DEALING WITH THE PROBLEMS ARISING FROM THE EVIDENCE OF A HOSTILE WITNESS IN TRIALS DONE BY WAY OF FRONTLOADING OF EVIDENCE IN CHIEF: AN EXAMINATION OF THE PROVISIONS OF THE EVIDENCE ACT, 2011*

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ABSTRACT

*The problems created by the evidence of hostile witnesses are as old as the commencement of adversarial system of litigations and varies in their impacts from jurisdiction to jurisdiction in accordance with the provision of the rules of evidence and procedure in each jurisdiction. It is more rampant in criminal trials where conviction may mean the death of the defendant or other harsh punishments. Civil trials are, however, not spared the appearance and impact of hostile witnesses. The laws as to the examination of witnesses in Nigeria are found in the Evidence Act, 2011. There is no sufficient provision as to how a litigant in a civil trial under the regime of frontloaded evidence-in-chief would beset with a hostile witness can afflict the evidence of such witness hence this work which its purpose is to expose the lacuna and suggest solutions.**

Introduction

The word Evidence has been defined in various contexts by authors and scholars. According to Black's Law Dictionary, evidence means 'something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact…The collective mass of things, especially, testimony and exhibits presented before a tribunal in a given dispute.'[1]

One scholarly definition of 'evidence' that is often quoted in texts and articles is by Phipson. The learned author defines evidence as 'the testimony, whether oral, documentary or real which may be legally received in order to prove or disprove some facts in dispute.'[2] From Phipson's definition, what constitutes evidence is that which 'may be legally received' in trial to prove or disprove a fact.

The Supreme Court in *Tukur v U.B.A & Ors*[3] elaborately defines evidence as:

> …the demonstration of a fact; it signifies that which demonstrates, makes clear, ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptance, the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.[4]

In *Chief (Mrs.) F. Akintola &Anor v Mrs. C.F.A.D Solana*[5] Oputa, JSC stated that:

> Evidence simply put is the means by which any matter of fact, the truth of which is submitted to investigation may be established or disproved. Evidence is a

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[1]AB Garner (ed),*Blacks Law Dictionary* (USA:West Publishing Co. Thomson Reuters2009)635.
[2]MN Howard and others, *Phipson on Evidence* (15thedn, London: Sweet& Maxwell)..
[3](2012) LPELR – 9337 (SC).
[4]Per Ariwoola, JSC44.
[5](1986) 4 SC 141 at 184.

> means whereby apart from the argument and inference, the courts informed as to the issue of facts ascertained by the pleadings, that is, the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove an issue of facts.

In *Awuse v Odili*[6], Amaizu JCA relied on the definition in *Taylor v Howard,*[7] to the effect that evidence is:

> any species of proof or probative matter, legally presented at the trial of an issue, by the acts of the parties and through the medium of witnesses records, documents, exhibits, concrete objects etc for the purpose of inducing belief in the minds of the court or jury as to their contention.

In a nutshell, evidence may be stated to mean the means by which facts in issue are established before a judicial tribunal. Such evidence includes oral testimony of a person who actually perceived the fact in issue through any of the senses.

Who is a Witness?

A witness has been defined in the following words 'one who sees, knows or vouches for something, one who gives testimony under oath or affirmation in person by oral or written deposition or by affidavit[8]… A person who has seen or knows something and is therefore competent to give evidence concerning it… One who has knowledge of facts relating to a given cause and is subpoenaed to testify.'[9]

In our adversarial system of trial, based on the English common law tradition, all evidence in a trial whether civil or criminal must be proffered by a witness who has been administered with an oath or affirmation to speak the truth. In this regards, all persons except in few circumstances are presumed to be qualified to appear as a witness in trials and other legal proceedings.[10] All persons are equally presumed to have a legal obligation to serve as witnesses if their testimony is sought[11].

