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Probative Value of Evidence in Forensic Trials in Nigeria*

Introduction

The object of this paper is to appraise both the statutory and judicial criteria and standards which a litigant (whether as Plaintiff or Defendant and whether as Appellant or Respondent) is duty bound to satisfy before a court of competent jurisdiction would hold that such litigant has proved his or her case or has discharged the onus of proof on him or her on matters in which issues have been joined as well as the judicial duty of holding the balance, in an egalitarian way, in the truth-searching process. Therefore, the theme of this paper is, essentially, a juristic enquiry into the most significant scientific analysis in judicial decision under Anglo-Saxon system of administration of justice.

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The word "probative" means a fact or piece of evidence "having the quality or function of proving or demonstrating" the truth of a

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statement.[1] It is therefore, submitted that in the Law of Evidence, the word "probative" is meaningful at two stages of a forensic trial. Thus, a piece of evidence or fact is "probative primarily" in its own right so as to make it tenable and worthy of being recorded by the court as a tenable fact or point, in the first instance, as a means of, or a foundation for conclusively proving that fact or point. Thus, at this first stage, for a piece of evidence to have probative value, it must pass the dual test of "relevancy" and "admissibility". Thus, an irrelevant and valueless fact or piece of evidence will lack probative value *ab initio* to prove anything. Secondly, the same piece of evidence may, subsequently, qualify to be "probative competitively" as the more reliable and acceptable version of two conflicting piece(s) of evidence or sets of facts provided by opposing litigants in a case in the final analysis.

Therefore, the main focus of this paper concerns the second stage of judicial analysis in probative value of evidence in forensic trials, which is decisive and helpful to the version of a litigant's contention.

It has been a seldom experience to find direct references to the phrase "probative value" in judicial decisions as it has featured in *Ojo v. Gharoro*.[2] However, in Nigerian courts, probative value of evidence is both central and inevitable to the reasoning and force of every judicial decision, whether at the trial or appellate level. For ease of reference, the twin statutory and judicial classes of probative value described above would be categorized as "statutorily-prescribed probative value" and "judicially-determined probative value", respectively.

The Nigerian Evidence Act[3] is a very fertile source of statutorily-prescribed probative value and some of its explicit provisions, which have defined the precise compass of probative value in given cases, are many and include *inter alia* the following matters, which have been

1. See, *Oxford English Dictionary* (Compact Edition, Oxford University Press, 1971),.2310.
2. (1998) 8 N.W.L.R. (Pt. 615) 374; see also, *Onwaka v. Ediala and Anor.* (1989) 1 N.W.L.R. (Pt.96) 182 and *Oyadiji .v..Olaniyi* (2004) 49 W.R.N 133. In each of the cases above, probative value has been perceived, only, from the judicially determined perspective, without any mention of the statutorily-prescribed probative value,
3. Cap, E 14, Laws of the Federation of Nigeria, 2004.

arranged in some perceived pre-eminent sequence: (i) *section 137* (burden of proof in civil cases); (ii) *sections 138 and 141* (burden of proof beyond reasonable doubt and burden of proof in criminal cases); (iii) *section 75* (facts admitted need not be proved); (iv) *sections 14 and 73* (what customs admissible and fact judicially noticeable need not be proved); (v) *section 38* (entries in books of account, when relevant); (vi) *section 42 (i) (b)* (certificates of specified Government officers to be sufficient evidence in all criminal cases). The distinctive feature of statutorily-prescribed probative value is the duty it has placed on the court to apply it mechanically or routinely without any choice on the part of the court, whenever it is applicable.

On the other hand, the judicially-determined probative value is a function of the relative analytical talent of the judicial mind. Consequently, in cases in which the parties are satisfied about the judicial analysis of the requisite evidence to prove the contentious issues in a given case and therefore there has been no appeal against the findings of fact by the trial court or in which the appellate court has endorsed the findings of fact by the trial court,[4] the judicially-determined probative value would have occurred, whether or not either the trial court or the appellate court has, in the course of its decision in the given case, adverted to the relevance of the phrase, probative value. However, in the rare cases in which the courts themselves have adverted to the relevance of the phrase "probative value of evidence", the juridical exposition in such cases had been illuminating as in the decided cases of *Oyadiji v. Olaniyi*[5] and *Onwaka v. Ediala*.[6] In the *Oyadiji Case*,[7] the Court of Appeal had declared, eloquently, that:

"Evaluation of evidence relates to assessment of facts available to the trial court in its endeavour to ascertain which of the parties to a case before it has more preponderant evidence to sustain his claim. Evaluation of evidence and the ascription of probative value to such evidence are the preserve and/or primary functions of a trial court. This

4. See, *Olabanji v. Omokewu* (1992) 6 N.W.L.R. (Pt. 250) 671, 688, S.C. "The reasons given by the learned trial judge for accepting the evidence adduced by the appellant cannot be described as unreasonable and perverse. On the contrary, it is the decision of the Court of Appeal that is perverse" *per curiam*
5. (2002) 49 W.R.N. 133.
6. (1989) 1 N.W.L.R. (Pt. 96) 182, 208 - 209.
7. *Supra*, 145.

is so because the trial court had the opportunity of seeing and hearing the witness who appeared in a given case and even watched their demeanour".

Also, in the *Onwaka Case*,[8] the Supreme Court, decisively, explained that:

"This scale though imaginary is still the scale of justice and the scale of truth. Such a scale will automatically repel and expel any and all false evidence. What ought to go into that imaginary scale should therefore be no other than credible evidence. What is therefore necessary in deciding what goes into the imaginary scale is the value, credibility and quality as well as the probative essence of the evidence."

The problem of proof is central to the administration of justice. Proof of facts is a necessary element of judicial reasoning in the process of adjudicating specific matters or cases. In all jurisdictions, judicial system, whether inquisitorial or the adversarial, is concerned with making decisions which must, often, be made in a situation of uncertainty, either as to past or future events. Thus, in any civil or criminal proceeding, parties are obliged to prove their cases with every legally admissible evidence at their disposal, which will tilt the scale of justice in their favour. Forensic "evidence", therefore, concerns "proof" of facts and proof presupposes the existence of a dispute. In other words, where there is no dispute, proof does not arise.[9] Thus, evidence as used in judicial proceedings means in one sense the testimony, whether oral or documentary, which may, legally, be received in order to prove or disprove some facts in dispute.[10]

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8. *Supra*, 208 - 209.
9. For instance, in any civil proceeding, facts which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings require no proof; see, *Veepee Industries Limited v. Cocoa Industries Limited* (2008) 13 N.W.L.R. (Pt. 1105) 486; *Finnih v. Imade* (1992) 1 N.W.L.R. (Pt. 219) 511; *Odogwu v. Ilombu* (2007) 8 N.W.L.R. (Pt. 1037) 488; *Jacobson Engineering Company Limited v. U.B.A. Limited* (1993) 3 N.W.L.R. (Pt. 283) 586, 601; *Ugbomor v. Hadomeh* (1997) 9 N.W.L.R. (Pt. 520) 307, 328; see also, *section 75 of the Evidence Act, supra*.
10. per Ogwuegbu, J.S.C. in *Lawal v. U.B.N. Plc.* (1995) 2 N.W.L.R. (Pt. 378) 407, 422; see also, *sections 76 and 78 of the Evidence Act, supra*.

Evidently, it is not every piece of evidence adduced in court that may be admitted. There are two basic questions to be decided in determining whether a piece of evidence is admissible. The first of these questions is whether the evidence is logically probative and the second is whether the evidence is not excluded by any of the rules of exclusion such as hearsay, similar facts and evidence of character. Evidence which makes it more or less probable that a fact which has to be proved exists will be admitted by the court unless it is excluded under some rules. Such evidence is said to be "relevant" and "logically probative". Conversely, evidence which does not make any fact in issue more or less probable will not be admitted in court. All that is necessary to qualify evidence for admission is that it should increase or diminish the probability of the existence of a fact in issue.[11]

Admissibility and relevance are, however, distinct issues in the law of evidence, the former being a question of law and the latter one of fact. In *Akere v. Adesanya*,[12] it was explicitly stated that relevancy, admissibility and proof are quite different concepts in the Law of Evidence. A piece of evidence, though may be relevant, yet, it may not be admissible as evidence because it is remotely relevant. But once a piece of evidence is admissible and it is admitted, it is relevant and is therefore relevant to prove one or more facts in issue. Also, by *section 8 of the Evidence Act,* what is relevant is admissible unless there are compelling reasons to exclude it or that the evidence is hearsay.[13] In essence, admissibility of evidence is predicated on relevancy of such evidence. It has to be borne in mind, however, that every piece of evidence that is admitted in the course of proceedings is still subject to be tested for credibility, weight or cogency by the trial court. The weight that the court will attach to any evidence will depend on the circumstances of the case as contained or portrayed in the evidence. In effect, there is, in law, a distinction between admissibility of evidence and the question of its probative value or the weight to be attached to it. The fact that evidence, oral or documentary, is admissible does not mean that it has weight. It

11. See, Eggleston, R., *Evidence, Proof and Probability,* (Weidenfeld & Nicolson,. London, 1978), 43 and 68.
12. (1993) 4 N.W.L.R. (Pt. 288) 484.
13. See also, Ndoma-Egba, J.C.A. in *Nigeria Arab Bank Limited v.Shuaibu* (1991) 4 N.W.L.R. (Pt. 186) 450, 465 and *Agbahomovo v. Eduyegbe* (1999) 3 N.W.L.R. (Pt. 594) 170.

may not have any probative value or any weight at all, though admissible.[14] Thus, in *Udeze v. Chidebe*[15] where Plaintiff/Appellant's plan was tendered and admitted in evidence without objection in a claim of ownership over a disputed land, the Supreme Court held that the fact that the Appellant's plan was admitted without objection will not entitle the Judge to ascribe to it a probative value which it did not otherwise possess when the plan itself is bereft of features which can give the boundaries in it the character of certainty.

Also in *Ogun v. Akinyelu*,[16] it was held that it is the acceptable rule of law that a document may be admissible in law but when put through the crucible of attaching weight or probative value, it may be found to be worthless or of no evidential value.

In *Abubakar v. Chuks*,[17] in which the Appellant's counsel had appealed, unsuccessfully, to the Court of Appeal and thereafter the Supreme Court, over the ruling of the trial Judge, on the admissibility of a particular document, on the ground that the admission of the document would offend the provisions of *section 170(1) of the Evidence Act*, the Supreme Court held that the fact that the document has been admitted does not, necessarily, mean that the document has established or made out the evidence contained therein, and must be accepted by the court. It is not automatic. The Supreme Court further held that relevancy and weight are in quite distinct compartments in the law of evidence and that relevancy comes before weight. Relevancy, which propels admissibility, is invoked by the trial Judge immediately the document is tendered. If the document is relevant, the Judge admits it. If the document is irrelevant, it is rejected with little or no ado. Weight, however, comes in after the document has been admitted.

This is at the stage of writing the judgement or ruling, as the case may be. At that stage, the Judge is involved in the evaluation of the evidence viz- a-viz the document admitted. While logic is the

14. See, *Gbafe v. Gbafe* (1996) 6 N.W.L.R. (Pt. 455) 417; *N.E.P.A. v. Adeyemi* (2007) 3 N.W.L.R. (Pt. 1021) 315.
15. (1990) 1 N.W.L.R. (Pt.125) 141.
16. (1999) 10 N.W.L.R. (Pt. 624) 671, 693; see also, *Akaniwon v. Nsirim* (1997) 9 N.W.L.R. (Pt. 520) 255, 290.
17. (2007) 18 N.W.L.R. (Pt. 1066) 386, 403 - 4., per Tobi, J.S.C.

determinant of admissibility and relevancy, weight is a matter of law with some taint of facts. The weight the court will attach to the document will depend on the circumstances of the case as portrayed in the evidence.

