COMPETENCE AND COMPELLABILITY: IS CHILD EVIDENCE ADMISSIBLE?

BY

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MATRIC NO: 06/40IA028

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BEING A LONG ESSAY SUBMITTED TO THE FACULTY OF LAW, UNIVERSITY OF ILORIN, ILORIN, NIGERIA, IN PARTAIL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF BACHELOR OF LAW (LL.B HONS.) IN COMMON LAW.

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CERTIFICATION

This is to certify that this long essay: COMPETENCE AND COMPELLABILITY: IS CHILD EVIDENCE ADMISSIBLE? was written by AFOLABI IKEOLUWA ADEOLA. It has been read and approved as meeting part of the requirements for the award of Bachelor of Law (LL.B Hons.) Degree in Common Law in the Faculty of Law, University of Ilorin, Ilorin, Nigeria.

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ABSTRACT

Determination of lawsuits is highly dependent on these availability of evidence. In law, every person is a competent witness in any judicial proceeding unless otherwise prevented by the law. And every compellable witness is a competent witness as the court will not compel anyone to give evidence, if he is incompetent to do so.

However, it is not every competent witness that is compellable in court. Competence does not imply ‘reliable,’ thus a witness may legally speaking not be able to give evidence for several reasons. For example, the witness may be a child who is too young that he/she cannot understand the questions put to him or give rational answers to them. 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 long essay therefore aims at analyzing the competency and compellability of a child to give evidence as a witness with respect to how it affects availability and admissibility of evidence.

Chapter one of the long essay which is introductory explains the objectives, focus, extent and limitation of the study as well as the methodology employed in carrying out the research. Chapter two gives an insight as to the elements of the topic by explaining what Competency and Compellability of a witness imply. In chapter three the long essay considers who a child is in law and the conditions for the admissibility of his testimonies. While chapter four sheds light on issues relating to compellability of a child witness and the effect of compelling an incompetent child witness. Lastly, chapter five summarizes the findings of the research and made far reaching recommendations were offered as a forward It is strongly believed that if recommendations made herein are taken seriously and reflected in proposed amendment to the Act, the would go along way in improving the state of the law in that direction.

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DEDICATION

This long essay is dedicated to the Almighty God. To Him be the glory for His Mercies endures forever. I give thanks to the Lord, the Author and Creator of good things in my life; for being with me from the beginning of this course to the end.

ACKNOWLEDGMENT

ó*May your road be rough'* a statement by Tai Solarin (1982).The journey to the stage of producing this project was indeed very rough coupled with the dotted periods of confusion, but because like Tai Solarin, I believe that there is no smooth road to success, so it came as a challenge.

My random musing must therefore give way to the more important task of expressing my appreciation to all those who in one way or the other contributed to the success of this work.

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To the crew of Class of 2011, without whom this voyage would not have worth the while. Their competitiveness brought out the best in me.

Finally, I wish to acknowledge the contribution of those whose name have not been mentioned here, it is due to lack of space and not of appreciation. Some other times, of course, that is the way life is, do some and leave some. Thank you very much.

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- Penal Code (Northern Nigeria Federal Provisions) Act Cap P3 LFN 2004.
- Supreme Court Ordinance No.11 of 1863.

LIST OF ABBREVATIONS

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
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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
W N L R:	Western Nigeria Law Reports.
W R N L R:	Western Region of Nigeria Law Reports

CHAPTER 1

GENERAL INTRODUCTION

1.1.0: INTRODUCTION

Issues relating to competence and compellability of child evidence in Nigerian law of evidence are though becoming a recurrence and popular with the availability of case laws and statutes regulating the subject matter, yet it is not out of point to assert that it has not received its deserved attention[1].

However, the law of Evidence remains the channel for proper regulation of the legal process. And evidence has been defined as:

> Any specie of proof or probative matters legally presented at the trial of an issue, by the act of the parties and through the medium of witness records, documents, exhibits, concrete objects for the purpose of inducing belief in the mind of the court or judiciary as to their contention.

