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From Fry Pan to Fire or from Fire to Fry Pan: a Comparative Critique of Competency of A Child Witness in Nigeria

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From Fry Pan to Fire or from Fire to Fry Pan: a Comparative Critique of Competency of A Child Witness in Nigeria

Timothy F. Yerima

Abstract- This paper takes a comparative critique of the Nigerian Evidence Acts 2004 and its 2011 counterpart. Specifically, the paper seeks to tackle the question whether the controversial issues raised against the provisions on competency of a child witness under the 2004 Act have been resolved or they are still rearing their ugly heads under the 2011Act. In tackling this question, the paper relies on the two Evidence Acts as the major statutes. Other domestic legislation of Nigeria relevant for consideration, include the Children and Young Persons Act, the Criminal Procedure Act, the Child Rights Act and the Constitution of Nigeria, (as amended). At the international plane, the Convention on the Rights of the Child, Convention on the Elimination of Discrimination against Women, the African Charter on the Rights and Welfare of the Child and the Protocol on the Rights of Women in Africa are relevant. The paper answers the question raised in this paper in the negative, concluding that, though the Evidence Act, 2011 has brought some innovations to its 2004 counterpart, some of the controversial issues raised under the 2004 Act are compounded under the new Act. The paper recommends necessary steps forward, including legislative and judicial intervention.

I. Introduction

The role of the courts in the administration of justice cannot be undermined. Courts have special responsibility to preserve and enforce the moral pillars upon which our society is built. The judicial powers are vested in the courts but the courts themselves are only vehicles driven by human beings – the judges/magistrates. That is why Lopes L.J., in *Royal Aquarian v. Parkinson*[1], said: "It (the word 'judicial') may refer to the discharge of duties exercisable by a judge or justices in court, or to administer justices, which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind …". Judicial power, therefore, is the authority vested in courts and exercisable by judges to hear and decide cases and to make binding judgments on them.[2] Emeritus Professor Ijalaye had once passed the message that "… judicial independence endows the judge with the virtue and power by which he gives every man that comes before him what is due. The judge is expected to do justice to all and sundry." [3]

A judge plays the role of unbias umpires. He does not only see that the rules and procedures of court are kept but also takes forensic examination of the strength of the evidence given by the parties and witnesses in a matter, so that at the end of the trial he pronounces who wins the case. [4] That is why the role of a judge in the administration of justice is comparable with that of "referees at boxing contests." [5]

But a judge cannot perform his adjudicatory role without the testimonies of witnesses given in court or outside the court in certain circumstances. A witness is a person who testifies from the witness box; a person who has direct knowledge of any relevant fact in issue irrespective of his relationship with the party. [6] Evidence of a witness is the common mechanism used for proof. Oral proceedings and the use of witness in proving or disproving cases are the key features of the adversary system. [7] But the first crucial issue is whether the witness is competent to testify. This question becomes imperative because if a witness is not competent to give evidence in the first place, he cannot do magic to give evidence; as doing so will be legally an exercise in futility. But if a person is competent to give evidence, then the second question comes to the fore for determination: that is whether the competent witness can be compelled to give evidence.

Over the years, the provisions of the Nigeria's Evidence Act, 2004, [8]on the competence of child have generated some controversies. It becomes imperative to determine whether these issues have been resolved

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[1] (1892) 1.Q.B. 431.
[2] T.F. Yerima, 2005, "Safeguarding Rule of Law in Nigeria's Nascent Democracy: The Role of Judiciary," Fountain Quarterly Law Journal, Vol. 2, No. 2, at 27.
[3] D.A. Ijalaye, 1992, "Justice as Administered by the Nigerian Courts," being a paper delivered at the Idigbe Memorial Lecture Series Five, at 3.
[4] Taiwo Osipitan, 2007, "Competence and Compellability of Witness", in A. Babalola (ed.) *Law and Practice of Evidence in Nigeria,* Ibadan: Sibon Books Ltd, at 379. See also Aondover Kaka'an, 2008, " Case Management and Quick Dispensation of Justice," *Frontiers of Nigerian Law Journal,* Vol. II No. 2, at 435-436.
[5] Osipitan, *Ibid.*
[6] *Ikye v. Iorumbor* (2002) 11 NWLR (pt. 777), 52 at 77.
[7] Osipitan, *supra,* note 4.
[8] Cap. 112 LFN, 2004.

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under the Evidence Act, 2011[9]or they are still rearing their ugly heads under the new Evidence Act. This is the crux of this paper. But before delving into the main intricacies, it is gratifyingly crucial to clear some fogs which may hitherto becloud our understanding of this topic.

II. Meaning of Competency and Compellability of Witness

The terms "competence" and "compellability" of witness, roll together, deals with the rules regulating competence of witness and the circumstances under which such competent witness can be compelled to testify. In the definition of *Cross on Evidence:*[10] "A witness is competent if he may lawfully be called to give evidence." To Tracy Aquino: "Competence is the legal test of an individual's ability to testify as a witness in court. Compellability ensures that a potential witness can be forced to testify, even though he may be reluctant or unwilling to do so." [11] In *Black's Law Dictionary* [12] competence is also explicitly defined as a "basic or minimal ability to do something, especially to testify"; and the word "compellable" is regarded as "capable of or subject to being compelled, especially to testify." Thus, a competent witness is a person who can lawfully be called to give evidence. He is a person who is "fit, proper and qualified to give evidence", to borrow the sentiment of Professor Osipitan (SAN).[13] Distilled from the foregoing definitions is that in certain cases a person may be competent to give evidence and may also be compelled to enter the witness box to testify. But in other cases, a person may be competent to give evidence but cannot be compelled to give evidence.

