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Exclusionary Rules of Evidence: Hearsay Rule and Its Exceptions in Nigeria

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Abstract:

Both rules and legal principles are the elements of the law of evidence. This mainly drives legal proceeding. These basically form the decision rules of the court. The quantity, quality and type can also be judged from this law of evidence. However, in a criminal matter, there are a number of issues which either the prosecutor or the defence will have to prove in order to persuade the court to find in their favour. The law must therefore ensure certain guidelines are set out in order to make certain that the evidence adduced before the court is reliable. It has evidence that hearsay evidence is invalid, with an exception of the Nigerian Evidence Act of 2011. The aim of this paper therefore is to give an overview of hearsay rule, its exceptions and applicability in Nigeria with particular consideration of dying declaration. The paper finds that the modern formulation of the hearsay rule emphasis that it operates only on out-of-court assertions and only where such an assertion is tendered for a particular purpose. The paper concludes that there are several exclusionary rules under which the courts will not accept certain matters as evidence of a fact.

Keywords: Dying declaration, evidence, exclusionary rule, and hearsay

1. Introduction

Criminal justice as a vital institution of the society plays a significant role in protecting public order and maintaining security and justice. Law of evidence constitutes an integral part of the criminal justice system. It plays a crucial role in conviction or acquittal of the accused. In the common law doctrine, the law of evidence is determined as the law, which regulates the generation, collection, organization, presentation and evaluation of information for the purpose of resolving disputes about past events in legal adjudication. During the hearings in court, proof of guilt or innocence can be found through the law of evidence. It consists of the rules and principles applied by courts in the process of facts finding at a trial. The evidence of a fact that tends to prove an inference is called admissible evidence. There are several exclusionary rules, under which the courts will not accept certain matters as evidence of a fact. However, this paper intends to treat briefly only one of those exclusionary rules: Hearsay Rule and its exceptions (Another innovation in the new Act is that unlike the old Act, hearsay is now specifically defined and made inadmissible in accordance with established legal principles.)

This paper is divided into four brief parts. The first part deals with clarification of concepts, while part two relates to relevancy. Part three explores hearsay evidence. Part four concerns dying declaration and the conclusion follows.

2. Clarification of Concepts

2.1. Evidence

According to Akinola Aguda, evidence is the means by which facts are proved but excluding inferences and arguments. The learned author stated as follows:

It is common knowledge that a fact can be proved by oral testimony by persons who perceived the fact or by the production of documents or by the inspection of things or places-all this will come within the meaning of judicial evidence. On a very broad view, it is sometimes, permissible to include in this list such other means of proving a fact as admissions and confessions, judicial notice, presumptions and estoppels¹

The Black's Law Dictionary defines the word evidence as: Any specie of proof or probative matter, legally presented at trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention.²

Any matter of fact that a party to a law suit offers to prove or disprove an issue in the case is known as evidence. It is a system of rules and standards that is used to determine which facts may be admitted, and to what extent a judge or jury may consider those facts, as proof of a particular issue in a law suit.³

¹Akinola Aguda, *The Law of Evidence in Nigeria* (1974), p. 11

²Black's Law Dictionary, p. 656

³Evidence-Legal definition of evidence, available at <http://legal-dictionary.thefreedictionary.com/evidence>, accessed 1 October 2019

Evidently, evidence, during trial proceedings in the courts is taken during the course of interrogation of a person on oath or affirmation. The evidence of the witness is obtained by oral examination called the examination-in-chief. The witness is then examined on behalf of the opposite party in order to diminish or dismantle the effect of his evidence, under what is called, cross-examination. The party calling him in order to give an opportunity of explaining or contradicting any false impression produced by the cross-examination again examines him. This is called re-examination and it is necessarily confined to matters arising out of the cross-examination.⁴

This pattern of eliciting evidence in Nigeria's courts follows whether the suit is civil or where there is accusation of a crime under a charge or information.⁵

The law of evidence in Nigeria is governed by the Evidence Act, 2011. It came into force on the 3rd day of June, 2011. It repealed the Evidence Act Cap E14 by its section 257. According to its long title, the Evidence Act, 2011, is an "Act to repeal the Evidence Act Cap E14, Laws of the Federation of Nigeria and enact a new Evidence Act which shall apply to all judicial proceedings in or before courts in Nigeria and for related matters."

