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# Hearsay Evidence and Reasons for Its Inadmissibility in the Nigerian Adversarial Legal System

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## Abstract

At common law and in Nigeria, hearsay evidence arises where a witness in his own testimony makes a statement, oral or written made by another person who experienced, heard and saw an incident happen in order to establish the truth asserted. Such testimony is generally inadmissible because the informant who witnessed the event is not in court to prove the truth of his statement under oath. This paper examines what is hearsay evidence and further seeks to discuss exceptions to the rule and highlights reasons for its inadmissibility. The finding of this article is that hearsay evidence is weak and untrustworthy to be relied upon by the court, the same not being a testimony of a person who witnessed the event. The paper recommends that the Evidence Act be amended to provide for the range of offences that section 37 of Evidence Act can cover apart from exceptions mentioned in Sections 38-45.

**Keywords:** Trial evidence, Hearsay rule, Inadmissibility, Nigerian Evidence Act.

## 1.1 INTRODUCTION

The law of evidence, also known as the rules of evidence, encompasses the rules and the legal principles that govern the proof of the facts stated in legal proceedings. These rules determine what evidence must or must not be believable by the court who is hearing the facts of the case before reaching its decision. It is pertinent to note that the principal means of proof of facts alleged in any judicial proceedings is governed by the use of testimony such as oral or written statements, physical objects, documentary material and so on depending on whether the matter is a civil or criminal matter.However, hearsay evidence is then testimony by a witness who states what other persons have said and not what he knows what he experienced, saw and heard personally. It is a statement which is not made by a person while giving oral evidence in a proceeding and which is tendered as evidence of the matters stated, but a statement repeating what another person has said. It is this concept of repeating what another person has said outside the courtroom that the law of evidence regards as being inadmissible testimony. Thus, for the purpose of establishing the truth that an accused person committed an offence, a witness is not allowed to offer evidence that he heard someone else say that the accused committed that offence. But, he can give evidence of what someone told him as a proof that someone was his informant and not when the object of evidence is to establish the truth of what is contained in the statement asserted. For instance, Mr. ‘A’ stole a Toyota Camry car some meters from the Le meridian Hotel and Resort Centre in Uyo, AkwaIbom State belonging to a visitor and Mr. ‘B’ saw Mr. ‘A’ when he stole the car. However, three days after when Mr. ‘B’ was about to leave for the United States of America for further studies, he told Mr. ‘C’ that he saw Mr. ‘A’ steal a ToyotaCamry car belonging to a visitor at Le-meridian Hotel and Resort Centre, Uyo. The question is: if Mr. ‘A’ is later on arrested and arraigned before a High Court in Uyo for stealing a Toyota

Camry car, can Mr. 'C'give evidence to establish the fact that he saw Mr. 'A' steal the vehicle, or can he testify of the truth of what is contained in the statement as to who stole the car? The answer which is in line with Section 37 of Evidence Act, is no. Mr. 'C' can only give evidence of what Mr. 'B' told him about the theft but certainly he cannot testify to establish the truth of the matter.

What constitutes inadmissible hearsay in respect of one issue or case may be admissible direct evidence in respect to another issue or case. For instance, in theillustration above, Mr 'C' can only give evidence of what Mr 'B' told him about the theft but certainly, he cannot testify to establish the truth of the matter, or the facts asserted. What to remember about hearsay is that it is not the repetition of what a witness was told per se that is inadmissible, but the repetition of it for the purpose of establishing the truth of the matter. Many a time witnesses want to give evidence about what someone else told them and they are prevented from doing so. The above position was eloquently captured by two eminent English scholars, Murphy and Barnard in their book titled, Evidence and Advocacy, when they said:

> There should probably be an organization called 'Hearsay Anonymous'. Membership would be open to those judges, practitioners and students (not to mention occasional law teachers) to whom the rule against hearsay has always been an awesome and terrifying mystery. Like its partner in terror, the rule against perpetuities, and the rule against hearsay ranks as one of the law's most celebrated nightmares. To many practitioners, it is a dimly remembered vision, which conjures up confused images of complex

> exceptions and incomprehensible and antiquated cases.[1]

However, both in England and Nigeria, hearsay evidence is codified in Evidence Act and there are dozens of exemptions and conditions for its admissibility. The truth about hearsay evidence is that so much has been written and said about the rule, ranging from writing of scholars and eminent jurists to the case law, the debate on the appropriateness of the hearsay evidence is far from being over, and that is the concern of this paper.

## 1.2 THE CONCEPT OF HEARSAY EVIDENCE

Statutorily, Section 37 of the Evidence Act[2] defines the phrase hearsay evidence as a statement:

> (a) oral or written made otherwise than by a witness in a proceeding; or
>
> (b) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it,

while Section 39 of the English Evidence Act provides for the definition of hearsay evidence as follows:

> Statements, whether written or oral of facts in issue or relevant facts made by a person: (a) who is dead; (b) who cannot be found; (c) who

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[1] A.Ekundayo, Hints on Legal Practice, (2nd edn. Intec Printer Limited, Ibadan, Nigeria, 1988) p.175

[2] Evidence Act, 2011 (HB. 214)

> has become incapable of giving evidence, or (d) whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, are admissible under Sections 40 to 50.

