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APPRAISAL OF THE SCOPE OF APPLICATION OF EVIDENCE ACT IN CUSTOMARY AND AREA COURTS IN NIGERIA

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ABSTRACT

By sections 6 (4) (a), 5 (c) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), States are empowered to establish such other courts as may be authorized by law to exercise jurisdiction at first instance or in appeal on matters with respect to which a House of Assembly may make laws. It is in this regard that by their various laws, the States and the Federal Capital Territory enacted Customary Courts and or Area Courts laws, which provide for the establishment of Customary and or Area Courts to administer customary laws. It is to be noted that by section 256 (1) of the Evidence Act 2011, the Evidence Act shall not apply to judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court, except so authorized by a gazette of the States or that of the Federal Government in the case of the Federal Capital Territory. In their adjudicatory process, the Customary and or Area Courts receive evidence, admits documents, etc in all classifications of Evidence, yet the Evidence Act says it is not applicable

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to these Courts. It is for this reason that this study embarked on an appraisal of the scope of application of the Evidence Act in customary courts and Area Courts in Nigeria. It adopted the doctrinal method of research. This study made a finding that despite the provision of section 256 (1) of the Evidence Act excluding the applicability of the Evidence Act to Area and Customary Courts yet the said Evidence Act has not delineated which area of the Evidence Act should apply to Area and Customary Courts in civil proceedings. The study recommended that in view of section 3 of the Evidence Act, the States should take advantage of the said section and provide in a law clear situation where the Evidence Act should be applicable to Area and Customary Courts

Key Words: Scope of application, Evidence Law, Customary and Area Courts.

1. INTRODUCTION

The first law on evidence in Nigeria is the Evidence Ordinance of 1943 which came into effect on 1st June, 1945[1]. The Evidence Ordinance was based on the 12th edition of Stephen's Digest of the Law of Evidence who codified the England common law of evidence[2]. Before the promulgation of the Evidence Ordinance of 1945, Nigeria relied on the common law, statutes of general application before 1900 on evidence.

The Evidence Ordinance metamorphosed into the Evidence Act Cap.62 Laws of the Federation 1968. In 1990, Federal laws were revised and put in alphabetical order and the Evidence Act Cap. 112 Laws of the Federation of Nigeria, 1990 came into being. Another revision of the Laws of the Federation was made in 2004 and the laws on evidence in Nigeria became Evidence Act Cap.14 Laws of the Federation, 2004. It remained in force until the Evidence Act 2011 was enacted.

Apart from the Evidence Act 2011 which is the principal legislation on the law of evidence in Nigeria, there are other sources of evidence law in

[1] J.O. Amupitan, Evidence Law: Theory and Practice in Nigeria (Lagos, Innovative Communication, 2013) P.23

[2]Sebastine Tar Hon S.T. Hon's Law of Evidence in Nigeria (Port Harcourt, pearl publications, 2012). P.37

Nigeria. For example, Order 20 of the Federal High Court Rules[3]provides for rules on admissibility of evidence. Also Paragraphs 41 of the 1st Schedule to the Electoral Act, 2022 provides for evidence at hearing of petition. Sections 89 and 129 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) empower each House of the National Assembly and State Houses of Assembly, respectively, to procure all such evidence written or oral, direct or circumstantial as it may think necessary or desirable and examine all persons as witnesses whose evidence may be material or relevant to the subject matter[4]. In the same vein, section (2) (b) of the National Industrial Court also provides for the Court to be bound by the Evidence Act, but may depart from it in the interest of justice.

Although the Evidence Act 2011 is the principal legislation on evidence in Nigeria, section 256 (1) thereof excluded Customary and Area Courts from being bound by the Act. It provides as follows:

> This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but it shall not apply to –
> (a) proceedings before an arbitrator
> (b) a field general court martial; or
> (c) judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court, unless any authority empowered to do so under the Constitution, by order published in the gazette confers upon any or all. Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory Abuja or a State as the case may be, power to enforce any or all the provisions of this Act.

