THE RECORDING OF CROSS-EXAMINATION QUESTIONS IN NIGERIA: A LEGAL APPRAISAL

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Abstract
The right to a fair hearing connotes or involves a fair trial and a fair trial of a case consists of the whole hearing; yes, the whole hearing. By section 36 of the Constitution of the Federal Republic of Nigeria 1999, the aforesaid right to a fair hearing is guaranteed. Cross-examination is a vital feature in the proceedings/trial of contentious cases and it is a noble art that occupies an Olympian position in the administration of justice. The noble art of cross-examination is the index with which the truth or otherwise of evidence-in-chief is usually measured in appropriate cases. Skilful questioning and questions constitute a very important tool in the noble art of cross-examination. Meanwhile, some judicial officers in the trial courts oftentimes neglect and/or fail to record cross-examination questions [i.e. questions asked under cross-examination]; in other words, such judicial officers record only the responses/answers elicited from a witness under cross-examination. Perhaps, this is so because the said judicial officers would want to save both time and strength since judicial officers in Nigeria are still required to record in longhand which mode of recording bountifully consumes both time and strength. Accordingly, this work interrogates the legal place of questioning and recording of cross-examination questions vis-à-vis the concept of fair hearing. It is the researchers' finding that questioning and questions constitute the foundation upon which responses/answers elicited under cross-examination should stand in the records of trial Courts, even as it is axiomatic that the context of every response/answer is defined by the questions pursuant to which the response/answer was volunteered or given. This work adopted the doctrinal research methodology in its work analysis relying on primary and secondary sources in the cause of this research. It is further found that non-recording of cross-examination questions by a trial Court will not only lead the trial Court into the temptation of speculation in the course of evaluating evidence but may equally amount to a breach of a party's fundamental right to a fair hearing. This work recommends that cross-examination questions should be given their due place and space in the Record of Proceedings of trial Courts even as the Supreme Court has held that the Record of Proceedings is the only indication of what takes place in Court and is always the final reference of events, step by step, that took place in the trial Court.

KEYWORDS: FAIR HEARING, CROSS-EXAMINATION, FAIR TRIAL, QUESTIONS, QUESTIONING, RECORD OF PROCEEDINGS, PERCEPTION, EVALUATION

1.0 Meaning of, and the Legal Basis for Cross-Examination

Witnesses and evidence occupy significant space and command a prominent place in judicial proceedings not only in Nigeria but in other nations/countries.

> The term 'witness' in its strict legal sense, means one who gives evidence in a cause before a court; and in its general sense includes all persons from whom testimony is extracted to be used in any judicial proceeding, and so includes deponents and affiants as well as persons delivering oral testimony before a court or jury.[1]

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[1] BA Garner(ed), *Black's Law Dictionary* (9th edn, Minnesota: Thomson West Publishing Co., 2009) p. 1740. Also, the provisions of section 107 of the Evidence Act 2011 (as amended) to the effect that "A court may in any civil proceeding make an order at any stage of such proceeding directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination: Provided that where a party desires the attendance of such deponent for cross-

On the other hand, evidence has been defined as something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact in a judicial proceedings.[2] Evidence are generally and usually adduced by witnesses in judicial proceedings by means of oral testimony,[3] production/presentation by witnesses of relevant documents,[4] and/or reference to tangible objects (material things other than a document) which tend[s] to prove or disprove the existence of alleged fact[s][5]. Meanwhile, it is noteworthy that by virtue of section 218 of the Evidence Act 2011 (as amended), a person, whether a party or not in a cause, may be summoned to produce a document without being summoned to give evidence, and if he causes such document to be produced in court, the court may dispense with his personal attendance. Furthermore, by virtue of section 219 of the Evidence Act 2011 (as amended), such a person summoned to produce a document does not become a witness by the mere fact that he produces it and cannot be cross-examined unless and until he is called as a witness. According to section 215(1) of the Evidence Act 2011 (as amended), witnesses shall be first examined in chief and then, if any other party so desires, cross-examined, and then if the party calling him so desires, re-examined.