*TheBlack's Law Dictionary*[3], on the other hand, defines hearsay evidence as:

> A statement (either verbal assertion or non-verbal assertive conduct),other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted,

While *TheOxford Advanced Learner's Dictionary*[4] defines hearsay as:

> Things that you have heard from another person but do not know the truth

According to Aguda[5], Hearsay Evidence generally means a statement, written or oral, made by a person, who is not called as a witness. Nwadialo, [6] in his book, *Modern Nigerian Law of Evidence* States that:

> Hearsay evidence arises where a witness in his own testimony repeats a statement, oral or written made by another person in order to prove the truth of the facts stated.

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[3] B. Garner, *Black's Law Dictionary,* (7thEdn. St Paul Minm: Thompson West, 1999) p 726

[4] A. Honby, *Oxford Advanced Learner's Dictionary* (6thedn. Oxford University Press, 2000 ) P. 551

[5]Aguda, *Law of Evidence*, (3rdedn Spectrum Law Publishing: Ibadan), 1980

[6] F. Nwadialo, *Modern Nigerian Law of Evidence*, (1stedn, Ethiope Publishing Corporation, Benin, 1981) p. 96

Two English scholars, Murphy and Barnard[7] in their book titled "Evidence and Advocate" defined hearsay rule thus:

> Evidence by a witness of what another person state (whether verbally, in writing or otherwise) on a prior occasion is inadmissible for the purpose of proving that any fact stated by that person on such prior occasion is true.[8]

From the angle of judicial precedents, the Judicial Committee of the Privy Council in the case of *Subramanian v. Public Prosecutor*[9] carefully highlighted the actual basis of hearsay evidence in the following expression:

> Evidence of a statement made to a witness by a person who is not himself called a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

Also, in the case of *Orji v. Ugochukwu*,[10] the court held in a bid to determine the principle of hearsay evidence thus:

> Hearsay evidence is devoid of probative value. The consequence thereby is to discountenance it and where it has been made use of by the court; it should be regarded as inadmissible evidence and expunged.

[7] A.Ekundayo, Op. cit. 179
[8] A.Ekundayo ,opcit note 1, pp. 22-23.
[9] (1956) 1 WLR 965
[10] (2009) 14 NWLR, part 1161, p. 228 at p. 233

On our part, we define hearsay evidence as an out of court statement offered to prove the fact-in-issue which proof is inadmissible under the Nigerian Evidence Act.

It is pertinent to state that hearsay statements are of many kinds. Some are worthless; some are very reliable and fair to use, while some are unfair and unreliable to use. But one thing is sure; as the law has developed, it has come to recognize some exceptions or what the author may call the relevance and place of hearsay evidence in our judicial proceedings.

## 1.3 EXCEPTIONS TO THE RULE AGAINST HEARSAY EVIDENCE

If the hearsay rule has so many bad effects under the English and Nigerian laws, the questions to ask are: how did hearsay evidence come into existence in the first place? Why has it not been abolished? What purposes have hearsay evidence presently served in our system of courts? Have those purposes been served? If not, should the rule be reformed? Our answers to the above questions will now take us to what the author may call conditions for admissibility of hearsay evidence or exceptions to hearsay evidence by all common law jurisdictions including Nigeria. As earlier stated, hearsay evidence is an oral or written statement made by a person, not called as a witness or a statement contained or recorded in a book, document or any record whatsoever, proof of what is not admissible under any provision of the *Evidence Act*, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.[11]

Generally speaking, hearsay evidence is excluded and held inadmissible from evidence except as otherwise provided for or permitted in the *Evidence Act* or any other legislation.[12] The

[11] Section 37 of Evidence Act, 2011
[12] Section 38 of Evidence Act, 2011

exclusionary rule both in England and Nigerian *Evidence Act, 2011* are substantially the same. Some have been developed by the courts while others have been developed by statutes and each has its own set of conditions for admissibility. One of the most important exceptions to hearsay rule in all common law jurisdictions including Nigeria is in respect of statements made by deceased persons. For instance, in Nigeria, Section 40(1) of the *Evidence Act* provides that:

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

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

It is pertinent to note that before a statement can be admitted as a dying declaration, the following conditions must be met:

i. It must deal with the cause of the maker's death or any of the circumstances of the transaction which resulted in it.
ii. The cause of death must be in issue in the trial in which the statement is to be proved
iii. That trial must be for murder or manslaughter of the deceased maker, and

iv. At the time of making it, the deceased must have believed himself to be in danger of approaching death.

At common law, for a statement made by a deceased to be dying declaration, he must have been at the time of making the statement, *"in a settled hopeless expectation of death"*[13] and not merely believing himself to be in danger of approaching death. Under the Nigerian Evidence Act, the declarant need not have a settled hopeless expectation of death. If he believes himself to be in danger of approaching death, although he may have entertained at the time of making its hopes of recovery, such a statement would be admissible. Also, under the common law, the court is permitted to infer from the nature of the wound sustained by the deceased that he was in fear of death when he made the declaration. In Nigeria, it has been held that there must be positive evidence that the deceased was in fear of death[14]. The case of *Okoko v. State*[15] is very instructive on this point. Here, the deceased was the bellman of his church in Imo State. In the early hours 13th October 1987, he went to the church which was close to his compound to ring the bell for morning prayers. After ringing the bell, there was a sound of a gunshot and the deceased raised his voice saying: "Anthony Okoro has shot me". The statement was credited to the evidence tendered by PW1 being the wife of the deceased who by then was still in bed at the material time, but she recognized the voice as that of her husband. On hearing that, she rushed to the scene where she saw her husband stooping and holding his neck, which was bleeding profusely. The

[13] R v. Peel (1860) 1 F and F 21, per Willes J. For a general discussion on Dying Declaration, , in Chianu Edit, Legal
Essays in Honour of Professor Sagay (1996) (Benin: Department of Public Law, University Of Benin,
Benin City), 134, where the writer argues that "there is need to extend the ambit of dying declaration beyond
trials for murder and manslaughter."

