THE ROLE OF MEDICAL EVIDENCE IN THE ADMINISTRATION OF CRIMINAL JUSTICE IN NIGERIA

BY

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DECLARATION

I, ABDULLAHI Sani, hereby declare that this thesis is a direct product of my own research. It has not been presented in any previous application for the award of any degree by anybody. All references and quotations are fully acknowledged in the footnotes.

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ABDULLAHI SANI **DATE**

CERTIFICATION

This thesis titled *The Role of Medical Evidence in the Administration of Criminal Justice in Nigeria* meets the regulations governing the award of the degree of Master of Laws (LL.M) of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This work is dedicated to my parents, Mallama Hajara Zubairu and Mallam Abdullahi Abubakar, for their love and care towards me.

ACKNOWLEDGEMENT

First and foremost, my appreciation goes to Almighty Allah for sustaining my life to this moment and enabling me accomplish this enormous task.

To my parents, Mallama Hajara Zubairu and Mallam Abdullahi Abubakar, I am unable to thank you for all you have been doing to me especially your fervent prayers for my success. May Allah make you among the dwellers of jannat firdaus, amen.

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ABBREVIATIONS

1. A.B.U	Ahmadu Bello University.
2. AFIS	Automated Fingerprint Identification System.
3. AK	Adenylate Kinase.
4. CA	Court of Appeal.
5. Cap.	Chapter.
6. CJ	Chief Justice.
7. CO.	Company.
8. Crim.L.R.	Criminal Law Review.
9. EAP	Erythrocyte Acid Phosphate.
10. All ER	All England Report.
11. ESCLR	Eastern States Court Law Report.
12. FSC	Federal Supreme Court.
13. FWLR	Federation Weekly Law Report.
14. IPO	Investigating Police Officer.
15. JCA	Justice of the Court of Appeal.
16. JSC	Justice of the Supreme Court.
17. KLR	King's Law Report.
18. LFN	Laws of the Federation of Nigeria.
19. Ltd	Limited.
20. NBA	Nigerian Bar Association.
21. NLR	Nigeria Law Report.
22. NMLR	Nigeria Monthly Law Report.
23. NNLR	Northern Nigerian Law Report.
24. NSCC	Nigerian Supreme Court Cases.

25. NWLR	Nigeria Weekly Law Report
26. Ph.D	Doctor of Philosophy.
27. Pt.	Parts.
28. SC	Supreme Court.
29. SCNJ	Supreme Court of Nigeria Law Judgement.
30. SCNLR	Supreme Court of Nigeria Law Report.
31. US	United States.
32. VS	Versus.
33. VSC	Video Spectra Comparator.
34. WACA	West African Court of Appeal.
35. WRNLR	Western Region of Nigeria Law Report.

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ABSTRACT

Medical evidence is very relevant evidence in the administration of justice in that it provides a means of proof of some facts in criminal cases. This beclouds some parties into having the impression that some facts could not be proved without medical evidence. On the other hand, some judges undermine the role of such evidence in proof of some facts. This Thesis, therefore, examined the role of medical evidence in some of the cases where its relevance crops up such as murder and culpable homicide punishable with death and proof of rape especially penetration which is central in sexual intercourse. The author used doctrinal research method in conducting the research. At the end of it, he found that medical evidence may not always be necessary in cases of homicide and rape. It is considered indispensable in determining whether the act of the accused person caused the death of the deceased especially where the death occurred long time after the act of the accused, or where the deceased had been treated at various hospitals before his death, or that there was the possibility of an intervening cause, or the nature of the alleged cause of death is such that only medical evidence could determine with certainty; proof of penetration in rape cases especially where there was trace of semen. However, in the other circumstances examined medical evidence is only relevant and important in the sense that the facts it sought to prove could be proved by other available evidence. It is recommended that judges and parties to litigation should be able to know exactly when medical evidence could be indispensable, desirable or merely relevant so that it is considered in accordance with the circumstance of the case. Consequently, this will go a long way in striking a balance between the mixed impressions about its role in the administration of criminal justice.

CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

Law has played and continues to play a major role in human affairs so much so that any argument to the contrary would holds no water.[1] This is because experience has shown that law is one of the great civilizing forces in human society and that the growth of civilization has generally been linked with the gradual development of a system of legal rules.[2] It plays a central role in the life of the society[3]as it transcends endlessly through all spheres of human endeavours.[4] Since, "…the law affects us from the moment we are born",[5] the knowledge of the laws of our society, is the proper accomplishment of every gentleman and scholar.[6]

Without prejudice to this important role of law in a civilized society, science has equally been recognized as playing a crucial role in modern society.[7] Therefore, law (and strictly speaking, administration of justice) being indispensable and an integral part of a modern civilized society, stands to benefit from Science. This explains the long-standing relationship law and science enjoy from time immemorial which made a writer to opine that Science and Law exist to pursue a common philosophy.[8] This relationship led to the emergence of a fully-fledged discipline – Forensic Science which has proved

[1] Leading Philosophers from Plato to Marx have argued that law is an evil thing of which the society would do well to rid itself, see Lloyd, D., (1964), *The Idea of Law,* Penguin Books Ltd, London p. 7

[2] Ibid.

[3] Eri, U.: Law as an Instrument for the Promotion of Social Justice: A Nigerian Perspective, being a paper presented at the world Jurist Association Conference held at Beijing and Shanghai China, August, 2005, p. 4

[4] Justice Robert H. Jackson of the United States Supreme Court on the Occasion of the Declaration of American Bar Centre, Chicago, (1953), p.1

[5] Paul. D., (1983) *Law: A modern Introduction.* (4th ed) Multiple Techniques Ltd., London, p.1

[6] Denning, M.R., *The Due Process of Law*, Butterworth, London, (1980), p.iii

[7] Benton, W. & Benton, H.H., (1975) *The New Encyclopaedia Britannica* (15th ed) vol. 16. Encyclopedia Britannica Inc.,, p. 392

[8] Britain R.D., (1970), 'Science, Legislation and politics' in Cameron J.M., (ed) Medicine, Science and the Law, the British Academy of Forensic Science, Bristol, p. 17.

to be relevant in the administration of justice and which is critical in police investigations and makes the burden of proof of some facts lighter.[9]

There is an increasing use of the evidence science and technology generate because they are generally considered to have some degree of credibility that could be equated with mathematical assurance.[10] The law, therefore, has frequent need of scientific knowledge in pursuing its enquiries, preparing and presenting evidence in court[11].

Medicine, as one of the various fields in science, is not left out of the relationship between science and law. Therefore, as per administration of justice, medical profession complements the Legal Profession in the sense that in a variety of cases, the court can not attain its purpose of justice without assistance of medical experts. Therefore, legal knowledge alone is deficient and must be supplemented by medical knowledge.[12] This is because in the more advanced countries a greater percentage of their cases require medical evidence.[13] Notwithstanding the fact that this percentage may be lower in Nigeria,[14] medical evidence has been statutorily[15] and judicially[16] recognized as a means of proof of some facts in judicial proceedings. This is the position in cases bordering on homicide and rape. Thus, medical evidence, which is a product of Forensic Medicine comes to the fore in some criminal cases as its absence leads to discharge or conviction

[9] Osibanjo Y., (2006) *'Law of Evidence*': In Tobi N., (ed) *Uwais Through the Cases*, Snaap Press Ltd., 1 Snaap Drive, Independence Layout, Enugu, p. 589

[10] Camps, F.E., (1976) *Gradwohls Legal Medicine,* Bristol: John Wrights & Sons Ltd. (3rd ed) p. iv

[11] Obi-Okoye A., '*The Doctor Seen from the Bench',* In: Umerah B.C., (ed) *Medical Practice and the Law in Nigeria,* Amino press, Ikeja, (1989) p. 155

[12] Obi-Okoye A., op. cit

[13] See Polsky, S., (1956), 'Why Forensic Medicine'? In Polsky S.,(ed) *The Medico-Legal Reader,* Oceana Publications, U.S.A., , p. 12, where the Author asserted that about 70 percent of the cases require Medical Evidence

[14] We could not lay our hands on available statistics

[15] See ss. 144, 189 constitution of the Federal Republic of Nigeria, 1999; 320 321, 328, 329 Criminal Procedure Code, Cap. 30, *Laws of Northern Nigeria*, (1956); 223,224, 231, 233, 311 Criminal Procedure Act. Cap C41 LFN 2004; 15 Matrimonial Causes Act Cap. M7 LFN 2004 etc.

[16] There is a plethora of cases recognizing medical evidence as playing an important role in the administration of justice

of a lesser offence,[17] and in others, makes the discharge of the burden of proof more onerous or seemingly impossible.

1.2 STATEMENT OF THE PROBLEM

Medical evidence has a very relevant and important role to play in the administration of criminal justice in Nigeria today. However, there are several problems associated with the use of medical evidence. Therefore, statement of problems in this research have been identified as follows:

(i) The role of medical evidence in the administration of criminal justice used to give a mixed impression to parties to a litigation and even the court. Consequently upon this, some times parties insist that some facts could not be proved without medical evidence. For instance, in most cases of culpable homicide punishable with death and rape, the accused persons do argue that the offences could not be established against them in the absence of medical evidence. Conversely, some judges underestimate the role of medical evidence in proof of these cases. A court of law is not seen as omniscient nor should it claim to be one. This is why the law renders relevant the opinion of some professionals as the basis upon which it would form its own.[18] However, this is not always the case as judges sometimes look down upon such evidence. For instance, a judge once said of scientific evidence "… I do not require any scientist to substantiate before me that these stains are blood stains and that they are human blood."[19]

(ii) Medical evidence is sometimes fraught with problems emanating from the medical witnesses. It could be as a result of proof of their qualifications as

[17] Parikh, C.K., (1970) *A Simplified Textbook of Medical Jurisprudence and Toxicology* (1st ed), Bombay Medical Publications, Bombay, India, pgs. Xi-xii

[18] See S. 68 (1) Evidence Act, 2011.

[19] Kasa vs The state (1994) KLR 84 at 91

experts or giving contradictory, ambiguous or inconclusive evidence that creates doubt in the mind of the judge. It may also arise as a result to the use of unintelligible and incomprehensible medical language and highly technical terms either in their testimony or reports which confuse rather than guide the court. While such technological language may be justified in some cases because they may not be expressible in layman's language, they could not in others. In this respect, medical practitioner once testified that on examining the victim of an assault, he found him suffering from "a severe contrusion of the integument under the left orbit, with great extravasations of blood and ecchymosis in the surrounding cellular tissue which was in a tumified state". When asked about a particular substance, another expert witness responded. "It is analogous in diatomic composition to Para Sulpho Benzine Azode Methyl Aniline in conjunction with phenekatholine".[20] Who would ever expect an ordinary layman (including the court) to understand what the substance is all about using this medical jargon? A similar attitude was exhibited when a medical practitioner was called to establish the cause of death in a charge of manslaughter. He testified that: "my findings are as follows: an incision above the left clavicle stretching from the end of sternum and parallel to the clavicle cutting a portion of the sternocleido-mastoid muscle and percing through the cavity of a nuddle and then cutting through the thoracic duct – cause of death – hemorrhage".[21]

This happens especially in proof of murder or culpable homicide punishable with death.

[20]See Andrew, W., '*The Lawyer in History, Literature and Human'* (1896) quoted in Iyizoba, C.E.,)1090_ '*Medical Evidence'.* In B.C. Umera (ed), *Medical Practice and the Law in Nigeria,* op cit, p. 116

[21] Obi-Okoye, A., op cit p. 154

The extent of the effect of these problems of medical evidence on its probative value is sometimes difficult to be determined by the trial judges. Consequent upon this, they tend to throw away both the child and the bath water.

1.3 AIMS AND OBJECTIVES

Parties to a litigation sometimes insist on production of medical evidence as if it were *sine quo non* in proof of some offences and facts while some courts treat such evidence as if it were not relevant an important. In this light, this research is aimed at:

i. Examining the extent of the role medical evidence plays in proof of murder/culpable homicide punishable with death and rape.
ii. Highlighting the scientific aspects that are relevant in the administration of justice and
iii. Proferring solutions to the problems identified in this research

1.4 JUSTIFICATION

This research is justified by the need to correct any wrong impression litigants and judges do have about what medical evidence could do in proof of culpable homicide punishable with death and rape. Therefore, a wide spectrum of such professionals as legal practitioners, medical practitioners, forensic scientists, officers and men of the police force (especially those involved in investigations and prosecutions), law and medical teachers, students and researchers, will find this research useful.

1.5 SCOPE OF THE RESEARCH

The scope of this research is determined by its aims and objectives i.e. it is confined to examination of the role of medical evidence in the administration of criminal justice particularly in proof of cases of murder/punishable homicide punishable with death and rape. Territorially the research covered Nigerian but reference is made to other jurisdictions on relevant matters.

1.6 RESEARCH METHODOLOGY

The method adopted by the researcher in collecting/gathering\ information for the purpose of this research was doctrinal research methods. Thus, relevant statutes, case laws, textbooks and journals were consulted and appropriately used.

1.7 LITERATURE REVIEW

One of the first and most authoritative and comprehensive book on Forensic Medicine is that of Francis Camps entitles *Gradwohl's Legal Medicine*[22]. It traces the history of legal medicine (Forensic Medicine), the relationship between law and medicine and important aspects of forensic science such as heamatology, psychiatry and toxicology. However, the book fails to highlight the role which such aspects play in the administration of justice and which this research does.

This is closely followed by Parikh's book entitled 'A *Simplified Textbook on Medical Jurisprudence and Toxicology'*.[23] The author covers comprehensively such aspects as causes and nature of death, injuries/wounds and toxicology. But the scope of this research is wider than that of the book as it highlights their relevance in the administration of criminal justice.

Curran and Shapiro have exhibited their prowess in the field under consideration in their authoritative textbook, *Law, Medicine and Forensic Science*.[24] The book covers, *in extensio*, the relationship between law and medicine; the nature of medical and forensic science; medical proof in litigation and some other medico-legal issues outside the scope of this research. Its apparent *lacuna* is that, unlike this research, it does not take into account the recent developments in the field because it was written long before them.

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[22] Camps, F.E., op.cit

[23] Parikh, C.K., op. cit

[24] Curran, W.J. and Shapiro, D. (1970), *Law, Medicine and Forensic Science,* Little, Brown & Co., Toronto, (2nd ed).

Onashile, the author of *Scientific Criminal Investigation Detection and Prosecution*,[25] possibly the first Nigerian author in this field, has made a significant contribution. Although his personal experience in this field was brought to bear as such formed the bulk of the information provided in the book, it covers much of forensic science laboratory. However, it does not point out the role of such laboratories in the administration of criminal justice as this research does.

The Practical Police Surgeon,[26] by Cooke, succinctly covers the present state of forensic science for those who are professionally concerned. It's a useful handbook and guide for lawyers, police officers and forensic scientists called upon to provide expert opinion.[27] It covers some aspects of forensic science like forensic science laboratory, forensic, toxicology, blood-alcohol analysis, firearms, questioned documents and definitions of some legal terms. However, it does not provide a detail account of forensic science laboratory as provided in this research.

Polson's *Essentials of Forensic Medicine*[28] is a very resourceful material in the filed. It deals with the basic legal aspects of medicine and medico-legal aspects of abortion; insanity; sexual offences and legal regulation of medicine. However, its oversight is that no attention is paid to the evidential role of forensic medicine in proof of murder/culpable homicide punishable with death and sexual offences which is one of the focus of this research.

Traumatic Medicine and Surgery for the Attorney,[29] edited by Cantor,[30] is just a work of reference for the legal profession but in no way a medico-legal publication as

[25] Onashile, Y., (2002), *Scientific Criminal Investigation Detection and Prosecution,* Sam Bookman Publishers, Ibadan.
[26] Cooke, R.H., et al. (ed), (1969) *The Practice Police Surgeon,* Sweet and Maxwell, London.
[27] See the back cover of the book.
[28] Polson, C.J. (1965) *The Essentials of Forensic Medicine,* Porgamon Press, London. (2nd ed)
[29] Cantor, P.D. (ed) (1959), Traumatic Medicine and Surgery for the Attorney, Butterworth Co. Ltd., Toronto, Canada.
[30] Adjunct professor of law; Professor of Medical Jurisprudence, Georgetown University Law Centre; professional Lecturer, Legal Medicine, Georgetown university School of Medicine; National Medico-

indicated by the publishers.[31] This apparent gap is filled by this research as it deals with some medico-legal issues.

Mann has done a great job in his *Medical Assessment of Injuries for Legal Purposes*.[32] Notwithstanding the fact that the book is authoritative in cases of assessment of injuries, the subject matter does not one of the issues covered by this research.

Although Annas, and Glants *et. al*. could not claim their book, *Informed Consent to Human Experimentation: The Subjects Dilemma,*[33] to be comprehensive in forensic medicine, it deals decisively with such aspects as law of consent to medical treatment and experiment and medical negligence and its consequences. Although relevant in forensic medicine, such aspects are inconsequential in this research.

A Guide to Pathological Evidence by Jaffe[34] covers one of the most important aspects of forensic science – forensic pathology. It deals comprehensively with the preparation of autopsy, poisoning and intoxications, sexual and physical assaults. However, the book fails to highlight the role of scientific knowledge of pathology in the administration of criminal justice as this research does.

Handbook of Legal Medicine by Morits Allan[35] is a concise handbook that does not provide a detailed explanation on the subject as this research does. Credit must, however, be given to its authors for comprehensively covering such areas as scientific proof in personal injury cases which mostly arise in civil matters. This research is wider in scope than the book as it covers scientific proof in criminal matters.

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legal consultant, American Red Cross.

[31] Cantor P.D., op. cit P. viii

[32] Mann, A., (1971), *The Medical Assessment of Injuries for Legal Purposes,* Butterworth, London. (2nd ed),

[33] Annas, G.J., et al (1977) *Informed Consent to Human Experimentation: The subject's Dilemma*, Ballinger Publishing Co; Cambridge.

[34] Jaffe, F.A., (1976), *A Guide to Pathological Evidence,* The Carswell Co. Ltd., Toronto, Canada.

[35] Morits, A.R., et.al op. cit

Rafindadi's *Handbook of Forensic Medicine*[36] is just a summary of some aspects of forensic medicine aimed at sensitizing undergraduate medical students on the subject. This research is much more than a summary as it covers much of forensic medicine.

Many authors like Nwadialo [36a], Aguda[36b] and Sebastine[36c] wrote extensively on relevance and admissibility of evidence generally. However, they failed to point out what medical evidence could do in the administration of criminal justice.

1.8 ORGANIZATIONAL LAYOUT

This research consists of five chapters organized in the following sequence:

Chapter one generally introduces the topic of the research. It therefore comprises of general introduction, statement of the research problem, aims and objectives of the research, justification, scope of the research, methodology to be adopted, literature review, and its organizational layout.

The second chapter covers the relationship between science and law which gave rise to the emergence of Forensic Science like pathology, psychiatry, toxicology, serology/ haematology. It also discusses forensic science laboratory

Chapter three discusses the meaning, classification, relevance and admissibility of evidence.

Chapter four contains the role of medical evidence and in proof of murder/culpable homicide punishable with death and rape.

Chapter five is the conclusion and contains summary, observation and recommendation.

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[36] Rafindadi, A.H., (2004), *A Handbook of Forensic Medicine,* Amana Publishers Ltd., Zaria.

[36a] Aguda T.A, (1999) The Law of evidence, Spectrum Books Ltd, Ibadan, (4th ed).

[36b] Nwadialo, F., (1999) Modern Nigeria Law of Evidence, Ethiope Publishing Co. Ltd., Benin (2nd Ed).

[36c] Sebastine, T.H. (2007) The Nigerian Law of Evidence: Substantive and procedural, Pearl Publishers, Port Hacourt.

CHAPTER TWO

2.0 THE RELATIONSHIP BETWEEN SCIENCE AND LAW

2.1 INTRODUCTION

The relationship between science and law has been pointed out else where in this research[37]. Suffice it to state here that such interface gave rise to the emergence of a subject called for forensic science.

"Forensic" means belonging to the courts of justice.[38] In other words, it means applied to the law.[39] A more comprehensive meaning is that "forensic" is that relating to the scientific tests used to help with police investigations and legal problems.[40] Science, on the other hand, means the study of the structure and behaviour of the physical and natural world and society, especially through observation and experiment.[41] It is also a branch of study concerned with the observation and classification of facts, especially with the establishment of verifiable general laws chiefly by inductions and hypothesis.[42] From the foregoing definitions of forensic and science, it could be understood that forensic is the use of science to solve legal problems in the courts of law. However, a better and more elaborate definitions of forensic science is given as the application of scientific knowledge and methodology in legal problems and criminal investigations.[43] It is also defined as a science applied to the interest of justice.[44] Forensics, otherwise considered as synonymous with forensic science,[45] has been defined as a field of science dedicated to the methodological gathering and analysis of evidence to establish fact that

[37] See pp1-3 of this Thesis.
[38] Black, H.C (1990) *Black's Law Dictionary,* West Publishing Co. St. Paul Minn., P.555
[39] Jaffe, F.A., op. cit. p.147
[40] Crowther, J. Ed.) (1995) *Oxford Advanced Learner's Dictionary of Current English,* Oxford University Press, New York, (5th Ed.) p.462
[41] Ibid, p.1050
[42] Watsons S.A. (1963) *Psychiatry for lawyers,* International Universities Press Inc., New York p.31
[43] Google search, accessed on 4/11/10
[44] Firth J.B 'Aspects of Forensic Science', Crim L.R (1954) Sweet & Maxwell Ltd; London, p.107.
[45] Goggle search, op. cit.

can be presented in a legal proceeding.[46] To put it more succinctly, a medical analysis made by a pathologist to determine the nature and extent of injuries or the cause(s) of death in a legal proceeding is forensic science. The chemical analysis of alcoholic substance, blood or stomach contents carried out by a toxicologist in a suspected case of poisoning becomes forensic science. So also a blood, DNA, semen or any other body fluid or fingerprint analysis in cases like violent crimes, rape, paternity/maternity determination, theft/stealing or housebreaking, etc.

Forensic science is of various types such as forensic pathology, odontology, chemistry, engineering, psychiatry, ballistics, toxicology, entomology, haemotology and in fact as many as the branches of science that exist. However, for the purpose of clarity and precision the most frequently used types are considered i.e. forensic pathology, psychiatry, haematology and toxicology.