One point is also germane from the foregoing definitions: any person that is compelled to give evidence must be a competent witness. It depicts that every compellable witness is a competent witness but not every competent witness is a compellable witness. Consequently, it will be an exercise in futility for a court to compel a person who is not competent to testify in court or any place directed by the court. This is predicated on the notions that "the law does nothing in vein nor does it attempt the impossible." The maxims are: *lex nil frusta facit* and *lex non legit ad impossibilia* respectively. [14]

Our law makes it glaring that certain persons by virtue of their position(s) cannot be compelled to give evidence in court even if they are competent to do so. These include: President, Vice President, Governor, Deputy Governor,[15] accused person[16] *et cetera.* Consequently, if a person is not exempted by law to give evidence, he is a compellable witness; and his refusal to give evidence amounts to contempt of court that attracts punishment.

III. A Brief Historical Survey

History has revealed that at the early stage of common law, children were disqualified from testifying. The question of whether they were intelligent and could give intelligent testimonies was not considered. It was felt that children were not naturally intelligent and, therefore, not capable of understanding what they could testify or the nature and implication of giving evidence on oath. The nature of the oath at the early stages of common law was stated in *R v. Hayes:* [17]

> …it was firmly believed that lying on oath would send the perjurer to hell. Oath taking occupied a significant place in the religious and every day existence of the people at that time that no one would die on oath. But with the passage of time, civilization and the advancement of society led to a decline in religious instructions, young children became more unlikely to understanding the religious implication of oath taking.

However, the Eighteenth Century witnessed a change of perception. The reliance on age was dropped. The court concentrated on the children's ability to understand the nature and consequences of an oath. *R. v. Braisier,*[18] is one of the cases that gave preference to intelligence to the age of the child. The court stated, *inter alia,* that*:* "There is no precise or fixed rule as to the time within which infants are excluded from giving evidence but their admissibility depends upon the sense and reason they entertain of the danger in impiety

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[9] This Act repeals the Evidence Act, Cap. E14, Laws of the Federation of Nigeria, and enacts a new Evidence Act, 2011 which applies to all judicial proceedings in or before Courts in Nigeria.

[10] R. Cross and C. Tapper (eds.), 1995, *Cross on Evidence, 8th* edn. (London: Butterworths, at 224.

[11] T. Acquino, 2000, *Essential Evidence,* 2nd edn., Cavendish Publishing, at 205.

[12] B.A Garner (ed.), 2009, *Black's Law Dictionary*, 9th edn., United States of America: Thomson Business, at 322 and 321.

[13] Osipitan, *supra,* note 4, at 381.

[14] D.A. Ijalaye, "Specific Rules of Evidence in Criminal Justice Administration in Nigeria" in Akin Ibidapo-Obe & T.F. Yerima (eds.) *Law, Justice and Good Governance* (Ado-Ekiti: PETOA CO. Nig. Ltd., 2005), at 37.

[15] See Sections 308 of the 1999 Constitution, (as amended). See also the cases of: *Rotimi & Others v. Mcgregor* (1974) NSCC Vol. 9, at 542; *Obih v. Mbakwe* (1984) SC NLR 192; *Tinubu v. I.M.B. Securities Ltd.* (2001) 16 NWLR (Pt. 740); *Fawehinmi v. Inspector-General of Police* (2002) 7 NWLR (Pt. 767); *Alamieyeseigha v. Yelwa* (2001) 9 W.R.N. 94; *Chief Victor Olabisi Onabanjo v. Concord Press of Nigeria* (1981) 2 NCLR 399; *Alliance For Democracy v. Peter Ayodele Fayose & 4 Ors.* CA/IL/EP/GOVS3/03. See also T.F Yerima, 2005, "Balancing Equality before the Law and Executive Immunity in the Nigerian Fledging Democracy: An Imperative", *Legal Thoughts : Ondo State Law Journal* Vol. 1, No. 2, at 1-34.

[16] Section 36(11) of the 1999 Constitution (as amended) provides that: "No person who is tried for a criminal offence shall be compelled to give evidence at the trial". See O. Enemaku, 2012, "The Concept of Crime and the Human Rights of an Accused Person under the Nigerian Criminal Justice Administration", *Human Rights Review. An Int'l Human Rights Journ.* Vol. 3, at 302.

[17] (1971) 1 WLR 234.

[18] (1979) 1 Leach, 199.

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of falsehood which is to be collected from their answers to questions propounded to them by the court."

Again, in the 19th Century, there was a legislative intervention to permit the admission of unsworn evidence of a child as long as the evidence was corroborated by other material evidence. [19] Even in the late 20th Century, Lord McLachlin J. in *R v. W (R)*, pointed out explicitly: [20]

> The law affecting the evidence of children has undergone two major changes in recent years. The first is the removal of the notion found at common law and codified in legislation that evidence of children was inherently unreliable and therefore to be treated with caution… Second, the repeal of the provisions creating a legal requirement that children's evidence be corroborated… revokes the assumption formerly applied to all evidence of children often unjustly, that children's evidence is always less reliable than evidence of adults.

The passing of the Children and Young Persons Act, 1933, also saw another development in the law of a child witness. Under section 38(1), in any criminal case, a child of tender years, who did not understand the nature of an oath, might give unsworn evidence "if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understand the duty of speaking the truth."