The law of evidence is generally targeted at the regulation of the types of evidence that may be sought from witnesses and the manner in which the examination of witnesses is conducted during trials. It is the right of a party to a suit or charge to call witnesses of his choice including his adversary (the other party) see *Morrison Industries Plc v Makinde*[12]; *T.M Orugbo & Ors. v Bulara Una & Ors.*[13] In *Ojo Maduekwe v Prince Onyeka A Okoroafor & Ors,*[14] Akintan, JCA (as he then was stated:

[6](2005) 16 NWLR (Pt 952) 416 at 496.
[7]111R1 527, 304.A2d891, 893.
[8] Black's Law Dictionary,p1740.
[9] The New International Webster Comprehensive Dictionary of the English Language, Deluxe Encyclopedic Edition, (2010 edn, US: Typhoon Media Corporation 2010) 1446.
[10] See Evidence Act 2011, s 175 for competency of witnesses
[11]Ibid s 181, on the compellability of witnesses.
[12](2006) All FWLR (Pt 321) 1339 at 1351.
[13]11.NSCQR 537 at 552.
[14](1992) 9 NWLR (Pt 263) 69 at 84.

> The main issue in the appeal is the refusals by the tribunal to allow the 7th respondent testify for the petitioner. There is no doubt that the law permits a plaintiff to call his opponent as a witness. (See Obolo v Aluko (1976) 1 NMLR) 334). However, the mere fact that a particular witness was not allowed to testify will not per se vitiate a trial. It has to be shown that as a result of the act of the tribunal, the very evidence which the witness was to give was not presented to the tribunal and that the said evidence, if presented, would have tilted the verdict of the tribunal in the appellant's favour.

THE FRONT LOADING SYSTEM:

One of the most innovative measures introduced into the rules of procedure is the frontloading system of commencement of civil actions. Under the old method of commencement, writs were issued to commence proceedings before pleadings were filed at a later date, while actual evidence was only revealed at trial. That prolonged the time of the proceedings and gave room for many unserious litigants to clog the proceedings. It took a long time for parties to join issues and made it difficult for the parties to fully appreciate beforehand the case of their adversaries and for the Judge to apprehend the issues in contention between the parties.

To cure these problems, the frontloading system of commencement of civil actions introduced into the Rules prescribed that parties should frontload and fully reveal their respective cases before trial. A Plaintiff who is to commence his civil suit by Writ of Summons is expected to accompany same with his statement of claim; list of witnesses he intends to call at trial; Written statements on Oath of the witnesses and copies of all documents he intends to rely upon at trial

As aptly stated by His Lordship Lokulo-Sodipe, JCA in *Buhari & Ors v Haddy Smart Nigeria Ltd & Anor (2009) LPELR-8362 (CA) at pages 32-33, paras F-B*:

> The rationale of frontloading of witness statements and documents pleaded by a plaintiff, or which the plaintiff relies upon in the proof of his case, is designed to expedite trial by giving the defendant the overview of the case he has to contend with and to provoke an informed decision as to whether it is prudent to contest the case. Conversely, the same applies to the plaintiff, as the plaintiff having had the benefit of the overview of the defendant's case, from the witness statements and documents exhibited by the defendant, would be able to make an informed decision as to whether or not the case he has instituted is worth pursuing.

See also: *Adegbuyi v Mustapha & Ors (2010) LPELR-3600(CA);* per Kekere-Ekun, JCA (as she then was) *at pages 30-31, paras F-A and Diamond Bank Plc v Yahaya & Anor (2011) LPELR-4036(CA).*

One other important advantage of the frontloading procedure is that it reduces part of the trial time in which witnesses go through the tedious procedure of giving oral evidence-in-chief and Judges similarly labour to manually record such testimonies. Under the new frontloading procedure, witnesses are only expected to adopt their respective witness statements on oath which were already frontloaded along with the originating process. Once adopted, the statement on oath

becomes the oral evidence-in-chief of the witness. See: *Aregbesola & Ors v Oyinlola & Ors (2010) LPELR-3805(CA),* per Ogbunbiyi, JCA at page 157, *paras E-F; Onyenwe & Anor v Anaejionu (2014) LPELR-22495(CA),* per lge, JCA at pages 30-32, paras F-F.

The Law on Procedure for the Oral Examination of Witnesses

The provisions of the Evidence Act as to the procedure for examination of witnesses are found mainly in Section 214 and 215 of the Evidence Act, 2011 which provides for the examination, cross-examination and re-examination of a witness. Under the various High Court Rules of the states in Nigeria, presently, the evidence-in-chief of witnesses are done in the chambers of Judges (?) and frontloaded along with pleadings and documents. Such is seen in the provisions of Order 3 Rule 2 (c) of the Anambra State High Court (Civil Procedure) Rules, 2006 which is almost similar to the High Court (Civil Procedure) Rules in use in other states of the Federation of Nigeria. It is, therefore, only under cross-examination that a witness can display hostility towards the party that called him to give evidence in support of his case. That party is only allowed to re-examine him after his cross-examination on matters that arose from cross-examination or with the permission of the court on new issues.

