LAW & PRACTICE OF EVIDENCE
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AFE BABALOLA, OFR, SAN, LL.D

With

SIXTEEN SPECIALIST CONTRIBUTORS

Foreword by

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CHAPTER SIXTEEN

COMPETENCE AND COMPELLABILITY OF WITNESS

by

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INTRODUCTION

The adversary system[1] remains the heartbeat of our judicial process. Quite unlike the continental inquisitorial system[2], which gives pre-eminence to active involvement of judges in the trial process, the adversary system ensures that judges play the role of unbiased umpires. And like referees at boxing contests judges, under the adversary system, not only see that the rules are kept, they also count the points scored by each party to the contest and at the end of the day, decide who the winner of the contest is[3]. Orality of proceedings (civil and criminal alike) and the use of witnesses in proof or disproof of cases, are the key features of the adversary system. As rightly observed, "the most common vehicle for proof is the evidence of witnesses"[4].

However, the evidence of a witness will only be admissible if that witness is competent to testify. The rules regulating the competency of witnesses, as well as circumstances under which such competent witnesses will be compelled to testify are inquired into in this chapter.

A preliminary point worthy of note is that many potential witnesses shun court proceedings because the system fails to protect them against intimidating and incriminating questions during cross-examinations. Potential witnesses are therefore not easily forthcoming unless they are subpoenaed. It suffices to state, that the court as well as the parties, are deprived of the testimonies of most witnesses. A writer presents the plight of witnesses under the adversary system thus:

> *"A witness in a court of law has no protection. He comes there unfed without hope of guerdon, to give such assistance to the state in repressing crime and assisting justice as his knowledge*

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1 For details of the adversary trial process see Sir Amos Maurice *A Day in Court at Home and Abroad.*
1925 Camb L. J. at p. 343

2 See the views expressed by J.R. Spenser and Rhona film in *The Evidence of children, The Law andPsychology.* 2nd Ed. Blackstone press p.4 to the effect. "It is generally accepted that there are two main systems of trial in the civilised world. The accusatorial (alias adversarial) and inquisitorial".

3 See *Thomas V Glassgow Corp.* (1961) SLT. 237.

4 Cross and Taper on *Evidence* 8th Edition (1995) Butterworths p.224.

in a particular case may enable him to afford, and justice, in order to ascertain whether his testimony be true, subjects him to torture. One would naturally imagine that an undisturbed thread of clear evidence would be best obtained from a man whose mind was not harassed but this is not the fact: to turn a witness to good account he must be badgered this way and that until he is nearly mad, he must be made a laughing stock for the court. His very truths must be turned into falsehood so that he may be falsely shamed... He must be made to feel that he has no friend near him. That the world is all against him. He must be confounded till he forgets his right hand from the left, till his mind be turned into chaos and his heart into water and then let him give his evidence.... No member of the humane society interferes to protect the wretch".[5]

A person can only testify if he is not an incompetent witness. Put in other words, only a competent witness can testify in court and judicial proceedings.

COMPETENCE AND COMPELLABILITY

It is trite, that the English Common Law[6] rules of evidence as at 1943 form the basis of Nigerian Evidence Act[7]. Since 1945 when the Act became operational, it has not undergone any major reform. Interestingly, some of the rules, which form the basis of our evidence Act, have either been reviewed or totally discarded in England.

It is of historical interest that the rule on competence of witnesses, was in the 18th century, negatively stated in England. Exclusion of most potential witnesses was then the order of the day. Parties, their spouses, persons with financial interests in the outcome of proceedings, accused persons and persons with past criminal convictions, were generally prevented from testifying in court proceedings. The unreliable status of convicts, and the need to avoid tempting parties to commit perjury while testifying, accounted for the general exclusion of testimonies of these potential witnesses. By the 19th century, there was a change. A universal rule on competence of all

5 Anthony Holdope The Three Clerks noted in *The Evidence of Children of Children, the Law and Psychology* Op. Cit. p.80.