2.3.2 Forensic Pathology

Pathology is defined as the scientific study of the way things go wrong.[47] Pathology is also the study of the cause and nature of disease, or a disease.[48] It has also been defined as the scientific study of disease. Its concerned with the causes and mechanism by which disease is produced with the description of the manifestation of disease and with its progress and sequels.[49] A wider definition is that pathology is the branch of medicine concerned with alterations in the structure of tissues caused by disease, ageing or violence.[50] From the totality of these definitions, pathology involves the study of the changes in the structure of tissues and the changes will invariably and unarguably include death and injuries/wounds. This is because the determination of cause of death and nature of injuries/wounds usually become relevant in criminal and civil

[46] http://ezinearticles.com accessed on 01/11/10
[47] Spector, W.G.(1989) *An Introduction to General Pathology,* Churchill, Livingstone, London (3rd Ed.), p.1
[48] Walter, M.J. (1966) *Short Encyclopaedia of Medicine for Lawyers,* Butterworth, London, p.307
[49] Govan (1994) A.D., *Pathology Illustrated,* Longman Group, London, (4th Ed.), p. ix
[50] Jaffe, F.A., *op. cit,* p. 151

proceedings. Thus, forensic pathology is that branch of medicine dealing with disease and disorders of the body in relation to legal principles and cases.[51]

Therefore, the two main aspects of pathology – death and injuries/wounds form the crux of our discourse here.

2.3.2.1 Meaning of Death

Death is of two types or, to be more precise, occurs in two different stages. The first is somatic death which is the actual death of the human being as a whole. This is followed by molecular death which is the death of the issues which occurs three to four hours later. The former is our concern because without it there cannot be the latter and it is the death the law refers to. It is defined as the complete and persistent cessation of respiration and circulation.[52] Or more comprehensively, the permanent cessation of all vital functions.[53] This first definition is considered outdated, obsolete and no longer tenable in the light of modern resuscitative techniques that maintain circulation and respiration in the body whose circulation and respiration have ceased persistently. Death has also been defined as the complete and persistent cessation of the functions of brain, heart and lungs, the so-called tripod of life.[54] This definition is not so dissimilar to the above and it is based on the proposition that life is maintained by the action of the brain, lungs and heart. Therefore, the arrest of the function of any of them leads to that of the others and life ceases.

The advent and advancement in organ transplantation expose these definitions to criticism. In view of this, the only concept of brain death which is now medically and legally acceptable is the concept of death. This is the situation in which all the neurons

[51] Black, H.C., *op. cit,*. p.49
[52] Ikerionwu, S.E., '*Death'*, In: Umerah, B.C., (ed), op. cit. p.22
[53] Jaffe, F.A., *op. cit.,* p.144
[54] Parikh, C.K., *op. cit.,* p.96

in the whole brain have completely ceased functions. Its considered as the actual death of the whole person which is irreversible.[55]

2.3.2.2 Signs of Death

These are characteristics that appear on the body signifying that the person is dead. They include:

- Cessation of circulation due to the failure of the heartbeat.
- Cessation of respiration which could be detected by a thorough inspection of the chest and abdomen.
- Cooling of the body brought largely by the stoppage of heat production in the body.
- Loss of corneal and light reflexes
- Reduction and loss of the tone of the eye ball.
- Total loss of tone in all the skeletal muscles as a result of which the mouth may become easy to open, the jaws can readily droop, the joins become flexible and there may be incontinence of urine and faeces.
- Putrefaction or decomposition which involves the breaking down of the tissues due largely to the actions of micro organism.[56]

2.3.2.3 Modes of Death

Death may be caused by any disease of the body organs, but there are only three main modes by which death occurs. They are interdependence because no clear cut line exists as such the factors inducing one may also induce the other(s). Whatever the mode of death may be, the concern of the law mostly is the actual cause of death so that it could be determined whether it was homicidal, suicidal or accidental. However, the modes of death help in determining the cause. The modes are; asphyxia, coma and syncope.

[55] Ikerionwu, S.E., *op. cit.,* p.22
[56] See generally Parikh, C.K., *op. cit.* pp.22-23

2.3.2.4 Asphyxia

To most scholars, asphyxia is synonymous with anoxia which means lack of oxygen. Asphyxia is therefore death from failure of the function of the lungs.[57] It's also non-oxygenation of blood caused by cessation of breathing.[58] It may be due to the mechanical interference to the passage of air into respiratory tract; or the prevention of normal movement of the chest and cessation of respiratory movements. Asphyxia may take the form of or be caused by any of the following means i.e. hanging, strangulation, suffocation and drowning.

(i) Hanging

This is the constriction of the neck by a noose or loop by the effect of body weight.[59] It is equally described as the type of ligature strangulation in which the constricting force is due to gravity.[60] It is the form of death which is caused by suspension of the body by ligature which encircles the neck, the constricting force being the weight of the body.[61] In hanging, the tongue is being forced up and back so as to obstruct the larynx (opening to the windpipe) which may cause death. Death may also be caused by deprivation of the brain of blood by pressure on arteries in the neck.[62] Therefore, in some cases, the veins, arteries and the airway may all be obstructed; there may be injuries to the spine, spinal cord and the skull.[63]

(ii) Strangulation

This is a form of violent asphyxia caused by constricting the neck by means other than the weight of the body. It may be by ligature, the hand (throttling) or some hard object,

[57] Ibid, p.99
[58] Levitt, M.W., op. cit. p.42. 43
[59] Ibid, p.190
[60] Jaffe, F.A., *op. cit*, p.148
[61] Parikh, C.K., *op. cit*. p.132
[62] Levitt, M.W., *op. cit*, p.190
[63] Polson, C.J., *op. cit,* p.290

such as a stick.[64] Strangulation is caused by the application of a ligature to the neck in such a manner that the force acting upon it is other than the weight of the victim's body.[65] In strangulation, there is a sudden and violent compression of the windpipe which often renders a person powerless and causes immediate insensibility and death. Strangulation is usually homicidal, although there are rare instances where it was found to be suicidal or accidental.

(iii) Suffocation

This is a form of asphyxial death from causes other than constriction of the neck.[66] Suffocation occurs when there is inadequate oxygen to breath either because of lack of oxygen in the immediate atmosphere or because of obstruction of the airway. In suffocation, therefore, there is struggle to breath, accumulation of carbondioxide that simulates more struggle and exacerbate lack of oxygen then followed by death.[67]

(iv) Drowning

Drowning is death due to immersion of the nose and mouth in water or other fluid.[68] Another author described it as death from deprivation of air by water or other fluid entering the air passages.[69] In other words, drowning is a form of asphyxial death in which the access of air to the lungs is prevented by the submersion of the body in water or other fluid medium. When a non-swimmer falls into water, he sinks and then raises to the surface due to natural buoyancy of his body and the movements of his limbs in the course of struggle. When he finally sinks into the bottom of the water, his respiratory efforts continue which result in filling of the air passage and lungs with water. This is

[64] Parikh, C.K., *op. cit.,* p.141
[65] Polson, C.J., op. cit, p.141
[66] Parickh, C.J., *op. cit.,* p.316
[67] Umerah, B.C., '*Asphyxia',* In: Umerah, B.C. (ed), op. cit. p.33
[68] Jaffe, F.A., *op. cit.,* p.145
[69] Levitt, M.W., *op. cit,* p.131

followed by loss of consciousness and death.[70] Death occurs largely due to the fact that the fluid (which may be water) replaces the air in the lungs resulting in the fatal lack of oxygen,[71] or the absorption of water by the circulating blood and the ensuing changes in the blood[72]

2.3.2.5 Coma

Another mode of death aside from asphyxia, discussed above, is coma. This is death from failure of the function of the brain. Death occurs due to the compression of the brain resulting from diseases of the brain or its membranes. [73]

2.3.2.6 Syncope

This mode of death is due to the failure of the function of the heart. This may occur due to heart disease or from hemorrhage or from pathological state of the blood. Apart from organic disease, this mode of death may also be caused by reflex nervous arrest. Other causes are: emotional shock; blow on the testicles; sudden immersion of body in cold water; and insertion of an instrument into the uterus, bladder or rectum.[74]

2.3.2.7 Post-Mortem Examinations

Post-mortem literally means after death. Post-mortem examination is a term generally applied to an autopsy or examination of a dead body to ascertain the cause of death or to the inquisition for the purpose by the coroner.[75] Since this definition regards post-mortem examination as synonymous with autopsy; then autopsy itself has been defined to mean the dissection of the dead body for the purpose of inquiring into the cause of death.[76] From these definitions, it could be concluded that autopsy and post-term examination refer to one and the same thing i.e. the examination performed on a dead

[70] Parikh, C.K., op. cit. p.150
[71] Jaffe, F.A, op. cit,. p.68
[72] Polson, C.J., *op. cit.,* p. 142
[73] Parikh, C.K., *op. cit.,* p.98
[74] Ibid.
[75] Black, H.C., *op. cit.* p.1167
[76] Ibid, p.134

body to determine what caused the death. This, therefore means that a medical practitioner or, to be more precise, a forensic pathologist[77] called upon to find out the cause of death cannot convincingly and satisfactorily establish the cause without conducting this examination. It's important at this juncture to briefly highlight the procedure by which such examination is conducted.

2.3.2.8 Post-Mortem Examination Procedure

The following procedure is adopted by the pathologist who performs post-mortem examination:

- He should obtain an authority in the prescribed form[78] through the Investigating Police Officer (IPO).
- The body must be identified to him by the investigating police officer or by a relation or through labeling if it is in the mortuary.
- The investigating police officer and other interested persons should be present.
- Photographs of the body should be taken before removing the cloths from it.
- Collect trace evidence present in the body like hairs, fibres, glass pieces etc.
- Collect specimens like heirs, swabs from vagina, anus, nose, etc.
- A detailed external examination of the body organs like limbs, hands, neck, ears, eyes, nose, mouth, teeth, genitalia etc. for wounds, scars, lividity, decomposition, etc.
- A detailed internal examination of the body organs like the heart, lung, stomach, liver, kidneys, bladder, etc. and all other internal aspects of the neck, chest and abdomen. This examination is possible by making an incision from the chin to the

[77] He is generally considered as the most specialized to conduct post mortem examination. See. info@fflm.ac.uk. Accessed on 4/11/10.

[78] Form D as required by the Coroner's Laws of the Various States of the Federation. See for instance S.14 Coroner's Law, Cap 39 Laws of Kaduna State of Nigeria, 1991.

pubic region which exposes the neck, chest and the abdominal organs and another incision from ear to ear which exposures the skull.[79]

After the examination has been concluded, then comes the preparation of the report which entails the result of the examination. In the course of the examination, notes made on the internal and external findings should form the basis of the report to the court. The report should be in plain English, without much technical medical jargon, explaining in greater details the external and internal findings and his opinion based on the findings.[80]

2.3.2.9 Injuries/Wounds

Since pathology entails the scientific/medical knowledge of diseases, the study of wounds, which is also a disease, necessarily becomes part of pathology. The knowledge of wound could also be relevant in a judicial proceeding because it is an offence to cause grievous bodily harm or wound.[81] A wound is a lesion or damage produced on the body by a chemical or mechanical force.[82] Injury, which is synonymous with wound, has been defined as lesion of the body, external or internal, caused by the application of violence.[83]

2.3.2.10 Types of Wounds

The type of a wound is determined by the impact of the force as well as the tissue on which the force was applied. Thus, the main types of wounds are lacerations, incised wounds, abrasions and contusions (bruises).

(i) Lacerations

These are wounds caused by the forcible impact of a blunt object on the body tissue. Lacerations have irregular edges and the affected tissue may not be severed completely. Lacerations do not usually bleed much and heal readily and usually leave little or no

[79] Rafindadi, A.H., op. cit., pp.95-96.
[80] Camps, F.E., op. cit. p.75
[81] It will be discussed in a great detail in the next chapter of this Thesis.
[82] Ikerionwu, S.E., *op. cit,* p.39
[83] Parikh, C.K, *op. cit,* p.174

scars at all.[84] They are often associated with injuries to internal organs and fractures of bones. They are usually found in parts of the body where bones lie close to the subjacent tissue e.g. on scalp, face, lower leg etc. They may be caused by blows from stones, bricks, bottles, or earthenware pot.[85]

(ii) Incised wounds

These are linear wounds with sharp clean edges. Incised wound is almost invariably produced by sharp objects such as knife, glass or sharp edges of metallic objects. An incised wound is often deep and may gape due to the retraction of the edges of the wound but bleeds profusely.[86] The wound is usually straight but may be irregular if inflicted over an area of lax tissue like scrotum. Deep incised wound of limbs produce permanent paralysis and waste of muscles due to severed nerves.[87]

(iii) Abrasions

These are superficial injuries which involve only the outer layers of the skin. They are indications of friction or pressure between the surface of the body and some rough objects. They bleed very slightly and heal rapidly and have no permanent mark unless where deeper layers of the skins are involved. Abrasion could be scratch, graze or imprint/pressure/contact. A scratch abrasion is a linear injury produced by a sharp object such as pin, thorn or fingernail running across the skin. A graze abrasion is produced when a broader surface of skin scrapes against a rough surface like where the body has been dragged in an accident. An imprint or pressure or contact abrasion is an injury produced as a result of direct impact or passage or a contact with some objects which

[84] Ibid, p.182
[85] Ikerionwu, S.E., *op. cit*, p.39
[86] Parikh, C.K, *op. cit.*, p.185
[87] Ikerionwu, S.E. *op. cit.,* p.39

stamps a reproduction of its shape in the skin e.g. rope marking in hanging, tyre marks in case of passage of wheel over the victim, thumb marks in manual strangulation etc.[88]

(iv) Contusions (Bruises)

A bruise is an infiltration of blood into the tissues, following the rupture of vessels, usually the capillaries as a result of the application of blunt force. A fresh bruise is slightly above the surface of the skin and some swelling may be apparent in the injured area. Though bruise is usually simple injury, it may prove fatal when it involves an important internal organ like the heart.[89] Loose tissues like that of the eye lids readily show bruises while the palms or the sole of the feet rarely does.[90]

2.3.3 Forensic Psychiatry

Psychiatry has been defined as the branch of medical science dealing with disease and disorder of the mind.[91] The importance of psychiatry in legal parlance cannot be over-emphasized. It has application in criminal proceedings because the Nigerian criminal justice system, and indeed most criminal justice systems in the world, recognizes insanity as a defence to criminal liability. In civil cases, most legal transactions like will, marriage, contract, divorce etc. cannot be undertaken by parties without mental capacity. This therefore means that such transactions may require psychiatric knowledge to prove mental capacity where it arises.

Forensic psychiatry has been defined as the branch of medicine dealing with disorders of the mind in relation to legal principles and cases.[92] On the other hand, it is the application of the principles of general psychiatry to the part of the population that has come into conflict with criminal law. It is also that branch of psychiatry which is specifically concerned with the relationship between mental illness and criminal

[88] Parikh, C.K., *op. cit,* p.174-175
[89] Ibid, p.17-178
[90] Ikerionwu, S.E. *op. cit.*, p.40
[91] Black, H.C, *op. cit*, p.49
[92] Levitt, M.W. *op. cit.,* p.339

behavior as well as the position in civil law of the mentally ill.[93] In practice, therefore, forensic psychiatry is concerned with:

(i) The legal provision or the restraint and formal confinement of the mentally ill for treatment.

(ii) The rights and responsibilities of the mentally ill in civil law, and

(iii) The fitness or otherwise of the mentally ill charged with a crime, to plead his case in court and his responsibility for his acts in criminal law.

Thus, psychiatric opinion may be sought at different stages in legal proceedings particularly in advising the court regarding the most appropriate method of disposing of the mentally abnormal offender and in determining the accused person's fitness to plead and his criminal responsibility.[94] To put it more vividly, psychiatry is relevant at the beginning of the trial to determine the accused person's fitness to plead; during the trial it may be relevant in determining the defence of insanity raised by the accused and the execution stage, it may be relevant where the convict under death sentence develops features of mental illness.

2.3.3.1 Mental Illness/Disorder

In psychiatry, mind and body are considered inseparable in that what affects the former affects the latter and vice-versa. Therefore, some disease of the body gives rise to that of the mind (mental illness/disorder).

Considering the fact that forensic psychiatric deals with instances in which psychiatry is relevant in the determination of the mental capacity of persons, then a brief discussion on the types of mental illnesses/disorders likely to render a person mentally incapable will not be out of place. The mental disorders worthy of note in this research include amentia and psychoses.

[93] Onyeama, W.P.C (1989) 'The Law and Mental Illness' In: Umerah, B.C, (ed) *op. cit.* p. 157
[94] Ibid

2.3.3.4 Amentia

This has various synonyms like mental handicap, mental retardation, mental subnormality and mental defect. Therefore, amentia, simply put, is mental deficiency.[95] This means, that it may not be caused by any mental illness but failure of mental development.

Patients suffer from amentia because of failure of the brain development due to such causes as birth injury. There are three grades of amentia, viz: idiocy (idiots), imbecility (imbeciles) and feeble-mindness (feeble-minded).

(i) Idiocy (Idiot):

An idiot is a person in whose case there exists mental defectiveness of such degree that he is unable to guard himself against common physical dangers of the face, eyes, tongue, nose, ears. His mentality never exceeds that of a normal child over three years of age and his Intelligent Quotient (I.Q) is between 0 and 20. He cannot speak intelligently and cannot be trained to do anything.

(ii) Imbecility (Imbecile)

This is a person who has a mental defect which though not amounting to idiocy is pronounced as incapable of managing himself or his own affairs. His mentality ranges from that of a normal child of three to six/seven years and his intelligent Quotient is between 20 and 40. Unlike an idiot, an imbecile can often be trained to do simple work under supervision although his speech is slow and articulation poor.[96]

(iii) Feeble-Mindedness (feeble-minded)

The feeble minded has mental defect which, though not amounting to imbecility, requires care, supervision and control for his protection and that of others. His mental age is that of a normal child aged six to eleven and his Intelligent Quotient (I.Q.) is

[95] Catherine, S. et al (eds) (1990) *Chambers English Dictionary,* W & R Chambers Ltd, New York, p.42
[96] Mason J.K. (1975) *Forensic Medicine for Lawyers,* Bristol: John Wright & Sons, Ltd., p.347

between 40 and 70. Its difficult to distinguish him from stupid. Although this category of people may be law-abiding, they cannot comprehend what the society expects of them. They may commit sexual crimes, theft and housebreaking. Their limited comprehension of moral values account for sexual crimes committed by the defectives. As for female detectives, they find no difficulty in satisfying their sexual drives because they are superficially attractive. But for males, since they are usually rejected by girls of their own age, they turn to children and may even kill them out of frustration if they resist their advances.[97]

2.3.3.5 Psychoses

Psychoses are the disorders of the thought and behaviour due to disease of the mind (although often without demonstrable organic disease) in which the patient has no insight into his mental status, is unable to care for himself properly and may constitute a danger to others.[98] They are divided into organic and functional psychoses. In the former there is some clearly demonstrable structural and biochemical damage, usually in the brain, while in the latter, although the damage is suspected, it has not yet been conclusively demonstrated.

2.3.3.6 Organic Psychoses

The key disturbance in the organic psychoses is a confusion and clouding of consciousness (which could be transient or permanent) and defective memory. Such a confusional state may arise from damage to the brain itself as a result of trauma, tumour, toxin or vascular accident. It may also arise from systematic disease in other parts of the body which affects either the quantity or quality of the supply of blood to the brain (e.g. congestive cardiac failure, hypoglycaemia, liver disease, vitamin or hormone

[97] Levitt, M.W; op. cit. p.340
[98] Levitt, M.W.; *op. cit,* p.340

deficiency). Example of such mental illnesses are epilepsy, insanity due to drugs, or due to pregnancy and child birth or due to trauma or general diseases.

(i) Epilepsy

A group of diseases of the brain function characterized by attacks of widespread muscular convulsions often with complete unconsciousness and followed by deep sleep or mental confusion.[99] Epileptics can sometimes be dangerous to themselves and to others. They can attack usually a stranger, with no motive, no accomplice and no even preparedness and there is no attempt on the part of the patient to hide the crime or escape.[100]

(ii) Mental Illness due to Drugs

Certain drugs such as alcohol, morphine, cannabis indica and cocaine used habitually may produce a great variety of mental conditions. Such illness is characterized by delusion, hallucination, loss of memory, extreme dissociation and confabulation. It leads to sexual and homicidal crimes.

(iii) Mental illness due to Trauma

Head injury is generally followed by some degree of temporary or permanent mental impairment. Sudden mechanical injury to the brain causes concussion, a state of disturbed consciousness. This may arise as a result of an accident or damage to the brain at or during child birth or at childhood.

(iv) Mental illness due to Pregnancy and Childbirth

From conception to the end of lactation, mental illness may occur. During pregnancy, delusions and dislike or hatred towards the husband may be manifested and suicidal tendency developed by the wife. It's characterized by mental confusion, hallucinations,

[99] Ibid, p.145
[100] Parikh, C.K; *op. cit,* p.432

painful obsessions of fear and depression. The patient may commit suicide or infanticide.[101]

2.3.3.7 Functional Psychoses

These are called functional as opposed to organic because their basis may be genetic, biochemical, metabolic or even psychological. The disorder in this group may be primarily in the sphere of the mood or in the thinking processes of the individual. Under this category come maniac depressive and schizophrenia.

(i) Maniac – Depressive Psychosis

This form of psychosis mania and depressive psychosis, derives its name from the fact that the suffers are, at different times in their lives, either profoundly depressed or unduly elated. In fact, patients are subject to the unpredictable swings of mood from deep depression to exalted elation with only brief spells of normality.[102] This mental illness is a coin having two sides – mania and depression.

a. **Mania:** The patient in this case is excited, restless and talkative. The excitement is accompanied by exaltation which is consistent with the circumstance of the patients. He may be violent and dangerous in severe cases due to clouding of consciousness.
b. **Depression or melancholia:** This is more common than mania. Despair and apathy unwarranted by the patient's physical condition or circumstance are the main features. The patient feels that there is no future for him or his family, not only is he doomed but every one connected with him is equally damned. This may lead to suicide and/or ghastly family tragedy to "save" himself and/or the family. Hallucinations and delusions are very common and the patient constantly feels the presence of imaginary evil or anger.

[101] Ibid, p.434
[102] Mason, J.K., op. cit, 352

c. Schizophrenia: This is a group of conditions which have certain characteristics in common and which may arise in a number of different ways. Therefore schizophrenia takes different forms,[103] the explanation of which is beyond the scope of this research. However, it would be more convenient if some of the characteristics of this mental disorder is outlined.

They are:

- Disorder of the perception as such the world the schizophrenic sees around him is distorted by hallucinations, illusions and delusions as such lives in a world of fantasy.
- Total withdrawal from or wild and impulsive attack on those around him.
- He is aggrieved and hostile to the environment as he interpreted any action or spoken word in the belief that everyone is against him.
- His auditory hallucination may command him to attack an innocent by-stander.
- He commits homicidal crimes against close relations, friends or even strangers in a bizarre and unusual manner.

2.3.4 Forensic Toxicology

Poisons (or poisonous substances) and dangerous drugs are a common sight in our immediate environment. They are being used in many places including the households for various reasons. However, their manufacture, handling storage, sale and usage are regulated by law. Any of such activities is therefore the concern of the law. In some cases, it is the effect of such poisons or whether or not a given poisoning is accidental, suicidal or homicidal that becomes an issue before the court for which reason poisons also become the concern of the law. This underscores the importance of scientific knowledge of poisons otherwise known as toxicology.