Order 32, Rule 1 ((1),(2),(3)), High Court (Civil Procedure) Rules, 2006 of Anambra State provides that:

> (1) Subject to these rules and to any enactment relating to evidence, any fact required to be proved at the trial of any action shall be proved by written deposition and oral examination of witnesses in open court.
>
> (2) All agreed documents or other exhibits shall be tendered from the Bar or by the party where he is not represented by a Legal Practitioner.
>
> (3) The oral examination of a witness during his evidence-in-chief shall be limited to confirming his written deposition and tendering in evidence all disputed documents or other exhibits referred to in the deposition.

Under the Evidence Act, 2011, the law relating to the presentation of evidence of a witness is seen in Section 214 and 215 of the Evidence Act. However, the provisions of Section 230, 231 and 232 of the same Evidence Act 2011 are relevant to this discussion.

Section 214 of the Act provides:

> *(1)* The examination of a witness by the party who calls him shall be called examination-in-chief.
>
> *(2)* The examination of a witness by a party other than the party who calls him shall be called cross-examination.
>
> *(3)* Where a witness has been cross-examined and is then examined by the party who called him, such examination shall be called re-examination.

Section 215:

> *(1)* Witnesses shall be first examined-in-chief, then, if any other party so desires, cross-examined, then, if the party calling him so desires, re-examined,
>
> *(2)* The examination 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.
>
> *(3)* The re-examination shall be directed to the explanation of maters referred to in cross-examination and if a new matter is by permission of the court introduced in re-examination, the adverse party may further cross-examine upon that matter.

Section 230:

> The party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may in case the witness shall, in the opinion of the court, prove hostile, contradict him by other evidence, or by leave of court, prove that he has made at other times a statement inconsistent with his present testimony; but before such last mentioned proof can be given the circumstances or the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether or not he has made such statement.

Section 231:

> If a witness upon cross-examination as to a former statement made by him relative to the subject matter of the trial, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given the circumstances of the supposed statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he has made such statement.

Section 232:

> 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 proceedings 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 is 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 shall think fit.

In law practice, one of the rules governing examination-in-chief of witnesses is that a party is not allowed to impeach the credit of his own witness by general evidence of bad character. This is because when a party puts forward a person as a witness he is presumed as holding that person out as being truthful.

In that regards, a party that puts forward a witness is not allowed to ask him leading questions. Leading questions are those questions that suggest the answer the witness is expected, by the person asking the question, to give to the question.[15] Leading questions are meant to elicit the answers desired by a cross-examiner from the witness of the other party who, naturally ought to be hostile to the cross-examination of the opposing party. However, as an exception to the rule, Sections 230, 231 and 233 of the Evidence Act 2011 makes provisions for the circumstances and manner in which a party that calls a witness may be allowed to impeach his credit. In such circumstances, the court may permit leading questions.[16] The credit of a witness may be impeached in the following ways by any party other than the party calling him or with the leave of the court by the party who calls him (ie. when he has been declared a hostile witness). Such ways includes:

(a) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(b) By proof that the witness has been bribed, or has accepted the offer of a bribe, or has received any other corrupt inducement to give his evidence; or

(c) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.[17]

Hostile Witness

We have seen the circumstances under which our Law of Evidence allows a witness to be cross-examined by the party who called him to give evidence and the important, though negative, role that a hostile witness may play on the case of the party that called him to give evidence. The obvious questions that necessarily follows at this point are: 'who is a hostile witness?'; 'In what circumstances can a witness be declared a hostile witness?'; 'What are the implications or consequences of being declared a hostile witness?'

The Black's Law Dictionary[18] defines the word hostile in these terms: Hostile – Adverse – Showing ill will or a desire to harm – Antagonistic – Unfriendly.

[15]Evidence Act 2011, s 221 (1)
[16]Ibid.
[17]Ibid s 233.
[18](n 1) 806.

The same Dictionary defines a hostile witness in the following words: a witness who is biased against the examining party, who is unwilling to testify or who is identified with an adverse party; a hostile witness may be asked leading questions on direct examination[19].

