2011 Evidence Act: Highlights of Changes and Implications for Practical Application*

Introduction

After over five decades of its existence[1], the Evidence Ordinance which later became the Evidence Act, Cap 112 Laws of the Federation of Nigeria 1990 and later still Cap E14 Laws of the Federation of Nigeria 2004 (hereafter referred to as the old Evidence Act) was eventually repealed and replaced by the 2011 Evidence Act (hereafter referred to as the new Evidence Act). The old Evidence Act was derived from the Stephen's Digest of the Law of Evidence, a proposed codification of the law of evidence in England which was not enacted into law in that country but served as the source of the law of evidence of several common law countries, including Nigeria. The Digest itself, according to the author, was based on the Indian Evidence Act of 1872 (a law drafted by the same author)[2].

Given the age of the old Act, circumstances of its origin and some radical developments in the law of evidence which were outside its contemplation, there emerged a continuously widening gap between the Act and practical legal reality thereby rendering a review of the Act inevitable. After series of efforts, a new Act was introduced in 2011. A cursory look at the new Act will show clearly an overwhelming retention of the core of the old Act, radical change to a few provisions and halfhearted modification of others.

In view of the near settled understanding in relation to most provisions of the old Act, some changes in the new Act are expected to throw up some fundamental issues of interpretation and practical application. It is proposed in this paper to highlight some of the changes in the new Act, examine their practical implications and explore possible practical challenges to their application. Efforts will be made to see how such challenges may be addressed. In doing these, we shall address in turn each of the changes in the new Act

Law regulating admission and exclusion of evidence in Nigeria

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[1] The Ordinance was enacted by the colonial government as far back as 1943 and came into force in 1945.

[2] See J. F. Stephen, A Digest of the Law of Evidence, 5th ed. (London, Macmillan & Co, 1887) v

Section 2 of the new Act provides that:

> For the avoidance of doubt, all evidence given in accordance with section 1 shall, unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria be admissible in judicial proceedings to which this Act applies:
> Provided that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act.

Section 3 of the same Act provides:

> Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.

With these provisions, it is now abundantly clear that both admissibility and exclusion of evidence in Nigeria are purely matters of statutes. In other words, for a piece of evidence to be admissible, it must be relevant in accordance with section 1 of the new Act or be made admissible by any other legislation in force in Nigeria. On the other hand, a piece of evidence which is relevant in accordance with section 1 can only be excluded by reference to the Act itself or any other statute in force in Nigeria. It must be remembered that received English statutes will qualify as part of legislations in force in Nigeria. It is also submitted that the expression 'legislation validly in force in Nigeria' is not restricted to federal legislations. A state legislation may be the basis of admission or exclusion of evidence.[3] This is notwithstanding the fact that evidence generally is a matter under the exclusive legislative list of the Constitution.[4]

The provisions of sections 2 and 3 of the new Act represent a clear departure from the position under the old Act. Under the old Act, a piece of evidence admissible at common law was held admissible by virtue of section 5(a) of that Act which provides that: *"Nothing in this Act shall— (a) prejudice the admissibility of any evidence which would, apart from the provisions of this Act, be admissible;…"*[5]

Also, there was no express provision in the old Act as to whether or not evidence could be excluded

[3] See Onyioha v Union Bank of Nigeria Ltd [1993] 5 NWLR 698 Where a state Land Instruments Registration Law was relied upon to admit a piece of evidence. Same statute provides for exclusion of unregistered instruments from evidence.

[4] Item 23, Part I of the Schedule 2 to the 1999 Constitution (as altered).

[5] See Onyeanwusi v Okpukpara; R v Itule [1961] 1 All NLR 462 as well as the commentaries by the leaned authors, Aguda, T. A., *Law and Practice Relating to Evidence* (2nd Ed) (Lagos, MIJ Professional Publishers, 1998) 4 & 35 and Nwadialo, F Modern Nigerian Law of Evidence, (2nd Ed) (Lagos, University of Lagos Press, 1999) 17.

in Nigeria based on rules of common law. It was the courts, in interpreting the Act, that made it clear that whilst evidence could be admitted based on common law, rules of common law could not be relied upon to exclude a piece of relevant evidence.[6] The judicial position in this regard has now been expressly enacted as section 2 of the new Act. For practical purposes, therefore, all questions of admissibility or inadmissibility of a piece of evidence in Nigeria must now be referable to the Act or any Nigerian statute.

Admissibility of illegally or improperly obtained evidence

Section 14 of the new Act provides that:

> Evidence obtained-
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> (a) improperly or in contravention of a law; or
>
> (b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

Section 14 of the new Act not only expressly provides for the admissibility of illegally or improperly obtained evidence but gives the court power to exclude such evidence where its probative value is outweighed by the nature of the illegality or impropriety by which it was obtained. The Act in its section 15 goes ahead to set out in detail those factors the court will take into consideration in deciding on the admissibility or otherwise of such evidence.

Provisions similar to sections 14 and 15 of the new Act were conspicuously absent in the old Act thereby saddling the courts with the responsibility of deciding how such evidence should be treated. In responding to this challenge, the courts in Nigeria have consistently held that once such evidence is relevant, it remains admissible.[7] In the old case of *Kuruma v R*[8], it was held that *"(t)he test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is admissible.....the court is not concerned with how the evidence was*

[6] See R v Agwuna (1949) 12 WACA 456 at 458. See also Aguda T. A. op. cit. at 110
[7] See Musa Sadau v State (1968) NMLR 208
[8] (1955) 1 ALL ER 236

obtained".[9] In civil cases, the court invariably was bound to admit such evidence once relevant and had no discretion in the matter. However, it seems to be generally accepted that in criminal cases, the court has a discretion to exclude any piece of evidence where its probative value is outweighed by its prejudicial effect.[10]

It is now clear that both in criminal and civil cases, the decision to admit or exclude illegally or improperly obtained evidence is now a matter for the judicial discretion of the court to be exercised on the basis of guidelines set out in section 15 of the Act.

Requirements for judicial notice of custom

Section 17 of the New Act simply provides that:

> A custom may be judicially noticed when it has been adjudicated upon once by a superior court of record.

On the face of this provision coupled with other provisions of the Act, it appears that other than the repugnancy test[11], the only condition a custom is required to meet in order to be judicially noticeable is that it must have been adjudicated upon at least once by a superior court of record. By this requirement, the various requirements under section 14 of the old Act seems to have been abandoned. According to section 14(2) of the old Act,

> A custom may be judicially noticed by the court if it has been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court asked to apply it in assuming that the persons or the class of persons concerned in that area look upon the same as binding in relation to circumstances similar to those under consideration.

