the defendant and for any co-defendant. A defendant's spouse, provided he or she is not also charged in the proceedings is compellable as a witness for the defendant. In a criminal trial, a child will be competent provided he or she can understand the question he's asked and can give understandable answers to them. In a civil trial, a child will be competent if he or she satisfies the Hayes Test for taking an oath; alternatively, if he or she satisfies the test in the Children and Young Persons Act[34] for giving unsworn evidence.

Conclusively, in a civil trial, a person of defective intellect will be competent if he or she satisfies the test. Such a person will be competent in a criminal trial if he or she can understand the questions that are asked and give understandable answers to them. It is now clear from the provisions of Evidence Act 2011 that application for obtaining the competent and compellability of Child testimony is same in both civil and criminal matters.

[34] See Sec. 96 of the Children and Young Persons Act,Cap C24 LFN 2004

CHAPTER THREE

3.0 Legal Framework of a Child

This section attempt to delineate the legal understanding of a child in the Nigeria evidence Act. This is done through explicit, tacit and implicit procedural rendition in the competency and compellability of child (testimony).

3.1A Child under the Law

One of the problem with competency test, and it is interpretation by the court is the absence of definition of a 'child' or 'a person of tender years' in the Nigeria Evidence Act. There is a broader argument that the omission is a deliberate act of the legislative body to accommodate various definition of a child contain in our local legislations which were done for their respective purposes. However, in a very significant quest, one may ask how right it is for both words to be used interchangeably in law and practice. These makes it more intensity to know the sources of definitions offered in the interpretations of both phrase in competency inquiry.

The United Nations convention on the Rights of a child (1989) and the African Charter on the rights and welfare of a child (1991) have substantially the same provisions on definition of a child. "All human being below the age of eighteen years is a child" except, that the charter excluded the phrase, unless under the law applicable to the child. Majority is attained earlier, but made an additional definition of age of majority to mean 18 years.[1] In line with the above provisions, the child Right Act 2003 in Nigeria agrees that a child is a person who has not attained the age of eighteen years. The only difference seen in other human Right provisions on the definition of a child,

[1] Art 2 African child right charter, art .1of United Nations connection on Right of a child.

is the Art .2 of children and young person's Act which provides as following: "*A child means a person under the age of fourteen years, a young person means a person mean a person who has attained the age of fourteen years".* This definition is popular because of its consonance with both relevant case law and criminal procedure Act section. 2.

In *The State V. John Okoye*,[2] the trial judge applied section 2 of the criminal procedure Act to determine who is a child in Nigeria. On appeal, *Coker J.SC*, stated that "the doubt as to whether or not the definition of a child in the criminal procedure Act, does not necessarily carry the same connotation in the context of section 182 of Evidence Act, is immaterial to our present decision since it must be generally accepted that a boy or a girl of the age 13 years must be considered a child".

"Except for the purpose of one Act, dealing with compulsory attendance, no definition in the statute has been given of a child, it is impossible to lay down any definite boundary separating children from young men or young women or any other description by which an advance beyond childhood may be indicated. Practically, I supposed that at somewhere between 16 and 17 at most, an age has arrived at which no one would ordinarily call childhood,"[3] A similar decision was reached in the Nigerian case of The *State V. Njoku Obia*[4]where the court held that though there was no definition of a child in section 155(1) and section 183(1) (now sections 175(1) and 209(1) respectively) of evidence Act, a person of 15 years was no more of tender years.

Furthermore, section 209(1) of 2011 Evidence Act in attempt to solve

[2] (1972) All N.LR 938.

[3] R.V Cocker ton (1901) 1Kb 32 @p.340/341.

[4] Section 209 Evidence Act 2011.

the controversy created in the previous Act read as follows;

> "In any proceeding in which a child who has not attained the age of 14 years is tendered as a witness, such child shall not be sworn and shall give evidence otherwise than on oath or affirmation, ..."

It is important to note that section 209 (1) indicates that a child below the age of 14 years is restricted from giving evidence on oath whether he understands the true meaning and consequences of lying under an oath or not. In view of most scholars like, *T.F Yerina and Dr. Amusa,* 2011 evidence Act failed to mob up the lacuna on child definition instead compounded the issue by stamp aging on the right of a child who may by reason of intellectual ability convince

the judge that he understands the nature and consequences of the oath.[5]

However, it is obvious from the fore going that the controversial issue on the definition of a child or a person of tender years has not been resolved under the evidence Act.

