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Reception of the Evidence of Vulnerable Witnesses in Legal Proceedings in Nigeria

The goal of the Court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth.[1]

Abstract

Generally, ensuring the quality and accuracy of witnesses' *viva voce* (verbal) evidence in Court proceedings, is central to achieving fairness and transparency in legal proceedings. Incidentally, there are occasions where such witness may be vulnerable witnesses whose quality and accuracy of evidence may be negatively affected due to various inherent variable factors. Under the Nigerian legal system, testimonies of vulnerable persons where relevant and vital are admissible in the Court of law in order to achieve fairness; persons such as children, the aged, mentally disable, physically challenged, intimidated witnesses and victims may be compelled to testify as witnesses in legal proceedings. Section 175 and 176 of the Nigerian Evidence Act 2011 provides for competence and compellability of witnesses including those that may be classified as vulnerable persons to testify where their evidence are relevant, vital or indispensible, and will aid the Court in arriving at a just conclusion. This paper examines the legal framework for receiving testimony of vulnerable and intimidated witnesses in legal proceedings in Nigeria; it interrogates the adequacy of extant provisions.

Keywords: evidence, testimony, vulnerable witness, *viva voce*, competency

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1 Introduction

Nigeria operates the adversary system of adjudication,[2] in contradistinction to the inquisitorial system. In the adversary system of adjudication, parties and their lawyers are given ample

[1] Per Madame Justice L"Heureux-Dubé, in *R. v. Levogiannis* [1993] 4 R.C.S. 475.
[2] *Leaders of Company Ltd. & Anor v Major General Musa Bamaiyi* (2011) 199 LRCN 185.

control over how facts are collected and presented to Court;[3] parties generally adduce evidence that are favourable to their position and will weaken the opponent's case, while at the same time suppressing or discrediting unfavourable evidence. Thus a key instrument under the system is *viva voce* testimony in proof or disproof of the facts in issue (Cross and Tapper 1995: 224). The role of the judge in the adversary system is restricted to that of an impartial umpire; holding the balance between the contending parties, without descending into the arena of conflict in order to avoid obscuring his sense of justice; ensuring that the evidence is presented in compliance with laid down rules.[4] In performing this role, the Court has two basic functions, to wit; reception of evidence, whilst the second is the corollary of the first, which is evaluation and ascription of evidential value to the received facts.[5] There is no gainsaying that reception of evidence is a very essential aspect of the Court process; it provides the data -that is the facts- which the Court relies on to form its opinion and rationale for its judgement. Thus in order to maintain a minimum standard of fairness, transparency and strengthen the credibility of the justice system, the reception of evidence by Courts is by and large statutorily regulated.

2 Evidence

Nigeria is a Federal-State[6] (Odiase 2009: 27-42) and under her Federal Constitution, the power to make law with regard to evidence is vested in the Central (Federal) Government.[7] In exercise of the said power, the Federal Legislature enacted the extant Evidence Act, 2011(Evidence Act). At the moment, the Act is the principal statute regulating the reception of evidence in Nigeria. The Act applies to all judicial proceedings before any Court in Nigeria except that it does not apply to proceedings before an arbitrator(s), a field general Court martial or judicial proceedings in any civil cause or matter before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court, unless if there is any other statute empowering these Courts to enforce any or all the provisions of the Act.[8] However, whenever these Courts adjudicate on any criminal matter, they are required to observe and adhere to the provisions of the Act.[9] In addition to its provisions, the Evidence Act allows the reception of any evidence that is made admissible by any other legislation in force in Nigeria.[10]

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[3] In the words of Ogbuagu JSC "... it is implicit in the adversary system of administration of justice which operate, that all material evidence, shall be called by the parties themselves. That the position of the trial Judge, is that of an impartial umpire and he lacks the power to call any witness or evidence without the consent of the Parties. *Marcus Ukaegbu v Mark Nwololo* (2009) 169 LRCN 210 (SC), 253

[4] *Rabbo Damina v The State* [1995] 8 NWLR(Pt. 415)513

[5] *Gbemisola v Bolarinwa & Another* (2014) Vol. 234 Law Reports of Courts of Nigeria (LRCN) 137 at 181. Also *G. M. O. Nworah & Sons Co. Ltd v. Afam Akputa* [2010] 3 S.C. (Pt. I) 23

[6] An arrangement whereby governmental powers within a country are shared between a central government and a number of unit governments. The cardinal principle being the requirement of equality and autonomy of each tier of government and non-interference with the functions of the other. Nigerian Nation federation has three tiers of governments; these are Federal, States and Local governments.

[7] The legislative powers to make law with respect to 'evidence' is exclusive conferred on the federal legislature (the National Assembly) Pursuant to the combine effect of section 4, item 23 of the Exclusive Legislative List set out in Part I of the Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 as Amended (hereinafter the Constitution), item 23, Part I, Second Schedule

[8] Evidence Act, s 256.

[9] Ibid, s 256(2)

[10] Ibid, s 3. An example of such legislation is the Child's Right Act 2003, Cap C50, LFN 2004 (Child's Right Act), s 160.

A preliminary point to note is the silence of the Evidence Act on the meaning of the term "Evidence". The Act assumes that the meaning is not in doubt and thus commences by stating the nature of evidence that may be adduced in any legal proceedings. It provides "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 declared to be relevant and of no others."[11] A painstaking study of this provision reveals that evidence is information that provides grounds for the belief that a particular fact or set of facts is true (Dennis 2010: 3). Strictly, in judicial proceedings, evidence is the information received by the Court from the parties by which any alleged matter of fact the truth of which is in issue is established or disproved.