From the above provisions, three groups of courts or tribunals are not bound by the Evidence Act to wit: proceedings before an Arbitrator, General Field Court Martial and Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Courts.

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[3]Federal High Court Rules 2009. See similar provisions in Order 34 of the High Court of Nasarawa State (Civil procedure) Rules 2010

[4]By subsection (b) (c) (d) of the section, can also require such evidence to be given on oath, summons person to give evidence and issues warrant of arrest.

a. Arbitrator: This is a proceeding conducted before a person or persons appointed as arbitrator(s) by parties or by the court to adjudicate over a dispute devoid of the technical rules of procedure in order to arrive at the just determination of the dispute.

b. **General Field Court Martial: -** This is a court established by a superior military officer on the field of battle to try persons who are subject to military service law under the Armed Forces Act[5]. Although the Evidence Act uses the phrase "general field court martial", the use of such phrase is a misnomer. This is because by section 129 of the Armed Forces Act, there are only two types of Court Martial, i.e. the General Court Martial and the Special Court Martial. A General Field Court Martial no longer exists in the Army, except that for offences committed in the field of action, the Commanding Officer is empowered to convey a special court martial to try such persons summarily. Section 256(1) of the Evidence Act excluding its provision from being applied to military courts will only mean that it will not apply to general and special court martials.

c. **Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court**

In civil proceedings, these courts are excluded from applying the provision of the Evidence Act. However, where any authority empowered to do so by the constitution, by order published in the gazette, so empower these courts to apply the Evidence Act, then these courts will so apply[6]. It is important to note that Section 256(1) (c) with regards to Sharia Court of Appeal, Customary Court of Appeal, Customary and Area Courts talks about civil causes or matters. It therefore means that for criminal cases, the Customary and Area Courts are to be guided by the Evidence Act[7].

The question to ask is: why are the Sharia and Customary Courts of Appeal and Area and Customary Courts of Appeal excluded from applying provisions of the Evidence Act? This perhaps could be as a result of the

[5] S – Armed Forces Act Cap.A20 Laws of the Federation 2004.

[6] As for Sharia Court of Appeal and Customary Court of Appeal the said authority means the National Assembly, while for Area and Customary Courts means the State Houses of Assembly.

[7] This is provided for in section 256(2) of the Evidence Act 2011 a custom is judicially noticed once it has been adjudicated by a superior court. A fact is provided by at least witnesses.

history and nature of Customary and Area Courts. These courts are successors to Native Courts which applied native system of justice administration which is devoid of technical sophistication.

The Native Court is a precursor to the present Customary and Area Courts. After the amalgamation of the southern and northern protectorates, and was named Nigeria in 1914, the Native Ordinance 1916 was enacted to give jurisdiction to Native Courts. Their civil jurisdiction was on questions of customary law applicable to communities. As a matter of fact, customary law is recognized by sections 16 – 19 of the Evidence Act. The said sections provide that customary law can be proved if it is judicially noticed or proved as a fact by at least two witnesses.

Despite the above, the Customary and Area Courts are a creation of law of the various states and the Federal Capital Territory. Thus, section 6(2) (5) (k) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides as follows: -

> (2) The judicial powers of a State shall be vested in the courts to which this section relates, being courts established subject as provided by this Constitution for a state.
>
> (5) This section relates to: -
>
> (k) Such other courts as may be authorised by law to exercise jurisdiction at first instance or on appeal on matter with respect to which a House of Assembly may make laws.

It is also noteworthy that section 256(1) of the Evidence Act even though excluded the Sharia and Customary Courts of Appeal, and the Area and Customary Courts of Appeal, yet does not clearly delineate the area of evidence law that these courts should not apply and or apply. It is our view that these Courts shouldn't have been excluded from applying the Evidence Act. The Sharia and Customary Courts of Appeal being appellate courts to Customary Courts and also being superior courts, it will be absurd to prevent them from applying the Evidence Act. The judges being lawyers with 10 years post call before appointment, it does not mean well to them to exclude them from applying the Evidence Act. After all, from their training they will certainly delve into applying the Evidence Act.