Where a witness presented to court by a party to a suit is hostile, it will be an exception to the rule, i.e. the party calling the witness can impeach the credit of that witness. A witness is considered hostile when, in the opinion of the court, he bears a hostile *animus* to the party calling him and so does not give his evidence fairly and with a desire to tell the truth. From the above quoted section, it can be seen that the opinion of the court in this respect is what matters.

Effect of Treating a Witness as hostile:

The effect of allowing a party producing a witness to impeach the credit of the said hostile witness by showing that the witness made statements inconsistent with the evidence on oath is to make the witness unreliable and the Supreme Court has said so, over and over again. In the case of *Christopher N. Onubogu & Anor v The State*[20] the Supreme Court said:

> We thought that the submissions of learned Counsel for the appellants are well founded. In our view, where a witness, such as the complainant (P.W.4) in this case in hand, has made a statement before trial which is inconsistent with the evidence he gives in court, the court, provided that no cogent reasons are given for the inconsistency, should regard his evidence as unreliable…

In this same case (Onubogu's case) the Supreme Court re-affirmed its decision in the case of the Queen v Joshua.*[21] The relevant passage at page 18 reads:*

> Again there is the decision of this court in the case of the Queen vs. Joshua (1964) 1 All NLR 1 at 3 where we referred to the decision in R v Golder (1960) 1 WLR. 11669 with approval and also observed that where a witness has made previous statements inconsistent with the evidence given at the trial the court has been slow to act on the evidence of such a witness. In our decision in the case of the Queen v Joshua we referred in particular to the observation of Lord Parker LCJ in his judgment in R vs Golder (supra) on this point. The observation which is at 1172 of the said judgment reads… In the judgment of this court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable, they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act.

In *Joseph Aderemi v The State,*[22] the appellant was tried and convicted of the offence of rape. The complainant, in her statement to the Police and to two other witnesses, said the sexual intercourse

[19]Ibid 1740.
[20](1974) 9 SC 1 at 17.
[21](1964) 1 All NLR 1.
[22](1975) 9-11 SC 115 at 120-122.

with her was by force. In her testimony in court, however, she stated that it was with her consent and the prosecution applied to treat her as a hostile witness. Despite this, however, the appellant was convicted by the learned trial judge. On appeal to the Supreme Court, it was contended on his behalf that the effect of making a witness hostile is to make his or her evidence unreliable. The decision thus turned on the effect of treating the prosecution witness as a 'hostile witness'. The appeal was allowed. In *The State v Shofolahan*[23] However, under cross-examination, the witness testified that all he said during his examination-in-chief were what he was asked to say by the Federal and Lagos State Governments. He said further that his written statement (Exhibit A6) made on 29th September 1999 was induced by the authorities. And that in his actual voluntary statement, he denied knowing anything about the murder of the deceased. Under re-examination, he stood his ground and maintained all he said under cross-examination. The court held on appeal to that court as follows:

a. On duty on court where previous statement of witness is inconsistent with his testimony in court – Where a witness makes a previous statement which is inconsistent with the testimony of the witness before the court, the court is mandated (not a matter of discretion) to reject both the previous statement and the evidence given by the witness on oath as unreliable (P311, paras A-B).

b. On when an application to treat a witness as hostile witness should be made – An application to treat a witness as hostile witness should be made as soon as it is obvious that he is hostile or that his testimony will be adverse to the interest of the party that called him to give evidence (P319, para F).

c. On aim of cross-examination – The aim of cross-examination is to enable the cross-examining party to demolish or weaken the case of the party being cross-examined, and to also allow the cross-examining party the opportunity of stating or representing its case through the witness of its opponents. (Shegun v. State (Unreported) CA/J/71C/2009 delivered 10/12/12 referred to) 9Pp. 320-321, paras H-A).

Also in *The State v Al Mustapha,*[24] PW2 testified in his examination-in-chief that the appellant instructed him to eliminate the deceased as she was against the State. He stated that he opened fire on the deceased on the 4th of June 1996. That it was the appellant who gave him the gun he used in attacking the deceased, which he returned to the appellant through his orderly, who confirmed receipt. A statement he made to the police was tendered as exhibit "A2".

However, under cross-examination, he testified that all he said in his examination-in-chief were things he was doctored to say by the Federal Government and the Lagos State Government to implicate the appellant. He said he was induced variously to so testify. He said further that exhibit "A2" was made both by him and government officials. Under re-examination, he maintained all the said under cross-examination.