Such information in proof or disproof of any fact in issue may be presented to the Court as evidence by means of oral, documentary or real testimony; the most preferred being oral testimony. This is because Courts attach high evidential value to *viva-voce*[12] testimony for two reasons. First, in addition to the testimony, it gives the Court opportunity of observing the demeanour of the witness as he testifies, interpret and draw proper inference from the presentation as to the credibility of witness.[13] Secondly it is the means employed in the presentation of other types of evidence (real and documentary). In recent time in a bid to avoid inordinate delay and expedite proceedings, the civil procedure rules of most Courts of record in Nigeria have introduced what in the Nigerian legal parlance is referred to as "front loading". The effect is that in place of oral examination in chief,[14] most Courts now accept affidavit depositions by witnesses or other such like statements taken under oath; subject to the deponent being made available in Court for *viva voce*[15] cross-examination. Despite this development in the sphere of civil matters, the use of witness testimonies in obtaining accurate and reliable evidence remains vital aspect in achieving fair and transparent trial (Salifu 2015). However, instances may arise (whether in civil or criminal matters) where such witnesses may fall within the category of persons classified as vulnerable or intimidated witnesses.

3 Vulnerable witnesses

At the moment, the term "vulnerable witness" or "vulnerable persons" is not employed in any statute and as such, there is no statutory definition of what category of persons that can be classified as vulnerable witnesses in Nigeria. For the purpose of this paper it will suffice to adopt with slight modification the definition provided by Elliott (1998: 10) that a vulnerable witness is

> any witness (whether a victim or not) who is likely to find *testifying before a Court of law*, unusually stressful, upsetting or problematic, because of *his* personal characteristics; the nature of the *issues at stake*; the nature of any evidence *he is* called upon to give at any stage to assist the justice process; the

[11] Evidence Act, s 1.

[12] Latin: by voice. Evidence which is given orally to a Court by a witness' word of mouth (as opposed to in writing, such as by affidavit or deposition). See *John Nwachukwu v. The State* (1986) -SC.233/1984

[13] *Engineer Goodnews Agbi v Chief Audu Ogbeh & Ors* [2006]5 S.C . (PT. II) 129

[14] The questioning of a witness before Court by the party who called him. Evidence Act, S 214(1); *Abudu G. Kehinde v. Wahabi Irawo* (1973) All N.L.R 187.

[15] See the High Courts' Civil Procedure Rules and others*; Akpankere Apishe, Kakeme Anekam and Obofire Achike v. The State* (1971) All N.L.R 53

> *defendant* characteristics; any relationship between *him* and the defendant; or intimidation.[16]

A similar but more practical definition can be found in various domestic laws of some advanced nations. For example, in Queensland, a vulnerable witness (called special witness) means

> (a) a child under 16 years; or
> (b) a person who, in the court's opinion—
> (i) would, as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness; or
> (ii) would be likely to suffer severe emotional trauma; or
> (iii)would be likely to be so intimidated as to be disadvantaged as a witness; if required to give evidence in accordance with the usual rules and practice of the court; or
> (c) a person who is to give evidence about the commission of a serious criminal offence committed by a criminal organisation or a member of a criminal organisation; or
> (d) a person—
> (i)against whom domestic violence has been or is alleged to have been committed by another person
> (ii) who is to give evidence about the commission of an offence by the other person.[17]

Suggesting a "test of vulnerability" to assist the Courts in the United Kingdom in declaring a witness as vulnerable, the Advisory Group on Video Evidence[18] suggested that such witness is a person "likely to suffer an unusual and unreasonable degree of mental stress if required to give evidence in open Court, having regard to the witness's age; their physical and mental condition; the nature and seriousness of the offence; and the nature and seriousness of the evidence they are to give." Thus the class of witness considered as vulnerable witness in most countries are children, persons with temporary or permanent disabilities or illnesses, elderly persons, intimidated witnesses (for instance victims of special offences like sexual offence) or a person whose quality of evidence may diminish by reasons of fear or distress in connection with testifying in the proceedings.

In Nigeria, though the term vulnerable witness is not statutory defined and thus absence of legal parameters for the determination of who is one. However, applying the above test, there are some provisions in the country's laws for the reception and treatment of the evidence of persons who may be regarded as falling within the ambit of the above definitions.[19] For the purpose of this paper and taking into consideration the local peculiarities in Nigeria (legal complexity in the field of crime and evidence obtainable in more advance countries are yet to be transplanted into Nigeria), it will suffice to classify these persons into two broad groups.

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[16] Words in italic mine.
[17] Queensland Evidence Act 1977 [as amended by all amendments that commenced on or before 22 October 2015] available at https://www.legislation.qld.gov.au/legisltn/current/e/evidcea77.pdf, last accessed 8 November 2015
[18] 1989, also known as the "Pigot Report" 1989
[19] For instance Victims and Witnesses (Scotland) Act 2014; See also the Youth Justice & Criminal Evidence Act 1999, as amended s 16 & 17.

First, it is generally accepted that vulnerable witnesses include persons such as children, persons of unsound mind and people living with disabilities such as an imbecile or dumb and deaf or afflicted with any other permanent infirmity of body or mind (in other words, children and vulnerable adults). The rationale for this classification is the general presumption that the ability to give evidence in the open Court by this group of persons is most likely to be diminished by reason of their age, level of intelligence, mental impairment, physical disability or disorder.

The second group arose as a result of the challenges posed by the emergency and prosecution of complex criminal cases like money laundering, organised crime, terrorism (militant groups like Boko Haram and others), high profile corruption cases (in public and private sectors), cybercrimes, sexual crimes, domestic violence and the likes. Key prosecution's witnesses including victims of these crimes are most likely to be confronted with a number of risks to their person; such as threats or actual harm to their person, injury to their financial interest, their property; or/and actual harm or threats against a third party connected to the witness (for example a relative, a friend and so forth). A natural inclination of any human being is that the slightest awareness of any threat or actual danger to himself or relative will in most cases diminish the quality of the witness's testimony or in some cases prompt the witness to withdraw from testifying. This creates another category of vulnerable witnesses who may or may not fall within the parameters of the former group. These are persons who may likely suffer significant risk of harm because they gave or are giving or agree to give evidence in a particular trial; they are commonly referred to as 'intimidated witnesses'.