By the provisions of section 214 of the Evidence Act 2011 (as amended), while the examination of a witness by the party who calls him is called examination-in-chief,[6] the examination of the said witness by a party other than the party who calls him is called cross-examination,[7] and where a witness has been cross-examined and is then examined again by the party who called, such a second examination by the party who called him is called re-examination.[8]

In the premises of the foregoing, the researchers deem it correct and safe to submit that in judicial proceedings, there are generally three basic legal tools and/or opportunities for examining a witness for the purpose of adducing evidence through the witness and/or extracting evidence from the witness as the case may be: the first legal tool and/or opportunity is examination-in-chief (evidence-in-chief), the second legal tool and/or opportunity is cross-examination, and the third legal tool and/or opportunity is re-examination. The Supreme Court of Nigeria per Rhodes-Vivour, JSC in *Anthony Okoro v. The State*[9] stated *inter alia* that:

> "…examination in chief is an opportunity to state the facts of his case by the Plaintiff and his witnesses. Cross examination is to test the correctness of the testimony of the Plaintiff and his witnesses, while re-examination is another chance to clarify facts but not an opportunity to restate the testimony given in evidence in chief all over again".

The crux of this paper relates squarely to cross-examination - the legal tool and/or opportunity for testing the correctness and credibility of the testimony of witnesses. Accordingly, the researchers shall hereinafter focus on the said legal tool and/or opportunity called cross-examination. Suffice it to submit that in the parlance of law and legal practice, cross-examination is the formal interrogation

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examination the court shall require his attendance for that purpose where this would not result in unjustifiable delay or expense".

[2] BA Garner(ed), *op cit*., p. 635

[3] The Evidence Act 2011 (as amended), ss. 125 & 126. Please note that the Evidence Act 2011 was amended by the Evidence (Amendment) Act 2023 and that is herein cited as the Evidence Act 2011 (as amended).

[4] *Ibid.,* ss. 83(1) & 85.

[5] *Ibid.,* s. 127

[6] *Ibid.*, s. 214(1)

[7] *Ibid.*, s. 214(2). See also the case of *Christian Nwabunike v. The State* (2019) LPELR-47748(CA) p. 10, para. A.

[8] *Ibid.*, s. 214(3)

[9] (2012) LPELR-7846(SC) p. 31, paras. D – E.

of a witness called by the other party in a judicial proceeding which interrogation is aimed at challenging testimony or evidence already given or adduced. It is the questioning of a witness who has already testified in order to check or discredit the witness's testimony, knowledge, or credibility.[10] To cross-examine means "to question somebody carefully and in a lot of details about answers that they have already given, especially in court"[11] Elsewhere, cross-examination has been defined as "to question anew a witness called by the opposing party for the purpose of testing the reliability of his previous testimonies"[12]. The Black's Law Dictionary defines cross-examination as the questioning of a witness at a trial or hearing by the party opposed to the party who called the witness to testify. The said Law Dictionary went further to state *inter alia* that the purpose of cross-examination is to discredit a witness before the fact-finder in any of several ways, as by bringing out contradictions or inconsistencies and improbabilities in earlier testimony or evidence by suggesting doubts to the witness, and by trapping the witness into admissions that weaken the testimony or evidence.[13]

Apart from aforementioned relevant sections of the Evidence Act 2011 (as amended) vis-à-vis cross-examination, there are many other relevant statutory provisions in Nigeria especially as contained in the same Evidence Act 2011 (as amended) which also relate to cross-examination; some of these other relevant statutory provisions are highlighted hereinafter. For example, by virtue of section 215(2) of the Evidence Act 2011 (as amended), examination-in-chief and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief. Section 215(3) of the Evidence Act 2011 (as amended) provides that the re-examination of a witness must be directed to the clarification/explanation of matters referred to in cross-examination and if a new matter is by permission of the court introduced in the course of re-examination, the adverse party becomes entitled to cross-examine upon that matter and may so cross-examine. By the provisions of section 216 of the Evidence Act 2011 (as amended), where more than one defendant is charged at the same time, each defendant shall be allowed to cross-examine a witness called by the prosecution before the witness is re-examined. Similarly, where more than one defendant is charged at the same time, a witness called by one defendant may be cross-examined by the other defendant[s] and if so cross-examined by the other defendant[s], such cross-examination shall take place before cross-examination by the prosecution.[14] Section 220 of the Evidence Act 2011 (as amended) provides that witnesses to character may be cross-examined and re-examined. Section 221 of the Evidence Act 2011 (as amended) allows leading questions[15] to be asked in cross-examination,[16] whereas it prohibits leading questions in examination-in-chief and re-examination except with the permission of the Court.[17] Sections 223 to 229, 236 of the Evidence Act 2011 (as amended) contain provisions

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[10] Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/cross-examination> accessed on 6 August 2021.