6 The Evidence Act is based mainly on Sir Stephen's Codification of English rules of evidence as at 1943.See Osinbajo The Common Law, The Evidence Act and the Interpretation of Section 5A: In *Essays in Honour of Judge Elias* J.A. Omotola Ed. 1987Faculty of Law, University of Lagos p.105

7 Cap 112 *Laws of the Federation* 1990 Edition

persons to testify as witnesses had emerged. Inability to testify consequently became an exception rather than the rule.
Wiles J. succinctly stated the universal rule thus:

"Every person in the United Kingdom except the sovereign may be called upon and is bound to give evidence to the best of his knowledge upon any question of fact material and relevant to an issue in any of the Queens court unless he can show some exceptions in his favour[8]*."*

The above judicial pronouncement, finds written expression in Section 155(1) of the Nigerian Evidence Act. It provides;

"All persons shall be competent to testify, unless the court considers that they are prevented from understanding questions put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind."

By virtue of the above provision all persons are competent to testify unless they fall within the scope of the specific exceptions. It flows from the above, that a competent witness is a person who can lawfully be called to give evidence. He is fit, proper and qualified to give evidence. He is neither exempted by the provisions of the Act nor deprived of his capacity to testify as a witness. A compellable witness is a person who can be lawfully compelled by the court to testify. Unlike a competent witness, who can elect to testify or not to testify, a compellable witness has no option on whether to attend court when summoned. He must attend. A person must be competent before being compellable. However, not all competent witnesses are compellable.

A fundamental distinction, exists between competence, compellability on one hand and privilege on the other hand. In competence and compellability the focus is on whether a person may testify or can be compelled to testify as a witness. With privilege, the issue of concern is whether the witness can refuse to answer particular questions or decline to tender a particular document. In other words, what type of evidence must he give or withhold, is the focus under privilege. A compellable witness, is consequently not at liberty to refuse to attend court or judicial proceedings merely because, the evidence he is expected to give is privileged. He must attend the proceedings

8 *Ex parte Commander* (1951) 10 CBNS p.3 at p.35. See also *Haskyn v Commissioner of Police for Metropolis* (1979)A. C. 474 at 484 - 500 F

and claim his privilege there. It is only when court or judicial tribunal upholds the privilege that his presence in court may be excused or he may be allowed not to give particular evidence or not to tender a document. An attempt is made below to examine the evidence of children, old persons, accused persons, accomplices, spouses, parties and victims in order to illustrate the application of the various rules on competence and compellability.

The various issues examined below are not examined in any order of importance. Consequently where issues are common to criminal and civil cases, they are examined as such. Some issues are however specifically examined against the backdrop of their civil and criminal nature.

CHILDREN, OLD PERSONS AND PERSONS SUFFERING FROM DISEASE OF BODY OR MIND OR OTHER AFFLICTIONS

A rebuttable presumption of competence exists in favour of all witnesses. In other words, every person is presumed competent to testify unless and until the contrary is established. This is in view of Section 155(1) of the Evidence Act. It provides:

> *"All persons shall be competent to testify, unless the court considers that they are prevented from understanding questions put to them or from giving rational answers to those questions by reason of tender years, extreme old age, disease whether of body or mind or any other cause of the same kind."*

Apart from the evidence of children which has attracted judicial attention, there is virtually no Judicial authority on the competence of old persons, and persons suffering from diseases of body or mind or other affliction. However, in view of the fact that these classes of witnesses are all caught in the web of the exceptions to section 155(1) of the Act, it has been rightly submitted that "the same method of test used in the case of a child would be used in the case of an old person. Similarly, a person suffering from disease whether of body or mind is a competent witness unless the court considers that he is prevented from giving national answers to those questions by virtue of the said disease[9]".

We shall return to the preliminary tests, necessary to determine the competence of a child shortly. But a question of immediate importance, is who is a child? Curiously, the Evidence Act does not define a child. This has generated controversies on the status of a child. The question is which

[9] Aguda, *Law and Practice Relating to Evidence in Nigeria* (1980) London; Sweet & Maxwell

of the conflicting tests do we apply? Do we adopt the age of majority from the point of view of contractual capacity? or the age of franchise (18 years)? or puberty as is the case, under native law and custom? Or that specified in the Criminal Procedure Act? Simply put, at what age does a witness remain or ceases to be a child? The Criminal Procedure Act, for example, regards any person below the age of 14 years as a child[10]. The case of *Okoye v The State*[11] supports the proposition, that a boy or girl of 13 years is a child. The decision in *State v Njokwu Obia*[12] supports the view, that a witness aged 15 years is not a child. From the decision of the Supreme Court in *Okon v The State*[13] it is evident that the judicial approach is to regard any person below the age of 14 years as a child. Nnaemeka-Agu J.S.C. (as he then was) reasoned thus:

> *"...In the absence of any general provision in either the Law (Miscellaneous Provisions) Act Cap 89 of 1958, and the interpretation Act of 1964 or any definition of the evidence Act (Cap 62) itself, I believe on the principles that I have discussed I should adopt and apply the definition in section 2 (1) of the criminal procedure Act. An Act designed to make provision for the procedure to be allowed in criminal cases under the Act, "child" means anyone who has not attained the age of fourteen years[14]."*

Subsequent decisions also endorse the above position that a person below the age of 14 years is a child[15].

It has however been argued, that competency of a child is not so much of a matter of age as of understanding. The test is more of the understanding of the child than on his age.[16] To determine the competence of a child, the court is expected to perform two basic tests. It is trite that a child, who is prevented from understanding questions put to him or from giving rational answers to those questions, by reason of tender years, is not a competent witness[17]. The court, is by virtue of sections 155, 180, and 183 of the Evidence

[10] Cap 80 Laws of the Federation 1990 Edition, Section 2(1)
[11] (1972) 1 All NLR p. 500
[12] Vol. 4 ECS LR p. 67
[13] (1988) 1 N.S.C.C. p. 157
[14] *Okon v The State* (1988) 1 N.W.L.R. (Pt. 69) p. 172
[15] *Onyegbu v The State* (1995) 4 N.W.L.R. (Pt. 391) p.510; *Ogunsi v The State* (1994) 1 N.W.L.R. (Pt. 322) p. 10; *Mbele v The State* (1990) 4. N W.L.R. (Pt. 145) p. 484
[16] Nwadialo *Modern Nigerian Law of Evidence* (1981) Ethiope Publishing Corp. p. 204
[17] Aguda, *Law and Practice Relating to Evidence in Nigeria* op. cit. at p. 299

Act, expected to investigate, whether the child is possessed of sufficient intelligence to be able to understand questions put to him or answer such questions rationally. That is to say does he understand the duty of speaking the truth and the nature of oath taking?

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

According to Muktar J.C.A in *Ogunsi v State*[18]

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

In *Mbele v The State*[19] Nnaemeka Agu J.S.C. (as he then was) relying on his previous pronouncements in *Okon v The State*[20]

> *"It is my view that once a witness is a child by the combined effect of section154 and 182(1) and (2) of the evidence Act the first duty of the court is to determine first of all whether the child is sufficiently intelligent to understand the questions he may be asked in the course of his testimony and to be able to answer rationally. This is tested by the court putting to him preliminary questions which may have nothing to do with the matter before the court. If as a result of these preliminary questions the court comes to the conclusion that the child is unable to understand the questions or answer them intelligently then the child is not*

18 (1994) 4 N.W.L.R. (Pt. 322) at p.590

19 (1990) 1 N.W.L.R. (Pt. 145) p. 484 at 504- 505

20 (1988) 1 N.W.L.R. (Pt. 69) p. 172

> *a competent witness within the meaning of section 154(1). But if the child passes this preliminary test, then the court must proceed to the next test as to whether in the opinion of the court, the child is able to understand the nature and implications of an oath. If after passing the first test he fails the second, then being a competent witness he will give evidence which is admissible under section 182(2) though not on oath. If, on the other hand, he passes the second test so that, in the opinion of the court he understands the nature of the oath, he will give evidence on oath. His evidence thus given will be admissible and be admitted. It is thus clear that a Judge faced with the testimony of a child witness has two vital investigations to make namely:*
>
> *(1) is he or she possessed of sufficient intelligence to justify the retention of his/her evidence that is: does he or she understand the duty of speaking the truth?*
>
> *(2) Does he understand the nature of an oath? It is only after the above questions have been answered that an oath can be lawfully administered to the child".*

It suffices to state also, that where the child gives evidence on oath, the evidence is treated as that of an adult and except the fact in issue expressly requires corroborative evidence, the general rule is that corroboration is not required as a matter of law with respect to the evidence of such a child. However where the evidence given by the child is not under oath, such evidence requires corroboration as a matter of law.