The reception and evaluation of the evidence of these groups of vulnerable witnesses by Courts in Nigeria raises some fundamental concerns for justice delivery in the country. The first is whether there is any legal test for determining who a vulnerable witness is? As earlier mentioned and without mincing words there is no such test. Other basic issues are the legal criteria for determining the competency of these persons as witnesses? What are the legal measures put in place to ensure the quality and accuracy of the evidence of these persons? The following discussions address the last two questions.

4 Competency of vulnerable witnesses

Generally, evidence may be given in all proceedings before the Courts in Nigeria by witnesses adjudged by Court to be competent. A competent witness is anyone who has personal knowledge of the facts relevant to any fact in issue and is legally permitted to give evidence.[20] The competency of vulnerable persons to testify before judicial proceedings is by and large a constitutional issue. The right to freedom from discrimination is guaranteed by the Constitution of the Federal Republic of Nigeria.[21] Uniquely, unlike other fundamental right in the constitution there is no exception or derogation from the right; in other words freedom from discrimination is absolute.[22] However, in the interest of fair trial, the reception of the evidence of these groups either as party or witnesses is statutorily regulated.

[20] *J. Elabanjo v Alhaja A. O. Tijani* [1986] 5 NWLR (Pt. 46) 952. Competent witness is a person who can lawfully be called upon to give evidence without any disability on account of the law or is not exempted by the provisions of the law from giving evidence.
[21] The Constitution, s 42.
[22] Ibid, s 45; provides exceptions to the rights guaranteed by the Constitution.

Whether a person who is competent to testify will be allowed or can be compelled to do so in any trial will depend entirely on some statutory considerations. It is a truism that every compellable witness or person who may be allowed to give oral evidence in Court is a competent witness; however, it is not every competent witness that is compellable or will be allowed to give evidence (Amusa 2014: 49-53). Statutorily, pursuant to section 175(1) of the Evidence Act, a competent witness can be declared incompetent as a result of his intellectual capacity. Pursuant to the section all persons are presumed "competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason of tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."[23] This provision provides for the taking of evidence of children and vulnerable adults. The following discussion is on the class of persons referred to in 175 of the Evidence Act,

4.1 Child witness

For the purpose reception of the evidence of a child, it is important to know the age bracket of persons that may be referred to as child. The Evidence Act is silent on who is a child. However, under the Constitution of the Federal Republic of Nigeria, the age of franchise is eighteen years.[24] Contractually, the contractual capacity to contract is the common law age of majority; the age of twenty-one is the age of majority at common law (Sagay 2000: 401-410). From judicial viewpoint, for the purposes of receiving evidence, a child is a person below the age of fourteen (Amusa 2014: 49-53).[25] With regard to criminal culpability, the Criminal Procedure Act states that a "child" means any person who has not attained the age of fourteen years" It however defines an "adult" as "a person who has attained the age of seventeen years or over." [26] The Child Rights Act a Federal Statute, fix the age of a child at eighteen years.[27] The Administration of Justice Act 2015, a statute enacted primarily to facilitate criminal procedure, defines a child as "a person who has not attained the age of eighteen years. The only conclusion that can be reasonably made is that a child in Nigeria is any person that is below 18 years old.

In practice, there is no fixed rule on how old a child must be before he can testify before a law Court; this judgement is left to the discretion of the Court. Statutorily every child is presumed competent to give evidence in any civil or criminal proceedings in Nigeria.[28] However, in the reception of the evidence, there is a legal distinction between a child strictly so called and a young person. Thus, pursuant to the provisions of the Evidence Act, a child who has attained the age of 14 years is subject to the requirements of sections 175 of the Act, allowed to give sworn evidence in all cases.[29] Whereas, a child who is below 14 years but possesses sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth, is not allowed to give sworn evidence,[30] but he is allowed to give unsworn evidence provided that in the opinion of the Court, he is possessed of sufficient intelligence to justify the

[23] Evidence Act, s 175(1).
[24] Ss 77(2) and 117(2) of the Constitution of the Federal Republic of Nigeria 1999
[25]See *Okon v The State* (1988) 1 NSCC p. 157; *Mbele v The State* [1990] 4 NWLR (pt 145) 484; *Ogunsi v The State* [1994]1 NWLR (pt 322) 583; and *Onyebu v The State* [1995]4 NWLR (Pt 391) 510.
[26] Criminal Procedure Act, Cap C41, LFN, S.2(1).
[27] Child's Right Act, s 277.
[28] Child's Right Act, s 160(1).
[29] Evidence Act, s 209(2).
[30] Evidence Act, s 209(1).

reception of his evidence and understands the duty of speaking the truth. This is a departure from the position under the repealed Evidence Act,[31] which allows the evidence of any child who understands the nature of an oath to be taken under oath (sworn) without reference to the child's age. The present position is a disservice to a child witness, because, in criminal trials, the Court cannot convict a defendant on the unsworn evidence of a child unless it is corroborated by some other material evidence in support;[32] regrettably, this has in plethora of cases militated against the quest for justice.[33]