[11] Page 351 of the 8th Edition of *the Oxford Advanced Learner's Dictionary* cited in E Udim, *Trial Within Trial in Criminal Proceedings (With Sample Courtroom Arguments, Selected Judgments and Practical Approach to Effective Cross Examination)* (Lagos: Princeton and Associates Publishing Co. Ltd, 2016) p. 284.

[12] Page 309 of the 2010 *Encyclopedia Edition of the New International Webster's Comprehensive Dictionary of the English Language* cited in E Udim, *op cit*., p. 285.

[13] BA Garner(ed), *op cit*. p. 433

[14] The Evidence Act 2011 (as amended), s. 217.

[15] Any question suggesting the answer which the person putting it wishes or expects to Leading question receive is called a leading question. See the Evidence Act 2011 (as amended), s. 221(1).

[16] *Ibid.*, s. 221(4).

[17] *Ibid.*, s. 221(2) & (3).

relating to questions which are allowed, allowable or otherwise under cross-examination. By virtue of section 232 of the Evidence Act 2011 (as amended), a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relative to matters in question in the suit or proceeding in which he is cross-examined without such writing being shown to him or being proved but if it is, intended to contradict such witness by the writing, his attention must, before such writing can be proved, or such contradictory proof given, be called to those parts of the writing which are to be used for the purpose of' contradicting him: provided always that it shall be competent for the court at any time during the trial to require the production of the writing for its inspection, and the court may thereupon make use of it for the purposes of the trial as it deems fit.

The legal ground or basis for cross-examination can be inferred from a plethora of judicial pronouncements by the Court in Nigeria. For instance, in *Isaac Gaji & 2 Ors. v. Emmanuel D. Paye*[18], the Supreme Court of Nigeria stated *inter alia* that the effect of failure to cross-examine a witness upon a particular matter is a tacit acceptance of the truth of the evidence of the witness.[19] In *Patrick Oforlete v. The State*[20], the Court had made it clear *inter alia* that:

> "…The law was put thus, citing Hart (1932) 23 Cr. App P.202 as authority: "A party who fails to cross-examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses tacitly accepts the truth of the witness's evidence-in-chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness-box or, at any rate, to make it plain at that stage that his evidence is not accepted" …[21]

From the foregoing, it is clear that where the adversary fails to cross-examine a witness upon a particular matter, the legal implication is that the said adversary is deemed to have accepted the truth of that matter as led in evidence during the witness' examination-in-chief (evidence-in-chief).

It is therefore prudent and good practice for counsel not only to put across his client's case through cross-examination, he should, as a matter of utmost necessity, use the same opportunity to possibly negate the credit of that witness whose evidence is being tested under the fire of cross-examination.[22] We therefore submit that the legal ground / basis for cross-examination is captured and/or encapsulated in the need and effort of an adverse party in a case to avoid the aforesaid legal implication of the failure to cross-examine a witness on any matter. However, beside the avoidance of the aforesaid legal implication of failure to cross-examine a witness, cross-examination plays a vital role in the truth searching process of evidence-in-chief[23]; it tests the authenticity or veracity of the witness and a Court of law is entitled to ascribe little or no probative value (weight) to evidence if such evidence does not pass the test of cross-examination.[24]

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[18] (2003) LPELR-1300(SC) p. 20, paras. B – D.

[19] Per Edozie, JSC.

[20] (2000) LPELR-2270(SC).

[21] *Patrick Oforlete v. The State* (*supra*) pp. 32 – 33, para. D.

[22] *Patrick Oforlete v. The State* (*supra*) p. 24, para. G

[23] Evidence-in-chief here means evidence procured during examination-in-chief.

[24] *Buhari v. INEC* (2008) 19 NWLR (Pt. 1120) 246 at 414 – 415; *Udom Gabriel Emmanuel v. Umana Okon Umana & Ors.* (2016) LPELR-40037(SC) p. 66, paras. D – F.

