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The Unsettled Question on the Testimony of a Child Witness and Its Admissibility under the Nigerian Law of Evidence

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Abstract: *- This paper addresses the unsettled questions and agitations surrounding the procedure for the reception or otherwise of the admissibility of the testimony of a child witness under the relevant provisions of the Nigerian Evidence Act. There are however discordant voices and opinions concerning the right interpretation of this aspect of evidence relating to the testimony of a child witness. The objective of this paper is inter alia to examine some of the case laws on the point and to proffer suggestions as to what may be considered the correct approach and interpretation of the relevant provisions of the Evidence Act on the testimony of a child witness thereby resolving the unsettled question on the testimony of a child witness and its admissibility in judicial proceedings.*

Introduction

It is necessary to state that the word "child" is nowhere defined in the Evidence Act. However, for the purposes of criminal proceedings, section 2(1) of the Criminal Procedure Act defines a child as any person who has not attained the age of fourteen years. It has now been accepted that this definition applies to the Evidence Act with respect to criminal proceedings despite earlier doubts on the applicability of the definition to the Act.

As far as civil proceedings are concerned, this definition will definitely serve as a guide to the courts in determining the age bracket of a child.

The provisions of the Evidence Act relevant to this analysis are as follows:

Section 175(1) of the Evidence Act which provides inter alia that all persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind.

Section 209(1) of the Evidence Act also 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, understand the nature Of an oath may be received, though not given upon oath, if in the opinion of the court, such child is possessed of sufficient intelligence, and understands the duty of speaking the truth.

Section 209(2) of the Evidence Act equally states that if the court is of opinion as stated in subsection (1) of this section, the deposition of a child may be taken though not on oath and shall be admissible in evidence in all proceedings where such deposition if made by an adult would be admissible.

Two different and contradictory lines of decisions have emerged from the interpretation of Section 209(1) above. Firstly, the Supreme Court has in some cases decided that there is no duty on the trial court to conduct what is regarded as "preliminary test" of the child to determine not only the child's competence to testify but also whether or not the child should testify on oath. The second judicial approach canvasses that the test is a condition precedent to the reception of the evidence of a child.

Review of the Case Law

The position that emerges from the cases of John Okoye vs. The State and Simon Okoyomon vs. The State is that there is no duty on trial court to conduct any preliminary test under Section 183 of the evidence Act in order to ascertain the capability

or competence of a child witness to testify on oath. In the former case, the Supreme Court held:-

Where the child is incapable of understanding the nature of an oath, the procedure in Section 183 (now Section 209(1)) must be followed so as to justify the necessary departure from the mandatory provisions of the Act. On the other hand, where the child is capable of understanding the nature of an oath, he must comply with Section 179 as is the case in the present proceedings

Also in the notorious case of Onyegbu vs. The State one of the issues that came up for determination was

Whether by virtue of Section 183(1) of the Evidence Act (now Section 209(1)) the sworn evidence of a child was properly received having regard to the fact that there was neither a preliminary inquiring nor a note in the record indicating that the child witness (P. W.I.) was capable of understanding the nature of an oath

Although the P.W.L. in that case was found not to be a child, but the Supreme Court made some important pronouncements on whether or not preliminary tests are necessary in determining the competence of a child to testify on oath.

According to Ogwuegbu, JSC. Who read the lead judgment?

I must also point out at this stage that Section 183(1) of the Evidence Act deals with unsworn evidence of a child produced as a witness in a criminal proceeding who cannot be and is not sworn because he cannot understand the nature of an oath. That is not the case in the appeal before us.

The opinion about a child-witness is the "opinion of the court". When a judge sits alone he is undoubtedly the person whose opinion is relevant. That explains why emphasis is laid on the ... provisions of the Evidence Act on the phrases, 'if the court is of the opinion', "in the opinion of the court", "unless the court considers that", "and if the court thinks fit and expedient.

His Lordship went further to state

A great deal depends on the opinion of the Judge who sees and hears the witness. Where a child is incapable of understanding the nature of an oath the procedure in Section 183(1) must be followed but where the child is capable of understanding the nature of an oath the judge must comply -with Section 183 as is the case in the present proceedings. On the other hand, there are other cases in which the same Supreme Court has decided otherwise. In Asukwo Okon & Others vs. The State the court laid down the procedure as follows:-

A. Once a witness is a child by the combined effect of Section 155 and 183(1) and (2) of the Evidence Act, (now sections 175 and 209 of the new Evidence Act) the first duty of the court is to determine first of all whether the child is sufficiently intelligent to understand the questions he may be asked in the course of his testimony and be able to answer them rationally.