[103] Parikh, C.K.; op. cit. p426-428

Simply defined, toxicology is the study of poisons and their effects on the body.[104] By this definition, toxicology is only confined to two aspects namely, the study of poisons and the study of the results which such poisons produce on the body. A more comprehensive definition provided is that it is a branch of medical science which deals which poisons with reference to their sources, characters and properties, the symptoms which they produce, the nature of the fatal results, the methods of their detection and the remedial measures which should be employed to combat their actions or effects. It also concerns the law regarding their sale and prescription.[105] From these definitions, it is safe to conclude that toxicology entails the nature, effects and the laws governing the sales of poison. Generally, toxicology not only deals with poisoning due to conventional drug but also with other toxic chemicals which may be household, environmental or industrial.[106] Forensic toxicology therefore has to do with the application of scientific knowledge of poison in the administration of justice. The role of forensic toxicology involves the detection, identification and measurement of poisons in human biological materials.[107] Poison, which is central in forensic toxicology indicates a substance that when ingested in small amount destroys life or impairs health. It is also a substance that when taken by any route, has a deleterious action on the body.[108] The two basic aspects of forensic toxicology i.e. the scientific and the legal aspects will now be considered.

2.3.4.1 Types/Classifications of Poison

No classification of poison is entirely satisfactory because many poisons fall into more than one group. However, the classification according to the mode of their action in the

[104] Levittus, W.M, *op. cit.,* p.426
[105] Parikh, C.K., *op. cit,* p.523
[106] Igbuekiri J. (1989) 'Toxicology of Drugs, Chemicals and Galenicals in the Tropical Environment'*, i*n Umerah, B.C. (Ed), *op. cit.* p.177
[107] Oliver J.S, (1989) 'Forensic Toxicology'*,* In: Mason, J.K. (ed.) *Forensic Medicine for Lawyers,* English Language Books Society, Butterworth (2nd Ed.), p.276
[108] Ibid

body appears to be more convenient. Accordingly, poisons are classified into three main groups namely, corrosives, irritants and neurotics.

(i) Corrosives

A corrosive poison is highly active and produces inflammation and actual ulceration of the tissues. This group of poisons include mineral acids (e.g. sulphuric, nitric and hydrochloric acids); organic acids (like oxalic and carbolic acids); vegetable acids (such as hydrocyanic acid) and concentrated alkalis (for example, caustic soda, caustic potash, sodium potassium).

(ii) Irritants

This class of poisons produces symptoms of pain in the abdomen, vomiting and purging and ulceration of the gastrointestinal tract. Corrosives in dilute solutions also act as irritants. This group consists of metallic (poi

(iii) Irritants

This class of poisons produces symptoms of pain the abdomen, vomiting and purging and ulceration of the gastrointestinal tract. Corrosives in dilute solutions also act as irritants. This group consists of metallic poisons (arsenic, mercury, copper, lead, thallium, zinc, iron, tin, silver etc); non-metallic poisons (phosphorus, iodine, boron etc.) vegetable poisons (castor-oil seeds, colocynth, ergot, marking nut etc); animal poisons (cantharides, snakes, scorpion, spiders, etc) and mechanical poisons (like powdered glass, chopped hair, dried sponge and dust).

(iv) Neurotics

These poisons mostly act on the nervous system after absorption. They produce symptoms like headache, drowsiness, delirium, coma, convulsions or paralysis. These poisons have specific action on the cerebrum, spinal cord, peripheral nerves, heart and lungs. They include alcohol, anesthetics, sedatives, hypnotics, fuel, insecticides,

cannabis indica, cocaine, oleander, tobacco, irrespirable gases (e.g. coal gas, carbon monoxide, sewer gas and waste gases).[109]

2.3.4.3 The Legal Regulation of Poisons

In view of the definition of toxicology provided earlier that it entails the study of the nature and effects of poisons and the law regulating them, it is germane here to briefly highlight some Nigerian legislations regulating them. There used to be a very comprehensive legislation that regulated poisons generally i.e. the Pharmacy Ordinance.[110] However, it is no longer part of our laws.[111] The legislation which regulates cocaine (because cocaine is regarded as part of neurotic poison[112]) i.e. the Dangerous Drugs Act will be considered here.[113]

(ii) Dangerous Drugs Act[114]

The Act regulates the importation, exportation, manufacture, sale and use of dangerous drugs. Under Part III of the Act, dangerous drugs include coca-leaves,[115] and coca-leaves means the leaves from which cocaine can be extracted either directly or by chemical transformation.[116] Dangerous drugs can only be exported from and imported into Nigeria upon a valid authorization by the Comptroller General Customer Services and Minister of Health respectively.[117] The president has powers to make regulations authorizing the control, importation, exportation, production, sale and distribution of drugs including coca-leaves.[118] He is equally empowered to make such regulations for the control and handling of cocaine.[119] The minister of health can authorize any police

[109] Parikh, C.K, *op. cit,.,* p.534
[110] Cap. 152 Laws of the Federation and Lagos
[111] See the index to the LFN (1990)
[112] See the discussion on the types of poisons above
[113] Cap. D1 LFN 2004
[114] Ibid
[115] Ibid SS. 9 & 10
[116] Ibid, S.2
[117] Ibid, S.S. 11 & 12
[118] Ibid, S.3
[119] Ibid, S.7

officer or any person to enter any premises wherein the production, manufacture, sale or distribution of dangerous drugs is being carried out and inspect any stock of the drugs. Equally, a magistrate has powers to issue a search warrant to a police officer to enter and inspect any premises where he is satisfied on a reasonable ground that some transactions in dangerous drugs take place and to search any persons found in that premises and to seize and detain any drugs found even by force.[120]

Some regulations were made as subsidiary legislation pursuant to the powers of the President,[121] authorizing professionals like licensed/registered medical practitioners, persons who dispense medicines in public hospitals and other institutions; qualified veterinary surgeons any person for use in laboratory research or in institutions attached to public hospitals; any government chemist for the purpose of practice of his profession to possess and supply coca-leaves.[122]

2.3.5 Forensic Haematology/Serology

Blood has proved to be a veritable tool in the administration of justice especially in cases requiring identification. This is because it is one of the body fluids that descends from parents to their offspring and, using scientific techniques, blood is traceable to its owner. This therefore makes it relevant in cases of dispute over the paternity of a particular child; and cases where blood is left at the scene of a crime or on the object used in the commission of the crime or on the body or clothes worn by the victim. In both situations, such information may be obtained by the examination of blood samples. Even though this information may not be conclusive in answering the question of identity, it goes to strengthen other available evidence on the issue. Hence, the study of blood and its legal application is imperative in a research of this nature.

[120] Ibid, S.7
[121] Under S.3, as pointed out earlier.
[122] See regulation 7 Dangerous Drugs Regulations as contained in the Dangerous Drugs Act, Ibid.

Haematology, which is considered synonymous with serology, has been defined as the study of blood.[123] It is otherwise considered as the study of disorders of the blood and blood forming organs.[124]

When this knowledge is used to solve legal cases it becomes forensic haematology. It has application in both civil and criminal proceedings for establishment of paternity and the nature and individuality of bloodstain respectively. They will now be discussed briefly.

2.3.5.1 Doubtful Paternity/Parentage

A common problem which confronts the law courts is doubtful parentage. Such a dispute arises when an unmarried woman accuses a man of being the father of her born or unborn child or a husband denies the paternity of his wife's pregnancy or a child born by her. Sometimes there may be cases of doubtful maternity either due to deliberate act of child stealing in a maternity ward or due to an error in placing an unmasked baby by a maternity staff. Where any of these cases arises, a haematologist may be ordered by the court to test the blood of the persons involved with a view of identifying the real father.

2.3.5.2 Guidelines on Blood Test in Paternity Disputes

- The court orders that blood test be carried out on the parties i.e. the mother, child and the putative father. The parties involved should not have had a blood transfusion within the last six months and the child should be at least one year old for it to develop serum agglutinis and blood cell antigens. The sample should also be taken in the presence of court appointed official.[125]
- The consent of the persons to be tested must be obtained otherwise any blood sample obtained without consent or the lawful authority will be a trespass to the

[123] Catherine, S. et al (eds) *op. cit.* p.638
[124] Bander, E.J. *op. cit.* p.29
[125] Rafindadi, A.H. op. cit. p.81

persons.[126] Consent in this context means the act of giving approval or acceptance to something done or proposed to be done and it is an exact conduct flowing from the person giving the consent.[127]

- The court's registrar should send to the doctor conducting the test the photographs of the persons involved in order to ensure that only the actual people involved are tested and the correct result obtained.[128]

2.4 FORENSIC SCIENCE LABORATORY

Laboratory is a place for experimental work or research.[129] Forensic Science laboratory is therefore the place where experimental research work is conducted for legal purposes. Many court cases require laboratory investigation which is the main function of the Forensic Science Laboratory.[130] Therefore, in the laboratory scientific analyses are made which produce medical evidence used in the administration of justice. The laboratory is the cradle of forensic science as such requires a thorough research. The number of sections that make up forensic science laboratory varies from one laboratory to the other. However, a standard Forensic Science Laboratory should have the following sections. They are:-

2.4.1 Mobile Unit/Crime Scene Section

In criminal cases, science begins from the scene of the crime. This section is responsible for the screening of crime scenes and preparing crime scene sketches, and the collection of anything of evidential value from the scene of the crime for onward submission to the laboratory. This section is responsible for gathering evidence from the scene to establish the facts of the offence and the identity of the perpetrator. The section, therefore, comprises of evidence collection officers or technicians whose main functions are:-

[126] *Letter vs. Braddel* (1881) 50 LJQB, 448
[127] See *Okekearu vs. Tanko* (2002) 15 NWLR (pt.791) 657 SC
[128] Rafindadi, A.H., *op. cit.,* p.79
[129] Catherine, S., op. cit, p.796
[130] Google Search, 11/4/2010

- Searching of the crime scene.
- Documentation of the scene.
- Collection and preservation of evidence.

This section is very vital to the conduct of thorough investigation as it is generally believed that physical evidence does not lie unless it has been contaminated, carelessly collected, mishandled, tampered with or planted. Therefore, it requires due care and diligence because any laxity or carelessness renders useless the instrument and expertise available at the laboratory.[131]

2.4.2 Photographic Section

Photography has become a very important tool in criminal investigation. Records of the crime scene and exhibits found there are kept in the form of photographs[132] which could be enlarged for clarity purposes. This is because crime scenes are never permanent as such by the time a case comes for trial, the scene might have been so altered as to make reconstruction impossible. This is notwithstanding the power of the trial court to inspect the scene of the crime (locus in quo).[133] Photographs therefore afford a golden opportunity for witnesses, prosecutors, lawyers and judges to have a vivid picture of the crime scene which provides an important evidence in the case.

The scope of this section extends to the operation of motion – image camera, for example, video camera which affords an opportunity to view the crime scene "live" as many times as possible which enables construction easier. However, the admissibility of videotape record may be fraught with uncertainty due to lack of clear cut authority. It has been argued that the Evidence Act[134] does not expressly provide for the

[131] Onashile, Y., *op. cit.* p.13
[132] Photographs are considered as a specie of documents and admissible under the Nigerian Law of Evidence. See. S.256(1) Evidence Act, *op. cit.*
[133] See Ss. 243 Criminal Procedure, op. cit., 207 Criminal Procedure Act, op. cit and *R. vs. Dogbe* 91947) 12 WACA 184
[134] Op. cit.

admissibility of video tape evidence, and, on the other hand, does not expressly exclude them. Therefore, the question of its admissibility is an open ended one.[135]

2.4.3 Chemistry Section

This section identifies unknown substances by qualitative and quantitative chemical and physical analysis. Most of the substances are either natural or manufactured products such as hard drugs, poison, explosives, etc. So the section is relevant in cases like poisoning/abortion, arson, drug abuse/trafficking, explosions, etc.

2.4.3.1 Poisoning/abortion

In the investigation of death by poisoning (whether it was homicidal, suicidal or accidental), the determination of unknown substances allegedly used becomes relevant. Abortion could be induced by the ingestion of poisonous substance. So if somebody is killed or a pregnancy terminated by administration of unknown substance, the substance can be isolated from the body of the victim and identified using the equipments in chemistry section.

2.4.3.2 Drug Abuse/trafficking

Drug abuse is the use of drugs other than for legitimate medical purpose which is usually by self-administration.[136] Drug trafficking is the illegal trading in drugs.[137] Since Nigeria and many countries in the world, has criminalized the abuse and trafficking of some drugs, a device to positively identify them is therefore imperative. This is because the identification of these drugs is a requirement before an offender could be prosecuted and punished. There are different methods/devices for the identification of different drugs in the chemistry section of a forensic science laboratory. They include:

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[135] See Babaji, B. (2010) *The Admissibility of Documentary and Electronic Evidence under the Nigerian Law of Evidence (unpublished)* Ph.D Thesis, Dept. of Public Law, A.B.U, Zaria (2010) pp.99-100

[136] Igweze, E.O, (1989) 'Forensic Pharmacy', in; Umerac, B.C. (ed) op. cit, p.196

[137] Crowther, S.E. op. cit, p.1267

- Chromatography systems
- Ultra-violet and infra-red spectra
- Solubility test
- Spot test-colour test

The forensic chemist uses two or more of these methods to identify a particular drug to prevent a situation where a substance which is not under control behaves like banned substance.[138]

2.4.4 Biology Section

Investigations of blood, semen, hairs, fibres, plants are conducted in this section. Therefore, the assistance of this section may be sought in the following cases.

2.4.4.1 Rape

Biology section of forensic science laboratory can help in establishing a case of rape by examination of the clothing of the victim, the suspect and the scene of the crime. Usually, the clothing is examined for blood, semen, hair, etc. Bodily examination of the victim and the suspect(s) could include examination of the vagina/penis.[139]

2.4.4.2 Homicide

Investigation of homicide cases usually involves a forensic pathologist whose main job is to give an idea of the time and cause of death through a post-mortem examination carried out on the dead bodies. Although this may not always involve the examination of bodily fluid, it involves the examination of some internal and external organs to find out the cause of death. Blood-stained materials in homicide cases are also examined in this section by way of blood grouping or DNA typing.[140]

[138] Onashile, Y. op. cit, p.32-33
[139] See the next chapter for more details.
[140] This is discussed *in extensio* in chapter four of this Thesis.

2.4.4.3 Paternity dispute

Where there is a dispute over the paternity of a particular child, the blood test of the parties involved i.e. the mother, the contending/putative father and the child becomes relevant. Therefore, blood grouping or DNA typing, which could be found in this section, helps a great deal in resolving such disputes.

2.4.5 Ballistic Section

Ballistics is defined as the study of the behaviour of projectile.[141] This section deals with cases involving the use of firearms, as such identification of firearms is the main function of this section. This arises in shooting cases in offences like armed robbery, murder, manslaughter and attempted suicide. Such identification is possible with or without the firearm allegedly used.

An opinion may be sought whether a given bullet or spent case was fired or used in a given weapon and whether particles by blackening, unburnt propellant etc. found on the skin or clothing relate to a particular ammunition. The ballistic expert, given an empty cartridge case from the scene of the crime or a missile from the body of a victim, can often prove the identity of the firearm.[142] Therefore in cases of shooting, the bullets or empty shells found at the scene or its immediate environ should be forwarded to the ballistician with or without the suspect gun. Using the Integrated Ballistic Identification System (IBIS), the mark(s) left on the empty shells/bullets can be stored in the computerized system for the purpose of comparison with marks left on empty shells/bullets produced by suspect gun or firearms later recovered from suspects or elsewhere [143] Therefore, using ballistic section of forensic science laboratory, an examination of the bullet found in the body of the victim or at the scene of the crime

[141] Jaffe, F.A, op. cit. p.139
[142] Parikh, C.K., op .cit. p.196
[143] Onashile, Y. op. cit. p.51

could reveal the gun from which it was fired and whether a gun found in the possession of the suspect was recently fired or not.

2.4.6 Voice Identification/Polygraph Examination (Lie Detector) Section

The main function of this section is to compare an already recorded voice with laboratory recorded voices of the suspect. This section therefore plays a vital role in the investigation and prosecution of cases of threat, extortion, kidnapping etc. Tapes of recorded conversations should be sent to the laboratory with that of the suspect, the section could then identify, with a reasonable degree of certainty, whose voice is on the tape. This is possible due to the fact that each voice has its unique quality different from others. However until recently, as in the case of video tape, the admissibility of audio tape used to face some challenges in the Nigerian courts due to lack of clear cut provisions in the previous Evidence Act[144] although there are some cases to make recourse to.[145]

As for polygraph examination, a lie detector machine is used to identify whether a suspect is lying or not. A lie detector is an instrument that measures changes in a person's physiology during question and answer session. The physiological changes are with regard to cardio-vascular or respiratory activities and skin reaction which are recorded graphically on a chart and then evaluated to determine whether the answers given to specific questions are correct, not correct or even inconclusive. Such reactions from the suspect(s) enable the examiner to make an inference as to "guilty knowledge". Generally the polygraph examination result is inadmissible evidence in court due to its

[144] Op. cit.

[145] See Fawehinmi vs. NBA (No.1) (1986) 2 NWLR (pt.105) p.494. The Evidence Act has now been amended to make provisions for the admissibility of electronic evidence. See. Ss.83 & 84 Evidence Act, *op. cit*.

susceptibility to inaccuracy. However, in cases involving many suspects, it helps eliminate certain suspects and points the investigation in the right direction.[146]

2.4.7 Fingerprint Section

Fingerprint is an impression made when the end of a finger or thumb touches a surface. The knowledge of the characteristics of finger ridges is used to connect an individual to an impression made by a specific area of his/her finger. The identification of fingerprint is therefore based on the ridge characteristic and there must be a minimum number of similar ridge characteristics present in two fingerprints in order to establish positive identification.

Fingerprints are the most reliable means of identification of individuals and with the computerization of fingerprints,[147] searching and marching of fingerprints have also become the easiest and fastest means of identification. This section is therefore very important in the comparison of fingerprints found at the scene of a crime and subsequently the identification of the offender. Fingerprint evidence is applicable to almost all investigations since it establishes that a person once had contact with an evidentiary item.[148] Thus, in *R. vs. Akpan*[149], the accused was convicted of burglary based on the evidence of fingerprints found on the window louvers of the house that matched his own.

The uniqueness of fingerprints speaks for itself as in the entire history of fingerprint investigation no one has ever successfully challenged it. It has been statistically shown that the likelihood of two different people having identical fingerprints is one in ten

[146] Onashile, Y., *op. cit*. p. 83-84

[147] With the advent of computer device known as Automated Fingerprint Identification System (AFIS), it can store over 500,000 fingerprints of suspects/arrestees.

[148] Onashile, Y., *op. cit,* p.84-85

[149] (1961) 1 All NLR 31

billion people. This means that it is impossible to have two different people with identical fingerprints in the whole world.[150]

2.4.8 Disputed Document Section:

Document has been defined to include books, maps, plans, charts, drawings, photographs and also any matter expressed or described upon any substance by means of letters, figures, marks, or by more than one of these means intended to be used or which may be used for the purpose of recording that matter.[151] Disputed document, on the other hand, is any document which may be questioned during the course of any investigation because of its signature, contents, origin or circulation or circumstances of its production.[152] The main functions of Disputed Document Section therefore include comparison of handwriting to identify the maker, restoration of obliterated or erased writing and examination of forged/fraudulent document.

2.4.8.1 Identification of handwriting

It has been argued that the analysis of handwriting is a non-scientific discipline. Whether it is a science or not, the opinion of experts and that of non-experts in handwriting is relevant. This is because the opinion of persons specially skilled and that of those acquainted with the handwriting in question is relevant.[153] Even the court can, in some cases, make comparison of a disputed handwriting.[154] In the disputed document section of forensic science laboratory, a scientific comparison of handwriting is carried out by experts.

2.4.8.2 Obliteration/Erasure/Alteration in a Document

The development in science and technology has brought about some equipments for the examination of documents to identify suspected alteration or erasure or manipulation.

[150] Onashile, Y., *op. cit.*, p.88
[151] S.258(1) Evidence Act, op. cit.
[152] Onashile, Y., op. cit, p. 64
[153] See Ss. 68and 72 Evidence Act, op. cit.
[154] Onashile, Y., op. cit, pp. 65-66

For instance, infra-red equipment is used in the laboratory to reveal details which are invisible to the naked eyes like writing in charred documents, altered writings obliterated writing etc. The Video Spectra Comparator (VSC) Equipment used in detecting counterfeit document could also serve this purpose. Another instrument which could be used in such cases in Electron Microscope which has the capacity to magnify an image up to 100,000 times its actual size.[155]

2.4.8.3 Examination/Identification of Forged/Fraudulent Document

Using the equipments/technique mentioned above, scientific examination and evaluation of documents could reveal any fraudulent alteration or falsification. This will greatly help in investigation or proof of offences like fraudulent false accounting.[156]

In cases of forgery, like forgery on genuine cheque leafs, scientific detection is easier through handwriting comparison of the writings on the cheque leaf including the signature. Equally, where the forgery is on a fake cheque leaf, a paper analysis carried out on the cheque leaf will confirm if the cheque book from which the cheque leaf was taken was issued by the bank.[157]

2.6 SUMMARY

The relationship between science and law led to the emergence of forensic science which entails the use of medical and other physical sciences in the administration of justice. It is used in criminal investigations and subsequently proof of facts in legal proceedings. In most cases, laboratory analyses are necessary to obtain medical evidence for any of the purposes just mentioned. Such analyses are conducted in forensic science laboratory which is a force to be reckoned with in forensic science. Forensic science is of various types . Indeed every branch of science may have potential application in the law courts as such when applied, it becomes forensic science.

[155] Onashile, Y, op. cit, pp.65-66.
[156] See S.438, Criminal Code Act, op. cit.
[157] Ibid, S. 101

However, the most frequently used sciences are: pathology, psychiatry, toxicology and haematology.

Forensic pathology deals with cases where the knowledge of the cause and nature of diseases is applied in legal proceedings. Death and injuries/wounds come within the ambit of pathology, therefore determination of cause of death and nature of injuries is within the competence of a pathologist as such his opinion may be sought on these issues. Determination of cause of death is only possible after a post-mortem examination, i.e examination of the dead body is conducted . injuries may take various forms like laceration, incised wounds, abrasions and contusions (bruises).

Forensic psychiatry, as another type of forensic science, deals with the application of the medical knowledge of the disease and disorders of the mind in legal cases. This knowledge has particular application in criminal cases because the Nigerian criminal justice system recognizes insanity as a defence to criminal liability and psychiatric knowledge is one of the means of proving insanity. Insanity may also be raised as a ground for an accused person's inability to plead, stand trial or execution. It is also applicable in civil cases where mental capacity becomes an issue. Various types of mental illness exist which may impair the capacity of an individual in both criminal and civil cases. Broadly, mental illness may be caused either as a result of failure of the brain development or due to the disease of the mind. In the former type comes idiocy, imbecility and feeblemindedness, while in the latter, there is organic and functional psychosis.