By and large, it is the duty of contending parties to a case, whether civil or criminal, to discharge the onus placed on them and adduce credible evidence to support their cases, in order to secure judicial verdict in their favour. Some of the relevant statutory duties imposed on litigants should be our next focus and to this we now turn.

Relevant Statutory Duties on Litigants

The law has imposed certain duties on litigants which may be found in *the Constitution of the Federal Republic of Nigeria, 1999*,[18] *the Evidence Act*,[19] any other Federal Act[20] and the State High Court Laws and High Court Rules. The first of such duties is the burden of proof placed on a litigant and the requisite standard thereof. The issue of burden of proof arises in any proceeding, whether civil or criminal, where issues have been joined between the parties. The burden of proof is, merely, an onus to prove an issue and there cannot be any burden of proof where there are no issues in dispute between the parties. *Section 135 (1) and (2) of the Evidence Act* provides that:

> "(i) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
> (ii) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Thus, in a civil proceeding for instance, it is always the duty of the

18. Cap. C. 23, Laws of the Federation of Nigeria, 2004; see, for instance, *section 36(5)* thereof.
19. *Supra*.
20. See, for instance, *Customs and Excise Management Act, 1959*, Cap. C 45, Laws of the Federation of Nigeria, 2004 and *section 27 of the Criminal Code*, Cap. C 38, Laws of the Federation of Nigeria, 2004.

party who desires a court of law to give judgement in his favour to prove that his claims are genuine. The onus of proof, thus, lies on him.[21]

The phrase "burden or onus of proof" is said to have three meanings.[22] The first is the persuasive burden, which is the burden of proof as a matter of law and pleading; the burden of establishing a case, whether by preponderance of evidence or beyond reasonable doubt in civil and criminal cases, respectively. This is also referred to as the legal or the general burden - the burden of proof of the fact in issue. The party on whom the legal burden of proof lies has the right to begin and adduce evidence.

The second is the evidential burden, that is, the burden of proof in the sense of adducing evidence as to particular facts. This burden of proof is used in connection with the proof of particular facts which are distinct from the facts in issue (that is, the persuasive burden). Thus, the evidential burden is the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation.[23]

The third meaning of burden of proof is the burden of establishing the admissibility of evidence.[24]

In Nigeria, where the Judge is both Judge and Jury, evidential burden is that provisionary burden which is incumbent on a party to introduce, to produce or elicit evidence on any material element of the case. The

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21. See *U.B.A. Limited v. Abimbolu and Company* (1995) 9 N.W.L.R. (Pt. 419) 371. The general rule in civil cases is that the burden of proving that a fact exists rests on the person who asserts it. It is only in exceptional cases that a party is required to disprove the existence of a fact in support of which no evidence has been given. An example is the case of an action for malicious prosecution.
22. *Kala v. Potiskum* (1998) 3 N.W.L.R. (Pt. 540) 1.
23. See, Cross and Tapper, *Evidence* (Butterworths, London, 1995) 122.
24. See, Onalaja J.C.A. in *Elendu v.Ekwoaba* (1995) 3 N.W.L.R. (Pt. 386) 704, 745 - 746. The term "burden of proof" is, however, frequently used in two senses only - the persuasive burden of proof sense and the evidential burden of proof sense; see, Aguda, A., *Law and Practice* Relating to Evidence in Nigeria. (MIJ Professional Pubs. Ltd., Lagos, 1998) 322.

burden is usually imposed by law. On that burden, no question of proof, in the sense of evidence, which has been assessed and believed, arises. It is discharged by introducing such evidence as is required of the party. When it is incumbent on the Plaintiff, then, unless and until he has discharged it, no question of evaluation of evidence arises. Evidential burden is placed by law on one of the parties in respect of every issue. Both evidential and persuasive burdens of proof may, however, be on the same party. In civil proceedings, the persuasive or ultimate burden is, usually, on the Plaintiff in that he is the party who will fail in the case if no evidence is led at all. A necessary corollary to this is that when the onus of proof is on the Plaintiff, as it often is, and he fails to make out a *prima facie* case, his case fails without any reference to the Defendant's case.[25]

In civil cases, the ultimate burden of establishing a case is as disclosed in the pleadings. Normally, this burden is placed on the Plaintiff to prove his case on the balance of probability. In doing this, he cannot rely on the Defendant's case or assume he is entitled to automatic judgement because the other party had not adduced evidence before the trial court.

By *section 137 (1) of the Evidence Act*, the burden of proving the existence or non-existence of a fact lies on the party against whom the judgement of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. The person who would lose the case if on the completion of the pleadings and no more evidence is led has the general burden of proof.[26] Therefore, the burden is on the Plaintiff to introduce evidence, that is, *prima facie* evidence and he fails if he does not adduce such, unless he is assisted by a "presumption",[27] that is, a rule which says that in certain circumstances, certain facts are presumed to exist.

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25. per Nnaemeka-Agu, J.S.C. in *Duru v. Nwosu* (1989) 4 N.W.L.R. (Pt.113) 24, 52.
26. See, *Akaniwon v. Nsirim* (1997) 9 N.W.L.R. (Pt. 520) 255; *Okubule v. Oyagbola* (1990) 4 N.W.L.R. (Pt.147) 723; *Ike v. Ugboaja* (1993) 6 N.W.L.R. (Pt. 301) 539; *Gbafe v. Gbafe* (1996) 6 N.W.L.R. (Pt. 455) 417; *Nsefik v. Muna* (2007) 10 N.W.L.R. (Pt.1043) 502; *Veepee Industries Limited v. Cocoa Industries Limited* (2008) 13 N.W.L.R. (Pt. 1105) 486; *Nsiegbe v. Mgbemena* (2007) 10 N.W.L.R. (Pt. 1042) 364.
27. See, *sections 114 - 131 and 144(1) of the Evidence Act, supra.*

It is important to note, however, that though the party on whom the legal or the ultimate burden is placed is to be determined from the pleadings filed by the respective parties to the case, it is a settled principle of law that pleading is not a substitute for evidence. Pleadings *simpliciter* are facts on which a party relies for his case and not the evidence. It has been described as the body and soul of any case in a skeleton form and which are built and solidified by the evidence in support thereof.[28] Therefore, the pleading of a litigant, without evidence to support it or evidence, without pleading, goes to no issue.[29] As such, where no evidence is led in support of pleaded facts, the facts are deemed abandoned.[30] Conversely, any evidence led on facts not pleaded goes to no issue and would be discountenanced.[31] In *N.I.P.C. Limited v. Thompson Organisation*,[32] the Supreme Court observed that:

"A plaintiff must call evidence to support his pleadings, and evidence which is in fact adduced which is contrary to his pleadings should never be admitted. It makes no difference...that the other side did not object to the evidence or that the Judge did not reject it. It is, of course, the duty of counsel to object to inadmissible evidence and the duty of the trial court anyway to refuse to admit inadmissible evidence, but if notwithstanding this, evidence is still through an oversight or otherwise admitted, then it is the duty of the court when it comes to give judgement to treat the inadmissible evidence as if it had never been admitted."

However, in *Onwuka and Another v. Omogui,*[33] the Supreme Court stated that:

"The addition of evidence of what is not pleaded to evidence about facts pleaded does not destroy the evidential value of evidence in support of facts pleaded. All the trial court would do is either not to

28. See, *Susainah (Trawling Vessel) v. Abogun* (2007) 1 N.W.L.R. (Pt. 1016) 456.
29. *Juli v. Muhammed* (1999) 4 N.W.L.R. (Pt. 600) 182; *Dalek (Nigeria) Limited v. O.M.P.A.D.E.C.*(2007) 7 N.W.L.R. (Pt. 1033) 402; *Ajikanlev v. Yusuf* (2008) 2 N.W.L.R. (Pt. 1071) 301.
30. See, *A.C..B Plc. v. Haston (Nigeria).Limited* (1997) 8 N.W.L.R. (Pt. 515) 110.
31. See, *Onyekwulunne v. Ndulue* (1997) 7 N.W.L.R. (Pt. 512) 250.
32. (1969) 1 N.M.L.R. 99.
33. (1992) 3 N.W.L.R. (Pt. 230) 393, 414..

receive such evidence because they are not pleaded or if it is erroneously received, to expunge it from record; but certainly the remaining relevant evidence about the facts pleaded can be used to support the case of the party who has pleaded such facts but has provided evidence in excess of facts pleaded."

Furthermore, the burden cast on the Respondent who claimed declaratory and injunctive orders as provided for in *sections 155, 136 and 137 of the Evidence Act,* has been judicially interpreted to mean that the Plaintiff succeeds on the strength of his own case and not on the weakness of the Defendant's case.[34] In other words, a Plaintiff must float or sink on the strength or weakness of his own case. The only exception to this rule is that where the facts in a Defendant's case support a Plaintiff's case, the Plaintiff can use those facts to establish his own case.

However, although the legal burden of proof remains throughout the trial, where it was at the beginning, the evidential burden may shift from one party to the other as the trial progresses.

This means that as a case proceeds, one party or the other will produce evidence which, if it remained unchallenged, would entitle the party producing it to a decision in his favour. In this sense, he can be said to have shifted the burden of proof to the other party.[35] Thus, *section 137 (2) of the Evidence Act*, which provides that "if such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgement would be given if no more evidence were adduced; and so on successively until all the issues in the pleadings have been dealt with", deals with the onus which goes from one side to the other in a civil matter until the end of the proceedings when the case must be decided on the balance of probabilities. This meaning flows from the use of such words at the beginning of the sub-section as "evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established" and at the end, "and so on successively until all the issues in the pleadings have been dealt with."[36]

34. *Gbadamosi v. Dairo* (2001) 11 W.R.N. 129; *Ajikanle v. Yusuf, supra; Egom v. Eno* (2008) 12 N.W.L.R. (Pt. 1098) 320; *Ajagungbade III and Others v. Laniyi and Others* (1999) 13 N.W.L.R. (Pt. 633) 92; *Elendu v. Ekwoaba* (1995) 3 N.W.L.R. (Pt. 386) 704.
35. See, Eggleston, R., *supra*, 91; see also, *N.M.S. Limited v. Afolabi* (1978) 2 S.C. 79.
36. per Nnamani, J.S.C. in *Duru v. Nwosu* (1989) 4 N.W.L.R. (Pt.. 113) 24, 41 – 42; see also, *Adekunle v. Aremu* (1998) 1 N.W.L.R. (Pt. 533) 203.

Thus, in civil cases, the onus of proving a particular fact is fixed by the pleadings and could shift depending on the circumstances of the case. It does not remain static but shifts from side to side. In this sense, the onus of proof rests upon the party who would fail if no evidence at all or no more evidence as the case may be, were given on either side. Such onus of proof rests, before evidence is gone into, upon the party asserting the affirmative of the issue and it rests after evidence is given upon the party against whom the court at the time the question arises would give judgement if no further evidence were adduced.[37] In *Susainah (Trawling Vessel) v. Abogun,*[38] wherein the Plaintiff/Respondent claimed special and general damages from the Defendant/Appellant for damage to his fishing boat, the court held that in civil cases, the burden of proof is not static, it does shift and that the Respondent had, clearly, pleaded and proved, that he used lantern and torchlight to warn the Appellants that they were at sea. The onus at that stage had shifted to the Appellants to, specifically, deny the claim of the Respondent. Their failure to adduce evidence in rebuttal was held to amount to an abandonment of their pleading on the issue.

