

**AN ANALYSIS OF THE USE OF TESTIMONY AS A MEANS OF
PROOF IN NIGERIA**

BY

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DECLARATION

I hereby declare that this work research has been written by me and that it is a record of my own work. It has not been presented in any previous application for a higher degree.

All quotations are properly fixed and the sources where the information and data were found are duly acknowledged wherewithal of footnotes and references.

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CERTIFICATION

This thesis titled An Analysis of the Use of Testimony as a Means of Proof in Nigeria meets the regulations governing the award of Degree of Master of Art Laws, Ahmadu Bello University, Zaria and is approved for its great contribution to knowledge and literary presentation.

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DEDICATION

To the departed soul of my blessed and beloved father Alhaji Ahmad Tanimu Dari who pass away on 12th February, 2002 I dedicated the reward of this work, I pray that may his gentle soul rest in perfect peace and jannatul-firdausi be his final abode Ameen.

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ABSTRACT

It is natural and common in human society to have between individuals a kind of dispute that may probably arise. Islamic Law had laid down and provides the procedures through which such dispute can be judicially determined. Nigerian Courts are enjoined to apply principles and Rules enunciated by Makili School of jurisprudence.

Complete application of Islamic law of Evidence in Nigeria has been limited and most of the texts on Islamic law of Evidence are classical and written in Arabic language. The rules of Islamic law of Evidence pronounced by the classical books are yet to be comprehensively codified to guide Nigerian Courts in conducting trials.

Regrettably the poor level of knowledge of Islamic law of Evidence rules among lawyers and the lower courts judges has led to erroneous appreciation and application of the rules.

The scope to be covered by this research is: the sources of Islamic law of Evidence, the cardinal principles governing the use of testimony, the application of testimony as means of Proof in Establishing both Criminal and Civil Cases. The research methodology of the thesis is doctrinal and analytical.

In the course of the research, some findings or observations were made. The research found that there is no clear distinction between substantive and procedural law in Islamic Law and most of the texts on the subject are written in classical Arabic which is technical in nature. The jurisdiction of Shari'a Court of Appeal in Nigeria is limited to Islamic personal Status. Suggestions were made in the research as proffered solutions to the enumerated findings/observations.

LIST OF ABBREVIATIONS

ALL FWLR - All Federation Weekly Law Reports.

ALL ER – All European Report

ALL NLR – All Nigerian Law Report

CA - Court of Appeal.

CFRN - Constitution of the Federal Republic Nigeria

F.S.C. - Federal Supreme Court Cases.

FWLR - Federation Weekly Law Reports.

LFN - Laws of the Federation of Nigeria 1990.

NRNLR – Northern Region of Nigerian Law Report

NWLR - Nigerian Weekly Law Reports.

SCA - Sharia Court of Appeal

SCNJ - Supreme Court Judgments of Nigeria.

SHLRN - Sharia Law Report of Nigeria.

WLR – Weekly Law Report

GLOSSARY OF TERMS

Adaa'a : Rendering; process of giving out a piece of information

Adalah : Honesty; referring to person of unimpeachable character

Adillah : Sources; the roots where which the Islamic Law rules were derived from

Ahkam ahwalul shakhsiyyah : Islamic law of personal status; branch of Islamic law that deals with personal interest of Muslim as an individual

Ahkamul Dusturiyyah : Principles of Constitutional law

Ahkamul Madaniyyah : Rules that regulates relationship between individuals and their transactions such as sale, mortgage, e.t.c.

Ahkamul Murafa'at : Islamic law of Evidence and procedures

Al-laghw : Futile oath; oath taken on the truth of something that suspected to be true and correct but the opposite emerges to be the case

Al'aaqedain : The two parties in a contract

Al'maa'qud alaih : The consideration of a particular contract

Al-mudda'iy : The Plaintiff in an instituted action

Al-mudda'iy alayhi : The Defendant in an instituted action

Al-Qibla : Direction facing the Ka'abah (Holy House of Allah situates at Makkah)

Alwaliy : The Guardian in a legal marriage

Amarah : sign; evidence or indication that that leads to an indirect ruling in sharia

Asl : Root, basis; the normal state of things

Assimaa'a : Hearsay

Baitulmal : Treasury a place where state or royal money and valuables are stored

Bayyina : Is an evidence/proof need to be presented in a court of law

Bid'a : Innovation, the Act of introducing something new in religion without any base

Da'awah : An suit or Action which is presented in a court of law and needs to be verified

Dalil : Source for legal evidence be it textual or otherwise on the basis of which one may arrive at a sound rulling or judgement on a question at hand

Fard ayn : Individual Obligation

Fard Kifaaya : Communal obligation

Faskh : Repudiation of Marriage or any contract

Hadith : Sayings of prophet Muhammad (P.B.U.H).

Haqq : A Right vested to a human being

Haqq : Right vested to a human being it can be legal, moral entitlement, duty or obligation

Hiraba : High way robbery; is felony punishable under capital punishments

Hirz : Savings where which a property is kept to avoid reaching of others

Hudood : Capital punishment

Hur : Freeman; Liberated person

Ibaha : Permission. The act of authorizing and given consent to somebody

Iddah : Waiting term; prescribed period of delay between women's divorce and re-marriage, or death of husband and re-marriage

Ijtihad : Independent reasoning; the effort exerted by a suitable qualified fiqh scholar to arrive at an accurate conceptualization of the divine will based on muslim legalsources. Eg Qur'an, Hadeeth etc.

Ilm-elqadi : The knowledge of the judge presiding over a case

Imam : An Islamic leader particularly in a mosque

Iqrar : Admissions. The act of acknowledging something asserted

Istihsan : Juristic preference; involves giving human interests and intents of the law priority over the results of qiyas, or analogical deduction

I'zar : The question put by the court: “ have you anything to say”.

Kabeera : A capital sin which is serious in nature

Kadi : Judge in sharia court

Kaffaraat : Expiation

Khalifah : The successor of prophet Muhammad (P.B.U.H.)

Khamr : Any alcoholic substance which may befogs the brain

Khultah : Relationship; sort of association that occurs between two individuals

Kitaaba : Writing, Handwriting

Lams : Sense of touching

Lutt : An Act of sodomy which is punishable under capital punishments

Mahjur : A person who is not allowed by Islamic law to exercise full control over his property – his affairs are manage for him/her due to lack of capacity to do so.

Mahr : Dowry; the monetary property giving when marriage

Mash hud alaih : Subject matter of the Testimony

Mash hud lahu : Benefitted party from Testimony

Mazalim : Department introduced during Holy prophet's time which has wide general jurisdiction both correctional and remedial in nature

Mu'amalaat : Civil transaction between individuals

Mubarriz : Witness of proven integrity that excels his peers

Muhsanaat : Fortified; the person have tested the luxury of matrimonial marriage

Mujtahidun : An exponent of Islamic law.

Mukallaf : Person accountable for all his deeds.

Musafir : Traveler; person not usually resident of one place.

Mutawaatir : Continuous chain of transmission without broken.

Muqim : Non-traveller; person that is usually domiciled in one place.

Muqirr : Acknowledger of a right; i.e person who admits liability.

Muqirr lahu : Person whose right/interest was admitted by admission maker.

Muwaqa'at elhayawaan : Bestiality; is an offence which is punishable under capital punishment.

Nass : Legal authority in Islamic law.

Nawafil : The superegatory prayers.

Nikah : Marriage; the union of two people to be husband and wife usually to the exclusion of others.

Nisaab : Fixed amount according to law.

Qadhf : Defamation; the act of injuring another's reputation by any slanderous communication, written or oral.

Qanun : Law; the body of rules and standards issued by a government, or to be applied by courts and similar authorities.

Qareena : Presumption.

Qat'i : Definitive; referring to clear-cut ruling or legislation.

Qisas : Penalty, Punishment.

Qur'an : Book of Allah revealed to prophet Muhammad (P.B.U.H.) to guide mankind.

Rashid : A person who is sane and mature, can be able to manage his affairs.

Ridda : Apostacy.

Ruuya : Sense of seeing.

Sam'uu : Sense of hearing.

Sariqa : Theft; the act of stealing property.

Shahada : Evidence/Testimony; anything admitted by a court to prove or disprove
alleged matters of fact in a trial.

Shahadatus-sama'i : Hearsay evidence.

Shahid : The party giving testimony (Witness).

Sham : Sense of sniffing.

Shari'a : Islamic law.

Shubha : Doubt; uncertainty in subject matter.

Shuf'ah : Pre-emption.

Sigha : Mode or manner of doing things.

Sihaaq : Lesbianism, is a felony punishable under capital punishment.

Sulh : Compromise; an Act of reconciling the disputed parties.

Sunnah : Whatever is reported about holy prophet.

(P.B.U.H.) be it saying, action, or silent approval.

Sunnah fi'liyyah : Acts prophet (P.B.U.H.) used to do.

Sunnah Qawliyyah : Things prophet (P.B.U.H.) enjoined Muslims to do through his
sayings (words).

Sunnah Taqirriyyah : Tacit approval of prophet (P.B.U.H.).

Ta'azir : Discretionary punishment.

Tahammul : Process of conceiving a piece of information.

Ta'jiz : A judicial declaration of forfeiture.

Talaq : Dissolution of marriage.

Tarjih : To give preponderance or to prefer a juristic viewpoint over another.

Taulij : Suspicion.

Ulama : Islamic scholars.

Ummul Mu'minin : The Mother of faithful; (nick name) of Aisha (RA) wife of the Holy Prophet (P.B.U.H) and daughter of Caliph Abubkr As-siddiq.

Urf : Custom; referring to customary law.

Wakil : Representative.

Waqf : Endowment.

Wasiyyah : Bequest.

Yamin ma'a shahid : An oath to support the evidence of a single witness.

Yaminul munkar : Oath to deny liability.

Yaminul qada'i : Oath impose on a person that make an assertion against a deceased person.

Zawq : Sense of testing.

Zanni : Speculative; non-definitive.

Zihar : Injurious assimilation.

Zina : Fornication, Adultery; The act of illicit sexual intercourse between a man and a woman.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background of the Study

The word Testimony means: the evidence of a witness usually given in court and usually under oath.¹The first source of the proof of a crime or a right in islamic law is SHAHADADA i.e Testimony literally means: information of what one has witnessed or seen or beheld with his eyes, declaration of what one knows, decisive information, it also means to be present.

Technically means: to give true information before a competent court of law what one has seen or known for the purpose of proving or disproving a right or crime.²

The law of evidence encompasses the rules and legal principles that govern the proof of facts in a legal proceeding, these rules determine what evidence must or must not be considered by the trier of fact in reaching its decision and sometimes the weight that may be given to that evidence.

The law of evidence is also concerned with the quantum (amount) quality of proof is how reliable such evidence should be considered. This includes such concepts as hearsay authentication, admissibility, reasonable doubt and clear and convincing evidence.

There are several types of evidence, depending on the form or source, evidence governs the use of testimony (e.g oral or written statements, such as affidavit), exhibits (e.g physical objects), documentary material, or demonstrative evidence

¹. Bone, S., *Osborn's Concise Law Dictionary*, Sweet and Maxwell, London, 2001, p.376.

². Cowdhury, A., *The Islamic Law of Evidence*, Kitab Bhavan, New Delhi, India, 2006, p.19.

which are admissible i.e allowed to be considered by the trier of fact, such as jury in a judicial or administrative proceedings, e.g a court of law when a dispute whether relating to a civil or criminal matter, reaches the court there will always be a number of issues which one party will have to prove in order to persuade the court to decide in his favour. The law must ensure certain guidelines are set out in order to ensure that evidence presented to the court can be regarded as trustworthy.

In Nigerian law the rule of corroboration in criminal cases requires that there must be two pieces of evidence, to prove each essential fact, eventhough this corroboration requirement is no longer applies in civil cases with the exception of some areas of family law, such as divorce, when another individual not party to the marriage must act as witness.

Also in nigerian law, evidence that would otherwise be admissible at trial may be excluded at the discretion of the trial judge if it would be unfair to the defendant to admit it. Evidence of a confession may be excluded because it was obtained by oppression or because the confession was made in consequence of anything said or done to the defendant that would be likely to make the confession unreliable. In these circumstances, it would be open to the trial judge to exclude the evidence of the confession.

Further the authentication requirement has import primarily in jury trials, if evidence of authencity is lacking in a bench trial, the trial judge will simply dismiss the evidence as unpersuasive or irrelevant.

In systems of proof based on the Nigerian law almost all evidence must be sponsored by a witness, who has sworn or solemnly affirmed to tell the truth. The

bulk of the law of evidence regulates the types of evidence that may be sought from witnesses and the manner in which the interrogation of witness is conducted such as during direct examination and cross of witnesses.

Other types of evidentiary rules specify the standards of persuasion (e.g proof beyond a reasonable doubt) that a trier of fact whether judge must apply when it assesses evidence.

Today all persons are presumed to be qualified to serve as witnesses in trials and other legal proceedings and all persons are also presumed to have legal obligation to serve as witnesses if their testimony is sought. However legal rules sometimes exempt people from the obligation to give evidence and legal rules disqualify people from serving as witnesses under some circumstances.

Witness competence rules are legal rules that specify circumstances under which persons are ineligible to serve as witnesses e.g nor judge is competent to testify in a trial in which the judge serves in that capacity, so also a person is deemed not competent to testify as to statements of or transaction with a deceased opposing party.

The Nigerian law set out the rules that regulates the procedure of witnesses whom are capable to testify in a court of law.

Islamic law is strives to ensure that justice does not only reign but fully implemented. And one of the way of ensuring justice is done is through judicial system. In order to ensure justice in judicial system, islamic law laid down the law of proof known as evidence (Bayyinah). The purpose of evidence in islamic law is to

avoid punishing innocent persons through errors i.e to set the innocent free and punish the offender if found guilty.

It is for this reason that islamic law made it incumbent on claimant to produce a piece of convincing evidence in support of his claim, on the basis of which decisions of courts are given.

In both civil and criminal proceedings, claims are proved in one of the following ways:

1. Through written or oral confession, (Iqrar)
2. By oral testimony (Shahada) which is the topic of research
3. By oath (Al-yameen)
4. By circumstantial evidence (Al-ithbaat bi Qaraa'in al Ahwaal)
5. By documentary evidence (Alkitab)
6. By opinion of experts (Raayul-khabir)
7. Through the knowledge of Judge (Ilmul-Qadi)
8. By hearsay evidence (Assimaa'a)

Other method of proof such as swearing on oath, circumstantial evidence, documentary evidence, experts evidence, knowledge through the judge and hearsay evidence do not form part of the scope of this work.

In islamic law great importance has given to testimony (Shahada).³ for that reason:

Allah said:

(O you who believe! Be staunch in justice witness for Allah
even though it is against you or your parents or kindred)⁴

³ Chowdhury, A., Principles of Evidence in Islam, A.S. Noordeen, Kuala Lumpur, Malaysia, 2004, p.1.

Allah said:

(And call to witness from among your men two witnesses, and if two men are not available then one man and two women whom you approve as witnesses, so that if the one makes an error the other will remind her...)⁵

Considering the significant of proof in both civil and criminal litigations, the messenger of Allah (S.A.W) was reported to have said:

Were people to be given whatever they claim (without proof) they would have claimed the property of other people and their blood, i.e lives, but establishment of proof i.e. al-bayyina is on the claimant and oath is administered on who refutes the claim i.e. defendant.⁶

There are two separate stages as far as testimony is concerned, the period of conceiving a particular piece of evidence (Attahammul) is one stage and the period of rendering such testimony in evidence (Aadaa'a) is another stage, and is not every bit of what one perceives or views that comes before court, the court will only satisfied with the oral testimony that will assist in ensuring justice.

The research work will put emphasis on Tesimony in Nigerian law with a particular reference to Islamic law, it is known that the Nigerian legal system enjoys three different laws i.e, a. The English common law, b. The Customary law, c. and The Islamic law.

⁴ Qur'an 4:135

⁵ Ibid, 2:282

⁶ Abdulwahab, A.A., Commentary on Forty an Nawawi's Collection, Arabiyya House for Publishing and Distribution, 1989, p.98

But park in his superb book *The Source of Nigerian Law* of the view that:

The term customary law for throughout the federation it includes islamic law. This is made explicit in the north by section 2 of the Native Courts Law which provides that: thus the practical purposes Islamic law and the various tribal law are treated alike, though there are many theoretical distinctions between them. In particular Islamic law originates from outside Nigeria, and is not a purely indigenous phenomenon.

Consequently it is not grounded in any particular locality, and can apply in appropriate cases throughout the country in large parts of the North, however it has supplanted the local system almost entirely, and occupies the same position in relation to those areas as does Igbo law to most of the west.

It seems that islamic law is not always uniform throughout Nigeria, but in the main it is the Maliki system that prevails.⁷

1.2 STATEMENT OF PROBLEM

One of the avenue of ensuring justice in the court of law is TESTIMONY, it is obligatory to convince the court about an offence that occurred which is punishable in the eyes of law, or a right that should be entertain in order to seek for redress and remedy i.e to return it back to the owner, or claiming for damages, in all of the above situations a case must be proved beyond a reasonable doubt in criminal matters, or the evidence will lies on preponderant possibility in civil cases.

⁷ Park, A.E.W., *The Sources of Nigerian Law*, Sweet and Maxwell, London, 1985, p.66

Burden of proof is a right of parties in dispute, they will play a positive role in trying to prove or confute a case before the court and the judge under the authority of the court will weigh between the two evidences.

It is clear that burden of proof may refer to the ultimate burden of establishing a case either by preponderance of evidence as in civil cases or beyond a reasonable doubt as in criminal cases, the burden of producing evidence whether at the beginning of a case or at any later moment throughout the trial, that is the burden of proof in the sense of introducing evidence in proof of certain facts.⁸

General burden of proof in criminal cases, is indeed provided in 1999 Nigerian constitution that:

Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty.⁹

While in civil cases it is stated in Evidence Act that:

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.¹⁰

The above law expressly stated that the accused can not be regarded as a guilty person until the prosecution satisfy the court that the accused is guilty. But the constitution moves further to state that:

⁸ Aguda, T.A., The Law of Evidence, Spectrum Law Publishing, Ibadan, 2009, p.212

⁹ Section 36 (5), 1999 Constitution of the Federal Republic of Nigeria

¹⁰ Section 135 (1), Evidence Act, 2011

Provided that nothing in this section shall invalidate any law by reason only that the burden of proving particular fact.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.¹¹

Therefore burden of proof as provided in the constitution is of two types that depends on or upon the party to any given case.

- a. Burden of proof on the prosecution to prove the accused person guilty of an offence or crime.
- b. Burden of proof on defence to disprove or cast doubt to the prosecution case.

In every dispute there are at least two litigating parties, the plaintiff and the defendant, the former claims what is contrary to the apparent facts and the defendant denies such claim. The burden of proof lies on the plaintiff because what is apparent is presumed to be the original state, if the plaintiff has no proof and the defendant denies the claim, he will then be given an oath after which the plaintiff's suit must fail.¹²

In Islamic Law, burden of proof means liability upon a party who brought his case to a court to provide evidence as to the truth of his claim, failure of which judgement would not be given on his favour unless the adverse party admits the plaintiff's claim positively.

¹¹ Ibid, Section 135 (2)

¹² Cowdhury, A., The Islamic Law of Evidence, Op. Cit. p.4

In *Danjuma V. Baaji*¹³ The court of Appeal Jos Division commented on wrongly producing witnesses in procedure of Civil Area Court Gombe thus:

I cannot understand how the trial court first ordered the defendant (and not the plaintiff) to prove his case. Hajja Baaji never took the matter to court. The facts as stated in the record of proceedings do not show that Hajja Baaji could be a plaintiff. After the statement of the claimant the defendant (Hajja Baaji) merely denied the claim. Instead of the judge to order the claimant to adduce Evidence in proof of his claim by calling the required witnesses, that court directed the defendant to call witness which was done by the defendant.

The court below therefore cannot, with due respect be right in upholding the decision of the upper Area court which in turn affirmed the wrong decision of the trial court. Moreover before the afore cited comment by the court of Appeal, the said court had held inter alia that the trial judge did not discharge his primary duty at the onset, to determine who is the plaintiff and the defendant among the parties that appeared before him.

Also in the case of *Dakasoye V. Dakasoye*¹⁴ the Court of Appeal Kaduna Division, Per Coomasie J.C.A. (as he then was) while commenting on procedural lapses of Upper Area Court, Yankaba (Kano State) observed that: “..... some of the

¹³ *Danjuma V. Baaji* (2000) 7, N.W.L.R. pt. 396, p.406

¹⁴ *Dakasoye V. Dakasoye* (2000) 3, N.W.L.R. pt. 647, p.50

Area Courts and even Upper Area Courts fall frequently into the mistakes of asking the defendant to call his or her witnesses in the event that the plaintiff failed to call required number of witnesses or even when the claimant failed completely to call any witness. In such a situation the court should call upon the defendant who is in possession to take (Yaminul Qada'a) the oath of judgement and dismiss the claim of the plaintiff.

Also in the case of Maryam V. Sa'adu¹⁵ the Magistrate ordered Maryam to produce her evidence i.e witness that will testify before the court to support her allegation and convince the court that her ex husband Sa'adu directed Zaheed (a classroom teacher in their children's school) to disgrace and disallow her access to their children whenever she visited the children in the school, Zaheed discharged his assignment and sent her away with insulting her.

She failed to produce the witness and the accused outrightly denied the allegation after which the case was dismissed.

In Kinnami V. Borno Native Authority, it was stated that: in Moslem law, as in English law, it is not the duty of the accused to prove his innocence. The duty is upon the accuser to prove his accusation. There is a presumption that an accused person who denies accusation is innocent, which makes it the duty of the accuser to prove his guilt.¹⁶

It is interesting for the legal luminaries to see that there is a broad consensus of the facts before it can be well established and that will lead to an appropriate decision.

¹⁵ No. 55/2013/Magistrate Court Tudun wada Zaria, Kaduna State, (Unreported)

¹⁶ Kinnami V. Borno Native Authority (1957) N.R.N.L.R.

It is also a matter of fact that before a claimant can win his claim he will provide a concrete evidence that will convince the court, otherwise he will lost his claim, there are some challenges disrupting the court's procedure in establishing cases through oral testimony the issues of consideration are: subject matter before the court i.e condition of claims (shurut da'awa), the competency of parties in dispute and jurisdiction of the court.

There are also issues to be put into consideration on witnesses and weighing their evidence such as: a. Qualification of a witnesses, b. Reception and admissibility of evidence, c. Is it true or false evidence, d. Is there any clashes of the evidence, e. Injuring Tarjih.

The rules of oral testimony are derived from caselaw and are applied by the courts to ensure the reliability of the testimony that is relied on, to reach a decision, however a judge errs in law if he gives no weight to a document because its contents were not proved in accordance with the rules of testimony.

Thus; the assessment of the testimony should be framed in terms of the credibility and trustworthiness of the evidence as that is the test set out in our courts proceedings, weighing of testimony tend to support the position of evidence either to admit or to reject it completely.

Further it is preferable to assess the credibility of the testimony based on total evidence presented, credible decisions are not always easy to make and often require careful thought and analysis if not the hearing process would become very slow and tedious.

In light of the foregoing and in order to overcome the problems of losing claims due to lack of sound oral testimony, research work of M.A Laws level is a welcome idea.

1.3 AIM AND OBJECTIVES

Since legal materials on proof by oral testimony in Nigeria law are mostly scattered in our leading books, the main aim of the thesis is to produce a material that will serve as an easy reference in Evidence law, also to equip the litigants or disputant parties on an ideal way of presenting or testifying their facts before the court of law to make it admissible.

It is part of the objectives of the work to:

Analyze the problems the courts are facing when adopting Testimony to establish or confute cases with a view to profer solutions.

Furthermore the thesis work will also analyze the concept of testimony in Nigerian law i.e Common law and Islamic law in particular with a view to arrive at a correct legal material as contribution in the area of proof.

1.4SCOPE OF THE RESEARCH

It is hoped that the research work will be restricted to Nigerian law of proof i.e Common law and Islamic law with particular reference to principles of proof by Testimony as one of the various means of evidence in both criminal and civil cases under Islamic law.

1.5METHODOLOGY

The doctrinal research method that is to say library oriented which involves the study and analysis of available literature, (i.e Evidence textbooks, judicial

authorities, journals), in order to determine the practicality or otherwise of the issue in question, is used.

1.6 JUSTIFICATION

In view of the fact that dispute can arise in our day to day activities and the court can adopt a sound and convinced oral testimony as a basis of its decision, there is an ardent need for the entire citizens to know more about Testimony so that they will know how to establish or refute cases.

In view of the above this research work should be interested to Judges, Lawyers, Academicians, and it will also be equally useful to general public.