Forensic toxicology entails the application of scientific knowledge of poisons and their effects on the body to solve legal problems. Poisons are classified, according to their effects on the body, into corrosives, irritants and neurotics. Since the definition of toxicology includes the laws governing poison, the Pharmacy Ordinance and the

Dangerous Drugs act, which regulate poison and dangerous drugs respectively are instructive. They make elaborate provisions on the preparation, mixture, handling, sale and disposal of poison and poisonous substances. Forensic toxicology is very helpful in the investigation and subsequent proof of an alleged death by poisoning.

Forensic hematology, which has to do with the use of the knowledge of the nature of blood in legal proceedings, is used in both in criminal and civil cases. In the former, it is used in cases where violent crimes left a trace evidence in the form of blood stain while in the latter it is relevant in determination of disputed paternity. This is possible by testing the bloodstain for an exclusionary possibility of an accused or suspect or of a person from being the father or mother of a disputed child.

Forensic science laboratory is where most of the analysis which give rise to medical evidence are conducted. The laboratory has different sections depending on the activities of the organization/agency that runs it. However, a standard laboratory should have such sections as mobile unit/crime scene, photograph, chemistry, biology, ballistic, voice identification/polygraph examination, fingerprints and disputed documents.

CHAPTER THREE

3.0 EVIDENCE, RELEVANCE AND ADMISSIBILITY

3.1 INTRODUCTION

The law of evidence is all about proof of a particular issue[158] as such it encompasses rules regulating the means and methods by which facts may be proved to the satisfaction of the court. It should be noted that law of evidence is so important in that judges, jurors and other judicial officers before whom those matters come up for adjudication are not super-humans, neither are they magicians who could just look at the faces of litigants and pronounce their judgments. They merely act on facts as adduced in evidence before them by the disputants.[159] Therefore, neither pleadings nor the most forensic eloquence of any brilliant lawyer can be a substitute for evidence.[160] Such evidence must be recognized and acceptable by the law. Therefore, it is imperative to discuss the meaning and classification of evidence and what evidence is regarded as admissible in law.

3.2 Meaning of Evidence

The term "evidence" may take ordinary and technical meaning. In the former, it means evidence in common parlance while in the latter it signifies evidence in legal parlance. In its ordinary sense, it signifies that which makes apparent the truth of a matter in question.[161] The meaning of evidence in legal parlance is different from that in common parlance because the facts that may satisfy the ordinary prudent minds of even clear understanding may not satisfy judicial minds.[162] Consequently, evidence has been variously defined by scholars either from the standpoint of its actual meaning or its

[158] *Adegbiye vs. Nwaogu* (2010) 12 NWLR (Pt. 1209) 419 at 439
[159] Sebatine T.H. ( ) The Law of Evidence: Substantive and Procedural, Pearl Publishers, Port Harcourt, p.2
[160] Per Pats-Acholonu JSc in Neka B.B. *Manufacturing Co. Ltd vs ACB Ltd (2004) All FWLR* (pt.198) 1175 at 1119
[161] *Ayyagar vs. Queen* (1962) ILR Mad. 393 at 395
[162]

scope. Thus, according to Phipson, evidence means testimony whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute.[163] Another scholar defined evidence both from the standpoint of its ordinary and legal meaning in the following words: evidence is any matter of fact, the effect, tendency or design of which is to produce in the mind, a persuasion, affirmative or disaffirmative of the existence of some other matter of facts.[164] To Professor Cross, evidence is the testimony, hearsay, documents, things and facts which a court will accept as evidence of the facts in issue in a given case.[165] According to Aguda, judicial evidence is the means by which facts are proved but excluding inferences and arguments.[166]

In defining the term "evidence" other writers such as Nokes and Nwadialo approached it from the standpoint of its scope rather than its meaning. To Nokes, judicial evidence consists of facts which are legally admissible and the legal means of attempting to prove such facts.[167] Nwadialo said that the subject is virtually the study of classes of fact which are allowed in law to be adduced in courts as proof of other facts, the classes excluded for the same purpose subject to certain exceptions, the means whereby and the manner in which such acceptable facts are so adduced and such other accidental matters as the party whose duty it is to prove certain facts, the standard of proof required of him and the ways of securing the attendance of necessary witnesses.[168]

[163] Phipson,
[164] Best, (1922) *Principles of the Law of Evidence,* p.6
[165] Cross, R. et al (1990) Cross on Evidence, Butterworth, London (4th Ed.) p.1
[166] Aguda, T.A., (1999) *The Law of Evidence,* Spectrum Books Ltd., Ibadan (4th Ed.) p.3
[167] Nokes, G.D., *An Introduction to Evidence,* (4th ed.) p.6
[168] Nwadialo, F. (1999) op. cit. p.2

3.3 Classification of Evidence

Evidence has been classified into various types on different basis as follows:

3.3.1 Direct Evidence

Direct evidence has two meanings in the scheme of classification of types of evidence. It may mean the evidence of fact in issue in a trial. This is direct evidence as opposed to circumstantial evidence which is evidence that if believed, proves a fact in issue without the court resorting to inference or presumption.[169] This is otherwise called positive evidence which is the evidence that goes expressly or directly to the very point in question[170] In a charge of murder, for example, the fact in issue is whether it was the accused who killed the deceased. The evidence of a witness who saw the accused perpetrate the crime is direct evidence of it. This is so because the evidence relates directly on the issue into which the court is inquiring.[171] Direct evidence could also mean evidence of a witness who saw, heard, or perceived with any of his senses the fact in issue or relevant fact. Thus, the direct evidence rule was held to have been enshrined in the provision of section 77 (new section 126) of the Evidence Act.[172] The section provides that oral evidence must be direct i.e. if it refers to the evidence of a fact which could be seen, heard or perceived with any of the senses; it should be the evidence of a witness who saw, heard or perceived the fact respectively. In this context, direct evidence, in murder case, for instance, means the evidence of a witness who saw and watched the act of killing the deceased person.[173]

[169] *Ahmed vs. State* (2002) All FWLR (pt.90) 1358
[170] *Legal Remembrances vs. Ghosa* ILR 41 Cal. 173
[171] Nwadialo, F. op. cit., p.3
[172] *Aregbesola vs. Oyinlola* (2011) 9 NWLR (pt.1253) 458 at 492
[173] *Idiok vs. State* (2008) ll FWLR (pt.421) 797 at 801

3.3.2 Circumstantial Evidence

Circumstantial evidence denotes the evidence of a relevant fact from which the existence or non-existence of facts in issue may be inferred.[174] It's evidence that does not directly prove the existence of a fact or happening, but which gives rise to a logical inference that such act exists or that the happening occurred.[175] Circumstantial evidence is very often the best evidence. It's the evidence of surrounding circumstances which by undersigned co-incidence is capable of proving proposition with the accuracy of mathematics. However, for circumstantial evidence to be sufficient to support conviction in a criminal trial, it must be complete, unequivocal, compelling and must lead to the irresistible conclusion that the accused and no one else is the culprit.[176] For instance, in a charge of murder, the fact in issue is whether it was the accused who killed the deceased. In the absence of eyewitness, it may be established that a bitter altercation had previously taken place between the accused and the ceased that only the two of them were in the room where the body of the deceased was found in a pool of blood, that at one juncture, the deceased was heard groaning in pain and that the accused bolted out of the room with a blood-stained matchet. All these facts are facts from which the fact in issue i.e weather the accused killed the deceased, may be inferred. They are, therefore, circumstantial evidence.[177]

3.3.3 Real Evidence

Real evidence means material objects, other than documents, produced for the inspection of the court.[178] In other words, real evidence, means anything other than testimony, admissible hearsay or a document the contents of which are offered as evidence of a fact at a trial, which is examined by court as a means of proof of such

[174] *Ahmed vs State* (supra) p.1364
[175] *Igabele vs. State* (2005) All FWLR (pt. 285) 568 C.A
[176] *Ahmed vs. Nigerian Army* (2011) 1 NWLR (pt.227) 89 at 115
[177] Nwadialo, F., p.
[178] Nokes, G.D., *op. cit.,* p.444

facts.[179] Such objects produced for the inspection of the court are called exhibits. They could include objects used in the commission of crimes like matchet in a case of murder, or a machine for minting counterfeit coins in a coinage offence. A document may also be real evidence if produced in evidence as an object and not for the purpose of using the statements contained as proof of a fact. For instance, in a charge of stealing, a document tendered as the stolen document is real evidence.[180]

The production of objects for the purpose of inspection by the court signifies that the objects are moveable. However, where they are not easily moveable, the Evidence Act empowers the court to visit the scene of the object (locus in quo) for the purpose of such inspection.[181] Visit to the *locus in quo* could be made in two ways. Firstly, the court could adjourn to the place where the subject matter is and continue the proceedings there and later adjourn back to its original place of sitting. Secondly, the court may attend and make inspection of the subject matter only and the evidence of what transpired there be given afterwards.[182] The parties must be present during the inspection although their absence may not be fatal unless miscarriage of justice is occasioned thereby.[183] The visit may be made at any stage of the proceeding before judgment is delivered.[184] This visit is referred to as real evidence.

3.3.4 Oral Evidence

Oral evidence or testimony is the totality of the evidence a witness gives in the witness box or at the scene after being sworn or affirmed and is given through examination –in – chief, cross-examination and re-examination.[185] Oral evidence is also the evidence given

[179] See S. 25891) Evidence Act, op. cit.
[180] Nwadialo, F., op. cit. p.5
[181] See S.127 Evidence Act, op cit
[182] Ibid, See also SS. 207 Criminal Procedure Act, op. cit, *Criminal Procedure Code,* op. cit; *Chukwuogor vs. Obuora* (1987) 2 NSCC 1062 SC; R. vs. Dogbe (1947) 12 WACA 184
[183] *R.vs. Oyefule* (1951) 13 WACA 186
[184] *Arutu vs. The Queen* (1959) 4 FSC 6
[185] Sebastine, T.H., op. cit. p.6

by means of statements made by a witness in court.[186] Oral evidence is the commonest type of judicial evidence[187] as such all facts may be proved by it, except contents of documents.[188] Such evidence must in all cases whatever be directly given by a witness who saw, heard or perceived the facts with any of his senses.[189] Therefore, in criminal proceedings, all facts except as may be permitted by law, must be proved by direct oral evidence of a person who has personal knowledge of the facts in issue.[190] The merits of oral evidence are that the accuracy of the testimony of a witness may be tested through cross-examination and also a study of his demeanour while giving evidence may assist the court in forming an opinion as to how truthful the witness is.[191]

Another evidence considered as oral although not given as prescribed above is that of a dumb witness given in any manner in which he could make it intelligible as by writing or by signs. It is deemed to be oral evidence provided that such writing or signs are made in open court.[192]

3.3.5 Documentary Evidence

Documentary evidence is a statement contained in documents tendered as a means of proving a fact.[193] It has also been defined as evidence tendered through or by the use of documents.[194] In other words, documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue.[195] From the above definitions, it could be safely concluded that the contents of a document tendered in court for the purpose of proving a fact in issue or relevant fact becomes documentary

[186] Nwadialo, F. *op. cit,* p.4
[187] *Ogu vs. M.T. & M.C.S. Ltd* (2011) 8 NWLR (pt.1249) 345 at 350.
[188] See S. 125 Evidence Act.
[189] S. 126, Ibid; *Abiodun vs. C.J. Kwara State* (2008) All FWLR (pt. 448) 340 at 363
[190] *Benjamin Thomas Apolo vs. The State* (1977) 11-12 SC 1
[191] Nwadialo, F. *op. cit,* p.5
[192] S. 176 Evidence Act, op. cit.
[193] Nwadialo, F. op. cit. p.5
[194] Sebastine, T.H. , *op. cit,* p.6
[195] Aguda, T.A, *op. cit, p.9*

evidence. So the question is, what is document? This has been answered by the Evidence Act as it provides that document includes books, maps, graphs, drawings, photographs; any matter expressed or described upon any substance by means of letters, a figures or marks, or by more than one of these means; disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable of being reproduced from it; film, negative, tape or other device in which one or more visual images are embodied so as to be capable of being reproduced from it and any device by means of which information is recorded, stored or retrievable, including, computer print out.[196]

Documents could be public or private Public documents are documents forming the official acts or records of the acts of the sovereign authority; official bodies and tribunals, or public officers, legislative, judicial and executive whether by Nigeria or elsewhere and public records kept in Nigeria of private documents.[197] All documents other than public are private.[198] The contents of such documents may be proved by primary or secondary evidence.[199] However, primary evidence shall be produced first except in the circumstances mentioned in the Evidence Acts.[200] Primary evidence means the document itself produced for the inspection of the court.[201] Secondary document, on the other hand is a copy produced from the original, its counterpart and oral account of its contents given by a person who has himself seen it.[202] This shows that documentary evidence could either be primary or secondary.

[196] S. 258(1) Evidence Ac,t op. cit.
[197] S.102, Ibid.
[198] S.103, Ibid.
[199] S. 85, Ibid.
[200] S.88, Ibid.
[201] S. 86, Ibid, *Ogu vs. M.T. & M.C.S Ltd* (supra); *Jacob vs. A.G. Akwa Ibom State* (2002), All FWLR (tp.86) 578
[202] S. 87, *Evidence Act,* op. cit., Sebastine T.H., op. cit, p.4

3.3.6 Hearsay Evidence

The term "hearsay" means a statement oral as written made otherwise than by a witness in a proceeding; or 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.[203] Hearsay evidence, therefore, arises where a witness gives evidence of a statement made by any person who is not himself called as a witness for the purpose of providing what is contained in that statement.[204] Such statement becomes hearsay if the object of the evidence is to establish the truth of what is contained it in it.[205] This signifies that what determines whether or not a statement made by some one who is not a witness is considered as hearsay is the object for which the statement is tendered in evidence. This was well stated by the Judicial Committee of the Privy Council in *Subramanian vs Public Prosecutor.*[206] as follows:

> Evidence of statement made to a witness by a person who is not himself called as 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.[207]

From the foregoing, the fact that a witness merely repeated what he was told by a person who is not called as a witness does not make his evidence hearsay. It's the purpose of the repetition that matters. [208]

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[203] S.37, Evidence, Ibid.
[204] Nwadialo, F. *op. cit,* p.4
[205]
[206] (1956) 1 WLR 965 at 969
[207] See also *Osuoha vs. State* (2010) 6 NWLR (pt.1219) 364 at 372
[208] See *Ihekioya vs. COP* (1992) 4 NWLR (pt.223) 57

Hearsay evidence is generally inadmissible except as provided by the Evidence Act or any other Act.[209] Thus, there are many exceptions to the rule which are developed by the courts or created by statutes.[210] In facts, the exceptions are numerous that much of the relevant law is concerned not with the exclusion but with the admissibility of hearsay evidence.[211] The exceptions include: statement by deceased persons[212], evidence of witness in former proceedings;[213] statements made in special circumstances[214]; evidence of traditional history in land matters;[215]; statement in public documents[216]; evidence admissible under section 83 of the Evidence Act; admissions and confessions;[217]; statements in *res gestae* and affidavit evidence.[218]

3.4 Relevance and Admissibility

The law of evidence is supposed to ensure that justice is done and the truth is as far as practicable ascertain. '…It is, therefore, paramount that there should be an effective system of discerning which evidence is admitted or rejected in proof of a matter'.[219] The mechanism already put in place for this purpose is that of relevance and admissibility of the facts sought to be proved by evidence. The word 'relevancy' which is usually used interchangeably with 'relevance' is a corrupted legal jargons in that it is grammatically incorrect.[220] The correct word which is 'relevance' is derived from the adjective relevant which means logically connected and tending to prove or disprove a matter in issue;

[209] S. 38 Evidence Act, op. cit.
[210] Aguda, T.A, *op. cit,* p.69
[211] S. 40 Evidence Act, op. cit.
[212] S.40 Evidence Act, op. cit.
[213] S.46 Ibid
[214] S.51, Ibid
[215] S. 66, Ibid
[216] Ss.102 & 90(1)© Ibid,
[217] SS. 20 & 28, Ibid
[218] S. 107, Ibid
[219] Workshop Papers on the Reforms of the Evidence Act – 1995 p.6, quoted in Sagay, I.E., op.cit., p.15.
[220]Sebastine, T.H., op.cit., p.20

having appreciable value – that is, rationally tending to persuade people of the probability or possibility of some alleged facts.[221] In other words, relevant means:

> …any two facts….are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other.[222]

A further description of the adjective 'relevant' also denotes a fact in issue or otherwise relevant in a trial. Thus, in *Osolu vs. Osolu,*[223] the Supreme Court held that any issue that does not fall within the parameters of fact in issue is an irrelevant issue.[224] Consequently, the only fact which could be proved by evidence is the fact in issue or fact relevant to the fact in issue.[225] Relevance, therefore is the basis and precursor to admissibility and what is not relevant is not admissible.[226] The facts categorically declared relevant under the Evidence Act are discussed below:

3.4.1 Facts Forming Part of the Same Transaction

According to the Evidence Act, facts which though not in issue, are so connected with the fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.[227] So, where a criminal act is the subject of a charge, evidence of other facts which constitute distinct offences but which are at the same time part of the same transaction as the criminal act is relevant.[228] This provisions was considered by the Supreme Court in *Ishola vs. State.*[229] The appellant in this case, was alleged to have shot dead the accused. The

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[221] Black, H.C., op.cit., p.1293.
[222] See *Stephen's Digest of the Law of Evidence*, Quoted in Sebastine T.H., op.cit., p.20
[223] (2003) 11 NWLR (Pt. 832) 608 SC
[224] See also *Ehimare v. Emohonyon* (1985), 1NWLR (pt. 2) 77.
[225] S.I. Evidence Act, op.cit.
[226] *Ogu vs. M.T. & M.S.C. Ltd*. (Supra) p.349
[227] S.4., Ibid
[228] Nwadialo, F. op. cit. p.30
[229] (1978) 2 LRN 11

evidence led in proof of the allegation was that the appellant had been having problems with the villagers, including the deceased at times reporting them to the police station. He was convicted of the offence on the basis of this evidence. On Appeal to the Supreme Court, it was held, among others that evidence of the facts tendered were admissible being "… acts which are closely and inextricably mixed-up with the history of the criminal act itself as to form part of one chain of relevant circumstances…" Also, in *Isibor vs State*[230], the appellant was tried and convicted of armed robbery. The trial court relied on the evidence given by PW 6 that he was robbed of his car the previous day and the same car was used to rob PW 4 also of his own car. The appellant appealed to the Court of Appeal challenging the evidence given by PW 6. The Court of Appeal held that the evidence of PW6 was relevant under Sections 7 and 8 (now sections 4 and 5) of the Evidence Act to enable him extricate himself that he was not a member of the robbery gang that robbed PW4.[231]

3.4.2 Facts Which Are The Occasion, Cause Or Effects Of Facts In Issue

Facts which are the occasion, cause or effect, immediate or otherwise of relevant facts or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.[232] This section is all embracing so much that it covers not only circumstantial evidence but also admissibility of evidence proving the causes of certain happening; the happening itself (occasion) and the consequences (effect) thereof.[233] However, it is no warrant for admitting inadmissible or hearsay evidence.[234] Thus, marks at or near the scene of a

[230] (2001) FWLR pt.78) 1077 C.A
[231] Ibid, p.1036
[232] S.5 Evidence Act, op. cit.
[233] Sebastine, T.H., op. cit. p.26
[234] Sagay, I.E., p.23; *Izude vs. IGP*. (1965) 1 All NLR 102 SC

murder indicating a struggle, were held relevant facts and admissible in evidence[235] being facts which are the occasion of the fact in issue.

3.4.3 Facts Relating to Motive, Preparation and Conduct

Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact[236]. This provision indicates that although facts showing motive are not in the ordinary case to be included in the fact in issue but among other facts declared to be relevant[237] motive is the reason for an act or omission, that is, what impels one to act, for example ambition, love, hatred jealousy, envy, greed, revenge, etc,[238] Although motive may not be an ingredient of an offence in a criminal charge as such an accused could be convicted without proof of his motive, evidence of ill or good motive on the part of and accused is relevant and admissible.[239] The motive or conduct of parties in a civil transaction is also admissible under this section.[240] Also under the section, the conduct of any party, or of any agent to any party to any proceeding, in reference to any fact in issue thereon or relevant thereto, and the conduct of any person an offence against whom is the subject matter of any proceedings, is relevant if such conduct influences or is influenced by any fact in issue or relevant fact and whether it was previous or subsequent thereto.[241] Not only that, the section covers facts which show preparation for the occurrence of the fact in issue. For example, in a charge of murder by poisoning, the fact that the accused person was seen while buying poison is relevant.

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[235] *R.Vs. Stewart* (197) 1 WLR 907
[236]. S.6 Evidence Act, Op cit
[237]. *Nwankwere Vs Adewunmi* (1966), All NLR 129
[238] Per Musdapha JCA in *Oguntolu vs State* (1987) I NWLR (Pt.50) 464 at 470
[239]. *Ishola vs the State* (1978) 9-10 SC 81
[240] Sebnbastine, T.H., op .cit, P. 26
[241] See S. 6 (2) Evidence Act, op cit

3.4.5 Facts Necessary to Introduce Relevant Facts

Under the Evidence Act facts which introduce as shade more light on relevant facts are themselves relevant. It, therefore, renders relevant facts:

(a) necessary to explain or introduce a fact in issue or relevant fact;

(b) which support or rebut an inference suggested by a fact in issue or relevant fact;

(c) which establish the identity of any thing or person whose identity is relevant;

(d) which fix the time or place at which any fact in issue or relevant fact happened;

(e) which show the relation of parties by whom any such fact was transacted[242].

3.4.6 Things Said or Done By Conspirators in Reference to Common Intention

Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in execution or furtherance of their common intention, after the time when such intention was first entertained by one of them, is a relevant fact as against each of the persons believed to be conspiring for the purpose of proving the existence of the conspiracy as well as for the purpose of showing that any such persons was a party to it.[243] Simply put, the position is that when the charge against the accused persons is that of conspiracy to commit an offence or actionable wrong, whatever one of them says, does or writes with respect to the execution or furtherance of the conspiracy becomes relevant for the purpose of establishing the existence of the conspiracy or the involvement of all the other co-accused persons.

However, before such facts become relevant, the statement, (not the act) must have been made in the presence of the co-accused persons[244] and that there must be other facts in support of the conspiracy.[245] The requirement that the statement must be made in the

[242] See 5.7, ibid
[243] S. 8(1), ibid.
[244] S. 8 (2), ibid.
[245] S. 8 (3), ibid.

presence of the accused person was re-affirmed in *Balogun vs. Police*.[246] In this case, the three accused persons were charged with conspiracy to steal and stealing of bags of cement. Two of the accused made statements to the police in the absence of the other incriminating him. Based on the statements, all the accused persons were convicted. The accused person in whose absence the statement was made appealed against his conviction on the ground that he was not present when the statement was made as such it could not have been admitted against him. It was held that although the statement could not be used against the appellant in proof of the conspiracy, other acts of the co-accused done in execution or furtherance of the conspiracy could be used. It's crystal clear, from this decision, that statements made in the absence of a conspirator is not admissible against him but acts done by the other conspirators is admissible.