[14] (1967) NWLR 189

[15] (2007) 2 NWLR, part 1019, p. 532

deceased was talking, and crying that the appellant had killed him. The local members of the community in the area came to the scene of shooting and saw the condition of the deceased. PW1 then left the scene of the shooting and made a report of the incident to the nearby Police Station while the deceased was rushed to a nearby hospital from where he was later transferred to a General Hospital. At the General Hospital, the deceased repeated the name of the appellant as the person who shot him and that at the material time of shooting by the appellant, two other brothers of the appellant were physically present. Before his death, the deceased made a dying declaration which was tendered by the prosecutor and was admitted in evidence as exhibit 'B'. On his part, the appellant denied the prosecution evidence of killing the deceased. The trial court, after considering exhibit 'B' and the evidence of prosecution witnesses, found the appellant guilty of murder and sentenced him to death. The two other accused persons charged with the appellant were discharged and acquitted. Dissatisfied with the judgment of the trial court, the appellant appealed to the court of appeal and contended that the trial court was wrong in admitting exhibit 'B' as dying declaration of the deceased, as that was distinct from the evidence of prosecuting witnesses. The court, unanimously dismissing the appeal, held inter alia that:

1. A dying declaration is a statement made by a person who may die from the injury received from a person whom the deceased person identified as the person who inflicted on him the injury that eventually caused his death. It is one of the rules of direct evidence to prove facts in issue.
2. The following conditions are occasions when a dying declaration is admissible:
    a) The declarant must have died before the statement written or verbal is made.

b) The declaration or statement must relate to the cause of death of the declarant.

c) The declaration is relevant only in a trial for murder or manslaughter.

d) Though the declarant may have hopes of recovery, he need not have lost

hope entirely of life or in a settled hopeless expectation of death.

3. Section 33 of the *Evidence Act* does not require for its admissibility a formal declaration of dying to be made. What is relevant is a statement made by the deceased during his life as to the cause of his death. Therefore, when the issue arises as in the instant case as to the cause of the death of the deceased, the statement made by the deceased is relevant and admissible as a dying declaration.

4. There is a difference in the provisions of the Nigerian evidence law on the circumstances and occasion for admissibility of dying declaration from the English provision. The latter requires the statement to have been made when the deceased has lost all hope of life. Such condition is not required under the Nigerian law of evidence. In the instant case, the fact that the deceased invited the police to whom he made the statement of his dying declaration when he died became valid as a dying declaration.

Also, in the case of *R v. John Ogbuewu*[16]the deceased who was in hospital weak and in pain, was asked by a police officer the following day after he had been wounded, whether he could make a statement. He said he could. The police officer then asked him if he thought he was going to die, to which he replied, *"I don't know*

[16] (1949) 12 WACA 483

*whether I am going to die."* The deceased then made a statement as to the cause of his injuries which was taken down in writing. It was held that this statement was not admissible as a dying declaration as there was no proof that the deceased when making it, believed himself to be in danger of approaching death. It must be understood that any declaration made after the deceased has abandoned the belief of being in danger of approaching death will not be admissible under Section 40(1) and (2) of *Evidence Act, 2011.* On the contrary, *the Supreme Court in the case of MomoGarba&Anor v. R*[17] held that the statement of the deceased was not amounting to dying declarations. The facts of the case are: after suffering an attack which ultimately caused his death, the deceased told the first person who found him injured that he was going to die, that he had been beaten, and that one Momo had instigated the beating. It was held that his evidence was properly admissible under his heading. After the deceased had been taken home and given water, he made further statement as to how he received his injuries, in the presence of two persons. According to them the deceased then said nothing about his expectation of death. In spite of objection to this evidence, the trial judge admitted it taking the view that the first statement made this second statement admissible as the former had contained words showing an expectation of death. He said, "that is a sufficient belief in impending death to support further declarations made the same evening." The Federal Supreme Court, however, held that was too wide an expression because of the possibility that the expectation of death might have been, owing to his being at home and among friends, removed from the mind of the deceased and that therefore the evidence of the later declaration was wrongly admitted.