In view of the foregoing, this paper seeks to examine the scope of applicability of the Evidence Act 2011 to Area and Customary Courts[8].

2. CONCEPTUAL FRAMEWORK

In this discourse, the following concepts call for clarification, viz "Law of Evidence", "Customary and Area Courts" "Scope of Application".

Law of Evidence

In this concept, there are two words needing definition, "Law" and "Evidence", before the concept "Law of Evidence" can be properly defined.

"Law" according to Meriam Webster.com is a binding custom or practice of a community: a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority[9]. According to *Black's Law Dictionary, Law* is a body of rules of action or conduct prescribed by controlling authority and having binding legal force.[10]

"Evidence", according to Aguda, is the means by which facts are proved but excluding inferences and arguments[11]. Nwadialo, on his part, defines evidence as (i) facts which are legally admissible (ii) the legal means of attempting to prove such facts. Amupitan gives a working definition of evidence "as an art or process which describes how relevant facts are proved including facts that are excluded by law as well as facts which the law dispenses with the proof but excluding arguments, prayers, legal conclusion and judgment". From the above definition of "law" and "evidence", "law of evidence" therefore is the body of rules prescribed by law by which facts are proved in order to establish a cause of action.

Customary and Area Courts

"Customary" is an adjective, and, according to *Oxford Language Dictionary*, means "the customs or usual practices associated with a particular society, place or set of circumstances[12]". According to section 51 of the Customary

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[8] Although this paper is dwelling on the scope of applicability of the Evidence Act on Customary and Area Courts, the Customary Court of Appeal and Sharia Court of Appeal even though are court of records are still considered as Customary Courts since the only adjudicate on appeals emanating from Customary and Area Courts.

[9]http://www.mariam-webster.com> accessed on 24/12/21

[10]http://saylordstorg.gethub> accessed on 24/12/21

[11]Aguda, T. Akinola; The Law of Evidence in Nigeria (Ibadan, 7th edition, spectrum law publication, 1999) p.3

[12] Language.cup.com> accessed on 26/12/21

Laws of Lagos State 2018, "customary court" means a court established or deemed to have been so established or deemed to have been so established under this law".

"Area", according to *Collins Dictionary,* is "a part of the earth surface[13]". "Area Court" is defined by section 2 of the Area Court Law 1968 as a court established under or in pursuance of this law and shall include an Upper Area Court".

Although the definitions of Customary and or Area Court, as reproduced above are not explicit, it is clear that Customary or Area Courts are successors to Native Courts and charged with the responsibility of adjudicating on causes and matters dwelling on customary law of particular communities. For the purpose of this paper, Customary and Area Courts include Sharia Court of Appeal and Customary Court of Appeal. This is because section 256(1) of the Evidence Act excludes the application of the Evidence Act to these courts of record.

Scope of Application

According to Oxford languages.com, "Scope" means the extent of the area or subject matter that something deals with or to which it is relevant[14]. In a similar vein, Britanica.com, defines "scope" as the area that is included in or dealt with by something. *Oxford Languages* defines "application" as "the action of putting something into operation, for example, "the application of general rules to particular cases".

From the above definitions of "scope" and "application", "scope of application" means the extent of the area or subject matter in which it can be put into operation.

In the context of this paper, it has to do with the extent of application of the Evidence Act in view of section 256 of the Evidence Act to Customary and Area Courts in Nigeria.

Overview of the Evidence Act 2011 on Evidence

The term "evidence", in its judicial sense, was defined by Justice Salami JCA (as he then was) in the case of *Onya v Ogbuji*[15] thus:

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[13]https://www.colinsdictionary.com> accessed on 26/12/21

[14] See N.10

[15] (2011) All FWLR (Pt 556) 493 at 517

> The term evidence has been aptly described as any specie of proof, or probative matter legally presented at the trial of any issue, by the parties and through the medium of witnesses, records, documents, exhibits, concrete objects etc, for the purpose of inducing belief in the mind of the court or jury as to their contentions.