However, because of the danger of convicting accused on the uncorroborated evidence of a child, section 38(1) contained a *proviso* requiring that there should be corroborative evidence implicating the accused. This article will review that this was the position under the 2004 Act of Nigeria, but it has been dropped under the 2011 Act. The basis of this provision is the "unreliability of witnesses of tender years" or "because of the obvious danger of accepting such unsworn evidence," [21] or "to ensure that no person is liable to be convicted solely on unsworn testimony." [22] Thus, in *R v. Manser,*[23] it was clearly stated that the unsworn evidence of a child given under section 38(1) "was not to be accepted as evidence at all" unless it was corroborated by a sworn evidence. In *R v. Campbell*, [24] the point was made clear that as a matter of law, the unsworn evidence of one child might corroborate the sworn evidence of another child and vice versa; but a particular careful warning should be given in such a case of the danger of acting on the evidence of children.

It was also stated that as a matter of practice both in civil and criminal cases, even if the child witness gave evidence on oath or the witness was an adult, the court might deem it desirable and necessary to give a corroborative warning. This was predicated on the tacit fact that: "Although, children may be less likely to be acting from improper motives than adults, they are more susceptible to the influence of third persons, and might allow their imaginations to run away with them". [25]

IV. Competency of a Child Witness Under the Evidence Act 2004

The competence of a child witness in Nigeria was governed by the general rule provided under the Evidence Act 2004 that "all persons" (including a children), were competent to give evidence. To this general rule, the section provided further that unless, the court considered that they were prevented from understanding the questions put to them or from giving rationale answers to those questions, by reason of tender years, extreme old age, disease, *et cetera*. [26] Under the Act, there was always a presumption that a child, among other category of persons, was competent to testify, unless the child was incapable of understanding the questions put to him or that he could not give rationale answers to those questions. As the Supreme Court stated in *Onyegbo v. The State*, [27] "when the judge sits alone, he is undoubtly the person whose opinion is relevant." This is buttressed by the use of the phrase "unless the Court considers," in section 155 of the Evidence Act, 2004.

Under the 2004 Act, courts embarked on putting preliminary questions that might not necessarily be connected with the matter before it; and if the child did not understand the questions or gave rationale answers to the questions he would be regarded as an incompetent witness; he would not enter the witness box to give evidence. The incompetency of the child to testify might not necessarily be due to his immaturity or on account of his age; it might be as a result of his "mental infirmity."If from the court's judgment the child answered the questions correctly he would be considered a competent witness; he was neither affected by his "tender years", "disease" or "infirmity."

Having passed the first test, the court would adopt the second test to determine the understanding of the child of the nature of an oath. The second test was adopted to satisfy the requirement of section 180 of the 2004 Act to the effect that "… all oral evidence given in any proceedings must be upon oath or affirmation administered in accordance with the provisions of the

[19] A.O. Enabulele, 2006, "Beyond Sufficient Intelligence & the Ritual of Oath Taking: A Liberalized Approach to the Evidence of a Child", *Ahmadu Bello University Journal of Private & Comparative Law,* Vol. 1, No. 2, at 140.
[20] (1992) 2 SCR 122.
[21] Cross & Tapper, *supra* note 10, at 211.
[22] See *Director of Public Prosecution v. Hester* (1973) A.C. 296, per Lord Viscount Dil horne.
[23] (1934) 25 Cr. App. R.18;
[24] (1956) Q.B. 432.
[25] Cross & Tapper, *supra* note 10, at 224 relying on *R. v. Dossi* (1918) 13 Cr. App. Rep. 158 at 161.
[26] See S. 155 of the Evidence Act 2004 and S. 175 of the Evidence Act, 2011.
[27] (1995) 4 NWLR (pt. 391), at 510.

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oath Act."[28] In the view of Olatawura J.S.C (as he then),[29] section 182 of the Evidence Act appeared to be mandatory to avoid a miscarriage of justice; adding that any witness, whether an adult or a child, who had no regard for truth should not be believed. It would be dangerous to convict on the evidence of such a witness. Section 180 was applied strictly in civil proceedings; its application did not extend to the provisions of section 183 of the same Evidence Act, dealing with the admission of evidence of a child not given on oath in criminal cases. This is one of the sharp distinctions between the 2004 Act and its 2011 counterpart.

The court satisfied the second test by asking the child questions pertaining to the nature and implication of an oath. Questions are directed to such matters as the consequences of telling lies on oath, why people should speak the truth, *et cetera*. [30] Words such as as God, Bible, Church, Holy, Jesus, *Allah*, Mosque, Prophet Mohammed, Qur'an, were used, depending on the religious background of the child.

It is crucial to state that the two tests were required in both civil and criminal proceedings and irrespective of the child's age. The consequence, therefore, was that if the child did not satisfy the first requirement, he was not competent to give evidence both in civil and criminal proceedings. If, on the other hand, he passed the first test but failed the second test, he would give evidence in criminal cases, not in civil cases because the rule in civil cases was strict. The 2004 Act itself did not provide exception where a child witness could give unsworn evidence in civil cases. It was only in criminal proceedings that the Act provided exceptions to the rule that oral evidence must be given on oath or affirmation in accordance with the Oath Act.