Another outstanding condition for admissibility of hearsay evidence is a statement made in the course of business whether verbal or

[17] (1959)4 FSC 162

written by a person, who has since died in proof of facts which was the person's duty to state on record. Section 41 of the *Evidence Act* states thus:

> A statement is admissible when made by a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books, electronic device kept in the ordinary course of business or in the discharge of professional duty, or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind or of a document used in commerce written or signed by him or of the date of a letter or other document usually dated, written or signed by him: Provided that the maker made the statement contemporaneously with the transaction recorded or so soon thereafter that the court considers it that the transaction was at that time still fresh in his memory.[18]

The above provision received judicial interpretation in the case of *R v. Lawani*[19] where an entry made in an Accident Report Books by a police officer who later died before trial, was held admissible since it was made in the course of his duty. This exception is also applicable to criminal cases. For instance, in *R v. McGuire*[20], the defendant was being tried for arson. A report prepared by a deceased scientific officer who had visited the scene of the fire shortly after it happened, stating the extent of damage, state of the

[18] Cap., H.B 214
[19] (1959) L L R 97
[20](1958) 81 Crim. App. R 323. This case was decided under the common law exception, which is similar to section 41 of the Evidence Act, 2011

building, was held admissible under this exception. However, the statement must have been made by a person whose duty it is to do a particular act and record it. In the old English case of *Smith v. Blakey*[21], it was held that a letter written by the deceased branch manager to the plaintiffs informing them that the defendant had sent three cases of shoes to the branch office was inadmissible evidence as it was not the deceased branch manager's duty to do a particular act and record it.

The *Nigerian Evidence* Act, *2011* in Section 42 further makes provision for admissibility of hearsay evidence in our courts in the following terms:

> A statement is admissible where the maker had peculiar means of knowing the matter stated and such statement is against his pecuniary or proprietary interest and (a) he had no interest to misrepresent the matter; or (b) the statement, if true, would expose him to either criminal or civil liability.

The above provision is the same under the English law, however, Section 42(b) of the new *Evidence Act,2011* is novel as *Evidence Act, 2004* did not contain this innovation. An example of the above situation is a statement that the deceased paid rent is admissible to rebut the presumption of ownership of the property of a tenant who seeks to renew his tenancy of Baba's premises. Here, a tenant promises to pay the rent the next day, pleading that he forgot his cheque book in the office. In anticipation of the tenant paying him the rent the next day, Baba issues out a receipt to his tenant. His tenant defaults and shortly afterwards dies. Baba's representatives seek to recover his unpaid rent from the tenant who resists the claim and seeks to produce the receipt as evidence of payment. Once it is

[21] (1867) L.R. 2 QB 326

shown that the maker knew that the statement, at the time it was being made, was against his or her interest, the matter is settled.

Another instance whereby hearsay evidence can be admissible in law is under Section 43 of the Act, that is to say, where the deceased person is giving an opinion as to public rights and matters of general interest. By Section 43 of the *Evidence Act*, oral or written statements of relevant facts made by a person who is dead are admissible when the statements give the opinion of that person as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statements were made before any controversy as to such right, custom or matter has arisen, is admissible.

The other exception to the hearsay evidence is to be found where a statement relating to the existence of a relationship: By Section 44 of the *Evidence Act*,[22] the existence of any relationship by blood, marriage or adoption between persons if the person making the statement had special means of knowledge of such relationship.[23] Under this section, for instance, a statement made by 'A' before his death that he was present at the wedding ceremony between Miss 'X' and Mr. 'Y', will be relevant in a trial in which the court has to determine whether a marriage exists between the parties.

Another Section of our *Evidence Act, 2011* which recognizes admissibility of hearsay evidence in our courts is to be found in Section 45. This is what the Section says: The declarations of a deceased testator as to his testamentary intentions and as to the contents of his will are admissible, under certain circumstances: (i) when the will of the testator has been lost and there is a question as to what was its content, (ii) when the question is whether an existing

[22] Cap., H.B. 214
[23] Section 44 of the Act

will is genuine or not, or was improperly obtained, or (iii) when the question is whether any and which of more existing documents than one constitutes his will. Section 45(2) of the same law states that in the cases mentioned above, it is immaterial whether the declarations were made before or after the making or loss of the will. The above provisions of the law, tomy mind settle the raging issues of who was present when the will was done and where more than two will exist. It is worthy to note that Section 49 of the *English Evidence Rule* which is in *parimateia* with Section 45 (2) of our law was given judicial interpretation in the case of *Sudgen v. Lord St. Leonards.*[24] In this case, the will of Lord St. Leonard, a famous Judge was missing at his death and the question before the court was the content of the will. His daughter knew most of the contents of the will. She was able to quote most of it from her memory. She and some other witnesses were able to testify as to statements made by the deceased before and after the execution of the will concerning its contents. The court of Appeal held that the statements made by the deceased before or after he had executed the will were admissible as exceptions to the hearsay rule. This decision has been affirmed in the case of Mcgillivary, Rc[25] and it also represents the law applicable in Nigeria.

## 1.4 THE REASONS FOR REJECTION OF HEARSAY EVIDENCE

So far, it can be asserted that hearsay evidence is viewed with suspicion both at common law and in Nigeria. This is because it is thought to be less reliable same not being a testimony of a person who witnesses the event.[26] However, critics canvass that the theory that hearsay evidence is inherently weak and untrustworthy is

[24] (1876) IPD
[25] (1946)2 All E.R. 301
[26] C. Mueller, "Post – Modern Hearsay Reform: The importance of Complexity",*Minn L.R*. vol. 76 (1992) Pp 367 – 374.

spurious and a legal fiction[27] and that current doctrine of exclusion cannot wholly be justified on the basis of a preference for live testimony. They point to the fact that several of the exceptions, to the rule, do not require proof of unavailability of the declarant.[28] Others argue that although hearsay may give inaccurate information, it does not give misinformation.[29] Yet all seem to agree that the perceived weakness of hearsay evidence derives from its susceptibility to what are now known as the four hearsay dangers.[30] These are the risks of faulty perception, faulty memory, ambiguity, and insincerity.