[1] Black H.O,Blacks Law Dictionary(6th ed.Paul Minn West Publishing Co,1979)689.

At Common Law, it is not all evidence given in court that may be held admissible, for instance before a child can give evidence which will be admitted, such child must be and compellable witness. Therefore, a proper attention will be given to the definition and meaning of competence and compellability, its nature and principles and the position it occupies in the law of evidence.

Also worthy of addressing is who child is in law? And the conditions which such child must satisfy before he becomes a competent and compellable witness. Importantly, as giving of evidence by a child may have some negative effects, it has been advocated that there should be a systemized way of receiving a childôs evidence with proper consideration of the situation of the child and determination of whether the child is induced by a third party.

Also, attention will be paid to the effect of giving evidence in court and why most children may feel reluctant to give evidence in court as well as

the issues risk of hysterical invention, childish imagination and collisions which may be inherent in the evidence of a child in Nigerian courts.

1.1.0: BACKGROUND TO THE STUDY

This long essay focuses on competency and compellability of a child to give evidence before Nigerian courts. The meaning, general principles, importance, provisions of the Evidence Act as well as the exceptions to the general rule in Section 155(1) of the Evidence Act[2] would be examined.The essay would also explain who a child is in law, the testimony of such a child in civil and criminal proceedings as well as the conditions for the admissibility of such evidence. More importantly, the long essay examines the effects and defects of wrongfully admitting evidence by a child in court.

[2] Cap E14 Laws of the Federation of Nigeria,2004.

1.2.0: OBJECTIVES OF THE STUDY

The main reason for venturing into the subject mater of this long essay is to bring out and explain the procedure and practices of the Nigerian courts in relation to the admissibility of child evidence as well as the importance and nature of competence and compellability as in relation to child.

The long essay would also appraise and analyze the role of and what should be the role of the courts in ensuring that the evidence of a child is credible enough to be admitted and the conditions. It is hoped that the reader of the long essay would on careful perusal of the essay appreciate the competence of a child in law.

1.3.0: FOCUS OF STUDY

This long essay explains competency and compellability as regards child evidence 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 competency and compellability of a child and the methods to be adopted.

1.4.0: SCOPE OF STUDY

This long essay is writing basically within the ambit of its title. Chapter one is on the general introduction which includes background of the study, objectives of the study, focus of study, scope of study, research methodology adopted, and review of related literatures as well as definition of terms having peculiar meaning. Chapter two dwells on the definitions and principles relating to competence and compellability, the provisions of the Evidence Act thereon and the exceptions to the general rule.

Chapter three explains the evidence of a child, who child is in law and the conditions for the admissibility of his evidence. Chapter four deals with the implication of uncorroborated evidence of a child, effects of wrongful admission or rejection of a child evidence, the importance of competence and compellability and the negative effects of our court process on the child witness while chapter five dwells on the conclusion and

recommendations to strengthen competency and compellability of child evidence before the Nigerian courts.

1.5.0: METHODOLOGY

This essay is basically library based. The method adopted for the study is descriptive analysis and general appraisal. And for a thorough exposition of the subject of the work the essay would source its materials from both primary and secondary sources of law.

The primary sources include basically the Evidence Act (now Cap. E14 LFN, 2004), 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.

1.6.0: LITERATURE REVIEW

The fact that this area of the law is not new can not be denied as there are sufficiently available texts and learned journals articles in which opinions

have been expressed on almost every aspect of the law in this area in Nigeria. It is not however, being suggested that this long essay would be copying the works of others in to this long essay, but to find a strong foundation for the present presentations and to examine earlier opinions. After all, precedents thrive well in law. And more so, it is important to add that there are scanty or virtually no available literatures exclusively on the topic as a basic theme. Hence, there is no one text dealing exclusively with the subject of this study.