Fedelis Nwadialo had observed that if a child did not understand the essence of an oath, he could not properly swear to it and without so swearing he could not testify. The second condition, according to him, involved a higher level of understanding and "generally if it is satisfied, the first is also impliedly satisfied." [31] It is agued that Nwadialo's submission could be accepted only to the extent that it did not apply to evidence of a child witness in civil cases. First, under the 2004 Act; particularly in criminal cases, the fact that the witness did not comprehend the essence of an oath and, consequently, could not swear on it did not mean that he could not testify; he could testify but not on oath, "if in the opinion of the court, such child was possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

It is also doubtful if justice could be done in criminal proceedings, if judges had gone straight to apply the second test. "If it is satisfied", Nwadialo concluded; "the first is also impliedly satisfied". This would mean conversely that if it was not satisfied, the first was also impliedly not satisfied. This procedure, it is submitted, would have occasioned a miscarriage of justice because by virtue of section 183(1) of the 2004 Act, the court would still receive the evidence of a child witness who did not satisfy the second requirement; but such evidence must not be given on oath since his understanding of the nature and implication of giving evidence on oath was defective.

It is, however, interested to point out that Nwadialo wondered how a judge would form an opinion about the child's capacity to comprehend the essence of an oath without making an inquiry first to that effect. [32] In any case, it is convincing to adopt the summary of a learnt expert on the Law of Evidence that section 183(1) applied only to criminal proceedings where a child was to give evidence; and where the child, in the opinion of the court, did not understand the nature of an oath. [33]

V. The Requirement of Corroboration in Evidence of a Child Witness

I. *Meaning and Nature of Corroboration*

Corroboration is an exception to the general rule that no specific number of witnesses is required for the proof of facts. It means that the "court can act on the evidence of a single witness if that witness can be believed…truth is not discovered by a majority vote." [34] However, both the Evidence Acts 2004 and 2011 provide for cases in which the evidence of a single witness, no matter how cogent, cannot be accepted by the court. In those cases the evidence must be corroborated. In some other cases, even if the law does not require corroboration, it is necessary and corroboration is required as a matter of practice.

Although, the Acts require corroborative evidence in some cases, they do not define corroboration. Text writers have laid down that a piece of evidence which confirms, reinforces or supports another piece of evidence of the same fact is a corroboration of that other one. It is the act of supporting or strengthening a statement of a witness by fresh

[28] S. 182 Evidence Act 2004 & S. 209(1) Evidence Act 2011. See *Kowa v. Musa* (2006) NWLR (Pt. 972), at 35.
[29] Olatawura JSC (as he then was) in *Sambo v. The State* (1993) 6 NWLR (pt. 300) at 422.
[30] Fedelis Nwadialo, 1999, *Modern Nigerian Law of Evidence,* 2nd edn., Lagos: Univ. of Lagos Press, at 470-471.
[31] *Ibid,* 468.
[32] *Ibid,* 473.
[33] Joash Amupitan, 1998, "Child-Witness in Judicial Proceedings", *Uni Jos Current Journal,* Vol. 4, No. 4, at 128-129.
[34] *Onafowokan v. The State.* (1987) 2 NSCC 1099 at 1111, per Oputa JSC. This is a Common Law principle in *Director of Public Prosecution v. Hester, supra, note, 22*, that has been incorporated in the Nigerian Evidence Act that: "Except as provided in this section, no particular number of witnesses shall in any case be required for the proof of any fact". See S. 179(1) Evidence Act 2004.

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evidence of another witness.[35] "Corroboration does not mean that the witness corroborating must use the exact or very like words, unless the maker involves some arithmetic."[36] Corroboration is the confirmation, ratification or validity of existing evidence from another independent witness or witnesses. In *DPP v. Hester,* [37] Lord Morris of Borth- Gest passed the message that: "The purpose of corroboration is not to give validity or credence which is deficient or suspect or incredible…Corroborative evidence will only fill its role if it is completely credible" Both evidence to be corroborated and the corroborating evidence must be accepted by the court or tribunal. In criminal cases, the corroborative evidence must be independent and capable of implicating the accused in relation to the offence charged. That the corroborative evidence must be independent means that the evidence must come from a different person or source other than the witness such evidence tends to support;[38] and there must be no any likelihood or possibility of collusion between the two evidences. In fact, "the corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime."[39]

II. *Corroboration Required by Law in Unsworn Evidence of a Child Under the Evidence Act, 2004*

It is important to reiterate that under the Evidence Act 2004, the legal basis for admitting the unsworn evidence of a child in criminal cases is the provision of section 183(1) of the Evidence Act. The provision is *pari materia* with section 38(1) of the Children and Young Persons Act, 1933, which allowed a child to give unsworn evidence in criminal proceedings, provided the child was of sufficient intelligence and understood the duty of speaking the truth.

However, due to the obvious danger of convicting an accused on the unsworn evidence of a child, section 38(1) required corroborative evidence implicating the accused. This *proviso* was incorporated almost *verbatim* into section 183(3) of the Evidence Act, 2004. The legal consequence was that the court could not rely on the unsworn evidence of a child given for the prosecution to convict the accused unless the evidence was supported by independent evidence implicating the accused. It means "such unsworn evidence is inferior in its probative value hence it has to be corroborated by some other material evidence."[40] In *Director of Public Prosecution v. Hester*,[41] the words "other material evidence", was defined as "evidence admitted otherwise than by virtue of section 38."

The basis for the requirement of corroboration in the unsworn evidence of a child under the Act was to ensure that no person was liable to conviction solely on the unsworn testimony of a child. But the independent evidence must be sworn evidence. It has long been recognized by legal authorities that the unsworn evidence of a child cannot corroborate the unsworn evidence of another child. In *Igbine v. The State*,[42] the court said: "The evidence of the victim (Pw3) was damning against the appellant. Going by her evidence, it was the appellant who had nasty indecent assault on her. The evidence of her brother (Pw2), a child under 14 years of age cannot, however, corroborate her own evidence as both gave unsworn evidence."