As the Code of Nigerian law of evidence, the Evidence Act, 2011 contains a complete system of law upon the subject of evidence as applicable in judicial proceedings before courts in Nigeria subject to the exclusionary provisions contained in section 256(1) (a), (c), (d), and (2) thereof.⁶

2.2. Exclusionary Rule

The law of evidence deals with the legally acceptable means of proving or disproving the facts in issue and standard of proof required in any particular case. It means that the law of evidence also excludes certain facts from being proved or disproved. It is exclusionary in nature.⁷This type of rule flows directly from the constitutional language such as the 1999 Constitution's command. "no person who is tried for a criminal offence shall be compelled to give evidence at the trial" and that "every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria".⁸

Accordingly, Professor Glanville Williams writing on the exclusionary rules of the law of evidence stated as follows:

The common law of evidence is distinctive chiefly in the determined way in which, although logically relevant, is regarded as unfair, or as dangerously misleading. The two chief examples of this exclusion are hearsay evidence and evidence of the accused's bad character.⁹

2.3. Relevance

Determination of evidence whether it is acceptable or not is the most significant factor. Evidence for the existence of a material fact more probable or less probable is included under relevant evidence. In every jurisdiction, Nigeria inclusive, based on English common law tradition, evidence must conform to a number of rules and restrictions to be admissible. Evidence must therefore be relevant-that is, it must be directed at proving or disproving a legal element. As a general rule, relevant evidence is admissible while evidence deemed irrelevant is not.¹⁰ Basically, there are two types of relevance: Factual relevance: does the evidence make a fact in issue more or less likely to be true and Legal relevance: is the evidence directed at a matter in issue in the case? Does it help to resolve a fact that must be proved to establish the offence/charge? Or is it relevant to a fact lying outside the fact that must be proved to sustain/defend against the cause of action?

Relevant evidence will be excluded where there are concerns with:

- Reliability-evidence not reliable where it has the potential to distort the fact-finding function of the court, or if it may cause the judge to reason irrationally or inappropriately
- Trial efficiency-does the evidence lead the trial down a side alley, or is it only marginally relevant
- Fairness-excluded where it may unfairly surprise the other party
- Privilege-excluded to foster certain relationships protected by confidential communication
- Exclusionary discretion-judicial discretion to exclude where the probative value outweighed by prejudicial effect

Therefore, even if the evidence is deemed relevant by a judge, it could be excluded if the possibility that it would confuse the judge and is unfairly prejudicial to the defendant. In the process of excluding evidence, some basic questions to be considered include:

- Is the evidence relevant?
- Is it factually relevant?
- Is it materially/legally relevant?
- Is the evidence admissible on the ground of law?

⁴ P.G., *Concise Law Dictionary*, p. 104

⁵ I.A. Umezulike, Recording of Evidence and Judgment Writing, in *Essays in Honour of Professor C.O. Okonkwo*, in E.S. Nwauche and F.I. Asogwa (eds) (PortHarcourt: Jite Books, 2000), p. 273

⁶ Z. Adangor, What is Innovative in the Evidence Act, 2011? *Journal of Law, Policy and Globalization*, Vol. 43,2015, p. 36

⁷ AfeBabalola, *Law and Practice of Evidence in Nigeria* (Ibadan: Sibon Books Ltd, 2001), p. 1

⁸ Sections 33 and 36 of the Constitution of the Federal Republic of Nigeria, 1999, as amended

⁹ *The Proof of Guilt*, 1963, p. 195

¹⁰ See generally, PARTS II and III of the Evidence Act, 2011

3. Hearsay Evidence

3.1. Introduction

Before the advent of British rule, and consequently the establishment of English style of court in Nigeria, adjudication of disputes was carried out ranging from informal family or village councils to customary courts presided over, in some cases, by traditional rulers.¹¹ Although these courts dispensed justice fairly and impartially and always preferred live testimonies to secondary evidence, there was no technical rule prohibiting hearsay evidence. With colonization, came the introduction of English mode of courts and the extension of English common law doctrines of equity to the country.¹² An incidence of this colonial nexus was the adoption in Nigeria, of English common law evidence. By that fact, the hearsay rule became applicable in Nigeria.

Nigeria has detailed rules of evidence which regulate what facts that court may receive in the adjudication of disputes brought before it. The hearsay rule is one of such rules. It is essentially one of exclusion of evidence. It is an old principle having its root in the common law and is a feature of the evidentiary process of Nigeria. The rule has been regarded as one of essential features of the basic common law principle that a trial, especially in criminal case, should be based on evidence given by live witnesses in open court subject to cross examination.