As a result of the above, apart from the *Evidence Act*, the *Children and Young Persons Act* whose provisions will be useful in defining who a child is, worthy of reference is also the Criminal Procedure Act[3] other materials to be appraised include the works on law of evidence of learned authors like Aguda on Law relating to evidence in Nigeria, Christopher Allenôs *Practical Guide to Evidence*, Richard May *on Criminal Evidence,* Peter Murphy *Murphy on Evidence*, Edward Phillips *Brief Case On Law Of Evidence*, Afe Babalolaôs Law and Practice of Evidence in Nigeria.

[3] Cap C41 Laws of the Federation of Nigeria,2004.

Similarly, opinions expressed in the class lectures and notes would be a subject matter of close scrutiny. Finally, it is importance to add that because of constraints of time and space, not all the various material source employed in this work are fully reviewed except those that are of direct importance to the subject matter of this work.

1.7.0: CONCLUSION

In conclusion, there is a presumption that everybody has the capacity or is competent to give evidence in court. This presumption is rebuttable where a person is prevented from understanding questions put to him or giving rational answers to those questions by reason of tender age or disease of the body or mind. If a judge is in the opinion that a child is capable of understanding the nature of an oath and the duty of speaking the truth, he must warn himself so as not to judge based on the uncorroborated evidence of an incompetent child.

CHAPTER 2

COMPETENCE AND COMPELLABILITY OF A WITNESS

2.0.0: INTRODUCTION

The adversary system remains the heart beat of our judicial process. Orality of proceedings, be it civil and criminal and the use of witnesses in proof or disproof of cases are the key features of the adversary system. As rightly observed, ―the most common vehicle for proof is the evidence of witnesses[4]. Thus, testimony of a witness is only competent to be admissible if that witness is competent to testify. Thus, there are rules regulating the competence and admissibility of witnesses as well circumstances under which such competent witness may be compelled to testify.

A preliminary point worthy of note is that many potential witnesses have the tendency of shunning the court proceedings because the failure of the

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

legal or judicial system to protect them against intimidating and incriminating questions during cross-examinations. Potential witnesses are therefore not easily forthcoming unless they are subpoenaed. It is not gaining saying to therefore argue that, the court as well as the parties are in some instance deprived of the testimonies of most witnesses who are otherwise indispensible in the proper determination of the case.

Thus, a writer has presented the plight of witnesses under the adversary system thus:

> 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 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 tortureé 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 ashamedé 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[5].

[5] AnthonyT, The Evidence of Children,Law and Psychology(Cavendish Publishing Ltd London)1988

2.1.0: MEANING AND PRINCIPLES OF COMPETENCE AND COMPELLABILITY

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[6] 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. The unreliable status of convicts and the need to avoid tempting parties to

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

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 favor[7].

The above Judicial pronouncement finds written expression in section 155(1) of the Nigerian Evidence Act which provides:

> All persons shall be competent to testify unless 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.

[7] See *Exparte Fernandez*[1861] 10 CBNS 39,*Hoskyn v Commisssioner of Police of Metropolis*[1899] AC 474

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 witnessôs 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.

2.2.0: PROVISIONS OF THE EVIDENCE ACT ON COMPETENCE AND COMPELLABILITY

Section 155 (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 questions put to them, or from giving rational answers to those questions by reason of tender years, extreme old age, disease of the body or mind, or any other cause of the same kind.

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[8]é

Thus, in *Mbele v The State*[9], 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[10]. 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

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[8] Aguda T.A, Law and PracticeRelating to Evidence in Nigeria(2nd ed.MIJ Publisher Ltd ,Lagos 1998)299.

[9][1990]4 NWLR(Pt 145)484.

[10] *R v Surgenor* 27Cr A.R 175.

before the panel of jury. In *R v Dunne*[11], 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 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 Suara Sumonu*[12], 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

[11] 21 Cr. A.R 176.

[12] (1957)WRNLR 23.

> 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[13], they are however 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;ôForeign envoy and every consular officer, the members of the families of their official staff, shall be accorded immunity from suit and legal processõ

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

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

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.

