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VICE-CHANCELLOR'S MESSAGE

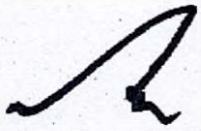
Welcome to *Zambian Open University Law Journal (ZAOULJ)* which I have the honour and privilege of introducing to readers. This Volume (One) is the inaugural issue of the journal; and it is published by Zambian Open University (ZAOU). It features articles of high academic quality written by local and foreign legal scholars. These articles deal with important topics for both professional and lay readers. Topics such as law and ethics, risk management, the lawyer as a member of the community, corruption and street law are very stimulating to the reader. A number of reviews on recent legislation are included in this Volume One of *ZAOULJ*. The articles are interesting, illuminating, and, above all, educative. There are also general comments on matters of public interest, for example, law of tourism, law of diplomacy and property crime.

At ZAOU, teaching and learning are supplemented by rigorous research. The outcome of research needs to be published as articles in journals, as Volume One of *ZAOULJ* shows. I am proud to commend the School of Law at ZAOU for being in the forefront of publishing a journal, thereby setting a good example to be emulated by other Schools (at ZAOU). Academic members of staff in the School of Law have demonstrated that with dedication and commitment to academic endeavours through teaching and research, academic excellence can be achieved and maintained. At ZAOU, we believe that our learning and teaching philosophy and research methods can provide the necessary impetus for academic flourishing, which, in turn, will provide the basis for the advancement of our society.

This journal is not only intended for academic lawyers or legal practitioners, but also for a wide readership. The articles published cover a range of legal concepts, principles and practices that are relevant to understanding the role of law in society. The text of every article thus should be useful to undergraduate and postgraduate students alike.

Practising lawyers will find the text of most articles as a guide and reference when dealing with legal issues arising in the course of litigation. Other readers will gain new insights in law from the contents of the articles included in this volume of ZAOULJ and in subsequent ones.

The future of teaching and research in Law at ZAOU is bright. I invite you to join us in reading and contributing articles to ZAOULJ, and to be part of the promising ZAOU Mission which states: 'ZAOU is a leading high education provider using creative and innovative learning methodologies aimed at reaching diverse constituencies for promoting social and economic development'.



Prof. Mutale Musonda
Vice-Chancellor, Zambian Open University

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ZAMBIAN OPEN UNIVERSITY LAW JOURNAL

CONTENTS

THE ROLE OF LITIGATION LAWYER IN ADVERSARIAL SYSTEM OF JUSTICE

By

Sunday A. Fagbemi*

INTRODUCTION

In an adversarial system of jurisprudence, as against inquisitorial system of justice, evidence plays an important role in legal proceedings. Judges deliver judgment based on the quality of the evidence adduced by the parties to dispute. Over the years, it has been observed that a very minute error in the course of giving evidence during a trial can go a long way in turning the table the other way round, most especially negatively in a case that is otherwise on a sound footing.

The importance of evidence can be traced back into the first trial of Adam and Eve in the Garden of Eden. Before God pronounced His judgment, the parties were given the opportunity to give evidence in defence of their cases.[1] The inability of Adam and Eve to adduce credible and convincing evidence on the balance of probability as against the extant order of God led to the fall of the first family. Up till today, the pattern of taking evidence in the law courts, the world over, is tailored after the above precedent.

Since evidence is germane in the proof of cases before the courts of law, success at trial is therefore in the hands of parties and their counsel. This article aims to consider how

* LLB (*Hons*), LLM (Ife), BL; Lecturer, Department of Public and International Law, Faculty of Law, University of Ibadan, Ibadan, Nigeria; e-mail: sakinfagbemilaw@gmail.com. Tel: 08034709340.

[1] See Genesis, Chapter 3; Maxwell, J. and Elmore, T. (2007), *The Maxwell Leadership Bible.* Second Edition, NKJV. USA: Thomas Nelson Inc, 6-7.

lawyers can assist their clients to win their cases? What are the means of proof and mode of presentation of evidence in court? To answer these questions, this article examines the roles of lawyers in an adversarial system of justice as opposed to inquisitorial system.[2] The article discusses preliminary issues and personalities involved in civil litigation, the scope of the law of evidence, types and classification of evidence, the rule of evidence and order of examination of witnesses in legal proceedings. This article focuses on civil litigation; however, references are made to criminal proceedings for clarity. For the purposes of comparison, the article makes references to the South African laws relating to the rule of evidence.

(a) Civil Litigation

Civil litigation is recourse to the ordinary courts of law for the resolution or determination of conflicts or disputes between two or more parties as to their respective legal rights and obligations. It includes the determination by the court as to the status of one or more parties. The recourse of controversy between parties or between parties and authorities to law courts for settlement is a fundamental right of all Nigerian citizens.[3] Obviously, conflict

[2] The dichotomy between adversarial and inquisitorial system of justice lies in the fact that adjudication in adversarial system is parties or litigant-based whereas in inquisitorial system, it is judge-based. See Schwikkard, P.J. and S.E. van Der Merwe, Coller, D.W. and W.L. de Vos, A. St Q. Skeen and E. van Der Berg (2002), *Principles of Evidence*. Second Edition. Lansdowne 7779, JUTA Law 152-153; Uglow, S. (2006), *Evidence Text and Materials,* Second Edition. London: Sweet and Maxwell, 9.

[3] Section 36 (1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), which provides that: 'In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality'. Furthermore, in order to facilitate administration of justice, section 6(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) vests judicial power on the courts established both at the Federal and State Government levels, respectively.

is inevitable in human relations. However, before conflict becomes matter for judicial adjudication, it must involve legal rights and legal duties. Other disputes not involving in legal rights such as; agreement, binding in honour only or that does not give rise to legal relations or enforcement in the court of law, disputes arising out of illegal or immoral transaction, or in relation to matter against public policy, dispute arising out of social relations, are excluded from the field of civil litigation. For instance, if a father says to his child: 'If you work hard and pass your examination in October, I will buy you a bicycle'[4], the child cannot sue his father to enforce the agreement if he passes and the father fails to buy him a bicycle. It is settled law that courts will not entertain a purely hypothetical case or a feigned issue nor will the court be compelled to answer a question which is merely academic unless litigation was fought out at arm's length.[5] Other instances include gaming transactions or illegal contracts. Although, civil-litigation has its sources in the rules of courts, the statute creating the court, the constitution of a country, the sheriff and civil process law and judgment enforcement rules, the decision of superior courts on procedural matters, practice direction and other statutes, however, it can broadly be classified into three:

(i) dispute concerning family relations, such as divorce, custody, maintenance and so on;
(ii) dispute concerning proprietary relations like land matter or tenancy; and
(iii) dispute concerning personal relations such as contract or tort.

[4] In the case of *Balfour v. Balfour (1919)* 2 KB. 571, it was held that 'mere domestic arrangements made in the ordinary domestic relationship of husband and wife do not of necessity give cause of action in a contract'.

[5] *R v. Weisz* (1951) 2 KB. 425.