Though this provision had not been without controversy in its interpretation and application, it seems to have been settled that a custom sought to be judicially noticed under it must have been

[9] Ibid at 239 -240. See also the cases of Musa Sadau & Anor. v The State (supra); Torti v. Ukpabi (1984) 1 SCNLR 214 at 236 - 237 and 239 – 240 and Lasun v. Awoyemi [2009] 16 NWLR (Pt.1168) 513 at 553.
[10] R v Olubunmi Thommas (1958) 3 FSC 8
[11] See section 18(3) 2011 Evidence Act

(a) acted upon by a court which is superior to or co-ordinate with the court before which it sought to be judicially noticed.
(b) acted upon on such number of occasions as to justify the court in assuming that the persons concerned look upon it as binding in relation to circumstances similar to those under consideration[12]; and
(c) acted upon in relation to the same area as that in respect of which it is sought to be judicially noticed.[13]

Whilst the brevity and simplicity of section 17 of the new Act cannot but be appreciated, the attempt to do away, without qualification, with the need for frequency of proof and the need for sameness of the area where the custom applies, may be a recipe for more problems than the Act sets out to solve.

It is our humble submission that frequency of proof ought to have been maintained whilst at the same time giving the courts discretion to judicially notice a custom on the basis of a single decision of a superior court like the Supreme Court as was done in *Rabiu v Abasi*[14].

It is also our humble submission that notwithstanding the silence of the new Act on the requirement that the custom sought to be judicially noticed must have been applied by the court in the same area, this requirement must of necessity be read into the Act. This is because custom is the accepted usage of a particular set of people.[15] The fact that a superior court of record in Nigeria has applied a custom cannot be sufficient for all courts in Nigeria to take judicial notice of such custom as the cases my involve people with totally different customs. There must be additional evidence that the two cases involve people of the same area or people with the same custom. This is why the West African Court Appeal warned that *"to hold that because a particular native law and custom is proved for one particular*

[12] See Giwa v Erinmilokun (1961) 1 ALL NLR 294 at 296; Oyewunmi v Ogunesan [1990] 3 NWLR 182 at 222; Romane v Romane (1992) 5 SCNJ 25. However, it seems to have been accepted that frequency of proof is unnecessary where a custom had once been acted upon by the Supreme Court. See Rabiu v Abasi (1996) 7 SCNJ 53 at 58; Cole v Folami [1990] 2 NWLR 445.
[13] See Taiwo v Dosunmu (1965) 1 All NLR 399.
[14] Supra
[15] Owoniyi v Omotosho (1961) 1 All NLR 304

locality in Nigeria, it necessarily becomes established law that that custom obtains throughout Nigeria would be most dangerous".[16]

Admission by Conduct

Section 20 of the new Act defines admission as *"a statement, oral or documentary, or conduct which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and in the circumstances, mentioned in this Act."*

By this definition, it is now statutorily explicit that admission can be by conduct in Nigeria. The definition of admission in the old Act was silent on whether admission could be by conduct. However, it had long been accepted at common law that admission could be by conduct including silence in appropriate cases.[17] The attitude of the Nigerian court was to adopt the common law approach by holding that, notwithstanding the silence of the Act on the point, admission could nevertheless be by conduct including silence.[18] In *Gwani v. Ebule*[19], in holding that failure to reply a business letter amounts to an admission by conduct, the Court of Appeal had the following to say:

> By the state of pleadings and the evidence in adduced in support, the appellant by his silence in circumstances in which a reply is obviously expected, admitted that the Respondent on return to Imo State personally and through a solicitor demanded from the appellant payment for the labour he supplied as agreed in Exhibit "A", this admission lends credence to the Respondent's side of the case. Silence in the situation aforesaid leads to an irrefutable presumption of admission by conduct or representation. This is implicit in the decision of Obaseki, JSC. In Joe Iga & Co. v. Chief Ezekiel Amkiri 4 Ors (1976) 11 SC 1. The appellant's admission is clear and unambiguous.[20]

It must be pointed out that notwithstanding the provision of the new Act, the court still reserves the duty of determining whether a particular conduct can amount to admission from the totality of the surrounding circumstances as previously done prior to the enactment of the new Act. For instance, whilst the court the courts may be readily persuaded that failure to reply a commercial

[16] See Santos v Ikosi Industries Ltd (1942) 8 WACA 29; see also Taiwo v Dosunmu (1965) 1 All NLR 399.
[17] See Moriarty v London, Chartam & Dover Railway (1870) 5 QB 314; Bessela v Stern (1872) 2 CP 265; Wiedemann v Walpole (1891) 2 QB 534.
[18] see Akinbiyi v Anike (1959) WRNLR 16; In-Time Connection Ltd v Ichie (2009) LPELR-8772(CA)
[19] [1990] 5 NWLR (Pt 149) 201
[20] Ibid at pg. 211; see also Vaswani v Johnson [2000 11 NWLR (Pt. 679) 582 at 588-589; Abajue v Adikpa [1994] 1 NWLR (Pt 322) 621 at 628;

or business letter amounts to admission of its content, the court may not be so readily in regard to a social letter.[21]

Conditions for admissibility of confession

Section 29 of the new Act in prescribing the conditions for the admissibility of a confessional statement provides that:

> (1) In any proceedings, a confession made by a defendant may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.
> (2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been made by a defendant, it is represented to the court that the confession was or may have been obtained –
> (a) by oppression of the person who made it; or
> (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained in a manner contrary to the provisions of this section.
> (3) In any proceedings where the prosecution proposes to give in evidence a confession made by a defendant, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either paragraph (a) or (b) of subsection (2) of this section. …
>
> (5) In this section "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.

With the above provisions, the grounds for exclusion of confessions from evidence have become wider thereby making the admissibility of confessional statements subject to more rigorous tests. As it is, some confessional statements that might have been admissible under the old law may now end up being rejected by the courts. More specifically, a number of conditions that were required to render a confession involuntary have now been removed with the result that a confession may nevertheless be inadmissible in the absence of those conditions. Under the old Act, a confession would be involuntary and therefore inadmissible only if

> the making of the confession appears to the court to have been caused by any inducement, threat or promise having reference to the charge against the accused person, proceeding from a person in authority, and sufficient, in the opinion of the court, to give the accused person grounds which would appear to him reasonable for

[21] See Wiedemann v Walpole (supra) Oloko v Oloko (1961) WNLR 101

> supposing that by making it he would gain any advantage or avoid any evil of a temporal nature.[22]

Under the old Act, in order to render a confession involuntary, an inducement, threat or promise must "have reference to the charge" for which the accused is standing trial. Even where a confession was made as a result of inducement, threat or promise, it was still admissible as long as the inducement, was merely collateral or does not reference to the charge against the accused. This was the position at common law[23] but has since been reversed by the House of Lords.[24]