Also, as a matter of law, the unsworn evidence of one child might corroborate the sworn evidence of another child but the judge has to warn himself of the danger of acting on such evidence. This was the dictum in *R v. Campbel.* [43]

It is noteworthy that where the court receives the unsworn evidence of a child and the latter willfully gives false evidence which would have made him guilty of perjury if the evidence had been given on oath, the child would be liable for the offence under section 191 of the Criminal Code, dealing with false statements in Statements required to be under oath or solemn declaration – and if guilty would be liable to imprisonment for seven years. The 2004 Act only mentioned section 191 of the Criminal Code, though there is the corresponding offence in section 158(1) of the Penal Code. It is pointed out that this anomaly is still *rearing its ugly head* in the Evidence Act, 2011.

III. *Corroboration Required as a Matter of Practice in Sworn Evidence of a Child*

Since section 183 of the Evidence Act, 2004, applied only to unsworn evidence of a child in criminal proceedings, it meant that if a child satisfied the requirement of section 155 and understood the nature and implication of an oath as required by section 180 of the Evidence Act, he could give sworn evidence. Such evidence did not require the application of section 183 because the section was aimed at a child who did not understand the nature of an oath. There was nothing under the Evidence Act, 2004, that said sworn evidence of a child must be corroborated. Over the years, however, courts have held that in practice the judge must warn himself of the danger of convicting an accused based on the uncorroborative evidence of a

[35] Nwadialo, *supra* note 30, at 431. See also S.T. Tar Hon, 2006, *Law of Evidence in Nigeria: Substance and Procedural,* Port- Harcourt: Pearl Publishers, , at 587.
[36] *Dagayya v. The State.* (2006) 7 NWLR (pt. 980) at 667.
[37] *Supra* note 22. See also *Director of Public Prosecution v. Kilbourne* (1973) AC 729 at 745, per Lord Haisham.
[38] *Ukershima v. State* (2003) FWLR (pt. 137) 1117 C.A.
[39] Y.H. Rao & Y.R. Rao (eds.), 2011, *Criminal Trial- Fundamentals & Evidentiary Aspects,* 4th edn., Haryana, India: LexisNexis Butterworths, , at 815. See also Tar Hon, *supra,* note 35 at 587.
40 Enabulele, *supra* note 19, at 142.
41 *Supra* note 22.
42 (1997) NWLR (pt. 519) 101.
43 (1956) QB 432.

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sworn child. In *Omosivbe v. Commissioner of Police*, [44]the court passed the message, *inter alia,* that: "The evidence of a child tender on oath does not require corroboration; although if uncorroborated, it is customary to warn jury or, in the case of a judge sitting as a judge to warn himself, not to convict on such evidence of a child except after weighing it with extreme care."

The necessity of such warning had long been stated that children are more susceptible to the influence of third persons, and may allow their imaginations to run away with them. [45] It is within the discretion of the judge to warn himself of the danger of acting on the un-corroborative evidence of a child to convict an accused. That the warning was not given an appellate court could not quash a conviction of the accused solely on that ground except it was shown clearly that there was a miscarriage of justice.

However, since section 183 of the Evidence Act did not apply to civil cases, it meant that the relevant provisions that determined the competence of a child witness in civil cases were sections 155 and 180 of the 2004 Act. It meant also that in civil cases, if a child did not understand the nature and implication of an oath, he was not a competent witness in civil proceedings. The child's unsworn evidence would not be admissible and if wrongly admitted, any order of court based on such unsworn evidence would be quashed on appeal. [46]

VI. The Innovations or Otherwise Made by the Evidence Act, 2011- *from Fry Pan to Fire* or *from Fire to Fry Pan*

a) *Admissibility of Unsworn Evidence of a Child below the Age of 14 Years*

As far as competence of a child witness is concerned, section 155 of the Evidence Act, 2004 is *pari materia* with section 175 of the Evidence Act 2011 that deals with the first test of a child's competency. It means under both Acts, even a lunatic is competent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them. There is always competency, in fact, unless the Court considers otherwise. However, the Evidence Act, 2011 has brought some innovations regarding the admissibility of unsworn evidence of a child and the requirement of corroboration. For the purpose of comparison, it is necessary to reproduce section 209 of the Evidence Act *verbatim:*

1. In *any proceeding* in which a child who has not attained the age of 14 years is tendered as a witness, such child *shall not be sworn* and shall give evidence otherwise than on oath or affirmation, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understand the duty of speaking the truth.
2. A child who has attained the age of 14 years shall, subject to sections 175 and 208 of this Act, give sworn evidence in all cases.

A comparison of section 183 and section 209 of the Evidence Act 2004 and 2009 respectively, no doubt, reveals that while the former dealt with the evidence of unsworn child in criminal cases, the latter distinguishes between competence of a child below the age of 14 years and that of a child who has attained the age of 14 years in both civil and criminal proceedings. This is a sharp distinction between the two Evidence Acts. While section 183 was restricted to criminal cases, section 209(1) applies to both civil and criminal cases. Consequently, under the Evidence Act, 2011, unlike its 2004 counterpart, a child who has not attained the age of 14 years is not competent to give sworn evidence.

The legal implication of the provision of section 209(1) is that where a child below the age of 14 years is called as a witness in either civil or criminal proceedings, the court is only required to adopt the first test to satisfy the provision of section 175 of the Evidence Act, 2011, *pari materia* with section 155 of its 2004 counterpart; and if the child passes the test, he can give unsworn evidence, "provided in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth". This provision under the Evidence Act 2004 only applied to criminal proceedings. The 2004 Act was applied strictly in civil proceedings to the effect that the child witness, either below the age of 14 years or above the age of 14 years, must understand the questions put to him and giving rationale answers to those questions and the nature of an oath. The criticism of this provision under the 2004 Act emanated from the question whether a child who is statutorily disqualified from giving evidence on oath be required to "possess of sufficient intelligence to justify the reception of his evidence and understand the duty of speaking the truth." The phrase is still *rearing its ugly heads* under the 2011 Act.