2.3.0: EXCEPTIONS 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:

A) 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[14] and while the case of *Okoye v The State*[15] supports the position that a person of 13years is a child, while the decision in *State v Njokwu Obia*[16] 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*[17], 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.

[14] Cap C43 LFN 2004.

[15] [1972]1 All NLR 500.

[16] 4 ESCLR 67.

[17] [1988]1 NWLR(Pt.76) 172.

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 155, 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.

b) Old persons and persons suffering from disease of the body or mind or other afflictions.

By virtue of Section 155(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 prevented form understanding questions put to him by virtue of the said disease.

The procedure of determining this is have to be 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 155(2) 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 156 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.

c) Evidence of spouses.

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[18]. 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 favor

[18] Section 6(2) of the Evidence Act.

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[19]. But the mere fact that the witness is sworn on the Quran has been held insufficient to rebut presumption of a monogamous marriage between that witness and the accused[20].

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

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

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

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.

2.4.0: CONCLUSION

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 cannot be compelled. A defendantôs spouse is competent to give evidence for the prosecution, for the defendant and for any co-defendant. A defendantôs 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 heôs 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[21] for giving unsworn evidence.

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

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.

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CHAPTER 3

THE EVIDENCE OF A CHILD

3.0.0: INTRODUCTION

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.

It is to be noted 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 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 or to answer them rationally, then the child cannot be a witness at all in the case. But if the child passes the test, he is

submitted to a further test for the determination of a further question whether he is in the section 155(1) Evidence Act or in the opinion of the Court able to understand the nature of an oath. This question is also determined by the Court by putting questions to the child as to the nature of an oath. He is asked about God and what will happen to someone who tells lies after being sworn. If he fails in this respect, he will nevertheless be able to give his evidence but will not be sworn, provided he has passed the first test under section 155(1) and understands the duty of speaking the truth (section 183) such unsworn testimony is admissible evidence as in the case of the sworn testimony of adults. Section 183(2) The question whether a child understands the duty of speaking the truth cannot be determined outside the Court or after the child has given his evidence.

In *William Omosivbe v Commissioner of Police*, Kester J. said:

> There was nothing on the record to show that an investigation was first made in court to justify admitting the childôs evidence on oath. This is a serious omission. The fact that in his judgment the learned magistrate said that after hearing the evidence of the child in the witness box, he came to the conclusion that she may be mentally capable of understanding and giving an intelligent account of the case to his satisfaction, cannot justify his condition precedent nor lure the irregularity.

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 or to understand or answer them rationally or the understand the duty of speaking the truth.

3.1.0 A CHILD UNDER THE LAW

The concept of a child under Nigerian law is clear, simple and based exclusively on calendar age. From the provision of the Children and Young Persons Act[22], 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.

[22] Cap C24 LFN 2004.

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 ócháldô it may be imprudent to apply any hard and fast rule as was held in the case of *John Okoye v The State*[23] . 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 ó any boy or girl under 14years of age is considered a childô. This provision was buttressed by the case of the *State v Njoku Obia*[24] where Araka J. (as he then was) held that a person of 15years of age is no longer of tender years

[23] (1972) 12 SC 21.

[24] 4 ESCLR 67.

or a child who cannot understand the nature of an oath or the duty of speaking the truth.

Section 154(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, whether of body or mind or any other cause of the same kind.

It follows therefore that a child must satisfy the conditions of section 154(1). Also, section 182(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 opinion 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 v Wallwork*[25]Lord Goddard C.J deprecated the calling of a 5year old girl, in an unsuccessful attempt to have her give evidence of alledged acts of incest by her father ,and hoped that it would

[25] (1958)42 Cr.App R153

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 expressing the matter is that the younger the child, the more the court should approach the issue of competence with caution, and subject the childôs 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.