2.0 Interrogating the Legal Utility of Cross-Examination

Cross-examination is a very sensitive process and vital tool in every judicial trial. It is a weapon used in advocacy as a means of separating truth from falsehood and rendering exaggerated statements to their true dimensions.[25] It is beyond doubt that cross-examination is the greatest weapon ever invented in judicial trials for the discovery of truth.[26] Cross-examination, *inter alia*, tests the accuracy, veracity or credibility of a witness.[27] The importance of cross-examination in judicial proceedings cannot be over-emphasized.[28] According to Udim,[29] the objectives of cross examination can briefly be listed as follows:

1. To discredit a witness by showing from his own mouth that he is unworthy of belief.
2. To discredit the witness by demonstrating that his evidence is inconsistent with his other testimony or to discredit another witness on the same side.
3. To put the case in proper perspective by separating truth from falsehood and adding facts deliberately omitted.
4. To give the court advance notice of the case of the cross-examiner.
5. To obtain admissions or proof of facts advantageous to the case of the cross-examiner.[30]
6. To separate hearsay from actual knowledge.
7. To separate opinion from facts.
8. To separate inference from recollection.
9. To discover the bias and prejudice of a witness and discredit the witness pursuant to such bias and prejudice.
10. To discover the qualifications and deficiencies of an expert witness and discredit such expert witness on the bases of lack of qualifications and deficiencies.
11. To destroy or weaken the Judge's favourable impression of the witness.
12. To demonstrate that the witness is lying on one or more material points.
13. To show through the mouth of the witness that his testimony is improbable.
14. To impeach the credit of the witness by showing that he or she has given a contrary testimony or made a contradictory statement at another time.
15. To show that the witness has been convicted of a serious crime where there is such record.
16. To reduce exaggerated statements to their true dimensions.

The summation of the above objectives of cross-examination is consistent with section 223 of the Evidence Act,[31] which provides that:

> When a witness is cross-examined, he may in addition to the question referred to the preceding sections of this Part, be asked any question which tend to –
>
> (a) Test his accuracy veracity or credibility; or
> (b) Discover who he is and what is his position in life; or
> (c) Shake his credit by injuring his character.

Underscoring that cross-examination forms a crucial and indispensable aspect of the process of adjudication, the Court of Appeal of Nigeria per Oredola, J.C.A. held as follows:

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[25] *Unigwe v. Okoye & Anor.* (2013) LPELR-22582(CA) p. 17, paras. C – D.
[26] *Usman v. Baba* (2013) LPELR-22136 (CA) p. 46, paras. C – F.
[27] See Evidence Act 2011 (as amended), Section 22.
[28] *Unigwe v. Okoye & Anor.* (supra) p. 20, para. C.
[29] E Udim, *op cit*., pp. 285 – 286.
[30] JA Dada, *The Law of Evidence in Nigeria* (Calabar: Optimist Press, 2004) p. 441 cited in E Udim, *op. cit.*
[31] 2011.

> "The law is trite that in the conduct of proceedings/hearing in a matter, evidence adduced through answers elicited or obtained from a witness while being cross-examined, is admissible, potent and as good as the evidence proffered under examination-in-chief. Indeed, cross-examination forms a crucial and indispensable aspect of the process of adjudication. Thus, evidence extracted during cross-examination has similar potency and weight in relation to the facts in contention. Consequently, where answers to questions posed under cross-examination are relevant and linked to the facts in issue, such answers cannot be swept aside with a wave of the hand, glossed over or ignored, simply because it was procured through or under the intense heat of cross-examination and not otherwise..."[32]

On the posing of relevant and admissible questions during cross-examination and supply of answers thereto, sections 180(g), 223, 224, 225, 226, 227, 228 and 229 of the Evidence Act 2011 (as amended) are basically germane. By virtue of section 180(g) of the said Evidence Act 2011 (as amended), it is provided that a person charged and called as a witness in pursuance of section 180 of the Evidence Act 2011 (as amended) shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that with which he is then charged or is of bad character unless –

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or
(ii) he has personally or by his legal practitioner asked questions of the witnesses for the prosecution with a view to establish his own good character or has given evidence of his good character or the nature or conduct or the defence is such as to involve imputations on the prosecutor or the witnesses for the prosecution, or
(iii) he has given evidence against any other person charged with the same offence.