Also, under the old Act, in order to render a confession involuntary, an inducement, threat or promise must have proceeded "from a person in authority". Therefore, where a confession was made as a result of inducement, threat or promise, it was still admissible as long as the inducement, threat or promise did not come from a person in authority. This was the position at common law[25] as well as judicial interpretation of the old Act.[26]

Finally, under the old Act, the advantage promised or evil threatened must have been of a temporal or physical nature in order to render the ensuing confession involuntary and inadmissible. Thus, advantage or evil of a metaphysical nature would not render a confession inadmissible even if it was clear that the confession would not have been made but for such promise of such metaphysical advantage or threat of such metaphysical injury or evil.[27] Commenting on this provision as interpreted in *R v Ebong*,[28] the learned author, Akinola Aguda,[29] maintained that this position appears *"to overlook the fact that the question of fear is always a subjective one and that when a person is frightened by any object whatsoever, his action or utterance thereafter becomes one done or uttered under a threat or fear."*

It now appears that under the new Act that a confession made as a result of oppression or anything said or done which renders it unreliable will be inadmissible and it would not make any difference whether the oppression of what is said or done has reference to the charge, or

[22] Section 28 of the old Act.
[23] See R v Joyce (1957) CAR 19; R v Fudge (1965) CAR 52
[24] See Commissioner for Customs and Excise v Harz (1967) AC 760.
[25] See Deokinanan v R (1969) 1 AC 20
[26] See Nweke v R (1959) 4 FSC 225; R v Haske (1961) 1 All NLR 330; Ode v State (1974) 1 All NLR (Pt II) 411.
[27] R v Ebong (1947) 12 WACA 199
[28] supra
[29] Op. cit. at 82

proceeded from a person in authority or is of temporal or metaphysical nature. It is now left to the courts in Nigeria to interpret and apply these provision in such manner as to give full effect to their intendment. In this regard, the English Police and Criminal Evidence Act of 1984 from where these provisions were copied have been liberally construed to exclude from evidence confessions made under a wide range of circumstances rendering them unreliable in line with the general spirit of the new law. Thus in *R v Mushtang*[30] the House of Lords per Lord Carswell LJ, defined "oppression" as used in the English version of the current law on confession include any *"questioning which by its nature, duration, or other circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent."*

In *R v M*[31] the defendant's legal representative's interjection during interviews was held to have rendered the subsequent confession unreliable.[32] However, proper advice from counsel will hardly provide a basis for excluding a confession from evidence.[33] In *R v Walker*[34], police conducted interview leading to the confession shortly after, unknown to the police, the defendant who was mentally unstable had smoked crack. Conducting interview under such circumstance was held to qualify as something "said or done" which rendered the confession unreliable.

Definition and exclusion of hearsay evidence

Sections 37 of the new Act defines hearsay to mean

> "a statement (a) oral or written made otherwise than by a witness in a proceeding; or (a) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.

Section 38 goes further to provide that hearsay "evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act."

[30] [2005]2 Cr. App. R 32
[31] [2000] 8 Archbold News 2, CA
[32] See also R v Wahab [2003] 1 Cr. App. R. 15; R v Goldenberg 88 C.A.R 285
[33] R v Wahab (supra)
[34] [1998] Crim. L.R 211

There was no provision similar to sections 37 and 38 under the old Act. Whilst several of the exceptions to the hearsay rule could be found in the old Act, the definition as well as the general rule excluding hearsay evidence had been omitted thereby leaving to the courts the issue of definition and the rule to the courts. In this regard, the courts have had to adopt the common law definition[35] and general rule.[36]

General grounds for admissibility of hearsay evidence

Section 39 of the new Act provides that:

> Statements, whether written or oral of facts in issue or relevant facts made by a person –
> (a) who is dead;
> (b) who cannot be found;
> (c) who has become incapable of giving evidence; or
> (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are admissible under sections 40 to 50.

It appears from these provisions that a statement, oral or documentary, by a person who is absent at the trial of a case, civil or criminal, due to any of the reasons stated in the section will be admissible as exception to the rule excluding hearsay evidence. There was no general provision as this under the old Act. However, similar provision was made in the old Act in relation to specific instances. For instance, opinion of an expert who is absent at the trial due to any of the reasons set out above was admissible where the opinion was already reduced into writing.[37] Similarly, statement in respect of a fact of which direct oral evidence was admissible, made by a person in a document was admissible where the maker was absent at the trial for any of those reasons stated above.[38]

It must be pointed out that the provisions under section 39 of the new Act is not as general as it appears to be. This is due to the apparent limitation of cases to which the section applies to those contained in 40 to 50 of the Act. Meanwhile, the cases set out in sections 40 to 50 are traditional

[35] Subramaniam v. Public Prosecutor (1956) 1 WLR. 965 at 969; Judicial Servcie Commission v Omo [1990] 6 NWLR (Pt 157) 407
[36] Pharmacists Board of Nigeria v. Franklin Adegbesote [1986] 5 NWLR, (Pt.44) 707; JSC v Omo (Supra).
[37] See section 77(d)(i) of the old Act now section 126(d) of the new Act; Nteogwile v Otuo (2001)6 SC 200 at 209; SPDC v Isiah [1997] 6 NWLR (Pt 503) 236; Osolu v Osolu [1998] 1 NWLR (Pt 535) 523.
[38] See section 91 of the old Act now section 83 of the new Act.

exceptions to the hearsay rule under the old Act[39]. It is therefore submitted that it is not in all cases where the maker of a statement is absent due to those reasons in section 39 that the statement will be admissible. Such statement can be admissible only in those cases specifically provided for under other provisions of the Act such as sections 40 to 50.

Dying declaration redefined

Section 40 of the new Act provides that:

(1) A statement made by a person as to the cause of his death, or as to any of the circumstance of the event which resulted in his death in cases in which the cause of that person's death comes into question is admissible where the person who made it believed himself to be in danger of approaching death although he may have entertained at the time of making it hope of recovery.
(2) A statement referred to in subsection (1) of this section shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.

With this provision, the law relating to admissibility of statements as to cause of death generally known as dying declaration has been radically altered at least in three major respects. First, it appears that such a statement is now admissible both in criminal and civil trials. Secondly, the statement is admissible in any case regardless of the nature of the claim or the charge as long as the maker is dead and the cause of his death is an issue in the case. Thirdly, the statement may be admissible even where the death of the maker is not the subject matter of the case. All that is required for this purpose is that the Cause of death must be a fact in issue in the case. Civil cases where such statements may be admissible now include cases under the Fatal Accident Laws of the States.[40]

Under the old law as contained in section 33 of the old Act, such statement is admissible only at the trial of the murder or manslaughter of the deceased maker which limited such cases (1) criminal trials, (2) trials for murder or manslaughter and (3) trials of offences for the killing of the maker. Such restrictions have now been done away with under the new Act.