1.7 LITERATURE REVIEW

In the process of this research work, emphasis is or would be place in bringing the two different laws together to deliberately point out the untouched areas in the text written by learned minds in the field who have strictly focussed on single aspect of law of Evidence generally some of the literatures consulted are as follows:

Ismaeel, richly discussed various means of proof in his book¹⁷ Commentary of the Sudanese Evidence Law, however , he laid emphasis on the means of proof as applied in the criminal matters only ignoring the civil cases.

Aguda, in his book¹⁸ discussed intensively and extensively the principles of Evidence from relevancy, means of proof, documents, production as effect of Evidence and finally closed his discussion with witness, he also pointed out the relevant reference to the law of Evidence Act, alongside with a large number of

¹⁷ Ismaeel, M.F., Commentary on the Sudanese Evidence Law, University Press, Khartoum Sudan, 2009, pp. 38-56

¹⁸ Aguda, T.A. Op. Cit. pp. 297-379

judicial decision, but the author's work is silent and ignored the principles of the law of Evidence in the eyes of Islamic Law, this is an omission that requires an action to be taken.

Nwadialo,¹⁹ explained the source of Nigerian Law of Evidence, he showed the matters that need not to be proved by Evidence i.e. Formal Admissions, Judicial Notice and Presumptions, he also observed the facts that have to be proved by Evidence, i.e. Facts in issue, Relevancy of facts, Resgestae, Facts relevancy on special ground e.t.c. he rightly observed facts generally irrelevant but which may be proved in exceptional cases on one hand while on the other he takes a look at relevant facts but the proof of which is not allowed.

The author's work on the topic should be enough to exhibit the admission and confession with an accurate explanation, he furthermore considered the proof right from Burden of proof in both civil and criminal cases, standard of proof in both civil and criminal cases and corroboration, its nature and the cases that required corroboration under Evidence Act.

In chapter fifteen of the book, the learned author dealt with witness: competence and compellability, competence of children, competence of parties to civil suits and their spouses, competence in criminal proceedings, witnesses for the prosecution, witnesses for the defence and examination of witnesses. However with due respect the work did not go far enough to discuss the aforementioned issues under Islamic Law.

¹⁹ Nwadialo, F., Modern Nigerian Law of Evidence, University of Lagos Press, Lagos, 1999, pp. 15, 465-541

Bambale, in his book²⁰ dealt with the concept of crime, features of Islamic criminal liability. He laid great emphasis on capital punishments (Hudud) where he rightly exhibited and explained the crimes and the punishments attached to each crime which gives a clear, comprehensive and all-embracing view on Islamic criminal justice system.

He also discussed the various means of proof for establishing some criminal offences such as Zina (Adultery), Qadhf (False accusation), Hiraaba (Brigandage, Highway robbery) e.t.c

Chowdhury, In his book²¹ titled Principles of Evidence in Islam, he highlighted and enlighten the principles of evidence, ranging from Testimony (Shahada), Admission, Circumstantial Evidence, Oath and Expert opinion, he only explains the principles of proof as applied in the criminal matters ignoring the civil matters.

Abubakar, popularly known as Alkafawy in his book²² extensively discussed the general principles of islamic law of evidence relating to criminal cases, but the author's work did not give attention to proof on civil matters. This is a serious ommision.

Awdah, (of the blessed memory) in his book²³ Islamic Criminal Law discussed the principle of Testimony (Shahada) as a proof of the offences in some criminal offences, such as a assault against an Embryo which terminates the life of child resulting in Abortion.

²⁰ Bambale, Y.Y., Crimes and Punishment Under Islamic Law, Malthouse Press Limited, Lagos, Nigeria, 2003, pp. 1-73

²¹ Chowdhury, A., Principles of Evidence in Islam, Op. Cit. pp. 1-75

²² Abubakar, M.S., Some Principles of Islamic Law of Evidence-Murafa'at, AMD Designs and Communication (Printers and Publishers), Keffi, Nigeria, 2012, pp. 1-221

²³ Awdah, A., The Islamic Criminal Law, Darut-turas Library, Cairo, Egypt, 2005, pp. 276-544

He also discusses other offences such as fornication, its proof and other offences and their proofs. He regrettably failed to discuss proof in civil cases, this is a serious omission which needs to be remedied.

El'imairi,²⁴ rightly dealt with issues in respect of principles of Evidence under Islamic Law, he discussed the conditions of the claim, parties to a dispute, Acknowledgement, he also discussed the authority for Evidence, the required conditions of witness and the number of witnesses in different cases.

However with due respect, the value of the work of the author centered on Islamic Law ignoring the principles of Evidence under English Law.

Alkalaby, in his book²⁵ *Laws of Jurisprudence* talked on Testimony (shahada) and the conditions which the witnesses must satisfied, the degrees of Testimonies and witnesses and also the consequences that may happened as a result of retraction or withdrawal from Testimony, but could not discuss proof in both criminal and civil litigation.

Azzuhaily, in his book²⁶ *The Concise on Islamic Jurisprudence* extensively discussed the concept of Testimony, the conditions required to be satisfied in a valid Testimony by a non muslim and the penalty that should be imposed on a false witness (perjury). He however , not discussed or provide answers to proof on civil litigations.

²⁴ El-imairi, M.T., *Murafa'at Procedure and Evidence in Shari'a Courts*, Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria. (Unpublished), pp. 28-75

²⁵ Alkalaby, M.A., *Qawaneen elfiqhiyya*, Dar elkutoub el'ilmiiyya, Beirut, Bebanon, 1998, pp. 219-233

²⁶ Zuhaili, W., *Al-wajeez Fil Fiqh al-islamy*, Darul Fikr, Damuscuss, 2002. pp. 540-570

Salihu, devoted the last chapter of his book²⁷ to a detailed discussion of Testimony from its definition to its legality, and his opinion on the required conditions of witness. He move further to laid down the related principles of testimony. The work however did not cover the application of Testimony on both civil and criminal matters.

Isma'eel, in his book²⁸ did not did a thorough job with regards to testimony, the only areas he touched is the ggeneral introduction to testimony and the Islamic stand on receiving fees over testimony.

He further discussed the modes of delivering testimony, the work however did not cover the application of testimony on civil and criminal matters which is an ommission that needs an action to be taken.

Abdussalam, In his book²⁹ Commentary on the Tuhfatul Hukkam, the author makes an extensive discussion on adjudication and its fundamentals, procedure of ascertaining who is a plaintiff and who is a defendant was discussed. The procedure of stating claim by the plaintiff and the manner in which the defendant is to respond to the plaintiff's claim; the relationship between courts within same jurisdictional district and out had been discussed. He also extensively examines testimony of witnesses, oath and matters relating therefrom.

It is these gaps or ommissions in the present literature on testimony and issues related thereto and further development creeping into litigation in Nigeria that the thesis intends to fill.

²⁷ Salihu, A. Alfiqh almuyassar alal kitab wassunna, Alhadyi elmuhammadi Library, 2011. pp295-320

²⁸ Isma'eel, M.B, Alfiqh el wadih, Manar House for Publication and Distribution, Cairo, Egypt, 1998. pp. 330-338

²⁹ Abdussalam, A.A, Commentary on Tuhfatul Hukkam, Mustafa Al-Babi al-Halabi and Sons Press, 1951.p. 360

By bridging the gaps, the thesis will be unique and different from previous research works in the realm of Evidence in Nigeria.

1.8 ORGANIZATIONAL LAYOUT

For proper assimilation of this work, it is prudent to subdivide it for easy understanding. This research work has been broken down into five chapters.

Chapter one is the General introduction which includes: introduction, statement of the problem, aims and objectives of the research, methodology, justification, literature review, and organizational layout.

Chapter two contains a discuss on the sources of Islamic law of Evidence which includes the Qur'an, Sunnah (Prophetic traditions), Classical work of Islamic jurisprudence, Contemporary works of Islamic jurisprudence by the contemporary islamic law jurists, Constitution of the Federal Republic of Nigeria 1999 as amended, Sharia courts' Rules and the Evidence Act.

Chapter three contains a discuss on the concept of testimony which includes the principles of the oral testimony, the required conditions of witness and the divergent views of scholars in respect of conflict between witnesses in Nigerian law.

Chapter four discusses the oral testimony as a means of proof in establishing criminal cases such as theft, adultery, drunkenness, robbery e.t.c. Also the chapter discusses the oral testimony as a means of proof in establishing civil cases such as sale contract, loan, mortgage, gift, marriage, divorce, revocation.

Chapter five concludes the research work and consistsof a summary of the previous chapters, findings and recommendations.

CHAPTER TWO

SOURCES OF ISLAMIC LAW OF EVIDENCE

2.1 Introduction:

Islamic law is divine in origin and it represents the will of Allah which must at all times be obeyed. Islamic law is not found in any one code but must be sifted through several sources (adillah). Literally, dalil means a guide to something;³⁰ proof, indication or evidence. Technically, it is an indication in the source from which a practical rule of Islamic law is deduced. The rule so obtained may be definitive (qat'i) or it may not be definitive (zanni) depending on the nature of the subject, clarity of the text, and the value which it seeks to establish.³¹

Some Muslim jurists have drawn a distinction between dalil (source) and amarah (sign or allusion) and apply dalil to the kind of evidence which leads to a definitive ruling. Amarah, on the other hand, is reserved for evidence or indication which only leads to an indirect ruling³². Most of the rules of Islamic civil procedure are not derived from text, but were extracted from legal reasoning and deductions of jurists through istihsan (juristic preference), which can be found in numerous classical and Contemporary works. It is to be noted that the Qur'an and even the Sunnah contain only general rules of Islamic law of Evidence. The Qur'an, Sunnah, classical and contemporary works of Islamic jurisprudence are sources of Islamic Law of Evidence in Nigeria. Apart from these sources, the 1999 constitution, various enabling statutes, rules of Courts and Decisions of superior Courts on Islamic law of Evidence are relevant sources to the topic which render assistance to courts in

³⁰ Khallaf, A. Ilmu usulil fiqh, Dar elhadith, Cairo, Egypt, 2003, p.26

³¹ Badran, A.B., Usul elfiqh al-islamy, Mu'assasah shabab al'jami'ah, Alexandria, Egypt, p.46

³² Al'Aamidy, S.A., Al-ihkaam fee Usulil Ahkaam, Almaktab al'islamy, Beirut, Lebanon, p.9

conducting trials in Nigeria. With this brief introduction subsequent pages of the chapter will consider sources of Islamic Law of Evidence.

2.1.1 Qur'an

Qur'an is the basis of Islamic law; it provides authority for Islamic legislation. Qur'an literally means 'reading or recitation'. Technically it may be defined as: The words of Allah revealed unto Prophet Muhammad Ibn Abdullahi, through angel Jibril in Arabic language, so that it would be an authority to show the authenticity of his Prophethood, messengership and a Constitution for the entire Muslims to serve as guidance to them in the worship of Allah by way of rehearsing it; it is recorded in the holy Book, which begins with Suratul Fatihah and ends with Sura al-Nas, transmitted to us through transmission and it is protected against any alteration or changes.³³

There are 114 suras (chapters) and 6235 (ayat) of unequal length in the Qur'an. Each chapter has a separate title. The contents of Qur'an are not classified subject wise. The verses on various topics appear in unexpected places and no particular order can be ascertained in the sequence of its texts³⁴. To give just a few examples, the command concerning prayer appears in the second verse. In the midst of other verses which relate to the subject of divorce (al Baqarah) 2:228 – 248). In the same verse, there are rules which relate to wine drinking, apostasy and war, followed by passages concerning the treatment of orphans and the marriage of unbelieving women. Similarly the verse relating to pilgrimage occurs both in chapter al- Baqarah

³³ Khallaf, Op.Cit. p.26

³⁴ Kamali, M.H., Principles of Islamic Jurisprudence, Islamic Text Society, Cambridge, England, p.14

(196 – 203) and chapter al-Hajj (22: 26 – 27). Rules on marriage, divorce and revocation are found in the chapter al-Baqarah, al-Talaq, and Nisa.i.³⁵

The Qur'an deals with different subjects and only a small part of it deals with what is purely law. Rules relating to non-ritualistic matters in the holy Qur'an in legal parlance are referred to as Mu'amalat, in contemporary times these rules (Muamalat) vary according to the purpose for which they are used. The holy Qur'an deals with rules of Islamic personal law/status (Ahkamul Ahwalul Shakhsiyyah) in about seventy verses. Civil rules (al- ahkamul madaniyya) is also a subject the Qur'an deals with, it regulates relationship between individuals and their transactions such as sale, hire, mortgage, pledges, surety, company, loan, etc. Another set of rules contained in the holy Qur'an is: criminal rules, these rules deal with crimes, punishment which aim at protecting sanctity of human life property, dignity and rights. Criminal rules also define the relationship between victim, culprit and society, about thirty verses can be found in the Qur'an dealing with these types of rules.

Furthermore rules of procedure (ahkamul murafa'at) have being enunciated in the Qur'an; the rules deal with adjudication, testimony of witnesses and oath. These rules are meant to regulate proceedings; there are about thirteen such verses in the Qur'an. The holy Qur'an also provides constitutional rules (ahkamul dusturiyyah) these are rules relating to system of governance and its basis. It has defined relationship between governments and the governed and it decides what rights are available for individuals and groups of people. There are about 10 verses in the holy Qur'an that clearly deal with these kinds of rules. The holy Qur'an has also provided

³⁵ Ibid, p.15

rules of international relations and those of economic and financial matters in about twenty five and ten verses respectively. However, Ibn Arabi and al-Ghazali opined that there are 500 verses in the Qur'an which give legal provisions. Some scholar's states that the verses are more than 500, while others view the number of verses as not more than 200.³⁶

By a community reading of all rules in the holy Qur'an it is apparent that all the rules relating to worship, Islamic law of personal status and inheritance are self-explanatory and most of these rules leave no room for employing rationality.

But for rules relating to non-worship such as civil, criminal, constitutional and economic rules, these are general in nature. They constitute basic principles and do not contain detailed explanations except in very rare cases. These rules are developing by the development of the society, that is why the Qur'an limited them to general rules, basic principles so as to allow the leaders of any time of age to make laws within the rules of Qur'an without contradicting it³⁷. The Qur'anic verse that directly defines itself (the Qur'an) as a source of Islamic law is Q 4: 58: "O you who believe! Obey Allah...." obedience to Allah in the verse refers to obedience to the Qur'an.

The Qur'an is the chief source of Islamic law. It is the final authority for both religion and the laws governing all Muslims in their individual and social behavior. It is the original and primary source of Islamic law.³⁸

³⁶ As-saleeh, M.A., Masadirut Tashri al'islami wa manahijul istinbaat, Al'ubaykaan, Riyadh, Saudi Arabia, 2002, p. 79

³⁷ Khallaf, Op.cit, p.37

³⁸ Ambali, M.A., The Practice of Muslim Family Law in Nigeria, Tamaza Publishing Company, L.T.D., Zaria, Nigeria, p.4

However, the most important feature of Qur'anic legislation, is its division into Qat'i(definitive) and Zanni (speculative), precepts as it relates to almost every aspect of law.

Qat'I qur'anic legislation is a provision of the Qur'an which is clear and specific it has only one meaning and accommodates no other interpretation.³⁹ An example of this is the text on the entitlement of the husband in the estate of his deceased wife.

“In what your wives leave your share is a half, if they leave no child ...”⁴⁰ Other examples are “The adulterer, whether a man or woman, flog them each a hundred stripes ...”⁴¹. And “those who accused chaste woman of adultery and fail to bring four witnesses (to prove it) flog them eighty stripes ...”⁴² The quantitative aspect of these Qur'anic rulings, namely one half, one hundred and eighty are self-evident and therefore not open to interpretations. These rulings of the Qur'an are Qat'i (clear cut or definitive) their validity is unequivocal and everyone is bound to follow them, they are not open to other interpretations. Furthermore where a Qur'anic provision can accommodate various interpretations, such verse is Zanni (not definitive) in character. The Qur'an itself should be looked at as a whole to find the necessary elaboration elsewhere in a similar or even different context. Other sources that can supplement interpretation of Zanni, Qura'nic legislation are: Hadith, when necessary interpretation can be found in it, becomes an integral part of the Qur'an and will carry a binding force. Next in this order comes interpretation of Zanni Qur'anic legislation by companions who are particularly well qualified to interpret it in light

³⁹ Khallaf, Op. cit. p.38

⁴⁰ Qur'an, 4:12

⁴¹ Ibid, 2:196

⁴² Ibid, 24:4

of their close familiarity with the text, the surrounding circumstances, and teachings of the Prophet (SAW).⁴³

Where a provision of the Qur'an indicates a meaning that can accommodate various interpretations, Such verse is Zanni or ambiguous in character.⁴⁴ In other words, the Zanni text is a Qur'anic legislation conveyed in a language that is open to different interpretations: "Prohibited to you are your mothers and your daughters...."⁴⁵, is an example of Zanni Qur'anic text. The word *banatukum*: your daughters could be taken for its literal meaning: a female child born to a person either through marriage or illicit sexual relations (*Zina*). Or its legal meaning, a legitimate daughter (female child born in a marriage). Jurists have disagreed as to which of the two meanings (literal or juridical meanings) should be read into the Qur'anic text. The Hanafis are of the opinion that female child born to a person in marital relations or illicit sexual Intercourse should be read into the text. Whereas the Shafi'is opined that only a legitimate daughter should be read into the text⁴⁶.

In a similar vein, the Ulama (scholars) have differed on the definition; of futile, as opposed to deliberate oaths: "God will not call you to account for what is futile (*Al Laghw*) in your oaths, but He will call you to account for your deliberate oaths ...".⁴⁷ According to the Hanafis, a futile oath is one which is taken on the truth of something that is suspected to be true but the opposite emerges to be the case. The majority view of jurists have, on the other hand, held it to mean taking an oath which is not intended, that is, when taken in joke without any intention. Similar

⁴³ Abu Zahra, M. *Usul elfiqh*, Dar elfikr, Arabi, Cairo, Egypt, 1958, p.71

⁴⁴ Matlub, A., *Usul elfiqh el'islami*, Mu'assasatul Mukhtar lil nashr wattazi', Cairo, Egypt, 2005, p.64

⁴⁵ Qur'an, 4:23

⁴⁶ Sha'abaa, Z.A., *Manhaj al-Qur'an Fi Bayan al-Ahkaam* 1971 in ed., Muhammad , T.U., *Alfiqh al-islami Asas attachri*, Matba al-ahram, Cairo, Egypt, pp.21-22

⁴⁷ Qur'an, 5:92

differences have arisen concerning the precise definitions of what may be considered as a deliberate oath (Yamin al-Mu'aqqabah).⁴⁸

However, there are some instances where the scope of disagreement over the interpretation of the Qur'an is fairly extensive. These are Ijtihad opinions; Ijtihad is not only permissible but is encouraged. The Shariah, restricts ijihad to the Mujtahidun to investigate and express an opinion. They may be right or they may be wrong in either case, the diversity of opinion offers the political authority range of choice from which to select the view it deems to be most beneficial to the community. When the ruler authorizes a particular interpretation of the Qur'an and enacts it into law, it becomes obligatory for everyone to follow only the Authorized Version.⁴⁹

2.1.2Sunnah

Literally Sunnah means way or path, be it good or evil. It may be a good example or bad, and it may be set by individual, a sect or a community.⁵⁰ In pre-Islamic Arabia, the Arabs used the word "Sunnah" in reference to the ancient and continued practice of the community which they inherited from their fore-fathers. Thus it is said that the pre-Islamic tribes of Arabia had their own Sunnah which they considered as a basis of their identity and pride. Sunnah in a literal sense implies an established practice or course of conduct. Technically, the Sunnah has a specified/restricted definition, depending on the scholar that offered the definition. The scholars of Hadith have defined Sunnah as: what ever is reported about the holy Prophet (P.B.U.H) be it his sayings, actions, approvals, description of his physical features,

⁴⁸ Sha'aban, Op. Cit. p.22

⁴⁹ Shaltut, M., Al'islam Aqeeda wasshari'ah, Matba' Dar- elqalam, Kuwait, p498

⁵⁰ Al-Isnawi, J.A., Nihayatu sul fi sharhi Mnhaj al-wusul ila ilm al usul, Matba' attawfeeq, Cairo, Egypt, VOL. II, p.170

character even if it is before his apostleship. To jurists of bias to jurisprudence, Sunnah means: whatever is reported from the Holy Prophet (P.B.U.H), his Sayings, actions or approvals.⁵¹ It can be discerned that, scholars of jurisprudence have excluded the description of the physical features of the Prophet from the definition of Sunnah.

According to jurists of jurisprudence, Sunnah is an action of the Prophet, if done by a Mukallaf (a competent person who is in full possession of his faculties) will be rewarded for doing it and will not be punished for abandoning it. For instance supererogatory prayers (Nawafil). Sunnah is used among jurists to mean the opposite of (bid'a) innovation.

There is consensus among jurist on the importance of Sunnah in Islamic law and it is the second source of legislation, obligatory on the Mukallaf to know and observe it.⁵²

The differences of scholars in technical definitions of Sunnah can be attributed to the different purposes in which the scholars view the Sunnah. For example, the scholars of Hadith restricted works to the Holy Prophet as a worthy of emulation and leader to be followed. That is why they reported everything about the Prophet. For jurists (Ulama of Usul) their main concern with Sunnah is, the holy Prophet as a custodian of Islamic law that explains the Qur'an, the explanation which guides jurists in arriving at the best way for extracting legal rules; and he also set a constitution for

⁵¹ Al-Saleh, Op. Cit. p.109

⁵² Ibid, pp. 111-112

Muslims. This is why the jurists concentrated their works on his (prophet) actions, sayings and approvals from which legal rules are ordinarily extracted.⁵³

However the legality of the Sunnah as a source of Islamic law can be found in the holy Qur'an. Allah Has ordained compliance with whatever the Prophet came with and the abstaining from what he prohibits.⁵⁴ And He (Allah) associates obedience to Him with obedience to the holy Prophet. Whoever obeys the Prophet indeed has obeyed Allah.⁵⁵ The Qur'an is categorical about obedience to Holy prophet: "Say: obey Allah and his messenger ..."⁵⁶ The Muslims are enjoined to submit to the Holy Prophet as the final arbiter in whatever dispute that arises between them⁵⁷.

The Holy Prophet is saddled with the responsibility of explaining the content of the Qur'an. The words of the prophet according to the Qur'an are divinely inspired. Should Muslims happen to dispute over something, the Qur'an enjoins such dispute to be referred to Allah and to the messenger.⁵⁸ To refer a dispute to Allah means recourse to the Qur'an, and referring it to the messenger means recourse to the Sunnah. The rulings of Qur'an and Sunnah are binding on the Believers in that they are not at liberty to differ with the dictates of the divine will or to follow a course of their own choice. It is clear from afore-mentioned verses and other passages in the Qur'an, that the Sunnah derives its legitimacy from the Qur'an. Sunnah is next to the Qur'an according to hierarchy in all legal matters; conformity to the terms of prophetic legislation is a Qur'anic obligation on all Muslims.

⁵³ Ibid

⁵⁴ Qur'an, 59:7

⁵⁵ Ibid, 3:132

⁵⁶ Ibid, 3:32

⁵⁷ Ibid, 4:65

⁵⁸ Ibid, 4:59

Furthermore legality of Sunnah has backing of the Sunnah itself. It has been reported that holy prophet used to instruct companions to convey or inform whatever they heard from him to those who were absent. And also he used to urge them (the companions) to understand whatever he informed them about, this is clear evidence that shows importance of Sunnah and its prominent position in legislation.⁵⁹ Legality of Sunnah as a source of Islamic law can be inferred from the works of companions during the lifetime of Prophet and after his demise. It has been established that the companions during the lifetime of the Prophet used to consider his sayings, deeds and approvals as legislation, they considered Sunnah to be binding in line with Allah's command of obedience to Holy Prophet.⁶⁰ Thus when the Prophet sent Muadh Ibn Jabal (R.A) as judge to the Yemen, he was asked to the sources on which he would rely in making decision. In reply Muadh referred first to the "Book of Allah", and then to the "Sunnah of the messenger of Allah".⁶¹ This encounter between the Prophet and Muadh is an example that companions of the Prophet do use Sunnah as sources of Islamic law during his lifetime.

However, after the death of Prophet, companions continued to use the Sunnah as legislation bound to be complied. This is because obedience to holy Prophet as contained in the Qur'an is not restricted to the Prophet's lifetime.⁶² The first two Chaliphs, Abu Bakr and Umar, resorted to the Sunnah of the Prophet whenever they know of it. In case they did not know, they would ascertain if other companions had any knowledge of the Sunnah in connection with that particular issue. It is on record Khalifah Umar Ibn al-Khattab issued written instructions to his judges; he instructed

⁵⁹ Al-saleh, Op.Cit. p. 115

⁶⁰ Ibid, p.119

⁶¹ Abu Dawud, Al-Sunan, Dar el'ihya Sunnah al-Nabawiyya, Cairo, 1975, Vol III, p.154

⁶² Al-saleh, Op. Cit. p.81

them to follow the Sunnah of the Prophet whenever they could not find the necessary explicit guidance in the Qur'an.⁶³

2.1.2.1 Classifications of sunnah:

According to Usuliyun sunnah has been classified into; verbal (Qawliyyah), actions (Fi'liyyah) and tacit approval (Taqririyyah).