The age long rationale for imposing these restrictions and requirements amongst others is that adult witnesses are presumed to have the knowledge of the fear and nature of oath-taking and, the essence of truth-telling. Sadly, this presumption does not avail children who are generally believed to be bereft of such knowledge (Dennis 2010: 557-563), hence are not allowed to give evidence on oath (Osadolor 2004: 185). Such evidence if admitted is to be taken with a pinch of salt and only acted upon if corroborated by material independent evidence. Justifying the stigmatization of child's evidence as generally unreliability, Professor Nokes (1963: 513) opines that "Very young children live largely in a world of imagination, and their powers of observation, understanding, memory and expression are rudimentary. Most children are influenced by what they hear from adults, not necessarily by way of deliberate suggestion or instruction." The stigmatization is further fortified because it is traditionally believed that the evidence of this class of persons is prone to fantasy, malice or speculations and that they are more likely to suffer from inability to properly observe and recall (Day 2012). There are also arguments that malice may induce a child to testify against an accused person whose face and physique he dislikes or scares him; that he may assume he experienced, saw or felt something or somebody that was in fact non-existent, or engage in guess work caused by forgetfulness and so forth. However, these arguments are contrary to recent empirical studies suggesting that children evidence was not as unreliable as was traditionally alleged (Dennis 2010: 559). Obviously, the implication of section 209 of the Evidence Act is to statutorily stigmatise the evidence of every child below 14 years as unreliable until corroborated.

In contrast to the above, the Supreme Court of Nigeria has prior to the enactment in plethora of case stated unequivocally, that "competency is not a matter of age but that of intellectual capacity;"[34] however, this position is yet to be codified and made part of the written law. Under the regime of the Child's Right Act some progress has been recorded; a deposition of a child's (below or above 14 years) sworn evidence is considered (whether in a civil or criminal matter) as evidence given on oath[35]and thus, does not require corroboration. Ultimately, a child's testimony whether sworn or otherwise, before it is received, demands that the competence of the child to give evidence is subjected to the competency tested.

[31] Evidence Act 1945, Cap E14, Laws of the Federation of Nigeria.
[32] Evidence Act, s 209(3).
[33] These may include criminal cases touching on Sexual offences, child abuse, child trafficking, domestic violence against women and children etc. For instance *Clement Obri v The State* [1997] 7 NWLR (Pt.513) 352 S.C. Where an accused was convicted of murder by the two lower Court on the evidence of a small child about 7 years, who was the only eye witness (about six years at the time the offence was committed) but on appeal to the Supreme Court, the judgements of both the High Court and the Court of Appeal were set aside and the appellant found not guilty of the offence charged and was discharged and acquitted.
[34] *Onyegbu v The State* (1995) 4 N.W.L.R. (Pt.391) 510 at 529.
[35] Child's Right Act, s. 160(2) ; this section of the Act has not been given judicial interpretation.

4.2 Vulnerable Adult Witnesses

This group consists of the aged, persons of unsound mind and people living with other disabilities including the dumb and deaf or afflicted with any other permanent infirmity of body or mind. There is a general misconception that disability denotes 'unreliability; hence the need to regulate the reception of the evidence of this group (Dennis 2010: 616-617).

The aged

The general presumption is that the power and ability of recall dims with age.[36]This presumption seems reasonable because elderly persons (witnesses) become vulnerable (at least in some cases) as a result of mental or physical disabilities/illnesses which are often associated with old age. However, due to the importance of the aged persons in certain cases (Nwadialo 1981: 213) their evidence may be crucial to resolving facts in issues and where that is the situation, he may be called as a witness. For instance in *Prince Yahaya Adigun & Ors v A.G of Oyo State and Ors*[37] the matter centred on succession to traditional chieftaincy stool. In resolving the facts in issue, the Court relied on the testimony of on, an old man, aged about 75 years and blind. The Court was of the opinion that these physical disabilities did not detract from the quality of his information because his vocation places him in a very crucial position to understand the facts in issue.

Generally, no matter how old a witness is, he is a competent witness, if he is able to understand questions put to him and to give rational answers to those questions. Where an aged person's ability to testify is challenged or is in doubt, the Courts will be compelled to carry out preliminary test to determine his competence. Once the test is successfully administered on the aged person, he is competent to give evidence whether sworn or unsworn; provided he understood the questions put to him coupled with being able to provide rational answers to same. (Osadolor 2004: 201). Issues of recall and memory loss of aged witnesses could be dealt with in milder cases by the administration of the preliminary test or in complex ones by expert opinion. Even at that, where there is an intelligibly recurrent and comprehensible line of thought in the testimony of aged witnesses, however "patchy" such testimony might be, the Court may still receive it after warning itself of the risk of reliance on it.

Unsound Mind

Generally, every person is, unless the contrary is proved, presumed by law to be sane.[38] The law recognizes that even the mentally infirmed have their lucid moments (Boerne 2008: 31), hence section 175(2) of the Evidence Act provides that "A person of unsound mind is competent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them." Thus, every person sane or insane is presumed competent to testify. This rebuttable presumption may be displaced where such potential witness suffers

[36]"How Memory Changes with Age: Symptoms and Information." Patient Education Centre, Harvard Medical School .http://www.patienteducationcenter.org/articles/how-memory-changes-with-age/, accessed 26 June, 2015) Also "Improving Memory: Understanding Age-Related Memory Loss." Harvard Health Publications. http://www.health.harvard.edu/mind-and-mood/improving-memory-understanding-age-related-memory-loss accessed 26 June, 2015.