(b) The Actors in Civil Litigation

Apart from litigants, two other prominent figures in adjudicatory processes are the judge and lawyer. These two are instrumental to the administration of justice. According to Amina Augie,[6] 'they are bound together in some form of symbiotic existence'. Obviously, judge and lawyer play key role in the administration of justice; however, they are supported in this onerous task by other supporting staff. In this category are; court registrar, court clerk and sheriff. The registrar and court clerk, on one hand, perform administrative duties. In Nigeria, with the exceptions of the Federal High Court, Court of Appeal, Supreme Court and those at the high pedestal at the State High courts, court registrars are mainly laymen.[7] The sheriff or the bailiff on the other hand, is saddled with the services of the court processes and execution of court orders or judgments. In summary, the duties of court registrar and sherriff are complimentary to that of the judge and lawyer.

The Judge

According to *Black's Law Dictionary,*[8] a judge is a public officer appointed or elected to hear and decide legal matters in court. The *Encarta Dictionary*[9] defines 'judge' as 'a high-ranking court officer, formerly a lawyer, who supervises court trials, instructs juries and pronounces sentence'. Within the above contexts, a judge is the first person in legal proceedings as a

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[6] Hon. Justice Amina A. Augie JCA, 'The Bar and the Bench: Twin Pillars Upholding the Rule of Law in Nigeria'. After Dinner Speech at the Nigeria Bar Association (NBA), Ibadan Branch, held in Ibadan, Thursday, 1 June 2006, 140, 181.

[7] In England, most especially County courts, registrars are solicitors and they perform some judicial functions in hearing interlocutory applications and minors' suits.

[8] Garner, B.A. (2004), *Black's Law Dictionary.* Eighth Edition. USA: West Publishing Company, p. 857.

[9] Microsoft Encarta Premium, 2009.

presiding officer. His role is very essential in legal proceedings. A judge, amongst others, must have integrity of character and doing what is right according to the law. He should be free to give orders, which must be respected by the legislature, the executive and the citizens.[10] To meet the above demands, the fundamental attributes of a judge requires patience, wisdom and courage. The integrity of a judge is a dominant factor in the conduct of the trial and in its outcome. The character and personality of different judges can be divided into the careful type or attentive judge and the talkative, the slow and the fast.

There are both good and bad judges. Charles Evans Hughes in 1925 as part of a Presidential address to the American Bar Association was quoted to have said:

> A poor judge is perhaps the most wasteful indulgence of the community. You can refuse to patronise a merchant who does not carry good stock, but you have no recourse if you are hauled before a judge whose mental or moral goods are inferior. An honest, high minded, able and fearless judge is therefore the most valuable servant of democracy, for he illuminates justice as he interprets and applies the law, as he makes clear the benefits and the shortcomings of the standards of individual and community rights among a free people.[11]

In order to checkmate the excesses of a judge in Nigeria, section 153(1) (i) of the Constitution of Federal Republic of Nigeria, 1999 (as amended) established the National Judicial Council (NJC) is what is in place. The NJC is empowered to recommend the appointment, removal or retirement of judicial officers (both Federal and State) and also to collect, control and

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[10] *Supra* note 6, 151.

[11] *Ibid,* 17.

disburse all monies, capital and recurrent for the judiciary.[12] Integrity is further enforced among judges through the Code of Conduct for judicial officers, which is a guide to all judicial officers on the standard of conduct and discipline expected of them.[13]

Legal Practitioner

A legal practitioner is someone who has received legal education either in Nigeria or abroad and has been formally admitted to the Nigerian Bar as Barrister and Solicitor of the Supreme Court of Nigeria.[14] Legal practitioners are next to judges in adversarial system of justice. A legal practitioner has a right of audience in all superior courts of record, including the Supreme Court of Nigeria.[15] Legal practitioners are ministers in the temple of justice; litigation may be impossible without legal practitioners' input. A legal practitioner must be honest and not knowingly conceal the truth from the court. He must realise that he owes an allegiance to a higher cause. The expected status and roles of legal practitioners was captured by Lord

[12] See Third Schedule, Part I to the Constitution of Federal Republic of Nigeria, 1999 (as amended). See in particular sections 20 and 21 of the Third Schedule of the Constitution.

[13] Hon. Justice A.A. Gbolagunte, 'Towards Strengthening Professional Integrity, Ethics and Rule of Law in the Legal Profession in Nigeria'. In A. Onigbinde and S. Ajayi (eds) (2010), *Contemporary Issues in Nigerian Legal Landscape : A Compendium in Honour of Prince Lateef Fagbemi SAN*, Crown Goldmine Communications Limited, Nigeria 59, 63. In the case of *Akomolafe v. Nigeria Exchange Insurance Co. Ltd* (2000) 13 NWLR (Pt. 683) 181 SC. It was held that: 'The legal profession is an honourable profession and is expected to be practised by men of integrity and great honesty'.

[14] Fagbemi, S.A. (2009), The Roles, Prospects and Challenges of Academic Lawyers in Legal Education in Nigeria, 6, *Ibadan Journal of Educational Studies,* 182, 86, 89 (Jan/June 2009). See also the Legal Education (Consolidation) Act, 1976, which established the Council of Legal Education, which is responsible for the legal education of persons seeking to become members of the legal profession.

[15] In this article the words 'counsel' and 'lawyer' are used interchangeably for legal practitioner.

Denning in the case of *Ronald v. Worsely,* [16] where he put the position in the following terms:

> As an advocate, he is Minister of Justice equally with the judge. He has a monopoly of audience in the higher courts. No one save he, can address the judge, unless it be a litigant in person. A Barrister cannot pick and choose his clients. He is bound to accept a brief from any man who comes before the courts, no matter how great a rascal that may be. No matter how given to complaining, no matter how underserving or unpopular his cause. The Barrister must defend him to the end provided that he is paid a proper fee....

Speaking further in the same vein, Crampton J in the case of *R v. O'Connell,*[17] observed that:

> This court in which we sit is a temple of justice and the advocate at the Bar as well as the judges upon the bench is equally ministers in that Temple. The object of all equally should be attainment of justice, slow and laborious and perplexed and doubtful in its issues, that pursuit is a noble one and those are honoured, who are the instruments engaged in it.

A legal practitioner is expected to be a man of integrity, diligent, honest, scrupulous, skilled and must have a partisan-belief in client's case. A lawyer must be dedicated to his client's case

[16] (1967) 1 QB 443 HL. See also Ahmed, R.I. (2014), 'Management and Organisation of Law Firm in Nigeria: The Ethical Trends and Challenges; 17, *The Nigerian Law Journal,* 1, 213, 214; Akubo, P.A., Setting Standards of Best Practice in the Legal Profession as Lawyers in Onigbinde, A. and Ajayi, S. (eds) (2010), *Contemporary Issues in Nigerian Legal Landscape,* A Compendium in Honour of Prince Lateef Fagbemi SAN, Crown Goldmine Communications Limited, Nigeria, 100, 141.

[17] (1844) 71 LR 261, at 312-313.

and pursue the same with vigour and conviction.[18] Ultimately, there is need for legal practitioners to conduct their clients' cases competently, albeit within the stipulations of the law and the Rules of Professional Conduct for Legal Practitioners.[19] To be seised of his client's case, it is imperative for a legal practitioner to conduct office interview with clients. This is briefly discussed below.