Like all humans, a declarant of hearsay might have misperceived the event in respect of which he spoke. Three concerns have been identified in this regard.[31] One centre on the speaker's sensory capacities, another on his mental capacities, i.e. ability to process and make sense of what he sees and the third is the relevant physical circumstances that might bear on the opportunity for him to observe the facts. For instance, if the speaker's mental capacity is impaired, or otherwise not functioning properly, he might misconstrue an event or a fact which he observed. Similarly, if there were circumstances impacting negatively on his observation, his utterance or narration may distort the fact. The concern with faulty memory is understandable. Human memory is short and fallible. Ability to recollect, and therefore to assert correctly, what may have

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[27] Paul Milch," Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over", *71 Or. L. Rev.*(1992) pp.
745 – 769

[28] Ibid

[29] P. Milch, "Hearsay Antinomies: The Case for Abolishing the Rule and Starting Over", Or. L. Rev. Vol. 71 (1992)
Pp. 745 - 769

[30] M. L. Siegel, "Rationalizing Hearsay: A Proposal for A Best Evidence Hearsay Rule" , 72 B.U.L Rev. Vol.72 (1992)
Pp. 893 - 910

[31] C., Mueller, op. cit. note 26 p. 582

been perceived, may be affected by several factors.[32] The declarant may confuse the fact with subsequent events and again this may result in distortion of the fact.

The third danger, ambiguity, is common with communication and the use of language. It is difficult to use a language with precision. The speaker may say one thing while meaning another. The hearer may misconstrue what the speaker said as words may convey different things to different persons. Besides, the language used may not capture the points of detail, qualification, or limit.[33]
The danger of insincerity is based on the possibility that the speaker may deliberately lie. Collorally to this is that in court a witness may also deliberately lie by ascribing to a "declarant" what the latter never said.

A remarkable point, however, is that every human is prone to the above shortcomings. The live witness may have misperceived the events, his memory may be faint and even the language he uses in court may be ambiguous. He may also fraudulently misrepresent. Therefore, in a sense, the above dangers are not peculiar to hearsay evidence. But the difference between the two, and therefore the explanation for the current stricture against hearsay, is two-fold. First, in the case of hearsay evidence each danger arises at two separate levels. For instance, there is danger of whether the declarant misperceived the fact and also whether the hearsay reporter misperceived the fact and also whether the hearsay reporter misperceived what the declarant had said. There is the danger of whether the speaker remembers the fact accurately and the danger of whether in court witness accurately remembers what the speaker said. The Judge who hears the facts has to worry about whether the declarant interpreted the statement made by the declarant. We have already alluded to the dual nature of the insincerity problem.

[32] Ibid at pp 788-789
[33] Ibid at p. 789

Secondly, and more importantly, where direct evidence is offered the trial process provides safeguards that reduce these dangers.[34] These safeguards, or controlled conditions,[35] help sift evidence and diminish, if not totally eliminate these dangers. The absence of these safeguards is regarded as the reasons for the inadmissibility of hearsay evidence. The safeguards are an oath, cross-examination, demeanour, depreciation of truth, fraud and so on.

**1.5 Oath**

Under the Common Law and in Nigeria, oral evidence in court is usually given upon oath or on affirmation.[36] The *Evidence Act, 2011*, for instance, states as follows:

> All oral evidence given in any proceeding must be given upon oath or affirmation administered in accordance with the Oaths Act or Law, as the case may be.

Section 208 of the same law goes further to provide for cases in which evidence is not given upon oath. The underlying reason for the administration of oath is that it will induce or inject fear on the witness to speak the truth because a false testimony would earn them punishment by God in the world beyond. Similarly, since the giving of false testimony upon oath is an offence of perjury in England and Nigeria, the fear of prosecution and consequent punishment would reinforce the need for a witness to speak the truth.[37] It, therefore, has a temporal as well as spiritual basis. Oath is an answer to the danger of fabrication. The argument against hearsay is that since the informant, assuming he made an assertion

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[34] Ibid at p. 791

[35] Wellborne III, supra note 12 at 54

[36] Section 180 of the Nigerian Evidence Act and Section 202 of the Draft Evidence Decree.

[37] John William Strong (ed) McCormick on Evidence, supra note 33 at 93; Mueller and Kirkpatrick, supra note 33 at 791

in question, was not under oath, there would be no compelling reason, to tell the truth.

However, one of the learned English authors, Morgan, doubts the efficacy of oath as a stimulus, to tell the truth in court when he stated thus:

> What happened comparatively early to the oaths of compurgators has now unfortunately happened to the oaths of a witness. The deliberate expression by a witness of his purpose to tell the truth by a method which is binding upon his conscience probably still operates as some stimulus, to tell the truth; but fear of punishment by supernatural forces for violation of an oath is generally regarded as virtually non-existent, and the threat of prosecution for perjury has little effect.[38]

Others doubt if the efficacy of oath is a true rationale for the exclusion of hearsay evidence. They contend that if it is a true basis for the hearsay rule then out of court statements made on oath would be admissible, but this is not so.[39] Yet another learned author John Wigmore,argued that oath should be subsumed into cross-examination when he said:

> It is thus apparent that the essence of the hearsay rule is a requirement that testimonial assertions shall be subjected to the test of cross-examination and that the judicial expression….