Therefore, the court may apply a relevant statute in consideration where it contains a definition of a child in arriving at competency of a child to testify.

More so, the concept of a child under Nigerian law is based exclusively on calendar age. From the provision of the Children and Young Persons Act[6], a clear distinction is made between a child and a young person. A child means any person who has not attained the age of 14 years whereas a young person is between the age of 14 and 17 years. By this implication, he is a person who is incapable of understanding anything. He is immature in both in mind and will.

In the law of Evidence, the presence of those characteristics or the absence of those disabilities which renders a witness legally qualified to give testimony in a court of justice applies in the same sense to a child. As regards the Evidence Act, it is silent on the legal definition of a child and it is doubtful whether or not the definition under section 2(1) of the Criminal Procedure Act does necessarily carry the same connotation as section 182(1) of the Evidence Act. The reason for doubt being that there is a huge body of statutes referring to children and with most of them carrying the definition of the word 'child' it may be imprudent to apply any hard and fast rule as was held in the case of *John Okoye v The State.*[7]

However, it has been generally accepted that the legal definition of a child has been answered by section 2(1) (2) of the Act, it states that 'any boy or girl under 14years of age is

[5] Mordern Nigeria law of Evidence Nwadialo P. 468,

[6] Cap C24 LFN 2004.

[7](1972) 12 SC 21.

considered a child'. This provision was buttressed by the case of the *State v NjokuObia*[8] where *Araka J.* (as he then was) held that a person of 15years of age is no longer of tender years or a child who cannot understand the nature of an oath or the duty of speaking the truth.

Section 175(1) of the Evidence Act has provided assistance as it states that:

> All persons shall be competent unless the Court considers that they are prevented from understanding the questions put to them or from going rational answers to those questions by reason of tender years, extreme old age, disease, wheth

[8]4 ESCLR 67.

> er of body or mind or any other cause of the same kind.

It follows therefore that a child must satisfy the conditions of section 175(1). Also, section 209(1) of the Evidence Act, which states that:

> In any proceedings for any offense, the evidence of any child who is tendered as a witness and does not in the opinion of the court understand the nature of an oath may be received though not given on oath, if in the opinio

n of the court such a child is possessed with sufficient intelligence to understand the nature of an oath, the duty of speaking the truth before he can give sworn evidence.

It follows from the later principle that oral evidence shall be on oath or affirmation. At Common law, there was no set age at which a child ceased to be of tender years. In *R vWallwork*[9] Lord Goddard C.J deprecated the calling of a 5year old girl, in an unsuccessful attempt to have her give evidence of alleged acts of incest by her father, and hoped that it would not occur again. As a result of this, some feelings arose that there may be a minimum age of six and it was not unusual for eight to be taken as a desirable minimum practice. In Hayes, the court of Appeal said that the watershed dividing children who are normally considered old enough to take the oath probably falls within eight and ten. But the reported cases reveal a considerable divergence of opinion and perhaps the best way of

[9] (1958)42 Cr.App. R153

expressing the matter is that the younger the child, the more the court should approach the issue of competence with caution, and subject the child's answers to a critical scrutiny. Ultimately, it seems that at common law, competence should depend on the individual characteristics of the child in question rather than on any standard minimum age.

3.1.1 Testimony of a Child in Civil Proceedings

Section 38 of the Children and Young Persons Act 1938 is applied only to criminal cases. In civil cases, the common law principles continued to apply until the enactment of section 96 of the Children Act 1989.This section effectively adopted the position taken by the 1938 Act and the common law position as stated in *R.v. Hayes*.[10] It provides that in Civil proceedings, if a child in the opinion of the court does not understand the nature of an oath, his evidence may be heard if in the Court's opinion, he understands that it is his duty to speak the truth and has sufficient understanding to justify his evidence being heard[11], this provision is now of course, out of step with the position in criminal cases and ironically, affords in a Civil case, a degree of Judicial scrutiny denied to the accused in criminal case.

In the case of *R v. Hayes* there are three boys aged 12, 11 and 9 gave evidence against the defendant on an indecency charge. The youngest gave unsworn evidence while the two others gave their evidence on oath. The question arose as to whether they were competent witnesses. It was held that, in determining whether evidence ought to be given on oath, it is immaterial that the child does not understand the divine sanction of the oath, or that he is ignorant of the existence of God but that he must understand his duty to

[10] (1977) 1 WLR 234.

[11] Section 5(1) of the Civil Evidence Act 1995 which adopt the test laid down by sec.96 of the Children Act.

speak the truth. The accused was thereby convicted.