It is also gratifying to point out that under section 160 of the Child Rights Act, 2003:

1. In any proceedings, whether civil or criminal, the evidence of a child may be given unsworn
2. A deposition of a child's sworn evidence shall be taken for the purpose of any proceedings, whether civil or criminal, as if that evidence had been given on oath.

It is submitted that, while the foregoing provisions conflicted with section 183 (1) of the Evidence Act, 2004, which restricted the admissibility of unsworn evidence of a child to criminal proceedings, the

[44] (1959) WRNLR 207.
[45] See Cross and Tapper, *supra* note 10, relying on *R.v. Dossi, supra* note 25.
[46] Nwadialo, *supra* note 30, at 471. See also *Robberts v. Baker* (1954) CLY 242 DC.

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conflict has now been resolved by the use of the words: "in any proceedings" in section 209 (1) of the Evidence Act, 2011, thereby allowing the unsworn evidence of a child in civil proceedings to be given.

However, section 209 (2) makes it explicit that a child who has attained the age of 14 years shall give sworn evidence in both civil and criminal proceedings. The Act makes this provision subject to the provisions of sections 175 and 208 of the same Act. This means:

i. Even for a child, who has attained the age of 14 years to give sworn evidence, he must understand the questions put to him or give rationale answers to those questions and also understand the nature of an oath.
ii. The court may discard with the requirement of administering evidence on oath if it is of the opinion that taking of any oath whatsoever according to the religious belief of the child witness is unlawful or because of lack of religious believe, the court is of the opinion that the child witness ought not to give evidence upon oath.

There was no similar provision under the 2004 Act. It is an exceptional innovation brought by the 2011 Act.

b) The Requirement of Corroboration

Section 209(3) of the Evidence Act 2011, dealing with the requirement of corroboration of unsworn evidence of a child is another provision that brings a remarkable confusion to the evidence of a child witness in Nigeria. The sub- section provides:

(3) A person shall not be liable to be convicted for an offence unless the testimony admitted by virtue of subsection (1) of this section and given on behalf of the prosecution is corroborated by some other material evidence in support of such testimony implicating the defendant.

Although, section 209 (1) of the same Evidence Act, 2011 applies to both civil and criminal proceedings, section 209 (3) applies to only criminal proceedings. The combined legal consequences of the two provisions are:

i. Although, under section 209(1) of the Evidence Act, a child, who has not attained the age of 14 years, can give unsworn evidence, it is only in criminal cases that such unsworn evidence requires corroborative evidence implicating the accused (defendant). There is nothing under the provision of section 209(3) to show that the unsworn evidence of a child below the age of 14 years in civil cases require corroboration.
ii. Even in criminal cases, there is nothing under section 209 or any other provision to show that the unsworn evidence of a child, who has attained the age of 14 years, require corroborative evidence implicating the accused person. On the contrary, under its 2004 counterpart, unsworn evidence of a child of whatever age required corroborative evidence in criminal proceedings, implicating the accused person.

It seems the foregoing innovation made by the Evidence Act, 2011, is an incorporation of the view of some scholars in Nigeria. For example, Professor Amupitan had once felt that: "… in order to remove the controversy created by the need for preliminary inquiry or not, a person of 14 years and above should be treated like an adult who could give sworn evidence in the court while a person below the age of 14 years should be considered as a child whose evidence requires special treatment."[47] While the new Evidence Act was pattered along the suggestion of Professor Amupitan, the legislature limited the exception (special treatment) to only criminal cases, thereby compounding the criteria for determining the competence of a child witness in civil cases.

c) Problem of Definition of a 'Child' or 'a Person of Tender Years'

It is expedient to reiterate that section 155 and 175 of the Evidence Acts, 2004 and 2011 respectively, do not use the word "child"; they use the words: "a person of tender years". Section 183 and 209 of the two Evidence Acts respectively use the word "child". It, therefore, depicts that as far as criminal proceedings are concerned the first thing to determine in the application of section 209 is whether the person is a child or a person of tender years. It was expected that the new Evidence Act, would clear the fogs by defining the phrase "a person of tender years" and or "a child," but to no avail. With such lacuna in our Evidence Act, the meaning of a child or a person of tender years, continue to generate tension. According to a commentator:

The omission by the Evidence Act to define who is a child might be deliberate. This is because until lately most jurisdictions did not bother to define who is a child. It is rather left for the court in each particular case to determine whether a person is a child or not. This is to give room for flexibility and to allow each child witness to be treated in accordance with their intellectual abilities and background. [48]

Long before the Children and Young Persons Act was passed in 1933, there was "no precise or fixed rule as to the time within which infants were excluded from giving evidence." Even many years after the passing of the 1933 Act, English Court of Appeal did not only realize the danger of fixing a particular age but also condemned such idea. In *R v. Braisier,*[49] the court frowned against fixing a particular time and age within which infants are excluded from giving evidence…; and in *R. v. Z,*[50] the English Court of Appeal, did not only

[47] Amupitan, *supra* note 33, at 128.
[48] *Ibid,* at 126.
[49] *Supra* note 18.
[50] (1990) 3 W.L.R. 113.

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warn itself of the danger of fixing a particular age but also condemned the idea of a fixed age below which a judge may not find the competency requirement satisfying.