Office Interview

> The first interview with a client is very important; many suits are lost or won upon the first interview. A hasty interview with a client, perfunctory grasp of the matters he is trying to lay before the solicitors may be fatal to the solicitors handling the matter subsequently. At the first interview, the lawyer has his opportunity to lay good foundation for the services he would eventually render. Before the commencement of an action in court, the pre-requisites for the maintenance of the action have to be considered. It is essential to comply with prescribed procedures, either statutory or contractual, or the selection of the particular court may be decisive. The essential factors which a legal practitioner retained to conduct a case must consider, at the planning stage of an action, to include but not limited to the determination of the relevant law, possible parties and their standing,[20] the cause of action,[21] jurisdiction of the subject

[18]Section 14(1) of the Rules of Professional Conduct for Legal Practitioners, 2007.

[19]*Ibid,* sections 15 and 16.

[20]*Senator Abraham Adesanya v. The President, Federal Republic of Nigeria* (1981) 5 SC 112.

[21]*Egbe v. Adefarasin* (1985) 5 SC 50, at 87.

matter and the appropriate court,[22] statute of limitation,[23] compliance with conditions precedent, immunity of any kind, cost of litigation and ultimately knowledge of the scope and various rules of evidence.

(c) Scope of the Law of Evidence

According to Schwikkard, 'the general scope of the law of evidence can be determined with reference to its functions'.[24] The main function of the law of evidence is to determine what facts are legally receivable (admissible) to prove the facts in issue. According to section 1 of the Evidence Act,[25] 'evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no other,' although, the provisions of the Evidence Act cover a wide range of issues for the purposes of legal actions. These, among others, include; relevance and admissibility of certain evidence, [26] hearsay,[27]

[22] It is more than settled that the issue of jurisdiction is fundamental pre-requisite in the adjudication of any matter. Jurisdiction has been aptly described as the life-wire of all suits. See the case of *Federal Government of Nigeria & 2 Others v. Adams Oshiomole* [2004] 3 NWLR (Pt. 860) 305, at 319 SC.

[23] The issue of whether or not an action is statute-barred is one touching on the jurisdiction of the court, once an action is found to be statute-barred, although the plaintiff may still have his cause of action, his right of action has been taken away by statute. See the case of *Emiator v. Nigerian Army* [1999] 12 NWLR (Pt. 631) 362, at 372 SC.

[24] Out see Schwikkard*et al., Supra* note 2.

[25] See the Nigeria Evidence Act, 2011.

[26] See sections 4 and 46 of Evidence Act, 2011. See Osipitan, T. (1995), Admissibility of Computer Printout under Nigeria Law of Evidence (October 1995) 2, *Lawyers' Bi-Annual,* 1, 236, 239. See further the cases of *R v. Agwuna* 12 WACA 456, *Salawu Agunbiade v. A.O. Sasegbon* (1968) NMLR 243 *and Abubakar v. Chuks* (2007) 12 SCM (Pt. 2) 28, at 39.

[27] See sections 37 and 38 of Evidence Act, 2011. See also*JAMB v. Orji* (2008) 8 NWLR (Pt. 1072) 552.

opinion evidence,[28] character evidence,[29] documentary evidence,[30] means of proof,[31] competence and compellability,[32] presumptions[33] and estoppel,[34] corroboration,[35] taking of oral evidence and examination of witness,[36] burden of proof[37] and wrongful admission and rejection of evidence.[38] However, the scope of law of evidence can broadly be divided into substantive and adjectival laws. Substantive law, on the one hand, defines the rights, duties and liability of parties to the transaction in issue. In this category are law of torts, contract and criminal law and so on. Adjectival law, on the other hand, governs the machinery by which substantive law is applied in practice. It regulates the conduct of litigation and establishes the facts on which rights, duties and liabilities are founded. Adjectival law comprises procedure and evidence. Procedure deals with the methods of initiating proceedings and how they are conducted. These are found in Civil Procedure Rules of various courts in Nigeria for civil cases[39] and in Criminal Procedure Act,

[28] See sections 67-76 of Evidence Act, 2011. See*Ajani v. Comptroller of Custom* (1962) 14 WACA 34; *Abubakar v. Yar'adua & Ors* (2008) 12 SCM (Pt. 2) 1, at 103/104.

[29] See section 77 of Evidence Act, 2011.

[30] See section 128 of Evidence Act, 2011.

[31]Means of proof is broadly divided into oral evidence, real evidence and documentary evidence. See section 121 of Evidence Act, 2011.

[32] See sections 175-182 of Evidence Act, 2011.

[33]See section 145(3) of Evidence Act, 2011.

[34] See section 173 of Evidence Act, 2011; see also*Agbasi& Others v. Obi & Others* (1998) 1 SCNJ 31.

[35] See section 200 of Evidence Act, 2011. See also Heydon, J.D. (1970),*Cases and Material on Evidence.* London: Butterworths, 67.

[36] See section 214 of Evidence Act, 2011.

[37] See section 133(1) of Evidence Act, 2011. See further*Olufosoye v. Fakorede* (1993) 1 NWLR (Pt. 272) 247.

[38]See section 20 of Evidence Act, 2011.

[39] The rules are made by the heads of various courts as empowered by the Constitution of the Federal Republic of Nigeria, 1999 (as amended). See section 236 for the Nigerian Supreme Court, section 248 for the Nigerian Court of Appeal, section 254 for the Federal High Court and section 274 for the State High Court etc.

or the Criminal Procedure Code for criminal trials in the Southern and Northern states of Nigeria, respectively.[40]

In the conduct of civil proceeding, the essential issues to be considered are the mode of taking evidence and advocacy. The two are intertwined and go hand in hand. An understanding of types and classification of evidence is a ready tool in the hand of legal practitioners. The Evidence Act governs the bulk of the rules of evidence applicable in Nigerian courts. Section 3 of the Evidence Act, 2011 provides that: 'nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria'. This section, it is submitted, is a safe haven for the purpose of admitting rules of evidence under the English common law, the rules of customary law as well as provisions of the other statutory enactment, which are not declared irrelevant under the Evidence Act.[41]

In an adversarial system of justice, a legal practitioner must be abreast of the law of evidence and conversant with the provisions of relevant statutes, jurisdictions and rules of courts in order to win cases.[42]

(d) Types and Classification of Evidence

According to *Black's Law Dictionary,*[43] evidence is 'something *(including testimony, documents and tangible objects)* that

[40] Yusuf, O.A., The Nigerian Evidence Act and Electronically-Generated Evidence: A need to fast track the system. In Onigbinde, A. and Ajayi, S. (eds) (2010), *Contemporary Issues in Nigerian Legal Landscape; A Compendium in Honour of Prince Lateef Fagbemi SAN*: Crown Goldmine Communications Limited, Nigeria, 73.

[41] See the case of *R. v. Itule* [1961] 1 All NLR, 462 SC. Conversely, in South Africa, the position of law is that the rule of evidence is based on local statutes and where these are silent, on a specific topic or issue, the English Law of Evidence which is in force in South Africa since 30 May 1961 may be referred to. See the case of *S. v. Desai* (1997) 1 SACR 38 (W) 43g.