The other classification of Sunnah is, Legislative and Non-Legislative Sunnah. Sunnah (Qawliyyah) are traditions of the Prophet dealing with those things he enjoined Muslims to do through words of mouth, such as the Hadith; "Whoever kills a warrior (in battle) may take his belongings."⁶⁴ The actual Sunnah (Fi'liyyah) of the Prophet are those things or acts he used to do in his daily activities such as performing prayers, pilgrimage and other acts of worship.⁶⁵ The tacit approval Sunnah (Taqririyyah) of the Prophet consists of the acts and sayings of the companions which came to the knowledge of the Prophet and of which he approved by showing his appreciation and acceptance.⁶⁶ Non legislative Sunnah mainly consists of the natural activities of the prophet such as the manner in which he ate, slept, dressed and such other activities. Activities of this nature do not constitute legal norms. According to majority of jurists, the Prophet's preferences in these areas, such as his favorite colours, or the fact that he slept on his right side etc. only indicate permissibility (ibahah) of the acts in question⁶⁷.

Acts and sayings of the Prophet that relate to particular circumstances such as strategy of war, including such devices that misled the enemy forces, timing of

⁶³ Badran, Op. Cit. p.81

⁶⁴ Assijistaany, A. D., Sunan, Op. Cit. Vol. II, p. 79

⁶⁵ Al-saleh, Op. Cit. p.110

⁶⁶ Ibid

⁶⁷ Khallaf, Op. Cit. pp. 47-48

attack, siege or withdrawal, these are considered to be situational and not part of the sunnah strict sense of the term⁶⁸. However, the legislative Sunnah consists of the exemplary conduct of the Prophet, be it an act, saying, or a tacit approval, which incorporates the rules of Shari'a. The Sunnah may be categorized into three, namely the Sunnah which the Prophet laid down in his capacities as messenger of Allah, as Head of State or imam, or in his capacity as a judge. In his capacity as messenger of Allah, the Prophet laid down rules which are, on the whole complementary to the Qur'an, but also established rules on which the Qur'an is silent. Allocations and expenditure of public funds, decisions pertaining to military strategy and war, appointment of state officials, distribution of booty, signing of treaties, etc. are Sunnah of the Prophet which originates from him in his capacity as imam or head of state⁶⁹.

Sunnah which originates from the Prophet in his capacity as a judge in particular disputes usually consist of two parts; the parts which relates to claims (Da'awa), evidence and factual proof and the judgment which is issued as a result.

The first part is situational and does not constitute general law, whereas the second part lays down general law, with the provision, however, that it does not bind the individual directly, and no one may act upon it without the prior authorization of a competent judge. Since the Prophet himself acted in a judicial capacity the rules that he enacted must therefore be implemented by the office of judge (Qadi).⁷⁰

Hence when a person has a claim over another which the latter denies, but the claimant knows of a similar dispute which the Prophet has adjudicated in a certain

⁶⁸ Ibid

⁶⁹ Shaltut, Op. Cit. p.513

⁷⁰ Khallaf, Op. Cit. pp. 47-48

way, this would not entitle the claimant to take the law into his own hands. He must follow proper procedure to prove his claim and to obtain a judicial ruling.⁷¹

In summary whatever the messenger of Allah did, i.e. be it, a saying, an action or tacit approval constitutes part of his Sunnah from him (action or saying) in his capacity as Messenger of Allah which is intended to be a general legislation, then it is a law and obligatory on Muslims to follow.⁷²

2.1.3 Classical Works of Islamic Jurisprudence

These are writings by early Muslim jurists; their works are widely accepted and have been used for a long period of time. The jurists have shown much insight and intellectual understanding of the principles of Islamic law in their classical writings. Works of classical Islamic jurisprudence cover the whole field of human conduct. Areas dealt with in the classical works include; rituals, prayer, fasting, almsgiving and pilgrimage. Other matters covered by the works are family law, law of contract, law of crimes, law of war and peace, and the law of evidence and procedure.

The general rule of Islamic law of Evidence was provided or laid down during the period of Holy prophet (SAW). The procedure is simple; parties must be present before settlement of a dispute. Burden of proof is on the asserting party and the defendant has to deny on oath the plaintiff's claim. Upon such denial the plaintiff must prove his case but if the defendant refuses to take the oath, judgment should be given in favour of the plaintiff. Possession is also regarded as prima facie proof of the right to hold the property. Thus if evidence of both sides claiming the property was equal the decision would go in favour of the person in possession.⁷³ The early

⁷¹ Shaltut, Op. Cit. p. 514

⁷² Khallaf, Op. Cit. p. 49

⁷³ Ullah, M.A., The Administration of Justice in Islam, Nusrt Ali Nasri, New Delhi, India, pp. 4-5

Muslim jurists have played a vital role in the growth and development of Islamic law of Evidence. The general procedural rules enunciated by the Holy Prophet (SAW) were expounded and shaped by these jurists. Their contribution in the development of Islamic law of Evidence is a source of Islamic law of Evidence. The jurists made their contribution in developing Islamic law of evidence through Ijtihad. The first legal instrument issued pertaining to Islamic law of Evidence was given by Khalifah Umar Ibn Khattab (RA). The letter reads: Jurisdiction is to be administered on the basis of the Qur'an and Sunnah. First understand what is presented to you before passing any judgment... Full equality for all (litigants): in the way they take places in your presence, and in the way you look at them, and in your jurisdiction. That way, no highly- placed person would look forward to your being unjust, not would a weak one despair of your fairness... The burden of proof is the responsibility of the plaintiff, and the oath is upon the denying party. Compromise is always the right of litigants except if it allows what (Islam) has forbidden or forbids what (Islam) has allowed. Clear understanding of every case that is brought to you for which there is no applicable text of Qur'an and Sunnah. In this regard yours is a role of comparison and analogy so as to distinguish similarities and dissimilarities thereupon seeking your way to the judgment that seems nearest to justice and apt to be the best in the eyes of Islamic law. Never succumb to anger or anxiety, and never get impatient or fed-up with litigants⁷⁴

The above quotations are brief extracts from the long letter that has been held authentic by all jurists.⁷⁵ The letter could best be described as an instrument that laid down the foundation for rules of Islamic law of Evidence. The letter established

⁷⁴ Sabiq, S. Fiqhu sunnah, Darul Fikr, Beirut, Lebanon, p. 321

⁷⁵ Ibn el-Qayyim, l'Lam el-Muwaqqi'in, Almunirah Publishers, Cairo, Egypt, p.62

the Islamic Judicial system; Practical Rules of procedure and Evidence which all together made up the civil and criminal Sharia procedural Rules. Some important issues that flow from the letter are: The position of a judge; the jurisdiction of a judge; parties to an action (Plaintiff and the Defendant); equality of parties; statement of claim; burden of proof; judgment, its consequences and review of judgment. Judgment delivered based on Ijtihad by one judge may not be set aside by another merely because the latter happens to have a different opinion on the matter. It is reported that a man whose case was adjudicated by Khalifah Ali (R.A) and Zayd informed Khalifah Umar Ibn Khattab (R.A) of their decision, to which the Khalifah Umar (R.A) replied that he would have ruled differently if he was the judge. To this man replied, “Then why don’t you, as you are the Khalifah”. Khalifah Umar replied that had it been a matter of applying the Qur’an or the Sunnah, he would have intervened, but since the decision was based on Ijtihad, they were all equal in this respect.⁷⁶

The precedent of the companions on this issue has led to the formulation of a legal maxim which provides that: Ijtihad may not be overruled by its equivalent (al-Ijtihad la Yunqad bi- Mithlih). Consequently unless the judge is convinced that his previous decision was erroneous, he must not attempt to reverse it. Thus a judicial decision which is based on the Ijtihad of a particular judge is irreversible on the basis of a mere difference of opinion by another judge.⁷⁷

Furthermore, another area of Islamic law of Evidence in which the Khalifah Umar Ibn Khattab created a new precedent is, accepting the evidence of an expert. Experts of a particular science or art in question were called to give testimony in Court. For

⁷⁶ Ibid, p.177

⁷⁷ Ibid.

instance in a defamatory suit filed by Zibriqan Ibn Badr against a poet Hutaya, the verse in dispute was not clear hence Khalifah Umar summoned another Poet Hassan Ibn Thabit and decided the case according to the latter's opinion.⁷⁸

The Islamic law of Evidence has not experienced any alteration or modification in its development during the times of Khalifah Usman (R.A.) and Ali (R.A.). However, the system of judicial administration remained more or less the same even under the Ummayyad Caliphate.

Moreover it was during the Abbasid period that the science of jurisprudence flourished and attained its golden age. It was in this age that traditions were collected, commentaries on the Qur'an were written and the science of the sources was developed. The four great Sunni Schools of law Hanafi, Maliki, Shafi'i and Hambali became emerged and established. The Abbasids developed a procedure for consulting specialists in the Shari'ah through Muftis and jurists.⁷⁹ However, parties to a litigation could also appear through representatives appointed in accordance with the Islamic law of agency or mandate, called a Wakil. The Wakil had to submit his power of attorney or tawakkil to the Qadi before being allowed to plead.⁸⁰ Most of the rules of Islamic Procedure expounded and developed by classical works of Islamic jurisprudence are based on legal reasoning and deduction through the means of Istihsan (juristic preference).⁸¹ For example, oral testimony is the standard form of evidence in Sharia.

Muslim jurists have insisted on oral testimony and have given it priority or preference over other methods of proof, including confession and documentary

⁷⁸ Ullah, Op.Cit. p. 7

⁷⁹ Ibid, pp. 10-11

⁸⁰ Ibid, p. 13

⁸¹ Ibn Farhun, Op. Cit. p. 169

evidence. In their view, the direct and personal testimony of a witness who testifies before a judge with no intermediary is the most reliable means of discovering the truth⁸². Another juristic preference that shapes Islamic procedure is: where the testimony of two competent witnesses of the plaintiff conflict with the evidence of a defendant's witness that is Mubarriz (i.e witness of proven integrity that excels his peers); some jurists are of the opinion that judgment should be given in favour of the plaintiff because testimony of his two witnesses are more preferable over the testimony of the Defendant's Mubarriz witness. Asbag, a Maliki jurist prefers judgment to be entered in favour of the defendant. (But the defendant must subscribe to the complementary oath). Asbag argued that, the testimony of the Mubarriz witness carries heavy weight that is why he preferred judgment in favour of the defendant.⁸³

The Maliki jurists have contributed in shaping the concept of jurisdictions; the power of Court or judge to entertain an action depends on the subject matter in dispute and parties involved in the case.⁸⁴ A non-traveler shall be sued at his place of residence notwithstanding where the subject matter in dispute is located. In the case of a traveler, an action against him is to be instituted where ever he is found.⁸⁵ Power of a judge to determine a case is restricted to a specified territory. Ibn Asim has stated that, the popular opinion of the Maliki School is that a judge is not permitted to accept or entertain a suit in a territorial jurisdiction of another judge.

⁸² Kamali, M.H., Op. Cit. p.248

⁸³ Daura, M.U., Op. Cit. p. 83

⁸⁴ Al-kafiy, M.Y., Ihkaamul Ahkaam, Farul Fikr, Beirut, Lebanon, p. 13

⁸⁵ Ibid

While the minority view of the school is that, he can entertain the suit provided he notifies the judge that has power over the territory.⁸⁶

Another area of Islamic law of Evidence which the classical works have contributed in shaping is the identification of who the plaintiff is and who is the defendant. In al-Qawanin al-Fiqhiyyah it has been stated that, the plaintiff is the person stripped of advantage in terms of possession, circumstances and convention. The defendant is presumed stronger and thus the burden lies upon the plaintiff to adduce evidence. Some jurists have held that the plaintiff is the one who claims a fact, and the defendant is the one who denies that fact. The Plaintiff could also be in the form of person who sues and the defendant is the one who is sued.⁸⁷

Islamic law of Evidence as contained in the classical works attaches much emphasis on clarity and precision of proof that is why they allow judge and the defendant to interrogate the plaintiff who fails to make his proof vivid and clear.⁸⁸

Islamic law of Evidence developed by classical authors were made in consonance with the objectives of the Shari'a; Thus to bring people close to well-being and move them away from harm, even if no authority is found for them in the Holy Qur'an or authentic Sunnah of the Holy Prophet (SAW).⁸⁹

2.1.4 Contemporary Works of Islamic Jurisprudence

The time or period being referred to as contemporary for the purpose of this research is from 1900 to date. Writings made on Islamic jurisprudence within the aforementioned period are termed as contemporary works of Islamic jurisprudence. The

⁸⁶ Daura, M.U., Op. Cit. p.31

⁸⁷ Alkalaby, I.J., Qawaeen el-Fiqhiyyah, Dar el-fikr, Beirut, p.257

⁸⁸ Al-Azhari, S.A., Jawahirul Ikhilil, Dar elfikr, Beirut, Lebanon, p.225

⁸⁹ Ibn Qayyim, A. Turuq elhukmiyyah Fis-Siyasatish Shar'iyya, Al-Mu'assasah al-arabiyya, Lil Tiba'ah, Cairo, Egypt, 1906, p.6

works were written in Arabic and English languages. Contemporary works of Islamic jurisprudence unlike the classical works have not passed the test of time. The works were not subjected to much scrutiny. Unlike classical works, there are no various commentaries written for the contemporary works. Contemporary works covers many fields of Islamic jurisprudence. The authors of contemporary works used to make reference to classical works in their writings.

Common law has influenced the contemporary works of Islamic jurisprudence written in English language. The works were made to spark passion for further research in Islamic jurisprudence.

The Contemporary works of Islamic jurisprudence form a source of Islamic law of Evidence rules. The contributions made by these authors in shaping Islamic law of Evidence are not much, in fact the works are mostly restating the Islamic law of Evidence rules enunciated by the Ijtihad of classical authors.⁹⁰ The works have made additional contributions on the admissibility of the evidence of non-Muslims before Sharia Courts which will be demonstrated later in the work. The authors are of the opinion that Qur'an, the grand norm of Sharia allows the evidence of non-Muslims.⁹¹

Furthermore, Kadi Ambali has opined that, the nature of Nigeria being a multi-religious society where Muslims and people of other faiths freely mix in political, social, cultural and economic interactions recommends that Qur'an 5:106 should be critically examined and intellectually interpreted to give a meaningful Evidence law in Nigerian Courts where Islamic law is applied.⁹² In the case of *Mai Aiki V Mai*

⁹⁰ Ambali, M.A., *The Practice of Muslim Family Law in Nigeria*, Tamaza Publishing Company, Zaria, p.98

⁹¹ *Ibid*, p. 115

⁹² Ambali, M.A. *Op. Cit.* p.113

Daji⁹³ The Court of Appeal, per Murtala Okunola, JCA as he then was held that: “Evidence of a non-Muslim is acceptable and reliable against a Muslim.” The pronouncement of Justice Okunola on this issue is wider and slightly different from the views of most of the Muslim jurists who allowed the evidence of non-Muslim to be admissible against Muslims in cases other than Hudud only. The position held in the case has given the impression of the admissibility of testimony of non-Muslims against Muslim in all cases, Hudud matters inclusive. Moreover, Muhammad Hashim Kamali has made suggestion that recourse to Istihsan can be utilized to shape Islamic law of Evidence rules in the present day time. The learned contemporary author cites an example that oral testimony is the standard form of evidence in Islamic law. Muslim jurists have given it priority over other methods of proof, in their view testimony of a witness who gives evidence before a judge with no intermediary is the most reliable means of discovering the truth.

Contemporary works of Islamic jurisprudence are books of reference in Nigerian courts. One of the works used as an authority by courts is Ruxton’s Maliki Law. In *Gwabro V. Gwabro*⁹⁴, the Court of Appeal quoted a principle of law from the Maliki Law: “Admission is more preferable than the testimony of witness”. Other cases where Court of Appeal relied on Ruxton as authority in its judgment are: *Umma V Bafullace*.⁹⁵ *Ahmad V. Umaru*⁹⁶ where it stated thus: “.....this has been clearly stated in the Maliki Law by Ruxton on page 297 Rule 1536 to the effect that it is permissible under Islamic law for a witness to give evidence in the same case in favour of one another”

⁹³ *Mai Aiki V. Mai Daji* (2004), F.W.L.R. p.189

⁹⁴ *Gwabro V Gwabro* (1998) 4 N.W.L.R. pt.544, p.60

⁹⁵ *Umma V Bafullace* (1997) 11 N.W.L.R. pt.529 p.363

⁹⁶ *Ahmad V Umaru* (1997) 5 N.W.L.R. pt. 503 p.103

2.1.5 Constitution of the Federal Republic of Nigeria 1999

The Constitution of the Federal Republic of Nigeria is a source of Islamic law of Evidence in Nigeria that binds all courts including Shari'a courts. It is an enabling law for the making of the rules of Evidence, for example, Shari'a Court of Appeal. The Constitution also provides provisions relating to right of the parties in dispute to produce Evidence in order to win their case, it is provided in the constitution at exactly section 36 (6) (d) which read as follows: ⁹⁷Every person who is charged with criminal offence shall be entitled to: d. examine in person or by his legal practitioners, the witnesses called by the prosecution before any court or tribunal and obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court or tribunal on the same conditions as those applying to the witnesses called by the prosecution; and e. have, without payment, the assistance of an interpreter if he cannot understand the language used at the trial of the offence.

Furthermore in the constitution there were two legislative lists; the Exclusive and Concurrent at the second schedule part I item 23 of the constitution. The Federal legislative i.e parliament alone could legislate for the whole country over any matter in the Exclusive list and its power in this respect also extended to matters of evidence which were incidental to the subjects under the list. In the case of subjects in the concurrent list the parliament for the whole country or the state could legislate on them. Either of these legislatures was also empowered to legislate on matters of evidence incidental or supplementary to those subjects.

⁹⁷ Section 36 (6) 1999 Constitution of the Federal Republic of Nigeria As Amended

2.1.6 Shari'a Courts' Rules

The constitution of the federal republic of Nigeria was the law that created the Shari'a Court of Appeal of FCT and that of states that requires it. However the constitution empowers the same courts to make rules regulating the processes and smooth running of the court and their judgments is binding on lower courts.

In *Usman V. Kareem*⁹⁸ the respondent demanded from the appellant his father's share of a piece of land which the respondent claimed was donated to the family. The appellant on the other hand contended that the land was donated to him personally and not to the family. The matter proceeded to the Area Court wherein judgment was given against the respondent. He appealed to the Sharia Court of Appeal which allowed the appeal whereon the appellant appealed to the Court of Appeal which dismissed the appeal.

It was held by the court that⁹⁹ (1)in cases under Islamic Law a party is not competent to testify in his own case, he can only state his case and call independent witnesses to prove it, (2) under Islamic law a plaintiff's case can only be proved by evidence of i. two unimpeachable male witnesses; ii. An unimpeachable male witness and two more unimpeachable female witnesses; or iii. A male witnesses or two or more female witnesses plus the plaintiff's complimentary oath.

2.1.7 The Evidence Act

The Evidence Act is applied through the whole country and is also one of the main sources of Islamic law of Evidence. It is provided in the Act section 162 that: when person charged with an offence is married other than a monogamous marriage such

⁹⁸ *Usman V. Kareem* (1995), 2, N.W.L.R. pt. 379, 537

⁹⁹ Olakanmi, J., *Synoptic Guide to Evidence Act*, Law Lords Publications, Abuja, Nigeria, 2011, p.243

last named person shall be a competent and compellable witness on behalf of either the prosecution or the defense.

Provided that in the case of a marriage by Islamic law neither party to such marriage shall be compellable to disclose any communication made to him or her by the other party during such marriage.¹⁰⁰

¹⁰⁰ Section 162, Evidence Act, 2011.

CHAPTER THREE

THE CARDINAL PRINCIPLES GOVERNING TESTIMONY

3.1 Introduction

The law of evidence encompasses the rules and legal principles that govern the proof of facts in a legal proceedings. These rules determine what evidence must or must not be considered by the trier of fact in reaching its decision and sometimes the weight that may be given to that evidence.

The law of evidence also is concerned with the type of proof needed to prevail in litigation, the quality of proof is how reliable and dependable such an evidence should be considered before a court of law. There are several types of Evidence depending on the form or source of evidence governs the use of testimony.

In every jurisdiction based on the Nigerian Common Law tradition, evidence must conform to a number of rules and restrictions in order to enable facts to be admissible. Evidence must be relevant, that is it must be directed at proving or disproving a legal element, it is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

In all kinds of trials be it civil or criminal, under the Evidence Act or Islamic Law, it is fundamental principle that for the rendering testimony, certain stated standard proof must be attained. This is attributed to the fact that the question whether or not a party to a proceeding obtained judgment in his favour on the testimony adduced by witnesses before the court of law in conformity with the standard sets by law, for as

they said: “it is better to set ten guilty persons free by mistake than to convict an innocent person by mistake”. It was reported that the Prophet P.b.u.h says:

“You come to me for adjudication, perhaps some of you are more intelligent in making their cases than others. If I adjudicate in favour of a person against his brother depending upon the former’s statements while the later in reality is in the right, then I would only be handling the former a piece of hell, let him not take it¹⁰¹”.

In *A.R Mogaji and Ors V. Rabiatu Odafin and Ors*¹⁰² the Supreme Court indicated how the decision as to where the balance of probabilities lies and can be reached. It holds the opinion that the judges should first of all out of the totality of the testimony adduced by both parties on an imaginary scale, he will put the evidence adduced by the plaintiff on one side and that of defendant on the other side and weight them together. He will then see which is heavier not by number of witnesses called by each party, but the quality of the testimony of those witnesses.

The judge in determining which is heavier, will naturally have regard to whether the evidence is admissible, relevant, credible, conclusive and more probable than that given by the other party.

The establishment of proof in civil cases as it was stated elsewhere in the work must prove by balance of probabilities in his favour.

¹⁰¹ Assuyuty, J.A.M., *Alfath elkabeer fee Dammi ezziyadati ila jami’l essagir*, Dar elfikr, Beirut, Lebanon, 2003, p.219

¹⁰² *A.R. Mogaji and others v. Rabiatu Odafin and others* (1978) 4, S.C.J, p.91

This is interpreted to mean that the court will weight the evidence of both parties on an imaginary scale and pass judgment in favour of the part whose evidence outweigh the evidence of the other, where a trial judge review the evidence of the plaintiff and concludes on it before passing his verdict must review the evidence of the defendant to avoid miscarriage of justice. In legal procedure, civil cases can be discharge by production of credible and unimpeachable witnesses, these witnesses are either two males, one male and two females, four females, one male plus the claimant oath, etc, the researcher will discuss its details later. In criminal cases under Nigerian law, the rule is that the prosecution must prove the guilt of the accused beyond reasonable doubt, that is the jury should be satisfied so that they felt sure about the guilt of the accused person as in *R v. Atte Fiela*¹⁰³.

It is observed that the Evidence Act provides that the proof must be proved beyond reasonable doubt and not beyond all doubts for that learned Lord Denning J. said in the case of *Miller v. Minister...*¹⁰⁴ to proof beyond reasonable doubt does not means proof beyond any shadow of doubt.

In *Akinyemi v. Akinyemi*¹⁰⁵ the husband accused his wife of adultery with the co-respondent whom he saw kissing his wife at the door. The trial judge stressed that the evidence of kissing did not support an irresistible influence that they had committed adultery, on appeal by the husband to the Supreme Court, the court said that the inference of adultery arises where there is proof of disposition of the parties to commit adultery together with the opportunity to commit it. In contrast with Islamic Law, the proof must be beyond all doubts. The standard is made very high

¹⁰³ *R v. Atte Fiela* (1961) 1, W.L.R p.1135

¹⁰⁴ *Miller v. Minister* (1947) 2, All. E.R. p.392

¹⁰⁵ *Akinyemi v. Akinyemi* (1963) All N.L.R p.340

and difficult enough, that high demand are made of the witnesses, their number, sex, qualification and contents of their statements. Whenever there is any doubt as to the guilt of the accused person, the prescribed punishment is not been reflected. This is because the Prophet (Pbuh) was reported to have said:

Avert the prescribed punishment where there is doubt¹⁰⁶.

The concept of doubt in criminal cases will be discussed later in the work. Furthermore in Islamic law the condition as to the number of witnesses must be met in order to establish a crime. In case of (Zina) Adultery for example, the number of witnesses required for the proof of the offence is four (4) males, reliable, adult, sane and Muslim witness. Thus less than four with even a single one (1) do not establish the offence and the witnesses are to be charged for defamation. Since they are less than four, even if they are four (4) but their statements is quite different also will not establish the offence, they will be charged with defamation. This is consonance with the Qur'anic provision where Almighty Allah says:

And those who launched a charge against chaste woman and produce not four (4) witnesses to support their allegation, flog them with eight stripes and reject their evidence ever after for such men are wicked transgressors¹⁰⁷.

