

COMPETENCY OF A WITNESS: THE COMMON AND ISLAMIC LAW PERSPECTIVES

I. INTRODUCTION

Witness is a very important personality in any legal proceedings due to the fact that it is upon the evidence or testimony of such witness that the just decision of the case rests. Administrations of justice rests solely on the weighing of evidences adduced by the various witnesses before the court and as such, litigants or parties are to ensure that they produce witnesses whose evidence will be favourable to their respective causes.

However, the laws have regulated the mode of adducing evidence or way of calling witnesses in Court, As such; we have the concept of competency of witness. Generally, by the provision of section 155 of the evidence Act,

All persons shall be competent to testify, unless the court consider that they are prevented from understanding the questions put to them, or from giving material answers to those questions by reason of tender years, extreme old age, disease whether of the body or mind or any other cause of the same kind¹

The position differs under Islamic law, as competency of a particular witness may be determined by reason of chain of affiliation² to parties or litigants and some other factors.

Since witness evidence is a vital tool in administration of justice in any judicial proceeding, there is need to appraise the system under the two laws.

The necessity for witness came in as a result of the effect of evidence. The provision under the evidence Act is that, in any civil litigation, the burden of proof lies on that party against whom the judgment of the Court would be given if evidence were given from either side, i.e. to say he who asserts must prove that those fact exist³.

Similarly, under Islamic law, the provision is that evidence should be led by calling competent witnesses to testify to the existence or non-existence of a fact, since the object of witness is to give testimony by furnishing information of facts. So, Islam places emphasis on calling witness who will furnish information on facts whenever the defendant disputes the claim. Then, the plaintiff will need to prove his allegation and if he is able to adduce admissible and sufficient evidence, he will be entitled to a decree in his favour.

* LL.B, LL.M, P.G.D.E, BL, Lecturer, Department of Common Law, CAILS, Ilorin, E-Mail: queenbilqees@yahoo.com, Phone: 08036949850

¹ Section 155 Evidence Act vls. 6 Cap E 14 LFN 2004

² Abdul-Rahim M.A, Principles of Mohammedan Jurisprudence. (All Pakistan Legal Decisions publishers Lahore, 1978), 376.

³ Sections 135- 139 Evidence Act . Volume 6 cap E14 LFN2004

Otherwise, the defendant will need to take oath in support of his denial⁴. But regard must be made to ensuring the credibility of such witness and the truthfulness of his statement to avoid misleading the cause of justice.⁵

This paper aims at shedding light on the competency of witness in giving testimony in judicial proceeding or litigation. It makes a comparative appraisal of what it entails in our modern court practicing the common law i.e. the received English law and a court administering Shariah i.e. Islamic law. It thus examines who is a witness, who is competent to testify under the laws, who can be compelled to testify and drawing conclusion.

II. WHO IS A WITNESS?

A witness is a person who makes statement to judicial officers on question of facts.⁶ As a general rule, witnesses are required to be sworn before giving evidence. However, a witness may choose to be affirmed, as against being sworn. Parties to a suit are free to call person of their choice as witness in any proceeding.

Any witness called can refuse to answer question, the answer to which would have tendency to expose him to criminal proceeding, or to forfeiture or penalty⁷.

According to Islamic law, a witness is a person upon whom the law of Islam has placed a duty of giving testimony or evidence to assist the cause of justice⁸.

The right to be a witness may be by virtue of the position a person occupies on the issue or by virtue of circumstances in which he became aware of some facts which is presently a subject matter of dispute before a court of justice and whose evidence is paramount to the just determination of the issue before the court. The Holy Quran emphasizes thus:

O ye who believe! Stand out firmly for justice as witness to God even as against yourselves, or your parents, or your kin, and whether against, rich or poor.⁹

The holy Prophet of Islam complements this by saying:

Say the truth even if it is bitter¹⁰

So, only true information is regarded as evidence and as such the rule of Shariah lay down the numbers of criteria to be satisfied before the statement given can be regarded as evidence emanating from a witness.

Generally, witness is a person called to testify on behalf of a litigant in support of his case. Both parties in any litigation call witness be it civil or criminal.

⁴ Abdul - Rahim M.A (n2)370.