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

In *Omosivbie v C.O.P.*[21] the evidence of a seven-year-old girl was used to convict the accused. She had been allowed to give evidence on oath without the preliminary tests being carried out. On appeal against his conviction by the magistrate court, Kester J. (of blessed memory) allowed the appeal. He reasoned thus:

21 (1959) W.N.L.R. p. 209 at 211

"There was nothing on record to show that an investigation was first made in court to justify admitting the child's evidence on record oath. This is a serious omission. The fact that in his judgement the learned magistrate said that after hearing the evidence of the child in the witness box he came to the conclusion that she was mentally capable of understanding and giving an intelligent account of the case to his satisfaction can not justify the condition precedent nor cure the irregularity"

The cases of *Okoye v The State*[22] *and Okoyonmo v The State*[23] are authorities, which support the proposition that a trial court is not bound under section 183(1) to hold and record preliminary inquiry on the competence of a child to give evidence on oath before he is allowed to take oath, if the court is of the opinion that the child is capable of understanding the nature of an oath.

These cases operate on the assumption, that a child understands the nature of an oath unless the contrary is proved or objection taken to the evidence of the child. Appreciation of religious consequence of lying under oath is evidently the underlying basis for allowing a child to testify under oath. But why the distinction between a child who knows the implication of an oath and the child who does not? Our constitution[24] fails to recognise any religion as state religion. The lack of religious belief cannot therefore deprive a child of his Nigerian Nationality. Oath is evidently a test of religious belief of a child. Accordingly, the evidence of a child who has religious instructions should not be superior to that of another child who lacks religious instructions. provided the latter can give an accurate account of the facts in issue. It is consequently suggested, that provided a child understands the duty of speaking the truth and is able to answer questions rationally, he should (like an adult) testify under oath. It is by so doing that full advantage can be taken of evidence of children. As rightly observed:

"...a child of tender years is in the same position as an adult witness when the determination is being made, whether the child witness understands the nature of an oath. A child can furnish an accurate account of an event as adults and children, as a class of witnesses are no less honest than adults and there is no evidence that children are more prone than adults to have false allegations.

22 (1972) 1 ALL NLR (Pt.2) p. 500

23 (1975) N.M.L.R. 282. See also *Okon v The State* (1988) 1 N.S.C.C. p. 137

24 Section 10, 1999 Constitution of the Federal Republic of Nigeria

There is no relationship between age and honesty. The testimony of a child is as trustworthy as the evidence furnished by an adult witness"[25]

A related issue is the need to minimise psychological harm to children who testify as witnesses. Our law leaves our children who testify in court unprotected psychologically. In some jurisdictions, strategies have been adopted to minimise the effect of fright and distress on children who testify in courts especially in criminal cases. In England, the Department Committee on Offences against Children and Young persons in England had cause to observe.

"We have had many cases brought to our notice in which a child or young person has been overcome with distress or fright in giving evidence at the trial or has broken down or even fainted. The result of this distress has sometimes been that no evidence could be obtained and the case has consequently been lost or has had to be withdrawn. Adults may (or may not) see the need for their evidence to be tested, children definitely will not. It may confuse and distress to be called a liar[26]*"*

Against the backdrop of the need to protect children who testify in court and judicial proceedings. in some jurisdiction the courts, have in the exercise of their inherent powers, shielded such children from the accused person when the former testify against the latter. The use of television screens, live video links, close circuit televisions, are examples of strategies adopted in some of these jurisdictions for the protection of these children.

In England for example, a home office circular[27] encourages the use of screens in cases of rape and terrorism. When the child gives his evidence, the accused is not brought into contact with the witness but watches the testimony of the victim on the screen. The use of television link which enables the child to give evidence from a room adjoining the courtroom has also been judicially approved[28].

The use of close circuit television ensures that the child witness is televised when giving his evidence from a separate room. The child's image and voice

25 *Workshop papers on the Reform of the Evidence Act* (1995) Nigerian Law Reform Commission pp. 170 –171

26 (1925) Cmnd. Paragraph 98

27 Home Office Circular (61/1990)

28 XY & Z (1990) 91 Crim. App R. 128

are transmitted to a series of television monitors in the courtroom. The child is seen and heard giving his evidence. This is like a life performance but physical contact between the child and the accused is avoided.