[39] See generally, sections 33 to 45 of the old Act
[40] See for instance, the Fatal Accidents Law, Lagos State; Fatal Accidents Law, Kano State; Jenyo v Akinreti [1990] NWLR (Pt.135) 663.

Admissibility of documentary hearsay in criminal cases

Section 83(1) of the new Act provides that:

> In a proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied- ...

The opening three words of this provision (in a proceeding), show clearly that its application is not restricted to either civil or criminal proceedings. This is in contrast to the opening four words (in any civil proceedings), of section 91 of the old Act which clearly shows that it was applicable only to civil cases. It is settled that the primary purpose of section 91 of the old Act which is being replaced by section 83 of the new Act is to allow for admissibility of documentary hearsay upon satisfaction of conditions prescribed by the section.[41]

With the wording of the new Act, therefore, documentary hearsay that might not have been admissible in criminal trials in the past may now be admissible once the conditions set out under section 83 are met. These include the fact that the maker must have had personal knowledge of the information recorded in the documents or must have recorded same from a person with such personal knowledge in performance of duty to so record the information as part of a continuous record as well as the requirement that the document must not have been made by a person interested in anticipation of the proceedings.[42]

Admissibility of computer generated evidence

Section 84(1) of the new Act provides -

> In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

This section is one of the high points of the new Act. It marked a positive response to several years of uncertainty and controversy as to the admissibility or otherwise of computer generated or electronic evidence.[43]Over the years, the courts have had to reason by analogy in the absence

[41] See Armels Transport Ltd v Atinuke Martins (1990) All NLR 27.
[42] See Apena v Ayetoba [1989] 1NWLR (Pt 95) 85; Anyeabosi v R. T Briscoe [1987] 3 NWLR (Pt 59) 84; Highgrade Marine Services Ltd v FBN [1996] 1 NWLR (Pt 167) 290.
[43] See for instance FRN v Fani Kayode [2010] 14 NWLR (Pt 1214) 481 where the trial Federal High Court held that a computer generated statement of account was not admissible only to be reversed by the Court of Appeal.

of express provision regarding such evidence. The courts have had to rely on the definition of 'document' in section 2(1) of the old Act as being wide enough to accommodate computer generated document. Thus in *Federal Polytechnic, Ede v Oyebanji*[44], the Court of Appeal, per Iyozoba JCA held that

> ... the courts made the best of the situation by expanding the definition of "document" to include computer generated information which to my mind includes tape recordings. See definition of "document" in Section 2(1) of the Evidence Act 1945 as amended and the cases of Yusuf v. ACB Ltd (1976) 1 SC 45: Anyagbosi v. R.T. Briscoe Ltd. (1987) 3 NWLR (Pt. 59) 108: Trade Bank PLC v. Chams (2003) 13 NWLR (Pt. 836) 216: FRN v. Fani-Kayode (2010) 14 NWLR (Pt. 1214) 481 at 506…. The learned trial judge was therefore right in ruling the tape recording inadmissible.

Also, in *FRN v. Fani Kayode*,[45] the Court of Appeal, per Saulawa JCA lamented that

> .. the definition of the term document in section 2(1) of the Evidence Act includes "computerized statement of accounts. Undoubtedly, the provisions of the Evidence Act, and indeed, most of the Nigerian Statutes, including the Grundnorm itself; the Constitution of the Federal Republic of Nigeria, 1999, need to be generally overhauled to meet the exigencies of the modern computer age. However, the above contention notwithstanding, I would want to believe that by virtue of the provision of section 2(1) of the Evidence Act (supra), the definition of the word 'document, undoubtedly encompasses the computerized bank statement of accounts.

With the new Act, there is no longer the need for stretching of language to make for the apparent gap in the law. However, there is still the task of interpretation and application of the provision as the conditions for admissibility of the evidence under the provision are couched in somewhat windy and repetitive language.

Nevertheless, what gathered from the conditions set out by the section is that proper foundation must be laid for the purpose of tendering a computer generated evidence by production of a certificate by a person having control of the use of the computer stating that:

(a) The document is produced by a computer/series of computers
(b) The document was produced at a period when the computer was in regular use
(c) The document was produced from information supplied to the computer in the ordinary course of business during which information similar information was being supplied to the computer
(d) That the computer was substantially in good working condition over the material period

The above is the substance of the requirements under the section. It is our humble submission that substantial compliance with the conditions should suffice.[46] What the courts should be concerned with is

[44] (2012) LPELR-19696(CA).
[45] Supra at 506.

the confirmation of the source and accuracy of the document. Strict compliance with the cumbersome and somewhat repetitive conditions set out under the section will obviously be counterproductive. In line with the attitude of substantial compliance, it appears that a certificate may not be necessary as an affidavit evidence or even direct oral evidence of the relevant person may be sufficient. The only Supreme Court case on the issue till date seems to bear out this position, though without expressly saying so. In *Kubor v Dickson*[47], the Supreme Court, per ONNOGHEN, J.S.C., held that:

> Granted, for the purpose of argument, that Exhibits "D" and "L" being computer generated documents or e-documents down loaded from the internet are not public documents whose secondary evidence are admissible only by certified true copies then it means that their admissibility is governed by the provisions of section 84 of the Evidence Act, 2011. Section 84 (1) provides thus: "(i) In any proceedings, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the condition in sub-section (2) of this section is satisfied in relation to the Statement and the computer in question. The conditions are:- (a) that the documents containing the statement was produced by the computer during a period over which the computer was used regularly to store or process the information for the purpose of any activities regularly carried on over that period, whether for profit or not, by anybody whether corporate or not or by any individual; (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived; (c) that throughout the material part of that period the computer was operating properly or if not that in any respect in which it was not operating properly or was out of operation during that point or that period was not such as to affect the production of the document or the accuracy of its contents; and (d) that the information contained in the Statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities. There is no evidence on record to show that appellants in tendering Exhibits "D" and "L" satisfied any of the above conditions. In fact they did not as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under Section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held, at page 838 of the record thus: - A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act, 2011. I agree entirely with the above conclusion. Since appellants never fulfilled the pre-conditions laid down by law, Exhibits “D” and “L” were inadmissible as computer generated evidence/documents.[48]

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[46] That is the attitude adopted by the courts in relation to proper foundation for tendering bankers’ book under section 97(1)(h) & (2)(e) of the old Act now sections 89(h) and 90(e). See Yassin v Barclays Bank (1968) NMLR 380.
[47] (2012) LPELR-9817(SC)

[48] At pages. 48 -50

Recognition of electronic signature

Section 93 of the new Act provides that

> Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed; an electronic signature satisfies that rule of law or avoids those consequences.