3.2 The Rights need to be proved

The rights that needs to be proved via testimony is classified into four viz:¹⁰⁸

¹⁰⁶ Naseef, A.O., Encyclopedia of Seerah Vol. 11, The American Schools Trust, London, 1982, p.776

¹⁰⁷ Qur'an: 24:4

¹⁰⁸ Zuhaily, W., Alwajeez fee usuul el fiqh, Dar elfikr, Damascus, Syria, 2003, p.152

3.2.1 The right of individual (Haqqal abd or adami)

The right of an individual (a man) is a right which affect the individual directly for example compensation of damage, breach of contract, debts, right of preemption.

The jurist are of the view that an individual have the right to decide to relinquish and withdraw from his right, since he possessed the capacity to enjoy his right.¹⁰⁹

3.2.2 The right of Allah (Haqqaal llah)

The right of Allah is that which affect the general public for example Hudud punishments such as: Adultery, theft, prevention of murderer from inheriting his victim, expiation (Kaffaraat) i.e. expiation of oath, expiation of injurious assimilation and expiation of manslaughter.¹¹⁰

3.2.3 The Joint rights but rights of Allah Prevails

That is to say the fused rights of Allah with that of individual but the right of Allah is predominant, the had of false accusation (Qadhf) fall under this class, the majority of jurists are advocates of this view, while shafi'is considered it as pure right of individual.¹¹¹

3.2.4 The Joint Rights but right of Individual Prevails

Is also a fused right of Allah with that of individual, but the right of individual is predominant such as Retaliation (Qisas) for bodily injuries or culpable homicide¹¹².

3.3 Legal Authorities for Testimony

It is understood that Evidence/Testimony is an attempt to present the judge with an objective picture of a fact that took place at a certain clime and time so that the court

¹⁰⁹ Ibid, p. 153

¹¹⁰ Ibid, p.153

¹¹¹ Ibid, p.153

¹¹² Ibid, p.154

can arrive at an accurate and proper joint to deliver a fair judgment. In respect to the legality of testimony as a means of proof for ascertaining a fact in both civil and criminal matters there are many Qur'anic provision and prophetic traditions as follows:

3.3.1 Qur'anic Verses

Allah the most high said:

- a. And get two witness out of your own men and if there are not two men, then a man and two women such as you choose for witnesses¹¹³

The verse stated further that:

...but take witnesses whenever you make a commercial contract¹¹⁴

Also in chapter 65 Allah said:

- b. And take for witnesses two persons from among you endued with justice and establish the evidence as before God¹¹⁵.
- c. And for those of your women who are guilty of lewdness call to witness four of you against them¹¹⁶

3.3.2 Prophetic Traditions

- a. It was reported by Abdullahi bn Abbass that the Apostle of Allah (SAW) gave a verdict after a case was established by a witness supported with an oath¹¹⁷.

¹¹³ Qur'an 2:282

¹¹⁴ Ibid

¹¹⁵ Ibid 65:2

¹¹⁶ Ibid 4:15

¹¹⁷ Al Hanbaly, M.A.A., Tanqeeh Ettahqeeq Ahaadeeth etta aleeq, Dar elkutoob, el'ilmiiyya, Beirut, Lebanon, 1998, Vol. III, p.25

- b. Also it was reported by Zaid Ibn Khalid that the Apostle of Allah (SAW) is reported to have said should I not inform you about the best witness? It is he who gives his testimony before being asked¹¹⁸.
- c. Furthermore from Ikrima that it was reported by Ibn Abba that Hilaal the son of Umayya defamed his wife, alleging to the Prophet (SAW) that he saw her with Shareek the son of Samhaa the prophet said: your proof or your oath or hadd punishment would be imposed on your back¹¹⁹.

In view of the above provisions, Muslim Scholars categorized the position of rendering testimony into two:

3.3.3 The Position of Rendering Testimony Considering the Witness

3.3.3.1 The First View

The advocates of the first view maintains that testimony is binding and compulsory (Fard ayn) on whoever conceive it, and it is feared that the truth will be lost if he fails to testify before the authority concern, this opinion is supported with the following Qur'anic verse:

And do not conceal testimony, for whoever conceals it,
his heart is indeed sinful¹²⁰

3.3.3.2 The Second view

While the advocates of the second view maintains that conceiving testimony and rendering it, is generally binding i.e. (Fard kifaaya) on those who perceive it to come forward and testify except where it becomes absolutely binding i.e. (fard ayn), that is

¹¹⁸ Asshafi'l, S.U.A., Albadru elmuneer fee takhreej ahaadeth wal aathar el waqia fee sharh el kabeer, dar el hijra for publication and Distribution, Riyadh, Saudi Arabiya, 2004, Vol. ix, p.659

¹¹⁹ Assuyuty, J.A.A., Lubab en Nuzool fi Asbaab en Nuzool, Maktabat essafa, Cairo, Egypt, p.191

¹²⁰ Qur'an 2:283

when a particular incident being litigated is only known to one individual or it is known to many people but it is practically difficult for remaining witnesses to come forward and testify¹²¹.

The terms: fard kifaaya and fard ayn are Arabic principles utilized by scholars of Islamic jurisprudence, the universal obligatory act (fard ayn) it is an act which is demand by the law giver from each subject with the legal capacity to perform, like prayers, fasting, hajj, the rule of this type of obligation is that is to be performed by each person from who it is demand, this is same as the rule of the first category of scholars with regards to rendering of testimony.

While communal obligatory (fard kifaaya) it is an act whose performance is required to the whole community and not from each individual such as Holy War (Jihad), responding the salaam, rendering testimony as adopted by the second category of scholars. The golden rule is that: if an act is perfectly performed by some individuals in the society, the rest members are no longer liable for it, as the require act stands performed¹²².

3.3.4 The Position of Rendering Testimony Considering the Subject Matter at Hand

Under this classification the jurists holds two different views as follows:

3.3.4.The First View

The jurists in this category agree that a witness is duly bound to give evidence when he is called upon in cases relating to rights of human beings i.e. in all civil cases, such as sale contract, loan, mortgage, marriage, divorce, also in a case of joint right

¹²¹ Abubakar, M.S., op.cit pp.56-57

¹²² Bambale, Y.Y. op.cit p.15

of Allah and that of individual but right of individual prevails such as false accusation (Qadhf).

3.3.4.2 The Second View

The second category of scholars are of the view that, for the rights of the Almighty God if they are punishable with Hadd punishment such as adultery, intoxication the witness is at liberty to give testimony or not¹²³, because the prophet pbuh is reported to have said: ...whoever conceals the vices of his brother Muslim shall have drawn a veil over his crimes in the two worlds by the Almighty God¹²⁴.

3.4 Conditions for Validity of Testimony

For a testimony to be sound and legally given also admitted validly, the following conditions for the validity of testimony must exist, (Essentials of testimony).

- a. The party giving the testimony (shaahid)
- b. The party for whose benefit is given (mash-hud lahuu)
- c. The specific formula used in conveying it (sigha)
- d. The subject matter of the testimony (mash-hood Alaihi)

It is indeed a matter of fact that each of these conditions is critical and without one out of it the entire structure of litigation will collapse and crush to the ground, can you imagine the fate of a case before coming to court without anybody who will testify for or against it, or where witnesses are summoned to testify before a court with reference to a particular right or property¹²⁵.

¹²³ El-Imairi, M.T., Op.cit pp.29-30

¹²⁴ Abdulwahab, A.A., Op.cit p.107

¹²⁵ Abubakar, M.S., Op.cit p.60

In *Maryam v. Sa'adu* the court ordered the plaintiff to provide before the court her witnesses that they will testify to prove her case positively, which she failed to do so and responded to the court that nobody was present at the scene when the incident occurred, she definitely lose her case, because the defendant denied her allegation outrightly¹²⁶.

3.4.1 Conditions for Conceiving Testimony

At the time an incident is occurring a witness can not be considered to have conceived a particular piece of testimony unless he meet the following conditions.

- a. Sane and adult, this is unanimous views of the jurists of all schools of thought, it is based on the Hadith of the Holy Prophet (p.b.u.h) who said: three persons have been exempted from every kind of obligation, i. the minor until he attains puberty, ii. The mad until he recovers, iii. The sleeping person until he awakes.
- b. Capable of understanding, to enjoy a sound reasoning and can differentiate between right and wrong.
- c. Stand in possession of his sight, speaking and hearing faculties¹²⁷. That is to say he should not be blind, even though Imam Shafi'I does not give regards to it because under some circumstance the kind of testimony required can still be served by his faculty of hearing.

3.4.2 Conditions for Rendering Testimony

A witness who is fully aware of an incident can testify before a court of law, but he should have the following qualities:

¹²⁶ *Maryam v. Sa'ad* Supra p.10

¹²⁷ El-Imairi, M.T. op.cit p.32

a. He should be a Muslim

The jurists unanimously hold this view, although Imam Aboo Haneefa agree that witness should always be a Muslim yet make an exception when writing will and this view is supported with the following verses,

Almighty Allah said:

O you who have believed, testimony (should be taken) among you when death approaches one of you at the time of bequest (that of) two just men among you or two others from outside¹²⁸.

The Almighty also said in another verse

...and bring to witness two people if there are not two men (available) then a man and two women from those whom you accept as witnesses¹²⁹.

On the other hand Imam Malik as well as Hanafi is of the view that a non Muslim can conceive an evidence but it remains inadmissible until his conversion to Islam, Imam Aboo Haneefa move further to allow the testimony of non-Muslims between and among themselves. His opinion is based on the fact that the Prophet p.b.u.h had sentenced two Jews to death by stoning on the ground of testimony of some Jews against them that they have committed adultery¹³⁰.

¹²⁸ Qur'an 5:106

¹²⁹ Ibid 2:282

¹³⁰ Abubakar, M.S., Op.cit, p.64

The great learned Ibn Taymiyya in his contribution on the subject matter advocated that the evidence of a non Muslim for or against Muslim is acceptable in all circumstances of necessity.

Learned Anwarullah in his personal view with regards to subject matter, buttressed that this position needs to be revisited in light of the present day reality and the cosmopolitan nature of the world today, he says:

“the situation in the present day has greatly changed, many Muslims resides in non Muslim states and many non-Muslims resides in Muslims states, and all the countries of the world are interconnected with one another through mutual contracts and different international and territorial organizations under which every state is bound to give rights to all its residents which are available to the residents of other states. Moreover all the nations of the world, especially all Muslim countries have signed Geneva Convention and Charter of Human Rights, which oblige them to treat non Muslims alike to a possible stage keeping in view the laws of Islam. Thus depriving non-Muslim the opportunity of giving evidence for and against one another is not fit in the present day circumstances. It will be in the interest of the present day situation in Muslim countries to allow non-Muslims to give evidence for and against one another in matters other than Hudud, as far as hudud crimes are concerned, their evidence for and against each other will be acceptable but the accused shall not be punished under hadd, but will be punished under ta’azir.

Moreover the evidence of a non-Muslim may also be accepted for and against a Muslim in matters other than hudud, because there is no express verse of the Holy Qur’an or Hadith of the Holy Prophet (pbuh) which prohibits the acceptability of the evidence of a non-Muslim.

On the contrary according to chapter 5 verse 106 of the Holy Qur'an the evidence of two non-Muslims for a Muslim is accepted in connection with his will at the point of death during a journey when Muslims are not available there¹³¹.

b. He Must be upright (Aadeel)

Means he should be a person of irreproachable and serious character and not to be liable to suspicion, according to Shafi'I school of thought, it means a person who abstain himself from committing capital sins and does not insist on minor sins and thus models his conduct upon the respectable among his contemporaries and fellow countrymen.

It is concluded that Aadeel means a person who is generally considered a reliable person in his society and is not notorious.

c. He must have knowledge

A witness is not expected to testify unless he possessed full information with respect to an incident in question.

The Knowledge is said to be acquired in one of the following ways:

- i. Through the five known sense organs, i.e. Hearing, seeing, testing, smelling and touching (samuu, ru'uyah, zawq, sham, and lams).
- ii. Through an unbroken chain (mutawatir)
- iii. Through observational deductions. It is reported that Abo-Huraira may Allah be pleased with him had witnessed a person who vomited alcohol, the matter came before Umar bn Khatta may Allah be pleased with him in the process of cross examination Umar asked Aboo Huraira have you seen him taken alcohol? Aboo Huraira replied I

¹³¹ Cowdhury, A., Op.cit p.6

have seen him vomited alcohol, Umar said he will obviously not have vomited, it if he had not consumed it in the first place¹³².

d. He must be sane, the Hadith that exempted certain individual, i.e. a minor, a mad person and a sleeping person from every kind of obligation, therefore for a witness to be capable to testify before a court must be sane.

e. Maturity. Sound mindedness (Buluq elaql)

The jurists unanimously maintains that a witness must be matured enough and their view is also supported with the aforementioned Hadith where the prophet exempt three categories of persons from responsibilities of their commission or omission.

But Malikis move further to accept the testimony of minors in cases of injuries or wound which are caused during their plays and outings. This same view is equally expressed by a companion known as Abdulahi the son of Zayd, with a condition that the statement of the children must be the same, they should adduce their testimony before they dispersed and live the scene and they should not be accompanied or mingled by adult¹³³.

f. He must be free (Hur)

Here it simply barred a slave from giving testimony but he can do so after gaining his freedom, but some of jurists are of the view that the testimony of a slave is acceptable because the basic requirement of Sharia is the establishment of uprightness (Adaala) thus slavery cannot affect it¹³⁴.

g. He should have the capacity to speak (Qadirun alal kalam)

¹³² Ibid p.63

¹³³ Alkalaby, M.A., Op.ci p.229

¹³⁴ Abubakar, M.S., Op.cit p.76

A witness must be able to communicate orally, his testimony will be rejected if he is dumb, and his gesture will not be accepted even if it is clearly understood, except if he can write it down. Imam Malik and Shaf'I are of the view that testimony of a dumb person is admissible as long as his gestures are understood, on matters like divorce, (Talaq), marriage (Nikkah), injurious assimilation (Zihar) and Oath of abstention (Ilaa)¹³⁵.

h. Precision/Good memory (Al-hifz waddabt)

This means that a person who stand as a witness his memory must be very sound that enables him to relate his testimony accurately, therefore any person who is usually absent-minded or weak remembrance or habitually mistaken his testimony is inadmissible.

i. Absence of Suspicion (Nafy ettuhma)

There are two reasons that emanates from suspicion, and is either (Affection) or Enmity (Disaffection), by which ever means is generated. The jurist unanimously agree that the testimony between parents and their children is inadmissible, they have different views in respect of testimony between spouses, Imam Malik and Aboo Haneefa considered it inadmissible, while Shafi'I and Aboo Thawr considered it admissible. Ibn Abi Laila is of the view that the testimony of husband to his wife is admissible, but her testimony to him is inadmissible.

Imams Malik and Shafi'I move further to reject completely the testimony of enemy against his enemy and vice versa, but Imam Aboo Haneef says is admissible¹³⁶.

¹³⁵ Ibid p.77

¹³⁶ Ibn Rushd, M.A.M. op.cit p.380

j. He should not be unknown character (Majhul elhaa)

A person who will stand as witness to testify should be known to the person against whom or in favour of whom he is testifying. The testimony of a person of unknown behavior is inadmissible according to most of jurists, they supported their view with the following authority of Umar may Allah be pleased with him, it was reported that a man had testified before Umar, and Umar told him thus “I don’t know you, but that will do you no harm, you can bring somebody who knows you”. “A man from among the people said, I know him Umar asked what do you know about him? The man answered “I know his to be just and generous”. Umar asked is he your close neighbor whom you know his movement day and night? The man said: No Umar enquired, “You have conducted business transaction with him through which you know him. The man said: No “Umar sought to know whether he had ever accompanied him on a journey which afforded him opportunity to know his moral standard

The man said No, Umar told the man to go and bring someone who knew him¹³⁷. This was done because the man who described him as just and generous did not in actual sense know him.

k. He should not happens be sentenced for Defamation (Mahdud fil Qadhf)

The witness who stands to testify prior his testimony should not be sentenced for offence of defamation (false accusation), happens to be sentenced, henceforth his testimony is not admissible even if he repented because complete rejecting of his testimony serve as conclusion to his punishment, this view is supported with the Qur’anic provision as follows:

¹³⁷ Isma’eel, M.B. Op.Cit p.335

And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever, they indeed are fasiqun (Liars, rebellious, disobedient to Allah)¹³⁸.

However, based on the aforementioned verse, Almighty Allah precludes mankind from accepting the testimony of such corrupted persons (fasiqun) forever, this is in addition to his punishment and it will deter and restrain others from committing such, as it is in the theory of punishment. On the other hand, those that were sentenced for Adultery (Zina), theft (Sariqa), Drunkness (Shrub el Khamr) their testimony is admissible if they repented, because by repentance they turned to upright¹³⁹.

3.4.3 Representation in Testimony (Niyaba alal ashahaada)

When a person who happens to be a real witness dead or fall into a serious ill or is on a long distance far from the court, or by any other cogent and sound reason that barred him from appearing before the court, he can direct another person to give his evidence before the court, in the above obstacles apart from death the real witness must tell the second witness that he has witnessed such and such fact and direct him the mandate to give his evidence before the court. The representer witness must have to identify the original witness before the court by stating his name and all his correspondences.

¹³⁸ Qur'an 24:4

¹³⁹ Qurra'ah, Ali., Al-Usul al-Qada'iyya, Madba'a Annahda, Egypt, 1925, p.154

The advocates of this view are Imam Aboo Haneefaa and Imam Ashafi'I, they hold it as admissible in every case except in hudud and qisas¹⁴⁰.

3.4.4 Witnesses of Witnesses

The jurists have three different views in respect of witnesses of witnesses as follow:

- i. Is that where the four required witnesses testified before a court that they have witnessed the commission of Adultery (Zina), for each of such witnesses, four other witnesses will testify on their credibility and worthiness in character, i.e. the credibility of the first four (4) witnesses.
- ii. While the second view is that for each witness two witnesses should testify, that is to say eight (8) witnesses will testify on the trustworthiness of the first four witnesses.
- iii. The third view is that the jurist agreed that four (4) witnesses should testify on the credibility of the four witnesses that perceived the commission of the offence¹⁴¹.

3.4.5 Expert's Evidence (Ra'ayul Khabir)

An expert evidence is that testimony given by a proficient based on his profession, it carries in it an amount of authority.

Allah the most high says:

And we sent not (as our messenger) before you (O Muhammad pbuh) any but men, whom we inspired, (to preach and invite mankind to believe in oneness of

¹⁴⁰ Anwarullah, op.cit p.49

¹⁴¹ Al-aysh, M.A., Fath el aliy el maliki fee fatawa ala mazhabi al-Imam Maliki, Dar elfikr, Beirut, Lebanon, Vol. I 1958, p.246

Allah) so ask of those who know the scripture (learned men of the Taurat Torah and Injeel Gospel) if you know not¹⁴².

Based on the above provision the Malikis, Hambalis and Ibn Qayyim accepted the legal validity of expert's evidence, as such seeking of experts opinion to establish or refute a case before the court of law is actually in order, and has been the practical use of the great companions¹⁴³.

3.4.6 Testimony under The Evidence Act

On the other hand a witness under Evidence Act is considered a qualified person to appear before a court of law to testify when he is competent and compellable, and every person is a competent witness in any judicial proceeding, the question whether a person who is competent to give evidence can also be compelled to do so. It is obvious that every compellable witness is a competent witness because the court will not compel anyone to give evidence if he is incompetent to do so. On the other hand it is not every competent witness that is compellable. Any compellable witness who refuses to give evidence can be punished for contempt of court¹⁴⁴.

Section 155(1) Evidence Act provides that:

All persons shall be competent to testify, unless the court consider that they are prevented from understanding the questions put to them, or from giving material

¹⁴² Qur'an 16:43

¹⁴³ Abubakar, M.S., Op.cit, p.109

¹⁴⁴ Aguda, T.A. Op.cit, p.299

*answers to those questions, by reason of tender years, extreme old age, disease whether of the body or mind, or any other cause of the same kind*¹⁴⁵.

A person of unsound mind is not incompetent to testify unless he is prevented by his mental infirmity from understanding the questions put to him and giving rational answers to them¹⁴⁶.

Therefore the above provisions stated clearly that all persons are capable and competent to stand as witnesses to testify in a court of law regardless of their sex, status, and their position in the society.

The provisions laid emphasis on mental faculty, that whenever a person is mentally sound can understand question put to him and give rational answers to them is qualified as competent witness, however an imbecile, an insane and all persons that are unsound mindedness are not competent witnesses.

3.4.6.1 Evidence of a Child

A child who is prevented from understanding the question put to him or from giving rational answers to those questions by reason of tender years, is not competent witness¹⁴⁷, but if a child possessed sufficient intellect to understand the question put to him and he is able to give rational answer, then he is competent, he should give the evidence on oath, if he is capable of understanding the nature of an oath.

In *Okoye v. the State*¹⁴⁸ the appellant in this case has been convicted in the lower court for murder of the deceased. During the course of his trial in the lower court, the daughter of the deceased who was an eye witness testified as a witness. The

¹⁴⁵ Section 155(1) Evidence Act Op.cit

¹⁴⁶ Ibid Section 155(2)

¹⁴⁷ Aguda, T.A., Op.cit, p.301

¹⁴⁸ *Okoye v. The State* (1972) 1, All N.L.R. 500

record shows that at the time of testifying the witness who was 13 years old was sworn on a bible and thereafter she proceeded to give evidence. The trial judge accepted the testimony of the witness and rejected the story of the accused, though the trial judge found other materials which tendered to make her testimony more probable. The judge thereon convicted the accused for murder.

The discussion on the competency of a child may be end with a few remarks on the decision of the Supreme Court in *Okoye v. the State*, by this decision a child is a person who has not attained the age of fourteen (14) years, that is to say a person of between 7 and 14 years is a child.

Also in *Mbele v. The State*¹⁴⁹ the appellant was tried and convicted of the murder of his wife. The case against the appellant was that he inflicted serious matched cut on the deceased which subsequently resulted in her death. The only eye-witness of the incidence was a ten year-old who also testified.

She gave evidence on oath and the trial judge examined her in accordance with section 155 Evidence Act to satisfy that she understood the duty of testifying under oath to speak the truth and that she possessed sufficient intelligent to justify the reception of her evidence.

3.4.6.2 Physical or Mental Challenged Persons

An old person(s) and those afflicted with disease whether of body or mind, these classes of people are also competent unless they cannot understand the questions put to them or answer those questions rationally by reason of their disability.

¹⁴⁹ *Mbele v. The State* (1990) 4, N.W.L.R pt.145 p.484

Where a person who prima facie belongs to any of the classes appears before the court as a witness in order to determine his fitness, the court may conduct some preliminary inquiry to find out his mental capacity without such a procedure it is difficult to imagine how else his competency can be ensured¹⁵⁰.

3.4.6.3 Accomplice Witness

An accomplice is a competent witness against an accused person, but his evidence generally requires corroboration¹⁵¹.

3.4.6.4 Incompetency by Virtue of Office or Occupation

In respect of incompetency or non compellability there are some other instance where some persons may be incompetent as a witnesses because of the office they holds or their occupation, they can be seen as competent witnesses but not compellable they are as follows:

a. Bankers

A Banker or an officer of a bank is not in any legal proceedings to which the bank is not a party compellable to produce any bankers' book or to appear as a witness to prove matters, transactions and accounts therein recorded, unless by order of the court made for special cause.

b. The Head of State and State Governors

The president, vice president, state governors and their deputies are actually competent witnesses, but they cannot be compelled to appear before the court while they are in office.

¹⁵⁰ Nwadialo, F., Op.cit, p.489

¹⁵¹ Ibid p.479

Section 308 of the 1999 Nigerian Constitution granted them an immunity from all civil and criminal proceedings, because they should not be disturbed while discharging their political commitments.

In *Tinubu v. IMB Securities Plc*¹⁵², the respondent commenced an action at the trial court against the appellant and some other persons. During the course of the trial, the judge made an interlocutory application to which the appellant appealed to the Court of Appeal, while the appeal was pending the appellant was elected and sworn into office as governor of Lagos State.

On the date the appeal came up, the appellant's counsel applied that the matter be adjourned sine die in view of the provision of section 308(1)(a) of the 1999 Constitution. The Court of Appeal granted the application and adjourned sine die until the appellant vacates the office as governor of Lagos.

c. Diplomats

Foreign envoys, consular officers and members of their families and staff are accorded immunity from suits and legal process. They cannot be summoned to court as witnesses and thus are non compellable. However these immunities can be waived when deems fit¹⁵³.