The other requirement before such facts become relevant is that there must be prima facie grounds for believing in the existence of the conspiracy[247]. Thus, in *Enahoro vs. the Queen*[248]. The Supreme Court held that evidence about actions of conspirators pursuant to, or in furtherance of, unlawful purpose is not admissible under section 11 (now section 8) of the Act, save where there already exists prima facie evidence of conspiracy.

3.4.7 Facts Relevant in Proceedings for Damages

In proceedings in which damages are claimed any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.[249] Thus, in an action for defamation, evidence of the bad character of the plaintiff is relevant to show that he does not deserve the damages he claimed.

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[246] (1953) 20 NCR 148

[247] See s. 8(3) Evidence Act, op. cit: *Emeka vs. State* (1998) 7 NWCR (pt. 559) c. a.

[248] (1965) NMCR 265 SC

[249]

3.4.8 When Facts Not Otherwise Relevant Become Relevant

Facts which ordinarily are not relevant become relevant if they are inconsistent with any fact in issue or relevant fact or if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact probable or improbable.[250] This, therefore, means in a criminal proceeding, for instance, any fact which tend to show the possibility or impossibility of the accused person committing the offence is relevant. Thus, where the issue is whether it was the accused who bought a house in a particular village on a particular date, the fact that throughout that he was at a place very far away from the village is relevant. The absence of the accused in the village on that fateful day rendered it impossible that he was the culprit. Such fact is equally relevant being inconsistent with the fact in issue i.e. the guilt of the accused.[251]

Illustrative in buttressing the application of this section is the case of A*nagbada vs. Anagbado*[252]**.** In this case, a husband petitioned for the dissolution of the marriage between him and his wife on ground of cruelty. The wife led evidence that they were having sexual intercourse regularly within the twelve years of their marriage and consequently they had six children within the period. While considering the relevance of this evidence at the Court of Appeal, the court held that the facts were relevant because they were inconsistent with the averment that the wife for the most part of the marriage had behaved in such way that the husband could not reasonable be expected to live with the wife or that the marriage has irretrievably broken down.[253]

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[250] S. 10 Evidence Act.
[251] S. 9, ibid.
[252] (1992) 1 NWLR (Pt. 216) 207 C.A
[253] See also *Akingbade Vs. Elemosho* (Unreported) FSC/353/62 decided on 9th April, 1964 also quoted in Aguda, T., Op. cit P. 29

3.4.9 Facts Showing the Existence of State of Mind and Body

Any fact which show the existence of any state of mind such as intention, knowledge, good faith, negligence, rashness, ill-will or good will towards any particular person or any state of body or bodily feeling are relevant when they are in issue.[254]

3.4.10 Facts Bearing On the Question Whether Act Was Accidental or Intentional

When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention to rebut any defence that may otherwise be open to the defendant, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant[255]. The facts admissible under this section are generally facts similar to the facts in issue on the conditions stated thereon. The conditions are that the facts are admissible only for the purpose of determining whether an act done by the defendant was accidental or intentional or done with a particular knowledge; or for rebutting any defence which would otherwise be available to the defendant. The provisions in this section embody one of the exceptions to the English common law principle of inadmissibility of similar facts evidence as enunciated by the Privy Council in the case of *Makin Vs. Attorney General New South Wales*[256] and re-affirmed by the House of Lords in *Harris Vs. DPP*[257]**.** Therefore, some cases decided in line with the English principles aptly illustrate this section in *R Vs. Ita***,**[258] the West African Court of Appeal held that when the gist of an offence is fraud, intent is material and evidence of similar acts is admissible. Also to rebut the defence that the person indicted for uttering forged document did not know that it was a forgery, evidence of his possession of similar

[254] S. 11, Evidence Act op cit
[255] S. 12 Ibid
[256] (1894) AC 57
[257] (1952) AC 694
[258] (1943) WACA

documents was held admissible[259]. In yet another case, the accused was standing trial for murder of a female cyclist by crushing her to death with his car. His defence was that the collision was accidental. To rebut this defence, evidence was admitted that he had collided with other female cyclists both earlier and later the same day.[260]

3.4.11 When Existence of Course or Business Becomes Relevant

According to the Evidence Act, when there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.[261] This simply means that for the purpose of proving that a particular act was done, it becomes relevant to establish the existence of a course according to which the act in question is naturally done. Thus, the doing of an act may sometimes be inferred from the existence of a general course according to which it would ordinarily be done, there being a probability that the general practice will be followed in a particular case.[262] This provision is similar to that of English Common Law which was applied in such English cases as *Lucas Vs Novosilieski*[263] in this case, in order to prove the fact that an employer had paid one of his employees his wages, evidence was admitted to the effect that it was the employer's practice to pay all his employees every Saturday and that the employee in question has been seen with others waiting to be paid and that he had not afterwards complained.

On the other hand, admissibility refers to whether evidence is permitted to be given. The admissibility of any evidence depends on two things – firstly, whether the fact sought to be proved by the evidence is a fact in issue or fact relevant to the fact in issue; and secondly whether the evidence is not excluded by any rule of law for the time being in force. This therefore means that apart from the test of relevance, as discussed above,

[259] R vs Martimer (1936) 2 C APP R. I50
[260] R Vs Mason (1914) 24 Cox 305
[261] S. 13 Evidence Act, Op. cit
[262] Sagay .I. E; op cit. P.7.
[263] (1795) 170 E.R. 363.

there is also the test of admissibility which is determined by the provision of the law (The Evidence Act or any other statute in force). Thus, the Evidence Act excludes evidence no matter how relevant of facts considered too remote and facts categorically rendered inadmissible by it or any other statute having the force of law in Nigeria.[264]

Admissibility of evidence connotes relevance and absence of any legal rule of exclusion. Therefore, admissible fact must be relevant and not prohibited in proof by any rule of law. Describing what admissible evidence entails under the Evidence Act, the Supreme Court, per Coker JSC said "Admissible evidence under the Act is evidence which is relevant and it should be borne in mind that what is not relevant is not admissible"[265]. With due respect to the learned Justice, this does not mean that what is not admissible is necessarily not relevant because there are some relevant facts but declared inadmissible by the Evidence Act like hearsay, similar fact and opinion evidence.[266]

3.5 The Admissibility of Medical Evidence

The legal framework for the admissibility of medical evidence in Nigeria is not in doubt because the Nigerian legislation and case law recognized the admissibility as well as the role which medical evidence has to play in the administration of justice. Under the Nigerian legislation, the Evidence Act,[267] which generally determines the admissibility or otherwise of facts including any specie of evidence, provides a sound legal basis for its admissibility. More categorical on the admissibility of medical evidence is the fairly recent legislation – Child's Rights Act.[268]

Medical evidence, is the evidence furnished by doctors, nurses and other medical personnel testifying in their professional capacity as experts, or by standard treatises on

[264] S.1 Evidence Act op cit
[265] Agunbiade Vs. Sasegbon (1968) NMLR 223 at 226
[266]. SS 38, 12 67 respectively
[267] *Op. cit.*
[268] (2003)

medicine and surgery.[269] This, therefore means that medical evidence is given by a ,medical personnel based on the facts revealed by medical analysis carried out or based on what other medical professionals have written in a treatise. The admissibility of evidence refers to whether a piece of evidence is permitted to be given.[270] The admissibility of forensic evidence, therefore, refers to the question whether or not scientifically generated evidence is permitted to be given for the purpose of determining rights and responsibilities of parties by courts and tribunals. The question has been answered affirmatively as there exists a legal framework for the admissibility of the specie of evidence under consideration. A legal framework for the admissibility of forensic science evidence entails the statutory and judicial authorities recognizing the admissibility and the acceptability of any evidence generated by scientific (including medical) analyses. While some of these authorities categorically make reference to the issue of the admissibility i.e. whether or not medical evidence is admissible in courts, others only recognize their role in proof of some facts/matters. Hence, the former expressly and explicitly recognize their admissibility in evidence while the latter do so impliedly by providing that certain facts could be proved by medical evidence. Therefore, it would be more convenient to discuss the former category of authorities now and the latter when considering the role which medical evidence plays in the administration of criminal justice. For the purpose of clarity, cohesion, comprehension and comprehensiveness, the discourse here will include Nigerian statutes that are specific on the issue of the admissibility of forensic evidence and other matters related thereto, Islamic law and case law expatiating the provisions of these laws.

[269] Black, H.c, op. cit. p.1
[270] Elliot, D.W (1980) *Manual of the Law of Evidence,* Sweet and Maxwell, London (11th Ed.,) p.13

3.5.2 The Nigerian Statutes

The entire law of evidence is dependent, mainly on the rules governing the admissibility and inadmissibility of evidence.[271] The principal source of the law relating to evidence in Nigeria is to be found in the Evidence Act.[272]. As such the admissibility of any specie of evidence before the Nigerian courts and tribunals is largely determined by the Act although some other statutes make provisions supplementing it on some issues and proceedings. Whether a piece of evidence is admissible or not is dependent upon whether the fact to be established by the evidence is relevant to the fact in issue and relevancy itself is being determined by the Act[273] or ordinary logic between the facts.[274] This, therefore, means that admissibility is determined by relevancy and relevancy is determined by the provisions of the Act. As such the Act determines the admissibility of evidence.

To be more precise, the admissibility of medical evidence is first governed by the Evidence Act[275] as the statute which generally regulates the admissibility of evidence in Nigeria. This is followed recently by the Child's Right Act.[276] We will therefore briefly consider the provisions of these statutes and the decisions of the Nigerian courts, and in some cases English courts (otherwise known as case law) interpreting and applying the relevant provisions of the statutes and/or principles of the law of evidence on the admissibility of medical evidence and other relevant matters.

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[271] Aguda, T.A. (1999) *The Law of Evidence,* Spectrum Books Ltd, Ibadan (4th Ed.) p.25
[272] *Op. cit.*
[273] Aguda, T. A op. cit.
[274] Nwadialo, F. (1999) *Modern Nigeria Law of Evidence,* Ethiope Publishing Co. Ltd, Benin (2nd Ed.,)p. 29
[275] Op. cit.
[276] (2003)

3.5.3 The Admissibility of Medical Evidence under the Evidence Act

The Evidence Act[277] is very specific about the admissibility of some evidence in the sense that it categorically deals with the issue. However, in other cases, it only recognizes the admissibility of a specie or category or group of evidence without specification so that any piece of evidence that falls within the specie or category or group becomes admissible. Therefore, in the case of admissibility of medical evidence, there is no such specificity as the Evidence Act[278] does not specifically mention medical evidence. What it does is to recognize the relevancy and the admissibility of a specie or category of evidence within which it falls – opinion of experts in medical science). Generally, opinion evidence is inadmissible.[279] In this regard, the Act provides that whenever the court has to form an opinion on a point of foreign law, native law and custom, science or art, identity of handwriting or finger impression, the opinion of persons specially skilled on any of these points is relevant[280] and such persons are called experts.[281] This experts opinion is only relevant when the court is to form an opinion on any of these points.[282] This, therefore, makes the opinion of scientific (including medical) experts admissible.

The subjects which will come under science in this context include medical subject (like the causes of disease or death) physical and other sciences.[283] The provision under consideration could therefore mean that whenever the court has to form an opinion on a point of medical science, the opinion of medical practitioners is relevant.

[277] Op. cit.
[278] Ibid
[279] Except as provided in the Act, see ibid, S.67
[280] Ibid, S. 68(1)
[281] Ibid, S. 68(2)
[282] U.T.B vs. Awagizana Enterprises Ltd (1994) 6 NWLR (pt.348) p.548
[283] Sarkar, S.C. (1965) *Sarkar's Law of Evidence,* Sakar and Sons (Private) Ltd, Calcutta, p.506

The above discussion points to the fact that medical evidence is relevant and admissible as expert evidence under the Evidence Act.[284] It's therefore important at this juncture to briefly highlight the person who qualifies as expert under the Act, the nature of expert evidence and how such an expert presents his evidence in court.

3.5.3.1 Meaning and Nature of Expert Evidence

As noted earlier, an expert is a person who is specially skilled on point of foreign law, native law and custom, science or art and handwriting or finger impression.[285] In other words, an expert is a person who is specially skilled in the field in which he is giving evidence.[286] Expert testimony, which gives an insight into the meaning of expert has been defined as the opinion evidence of some persons who possess special skill or knowledge in some science, profession or business which is not common to the average man and which is possessed by the expert by the reason of his special study or experience.[287] The combined effect of the above definitions is that an expert is a witness who testifies not based on the facts he/she sees or hears or perceives with any of his/her senses[288] but based on the analyses he made using his expertise that is likely to be outside the knowledge of an ordinary layman including the court. This therefore means that the expert witness differs fundamentally from an ordinary witness. He did not see or hear the incident in dispute, he gives evidence of scientific fact and gives an opinion based on professional knowledge and experience.[289] This points to the fact that expert opinion is only necessary where the experts can furnish the court with scientific or other information of technical nature that is likely to be outside the experience and knowledge

[284] *Op. cit.*
[285] Ibid, S. 68(2)
[286] *SPDC Ltd. vs. Farah (1995)* 3 NWLR (pt.382) p.547
[287] Black, H.C., op. cit. p.578
[288] As required by S.126 Evidence Act, op. cit.
[289] Sauels A., (1974) *Expert Forensic Evidence,* Cameson, M; (Ed), *Medicine, Science and Law,* John Wight & Sons Ltd, Bristol Vol. 14 p.17

of the judge[290] or beyond the knowledge of a mind untrained in the discipline or art concerned.[291] Hence, the Evidence Act[292] acknowledges the need for experts or persons specially trained or qualified in a particular discipline to assist the court by testifying on certain phenomenon studied by them.[293] A person need not be academically qualified in a particular field of study before he can claim to be an expert. All he needs to do is to satisfy the court that he has acquired sufficient expertise in the field in which he is called upon to give expert opinion. His expertise or otherwise could also be extracted from him through cross-examination.[294] The duty of such an expertise is to give evidence which furnishes the court with necessary scientific or professional criteria for testing the accuracy of his conclusion so as to enable the court form an independent judgement by the application of these criteria to the facts proved in evidence.[295]

The court is not bound by the opinion of expert where it is contrary to common sense and the usage of mankind.[296] However, where the expert evidence is not shaken or contradicted under cross examination, the trial court is bound to accept such evidence.[297]

3.5.3.2 Presentation of Expert Evidence

The first step to be taken to enable an expert to testify is to call him as a witness. This becomes necessary because expert evidence is admitted, as pointed out earlier, in the form of opinion evidence which is required to be direct. In this regard, The Evidence Act provides:

> Oral evidence must, in all cases, whatever be direct… if it refers to an opinion or to the grounds on which that

[290] *Udo vs. Eshet* (1994) 8 NWLR (pt.303: 343; *R. VS. Turner* (1975) 1 All ER 70
[291] *Seismograph Services Nig. Ltd. Vs. Ogbeni* (1975) 1 NMLR 290
[292] See S.68 Evidence Act, *op. cit.*
[293] *Seismograph Services Nig. Ltd vs. Ogeni (*supra) p.299
[294] *Aonoad vs. GP* (1954) 14 WACA 449
[295] *SPDC Ltd. vs. Adamkue* (2003) 11 NWLR (pt.832) 533
[296] *Elijah Okoh vs. The State* (1971) 1 NMLR 140
[297] *Elf Nig. Ltd vs. Sillo* (1994) 6 NWLR (pt.350) p.549

> opinion is held, it must be the evidence of the person who holds that opinion on those grounds. [298]

Where such an expert was not called, his opinion evidence becomes inadmissible[299] except where any of the condition stated in S.77(d)(now S.125(d))[300] applies as well articulated by the Supreme Court in *AG Federation & Ors vs. Abubakar & Ors.*[301] Additionally, such an expert may not be called as a witness if he is one of the experts whose presence could be dispensed with under the Evidence Act.[302] Given the fact that whether or not a witness can be regarded as an expert is a question for the judge to decide,[303] the expert must state his qualification to enable the judge make such a decision. So the relevant facts to be stated by the witness and considered by the court are credentials of the witness[304], his experience, training and the nature and duty of his office as they relate to the subject matter of his evidence.[305] Where the adverse party wants to challenge any of these, he must cross examine on that with a view to discredit the witness as an expert. Where such relevant fact so stated by the experts were not challenged, they constitute *prima facie* evidence of his qualification to be admitted as an expert witness and which cannot be challenged even on appeal.[306] Where he does not possess or so state the qualification, such expert evidence is unreliable.[307] The expert should equally state the factual basis of his opinion otherwise the court should reject it.[308]

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[298] S. 125Evidence Act, *op. cit*.
[299] *Ado Kofar Wambai vs. Kano Native Authority* (1965) NMLR 15
[300] Evidence Act, op. cit.
[301] (2007) 4 SC (pt.11) 62
[302] See. S. 55
[303] Aguda, T.A., *The Law of Evidence,* op. cit. p.99
[304] *R. vs. Onatiri* (1946), 12 WACA 15
[305] *Fasugbai vs. IGP* (1964) 2 All NLR 15
[306] *Aouad vs. IGP* (supra); *Ogonzee vs. The State* (supra)
[307] *Unipetrol vs. Aderije* (2005) 14 NWLR (pt.946) 563
[308] *Wambai and Sambo vs. Kano* N.A. (1965) NMLR 15

3.5.4 The Admissibility of Medical Evidence under the Child's Rights Act

The Child's Rights Act[309] is enacted to take care of the rights and responsibilities of a child in Nigeria and to provide a system of child justice administration and the care and supervision of child.[310] The Act is one of the relatively new statutes that take cognizance of the scientific advancement in the globe that manifests in the administration of justice. The Act has categorically recognized and made admissible some forensic evidence. In just few sections containing various subsections and paragraphs, the Act has made elaborate provisions on the admissibility of blood test evidence and other related matters even though a cursory look at the provisions reveal that it is a mere replica of part III of Family Law Reform Act of England, 1969. The Child's Rights Act[311] in Part VII provides, and we quote *in extensio:*

> In any civil proceedings in which the paternity or maternity of any person falls to be determined by the court hearing the proceeding, the court may, on an application by a party to the proceeding give a direction for the use of scientific tests, including blood test, to ascertain whether the tests show that a party to the proceeding is or is not the father or mother of that person and for the taking, within a period specified in the direction of blood or other samples from the person, the mother of that person, the father of that person or any party alleged to be the father or mother of that person or from any two of those persons.[312]

It's crystal clear from this provision that blood tests evidence, which is a specie of medical evidence, is admissible for the purpose of determination of the paternity or maternity of any person in a civil proceedings in the courts.[313] The person who carried out the test should send a report to the court which gave the direction stating the result

[309] (2003)
[310] See the Child's Rights Act Explanatory Memorandum, Federal Ministry of Women Affairs and Child Development, p.1
[311] Op. cit.
[312] See S. 63(1)
[313] The court in the context of the Act means Family courts established under it. See S.277

of the test, indicating whether the person tested is the father or mother of the child whose paternity or maternity is in issue.[314] Such a report should be received by the court as evidence of the matters stated therein[315] and a party may or shall obtain a written statement from the person who made the report explaining any statement in the report and such explanation should form part of the report.[316] Where a party to the proceeding intends to call the person who carried out the test as a witness for the purpose of cross examination he should, within 14 days of the receipt of the copy of the report, serve a notice to the other party(s) to the proceedings of such an intention.[317]

Consent is *sine qua non* to taking of sample for the purpose of obtaining medical evidence as pointed out earlier in this Thesis and the Child's Rights Act[318] equally so recognizes. A scientific sample which is required for the purpose of blood tests shall not be taken from a person without his consent.[319] And for this purpose, a child of sixteen and eighteen years can give a valid and sufficient consent.[320] When the child is below sixteen years, the consent of the person who has the care and control of the child is required.[321] So also where the child is suffering from mental disorder within the meaning of any relevant law in Nigeria and is incapable of understanding the nature and purpose of scientific test provided the medical practitioner who takes care of the child has certified that such taking of scientific sample shall not be prejudicial to his proper care and treatment. However, where a party fails to take steps to comply with the direction of the court as to taking of scientific sample, the court may draw proper inference from the facts or such a party's claim for relief may be dismissed even though

[314] Ibid, S. 63(5)
[315] Ibid, S.63(6)(a)
[316] Ibid, S. 63(7)
[317] Ibid, S.63(8)
[318] Ibid
[319] Ibid, S.64(1)
[320] Ibid, S.64(2)
[321] Ibid, S. 64(3)

there exists in his favour presumption of legitimacy which is not rebutted by evidence.[322] The Act also empowers the Minister[323] to make regulations prescribing the persons who should take the samples and where it should be taken, the identity of the persons to be tested and procedure for making the report to the court.[324]

3.5.5 Other Rules on the Admissibility of Blood Test

In addition to the above, there are some rules guiding the courts on the admissibility of blood test evidence. Thus, it has been judicially established that in cases where the evidence of blood stain is sought to be relied upon, it must be established that the blood is human blood and it is that of the accused person. Where none of these is established, the stain will prove nothing. In *Kasa v. The State*[325], the appellant and another accused person were charged with culpable homicide punishable with death before the Sokoto High Court for killing one Hajiya Arita. One of the evidence against the accused persons was that the Investigating Police Office (IPO) who was also the (PW 7) recovered blood-stained materials from the two accused persons and the deceased's house, but no blood test was conducted. The trial court found the two accused persons guilty as charged on the blood-stained evidence and the confessional statement made by the appellant. On appeal to the Court of Appeal, the 2nd accused was discharged and acquitted as the only evidence against him – blood stained materials was found to be unsatisfactory. However, the appellant was found to have been rightly convicted of his confessional statement (which was found to have been corroborated by the blood-stained material) as such his appeal was dismissed. The appellant further appealed to the Supreme Court to determine among other things, whether it was proper for the Court of Appeal to have employed the same discredited evidence (blood-stained material) to

[322] Ibid, S.66
[323] The Minister in charge of the matters relating to children. See S. 277
[324] S.65 Child's Rights Act, op. cit.
[325] (1999) 9 KLR 84

convict him and acquit the 2nd accused person. Upholding the argument of the learned counsel for the appellant, the court held that the blood-stained evidence could prove nothing in the absence of forensic report establishing that the stain was human blood and it was that of the deceased. The court, per Uwais JSC (as he then was) said:

> … the discovery of exhibit "H" found in the appellant's room has not proved anything that can be considered as corroborative evidence in the absence of forensic report which confirms that the stain on the shirt was human blood and not only that but also it was the deceased's blood that stained the shirt. The investigation in that regards had not been concluded by the police to its logical conclusion … therefore, the Court of Appeal misdirected itself in coming to the conclusion that exhibit "H" constituted evidence which could corroborate the confessional statements made by the appellant. However, this is neither here nor there, since there are other pieces of material evidence which as I have pointed out earlier in this judgement, corroborate the confession.[326]

It should be noted, however, that the Court of Appeal decision in acquitting the 2nd accused person based on the blood-stained evidence was right as the Supreme Court, per Adio JSC, observed:

> In the case of the 2nd accused, the court below held, rightly in my view, that what constituted the basis of his conviction (the blood-stained cloth) could not be sustained as nobody could say whether the stain on the cloth was human blood and, if so, whether it was the blood of the deceased, without the cloth being sent to the forensic laboratory for examination and report.[327]

What should be pointed out here is that although the decisions of the trial court and the Court of Appeal (in the case of the appellant) were affirmed by the Supreme Court, the blood-stained evidence against the appellant was admitted by the trial court and the Court of Appeal was rejected as inadmissible for failure to establish that the stain was human blood and the blood that of the deceased. This emphasized the importance of these two factors to be established as a requisite to admit blood-stained evidence.