[23](2013) 17 NWLR (Pt 1883)281.
[24](2013) 17 NWLR (Pt 1883)350.

PW3 in his examination-in-chief testified that he drove the vehicle from which PW2 fired the shot at the deceased. However, under cross-examination, he stated that on the day of the alleged incident, he was in his village at Azare in Bauchi State on which day he had his first marriage. He also maintained that he was induced by government officials and was offered the gift of a house to implicate the appellant. He was not presented for cross-examination. It was held on appeal that:

On purpose of cross-examination

> The entire trial process revolves around this art of cross-examination. The Evidence Act actually underscores the purposes of cross-examination that when a witness is cross-examined, he may in addition to the questions referred to be asked any questions which tend:
>
> (a) To test his accuracy, veracity and credibility
> (b) To discover who he is and what is his position in life
> (c) To shake his credit by injuring his character.
>
> To deprive an accused person of this opportunity amounts to gross violation of his constitutional right to fair hearing. See Shegun vs. State (Unreported) CA/J/71C/2009 delivered 10/12/12 referred to) 9 PP. 320-321, paras A-E).

It has been held that where evidence of prosecution witnesses is contradictory to each other, it is the duty of the court to discountenance same and treat the entire evidence as unreliable. This is a duty in law and not one marked by discretion. However, the contradiction must be material and against the very issue of a case, and must go to the root of the prosecution's case. It must be on material facts. In the instant case, the contradictions in the evidence of the prosecution witnesses were material. The trial court should have expunged the evidence of PW2, PW3 and PW4. (*Onubogu v State* (1974) 9 SC 1 referred to at 403, paras F-H; 404, para B; 412, para G).

On duty on prosecution on explain contradictions in evidence of prosecution witnesses:
Contradictions in the case of the prosecution must be explained by it. A court cannot speculate or imagine explanation for the contradictions neither can it choose and pick which of the prosecution witnesses to believe, in matters relating to contradictions. (*Ahmed v State* (1999) 7 NWLR (Pt 612) 641 referred to at 404, paras A-B).

The Supreme Court in the case of *Onubogu v State*[25] held that:

> … where in a criminal case, one witness called by the prosecution contradicts another prosecution witness on a material point, the prosecution ought to lay some foundation, such as showing that the witness is hostile, before they can ask the court to reject the testimony of one witness and accept that of another witness for the evidence of the discredited witness. It is not competent for the prosecution which called them to pick and choose between them. They cannot, without showing clearly that one is a hostile witness, discredit one and accredit the other.

[25](1974) 9 NSCC 358 at 366.

This decision was applied by the Court of Appeal in the case of *Etumionu v A.G Delta State.*[26] Where the prosecution fails to treat the witness as a hostile witness and the court is faced with two contradictory evidence of two prosecution witnesses on a material issue, the proper approach is for the court to discountenance both pieces of evidence for being of low or no probative value rather than choosing or picking which of them to believe[27] In *Okonkwo v The State*[28], the evidence of the third prosecution witness as well as his previous statement to the police at the earliest opportunity when the matter was fresh in his memory was not acted upon. The accused was discharged and acquitted. The consequences of treating a witness as a hostile witness is that the witness sworn evidence (evidence in court) becomes unreliable as well as his previous un-sworn evidence (extra judicial statement made to the police) both of which must then be rejected. Where the prosecution fails to so treat a prosecution witness as a hostile witness, his evidence together with the evidence of another prosecution witness which has contradicted each other will be unreliable and no evidential value will be placed on such evidence.[29]

Assessing the Challenges of the Evidence of a Hostile Witness in Civil Trials

Over the years, our courts have consistently stood on the point that he who makes mutually inconsistent statements is not be listened to.[30] Equally, no witness who gives on oath, two materially inconsistent pieces of evidence is entitled to the honour of credibility.[31] Generally, a party who adduces inconsistent evidence over one and the same issue damages his own case; unless, he can reconcile the apparent inconsistency.[32]

There is no better evidence against a party than one from a witness called by a party giving evidence contrary to the case of that party[33]. In *Chief Onisaodu & Anor v Chief Elewuju & Anor,*[34] the contention that an admission by the defendant's witness that the land in dispute was owned by the plaintiff's family, was or was not material enough to vitiate the defence was ruled in favour of its being material enough to find in favour of the plaintiff. Meanwhile, it was noted that the defendant did not treat his witness as a hostile witness.