⁵ Ibid, 364

⁶ Leslie, R. & Sheila B, Osborn's concise law dictionary, (8th Edition, London Sweet and Maxwell, 1993)

⁷ Section Evidence Act, Volume 6 cap E14 LFN2004

⁸ Leslie, R. & Sheila B, Osborn's concise law dictionary, (8th Edition, London Sweet and Maxwell, 1993) P. 351

⁹ Q4:135

¹⁰ Ambali M.A, Practice of Muslim family Law in Nig, (2nd Edition, Tamaza publishing Company, 2003), 103.

Under common law, the plaintiff is entitled to call such number of witnesses he wishes to prove his case so also is the defendant. Though, by the provision of the procedural rule, a litigant is expected to inform the court such number of witnesses he intend to call for the just determination of his case¹¹. In the same vain, each of the witness before giving evidence is expected to be sworn on oath or affirm¹².

However, in Islamic law, each case has specified number of witnesses required for its proof¹³. It is the duty of the witness to give true evidence and incumbent on the law and the judge to take precaution with a view to preventing the court from being misled by falsehood.

The evidence Act provide as follows:

In estimating the weight, if any to be attached to a statement rendered admissible as evidence by this act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular to the question whether or not the statement was made contemporaneously with the occurrence or existence of the fact stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts¹⁴

III. COMPETENCY OF A WITNESS UNDER COMMON AND ISLAMIC LAW

Under the common law, the golden rule of practice is as provided under the provision of the evidence Act as follows:

All persons shall be competent to testify, unless the court consider that they are prevented from understanding the question put to them or from giving material answers to those questions, by reason of tender years, extreme old age and disease whether of the body or mind or any other cause of the same kind¹⁵.

The provision of the evidence Act as quoted above is the premise upon which the concept of competency of a witness under the common law is built. Thus, once it can be established that the particular witness can understand the question put to him, and can accordingly provide rational answer to such question, that person is competent witness.

The other circumstances worthy of consideration are as follows:

First, the persons or intended witnesses who are ordinarily competent witnesses but have listened to a part or all the evidence in court in the same case. If they intend to be witnesses, would this make them cease from being competent

¹¹ Order 2 Rule 2, Kwara State High Court Civil Procedure Rules 2005.

¹² Section 180 Evidence Act, Volume 6 cap E14 LFN2004

¹³ Ambali M. A, Op Cit. P. 108

¹⁴ Section 92 Evidence Act, Volume 6 cap E14 LFN2004

¹⁵ Section 155 Evidence Act Volume 6 cap E14 LFN2004

witnesses? The position of the law is that this does not prevent them from being a competent witness as it was illustrated in the case of *Udo Idion Akpan Ekerete V. Udo Unwe Eke*¹⁶. However, under the provision of the Evidence Act, the position of the witness will be considered in terms of weight to be attached to such evidence¹⁷. Competency under the common law includes that no matter the relationship be it blood or marriage i.e. consanguinity or affinity, every person is competent witness. The relationship does not make such evidence susceptible to suspicion. The essential factor is the ability of the witness to understand, comprehend and give appropriate response. This is illustrated in the case of *Azeez Okoro V. the state*¹⁸ where a full brother to the murdered was held to be a competent witness.

It was also provided under the Act, circumstances that make spouses to be competent witness to each other in civil matters¹⁹ but in criminal matters it must be on the application of the accused²⁰

Another area worthy of note is in terms of competency of person charged with criminal case. The Act provides.

Subject to the provisions of this Act, in criminal case, the accused person and his or her wife or husband and any person and the wife or husband of any person jointly charged with him and tried at the same time, is competent to testify²¹

This was illustrated in the case of *R vs Onyuke*²² where a person convicted of murder was held to be a competent witness. Also, under the Act, any person charged with an offence²³ is held to be a competent witness as well as an accomplice.²⁴

This position was illustrated in the case of *Inspector General of Police vs Sunday Edosomwan*²⁵ where an accomplice not charged was held to be a competent witness for prosecution. Also a witness facing criminal trial in another case was held to be a competent witness, see *R vs Michael Adedapo Omisade & ors*²⁶.