Section 224 of the Evidence Act 2011 (as amended) donates discretionary power to the court to decide whether any question that is not relevant to the proceeding shall be asked in cross-examination and when a witness may be compelled to answer such a question, especially when the said question does not affect the credit of the witness by injuring his character.[33] In exercising its aforesaid discretion, the court shall have regard to the following considerations:[34]

(a) such question is proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;
(b) such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility or the witness on the matter to which he testifies; and

[32] *Maduka & Ors. v. Anyadiegwu* (2014) LPELR-23751(CA) pp. 26 – 27, paras. E – C.
[33] The Evidence Act 2011 (as amended), s. 224(1).
[34] *Ibid., s*. 224(2).

(c) such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

Section 224(3) of the Evidence Act 2011 (as amended) provides that "the court may, if it deems fit, draw from the refusal of the witness to answer, an inference that the answer if given would be unfavourable". Any question referred to in section 224 of the Evidence Act 2011 (as amended) may not be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.[35] If the court is of the opinion that any question referred to in section 224 of the Evidence Act 2011 (as amended) was asked without reasonable grounds, it may, if it was asked by any legal practitioner report the circumstances of the case to the Attorney-General of the Federation or other authority to which such legal practitioner is subject in the exercise of his profession.[36] By virtue of sections 227 and 228 of the Evidence Act 2011 (as amended), the court is empowered to forbid questions that fall into any of the following categories:

1. Indecent and scandalous questions[37]
2. Questions which are intended to insult or annoy[38]

Pursuant to section 229 of the Evidence Act 2011 (as amended), when a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him, but if he answers falsely, he may afterwards be charged with an offence under section 191 of the Criminal Code and on conviction shall be dealt with accordingly. Provided that a witness may be contradicted if he is asked -

a) whether he has been previously convicted or any crime and denies it, evidence may be given of his previous conviction; or
b) any question tending to impeach his impartiality and answers it by denying the facts suggested.

From the above statement of the law and in the light of the relevant statutory and judicial authorities, the researchers have noted that there are two basic components or elements/features of cross-examination, to wit:

1. The posing of relevant and admissible questions; and
2. The supply of relevant answers, and explanation(s) thereto, if any.

Highlighting the legal utility of cross-examination in judicial proceedings, the Court of Appeal of Nigeria in *Chief Felix Okon Idem v. Mr. Emmanuel Bassey Asuquo*[39] stated *inter alia* that:

> "…Cross examination is a formidable tool in the hands of a skillful Counsel. By the instrument of cross examination, Counsel can either demolish the Plaintiff's case or fully develop the case of the Defendant and vice versa."

In another case, the Court held *inter alia* that: "…the legal instrument of cross-examination is a powerful tool in the hands of a skillful legal Practitioner; it provides a vital survival kit in a legal battle."[40] Since the noble art and legal instrument of cross-examination has been held by the Courts,

[35] *Ibid.,* s. 225.
[36] *Ibid.,* s. 226.
[37] *Ibid.,* s. 227
[38] *Ibid.,* s. 228
[39] (2014) LPELR-24260(CA) p. 19, paras. E – F.
[40] Asonibare v. Mamodu & Anor. (2013) LPELR-22192(CA) pp. 32 – 33, paras F – B.

as shown above, to be a sensitive and vital process in every judicial trial and to form a crucial and indispensable aspect of the process of adjudication, it follows by parity of reasoning that the record of proceedings of the Court should fairly and/or fully capture this sensitive, vital, crucial and indispensable process in every judicial trial. This introductory submission is apropos because, beside the trite and settled position/principle of law to the effect that parties as well as the Court are bound by the record of proceedings thereof,[41] the Supreme Court of Nigeria has held *inter alia* that:

> Record of Proceedings is the only indication of what took place in Court; it is always the final reference of events, step by step, that took place in Court.[42]

This work focuses, and beams some measure of [re]search light, on the place of recording both cross-examination questions and the response(s) / answers thereto in judicial trials vis-à-vis the concept of fair hearing / fair trial.