Where a witness called by a party gives evidence against his interest, our adjectival law requires the party to urge the court to declare him a hostile witness for purposes of cross-examination to enable him to discredit the witnesses' evidence and reject the evidence,[35] else the evidence shall be accepted *cum onere* against the party which called him.

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[26](1995) 6 NWLR (Pt 404) 719.

[27] See *Obade v The State* (1991) 6 NWLP (Pt 198) 435.

[28](1998) 4 NWLR (Pt 544) 142.

[29]Obiora Atuegwu Egwuatu ???

[30]See *Odu'a Investments Co Ltd vTalabi*(1991) 1 NWLR (Pt 170) 761 at 767; *Ladega v Durotimi* (1978) 3 SC 91 at 101.

[31]*Ezemba vIbeneme&Anor*(2004) All FWLR (Pt 223) 1786 at 1816 (SC).

[32]*Daniel Bassil & Anor v Chief Lasisi Fajebe &Anor* (unreported), SC76/93 April 27th, 2001. Two material inconsistent pieces of evidence given on oath by the same person affects credibility of witness; *Adepoju Ayanwale&Ors vBabalolaAtanda&Anor* (1988) 1 SC 1.

[33]*Chief Odi&Ors.v Chief Uyala&Ors* (2004) All FWLR (Pt 207) 570 at 592; also reported in (2004) 4 SC (Pt i) 20 at 35.

[34](2006) 7 SC (Pt ii) 45 at 53; (2006) All FWLR (Pt 328) 676 at 684-5 (SC).

[35] See *Ilouno v Chiekwe* (1991) 2 NWLR (Pt 173) 316; *Udoh vs. the State* (1994) 2 NWLR (Pt 329) 666; *Odi v Iyala & Ors* (2004) 6 MJSC 92 at 109 paras A-B.

Further on the legal effect the evidence of a witness being against the party who called him, if a witness called by a party gives evidence against that party the evidence will be regarded as one against interest and unless explanations are given which satisfy the court that admission should not be regarded, due weight should be given to them as such.[36]

Secondly, it is trite under the Nigerian law of evidence and procedure that evidence elicited from cross-examination is as valid and authentic as evidence procured from examination-in-chief. Both are said to have the potency of relevancy and relevancy is also said to be the heart of admissibility in the law of evidence. Where evidence is relevant, it is admissible and admitted whether it was procured from examination-in-chief or under cross-examination.[37]

It is settled law that a plaintiff can derive strength from evidence volunteered by a defendant even when such evidence goes to no issue for the defendant provided that it is admissible evidence[38]. Standing on the case laws on this subject matter as it is today, there is no dispute that where a witness turns hostile against a party that brought him to give evidence in his favour, he can wreck the case of that party by giving evidence under cross-examination that amounts to admission against the case of the party that brought him to give evidence. It is arguable that where the evidence of such a witness under cross-examination varies with his evidence-in-chief which must have been frontloaded and he adopted, he had given two contradictory pieces of evidence under oath and ought not to be entitled to the honour of credit on that issue. However, our case law seems to accord different treatment to such scenario to the effect that such debilitating evidence of the hostile witness made under cross-examination is gladly received by the court and credited to the adverse party. More often than not the court relies on such evidence which they call admission against interest to make a determination of the case against the party that brought the hostile witness.

It may be necessary at this point to distinguish between a hostile witness and an unfavourable witness. A hostile witness displays a hostile *animus* against the party that called him and deviates from the obligation to give evidence of truth. On the other hand, an unfavourable witness stays within the obligation to give evidence of truth though his evidence is against the person that called him.

It is indeed an onerous task to distinguish between a hostile witness and an unfavourable witness save for the issue of physical hostility that may be displayed by the hostile witness. It seems that the law allows for the admissibility of the evidence of an unfavourable witness while mandating the rejection of evidence of a witness that has been declared hostile by the court at the instance of the party that brought him to give evidence. The dividing line, therefore, lies at the point where the party that brought the hostile witness moves the court to declare him a hostile witness and impeaches his evidence. In this instance, he may escape the impact of the witness of the hostile

[36]Ibid *Odi v Iyala & Ors* at 108-109 paras G-A.See also *Ojiegbe v Okwaraonyia* (1962) All NLR 605; *Okai v Ayikai* (1946) 12 WACA 31.