The court has also approved the physical removal of the accused from the presence of the witness during the latter's testimony. In this case[28] the accused was arraigned for cruelty to children. His 11-year-old daughter testified as a witness. During the testimony, the accused was evacuated from the dock and made to sit on the stairs leading to the dock. The accused was therefore out of sight but definitely not out of hearing. He was convicted. He appealed against the conviction and argued that his being out of sight operated unfairly against him during trial. The criminal court of appeal rejected his contention. As the court puts it "if the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter."

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

EVIDENCE OF SPOUSES

The nature of the marriage between the accused and a witness as well as the offence charged, are vital factors in the determination of the competence or otherwise of a spouse to testify in court or judicial proceedings.

Generally, the spouse of an accused is only competent to testify on the application of the accused person[29]. The spouse envisaged under the Act is the spouse of a monogamous marriage. Under Section 2(1) of the Act, Husband or wife is synonymous with spouses of monogamous marriages. Consequently, spouses of non-monogamous marriages are competent and compellable witnesses without the application of the accused persons. Criticising the evident discrimination against spouses of non monogamous marriages, Aguda describes it as "a relic of old colonial days when the so called "Christian" marriage was regarded as superior to the indigenous customary and Mosiem marriages of Nigerians which relic should have disappeared with the colonial era"[30].

It is however gratifying, that judicial decisions, have tried as far as they

[28] *R. v Bimaffie* (1991) 92 Crim. App. R. 125
[29] Section 181 (2) Evidence Act
[30] *Law and Practice relating to Evidence in Nigeria* Op. Cit. p. 218

can, to blur the distinction between spouses of monogamous and non-monogamous marriages. A rebuttable presumption of monogamy exists in favour of every marriage thereby making the spouse of the accused to be pre-facie incompetent to testify except on the application of the accused. The burden of therefore proving the non-existence of a monogamous marriage is on the prosecution. Unless the burden is discharged, the spouse remains an incompetent witness except on the application of the accused. Where the spouse witness is sworn on Holy Bible he or she, will be regarded as a spouse of a monogamous marriage.[32] However, the mere fact, that the witness is sworn on the Koran, has been held insufficient to rebut the presumption of a monogamous marriage between that witness and the accused[33].

There must therefore be clear, positive and unequivocal evidence of a non-monogamous marriage between the accused and the witness for the presumption of monogamy to be displaced. However, where the offence committed is within the scope of Section 161 of the Evidence Act the spouse is a competent and compellable witness regardless of the absence of consent of the accused.

According to Section161 "when a person is charged:

(a) with an offence under any of the enactments contained in Section 217, 218, 129, 221, 222, 223, 224, 225, 226, 231, 300, 301, 340, 341, 357, to 362, 370 and 371 of the Criminal Code.

(b) Subject to the provisions of Section 36 of the Criminal Code with an offence against the property of his or her wife or husband or

(c) Inflicting violence on his wife or husband, the wife or husband of the persons charged shall be a competent and compellable witness for the prosecution or defence without the consent of the person charged".

The above are the exceptions to the general rule on the incompetence of spouses of accused persons. Offences identified as falling within the scope of these exceptions are indecent practices between males defilement of a girl under 13 years, householder permitting defilement of young girls in his premises, defilement of a girl between 13 and 16 years, and idiots, indecent treatment of girls under 16 years, procuration, procuring of defilement of women by threat, fraud or administering drugs, abduction of a girl under 15 years, with intent to have carnal knowledge, unlawful detention with intent to

[32] *Idiong and Another v The King* (1960) 18 W.A.C.A p.30
[33] *Lamu v The State* (1967) N.M.L.R. 228

defile in a brothel, indecent acts, failure to provide necessaries by a person for those under him, endangering life or health of apprentices or servants, abandoning or exposing children, assaults on females, abduction, slave dealing, bigamy, child stealing"[34].