3.2. What is hearsay Evidence?

In case of common law jurisdiction, Hearsay is one of the largest and most complex areas of the law of evidence. It is offered to prove the truth of the matter asserted. It is demarcated simply as any declaration made outside of court that is obtainable in indication to ascertain the truth of the matter. The statement may be oral or written, or it may be non-verbal conduct intended as an assertion, such as pointing to a crime suspect in a police line-up. It is generally inadmissible, since the judge is unable to form an opinion regarding whether the person making the out-of-court statement is reliable. It is the testimony by a witness of what other persons have said, not what he or she knows personally. It is a statement which is not made by a person while giving oral evidence in a proceeding and which is to be tendered as evidence of the matters stated. The general exclusionary rule of hearsay evidence is that such testimony is no evidence.¹³ In other words, hearsay are assertions of persons, who are not called as witnesses, made out of court in which they are being tendered for the purpose of proving the truth or falsity of the facts contained in the assertions (oral or written).¹⁴ Under section 37 of the Evidence Act, 2011(b) hearsay evidence, oral or documentary, is inadmissible and lacks probative value.¹⁵

An eminent scholar, and one of the earliest writers on the subject of evidence, Stephens, formulated the hearsay rule thus:

A statement oral or written made otherwise than by a witness in giving evidence, and statement contained or recorded in any book, document or record whatever, proof of which is not admitted on other ground, are deemed to be irrelevant for the purpose of proving the truth of the matter stated.¹⁶

Phipson's Law of Evidence identifies the matter this way: "oral or written statements made by persons who are neither parties nor witnesses, are unacceptable to prove the truth of the matter stated."¹⁷ It is a declaration prepared by a person while giving oral evidence in the proceedings is allowable as indication of any fact.¹⁸

If any declaration is pertinent for some purpose except the truth of their contents, it is not a hearsay statement. Such "state of mind" evidence may be admissible to explain the state of mind, knowledge or emotion of the hearer (the witness) or the speaker (the maker).¹⁹ The question of the envisioned and legalized use of the declaration remnants to be topic of the argument or concession, ruling by the judge, and if there is a jury, a direction of the judge to the jury.²⁰

3.3. Definition and Statement of the Rule of Against Hearsay Evidence

"Hearsay evidence", the Evidence Act, 2011 comprises of two substantive provisions. It opposes the Evidence Act, Cap. E14.²¹ For the law maker, sections 37 and 38 have no equivalent provisions on the meaning and inadmissibility of hearsay evidence.²² Sections 37 and 38 of the 2011 Act were specifically applied and interpreted by the Court of Appeal in the cases of *Uweh v. State*²³ and *Magaji v. Ogel*²⁴. Thus, in the case of *Utteh v. State*²⁵, the Supreme Court of Nigeria quoted

¹¹ T. Akinola Aguda, *The Law of Evidence*, 1989 (3rded), p. 3

¹² This was done through reception of statutes; e.g. Ordinance No. 3. Of 1863; Interpretation Act, Cap. 89, Section 45 High Court of Eastern Region No. 27 of 1955; High Court Law of Northern Region No. 8 of 1955; Law of England (Application) Law of Western Region Cap. 60, Western Region High Court Law

¹³ National Open University School of Law, Course Code, Law II, Law of Evidence

¹⁴ Ibid

¹⁵ See *Buhari v. Obasanjo* (2013) NWLR (pt. 941) 1 at 317; *Doma v. INEC* (2012) All FWLR (pt. 628) 813 at 829; *Okereke v. Umahi & Ors* (2016) LPELR 40035 (SC)

¹⁶ *Digest of Law of Evidence*, Article 15

¹⁷ *Phipson's Law of Evidence* (10^{ed}), p. 271

¹⁸ C. Tapper, *Cross on Evidence* (7thed), 1990, p. 509

¹⁹ Evidence Law Summary; available at www.lawskool.co.nz Accessed 3 October 2019

²⁰ Philip McNamara: The Canons of Evidence- Rules of Exclusion or Rules of Use? In *The Adelaide Law Review*, 2009, p. 350

²¹ See *Ojiako v. State* (1991) 2 NWLR (pt. 175) 578 at 584; *Ajiboye v. State* (1994) 8 NWLR (pt. 364) 587 at 600; *Umeh v. State* (1992) 2 NWLR (pt. 223) 257 at 272-283; *Onuoha v. State* (1995) 3 NWLR (pt. 383) 591 at 598

²² See *Olalekan v. State* (2001) 18 NWLR (pt. 746), p. 793; *JAMB v. Orji* (2008) 2 NWLR (pt. 1072)

²³ (2012) LPELR 19996 (CA)

²⁴ (2012) LPELR 9497 (CA)

²⁵ (1972) 2 SC SCNJ (pt. 1), p. 189

with approval, the judgment of the Privy Council in *Subramanian v. Public Prosecutor*²⁶, where the rule was expressed as follows:

Proof of a declaration prepared for a witness by a person, who is not himself called as a witness may or may not be hearsay. It is hearsay and irrelevant when the object of the evidence is to establish the truth of what is confined in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The point was made more clearly by the Privy Council in *Ratten v. The Queen*²⁷.