3.0 Recording of Cross-Examination Questions: A Safeguard against Speculation

Speculation means to form an opinion about something without knowing all the details or facts.[43] It has become trite that no Court of justice engages in speculation to arrive at objective deductions and conclusions.[44] In fact, the law has become settled that a judicial decision based on suspicion and speculation is faulty.[45] Speculation has no place in our Courts. Neither the parties nor the Court, is permitted entitled, to speculate anything.[46] We wish to show here how the recording of cross-examination questions would constitute a legal safeguard against speculation.

Notably, in the judicial bid to arrive at objective deductions, findings, conclusions and decisions, trial Courts have two principal judicial tasks, to wit:

1. Perception: Simply put, this is the duty of a trial Court to receive all relevant evidence adduced before the Court.
2. Evaluation: This is the weighing of the adduced and received relevant evidence in the context of the surrounding circumstances of the case. A Court in evaluating evidence must take into consideration every little aspect of the evidence and the surrounding factors.[47]

These two principal judicial tasks were countenanced by the Supreme Court of Nigeria per Rhodes-Vivour, J.S.C. when the apex Court held *inter alia* that:

> "It is the duty of the trial Judge to receive all relevant evidence. That is perception. The next duty is to weigh the evidence in the context of the surrounding circumstances of the case. That is evaluation. A finding of fact involves both perception and evaluation."[48]

Now, it is true in law that what constitutes evidence in in relation to cross-examination are the relevant answers elicited under the cross-examination and not necessarily the corresponding questions posed [put across to the witness] and pursuant to which the answers were volunteered/given. Howbeit, it is important that as part of the judicial perception stage, the trial

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[41] *Okon v. The Akwa Ibom Sector Commander, Federal Road Safety Commission Uyo & Anor.* (2017) LPELR-43648(CA) p. 18, para. D; *Agbareh & Anor. v. Mimra & Ors.* (2008) LPELR-43211(SC) p. 21, para. B.

[42] *Fawehinmi Construction Co. Ltd. v. OAU* (1998) LPELR-1256(SC) p. 10 para. B.

[43] *Aribo v. CBN & Anor*. (2010) LPELR-4751(CA) p. 27, paras. B – C.

[44] *FBN v. Davies* (2017) LPELR-43556(CA) pp. 43 – 44, paras. E – A; *Agip (Nigeria) Ltd. v. Agip Petroleum International* (2010) LPELR-250(SC).

[45] *Mbam v. State* (2016) LPELR-40966(CA) p. 18, paras. B – C.

[46] *Ikenta Best (Nig.) Ltd. v. AG Rivers State* (2008) LPELR-1476(SC) p. 51, para. D.

[47] *Ajagbe v. Idowu* (2011) LPELR-279(SC) p. 30, paras. B – C.

[48] *Ogundalu v. MacJob* (2015) LPELR-24458(SC) p. 19, paras. D – E; *Ukeje & Anor. v. Ukeje* (2014) LPELR-22724(SC) pp. 30 – 31, paras. E – G.

Court should not only receive into its records the evidence [response(s) and/or answer(s)] given under cross-examination but should equally be gracious to receive and record, step by step, the corresponding [cross-examination] questions posed [put across to the witness] and pursuant to which the answers were volunteered/given. The reason for this view is not far-fetched: the trial Court will most likely need the said questions at the evaluation stage to weigh the evidence [the responses/answers] in the appropriate context and accordingly avoid conjectures or speculations.

Meanwhile, the researchers are not ignorant of the pains accruing to judicial officers in Nigeria by reason of the duty and/or practice to record all proceedings, step by step, in long hand (manually). However, even as the researchers sympathize with Judicial officers in Nigeria for the said pains accruing from manual recording, it is herein humbly but firmly submitted that pending when electronic recording shall be introduced into the proceedings of the Courts in Nigeria, the pains of manual recording of proceedings should never be a justification for creating room for speculation. This view is consistent with the pronouncement of the Supreme Court of Nigeria per Omo J.S.C. when the apex Court held as follows:

> "This Court is bound by the record of the proceedings before it and cannot depart therefrom; certainly not on the basis of speculation. Until such a time as electronic recording is introduced into the proceedings of our Courts in this Country, we will have to rely on the evidence as recorded manually by the Courts. Tedious though the practice may be, it has so far stood us in good stead, and cannot be allowed to be doubted on the basis of speculation."