In *Ishola v. British High Commissioner*, the plaintiff in this case took out an originating summons in which he asked for a declaratory judgment against the British High Commissioner to Nigeria. The court held that the action should be dismissed the court has no jurisdiction to hear the action¹⁵⁴.

¹⁵² *Tinubu v. I.M.B Securities Plc* (2001) 16 N.W.L.R pt.740 p.670

¹⁵³ Nwadialo, F. Op.ci, p.486

¹⁵⁴ *Ishola-Noah v. British High Commissioner* (1980) 8-11 SC 100

d. Judges

A judge is an officer who presides over a judicial proceedings in both civil and criminal matters to decide and announce the verdict on cases before him, therefore he cannot act as an adjudicator and a witness in the same case.

In *Elebanjo v. Tijjani*¹⁵⁵, it was stated by the Supreme Court that:

A judicial officer who is sitting alone on a trial of a case cannot because of his position be a witness during the trial. A judge or magistrate who is sitting with others may leave the bench and give evidence but he should not return to the bench to take any further part in the trial in a judicial capacity.

3.5 Quantum of Witnesses (Nisabu Shuhood)

The Islamic Law system rates witness in accordance with their disposition and involvement in the environment where the case comes up, in some cases witnesses are strictly men, while in other cases they are confine only to women yet in some other cases they appear as joint witnesses.

Virtually in all hudud case women have been excluded, the system envisages that the chances of women's presence where crimes are being committed are very slim by virtue of their respective position and the role they play in generational reproduction couple with their non-violent nature.

¹⁵⁵ *Elebanjo v. Tijjani* (1986) 5 N.W.L.R pt.46 p.982

The system also precludes men completely from appearing as witnesses in matters that are strictly of women concern because it does not expect that the surrounding environment will be conducive for men, so it does not then to play any role¹⁵⁶.

The Holy Quran has prescribed the number of witnesses for the proof of Adultery (Zina), documentation of certain monetary transactions, bequest and divorce, the verses are as follow:

- a. And for those of your women who are guilty of lewdness, call to witness four of you against them¹⁵⁷.
- b. O ye who believe! When ye contract a debt for a fixed term, record it in writing. And call to witness from among your men, two witnesses, and if two men be not available, then one man and two women of such as ye approve as witnesses, so that if one make error the other will remind her¹⁵⁸.
- c. And those who accuse chaste women, but bring not four witnesses, whip them eighty strokes¹⁵⁹.
- d. Then when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men among you, and keep your testimony upright for Allah¹⁶⁰.
- e. O ye who believe! Let there be witness between you when death draweth nigh unto one of you, at the time of bequest appoint two witnesses just men

¹⁵⁶ Abubakar, M.S., Op.cit, p.1

¹⁵⁷ Qur'an 4:15

¹⁵⁸ Ibid 2:282

¹⁵⁹ Ibid 24:4

¹⁶⁰ Ibid 65:2

from among you or two others among you in case you are campaigning in the land and the calamity of death befall you¹⁶¹.

3.5.1 The Quantum of Witnesses in different cases

In light of the aforementioned verses which stated clearly the required number of witnesses proper for establishing different case according to their degree and danger to the individuals and society at large. The scholars laid down the quantum of witnesses for establishing or refuting different crimes and rights Bahnasi¹⁶² while describing the quantum of witness write as follow:

a. Four male witnesses

In order to prove the crime of Adultery (Zina) four male witnesses must be produced.

b. Three male witnesses

Imam Ahmad bn Hanbal said there is only one situation whereby three witnesses is required and the judgment will be based on their testimony he relied on the Hadith of Qubaisatu bn Mukhari may Allah be pleased with him as follows:

Qubaisatu bn Mukhariq said: I have borne a responsibility i.e. I have shouldered a burden on behalf of others. So I came and sought the assistance of the Prophet (SAW) He told ee wait for charity to be brought. He then said, O. Qubaisatu! Begging is not lawful except under one of the three conditions viz: A person who bears responsibility which he cannot shoulder, for instance selling a dispute that has to do with money owed to one of the disputants,

¹⁶¹ Ibid 5:106

¹⁶² Bahnasi, A.F. Nazariyya el ithbat fee fiqh el jina' l al Islami, Asharikat el Arabiyya, Cairo, Egypt, 1 962, p.89

making an undertaking to pay it can lawfully beg for assistance until he gets what to offset it, then he stops.

A victim of epidemic which destroys his wealth is allowed to beg until he secures what he can stand on his feet again, and a person stricken by poverty until three responsible members of the community will testify that he is actually impoverished is allowed to beg until he secures what to depend upon then he stops. Whatever one earns through begging other than from one of the three ways mentioned above is ill gotten¹⁶³.

c. Two male witnesses or one male plus two female witnesses in real property claims and contracts such as sale, cancellation by consent, transfer of debts due to one, and security as well as the rights resulting from these contract such as term for payment, may all be proved by the testimony of two male witnesses or one male and two female witnesses¹⁶⁴.

d. Two male witnesses

Two males witnesses are rigorously required in all other contested cases, whether it be a matter of non-remissible penalties, except that Adultery or of remissible ones, or of some dispute as to an act of private life ordinarily effected before men and in their sight such as marriage, return to conjugal union, conversion, apostasy, death¹⁶⁵.

e. Four Female witnesses

In what is specially liable to come under the observation of women and in general facts which do not usually take place in the presence and in the sight of men, such as the existence of virginity, accouchement, menstruation,

¹⁶³ Ibid, p.92

¹⁶⁴ Ibid p.96

¹⁶⁵ Anwarullah, op.cit, p.37

suckling, bodily defects in women and in parts of the body usually covered are proved by the evidence of four women.

It can be reduce to bearest minimum which is one. This is because it was reported that the prophet (SAW) gave verdict in respect of suckling relying on testimony of one female witness.¹⁶⁶

Imam Aboo Haneefa adopted this opinion and consider the evidence of only one woman to be sufficient in matters which are proved with the evidence of women only.¹⁶⁷In *Usman v. Kareem*¹⁶⁸, the respondent demanded from the appellant his father's share of a piece of land which the respondent claimed was donated to the family. The appellant on the other hand contended that the land was donated to him personally and not to the family. The matter proceeded to the Area Court wherein judgment was given against the respondent. He appealed to the Sharia Court of Appeal which allowed the appeal whereon the appellant appealed to the court of appeal which dismissed the appeal. The court held that:

- a. In civil cases under Islamic law, a party is not competent to testify in his own case in effect, a plaintiff cannot testify as a witness in his own case. He can only state his case and then call independent witnesses to prove it, same applies to the defendant.
- b. Under Islamic law a plaintiff's case can only be proved by evidence of the following persons:
 - i. Two unimpeachable male witnesses; or

¹⁶⁶ Alqurtubi, M. F., *Aqdiyatu Rasulillahi Sallallahu Alaili Wasallam*, Dar Ibn haytham, Cairo, Egypt, 2006, P. 75

¹⁶⁷ Anwarullah, *Op. Cit.* P. 38

¹⁶⁸ *Usman v. Kareem* (1995) 2 N.W.L.R pt.379, p.537

- ii. An unimpeachable male witness and two or more unimpeachable female witnesses; or
- iii. A male witness or two or more witnesses plus the plaintiff's complimentary oath¹⁶⁹.

In *Hadda v. Malumfashi*¹⁷⁰, the respondent as plaintiff brought an action before the Area Court II against the appellant in respect to piece of land. The respondent stated his case and called witnesses. The appellant denied the claim and also called witnesses to prove his case. The trial court dismissed the plaintiff's claim. The appeal went on to the Supreme Court.

The court held that:

- i. Under Muslim Law, unlike English Law, parties are not competent witnesses in their respective cases. Hence their statement in the court would not be regarded as evidence but something akin to statement of claim or defence in the district High Courts.
- ii. The general principle of Islamic law relating to claim in civil matters in both movable and immovable property is that proof is complete by the evidence of two male unimpeachable witnesses, or such one male witness and two or more female unimpeachable witnesses, with the claimant oath in either case.
- iii. Under Islamic law, the evidence of near relative is admissible in favor of another if:

¹⁶⁹ Olakanmi, J. Op.cit, p.243

¹⁷⁰ *Hadda v. Malumfashi* (1993) 7 S.C .N.J, 504

- a. The witness will derive some benefit from such evidence
- b. By giving such evidence he may escape some harm or loss.

Based on the above court statement that an evidence of close and near relatives is admissible as long as the witness will not derive some benefit or he may escape some harm or loss, the researcher deducted that whenever sentiment is attached to an evidence it will be completely rejected and inadmissible as it will be discussed later.

f. One male witness supported with an oath

In some civil cases other than hudood and qisas a testimony of one male witness can be proved but it should be supported with the oath of the plaintiff¹⁷¹.

However, in all of the above discussion if the prescribed evidence is not available in a case and lesser authentic evidence is available, the evidence will be accepted and the accused will be given respite to confute the allegation, if he failed, he will be punished with ta'azir or the defendant will be obliged for the restoration of the right accordingly except in the case of Adultery¹⁷².

After a thorough observation of scholars' views the researcher learned that the main factor for considering the testimony is the trustworthiness, honesty and upright of a witness before the number even though the stipulated quantum is required and must be observed and adhere to in different cases, particularly in hudood cases i.e. Adultery so as to set free the innocents and to safeguard the rights also to punish the criminals properly and accurately.

On the contrary under Nigeria Evidence Act, it is provided that:

¹⁷¹ Annawawi, A., Minhaddj al Talibin wa umdat al-muftiyyin, matba'a Abdulhamid, Cairo, Egypt, p.142

¹⁷² Anwarullahi, Op.cit, p.38

Except as provided in this section, No particular number of witnesses shall in any case be required for the proof of any fact¹⁷³.

While Olakanmi, J. in synoptic guide to Evidence Act move further to state that:

A person can be convicted of any offence upon Evidence on oath of a single adult witness¹⁷⁴.

In *Salisu Babuga v. State*¹⁷⁵ the court stated that just as a plaintiff in civil suit can succeed on the evidence of a single witness without any other confirmation of the witness's evidence by the testimony of another witness or by any other circumstance. This does not mean, however that the court must act on the evidence of a single witness, and it is perhaps fair to say that the court will be exceedingly careful in convicting an accused person on the evidence of a single witness without more especially for serious offences like murder.

A court cannot take into account a number of witnesses who have given evidence for each side as a relevant factor in deciding which side should succeed¹⁷⁶.

As the researcher did observed in the earlier discussion of Islamic law perspective with regards to quantum witness, here also the principle is the same that is to say the primary important factor is that quality of the evidence before looking at the quantity.

Unlike Islamic law, the Nigerian Evidence Act states that: No particular number of witness is required for proof of any fact, while under Islamic law there are certain

¹⁷³ Section 179(1) Evidence Act op.cit

¹⁷⁴ Olakanmi, J., Evidence Act: Synoptic Guide, Panaf Press, Abuja, Nigeria, p.144

¹⁷⁵ *Salisu Babuga v. The State* (1996) 7 S.C.N.J. 217

¹⁷⁶ Aguda, T.A. Op.cit, p.328

cases that required a fixed number of witness to proof such cases failure of which may render the process abortive.

3.5.2 Hindrances to Admissibility of Testimony

The learned Ali Qurra'ah stated that the testimony of the following witnesses is inadmissible due to their closeness and affection and lack of sure for driving benefit or escaping harm viz¹⁷⁷:

- a. The affinity (Ascendant or Descendant) how high or low whatsoever i.e. the testimony of father for son or son for father.
- b. The spouses, the testimony of husband for his wife or wife for her husband is inadmissible.
- c. The servant for his master, the testimony of a servant for his chief is inadmissible.

It was reported during Imam Ali's caliphate, that shurayh was the judge. The Imam came to the court with a Jew so that shurayh will judge between them. The Imam said the cuirass which is in your hand is mine for I have neither sold it nor have I given it as a present. The Jew said: the cuirass is mine and now it is in my hands, shurayh asked the Imam to present a witness. Imam Ali said "Qanbar (his servant) and Hussain (his son) testify that the cuirass is mine, shurayh said: sons' testimonies for their fathers are not valid nor is that of servant, for they will witness in your favour.

Imam Ali said woe to you shurayh! You have certainly made several mistakes. Firstly I am your leader and you obey Allah because you obey me and you know that what I say is not false. Secondly, you claimed that Qanbar and Hussain

¹⁷⁷ Qurra'ah, Ali, op.cit, p.172

witnessed in my favor. The punishment for this is to judge among the Jew for three days. The Imam sent to judge to a Jewish neighborhood to judge among them and then to come back to his place of work, when the Jew heard that although Ali had two witnesses but did not misuse his authority and the judge pass the judgment against him said: this is truly the leader of the believers, “Hence he converted to Islam and confessed that the cuirass belong to Imam Ali, it had fallen off the Imam’s black and white camel during the battle of siffin and he had taken it for himself¹⁷⁸.

- d. The partners, the testimony of partners within their affairs is inadmissible, but if his testimony has nothing to do with their affairs is admissible.
- e. A loyal discipline to his teacher, who is seeing a harm to his teacher as an inflicted injury to himself, his testimony for his teacher is inadmissible.
- f. The cordial friends; who are sharing the same idea, be it right or wrong, such a friend his testimony for his friend is inadmissible.
- g. The Enmity: The enmity between a witness and a party to a case is inadmissible¹⁷⁹.

3.6 Procedure of Giving Testimony

After satisfying the set out conditions and meeting all the requirements, a competent witness who is invited to the court of law to testify the facts he witnessed must be equipped with the art of practice and procedure of giving testimony in order to make the testimony effective.

¹⁷⁸ At Tasuli, A.A. Al Bahja Fee Sharh Ettuhfa, Dar Elfikr, Beirut, Lebanon, Vol. I, p.98

¹⁷⁹ Qurra’ah Ali, Op.cit, p.172

3.6.1 Under Islamic Law

In the course of lodging an action whether criminal or civil, a party to a dispute (prosecutor or plaintiff) should produce his witnesses or he comes along with them to court at a fixed time scheduled by the court to give the evidence. On the hearing date when the case is mentioned parties appear and the witnesses shall be called upon and be asked to stand in between the parties while other witnesses be asked to be out of the court and out of hearing. At time the judge may not know the witness in or he is doubt about his credibility. The judge should commence taking the evidence by recording the witness name, age, religion, his relatives, where he resides, the mosque where he prays, his natural make up whether he is deformed¹⁸⁰.

The court shall remind the witness about God and inform court on what he knows, he saw, or perceived with any of his five senses but not what he was told. Although a witness is not always required to swear before giving evidence, but it is permitted to administer oath to a witness when the need to do warrant itself.

It was reported that the fifth rightly guided caliph, Umar Ibn Abdul-Azeez said: Administer Justice in accordance with what prevails in a society¹⁸¹.

In *Binta Yusuf Ahmad v. the Family of Yusuf Ahmad*¹⁸², the court held that there is nothing wrong for a court applying Islamic law to swear a witness before testifying. Ibn Farhun was reported to have said: a judge can compel a witness to take an oath...if he doubt his credibility¹⁸³.

¹⁸⁰ Ibn Farhun, *Tabsiratul Hukkam Fee Usulil Aqdiyati wa manahijil ahkam*, Al-Azhariyya lit turath, Cairo, Egypt, p.207

¹⁸¹ Mahmud, A.B., *Supremacy of Islamic Law*, Hudadhuda Publishing Company, Zaria, Nigeria, 1991, p.67

¹⁸² *Binta Yusuf Ahmed v. The Family of late Yusuf Ahmad* (2007) 2 R.S.M.N.W, p.73

¹⁸³ Al-aysh, M.A. op.cit Vol. II p.311

It was also stated in *Alfiqh el Islam wa Adillatuhu* that: witness oath is an oath that is subscribe by a witness before testifying in order for the judge to be sure of the truthfulness of his testimony to support its decision¹⁸⁴. If a witness testifies and his testimony agrees with the statement of claim, the judge shall give the defendant the opportunity to cross examine him. Where the defendant discredits the testimony of a witness such evidence shall be rejected. But if he fails either to impeach the witness or debunk his testimony then the evidence shall be admitted.

The same rule and procedure should apply to all witnesses; that is to say every witness of the plaintiff shall be cross examined except that the witness who happens to testify as to the credibility of another witness shall not be cross examined. The plaintiff shall be allow every witness to defend himself in response to the cross examination¹⁸⁵.

It should be noted that a defendant is expected to raise objection on any grounds under Islamic law; such as the witness is an ascendant or descendant of the plaintiff, husband or wife to the plaintiff and any other person who as a result of giving the evidence will obtain some benefit or avoid some loss¹⁸⁶. Once the objection is raised, the court shall ask the witness on whether the allegation is true or not. If the witness admits the allegation, the evidence shall be rejected, but if the witness denies the allegation, the defendant shall bring two or more witnesses to impeach the credibility of the witness or his evidence so as to prove the allegation.

The court shall extend such chance and opportunity to the defendant until he exhausted of all the defences and eventually responds to the court voluntarily that he

¹⁸⁴ Zuhaili, W. *Alfiqh el Islam wa Adillatuhu*, Dar al-fikr, Beirut, Vol.. VI 1989, p.600

¹⁸⁵ Order II Rule 6 of the Kano State Sharia Courts (Civil Procedure) Rules, 2000

¹⁸⁶ Mahmud, A.B., *Op.cit*, p.10

has no further objection on either the witnesses or on their adduced testimony before the court. The court on her role shall continue to call the plaintiff's witnesses to testify one after the other in the same manner stated above until the plaintiff is exhausted of all evidence and says that he has no further witnesses to call to testify on his behalf. It is important to note that the above procedure of giving evidence is the same to be adhered by every party possessing the burden of proof¹⁸⁷.

3.6.2 Under Nigerian Evidence Law

There is no much contrary with regards to the procedure of giving Evidence/Testimony as follow: The Nigeria Law of Evidence encompasses the rules and legal principles that govern the proof of facts in legal proceedings. These rules determine what evidence must or must not be considered by the trier of fact in reaching its decision and sometimes the weight that may be given to that evidence. The law of evidence is also concerned with the type of proof needed to prevail in litigation, the quality of proof is how reliable such evidence should be considered.

In every jurisdiction based on the Nigerian Common Law tradition evidence must conform to a number of rules and restrictions so as to be admissible. Testimony must be relevant, that is it must be directed at proving or disproving a legal element. Testimony is relevant if it has the tendency to make the existence of any fact that is of consequence to the determination of the action more probable.

For a competent witness to render his evidence effectively in court, he must be focused, concentrate on the relevant material evidence and steer away from irrelevant or marginally irrelevant evidence, for having clear understanding on

¹⁸⁷ At Tasuli, A.A., Op.cit, p.98

relevant and not relevant evidence the following two questions can give clear sight to that regard¹⁸⁸.

1. What are the main questions that the courts had to decide? (they are referred to by lawyers and judges as “issues”).
2. Is the evidence that the witness is about to give directly connected or related with these questions? If not, it is best to avoid referring to such evidence¹⁸⁹.

In *Osazuwa v. Isibor*¹⁹⁰, the court laid down procedures for evaluating testimony/evidence, the trial court must first take a piece of evidence and consider whether in the natural order of things it is credible. If it is not intrinsically incredible, then it checks it against the pleadings of the party who is relying on the piece of evidence to ensure its relevance to the matter at hand.

If the fact to which the piece of evidence relate is not pleaded, it goes to no issue, but if it is pleaded, the trial court should then check the pleadings and the evidence adduced by the other party to see if the fact stated in evidence is admitted either expressly or impliedly. If it is then the fact on which the piece of evidence was adduced is proved. If there is no admission, the trial court has to check for what other contrary evidence there is from the opposing party.

Thereafter, it must place the two pieces of opposing evidence on an imaginary scale of justice; and the piece of evidence that tilts the scale constitutes the findings of the court¹⁹¹.

¹⁸⁸ Solomon, A., Basic Principles to Remember if you must be a witness in court. (2011-2012) www.self-represented.com/ba_sic.prin...

¹⁸⁹ Ibid

¹⁹⁰ *Osazuwa v. Isibor* (2004) 3, N.W.L.R pt.16, p.22

¹⁹¹ Solomon, A., Op.cit

Also in *Oyewole v. Akande*¹⁹², the trial court set out Guidelines for evaluating evidence as a trial court has a primary duty after hearing evidence from witnesses and watching their demeanor to evaluate relevant and material evidence adduced by both parties having regard to the pleadings of the parties. The court must thereafter show how and why he came to its findings of fact and final determination of the issue before him. In the process of evaluation, the court must have regard to certain guidelines like:

- a. Admissibility of the evidence
- b. Relevance of the evidence
- c. Credibility of the evidence
- d. Conclusiveness of the evidence
- e. Probability of the evidence of one party more than the other

Examinations of witness during the trial of an action are divided into the following categories:¹⁹³

- a. Examination in chief
- b. Cross examination
- c. Re-examination

Examination in chief consist of a series of open-ended and non-leading questions which your lawyer will ask you about the relevant events and facts concerning the case. A witness should listen to the question and wait until the whole question has been put to him, then he begin to answer. If he do not understand the question he has the full right to ask the examiner to repeat it, then a witness should answer the

¹⁹² *Oyewole V. Akande* (2009) All F.W.L.R pt. 26, p.816

¹⁹³ Nwadialo, F., Op,cit, p.500

question asked completely without volunteering additional information, a witness must be precise and direct to the point. If he do not know an answer he do not guess, he should just simply say I do not know the answer to that, he should not rush, no to argue or joke with the examiner, a witness must leave by his words, above all he should tell the truth¹⁹⁴.

The opposing party will begin his cross examination which ideally should consist of leading questions designed to elicit short answers usually “yes or “no” but not always. Here are some fairly standard points to remember when a witness is being cross examined as follows:

- a. He should make sure he understand the question put to him, if not say so.
- b. He should just answer the question asked;
- c. And give complete answer, but not volunteer any information not required by the question, when responding to the questions a witness must use his own words, not let words to be put in his mouth.

A witness should avoid too much looking at the party who has called him or her as a witness as if you are looking for help or approval. He should also avoid temptation of trying to explain an unfavorable answer given by him, if the answer he gave was incomplete or wrong, the party who has called the witness will have the opportunity on re-examination to solicit answers from him which hopefully effect of those answers.

The judge may ask a witness questions during the examination in chief or cross examination, and judicial interrogations is not necessarily a bad thing, but a witness should be careful not let the judge put words in his mouth.

¹⁹⁴ Solomon, A. Op.cit

He should also be polite and courteous in his exchange with the judge, but guard against agreeing too readily with the judge's suggestions unless they are completely accurate¹⁹⁵.

These are the art and tactics a witness should be equipped with and make the practice use of it so as to adduce an effective and efficient testimony.

3.7 The Legal Position on Conflict between and among Witnesses

For a testimony to be sound and effective before a court of law, the statements of the witnesses must be of one accord, indicating all the ingredients of the matter in question whether civil or criminal, but when the witness testified in different and contrastive statement, such will affect negatively to the rendered testimony in court proceedings.

3.7.1 Conflicts of Witnesses in Criminal Offences

The Hudood offences can be established by producing four upright and unquestionable integrity witnesses as in case of Adultery before the court, that they witnessed the commission of the Adultery i.e. they actually saw his pudenda in her womanhood, at the same time, place and the angle of the room and above all the lady is alien to the man.

If the statements of the witnesses corresponded each other, the judge will proceed to give the verdict, but in a situation whereby the witnesses rendered a conflicting statements as to the place and time of committing the offence, the jurists have different views thereto the Hanafis count the conflicting statements of witnesses as to the place or time as doubt (shubha) which may ward off the hadd, if two witnesses

¹⁹⁵ Ibid

testified that the accused committed Adultery with a lady in Kufa while the remaining two testified that the accused committed Adultery in Basra, the punishment will be suspended¹⁹⁶.

The Malikis are of the view that the witnesses in Adultery offence must be eye witness at the same place and time if one of the witness adduced different statement that oppose the statements of other witnesses, the Hadd penalty will be ward off on the parties. Apart from Adultery, every Hudood offences can be established with two upright witnesses i.e. theft, defamation etc.

The conflict of witnesses in establishing the offence of theft, e.g. a witness testify that A steals a white ram belongs to B at the morning, while the other testified that he witnessed A steals the ram belongs to B at night, therefore the punishment will automatically be ward off. However with regards to the offence of Defamation, the Hanafis maintains that the two witnesses during testimony if they differ in time and place will not affect their testimony, because defamation is a statement repeatable at different time and place.

According to Malikis if a witness testified that the accused committed the offence of defamation on Friday while the other testified that he committed the offence on Thursday, the court may bring the two testimonies together and decide to punish the criminal.

While Shafi'is maintains that, if a witness testified that the accused committed the offence of defamation in Arabic language while the other testified that he used English language to commit the offence, or one of the witnesses testified that he committed the offence on Thursday while the other stated that he committed the

¹⁹⁶ Qurra'a, Ali, Op.Cit, p.181

offence on Friday, the hadd punishment will be averted, because the evidence is not fully established¹⁹⁷.