As regards the *standard* of proof required in civil proceedings, it has been held in a plethora of cases including *Mogaji and Others v. Odofin and Others,*[39] *Atikpekpe v. Joe,*[40] *Usman v. Kaduna State House of Assembly,*[41] *Agienoji v. C.O.P., Edo State*[42] that the standard of proof in civil cases is on the balance of probability or the preponderance of evidence. In effect, where the party gives evidence as to the claim before the court, judgement will be given to the party that the evidence tilts in favour of. Thus, where the situation presented is equipoise, so that the court would pick and choose, then the matter has not been proved.

In *Abdulahi v. Raji,*[43] the Plaintiff sued the Defendants claiming

37. per Edozie, J.C.A. in *B.O.N. Limited v. Saleh* (1999) 9 N.W.L.R. (Pt. 618) 331, 345; see also, *Elemo v. Omolade* (1968) N.M.L.R. 359; *Insurance Brokers of Nigeria v. Atlantic Textiles Manufacturing Company Limited* (1996) 8 N.W.L.R. (Pt. 466) 316, 318.
38. *Supra*; see also, *University of Benin v. Kraus Thompson Organization Limited* (2007) 14 N.W.L.R. (Pt. 1055) 441; *S.P.D.C.. Limited v. Emehuru* (2007) 5 N.W.L.R. (Pt. 1027) 347.
39. (1978) 4 S.C. 91, 94; see also, *Onowhosa v. Odiuzou* (1999) IN.W.L.R. (Pt.586) 173.
40. (1999) 6 N.W.L.R. (Pt. 607) 428.
41. (2007) 11 N.W.L.R. (Pt. 1044) 148.
42. (2007) 4 N.W.L.R. (Pt. 1023) 23.
43. (1998) 1 N.W.L.R. (Pt. 534) 481.

damages for unlawful imprisonment and malicious prosecution. Evidence was led by the Plaintiff, while none of the Defendants called evidence. At the conclusion of hearing, judgement was given in favour of the Plaintiff. Dissatisfied with the judgement of the trial court, the Defendants appealed to the Court of Appeal and contended *inter alia* that the Plaintiff did not establish the necessary elements of an action for malicious prosecution. The Court of Appeal allowed the appeal and held that the onus is on the Plaintiff to prove his case by preponderance of credible evidence and he can only use the evidence adduced by the Defendant in so far as it supports the Plaintiff's case. Therefore, where a Plaintiff fails to prove his case by a preponderance of evidence or leads no evidence in proof of his pleadings, whether or not the defence is weak or strong, the trial court should dismiss the case.

Oral evidence that remains unchallenged through cross-examination or uncontroverted by other evidence is admissible, once it is credible and can be acted upon by the trial court. Thus, where there is no counter-evidence, the oral evidence before the trial court goes one way with no other set of facts or evidence weighing against it. This is because there is nothing in such a situation to put on the other side of that imaginary scale as against the evidence that is unchallenged. The onus of proof in this instance is naturally, discharged, on minimum proof. Thus, in *KLM Royal Dutch Airlines v. Ayanlaja,*[44] the Plaintiffs/Respondents filed an action claiming special damages upon the fact that sometime in 1986, they bought first class tickets from the Appellant for a return journey from Lagos to New York via Amsterdam and London for a total cost of N6, 095.00 (Six Thousand and Ninety-Five Naira). The Respondents' journey was confirmed except the return journey from Amsterdam to Lagos, where they were waitlisted. The first Respondent travelled with her two young daughters. On their return journey, the Respondents could not be carried from Amsterdam to Lagos because they had no confirmation. They were, thus, stranded in Amsterdam and London where they incurred expenses in respect of hotel accommodation and feeding. They also had to purchase clothes because their luggage had been forwarded to Lagos by the Appellant.

44. (1998) 13 N.W.L.R. (Pt. 582) 468; see also, *Isitor v. Fakarode* (20008) 1 N.W.L.R. (Pt. 1069) 602; *Afribank (Nigeria) Limited v. Moslad Enterprises Limited* (2008) 12 N.W.L.R. (Pt. 1098) 223; *Ogunyede v. Oshunkaye* (2007) 15 N.W.L.R. (Pt. 1057) 218; and *Nzeribe v. Dave Engineering Company Limited* (1994) 8 N.W.L.R. (Pt. 361) 124.

The Respondents, in an action against the Appellant, claimed special damages in respect of the costs of the unused return ticket, hotel accommodation and feeding. They also claimed the money spent in purchasing clothes as well as general damages. The Respondents pleaded this special damage in their Statement of Claim and the first Respondent testified in this regard.

The Appellants, in their Statement of Defence, did not raise any issue in respect of this aspect of the Respondents' claim. In fact, they did not cross-examine the first Respondent in order to show that they did not spend the nights in the hotels at London and Amsterdam, or incurred any expenses in respect of transportation and feeding, to show that they did not suffer these damages and that they had exaggerated them. Neither did the Appellant call any evidence to contradict them. The trial court granted the claims of the Respondents except the claim made for the money spent on clothes and awarded ₦10, 000 as general damages. The Appellant appealed against the awards made by the trial court. The Respondents also cross-appealed against the trial court's refusal to grant their claim for special damages in respect of the cloths purchased in London and also against the award of ₦10,000 Naira (Ten Thousand Naira) as general damages on the ground that it was too low.

The Court of Appeal allowed both the appeal and cross-appeal in part and held, *inter alia,* that oral evidence that remains unchallenged or uncontroverted is admissible once it is credible and the onus of proof is naturally discharged on minimal of proof. Also, in *International Bank for West Africa Limited v. Oguma Associated Coies (Nigeria) Limited*,[45] it was held that where the defence offers no evidence, either through the Plaintiff, or his witnesses, and fails to call defence witnesses in this regard, the evidence in support of Plaintiff's case stands unchallenged and uncontradicted. The trial court is obliged to enter judgement in favour of the plaintiff.

Furthermore, in *Ahmadu Bello University, Zaria and Another v. Dr. (Mrs.) Nwakego Molokwu,*[46] it was held that where a Defendant fails to give evidence either in support of his Statement of Defence or in

45. (1988) 1 N.W.L.R. (Pt. 73) 658; see also, *Artra Industries Nigeria Limited v. N.B.C.I.* (1998) 4 N.W.L.R. (Pt.546) 357 and *Nwbuoku v. Ottih* (1961) All N.L.R. 507, 508.
46. (2004) 2 W.R.N. 166.

challenge of the evidence of the Plaintiff, he must be taken to have accepted the facts averred by the Plaintiff notwithstanding their general traverse contained in the Statement of Defence.[47] However, where the evidence adduced by the Plaintiff is self-defeating and unacceptable, the Defendant has no obligation to cross-examine on worthless evidence and the court is not obliged to act on it.[48]

Also, if the story of the Claimant, that is, the Plaintiff, is as good as that of the Defendant, or if there is an equilibrium between them or they are on equal knell, then *a fortiori,* the Plaintiff must fail and his case be dismissed.. This is because the evidence on that imaginary scale of justice (carrying a pair of scales and not a cornucopia) has not and does not preponderate in his (Plaintiff's) favour.[49]

In criminal proceedings, it is a cardinal principle of the adversarial system of justice that in all cases, the burden is, squarely, on the Prosecution to prove the facts they assert, for he who asserts must prove. The standard of proof required, unlike in civil cases, is proof beyond reasonable doubt.[50] In other words, the burden of proving that any person is guilty of a crime or wrongful act, subject to certain exceptions, is on the Prosecution.[51] This fundamental principle has a number of constituent components, such as that there must be some evidentiary basis for the conviction; that the state must prove its charges beyond reasonable doubts and that the accused must be entitled to confront and cross-examine the witnesses against him.[52] The requirement that the Prosecution must prove the guilt of the accused beyond reasonable doubt is further reinforced by the presumption of innocence in favour of an accused person contained in *the Constitution of the Federal Republic of Nigeria, 1999 which provides in its section 36(5)* that:

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47. See also, *Imana v. Robinson* (1979) 3 - 4 S.C. 1, 8; *Odunsi v. Bamgbala* (1995) 1 N.W.L.R. (Pt. 374) 641; *Omoregbe v. Lawani* (1980) 3 - 4 S.C. 108, 117.
48. See, *Jalingo v. Nyame* (1992) 3 N.W.L.R. (Pt.231) 538, 545.
49. per Nsofor J.C.A. in *U.B..N. Limited v. Osezuah* (1997) 2 N.W.L.R. (Pt. 485) 28, 42.
50. See, Eggleston, R., *supra*, .89.
51. See, *Chukwuma v. F.R.N.* (2008) 7 N.W.L.R. (Pt. 1087) 553 and *section 138(2) of the Evidence Act, supra*.
52. See, Gora, J. M., *Due Process of Law* (National Textbook Coy. Skokie, Illinois in conjunction with the American Civil Liberties Union, New York), 122; see also, Williams, G, *The Proof of Guilt* (Stevens & Sons Ltd., London, 1955), 128 and *section 36 (5) (d) of the Constitution of Federal Republic of Nigeria, 1999, supra*..

"Every persons who is charged with a criminal offence will be presumed innocent until he is proved guilt."

Thus, the burden is not upon the accused person to prove his innocence or that no crime was committed. The provisions of *section 36 (5)* of the *1999 Constitution* is a codification of the House of Lord's decision in *Woolmington v. D.P.P.*[53] in which the trial Judge in a murder case had told the Jury that if the victim was proved to have died as a result of the accused's act, the burden was on the accused to prove that there were circumstances which reduced the crime to manslaughter, or which showed that it was no crime at all, but pure accident. On appeal to the House of Lords, this direction to the jury was held to be erroneous. The position of the law was, eloquently, stated by *the Lord Chancellor (Lord Sankey)* that:[54]

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.."

Also, *section 138 of the Evidence Act* provides that:

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

"(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 141 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."

53. (1935) A.C. 462.
54. *Supra,* 481 - 482.

In *Uma Agwu v. State,*[55] the Appellant was charged with murder. The deceased's mother in her two statements made to the Police said the Appellant stabbed the deceased with a penknife in the neck. However, at the trial, the Prosecution did not prove beyond reasonable doubt that what caused the fatal injury suffered by the deceased was a penknife recovered from the Appellant. The trial court convicted the Appellant as charged and sentenced him to death. The Appellant's appeal to the Court of Appeal was allowed and the Court held that in all criminal trials the onus is on the Prosecution to prove the guilt of the accused beyond reasonable doubt. That burden never shifts. This is so because an accused person is presumed innocent until his guilt is proved and care must be taken that no innocent person is punished, no matter how heinous the charge.[56]

The onus of proof imposed on the Prosecution is not discharged until it has established all the elements of the offence against the accused. In *Onyeachimba v. State,*[57] the Court of Appeal held that in discharging the duty of proving the guilt of the accused beyond reasonable doubt, the Prosecution must prove all the essential ingredients of the offence as contained in the charge. The Court added that where there are material contradictions on vital issues in the evidence called by the Prosecution, which create reasonable doubt, the learned trial judge has a duty to resolve the doubt in favour of the accused because the burden of proof in criminal cases never shifts. The accused is under no obligation to prove his innocence.[58]

The general rule that the Prosecution has the general burden of proof in criminal trials is, however, subject to certain exceptions contained in *the Constitution* and *the Evidence Act*. For instance, *the proviso to section 36(5) of the 1999 Constitution* states that:

"Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts."