3.1.2.0 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 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*[26]. 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 Courtôs opinion, he understands that it is his duty to speak the truth and has sufficient understanding to justify his evidence being heard[27], 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* (1977) 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 speak the truth. The accused was thereby convicted.

[26] (1977) 1 WLR 234.

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

3.1.3.0: 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 persons Act 1983, section 38(1) provided;

> Where in 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 ñtender yearsò. 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 can not be convicted of perjury unless he has been lawfully óswornô a new offence akin to perjury was created by section 38(2) children and young persons 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 childôs evidence in criminal proceedings shall be given unsworn

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

In this section, ôchildô 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 childôs apparent ability to express himself 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.

3.2.0 ADMISSIBILITY OF THE EVIDENCE OF A CHILD

It is the duty of the Court in all proceedings which require the deposition of a childôs evidence in order to resolve a matter to make a preliminary inquiry into the level of the childôs understanding. Even in cases, whereby the child is legally of age to give sworn evidence he may still be considered too immature to understand the significance of taking an oath.Therefore, it is right in saying that questions relating to the level of a childôs competence are questions of fact satisfiable only in each particular case.

Justice Akinola Aguda correctly interpreted the provisions of section 154, section 179 and section 182 of the Evidence Act in so far as they relate to the taking of the evidence of a child where he stated that óA child who is prevented from understanding questions put to him or giving rational answers thereto by reason of tender years is not a competent witness.ô

The first point to note is that there is no age limit stated therefore, it is 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 the 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 arrives at the conclusion that the child is unable to understand the questions or to answer them rationally, then the child cannot be a witness at all in the case

3.3.0 THE FULL INQUIRY TEST

A major point to note is that no age is stated before a child could be competent to give evidence and 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.

3.3.1.0: PRELIMINARY QUESTIONS

Once a witness is a child, by the combined effect of sections 155 and 183(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 155(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 183(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 *Asuquo Eyo Okon 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*[28], it was held that the conditions for receiving the evidence 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.

3.3.2.0: 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

[28] (1994) 12 NWLR(Pt.53)1 at 6-7.

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 submitted 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 e.t.c. 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 182(1) such unsworn testimony is admissible evidence as in the case of sworn testimony of adults section 182(2). It appears that section 182 is identical with the provisions of section 18(1)

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 oath. 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 childôs 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*[29] and retreated in the leading case of *Ngwuta Mbele v State*[30].

Except for *Ngwuta Mbele's* case, in each of the two former cases, the child witness was sworn before giving evidence 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.

[29] (1973)NMLR 292.

[30] (1990) 4 NWLR(Pt.145)484.

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 course section 179 Evidence Act.

However, in *Mbele'*s case, the trial Judge of first instance, from records did point out accordingly that, Nwanko Mbele (Prosecution Witness 4) was examined by him in line with sections 182 and 154 ñshe 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 is possessed of sufficient intelligence to justify the reception of her evidence.

The Supreme court rejected the submission that the learned trial 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.

3.4.0: THE ROLE OF THE COURTS IN ADMITTING THE EVIDENCE OF A CHILD.

The Court is by virtue of section 155, 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 answer such questions rationally. That is to say, does he understands the duty of speaking the truth and the nature of oath taking?

Whether a child will testify at all or under oath or give unsworn testimony will depend on the result of the above tests. Judicial guidance exists in the decisions of the Court of Appeal and the Supreme Court on the obligations of a trial judge when faced with a child witness.

According to Muktar J.C.A in *Ogunsi v State*

> Before a child of tender years evidence is taken, the Judge must ask certain questions like her age or whether she understands the questions put to her. If the judge is satisfied that she understands the questions put to her then he proceeds to enquire from her whether she understands the essence or implication of oath taking. If she understands, she will be sworn and her evidence will be taken on oath. If she does not, then, she gives an unsworn testimony. If the Judge is satisfied with the childôs answer that she quite understands the reason why she is in Court and is intelligent enough to answer questions put to her intelligently and rationally, then she

> becomes a competent witness and her evidence is admissible and could be relied upon.