[37]See again *Gaji & Ors v Paye* (*Opcit);* Ogbuagu, JCA (as he then was) in *Alhaji Mohammed S. Daggash v Hajia Fati Bulama& Ors*(2004) 14 NWLR (Pt892), 144 at 241.

[38]See *Akpauna & Ors v Obi Nzeka II &Ors* (1983) 2 SCNLR 1; (1983) 1 All NLR 224; (1962) 336 at 337". – Ibiyeye, JCA in *Madam Victoria Okundaye & Anor. v Mrs. NK Oyegun* (1999) 4 NWLR (Pt 598) 207 at 217.

witness otherwise such evidence is regarded as evidence of an unfavourable witness amounting to an admission against the interest of the party that called him to give evidence which is fatal.

The Weakness of the Provisions of the Evidence Act, 2011, in the Face of Frontloaded Evidence-in-Chief

The Evidence Act, 2011, provides for the procedure of examining a witness in court.[39] It is worthy to note that under the provisions of the Evidence Act, 2011, re-examination of a witness to which a party that brought a witness is entitled after the cross-examination of his witness by the adversary is limited to matters that arose from the cross-examination only.[40] It is submitted, most humbly, that the party that called a witness can hardly stand on this diminished pedestal to deal effectively with the debilitating effect of the evidence of a hostile witness. Such a party whose witness turned hostile to his cause is likely to end up carrying the undiminished burden of evidence in favour of his adversary that remains unchallenged. It may be argued that Section 215(3) of the Evidence Act, 2011, allows a party re-examining his witness to raise new issues which gives the adversary party the right to further cross-examine on those new issues. The said Section 215(3) of the Evidence Act, 2011 provides:

> The re-examination shall be directed to the explanation of matters referred to in cross-examination and if a new matter is, by permission of the court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Going through the provisions of Section 215(3) of the Evidence Act, 2011, it is doubtful if it allows a party who is re-examining his witness to impeach his credit at that time. Whether he can do that or not, depends on the discretion of the judge who may be minded to grant him leave to do so or justifiably refuse leave in the absence of an express provision mandating him to grant leave in such a circumstance. In practice presently, the courts only allow re-examination of witnesses on such matters where the answers given by the witness under cross-examination creates 'ambiguity'. In the absence of any such ambiguity arising from answers given by a witness under cross-examination, the courts hardly allow addition or removal from evidence elicited under cross-examination.

The position of the courts on re-examination of witnesses that such is limited to ambiguities arising from cross-examination only may be justifiable to the extent that cross-examination may be rendered worthless if answers elicited from such exercise are allowed to be reversed or obliterated by impeaching the character of a witness that may have chosen to tell the court the truth of the facts-in-issue after being goaded into alluding to falsehood in his evidence-in-chief. This has become more important under this regime of frontloading of evidence-in-chief of witnesses where the witness puts down his evidence outside the court and merely appears in court to adopt same. Equally, if a party is allowed to lead further evidence to impeach the evidence of his witness elicited under cross-examination that is against his interest, good advocacy and dexterity of the counsel in the art of cross-examination may have been unwittingly rendered unimportant.

[39]Evidence Act 2011, ss 214 and 215.
[40]Ibid s 215 (3).

Can a Party Call Other Witnesses to Impeach the Evidence of a Hostile Witness?

The technique of confrontation in cross-examination consists in bringing a witness face-to-face with facts and/or documents, which he cannot possibly deny. Section 231 of our Evidence Act, 2011 lays down the proper procedure when confrontation is resorted to. Section 231 of the Act provides to the effect that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question in the suit or proceeding in which he is cross-examined without such writing (being) shown to him, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.[41]

Lord Herschell (Lord Chancellor) in *Browne v Dunn*[42] stated:

> My Lords I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses … All I am saying is that it will not do to impeach the credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there, having been no suggestion whatever in the course of the case that his story is not accepted.

Nnamani, JSC (dissenting) in *Chief Jim Nwobodo v Chief Christian C. Onoh & Ors,*[43] stated that:

> In Naba Kumar v R Narayan (1923) AIR 7 the Privy Council (Viscount Heldane, Lord Dunedun and Sir John Edge) held that: "a witness cannot be disbelieved without his attention being drawn to the documents inconsistent with his deposition even though the documents were produced after his cross-examination. In such a case he should be recalled for further cross-examination."

What is the Effect of Failure to Challenge a Witness as to his Evidence?