This is tested by the court putting to him some preliminary questions which may have nothing to do with the matter before the court.

B. 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 the preliminary test then as to whether in the opinion of the court the child is able to understand the nature and implication of an oath, is that of the court and there must be evidence of this opinion in the record of the court.

C. If after passing the first test, he fails the second, then being a competent witness he will give evidence which is admissible under section 183(2) (now section 209(2) of the Act) 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 thus given will be admissible and be admitted.

The court finally held that evidence of a child admitted without observing the preliminaries amounts to an irregularity and that the correct

approach to such evidence is not to expunge it but to see whether it has been corroborated by other evidence implicating the accused.

In the case Mbele vs. The State one of the issues that came up for determination was whether an infant aged 10 years was competent to give evidence on oath without a disclosure of what questions if any, were asked by the court and what answers were given by the child upon which the court considered the child not prevented by reasons of tender years to be competent to testify. However, it was on record that before that child gave her evidence, she was asked some preliminary questions as the record of proceedings had it that:

Nwankwo Mbele was examined by me in accordance with Sections 183 and 155 of the Evidence Act. She is aged and appears quite intelligent although she says she does not attend school. She understands the duty of speaking the truth and is possessed of sufficient intelligence as to justify reception of her evidence.

All the same, the Supreme Court held that this examination was not sufficient for the reception of her evidence on oath as there was nothing on the record to show that she understood the nature of an oath. According to Agbaje JSC

The record of proceedings shows that the learned trial Judge as a result of his investigation was satisfied that P.w. 4 understood the duty of speaking the truth and was possessed of sufficient intelligence to justify the reception of her evidence. The result would entitle the learned trial judge to take the evidence of P.W.4 under Section 183 of the Evidence Act. But the result without more will not entitle the learned trial judge to take the evidence of P.W.4 under Section 183 of the Act. That they should be something more showing that P. W. 4

Understood the nature of an oath. There is no indication at all that the learned trial Judge appreciated this aspect of the point at issue let alone that he carried out any test at all with a view to determining whether in his opinion P.W. 4 was able to understand the nature of an oath. In the absence of any indication in the latter regard I must hold and I do hold that the learned trial judge was wrong to take the evidence of P. W. 4 on oath.

Similarly, in the case of Isaac Sambo vs. The State the result of preliminary inquiring made by the trial Judge was as follows;

“Muslim a child of eleven years old who knows the nature of an oath but does not know the consequences of telling a lie affirmed to speak the truth”.

The conviction of the appellant was quashed as the court held that the preliminary examination was not in strict conformity with the provision of Section 183(1) and (2) of the Evidence Act now in section 209(1) and (2) of the extant Evidence Act in that the trial judge merely found out whether the child witness knew the nature of an oath and the consequences of telling a lie without ascertaining in addition whether the child also knew the duty of telling the truth. It is my humble view that competency is not a matter of age but more of understanding. One does not dispute the fact that Section 183 or now section 209 of the extant Act deals with unsworn evidence of a child witness. There is also no doubt that from the provisions of Sections 155(1) and 183(1), the trial judge has the sole prerogative of determining whether or not a child is competent to testify and to understand the nature of an oath. This opinion has to be formed subjectively. This implies that once the Judge forms an opinion on the matter, his opinion becomes unchallengeable or unimpeachable. The crucial issue is "how can the Judge form the opinion"? if competency is not a matter of age but one of understanding, can the trial Judge, therefore form his opinion on the matter without first putting questions to the child to determine his level of understanding? Can the Judge form his opinion just by looking at the physical appearance of the child even where the devil does not know the mind of man? Thus; the problem lies with the line of cases that maintain that it is only where a child is incapable of understanding the nature of an oath that the procedure in Section 183(1) now section 209 must be followed but where the child is capable of understanding the nature of an oath, the judge must only comply with Section 183. The capability or incapability of a child to testify on

oath can be ascertained only through a preliminary test. Therefore, it is my contention that before a child can be allowed to give evidence on oath, the trial court must satisfy itself as to whether or not the child is in a position to be sworn that is whether he understands the full implication of an oath. To form this opinion, the trial court must put to the child preliminary questions in the open court and in the presence of the accused person.