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55. (1998) 4 N.W.L.R. (Pt. 544) 90.
56. See also, *Asake v. Nigerian Army Council* (2007) 1 N.W.L.R. (Pt.. 1015) 408; *Kalu v. State* (1988) 4 N.W.L.R. (Pt. 90) 503, 513; *Babuga v. State* (1996) 7 N.W.L.R. (Pt.. 460) 279; *Obri v. State* (1997) 7 N.W.L.R. (Pt. 513) 352..
57. (1998) 8 N.W.L.R. (Pt. 563) 587.
58. See also, *Baruwa v. State* (1996) 7 N.W.L.R. (Pt. 460) 302; *Onafowa v. State* (1987) 3 N.W.L.R. (Pt. 61) 538.

Thus, some statutes may provide that when the Prosecution has proved certain facts, the accused shall be deemed to have committed the alleged offence unless the contrary is proved.[59] For instance, in *Ebiri v. Board of Customs and Excise,*[60] the court held that the combined effect of all the provisions of *the Customs and Excise Management Act, 1959 ("CEMA")* is that where a customs officer finds a person in any part of Nigeria in possession of dutiable imported goods and such a person is charged under *section 145 CEMA*, the onus of proving either that the duties had been paid or the absence of intent to defraud the Government of any duty is on the accused person.

Moreover, *section 138 (3) of the Evidence Act* provides that:

"If the prosecution proves the commission of a crime beyond reasonable doubt, the burden of proving reasonable doubt is shifted on to the accused".

It is implicit in this section that there are instances in which the "evidential burden" as distinct from "the legal burden" of proof may be imposed on the accused person. Such evidential burden imposes that obligation on the accused person to bring such evidence on which he relies for his defence.

Thus, in cases where apparently damning circumstances are established against the accused, it is incumbent on him to give a satisfactory explanation which would create a reasonable doubt in the Prosecution's case. In *Lateef Adeniji v. State,*[61] the Appellant was convicted and sentenced to death by the trial court upon a charge of murder. His appeal to the Court of Appeal was dismissed whereupon he further appealed to the Supreme Court. The Supreme Court dismissed his appeal and held, *inter alia,* that the Appellant's failure to testify or call any witness to rebut his guilt based on the over-whelming circumstantial evidence before the court against him, which he was perfectly entitled to

59. See, for instance, *section 417 (d) of the Criminal Code* Cap. C.38, Laws of the Federation of Nigeria, 2004; *sections 145 (a) and (b), 166(2) (b) and 168 of Customs and Excise Management Act*, Cap. C.45, Laws of the Federation of Nigeria, 2004.
60. (1967) N.M.L.R. 35;.see also, *Chairman Board of Customs and Excise v. Ayo Baye* (1960) W.N.L.R. 178.
61. (2001) 13 N.W.L.R. (Pt 730) 375; *Magaji v. The Nigerian Army* (2008) 8 N.W.L.R. (Pt. 1089) 338; *Ubani v. State* (2003) 18 N.W.L.R. (Pt. 851) 224; and *R v. Nash* (1911) 6 Cri. App. Rep. 225.

rebut, on a preponderance of probability, was fatal to his case and that both courts below were right in holding that the circumstantial evidence relied on by the court to convict the Appellant for the murder of the deceased was, absolutely, so cogent and compelling and led to no other conclusion than that it was the Appellant who killed the deceased. Also, if the defence asserts an impossibility or a non-existent situation, he cannot expect the Prosecution to prove the impossibility or to bring into existence what does not exist,.[62] *section 141(1) and (3) of the Evidence Act* further qualifies the general rule when it provides that;

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

(2) ...

(3) Nothing in sections 138, 142 of this Act or in sub-section (1) or (2) of this section ...

(c) affect the burden placed on an accused person to prove a defence of intoxication or insanity."

Section 142 of the Act further provides that:

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

By the combined effect of the relevant sections of *the Evidence Act* quoted above, it is evident that, in certain exceptional circumstances, the burden of proving the existence of a fact or some defences may be placed on the accused person. Where, for instance, a fact is within the exclusive knowledge of the accused and such fact will aid the accused in his defence, the burden of establishing that fact is upon the accused.[63] Also, where, for instance, the accused raised the defence of insanity, the onus is upon him to prove that he was, actually, insane at the time of the

62. per Oputa, J.S.C. in *Bakare v. State* (1987) 1 N.W.L.R. (Pt. 52) 579, 581.

63. See, *Chukwuma v. F.R.N., supra; Christopher Otti v. I.G.P.* (1956) N.R.N.L.R. 1; *Rahman v. C.O.P. (1973) N.M.L.R. 87.* However, this rule will only apply so long as the facts remain within the exclusive knowledge of the accused. Where it is a fact within the common knowledge of the accused, the Prosecution has the onus of proof. See, *Joseph v. L.G.P.* (1957) N.R.N.L.R. 70.

commission of the offence. The rationale for this is the presumption of sanity contained in *section 27 of the Criminal Code* which provides that:

"Every person is presumed to be of sound mind and to have been of sound mind at any time which comes in question until the contrary is proved".

In *Ogbu v. State*,[64] the Appellant was charged with the murder of his father but he raised the defence of insanity. He was, however, convicted of the offence and sentenced accordingly. The Appellant's appeal to the Court of Appeal was dismissed and he further appealed to the Supreme Court. The Supreme Court dismissed his appeal and held that the Prosecution has no duty to prove that the accused was sane or insane. The onus is on the defence to establish the defence or plea and the burden of proof of insanity is satisfied if the facts proved by the defence is such that makes it "most probable" that the accused was, at the relevant time, insane within the meaning of *section 28 of the Criminal Code.* The court further held that there was no evidence in this case of insanity either from the Prosecution or from the defence. The strange behaviour of the Appellant was not traced to his family history or his conduct before the commission of the offence or even afterwards when he was in custody. Thus, there was no evidence, previous or contemporaneous, suggestive of the aberrant mental state of the Appellant.

It is important to note, however, that, the court will not ascribe any probative value to the accused's own evidence of his mental state. This is because evidence by the accused of his own mental state is, usually, suspect and not reliable for establishing his insanity. Also, if the *ipse dixit* of an accused person as to the state of his mind in proof of mental infirmity is accepted, it would be easy for vicious but imaginative murderers to establish a defence of insanity[65]

Another type of defence which the accused will be required to establish if raised is the defence of *alibi*. "*Alibi*" means "elsewhere" and since it is a matter particularly within the knowledge of the accused person, if he was at some particular place other than that which the

64. (1992) 8 N.W.L.R. (Pt. 259) 255; see also, *Uluebeka v. State* (1998) 12 N.W.L.R. (Pt. 579) 567.
65. per Omo, J.S.C. in *Ogbu v. State, supra,* 277.

Prosecution says he was at the material time, the evidential burden of proving that fact rests on him. The accused person is required to support and substantiate the defence with unassailable credible evidence that is not riddled with holes.[66] Also, the accused person has a duty of bringing the evidence of *alibi* at the earliest opportunity to the Police in order to give the Police the chance to investigate the truth.[67] In *Yanor v. State,*[68] the Supreme Court held that while the onus is on the Prosecution to prove the charge against the accused person, the latter, however, has the duty of bringing the evidence on which he relies for his defence of *alibi*, and from the provisions of *section 138 (3) of the Evidence Act,* the accused raising a defence of *alibi* only need to establish a reasonable doubt.

Nevertheless, despite the fact that evidential burden has been imposed on the accused in the above-mentioned instances, the law that the Prosecution must prove the guilt of the accused does not shift. In effect, where the accused person sets up *alibi* in answer to a charge for instance, he does not thereby assume responsibility of proving the answer. It is still the duty of the Prosecution to investigate it, properly, and prove beyond reasonable doubt that the accused person was not only at the scene of the crime but that he committed the offence as failure to do so could raise reasonable doubt in the mind of the court and will lead to quashing the conviction.[69]

The duty is therefore on the prosecution to prove the whole crime by direct or circumstantial evidence including the negative of defences which are in issue such as accident, *alibi*, or self-defence. In *Braide v. State,*[70] the Appellant and one other person were charged with the offences of conspiracy to murder and murder. The case for the Prosecution was that the accused person conspired together and murdered the deceased by stabbing him to death. The accused persons did not deny fighting with the deceased but explained that the deceased ran into the knife held by the Appellant, when he, the deceased, wanted to stab the Appellant with broken bottles. Thus, from their statements to

66. See, *Ochemaje v. State* (2008) 15 N.W.L.R. (Pt. 1109) 57.
67. See, *Mangai v. State* (1993) 3 N.W.L.R. (Pt. 279) 105.
68. (1965) N.M.L.R. 237.
69. *State v Azeez* (2008) 14 N.W.L.R. (Pt. 1108) 439; *Maiaki v. State* (2008) 15 N.W.L.R. (Pt. 1109) 173.
70. (1997) 5 N.W.L.R. (Pt. 504) 141.

the Police and evidence in court, the defence of self-defence and accident were raised by the accused.

At the conclusion of trial, the Appellant was found not guilty on the conspiracy charge but guilty of murder and sentenced to death. The co-accused was discharged and acquitted on both counts of conspiracy and murder. Appellant's appeal to the Court of Appeal was dismissed whereupon he further appealed to the Supreme Court. The Supreme Court allowed the appeal and discharged and acquitted the Appellant. The Supreme Court held that a defence of self-defence pre-supposes that the accused person, unlawfully, assaulted the other person in the course of preserving himself from death or grievous harm. The grounds for the belief of the accused person may exist even though they are founded on genuine mistake of fact. The evidence before the trial court established that the Appellant believed, on reasonable grounds, that he could not preserve himself from death or grievous bodily harm otherwise than by using force as he did. The Supreme Court then further held that where an accused person raises the defence of accident, the onus is not on him to prove such defence, but on the Prosecution to disprove it

The Supreme Court has also stated in *Ozaki v. State*,[71] that it is settled law that there is no burden of proof imposed on an accused to establish an issue affording justification or excuse at common law such as accident, self-defence or *alibi* as an answer to the charge.

The standard of proof required of the Prosecution which would secure a conviction of the accused person is proof "beyond reasonable doubt", by virtue of *section 138 (1) of the Evidence Act.*[72] The expression "beyond reasonable doubt", which is of common law origin, has been judicially interpreted in a number of cases such as *Miller v. Minister of Pensions*,[73] where it is stated that "that degree is well settled. It need not reach certainty but it will carry a high degree of probability..." Also, the court in *R v. Summers*[74] stated that a Jury is satisfied beyond reasonable doubt when the evidence has produced in their minds reasonable but not

71. (1990) 1 N.W.L.R. (Pt. 124) 92, 108; see also, *Maiyaki v. State* (2008) 15 N.W.L.R. (Pt. 1109) 173; *Ukwunneyi v. State* (1989) 4 N.W.L.R. (Pt. 114) 131, 144 - 145.
72. See, *Uma Agwu v. The State, supra; Onyeachimba v. The State, supra*..
73. (1947) 2 All E.R. 372, 373 - 374, per Denning, L.J. (as he then was).
74. (1952) 1 All E.R. 1059

absolute certainty, a state of mind sometimes described as moral certainty. In *Ezike v. Ezeugwu,*[75] the court stated that "proof beyond *reasonable* doubt" does not mean proof beyond *all* doubt. But reasonable doubt will automatically exclude unreasonable doubt, fanciful doubt, imaginary doubt and speculative doubt not borne out of facts and surrounding circumstances of the case.