[42] Out see, Fagbemi.*supra* note 2, p. 96.

[43] *Supra* note 8, p. 595.

tends to prove or disprove the existence of an alleged fact'. From the above definition, evidence is basically classified into oral, real and documentary evidence.

Oral Evidence

Oral Evidence could be described as verbal disposition of a witness. The usual method of proving facts in court is by oral testimony of witnesses. For this purpose, section 125 of the Evidence Act, 2011 provides that: 'all facts, except the contents of documents, may be proved by oral evidence'. This provision is similar to section 161 of the South African Criminal Procedure Act, 1977, which provides *inter alia* that: 'a witness in criminal proceeding should *(except where the CPA or any other law provides otherwise)* give evidence *viva voce'. Viva voce* evidence, according to St Q Skeen[44] will, in the case of a deaf-and-dumb person, include gesture language, and in the case of a person less than eighteen years, shall be deemed to include 'demonstrations, gestures or any other forms of non-verbal expression'. Within the above context, oral evidence must in all circumstances include any form of communication intelligible to court.

Real Evidence

Phipson[45] defines 'real evidence' as 'material object other than documents produced for inspection by a court'. A full definition of real evidence is given under section 258 (1) of the Evidence Act, in the following term:

> Real evidence' means anything other than testimony admissible hearsay or a document the contents of

[44] Out see, Schwikkard PJ*et al., Supra* note 2, p. 338.

[45] Phipson, S.L. (2005),*The Law of Evidence.* Sixteenth Edition. London: Sweet & Maxwell, 5.

> which are offered as evidence of a fact at a trial, which is examined by the court as a means of proof of such fact.

From the above definition, real evidence includes anything, person or place which is observed by a court in order that a conclusion may be drawn as to any fact in issue.[46] Types of real evidence include; weapon(s) used in the commission of a crime, tape recordings, fingerprints, photographs, films, video recordings, hand-writing, documents (when presented as a chattel rather than their contents), blood test or the scene of the accident. Real evidence usually owes its efficacy to the evidence of a witness who explains or produces the exhibit in court.

In Nigeria, section 127 of the Evidence Act deals with the inspection where oral evidence refers to real evidence. In this context, the court may require the production of such material things for its inspection or it may inspect the scene of any moveable or immovable property to see on first-hand, the object being referred to, to aid it in the proper determination of the question in dispute.[47] The essence of inspection of *locus* is to bring to the fore, the evidence of both parties without bias. It is a forum to allow parties show the court important boundaries and landmarks that will enable the court to decide the issue or issues in dispute. Similarly, under the South Africa law, the power to hold inspection in *loco* in criminal case is conferred on a court by section 169 of the Criminal Procedure Act, 1977 and in civil cases under section 39(16) (d) of South African Supreme Court Rule, 1959. The objective of the visit to the *locus* is to clear any ambiguity that may arise in the case.[48]

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[46] Schwikkard *et al., supra* note 2, p. 366.

[47] Evidence Act, 2011, s. 127(1) (a) (b).

[48] *Obi & Ors v. Mbionwu* (2002) 14 SCM 189, at 204 SC.

Procedurally, during a visit to the *locus in quo,* the court does not cease to be a court because it is on inspection away from the court building. Statements made during the visit to the *locus* are as much as oral evidence as if they were made in the court room. The trial court can make use of such evidence while considering the fact in issue without observing section 205 of the Evidence Act, 2011, which provides for the given of evidence under oath or affirmation.

During a visit to the *locus in quo*, parties, their counsel and witnesses must be in attendance. Similarly, where a witness points out items and places during the inspection, he must confirm the same in the open court and where necessary, cross-examined by the adverse party. Where a trial court departs from strict observance of the intent and spirit of section 127 of the Evidence Act, its decision is liable to be set aside by the appellate court.

Documentary Evidence

Documentary evidence consists of statements made in writing, which are intended to be relied upon at the trial of cases. The word 'Document' has been defined in various ways in the statutes, judicial authorities and by text writers. In the case *R. v. Daye*[49] a 'document' is said to include: 'any written things capable of being evidence'. Similarly, in section 33 of the South African Civil Proceedings Evidence Act, 1965, 'document' is defined as including any book, map, plan, drawing or photograph'. This definition is *in parimateria* with the definition in the repealed Nigerian Evidence Act.[50]In section 258 (1) of the Evidence Act, 2011, 'document' is defined to include:

[49] (1908) 2 KB 330, at 340 HL.

[50] See section 2 of the Evidence Act, Cap E14, Laws of the Federation of Nigeria, 2004.

(a) books, maps, plans, graphs, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;

(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) in the case of a document not falling within the said paragraph (c) of which the visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not, and any reference to a copy of the material part of a document shall be construed accordingly.

The definition of document in section 258 of the Evidence Act, 2011 is wider in scope than its definition under the repealed Evidence Act. The new definition includes any information or fact recorded in computer and other electronic devices such as tape, sound track, disc, film and other similar devices by means of which information is recorded. There is no consensus among text writers on the meaning of computer. However, we can draw inferences from the various attempts made to give meaning to the word. Yusuf[51] defines 'computer' as 'an intelligent electronic device constructed to receive and process

[51] Yusuf, A.O. (2005), Computer Technology and Copyright Eligibility under the Nigerian Copyright Law (September, 2005), 3, *Igbinedion University Law Journal*, 41.

information and data, bringing out the desired output'. A computer is a machine which can accept data in a prescribed form, process the data and supply the result of the processing in a specified format as information or as signals to control automatically some further machine or process.[52] The *Encarta Dictionary*[53] defines 'computer' as 'an electronic device that accepts, processes, stores, and outputs data at high speeds according to programmed instruction'.

The above definitions give insight into what a computer is and what it could be used to achieve in practical terms. There is no doubt that the use of a computer and other electronic devices in business transactions has gained tremendous recognition the world over. According to Frank Webster,[54] we are living in what is usually described as an 'information society' and as the business community makes even greater use of the computer, the courts are going to find out that the disputes before them border on evidence which had at some stages passed through or been processed by a computer. For example, this new trend of information technology is most evident in the banking sector. Electronic banking transactions are paperless transactions and they present a myriad of difficulties in their proof. Banks and other outlets utilise the computer and computer network systems, the internet, automated teller machines, telephone etc., at every stage of operation.[55]

Similarly, the prosecution of criminal cases is not totally unaffected by this new wave of technology. This is because

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[52] *The Penguin Dictionary of Computer Hammondsworth.*

[53] *Supra* note 9.

[54] Webster, F. (2006), *Theories of the Information Society.* Third Edition. Routledge Publisher, 8; Mason, S. (2010), *Electronic Evidence.* Second Edition. Lexis Nexis: Butterworth, 21.