However, in its ordinary sense, the term "evidence" signifies that which makes apparent the truth of a matter in question[16]. The Customary Court or Area Court, being a judicial court means it embraces proof through the medium of witnesses, records, documents, exhibits, concrete objects. However, since native courts are freed from the shackles of technicalities, they embrace proof by what make apparent the truth of the matter in question. Thus, in *Umeadi & v Chubunze & Anor,*[17]the Supreme Court held as follows as per Mary Peter Odili (JSC) (as she then was).

> I need to place on record in re-iteration that when parties who believe in the efficacy of a Juju resort to oath taking to settle a dispute they are bound by the result and so the common law principles in respect of proof of title to land no longer applies since the proof of ownership of title to land will be based on the rules set out by the traditional arbitration result to oath taking. See *John Onyenge & Ors vs Chief Loveday Ebere* (2004) 13 NWLR (pt 889) page 20 at 40 – 44. From the pleadings and evidence led at the trial of this suit, it is clear that there was a dispute in 1940 between Emmanuel Uba of Umugbocha family and the respondents' father of Umuofuonye family all of the Egbeagu village Amansea over the land in dispute. The dispute was referred to Egbeagu village Amansea for resolution. Egbeagu village resolved that members of Umuagbocha family should place any Juju of their choice on the land in dispute for the people of Umuofuonye family to remove. Umuagbocha family placed "Ngene Olineru" Juju on the said land in dispute. All the averments

[16] Selective TarHon: S.T. Hon's Law of Evidence in Nigeria Vol. 1 (Port Harcourt, Pearl Publications 2012) P.1.
[17] (2020) LPELR 49566

> and evidence respecting the land in dispute in the traditional history of the land in dispute from both parties in this appeal prior to 1940 no longer apply in the appeal. What is now applicable in the appeal is the customary law of oath taking.

From the above judgement, it means the Customary Court or Area Court can give judgment solely on what is apparent as in the circumstances of the above case. To a Customary Court, what is apparent is the oath taking which by custom proved that a certain party owns the land in dispute. If it were legal evidence, the parties will be required to prove the criteria for traditional history i.e., who founded the land, particulars of intervening owners and how it devolved to the present parties.

Under the Evidence Act 2011, evidence is mainly divided into primary and secondary evidence, but further classified as oral, documentary, direct, circumstantial, original, hearsay, real evidence

a. Primary Evidence

Although primary evidence is used with regard to documentary evidence[18] it is the evidence as required by law to be given first in a proceeding. Thus, primary evidence is both oral and documentary and is the best evidence required to prove a matter".

b. Secondary Evidence

Secondary evidence is substitutionary evidence given in the absence of the primary evidence. Thus, section 87 lists secondary evidence as: -

1. certified copies of public documents
2. copies made from the original documents by mechanical or electrical means
3. copies made from or compared with the original
4. counterparts of documents as against the parties who did not execute them; and

[18] See Section 85 of the Evidence Act 2011 which provides that the contents of documents may be proved either by primary or by secondary evidence. Also, section 86(1), Evidence Act defines primary evidence as the document itself produced for the inspection of the court.

5. oral accounts of the contents of a document given by some person who has himself seen it.

c. Oral Evidence

Oral evidence is the testimony of a witness in court, who gives evidence of what he saw, heard, perceived and held an opinion viva voce [19]. However, in this era of front loading, a witness written statement on oath is now regarded as its oral evidence in courts of record.

d. Documentary Evidence

Documentary evidence is the proof by documents which include books, plans, photographs, video tape, audio tape, computer disk, computer database or any other devise by which information is recorded, stored or retrieved[20]. Sections 83 and 84 of the Evidence Act deals with admissibility of statements made in a document and statements contained in a document produced by a computer.

e. Direct Evidence

Direct evidence is evidence coming from a person who was an eye witness to a fact in issue.[21] Direct evidence is the best evidence to prove a fact in issue.

f. Circumstantial Evidence

Circumstantial evidence is secondary evidence or indirect information whereby from a combination of facts, it can be inferred that a fact in issue has been proved. However, the combination of these indirect evidence must not be broken in order to establish the fact in issue.