Also, in *Abadom v. State,*[76] the Court of Appeal stated that the degree of proof that would amount to reasonable doubt need not reach scientific certainty, but it will carry a high degree of probability. Indeed, in *Oche v. State,*[77] it was stated that "proof beyond reasonable doubt" does not mean proof beyond all shadow of doubt. And that if the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course, it is possible but not in the least probable", then the case is said to be proved beyond reasonable doubt. A reasonable doubt may be created in the mind of the trial court either by the evidence given by the defence or by the prosecution. All it means is that the prosecution must adduce such evidence, which, if believed, it could be accepted by the trial court as proof.[78]

The requirement of proof beyond reasonable doubt is, basically, designed to reduce the risk of convictions resting on factual error and also to provide concrete substance for the presumption of innocence - that bedrock "axiomatic and elementary" principle which "enforcement lies at the foundation of the administration of criminal law."[79] If the evidence adduced at the trial is equivocal in the sense that it is consistent with both the guilt and the innocence of the accused such that there is doubt on whether or not the accused committed the offence charged, the Prosecution would not have discharged the burden imposed on him to prove the guilt of the accused beyond reasonable doubt.[80] *Nnamani,*

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75. (1992) 4 N.W.L.R. (Pt. 236) 462; see also, *Bakare v. The State* (1987) 1 N.W.L.R. (Pt. 52) 579.
76. (1997) 1 N.W.L.R. (Pt. 479) 1; see also, *Orji v. State* (2008) 10 N.W.L.R. (Pt. 1094) 31.
77. (2007) 5 N.W.L.R. (Pt. 1027) 214.
78. *Azeez v. State, supra.*
79 per Mr. Justice Brennan in *Re Winship,* 397 U.S. 358 (1970)
80 See *James Ikhane V C.O.P* (1977) 6 S.C. 119; *State V Kura* (1975) 2 S.C. 83
81 (1988) 4 NWLR (pt. 90) 503 at 513
80 See *James Ikhane V C.O.P* (1977) 6 S.C. 119; *State V Kura* (1975) 2 S.C. 83
81 (1988) 4 NWLR (pt. 90) 503 at 513

J.S.C. (as he then was), succinctly, stated in *Kalu v. The State*[81] that;

"It is a fundamental principle of our system of criminal justice that an accused person is presumed innocent until proved guilty. The standard of proof in criminal matters is proof beyond all reasonable doubt. Any lingering doubt must be resolved in favour of the accused person"

However, the standard of proof, in criminal cases, varies according to the nature of the crime charged. In proportion as the crime is enormous, so ought the proof to be clear. One would not expect the same level of proof for every minor offence as it would be required in a murder case for instance. The standard remains the same in terms, but "reasonable doubt" changes according to the seriousness of the consequences for the accused.[82] In *Bater v. Bater,*[83] *Denning, L.J.* pointed out that

"In criminal cases, the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard."

Also, in *Andrew v. Director of Public Prosecutions,*[84] while delivering the judgement of the House of Lords, *Lord Atkin* stated that:

"For purposes of the criminal law, there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied "reckless most nearly covers the case... But it is probably not all-embracing, for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid it, and yet shown such a high degree of negligence in the means adopted to avoid the risk as would justify a conviction".

Also, in the case of *Egwim v. State,*[85] it was held that a higher degree of negligence is required to ground a conviction for manslaughter under *section 325 of the Nigerian Criminal Code* than one required for causing death by dangerous driving under *section 17 (2) of the Road Traffic Law.* In the former, the degree of negligence required is the same degree that is

82. See Eggleston, R; *op cit*;, p.105
83. *supra*
84. (1937) 2 All E.R. 552
85. (1999) 13 N.W.L.R. (Pt. 635) 338.

required to prove all charges of homicide by negligence; that is, a very high degree of negligence. The court further held that for purposes of Criminal Law, there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established.

The foregoing analysis reveals that the Prosecution succeeds in proving his case beyond reasonable doubt by ensuring that all the necessary and vital ingredients of the charge or charges are proved by evidence.[86] The inevitable consequence of an unsatisfactory state of evidence tendered by the Prosecution in proof of a criminal offence is either a complete failure on its part to prove the charge or the raising of reasonable doubt as to the guilt of the accused which the law demands must be resolved in favour of the accused person and which, consequently, leads to his discharge.[87] It would be a violation of due process to convict and punish a man without reasonable and compelling evidence of his guilt.

However, in situations where evidential burden of proof is placed upon the accused person such as in *sections 141* and *142 of the Evidence Act,* or where a particular statute places that burden on the defence, that burden is discharged once he satisfies the lighter burden of proof on the balance of probability required in civil proceedings.[88] The burden on the accused is to prove neither innocence nor a reasonable doubt of guilt, but to prove material, which may give rise to a reasonable doubt in the mind of the Judge. Thus, where the accused pleads the defence of insanity, for instance, the evidential burden on him is discharged, once he satisfies the court of the probability of the defence. In *Ani v. State,*[89] the Appellant was charged for murder. At her trial, she raised the defence of insanity. It was held that the burden of rebutting the presumption of sanity is on the person who alleges insanity and the burden is, as in civil cases, discharged on the balance of probabilities.

Section 138 (1) of the Evidence Act provides an exception to the general rule on onus and standard of proof in civil cases. Thus, where in a

86. See, *Yongo v. C.O.P.* (1992) 8 N.W.L.R. (Pt. 257) 36.
87. See, *Orji v. State, supra; Kalu v. State* (1988) 4 N.W.L.R. (Pt. 90) 503.
88. *Ochemaje v. State* (2008) 15 N.W.L.R. (Pt. 1109) 57.
89. (2001) 17 N.W.L.R. (Pt.742) 411; see also, *State v. Akinbamiwa* (1967) N.M.L.R. 355 and *Agunbiade v. State* (1999) 4 N.W.L.R. (Pt. 599) 391.

civil trial, the commission of a crime is alleged, the onus of proving the commission of the crime is on the party alleging it and the standard of proof is still proof beyond reasonable doubt. In *Rotimi v. Faforiji,*[90] the Appellant, in an election Petition had alleged electoral irregularities. The court held that in an election Petition, the burden of proof lies on the Petitioner who alleges the existence of electoral irregularities and such allegation is to be proved beyond reasonable doubt. The court further held that, from the nature of the complaint by the Petitioner, it was clear that the allegation of criminal offences was the substratum of the petition. Therefore, the standard of proof must be one beyond reasonable doubt, by virtue of *section 138 (1) of the Evidence Act.*

Also, in *Atikpekpe v. Joe,*[91] the whole Petition of the Petitioner was based on criminal allegations such as possession of fire-arm, assault of various degree, threat to life, breach of peace, destruction of property and electoral materials such as ballot boxes and the result sheets, falsification and forgery of election results which were not only offences under *Decree No.36 of 1998* but also constitute crimes under *the Criminal Code*. The court held that by virtue of *section 138 (1) and (2) of the Evidence Act,* the burden of proving that any person has been guilty of a crime or wrongful act is subject to the provisions of *section 141 of the Act,* on the person who asserts it, whether or not the commission of such crime is directly in issue in the action. It was also held that although the standard of proof in civil cases is one of preponderance of evidence, or balance of probabilities, it is, however, subject to the provisions of *section 138 (1) of the Evidence Act.* The court further held that in the absence of credible and uncontradicted evidence that there was no collation because of violent disturbance, which disrupted the collation, the tribunal could not find that the Petition was proved beyond reasonable doubt. In classical legal theory, the Petitioner's case has failed the test of imaginary scale of probative measure as propounded in *Mogaji v. Odofin.*[92]

90. (1999) 6 N.W.L.R. (Pt. 606) 305; see also, *Aniagala v. Abeh* (1999) N.W.L.R. (Pt. 611) 454.
91. (1999) 6 N.W.L.R. (Pt. 607) 428; *Akinkugbe v. Ewulum Holdings (Nigeria) Limited* (2008) 12 N.W.L.R. (Pt.1098) 375.
92. *Supra.*

Apart from these statutory duties imposed on litigants, there are also common-law rules, which serve as the hand-maiden of justice in the judicial process. It is to these common-law rules that we now turn.

Ancillary Common-Law Rules

It would appear that the infinite range of ancillary common law rules on probative value of evidence in forensic trials in Nigeria has been introduced by *section 5(a) of the Evidence Act*, which provides that:

"5 Nothing in the Act shall-

(a) prejudice the admissibility of any evidence which would apart from the provisions of this Act be admissible"

One of the obvious objects of that omnibus licence to Nigerian courts has been the desire of the Nigerian policy-makers to place the courts in a position to continue to apply relevant common-law rules on the admissibility of any evidence which has either not been codified or is not a matter suitable for codification. In the first category of matters which are yet un-codified would be found the important rule on circumstantial evidence. The Nigerian courts have, scrupulously, applied this common-law rule in deserving cases. Thus, in *Kalu v. State*,[93] the Court of Appeal held that circumstantial evidence is, very often, the most dependable evidence, notwithstanding that it is called "circumstantial". However, before basing a conviction of murder on such circumstantial evidence, such evidence must be cogent, unequivocal and so compelling as to lead, irresistibly, to the conclusion that the accused, and not any other person, committed the offence. Also, in *Adepetu v. State*,[94] the Supreme Court stated that "where direct evidence of an eye witness is not available, the court may infer from the facts proved, the existence of other facts that may, logically, tend to prove the guilt of an accused person. In drawing an inference of the guilt of an accused person from circumstantial evidence, however, great care must be taken not to fall into serious error. It follows, therefore, that circumstantial evidence must, always, be narrowly examined as this type of evidence may be fabricated to cast suspicion on innocent persons. Before circumstantial evidence can form the basis for conviction, the circumstances must, clearly, and forcibly, suggest that

93. (1993) 3 N.W.L.R. (Pt. 279) 20.
94. (1998) 9 N.W.L.R. (Pt.565) 185, 207.

the accused was the person who committed the offence and that no one else could have been the offender".

Thus, whenever the court has applied circumstantial evidence to convict an accused person, it would follow that such circumstantial evidence must have satisfied the test of probative value, in the context of the analysis in this paper.

Conversely, the net effect of numerous common-law precepts and maxims which the Nigerian courts have applied, from time to time, in the system of administration of justice, routinely, and regularly, is that such common-law precepts and maxims, once invoked or applied by the court, would satisfy the test of probative value of the evidence required in the given situation. For example, in *McNaghten's Case,*[95] it was held that:

"The law is administered upon the principle that everyone must be taken conclusively to know it without proof that he does know it".

This is often expressed by the common law maxim *Ignorantia legis neminem excusat* (Ignorance of the law does not afford excuse). Also, in *R. v. Esop*,[96] the court declared that:

"Every man is presumed to be cognizant of the statute law and to construe it aright; and if an individual infringe it through ignorance, he must, nevertheless, abide by the consequences of his error. It is not competent to him, to aver in a court of justice, that he has mistaken the law, this being a plea which no court of justice is at liberty to receive".

The Nigerian courts (especially the Supreme Court) have, very actively, espoused the rapid development of decisive legal principles and maxims to, inevitably, supplement the circumscribed compass of *the Evidence Act*. The examples given in this paper of this infinite class of common-law rules which have served as equivalent of probative value

95. 10 CL. & F. 200, 210. Emphasis supplied
96. 7 C& P. 456. Where, however, the passing of a statute could not have been known to the accused at the time of doing an act thereby rendered criminal, the State would, probably, think fit, in the case of conviction, to exercise its prerogative of mercy: see *R. v. Bailey*, Russ. & RY. 1

of evidence in forensic trials have been limited in number due to limited space and time. Among the leading examples is the principle of doctrine of *lis pendens (pendente lite nihil innovetur)* which means that nothing new should be introduced during the pendency of an action. This principle applies in respect of property and operates to prevent the effective transfer of any property in dispute during the pendency of the dispute. And it is irrelevant whether the purchaser has notice, actual or constructive.[97] In *Umoh v. Tita,*[98] the 1st Respondent carried out a purported sale of a property at No. 12, Cameroon Street Calabar, which is the subject of an action in court. The Court of Appeal held that the purported sale was a nullity because it was caught by the *lis pendens rule.* Also, in *Bamgboye v. Olusoga,*[99] the Supreme Court held that the title, purportedly, acquired during the pendency of a case in court concerning same is caught by the *lis pendens* rule and that the Respondent could not rely on the conveyance in proof of her title since the conveyance is void and the Supreme Court allowed the appeal..