Analysis of the Relevant Provisions of the Act

Under Section 175(1) of the extant Evidence Act quoted above every person including a child is a competent witness. A child becomes incompetent to testify only if the trial court considers or has reason to believe that such a child is prevented by reason of tender years from understanding the questions put to him or from giving rational answers to those questions. Consequently, there is not duty on the court to determine the competence of a child to testify under this section as such competence has already been conferred on the child. It is only when a child is to be declared incompetent that there is a duty on the court to conduct a preliminary inquiry in order to ascertain whether because of tender years the child is prevented from understanding questions put to him or from giving rational answers to them. From the appearance of a very young child, the trial court may have reason to doubt competence of the child and also the party against whom the child is to give evidence may also raise an objection to the competence of the child so to do. When any of these situations arises, the court is bound to conduct a preliminary inquiry to determine whether or not the child is capable of understanding questions put to him and can also give rational answers to them. There is no other reasonable means by which the disqualification of a child can be achieved. One, therefore, agrees with Agbaje, JSC, when he held that:

"Since all persons are competent to testify until the competence of a witness to testify is challenged for any of the reason stated in the Section, there is in my view no obligation on the court to determine the question of competence of a witness to testify".

The results of the preliminary inquiry, it is submitted, must also be shown on the records of proceedings of the court involved.

On the other hand, Section 183 now section 209 of the extant Evidence Act which deals solely with criminal proceedings appears not to have been correctly construed by the Supreme Court. It is humbly submitted that the better view is that stated in cases such as Okon vs. The State, to the effect that the preliminary inquiring is mandatory before a child witness can give evidence on oath. In fact, in criminal proceedings, it is submitted that there is no other way, a child can testify without first going through the test.

The order of examination or the inquiring should, however, be as follows:

- **B.** As Section 175(1) has already conferred competence on the child, a child witness in a criminal proceeding is presumed competent to testify until the contrary is determined whether or not the child understands the nature of an oath, and he has to give evidence on oath without any further inquiry.
- **C.** If the child does not, in the opinion of the court, understand the nature of an oath, then the trial court must probe further to ascertain if the child is possessed of sufficient intelligence and understands the duty of speaking the truth. If he passes this test, his evidence has to be received though unsworn.

If he fails the test, he cannot testify in the relevant criminal proceeding.

Although, it has not been shown in the case of Sambo vs. The State that a child could understand the nature of an oath but fails to appreciate the duty of telling the truth, the intention of the lawmakers is to presume a child who understands the nature of an oath as capable of understanding the duty of speaking the truth. This is because appreciating the nature of an oath requires a higher level of understanding than that of mere duty of telling the truth. It is submitted; therefore that the two tests become mandatory only if the child does not understand the nature of an oath. This is because a determination as to whether the child understands

the nature of an oath is a condition precedent to the court ascertaining whether the child is possessed of sufficient intelligence and understands the duty of speaking the truth. In effect, if the child understands the nature of an oath, there is no further duty on the court to determine whether he is possessed of sufficient intelligence and understands the duty of speaking the truth. Interpreting Section 38(1) of the English Children and Young Persons Act, 1833 which is similar to our Section 183(1) now section 209(1) of the extant Evidence Act Lord Goddard, C.J., said:

When a child is put into the witness box, the presiding judge has to decide first whether the child is 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 the child is possessed of sufficient intelligence to justify the reception of unsworn evidence on the ground that he understands the duty of speaking the truth.

The above approach, it is submitted, is the correct approach which should be adopted in the interpretation of Section 209(l) of the Extant Evidence Act and it is hereby commended to the Nigerian Courts. If the trial court in Sambo vs. The State had adopted this procedure there would have been no need for the trial judge to determine whether the child witness understood the consequences of telling lies or the truth. That would have been superfluous for a child who does not understand the nature of an oath, that he can be tested on whether he is possessed of sufficient intelligence to understand the duty of speaking the truth so as to justify the reception of his unsworn evidence. Similarly, in Mbele vs. The State the trial judge having chosen to start his inquiry with whether the child was possessed of sufficient intelligence and understood the duty of speaking the truth, to justify the reception of her evidence, it was mandatory on him to also ascertain whether she understood the nature of an oath before her evidence could be on oath.