[38] E. Morgan, some problems of proof under the Anglo-American System of Litigation (1956) Pp. 142-143. See also
R; Park, "A Subject Matter Approach to Hearsay Reform", *Mich L. Rev*. Vol. 86 (1987) Pp. 51-96.

[39] G. Kessel, "Hearsay Hazards in the American Criminal Trial: An Adversary-oriented Approach", *Hastings*
*L.J*.Vol.49 (1998) Pp. 477-482.

> Coupling oath and cross-examination had in mind the oath as merely the ordinary accompaniment of testimony given on the stand, subject to the essential test of cross-examination.[40]

The truth of the matter is that today not many people hold oath in high esteem as was the case in the time past, yet even for people without strong religious persuasion, the threat of perjury is sufficient inducement, not a lie. It is not uncommon for lawyers to remind witnesses that false testimonies exposethem to prosecution for perjury. Certainly, the absence of oath is an important consideration in the hearsay rule. Cross and Willins are opposed to the belief in divine sanctions as the basis of a child's competency to testify on oath. Rather, they suggest that what a judge should consider is whether the child appreciates the solemnity of the occasion. Although their comments involve achild's competency to testify on oath, the principle is the same on the belief in divine sanction. They exhort thus:

> It used to be said that the judge had to be satisfied that the proposed witness appreciated the nature and consequences of an oath, and the context made it plain that the court had the divine sanction in mind. The Court of Appeal had recently adopted a more secular approach. The important thing is for the judge to be satisfied that the child appreciates the solemnity of the occasion and is sufficiently responsible to understand that the taking of an oath involves an obligation, to tell the truth over and over the ordinary duty of doing so. It

[40] J. Wigmore, *Law of Evidence* (3rdedn; London Steven & Sons (1940) Pp. 180-183)

> is unnecessary for the child to believe in anything in the nature of a divine sanction for the majority of the adult population probably does not believe in it.[41]

On our part, we are in total agreement with the view expressed by Cross and Willins, which is in line with the biblical injunction which states that:

Thou shalt not forswear thyself, but shalt perform unto the Lord thine oath: But I say unto you, swear not at all; for it is God's throne: Nor by the earth; for it is His footstool neither by Jerusalem; for it is the city of the great King. Neither shalt thou swear by thy head, because thou canst make one hair white or black. But let your communication be, yea, yea, nay, nay: for whatsoever is more than this cometh of evil.[42]

### 1.6 CROSS-EXAMINATION

It is important to observe that in all common law jurisdictions, a significant feature of the adversarial process of litigation is the rights of an opponent or adversary to cross-examine any witness called by the other party. In some respects the right has constitutional undertones.[43] According to John Wigmore:

> The theory of the hearsay rule is that many possible deficiencies, suppressions, sources of error and untrustworthiness which lie underneath the bare untested assertion of a

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41 Cross and Willins, *AnIntorduction to Evidence* (5thednButterworths, London 1981) 62.

42 Matthew chapter 5:33-37 (KJV).

43 The 1999 Constitution of the Federal Republic of Nigeria (as amended) in Section 36(6) (d) allows the accused

the right not to call and examine his own witnesses but also to cross examine the witnesses called by the
prosecutor, this provision is mandatory.

> witness, maybe best brought to light and exposed by the test of cross-examination.[44]

The learned author goes further to assert that in addition,[45] cross-examination is the greatest legal engine ever invented for the discovery of truth.[46] To him, all other safeguards are subsumed in cross-examination. This fascination with cross-examination is shared by many other scholars who see cross-examination as a "security for correctness and completeness of testimony,"[47] and as the best all-embracing reason for the exclusion of hearsay evidence.[48] As a safeguard against the four dangers, cross-examination discloses:

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

When evidence is put through the rigours of cross-examination, the judge who is hearing the facts of the case would be able to properly

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44 Ibid

45 Peter Tillers and David Schum, "Hearsay Logic", *Minn. L. Rev*. Vol. 76 (1992) p. 813

46 John Wigmore, supra at note 30 p.3

47 John William Strong (ed), McCormick on Evidence, supra note 33 at 95

48 Rupert Cross, supra note 10 at 498; Micheal M. Martin, *Basic Problems of Evidence*, 299, (6th ed, Butterworths London (1988) p. 218.

evaluate evidence tendered before ascribing the probative value to it. The idea is that if the witness misperceived the fact, cross-examination will expose it. If his memory of the truth is defective this will also be apparent upon proper cross-examination. And if his language is ambiguous, in cross-examinations, he might clarify the meaning which he intends by his evidence.