In *Odi v. Iyala*¹⁹⁸ the court stated the effect of contradiction in evidence of witnesses called by a party as follows where two witnesses or more called by a party make irreconcilable and contradictory statements, every item of evidence contained which tends to collaborate or contradict either of them should be carefully weighed and considered in determining preponderance, where an issue is left in doubt so as to make the court speculate the part on whom the proof rests will ultimately lose when the essential fact relies on becomes uncertain or in doubt as to its existence.

Moreover in *Archibong v. State*¹⁹⁹ the court stated the solution to the contradiction in evidence of prosecution witnesses as follows:

Before any conflict, contradiction or discrepancy in the evidence of the witness for the prosecution can be fatal to the prosecution's case the conflict or contradiction must be substantial and fundamental to the main issues before the court and therefore necessarily create some doubt in mind of the trial court that an accused is entitled to benefit therefrom.

3.7.2 Conflict of Witnesses in Civil Cases

The statements of the claimant and that of the witnesses must be the same in order to be admissible and any evidence repugnant to the claim cannot be admitted, where the evidence adduced by a claimant is conformable to the claim, it is a worthy of credit, but not where it is repugnant to it. The witnesses must perfectly agree in their testimony the jurists laid down the following views:

¹⁹⁷ Hussain, U., *Ashshubuhaat al Musqida leel hudood*, Dar Ibn Hazm, Beirut, Lebanon, 2003, p.275-276

¹⁹⁸ *Odi V. Iyala* (2004) 8 N.W.L.R pt. 7, p.291

¹⁹⁹ *Archibong V. State* (2004) 1 N.W.L.R pt. 19, p.497

According to Aboo Haneefa if one of the witness bear testimony to one thousand dirham being due and the other to two thousand, no credit is to be given to either.

The two disciples (Aboo Yoosuf and Muhammad bn Hassan) are of the opinion that the evidence is to be credited to the amount of one thousand dirhams. Similar disagreement also subsists in a case where one witness attests one divorce and the other two or three divorces, the argument of the two disciples are that the witnesses agree in the smallest amount such as in one thousand dirhams or in one divorce, and one of them besides his agreement in this amount, attests an additional quantity their evidence therefore must be admitted in the degree in which they concur, and the testimony of one so far as it relates to the excess only must be rejected²⁰⁰.

In the above discussion, the researcher do observed that when the testimony of the witnesses contradicts the point of consideration is where all the testimonies concur in both meaning and words. The effect is also the same where the claimant alleges one thousand dirhams an one of the witnesses attests one thousand and the other one thousand five hundred, here also the claimant falsifies the testimony of one of his witnesses in as much as his claim is different from it²⁰¹.

But in a situation where the claimant says: my original claim was one thousand five hundred but I exempted the debtor from five hundred, in this case all the above mentioned testimonies would be credited, because of their conformity with the claim.

However in respect to the different of the terms of contract, the evidence to prove a contract is said to be annulled by difference of the testimonies, for example, if one

²⁰⁰ Hamilton, C., *The Hedaya, A Commentary on the Mussulman Law*, Premier Book House, Lahore, 1963, p.365

²⁰¹ *Ibid* p.366

person attest that Zaid had purchased a slave for one thousand dirhams and another that he had purchased the said slave for fifteen thousand dirhams, in that case the evidence of both is null, because the object of the evidence is to establish a cause of property, viz the contract of sale, but the mention of two prices necessarily implies the existence of two contracts and the proof of either of these is defective as there is only one witness to each²⁰².

But if the testimony of first of the witnesses is in conformity with the claim of the claimant, the claimant may wish to discard the second witness and stick to the first witness and support his claim with an oath²⁰³.

The same rule also holds with respect to a contract of Mukaataba, that is where a mukaatib and his master disagree with respect to the amount of the ransom or consideration of Mukaakaba and the two witnesses likewise disagree in their testimony, the evidence in such case is null since the evidence in the establishment of the contract of Mukaataba is defective.

Furthermore in the case of pledge, if one witness attest that it was pawned for one thousand dirham and the other that it was pawned for one thousand five hundred dirham, and the claim be preferred by the pawner, the evidence is in this case inadmissible, because the pawner has no advantage in preferring such a claim since he cannot resume his pawn until he pay the debt opposed to it, his claim therefore is not regarded and such being the case, the evidence he adduce is as it were evidence without claim and evidence without claim is inadmissible. Also in case of marriage, if one of the two witnesses testify to a dower of one thousand dirhams and the other

²⁰² Ibid p.377

²⁰³ Husain, U. Op. Cit, p.276

to a dower of fifteen thousand dirhams, the dower is established in the amount of thousand dirhams according to Aboo Haneefa whether the claim be preferred by the husband or wife, but according to the two disciples the evidence is totally inadmissible, they are of the view that the disagreement of the witnesses with regard to the amount of the portion is in fact a disagreement with regard to the marriage²⁰⁴.

In *Akaniwon v. Nsirim*²⁰⁵ the court on treatment of conflict in the evidence of party's witnesses stated that: No court worthy of its nature would accept conflicting statements such as made by appellant's witnesses in a case.

3.8 When Doubt (Shubha) Casted to Testimony

It is known that a testimony is one of the means of establishing cases and a great concern was given to it by jurists as they explained it and attach suitable conditions thereto in order to establish rights property and legally.

3.8.1 Definition of Shubha

Shubha literally means: a feeling of being uncertain about something²⁰⁶.

Technically means: is a situation that an accused felt in, or a situation surrounded the location of committing crime, as a result render the accused free from punishment or to a lesser punishment by the discretion of the judge²⁰⁷.

According to the above definition the researcher do observed that a doubt is any feature that has to do with commission of crime by an accused and may lead to set aside the prescribed punishment or to impose the lighter one.

²⁰⁴ Hamilton, C. Op. Cit, p.368

²⁰⁵ *Akaniwon V. Nsirim* (1997) 9, N.W.L.R pt.20, p.263

²⁰⁶ Hornby, A.S., Oxford Advanced Learners Dictionary, Oxford University Press, p.439

²⁰⁷ Hussain, U. Op.cit, p.59

In a legal process when the required number of witnesses who are unimpeachable, trustworthy and credible attest to a question at hand and their statements stands firm no contradictions in their testimony, the court will have no option but to decide the case in favor of the party who called such witnesses. But were the witnesses in testimony suffered from withdrawal of some or retraction or conflicting statements, such testimony is inadmissible because doubt casted therein and may avert the punishment²⁰⁸.

It was reported by Aisha (R.A) that the prophet Muhammad (pbuh) said. Avert hudood punishment when there is doubt, if there is a way out for the accused avoid inflicting the punishment on him, it is better for the Imam (Judge) to set an accused free in mistake than to impose penalty in error²⁰⁹.

Consequently the witnesses in hudood cases required a certain number, for example the number of witnesses in Hadd of Adultery (Zina) is four qualified witnesses and their statements must be in accord no controversy, but any disagreement between witnesses in their attested testimony or retraction of some of the witnesses therefore their testimony casted doubt and may suspend the hadd punishment.

While in the rest of hudood offences other than Adultery the testimony of two qualified witnesses is required to establish a case, but when the two witnesses felt in confusion in their testimony as to the place of the offence or time of the occurrence of the offence is also casted doubt and render the punishment to be ward off²¹⁰.

²⁰⁸ Ibid, p.272

²⁰⁹ Tirmidhi, Vol. 2 p.438 No.1447

²¹⁰ Hussaini, U. Op.cit, p.282

3.9 Retraction from Testimony and the Penalty Imposed upon false witness

3.9.1 Retraction from Testimony

Is an act of withdrawal by a witness from all that he adduced before the court as testimony it can be before judgment or after the decree has been passed.

For a retracted testimony to be count and affect the judicial proceedings must fulfill the following conditions:

- i. He must retract in a court of law and in the presence of a judge who presided over the case where the witness adduced his testimony.
- ii. Or he can retract in the presence of any other judge.
- iii. If the retraction is not before a judge is considered null and void²¹¹.

A retracted testimony before pronouncing the judgment is void i.e. if a witness retract their testimony prior to the judge passing any decree it becomes invalid, when a witness voluntarily retract from his testimony the judge must not pass any decree upon it, because the right of the claimant cannot be established and the judge cannot pass a decree upon contradictory testimony and in this case the witnesses are not liable to any compensation, since they have not occasioned any damage to either of the parties.

On the contrary if the witnesses retracted their testimony after the judge have passed a decree, the decree is not thereby rendered void, in as much as the judge follow all the proper proceedings in his court with those witnesses and he acted upon their rendered testimony, and he after thorough observation and careful studies of their statements arrive at positive conclusion that lead him to pass his decree, in this case

²¹¹ Qurra'a, A. Op.cit, p.209

his decree acquires superiority and authority that will be prevented from annulment, but the witnesses are bound to compensate for the injury they may have caused as a result of their retraction from their testimony²¹².

Witnesses retracting their testimony after a decree has passed must make a compensation to the suffering and aggrieved party. If two witnesses bear testimony that a particular sum is due by a certain person to another, and the judge accordingly pass a decree for the payment of it, and the witness afterwards retract their testimony they are in this case responsible to that person for the sum decreed against him, for whoever by a transgression performs an act destructive of another's property becomes responsible for the same.

But if in the case in question, only one witness retract his testimony, he becomes responsible for a half of the property; for it is a rule that where part of the witnesses retract, the right shall remain established so far as relates to the remaining witnesses.

And the same of any number who may retract, where one witness perseveres in his testimony. If three persons give testimony concerning property and one of them afterward retract his testimony, he is not subject to any responsibility because the whole of the right remains established in considering the testimony of the two remaining witnesses. The reason is that the right of the claimant is established because of the complete proof, viz the testimony of two witnesses.

Cases of retraction where the witnesses consist of both males and females, if one man and two women attest their testimony and one of the women afterwards retract her testimony, she is liable for one-fourth of the right, because in consequence of the existing evidence of one man and one women, three-fourth of it still remain in force.

²¹² Attasawwuly, A.A. Al-Bahja fee sharhi ettuhfa, Dar el fikr, Beirut, Lebanon, Vol. 1, pp.108-109

If also both the woman retract their testimony they are responsible for an half, since in considering the existence of one male witness, an half of the right remains in force²¹³.

Almost the same rule applies in criminal cases with regards to retraction of witnesses in their evidence, the following is a clear picture of the case in question. Firstly whenever a witness or witnesses retract from their attested testimony before the verdict, such a retraction cast doubt which may avert the punishment.

Secondly if the witnesses retract from their testimony after the judgment was passed and the punishment was executed, the jurists unanimously are of the view that the witnesses suffer the remedy of the damages and injuries occasioned as a result of their evidence i.e. they must pay the compensation of the damages they caused to either parties²¹⁴.

3.10 Penalty of False Witness

One of the means for actualizing justice and consolidating it, is testimony, testimony is a vital criterion with which the judge/court use to distinguish between truth claims from false ones, it is said that testimony to the people's rights is like the soul to the body, for Allah enlivens rights with truthful testimony as he enlivens bodies with souls.

It is essential in establishing a sound social life and all that has to do with it. One's testimony must be based on knowledge, clarity and trust. When a witness stands the position of possessing of all qualities and virtues of conceiving all the incidents of a matter that occurred in his presence or he is not aware or has no knowledge at all

²¹³ Hamilton, C., Op.cit, p.373

²¹⁴ Husain, U. Op.cit, p.280

about the case at hand but he forge ahead and render a false statement, such witness committed a crime of false statement in a judicial proceedings according to the following provisions:

Almighty Allah says:

That (manasik prescribed duties of Hajj is the obligation that mankind owes to Allah) and whoever honors the sacred things of Allah, then that is better for him with his lord. The cattle are lawful to you, except those (that will be) mentioned to you as exception so shun the abomination (worshipping) of idol, and shun lying speech false statements²¹⁵.

It was reported that the Prophet (PBUH) said: shall I not inform you of the biggest of the great sin? We said “Yes, O Allah’s Apostle, He said, “To join partner in worship with Allah, to be undutiful to ones parents, the prophet sat up after he had been reclining and added, and I warn you against given forged statement and a false witness, I warn you against given forge statement and a false witness, I warn you against giving a forged statement and a false witness, the prophet kept on saying that warning until we were telling ourselves out of sympathy for him because of the strain of repeating it, if only he would be silent²¹⁶.

Therefore the jurists have almost the same view in respect of the penalty of false witness. Imam Aboo Haneefa maintains that no certain punishment should be

²¹⁵ Qur’an 22:30

²¹⁶ An Nawawi, Y.S., Riyadh Essaliheen, Dar essalam, Cairo Egypt, 2003, p.379

inflicted on a false witness, but he will be embarrassed and declared him a false witness publicly.

Imam Malik, Shafi'i and Ahmad maintains that a false witness must be reprimanded in addition to it he must suffer an embarrassment and declared false witness in public, it can be in market, mosque or any assembled places²¹⁷.

Consequently for the interest of justice and enhancing the judicial proceedings the jurists viewpoints towards a false witness to suffer stigmatization in the society is very cogent, since he is not working for justice, rather he is misleading the court proceedings that lead to loss of rights, and punishing the innocent or pave way to the criminal to escape the justice, it was said: if you want peace work for justice.

²¹⁷ Ad Dimashqy, M.A., Rahmat el Umma fee Ikhtilaf el A'imma, Al Qudus, Cairo, Egypt, 2011, p.414

CHAPTER FOUR

TESTIMONY AS A MEANS OF PROOF IN CRIMINAL AND CIVIL CASES

4.1 Criminal Liability

It is a fact that one of the fundamental principles under Islamic law is: No act should be punished unless there is a prior provision spelt out clearly prohibiting such an act.

Criminal Liability Means: a person must be responsible for the consequences of his prohibited actions that he committed with his fully volition and he knows the consequences behind, because criminal liability is to assume to the a culprit all the burden of what his hands committed while he is in the state of full knowledge that such an act is prohibited and committing it is a crime punishable under Islamic law.

Criminal liability can be in hudood offences, Qisas (retaliation) or Ta'azir (Discretionary punishment) and it stands on three pillars²¹⁸.

- a. Criminal act that occurred positively or negatively
- b. Full volition
- c. Knowledge and understanding

The Islamic law put a sound and strong shield over the five higher Islamic intents, that is to say the religion, human life, faculty of human reason,

progeny (Lineage) and material wealth, so that it cannot be infringed or violated, as it show concern with the complimentary or interest which is to drive away hardship and of social functions in the life of people in the community, and the embellishment

²¹⁸. Isma'eel, M.F., Sudanese Criminal Law, I.U.A. University Press, Khartoum, Sudan, 2008, p.139

interest which is improving and attaining that which is desirable that lead to moral and spiritual progress of the individuals and the society, all these is to protect the consistent order that the existing of human being lies on as follows:

- i. The family system
- ii. The individual ownership system
- iii. The system of social life in the society
- iv. The system of government in the society in protecting and promoting the aforementioned systems there must be a good avenue for livelihood but when it is violated or challenged the life in the society will get disturbed.

Consequently the person who can be held liable and responsible for criminal action must be free from coercion and have the knowledge and understanding.²¹⁹

4.1.1 Sexual Offences

4.1.1.1 Sexual Offences in Nigerian law

The evidence Act provided as relates to sexual offence in section 179 (5) that.²²⁰

A person shall not be convicted of the offences mentioned above in paragraph (b) of subsection (1) of section 51 of criminal code which stated as follow:

(b) Utters any seditious words.²²¹

Or in section 218 of criminal code which states that:

Any person who has unlawful carnal knowledge of a girl under the age of thirteen years is guilty of a felony, and is liable to imprisonment for life, with or without caning.²²²

²¹⁹. Ibid, p.140

²²⁰. Section 179 (5) Evidence Act, Op. Cit.

²²¹. Section 51 (1) (b) Criminal Code, Cap C. 28, Laws of the Federation, 2004

Or in section 221 criminal code which states that:

Any person who:

- (1) Has or attempts to have unlawful carnal knowledge of a girl being of or above thirteen years and under sixteen years of age; or
- (2) Knowing a woman or girl to be an idiot or imbecile, has or attempts to have carnal knowledge of her;

Is guilty of misdemeanor, and is liable to imprisonment for two years, with or without caning.²²³

Or in section (223) the same code states as follows: any person who

1. Procures a girl or woman who is under the age of eighteen years to have unlawful carnal connection with any other person or persons, either in Nigeria or elsewhere, or
2. Procures a woman or girl to become a common prostitute, either in Nigeria, or elsewhere or,
3. Procures a woman or girl to leave Nigeria with intent that she may become an inmate of a brothel elsewhere..... Is guilty of a misdemeanor and is liable to imprisonment for two years.²²⁴

Or in section 224 the same code which states that:

Any person who:

²²² Section 218, Ibid

²²³ Section 221, Ibid

²²⁴ Section 223, Ibid

(1) By threats or intimidation of any kind procures a woman or girl to have unlawful carnal connection with a man either in Nigeria or elsewhere..... is guilty of misdemeanor and is liable to imprisonment for two years.²²⁵

According to the above provisions sexual offences includes defilement of girls between 13 and 16 years of age, and of idiot, procuration and procuring the defilement of women by threats of fraud or administering drug.

Similarly, section 282 of Penal Code captured sexual inter-course with a girl under 14 years of age as follow:

A man is said to commit rape who, save in the case referred to in subsection (2) has sexual intercourse with a woman in any of the following circumstances:

- a. Against her will
- b. Without her consent
- c. With her consent, when her consent is obtained by putting her in fear of death or of hurt.
- d. With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
- e. With or without her consent, when she is under fourteen years of age or of unsound mind.²²⁶

²²⁵ Section 224, Ibid

²²⁶ Section 282, Penal Code, Cap 105, Laws of the Federation, 2004

For the aforementioned sexual offences to be established, the provision of two codes required corroboration before the accused person is convicted.

The burden lies with the prosecution to prove his case through medical experiment of the doctor as to the actual penetration therein. As to what constitute corroboration, section 214 states clearly that:

In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.²²⁷

In *Jos Native Authority v. Alhaji Gani*,²²⁸ the High Court quashed the decision of Alkali Court based on the uncorroborated testimony of one witness, the court felt that it was a miscarriage of justice resulted by the failure of the Alkali court to be guided by the provision of section 179 (5) of the evidence Act.

However, in *Okabichi V. State*²²⁹ part of the prosecution case came from the unsworn evidence of a young girl. Quashing the conviction, the Supreme Court held that the evidence of a child who does not understand the nature of an oath must be corroborated by a competent witness before it can be sufficient to convict an accused which was in fact not done.

²²⁷ Section 214, Evidence Act, Op. Cit.

²²⁸ *Jos Native Authority V. Alhaji Gani* (1968) N.M.L.R. 8

²²⁹ *Okabichi V. State* (1975) 9, N.S.C.C. 124

Therefore, in Nigerian law the sexual offences must in all circumstances provide corroborative evidence apart from the testimony of the victim so as to secure the conviction of the accused person.

Under Islamic law

In the Islamic legal regime there are some offences regarded as sexual offences may comprises either of the following:

- a. Adultery /fornication [Zina]
- b. Homosexuality (Lutt)
- c. Bestiality [Muwaqa'atul hayawaan]
- d. Lesbianism [Sihaaq]

4.1.1.2 Adultery /Fornication (Zina)

Is defined as sexual intercourse between a man and a woman without legal relationship of husband and wife existing between them.²³⁰

Is also defined as: the insertion of the male organ into the female sexual organ between those not lawfully married to each other. The mere penetration of the glans of the penis is a sufficient legal ground for punishment. And it is not necessary that the penetration be full or that the sexual act be complete.²³¹

4.1.2.2.1 Authority of Prohibiting Adultery

Adultery is prohibited according to the Qur'anic provisions and prophetic traditions.

²³⁰ Naseef, A.O., Op. Cit, p.772

²³¹ Bambale, Y.Y., Op. Cit. p. 29

a. Qur'an

Almighty Allah Says:

And those of your women who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them and if they testify confine them (i.e. women) to houses until death comes to them or Allah ordains for them some other way.²³²

The aforesaid verse was abrogated with the following verse:

Allah says:

The woman and the man guilty of illegal sexual intercourse, flog each of them with a hundred stripes. Let not pity withhold you in their case in a punishment prescribed by Allah if you believe in Allah and the last Day. And let a party of the believers witness their punishment.²³³

This punishment is for unmarried persons guilty of the above crime but if married persons commit it, the punishment is stone them to death, according to Allah's law.

b. Prophetic Tradition

It was narrated by Aboo Huraira may Allah be pleased with him, Allah's messenger (pbuh) judged that the unmarried person who was guilty of illegal sexual intercourse be exiled for one year and receive the legal

²³² Qur'an 4:15

²³³ Ibid, 24:2

punishment (i.e.) be flogged with one hundred stripes.²³⁴ However, it was narrated by Jabir bn Abdullah Alansari may Allah be pleased with him. A man from the tribe of Bani Aslam came to Allah's messenger (pbuh) and informed him that he had committed illegal sexual intercourse and he bore witness four times against himself. Allah messenger (p b u h) ordered him to be stoned to death as he was a married person.

4.1.2.2.2 Conditions for Inflicting the Hadd of Adultery

The crime of adultery is so grave that Allah provides for imposing of punishment on everyone found guilty of the said crime, it was based on this that prophet, during his life, applied strict rules and procedure for the execution of those that accused other person(s) of the offence of Zina without proof.

In the process of establishing offence of Zina and the punishment to be inflicted the following conditions must be satisfied:

- i. The offender should be an adult

Hadd punishment will not be inflicted on a minor male or female but the judge can impose Ta'azir on them. But in a situation whereby a man or woman fit for sex commits an adultery with a minor will be punished with Hadd.

- ii. The offender should be sane

The crime of Zina is said to establish if the offender is sane and Hadd will be inflicted, but if the offender is insane, Hadd does not apply.

- iii. It should be committed or done voluntarily

²³⁴ Alqazweeny, M.Y. Sunan Ibn Majah, Dar elfikr, Beirut, Lebanon, Vol. II, p. 851

If the woman is forced, then it is regarded as forcible Zina, i.e. rape.²³⁵

It was reported that a woman went out in the time of the holy Prophet (S.A.W) to go to prayer and a man who met her attacked her and got his desire of her. She shouted and he went off and when a company of the emigrants came by, she said that man did such and such to me, they seized the man and brought him to Allah's messenger who said to the woman, go away for Allah has forgiven you, but of the man who had intercourse with her, he said stone him to death" because he was married.²³⁶

iv. The adultery should be a free person and not a slave.

The punishment of slave is not the same as that of free man, it is stated in the Qur'an that:

*And when they (the slave-women) are married and thereafter become guilty of immoral conduct, they shall be liable to half the penalty to which free women are liable.*²³⁷

v. The adulterer should be a Muslim:

According to Maliki school the Hadd of adultery applies to Muslims only, while shafi'i, Hanbali and Zahiri schools are of the view that Hadd applies to citizens of the state whether Muslims or non-Muslims.²³⁸

Hanafi School is of the view that the Hadd applies to Muslims and as to non-Muslims only lashing applies to them not stoning to death.

²³⁵ Bambale, Y.Y., Op. Cit, p.35

²³⁶ Hassan, H., Sunan Abee Dawud, Al-Madeena Publication LTD, New Delhi, 1985, p.1220

²³⁷ Qur'an 4:25

²³⁸ Bambale, Y.Y., Op. Cit. p.36

- vi. The adulterer should be fortified (muhseen) the Hadd punishment will only be inflicted on adulterer who is fortified, that is to say he have been legally married and have consummated the marriage with his wife.²³⁹

4.1.2.2.3 Means of Proof (Testimony)

The offence of adultery (Zina) can be proved based on confession of the offender as it was happened during the life time of the prophet, then Ma'iz approached the Prophet (S.A.W) admitting the commission of Zina, the Prophet (S.A.W) conferred all the avenues for Mai'z to exercise so as to withdraw his confession after it was completely exhausted the prophet ordered his execution.

However, the method or means for establishing the offence of Adultery Zina that this work have concern with is testimony, this is upon the production of four reliable witnesses who happens to witnessed the offence at the time, place, person's and when the offence was committed.

Allah the most high says:

- *And those of your women who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them; and if they testify, confine them or Allah ordains for them some other way.*²⁴⁰
- *And those who accuse chaste women and produce not four witnesses, flog them eighty stripes.*²⁴¹
- *Why did they not produce four witnesses? Since they (slanderers) have not produce witnesses! Then with Allah they are the liars.*²⁴²

²³⁹ Ibid.