It suffices to state also, that where the child gives evidence on oath, the evidence is treated as that of an adult and except the fact in issue expressly requires corroborative evidence.

It is this clear that a Judge faced with the testimony of a child witness has two vital investigations to make namely;

1.) Is he or she possessed of sufficient intelligence to justify the retention of his or her evidence that is: does he or she understands the duty of speaking the truth.

2.) Does he understand the nature of an oath? It is only after the questions have been answered that an oath can be lawfully administered to the child.

The application of the above preliminary tests has generated divergent views. It used to be thought that the performance of these tests, in open court before the reception of the admissibility of the evidence of the child.

In *Omosivbie v COP*[31] the evidence of a 7years old girl was used to convict the accused. She had being allowed to give evidence on oath without the preliminary test being carried out.

The case of *Okoye v The State* and *Okoyomon v The State* are authorities which supports the proposition that a trial court is not bound under section 183(1) to hold and record preliminary inquiry on the competence of a child to give evidence on oath before 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.

Also, as for the relevancy of *DPP v Hester* to the case of Okoyomon v State in which the Supreme Court referred to the English case. In the words of the learned author, Yemi Osinbajo[32] stated that it is doubtful if there is any substantial similarity between both cases. In the latter case, O was charged with rape under section 299 Criminal Code Law Cap 28, Law of Western Nigeria (also applicable in mid-western state) which is not under the preview of section 178(5) nonetheless being a sexual offence.

[31] ibid
[32] Cases and Materials on Evidence Pg 391

The complaint contended that the accused tricked her into the bush on the pretest of fetching firewood to have sex with her forcibly. She was between 11years and 12years of age. Her evidence was confirmed by C (her friend at that time). The medical examiner found her hymen torn which was consistent with sexual intercourse. She also had veneral disease. He however did not examine the accused merely asking him if he was capable of sexual intercourse, the accused denied the charge. The trial judge convicted him. On appeal to the Supreme court, it was argued inter alia that the trial judge erred in law;

> 1)Where he failed to carry out the preliminary inquiry as to Rôs and Côs level of understanding to necessarily stand as witness in a criminal trial.
>
> 2)Whether they had sufficient intelligence to justify their oath on evidence.

The Supreme Court erred in holding that the children were competent to give sworn testimony even where there was no prima facie evidence of a preliminary investigation as was held in *Omosivbe v COP* If a child gives

evidence without the preliminary investigation, the evidence is irregular and it can however be abated.

3.5.0 CONCLUSION

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 Suara Sunmonu*[33] the appellant was charged with indecent assault[34]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. (West, 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:

[33] (1957)WRNLR 23

[34] Contrary to section 360 of the Criminal code.

> Now the matter of a child who does not understand the nature of an oath was dealt with in the case, R v. Southern[35] it is clear 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 saying and understand the duty of speaking the truth.

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 a 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

[35] (1930)22 Cr.App R6

CHAPTER 4

THE EFFECT OF UNCORROBORATED EVIDENCE OF A CHILD.

4.0.0 INTRODUCTION

It is worthy of note that the legal admissibility of a piece of a childôs evidence is one thing, but the weight which the court would attach to such evidence after it has been admitted is quite another thing. Similarly, the competence of a particular child to give evidence in a particular proceeding is different from what weight the court will give to the evidence of such a child witness (even when admitted).

For example, even though as we shall see, a child may be a competent witness to give evidence against an accused person, the court would exercise a great caution before attaching much weight to such evidence.

In general, the evidence Act provides in Sec 91 (1) as follows;

> In establishing the weight if any,to be attatched to a statement rendered admissible by this Act,regard shall be heard to all the circumstances from which as any inference

> can reasonably be drawn as to the accuracy or otherwise of the statement,and particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated,and to the question whether or not the maker of the statement had an incentive to conceal or misrepresent facts..