g. Hearsay

Hearsay evidence is evidence of a person based on facts not within his personal knowledge. In *Ojo v Gharoro,*[22] the Supreme Court held as follows: -

[19] See sections 125, 126 of the Evidence Act 2011
[20] See Section 258 of the EA 2011
[21] See Section 126 of the Evidence Act 2011
[22] (2006) All FWLR (pt. 316) 197 at 218 - 219

> The word "hearsay" is used in various senses. Sometimes it means whatever a person declares on information given by someone else…. In most cases, hearsay is to the following or like effects. I was told by XYZ that, or XYZ told me that, or I heard that XYZ told ABC that, or I made enquiries and I was told that

Section 37 of the Evidence Act defines hearsay as follows: -

> Hearsay means a statement
>
> (a) oral or written made otherwise than by a witness in a proceedings; or
>
> (b) contained or recorded in a book, document or any record whatsoever, 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.

However, it must be noted that there are exceptions to the hearsay rule where hearsay evidence can be admissible in evidence. These include: - evidence of traditional history in proof of land, affidavit evidence, evidence of corporate transaction, evidence in previous proceedings between the same parties, *res gestae*, dying declaration, certificates signed by government pharmacists, government pathologist, or Accountant General, certificate produced by the government of the Central Bank of Nigeria, previous judgments, evidence of conspiracy or offences involving common intentions, admission against interest, statement made in the ordinary course of business, statement of opinions as to the existence of public right or history in general interest, statement as to the existence of any blood relations, marriage, adoption, declaration as to wills, admissibility of documentary evidence in the absence of the maker under section 85 of the Evidence Act, Statements whether written or oral of facts in issue made by a person who is dead, who cannot be found, has become incapable of given evidence or whose statement in court cannot be procured without an amount of delay or expense.

h. Real Evidence

Real evidence is evidence of material objects relevant to proof of a fact in issue[23]. In some instances, real evidence is necessary for the proof of certain cases such as stolen property, weapons used in a crime, or *locus in quo* in land cases.

The above classification of evidence is provided for under various sections of the Evidence Act. It is to these that section 256 (1), says should apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria but with the exception of proceedings before an arbitrator, a field marshal, or before any Sharia Court of Appeal, Customary Court of Appeal and Area or Customary Courts.

4. SCOPE OF APPLICATION OF THE EVIDENCE ACT BY CUSTOMARY AND AREA COURTS IN NIGERIA

Having examined the scope of evidence law, under the Evidence Act, what is the scope of the application of the Evidence Act in Customary and Area Courts in Nigeria? Section 256(1) – (3) provides as follows: -

> (1) This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic but it shall not apply to –
>
> (a) proceedings before an arbitrator
>
> (b) a field general court martial or
>
> (c) judicial proceedings in any civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless any authority empowered to do so under the Constitution by order published in the gazette confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the Federal Capital Territory Abuja or a State as the case may be power to enforce any or all the provisions of this Act.
>
> (2) In judicial proceedings in any criminal cause or matter in or before an Area Court, the Court shall be guided by

[23] See Section 127 of the Evidence Act

> the provisions of this Act and in accordance with the provisions of the criminal procedure code law.
> (3) Notwithstanding anything in this section, an Area Court shall, in judicial proceeding, in any criminal cause or matter be bound by the provisions of sections 134 – 140.

By the provisions of section 256(1) (C) of the Evidence Act, the Act shall not be applicable in civil causes and matters in Sharia Court of Appeal, Customary Courts of Appeal, Customary Courts and Area Courts. It means that the Act shall apply to criminal causes and matters. Thus, matters of evidence such as confession[24]dying declaration[25]statement of persons who are dead, who cannot be found and who has become incapable of giving evidence[26]admission of previous statement in a criminal trial for use in subsequent trial evidence of good character[27]are applicable in Customary and Area Courts.