[55] *Supra* note 51, 43-44. See also Hoey, A. (1996), Analysis of the Police and Criminal Evidence, section 69, Computer Generated Evidence; *Web Journal of Current Legal Issues* in Association with Blackstone Press Ltd.

corruption and economic crimes offences all come down to the issue of money and documents. Generation and transmission of documents have gone beyond posts and telegraph. Documents are no longer intercepted at the post office, but now programmes are being hacked, mails are being intercepted electronically and contents changed before being delivered in the name of the sender. In other words, cyber-crimes are displacing conventional crimes. Fixed wire analogue and digital lines are fast giving way to mobile phones on which fax messages and electronic data could be received and sent. Trading on the stock exchange has gone beyond physical exchange of share certificate to the operation of the Central Securities Clearing System (CSCS).[56]

Presently in Nigeria, the Evidence Act, 2011 is the only enactment that guides admissibility of computer and other electronic evidence.[57] With the coming into operation of the Evidence Act, 2011, the obstacle hitherto placed against the admissibility of electronically generated evidence under the

[56] Justice Oyewole, J.O., 'Adjudicating Corruption Cases in Nigeria: Zero Tolerance' (October 2006); see generally Bamgbose, O. (2011), The Use of Modern Technology in Crime Control: A Plus or Minus; 1, *University of Ibadan Law Journal1,* 147-182.

[57] This is unlike some other foreign jurisdictions where there are separate legislations for civil and criminal proceedings for the admissibility of computer evidence. In Britain, the Civil Evidence Act of 1965 regulates civil proceedings, while the Police and Criminal Evidence Act of 1984 deals with criminal proceedings. In Ireland, the Civil Law (Miscellaneous Provisions) Act, 2008 governs civil matters, while Criminal Evidence Act, 1992 regulates criminal cases.

Nigeria repealed Evidence Act has been removed.[58] Basically, section 84 of the Evidence Act, 2011 makes elaborate provisions for the admissibility of computer and electronically-generated evidence by Nigerian courts upon the satisfaction of certain preliminary conditions.

The section, among others, stipulates that the document containing the statement must be produced by the computer during a period over which the computer was used regularly, to store or process information for the purposes of activities regularly carried on over that period. That the information contained in the statement is reproduced or derived from information supplied to the computer in the ordinary course of those activities.[59] It must also be established 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, and that throughout the material

[58]Before the passing into law of the Evidence Act of 2011 in Nigeria, there were conflicting judgments from the Nigerian courts on the admissibility of electronically-generated or computer evidence. For instance, in the cases of *Esso West Africa Inc. v. Oyegbola* (1969) 1 NMLR 194, at 198 SC, an electronic version of 'statement of account' and their ledger copies were received in evidence by the Supreme Court of Nigeria under section 37 of the repealed Evidence Act of 1990. The decision was followed in the cases of *Yesufu v. ACB* (1976) 4 SC 1 SC; *Onyeabosi v. Briscoe Nig. Ltd* [1987] 3 NWLR (Pt. 57) 89 SC and *Ogolo v. IMB Nig. Ltd* (1995) 7 NWLR (Pt. 419) 314 . However, in the cases of *Nuba Commercial Bank Ltd v. NAL Merchant Bank Ltd (2003) 16 NWLR* (PT. 740) 517 *and Federal Republic of Nigeria v. Chief Femi Fani-Kayode* (FHC/L/532C/2008), the courts refused to follow the decisions of the Supreme Court on the admissibility of computer evidence on the ground that it is not expressly provided for under the repealed 1990 Evidence Act. See also Chukwuemerije, A.I. (2009), Affidavit Evidence and Electronically-Generated Materials in Nigeria Courts; *Scripted-Journal of Law, Teaching & Society,* retrieved from http://www.ed.ac.uk/ahrc.script_ed/vol3-3/affidavit.asp (accessed 26 Oct. 2012); Fagbemi, S.A. (2012), Admissibility of Computer and other Electronically Stored Information in Nigeria Courts: Victory at Last, 1, *University of Ibadan Law Journal* 3, 151, 163-167; Taiwo, O. SAN, "Why Computer Statement of Account is admissible as Evidence in Nigeria' and procedure/WHY COMPUTER STATEMENT OF ACCOUNT, at 9.50 am, retrieved from http://www.nigerian/lawguru.com/article.practice.

[59] Section 84(2) of the Evidence Act, 2011.

part of that period, the computer was operating properly or, if not, the period when the computer stops working did not affect the production of the document itself or the accuracy of its contents.

Presently, in Nigeria, and under the South African law, computer or electronically-generated evidence is admissible in courts. However, the provision is not absolute under the two jurisdictions. In South Africa, a witness seeking to tender computer printout must satisfy the 'authentication test'. It is wise, that the printout must be accompanied by an authentication affidavit and other supplementary affidavits as might be necessary to establish the reliability of the information contained in the printout.[60] Similarly, a witness who intends to tender a computer printout in Nigerian courts must accompany the same with a 'certificate'. The certificate must be signed by a person occupying a responsible position in relation to the operation of the relevant devices or the management of the relevant activities as the case may be. The certificate must also identify the document with particulars of any device involved in the production of the document.[61]

Rules of Evidence

The basic rule of evidence is said to evolve to assist the court in the determination of one principal problem, namely, upon whom rest the burden of proof? 'Proof' according to *Black Law Dictionary*[62] means 'the establishment or refutation of an alleged fact by evidence or the persuasive effect of evidence in the mind of fact finder' Procedurally, the burden of proof rests on the person who asserts the existence of such thing. In this wise, the plaintiff in civil cases and prosecution in criminal

[60] Section 2 of the South African Computer Evidence Act, 1983.

[61] Section 84(4) of the Evidence Act, 2011.

[62] *Supra* note 8, p. 1251.

cases. The term 'burden of proof' is used in two different senses, namely:

(a) *The burden or obligation to establish a case* - According to Fidelis Nwadialo,[63] this burden is an obligation which lies on a party to persuade the court either by preponderance of evidence in a civil case or beyond reasonable doubt in a criminal case, that the material facts which constitute his whole case are true and consequently to have the case established and the judgment given in his favour. This burden is called 'the burden on the pleadings', 'the legal burden' or 'persuasive burden'. The legal burden is always stable and does not shift among parties to legal proceedings throughout the trial and this party is determined at the beginning of the trial.[64]

(b) *The obligation to adduce evidence on a particular fact or issue*[65] - The evidence must be sufficient to prove the fact in issue in order to give reasonable possibility for the court to decide the case in his favour. This is called 'evidential burden of proof'.[66] Unlike legal burden, evidential burden 'shift' from one party to the other in the course of proceedings. It means that when a party bearing evidential burden discharges it by adducing sufficient evidence, the opponent comes under another evidential burden to disprove those facts in order to neutralise them.[67]

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[63] Nwadialo, F. (1981), *Modern Nigeria Law of Evidence.* Benin City: Ethiope Publishing Corporation, Ring Road 161.

[64] See the case of *Duru v. Nwosu* (1989) 7 SC (Pt. 1) 1.

[65] *Supra* note 63, p. 32.

[66] *Ibid.*

[67] In the case of *Ola Yusuf v. Oluseyi Adama (2010)* 3 SCM 224, at 235 SC; the Supreme Court of Nigeria held that: 'The fundamental rule of evidence is that the burden of proof rests on the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. Once the plaintiff has discharged the burden on him, the onus of proof, which is never static, shifts to the defendant.