The rationale for the selection of the above offences as exceptions to the general rule on incompetence of spouses is difficult to discern. It has been rightly observed"... there is little in the list of offences under Section 160 (now 161) to justify special treatment accorded them . Why should a wife be compelled to reveal her husband's abnormal sexual productivities and not be open to being forced to speak when her husband commits murder or treason?[35]"

It is submitted, that the competence and compellability of spouses of persons accused of offences, should be a question of policy involving the balancing of individual and societal interests. Promotion of matrimonial harmony and confidence, preservation of sanctity of marriage and the avoidance of domestic broods are the traditional reasons for the general rule on incompetency of spouses to testify, as witnesses except on the application of the accused person. On the other hand, there is the overriding interest of the society in ensuring justice through the establishment of truth. There is therefore, the need to balance the benefits of production of necessary and material evidence before the court, on one hand against the promotion of marital harmony and the harshness of compelling a wife to testify against her husband on the other hand. While the society should be interested in upholding the institution of marriage and recognising the privacy of marital relationship, this should not be at the expense of society's interest in prosecuting and convicting offenders. The mechanical approach of Section 161(2) of the evidence Act, which results in general incompetence of spouses should be jettisoned and be replaced by powers being invested in the courts to balance individual and society's interest.

Section 161(2) is wide enough to render the wife or husband of the accused person a competent and compellable witness for the defence. What is required of the accused who desires the evidence of his or her spouse, is an application to the court for the spouse to be called as a witness for the defence. The accused has a right to call or not to call his or her spouse as a witness. Where he in exercise of the right he decides not to call his spouse, his failure

34 Nwadiolu – *Modern Nigerian Law of Evidence* Op. Cit. at p 709

35 Yemi Osinbajo "Unravelling the Rules of Evidence of Spouses in Nigeria 1987 Vol. 1 No. 2 the *Legal Practitioners Rev.* at p. 24

not to call his spouse shall not be made the subject of adverse comment by the prosecution[37].

THE ACCUSED AS A PROSECUTION WITNESS

Section 159 of the Evidence Act provides:

> *"Subject to the provisions of this part, in criminal cases the accused person, and his or her wife or husband and any person jointly charged with him and tried at the same time is competent to testify".*

By virtue of the above provision, the accused person is a competent witness for the prosecution, as well as for the defence. Since the accused person, is unlikely, to testify against himself his competence as a prosecution witness, can only arise where there are more than one accused persons. In such situation, the particular accused testifies against co-accused person(s). It is however necessary that the accused (turned prosecution witness) should have pleaded guilty and possibly convicted or has been acquitted or a nolle proseque has been entered in his favour.

In the case of *Umole & Others v I.G.P.* [38] The appellants were charged with stealing. One of them pleaded guilty and was convicted but prior to being sentenced he testified against the appellants as a prosecution witness It was held that he competently testified. The court reasoned as follows: "We have no doubt that at the time he gave his evidence he was not on trial, when he pleaded guilty he was convicted on his own plea; there was no issue to be tried. (He) was not being jointly tried with the appellants and he was therefore a competent witness for the prosecution."

Although it is better to sentence the accused who has pleaded guilty, (thus avoiding hope of lighter sentence) when testifying, the absence of a sentence, does not deprive a convicted person of competence to testify against co-accused.[39] Where two or more persons are jointly charged, but an order for separate trial is made, one of them may testify against the other, although the witness has not been tried, acquitted or pleaded guilty. Similarly a witness who is not on trial in a case but faces a different trial for other related offences is a competent witness against the person standing trial[40].

It is also possible for an accused person, to indirectly give evidence against

37 Section 161(2) Evidence Act

38 (1937) N.R.N.L.R. p.8

39 *R. v Akpan* (1940) 6 W.A.C.A. p.169

40 *Onisade & Others v The Queen* (1964) N.M.L.R. 57

a co-accused person. Thus, in a joint trial, one accused person in the process of defending himself may give incriminating evidence against co-accused person. Such incriminating evidence may be the basis for convicting of the incriminated accused.

THE ACCUSED AS DEFENCE WITNESS

A presumption of innocence exists in favour of all accused persons.[41] Accused persons under our accusatorial process, also have the right to silence before and even during trial. It matters not, that such silence is consistent with guilt. There are statutory[42] and constitutional[43] provisions, pointing to the direction, that no person who is tried for a criminal offence shall be compelled to give evidence at his trial. Section 160 of the Act declares an accused as a competent witness at every stage of the proceedings. However, the accused remains a non-compellable witness, in the sense that he must not be called as a witness, except on his own application and where he refuses to do so, his failure to testify cannot be made the subject of any adverse comment by the prosecution.