It is worthy of note that before an accused person can testify for prosecution i.e give evidence against a co- accused: he must himself have pleaded guilty to the charge; then, he can enjoy the right to testify against a co- accused as provided under section 159 of E.A and illustrated in the case of *Emanuel Umole & ors v. inspector general of police*²⁷. In that case, the Appellant and B were charged with

¹⁶ [1926] 7 N.L.R.73

¹⁷ Section 92 Evidence Act Volume 6 cap E14 LFN2004

¹⁸ (1988) 14 NWLR. 181

¹⁹ Section 158 Evidence Act Volume 6 cap E14 LFN2004

²⁰ Section 161 Evidence Act Volume 6 cap E14 LFN2004

²¹ Section 159 Evidence Act Volume 6 cap E14 LFN2004

²² (1941) 7 W.A.C.A. 31

²³ Section 160 Evidence Act Volume 6 cap E14 LFN2004

²⁴ Ibid Section 178 (1) Evidence Act Volume 6 cap E14 LFN2004

²⁵ (1957) WRNLR 161

²⁶ (1964) N.M.L.R.67, (1964) All N.L.R. 233.

²⁷ 1957 N.R.N.L.R. 8

stealing, B pleaded guilty and was convicted but before he was sentenced, he was called as witness for the prosecution, **Brown C.J. (North)** said:

We have no doubt that at the time when 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 tried jointly with the appellants and he is therefore a competent witness for the prosecution.²⁸

In summary, by the provision of the Act, Sections, 159,160 (a-h). 163 and 178 {1} and {2}, criminal obligation does not affect competency of a witness.

Competency may also be considered in terms of persons and classes of people that enjoy immunity by virtue of our constitution due to the office they hold. President, Vice president, governors, deputy governors,²⁹ and Diplomatic Agents, foreign sovereigns, their Ambassadors and others, are all competent witnesses provided they waive their immunities³⁰. So also are the High commissioners and aliens who are all competent witnesses and even if they cannot speak English, which is the language of the court, their evidence will be taken through sworn interpreters³¹

Competency of a Witness under Islamic Law

Islamic law is unique and self-sufficient system with elaborate and exhaustive rules of procedure, distinct from the common law system that has just been appraised. The competency of a witness is seen from entire different perspectives. It is seen as the capacity and recognition accorded to a witness in Islam in order for his evidence to be admissible.

Firstly, the condition precedent for someone to be allowed to testify as a witness in Islamic proceeding are: the person must be a Muslim, he must be sane and must be of age. i.e. adult of pure moral³².

However, the procedural rule of Islamic law did not end there but went ahead to consider other reasons or circumstances which can induce person to tell lie or give false evidence. Thus, Islamic law insists upon this condition as necessary before a witness can be competent to give evidence.

The witness must have no stake or interest in the dispute i.e. the evidence to be given must be free from bias and prejudice. Witnesses related to parties either by blood or marriage, master and servant evidence are not allowed against each other or parties in support of their own case.³³

The essence of this is to avoid bias, but a person of well known character and exceptional integrity may give evidence in favor of his brother as held in the

²⁸ Aguda T.A (1989) *The Law of Evidence* (Ibadan; Spectrum Law Publishers) P301

²⁹ Section 308 (3) Constitution of Federal Republic of Nig. 1999

³⁰ Section 1 & 2 of the Diplomatic Immunities and privileges Act 1962 Cap 99, Law of Nig. 1990

³¹ Aguda T.A. Op Cit. P. 301

³² Ruxton F.H. *Maliki Law*, (London Luzac & Company, 1916) P. 293

³³ Abdul Rahim M.A. Op Cit P.376

case of *Manu. V. Muhammad*³⁴ and *Mafolukun v. Alamu*³⁵ Although according to [Ambali,2003] testimony of parents in favor of one of their children in one suit is in order, as it is in order, that the child testifies in favor of one of his/her parents and against the other parent in a suit, on condition that he/she is not biased³⁶. Also evidence of a testamentary guardian in favor of his ward is inadmissible but his evidence against his ward is admissible³⁷

Another vital condition as specified by Islamic legal system is on general reliability of character, A person who has been convicted of a criminal offence is not a competent witness, so also are habitual sinner, a liar, a drunkard, person given to dissipation and gambling, persons belonging to profession of degrading nature, such as professional dancers, adulterer, prostitute, lending money at interest are not competent witnesses. Others are those who are not of virtuous character or those whose bad act outweigh their good deeds and unscrupulous officer employed for the purpose of oppression. It should be noted however that Abu Yusuf is of the opinion that a man who is not of virtuous character but unlikely to depose to falsehood will be admitted as a witness³⁸

Furthermore, maturity of the understanding and power of perception of such witness is another factor on which competency is determined under Islamic legal system. Thus, a child, lunatic or a blind man are declared unfit to give testimony in matters which have to be proved by ocular testimony³⁹.