It is a statement made to a witness by one who is not himself called as a witness and which is offered to prove the truth of the statement.²⁸ In another case of *Osho v. State*²⁹, it was defined as a piece of evidence, provided an evidence of the content of a declaration made by a witness who is himself not called as a witness. In yet another recent case of *Federal Republic of Nigeria v. Usman*³⁰, it was held that "it is secondary evidence of an oral statement best described as second hand evidence". It was further held that "if a witness testifies on what he heard some other person say, the evidence is hearsay". Notwithstanding the narrow confines of section 37 of the Evidence Act, 2011, the courts extend hearsay to statements contained in documents.³¹

It is also interesting to note that unlike the position under the repealed Evidence Act wherein the exclusion of hearsay evidence in judicial proceeding was not explicitly stated, but rather inferred from the combined provisions of sections 77 and 79 of the Act, section 38 of the Evidence Act, 2011, explicitly codifies the general rule of exclusion of hearsay evidence in all judicial proceedings to which the Act applies. Thus, by virtue of section 38 of the Evidence Act, "hearsay evidence is not admissible except as provided in this Part or by or under any other provision of this or any Act".³² It is clear from a literal interpretation of this provision that the admissibility of hearsay evidence is permissible either under the Act itself or by virtue of the provisions of any other Act of the National Assembly.³³ Thus, the statement of exclusion of hearsay evidence under section 38 of the Evidence Act, 2011 is subject to exceptions provided in the Act or any other Act of the National Assembly.

3.4. Rationale for the Prohibition against Hearsay Evidence

It cannot be asserted that hearsay is viewed with suspicion in Nigeria like other common law countries. This is due largely to the fact that it is less reliable than live testimony.³⁴ However, critics canvass that the theory that hearsay evidence is inherently weak and untrustworthy is spurious and a legal fiction and that current doctrine of exclusion cannot wholly be justified on the basis of a preference for live testimony. They point to the fact that several of the exceptions, to the rule, do not require proof of unavailability of the declarant.³⁵ Others argue that although hearsay may give inaccurate information, it does not give misinformation.³⁶

Yet all seem to agree that the perceived weakness of hearsay evidence derives its susceptibility to what are now known as the four hearsay dangers.³⁷ These are the risks of faulty perception, faulty memory, ambiguity and insecurity.

According to Olakanmi³⁸, the rationale for the rule of Hearsay is as follows:

- The unreliability of the original maker of the statement who is not in court and not examined;
- The depreciation of the truth arising from repetition;
- Opportunities for fraud;
- The tendency of such evidence to lead to prolonged inquiries and proceedings, and
- The admission of hearsay evidence tends to encourage the substitution of weaker for stronger evidence.

However, in order to eliminate these dangers, there are some safeguards put in place to sift evidence and diminish, if not totally to eliminate them. The absence of these safeguards is regarded as the reason for the rule against the admissibility of hearsay evidence. The safeguards are oath, cross-examination and demeanor among others.

3.5. Safeguards to Eliminate Dangers of Hearsay³⁹

3.5.1. Oath

In Nigeria, oral evidence in court is to be on oath or affirmation.⁴⁰ The underlying reason for the administration of oath is that it will induce the witness to speak the truth because a false testimony would earn them punishment in the world beyond. Similarly, since the giving of false testimony upon oath is an offence of perjury in Nigeria, the fear of

²⁶ (1956)1 WLR, p. 969

²⁷ (1972) AC 378

²⁸ See *Abadon v. The State* (1997) 1 NWLR (pt. 479) 1 CA; *Nwoobosi v. A.C.B. Ltd* (1995) 6 NWLR (pt. 101), p. 625 SC

²⁹ (2012) 8 NWLR (pt. 1320), p. 1

³⁰ (2012) 8 NWLR (pt. 1301), p. 141

³¹ *Armel Transport Ltd v. Martins* (1970) 1 All NLR 27

³² Z. Adangor, op. cit

³³ Ibid

³⁴ Christopher B. Mueller, Post Modern Hearsay Reform: The Importance of Complexity, *Minn. L. Rev.* 367, 341 (1992)

³⁵ Paul Milch, Hearsay Antinomies: The Case for Abolishing the Rule And Starting Over, 71 *Or. L. Rev.* 723, 745-769 (1992)

³⁶ Ibid

³⁷ Michael Seigel, Rationalizing Hearsay: A Proposal for A Best Evidence Hearsay Rule, 72, *BUL. Rev.* 893, 909-910 (1992)

³⁸ Jide Olalekan, *Evidence Act 2011, Cap. E 14: Synoptic Guide* (Abuja: LawLords Publication, 2011), p. 132

³⁹ See generally, Lawrence O. Azubuike, Hearsay Evidence: A Comparative of Two Jurisdictions: United States and Nigeria, Thesis and Essays; also available at http://digitalcommons.law.uga.edu/at_11m/192 accessed 10 October 2019

⁴⁰ See section 205 of the Evidence Act, 2011

prosecution and consequent punishment would reinforce the need for a witness to speak the truth. It therefore has a temporal and spiritual basis. Oath is an answer to the damages of fabrication.