[37] [1987] All NLR, 328

[38] *Josephin Ani v The State* [2003] 5 SC (Reprint) 33 at 34

from obvious intellectual incapacity or defective understanding. When such witness is presented to testify, the Court will be compelled to conduct enquiry into his sanity *ipso facto* his competency to testify at the material time. Expect under such circumstances, a trial Judge need not carry out an investigation on the mental condition to determine the sanity or insanity of any witness in the absence of any reason or conduct compelling the Judge to suspect that the witness is of unsound mind.[39]

With regard to reception of evidence, whether the witness is sane or insane is only of consequence or importance at the time he is presented as a witness and throughout the duration of his testimony; his antecedent is of no moment. However, his state of mind as at when he his presented as a witness is a question of fact to be decided by the trial Judge, though sometimes with the aid of medical experts' opinion. The existence of medical certification is not ordinarily a conclusive proof of the state of mind of the witness; it will only aid the Court in reaching a conclusion.[40] In practice, where proper psychiatric report confirms the fitness of a person of unsound mind to testify, the Courts, subject to administering the competency test, will most likely adjudge him competent and admit the evidence; [41] taking into consideration contemporaneous acts of the witness.[42] However, in more knotty situations, the Court may have no option than to rely solely on its investigation (Nwadialo 1981: 213); thus witnesses whose disabilities interfere with their capacity to comprehend and manipulate language are at a stark disadvantage in the justice process (Benedet & Grant 2012: 14). Where from investigation, the Court is of the view that the unsoundness of mind is only of a temporary nature and likely to disappear, the Court in deserving cases and in the interest of fairness, may grant a stand down or an adjournment in the case for purposes of receiving such person's testimony at a later time or date, provided it will not work injustice against any of the parties.

Dumb

Where a witness is dumb, subject to preliminary competency test, he is required to give evidence in any manner in which he can make it intelligible; by writing or by signs. Such writing must be written or the signs made in open Court.[43]

4.3 Administration of Competency test

The rebuttable presumption of competence in section 175(1) of the Evidence Act applies equally to vulnerable witnesses and can only be challenged for any of the reasons stated in the section[44] and similar provisions.[45] Thus every vulnerable witness is presumed competent to testify in any legal proceedings until his competency is successfully challenged. Until then, there is no obligation on the Court to inquire into the competency of any witness. In the opinion of Agbaje JSC,[46] "since all persons are competent to testify, until the competence of a witness is challenged

[39] See *Iboko v. The State* (1965) NMLR 384.
[40] *Augustine Guobadia v The State*, (2004) 2 S.C. (PT. II) 1
[41] *Sule Noman Makosa v The State* [1969] All NLR 355
[42] See *R.v. Revitt* 34 Cr. App. R 87
[43] Evidence Act, ss 176(1) & 209(1).
[44] Ibid. See also *Asuquo Eyo Okon v. The State* (1988) ANLR 173 at 186
[45] Evidence Act, 176(1).
[46] *Asuquo Eyo Okon v. The State* (1988) ANLR 173.

for any of the reasons stated in the section, there is in my view no obligation on the Court to determine the competence of a witness to testify."[47]

Procedurally, a challenge of the competency of a witness requires the Court to make a judgment as to whether the particular witness fulfils the statutory criteria. In doing this the Court is not required to exercise its discretion but circumscribed to the express statutory criteria[48] of deciding whether the witness is prevented from understanding the questions put to him, or he is prevented from giving rational answers to those questions by reason of age, physical or mental state of the witness. The witness need not understand every single question or give a readily understood answer to every question; because many competent able body adult witnesses would fail such a competency test. The Court is expected to dealing with it broadly and fairly, provided the witness can understand the questions put to him and can also provide comprehensible answers, he is competent. On the other hand, if the witness cannot understand the questions or his answers to questions which he understands cannot themselves be understood by the court, he is adjudged incompetent to testify.

While the procedure for determining the competence of a witness is not expressly provided for under the Evidence Act, the ability of the witness is usually ascertained by putting questions which having no bearing to the matter before Court, across to the witness by the Judge. The aim in each case is to determine whether the witness is competent to give evidence in the particular trial. Consequently, the question is entirely witness specific. There are no statutory or practice predefined questions or answers. If the witness answers intelligently, he is presumed to be a competent witness. In other words, there is no general rule except that each witness must be assessed by the Court as to his competency. In the end the decision is a judgement about the individual witness and his competence to give evidence in the particular trial. In doing this the Court is enjoined to distinguish carefully between the issues of competence and credibility this is because the provisions do not require the witness to understand the special importance that the truth should be told in Court. This is because, at the stage when the competency question is being considered, it will be premature to determine whether a witness is or will be telling the truth; the weight to be attached to the evidence is to be considered by the Court in its final judgement.

On the whole, where the Court wrongly disqualifies a witness from testifying, it is a breach of the fundamental human right to fair hearing of the party calling the witness. (Babalola 2001: 456-480) As a result the Courts in most cases are weary of disqualifying witnesses at the stage of administering the competency test. Most Courts at that stage lean in favour of admitting such evidence, while consideration of the evidential value to be attached to the piece of evidence is postponed to and evaluated in the course of delivering final judgement.

5 Availability of testimonial aids

Taking into account the limitations of vulnerable witnesses, it is imperative that in order to ensuring the quality of their testimony appropriate measures are designed and put in place to facilitate and aid them in give full and accurate evidence. Apart from the provisions of the Evidence Act hitherto referred to, which only regulate the reception of the evidence of some specific vulnerable witnesses, there is virtually little or nothing in the *corpus juris* of Nigeria designed to aid vulnerable witnesses in communicating their testimony effectively before the Court and making the process stress free for them. Some of the existing statutory attempts aimed

[47] Ibid at 186,
[48] Report of Vulnerable Witnesses & Children Working Group February 2015, Judiciary of England and Wales, 28.

at aiding such witnesses are either too deficient, narrow or have their application restricted to defined offences.