3.1.2 Testimony of a Child in Criminal Proceedings

Before the decision in Hayes, frustration with the requirement of religious belief had led to an important statutory change in criminal cases. *The Children and Young Person's Act 1983, section 38(1)* provided:

> Wherein any proceeding against any person for any offence, any child of tender years called as a witness does not in the opinion of the Court understand the nature of an oath, his evidence may be received, though not given on oath, if in the opinion

of the Court, he is possessed of sufficient intelligence to justify the reception of the evidence and he understands the duty of speaking the truth.

The section did not offer any definition of the expression "tender years". By a proviso, it was provided that the accused should not be liable to be convicted of the offence charged unless any evidence given unsworn was corroborated by some other material evidence in support thereof implicating him. And because a witness cannot be convicted of perjury unless he has been lawfully 'sworn' a new offence akin to perjury was created by section 38(2) Children and Young Person's Act.

A more radical change was therefore made by section 52(1) of the Criminal Justice Act 1991 which inserted into the Criminal Justice Act 1988 the following new section 33A:

1) A child's evidence in criminal proceedings shall be given unsworn

2) A deposition of a child's unsworn evidence may be taken for purposes of criminal proceedings as if that evidence had being given on oath

In this section, 'child' means a person under 18years of age. It would seem that it is no longer necessary for the Judge to inquire into the competence of a child in every case. As in the case of an adult witness, the Judge may do so if it seems appropriate having regard to the child's apparent ability to express him or herself intelligibly.

In *R v Hampshire*, the accused was charged with offence of indecency with two girls, aged eight and nine. The evidence in chief of the children was admitted in the form of videotaped interview but in breach of the guidelines for the conduct of such interviews, no one had impressed on the children the importance of speaking the truth. The trial Judge admitted the evidence without any consideration on the issue of competence, but later formed the view that he ought to have investigated the matter and then purported to find that the children were competent. The Court of Appeal held that there was no longer any duty on the judge to inquire about the competence of a child in every case, though he retained the power to do so, if it appeared necessary in a particular case.

3.2 The Full Inquiry Test

A major point to note is that no age is stated before a child could be competent to give evidence, it is therefore the duty of each court, before which 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 or to be able to answer questions put to him rationally.

The court does this by putting preliminary questions to the child which may have nothing to do with the matter before the Court. If as a result of this investigation the Court comes to the conclusion that the child is unable to understand questions and answer them

rationally. Before a child will be regarded as competent to give evidence, he must have passed the inquiry test explicitly, tacitly and implicitly.

3.2.1 Preliminary Questions

Once a witness is a child, by the combined effect of sections 175 and 209(1) and (2) of the Evidence Act, the first duty of the court is to determine first of all whether the child is sufficiently intelligent to understand questions that may be asked in the course of his testimony and to be able to answer rationally. This is tested by the court by putting to him preliminary questions which may have nothing to do with the matter in Court.

If as a result of these preliminary questions the Court comes to the conclusion that the child is unable to understand the questions or to answer them intelligently; then the child is not a competent witness within the meaning of section 175(1). But if the child passes this preliminary test, then the Court must proceed to the next test as to whether, in the opinion of the Court, the child is able to understand the nature and implications of an oath. If after passing the first test, he fails the second test, then being a competent witness, he will give evidence which is admissible under section 209(2) though not on oath. If on the other hand, he passes the second test so that in the opinion of the Court he understands the nature of an oath, he will give evidence on oath. His evidence will then be admissible and admitted. In *AsuquoEyoOkon and 2 ors v. The state*, where the Supreme Court allowed the appeal on the ground that the trial Judge did not comply with the above preliminaries as the child was simply sworn and he gave evidence.

Also, in the case of *Nasiru Ogunsi v. The state,*[12] it was held that the conditions for receiving the evidence

[12] (1994) 12 NWLR(Pt.53)1 at 6-7.

of children of tender years are that certain preliminary enquiries must be made by the trial judge. Before the evidence of a child of tenders is taken, the judge must ask the child certain questions like his age and must find out whether the child does understand the questions put to him or her, then the judge must proceed to enquire from the child whether the child understands the essence and implications of oath taking.