Also in the old American case of *George L. Wheeler v. U.S.,*[51] Justice Brewer declared that there is no precise age which determines the competency of a witness, adding that: "This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former…."

In Nigeria, the Supreme Court in *Onyegbo v. State,*[52] relying on its earlier decision in *Okoyo v. The State,*[53] stated, *inter alia,* that "competency to testify is not a matter of age but of understanding and if a child understands the nature of an oath, the provision of section 183 of the Evidence Act becomes irrelevant." The Nigerian Law Reform Commission had reviewed the omission of fixing a particular age of a child concluding that it was dangerous to do so.[54]

Sometimes the word "child" is used interchangeably with the words, "juvenile", "minor" "infant" *et cetera.* Each of these words has been used in different legislation and the age fixed also differs depending on what the statute is aimed to achieve. A commentator, for example, had pointed out that "…under the Electoral Law in Nigeria, the legal age of majority to vote is 18 years, the age limit of acquiring a driving licence under the Traffic Law is 16 years and that of entering into contract agreement is 21 years under the Infant Relief Act, 1874." [55]

Black's Law Dictionary,[56] defines a juvenile as:"A young person who has not yet attained the age at which he or she should be treated as an adult. Section 2 of the Children and Young Persons Act, applicable in the Federal Capital Territory, Abuja, defines a child as "a person under the age of 14 years." The same definition is contained in section 2 of the Children and Young Persons Law of Lagos State, some State Laws of Nigeria[57] and the Children and Young Persons (Harmful Publications) Law.[58] It is glaring in these laws that a child is different from a young person. While the former has been defined as a person under the age of 14 years, the latter is defined as a person who has attained the age of 14 years but under the age of 18 years.[59]

Another procedural law that clearly brings out the definition of a child is the Criminal Procedure Act (CPA), [60] applicable in Southern States of Nigeria. The Act defines a child in section 2(1) as any person who has not attained the age of 14 years. The Criminal Procedure Code (CPC), [61] which is the equivalent of the CPA, applicable in Northern States of Nigeria, omitted the definition of a child. The Penal Code,[62] only pinned down the capacity of a child to criminal liability to 12 years without defining a "child".[63]

Some human rights instruments that Nigeria is signatory have also defined the word "child". The Convention on the Rights of the Child, says "for the purposes of the present Convention, a child means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier."[64]

The African Charter on the Rights and Welfare of the Child, adopted the definition of a child under the UN Convention on the Rights of the Child but excludes the phrase: "unless under the law applicable to the child,…"[65] It is gratifying to say that the foregoing definition has been adopted in Nigeria under the Child Rights Act, 2003 with additional definition of "age of majority" to mean"the age at which a person attains the age of eighteen years."[66]

In the absence of definition of a child under the Evidence Act, over the years, courts have beamed their light in search of the fixed age of a child for the purpose of giving evidence in court. The first case that attempted to revolve the controversy is *Asoguo Eyo Okon & 2 Ors. v. The State,*[67] where the only eye witness to the case was a person under 14 years. Justice Nnaemaka Agu J.S.C (as he then was) adopted and applied the definition of a child in section 2(1) of the Criminal Procedure Act – that is "any person who has not attained the age of 14 years". The Court reasoned that in criminal cases the Criminal Procedure Act and the Evidence Act should not be read in isolation but in *pari pasu* and considered as cognate legislation. His

[51] (1895) 159 U. S. 523.

[52] *Supra* 27. See also *Solola v. The State* (2006). All FWLR (pt. 269) 1751, where the Supreme Court of Nigeria had earlier held that competence to testify is not a matter of age but of intellectual capacity, hence, all persons, by virtue of section 155(1) of the Evidence Act (2004) (now section 175) of the Evidence Act, irrespective of age, are competent witnesses, provided they have the intelligence to understand the questions put to them.

[53] (1972) ANLR 938 at 945.

[54] Amupitan, *supra,* note 33.

[55] *Ibid.* at 127.

[56] Garner, *supra* note 12, at 945.

[56] Garner, supra note 12, at 945.

[57] Laws of Anambra State of Nigeria (Revised edn.), 2000, S. 2.; Children & Young Persons, Cap. 29, The Laws of Kwara State of Nig., Laws of the Kwara State of Nigeria, Vol. 1, 1994; Cap. 34, S. 2.

[58] Laws of Lagos State 2004, Cap. C11.

[59] See for example, Section 2 of the Children & Young Persons' Law.

[60] Laws of the Federation, Cap. C41, 2004.

[61] Laws of the Federation, Cap. C42, 2004.

[62] The Penal Code CAP. 89 Laws of The Northern Nigeria, 1959. Some provisions of this law are contained in the Penal Code (Northern States) Federal Provision Act, CAP. P3, Vol. 13, 2004.

[63] *Ibid.* S. 50 provides: "No act is an offence which is done: (a) by a child under seven years of age; or (b) by a child above seven years of age but under twelve years of age who has not attained sufficient maturity of understanding to judge the nature and consequence of such act.

[64] Child Rights Convention, Art. 1.

[65] African Child rights Charter, Art. 2.

[66] Child Rights Act, S. 277.

[67] (1988) ALL NLR178.

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Lordship did not distinguish between a child and a "person of tender years." It was expected that the 2011 Evidence Act, would over come the anomaly or resolve the controversy but section 175 of the Act, *pari materia* with section 155 of its 2004 counterpart, still uses the words "tender years."