Rationale for the Tests

The test or tests are necessary and should be mandatory because of the effect the testimony could have on an accused person. Where the child witness gives evidence on oath, conviction can be secured solely on that evidence except where the offence charged is one for which the evidence of a witness cannot ground conviction. Because of the vulnerability of children, despite the fact that conviction can be secured on the sworn evidence of a child, the courts have developed a practice of seeking for corroborative evidence or warning themselves of the danger in convicting an accused person on the uncorroborated evidence of a child. This is, however, not a rule of law or mandatory on the courts. Also if the test as to the child's understanding of the nature of an oath is not conducted, and a child witness is allowed by the court to give unsworn evidence just because the court thinks that the child does not understand the nature of an oath, many otherwise guilty persons could be set free if the child is the only or key witness and there are no other corroborative evidence as the unsworn evidence of a child cannot ground a conviction. It is, therefore, in the interest of justice to both parties - the prosecution and the defence - that the competence of a child to give evidence on oath or otherwise be determined first before his evidence can be received. To do otherwise could work injustice on either the accused person or the victim of the offence or even the larger society that is crying for justice.

It is also submitted that the only manner by which an appeal court can be convinced is to have evidence of compliance with sections 175 and 209 of the Evidence Act. The non-objection by the defence to the testimony of a child witness on oath should not be accepted as an escape route for the failure of a trial court to comply with the condition precedent to the competence of a child to testify on oath. This is because it is not a requirement of the provisions of Section 209(1) that the preliminary tests will be carried out only where the defence objects to the competence of a child who is tendered as a witness.

Consequences of Non-Compliance

The Supreme Court had in some cases accepted the fact that there could be non- compliance with the provision of Section 183(1) of the Evidence Act, now section 209 of the extant Act but as its opinions differ on the right approach to be adopted before the reception of a child's evidence under that section, so also the court has different view on the legal effect of non-compliance with the provisions of the section. In Mbele vs. The State the trial judge inquired only into the child witness's ability to understand the duty of speaking the truth and whether she was possessed of sufficient intelligence to justify the reception of her evidence after which he allowed her to testify on oath. The Supreme Court held that the judge having conducted this test without determining whether the child understood the nature of an oath, her evidence should not have been received on oath. The court added that the sworn evidence of the child was not useless but should be treated as unsworn testimony. In Okon vs.

The State the learned trial judge did not conduct any preliminary test before allowing the child to testify on oath. While holding that there was a violation of the provisions of Section 183(1), the Supreme Court took the position that evidence of a child admitted in breach of the provisions amounts to an irregularity and that the correct approach to such evidence is not to expunge it but to regard it as evidence which requires corroboration, that is, as an unsworn evidence of a child. On the other hand, in Sambo vs. The State, Omo, JSC., after holding that there was non-compliance with the provisions of Section 183(1) said:

"I am afraid I agree with the submission of the appellant that the effect of a failure to carry out both tests is not mere irregularity but should result in making the evidence of P. W.I. one which the court below should have disregarded in considering the appeal".

In the same vein, Uwais, JSC., (as he then was) added:

"I agree that the evidence given to the prosecutrix has no probative value since she was not examined by the learned trial judge in order to satisfy the requirements of Section 183(1) and (2) of the Evidence Act."

As has been pointed out, compliance with the provisions of section 1831 now 209(1) of the extant Evidence Act that is, the carrying out of preliminary inquiry is mandatory and a condition precedent to the reception of the evidence of a child in criminal proceedings whether sworn or unsworn. The sworn evidence of a child can be received only when in the opinion of the trial court, the child understands the nature of an oath. On the other hand, the unsworn evidence of a child is receivable in evidence only if the child does not understand the nature of an oath but in the opinion of the court is possessed of sufficient intelligence and understands the duty of speaking the truth. If it is not shown on the record of proceedings that though the child witness does not in the opinion of the trial judge understand the nature of an oath, but that in the opinion of the judge, the child is possessed of sufficient intelligence and duty of speaking the truth, the trial judged will have no justification for admitting the unsworn evidence of such a child witness.