3.3.2 Competent and Compellability of Child Testimony in Nigeria

The vulnerability of children can have ripple effect on their evidence. They can be easily intimidated by mean looking counsels or loved ones. Yet, the innocence of a child makes it desirable for the court to believe such evidence.[13] In the words of Antoine de Saint- Exupery[14] 'grown-ups never understand anything for themselves and it is tiresome for children to be always and forever explaining things to them'. The child requires protection from the court before, during and after giving the corroborative evidence. Hence the use of electronic gadgets, like live video links, conference calling and close circuit television can be employed so that the child won't be intimidated.[15] It is expedient to employ this especially in matters involving sexual assault of a child by the parent or guardian. The sanctity of childhood must be left untainted, and never deflowered.[16] The need to take precaution should never pull the wool over the eyes of the Judge who should only alight at Justice Bus-stop whatever the

[13] See 'Jobi Mike 'Tobi, *My Headache Is Not Your Headache* (Unpublished)

[14] Antoine de Saint- Exupery, The Little Prince

[15] The case of 14 year old Ese Oruru, before Justice Hyeladzira Ajiya Nganjiwa of the Federal High Court sitting in Yenagoa, Bayelsa State capital, Nigeria, who is the victim/star witness in a charge of forceful abduction, sexual exploitation and rape brought against Yunusa Dahiru, which had attracted a lot of media attention is instructive. Therein, the prosecution would not want Ese Oruru to be led in evidence in the open court to protect her from the prying eyes of the public, hence brought an application to obtain Ese's evidence in camera because of her status as a minor.

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transport-fare or duration may be.[17] The landmark innovation in the Evidence Act serving as the bedrock of adjudication has falconer! But we still await this raging wind of 'change' to sweep clear all obsolete acts in our statute books, and our polity as a whole.

It must be said that in his duty to evaluate evidence, a trial judge as the judge of facts dominates the province of the assessment of probative value to particular pieces of evidence tendered before him and he is perfectly entitled in the process to give weight to one piece of evidence and attach no weight to another. Succinctly, the uninducted, the inner bar and the outer bar must feed the bench appropriately. Definitely not to the extent of intoxicating the bench. And with profound respect, the bench being fed by creating some certainty with respect to the testimony of a child witness. This innovation was not entrenched into our law in isolation.[18] It can be said that the falcon has finally heard the falconer! But we still await this raging wind of 'change'[19] to sweep clear all obsolete acts in our statute books, and our polity as a whole.

It must be said that in his duty to evaluate evidence, a trial judge as the judge of facts dominates the province of the assessment of probative value to particular pieces of evidence tendered before him and he is perfectly entitled in the process to give weight to one piece of evidence and attach no weight to another.[20] Succinctly, the un-inducted, the inner bar and the outer bar must feed the bench appropriately. Definitely not to

[17] This is not to undermine the need for 'speedy justice'-'fiat justitia'

[18] See Evidence Act 2011 ss. 83 & 84– computer generated evidence is now admissible; ss. 37 and 38 – Hearsay rule spelt out; s. 116 – conflicting affidavit evidence; s. 166 – presumption of marriage, amongst others.

[19] Michael O. Ogunjobi, 'Tompolo, EFCC and The Law', This Day Newspaper, February 28, 2016, p. 8; Michael O. Ogunjobi, 'This Bitter Change', (April 13, 2016) www.opinionnigeria.com/bitter-change-by-michael-o-ogunjobi/. Accessed on 29th of April, 2016.

[20] Per Owoade J.C.A, Essien v. Essien (2009) 9 NWLR (pt. 1146) 334.

the extent of intoxicating the bench. And with profound respect, the bench being fed by the bar should endeavour to consume judicially and judiciously, not like some gullible gluttons!

Lastly, a court would be wrong to exclude the evidence of a child merely because the child does not understand the nature of an oath. Before the court can properly do so, it must be satisfied that the child as a result of tender age is unable to understand questions or answer them rationally to understand the duty of speaking the truth. In *Inspector General of Police v SuaraSunmonu*[21] the appellant was charged with indecent assault[22]and a child attempted to give evidence for the defence, but the trial magistrate refused to allow the child to give evidence on the ground that the child did not understand the nature of an oath. In deciding this case, Ademola C.J. (as he then was) unfortunately relied on an English case without referring to the Evidence Act which contains abundant provisions to cover the point. He said:

> Now the matter of a child who does not understand the nature of an oath was dealt with in the case, *R v. Southern*[23] it is clear

[21] (1957)WRNLR 23

[22]Contrary to section 360 of the Criminal Code.

[23] (1930)22 Cr.App R6

from this case that the evidence of a child would be properly admitted if the court is satisfied that the child does not understand the nature of an oath. Before admitting such evidence, however, it is the duty of the Judge to satisfy himself that the child is sufficiently intelligent to appreciate what he was say

ing an d un der sta nd the dut y of spe aki ng the tru th.