This provision is in tandem with the provisions of section 84 considered above regarding admissibility of electronic/computer generated evidence. It is also in line with other sections of the Act which recognize electronic document. For instance, section 51 of the Act provides that

> Entries in books of accounts or electronic records regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Furthermore it accords with the definition of 'document' under the new Act which states that 'document' includes

> (b) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it ; and
> (c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
> (d) any device by means of which information is recorded, stored or retrievable including computer output.

There was provision similar to the above in the old Act and as stated above, provisions in the new Act relating to admissibility of electronic/computer generated evidence represent one of the most dramatic innovations in the new Act. The only seeming challenge is the extent to which our judges and lawyers prepared in terms of capacity to effectively utilize these provision to serve the end of justice.

Resolution of conflicts in affidavit evidence.

Section 116 of the new Act states that

> When there are before a court affidavits that are irreconcilably in conflict on crucial facts, the court shall for the purpose of resolving the conflict arising from the affidavit evidence, ask the parties to proffer oral evidence as to such facts, and shall hear any such oral evidence of the deponents of the affidavits and such other witnesses as may be called by the parties.

There was no provision similar to this in the old Act. The courts have had to devise a judicial means of dealing with such conflict. The above provision is a substantial adoption of the judicial attitude. It had long been established in cases like *Falobi v Falobi*[49] and *Olu-Ibukun v Olu-Ibukun*[50] amongst a plethora of others that irreconcilable conflicts in affidavits of opposing parties are to be resolved by calling oral evidence.

However, the court have also held that it is not in all such cases that oral evidence must be called. For instance, where there are pieces documentary evidence which may assist in resolving the conflict, the court need not call for oral evidence.[51] The new Act is silent on this apparent exception. It is humbly submitted that the exception will continue to apply as the duty of evaluation of evidence which includes affidavit evidence belongs to the court and the court is at liberty to take into account for that purpose any material evidence before it.[52]

The new Act is also silent as to resolution of conflicts in the affidavit of the same party. In this regard, the courts have held that such conflict must be resolved against such party the same way conflict in the evidence of a party must be resolved against him.[53]In Momah v Vab Petroleum, the Supreme Court concluded that

> In the case in hand, the contradictions or conflicts in affidavit evidence did not relate to the affidavit evidence filed by the appellant, on the one hand, and that filed by the respondent, on the other; rather, the contradiction arose only in respect of the appellant's averments in his numerous affidavits. Therefore, the age-long principle of fielding witnesses to furnish oral evidence for the resolution of the contradictions between the two separate sets of evidence by the parties did not arise. Rather, it was self-evident from the judgment of the lower court that the contradictions alluded to were those that arose from the inconsistencies in the depositions in the appellant's own affidavits. Clearly, where the appellant's case is plagued by inconsistencies or contradictions, there is no obligation, in such circumstances, on the court seized of the matter to arrange for oral evidence to be called for the purposes of making or resolving the contradictions in the appellant's case. The law frowns on a party who approbates in one breath and reprobates in another. But having said that, I must hurry to state that the onus is undoubtedly on the appellant confronted with its self-created contradictions to fully and properly explain away the contradictions to the satisfaction of the court. Failure to do so is bound to leave an

[49](1976) 1 NMLR 169
[50] (1974) 2 SC 41. See also Ojengbende **v** Esan [1987] 4 NWLR (Pt. 63) 49; Okoye **v** Lagos State Government [1990] 3 NWLR (Pt.136) 115; Akinsete **v** Akindutire (1966) 1 All NLR 147.
[51] Nwosu v. ISESA [1990] 2 NWLR (Pt. 135) 688
[52] See Agbanelo v. U.B.N. Ltd. [2000] 7 NWLR (Pt.666) 534; Wachukwu & Anor v Owunwanne & Anor (2011) LPELR-3466(SC).
[53] See Momah v. Vab Petroleum Inc. [2000] 4 NWLR (Pt.654) 534

> indelible dent on the appellant's case. It is not open to the court to enter into the arena of judicial conflict between the parties in order to resolve the contradictions within the appellant's own affidavit evidence.[54]

This position which is consistent with reason remains the law in the absence of anything to the contrary in the new Act.

Admissibility of unsworn affidavit

Section 120 of the Act provides that

1. The person before whom an affidavit may be taken may take without oath the declaration of any person who –
   (a) affirms that the taking of any oath whatsoever is, according to his religious belief, unlawful; or
   (b) by reason of immature age or want of religious belief, ought not, in the opinion of the person taking the declaration to be admitted to make a sworn affidavit.
2. The person taking the declaration shall record in the attestation the reason of such declaration being taken without oath.

This provision which has no counterpart in the old Act, is apparently enacted to allow unsworn affidavit evidence the same way unsworn oral testimony in court is allowed. Under sections 182 and 183 of the old Act[55], oral evidence may be given though not on oath in circumstances similar to those set out above as exception to the general rule that oral evidence must be on oath.[56] Section 120 is now extending similar treatment to affidavit evidence. This is a welcome development as there can hardly be any justification for allowing a witness give oral evidence without being sworn on oath when the same witness cannot depose to an affidavit without being sworn.

More importantly, this innovation is necessitated by the current reality in litigation where, by the rules of courts, intending witnesses must swear to statement on oath to the frontloaded.[57] In the absence of the new provision, several witnesses who would not be prepared to swear on oath would have been shut out of court to the detriment of justice.

[54] Page 547
[55] Now sections 208 and 209 of the new Act.
[56] Section 180 of the old Act now section 205 of the new Act.
[57] See for instance Order 3 rule 2, High Court of Lagos State (Civil Procedure) Rules, 2012.

Facts within common knowledge to be judicially noticed

Section 124 of the new Act provides that

> (1) Proof shall not be required of a fact the knowledge of which is not reasonably open to question and which is –
> (a) common knowledge in the locality in which the proceedings is being held, or generally; or
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
> (2) The court may acquire, in any manner it deems fit, knowledge of a fact which subsection (1) of this section refers, and shall take such knowledge into account.
> (3) The court shall give to a party to any proceeding such opportunity to make submission, and to refer to a relevant information, in relation to the acquiring or taking into account of such knowledge, as is necessary to ensure that the party is not unfairly prejudiced.