The issue is yet to be resolved whether cross examination is an adequate answer to fabrication. A lying witness has a tendency not to be consistent both with surrounding circumstances and with prior statements. Therefore, ideally, cross-examination well-conducted will reveal inconsistencies and enable the judge or the magistrate to evaluate the body of evidence tendered. Yet it has been asserted that "cross-examination is probably less useful in exposing fabrication than in exposing defects in memory and perception.[49] The well-schooled perjurer may be able to withstand cross-examination but this is no reason to underestimate the mechanism. Many cases are resolved on matters coming out during cross-examination. In the majority of the cases, an effective cross-examination will give away an insincere witness. After all, in many jurisdictions, the cross-examiner has very wide latitude. For instance, under the *Nigerian Evidence Act*[50] he can ask the witness any question:

a) to test his accuracy, veracity, or credibility; or
b) to discover who he is and what is his position in life; or
c) to shake his credit, by injuring his character.[51]

There is no doubt that cross-examination is an important safeguard. This perhaps agitated the mind of Christopher Mueller when he said: cross-examination does not ensure that evidence is reliable, but "merely exposes the sources of unreliability and provides a

[49] Roger Park," A Subject Matter Approach to Hearsay Reform", 86 *Mich. L. Rev*. 51, 96 (1987)
[50] Section 223 of Evidence Act, 2011
[51] Ibid

basis for evaluating testimony and determining how reliable it is."[52] There appears a consensus by various scholars and jurists alike that the absence of this important device is a principal concern which informs the rule prohibiting hearsay. But it is not the sole basis nor is it exhaustive. As earlier pointed out, hearsay in the nature of evidence in prior proceeding is generally prohibited although there are exceptions to the rule.[53] It is arguable that if the absence of cross examination is the only basis for excluding hearsay, statements made where an adversary had the opportunity to cross-examine will ordinary be admissible. A counter-argument would be that such prior opportunity for cross-examination would not suffice in a later case where the parties and issues may be different. Nonetheless, it is farfetched to contend that the absence of cross-examination is the exclusive rationale for the exclusion of hearsay evidence. It is indeed a principal reason but is complemented by others.

**1.7 DEMEANOUR**

By demeanour we mean the comportment of the witness while giving oral evidence. The argument is that in evaluating a witness's credibility of evidence tendered, the court may consider the witness'behaviour in the witness box such as facial expression, tone of voice, gestures and his readiness to answer questions put across to him by his opponent to determine whether he is a truthful witness or not.

This procedural evidential position of the law influences the mind of Laird Kirkpatrick who in his journal titled *Evidence Law of the Next Millennium*, has this to say that: "Many mannerisms and human qualities come into the comportment of the witness, and an assessment of these points enables the Judge who hears the facts of

[52] C; Mueller, "Post-Modern Hearsay Reform: The Importance of Complexity" *Minn L. R*. Vol. 76 (1992) Pp. 367-374

[53] Section 37 of Evidence Act, Cap.H.B.214, 2011.

the case to assess credibility and meaning.[54] The judge who hears the facts of the case will consider whether the witness is composed or fidgeting. What is his facial expression? How does this witness generally behave himself? Is the witness willing and ready to answer questions put across to him? All these and more[55] have a bearing on whether the witness is telling the truth or not. They also help the trial court to evaluate the facts tendered".

There is a relationshipbetween demeanour and the trial safeguards of oath and cross-examination. The solemnity of the courtroom which induces witness, to tell the truth, may essentially derive from the oath taken, and demeanour is best evaluated under cross-examination.Where a witness narrates what an out of court informant said, the trial court is deprived of the opportunity to observe the out of court declarant, who is really the witness, the other merely being his conduit for transmitting the testimony. This deprivation impacts the evaluation of the evidence. The trial's court will thereby not have all the factors necessary for him to assess the evidence before ascribing probative value of the pieces of evidence tendered. This is yet another important concern of the adversarial system used in the common law jurisdictions which lead to, as it were, viewing hearsay evidence with suspicion.

## 1.8 OTHER REASONS FOR REJECTION OF HEARSAY EVIDENCE

The category of reasons for inadmissibility of hearsay evidence is not closed, as other rationales are proffered as justification for the maintenance of the rule against the admissibility of hearsay evidence. It is for instance, said that our system of trial is based on the adversarial system, where a Judge or a Magistrate is impartial and is to keep the ring but does not to enter the fight. For the most

[54] Mueller and Kirkpatrick, supra note 33 S8.3 at 792

[55] For more consideration see Mueller and Kirkpatrick, supra note 33 S 8.3 at 792

part, it is his job to decide the matter on the basis of what the parties and their advocates present to him rather than by the Judge. A party preparing his case needs to have a reasonably clear idea of what evidence the court will be willing to receive, both from him and from his opponent. Hence the adversarial system, in contrast to the Continental "inquisitorial" system, is characterized by an elaborate law of evidence. Part of the elaboration is the rule against hearsay, which, by and large, tells the parties that they must call the witness who can verify a fact from his own observation, rather than merely repeating what others have said.

Besides, Allen[56]posits in his article titled "The Evidence of Hearsay Rules to the Rule of Admission*"* that hearsay evidence gives too much discretionary power to the trial judges and magistrates particularly in criminal cases. The learned author further argues that as the informant is not subject to cross-examination, or under oath, and he is not subject to observation by the court, hence,his untested evidence has served as the foundation for less reliability of hearsay evidence.