However, oath as a stimulus to tell the truth has some doubt. Morgan notes:

What happened comparatively early to the oaths of compurgators has now unfortunately happened to the oaths of a witness. The deliberate expression by a witness of his purpose to tell the truth by a method which is binding upon his conscience probably still operates as some stimulus to tell the truth, but fear of punishment by supernatural forces for violation of an oath is generally regarded as virtually non-existent, and the threat of punishment has little effect.⁴¹

3.5.2. Cross Examination

A significant feature of the adversarial process of litigation obtainable in Nigeria is the right of an opponent or adversary to cross-examine any witness called by the other party. A significant feature of the adversarial process of litigation obtainable in Nigeria is the rights of an opponent or adversary to cross examine any witness called by the other party. Section 214 (2) of the Evidence Act, 2011, defines cross-examination as “the examination of a witness by a party other than the party who calls him” From a tactical perspective and in terms of its ultimate objective, cross-examination is more than mere interrogation; it is essentially a process of questioning designed to produce materials or evidence, which the counsel cross-examining will require in his address to discredit the version of the facts presented by the other side and present his own version as more credible.⁴²

According to Wigmore:

The theory of hearsay rule is that many possible deficiencies, suppressions, sources of error and untrustworthiness which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of cross examination.⁴³

Many scholars see cross examination as a “security for correctness and completeness of testimony”⁴⁴ and as the best all-embracing reason for the exclusion of hearsay evidence.⁴⁵

As a safeguard against the four dangers, cross examination discloses:

all data helpful to the trier in determining (1) what information the witness intends to convey to the trier by the language he uses (2) the belief of the witness in the truth of his testimony, that is his sincerity (3) the extent to which what the witness purports to remember is the product of memory or of some other mental process such as reconstruction or the mistaken adoption as his own of the experience of another and (4) the extent to which what the witness testifies that he perceived corresponds to what was then and there open to his observation or capable of being perceived.⁴⁶

When evidence is put through the crucible of cross examination, the judge would be able to properly evaluate it and to ascribe the appropriate weight to it. The idea is that if the witness misperceived the facts, cross examination will reveal this. If his memory of the fact is defective, this will also be apparent upon proper cross examination. And if his language is ambiguous, in cross examination, he might clarify the meaning which he intends by his evidence.⁴⁷

In Nigeria, an effective cross examination will give away an insincere witness. After all, the cross examiner has very wide latitude. E.g. under the Nigerian Evidence Act, he can ask the witnesses any question among others:

- To test his accuracy, veracity, or credibility; or
- To discover who he is and what his position in life is;
- To shake his credibility by injuring his character
- To weaken or destroy examination-in-chief
- To obtain evidence that will assist the party’s own case by the testimony of the opponent’s witness

According to the Supreme Court in the case of *Omisore v. Aregbesola*⁴⁸, cross examination is a vital tool for perforating falsehood if properly employed.

There is no doubt that cross examination is an important safeguard. As Morton notes, it does not ensure that evidence is reliable but “merely expresses the sources of unreliability and provides a basis for evaluating testimony and determining how reliable it is.

3.5.3. Demeanor

By demeanor is meant the comportment of the witnesses while giving evidence. The argument is that solemnity of the court scenario and the publicity of disgrace, coupled with the presence of the adversary will deter falsehood and intimidate witnesses to tell the truth.