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.[44] The position of the law is that evidence that is not attacked or discredited by the opposing party is good and credible evidence which a tribunal can confidently rely upon and use in the course of its findings.[45]

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[41]See Oputa, JSC in *Salau Ajide v Kadiri Kelani* (1985) 11 SC 124 at 169-170.

[42]HL (1894) 6 R 67 cited by P.A Onamade: *Advocacy in Election Petitions* (Lagos: Philade Co Ltd, 2007) 581.

[43] (1984) 1 SC 1 at 186-187.

[44]*Oforlete v The State* (2000) 12 NWLR (Pt 681) 415 at 436; see also *Agbonifo v Aiwereoh* (1988) 2 SCNJ 146; (n 37) Edozie, JSC in *Isaac Gaji & Or v Emmanuel D. Paye* 14 NSCQR (Pt 1) 613 at 629 had stated that it is not proper for a defendant not to cross-examine a plaintiff's witness on a material point and to call evidence on the matter after the plaintiff has closed his case.

[45]*Nigeria-Arab Bank Ltd v Shuiab* (1991) 9 NWLR (Pt 475) 634; *Aikhionabare v Omoregie* (1976) 12 SC 11.

Conclusion

In conclusion, it has been discovered that for a litigant to avoid the unpleasant consequences of losing its case due to the contradictions introduced into such a case by the evidence of a compromised witness, where it is faced with the evidence of a hostile witness, that litigant must seek the leave of court to declare such a witness, a hostile witness and follow the procedure enumerated in the Evidence Act, 2011 to demolish completely the evidence of such a witness. Having done so, the testimony of the other witnesses that remain thereafter would be treated as having probative value while that of the hostile witness will be of no probative value and will not be acted upon.

It has been highlighted that the Evidence Act, 2011 seems to be too narrow in its provisions as to how to deal with the evidence of a hostile witness in civil provisions under this regime of frontloading of evidence-in-chief. While litigants await the amendment of the Evidence Act, 2011 to provide for a procedure for dealing with the evidence of a hostile witness, particularly in civil matters under the present regime of frontloading of evidence-in-chief, it is expected that litigants who discover during cross-examination of their witness that their witness has become hostile would be allowed to mitigate the debilitating effect of such development through the narrow window of re-examination by the court granting leave to such a party to use leading questions to re-examine such a witness and possibly show him his previous statements so as to contradict him.

Until an amendment of the Evidence Act, 2011 is effected, incorporating wholesale provisions as to how to contain the effect of the evidence of hostile witnesses, litigants in both criminal and civil trials would continue to grapple with devastating effects of acrobatic summersaults by witnesses who defect to the adversaries of parties who summoned them to give evidence in court. It seems preferable to suggest that in such circumstances where the witness has made two contradictory statements under oath on the same facts, the court should discard his evidence entirely as he is not worthy of the honour of receiving credit on any of the two versions of his evidence.

The present practice where the courts pick and choose from the contradictory evidence of such witness and obviously prefer the version of the evidence of such a witness elicited from him under cross-examination is unfair to litigants, particularly in cases where such a witness received gratification or bows to some other form of pressure and accepts to lie under cross-examination against the party that called him to give evidence thereby giving the court an opposite of the evidence of truth which he had earlier given to the court in chief under oath.

Recommendations

It is recommended in the circumstances that Section 213 of the Evidence Act, 2011 be amended to incorporate an express provision that once a party to any matter whether criminal or civil indicates to court that his witness has departed from his evidence-in-chief and given a contrary version of same, he should be allowed to use leading questions to re-examine the witness as to the contradictions in his two statements. The practice of limiting re-examination to 'any ambiguities that arose from the answers given by the witness during cross-examination' should not be allowed to defeat justice in such a situation. If the party that brought the witness to court can succeed in

impeaching the credit of such a witness by showing the court that he is not a witness of truth, the court should throw away both versions of his evidence.

Finally, it is good that the law takes its course in such circumstances. Perjury is an offence under the Nigerian Criminal Code and is committed when a witness deliberately lies on oath. See Section 117 of the Criminal Code Act, 2004. In Nigeria, prosecution for perjury is very rare even when many people attend court to tell lies and deceive the court. Such witnesses that turn hostile and state the opposite of what they had told the court in their evidence-in-chief should attract an order of the court, which they had tried to deceive, that they be prosecuted for the offence of perjury so as to discourage defection of witnesses to the side of the adversary.