One of such instance is the feeble attempt made under the Administration of Criminal Justice Act with regards to taking the evidence of a child and young person.[49] The Administration of Criminal Justice Act empowers the Court to exclude all or any person from the courtroom during the taking of evidence of a person who in its opinion has not attained the age of eighteen in "any proceedings in relation to an offence against or any conduct contrary to decency or morality", provided that the excluded person is not a member or officer of the Court; or parties to the case, their legal representatives or persons otherwise directly concerned in the case. Unfortunately, the section is deficient in many aspect; a major deficiency is that the section is not of general application, as it clearly defines the types of offences it relates to and thus too restrictive; secondly, it will exert little or no effect in assisting a child give full and accurate evidence, particularly where either of the parties (who is legally allowed by the section to be in court) is the intimidating factor that makes his giving full and accurate evidence very remote.

Further, this paper is also not oblivious of certain sections of the Evidence Act (though not specifically designed to aid vulnerable witness) which can be invoked or employed to aid a vulnerable witness communicate effectively in the course of testifying. For instance as earlier mentioned, where in the course of testifying an aged witness suffers memory loss or has problem with recall of facts, the provisions of section 239 of the Evidence Act may be invoked if appropriate in the circumstances of the case. The section states that

> (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.
>
> (2) The witness may also refer to any such writing made by any other person, and read by the witness within the time mentioned in subsection (1) of this section, if when he read it he knew it to be correct.

The Court in order to ensure justice is done to all the parties may allow the aged witness who is caught in a web of memory loss to refresh his memory and recall whatever forgotten facts of which he has been called to testify by reference to a document earlier written by him and which is relevant to the facts in issue. The snag to this statutory relief is that it is subject to the discretion of the Court to determine whether to or not grant the application. Secondly, the evidential value to be attached by court is dependent on been able to prove that the transaction in the document was still fresh in the witness's memory as at the time he made the writing.[50] In all these, in the interest of fairness and transparent trial, the law balances the interest of parties by ensuring that any such document used in refreshing memory is produced and shown to the

[49] Administration of Criminal Justice Act 2015, s.260.

[50] *R v. Jimo Amoo* & Ors.(1959) 4 F.S.C. 113 at 115; (1959) W.R.N.L.R. 199. See also *Sunday Oyinlola v. Commissioner of Police* (1975) N.N.L.R. 36.

adverse party where the adverse party requires it for cross-examination and tendering same as exhibit before Court.[51]

While pockets of statutory provisions which may be invoked to aid the first group of vulnerable witnesses exist here and there within the *corpus juris* of Nigeria, in the case of the second group of vulnerable witnesses it is near non-existence. Similarly, administrative protection of witnesses[52] in Nigeria is near non-existence and progress towards putting in place a comprehensive witness protection law and functional protection services have been very slow in coming (Kariri 2014). So far, the only attempt at having in place a comprehensive witness protection statute was undertaken via the Witness Protection Programme Bill which originated in the House of Representatives (the lower House of the National Assembly) in 2012. The Bill was passed in June 2015 by the Senate but it is yet to receive the required Presidential assent to enable it become part of Nigerian law.[53]

At the moment the only outstanding provision that is specifically designed to protect intimidated witnesses is section 31 of the Terrorism (Prevention) Act, 2011. The Act is a specialized and restricted statute designed to prevent, prohibit and combat acts of terrorism in Nigeria. The relevant provision, vests the Court with the discretion on the application of the prosecutor or on the court's own volition, to protect a witness in any proceeding before it relating to offence of terrorism and the Court is satisfied that the life of the witness is in danger. Such measures include keeping the identity and address of the witness secret.[54] For the purposes of clarity, the Act states that such measures include the holding of the proceedings at a place to be decided by the court: avoidance of the mention of the name and address of the witness in its orders, judgments or records of the case accessible to the public; and issuing of a direction prohibiting the disclosure of the identity and address of the witness; and forbidding the reporting or publishing in any manner of all or any part of the pending proceeding.[55] In addition, the court may, exclude from the courtroom any person other than the parties and their legal representatives.[56] Again these measures are not robust enough and its application is restricted to the trial of offences relating to acts of terrorism.

Sadly, as a result of the absence of identifiable witness protection measures, prosecution of certain offences (like corruption, violent and organised crime, etc) have remained inconsistent; producing mixed results. Since successful prosecution of culprit is one of the means of stamping out crimes, having effective witness protection law is imperative in order to obtain accurate witness testimony and reduce avoidable incidences of witnesses withdrawing from testifying due to intimidation or actual harm. This is because witness intimidation has the propensity of discouraging witnesses from reporting crime or coming forward to testify,[57] and could cause cases charged to Court from being prosecuted speedily, lost or abandoned. At a more general level, it could undermine public confidence in the judicial system and its effectiveness.

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[51]Section 241 of the Evidence Act 2011. *Owanso Agbeyin v. The State* (1967) N.M.L.R 129, *David Ifenedo v. The State* (1967) N.M.L.R 85 at 88 S.C.

[52] Witness protection refers to a range of measures, which can be applied at any stage of criminal proceedings, to ensure the safety of witnesses to gain their cooperation in providing testimony.

[53] Assent was tacitly denied because of the scandalous process adopted by the Senate in passing the Bill. See Omololu Ogunmade "Senate Mocks Lawmaking, Passes 46 Bills Without Legislation in 10 Minutes", *Thisday* (Newspaper) June 4, 2015, p. 1.

[54] Terrorism (Prevention) Act, 2011, s.31(1).

[55] Ibid s. 32(2).

[56] Ibid s.31(3)

[57] Elliot, 179

Further, there is no law in place which specifically prohibits witness intimidation in Nigeria. The only available option is to prosecute offenders under the Criminal Code[58] for the offence of perverting the course of justice. The relevant section is section 127, it reads, "Any person who attempts, in any way not specially defined in this Code, to obstruct, prevent, pervert, or defeat, the course of justice, is guilty of a misdemeanour and is liable to imprisonment for two years."[59] The provision is an omnibus one.[60] In fact, the Federal Supreme Court, in *The Queen v. Ekanem,*[61] a matter dealing with a count under section 126, opined that the phrase 'the course of justice' cover a wider field than the words 'judicial proceeding' and include also the stage between the commission of an offence and the beginning of the prosecution. The offence here is the doing of some act after the commission of a crime but before or during prosecution, which has a tendency and is intended to pervert the administration of public justice and it includes intimidation of witnesses. Considering the prevalence of the crime of witness intimidation, there is a need for a special provision prohibiting and punishing witness intimidation.