The issue of admissibility of evidence is for the judge while the issue as to what weight to attach to such evidence after admission is for the jury but since there is not more trial by jury in Nigeria, it is for the court, but even the two overlapped each other[36].

It is safe to say that an evidence of a child which is admitted is sufficient to warrant conviction without more so long as the court has admitted that evidence.

As we have pointed out in *Williams Omosivbe v COP*, where it was held that conviction could be had on the uncorroborated sworn testimony of a child. As regards the unsworn testimony of a child, the Act specifically provides that a person shall not be liable to be convicted of an offence unless if such admitted evidence was corroborated

[36] *Muhammed Lawal Maiduguri v The State* (1969)NMLR 143.

by some other material evidence in support thereof implicating the accused and from an independent source.Sec. 183(3)

4.1.0 COMPELLABILITY OF A CHILD

The Oxford English Dictionary defines Compellability to mean the quality of being compellable, liability to be required to act as a witness regardless of oneôs willingness to do so. Not every competent witness is compellable. A Competent witness may not be compellable on a particular matter. Whether a competent or compellable witness decides to give evidence on a priviledged issue is a matter of discretion such a witness may in such a case claim priviledge as ground for refusing to disclose matters of relevant issue though the defence only relates to issues concerned with the privileged matter, it does not apply to general issues[37].

Thus, the witness is obligated to answer questions on all other matters despite the priviledge.

[37] Nwadialo F. ôModern Nigerian Law of Evidenceô (Ethiope Publishing Corporation,Benin 1989)202.

If a competent and compellable witness refuses to answer questions, he may not be liable for contempt of court. This type of priviledge may arise in a case of marriage i.e spouses cannot be compelled to disclose communications during their marriage[38].

The courts in some cases may be powerless to enforce them to appear as witness such person include sovereigns e.g state executives, ambassadors to foreign states. Priviledge of ambassadors extends to members of their suite, staff of international organizations. Non compellability of sovereigns and diplomat is not absolute as it can be waived. As stated earlier, not all competent witnesses are compellable, sovereigns and state executives are not compellable.

Similarly, husband and wives are not compellable. The law confers a special status on married persons and because of this there is a provision to the effect that spouse cannot be compelled to disclose communication made during the subsistence of their marriage. Section 161 of the Evidence Act states the conditions under which evidence by husband and wife may

[38] Section 163 Evidence Act Cap E14 LFN 2004.

be compelled. Section 164 also states that no communications during marriage shall be disclosed. Section 167 provides that evidence as to affairs of state should not be disclosed except the appropriate permission has been sought.

4.2.0: THE EFFECT OF COMPELLING AN INCOMPETENT CHILD

Whenever an incompetent child is being compelled to give evidence in court, such evidence will be a nullity. In Okoyomonôs case[39], O 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

[39] ibid.

who examined the complainant found that Rôs 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 182(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 the trial judge was right in admitting the evidence of the two girlsé . And that there was nothing in section 182 (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 may observed have that the real point is that section 182(1) deals with the unsworn evidence of a child, whereas in the instant case, we are dealing with the sworn evidence of a child allegedly corroborated by the sworn evidence of another child.

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 182(6).

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 taking 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 childôs 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 infact 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 childôs 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 with this incapacity as to age not excluded it would be unsafe to convict the 4th accused (3rdappellant) as had been done by the court

According to the above dictum, the purpose of the test is to remove the childôs 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.

4.3.0 IMPORTANCE OF COMPETENCE AND COMPELLABIITY

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 capacityto 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 witneses. 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 155(1) of the Evidence Act 1990,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

4.4.0 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 183 (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 n 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, infact 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*[40], 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 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 warning himself as to the danger of relying and acting on such evidence. The court in Akpan v The State[41]é .. ruled on the attitude of a 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 favor 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

[40] (1988) 5 NMLR Pt 164.

[41] (1946)NMLR 185 at 187-188

following the decision the court of Criminal Appeal in R v Campbell (supra) where Lord Goddard said that:ôThis 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 adultô

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.