At the end of the prosecutions case, three options are available to the accused. First, the accused may make statement from the dock without being sworn. In such situation, he will not be liable to cross-examination. The accused may testify from the witness box. In which case, he will be sworn and consequently liable to be cross-examined. Finally, the accused in the exercise of his statutory and constitutional right to silence may refuse to say anything beyond his plea of not guilty. Notwithstanding these options, the burden of proving the guilt of the accused beyond reasonable doubt is primarily that of the prosecution. If at the end of the case, the prosecution fails to prove its case beyond reasonable doubt, the accused is entitled to an acquittal[44].

It is evident that the accused, though competent, is a non-compellable witness. It is also evident that our criminal process over protects the accused by allowing him to remain silent even when silence is consistent with guilt. It suffices to state that "... both the educated, the elites and "professional criminals have been aware of these procedural rights and will be ready to demand it any time. The sophistry of English Common Law and American Common Law can hardly be expected to meet the demands of a society now

41 Sect on 36(5) *1999 Constitution of the Federal Republic of Nigeria*
42 Sect on 160 *Evidence Act*
43 Section 35(11) *1999 Constitution of the Federal Republic of Nigeria*
44 *Mumuni v The State* (1975) 6 S.C. p. 179; *Oniorikoko v The State* (1990) 7 N.W.L.R. (Pt. 162) p. 381

plagued by crimes, criminality and instability not common in these countries when that rule was developed"[46].

ACCOMPLICE, RELATIONS AND VICTIMS

An accomplice, who invariably, is a participant in or party to a crime, is definitely a competent witness. Section 178(1) of the Evidence Act states:

> *"An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice..."*

The net effect of the above provision is that the fact of a witness being an accomplice (who ought to have been charged along with the accused, as a party to the crime) does not deprive that witness of competence to testify, either as a prosecution or as a defence witness. However, where the only incriminating evidence against the accused, is that of an accomplice, the trial court should endeavour not to convict without either corroborative evidence or statutory warning. The point to note is that the competence of the accomplice is one thing, corroboration of his evidence, is an entirely different issue.

The victim of an offence as well as his relations are competent witnesses. As a matter of fact, authority exists[47] for the proposition that in a case of rape, the person ravished is a competent witness and her evidence is vital in deciding the most important element in the case, namely, whether sexual intercourse was by force and without her consent. With respect to the evidence of relatives of victims of offences, the Law is that such relatives are competent prosecution witnesses especially when they are either eye witnesses to or co-victims of the crime[48]. Similarly, relations of the accused are competent witnesses for the prosecution and the defence.

CIVIL CASES

Parties To Civil Suits And Their Spouses

By virtue of Section 158 of the Evidence Act, in all civil proceedings, the

46 Aguda "Some Aspects of Criminal Law and Procedure" 1980 *Proceedings and Papers of the 6th Commonwealth Law Conference* at p. 215
47 *Ekpo v The State* (1976) 5 SC p.29
48 *Ogunonze v The State* (1996) 8 N.W.L.R. (Pt. 551), p. 521 at 558. *Ahmed v The State* (1998) 5 N.W.L.R. (Pt. 550) 407 at 510; *Hausa v The State* (1994) 6 N.W.L.R. (Pt. 350) p. 281 at 328. *Onafowokan v The State* (1986) 2 N.W.L.R. (Pt. 230 p. 496

parties to a suit and the husband or wife of any of them are competent witnesses. A party is competent to give evidence not only upon his own application, but also upon that of his opponent[49]. It is immaterial to his competence that a subpoena has not been issued. However, where a party is served with a subpoena he becomes a compellable witness[50]. A careful analysis of judicial interpretation of the relevant provisions of the Evidence Act, shows that a defendant who has been served with a subpoena, is both a competent and compellable witness for the plaintiff[51]. Plaintiff is also a competent compellable witness at the instance of a defendant.

In proceedings instituted in consequence of adultery, parties to such proceedings, their husbands, and wives are competent witnesses. Section 163 of the Evidence Act however provides, that no witness, in any such proceedings whether a party or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless he or she had already given evidence in the same proceedings in disproof of the alleged adultery. The Matrimonial Causes Act[52] has modified the above provision, such that either party to a marriage is competent, but non compellable to testify that parties to the marriage did not have sexual relationship with each other at any particular time.