Furthermore, by the provision of section 256(2) of the Evidence Act, the provision of the Act shall guide the Area Courts in accordance with the Criminal Procedure Code. What this means is that evidential issues as embodied in the criminal procedure code and the Evidence Act are applicable to Area Courts. The question is, does this subsection only applicable to Area Courts and not Customary Courts? We are of the opinion that this is just legislative drafting lacunas as section 251(1) (c) which precedes subsection (2) thereof included Customary Courts as well as Sharia and Customary Courts of Appeal when excluding them from applying the Evidence Act in their civil causes and matters. It, therefore, means that this guide is applicable to Customary Courts in conjunction with the Criminal Procedure Act as applicable in the southern states. This subsection is referring to evidence on alibi, confessions, trial within trial, judges' rules, evidence of identification, searches, bail, criminal summons, service, arrest, charges, arraignment, examination of witnesses, corroboration, no case submission, defence, judgment, allocutus, sentencing, criminal appeal. Notwithstanding the use of the word "guide", the appellate courts have always ensured that Customary and Area Courts are bound by the

[24] Section 27
[25] Section 40
[26] Section 39,83(1) (b) (2)
[27] Section 46

provisions of the Evidence Act once noncompliance will lead to miscarriage of justice. Thus, in *Jos Native Authority v Allah Na Gani*[28], the accused was said to have raped a 7-year-old girl. The accused was convicted by an Alkali Court (Native Court, the precursor to Area Court) on the uncorroborated evidence of the victim who testified that the accused had pressed her". On appeal, the High Court held that although the Alkali Court was not bound to comply with the provisions of section 179(5) of the repealed Evidence Act (now section 209 (3) of Evidence Act 2011), the Court ought to have been guided by the provision of section 179(5) of the then Evidence Act which required corroboration and the failure to abide by it resulted in miscarriage of justice as the evidence of the victim, a girl of 7 years, was not even sufficient to prove sexual intercourse an ingredient of the offence of rape.

Customary and Area Courts are bound to apply sections 134 to 140 of the Evidence Act going by the provisions of section 256(3) of the Evidence Act 2011 which provides as follows: "Notwithstanding, anything in this section, an Area Court shall in judicial proceedings in any criminal cause or matter be bound by the provisions of sections 134 – 140".

Now the relevant sections are as follows:

134. The burden of proof shall be discharged on the balance of probability in all civil proceeding.

135. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to section 139 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action.

(3) If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the defendant.

136. (1) The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that shall lie on any particular person, but the burden may in the course of a case be shifted from one side to the other.

[28](1968) NMLR 8

(2) In considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively.

137. Where in any criminal proceeding the burden of proving the existence of any fact or matter has been placed upon a defendant by virtue of the provisions of any law, the burden shall be discharged on the balance of probabilities.

138. (1) The burden of proving any fact necessary to be proved in order to –

(a) enable a person to adduce evidence of some other fact; or

(b) prevent the opposite party from adducing evidence of some other fact, lies on the person who wishes to adduce, or to prevent the adducement of such evidence, respectively.

(2) The existence or non-existence of facts relating to the admissibility of evidence under this section is to be determined by the court.

139. (1) Where a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any exception or exemption from, or qualification to, the operation of the law creating the offence with which he is charged is upon such person.

(2) The burden of proof placed by this Part upon a defendant charged with a criminal offence shall be deemed to be discharged if the court is satisfied by evidence given by the prosecution, whether on cross-examination or otherwise, that such circumstances in fact exist.

(3) Nothing in sections 135 and 140 or in subsection (1) or (2) of this section shall –

(a) prejudice or diminish in any respect the obligation to establish by evidence according to law any acts, omissions or intentions which are legally necessary to constitute the offence with which the person accused is charged;

(b) impose on the prosecution the burden of proving that the circumstances or facts described in subsection (2) of this section do not exist; or

(c) affect the burden placed on a defendant to prove a defence of intoxication or insanity.

140. When a fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

The above provision deals with burden of proof in criminal cases which place the burden on the prosecution to prove the guilt of the defendant beyond reasonable doubt. Area and Customary Courts are bound to observe sections 135 to 140 of the Evidence Act.