[326] Ibid, p.200
[327] Ibid, p.11

This decision was anchored upon an earlier one by the same court in *Onah v. The State*[328] where the same Uwais JSC (as he then was) equally observed on the same issue as follows:

> … the evidence of the stain on the matchet and the wrapper (exhibits A and C respectively) being blood stain is neither here nor there. As conceded by the learned principal state counsel, there was no evidence to show that the blood stain belongs to the group as that of the deceased. All these go to show how weak and inconclusive the prosecution's case had been.

It should be pointed out here that for the prosecution stain to establish that blood stain was human blood and that of the deceased, the forensic examination must not only be carried out, but it must equally be prompt and diligent otherwise it would end up being an exercise in futility as it may only reveal negative results. Thus, in *Agwu v. The State,*[329] the prosecution could not, during the trial, prove beyond reasonable doubt that what caused the fatal injury suffered by the deceased was the blood-stained pen knife recovered from the appellant. However, the trial court convicted and sentenced him to death but the other two accused persons were discharged and acquitted. On appeal, the Court of Appeal found that the pen knife alleged to be stained by blood was curiously not sent for scientific analysis until after five months when the result showed that there were no blood stains. It was held, on proof of crime by blood stain, that where evidence of blood stain was intended to be relied upon by the prosecution to implicate an accused person in respect of a crime for which he is standing trial, that evidence must be conclusive that it was human blood as well as the blood of the victim.[330] On the issue of the negative result revealed by the examination of the blood-stained pen knife, Uwaifo JCA observed:

[328] (1985) 3 NWLR (pt.12) 236 at 242
[329] (1998) 4 NWLR (pt.544) 90
[330] Ibid p. 95

> … the reason for the negative analyst's report was not given as resulting from the rusty state of the knife but simply that there were no traces of blood on it. The point is relevant because if just because the knife had become rusty the result of the examination of it must or could be negative, the analyst might either have taken no trouble to scientifically analyse it or upon analysis, the reason for the negative result would be given as due to the rusty state of the knife. Medical science advances daily these days (e.g. DNA) that the possibility of what it can reveal must not be discounted…[331]

The reason for the negative result in this case, according to this observation, could be understood to mean not only that the forensic analysis was carried out late but also that the technique used could not have yielded positive result in the circumstances. Hence, the implied suggestion of a modern technique i.e. DNA.

SUMMARY

The law of evidence is concerned with the proof of issues required to be determined by courts and therefore comprises of the rules according to which such issues could be proved. This is so because judges and other persons whose duty it is to adjudicate should rely on evidence as presented before them. Such evidence tendered must be recognized and acceptable in law.

Evidence has been variously defined by writers and judges either from the perspective of its ordinary and technical meaning or its scope. It has also been classified, on the basis of the mode through which it is given, into direct, circumstantial, real, oral, documentary and hearsay.

The mechanism put in place to ensure that justice is done in the use of evidence is relevance and admissibility. Consequently, only evidence of a fact in issue and fact relevant to the fact in issue are regarded admissible. The Evidence Act goes further to declare the facts it considered relevant. They are facts forming part of the same

[331] Ibid

transaction; fact which are the occasion, cause on effect of a fact in issue; facts relating to motive, preparation and conduct; facts necessary to explain or introduce relevant facts; facts relating to conspiracy; when facts not otherwise relevant become relevant become relevant; facts relevant in proceedings for damager; facts showing the existence of state of mind, body or bodily feeling; facts bearing on question whether act was accidental or intentional; and facts relating to existence of a course of business.

Admissibility, on the other hand, refers to whether evidence is permitted to be given in a court of law. So, the evidence permitted is that of a fact in issue and fact relevant to the fact in issue and which is not excluded either by the Evidence Act or any other statute for the time being in force. The admissibility of medical evidence is recognized by statutes and case law. The Evidence Act is the principal statute that determines the admissibility of every specie of evidence. Although the Act does not categorically mention medical evidence, it renders admissible evidence of an expert in science (including medical science), medical evidence, therefore, falls within the armbit of expert evidence. The Child's Rights Act also recognizes the admissibility of blood test evidence for the purpose of determining the paternity of a child.

CHAPTER FOUR

4.0 THE ROLE OF MEDICAL EVIDENCE IN THE ADMINISTRATION OF CRIMINAL JUSTUICE SYSTEM

4.1 INTRODUCTION

As pointed out earlier on, medical evidence entails the evidence obtained by means of medical knowledge. It is therefore a specie and product of forensic science. The issue of proof of facts by medical evidence arises in both civil and criminal cases. However, it is more frequent in the latter cases hence they form the thrust of the discussion in this research. In some of these cases, the proof by medical evidence arises on grounds of relevance and is statutorily required in others. In either case, the probative value of such medical evidence depends on individual cases. This is because the issue of the admissibility of a specie of evidence is one thing and the weight to be attaché to it is quite another. The cases in which proof of facts by medical evidence arises frequently and which are dealt with in this research are homicide; insanity; bail and rape. In all these identified instances, medical evidence may be used to sustain or damage the case of a party relying on same as could be explained hereinafter.

4.2 PROOF OF MURDER AND CULPABLE HOMICIDE PUNISHABLE WITH DEATH

The sanctity of human life is recognized and upheld by all civilized nations of the world as such made its unjustifiable and unlawful violation a criminal offence known as homicide. Homicide is the killing of human being by a human being,[332] whether lawful or unlawful.[333] In Nigeria, unlawful homicide is a crime which takes various forms, the most common of which are murder and manslaughter or culpable homicide punishable with death and culpable homicide not punishable with death. Murder and culpable

[332] Richard, S. S. (1987), Note on Penal Code Law, Ahmadu Bello University Press, Zaria, p. 167.
[333] Owoade, M.A. (1990), *Law of Homicide in Nigeria,* Obafemi Awolowo University Press Ltd., Ile-Ife, p.16

homicide punishable with death refer to the unlawful killing of human being and are the forms of homicide in which proof by medical evidence most frequently arises. The former is created under the Criminal Code Act[334] (applicable in southern Nigeria) while the latter under the Penal Code Law[335] (applicable in northern Nigeria). Under both codes, the offences have almost identical ingredients.[336] To prove murder or culpable homicide punishable with death, the prosecution must prove the following:

a. Death of the deceased
b. The death was caused by the act or omission of the accused
c. That the act or omission of the accused was done with the intention.[337]

Proof of murder requires a strict proof of all these ingredients because a conviction for the offence is the highest punishable ever as it involves the taking away of human life. Therefore, no conviction could be grounded in the absence of any of these ingredients.[338] The burden of such proof is on the prosecution[339] to be discharged beyond reasonable doubt.[340] To discharge this burden up to the standard required, the prosecution should lead credible evidence which could include medical evidence. Let us examine the role which medical evidence could play in proof of these ingredients.

4.2.1 Death

The prosecution, in a charge of murder or culpable homicide punishable with death, must prove the death of the deceased. For proof of death, presumption of death[341] and ordinary eye-witness (evidence) testimony could serve the purpose depending on the

[334] Cap C Laws of the Federation of Nigeria, 2004
[335] See Penal Code Laws of the various states of Northern Nigeria. For instance, Penal Code Law, Cap 110 Laws of Kaduna State of Nigeria, 1991.
[336] See SS. 316 Criminal Code Act, op.cit, 221 Penal Code law, op.cit.
[337] *Omoni vs. the State* (1999)12 NWLR (pt. 630) 168 SC; *Uguru vs. The State* (2002)9 NWLR (pt. 771) 90 at
[338] *Igabele vs. State* (2004) 15 NWLR (pt 896) p. 318
[339] S. 132 Evidence Act, *op. cit.*
[340] Ibid, S.135
[341] Ibid, S.164

circumstance.[342] Thus, every conscious adult human being could prove that another human being is dead as pointed out:

> …any reasonable adult like PW1 should know when a person is dead. But unlike an expert he may not know the real cause of death. Even then in the olden days, adults did not need unavailable medical experts to tell them that one amongst them was dead whenever such occurred…[343]

Medical evidence also plays an important role in this direction. In fact, of the various ways of proving death, medical certificate is one of the most reliable in some jurisdictions.[344] In *Ogonzee v. The State*[345] the deceased person who was shot in the chest by the appellant was rushed to the hospital where he was artificial dead by the doctor on duly and even estimated the probable time of death.

Death could also be proved by circumstantial evidence notwithstanding that neither the body nor any trace of it has been found. So, where there are irresistible circumstances which pined the killing on the accused, death could be circumstantially proved.[346] On a similar issue, the Supreme Court explained such circumstances as follows:

> Having regards to the circumstances of this case particularly the fact that three years after the incident, the deceased has not been found and there was no explanation from his assailants as to his whereabouts other than a mere denial of complicity in the crime, the inference is irresistible that he is dead.[347]

The preceding discussion shows that medical evidence could play an important role in proof of death in cases of murder and culpable homicide punishable with death.

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[342] *Igabele vs. State* (2006)6 NWLR (pt. 975) p. 100
[343] Per Fatayi (JCA) in *Akinyemi vs. State* (1999)6 NWLR (pt 607) 449 at 462
[344] Cross, R., et al. (1990), Cross on Evidence, Butterworth, London, (4th ed) P. 635.
[345] (1998)5 NWLR (pt 551) 521.
[346] *State vs. Omedi Edobor & ors* (1975) 9-11 SC 69 at 76
[347] Per Edozie (JSC) in *Ubani vs. the State* (2003) 18 NWLR (pt. 851) 224 at 244.

4.2.2 Intention

Of the mental elements of murder or culpable homicide punishable with death, intention most frequently arises as such its proof is briefly discussed. An accused person should have the intention to kill (the deceased person or any other person) or cause him "grievous bodily harm" before he is convicted of murder or culpable homicide punishable with death. The assertion that even the devil knows not the hearts of men[348] goes to show that intention of the accused cannot be proved by any direct[349] but circumstantial evidence. The courts normally consider the nature of the weapon used, the part of the body attacked and the surrounding circumstances to infer the intention of the accused. Thus in *Elejikwu v. The State*[350] the accused, a policeman shot dead a colleague with a rifle gun. He was charged and convicted of culpable homicide punishable with death by the trial court, Court of Appeal and Supreme Court. Holding that the accused had the intention to kill the deceased, Wali JSC cited with approval the conclusion of the learned trial judge, Umaru Abdullahi, (as he then was) that the fact that the accused was a police man who knew that a rifle of the caliber he used to shoot the deceased was a deadly weapon and he chose to shoot the accused in the chest, one of the most delicate, sensitive and vital part of human being; go to show that the accused had the required intention to kill the deceased as such his intention was held to have been proved. In yet another case, the Supreme Court concluded that judging from the nature of the attack and the lethal weapons used, the attackers had the intention to kill or at least cause grievous bodily harm on the deceased.[351]

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[348] Chukkol, K.S. (2010), *The Law of Crimes in Nigeria*, Ahmadu Bello University, Press Ltd., Zaria, P.117 (Revised Edition).
[349] Apart from the accused's confessional statement
[350] (1993) 11 KLR 146
[351] *Ubani vs. The State* (supra)

Intention could also be proved by the presumption that a man intends the natural consequences of his acts.[352] Thus, in *Igogo v. the State*[353] the court stated that the death of the deceased as a result of being hit with a shovel on the head was something which should ordinarily or naturally be expected. A person intends the natural consequences of his conduct. By hitting the deceased with a shovel on the head, it can properly be inferred that the appellant intended to kill the deceased or wanted to inflict grievous bodily harm on him.[354]

The above discussions show that medical evidence has no role in proof of the requisite intention in cases of murder and culpable homicide punishable with death.

4.2.3 The Act of the Accused Caused Death

Under the Criminal Code Act, for act of an accused person to be considered capable of causing the death of the deceased, the death must have occurred within a year and a day.[355]

So, where the death occurred within that period, the prosecution must prove that the act of the accused did, in fact, cause the death of the deceased.[356] In other words, the prosecution must show conclusively that death was caused by the act of the accused. This means that there must be nexus between the act of the accused and the death of the victim.[357] Thus, "in a case of unlawful homicide, the evidence of the prosecution must establish a nexus, an unbroken link between the act of the accused and the death of the deceased."[358] Without this proof, the prosecution cannot succeed.[359] Therefore, in establishing this causal link between the act of the accused and the relevant

[352] See S. 316 criminal code act, op. cit.
[353] (1999)6 NWLR (pt 608) 568
[354] See also *Adamu vs. Kano N. A.* (1956) SCNLR 25
[355] However, there is no equivalent provision under the penal code. See Chukkol, K.S. (2010) *The Law of Crimes in Nigeria,* op. cit. p.120
[356] *Ugwu vs. The State* (1998) 4 NWLR (Pt. 544) 90 C.A., see also *Omogodo vs. State* (1981)5 SC 57; *Omoni vs. State* (Supra).
[357] *Onyegba vs. State* (1995) 4 KLR 4 978
[358] Per Oputa J. (as he then was) in *The State vs. Uzuagwu & ors.* (1972)2 ESCLR 429
[359] *Aighoreghian vs. State* (2004)3 NWLR (pt. 860) 367 SC

consequences, no aspect of the inquiry should be left to assumption, speculation or conjecture.[360] If there is the possibility that the deceased died from other causes than the act of the accused, the prosecution has not established the case against the accused person[361] and the latter is entitled to acquittal.[362]

In a charge of murder, cause of death must be positively proved either by direct or circumstantial evidence such that leaves no room either for doubt or speculation.[363] This is also the case in culpable homicide punishable with death. The direct evidence, therefore, must be such as would connect the death of the deceased with the act of the accused. This may include the evidence of a medical officer who examined or performed an autopsy/post mortem examination on the deceased and certified the cause of death.[364] This is what is referred to as medical evidence in this context.[365] It is unnecessary in some cases and necessary in others as could be seen below.

4.3.2.1 When Medical Evidence Is Unnecessary

Medical evidence is considered unnecessary when there are some other cogent, concrete and reliable evidence to prove that the act of the accused caused the death of the deceased without any intervening cause/factor or the deceased died on the spot or so soon after the unlawful act of the accused.[366] Proof of cause of death may not even be necessary in such a circumstance as the court could reasonably infer that the act of the accused caused the death of the deceased.[367] Therefore, the Supreme Court in *Idemudia v. State*[368] held that where there is abundant evidence of manner of death, medical

[360] *Omonga vs. The State* (2006)14 NWLR (pt.1000) p. 537.
[361] *Uguru vs. State* (supra) p. 93.
[362] *Aighoreghian vs. State* (supra) p. 373.
[363] Ibid, p. 374
[364] Medical evidence is even statutorily required for this purpose in cases of Coroners inquest which is not covered in this research. See for instance, S.14 Coroners Law, Cap 39 Laws of Kaduna State of Nigeria, 1991
[365] *Uguru vs. State* (supra) p. 94.
[366] *Elejikwu v., The State* (supra) p. 148.
[367] *Essien vs. The State* (1984)3 SC 14 at 18; Bakari (1965) NMLR 163.
[368] (1997) 7 NWLR (Pt. 610) 202

evidence can be dispensed with. Thus, in *Ben v. State*[369] the appellant struck the deceased on the head with a big stick. He fell down unconscious and never regained consciousness until he died a few hours later in the hospital. The Supreme Court, upholding the conviction of the appellant, held that medical evidence was not necessary to determine the cause of death in the circumstance of this case. It could properly be inferred that the wound inflicted caused the death of the deceased.[370] Also in *Oguntolu v. The State*[371], one of the issues was whether the trial court and the Court of Appeal were right in convicting the appellant when the cause of death was not ascertained by medical evidence or otherwise. The Supreme Court, per Kutigi JSC (as he then was), held that it was settled that where there is no medical evidence, it is proper for the court to infer the cause of death from the circumstances. As such in this case, it was inferred that the deceased, who died instantly on the spot after the appellant inflicted matchet cuts on him, died as a result of the act of the appellant.

So even where medical evidence was tendered but found to be not weighty enough to prove positively the cause of death because it was inconclusive;[372] or it was subjected to series of challenges as to the qualification of the medical doctor;[373] or found to be contradictory,[374] the court could infer the cause of death from the other available evidence. Therefore, medical evidence is *not sine quo non* in proof of cause of death as it may be established by sufficient, satisfactory and conclusive evidence showing beyond reasonable doubt that the death in question resulted from the act of the accused;[375] provided the court is fully satisfied of this.[376] In *Egboghonome v. The*

[369] (2006)16 NWLR (pt. 1006) 595
[370] See also *Uyo vs. A.G. Bendel State* (1986)1 NMLR (pt. 177) 418.
[371] (1996)2 KLR 2 & 3 ()pt. 38 & 39) 213.
[372] *Adekunle vs. State* (1989)5 NWLR (pt. 123) 505
[373] *Ogba vs. State* (1992)2 NWLR (pt. 22) 164.
[374] *Gabriel vs. The State* (1989)5 NWLR (pt 122) 457
[375] *Ubani vs. The State* (supra) p. 230.
[376] See *Onwumerie vs. State* (1991)4 NWLR (pt. 186) 428; *Lori vs. The State* (1980) 8-11 SC 81.

State[377], the Supreme Court affirmed the conviction of the appellant of murder by the trial court and the Court of Appeal for killing and cutting off the deceased hunch-back for money-making medicine. The medical doctor who conducted the post-mortem testified that the deceased died of traumatic amputation of the vertebral column involving the ribs, which resulted to haemorrhage and shock.[378] Despite this medical evidence, the Supreme Court in affirming the conviction of the appellant relied more heavily on the other evidence available in the case. This shows that in such a circumstance, the medical evidence only confirms the cause of death as established by the other evidence. Thus, where it was established that the appellant matcheted and gored the stomach of the deceased as a result of which he died, the Supreme Court held that the medical evidence adduced only confirmed that the deceased suffered multiple stab wounds and that he died as a result of haemorrhage from the wounds.[379]

4.2.2 When Medical Evidence is Necessary

The necessity or indispensability of medical evidence in establishing the cause of death is determined by its probative value in the circumstance which could be seen from two perspective. Medical evidence tendered may be used to prove the case of the party relying on it and lack of it may negatively affect the case of the party who ought to have tendered it. As pointed out earlier on, medical evidence becomes unnecessary where the deceased died on the spot or so soon after the attack. It follows therefrom that medical evidence becomes necessary where the deceased died relatively long time after the act of the accused. This is more so where the circumstance raises the possibility of an intervening cause. This is why in *Aighoreghian v. State*[380], the prosecution failed to prove either murder or manslaughter against the accused persons who were standing

[377] (1993)11 KLR 1
[378] Ibid, p. 8
[379] *Agbedi vs. The State* (1984) 6 SC 426.
[380] Supra, p.367

trial for the murder of the deceased after he was allegedly beaten by them. The deceased, who had sustained serious injuries on his forehead and left eye, was taken to two separate hospitals. The first hospital treated and discharged him, when he was relatively in good condition, into the hands of an ophthalmologist in the second hospital. After the eye was specially examined, he was again discharged. Three months later, the deceased died. It was alleged that he developed a swollen tummy and legs and was taken to the University of Benin Teaching Hospital for treatment. However, there was no medical evidence as to the nature of his illness and the treatment he received at the teaching hospital but only suggested the cause of death as liver cirrhosis. The doctor who performed the autopsy on the deceased testified that he died of liver abscess due to faulty change and cyst in the liver, although he had injuries on his forehead, nasal bone and the left eye that had nothing to do with the liver ailment. Despite these discordant medical evidence that clearly suggest an intervening cause which broke the chain of causation, the trial judge convicted the appellants of the lesser offence of manslaughter. According to him, the attack on the deceased lingered on continuously until his death. This was upheld by the Court of Appeal. On further appeal to the Supreme Court, the 1st appellant argued that the Court of Appeal was wrong to hold that his act of beating the deceased caused the death of the deceased three months later. The Supreme Court held that where, as in the instant case, a deceased was treated in two hospitals following his encounter with the accused persons and he died after three months; there is an *actus novus interveniens* which must be accounted for by the prosecution. To be able to do this, there must be evidence of the type of attention and treatment given by each hospital in the absence of which there is likely to be a break in the chain of causation. In the instant case the deceased was treated and discharged by two hospitals and he subsequently took ill and was admitted to another hospital, but no evidence of the nature

of the ailment and the treatment given satisfactorily linked the act of the accused with the death of the deceased.[381] On the necessity of medical evidence in such a case, the court further held that where death occurred after three months and the medical evidence as to the cause of death and the responsibility of the appellant was uncertain and doubtful, then medical evidence as to the cause of his death becomes a necessity and failure to produce same would be fatal to the prosecution's case.[382]

This decision of the Supreme Court was premised on the submission of the learned counsel for the 1st appellant that even though the prosecution owed the duty to prove that the swollen legs and tummy were caused by the incident and were a continued manifestation of the injuries suffered by the deceased, it led absolutely no medical evidence of that condition.

It could be concluded from this case that medical evidence given by the first doctor was that he satisfactorily treated and discharged the deceased of the injuries he sustained on his forehead after the attack. He handed him over to the second doctor who testified that he also treated and discharged him satisfactorily. The deceased subsequently developed and died of liver disease. Therefore, the failure of the prosecution to satisfactorily prove, by medical evidence, that the injuries inflicted on the head and the eye of the deceased led to the liver ailment of which he died contributed in the inability of the Supreme Court to determine whether such injuries lingered on until the death of the deceased or new ailments intervened and thereby caused the death. This doubt led the Supreme Court to resolve it in favour of the 1st appellant which underscores how indispensable medical evidence could be in proof of cause of death.