Under the Nigerian law of evidence, it is settled that evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as declared to be relevant.[68] The obligation of proving those and other relevant facts rests on the party propounding them.

In civil cases, pleadings are very crucial. Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at trial and giving all such details as his opponent needs to know in order to prepare his case in answer.[69] In civil cases, it is pleadings, which determine what constitutes facts in issue and who is asserting them. It is settled principle of law that the plaintiff must prove all the facts contained in his 'statement of claim' unless any of them had been admitted by the defendant; he must also prove all facts denied by the defendant. In the case of *Sunday Uzokwe v. Dansy Industries Nig. Ltd & Others.*[70] The Supreme Court held as follows:

> In civil cases, the ultimate burden of establishing a case is as disclosed on the pleadings. The person who would lose the case if on completion of pleadings and no evidence is led on either side has the general burden of proof .... It is only when the plaintiff has made out a *prima facie* case that the onus of proof shifts from the plaintiff to the defendant and vice-versa, from time to time as the case progresses and it rests on that party who would fail if no evidence were given on either side.

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[68] See section 1 of the Evidence Act, 2011.

[69] Mogha (1992), *Mogha's Law of Pleading*, cited by Takwani C.K. (1992), *Civil Procedure*. Second Edition. Lucknow: Eastern Book Company, 126.

[70] 2 SCM 159, at 166 SC. See further the cases of *David Ituama v. Jackson Akpe-Ime* (2002) 80 LRCN 2480, at 2496 SC and *Owoyemi v. Adekoya & Others* (2003) 12 SCM 277, at 296 SC.

Apart from the above circumstance, there are exceptions to the general rule that who asserts must prove. Good examples of these are incidents of presumptions. Presumptions save a party from proving certain facts and thus put the onus on the other side. A presumption is a conclusion which must or may be drawn from a given set of facts until the contrary is proved.[71] The presumption may either be 'presumption of law' or 'presumption of facts'. A presumption of law is further divided into rebuttable presumption and irrebuttable presumption. Thus, in the world of Nwadialo,[72] where the presumption is rebuttable, evidence contrary to the fact presumed is permissible and may be given. Schwikkard[73] is of the view that rebuttable presumptions of law 'are rules of law compelling the provisional assumption of a fact'. They are provisional in the sense that the assumption will stand unless it is destroyed by countervailing evidence.[74] In the latter, no evidence is allowed to be given to controvert the presumption.[75] Thus, the conclusion to be deduced from the given sets of facts are prescribed or stipulated by law and must be drawn as the inevitable consequence of those facts.[76]

With respect to presumptions of fact, the law merely recognises but does not stipulate the conclusion. A presumption of fact is in essence an ordinary logical inference from proved facts. Therefore, a court is not obliged to draw the inference dictated by a presumption of fact if such an inference would not accord with common sense or is against the public policy.[77]

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[71] *Supra* note 63, p.17.

[72] *Ibid.*

[73] *Supra* note 2, p. 366.

[74] *Ibid.*

[75] See Nwadialo, *supra* note 63. See section 145 (3) of the Evidence Act, 2011, which provides that: 'when one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved and shall not allow evidence to be given for the purpose of disproving it'.

[76] *Supra* note 63.

[77] *Ibid.*

Examples of presumption of facts among others are presumption of death,[78] presumption of legitimacy,[79] and presumption of marriage.[80]

(e) Order of Production and Examination of Witness

Legal proceedings, especially trials, depend on witnesses to present factual evidence to the fact finder, which may be a judge or a jury.[81] Typically, each party in a dispute has its own set of witnesses. Witness in its strict legal sense, means, one who gives evidence in a cause before a court, and in its general sense, includes all persons from whose lips testimony is extracted for use in judicial proceedings. Witness includes deponent in affidavit as well as persons giving oral testimony before a court or jury.[82] Broadly speaking, witness includes 'any person who has given a statement on oath and when a party does so, he becomes a witness for, on the record, he is classified as a witness and numbered as such'.[83]

Statutorily, all oral evidence given in legal proceedings must be initiated with either the taking of oath or making an affirmation in accordance with the provisions of the Oath-Act or Law.[84] The rationale for oath-taking before given evidence in court is to guarantee that the witnesses speak the truth. In practice, it is not mandatory for a witness to take oath or make a solemn affirmation; a witness who refuses cannot be

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[78] Section 164 of the Evidence Act, 2011.

[79] *Ibid*; see also case of *Watson v. Watson* (1983) 2 All ER 105.

[80] Section 166 of the Evidence Act, 2011.

[81] For instance, there is no jury system in Nigeria, judges sit alone without the assistance of a jury to decide the issues of law and facts.

[82] *Supra* note 8, p. 1633; Aguda, T.A. (1989), *The Law of Evidence.* Third Edition. Ibadan: Spectrum Law Publishing, 316; *Encarta Dictionary*, *supra* note 9.

[83] See the case of *Badullah v. The State* (1961) AWR CH. C 89, at 91.

[84] See First Schedule to the Oaths Act, Cap O1, Laws of the Federation of Nigeria, 2004. See also section 205 of the Evidence Act, 2011.

compelled to do so.[85] Thus, where a witness, due to a religious belief refuses to take oath, courts are enjoined to receive his evidence without oath.[86]

Similarly, where a child who has not attained the age of fourteen years is tendered as a witness, such child may not be sworn and shall give evidence otherwise than on oath or affirmation. However, if in the opinion of the court, such child possesses sufficient intelligence and understands the duty of speaking the truth, the evidence of a child who has attained the age of fourteen years may be given under oath.[87] In criminal proceedings, an unsworn evidence of a child must be corroborated by some other material evidence, implicating the accused person, otherwise the accused should not be convicted.[88] It is trite law that such material evidence must come from an independent source and must not be evidence which itself requires corroboration.[89]

It should be noted that before the coming into operation of the new High Court Rules in virtually all the States in Nigeria, including the Federal High Court of Justice, the evidence-in-chief of witnesses was obtained through oral examination by means of series of successive questions in the open court. Such witness may be cross-examined by the adverse party in order to diminish the effect of his evidence and or to test witness's

[85] See *A.I.B. Ltd v. Asaolu* (2005) All FWLR (Pt. 270) 2092, at 2128 and *Madu Manama v. Bornu Native Authority* (1964) 1 All NLR 143.

[86] See section 208(1) of the Evidence Act, 2011.

[87] See section 209(1) of the Evidence Act, 2011.

[88] See section 209(3) of the Evidence Act, 2011. In the case of *Solola v. The State* (2005) All FWLR (Pt. 269) 1751, at 1772, it was held that section 183(1) of the Evidence Act deals with the evidence of a child who does not understand the nature of an oath and provides that 'such a child is competent to give unsworn evidence if in the opinion of the court such a child possesses sufficient intelligence to justify the reception of such evidence' (note that the provision of section 183(1) referred to in the above case is the same with the provision of section 209(3) of the Evidence Act, 2011).