The judge must record a note to the effect that in his opinion the child is capable of understanding the nature of an oath: *Okoye v. The State*. If a judge is of the opinion that the child is capable of understanding the nature of an oath, it is not necessary for him to carry out any preliminary investigation in that regard: *Okoyomon v. The State*.

CHAPTER FOUR

4.1. Effect of Competency and Compellability in Sustaining the Credibility of Child Testimony

In the recent time, crime against children has been in the increase, whereupon children now flow into the court to testify as a witness or a victim. In an effort to ensure that children in such position receives the much needed assistance and help to overcome the trauma and develop well, both local and International Human Right Organizations provides law for the protection of the Right of a child victim or witness. Article 1 of Child Right Act Provides that;

> In all actions concerning child, where undertaken by court of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration.

In like manner, the United Nations in Vienna Convention on Drugs and Crime model law on justice in matters involving child victims and witnesses of crime as outlined in Article1 that;

> Every child, especially child victims and witnesses in the context of the (Law) (Act) has the right to have his or her best interest given primary consideration, while safe guarding the right of an accused or convicted offender.

The protection of the best interest of a child, is not absolute, the accused or victim shall not be prosecuted at the interest or expense of one another. In *Okoyomon V.The State*, The accused was held as having unlawful carnal knowledge with a girl under (14) years without her consent. The Supreme Court considered the whole evidence and finally found that there was no evidence of penetration just because the complainant said that the accused inserted his penis into her vagina. The

apex court however convicted the appellant of a lesser offence of attempted rape. Consequent upon the above fact, the Model Law also provides in section 21 that competency examination of a child may be conducted only if the court determines that there are compelling reasons to do so. The reasons for such a decision shall be recorded by the court. In deciding whether or not to carry out a competency examination, the best interest of the child shall be a primary consideration. In subsection 2 of Article 21, it flows that the competency examination is aimed at determining whether or not the child is able to understand questions that are put to him or her in a language that a child understands as well as the importance of telling the truth. The child's age alone is not a compelling reason for requesting competence examination. It is however a settled Law in Nigeria that competency is not a matter of age under section 175 of 2011 Evidence Act, Section 209 of same Act gave relevancy to age. Age is used under section 209 of Evidence Act to draw a clear distinction between sworn and unsworn testimony of a child. Those eligible to give evidence on oath, are those (14) years and above. While below 14 years shall be given unsworn evidence which must be corroborated. While we agree that the weight given to the testimony of a child shall be in accordance with his or her age and maturity. Should age be running factor capable of preventing children who can give important evidence from testifying?

Article 20 (1) of the Model Law provides that a child's testimony shall not be presumed invalid or untruth-worthy by reason of his or her age alone provided that his or her age and maturity allow the giving of intelligible and credible testimony. This is at variance with Article 22 of the Model Law which disagrees with the demarcation place on sworn and unsworn testimony of a child in

Nigeria under section 209 of the Act.

The Article provides that;

> If the child is unable to understand the consequences of taking an oath in such cases the presiding magistrate or judge may offer the child the opportunity to promise to tell the truth. In either event, the court shall never the less hear the child's testimony.

In Nigeria a child below (14) years cannot give evidence under oath, it is immaterial whether or not the child understand the nature and consequences of oath, making meaningless the intellectual development of a child below 14 years.

The above analysis are buttressed here such that whenever an incompetent child is being compelled to give evidence in court, such evidence will be a nullity. In *Okoyomon's* case.[1] It was charged with the offence of rape under sec. 299 of the Criminal code law of the Western state. The complainant, R gave evidence as to how O lured her to a spot on the pretext that he was going to show her a place she could readily fetch firewood and thereafter O forcibly had sexual intercourse with her. R was in company of another girl C, at the time the incidence occurred.

The complainant was between the ages of 11-12. Her evidence was substantially confirmed by C who was about the same age. The doctor who examined the complainant found that R's hymen had been torn, that this was consistent with having had sexual intercourse and that she had venereal disease, the doctor however, did not examine the accused so as to ascertain whether he too had a venereal disease but merely asked the accused who denied the charge. Nonetheless, the trial judge convicted him.