4.5.0: CONCLUSION

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 182(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 thereôs no miscarriage of justice.

Also, based on the decision of the House of Lords in England in DPP v Hester[42], the view was taken that where the evidence of a child requires corroboration it cannot be corroborated by the evidence of another childôs whether sworn or unworn evidence which is 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 38(2) is that unsworn evidence must be ñcorroborated by some material evidence in support thereof implicating the accused and that this means an evidence

[42](1973)AC 296.

admitted otherwise than by virtue of section 38(1) and since the sworn evidence of a child is admitted, it could therefore corroborate the unsworn evidence of another child.

CHAPTER 5

GENERAL CONCLUSION

5.0.0 CONCLUSION

It is important to note that notwithstanding the expressive terms of section 182 of the Evidence Act there still exist several problems in the area of competence and compellability of the evidence of children. Yet in as much as these problems would become the focus here, it cannot but be mentioned that problems may not arise where it comes to rules against self-corroboration. Given that it is imputed in the sworn evidence of a child that upon the evocation of section 213 of the Evidence Act, a counsel may insist that a childôs earlier statement may infact corroborate part of his testimony. Although the preponderance of learned opinion suggests that the principle applies in Nigeria. Nwadialo Fidelis, puts into serious doubts the accuracy of the provisions of section 213,it is also important to note that section 182 of the Nigerian Evidence Act, like section 38 of the Children and Young Persons Act 1933 of England are impari material. This is

because both will form the parallels of comparison in the due course of this chapter.The Supreme court has erred in holding that the children were competent to give sworn testimony even when there was no prima facie evidence of a preliminary investigation as was held in *Williams Omosivbe v Commissioner of Police*. If a child gives evidence without the preliminary investigation the evidence is irregular and it can however be abated by sufficient corroboration of it,but the question is what character does the evidence assume sworn or unsworn. 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. A preliminary point worthy of note is that many potential witnesses have the tendency of shunning the court proceedings because the failure of the legal or judicial system to protect them against intimidating and incriminating questions during cross-examinations. Potential witnesses are therefore not easily forthcoming unless they are subpoenaed. It is not gaining saying to therefore argue that, the court as well as the parties are in some instance deprived of the testimonies of most witnesses who are otherwise indispensible in the proper determination of the case.

A problem which needs to be taken care of is the need to minimize psychologic A preliminary point worthy of note is that many potential witnesses have the tendency of A preliminary point worthy of note is that many potential witnesses have the tendency of shunning the court proceedings because the failure of the legal or judicial system to protect them against intimidating and incriminating questions during cross-examinations. Potential witnesses are therefore not easily forthcoming

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al harm to children who testify as witnesses. 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. In England, the Department Committee on Offences against Children and Young Persons had cause to observe:

> We have had many cases brought to our notice in which a child or young person has been overcome with distress and fright in giving evidence at the trial or has broken down or even fainted. The result of this distress has sometimes been that no evidence could be obtained and the case has consequently been lost or has had to be withdrawn. Adults may or may not see the need for their evidence to be tested, children definitely will not. It may confusing and distressing to be called a liar[43].

5.1.0 RECOMMENDATION

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 beak 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 evidence under oath knows the implication of telling the truth under an oath yet they still continue to give unrealistic evidence.

Inspite of the fact of the law under our Evidence act has made enough provision for a child to give unsworn evidence in court, it is believed that

[43] (1925)Commd.66.

such evidence 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 reproved by the statute. Also, the issue of police interrogation should not be meted out on a child as their evidence 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 evidence from him because by nature of the childrenôs mental and physical disposition, their evidence 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 has 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, Competence and Compellability of witnesses in respect to child evidence, 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 evidence given by children. But the judge should also note that in the process of trying to be careful in giving judgment as regards children evidence, there should be as much as possible no miscarriage of justice. When all necessary precautions have been taken, a childôs evidence would certainly be as reliable as that of an adult.

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