It is to be noted that according to section 256 (3) of the Evidence Act, Area Courts are bound by sections 134 – 140 of the Evidence Act. However, section 134 deals with the burden of proof to be discharged by parties on the balance of probabilities in all civil proceedings. Does this mean that section 134 of the Evidence Act is applicable to Customary and Area Courts? If it does, then sections 131 – 133 of the Evidence Act should also be applicable to Customary and Area Courts because that is the beginning of Part IX of the Evidence Act dwelling on burden and standard of proof generally i.e., both in civil and criminal causes and matters. But if that is not the intention of the legislature, then it becomes bad legislative drafting. This is because the sections dealing with criminal proceedings in Part IX of the Evidence Act are sections 135, 137, 138, 139 and 140 thereof.

The notion of burden of proof also connotes the principle of fair hearing. Thus, section 36(4) of the Constitution provides: "Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing in public within a reasonable time by a court or tribunal".

Burden of proof also connotes the application of the presumption of innocence in accordance with section 36(5) of the Constitution which provides as follows: "Every person who is charged with criminal offences shall be presumed to be innocent until he is proven guilty".

It therefore means that Area and Customary Courts trying criminal causes and matters are bound to observe fair hearing in accordance with section 36(4) (5) of the Constitution.

According to section 256(1) (c) of the Evidence Act 2011, the Evidence Act shall not apply to civil cause or matter in or before any Sharia Court of Appeal, Customary Court of Appeal, Area Court or Customary Court unless any authority empowered to do so under the Constitution, by order published in the gazette confers upon any or all Sharia Courts of Appeal, Customary Courts of Appeal, Area Courts or Customary Courts in the

Federal Capital Territory Abuja or a State as the case may be, power to enforce any or all of the provisions of this Act".

The above provisions allow any authority so empowered by the Constitution, by an order published in a gazette to empower the Customary and Sharia Courts of Appeal and Customary and Area Courts to apply any or all the provisions of the Evidence Act. Evidence is Item 23 of the Exclusive Legislative List and so the authority referred to is the National Assembly for courts of records i.e., the Sharia Court of Appeal and Customary Court of Appeal. However, by the combined provisions of sections 264, 269, 279 and 284 of the Constitution, the Grand Khadi and President of the Customary Court of Appeal are empowered to subject to any provisions of an Act of the National Assembly or law of the State to make rules for regulating the practice and procedure of Sharia and Customary Courts of Appeal.

Again, section 3 of the Evidence Act provides as follows: "Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria".

The above provision allows the admissibility of any evidence that is made admissible by any other legislation validly in force. Customary and Area Courts are a creation of state legislation by virtue of section 6(4) and 6(5) (k) of the Constitution. It, therefore, means that the "authority" referred to in section 256(1) (c) of the Evidence Act is the State House of Assembly or the Grand Khadi and President of the Sharia and Customary Courts of Appeal.

From the above discourse, it means that the scope of application of the Evidence Act will include any law or rule of courts enacted by the State House of Assembly or Grand Khadi or President of the Customary Court of Appeal or Chief Judge of the High Court with supervising jurisdiction over Area and Customary Courts making any or all of the provisions of the Evidence Act to be applicable to Customary and Area Courts. For example, section 254 of the Armed Forces Act has provisions on admissibility of certain evidence. Also, by section 67 of the Nasarawa State Customary Court Law 2022, sections 16, 17, 18, 19, 70, 125, 126, 107, 34, 85,131, 132, 175, 197, and 251 of the Evidence Act are applicable in judicial proceedings in Customary Courts and Customary Courts of Appeal. In fact, the said sections provide that the Customary Courts and Customary Courts of Appeal shall be bound by the said provisions of the Evidence Act. Being

adjectival law, the rules on evidence can easily be enacted by the Head of Court with supervisory powers over Area and Customary Courts.

The scope of the applicability of the Evidence Act in Customary and Area Courts can also be measured against the backdrop of the fact that all the classifications of the law of evidence are also part of the practice and procedure of these courts. They take evidence viva voce, they admit documentary evidences, they consider real evidence, they consider circumstantial evidence. It, therefore, means that they apply the Evidence Act.