²⁴⁰ Qur'an 4:15

²⁴¹ Ibid, 24:4

²⁴² Ibid, 24:13

It was reported that the prophet (pbuh) said to Hilal the son of umayyah when he accused his wife for committing sexual intercourse with shareekh the son of Samaha'a, produce four witnesses otherwise Hadd punishment be inflicted on your back.²⁴³

Islamic law penalize adultery considering that it touches the entity of the community and disrupt it's safety and soundness, since is a serious assault to the family system which is one of the systems the Islamic law laid emphasis to protect.²⁴⁴

Therefore the witnesses that will testify the offence of adultery must met the said conditions which was stated elsewhere in the work, if they qualified as witnesses and forged ahead and testified and scale through all the judicial processes (i.e. examination, cross examination and re-examination) if their statements stands firm no contradiction, then the court will establish the crime and pronounce its Judgment but when contradiction occurred in the statements of the witnesses as to the accused (the man or woman) place or time, this will cast doubt and may ward off the Hadd punishment on the accused, however the witnesses testified the commission of the offence will be punish with Hadd of Qadhf (slander)²⁴⁵

4.1.2.3 Homosexuality /Lutt/ Sodomy

Is an unnatural act of sex to satisfy one's passion it arises in a situation where a man engages another man through the anus to satisfy his sexual urge.²⁴⁶

It is also defined as: carnal intercourse committed against the order of nature by a man with a man, or in the same unnatural manner with a woman.²⁴⁷

²⁴³ Alhumaidy, M.F., *Aljami'u baina Sahihain elbukhari wa muslim*, Dar ibn hazm, Beirut, Lebanon, 2002, Vol. II, p.85

²⁴⁴ Auda, A., *Op. Cit.* p. 305

²⁴⁵ Bahnasi, A., *Op.Cit.* p.55

²⁴⁶ Bambale, Y.Y., *Op. Cit.* p.40

4.1.2.3.1 Authority for Prohibiting Homosexuality

Allah the most high says:

- *And remember Lout (Lot) when he said to his people “Do you commit the worst sin such as none preceding you has committed in the Alamin (mankind and Jinns).*
- *Verily, you practice your lusts on men instead of women, Nay, but you are a people transgressing beyond bounds (by committing great sins).*
- *And the answer of his people was only that they said: “Drive them out of your town, these are indeed men who want to be pure (from sins).*
- *Then we saved him and his family, except his wife, she was of those who remained behind (in the torment).*
- *And we rained down on them a rain (of stones). Then see what the end of the Mujrimun was. (Criminals, polytheists, sinners, etc.)²⁴⁸*

The prophet (p.b.u.h) frowned strongly at this offence and it was reported that he said:

- *If you find someone who is committing an act of the commitment of Lut (that is homosexuality), kill the one on top and the one below.*
- *Kill both who commit homosexuality.²⁴⁹*

4.1.2.3.2 Means of Proof (Testimony)

As to the mode or means of proof, is the same with that of Zina, which is either by confession or the testimony of two (2) reliable, sane and adult Muslim who happens to witness the culprits committing the offence the testimony of the two (2)

²⁴⁷ Ibid

²⁴⁸ Qur'an, 7:80-84

²⁴⁹ Ibid, p.199

witnesses must be in accord stands firm and very constructive that will lead to the establishment of the offence,²⁵⁰ this is the view iman Aboo Haneefa. But the three Imams i.e Imam Malik, Shafi'I and Ahmad are of the view that the witnesses for establishing Homosexuality is the same as that of Zina that is four reliable, sane and adult Muslim.

4.1.2.3.3 Punishment of Homosexuality

Based on light of the Qur'anic and Hadeeth provisions prohibiting the act of homosexuality the jurists unanimously agreed that homosexuality is a crime, but the prophet (P.B.U.H) did not determine such a case or punish such offenders that is why different views is attached to the punishment of the offence

The first caliph Aboo-Bakr may Allah be pleased with him held that both the offenders should be burnt the fourth caliph Ali may Allah be pleased with him held that the offenders should be flogged and then stoned.

As a result of these divergent view of companions the jurists also differ;

Imam Aboo Haneefa and Zahiri School are of the view that the culprits ought to be punished by Ta'azir.

While Shafi'i Hanbali schools and the two disciples of Imam Aboo Haneefa (Aboo Yusuf and Muhammad Asshayban) are of the view that the offence is considered as Zina i.e. stoning for the married and lashing (100 strokes) for the unmarried.²⁵¹

²⁵⁰ Addimashqy, M.A., Op. Cit. p. 350

²⁵¹ Bambale, Y.Y., Op. Cit. p.42

Imam Malik in one of his views held that the punishment of the culprit of Homosexuality is stoning to death either married (Muhsin) fortified or unmarried (Bikr)²⁵²

4.1.2.4 Bestiality (Muwaqa'atu elhayawaan)

Is an act of committing sex or intercourse by a male person with an animal of whatever nature to satisfy his sexual urge.²⁵³ The animal can be a dog, monkey, cow, horse etc. Islam always tried to safe-guard the chastity and morality of people so as to have healthy society. With the current constrain and outbreak in West Africa of the deadly Ebola²⁵⁴ virus where death rate up to 90%, the illness affects humans and non-human primates (e.g Monkeys, Gorillas) the virus is highly contagious which can be transmitted through contact with infected animals, and the statistics shows that monkeys and bats are carrying the virus and if the humans are coming to contact with it can easily be affected with this terrible disease.

Consequently for the sake of health and safety, one must shun and keep away from having sex with animals, above this it is divinely prohibited by Almighty Allah.²⁵⁵

4.1.2.4.1 Means of Proof (Testimony)

The offence of sex with animal can be proved by either two male, reliable, sane and adult Muslim or through the confession of the culprit.

²⁵² Addimashqy, M.A., Loc. Cit. p.350

²⁵³ Auda, Op. Cit. p. 313

²⁵⁴ Ebola is an often deadly virus that is highly contagious when a person is exposed to body fluids or tissue of people who are infected, up to 90% of the people who are infected with the virus may die from it.

²⁵⁵ www.sharecare.com/infectiousDisease/viralinfectionsEbola

4.1.2.4.2 Punishment of the offence of Bestiality

Generally bestiality according to Malik and Aboo Haneefa is not considered as Zina but a grave sin punishable with ta'azir, while Shafi'I and Ahmad held two views, the most preferred concurred the view of Aboo Haneefa and Malik, the second view considered the act as Zina punishable with Hadd, they relied on the following Hadeeth:

He who commits sex with animal, kill the adulterer and the animal as well, the same rule should apply to a woman who allows an animal to have sex with her.

4.1.2.5 Lesbianism (Sihaaq)

This is opposite to sodomy in the sense that it is an act in which a woman engage another woman by friction or the touching together of the organs of two females.²⁵⁶

4.1.2.5.1 Authority Prohibiting Lesbianism

Allah almighty said in Holy Qur'an in the whole world to males you go and leave what Allah has created for you of your spouses? Nay you are a transgressing people.²⁵⁷

Even though the above verse is addressing the people of Prophet Lut A.S but at the same time in the second point of the verse it also means for women, leaving men to choose women is a transgression worthy of similar, severe condemnation as they too chose those who are not meant to be their sexual partners.

4.1.2.5.2 Means of Proof (Testimony)

It is very interested that Islamic law provided one single method or means of proof be the case at hand is criminal or civil in nature with the exception of the offence of

²⁵⁶ Bambale, Y.Y., Op.Cit. p.43

²⁵⁷ Qur'an 26:165-166

Zina which requires the number of witnesses to be four (4) before punishment may be imposed upon the culprit, therefore proof in offence of this nature i.e. lesbianism the testimony of two reliable witness suffice or the confession of the culprit as the case may be.

4.1.2.5.3 Punishment

As for punishment of this grave offence, there are many that an Islamic society reserves the right to give through its courts of law. They are not always mentioned in the Qur'an, but the divine book itself directs those with the legal and social authority in a Muslim society to forbid wrong and enjoin good. The jurists are of the view that is a crime punishable by Ta'azir.²⁵⁸

4.1.3 Crime against honour (Qadhf or false accusation)

4.1.3.1 Definition of Qadhf

Is an act of accusing a chaste person of committing an adultery or denial of his paternity.²⁵⁹

It is also redefined as: an unproved allegation that an individual has committed Zina. This crime is committed when one falsely accuses another of zina (adultery or fornication) or unchastely to man or woman, or when one injuriously contents the status or the paternity of a Muslim.²⁶⁰

4.1.3.2 Authority for prohibiting false Accusation (Qadhf)

Allah the most high says:

²⁵⁸ Iftikhaar, A., Lesbianism and Islam www.monthly-renaissance.com/issue/c...02/10/14, 05:16pm

²⁵⁹ Auda, A., Op. Cit. p.404

²⁶⁰ Bambale, Y.Y., Op. Cit. p.45

*And those who launch a charge against chaste women, and produce not four witnesses to support their allegations, flog them with eighty stripes and reject their evidence even after, for such men are wicked transgressors.*²⁶¹

Even though the verse made mention of al muhsanaat (chaste women) but it include to extend the chaste men.

Furthermore, the verses stated the masculine gender but it is not restricted to male only, it extends to the female accusers.²⁶²

But in a situation whereby a husband puts forward slanderous accusations against his wife or a wife against her husband, the holy Qur'an lays down the following procedure:

And for those who launch a charge against their spouses and have in support no evidence but their own, their solitary evidence (can be received if they bear witness four times with an oath) by Allah that they are solemnly telling the truth. And the fifth (oath).

Should be that they solemnly invokes the curse of Allah on themselves if they tell a lie.

*But it would avert the punishment from the wife, if she bears witness four times with (an oath) by Allah that he (her husband) is telling a lie. And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.*²⁶³

²⁶¹ Qur'an 24:4

²⁶² Bambale, Y.Y., Op. Cit. p.44

²⁶³ Qur'an 24:6-9

4.1.3.3 Conditions for imposing Hadd of Qadhf

According to Alkalaby there are eight (8) conditions that when met the Hadd of Qadhf must be inflicted on (Qadhif) accuser.

Six out of it is on the part of slandered person (Maqzuf) is as follows:

1. Islam: The jurists unanimously are of the view that the slandered person should be Muslim (male or female)
2. Freedom: The slandered person should be free no slave
3. Sane: The slandered person must possess the normal common sense
4. Maturity: The slandered person should attend the age of majority i.e. eighteen (18) years and above.
5. He must possess the organ of Zina
6. He must be chaste, i.e. he is a man of unimpeachable character.

While two out of the eight conditions is on the part of the accuser (Qadhif) which is:

1. Sane the accuser must be sane and have full common sense
2. Maturity: the accuser must attained the age of majority.²⁶⁴

4.1.3.4 Means of Proof (Testimony)

In respect of establishing the offence of Qadhf the testimony of two reliable, adult and sane witnesses is enough to establish the case of accusation (Qadhf) on Qadhif accuser. But on the side of confuting the accusation; the accused of Qadhf should adopt one of the following ways:

²⁶⁴ Alkalaby, M.A., Op. Cit. p. 264

- i. The accused will deny the case of Qadhf and summoned witnesses from male or female without restriction to a certain number to testify on the nonoccurrence of the Qadhf or
- ii. The accused will claim that the slandered person (maqzuf) admit the truthfulness of the Qadhf, it is enough to support this with the witness of two male reliable witness or one male and two female, or
- iii. The accused should insist on the truth of his allegation (Qadhf) and in this situation is a duty on him to prove his allegation by producing four reliable male witnesses to testify before the court or,
- iv. If the accused happens to be the husband of the slandered person (wife) with Zina, he have to resort to li'an (mutual imprecation) or he must provide four reliable male witness or he must be punished with hadd of Qadhf.²⁶⁵

4.1.4 Crimes Against Property (theft sariqa)

In general term crimes against property cover a variety of specific types of stealing including the crimes of larceny, robbery, burglary, looting embezzlement and theft, but the work will only take a look at the crime of theft.

4.1.4.1 Definition of Theft

Is defined as physical removal of protected (Mahruz) property or object secretly with the intention to deprive the owner from it permanently.

For instance a person enters a shop or house and take away clothes, gold or any valuable property.²⁶⁶

²⁶⁵ Auda, A., Op. Cit. p. 434

²⁶⁶ Aljaza'iry, A.J., Minhaaj elmuslim, Dar ibn Haitham, Cairo, Egypt, 2002, p.427

4.1.4.2 Authority for prohibiting theft

Theft is a classical Sin (Kabeera) that Almighty Allah prohibits it as he said in the Holy Qur'an

Qur'an:

Cut off (from the wrist joint) the right hand of the thief, male or female, as a recompense for that which they committed a punishment by way of example from Allah.....²⁶⁷

The Prophet (p.b.u.h) curses the perpetrator of theft where he said:

Allah curses a man who steals a Baida (an egg) and gets his hand cut off.²⁶⁸

In trying to ensure a healthy Ummah and to allow peace to reign in human society a theft is considered as not a believer at the time when he is committing theft in one of the hadith the Prophet (p.b.u.h) said: when an adulterer commits illegal sexualintercourse then he is not a believer at the time he is doing it; and when somebody steals then he is not a believer at the time he is stealing.²⁶⁹

Also the Prophet (p.b.u.h) in process of explaining the punishment that can be imposed on everybody found guilty without exception or interference in matters of justice on ground of relationship or high status (first class citizen) he said:

The earlier communities before you were ruined and destroyed whenever a noble person was convicted of theft, they left him unharmed. But if the same thing

²⁶⁷ Qur'an 5:38

²⁶⁸ An-Naisaboory, M.A.A.H., Almustadrak alaa assahihain, Dar elkutoob el ilmiyya, Beirut, Lebanon, p.199

²⁶⁹ Al'asqalany, A.A.A.M., Op. Cit. p.86

happened to a lowly person, they executed the punishment on him, by Allah, had Fatima stolen, I would have had her hand cut off.²⁷⁰

4.1.4.3 Conditions of Theft

Before the penalty of cutting the hands off is executed the following conditions must be satisfied: conditions in respect of the accused of theft

1. The accused must be sane
2. He must be an adult
3. He must commit theft voluntarily no compulsion
4. He must not be hungry while committing theft.

Conditions in respect to stolen property:

1. The stolen property must reach Nisaab
2. It must be valuable
3. It must be in a custody (Hirz)
4. It must be owned by someone.²⁷¹

4.1.4.4 Means of Proof (Testimony)

The proof of stealing should be established beyond doubt. There must be two reliable male witnesses who should be good Muslims, they are required to testify against the accused and the judge should be fully satisfied as to the crime and what has been stolen from where, when and the value of the stolen property.²⁷²

²⁷⁰ Alhumaidy, M.A., Op. Cit. p.45

²⁷¹ Doi, A.I., Shariah the Islamic Law, Center for Islamic Legal Studies, Ahmadu Bello University, Zaria, p.257

²⁷² Ibid, p.256

4.1.5 Crimes Against Reasoning (shrub al khamr)

The jurists unanimously agreed that taking wine is prohibited, they even considered it as impure substance and drinking small quantity or large quantity may cause the imposing of Hadd punishment and whoever legalized the wine (khamr) would be ruled as kaafir (disbeliever), they also agreed that the juice of grape when it is too much and can intoxicate is khamr (wine).²⁷³

4.1.5.1 Definition of Khamr

Is defined from khamara meaning: the covered or veiled thing.

Thus it will mean any fermented juice of grape, barely, dates, or any other thing which may make one intoxicated after drinking, it may also include any liquor or thing which has the same property.²⁷⁴

4.1.5.2 Authority for prohibiting khamr (wine)

Almighty Allah said:

*They ask thee concerning wine and gambling, say in them is great sin and some profit for men, but the sin is greater than the profit.*²⁷⁵

He also said:

*O ye who believe approach not prayers while you are drunk, until ye can understand all that ye say.*²⁷⁶

It comes to final stage that almighty Allah prohibits khamr totally in the following verse:

²⁷³ Ad-dimashqy, M.A., Op. Cit. p.365

²⁷⁴ Doi, A.I., Op. Cit. p.262

²⁷⁵ Qur'an, 2:219

²⁷⁶ Ibid, 4:43

*O ye who believe, intoxicants and gambling dedication of stones and divination by arrows are an abomination of satan's handwork! Eschew such abomination that ye may prosper satan's plan is but to excite enmity and hatred between you, with intoxicants and gambling and will keep you away from remembrance of Allah and from prayers will ye not then desist.*²⁷⁷

There are a number of prophetic traditions for prohibiting khmar (wine) as follows:

The prophet (p.b.u.h) said: an intoxicant is a mother of all vices, whosoever drinks it his prayers (salaat) will not be accepted (by Allah) for forty days, if he died and there is wine in his stomach he has died the death of jahiliyya (Pre Islamic period).²⁷⁸

Also the prophet said:

Anything that intoxicates is haram and if a large doses of something is intoxicant even its smallest does is also unlawful and if a cup of anything is intoxicant then even a drop of it also unlawful.²⁷⁹

Also:

The prophet (p.b.u.h.) said: a drunkard is a cursed person.²⁸⁰

4.1.5.3 Conditions before the hadd of wine drinking (shrub elkhamr) is inflicted

For the Hadd of wine drinking to be imposed the following conditions must be satisfied:

1. The accused must be adult

²⁷⁷ Ibid, 5:93-94

²⁷⁸ Attabaraany, A.S.A. Almu'ujam el awsaat, Dar elharamain, Cairo, Egypt, Vol. IV, p.81

²⁷⁹ Albusairy, A.A.J., Ithaaf elkhiyara elmahara bee zawa'id elmasanid el'ashara, Dar elwatan, Arriyadh, 1999, Vol. IV. P.349

²⁸⁰ Ibid

2. He must attained the age of majority
3. He must be a Muslim
4. He must take the wine voluntarily
5. He should not be forced to take the wine to choke away the food
6. He must be aware that it is an intoxicant (Kahamr)
7. He must know that it is prohibited.²⁸¹

4.1.5.4 Means of Proof (Testimony)

The punishment of wine drinking will be given if a person drinks accept or admits (al'aqrar) that he has drunk, or on the evidence of two male just witnesses.²⁸²

It can be added to this i.e. the evidence by smelling the alcoholic beverage coming out from the mouth of the drunkard, in this situation the evidence of one male just witness is enough to establish the case.²⁸³

4.1.6 Crime against Religion (Apostacy)

The Islamic concept of religion is unique in the broadest sense of the word, it is true that genuine religion must come from God for the right guidance of man. And it is equally true that human nature and major human needs are basically the same at all times. This conception leads to one conclusion and that is: there is only one true religion coming from the one and the same god to deal with the outstanding human problems of all times.

This religion is Islam, it should be noted that Islam was not taught and brought by our noble prophet (p.b.u.h) alone rather it had been taught and brought by all prophets before him, and true followers of Abraham and Moses as well as those of

²⁸¹ Alkalaby, M.A.J., Op. Cit. p.267

²⁸² Doi, A.I., Op. Cit. p.265

²⁸³ Alkalaby, M.A.I., Op. Cit. p.268

Jesus and the rest were all called Muslims. So Islam has been and will continue to be the true universal religion of god, because is one and changeless and because human nature and major human needs are fundamentally the same irrespective of time and place, of race and age and of any other considerations.²⁸⁴

Therefore whenever an individual enters the fold of Islam is expected to remain for his life as he enters into an unbreakable agreement, if one violate this bond will be considered as a criminal and will be punished under Islamic law.

4.1.6.1 Definition of Apostacy

The Arabic equivalent for apostacy is Riddah or Irtidad from the root Radd which means: “to retreat”, “to retire” to withdraw from or fall back from. Technically Riddah is: renunciation or abandonment of Islamic faith for any other religion, by one who professed it. The person who for sakes Islam for unbelief of for another religion is called a “murtadda.”²⁸⁵

It is also redefined as: rejection of the religion of Islam in favor of any other religion²⁸⁶.

4.1.6.2 Acts, Deeds or Words that lead to Apostasy

The offence of ridda is said to have been committed through speech (words) or deeds or to failed to observe certain obligatory act. The following are clear examples of it:

²⁸⁴ Abdl-aati, H., Islam in Focus, Ministry of Awqaaf and Islamic Affairs, Doha, Qatar, 1997, p.30

²⁸⁵ Bambale, Y.Y., Op. Cit. p. 74

²⁸⁶ Doi, A.I., Op. Cit. p. 265

1. Rejection of the fundamental principles of faith (Iman) like faith in the existence of Allah or the messengership of his Prophet Muhammad (p.b.u.h) as contained in the credal statement of Islam i.e. Kalimah al-shahadah.
2. Rejection of the belief in the Qur'an as the Book of Allah or the belief of the message contained in it.
3. The denial of the day of resurrection.
4. Throwing the Holy book (Qur'an) in a filth.
5. The rejection and denial of the obligatory ritual practices like salaah (prayers), Zakaat (giving of the poor rate), Siyaam (Fasting) in the month of Ramadan and Hajj pilgrimage.
6. Imitation of the practices of non-Muslims in their prayers
7. To have the belief and utter the unlawful to be lawful.²⁸⁷

4.1.6.3 Divine Provision on Apostacy

Allah the most high says:

..... And whosoever of you turns back from his religion and dies as

A believer, then his deeds will be lost in this life and in the hereafter, and they will be dwellers of the fire, they will abide therein forever.

In one of the prophetic tradition.

It was reported by Abbas, May Allah be pleased with him, and that the messenger of Allah (p.b.u.h) said: whosoever changes his religion (from Islam) to anything else) bring end to his life.²⁸⁸

²⁸⁷ Ibid, p.265

²⁸⁸ Qur'an, 2:217

4.1.6.4 Conditions

For the offence of apostasy to be perfectly established and the person qualified as an apostate, the following conditions must be satisfied:

- i. The culprit must be an adult
- ii. He must be sane
- iii. He must have committed it voluntarily.²⁸⁹
- iv. He must be in religion of Islam.

4.1.6.5 Means of Proof (Testimony)

The offence of apostasy is proved by the evidence of two competent witnesses who must be explicit and precise in showing that the accused person is guilty of apostasy by virtue of such and such declaration or by doing so and so action, in a situation whereby the witnesses testify that the accused did not express a word that amounts to apostasy, the accused will be called upon to corroborate it and if he does this the case is dismissed. But where he states the contrary, i.e. he mentions that he said something that leads to apostasy it will be regarded as a confession and punishment will be carried out accordingly.²⁹⁰

4.1.7 Homicide Offences (Crimes against Human life)

In discussing this topic, there is a need to see how Islamic law preserved and protected human life. Life is Allah's (S.W) gift to human and no one has the right to trespass it, even the person himself, Allah (S.W) creates humans and honors them to perform his tasks on earth and to test their capabilities of performing of worshipping

²⁸⁹ Bambale, Y.Y., Op.Cit. p.75

²⁹⁰ Ibid, p.75

him (SW). Islamic law guarantee a good and noble life for humanity thus forbidding humiliation, annoyance and harm.²⁹¹

Allah most high says:

*And those who annoy believing men and women undeservedly, bear (on themselves) a calumny and glaring sin.*²⁹²

Therefore, Homicide: is the act of killing of human being by another human being. Homicide is provided for in the penal code.²⁹³

Homicide is a capital offence in Islamic law and the offender is subjected to punishment once it is proved that he killed his victim without lawful and legal justification. It was on this that Doi, A.²⁹⁴ Says: life is so very sacred in Islam that it cannot be taken for sport or for any sacrificial or medical purposes.

As far as the question of taking life in retaliation for murder or the question of punishment for spreading corruption on this earth is concerned, it can be decided only by a proper and competent Qadi and his court, if there is any war with any nation or country, it can be decided only by a properly established government. In any case no human being has the right by itself to take human life in retaliation or for causing mischief on this earth. Therefore, it is incumbent on every human being that under no circumstances should he be guilty of taking a human life.

Islamic law considered one man's murder to be the murder of all human race and whoever saves a life it is as if he saved the lives of all mankind.

²⁹¹ Assaqaar, M.M., Become Acquainted with Islam, Muslim World League, p.82

²⁹² Qur'an, 33:58

²⁹³ Section 221, Penal Code, Op. Cit. p. 231

²⁹⁴ Doi, A.I., Shariah the Islamic Law, Op. Cit. p.231

Allah also said as follows:

*That is any one slew a person, unless it be for murder or for spreading mischief in the land it would be as if he (slew) the whole people and if anyone saved a life of the whole people.*²⁹⁵

The above Qur'anic verse keep on emphasizing on how legal injunctions are protecting and preserving human life, in another verse it was provided as:

Do not kill a soul which Allah has made sacred except through the due process of law.²⁹⁶

In light of the above verse there is a difference and incomparable reasons between destruction of life carried out for the cause of justice and killing mankind on no account.

4.1.7.1 Types of Homicide Offences

According to majority of scholars there are three types of homicide viz:

- i. Intentional or deliberate murder
- ii. Quasi intentional murder
- iii. Unintentional murder.²⁹⁷

But the researcher stick to the view of Maliki School in classification of homicide where they adopted two classifications as follows:

- i. Intentional or deliberate murder
- ii. Unintentional murder.