It seems that where a statute under consideration defines the word "child," the court would adopt that definition. For example, if the case involves violation of human rights and a provision of the Child Rights Act, 2003 is in controversy, the definition of a child would mean: "a person under the age of eighteen years."[68] Due to the controversies emanated from the definition of a child or a person of tender years, judicial authorities had shown that age did not really matter; the most important question was whether the child possesses the capacity of understanding the questions and giving rationale answers to them.[69] It is reiterated that the foregoing principles are no longer good Laws in Nigeria in view of the provisions of section 209 (1) of the Evidence Act, 2011 that distinguishes between competence of a child below the age of 14 years and that of a child who has attained the age of 14 years.

VII. Summary of Comparison and Observations

This are paper revealed that the Nigerian Evidence Act, 2011 does not change the provisions of section 155 of the Evidence Act, 2004, because section 175 of the new Act incorporates verbatim the wordings of section 155 of its 2004 counterpart. The new Evidence Act, therefore, still leaves the problem of definition of a child and a person of tender years in controversy.

However, the 2011 Act has brought substantial innovations to the provisions of section 183 of the Evidence Act, 2004 on the admissibility of unsworn evidence of a child witness. While this provision was restricted to evidence of a child in criminal proceedings under the Evidence Act 2004, section 209 of the Evidence Act 2011, applies to both civil and criminal proceedings.

Section 209 (1) is restricted to the evidence of a child who has not attained the age of 14 years. Under the Evidence Act, 2004, such a child could be sworn as a witness provided he understood the nature of an oath. The 2011 Act disqualifies such a child completely from giving sworn evidence; whether or not he understands the nature of an oath. The legal implication of this is that under the new Act, it would be an exercise in futility for the court to adopt the second test to determine whether or not a child, who has not attained the age of 14 years, is competent to give evidence on oath.

Again, while under section 183 of the Evidence Act, 2004, it was not clear whether court must adopt the second test to determine whether a child of whatever age is competent to give sworn evidence, the 2011 Act, having disqualified a child below the age of 14 years from giving sworn evidence, allows a child who has attained the age of 14 years to give sworn evidence in both civil and criminal proceedings. The question whether a court needs to adopt the second test to determine the competence of a child to give sworn evidence is still a controversial issue to be determined by case law.

The most innovative provision under the 2011 Act is section 209(3) dealing with the requirement of corroboration. The 2004 act allowed admissibility of unsworn evidence of a child in criminal proceedings only; and went ahead to require corroboration of the evidence against the accused to secure his conviction. While the 2011 Act allows a child to give unsworn evidence in both civil and criminal proceedings, the Act restricts the requirement of corroboration to criminal proceedings; leaving the requirement in civil proceedings to an open controversy.

Section 209 of the Evidence Act 2011 has resolved the conflict between the Child Rights Act 2003 and the Evidence Act 2004. The Child Rights Act allows the admission of unsworn evidence of a child in both criminal and civil proceedings. The Evidence Act 2004 did not allow the admissibility of unsworn evidence in civil proceedings. This conflict has been resolved by the introduction of the words: "In any proceedings…" under the 2011 Act.

VIII. Conclusion and Recommendations

From the foregoing summary of comparison of the two Evidence Acts, it is glaring that while the Evidence Act 2011 has brought some positive innovations to the 2004 Act, some of the innovations have further compounded the issue of competence and compellability of a child witness.

Again, the controversial question on the definition of a *child* or a *person of tender years* has not been resolved under the new Act. It is our position in this paper that unless the problems are tackled and the controversies resolved, it may be difficult to answer the question whether the innovations made by the new Evidence Act is a movement from *fry pan to fire or from fire to fry pan.* It is against this backdrop that the following recommendations are proffered in this work for a way forward:

A. It should not be in all cases that a child who has not attained the age of 14 years should be disqualified from giving evidence on oath. Where, therefore, a judge is of the opinion that a child below the age of 14 years is competent to give evidence on oath, the court should adopt the second test; and if the child

[68] See Child Rights Act, s. Art. 2.
[69] See for example, Solola v. The State, (supra), note 52.

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passes it, he (the child) should be allowed to give evidence on oath. Section 209 (1) should, at the tail end, include the phrase: *This provision does not apply to cases where the judge is of the opinion that a child, who has not attained the age of 14 years, understands the nature of an oath.*

Conversely, where in the opinion of the judge, a child who has attained the age of 14 years, is not competent to give sworn evidence after passing the first test, the court should adopt the second test to ascertain his competency or otherwise. It is, therefore, suggested that section 209 (2) of the 2011 Act, should be redrafted to include the following words at the tail end: *This provision does not apply to cases where the judge is of the opinion that a child, who has attained the age of 14 years, does not understand the nature of an oath.*

B. The requirement of corroboration should extend to civil proceedings also. Therefore, section 209(3) of the 2011 Act should be amended to read as follows: "A person shall not be liable to be convicted for an offence or *liable for civil wrong* unless…"[70]
C. Although, section 209(2) of the 2011 Act, which allows a child that has attained the age of 14 years to give sworn evidence does not require corroboration, it is suggested that, as a matter of practice, courts should always warn themselves of the danger of convicting an accused person or making the plaintiff liable for civil wrong in such cases without corroboration.
D. Despite the controversy in the definition of a child, each case should be treated on its merit. Where the law under consideration gives the definition of a child, that provision should be read subordinate to the provision of section 209 of the Evidence Act 2011, so that there will be a general definition and a specific definition of a child. It is hoped that if these steps are taken, the law relating to competency of a child witness in Nigeria will be meaningful.

[70] Words in italics are the new words recommended to be introduced in to s. 209 (3) of the Evidence Act, 2011.

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