This section which has no counterpart in the old Act represent an attempt at removing the somewhat artificial distinction between fact which the courts are under obligation to judicially notice and those facts which the courts merely have discretion to judicially notice. The artificiality of such distinction is exemplified in the dictum of Nnaemeka Agu JSC in *Osafile v Odi*[58], where his lordship stated

> Our law preserves the distinction between those facts of which the court shall take judicial notice, when called upon by a party to do so, because those facts are notorious to him, on the one hand, and those facts which, in exercise of its powers under subsection (3) of Section 73 of the Evidence Act, he may, when called upon to take judicial notice of the fact, refuse to do so unless and until such a person produces the necessary material or he has informed himself properly to enable him to do so. When the former is the case, the Judge, once called upon to take judicial notice of the fact, proceeds to do so based on his general knowledge, memory and experience. In the latter case, a proper foundation must be laid for him to take notice of the fact. The only difference is that under section 73(2), even for matters falling within the first category he may resort for his aid to appropriate books or other documents or reference.
>
> It follows from what I have been saying that every matter entitled to be judicially noticed has its appropriate and necessary foundation without which it cannot be judicially noticed. It must be noted that judicial notice is an anomalous appendage in the law relating to proof.

[58] [1990] 2 NWLR (Pt.137) 130 at 143

Under the old Act, judicial notice of notorious facts were essentially left to the court to decide[59] as sections 73 does not specify the yardstick for judicial notice of notorious facts unlike section 74 that sets out a list of matters that courts must judicially notice.

With the current provision, the courts are now under a duty to take judicial notice of notorious facts subject to the provisions of the Act.

General standard of proof in civil cases and discharging burden of proof on the defendant in criminal cases

Section 134 of the new act provides that

> The burden of proof shall be discharged on the balance of probabilities in all civil proceeding.

The old Act merely provided for standard of proof in criminal case, as being beyond reasonable doubt[60]but was silent as regards civil cases, thereby leaving the courts with the responsibility of deciding what standard of proof to require for the discharge of a burden of proof in civil cases. In this regard, the courts have come establish it as a rule of law that the standard of proof in civil case shall be on balance or probability or preponderance of evidence.[61] The current provision represent a statutory restatement of what has come to be accepted as the law over the years. As to the practical manner of weighing this balance, the Supreme Court has devised what has come to be known as the imaginary scale of justice in *Magaji v Odofin*.[62]

As regards discharging burden of proof on the accused in criminal cases, section 137 of the new Act provides that

> Where in any criminal proceeding the burden of proving the existence of any fact or matter has been placed upon a defendant by virtue of the provisions of any law, the burden shall be discharged on the balance of probabilities.

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[59] See Bakare v Ishola (1959) WRNLR 106 where the court took judicial notice of the facts that in the Western Region of Nigeria where the fact arose, people normally abuse each order as prelude to a fight by calling each other names like thief, ex-convict and that nobody takes such words of abuse seriously as to found a cause of action on defamation on it.

[60] See section 138 of the old Act.

[61] Sokwo v. Kpongbo [2008] ALL FWLR (Pt.410) 680 at 700; Nwokorobia v Wnogu [2009] 10 NWLR (Pt 1150) 553 SC.

[62](1978) 4 SC 91

With this provision, the uncertainty as to the exact nature of the standard of proof where the defendant in a criminal case has the burden of proof in respect of any fact has now been removed. There was no explicit provision in the old Act on this issue.

Meanwhile, the old Act placed the burden of proof in respect of certain facts on the accused. These included the burden of proving reasonable doubt after the prosecution has proved the offence beyond reasonable doubt[63], burden of proving that he comes under any of the exceptions to the law creating the offence for which he is standing trial,[64]the burden of proving insanity or intoxication[65] and the burden of proving any fact with the exclusive knowledge of the defendant.[66]

However, the old Act is silent on the standard of proof required to discharge the burden on the accused in in those instances with the result that the court have had to come with a prescription of the standard of proof required in such case. This they have done by insisting that the standard required is balance of probability or preponderance of evidence similar to that in civil cases.[67]

The purpose of the current provision is now to statutorily adopt this judicial position. The distinction between the standard of proof by the prosecution and the defendant in criminal cases is now a matter of statute.

Presumption as to electronic message (e-mail)

Section 153(2) of the new Act provides that

> The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person to whom such message was sent.

[63] See section 138(3) of the old Act now section 135(3) of the new Act
[64] See section 141(1) of the old Act now section 139(1) of the new Act
[65] See section 141(3)(c) now section 139(3)(c) of the new Act.
[66] See section 142of the old Act, now section 140 of the new Act.
[67] See Kure v State [1988] 1 NWLR (72) 404; Karimu v State [1989] 1 NWLR (Pt 96) 124; Edoho v State (2010) 4 SCNJ 100.

This provision is in line with the recognition of electronic evidence as discussed above. Similar provision under the old Ac was limited to presumption as to delivery of telegraphic messages.[68] These provisions both under the old and the new Acts are simply specific application of the general rule relating to presumption of fact.[69]

Presumption of customary or Islamic marriage.

Section 166 of the new Act provides that -

> When, in any proceeding whether civil or criminal, there is a question as to whether a man or woman is the husband or wife under Islamic or Customary law, of a party to the proceeding the court shall, unless the contrary is proved, presume the existence of a valid and subsisting marriage between the two persons where evidence is given to the satisfaction of the court, of cohabitation as husband and wife by such man and woman.

This presumption of Islamic or customary marriage from cohabitation had no counterpart in the old Act. This provision is in tandem with the expansion of the definition of husband and wife in the new Act to include husband and wife of Islamic and customary law marriages.[70] The presumption has become necessary in view of the limitation of the definition of husband and wife section 258 of the Act to husband and wife of a valid marriage.

There is no presumption in the Act as to monogamous marriage or what used to be referred to as common law marriage. The position of the law had always been in favour of presumption of marriage from cohabitation which marriage was then limited to monogamous marriages in view of the definition then in section 2(1) of the old Act.[71]

With the express limitation of the above provision to Islamic and customary law marriages, there is the question as to the intention of the law maker. Is it to do away with the presumption of monogamous marriage from cohabitation? This will be the effect unless there can be found any provision in the Act or any other law under which presumption can be raised in view of sections 2 and 3 of the new Act already considered above.

[68] See section 121 of the old Act.
[69] See section 167 of the new Act as well as section 149 of the old Act.
[70] See section 258 of the new Act.
[71] See Piers v Piers (1849) 2 HL Cas 331; Egunwoke v Egunwoke (1966) 1 All NLR 1

We humbly submit that such presumption can arise by presumption of regularity under section 168 of the new Act where parties are living together in consequence of a purported monogamous marriage contracted by them but is invalid for one reason or the order. Also, the existence of such marriage can be presumed under section 167(c) of the new Act which empowers the court to presume that "common course of business has been followed in particular cases." Therefore, where a man and a woman have been living together in what appears to be a monogamous marriage, the court may presume that they are doing so in consequence of a duly contracted marriage.