NON-COMPELLABILITY OF CERTAIN PERSONS/OFFICERS

There are instances where a person or an officer is either a competent but non-compellable witness or is absolutely an incompetent and non-compellable witness. The President and the Vice President, State Governors and their deputies are competent but non-compellable witnesses during their tenure of offices. This is because of the constitutional provisions to the effect: "no process of any court requiring or compelling the appearance of such a person holding the office of President or Vice President, Governor or Deputy Governor shall be applied for or issued."[53] The same constitution also clothes the holders of these offices with immunity from criminal and civil suits in their personal capacities while in office. The non-compellability of these office holders is limited to the tenure of their offices. As soon as they cease to be in office, they become compellable witnesses even in respect of causes of action, which accrued before, during or after the tenure of their offices. The above constitutional protection is for the person of the office holder. Such a

49 *Elias v Disu & Others* (1962) 1 ALL N.L.R. 214
50 *Obolo v Afuko* (1976) 1 N.M.L.R. 334
51 *Barclays Bank of Nig. Ltd v Alhaji Abubakar* (1977) 10 SC 13 at 15
52 Section 84, Matrimonial Causes Act No. 18 of 1970
53 Section 308 (1) (a) (b) & (c) 308 (3) 1999 Constitution

person can competently testify as a witness if he decides to waive the immunity. Furthermore, the constitution allows such office holders to be sued in their official capacities[54]

DIPLOMATIC AGENTS

By virtue of the Diplomatic Immunities and Privileges Act, every foreign envoy and every consular officer, members of their families, members of their official or domestic staff and members of the families of their official staff are accorded immunity from suits and legal processes[55]. Similarly, High Commissioners from Commonwealth countries their officials and families[56] as well representatives of recognised international organisations are immune from suits and legal processes.[56] The provisions of the Diplomatic Immunities and Privileges Act provides a shield to these persons against being compelled to testify.[57] They are however competent witnesses in the event of a decision to waive the immunity afforded them under the Act[58].

LEGAL PRACTITIONERS

There are provisions dealing with disclosure of professional communication between a counsel and his client.[59] But as rightly observed: "There is no direct provision in the Evidence Act to debar counsel appearing in a case from giving evidence in it and this must be governed by rules of common sense and the etiquette of the profession"[60].

Generally, a counsel is not at liberty to give evidence in a case which he appears as counsel. As a matter of fact, it is irregular for a counsel to put himself in a position where he is likely to be cross-examined or be in any way personally involved in the dispute before the court.

In *Idowu v Adekoya*[61] counsel who had acted for the defendant throughout the proceedings had at a certain stage given material evidence on behalf of his client. It was held that this was not only contrary to the practice of the court but was a sufficient irregularity, which rendered the whole trial a nullity. For the same reason, it is irregular for a counsel to depose to contentious

54 Section 308(2) 1999 Constitution
55 Section 1(1) Diplomatic Immunities and Privileges Act
56 Section 3 and 4 Diplomatic Immunities and Privileges Act
57 Section 11 and 15 Diplomatic Immunities and Privileges Act
58 Section 2, 4 and 15 Diplomatic Immunities and Privileges Act
59 Section 173 Evidence Act
60 Aguda – Law & Practice Relating to Evidence in Nigeria (1980) London Sweet and Maxwell p. 305
61 (1980) W.N.L.R. 210

affidavit[52]. Such counsel risks the possibility of being cross examined in the event of the court deciding to resolve conflicts in affidavits through oral evidence. Dignity requires a counsel who is aware that he is likely to be called as witness to cease acting as counsel[53]

The above rule is inapplicable to non-contentious issues, in which a counsel is for example expected to give formal evidence such as tendering court receipts, and processes of court filed or received by him.

There is no doubting the fact that a counsel, cannot testify as a witness to the opposing party. This is clearly contrary to the ethics of the legal profession. It is immaterial that counsel does not eventually appear in court for the party who briefed him. Once he has been briefed he automatically loses his competence to testify for the adverse party.

52 *Banque l'Afrique Occidentale v Alhaji Haba Shariadi & Others* (1962) N.N.L.R. 21

53 *Horn v Rickards* (1963) N.W.L.R. 67; *Sachi & Others v The State* (1965) N.M.L.R.