One may contend and argue that a trial Judge need not record the questions posed [put across] to a witness under cross-examination because the trial Judge knows all the questions having presided over the trial and accordingly, he knows or ought to know the context in which to apply the evidence (responses/answers given under cross-examination) at the stage of evaluation but it is the researchers' view that such contention/argument is weak in that it creates a large room for conjectures and/or speculations.

4.0 Cross-Examination Questions vis-à-vis the Principle in *MacFoy v. UAC*

It is a trite and long settled principle of law that "one cannot put something on nothing and expect it to stay there (stand); it will certainly collapse"[49].

It is the researchers' view that the questions posed [put across to a witness] under cross-examination do not only fix and define the context of the evidence [responses/answers elicited under the cross-examination] but they [the said questions] equally constitute the legal plank/foundation upon which the evidence [responses/answers elicited under the cross-examination] are built and must stand. Remove the foundation and the building must simply collapse. Take away the questions posed [put across to a witness] under cross-examination from the [record of] proceedings, and then the evidence [responses/answers elicited under the cross-examination] should loose contextual value, probative value or may be discountenanced.

5.0 Fair Trial/Hearing vis-à-vis Recording of Cross-Examination Questions

Although, there is no concise constitutional definition of fair hearing contained in the extant Constitution of Nigeria,[50] it is instructive to note that the legal framework in Nigeria for fair hearing

[49] *Benjamin Leonard MacFoy v. United African Company Ltd*. (1961) 3 WLR 1405 at 1409; (1962) AC 152 at 160; (1961) 33 All E.R. 1169.

[50] The Constitution of the Federal Republic of Nigeria 1999.

is located in section 36 of the Constitution of the Federal Republic of Nigeria 1999. Specifically, section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 provides that:

> In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.[51]

A fair hearing means a fair trial.[52] In *Ogboh & Anor. v. FRN*,[53] the Supreme Court of Nigeria has held *inter alia* that "Fair hearing involves a fair trial and a fair trial of a case consists of the whole hearing and there is no difference between the two"[54]. Since a fair trial consists of the whole trial/hearing, it follows by parity of reasoning that cross-examination should constitute a critical part of fair trial in view of the fact that it has been noted earlier in this work that cross-examination is not only a formidable legal instrument but equally a sensitive, vital, crucial and indispensable part of judicial trial and aspect of adjudication process. It is even interesting that the extant Constitution of Nigeria makes express provisions relating to the right of a defendant in a criminal trial to cross-examine witnesses called by the prosecution.[55] The researchers opine that trial Court which heard and recorded answers/responses elicited under cross-examination should be fair enough, even as of foundational importance to not only receive but also record the questions posed [put across to a witness] under the cross-examination; failure to so receive and record the questions could amount to denial of the right to fair hearing/trial.

6.0 Conclusion

The researcher observed that some Judicial Officers in Nigeria, do not record questions posed [put across to the witness] under cross-examination perhaps because of how tedious it is to record the proceedings manually.

It is the researchers' conclusion that questioning and questions constitute the context and/or foundation of the evidence [responses/answers elicited under the cross-examination]. The evidence must be evaluated in the context of the questions and perhaps other surrounding circumstances. Also, one cannot put something on nothing and expect it to stand, it will certainly collapse.

7.0 Recommendation

In the premises of the foregoing, it is hereby recommended that if a trial Judge or Magistrate is gracious enough to receive and record answers/responses elicited under cross-examination, the Judge or Magistrate should equally be gracious to record the questions posed [put across to the witness] pursuant to which the responses/answers were volunteered/given so that the answers/responses should always be interpreted in their proper contexts.

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[51] This was quoted by the Supreme Court per Bage, JSC., in *Darlington Eze v. Federal Republic of Nigeria* (2017) LPELR-42097(SC) p. 17, para. B.

[52] *Asakitikpi v. State* (1993) LPELR-572(SC) p. 8, para. A.

[53] (2002) LPELR-2285 (SC) p. 15, paras. D – E.

[54] Per Ogwuegbu, JSC.

[55] The Constitution of the Federal Republic of Nigeria 1999, s. 36(6)(d).