It is instructive to note that a blind person may give evidence but only in respect of what he has heard, while a deaf and dumb person may give evidence only on things he has seen.⁴⁰

Despite the status of a child as an incompetent witness, his evidence may be admissible in cases of necessity in proving allegation of crimes, such as homicide, manslaughter against other children. Such evidence can be used in the absence of adult evidence and on condition that such children are male children. The pieces of their evidence are also required to be unanimous, they must not have dispersed from the scene of the incident and an adult should not have had an opportunity to influence them.⁴¹

Competency of a Woman

On competency of a woman generally, Islamic law placed women in an inferior competence⁴² position as her evidence is generally inadmissible especially in matters of public right because of her weak character. The exceptions in this

³⁴ (1997) 11 N.W.L.R. pt. 5 287 at 331

³⁵ (1993) 1 Sh LRN 163

³⁶ Salihu Abdul Sami al Al-Azhariy, *Jawahiru Iklil Darul Fikri* (Vol. 11.) P. 235

³⁷ Sulaiman I. Nchi and Samaila I. Muhammad *Islamic Personal Law and Practice in Nigeria*. (Markurdi, Oracle Publishing Company Ltd. 1999) P. 238-239

³⁸ Abdulrahim Op Cit. P. 377

³⁹ Ibid P. 377

⁴⁰ Nchi Op Cit P. 248 and Section 156 E.A Volume 6 cap E14 LFN2004

⁴¹ Ambali M.A. Op Cit P. 110

⁴² AbdulRahim Op Cit P. 377

regard are in matters relating to property and birth of a child⁴³ i.e., such matters which woman alone are likely to know better. Where woman's evidence is admissible, it is required that at least two women must testify and be accompanied by that of one adult male, or with an Oath in cases in which one witness and Oath are acceptable.⁴⁴

Competency of a Non-Muslim

Competency of non-Muslim witnesses, the Muslim jurists are not unanimous on this issue as they differ in the interpretation of Quranic verse which says;

... is evidence of two just men from among you or two others not from among you....⁴⁵

But the golden rules of practice in Islamic courts in Nigeria is that non Muslim witness evidence may be admissible as illustrated in the case of **TELA Vs Dawudu**⁴⁶ where the trial court received the evidence of John to enter judgment in favour of Hassan. And the appellate court held that trial court is right in receiving the evidence of John as of necessity. And this necessity may cover the provision of the Act on expert opinion⁴⁷

As a precaution against false testimony a single witness is generally regarded as insufficient to prove a claim⁴⁸

Any witness called may be objected to or impeach on grounds of legal incapacity, bias, self – interest, hostility or prejudice or over zealousness but such witness can challenge the objection against him⁴⁹ as court held in **AHMAD V UMAR**⁵⁰

Finally, the judge has a responsibility to carry out enquiry into the witness competency and ensure the cause of justice is not jeopardized by false evidence and in fact, if a witness is a stranger to a place, the Qadi or the judge of the locality where he resides should be asked to make an inquiry. Also, judges in Islamic court are to keep record of persons who are proved to be a adil or men of rectitude and revise the register from time to time⁵¹

IV. COMPELLABILITY OF WITNESSES UNDER OUR LAWS

Under the provision of the Act, every person is a competent witness, as discussed. Thus, the question of compellability is whether, it is every competent witness that can be compelled to give evidence. The position of the law is that for anyone to be compelled to give evidence, he must be competent i.e. every compellable witness is a competent witness. However not all competent witnesses