[89] *R. v. Hester* (1972) 3 WLR 719.

veracity and credibility. The witness may thereafter be re-examined by the party that called him to resolve any doubt or ambiguity created during the process of cross-examination.

Due to the foregoing, the three established stages of examination of witness are; examination-in-chief, cross-examination and re-examination.[90] Each stage of examination has its own peculiar rules and procedures. For instance, the cardinal rule of law is that a leading question shall not be asked in examination-in-chief as well as during re-examination. A leading question is one which suggests the answer which the person putting it is expected to receive.[91] Depending on the circumstance, leading questions may be objectionable or proper. Leading questions may be asked with the permission of the court.[92] Instances where leading questions are permissible when dealing with issues which are introductory, such as name, address and occupation of witness or uncontroverted or admitted facts.[93] Again, where the memory of a witness has been exhausted and there is still information to be elicited, leading questions may be asked. Leading questions may also be allowed to contradict a hostile witness.[94]

Conversely, a leading question is allowed during cross-examination.[95] However, this provision is not absolute and thus, parties to legal proceedings must limit cross-examination to only pleaded facts. The combined effect of sections 224 and 225 of the Nigeria Evidence Act gives court-wide discretion to disallow any question not pleaded. In the case of *Punch Nig.*

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[90] See section 214 of the Evidence Act, 2011. See Nwadialo, F. SAN (1990),*Civil Procedure in Nigeria.* Lagos: MIJ Professional Publisher Limited, 550.

[91] See section 221(1) of the Evidence Act, 2011.

[92] See section 221(3) of the Evidence Act, 2011. See also Allen, C. (1988),*Practical Guide to Evidence.* London: Cavendish Publishing Limited, 62.

[93]See Nwadialo SAN, *supra* note 90.

[94]See Aguda, *Supra* note 82, p. 317.

[95] See section 221(4) of the Evidence Act, 2011.

Limited v. Eyitene,[96] it was held that 'evidence elicited from a party by his opponent during cross-examination cannot be used against the party if the material fact relating to evidence was not pleaded'.

It has been observed in practice that counsel usually thinks that the sky is the limit under cross-examination and that as lawyers they are at liberty to ask both relevant and irrelevant questions under the guise of cross-examination. This conception was rightly condemned in strong terms by Honourable Justice Onalaja, JCA (as he then was) in the case *Ogunmakinde v. Akinsola,*[97] as follows:

> Let me reiterate the misconception of many learned counsel that in cross-examination the sky is the limit, this school of thought ignores the provision of section 189(2) Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990 'that: the examination and the cross-examination MUST RELATE TO RELEVANT FACTS; but the cross-examination need not be confined to the facts to which witness testified on his examination-in-chief'. Judicially interpreted that under our civil process, RELEVANT FACTS are pleaded facts, unpleaded facts are irrelevant facts, so unpleaded facts cannot be relied upon under the camouflage or umbrella of cross-examination....

The position of the learned jurist finds support in the established rule of pleadings. Pleadings are written statements of parties which are served by each party on the other, which set forth in summary form, the material facts on which each relies in

[96] (2002) FWLR (Pt. 125) 678, at 701.
[97] (2002) FWLR (Pt. 105) 781.

support of his claim or defence.[98] It is settled law that parties as well as courts are bound by pleadings and that any material fact not pleaded lacks probative value and goes to no issue.[99]

The three stages of examination of witnesses mentioned above are provided for in the various High Court Civil Procedure Rules recently introduced in Nigeria. However, the rule have been slightly modified. For instance, Order 3, rule 3 (1) of the Civil Procedure Rules of the Federal High Court of Justice in Nigeria provides *inter alia* that all civil proceedings commenced by writ of summons shall be accompanied by the following documentation or court processes:

(a) Statement of Claim;
(b) Copies of every document to be relied on at the trial;
(c) List of non-documentary exhibits;
(d) List of witnesses to be called at the trial, and
(e) Written Statement on oath of the witnesses.[100]

With the above provisions, the first stage of examination of witnesses called examination-in-chief has been radically modified with the requirement for the filing of written statement on oath of witnesses. A careful search into the various High Court (Civil Procedure) Rules mentioned in this article did not reveal any guide as to how to prepare a written statement on oath of witnesses. In the face of this *lacuna*, guidance is to be sought from other jurisdictions. However, before doing so, it

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[98] Ojukwu, E. and Ojukwu, C.N. (2007),*Introduction to Civil Procedure.* Third Edition. Abuja: Helen-Roberts, 163; Efevwerhen, D.I. (2007), *Principles of Civil Procedures in Nigeria.* Enugu: Chenglo Ltd, 175.

[99] *Adeniran v. Alao* (2001) 1 NWLR (Pt. 745) 561; *Isheno v. Julius Berger (Nig) Plc.* (2008) All FWLR (Pt. 415)1647; *Baliol Nig. Ltd v. Navcon Nig. Ltd* (2010) 10 SCM 103, at 116 and *Adekeye & Others v. Adesina& Others* (2010) 12 SCM 1, at 16-17.

[100] See further Order 3, rule 2 (1) of the High Court of Lagos State (Civil Procedure) Rules, 2012; Order 3, rule 2 (1) of the High Court of Osun State Amended (Civil Procedure) Rules, 2008; Order 3, rule 2 (1) of the Oyo State High Court (Civil Procedure) Rules, 2010 and Order 3, rule 2 (1) of the High Court of Ekiti State (Civil Procedure) Rules, 2011.

is very important to bear in mind that a written statement of witnesses must conform with the standard of what a witness is required to say when giving oral evidence in the open court.

Thus, when preparing a witness statement, the witness whose statement is being drafted must recognise the importance of the oath or affirmation, usually taken before given oral evidence, it is germane that the witness understands that his evidence must be the truth, the whole truth and nothing but the truth. To ensure correctness of the witness evidence, the United Kingdom Guidance Note on Written Standards for the Conduct of Professional Work Code of Conduct has provided some useful tips for the preparation of written statements.[101] Rule 704 of the Code of Conduct highlights what a written statement of witness must contain as follows:

(i) it must accurately reflect a witnesses evidence;
(ii) it must not contain any statement which counsel knows the witness does not believe to be true;
(iii) it must contain all the evidence which a witness could reasonably be expected to give in answer to those questions which would be asked of him in examination-in-chief,
(iv) save for formal matters and uncontroversial facts, it should be expressed, if practicable in the witnesses' own words;
(v) it must be confined to admissible evidence that the witness can give, including permissible hearsay, inadmissible hearsay, comment and argument, which should not be excluded; and
(vi) it should be succinct and exclude irrelevant material.[102]

[101]Preparing Witness Statements for Use in Civil Proceedings, retrieved from http://www.lawstandardsboard.org.uk/code-guideance-preparing-witness-statenent-for-use-in-civl-proceeding (accessed 12 December 2014, at 1.05 pm).