On appeal to the supreme court, it was argued amongst other grounds that the trial judge erred in law when he failed to carry out the preliminary test as to whether both R and C understood the nature of an oath and if they did not, whether they posses sufficient intelligence to justify their giving unsworn evidence under section 209(1) of the Evidence Act. Rather than deal with the fundamental issue the Supreme Court, it is submitted that the Supreme court merely treated the evidence of R and C as sworn when he said:

> learned counsel for the respondent submitted that

[1] *Ibid.*

t the trial judge was right in admitting the evidence of the two girls... . And that there was nothing in section 209 (i) Evidence Act, which requires that a trial judge should carry out preliminary investigation on which counsel for the appellant had earlier insisted as a conviction precedent. We observed

that the real point is that section 209(1) deals with the unsworn evidence of a child, whereas in the instant case, we are dealing with the sworn evidence of a child testimony in Nigeria Evidence Act.

It is submitted that the underlined part of the diction of the Supreme court is not only inaccurate but it is also a circumscribed interpretation of the purport of section 209 (4). The same problem was considered some 16 years later, by the Supreme court and the court was inclined to treat the failure as a mere irregularity when it held in the case of *Okon v The state* (supra) that:

> where an irregularity has occurred in the tak

ing of the evidence of a child, the correct approach is not to expunge it but to see whether it has been corroborated by other evidence implicating the accused.

The decision of the Supreme Court in all the above cases was premised on the findings that the trail court merely failed to carry out the test as to the child's understanding of the implication of an oath alone. It may be asked whether the Supreme court would still regard the unsworn evidence of a child given without the preliminary test also as an irregularity which can be cured by the availability of a corroborative evidence. It is submitted that it would be difficult to justify such an approach and in fact it would be dangerous to regard the testimony of such a child as evidence of all since it has not been ascertained whether it is possessed of sufficient intelligence to justify its reception. It is further submitted that it would be safer not to treat the testimony of a child given without the preliminary test as evidence at all since the condition precedent to the acceptance of the child's evidence as sworn has not been fulfilled. The dictum of Eso JSC in the case of *Okon v State* appears

to be consistent with treating the failure to carry out the preliminary test as rendering the evidence as a nullity when he said thus:

> What is certain is that he was not examined as to whether or not he appreciated the nature of taking oath. Nothing there is on record to show the opinion of the court as to the witness understanding the duty of speaking the truth. With the evidence of this witness suspect and d with thi

s incapacity as to age not excluded it would be unsafe to convict the 4th accused (3rd appellant) as had been done by the court.

According to the above dictum, the purpose of the test is to remove the child's incapability to testify and if this incapability has not been removed, it seems difficult to treat the testimony as evidence. Such an approach would find support in the approach adopted by the Zambia Court of Appeal in *Dakar and ors v The People* where the court set aside the conviction because the trial court failed to carry out the preliminary test.

4.2. Credibility of Witness /Competence and Compellability of Child Testimony

Several principles have been established in respect of this topic. The basis of competence and compellability is to determine those persons who have the legal capacity to give testimony. The importance of legal suits cannot be over emphasized thus, the credibility of witnesses is essential to the determination of lawsuits. The courts also take an active part in matters affecting the competency and compellability of witnesses. In the case of children, the court is expected to carry out

examinations though it is not provided by statutes, it is a practice formulated by the courts.

The essence of these tests is to determine the capacity of a child witness, the court is similarly not expected to compel an incompetent witness thus the court is required to determine what persons are competent. In accordance with section 175(1) of the Evidence Act 2011, certain categories of persons are incompetent and non-compellable. The law also confers a special status on some persons as a result of which they are not compellable. The courts are powerless to compel the appearance to court such persons include spouses of an accused person. The testimony of witnesses can be classified into sworn and unsworn, the essence of this distinction is to determine the weight which can be attached to this evidence for instance, the unsworn evidence of a child requires corroboration as it is dangerous to convict based on the uncorroborated evidence of a child of tender years.

Furthermore, the law has provided a clarification of persons and it has provided for the treatment of their testimonies accordingly. The effect of this clarification is to avoid confusion and complexity of testimony. It further ensures a straightforward approach to treatment by providing guidelines as well as principles to which the courts must abide in the dispensation of its functions.

4.3. The Position of the Evidence of a Child to Prove a Fact

A proper examination under this topic will require further distinction between

(i) the sworn evidence of a child

(ii) the unworn evidence of a child.