To make medical evidence necessary and indispensable, the period between the act of the accused and the death of the deceased does not have to be so long. What matters is

[381] Ibid, p. 375-76
[382] Ibid, p. 376; se also *Enewoh vs. State* (1989)5 NWLR (pt. 119) 98.

that there is the possibility of an intervening cause other than the act of the accused which could only be explained by credible medical evidence. In *Ozoemena v. State*[383] the appellant bit the right ear of the deceased almost severing it from the body during an altercation between them. He was taken to a hospital where he was treated and discharged after few hours. A few days later, the deceased was admitted for few days in another hospital for the treatment of the ear which was found infected. As his conditions worsened he was referred to the general hospital, Okigwe, where he died eight days after the attack. The accused was convicted of murder relying on the medical report prepared by the doctor who performed the post-mortem examination that the deceased died of septicemia from infection of the wound on his ear. This was despite the fact that the accused denied the allegation and the evidence as contained in the medical report. Dissatisfied with this decision, he appealed to the court of appeal contending, among other things, that the learned trial judge erred in law in admitting and relying on the medical report under section 249 of the Criminal Procedure Code[384] as the maker was not called for the purpose of cross-examination in the face of his disagreement with the report. Unanimously allowing the appeal, the Court of Appeal held that the trial judge ought to have summoned the doctor for the purpose of cross-examination under the section.[385] The court added that when the medical evidence is discountenanced, the result would be that there was no medical evidence showing the cause of death of the deceased. Inevitably, this must lead to the acquittal of the appellant of the offence charged.[386]

In this case, medical evidence would have been indispensable but for the non-compliance with section 249 as pointed out earlier on. This is because only medical

[383] (1998)10 NWLR (pt.571) 632.
[384] Op. cit.
[385] *Ozoemena vs. State*, (supra) p. 637.
[386] Per Oguntade JCA, ibid.

evidence could have established whether the deceased died of infection of the wound on his ear or of another cause as his Lordship pointed out above.

It is now established that where a deceased did not die immediately or so soon after the act of the accused but sometimes later on having been treated somewhere else, the evidence of the medical treatment(s) given to the deceased while alive becomes necessary to sustain the chain of causation as may be established by the evidence of post-mortem examination. Thus, in *Uguru v. State*[387] the deceased was matcheted by the appellant until he fell down. He was taken to a private hospital for treatment and was later transferred to another where he died few days after the attack. He was found guilty by the trial court on the sole evidence of two eye witnesses without any medical evidence. The appellant's contention, when he appealed to the Court of Appeal, that the charge of murder against him was not proved beyond reasonable doubt was rejected. Allowing his appeal to the Supreme Court, the court held that there was no medical evidence adduced by the prosecution showing the condition of the deceased when he was taken to hospital and the medication given to him before he died. In the circumstance, it was unsafe to say that the act of the appellant was the cause of the deceased death. The conviction of the appellant cannot therefore stand as his guilt was not proved beyond reasonable doubt. The court, Per Kalgo JSC added:

> I also agreed with the Court of Appeal on the finding that PW2 and PW3 saw the appellant … inflict matchet blows on the deceased.. but this evidence is not evidence of proof of what caused the death of the deceased, since his death took place four days thereafter and the Court of Appeal did not, like learned trial judge, advert its mind to the cause of death of the deceased. It seemed to me that they both assumed that the fact that the deceased received matchet blows by the appellant until he fell down, he must have died as a result of the matchet blows despite the fact that there was no medical report to that effect. This is

[387] (supra).

> certainly a wrong assumption in law and a conviction based upon it cannot stand.[388]

In yet other cases, what makes medical evidence necessary is when the nature of the alleged cause of death is such that only medical evidence could prove to the standard required by law. This was illustrated in the case of *Omonga v. State*[389] where the deceased died shortly after eating the rice cooked and served him by the appellant. The case of the prosecution was that the appellant put in the rice a substance that looked like salt and gave it to the deceased to eat. The deceased fell ill immediately after eating the rice and was rushed to the hospital. He was treated and asked to return the following day but he died in the hospital after his return. The doctor who examined the deceased testified that he could not determine the cause of death and the report of post-mortem conducted was not tendered. The trial judge convicted the appellant on the evidence of eye witnesses. The appellant submitted at the Court of Appeal that the cause of death was not proved beyond reasonable doubt because there was no link between his act and the death of the deceased as such the case must fail. The court held that where it was alleged that the appellant poisoned the deceased, it was necessary and obligatory for the prosecution to produce evidence that the deceased died of poison and that could only be done by a medical report from the doctor who performed the autopsy.[390] The court further held that:

> Something that looks like salt is certainly not poison. It is not every substance that looks like salt that is poison and it is not every poison that looks like salt. To prove beyond reasonable doubt that the substance the appellant put in the rice he gave to the deceased is a poison, the substance must be identified, produced and tested by an expert in the field who has the scientific knowledge and competence to test same in laboratory. After that this report must be properly produced and tendered in the court at the trial. Any evidence offered by a witness without such test as

[388] Ibid, p. 108
[389] (2006)14 NWLR (pt.) 532.
[390] Ibid, p. 542-43.

> stated above… is grossly speculative, mere conjecture or superstition which has no place in criminal trial.[391]

In this case, the Court of Appeal rightly said it all. Apart from medical expert who conducted a scientific analysis, no any witness could say, with the degree of certainty as to discharge the burden of proof on the prosecution, whether a particular substance is really a poison and it did cause the death of the deceased. This is, therefore, within the exclusive preserve of medical evidence.

Although medical evidence may be necessary in proof of cause of death, it must positively and unequivocally link the act of the accused to the cause of the deceased death. Where any doubt is created by the medical evidence as to whether it was the act of the accused that caused death, the doubt should be resolved in favour of the accused. This goes to show that the same medical evidence could be used to exonerate the accused. This was clearly adumbrated in *Danjuma Aliyu & 23 others vs. The State*[392] where the accused persons were standing trial for criminal conspiracy, abduction and culpable homicide punishable with death under Sections 92, 273 and 221 of the Penal Code respectively. During the trial, it was established the accused persons, members of the Ahamadu Bello University Teaching Hospital Medical and Health Workers Union, broke open the office of the deceased, Prof. A.B. Bandipo, the then Chief Medical Director of Ahmadu Bello University Teaching Hospital, Zaria, and dragged him out. They beat him up, put him in the boot of a 504 Station Waggon car and drove straight to the Mortuary of Ahmadu Bello University Teaching Hospital, Tudun Wada, Zaria. They said that they would only release him after he paid them their allowances. The deceased was later rescued by the police and taken to Nana Clinic where he was medically examined and treated. He however, died the following day. The doctor who examined and treated the deceased while alive testified that the deceased "… was fully conscious,

[391] Ibid, Per Omokri JCA at 538.
[392] (Unreported) CA/k/137/C/98 Judgement delivered on 2nd Dec. 1999

fully alert and that the professor climbed the hospital steps unsupported.. There were bruises on his arms and back and he complained of severe back pain, headache and pain in both eyes". *In* the same vein, the doctor who performed post-mortem examination on the corpse, Dr. A. A. H. Rafindadi, testified that the death was caused by pre-existing kidney and heart diseases worsened by lack of proper medical care. This conclusion was based on his discovery of 10 stones in the deceased which are not usually found in a normal human being and they had nothing to do with the assault inflicted on him. Although the deceased sustained internal bruises, they were not enough to have caused the death of the deceased. Therefore, the incident of the assault on the deceased did not contribute to his death. Despite this concrete medical evidence which appeared to have exonerated the accused persons, the trial judge convicted them of all the offences as charged and sentenced them to death by hanging.

Dissatisfied, the appellants appealed to the Court of Appeal contending, among other things that the prosecution failed to prove that the acts of the accused persons caused the death of the deceased. The Court of Appeal, relying on the medical evidence of the post-mortem examination was of the view that there was doubt as to whether the act of the appellants caused the death which should have been resolved in their favour. The failure of the trial judge to give the accused persons this benefit of doubt made the Court of Appeal to quash the conviction and sentence of culpable homicide passed on them as it had not been proved by the prosecution. However, the court upheld the conviction of the appellants of the offences of conspiracy and abduction. But since the trial judge did not impose any sentence for these offences the appellants were discharged and acquitted.

The above case epitomizes the other side of the role medical evidence could play in proof of cause of death in that it was used to disprove an alleged cause of death. The conclusion of the prosecution and the learned trial judge, which the ordinary man in the

street including the author would have agreed with that the deceased died as a result of the attack on him by the appellants could not have been dispelled by any evidence than medical evidence. This is especially given the fact that the deceased died barely 31 hours after the attack which fact ordinarily lends so much credence to the culpability of the appellants.

4.2.3.3 Procedure for Proof of Cause of Death by Medical Evidence

There is a laid down procedure that guides the presentation of medical evidence for the purpose of proof particularly of cause of death in homicide cases. Therefore, to prove cause of death by medical evidence, the doctor must perform post-mortem examination and must be called as a witness. In the first instance, the doctor must perform autopsy or post-mortem[393] on the corpse sufficiently proved as that of the deceased. It is only by performing a post-mortem examination that the doctor could know what actually killed the deceased otherwise he only speculates as to the cause of death which has no place in our criminal law.[394] The Supreme Court held in *Idemudia v. The State*[395] that on a charge of murder, proof that the deceased died and that it was in respect of his body that an autopsy was performed is a legal requirement. Where the identification of the body is in issue, absence of direct or circumstantial evidence of the identification of the corpse examined is fatal where medical evidence of cause of death is vital. Therefore, in cases where the identity of the body examined by the doctor is shrouded in doubt, the person who identified the victim's dead body to the doctor should also be called as a witness.[396] This is necessary as medical evidence alone cannot disclose the identity of the victim.

[393] The procedure for conducting post-mortem examination is discussed in chapter two of this research.
[394] See *Omonga vs. the State* (supra) p. 538.
[395] (supra); see also *Enewoh vs. State* (1990)4 NWLR (pt. 145) 469 SC
[396] *Idemudia vs. The State*, ibid, p. 210.

Thus, in *Ubani v. The State*[397] the autopsy was performed by the doctor on human forearm and leg exhumed from an unused latrine pit. The forearm and the leg were not sufficiently and cogently proved to be that of the deceased. The medical evidence could only establish that the parts exhumed and examined was that of a middle-aged man. Upholding the decision of the trial court and the Court of Appeal, the Supreme Court held the medical evidence given by the doctor was not helpful in ascertaining the cause of death. .

Secondly, the medical doctor who performed the autopsy must be called as a witness otherwise his evidence would be inadmissible for being hearsay.[398] Where the medical doctor is called, he may not necessarily tender any medical report provided he is available to give evidence.[399] However, where the autopsy was performed by a medical officer, his presence could be dispensed with under section 55 of the Evidence Act.[400] In the case of *Isiekwe v. State*[401] it was held that by virtue of section 42(1) (now s. 55(1)) of the Evidence Act, it is not mandatory for a medical officer who performed an autopsy on the deceased to be present in court to give evidence. The production by either party of a certificate signed by a medical officer may be taken as sufficient evidence of the facts stated therein. However, the court still has the power, on application of either party or on its own motion, to direct that such officer shall be summoned to give evidence before it if it is of the opinion that for the purpose of cross-examination or for any other reason the interest of justice so requires.

Similarly, under the Criminal Procedure Code,[402] a written report by any medical officer or registered medical practitioner for the purpose of proving the physical cause of death

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[397] Supra
[398] See Ss.38 and 126 Evidence Act, op. cit; Kasa vs. The State (1994) 9 KLR 84.
[399] See *Igogo vs. State* (supra) *Adekunle vs. State* (supra).
[400] Op. cit.
[401] (1999)9 NWLR (pt. 617) 43
[402] See s. 249 (3) (a), Criminal Procedure Code, op. cit.

of any person he examined is admissible without calling him as a witness. But where it appears desirable to call him as a witness for the end of justice, he shall be called to give evidence in person,[403] particularly if the accused person expresses disagreement on the content of the report. In *Yahaya Idrisu v. The State*[404] the application of the accused to have the doctor called for cross-examination was refused by the trial judge. On appeal to the Supreme Court it held that where a medical practitioner was not a witness his written report could, at the discretion of the court, be admitted provided there was no objection by the defence. The court went further to state that S. 249(3)(c) entitled the accused person to have the maker of the report attend and give evidence in person where he would have the opportunity to cross-examine him.

The failure of the court to observe the provision of this section may be fatal to the proceeding especially where the trial judge solely relied on the medical report. This could be seen in *Liman v. The State*[405] where the appellant was convicted of culpable homicide punishable with death on the sole evidence of a medical report which put the cause of death as due to asphyxia of manual strangulation. This was despite the accused person's denial of any strangulation. The appellant's appeal on ground of non-compliance with section 249(3)(c) of the Criminal Procedure Code was allowed by the Supreme Court. It held that the trial judge ought to have called the doctor to enable the appellant cross-examine him. This failure deprived him of the right to fair trial and since there were no other evidence showing the cause of death, the reliance placed on the medical report had occasioned actual miscarriage of justice.[406]

[403] Ibid Section 249 (3) (b); see also S. 250 of the same code
[404] (1967)1 ALL NLR 12.
[405] (1976) 10 NSCC 405
[406] Ibid, p. 409.

Borrowing a leave from the above decision of the apex court, the Court of Appeal in *Ozoemena v. State*[407] also pointed out the fatality of the failure to call the medical doctor whenever the accused disagrees with the content of the report when it held that the court was enjoined to summon the medical officer as a witness and failure was fatal to the case of the prosecution.

4.2.4 Factors Affecting the Probative Value of Medical Evidence

The admissibility of a piece of evidence is determined by the provisions of the law while its probative value is determined by the trial judge having regards to the circumstances of the case. Therefore, there is a clear distinction between the questions whether evidence is admissible and the probative value to be attached to it. The fact that evidence is admissible does not mean that it has any weight.[408] From the foregoing, even though medical evidence is admissible in proof of murder and culpable homicide punishable with death, it may have little or no weight depending on the circumstances of the case. Such circumstances include where any of the factors discussed below exist.

4.2.4.1 Contradiction/Ambiguity/Inconclusiveness

Where medical evidence is found to be contradictory, ambiguous or inconclusive, the trial court attachés no weight to it as it cannot establish with any degree of certainty, the fact it sought to establish. An evidence is said to contradict another when it affirms the opposite of what the other has stated.[409] Therefore, the Supreme Court held in *Mgboko v. The State*[410] that a court is not bound by the evidence of a medical doctor particularly when it is contradictory in some material particular. Thus, in *Adekunle v. State*[411] the appellant was convicted of murder by the trial court on the evidence of a medical doctor and eye-witnesses. The doctor whose evidence appeared contradictory testified that "In

[407] (supra) at p. l637.
[408] *Ozoemena vs. State* (supra) p. 638; See also *Gbafe vs. Gbafe* (1996) 8 NWLR (pt. 455) 417.
[409] *Gabriel vs. State* (1889)5 NWLR (pt. 122) 457 at 459
[410] (1972)2 SC 123
[411] (Supra)

my opinion the corpse may have died of multiple injuries or starvation. In this particular case, the two may be responsible for the deceased's death."[412] In his own medical report, he stated that death was due to multiple injuries and starvation. On appeal, it was argued that the prosecution failed to establish the cause of death due to the two possible causes of death given in the medical evidence. It was also contended that the trial judge erred in law when, choosing from the possible causes of death, he concluded that death was due to multiple injuries. The appellate court approved of the course of action taken by the trial judge because he only inferred the cause of death from the evidence before him. The court held that the learned trial judge was entitled, in the face of inconclusive medical evidence, to examine the evidence before him and draw the necessary inferences.[413]

It should be noted that even the appellate court in the above case did not doubt that there was contradiction in the medical evidence. It, however, justified the action of the trial judge in drawing inference as to the cause of death from the totality of the evidence adduced. Thus, even though the medical evidence was admitted, its probative value was affected as little weight was attached to it.

Similarly, in *Agwu v. State*[414] the medical doctor who performed the autopsy in describing the wound that caused the death, testified: "…the wound was about 1cm in diameter and had a sharp edge… the primary cause of death is sharp object injury…the sharp object could be knife or dagger."[415]

Uwaifo JCA observed that since the wound was described in diameter, it meant necessarily that it was circular in shape, and must have been caused, under normal circumstance, by a round object. How could then a round wound be caused by a sharp

[412] Ibid, p. 512.
[413] Ibid, p. 508.
[414] (Supra)
[415] Ibid, p.105

object like knife or dagger? This could only happen where after the knife or dagger was plunged into its target, it was intentionally and deliberately twisted round almost like a screw driver. [416] He believed that there was contradiction in the evidence and therefore concluded that the prosecution could not discharge the burden of proving murder as such the appeal was, among other reasons, allowed.

In some cases, the contradictions in medical evidence arise where the doctor tendered medical report and also testified. This point was buttressed in *Valentine Adie v. The State*[417] where the appellant was charged with murder for killing the deceased by inflicting injuries on his head. The case of the appellant was that the deceased hit his head against a wooden door frame while trying to escape during the fight that ensued between the duo. The medical doctor called to prove the cause of death testified that death was as a result of head injuries due to direct force that were consistent with injuries caused if a person ran against a heavy object. However, in the medical report she tendered, she certified the cause of death to be due to the head injuries as a result of heavy blow. The trial judge, relying on the medical evidence, drew inference that the injuries that resulted in the death could not have been caused by the deceased hitting his face. He, therefore convicted and sentenced the accused for murder as charged. Dissatisfied, the accused appealed to the Court of Appeal and the Supreme Court. Allowing the appeal, the Supreme Court held that where there was divergence of opinion between the medical report and the testimony of the doctor, the court is bound to resolve the ambiguity in favour of the accused.[418] The court, Per Uwais JSC (as he then was) said:

> In any case with the ambiguity in the testimony of the medical doctor unresolved, it is difficult for me to see how the case of the prosecution which is based on

[416] Ibid,
[417] (1980) ALL NLR 39.
[418] Ibid, p. 40

> circumstantial evidence could be said to have been conclusive as to irresistibly lead to the guilt of the appellant.[419]

However, it should be noted that the contradictions which affect the probative value of medical evidence is such which is material. Hence, in *Gabriel v. State*[420] the contradiction was that the doctor stated in his report that there was deep lacerations on the skull which caused severe loss of blood leading to the death of the deceased. Under cross-examination, he testified that sharp object could cause such injuries and that they could not be self-inflicted. He also testified that a fall against a sharp object could inflict such injuries. Despite this, the court did not consider the contradiction so material as to affect its probative value.

4.2.4.2 Qualification

A witness must be "specially skilled" in the field in which he was called upon to give evidence in order to qualify as an expert[421] which means that he has special knowledge, training or experience in the matter in question.[422] Therefore, medical evidence given by a doctor is considered as expert evidence. The Supreme Court, Per Uwais JSC (as he then was) said that ".... It is elementary that the evidence of a doctor, which is based on his special field of scientific knowledge, is expert evidence".[423] In this light, a doctor must satisfy the court that he is such an expert. He does so by stating his qualification, experience and the relevance of his duties to the issue he is called upon to testify. So, after being called as a witness, he must satisfy the court that he is an expert on the subject in which he is to give his opinion and must state clearly the reasons for such opinion.[424] However, the medical doctor must state the qualifications he possesses

[419] Ibid, p. 44
[420] (supra)
[421] See S. 58 Evidence Act, op. cit.
[422] *Ajani vs. Comptroller of Custom* (supra).
[423] *Oladele vs. State* (1993)1 SCNJ 60 at 62
[424] *Sowemimo vs. State* (2004)11 NWLR (pt 885) 515.

honestly. Thus, the Supreme Court, having concluded that a medical doctor had betrayed the veracity or authenticity of his evidence in the matter due to the web of lies he told the court about his qualification as a pathologist who performed the autopsy, discountenanced his evidence and relied on that of eye-witnesses to prove that the deceased died from the beating he received from the appellant. The medical evidence was not, therefore, given any weight.

But where the doctor so stated his qualification honestly and was not challenged by the prosecution during the trial, it becomes evidence of his qualification which cannot be challenged on appeal. Therefore, a witness who only told the court his name, address and that he was a medical practitioner was considered as such by the Supreme Court because he was not cross-examined on that[425]. Also in *Ogonzee vs. State*[426], the medical doctor who conducted the autopsy merely introduced himself as a medical practitioner attached to the department of pathology in the University of Teaching Hospital[427]. Justifying the reception of his evidence as that of an expert, the Supreme Court, per Iguh JSC, said that it was a matter of common knowledge that to qualify as a medical doctor, one must undergo a study in forensic medicine the extent and scope of which the witness would have clarified were his competence challenged while he testified in the witness box[428].

4.2.4.3 Evidence in Technical Language

A doctor called to give evidence may, in line with his special training, use terms peculiar to the medical profession to describe his findings or observations in regard to the nature of the injuries he examined. But he should be prepared to explain those terms in plain language which will make his evidence intelligible so as to serve its purposes.

[425] *Azu vs. State* (1993) 9 KLR 43 at 44
[426] (Supra)
[427] Ibid, P. 534
[428] Ibid, P. 549-50

Failure to do so may render the evidence valueless. In *Agwu v. State*[429] the doctor who performed the autopsy testified on the cause of death as follows:

> The body was a fresh corpse of a young man with mild distension of the left hemithorax. There was a stab wound 1 cm in diameter on the left shoulder about 2cm from the medial and of the scapular with little clotted blood at the orifice. The stab wound passed through the superior fibres of the left deitoid muscles piercing through the jugular vein and punctured the vixer membrane of the left pleura with bleeding into the left plural cavity… about 950 ml of blood evacuated from left plural cavity……[430]

The court held that the medical evidence of the doctor called by the prosecution was riddled with unexplained medical terminologies that rendered it unintelligible[431]. Commenting on this evidence, Uwaifo JCA wondered how a person not knowledgeable in these medical technical terms could understand without explanation and guidance that the evidence referred to a stab in the neck or neck region. He admitted that he could only understand that there was a wound about "1cm in diameter" which appeared to have commenced from the left shoulder[432]. On the probative value of such evidence, he added that it was of no use to get a medical doctor to give evidence full of scientific and medical terminologies which neither the court, the counsel nor the lay person can readily claim to understand and leave the evidence in that state without elucidation. The evidence failed to serve its purpose as in the present case.[433] The Court of Appeal later allowed the appeal against this decision for this, among other, reasons.

From the foregoing, medical evidence plays an important role in homicide cases particularly murder or culpable homicide punishable with death. It helps establish the actual death of the deceased and the nexus between the act of the accused and the death

[429] Ibid, P. 98
[430] Ibid, p.105
[431] Ibid, P. 98
[432] Ibid, P. 105
[433] Ibid, p.108

of the deceased – two important ingredients of the offence. However, there are cases in which it plays little or no role either because there are other available evidence or its credibility had been negatively eroded.