As Mueller and Kirkpatrick noted, many mannerisms and human qualities come into the comportment of the witness and an assessment of these points enable the trier of facts to assess credibility and meaning.⁴⁹

The trial judge will consider whether the witness is comported or fidgeting. What is his facial expression? How does this witness generally carry himself? All these and more have a bearing on whether the witness is telling the truth. They also

⁴¹Edmund Morgan, Hearsay Damages and The Application of the Hearsay Concept, 62 *Harvard L. Rev.* 177, 179 (1948)

⁴²Fola Arthur-Worrey, Cross-Examination-Basic Principles and Techniques in Criminal and Civil Trials, being a paper presented at NIALS/CWAG Workshop on Oral Advocacy in Nigeria, holding at the Nigerian Institute of Advanced Legal Studies, Lagos, May 10th-12th, 2017

⁴³5 Wigmore, *Evidence*, s. 1370 (Chadbourn rev. 1974)

⁴⁴John William Strong (ed) McCormick on Evidence (1992) citing *Gibbons v. State*, 248, Ga 851, 286 (1982); *State v. Copeland*, 287, SC, 300 sc (1982)

⁴⁵Michael M.Martin, *Basic Problems of Evidence*, 299 (6ed, 1988)

⁴⁶Edmund Morgan, *Some Problems of Proof under the Anglo-American System of Litigation*, 142-143 (1956)

⁴⁷Lawrence O.Azubiuke, Hearsay Evidence: A Comparative of Two Jurisdictions: United States and Nigeria, Thesis and Essays, op. cit

⁴⁸(2015) 15 NWLR (pt. 1482), at p. 223

⁴⁹Lawrence O.Azubiuke, op. cit footnote 47

help the judge to evaluate the evidence. Where a witness narrates what an act of declarant said, the judge is deprived of the opportunity to observe the out of court declarant, who is really the witness, the other merely being his conduit for transmitting the testimony. This deprivation impacts on the evaluation of the evidence. The trial of facts will thereby not have all the facts necessary for him to assess the evidence and ascribe weight to it. This is yet another important concern of Nigeria which leads to it as it were, view hearsay with suspicion.⁵⁰

3.6. Exceptions to the Hearsay Rule

At common law, former statements of any person whether or not he is a witness in the proceedings, may not be given in evidence, if the purpose is to tender them as evidence of the truth of the matter asserted in them, unless there were made by a party to those proceedings and constitute admissions of fact relevant to those proceedings⁵¹. An important innovation is contained in Section 39 of the new Act, wherein, unlike Section 33 of the repealed Act, which limited the admissibility of statements made by persons who cannot be called as witnesses only to dead persons, the scope is now extended to:

- Persons who cannot be found;
- Persons who have become incapable of giving evidence; or
- Persons whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable

The Evidence Act⁵² makes provisions for admission of evidence of certain hearsay statement of relevancies under specified conditions. In other words, if the statement is not hearsay, it is admitted. However, if it is hearsay, it is presumptively inadmissible unless it fits with the categorical exceptions as enumerated under sections 1-4, and 39-65 and 83 of the Evidence Act, 2011.

However, according to section 126 of the Evidence Act, 2011, the general rule is that oral evidence must be direct; and except the content of documents, all facts may be proved by oral evidence. It provides as follows:

126. Subject to the provisions of Part III, oral evidence shall, in all cases whatever, be direct if it refers to-

- A fact that can be seen.
- to a fact which could be heard,
- to a fact which could be perceived by any other sense,
- It should have an evidence if it refers to an opinion or to the grounds on which that opinion is held.

This provision therefore makes hearsay evidence inadmissible.⁵³ The rule against hearsay consists of two separate rules:

- The rule requiring evidence to be 1st hand: This rule demands that evidence must be given by the percipients, because of the risk of the evidence being altered as it passes from one witness or potential witness to another.
- The rule requiring evidence to be given orally in court: This presupposes that evidence must be given in the witness box, because of the importance attached to the oath and to giving the opposing party or parties the opportunity to cross examine.

The common law principles of evidence are commonly expounded on the footing that they are dominated by rules of exclusion of evidence. However, on the other hand, how does one place the inclusionary principle that all information sufficiently relevant to the facts in issue at a trial is not only admissible but positively required to be admitted if elicited in proper form from a competent witness and for a proper purpose? The hearsay rule has therefore become the most difficult rule of common law of evidence to explain, justify and defend because it clearly can operate to prevent the use of reliable relevant information. Due to the mere fact that hearsay rule excludes evidence irrespective of its reliability and relevance; it has some of the trappings of an absolute rule of exclusion.⁵⁴ The point was made even more clearly by the Privy Council in the case of *Ratten v. The Queen*:⁵⁵

The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the spoken words are relied on "testimonial", i.e. as establishing some fact narrated by the words...