Comment on failure of defendant in criminal trial to give evidence

Section 181 of the new Act provides that -

> In any criminal proceeding, where a defendant has not given evidence, the court, prosecution or any other party to the proceeding may comment on the failure of the defendant to give evidence but the comment shall not suggest that the defendant failed to do so because he was, or that he is, guilty of the offence charged.

This is diametrically opposed to the position under the old Act where section 160(b) stated that:

> The failure of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution.

The provision in the old Act was understandably premised on the non-compellability of an accused person to testify at his own trial, a right that is constitutionally guaranteed.[72] Such comment was prohibited in the old Act to avoid such comment being used to prejudice the mind of the court against the accused. It is therefore difficult what purpose such comment will is meant to serve under the new Act. It is humbly submitted that this provision is ill advised as whatever benefit derivable therefrom is outweighed by the prejudicial effect such comment is surely likely to have on the court. It is well known rule in criminal trials that evidence that is admissible should be excluded where its prejudicial effect will outweigh its probative value.[73]

[72] Section 36(11) of the Constitution of the Federal Republic of Nigeria, 1999 (as altered).
[73] See R v Thomas (supra)

In any event this provision is incongruous with section 182(4) of the same new Act which provides that *"the failure of the wife or husband of any person charged with an offence to give evidence shall not be made the subject of any comment by the prosecution."*

Courts to determine claim of privilege in respect of affairs of state

Sections 190, 191 and 243 relate to objection to production of evidence of records or facts relating to affairs of the state on ground of privilege. After making provision for the usual grounds of objection have gone ahead to give the court power to examine such evidence, albeit, in camera before deciding whether to exclude such matter from evidence or to allow it. For instance the proviso to section 190 of the new Act states that

> Provided that the head of the Ministry, Department or Agency concerned shall, on the order of the court, produce to the judge the official record in question or, as the case may be, permit evidence derived from it to be given to the judge alone in chambers; and if the judge after careful consideration shall decide that the record or the oral evidence, as the case may be, should be received as evidence in the proceeding, he shall order this to be done in private as provided in section 36(4) of the Constitution.

This approach represents an adoption of the recommendation of the Supreme Court in African Press Ltd & Anor v Attorney General, Western Nigeria.[74]The recommendation was based on the need to balance the interest of the state against the need to do justice n individual cases. There was a consensus of opinion that the provision in the old Act[75] which made such claim of privilege absolute without any opportunity to examine the merit or otherwise was a recipe for denial of justice to individual litigants in cases involving governments.

The provisions under the new Act is an acknowledgment the judicial powers vested in the court under section 6 of the Constitution which power is exercisable over both individual and state litigants. The provision also accords with the general tenor of the Constitution which is against ouster clauses in legislations.[76]Provisions like sections 220(2) of the old Act are incongruous with the general tenor of the Constitution, hence their removal is a welcome development

Admissibility of documents marked "without prejudice"

[74] (1965) 1 All NLR 12
[75] See sections 167, 168 and 220 of the old Act.
[76] See section 4(8) of the Constitution.

Section 196 of the new Act provides that

> A statement in any document marked "without prejudice" made in the course of negotiation for a settlement of a dispute out of court, shall not be given in evidence in any civil proceeding in proof of the matters stated in it.

This provision which has no counterpart in the old Act is an attempt at statutory restatement of the law relating to communication made without prejudice which is generally regarded as privileged and therefore not admissible in evidence.

The law had always been based on section 25 of the old Act which is repeated as section 26 of the new Act. It provides that

> In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given or in circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

With the provision in the old Act, it was accepted that when parties made compromises in the course and for the purpose of amicable settlement of their dispute any communication exchanged between them for this purpose, oral or written, is privileged and not admissible in evidence. The practice is to mark documents or letters exchanged for the purpose "without prejudice". However, failure to so mark the document would not rob it of the privilege. On the other hand merely marking a document "without prejudice" would not attract the privilege if it was not made in the course or for the purpose of amicable settlement.[77]

In view of section 26 of the new Act, it is difficult to understand the purpose section 196 is meant to serve, especially when the privilege therein provided is limited to documentary evidence. The wording of the provision raises the question as to what happens to a document made in the course and for the purpose of amicable settlement of a dispute but is not marked "without prejudice"?

It is our humble submission that any communication made in the course and for the purpose of amicable settlement of a dispute, whether written or oral and whether marked without prejudice or not will continue to be privileged pursuant to section 26 of the new Act and the judicial interpretation and application of similar provision in section 25 of the old Act.

[77] See Nwadike v Ibekwe [1987] 2 NSCC 1219; Achibuogu v A-G Bendel State [1988] 1 SC 248.

We sincerely believe that section 196 ought to have been harmonized with section 26 to produce one comprehensive position on the subject matter. As it is, section 196 may not serve much purpose standing alone. It must of necessity be read together with section 26.

Accomplice defined

According to section 198(2) of the new Act,

> In this section and section 199 of this Act, an accomplice is any person who pursuant to section 7 of the Criminal Code may be deemed to have taken part in committing the offence as the defendant or is an accessory after the fact to the offence of a receiver of stolen goods

Although the new Act has not changed the law as to the power of the court to convict on the uncorroborated evidence of an accomplice subject to warning, the new Act has by this definition resolved the question of who qualifies as an accomplice as to determine whether evidence of a particular witness requires statutory warning or not. In the past, the courts had been called upon to treat evidence of a varied categories of witnesses as that of an accomplice which prompted the court in *Nweke v R*[78] to conclude that no formal definition was possible and that the question of whether a person is an accomplice was by and large one of fact in each particular case.

The definition in the new Act seems to have adopted the definition in *Idahosa v R*,[79]where, relying on the definition in the Halsbury's Laws of England[80]it was stated that *"persons are accomplices who are participes criminis in respect of the actual crime charged whether as principals or accessories before or after fact in the case of felonies or misdemeanors."*

Caution of witnesses before giving evidence.

According to section 206 of the new Act,

> Any witness summoned to give oral evidence in any proceeding shall before giving such evidence be cautioned by the court, or the registrar upon the court's direction, in the following words-

[78] (1955) 15 WACA 29. See also R v Esechi (1962) 1 All NLR 113
[79] (1965) NMLR 85. See also Ogunlana v State (1995) 7 SCNJ 189 at 202
[80] 3rd edition, Vol 10 p. 549 para 844

> "You (Full name)..... are hereby cautioned that if you tell a lie in your testimony in this proceeding or willfully mislead this court you are liable to be prosecuted and if found guilty you will be seriously dealt with accordingly to law."