Another maxim, which the Nigerian Courts have applied in a manner equivalent to the probative value of evidence, is *Nullus commodum capere potest de injuria sua propria* (No one can take advantage of his wrong). In *F.B.N. Plc v. Songonuga,*[100] it was held that the respondent, a lawyer, and holder of a statutory right of occupancy, who under a contract agreement and by the provisions of *section 22 of the Land Use Act*, had the duty to obtain the Governor's consent but failed or neglected to do so, could not be allowed to rely on his own illegality or turn around to foist his neglect as a basis of his claim or use same as a sword to attack the other party by declaring the mortgage void. Also, in *N.B.N. Plc. v. Medclinics,*[101] the Appellants, after losing a case in the lower court, was found to have taken away the records of the Court and thereafter came to the Court of Appeal to complain that such a judgement should be declared a nullity because the records are missing, thereby, seeking the indulgence of the Court of Appeal to allow them to benefit from their own wrong or fraud. The Court applied the maxim

97. See, *Enyibros Foods Processing Company Limited v. N.D.I.C.* (2007) 9 N.W.L.R. (Pt. 1039) 216.
98. (1999) 12 N.W.L.R. (Pt.631) 427.
99. (1996) 4 N.W.L.R. (Pt. 444) 520, 542.
100. (2007) 3 N.W.L.R. (Pt 1021) 230.
101. (1996) 9 N.W.L.R. (Pt. 471) 195, 206.

"*Nullus Commodum capere potest de injuuria sua propria*" to refuse the Appellant's request.

Another maxim, which the Nigerian Courts have applied on this point is *Ex turpi causa non oritur actio-* (An action does not arise from a base cause). In *Seriki v. Are,*[102] the Petitioner/Appellant in his brief has requested the Court of Appeal to sift all the invalid votes credited to him and the other contestants and by way of evaluation of evidence led, hold that he (Petitioner/Appellant) won the election. The Cross-Appellant made similar submission in his brief of argument. The Court of Appeal upheld the decision of the lower Tribunal that the doctrine of "*Ex turpi causa non oritur actio*" applies here and that the parties are *in pari delicto.*

Another maxim which the Nigerian courts have also applied on this point is *Allengans contraria non est audiendus* (He who alleges contradictory things is not to be heard). In *Ezenwa v. Ekong*,[103] on 30 May, 1995, the Appellant paid the sum of N6 Million and another sum of N675, 000 as the full purchase price for a property from the 1st and 3rd Respondents who had the right to sell the property. Later, on that same day, the vendors purportedly took a deposit of money from the 4th Respondent with a view to selling the same land. The trial court ordered specific performance in favour of the 4th Respondent who was Plaintiff in that case. The Court of Appeal reversed that decision, allowed the appeal and held that as for the 1st and 3rd Respondents, they are, forever, prevented from reneging from the position they, voluntarily, created for themselves; that is, the issue that they have divested themselves of any legal or equitable interest in the said property. They are estopped from denying that issue. Indeed, as between the 1st, 2nd and 3rd Defendants/Respondents on one side and the Appellant on the other side, the issue is final. To deny that they have sold the property to the Appellant, the 1st and 3rd Respondents would be blowing hot and cold. And the law does not permit a man to "blow hot and cold" with reference to the same transaction or insist, at different times, on the truth of each of the two conflicting allegations, according to the promptings of his

102. (1999) 3 N.W.L.R. (Pt. 595) 469, 480.
103. (1999) 11 N.W.L.R. (Pt. 625) 55, 73 - 74.

private interest. This principle finds expression in the Latin maxim *Allegans Contraria Non Est Audiendus.*

Another maxim on this point is *Nemo dat quod non habet* (Nobody can give what he has not). In *Egbuta v. Onuna,*[104] the Respondent claimed, *inter alia*, declaration of title as per customary rights of occupancy over two parcels of land against the Appellant. At the hearing of the suit, the evidence adduced by the parties showed that, though the Respondent purchased the two parcels of land which were held under native law and custom from the 4th Appellant, the latter did not obtain the mandatory consent of his family who held the land as family land. Applying the maxim *nemo dat quod non habet,* the Court held that failure of the 4th Appellant to obtain the mandatory consent of the members of his family before he sold the pledged land in dispute rendered the purported deed of conveyance void and of no consequence, whatsoever.

The Supreme Court of Nigeria, has also, in virtually all the following legal maxims administered justice by holding, respectively, in each case, that the relevant maxim has decisive force and effect *equivalent* to probative value of evidence in forensic trials; *Expressio unius (personae vel rei) est exclusio alterius (The express mention of one person or thing is the exclusion of another);*[105] *Verba Chartarum fortius accipiuntur contra proferentem* (The words of deeds are to be taken most strongly against him who uses them);[106] *Omnia praesumuntur rite esse acta* (All things are presumed to be correctly and legitimately done);[107] *Quicquid plantatur solo solo cedit* (Whatever is affixed to the soil belongs to the soil);[108] *Damnum abseque injuria* (Damages due to the legitimate

104. (2007) 10 N.W.L.R. (Pt 1042) 298; see also, *Akerele v. Atunrase,* (1969) 1 All N.L.R. 201; *Famuroti v. Agbeke* (1991) 5 N.W.L.R. (Pt. 189) 1. S.C.; *Romaine v. Romaine* (1992) 4 N.W.L.R. (Pt. 238) 650; *Ajuwon v. Akanni* (1993) 9 N.W.L.R. (Pt. 316) 182.
105. See, *Udoh v. O.H.M.B.* (1993) 7 N.W.L.R. (Pt. 304) 139; *Ogbuanyanya v. Okudo* (1979) 6 - 9 S.C. 32.
106. See, *F.B.N. Plc. v. Associated Motors Company Limited* (1998) 10 N.W.L.R. (Pt.570) 441.
107. See, *Ndukwe v. The Legal Practitioners Disciplinary Committee* (2007) 5 N.W.L.R. (Pt. 1026) 1; *Odubeko v. Fowler* (1993) 7 N.W.L.R. (Pt. 308) 637.
108. See, *Finnih v. Imade* (1992) 1 N.W.L.R. (Pt. 219) 511, 538; see also, *Ude v. Nwara* (1993) 2 N.W.L.R. (Pt. 278) 638; *Adeniji v. Tina George Industries Limited* (1998) 6 N.W.L.R. (Pt. 554) 483.

exercise of a right is not actionable, even if the actor contemplates the damages);[109] *Vigilantibus et non dormientibus jura subveniunt* (The person who comes to equity or intends to resort to equity must be vigilant);[110] and *ut res magis valeat quam pereat* (It is better for a thing to have effect than to be made void).[111]

The judicial passion to do justice in Nigeria is transparently clear. But with due respect, this has been chequered by the rare but important occasions when the road to probative value of evidence has either been surprisingly abandoned in some decided cases or excessively circumscribed by some judicial zealots. These travails of the worthy judicial passion in question should now be cursorily addressed in the next part of this paper.

The Presumed Quest for Justice

In its quest for justice, it is settled law that the primary duty of the trial court is to properly evaluate all the evidence that have been adduced by both parties to a given case. This duty is premised on the fact that it is the trial court that has the advantage of seeing and observing the witnesses demeanour, their integrity, manners and comportment and assessing the background from which they testified and drawing necessary inferences.[112]

"Evaluation" simply means the assessment of evidence so as to give value or quality to it.[113] Proper evaluation thus involves reviewing and criticizing the totality of the evidence led by each of the parties on any issue of fact in the circumstances of each case, estimating it, determining their credibility and ascribing probative value to them.[114] In a civil case, evaluation of evidence by the trial court also includes some weighing of evidence to determine either balance of probability or preponderance of

109. See, *Adene v. Dantunbu* (1994) 2 N.W.L.R. (Pt. 328) 509, 528 - 529.
110. See, *Fasesin v. Oyerinde* (1997) 11 N.W.L.R. (Pt. 530) 552, 560.
111. See *Mahammed v. Olawumi* (1990) 2 N.W.L.R. (Pt.133) 458, 484; *Nafui Rabiu v. Kano State* (1980) 8 - 11 S.C. 130.
112. See, *Akindipe v.State* (2008) 15 N.W.L.R. (Pt. 1111) 560; *Adebayo v. Attorney-General, Ogun State* (2008) 7 N.W.L.R. (Pt. 1085) 201.
113. See, *Onwaka v. Ediala* (1989) I N.W.L.R. (Pt. 96) 182, 208; see also, *Oyadiji v. Olaniyi and Others* (2004) 49 W.R.N. 133, 145.
114. See, *Lagga v. Sarhuna* (2008) 16 N.W.L.R. (Pt. 1114) 427.

evidence. In this vein, the general approach to proper evaluation by a Judge is as laid down by the Supreme Court in *Mogaji and Others v. Odofin and Others*[115] that:

"In short, before a Judge before whom evidence is adduced by the parties in a civil case comes to a decision as to which evidence he believes or accepts and which evidence he rejects, he should first of all put the totality of the testimony adduced by both parties on that imaginary scale, he will put the evidence adduced by the plaintiff on one side of the scale and that of the defendant on the other side and weigh them together. He will then see which is heavier not by the number of witnesses called by each party, but by the quality or the probative value of the testimony of those witnesses. This is what is meant when it is said that a case is decided on the balance of probabilities. Therefore, in determining which is heavier, the Judge will naturally have regard to the following: (a) whether, the evidence is admissible; (b) whether it is relevant; (c) whether it is credible; (d) whether it is conclusive; and (e) whether it is more probable than that given by the other party."

The above-quoted position of the Supreme Court in *Mogaji's* case was also reiterated in *Duru v. Nwosu,*[116] where it was found that the trial Judge did not properly evaluate the evidence before him. The Supreme Court allowed the appeal filed by the Appellant on this ground and held, *inter alia,* that to enable a Judge produce a judgement which is a fair and just verdict on the case put up by two or more contending parties, he must fully consider the evidence preferred by all the parties before him, ascribe probative value to it, weigh the evidence by both sides in the imaginary scale of justice, make definite findings of fact, apply the relevant law and come to some conclusion on the case before him. Moreover, it is now a trite law that any decision arrived at without a proper or adequate evaluation or non-evaluation of the evidence cannot stand.[117] In this regard, the fact that evidence adduced by a plaintiff is unchallenged or uncontradicted would not relieve a trial court of its duty

115. (1978) 4 S.C. 91, 98; see also, *Ajagungbade III and Others v. Laniyi and Others* (1999) 13 N.W.L.R. (Pt. 633) 92.
116. (1989) 4 N.W.L.R. (Pt. 113) 24; see also, *Raufu Gbadamosi v. Olaitan Dairo and Another* (2001) 11 W.R.N. 129.
117. See, Ayoola, J.S.C. in *Daniel Bassil and Others v. Fajebe and Another* 6 N.S.C.Q.R. 269, 281; see also, *Lagga v. Sarhuna, supra.*

to consider and evaluate the body of evidence adduced by the plaintiff before ascribing probative value to the pieces of evidence tendered. The trial judge is still duty bound to examine whether or not the unchallenged evidence was sufficient to establish the claims made by the party in whose favour the unchallenged evidence was given.[118]

Furthermore, a Judge is enjoined, not only to consider the weight of evidence adduced, but also, their credibility. An issue of credibility will, necessarily, arise where both sides to the conflict have tendered oral evidence on the point at issue and the court will have to contend with the problem of deciding which evidence it will prefer to accredit and which evidence it will discredit.[119] Once the court considers a piece of evidence to lack credibility, then, its weight becomes light and thus affects the pendulum of the imaginary scale. The general rule, however, is that in the absence of any genuine or valid complaint against the credibility of a witness, the trial court should attach probative value to the evidence of such witness. In *Fulani v. Idi*[120] where the Plaintiff/Respondent instituted an action against the Defendants/Appellants for the sum of N3,000, jointly and severally, being special and general damages for the maize destroyed by the cows of the 3rd Defendant/Appellant while in the care of the 1st and 2nd Appellants, the Court of Appeal dismissed the appeal filed by the Appellants and held that if the trial District Court had attached probative value to the evidence of the policeman who went to the scene of the incident in response to the report made at the police-station and saw the damage to the Respondent's farm and also saw the cows eating the maize, as it should have done, its conclusion would have been different.