²⁹⁵ Qur'an, 5:32

²⁹⁶ Ibid, 17:33

²⁹⁷ Zuhaily, W., Alwajeez fee elfiqh elislaamy, Op. Cit. p.435

They employed the two above classification while defining it as: intentional murder is any action committed with aggressive intention that lead to the death of the victim either the perpetrator intended killing or not, it is from this definition they deducted intention murder, while they deducted unintentional murder in the following definition of unintentional murder as follows: any action that lead to death without intention of the offender.²⁹⁸

4.1.7.2.1 Intentional Murder

It was defined above that when the offender intends to cause death by using a deadly weapon or a blunt, but heavy object, or by otherwise burning, drawing, strangulating or poisoning the victim. There is a consensus opinion of the jurists that in this type of case, Qisas become due in such a case.²⁹⁹

4.1.7.2.2 The Ingredients need to be proved in Intentional Homicide:

- i. Intention, the intent to do the actus reus
- ii. The victim must be human being
- iii. The death of the victim is as a result of the offender's action.³⁰⁰

The aforementioned ingredients are almost similar with what the penal code provided in section 221 as follows:

- a) That the death of the deceased had occurred
- b) That the death was caused by the act of the accused
- c) That the act was done with the intention of causing death, or that it was done with the intention of causing such bodily injury as:

²⁹⁸ Auda, A., *Attashri'u el jinai elislamy*, Op. Cit. p.7

²⁹⁹ Zuhaily, W., O p. Cit. p.435

³⁰⁰ Auda, A., Op. Cit. p.12

- i. The accused knew or had reason to know that death would be the probable and not likely the consequence of his act, or
- ii. That the accused knew or had reason to know that death would be probable and not only the likely consequence of any bodily injury which the act was intended to cause.

In *Ahmed v. State*³⁰¹ where the case was entertained by Kogi State High Court sitting at Lokoja, the appellant and one Musa Yusuf were charged with the offence of culpable homicide punishable with death under section 221 (a) of the penal code (read together with section 79 of the same code) in that they killed one Anda Ali.

The prosecution's case was that at about 8:00pm on the 9th day of December, 1993 at Obehira in Okene Local Government Area, one James Averehi was P.W.I was eating in his compound when he heard the distressed voice of Anda Ali, the deceased, who ran into a room in the witness compound.

The appellant and others chased the deceased into the premises. The two accused who forced the door by kicking it with their legs, entered the room and dragged the deceased from the room where he had gone into hiding. They duo jointly flogged the deceased. The appellant assisted the other convict to pin down the deceased while the latter fetched a short gun from his pocket, directed or pointed it at the deceased's neck before pulling the trigger which on discharge left the deceased sprawling in his own blood, dead, a medical report confirmed that the deceased died of gunshot wounds.

³⁰¹ *Ahmed V. State* (1997) 10, N.W.L.R 655

Also in *Khaleel V. State*³⁰² the case of the prosecution was that in the early hours of 15th August, 1987, at Gama Judu Quarters in Kano, there was a fire incident that took place in the room of one Dauda Abdullahi, the deceased, on that fateful date the deceased who was a casual friend of the 1st appellant and whose wife Sabuwa Dauda was also a former girlfriend of the 1st appellant were sleeping in their room. At about 2:00 am, the appellants came to the open window of the deceased's room with a container of petrol and emptied its contents on the deceased, his wife and the properties contained in the room and then set it ablaze.

The deceased and his wife who know the appellants before this date saw and identified them through the window before the room was set on fire which destroyed the properties in the room and also caused severe burns on the deceased and his wife Sabuwa. Sabuwa was lucky to survive but her husband died on the 40th day of his admission in the hospital as a result of the severe wound which became septic.

4.1.7.3.1 Manslaughter (Unintentional Homicide)

Is an act of offender where he did not intend the strike and also the effect of death, such as where one falls over another or where one aiming at game misses his mark and target and hits a man.³⁰³

4.1.7.3.2 Essential Elements for Committing Manslaughter

- i. The action should lead to the death of the victim.
- ii. The action occurred mistakenly.
- iii. There must be relationship between the mistaken action and the consequences of the action.³⁰⁴

³⁰² *Khaleel V. State* (1997) 8, N.W.L.R., 240

³⁰³ Zuhaily, W. Alwajeez, Op. Cit. p.360

4.1.7.4 Means of Proof (Testimony)

For the establishment of the offence of murder two just male witnesses must testify before the court, and the testimony of one male plus two females, or the testimony of one male plus the oath of the complainant is out rightly not accepted.

This is the unanimous views of the four schools, it is because of the gravious nature of the offence and to ascertain the facts seriously while proven it.

The Maliki school move further to approve the testimony of one just male witness plus the oath of the victim in injury or wound inflicted on the body, they also authorized and accepted the testimony of boys (minors) before they disperse and no matured person mingled with them there and then.

However, the majority of jurists i.e. Hanafis, Shafi'i's and Hanbalis are of the view that the offence of Ta'azir can be proved with the testimony of two just witnesses.³⁰⁵

The issue of number in establishing case in strict sense of common law is not applicable as the researcher referred to it in chapter two of the work, this depicted clearly in *Khaleel V. State* where the Court states the credibility of the evidence as follows:

The credibility of evidence adduced in a criminal trial for culpable homicide does not ordinarily depend on the number of witnesses that have testified. Evidence of a single credible witness, if accepted and believed by the trial court is sufficient to justify or support a convictions.³⁰⁶

³⁰⁴ Auda, A., Op. Cit. p.95

³⁰⁵ Zuhaily, W. Alwajeez, Op. Cit. p. 484

³⁰⁶ *Khaleel V State* Supra

4.2.0 Testimony As A Means of Proof in Civil Matters

4.2.1 Civil Liability

Means: a potential responsibility for payment of damages or other court enforcement in law suit as distinguished from criminal liability which mean open to punishment for a crime.³⁰⁷

4.2.2 Sale Contract

4.2.2.1 Definition

A contract for sale of goods: is a contract whereby the seller transfers or agrees to transfers the property in goods to the buyer for money consideration called the price.

It is also redefined as: a transfer of a right of property in consideration of a sum of money that may grant right to the owner to make use of the property or benefit from it permanently.³⁰⁸

4.2.2.2 Essential Elements for sale contract

In every valid and legal contract there are some key elements a contract must have, short of which may render the contract invalid. The sale contract initially stands on three basic elements according to the Islamic law scholars namely:

- I. Formula i.e Offer and Acceptance (As seega)
- II. Parties i.e Buyer and Seller (Al aaqedain)
- III. Consideration (Al maaqud alaihi)

³⁰⁷ Gerald, N. H., and Kathleen, T.H.,
Legal-dictionary-the free dictionary.com/civil+liability

³⁰⁸ Jamal, I.R., In eeqaad elbay bee wasaa'el hadeetha, Dar elfikr aljami' ee, Alexendra, Egypt, p.12

The formula is the agreed element unanimously between and among the jurists while the two parties and consideration may not materialized or achieved without formula as it is the basis on which can manifest clearly the volition of the parties. Hence the formula is what comes out from the parties either verbally, in writing, by saying or by action with intention to create contract.³⁰⁹

4.2.2.3 Means of proof (Testimony)

Before the parties to a contract concluded the agreement it is incumbent upon them to assign witnesses to bear witness for their commercial contract in accordance with the following Qur'anic text:

(..... But take witnesses whenever you make a commercial Contract.³¹⁰

In light of the above qur'anic verse Almighty Allah ordained the parties to a contract i.e the buyer and seller to appoint witnesses to avoid falling in conflict that may come up or to reduce the hardship when dispute in the sale contract arises.

But in the event of dispute between the parties the proof required under Islamic law centered on the means of proof itself such as the testimony of the witness. It is for the plaintiff to prove his claim against the defendant with high sufficient and sound evidence before he succeeds.

Where it involves oral evidence it may requires witness to testify as to the authenticity of the plaintiff's claim or defense of the defendant. However under Islamic law as in the case of civil wrongs or litigation, the required number of

³⁰⁹ Ibid, p. 22

³¹⁰ Qur'an 2:286

witnesses to prove the claimant's claim is two unimpeachable witnesses, but where the number is reduce to less than two the claimant oath must follow, also where the witnesses happens to be female the rule is that they must be at least two in number³¹¹ i.e two females in position of one male while four females in position of two males, the following Qur'anic injunction stated it clearly as follows:

(..... And call to witness from among your men two witnesses

And if two men be not available then one man and two women of

Such as ye approve as witnesses, so that if the one make error the

*Other will remind her.*³¹²

In Sa'a and Ors V. Ibrahim Iro³¹³ the court held that it is an established principle of Islamic Law that he who asserts must prove and this can be done by calling at least two unimpeachable male witness with at least two female witnesses supported with the claimant oath.

4.2.3 Ownership

Is defined as an act of owning something. It is redefined as: the right to the exclusive enjoyment of a thing, it denotes the relation between a person and any right that is vested in him. Or is an absolute or restricted, absolute ownership involves the right of free as well as exclusive enjoyment, including the right of using, altering, disposing of or destroying the thing owned. Absolute is of indeterminate duration.³¹⁴

³¹¹ El'imairi, M.T., Op. Cit. p.57

³¹² Qur'an 2:282

³¹³ Sa'a and Ors V. Ibrahim Iro, Shariah Law Report, Vol. (1) 1985/ CA/K/165/85

³¹⁴ Munzal, M.H.S., At-takyeef elfiqhy wal-qanoony lee uqood ijaraat el arady elhukumiyya, University Press, Khartoum, Sudan, 2007, p.75

4.2.3.1 Constituted Elements of Ownership

I. Independence

The owner of something should have total independence on the thing he owns.

II. Usage/Benefit

He should have an exclusive right to make the use or benefit from the thing he owns.

III. Disposal

The owner of something have an absolute right over the thing he owns, either to sell, give out as gift/endowment or to utilize on any form of usage.³¹⁵

4.2.3.2 Means of Proof

It is a popular adage according to the jurists that: (Alhiyazatu sanad el milkiyya) Possession of something is a clear evidence of its ownership, but in the event of conflict in respect of ownership it is stated by the prophet (PBUH) that: we should live by his traditions and the traditions of his rightly guided caliphs.

It has happened during the Imam Ali's era that shurayh was the judge then, the Imam instituted an action against a Jew before shurayh, claimed that the cuirass which is in the possession of that Jew is his, for he has neither sold it nor have he given it out as present. The Jew denied and claimed the cuirass to be his since it is in his hands, Shurayh asked the Imam to present witness, Imam Ali said: Qanbar (his servant) and Hussain (his son) testify that the cuirass is its own.

Eventhough the judge rejected the testimony of son and servant, but he is of the view that two male witnesses is enough to testify in establishing ownership.

³¹⁵ Ibid, p.76

This is an input in judicial process by Imam Ali since he was asked to produce witness to establish his case he assigned two male and sane witnesses. It is a known fact that the prophet (PBUH) ascribed knowledge to himself as he is the City of knowledge while Ali is the door to that City.

4.2.4 Loan

4.2.4.1 Definition of Loan

Is defined as an arrangement in which a lender gives money or property to a borrower and the borrower agrees to return the property or repay the money, usually along with interest at some future point(s) in time usually there is a predetermined time for repaying a loan and generally the lender has to bear the risk that the borrower may not repay a loan (though modern capital markets have developed many ways of managing this risk, while on Islamic Legal perspective the interest cannot be charged on.³¹⁶

4.2.4.2 Essential Elements of Loan

Based on the above definitions the researcher deducted the following as elements of loan.

1. Two parties (Borrower and Lender)
2. Consideration (Property or any valued item)
3. Specific period of repayment

4.2.4.3 Means of Proof (Testimony)

According to the Qur'anic provision chapter 2 verse 282 the loan contract should be established and concluded by appointing witnesses who may attest to the contract when dispute between and among the parties, the verse is as follows:

³¹⁶ www.investwords.com/2858/loan.html

..... *And get two witnesses out of your own men. And if there are not two men (available) then a man and two women such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her. And the witnesses should not refuse when they are called on (for evidence). You should not become weary to write it (your contract) whether it be small or big, for its fixed term, that is more just with Allah, more solid as evidence and more convenient to prevent doubts among yourselves, then there is no sin on you if you do not write it down. But take witnesses whenever you make a commercial contract. Let neither scribe no witness suffer any harm. But if you do (such harm) it will be wickedness in you.*³¹⁷

4.2.5.0 Marriage

4.2.5.1 Definition of Marriage

With regards to the definition of marriage the researcher adopted the definition of two classical Islamic schools i.e Shafi’I and Hanbali where they defined it as follow:

Is a contract which was concluded by words “NIKAH” or “TAJWIZ” or equivalent terms and by which contract the right of sexual intercourse and other services of the woman in matters of enjoyment are acquired and guaranteed in a reasonable manner.³¹⁸

4.2.5.2 Legal Authority of Marriage

In respect to the legality of marriage in the eyes of Islamic law, Almighty Allah says:

³¹⁷ Qur’an, 2:282

³¹⁸ Gurin, A.M., An Introduction to Islamic Family Law, Alrauf Press Limited, Zaria, 2001, p.21

And if you fear that you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice two or three or four but if you fear that you shall not be able to deal justly (with them) then only one or (the captives and slaves) that your right hand possess.....³¹⁹

It was reported that prophet (pbuh) said: O, the community of youth, whoever among you can afford marriage maintenance should get marriage, for it will lower one's gaze and will fortify one's private part, but whoever cannot manage it should observe fasting, for it will be fortress to him.³²⁰

4.2.5.3 Elements of Marriage

1. Guardian (Alwaliy)
2. Two witnesses or more (Ash shahidaan)
3. Formulation (Siga)
4. Dowry (Mahr)³²¹

4.2.5.4 Means of proof

It is a necessary and paramount condition relating to the validity of marriage to have witnesses whom should witnessed the establishment of a valid marriage, in support of this idea the Qur'an says:

³¹⁹ Qur'an, 4:3

³²⁰ Abubakar, A.U., *Bugyat elmuslimeen wa kifaayat el'wa'zeen*, Bamako, p.29

³²¹ Al'jaza'iry, A.J., *Op. Cit.* p.339

*Bring two witnesses from amongst your males, if there are no two male then a male and two females will suffice from among those you accept witnesses.*³²²

The Prophet (pbuh) also reported to have said: There is no valid marriage without witnesses. He also said: the fornicateresses are those who marry themselves out without witnesses.

Consequent upon this the establishment of valid marriage or its otherwise may stand on the testimony of two or more male witnesses, if male are not enough then one male and two female witnesses.

4.2.6.0 Divorce

4.2.6.1 Definition of Divorce

The word Divorce denotes an Arabic word Talaq which is verbal noun from the Arabic verb Talaqa Yutalliqa Talaqa which means to untie to free.

Technically means: a unilateral power vested on the side of the husband to repudiate his wife and set free from bondage of marriage as and when he so wishes.³²³

4.2.6.2 Conditions of Divorce

Before a divorce can take place and have legal effect the following conditions must obtain:

- a. The husband must reach the age of puberty
- b. He must be sane, conscious, alert and free from excessive anger, if he acts while under the influence of intoxication his divorce pronouncement is void, according to some jurists, valid to others including we the Malikis.

³²² Qur'an, 2:282

³²³ Gurin, A.M., Op.Cit. p.180

- c. He must be free from external pressure, he should not be forced to divorce his wife, if it happens it rendered the pronouncement void
- d. There must be clear intention on his part (husband) to terminate the marriage
- e. If a divorce is to take place according to the prophetic sunnah the wife must be of age and in a state of “fresh purity” that she must be fully recovered from the menses of the regular menstruation and she must not have had an intercourse at any time during this period of fresh purity.³²⁴

4.2.6.3 Types of Divorce

We have different kinds of divorce considering several dimensions, one of these is sunna and cotra-sunna divorce.

1. The Sunna Divorce, it has three basic variants
 - a. The Simple Revocable Divorce
 - b. The Double Revocable Divorce
 - c. The Triple Irrevocable Sunnah Divorce
2. The Contra-sunnah Deviant Divorce

It is bid'I which is acted in the disapproved direction e.g triple divorce in a single pronouncement.

3. Irrevocable Divorce

The irrevocability is of two levels:

³²⁴ Abdl Ati, H., The Family Structure, International Graphics Printing Service, Maryland, p.227

Intermediate and ultimate, the former means: the resumption of the broken marital relationship is forbidden without a new marriage contract, while the latter is resumption of the broken marital relationship which is absolutely forbidden.³²⁵

4.2.6.4 Means of Proof

The vast majority of the scholars recommended for the validity of Talaq to have two persons to witness it, they relied and based their argument on the verse in surah at-Talaq that almighty Allah says:

..... and take for witness two persons from among you

*With justice and establish the evidence (as before God)*³²⁶

The above verse pave way to the Islamic Law of evidence (Proof) with respect to Talaq to appoint two male persons to serve as witness in establishing the Talaq.

³²⁵ Ibid, p. 231-237

³²⁶ Qur'an, 65:2

CHAPTER FIVE

SUMMARY AND CONCLUSION

5.1 Summary

It is a fact that Islamic law of evidence have been brought about the purpose of achieving the common objective of justice and equality in settlement of disputes which are fundamental in human society. Without the Evidence rules most of the people's rights and properties will lost and disorder and chaos is bound to be the order of the day. In this research, the theoretical and practical aspects of Islamic law of Evidence in Nigeria were discussed and analyzed.

In this work, Principles of Islamic law of proof articulated in the classical texts with references thereto and it is studied and arranged into chapters.

Going back to the history pages, individuals used to depend on the might of their strength as a result jungle justice is done but later on with the advent of Islamic law it was clearly stipulated or adequately provided procedure through which aggrieved persons can presents their claims and prove same in order to get remedy. (Ubi Jus Ibi Remedium) if there is right there is remedy.

Statement of the problem that push the researcher to embark on this work is properly presented, also the aim and objectives of the research is well adressed. However, the researcher reviewed a number of literatures where some gaps were observed and it was adequately remedied in the work.

Sources of Islamic law of Evidence in Nigeria were richly discussed, however the basic principles of Evidence and the nature of proof required to sustain an action is well handled.

Also the work sample some cases on both criminal and civil in nature and applied the principles of testimony thereto and studied the sound application so as to arrive at the establishment or otherwise of the cases.

5.2 Findings

In this research work the researcher found the following:

1. That most of the texts on the subject matter i.e Islamic Law of Evidence were written in classical Arabic Language and are technical in nature. Also, and with due respect there is a lack of proper understanding and appreciation of Islamic Evidential rules among the lower courts judges and most of the legal practitioners that are appearing on Sharia cases are not adequately conversant with Islamic law of Evidence rules.
2. In civil cases a Muslim woman witness is considered half the worth and reliability than a muslim male witness criminal cases women witnesses are unacceptable in stricter sense and traditional interpretations of sharia. But if it is a mixture i.e Male Females can be admissible. However, In all commercial and civil contracts such as those relating to exchange of merchandise, agreement to supply or purchase goods or property and other oral contracts testimony of two male or male and two female witnesses is enough for its establishment.
3. It is observed that when a committed offence violated the right of Almighty Allah such will be punished under capital punishment i.e Hudud offences eg Adultery, Defamation, etc. the witnesses are free to testify or to conceal it because the prophet SAW was reported to have said: whosoever conceals the vices of a muslim Allah will conceal his in the day of resurrection. But it is

obligatory upon witnesses to testify before a court of law if the right is not punishable under capital punishment, ie Divorce, Talaq, suckling and dispute in financial transaction.

Also It is difficult to establish the offence of Adultery/fornication looking at the number of witnesses required to its establishment and the exact onerous statement testified by them.

4. Accepting evidence of non-muslim against muslims in Shari'a Courts is still uncertain in Shari'a courts. It seems the courts are inclining to allowing non-Muslims to give evidence against Muslims even in Hudud cases which is contrary to the views of classical Muslim jurists. However, In both criminal and civil matters discussed in this research it is observed that two credible witnesses are enough to establish both civil and criminal cases except Adultery/Fornication which requires four unquestionable witnesses for its establishment. However, The rules of Evidence in sharia courts maintain a distinction custom of prioritizing oral testimony witnesses in the judicial system must be faithful, that is Muslim Male witness are deemed more reliable than female Muslim witnesses, and Non-Muslim witnesses considered unreliable and receive no priority over Muslim male witnesses particularly in matters of capital punishments.
5. That under evidence Act the Evidence of a child is acceptable and admissible in as much as he can understand the question put to him and he can give rational answers, so also under Islamic law the testimony of children is admissible before they dispersed and no matured person mingle with them thereafter.

6. Jurisdiction of Sharia courts of Appeal is limited to Islamic personal status. The limitation can be traced to the Sharia court of Appeal law which came into force 30th September, 1960. Section 11 of the law provides: “the court will hear appeals on muslim marriage, inheritance, wills, waqaf, gift, guardianship of an infant and questions regarding an infant, prodigal of person of unsound mind or guardianship of a muslim who is physically infirm”
Section 277 (2) of the 1999 Constitution is unambiguous on a fair construction that the jurisdiction of the Sharia Court of Appeal is confined to and limited to all questions of what is termed Islamic Personal status. A judge of Shari’a Court in Nigeria has no power to review or revisit his decision made in error in trying to correct it as provided by Islamic Law.
7. Many of the Sharia Courts judges do not consult jurists who have vast knowledge in Islamic Law before determining complex cases filed in their courts. This can be attested to the fact that most of the Sharia Courts cases cited in this research were set aside on appeal based on wrong application of Islamic law of Evidence.

5.3 Recommendations

Evidence rules was set up principally to enable the judges and the disputants alike to arrive at a sphere of justice, from the preceding chapters, Evidence rules and principles were discussed and analyzed. Based on the findings of this research there are hindrances identified disturbing the smooth application of Islamic law of Evidence in Nigeria. Below are some of the recommendations to the conceived and enunciated problems:

1. The classical works of Islamic law of Evidence is quite enough in Arabic Language but it be translated into English and other local Nigerian languages. Translating of these reputable works would assist judges in appreciating the evidential rules; because most of the judges of Sharia Courts are not conversant enough with Arabic Language. It will also save time for judges in searching for experts who can translate the works from Arabic to the language of the court. The translated works should be annotated, this will serve as a beacon of light or guide to judges in clearly understanding evidential principles stated by classical authors.

It is also suggested that the curriculum of the Nigerian legal studies reviewed and Islamic Evidence/proof as an independent course be mounted and introduced to be taught by legal practitioners that are well experienced in the area. The philosophy behind this is it will equip Nigerian lawyers with the evidential rules and prepare them for the awaiting task.

2. Rules and Principles of Islamic Law of Evidence should be enacted and codified to various Sharia Courts to be their authority and guide in attaining justice.

Also Evidence of Non-Muslims should only be accepted in civil cases where credible Muslim witnesses are not available in Sharia Courts. In capital punishment cases testimony of Non-Muslim should not be admitted.

3. Islamic law provisions are sometimes rigid while others are flexible, it is recommended that whenever a divine injunction provided a certain command or order must be strictly adhered to e.g providing four male credible

witnesses for the establishment of Adultery/Fornication. But when the provisions is a little bit flexible e.g two male or a male and two female witnesses for the establishment of commercial transaction or civil matters here a court can come up with a suitable interpretation that will lead to a soft landing and arriving at a fruitful justice joint.

4. Sharia court judges should embrace the habit of consulting the jurists learned in Islamic jurisprudence, and well experienced retired judges that are learned in Islamic law whenever a complex case is before them, as such will tremendously reduce the number of apparent erroneous cases and they will help in ascertaining the right and suitable witnesses to testify before the court of law.
5. The Testimony of children is recognised and acceptable under Islamic law provided no matured person mingle with them, in light of the above Sharia courts should provide a comfortable avenue or room for children to adduce what they perceived before the court.
6. It is recommended that the provisions of section 262 and 277 of the 1999 Constitution as amended limiting the jurisdiction of Sharia Court of Appeal of the Federal and that of State to Islamic personal law be amended. The jurisdiction of the courts should be widened to cover appellate jurisdiction involving questions on Islamic law without restriction. Also the Sharia court judges should be given chance to revisit their decided cases pronounced in error. Moreover, the judicial service commission should ensure that persons to be appointed judges of sharia courts and other courts that are entertaining Islamic cases in Nigeria must be well versed in the science of Islamic jurisprudence and are capable of conducting an independent research from

classical works of Islamic jurisprudence. In addition to that they should be conversant with the general Nigerian laws and must be capable of understanding and appreciating decisions of superior courts on Islamic law of Evidence.

7. For the avoidance of attack on decided cases on appeal, the judge shall strive to scout for legal authorities to buttress every pronouncement they offered in their judgment and to embrace the habit of consulting the Islamic law learned jurists for guidance and enlightening to the matter before them.

The aforementioned recommendations put by this researcher when thoroughly studied will actually assist in promoting the application of Islamic Law of evidence in Nigeria as developed by classical jurists. When every Islamic evidential rule is correctly applied in settling disputes no doubt the aim and purpose of the Islamic law would have been accomplished and realized.

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