6 International Commitments

Nigeria on the international level has entered into various commitments with regards to securing and protecting the rights of vulnerable and intimidated witnesses; the country is a signatory to plethora of conventions, declarations and other international instruments that recognise and protect the rights of the child, the aged, disabled, victim of crime, and the likes. The need to secure the rights of vulnerable witnesses permeates these international legal instruments, policies and declarations. For example, the United Nations (UN) Convention against Corruption[62], and the UN Convention against Transnational Organized Crime (UNTOC) and its protocols[63] require states parties to provide protection and support to witnesses and victims including providing 'effective protection from potential retaliation or intimidation for witnesses and experts who give testimony.'[64] Similarly, the Convention on the Rights of Persons with Disabilities (UNCRPD)[65] imposes on state parties amongst others the duty to provide appropriate measure to aid persons with disabilities give full and accurate testimony in Court.[66] The Declaration on the Basic

[58] Criminal Code Cap C38, LFN.
[59] Ibid, s 126.
[60] See *Joseph Etim Asuquo v The State* [1967] All NLR 132
[61] (1960)5 F.S.C. 14,
[62] 2004, available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf, accessed 4 November 2015.
[63] 2004, available at https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf, last accessed 4 November 2015
[64] Convention against Corruption, Art. 34.
[65] 2006, available at http://www.un.org/disabilities/convention/conventionfull.shtml, last accessed 30 October 2015). Article 13 of the Convention is on access to justice, it states that (para. 1) States that "Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages; and (para. 2) In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.
[66] UNCRPD, Art 13.

Principles for Victims of Crime (DBPVC)[67] requires state to provide proper assistance to victims of crime throughout the legal process with particular attention given to those with special needs due to disability. In addition, state parties are to ensure the safety of victims and protection of their privacy.[68]

At the regional level, Nigeria is a member of the African Union which has also facilitated series of international instruments recognising and guaranteeing the protection of the forgoing rights. For instance, the African Charter on Human and Peoples' Rights[69] which Nigerian Government domesticated through the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act,[70] enjoins state parties to provide special measures to aid aged and disabled witnesses.[71] Similarly, the importance of effective witness protection in the prosecution of international crimes has also been asserted through the recently amended Statute of the African Court of Justice and Human Rights, and the African Union (AU) Draft Model National Law on Universal Jurisdiction over International Crimes.

On the contrary, the extant domestic legal framework in Nigerian on vulnerable witness when juxtaposed against the backdrop of the various commitments assumed by the country at the international level leaves a lot of gaps between the lofty ideals prescribed by those international legal instruments and actual implementation of their provision at Nigerian domestic level; that is translating the commitment into law and practice in Nigeria.

7 Closing the gaps

From the forgoing, one area in which the Nigerian law of evidence lags woefully behind many advanced legal system is in the sphere of reception of the testimony of vulnerable and intimated witnesses, particularly with regard to having in place legal measures to aid vulnerable witnesses testify in Court. There may be countless explanation for the existence of this lacuna. One of them is that prior to this time, very little or nothing was known about vulnerable witness and witness intimidation because most of the crimes necessitating the need for such are alien to Nigeria people and culture (these modern crimes are imported from foreign countries). However, awareness of the challenges posed by the problem recently came to the fore as a result of the prosecution of cases relating to the activities of militant groups terrorizing the Nigerian nation (in the Niger-Delta and North-Eastern part of the country)[72] and other complex crimes.

Towards closing the gaps highlighted in the preceding discussions, it is imperative that certain steps be taken. First, in view of the upsurge of violent and organised crime in Nigeria, it submitted that successful prosecution of culprit will be a key factor in discouraging potential offenders. However, successful prosecution within the context of the adversary legal system

[67] Available at https://www.unodc.org/pdf/compendium/compendium_2006_part_03_02.pdf last accessed 4 November 2015

[68] Paragraphs 4-7. See also Belak, B., "Policies and Practices in the Treatment of Vulnerable and Intimidated Witnesses." Being a policy discussion report prepared for the Missing Women Commission of Inquiry February 2012. Available at http://www.missingwomeninquiry.ca/wp-content/uploads/2010/10/RESE-4-Feb-2012-BB-Policies-and-Practices-in-the-Treatment-of-Vulnerable-Witnesses.pdf, last accessed 4 November 2015.

[69] Also known as the Banjul Charter Adopted in Nairobi June 27, 1981 Entered into Force October 21, 1986 available at http://www.humanrights.se/wp-content/uploads/2012/01/African-Charter-on-Human-and-Peoples-Rights.pdf (last accessed 30 October 2015).

[70] Cap A 9, LFN 2004

[71] Part I, Chapter I, Article 18 para. 4. of the Charter states that " The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs".

[72] http://allafrica.com/stories/201305290066.html

depends on the ability of the prosecutor to presented vital evidence in proof of the charge before Court. This in turn depends on having key witnesses (whose safety may be threatened) testify in Court. Thus having a comprehensive witness protection law and programme in place has become a *sine qua non* in order to place before Court full and accurate witness testimony, eradicate high incident of witness withdraw due to intimidation (Salifu 2015). Such protection should be robust and comprehensive enough to effectively protect the witness prior to, during and after trial; providing for concealment of witnesses' identity, and allowing witnesses to relocate anywhere within and outside the country at government expense.