By virtue of section 209 (3) there is no provision under the Act to prevent the court from acting on the unsworn testimony of a child and relying on it alone in finding or disproving liability on the unsworn

evidence of a child without corroborative evidence. In Criminal cases, the subsection provides that in order to find criminal liability the unsworn evidence of a child must be corroborated by some other material evidence in support thereof implicating the accused such material evidence referred to in this subsection must be on which has come from an independent source. The evidence of one single witness can provide the corroboration required. Thus, in the case of *R.v. Francis Kufi,* a girl aged 10 was however, after the normal examination, held to be incapable of understanding the nature of an oath and was allowed to give evidence not on oath as she was found to be sufficiently intelligent to understand the duty of speaking the truth. In this case, it was held that the admission of the offence (of unlawful carnal knowledge of the girl) by the accused to the father of the girl provided the required corroboration.

However, the position is not entirely clear as regards the sworn evidence of a child. In *R v Campbell*, the court of Criminal Appeal in England held that the judge sitting with a jury must warn the jury and if sitting alone must war itself of the danger of convicting on the uncorroborated evidence of a child although a conviction could be had if the court is convinced that the child was telling the truth.

The position is not entirely clear in Nigeria, in fact the Supreme Court appears to be divided on this issue and therefore, it is unclear whether failure to administer the warning is fatal or the requirement of warning is merely directory. In *Shazali v The State*[2], *Agbaje JSC* delivering the lead judgement of the Court took the view that what is required is a warning and that requirement of warning itself is not mandatory but is only desirable so that a conviction would not necessarily be set aside merely because the trial court failed to

[2](1988) 5 NMLR Pt. 164.

administer the warning particularly if the circumstances show that there has been no miscarriage of justice. *Karibi Whyte JSC* appears to be of the same view when in delivering its judgment in *Shazali v The State* (supra) said:

> It was contended that the learned trial judge was wrong in acting on the evidence of the sworn evidence of tender age without administering the warning particularly if the circumstances show that there has been no miscarriage of justice. *Karibi Whyte JSC* appears to be of the same view when in delivering its judgment in *Shazali v The State*[3] ..... ruled on the attitude of a

[3] (1946)NMLR 185 at 187-188

trial judge before whom children of tender age give evidence. It was said that a person cannot be convicted on the unsworn evidence of a child of tender years without corroboration. Where the evidence of a child is in respect of an accused even if sworn corroboration is generally required. The general principle is in

favour of a caution which requires the judge to be satisfied that the evidence of the child is free

Although the supreme court in *Akpan v The State* (supra) in reaching its decision on the treatment of the sworn evidence of a child, purported to be following the decision the court of Criminal Appeal in *R v Campbell* (supra) where Lord Goddard said that: 'This warning should be given where a young boy or girl is called to corroborate the evidence either of another child sworn or unsworn of an adult.' The rationale for requiring corroboration is to show that the testimony of the witness who is to be corroborated is probably true and that is reasonably safe to act upon it. No amount of precaution is too much in criminal proceedings since the liberty of the subject is at risk, it would seem desirable to treat the requirement of warning on the need for corroboration as obligatory.

The conclusion which can be drawn from a consideration of the relevant cased above can be summarized as follows:

i) The unsworn evidence of a child requires corroboration as a matter of law. Section 209(3)

ii) As a matter judicial practice the sworn evidence of a child requires corroboration, when the child is the accuser.

iii) As a matter of judicial practice, it is desirable to warn of the danger of convicting on the sworn evidence of a child

without corroboration although a failure to do so will not necessarily result in an acquittal, if although a failure to do so will not necessarily result in an acquittal, if the court is satisfied that there's no miscarriage of justice.

Also, based on the decision of the House of Lords in England in *DPP v Hester*[4], the view was taken that where the evidence of a child requires corroboration it cannot be corroborated by the evidence of another child's whether sworn or unworn evidence which in turn requires corroboration. In *DPP v. Hester*, the House of Lords in England held that there was no reason why the unsworn evidence of a child cannot be corroborated by the sworn evidence of another child since what is required by section 209(3) is that unsworn evidence must be "corroborated by some material evidence in support thereof implicating the accused and that this means an evidence admitted otherwise than by virtue of section 209(1) and since the sworn evidence of a child is admitted, it could therefore corroborate the unsworn evidence of another child.

[4] (1973)AC 296.

CHAPTER FIVE

5.0 Conclusions

5.1. Summary

The thrust of this study has been to examine the competent and compellability of a child Testimony under the Nigeria Evidence Act. In other words, it focuses on the competency and compellability of a child to give testimony before Nigerian courts. This was done in five chapters. Chapter one dwelt on the background of the study, problem under investigation, aims and objectives of the study, research method, and significance of the study, scope and limitation of the study, synopsis of chapters then, followed by conceptualization of terms having peculiar meaning.