It has also been held in *Mogaji and Others v. Odofin and Others*[121] and reaffirmed in a number of cases such as in *Onwaka v. Ediala*[122] that the scale, though imaginary, is still the scale of justice and the scale of truth, such a scale will, automatically, repel and expel any and all false evidence. What ought to go into that imaginary scale should, therefore,

118. See, *Martchem Industries (Nigeria) Limited v. M. F. Kent West Africa Limited* (2005) 45 W.R.N. 1.
119. See, *Eholor v. Osayande* (1992) 6 N.W.L.R. (Pt. 249) 524, 549.
120. *Supra.*
121. *Supra*, 98.
122. *Supra.*

be no other than credible evidence. What is, thus, necessary in deciding what goes into the imaginary scale is the value, credibility and quality as well as the probative essence of the evidence. If any evidence is disbelieved, then such evidence has no probative value and should not therefore go into the imaginary scale.

In a criminal trial, the proper role of the court is to evaluate all the evidence before it and be sure that the case for prosecution has been proved beyond reasonable doubt. If there is doubt, whether based on material contradictions or lack of sufficient evidence, the benefit of the doubt must be given to the accused person..[123] In *Ibeh v. State,*[124] the Appellant was charged with the murder of two brothers (the Dawodu brothers). His main defence was one of accidental discharge. At the conclusion of the trial, the learned trail Judge convicted the Appellant as charged and sentenced him to death. The Appellant's appeal to the Court of Appeal was dismissed whereby he further appealed to the Supreme Court. At the Supreme Court, the main plank of the Appellant's complaint was that there were contradictions on material issues in the evidence of the Prosecution witnesses which ought to have been resolved in his favour and that he was covered by the defence of accident in the circumstances of the case. The Supreme Court allowed the appeal and held that the Court is duty bound to evaluate the whole evidence adduced by the Prosecution in order to come to the conclusion that the Prosecution's case has been proved. It is not for the Judge to pick and choose which set of the Prosecution witnesses to believe and which to reject, but must evaluate the totality of the evidence adduced by the Prosecution.

Furthermore, in *Uma Agwu v. The State,*[125] the Court of Appeal held that before a Judge could conclude that the Prosecution has proved its case, he must make a clear and accurate summary of facts as to which a decision is required, give the evidence a careful evaluation having taken into account the arguments on both sides, and draw proper inferences and conclusions about the primary facts and that any lingering doubt must be resolved in favour of the accused person. In *Oguntola v. State,*[126]

123. per, Belgpre, J.S.C. in *Ibeh v. State* (1997) 1 N.W.L.R. (Pt. 484) 632, 650.
124. *Supra.*
125. (1998) 4 N.W.L.R. (Pt. 544) 90, 104; see also, *R. v. Lawrence* (1981) 73 Cr. App. Rep. 1, 5.
126. (2007) 12 N.W.L.R. (Pt. 1049) 617.

where the Appellant and two others were arraigned on a four-count charge including conspiracy and armed robbery, it was held that since P.W.1. did not, instantly, mention the Appellant's name while reporting the robbery at the Police Station, a person she claimed to have known for nearly five years daily, her subsequent mention of the name of the Appellant in connection with the offence charged was an after-thought that had created a doubt which should have been resolved in favour of the Appellant. It was further held that in the circumstances, delay of the case has made the evidence of identity suspicious and has reduced the true content of evidence below acceptable and probative level.

However, in situations where the evidence of the Prosecution is not controverted or disputed by an accused person, such evidence is deemed to have been accepted and admitted by the accused person.[127]

Although evaluation of evidence is, primarily, within the domain of the trial court that saw, and heard the witnesses and observed their demeanour, the appellate courts have, nevertheless, always, risen to the occasion where the justice of the case demands in correcting any wrong evaluation of evidence adduced at the lower court by any trial Judge. The cardinal principle of the law which was stated by *Mukhtar, J,C,A,* in *Adekunle v. Aremu,*[128] is that a trial Judge may believe or disbelieve the evidence he wishes to believe or disbelieve, for it is he who has been opportuned to listen to the witness and watch his demeanour. Having been availed this singular prerogative, an appeal court will not, ordinarily, disturb the view and findings of the court of first instance on such ascription of probative value, unless it is perverse.[129]

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127. See, *Magaji v. The Nigerian Army, supra.*

128. (1998) 1 N.W.L.R. (Pt. 533) 203, 227; see also, *Igbuya v. Eregare (*1990) 3 N.W.L.R. (Pt. 139) 425; *Koiki v. The State* (1976) 4 S.C. 107; *Danjuma v. Garba (*1999) 3 N.W.L.R. (Pt. 595) 448; *Olorunfemi v. Asho* (1999) 1 N.W.L.R. (Pt. 585) 1, 9.

129. A perverse finding has been defined as one which ignores the facts of evidence led before the court and when considered as a whole amounts to a miscarriage of justice. A finding is perverse if it is not borne out of the evidence before the court. A perverse finding is a finding which is not only against the weight of evidence but is, altogether, against the evidence itself. It is a finding which no reasonable tribunal should have arrived at in the light of the evidence before it. A finding is perverse where the trial court has drawn erroneous conclusions from accepted evidence or has taken erroneous view of the evidence adduced before it; see, *Lagga v. Sarhuna, supra; Ezeanya v. Okeke* (1995) 4 N.W.L.R. (Pt. 388) 142; and *Okpiri v. Jonah* (1961) 1 S.C.N.L.R. 174.

Thus, the general rule which has been stated in a plethora of cases is that when the question of evaluation of evidence does not involve the credibility of witnesses but the complaint is against the non-evaluation or improper evaluation of the evidence tendered before the court, an appellate court is in as a good position, as the trial court, to do its own evaluation in the bid to ensure that justice is done. So, where the trial Judge had failed to properly consider and evaluate the evidence adduced by both parties to the dispute, the Court of Appeal has a duty and a right to consider and evaluate such evidence, ascribe probative value to them and make proper findings.[130] Similarly, in any criminal proceeding where the Prosecution fails to prove beyond reasonable doubt the link of an accused person to the crime he, allegedly committed, that is, did not dispel the doubt and the trial court did not resolve the issue, on conviction by the trial court, the appellate court will resolve the doubt in favour of the accused person and interfere to set the accused person free.[131] In situations where the evaluation would necessarily entail the determination of the credibility of witnesses, the appellate court cannot evaluate but can make an order of retrial.[132] However, where the trial Judge has unquestionably evaluated evidence and justifiably appraised the facts; it is not the business of an appellate court to interfere and to substitute its own views for the view of the trial court.[133]

In law, summary (or restatement) of evidence is not the same thing as evaluation of evidence.[134] Thus, in *Onyeachimba v. The State,*[135] the learned trial Judge, in a very unusual method of judgement just copied from his record book, word for word, in direct speech the evidence of each witness, including cross-examination and re-examination, stating the name of the prosecuting counsel and the defence counsel who

130. See, for instance, *Akindipe v. State, supra*; *Yadis v. G.N.I.C. Limited* (2007) 14 N.W.L.R. (Pt. 1055) 584.; *Kazeem v. Mosaku* (2007) 17 N.W.L.R. (Pt. 1064) 523; Spasco *Vehicle and Plant Hire Company v. Alraine (Nigeria) Limited* (1995) 8 N.W.L.R. (Pt. 416) 655, 670; *Narumal and Sons Nigeria. Limited v. Niger Benue Transport Company Limited* (1989) 2 N.W.L.R. (Pt. 106) 730, 740; and *Fashanu v. Adekoya* (1974) 1 All N.L.R. (Pt.1) 35.
131. See, *Oguntola v. State, supra.*
132. *Lagga v. Sarhuna, supra.*
133. See, *Adebayo v. Attorney-General, Ogun State, supra.*
134. per Tobi., J.C.A. in *Akintola v. Balogun and Others* (2000) 1 N.W.L.R. (Pt. 642) 532, 549; *Unity Bank Plc. v. Bouari* (2008) 7 N.W.L.R. (Pt. 1086) 372.
135. (1998) 8 N.W.L.R. (Pt. 563) 587.

conducted the examination-in-chief, the cross-examination and re-examination where appropriate; reproduced the submissions of both counsel almost verbatim and then gave his judgement. The reproduction of the evidence of the witnesses one after the other and the addresses of both counsel covered some twenty-two and a half foolscap papers typed double-spaced, and the judgment of the learned trial Judge covered about three-quarters of a page. Reacting to the attitude of this trial Judge, *Uwaifo J.C.A.* stated that "the duty of a trial Judge to evaluate evidence in a case carries with it the commitment to do so properly. He must justify the advantage he had to see and hear the witnesses testify. He must be able to analyze the substance of the evidence with judicial perception. He should, in appropriate circumstances, ascribe probative value to each material aspect of the evidence and place the burden of proof where it lies. It is a disservice to the proper administration of justice for a trial Judge to use sweeping expressions "I believe" and "I do not believe" to dispose of critical evidence of vital witnesses under pretext of evaluation of evidence".

In that case, the learned trial Judge was faced with enormous evidence of an alleged crime. The evidence of the Prosecution was in conflict with that of the defence. He could not make any effort to evaluate them and make findings that can be justified as a result of the reasoning leading to them. The Court of Appeal held that the trial Judge completely failed in his primary duty and because it largely involves the credibility of witnesses, the Court of Appeal cannot embark on evaluating the evidence.[136]

In *Georgewill v. Ekine,*[137] the Court of Appeal stated that belief or disbelief is a mental reaction to facts proved in or by evidence, their possibilities or probabilities. In *Onuoha v. State,*[138] it is stated that the belief or non-belief of witnesses must come from the evidence adduced by the witnesses and in certain situations, their demeanour. While the former flows from an exercise of the Judge's *mind*, the latter flows from an exercise of the Judge's *eyes*, both giving rise to the judicious conclusion of the Judge, in the total exercise of his wisdom. Where a trial

136. See also, *Akibu v. Opaleye* (1974) 11 S.C. 189
137. (1998) 8 N.W.L.R. (Pt. 562) 454, 470.
138. (1998) 5 N.W.L.R. (Pt. 548) 118.

Judge gives a reason which is all embracing in the sense that it adequately covers the realm or domain of belief or disbelief, an appellate court cannot fault the findings of the trial Judge. In essence, evaluation of evidence by a trial court must, necessarily, involve a reasoned belief of the evidence of one of the contending parties and disbelief of the other or a reasoned preference of one witness to the other.