4.5 RAPE

4.5.1 INTRODUCTION

Rape has been defined as having sexual intercourse with a non consenting female with the knowledge by the accused that his victim was not consenting.[434] In other words, it is the unlawful carnal knowledge of a woman by a man forcibly and against her will.[435] Put more comprehensibly, rape means a forcible sexual intercourse with a girl or a woman without her giving consent to it.[436] Rape is one of the most serious sexual offences as such attracts sever penalties under the various criminal codes operating in Nigeria.[437] The rationale for this is that befitting punishment must be meted out to persons who seek to defile and degrade womanhood and in particular the helpless girl-child so that it will act as deterrent to others.[438] Whether it so deters or not begs for the answer in the face of its current prevalence occasioned by moral decadence which has eaten deep into the bane of our societies.

4.5.2 Ingredients

The ingredients of the offence of rape are provided for in the provisions of the codes creating the offence. The Criminal Code Act[439] provides that:

> Any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation or any kind, or by fear of harm, or by means of false and fraudulent representation as to the nature of the act, or, in the case of a married woman, by

[434] Chukkul, K. S. (2010) *The Law of Crimes in Nigeria*, ABU Press Ltd., Zaria, (revised edition), p. 319.
[435] *Rabiu, vs. State* (2005)7 NWLR (pt. 490) at 494.
[436] Per Kalgo JSC in *Ogunbayo vs. State* (2007)3 SCNJ 119.
[437] *Rabiu vs. State* (supra) p. 495.
[438] Per Nzeako JCA in Upahar vs. State (2003)6 NWLR (pt. 816) at 264.
[439] Op. cit.

> impersonating her husband, is guilty of an offence which is called rape.[440]

Under the Penal Code,[441] whose provisions on rape appear more comprehensive, the offence is:

> A man is said to commit rape, who, save in the case referred to in subsection (2), has sexual intercourse with a woman in any of the following circumstances:
> a. against her will;
> b. without her consent;
> c. with her consent, when the consent has been obtained by putting her in fear of death or of hurt;
> d. with her consent when the woman knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;
> e. with or without her consent, when she is under fourteen years of age or of unsound mind.[442]

From the provisions of the two codes above, the important ingredients of the offence of rape are carnal knowledge/ sexual intercourse and consent. Carnal knowledge[443] is synonymous and often used interchangeably with sexual intercourse. The latter means a penetration of the male organ (i.e. penis) of a woman's vagina.[444] It follows from this that an important requirement in sexual intercourse is penetration. Therefore, the essential and most important ingredient of the offence of rape is penetration, unless it is proved, the prosecution must fail.[445] So, the penetration required is that of the vagina, unlike under English statute where the penetration of the anus or mouth is sufficient for the purpose of some sexual offences.[446]

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[440] Ibid, s. 257.
[441] Op. cit.
[442] Ibid, S. 282(1)
[443] It means sexual intercourse, see
[444] Chukkol, K. S. (2010) *The Law of Crimes in Nigeria,* op. cit. p. 320.
[445] *Iko vs. State (*2001)14 NWLR (pt.) 220 at 226
[446] See S. 1 of the Sexual Offence Act, 2003; *Kartamaki vs. R.* (185) A. C. 147; (1984)2 All E.R. 435.

4.5.3 Proof of Rape

The burden and standard of proof of rape, being a criminal offence, is on the prosecution and beyond reasonable doubt respectively. Therefore, it was held in *Obiakor v. State*[447] that by virtue of section 138 of the Evidence Act, for a conviction to stand where the accused is alleged to have committed rape, the law places the burden of proof on the prosecution and it never shifts. Under the Penal Code,[448] for the prosecution to prove rape, it is under a duty to prove that the accused had sexual intercourse with the victim (which entails proof of penetration); that the sexual intercourse was unlawful i.e. not being between husband and wife; that the accused had the requisite mens rea; and the evidence of the complainant be corroborated (although this is not required as a matter of law).[449] Penetration however slight is sufficient and it is not necessary to prove any injury or the rupture of the hymen[450] to constitute the crime of rape.[451] For this purpose also, emission is not a requirement.[452] However, such ejaculation and/or rupture of the hymen of the victim are important by way of evidence.[453] This depends on the circumstance of each case.

The next issue on proof of rape is that the evidence of the prosecution should be corroborated. It is not a rule of law that an accused in a charge of rape cannot be convicted on the uncorroborated evidence of the prosecution. The proper direction is that it is not safe to convict on such evidence. The court may, after paying due attention on the warning, nevertheless convict the accused person if it is satisfied with the truth of the evidence.[454] So, the nature of the evidence required for such corroboration is that

[447] (2002)10 NWLR (pt 776) 612.
[448] Similarly under the Criminal Code, because they have identical provision.
[449] *Obiokor vs. State* (supra) p. 496
[450] Hymen is the piece of skin partly covering the vagina of a woman who had never had sex. See *Upahar vs. State* (supra) p. 238.
[451] *Iko. vs. State* (supra) p. 226.
[452] *Ogunbayo vs. The State* (supra), p. 122.
[453] *Ibo. vs. Zaria* N. A. (1962) NNCN 30.
[454] See *Sunmonu vs. IGP* (1957) WRNLR 23.

which shows or tends to show that the story of the prosecution that the accused committed the crime is true; not merely that the crime had been committed, but also that it was committed by the accused.[455] The second important ingredient for the offence of rape is lack of consent. This means that the prosecution should prove that the prosecutrix did not expressly or impliedly consent to the sexual intercourse. Proof of consent or lack of it is mostly provided by circumstantial evidence as such medical evidence plays little or no role as such is not within the scope of this research. Therefore, below is a consideration of the role of medical evidence in proof of sexual intercourse, precisely penetration.

4.5.4 The Role of Medical Evidence in Proof of Rape

Medical evidence has an important role to play in proof of sexual intercourse which is considered complete upon the slightest penetration. In practice, it may not be that easy to prove penetration without recourse had to medical advice.[456] Depending on the circumstances of each case, both the prosecutrix and the accused person should be medically examined for medical evidence to play any significant role in the case. Any such failure could establish penetration only without connecting it to the act of the accused person. This is demonstrated in the line of cases considered below. In *Jegede vs. State*[457] the accused was convicted by the trial court for raping a 13 year old girl relying on the prosecution witnesses including a medical doctor who examined the prosecutrix. He testified that on examination, the vagina was very tender with some whitish brown discharge. The cervix and fornice were purplish blue on the mucosa due to traumatic inflammation. The vagina showed a group of bacteria called staphylococcus area and a few yeast cells. He opined that the genital tract of the girl was forcefully penetrated which was associated with attempted strangulation. This evidence

[455] *Sambo vs. State* (1993)6 NWLR (pt. 300) 399.
[456] Chukkol, K. S., (2010) *The Law of Crimes in Nigeria,* op cit. p. 319.
[457] (2001)1 NWLR (pt) 623.

was considered by the trial court as sufficient corroboration of the evidence of the prosecutrix that the appellant held her neck and threatened to school her on the face if she refuses to remove her pants. The doctor, however, admitted that he did not examine the accused.

The appellant appealed to the Court of Appeal where he contended that the medical evidence could not corroborate the evidence of the prosecutrix because the appellant was not examined particularly to find out whether he had the same bacteria and yeast cells found in the private part of the prosecutrix that could have proved that it was the appellant who raped her. Upholding this argument, the Court of Appeal held that the nature of a corroborative evidence to grant conviction on a charge of rape is that it must be cogent, compelling or unequivocal as to show that there was an act of rape. But there was nothing in the evidence in the present case to link the appellant with the offence. For the doctor's evidence to qualify as corroboration of the fact that the appellant penetrated the vagina of the victim, it must point directly and irreversibly to the appellant.[458] The court concluded that all the pieces of evidence adduced by the prosecution including the medical evidence pointed towards attempted rape. It therefore substituted his conviction of rape with attempted rape.

The issue of the negative effect the failure to have the accused person medically examined occasions on the case of the prosecution is more serious when there was emission of sperm or bodily fluid which revealed venereal or other diseases. In *Okoyomon vs. State*,[459] the accused was charged and convicted of unlawful carnal knowledge of a girl. The evidence of the prosecutrix was that the accused fell her down, removed her pants and his own pair of shorts, laid on her and inserted his penis into her vagina; shaking "his waist up and down" on her. The same story was related by an eye-

[458] Ibid, p. 625.
[459] (1973) 2 NSCC 9.

witness. The doctor who examined the prosecutrix testified that she had venereal disease, her hymen was not intact and that she had had a sexual intercourse with a man which was why she had offensive vagina discharge and the tearing of the hymen. Although the doctor also examined the accused but only to find out whether or not he was capable of having sexual intercourse. The trial judge disbelieved the evidence of the doctor but yet found the accused guilty on the other evidence of the prosecution. The appellant appealed to the Supreme Court on the grounds that the failure of the doctor to examine the appellant physically created a gap in the prosecution's case as it was not proved that the appellant had venereal disease which was in fact transmitted to the complainant during the commission of the offence. On proof of unlawful carnal knowledge, the Supreme Court was of the view that the prosecution had not established that the accused did have unlawful carnal knowledge of the prosecutrix in the sense that there had been proof of penetration. The doctor should have examined the accused as to whether he had venereal disease of a kind at least similar to that found in the prosecutrix's vagina. The court added that there should have been medical evidence as to how long the prosecutrix's hymen was torn and by whom.[460] For these reasons, the court held that there was no clear evidence of penetration. Therefore, conviction of attempted rape was substituted for the initial conviction of rape.[461]

The medical evidence should also conclusively and uncontrovertibly corroborate evidence of the prosecutrix that there was penetration by the accused. Thus, *in Upahar vs. State*[462] the appellants were charged with conspiracy to commit rape, rape and abatement of rape. The prosecution case was that the 1st appellant forcibly had sexual intercourse with the prosecutrix while the 2nd appellant held her legs apart. This was confirmed by an eye witness, the prosecutrix's brother. A medical report issued by the

[460] Ibid, p. 13.
[461] Ibid, p. 9
[462] (supra) p. 230.

hospital wherein the prosecutrix was medically examined was tendered and admitted. It stated that on general examination, the patient was conscious, febrile and not pale. The external gentiles was normal, the vulva was tendered with whitish secretion. The hymen was lax, lacerated, but there was no active bleeding. The trial judge found the appellants guilty as charged relying on the prosecutrix's evidence, eye witness account and the medical evidence. On appeal, the 1st appellant contended at the Court of Appeal that in giving evidence of the sexual intercourse, the prosecution must prove complete penetration. He submitted further that the mere act of the accused in laying on top of the complainant against her will and even with his penis in her vulva or the exterior genitals cannot amount to penetration for the purpose of rape. Therefore, the medical evidence tendered had no probative value at all in the case. Making a critical analysis of the medical evidence, which was tendered and admitted as exhibit "C", the Court of Appeal, per Obadina JCA, said that from exhibit "C", the external gentiles was normal, the vulva was tendered with whitish secretions. It does not show what type of secretion it was. The exhibit stated that the hymen was lax (meaning loose, slack, not tense, or rigid or tight) but there was no active bleeding. It did not state what could have caused the laceration or that the hymen was broken. The court concluded that the medical evidence raised more questions than it answered. The court therefore discountenanced the medical evidence and turned to the other evidence from which it could not find any evidence corroborating the act of penetration. It held that the evidence of PW2 (eye witness) and exhibit "B" (the prosecutrix's pant) corroborated the evidence of the prosecutrix to the effect that the 1st appellant did everything that was necessary to unlawfully have carnal knowledge of the prosecutrix, but failed to get complete penetration; that is to say the appellant attempted to commit rape on the prosecutrix.[463]

[463] Ibid, p. 238.

For these reasons, the court set aside the conviction of the 1st appellant for rape and substituted, there for one for attempted rape.

The above cases show that the courts were reluctant to hold that the evidence of eye witness could corroborate that of the prosecutrix in proof of penetration. This is a pointer to the fact that the case in which no such eye witness was present would be more difficult and most difficult where medical evidence was lacking. Therefore, in *Iko vs. State*[464] the only evidence against the appellant was that of the prosecutrix that he locked her in the vehicle (taxi) overpowered her and had carnal knowledge of her by inserting his penis into her vagina. Based on this evidence, the trial judge held that what was required was the evidence that the accused inserted his penis into the victim's vagina and insertion no matter how slight, is sufficient penetration in law.[465] This decision was upheld by the Court of Appeal. On further appeal to the Supreme Court, the conviction of the appellant by the lower courts was set aside. Pointing out the importance of medical evidence in rape particularly in proof of penetration, the court held that in the instant case, there was no medical or other evidence to support the evidence of penetration apart from the evidence of the prosecutrix.[466]

More categorically illustrative of the role of medical evidence in proof of rape is the case of *Ogunbayo vs. The State*.[467] The appellant was arraigned, charged, tried and convicted of the offence of rape by the trial court. The evidence relied upon by the prosecution to prove the offence were that of the prosecutrix and her father which established that the former was pounced upon by the appellant when she was stooling beside the shed toilet in their compound. He slapped, violently dragged and had "forcible sexual knowledge" of her. A medical doctor also testified that the prosecutrix

[464] (supra).
[465] Ibid. p. 245
[466] Per Kalgo JSC, ibid, p. 236
[467] (2007)3 SCNJ

was referred to him complaining of pain in the lower part of her abdomen and he then examined her medically. He found that the lower part of the abdomen showed some tenderness. When he examined her vagina, he found that the hymen was freshly lacerated. There were no sperm cells in it but only a few puss cells which was treated. The fresh laceration observed on the prosecutrix's vagina could have been caused by the insertion of any object generally falling astride a sharp object. The trial judge, holding that the case had been proved against the accused person as the evidence of the prosecutrix was corroborated by that of the medical doctor, stated:

> …the medical evidence which I accept and hold as true if any more is needed beyond the testimony of prosecutrix alone is the medical corroboration of her state and condition..which resulted in her being admitted into hospital for five weeks thereafter…presence of seminal fluid in vagina…and fresh laceration of her hymen prove penetration by the penis of defendant each on its own and eliminate any other cause of damage to the hymen or content of her vagina…[468].

The foregoing discussions reveal that medical evidence is one of the, if not the only, evidence that could serve as corroborative evidence of penetration as required by the courts. What other evidence, apart from medical testimony/certificate, could corroborate that of the prosecutrix that the accused inserted his penis into her vagina than eye witness account?

4.7 SUMMARY

Medical evidence being a specie of expert evidence is relevant in and criminal proceedings. It may be required by law or on ground of relevance. Such cases that may require medical evidence include homicide and rape. In homicide, medical evidence mostly plays a role in proof of cause of the deceased death. It may be unnecessary even though essential in some cases and necessary in others. However, some factors affect

[468] Ibid, p. 134.

the probative value of medical evidence which include contradiction, failure to establish the expertise of the witnesses in the relevant fields and giving evidence in technical language. One of the ingredients of the offence of rape is carnal knowledge/sexual intercourse which is the penetration of the male's organ into the female's organs. The proof of this fact may require medical evidence particularly to corroborate the evidence of the prosecutrix.

CHAPTER FIVE

5.0 CONCLUSION

5.1 SUMMARY

There has been a long- standing interface between science and law which resulted in the emergence of a fully fledged subject called Forensic science. It plays a vital role in the administration of Justice in the sense that such a specie of evidence as Medical evidence greatly help in proof of some facts and offences in legal proceedings. By its very nature, Forensic Science is one of the most credible and compelling evidence a party could have in both criminal and civil cases. Forensic Science is of various kinds prominent among which are Forensic Pathology, Forensic Psychiatry, Forensic Toxicology and Forensic Haematology/Serology. Forensic Pathology deals with such instances when medical knowledge becomes relevant in the determination of causes of death and the nature and extent of injuries/'wounds. Forensic Psychiatry entails the use of medical science in proof of the nature and extent of mental disorder vis- a- vis legal responsibilities. Therefore, it is being used in such criminal cases where the accused raised insanity as a defense to criminal liability or where a party alleges that it affects his/her fitness to stand trial. The issue of Forensic Toxicology comes in where the nature, detection and effect of Poison (including dangerous drugs) becomes relevant. In cases of parentage dispute and such cases where blood is found as a trace, the determination of the nature of blood necessarily becomes important. Therefore, the scientific knowledge of blood, otherwise known as haematology, equally becomes important. Its use for this purpose is a kind of Forensic Science called Forensic Haematology. Furthermore, a legal framework to admit evidence obtained by means of medical Science exists under such Nigerian statutes as the Evidence Act and Child Rights Act.

Generally, evidence is the means through which the existence or non-existence of a fact in issue is established. Before evidence is permitted to be given for this purpose, it must satisfy the twin requirement of being relevant and admissible. Although relevance is the basis of admissibility both may be determined by the provision of the Evidence Act. Therefore, admissible evidence is the one which is relevant\ and not excluded by any rule of law in force. Subject to this condition medical evidence is considered admissible being evidence of an expert under the Evidence Act.

Medical evidence, being an end product of Forensic Medicine, is an important ally in the administration of Justice. It is relevant in criminal cases particularly proof of facts in homicide, insanity, rape and bail applications. In cases of homicide, it is important in proof of the most important ingredient i.e. cause of death so much so that in some cases it could not only be essential but necessary. In proof of rape, the prosecution must show that there was a non- consensual sexual intercourse between the accused and the prosecutrix. Proof of such sexual intercourse entails proof of penetration in respect of which medical evidence is very essential.

5.2 Observations/ Findings

In this research, the following observations/findings have been made, to wit:

1. Medical evidence is a force to be rocked with in the administration criminal justice in the sense that it plays a pivotal role in proof of some facts in criminal proceedings. Depending on the fact to be proved and the circumstances of the case, it may not only be important but also indispensable in homicide cases. Medical evidence is considered indispensable in cases of proof of cause of death where the death occurred long time after the act of the accused person especially where the deceased had been treated at various hospitals for the injuries inflicted on him by the accused person; or that there is the possibility of intervening cause

of death. However, in other circumstances as examined, medical evidence is only relevant and important in the sense that the facts could be proved by other available evidence. Where death occurred instantly on the spot or so soon after the act of the accused person, medical evidence is not necessary or indispensable as the cause of death could be inferred by the court from these circumstances.

2. The issue of the expertise of medical practitioners as witnesses is being taken lightly by the judges. This is because they consider as sufficient qualification the fact that a witness is a qualified medical practitioner without proof of any special skill in the relevant field. In some cases the adverse counsel do not help matters in this direction as they do not cross- examine the medical practitioners to verify such expertise they claim to posses in the field. How could, for instance, one expect a gynaecologist to give a better opinion on the cause of death than a pathologist? To buttress this point, a medical practitioner who only identified himself as a medical practitioner in the department of pathology in a teaching hospital was allowed to testify as to cause of death without any proof of his expertise, the nature of his duties and experience as they relate to cause of death.[469]

3. It has also been found out that there are factors that negatively erode the credibility of medical evidence and consequently its probative value especially in cases of murder and culpable homicide punishable with death. Such factors include giving evidence in unexplained medical terminologies; or full of contradictions and ambiguity; or misrepresentation in proof of their qualification as experts. This is as a result of the fact that some medical doctors have little understanding of the role

[469] See Ogonzee vs. State (supra)

which forensic medicine could play in the administration of justice due to the fact that they are subjected to inadequate teaching and training in forensic medicine.[470]

4. In rape cases, medical evidence is necessary and indispensable in proof of sexual intercourse where there is trace of semen. This is because only medical evidence could establish, with certainty, whether the semen found on the prosecutrix belongs to the accused person or someone else. In cases where there are no traces of semen, sexual intercourse could be proved without medical evidence.

5. Although medical evidence has a very important role to play in rape cases especially proof of penetration, there is usually lack of cogent medical evidence in some cases. The fact that even the testimony of eye-witnesses is not sometimes considered as sufficient evidence of corroboration is a pointer to the importance of medical evidence for this purpose. This lack of medical evidence is not unconnected to the fact that not every victim has the audacity to submit her private part for medical examination in order to obtain evidence. Even if she does, it may be soon after all vital facts have disappeared.

6. Generally, the possibility of bias on the part of medical witnesses may not be ruled out. This is because in most cases, they tend to give evidence in favour of the party that called them either consciously subconsciously. This is not only peculiar to medical witnesses, but applies to all other expert witnesses.

7. The law on the admissibility of expert evidence gives an undue discretion to the courts to unjustifiably reject expert evidence including medical evidence by applying the test of common sense. This relegates expert evidence to the status of ordinary evidence.

[470] The NUC requirement is that Forensic Medicine should be taught for 60 hours in the Nigerian Universities. However, fewer than 5 hours is devoted for this purpose in most medical schools in Nigeria. See Rafindadi, A. H. Op cit. P viii

5.3 Recommendations

1. The judges and parties to a litigation should be able to know exactly when medical evidence could be indispensable, desirable or merely relevant in proof of causes of death and rape so that it is considered in accordance with the circumstance of the case. Consequently, this will go a long way in correcting any impression about its role in this direction.
2. There should be more to the qualification of a doctor as an expert witness than merely being a doctor. He must have gone through further training and certified as expert in the field by a body consisting of medical and legal practitioners. Or, in the alternative, the Nigerian Judges should take more serious the issue of the qualification of medical practitioners as experts. It should be adequately and satisfactorily settled before the commencement of his testimony.
3. The period required for teaching Forensic Medicine in the Nigerian Universities should be enlarged and strictly observed. This should not end there. After graduation, medical practitioners should be subjected to further training and re-training in Forensic Medicine through seminars and conferences.
4. Whenever a trace of semen is found in rape cases, the prosecution should ensure that the accused person is medically examined and the evidence tendered to enable the court determine with certainty, whether the semen belongs to the accused or someone else.

5. An intensive enlightenment campaigns should be mounted by civil society and other non-governmental organizations with a view to educating the public about the imperativeness of victims to go for medical examination immediately after rape incidents and before tampering with any trace evidence. This will always provide credible evidence examination/observation for the prosecution of the offence.
6. The trial judges must insist on the corroboration of medical evidence by an independent and qualified body of experts in the relevant field to be appointed by the court. This should be particularly in cases where the evidence raises doubt on its credibility. This would ensure that the possibility of bias is reduced to the barest minimum.
7. The wide discretion given to courts to admit or reject expert evidence, including medical evidence, should be checked by the law. The test of common sense, particularly, should not be one of the determining factors because it may not always be relevant.

5.4 Conclusion

Medical evidence plays a significant role in proof of some offences and facts as it may be required by a statute or on ground of relevancy. Such evidence are ordinarily accorded a very high probative value so much so that they are considered indispensable in some cases and essential in others. However, such evidence may not be given any weight where its credibility is negatively eroded by such factors as the witness inexperience and/or inadequate knowledge of medical practitioners in forensic medicine. In some other cases, such evidence may not play role because there are some other evidence upon which the court rely. Therefore, this research was able to strike a balance between the impression of some parties that some facts could not be proved

without medical evidence and the other impression that they are not important in such proof. None of these impressions is entirely correct because the circumstances under which some facts could not be proved without such evidence in the cases examined were pointed out and vice versa. Trial judges and prosecutors who used to have such erroneous impression would now be better informed.

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