There is no provision in the old Act similar to this. The purpose of this provision difficult to understand. Section 205 of the new Act provides that all evidence must be on oath or affirmation subject to few exceptions. The effect of giving evidence on oath is explained by Ariwoola JCA (as he then was) in *Chukwuma v Nwoye*[81] where his lordship stated

> Oath is defined as "a solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise." The implication or legal effect therefore of an oath is to subject the person who took an oath to penalties for perjury in the event that the testimony turns out to be false.

The question then is what happens where a witness testifies on oath but deliberately gives false evidence without being cautioned in line with section 206? Does the fact that he was not cautioned relieves him of liability in perjury? Certainly not. Again, does failure to administer the caution affect the admissibility or weight of the evidence of the witness in any way? Again, this is unlikely!

We therefore humbly submit that section 206 is merely a moral adjuration meant to serve as a reminder to the witnesses as to the risk they run by giving false evidence. In any event, the personal experience of this writer is that trials go on in most of our courts without recourse to this provision.

Sworn and unsworn evidence of children

Section 209 of the new Act provides that –

1 In any proceedings 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, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth.

2 A child who has attained the age of 14 years shall, subject to section 175 and 208 of this Act give sworn evidence in all cases

[81] (2009) LPELR-4997(CA)

With this provision, once a child attains the age of 14 years, he is deemed not only to be automatically sufficiently intelligent to testify but also to give sworn evidence. No preliminary test is required again to determine whether such a child is intelligent enough as to receive his evidence and whether he understands the nature of oath and the duty of speaking the truth to enable him give sworn evidence.[82] On the other hand, a child who has not attained 14 years must pass the test of intelligence to qualify to give evidence. However, no matter how intelligent the child is, he cannot give sworn evidence.

No doubt, this provision represent a fundamental improvement on section 183 old Act. It has clearly done away with the time wasting and uncertainty inherent in the provisions of the old Act in this regard.

Dispensing with attendance of first class and second class chiefs in court

Section 184 of the old Act which provided that

> Evidence of first and second class chiefs
> Where in any suit brought by or against a first or second class chief in either his official or personal capacity such chief desires to give evidence, or where in any other suit the evidence of such a chief is required, the evidence of the chief shall not be given at the hearing of the suit, but shall be taken in the form of a deposition or otherwise in accordance with the terms of an order to that effect to be made by the court, and the evidence so taken shall be admissible at the hearing if, when it was so taken, the other party to the suit had an opportunity of being present and of cross-examining: Provided that the evidence of the chief shall be given at the hearing of the suit if he so desires, or if the court, having regard to all the circumstances, considers it to be necessary that his evidence should be so given and makes an order to that effect. The examination of witnesses

This provision which allowed the attendance of the affected chiefs in court to be dispensed with has no counterpart in the new Act. The result is that such witnesses are now to attend court to give their evidence just like any other witnesses.

Rule against leading questions

[82] See Mbele v State [1990] 4 NWLR (Pt 145) 496; Okon v. State [1988] 1 NWLR (Pt.69) 172; Dagayya v. State [2006] 7 NWLR (Pt.980) 637

Section 221(2) of the new Act states that

> Leading questions shall not be asked in examination-in-chief, or in re-examination, except with the permission of the court

This is a departure from section 196(1) of the old Act which provides that *"Leading questions must not, if objected to by the adverse party, be asked in examination-in-chief, or in re-examination, except with the permission of the court."* (Underlining supplied for emphasis)

Under the old Act, leading questions were allowed and valid in respect of any fact as long as there was no objection from the adverse party. The rule excluding leading question under the old Act was therefore subject to objection being raised by the adverse party. In the absence of objection, leading questions were allowed.

It is our humble submission that, notwithstanding the apparent change in the law, the practical effect is of little or no significance. If a leading question is asked without leave of court and no objection is taken by the adverse party, once the question is answered, it becomes a valid piece of evidence. The adverse party will be deemed to have waived his right to object and cannot be heard later to complain. This is because, as the section stands, leading questions remain in the realm of evidence admissible upon satisfaction of certain condition, that is, leave of court. Once such evidence is admitted without objection, it becomes valid evidence. This is different from evidence which is not admissible at all event. Such evidence even if admitted without objection remains illegal evidence in respect of which objection can be raised at any stage, even at the Supreme Court.[83]

Power of minister to make regulation regarding evidence

Section 255 of the new Act provides that –

> The Minister charged with responsibility for justice may, from time to time, make regulations generally prescribing further conditions with respect to admissibility of any class of evidence that may be relevant under this Act.

[83] See generally for the two categories of evidence and their effect, Alashe v Ilu(1964) 1 All NLR 390; Minister of Lands Western Nigeria v Azikwe (1969) 1 All NLR 490; Shittu v. Fashawe [2005] 14 NWLR (Pt.946)671

This kind of provision was absent in the old Act and was sorely missed. With a provision as this, the old evidence might not have been so outdated by the time it was repealed and replaced with the new Act.

This provision affords an opportunity to update the Act without necessarily going through the rigours of legislative amendment by the national Assembly, a process which, from the experience in respect of the old Act may take several years to achieve.

Conclusion

As can be seen from several provisions of the new Act highlighted above, the new Act represent an attempt to address different shortcomings in the old Act that have come to light during the over five decades of its being in force as the major statue regulating evidence in Nigeria. Regardless of any imperfection that may be discovered in the Act, there is a clear demonstration of the intention by the legislature to bring our law or evidence in line with emerging realities of modern day litigation.

However, the full potential of the new Act cannot be realized unless our judges are willing to closely examine each of the new or updated provisions in the Act and subject them to rigorous analysis before deciding on the impact of such provisions on our law of evidence. We sincerely hope that the judges will approach the new Act with fresh insight and open minds. In this regard, we shall most humbly commend to our judges the words of Herschel LC in Bank of *England v Vagliano Brothers*[84] regarding approach to interpretation of codes but nevertheless relevant to interpretation of any new statute. According to his lordship,

> I think the proper course in the first instance is to examine the language of the statue and to ask what is the natural meaning, uninfluenced by any considerations ... derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.... If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by

[84] (1891) AC 107. See also NDIC v Okem Enterprises Ltd (2004) 4 SC (Pt II) 77 at 113 per Uwaifo JSC.

> interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by minute critical examination of the prior decisions. ... I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. ... What, however, I am venturing to insist upon is that the first step should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special grounds.

It is our conviction that a proper application of the new Act can only improve administration of justice in Nigeria.