It should be noted that the hearsay rule operates on out-of-court rule assertions according to the purpose of the party tendering, not the purpose of the original speaker. Even out-of-court statements which, when uttered, had purely an assertive function can in theory be tendered to be used non-assertively and if tendered to be so used are not caught by the hearsay rule. If and only if the out-of-court assertion is tendered solely to be used testimonially, that is as a means of proof of what is asserted, is the tender objectionable.⁵⁶ If the out-of-court statement is tendered to be used as the basis for an inference to which it rationally gives rise whether it is true or false or if it is tendered merely to be used as a step in the unfolding of the drama which gave rise to litigation, or if it is tendered merely because it is part of the background necessary to set the stage, and so add life and colour to the narrative given by the witness, its tender cannot be objected to on the basis of hearsay rule. It can be counterproductive, unjust and, as Professor Cross has noted, dangerous in particular instances.⁵⁷ It is in view of this that some have argued that the rule has become so hamstrung with exceptions that it

⁵⁰ Ibid

⁵¹ Phipson on Evidence, op. cit footnote 17

⁵² Evidence Act, 2011, op. cit

⁵³ See *Subramaniam v. Public Prosecutors*, op. cit

⁵⁴ See particularly, Philip McNamara, *The Canons of Evidence-Rules of Exclusion or Rules of Use?* In *The Adelaide Law Review*, 2002, pp. 348-353

⁵⁵ (1972) AC 378

⁵⁶ *Ladlow v. Hayes* (1983) 8 A Crim R 377, 382-383

⁵⁷ Cross On Evidence (2ed) 1982

should in fact be the exception rather than the rule.⁵⁸ It is the writer's stand that no matter the observations on hearsay rule, in Nigeria; it has come to be an important part of the law of evidence. This may be contrary to the decision of Uwais, CJN (as he then was) in the case of *Utteh v. The State*⁵⁹ when he noted:

Happily, the rule of evidence at common law is not applicable in Nigeria where the provisions of the Evidence Act specifically deal with a given situation-see *Jimoh Amoo & Ors. V. The Queen* (1959) 4 F.S.C 13 at p. 115; (1959) SCNLR 272. In the present case the evidence of PW2 is admissible by virtue of the provisions of sections 8, 76, 77 of the Evidence Act Cap. 112 to prove the fact of the statement made by Mr. Dante Noaro at the trial.

According to Osinbajo, the above is susceptible to two possible interpretations. It could mean that the common law rule on hearsay is not applicable in Nigeria. With respect, that view would be correct to the extent that the Evidence Act has not incorporated the statement of the common law on hearsay as defined in the leading case of *Subramaniam v. Public Prosecutor*⁶⁰ directly into the Evidence Act. His Lordship's statement could also be interpreted to mean that the essence of the hearsay rule which is to ensure that a witness speaks only of facts which he had personally perceived with one of his five senses is not applicable in Nigeria...the essence of the provision of section 77 of the Evidence Act amongst others is to ensure that only direct oral evidence is given by a witness.⁶¹

Of all the exceptions enumerated above, the dying declaration as an exception will be briefly discussed:

4. Dying Declaration

Dying declaration is based on the Latin maxim, '*nemo mariturus praesumitur mentiri*'-literally translated, it means 'a man will not meet his maker with a lie in his mouth'. It originated in English law. As early as the 1720's, dying declaration was used as an exception to the hearsay rule and was admissible, provided it complied with certain legal principles set out under English common law.⁶² It is admissible only to prove the cause of death or the circumstances of the transaction leading to the cause of death of the declarant but not to prove motive for the crime or to explain subsequent or previous transactions. The declarant must have believed himself to be in danger of approaching death.⁶³ This principle was established in the Nigerian cases of *R. v. Ogbuewu*⁶⁴ and *Kuge v. The State*⁶⁵

It means statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them. In *Akpan v. State*⁶⁶, the Supreme Court on the statement made by someone on sick bed held as follows: "...it is well established in our law of evidence that a statement made by a person in imminent fear of death and believing that he was going to die is admissible as a dying declaration". It is a declaration of someone at the point of death, whose hope of life is gone, when the motive for falsehood is no longer there and the mind is compelled by the most powerful consideration of the impending unknown to speak the truth.⁶⁷

It is also defined in section 40 of the Evidence Act as follows:

40 (1) A statement made by a person as to the cause of his death, or as to any of the circumstances of the events which resulted in his death in cases in which the cause of that person's death comes into question is admissible where the person who made it believed himself to be in danger of approaching death although he may have entertained at the time of making it hopes of recovery.

(2) A statement referred to in subsection (1) of this section shall be admissible whatever may be the nature of the proceeding in which the cause of death comes into question.

4.1. Rationale for this Rule

In the case of *R v. Woodcock*⁶⁸, Eyre, C.B. stated the rationale for dying declaration thus: The overall opinion on which the types of indication is acknowledged is that they are assertions made in extremity, when the party is at the point of death and when every hope of this world is gone; when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn and so awful, is considered by the law as creating an obligation equal to that when is imposed by a positive oath administered in a court of justice.