In addition, provisions should be include in the statute criminalizing and penalizing witness intimidation on the one hand, and on the other, penalizing failure of witness to attend Court, or attending Court and then refusing to answer questions or give false evidence as a result of intimidation. There is no gainsaying that the existence of a comprehensive witness protection measures will engender public confidence in the judiciary and increase the number of witnesses likely to come forward to testify.

Secondly and evidently from the previous sections, all that Nigerian law provides for with regard to the evidence of vulnerable witnesses is the parameters to be employed in determining their competency to testify. Aside from this, there are no special laws or provisions designed to aid a vulnerable witness in giving evidence in the best possible way. Whatever special treatment that is extended to a vulnerable witness in the past and at the moment is subject to the presiding judge's prejudice, discretion and largesse and of course the consent of both parties.[73] As earlier mentioned, though there are some sketchy provisions in the Nigerian *corpus juris* designed to provide protection to specified class of vulnerable witnesses, the provisions are seriously deficient in many respect. The deficiencies highlight the need for a coherent approach and predetermined statutorily stipulated procedure to guide the Courts in taking the evidence of vulnerable groups. It is suggested that such special measures or testimonial aid should expressly amongst other provide for:

- Permitting a support person of the witness' choice to be present and to be close to the witness while the witness testifies; the purpose is that the supportive physical presence of a familiar person will provide the vulnerable witness (whilst giving evidence) some measure of reassurance that he is doing what is right.
- Towards facilitating communication between the Court and a witness (ensuring that the communication process is as complete, coherent and accurate as possible), provisions should be made for examination of vulnerable witnesses with communication difficulties through intermediaries trained to facilitate communications without changing the substance of the evidence given. In addition, in the interest of fairness, the expense of procuring the services of these intermediaries should be funded from public fund as this

[73] For instance, in the trial of the Boko Haram kingpin, Kabiru Umar, alias Kabiru Sokoto who was sentenced to life imprisonment by an Abuja Federal High Court, the judge allowed the use of identity-protecting measures including the use of masks and pseudonyms to refer to witnesses, and also excluded the public from Court hall. *Punch*, December 20, 2013, <www.punchng.com/news/boko-haram-kingpin-kabiru-sokoto-jailed-for-life> accessed 24 July 2015. In contrast, due to opposition of defence the judge in trial of Aminu Ogwuche (another Boko Haram member whose trial is still pending), refused to allow witnesses to wear masks or exclude the public from the Court hall; though the Court allowed the use of pseudonyms and cubicles to shield the witness from public viewing. As a result the ruling, some of the prosecution witnesses who requested to be masked refused to testify. See Ade Adesomoju, "Nyanya bombing: AGF office stalls trial of Oguche, others" Punch 15 April 2015, <www.punchng.com/news/%E2%80%8Enyanya-bombing-agf-office-stalls-trial-of-oguche-others/> accessed 8 August, 2015.

will guarantee their impartiality and neutrality, and ensure that their primary loyalty is to Court.

- Evidence given in camera; that is the exclusion of members of the public from courtroom. At the moment, under the regime of the Administration of Criminal Justice Act, the Court has the discretion to exclude members of the public from the courtroom while talking the evidence of a child in a trial of an offence against any conduct contrary decency or morality and while dealing with terrorism related offenses. As canvassed earlier, the discretion is too restrictive as it is limited to specified class of offences and witnesses. There is still ample room for enlargement of the Court's discretion by extending the gesture to all classes of vulnerable witnesses and to exercise same in any proceeding where in the opinion of the Judge excluding the public from the courtroom is necessary in order to obtain a full and candid account of the acts complained from the witness.
- Empowering the Court in deserving cases to allow vulnerable witness testify from outside the courtroom or behind a screen or use of other devices where the direction will not interfere with the proper administration of justice. The purpose is to prevent the witness from seeing the defendant whose presence may likely pose some difficulties for the witness in communicating freely and accurately.
- Empowering the Court to place reporting restrictions on the media who might be covering such cases. As noted above, the Court in terrorism related cases is already so empowered. However, there a need to extend it to other crimes. Having provisions of this nature will go a long way in encouraging witnesses as well as victims (whose evidence may have scandalous effect on him; provoke public odium or expose him to greater danger) to give full and candid account of the facts of the case.

On the whole, incidental matters like definition of vulnerability, test for determining who is a vulnerable; stage of the justice processes where protection may be accorded, and who should decides whether a person qualifies for protection as a vulnerable person; the place of the opinion of the witness in deciding whether he is vulnerable; criteria for accessing particular measures (should it be granted as of right or subject to the discretion of the various agencies; etc.

The justification for providing these special measures and testimonial aid for vulnerable witnesses is that failure to recognise and compensate for the inequalities between witnesses seems both inhumane (particularly when this results in stress or trauma for the witness) and unjust (Elliott 1998: 7), and it denies the Court the benefit of being presented with the entire and accurate facts needed to assist the Court at giving just and fair judgement.

8 Conclusions

In Nigeria, reception of evidence by Courts is regulated by the Evidence Act. Section 175 along with other relevant sections of the Evidence Act allows the reception of the evidence of vulnerable witnesses whose evidence ordinarily would not have been heard. Beyond this, there remain ample room for aggressive legislative activities in the sphere of witness protection and special measures to aid children and vulnerable adult witnesses in line with international commitments entered into by Nigeria. The existence of visible witness protection programme and measures to aid vulnerable witnesses give their testimony before Court will, to large extent

encourage potential witness come forward to testify, guarantee the quality of such testimony and promote fairness in administration justice in Nigeria. In the fight against insurgency, corruption, violent and organized crimes it is crucial that the Nigerian government prioritizes having a Witness Protection Law including laws designed to aid children and vulnerable adult witnesses give quality and full testimony in legal proceedings.

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