It is, therefore, suggested that failure to conduct the preliminary test(s) makes the evidence of a child inadmissible as correctly held by the Supreme Court in Sambo vs. The State, It is, therefore, with utmost respect that the writer disagrees with Nnaemeka - Agu, JSC., when he held the evidence of a child admitted without observing the preliminaries amounts to an irregularity with the attitude that such evidence is not to be expunged but that the court has to search for corroborative evidence, thus implying that the evidence should be treated as an unsworn evidence of a child. This is because there will be no justification for admitting and retaining the evidence when the child was not tested and found to have possessed sufficient intelligence and understood the duty of speaking the truth, and the child passes the test, the court may be justified in receiving unsworn evidence which can be accepted only as unsworn evidence. This is because the child has been tested so as to enable the court to form an opinion on whether he appreciates the nature of an oath which as has been stated earlier requires a higher degree of

intelligence than that of knowing the duty of speaking the truth.

Conclusion

The present state of judicial authorities in this area of law leaves much to be desired. There are many conflicting and irreconcilable pronouncements and decisions on the points and yet the Supreme Court has not considered it necessary to overrule any of the decisions. This is more disturbing where a decision that is in conflict or at variance with the position taken in a subsequent case is cited in the latter case by the court without any firm stand taken as to the correctness or otherwise of such earlier decision(s). It is, therefore, necessary for the Supreme Court as the apex court of the country and whose decisions are binding on the lower courts to review the cases and take a firm stand on what it considers to be the correct interpretation of the provision of Section 209 which is a re- enactment of Section 183 of the repealed Evidence Act. This is because the lower' courts now rely on whichever of the conflicting decisions they prefer to be bound by. It is high time, therefore, for the Supreme Court to correct this untidy situation. For there must be an element of consistency in the judicial decisions based on the same provisions of the law Consequently, it is suggested that the cases in line with Okoye vs. The State, should be overruled while the principle established in Sambo vs. The State should be the law but then the approach to the preliminary inquiry of a child who is about to give evidence should be –

- **A.** First of all, the child witness should be tested by the court to ascertain whether he understands the nature of an oath. If in the opinion of the court, the child understands the nature of an oath, he has to give evidence on oath without any further inquiry (sworn evidence).
- **B.** If the child, in the opinion of the court, does not understand the nature of the oath, then the trial court must probe further to find out if the child is possessed of sufficient intelligence and understands the duty of speaking the truth. If he passes this test, his evidence is admissible but not on oath (unsworn). If he fails this test, he cannot testify.

This approach will accord with the intendment of the law makers and the express provisions of Section 209(1) of the extant Evidence Act.

Reference

1. No. 18 2011 as amended which repealed the Evidence Act cap. E 14, laws of the federation of Nigeria.
2. Ibid
3. Cap. 80 LFN 1990 now 2004
4. Ibid
5. Ibid
6. Ibid
7. Onyegbu v. the State (1998) NWLR pt. 391, p. 510
8. John Okoye v. the State (1972) 12 SC at p. 21
9. Ibid
10. (1973) NMLR p. 292
11. (1998) NWLP pt 391, 510
12. Ibid
13. Ibid
14. (1988) SC 108/1987 https:///Nigeria.org supreme court and also reported in law pavilion: www.lawpavillionpersonal.com
15. Ibid at pp. 182-183
16. (1990) 4 NWLR (pt. 145) 484
17. Ibid, at pp. 495 and 503.
18. Ibid at P. 499
19. (1993) 6 N.W.LR. (Pt. 300) 399
20. Ibid at p. 419
21. R. vs Dunne 21 Cri App R. 176
22. Okon vs. the State (1988) 1 N.W.LR. (pt. 69) 172 at 187
23. Supra
24. Supra
25. Ibid
26. Supra
27. Supra
28. See Section 179 of the Evidence Act, Cap. 112, Laws of the Federation, 1990 and section 201 of the extant Evidence Act no 18 2011 (as amended)

29. See Akapn vs. The State (1967) M.M.L.R. 185; Arebamen vs. The State (1972) 4 S.C. 35; DPP vs. Hester (1973) A.C. 296

30. See Section 183(1) of the evidence Act now section 209(1) of the extant Evidence Act 2011 Sambo vs. The State (supra)

31. Ibid

32. Supra

33. Supra