[102]*Ibid.*

Apart from the foregoing requirements, the formalities for the drafting of the witnesses' statement under the aforementioned Code of Conduct are as follows:

(i) that the statement should be expressed in first person singular sentences;
(ii) should state the full name of the witnesses' and place of residence, if the statement is made in professional, business or other occupational capacity, the address at which he works, the position he holds and the name of the firm or employer;
(iii) should state the witness's occupation or if he has none, his description;
(iv) should state if the witness is a party to the proceedings or is an employee of such a party;
(v) should usually be in chronological sequence divided into consecutively numbered paragraphs, each of which should, so far as possible, be confined to a distinct portion of the evidence;
(vi) must indicate which of the statements in it are made from the witness's own knowledge and which are matters of information and belief, indicating the source for any matters of information and belief;
(vii) must include a statements by the witness that he believes that the facts stated in it are true;
(viii) must be signed by the witness or, if the witness cannot read or sign it, must contain a certificate made by an authorised person as to the witnesses' approval of the statement as being accurate;
(ix) must have any alterations initialed by the witness or by the authorised persons;
(x) should give in the margin the reference to any document or document mentioned; and
(xi) must be dated.[103]

[103] *Ibid.*

Once the above requirements are met, what the witness is required to do during the hearing of the case under the various States High Courts Civil Procedure Rules is to confirm his written deposition and tendering in evidence all disputed documents or other exhibits referred to in the deposition.[104] The adoption of witness statement on oath is presently taken as the witness evidence in-chief in virtually all the High Court Civil Procedures Rules in Nigeria. After the confirmation of written deposition, the adverse party is at liberty (if he so wishes) to cross-examine him to either rebut his evidence-in-chief or contradict the statements in the witness deposition. The rules guiding the three stages of examination of witness are provided for in sections 210-249 of the Evidence Act, 2011.

Section 214 of the Evidence Act literally provides for the three stages. However, to qualify a person to give judicial evidence in Nigerian courts, section 175 (1) of the Evidence Act, 2011 states that all persons shall be competent to testify, unless the court considers that they are prevented from giving rational answers to questions asked of them, by reason of tender years, extreme old age, diseases, whether of body or mind, or any other cause of the same kind. Technically, all persons apart from people suffering from known incapacity or disability as aforementioned are competent to give evidence in court.

In legal proceedings, any person summoned as a witness is under a public obligation to attend the court and give testimony unless he enjoys certain privileges. In practice, witnesses are invited by the parties to the case themselves or they may be summoned by the court by serving on them legal process called *subpoena*. An individual who receives a *subpoena* is bound to obey it and appear in court. A person who fails to appear and

[104]Order 32, rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 2012; Order 32, rule 1 of the High Court of Osun State Amended (Civil Procedure) Rules, 2008; Order 32, rule 1 of the Oyo State High Court (Civil Procedure) Rules, 2010 and Order 32, rule 1 of the High Court of Ekiti State (Civil Procedure) Rules, 2011.

testify subject to *subpoena* may be punished for contempt of court.[105]

In legal proceedings, a witness does not make a speech, but he is examined by the counsel of the party calling him and thereafter by the counsel of the opposing party or by the party themselves, and sometime the witness may be examined by the court (judge). The proper mode of testimony is in form of responses to a series of questions rather than in a narrative form.[106]

CONCLUSION

In adversarial system of justice, parties themselves bear the burden of proof, success at litigation depends largely on the ability of the party to adduce convincing evidence. However, in this game, parties are not alone, they are assisted by their counsel, unless they are not represented by a lawyer. The role of a counsel is to guide and present the cause of his or her client to the court. Due to this, a counsel retained by the party must keep abreast of scope and various rules of evidence; he must muster the means and burden of proof, and must understand the principles of evidence with their exceptions, and also must have knowledge of the computer and other electronic devices. Ultimately, the counsel must understand every stage in the production and examination of witnesses. Success at

[105]Order 32, rules 10 and 12 of the High Court of Lagos State (Civil Procedure) Rules, 2012; Order 32, rules 10 and 12 of the High Court of Osun State Amended (Civil Procedure) Rules, 2008; Order 32, rule 10 and 12 of the Oyo State High Court (Civil Procedure) Rules, 2010 and Order 32, rules 10 and 12 of the High Court of Ekiti State (Civil Procedure) Rules, 2011.

[106]See Australia Law Reform Commission, *Evidence,* ALRC 26 (Interim Report Vol. I (1985, 620). Note however, that under section 29(2) of the Australia Uniform Evidence Act, 1995, a witness may be allowed to give evidence wholly or partially in narrative form, where the party applies to the court for a direction allowing the witness to do so. There is no such provision in Nigeria.

trial depends on the ability, the skill and acumen of the counsel retained to handle the case.

The first major problem of many practising counsel in achieving success during examination of witnesses is attributable to failure to identify the issues involved in the cases of their clients. Advocacy and self-analysis of the issues raised in the parties' pleadings will undoubtedly place a counsel in a better position to understand the sequence of questions to ask at every stage of examination of witnesses. Having adduced evidence, the counsel must also assist the judge in reaching the final decision. In the presentation of his final address, counsel must raise issues for the court's determination and present his argument in a convincing, lucid and persuasive manner in order to sway the judge to his side. The purpose of raising issues for the court's determination is to assist the court to decide the matter in controversy between parties.[107]

During final address, command of the language of the court, coupled with the ability to pass the message across is *sine qua non* of good advocacy. In practice, argument usually proceeds on the lines of a pleasant and good-humoured discussion between counsel and the judge, after setting out the facts and stating the issues, and making a point and refering to an authority, the judge puts a question or two to elucidate or clarify the matter under discussion, or to express an objection or difficulty, and counsel then replies.

Furthermore, intellectual candour on the part of counsel always pays. If the court has a difficulty, it is no use trying to evade or side-step it, it must be met and answered, and it

[107] See the case of *Cornelius Lebile v. The Registered Trustees of Cherubim and Seraphim Church of Zion of Nigeria Ugbonla* (2003) 1 SC (Pt. I) 25, at 36. See further the case of *Sanni v. Ademiluyi* (2003) 1 SC (Pt. I) 77, at 84. In that case, it was held that: 'The function of a court is to decide between the parties on the basis of the case put before it by them. It should confine itself to adjudicating on issues raised before it. It is not the duty of a trial judge to find on an issue which was neither pleaded nor raised in the case before him'.

is professional misconduct not to play fair with the bench. To quote an authority on one side, while suppressing one on the other or consciously to misquote the evidence is not an act of good advocate. An advocate must not only be a man of good character, he must in some degree, be a man of letters. Knowledge of every kind cannot be too highly commended. A good career at the bar should start with general knowledge of almost all aspect of the practice.[108]

Finally, it is pertinent to note that, the newly introduced civil procedure rules in most of the State High Courts in Nigeria have now provided the witnesses another vista to make their deposition on oath and frontload the processes. This new procedure has helped to lessen the rigour of calling witnesses for the purpose of examination-in-chief. However, the general rule is that parties to proceedings must call their witnesses to give evidence before the close of the case and this has been visualised through the examination of witnesses and the means of adducing evidence discussed in this article.

[108]Chief Akinjide, R. SAN (1998), Advocacy, Ethics and the Bar, 1 *Nigerian Law and Practice Journal* 2.