In some states, magistrates are appointed by the Judicial Service Commission but posted to Upper Area Court, or Upper Customary Courts or Upper Sharia Courts, or Upper Customary Courts or Upper Sharia Courts as sole judges. Being first a magistrate who is bound by the Evidence Act, he will feel duty bound to apply the provisions of the Evidence Act especially when adjudicating over cases handled by lawyers and who will argue in accordance with the Evidence Act. Being trained lawyers, it will be absurd for these Magistrates not to apply the provisions of the Evidence Act. To this end, the Evidence Act will be applicable in Upper Area Courts, Upper Customary Courts or even Area and Customary Courts manned by magistrates.

The question to ask is, what does section 256(1) envisage when it provides that the Evidence Act would not apply to Area and Customary Courts? In view of our analyses above, we are of the opinion that the areas in which Area and Customary Courts are not bound to apply in their proceedings include the following: -

1. Not being bound to lay foundation before admissibility of secondary evidence as provided under sections 89 and 90 of the Evidence Act.
2. Admissibility of documents is not restricted to persons who made these documents as provided for under section 83(1) of the Evidence Act.
3 Not being bound by the requirement that documents made by persons interested at a time when proceedings were pending or anticipated are not admissible as provided for under section 83(3) of the Evidence Act.
4. Not being bound by the requirements that opinion evidence is inadmissible as provided under section 67 of the Evidence Act.
5. Not being bound by the requirement that oral evidence is excluded by documentary evidence as provided under section 128(1) of the Evidence Act.

6. Not being bound by the requirement that only certified true copy of public document is admissible as provided for under section 90(1)(c) and section 105 of the Evidence Act.
7. Not being bound by the requirement of corroboration as provided for under sections 197 – 207 of the Evidence Act.
8. Not being bound by the requirement of admissibility of electronically generated evidence as provided for under section 84 of the Evidence Act.
9. Not being bound by the restriction on asking leading questions during examination of witnesses as provided for under section 221 of the Evidence Act.

5. CONCLUSION

This paper examined the role of Customary and Area Courts in the dispensation of justice. It critically examined the scope of application of the Evidence Act to Customary and Area Courts and areas these courts cannot apply the Evidence Act. The paper equally examined the fact that despite the exclusion of application of the Evidence Act in civil causes and matters to Customary and Area Courts being courts established by law, there are instances where they are bound by the Evidence Act even in civil cases. Having examined the scope of applicability of the Evidence Act to Customary and Area Courts, it is clear that the wordings of section 256(1) – (3) of the Evidence Act did not consider the dynamic nature of the law and the society it serves. From the Native Court Ordinance of 1916 to Area Courts Law of 1968 and various Customary Laws of the states, the native courts (Customary and Area Courts) have metamorphosed from being manned by non-lawyers to being manned by qualified lawyers, thus making the non-applicability of the Evidence Act to Customary and Area Courts totally unnecessary except for such courts not manned by lawyers.

6. RECOMMENDATIONS

In view of the above, we hereby make the following recommendations.

i. There is the need for the National Assembly to amend section 256 (1) to remove the non-applicability of the Evidence Act to Customary/Area Courts manned by lawyers. That section should be made to apply to Customary and Area Courts still manned by non-lawyers. Similarly, the National Assembly should amend the said section 256 (1) of the

Evidence Act to remove its non-applicability to Customary Court of Appeal and Sharia Court of Appeal as their Judges and Kadis are trained lawyers in most instances.

ii. There is no doubt that in Area/Customary Courts, litigants may not engage the services of lawyers to conduct their cases. It is therefore imperative for a section in the Evidence Act to be enacted to provide guidelines on how the Evidence Act should be applied in cases conducted without lawyers, just like the way the Evidence Act now have a section dealing with electronic generated evidence.

iii. There is the need for the Houses of Assembly and Heads of Courts with supervisory powers over Sharia, Customary and Area Courts to take advantage of section 3 of the Evidence Act to enact the scope of applicability of the Evidence Act in these courts.

When the above recommendations are applied by the authorities, they will go a long way in defining the scope of applicability of the Evidence Act in Nigeria.