## 1.9 CONCLUSION

The foregoing review clearly exposes the unsatisfactory nature of hearsay evidence for the purposes of placing believable evidence before the court based on our adversarial Legal System. As it has been pointed out, hearsay evidence has its pros and coins.Critics maintain that hearsay evidence is weak, spurious and untrustworthy to be relied upon by the courts, same not being a testimony of a person who witnesses the event. They argued that the informant of out-of-court statement might have misperceived the event in respect of which he spoke through his sensory capacities, mental capacities and physical circumstances to observe the facts well. They opine

[56]R; Allen, "The Evidence of Hearsay Rules to the Rule of Admission*"*, *MINN. L. Rev.* Vol. 76 (1992) Pp. 797-801

that as the untested declarant of hearsay evidence is not subject to cross-examination, oath and observation by the court, such evidence should not be regarded as one of the principal means of proving admissible judicial evidence in our legal proceedings.

Advocates of hearsay evidence claim that it does not matter whether the informant is in court to give evidence on oath, to be cross-examined and observed, the fact that the law and society need hearsay evidence as a way of securing justice to certain persons who are in dying declaration or who are unable to appear in court should be taken as one of the rules of direct evidence to prove the facts-in-issue. They contended that the fears that hearsay evidence is weak and untrustworthy and that it runs the risk of fabrication, faulty perception, faulty memory, ambiguity and insincerity were unfounded and that the matter should be left to the good sense of lawyers and impartial Judges and or Magistrates to decide.

A review of the definitions and decided cases on hearsay evidence reveals that a lot of energy has been exerted by scholars and jurists alike in dealing with the issue of hearsay evidence as one of the principal means of proving facts alleged in court, but up till now the topic remains controversial. The debate on the appropriateness of admissibility of hearsay evidence is not yet over. This paper, therefore, does not attempt to utter the final word or draw conclusion on the subject, but it intends to contribute to shaping up the laws on hearsay evidence in our legal system and to ultimately offer recommendation on admissibility of hearsay evidence in Nigeria in line with cogent jurisprudence that is progressive in the world and offer recommendation on admissibility of hearsay evidence in Nigeria.

## 1.10 RECOMMENDATIONS

Having analyzed hearsay evidence in Nigeria thoroughly, we, therefore, posit the following recommendations:

1. That Section 37 of the *Evidence Act, 2011* which is the principal law that provides for hearsay evidence in Nigeria be amended to allow the courts to receive much wider ranges of evidence based on a reasonable set of principles of reality, convenience, justice and public policy. Our reasons are: first, the category of persons whose testimonies can be allowed to repeat a statement, oral or written made by another person in order to prove the facts asserted should actually be broader than that envisaged in *Subramanian's case*[57] by Privy Council which Nigerian courts have followed. Secondly, the *Evidence Act* fails to state the range of offences that such evidence is allowed to be given. We recommend that the law be reviewed to provide for the range of offences that Section 37 of *Evidence Act* can cover apart from exceptions mentioned in Sections 38-45. For instance, it is necessary to state whether a witness can on his own testimony repeat a statement, oral or written made by another person and is admissible by the court to establish the truth of the facts stated in such criminal cases as murder, manslaughter, rape, bigamy, incest, assault, or misdemeanours and simple offences.

2. We recommend that the Evidence Act should be amended to provide for judicial discretion to admit hearsay evidence when such evidence is considered reliable and in the interest of justice. The United States Supreme Court in the case of *Crawford v. Washington*[58] held that this test, to wit: the reliability of hearsay evidence is unconstitutional when applied in the light of accuser's right to be confronted with witnesses against him. With respect to the decision of the Supreme Court, in this case, we submit that reliability has

[57] (1956) 1 WLR 965, 970, per Mr. L M D de Silva.
[58] (2004) 541 U.S. 36

two aspects, the reliability of the original statement, and the reliability of the process which is tendered or relayed to the court. To secure the first kind of reliability, it is recommended that such statements only be repeated to the court if the person who originally made them court had knowledge which was based on his own observations and what he was talking about and should be admissible. To secure the second reliability, it is recommended that the statement must either be repeated to the court by a witness who himself observed it is being made, or be in a document or record or chain of documents or record made in a reliable way. The opportunity to cross-examine depends on the person who made the statement being a witness; if he is, we recommend a statement which satisfies the reliability test be admissible as evidence. But if the person (the informant) is not a witness, then a party who wishes to put his statement in evidence will have to show justification for not calling him. For example, is that person dead unfit or incapacitated to be a witness because of his or her bodily or mental condition, or is the person out of jurisdiction and cannot be found to secure his or her attendance in court?

3. It is suggested that since hearsay evidence principle was developed in England and other common law countries with the objective of excluding hearsay evidence if such evidence was deemed not to be falling within a well-known exceptions, same being an integral part of the adversarial trial system, we recommend that our *Evidence Act* be amended to provide in a clear term that whenever a second-hand hearsay evidence is tendered in court which is relevant it should be admissible provided justice is done to both parties and the court should be guided by general standard of judicial practices.

4. On the issue of safeguards for the parties against whom hearsay evidence is adduced,the*Evidence Act* be amended to provide in a clear term that where it is known in advance of the trial that the party will seek to adduce hearsay evidence, rules of court should require that party to give notice of the intention to do so to the other party in order to avoid surprises.

5. It is also suggested that the *Evidence Act* should be amended to provide that where a party alleges that the party tendering the hearsay evidence caused the unavailability of the informant or declarant in order to prevent the informant from giving oral evidence, the burden of such proof should rest on the party opposing the admissibility of the evidence, otherwise such evidence should be admitted provided justice is done to the parties.