⁴³ Nchi Op Cit P. 247

⁴⁴ Ruxton Op Cit. P. 299

⁴⁵ Q5:106

⁴⁶ (1975) N.S.N.L.R. 87; (1993) 1 Sh L.R.N. 50

⁴⁷ Section 57 Evidence Act Volume 6 cap E14 LFN2004

⁴⁸ Abdulrahim Op Cit P. 337

⁴⁹ Nchi and Muh'd Op Cit P. 249

⁵⁰ (1997) 5 N.W.L.R. pt. 503, 111

⁵¹ Abdulrahim Op Cit P. 378A

are compellable witnesses and any compellable witness who refuse to give evidence may be charged for court contempt. Although, some compellable witness may be excused from answering some questions.⁵² There are instances under the Act when the law allows a witness to be compelled⁵³ and there are instances where the law forbids a witness to be compelled.⁵⁴

An accused person can be a competent witness for prosecution but can only be called on his own application.⁵⁵ and if he refuses to give evidence, his failure must not be a subject of comment by the prosecution.⁵⁶

By provision of the Act, couples i.e. husband and wife cannot be compelled to disclose any communication made to each other during marriage⁵⁷. Also a spouse of an accused person is a competent and compellable witness for him, if called as a witness on application of the accused.⁵⁸ So also a Banker cannot be compelled, in any legal proceedings to which the bank is not a party to produce any banker's book or to appear as a witness.⁵⁹

Compellability under Islamic Law

As explained under the provision of the Evidence Act, not all competent witnesses are compellable but all compellable witnesses are competent witnesses. The provision is not the same under the Islamic legal system. Every Muslim has a legal obligation to give evidence in all judicial proceeding.⁶⁰ Although, it is a duty incumbent upon all Muslim but is accomplished when competent witness gives admissible evidence and as such every competent witness is under an obligation to give evidence when summoned⁶¹

So, every competent witness under Islamic law is a compellable witness. This is the position in the holy Qur'an.

The witnesses should not refuse when they are called on for evidence. Conceal not evidence for whoever conceal, his heart is tainted with sin.⁶²

V. CONCLUSION

In conclusion, this paper has examined the competency of witness under common and Islamic law. It could be gleaned from the foregoing that, witness is an essential element in the administration of justice and his competency goes a long way to determine the admissibility of his/her evidence and weight to be attached to such.

⁵² Aguda T.A. Op Cit. P. 299

⁵³ Section 161 (2) of Evidence Act Volume 6 cap E14 LFN2004

⁵⁴ Section 157, 176 and 160 of Evidence Act Volume 6 cap E14 LFN2004

⁵⁵ Section 160(a) of Evidence Act Volume 6 cap E14 LFN2004

⁵⁶ Section 160 (b) of Evidence Act Volume 6 cap E14 LFN2004

⁵⁷ Section 162 (c) of Evidence Act Volume 6 cap E14 LFN2004

⁵⁸ Section 161 (1) c of Evidence Act Volume 6 cap E14 LFN2004

⁵⁹ Section 157 of Evidence Act et Volume 6 cap E14 LFN2004

⁶⁰ Ruxton, Op Cit P. 301. Also P73 note 3

⁶¹ Nchi & Muh'd Op Cit 250

⁶² Qur'an 2:282-283

Every pronouncement of a court of law by a presiding judge can only be based on the evidence adduced by a witness before him. Thus, the trial court has a duty to evaluate the evidence and determine the credibility of a witness before accepting his or her evidence. In nut shell, evidence assists or enables the court of justice in reaching a just decision.

Furthermore, the paper discussed compellability of a witness and the dichotomy between the common law and Shariah on the issue of compellability. The golden rule under the common law is that, all compellable witnesses are competent witnesses but not all competent witnesses are compellable. While the reverse is the case under Islamic law, as all competent witness are compellable; this can be seen from the word of Holy Quran and tradition of the prophet which says:

*Conceal not evidence for whoever conceals it his heart is tainted with sin*⁶³

And the Quran enjoin Muslims not to refuse to testify and that witnesses should not refuse when they are called on for evidence

*Assist your brother whether he is the oppressor or oppressed*⁶⁴

⁶³ Q.2:283

⁶⁴ Quardri Y.A. The Saying of Prophet (S.A.W) Translation from Arabic into English. (Ijebu-Ode Nigeria, Shebiotimoh Publisher, 1995) P.7.