Thus, an exception to the hearsay rule, the Supreme Court held that dying declaration in the Nigerian case of *Rev. King v. State*⁶⁹.

4.2. Applicability of Dying Declaration

In application of the above section, the Supreme Court in the case of *Okebata v. State*⁷⁰, held that:

⁵⁸ Faust F. Rossi, *The Silent Revolution*, 9 Litig. 13-17 (regarding the exclusion of hearsay as a fiction)

⁵⁹ (1992) 2 NWLR (pt. 223) 257

⁶⁰ Op. cit

⁶¹ Yemi Osinbajo, Law of Evidence, in Niki Tobi (ed) *Uwais Through The Cases* (Enugu: Snaap Press Ltd, 2006), p. 604

⁶² Sherika Maharaj, Should the dead have a say in a matter?, available at www.derebus.org.za, accessed on 10 February 2018

⁶³ See *R v. Bebetebe* (1938) WACA 67; *Mono Garba v. R* (1959) 4 JSC 152

⁶⁴ See *R v. Ogbuewu* (1949) 4 WACA 67

⁶⁵ (1969) NMLR 153

⁶⁶ (2016) LPELR-40012 (SC); see also: *Aknife v. The State* (1988) 3 NWLR (pt. 83), *Ajiboye v. State* (1994) 8 NWLR (pt. 364) 587 at 603

⁶⁷ See *Orshin Kuse v. State* (1969) NMLR 153

⁶⁸ (1789) 1 Leach 500/ (1789) 168 ER 353

⁶⁹ (2016) LPELR 40046 (SC)

⁷⁰ (2013) LPELR 22474 (CA)

The law is trite that evidence of a dying declaration is a special specie of evidence. Where the court must rely on the account given by an eye witness who heard a dying declaration made by the deceased, strict proof is required of the dying declaration in the exact words used by the deceased. If the words used in the dying declaration are unclear, imprecise and not free from ambiguity, such a manifest contradiction would militate against its application. Other factors to be satisfied when making reference to the statement made by a person before his death to be relevant are as follows:

- An assertion of a person with a belief that death is imminent;
- The statement must affect to what the person believes to be the cause or circumstances of death;
- the recorded statement must be made by the person concerned, as it is an exception to the rule of hearsay evidence
- the statement should be confidence bearing, truthful and credible;
- the statement must not be the one made on encouragement or tutoring, and
- The statement should not be provoked by any motive or retribution.⁷¹

The applicability of dying declaration was explicitly made in the Nigerian case of *Osiekwe v. The State*⁷² thus:

- The declarant must have died before the evidence of the declaration;
- It is admissible only in trials for murder (capable homicide punishable with death or manslaughter (capable homicide not punishable with death)), where the accused is alleged to have caused the death of the deceased/declarant;
- The statement must contain some expressions of hope of recovery or doubt as to his death. That is, the deceased/declarant, at the time of making this declaration, must have believed himself or herself to be in danger of approaching death, although he may have entertained hopes of recovery. The trial judge is required to make a specific finding that the deceased did in fact believe in the danger of approaching death when making the declaration;
- The statement must be made by the victim of the alleged crime (i.e. the deceased) and must relate to the cause of his/her own death;
- The declarant must have been a competent witness if he or she were alive. The declaration must not be or include hearsay; it may include an opinion;
- The declaration can be oral, or written or by signs;
- Where the declaration is admitted, it must be complete. It is not competent to shift the parts that are favourable from those that are not

Dying declaration under the Evidence Act is very restrictive. It does not apply to civil cases and is still limited to homicide cases. And even at that, not all homicide cases deal with dying declaration; but to those involving death of a particular declarant and in which the cause or circumstance of the transaction leading to such death are in issue. Under the Federal Rule of Evidence of the United States, the declarant need not be dead. His declaration may be admitted in civil cases or in a homicide trial resulting from the death of another person. On the other hand, under section 40 of the Evidence Act, it applies only to where the particular declarant is dead and only in respect of a homicide trial resulting from his death.

The central consideration is the declarant's belief of impending death. The declarant simply believes in danger of approaching death.

The English law principles were set out in *State v. Gabathwaelwe*⁷³ where the court held that dying declaration is a statement that may be oral or written or taken in the forms of signs, or gestures. It needs not be made with the deceased dying words or dying breath.

5. Conclusion

The laws of evidence consist of the rules and principles applied by courts in the process of fact finding at a trial. The evidence of a fact tending to prove an inference is called admissible evidence. However, there are several exclusionary rules, under which the courts will not accept certain matters as evidence of a fact. Overall, exclusionary rule is highly applicable under the Nigerian Law of Evidence.

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