Chapter two dwelt on the definitions and principles relating to competence and compellability of child testimony, oat taking, the provisions of the Evidence Act thereon and the exceptions to the general rule. Chapter three explains the testimony of a child, who a child is in law and the conditions for the admissibility of his evidence. Chapter four deals with the effect of procedure for obtaining child testimony, credibility, challenges and resolutions from local and international conventions while chapter five dwells on the summary, conclusion and recommendations to strengthen competency and compellability of child testimony before the Nigerian courts.

5.2. Recommendations

It is suggested that our court in exercise of their inherent powers should offer similar protection to children who testify as witnesses Presently, the non-protection of these children, who break down out of fright on sighting the accused in the dock, result in the acquittal of many guilty accused persons.

Also, despite the fact that most children or child of tender years that give testimony under oath knows the implication of telling the truth under an oath yet they still continue to give unrealistic evidence.

In spite of the fact that the law under our Evidence act has made enough provision for a child to give unsworn testimony in court, it is believed that such testimony in court by children of tender years is unreliable. Most of the children do tell lies to the court though it might not be as a result of other supervening forces such as a promise of threat from a person in authority that if a child could lie or give a contrary statement that such a child will be rewarded.

A good and conducive atmosphere must be created when a child is called to give evidence therefore during preliminary investigation nothing should be done outside the court as by the statute. Also, the issue of police interrogation should not be meted out on a child as their testimony may be influenced just by the look of a policeman. Lastly, the court should guide against brutal and unfriendly counsel which may be too hash on the child in an attempt to extract testimony from him because by nature of the children's mental and physical disposition, their testimony can be tainted when they are confronted with an unfriendly counsel. What should be required instead is that child be sufficiently intelligent.

As a result of this need to protect children who testify in court in England and other common law countries have by means of legislation put in place certain strategies to protect child witnesses. The use of television screens, live video links, close circuit television are examples of some strategies adopted by legislation for such protection.

Also, section 32(1) Criminal Justice Act 1988 provides for evidence to be given through a live television link by a witness who is under the age of 14

years in cases involving violence or sexual offences. Evidence by a child in this circumstance is done from a room near the courtroom. The child answers questions put to him by the counsel or the judge from the adjoining room via the monitor in the court room. The child could also have a monitor on which the questioner can be seen. Most times the child is accompanied by a social workers as appointed by the Judge.

In spite of the loopholes in respect of the topic, Competent and Compellability of witnesses in respect to child testimony, the courts have been able to ensure a degree of stability by providing guidelines and principles to cover these loopholes. The only shortcoming is that there is lack of uniformity.

There is no doubt that judges should be very careful before convicting an accused on testimony given by children. But the judge should also note that in the process of trying to be careful in giving judgment as regards children testimony, there should be as much as possible no miscarriage of justice. When all necessary precautions have been taken, a child's testimony would certainly be as reliable as that of an adult.

5.3. Conclusions

The vulnerability of children can have ripple effect on their testimony. They can be easily intimidated by mean looking counsels or loved ones. Yet, the innocence of a child makes it desirable for the court to believe such testimony.[1] In the words of *Antoine de Saint- Exupery*[2]- 'grown-ups never understand anything for themselves and it is tiresome for children to be always and forever explaining things to them'. The child requires protection from the court before, during and after giving the corroborative evidence. Hence the use of electronic gadgets, like live video links,

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conference calling and close circuit television can be employed so that the child would not be intimidated.[3] It is expedient to employ this especially in matters involving sexual assault of a child by the parent or guardian. The sanctity of childhood must be left untainted, and never deflowered.[4] The need to take precaution should never pull the wool over the eyes of the Judge who should only alight at Justice Bus-stop whatever the transport-fare or duration may be.[5]

The landmark innovation in the Evidence Act serving as the bedrock of adjudication has created some certainty with respect to the testimony of a child testimony. This innovation was not entrenched into our law in isolation.[6] It can be said that the falcon has finally heard the falconer! But we still await this raging wind of 'change'[7] to sweep clear all obsolete acts in our statute books, and our polity as a whole.

It must be said that in his duty to evaluate evidence, a trial judge as of facts dominates the province of the assessment of probative value to particular pieces of evidence tendered before him and he is perfectly entitled in the process to give weight to one piece of testimony and attach no weight to another.[8] Succinctly, the uninducted, the inner bar and the outer bar must feed the bench

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