It is noteworthy that there is a major difference between a court not evaluating evidence and not giving probative value to the evidence. Where there is a claim that there is no evaluation or improper evaluation of evidence, it means the trial court did not consider that evidence at all or considered it as immaterial to the case of the party who pleaded and proved it. On the other hand, where no probative value is attached to a piece of evidence, it means the trial court did not consider that evidence proffered as sufficient proof of the facts on which it was led and in aid of which it was adduced.[139]

Furthermore, a trial court is always entitled to draw inferences from the surrounding circumstances of a case in giving his judgement if this will serve the interest of justice. For instance, in *Buba v. State,*[140] the Appellant was charged with the murder of the deceased. The accused neither gave evidence nor called any witness. He rested his case on the Prosecution's case. The defence denied that the deceased died through stab wounds inflicted by the accused's knife which he was carrying on the fateful day and further pleaded accident. In his statement, the accused asserted that he had a naked dagger inside his jacket, on which the deceased fell when he was running after her. The learned trial Judge found the Prosecution's case proved beyond reasonable doubt and convicted the accused accordingly. Dissatisfied, the accused appealed to the Court of Appeal which dismissed the appeal. The Court of Appeal held that the trial court was right in drawing inferences from the circumstances of the case such as this, especially in a case where the accused himself admitted that it was his knife that caused the injury that killed the deceased and which led the investigator to its recovery. Furthermore, the presence of the Appellant together with the deceased alone when she sustained the injury, as testified by the Prosecution

139. See, *Eleran v. Aderonpe* (2008) 11 N.W.L.R. (Pt. 1097) 50.
140. (1992) 1 N.W.L.R. (Pt. 215) 1.

witnesses is enough to cast a shadow of guilt on the Appellant even after thorough consideration of his defence of accident. Thus, circumstantial evidence is as good as direct evidence once it is unequivocal, cogent, compelling and points, irresistibly, to the guilt of the accused, and such evidence can sustain a conviction.[141]

However, a note of warning was given by the Supreme Court in the case of *Ahmed v. State*[142] when it held that a trial court has a duty to, narrowly, examine circumstantial evidence where direct evidence is not available, if only because evidence of the kind may be fabricated to cast suspicion on another. Therefore, it is necessary, before drawing the inference of the accused's guilt from circumstantial evidence, for the trial court to be sure that there are no other co-existing circumstances which would weaken or destroy the inference. It, thus, follows that before circumstantial evidence can form the basis for conviction, the circumstances must, clearly and forcibly, suggest that the accused was the person who committed the offence and that no one else could have been the offender.[143]

Furthermore, in the quest to do justice in a given case, the trial courts have been enjoined to treat the evidence of certain witnesses with utmost caution. These witnesses include those that have been classified as tainted witnesses, accomplices and co-accused persons. The type of evidence given by this category of witnesses has been found, by experience, to be so liable to false invention that, though they remain admissible, special safeguards have been devised for them. For instance, to say that a person or thing is tainted, is to stigmatize it with blemish or stain. In other words, if the person is a witness, he cannot be relied upon.[144] A tainted witness has been defined as one who, though not an accomplice, is a witness who may have a purpose of his or her own to serve.[145] It is settled law that the testimony of this type of witnesses and

141. See, *Fatoyinbo v. Attorney-General, Western Nigeria* (1966) W.N.L.R 4 and *Abike v. The State* (1975) 9 - 11 S.C.97.
142. (1999) 7 N.W.L.R. (Pt. 612) 612, 614 and *Orji v. State, supra.*
143. See, *Adepetu v. State* (1998) 9 N.W.L.R. (Pt. 565) 185, 207; *Omogodo v. The State* (1981) 5 S.C. 24 and *Lateef Adeniji v. The State, supra.*
144. per, Pats-Acholonu, J.C.A. in *Adeoye v. State* (1997) 4 N.W.L.R. (Pt.499) 307, 313.
145. per, Nnamani, J.S.C. in *Nathaniel Mbenu v. The State* (1988) 3 N.W.L.R. (Pt. 84) 615, 626; see also, *Ogunlana v. The State* (1995) 5 N.W.L.R. (Pt.395) 266, 284; and *Ogunbayo v. State* (2007) 8 N.W.L.R. (Pt. 1035) 157.

those testifying for themselves ought, generally, to be minutely and scrupulously weighted on the scale and may not be accorded the same weight as the testimony of a disinterested witness. If there is anything affecting its credibility, it cannot be accepted as conclusive where it is self contradictory or where it smacks of equivocation and double-talk.[146]

Also, in *Uma Agwu v. The State,*[147] the Court of Appeal stated that although evidence of close relations and friends of a deceased who testify for the Prosecution is not inadmissible, it is also recognized that it is a matter of prudence for a tribunal hearing such a case to act with circumspection in receiving their evidence and to treat their evidence with caution. The circumstances of the case and the manner the evidence is given may well suggest whether such witnesses ought to be regarded as "tainted witness" in the extended meaning of the term. However, the relationship of a witness to a victim plays a weak, secondary role to the nature and circumstances of his evidence. In essence, therefore, trial courts are enjoined to be wary in convicting on the evidence of such witnesses without, first, warning itself of the inherent danger of acting on same and without some corroboration where it is expedient so to do.

The evidence of an accomplice,[148] like that of a tainted witness is also regarded as suspect evidence because of its tainted source. A trial Judge is also enjoined to treat this kind of evidence with caution as it is unsafe to convict a man on the uncorroborated evidence of an accomplice.

Furthermore, in civil proceedings the Supreme Court has been relentless in curbing professional indiscretion on the part of lower courts, especially, trial courts, concerning the settled procedure for ascertaining probative value of evidence in forensic trial in Nigeria. Thus, in the celebrated case of *Eperokun v. University of Lagos,*[149] wherein the trial Judge gave his decision without bothering about the probative value of evidence, *Oputa, J.S.C.* expressed dismay that:

146. See, *Adeoye v .State, supra.*
147. (1998) 4 N.W.L.R. (Pt. 544) 90.
148. See, *section 178(1) of the Evidence Act*, see also, *Halsbury's Laws of England* (3rd ed. Vol. 10), Art. 844 , 549 wherein accomplices are defined as persons who are *participes cimininis* in respect of the actual crime charged whether as principals or accessories before or after the fact in case of felonies or misdemeanours.
149. (1986) 4 N.W.L.R. (Pt. 34) 162.

". . . the trial judge made no specific finding. He went straight to consider the law. This is a wrong approach".

Also, in *Manakaya v. Manakaya,*[150] the Supreme Court chided the trial Judge for writing a judgement without receiving any evidence. The Supreme Court stated *inter alia* that:

"Now, it is a big question to ask, where did the learned trial Judge find the evidence which guided him to exercise his discretion to decide on the issue of disagreement between the parties?"

In *Georgewill v. Ekine,*[151] Plaintiff/Respondent and the Defendant/Appellant were married and had, jointly, formed a company named Sotonye Nigeria Limited. The marital relationship between the Appellant and the Respondent subsequently went sour and they separated. There was, however, a dispute as to the ownership of a property which the Appellant claimed was his personal property. The Respondent, however, contended that the property was jointly owned and that she had equal share to the property. The Respondent, consequently, filed a suit in court claiming *inter alia* a declaration that the property was jointly owned by herself and the Appellant. In its judgement, the trial court found for the Respondent on the ground that her evidence was more probable and gave judgement in her favour. On appeal by the Appellant, the Court of Appeal expressed dismay at the ignorance of the elementary principles of company law and corporate personality of Sotonye Nigeria Limited by the learned trial judge. In the words of *Nsofor, J.C.A*:

"There was no solid basis for the belief of the trial Judge of the evidence by the plaintiff. With respect to the trial Judge, he does not appear to me to have fully comprehended the pleadings and the issues of law involved in the case before him. He missed the point wholly and entirely. The plaintiff, if I may repeat, is not Sotonye Nigeria Ltd. And the company is not Grace Ekine. Grace Ekine lacks the locus standi to prosecute the action as if she were Sotonye Nigeria Ltd. But the rule in Foss V Harbottle (1843) Hare 461 ought to be familiar to the learned trial Judge".

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150. (2001) 43 W.R.N. 1 S.C. 40.
151. *Supra*

At present, it is well-nigh impossible to guarantee that the available procedure for ascertaining and enforcing probative value of evidence in civil and criminal proceedings in Nigeria is fool-proof. Indeed, the identified problems exemplified by several rules excluding a large proportion of pieces of evidence which may be true but are of unorthodox evidential value such as rules on hearsay and similar facts and the occasional application of technical rules to shut out evidence of an accused person due to his or her counsel's negligence in diligently prosecuting his defence in a criminal trial. The pursuit of truth in forensic trial is, understandably, substantially, elusive[152] but it is in the interest of the rapid development of a more civilized system of dispensation of justice that one may strongly enter a caveat against wholesale acceptance of the present approach.

Need for More Persistence in the Search for truth in Forensic Trials

The judicial process and the multi-media[153] rules of evidence in forensic trials have been geared towards eliciting the truth in the opposing claims and contentions of the parties in civil and criminal trials. The ceaseless pursuit of the actual *locus* of the truth in competing claims and contentions in civil and criminal trials is the sole social object of the probative value of evidence in forensic trials. The present relative social stability in Nigeria from the perspective of popular recourse to the judicial dispute-resolution process is a mirror of the ingenuity of the framers of the law of Evidence.

Depending on the given audience, the value system in the law of Evidence has been seen to be either *famous* for its intolerance of professional indiscipline or *notorious* for its rigidity. It is hardly disputable that without the present multi-media rules of evidence, the process for administering justice would have been unwieldy and chaotic.

However, the picture painted by the decided cases, thus far, in this paper is partially gloomy and requires urgent remedies. A pre-eminent

152. See, Eggleston, R., *Evidence,Proof and Probability* (Weidenfeld and Nicolson, London, 1978), *passim.*

153. Constitutional, Statutory and Common law rules of Evidence are herein collectively referred to as multi-media.

step which ought to be taken, forthwith, is to correct the ineffectiveness demonstrated in some of the decided cases already discussed in this paper by means of *inter alia* continuous legal education and provision of well-equipped law library for every Judge so as to make them more prepared to confront the onerous judicial task of gallantly searching for the *locus* of truth between the contending claims of the parties in forensic trials. One can then hope to expect, justifiably, that there would be an end or considerable decrease in the unfortunate incident in which judgments have been given in cases without the Judge receiving any evidence as in *Manakaya v. Manakaya;*[154] or neglecting to make findings of fact before considering the Law as in *Eperokun v. University of Lagos;*[155] or the making of wrong evaluation of evidence by the trial court as in *Adekunle v. Aremu;*[156] or adopting a wrong approach to the evaluation of evidence by lengthy reproduction of court record in the mistaken belief that it represents evaluation as in *Onyeachimba v. The State.*[157]

The delicate process of extracting the truth in the contending claims of litigants would remain a mirage unless there is considerable relaxation of some of the relevant rules. For example, since any evidence adduced in court, without corresponding pleading of facts, would be expunged from the record unless an amendment of such pleading is effected before the trial court delivers its judgement, otherwise, the Court of Appeal will correct the lapse if it gets to the higher court, it is submitted that it is more consistent with the search for truth between the litigant parties if there are new rules of Evidence or practice to require trial courts to call on the parties to seize the opportunity if they so wish to effect necessary parity between the evidence adduced by them and their pleaded facts.

Moreover, such decisions as those in *Ibeh v. State;*[158] *Braide v. State*[159] and *Ozaki v. State*[160] have, inescapably, conveyed the impression to the common jurist that the courts have applied the effect of probative

154. *Supra.*
155. *Supra.*
156. *Supra.*
157. *Supra.*
158. *Supra.*
159. *Supra.*
160. *Supra.*

value of evidence in criminal trials to mean automatic acquittal and discharge of the accused without bothering to see if the accused could have been convicted for the lesser criminal offence according to the available state of the evidence, within the letter and spirit of, especially, *sections 178 and 179 of the Criminal Procedure Act ("CPA")*[161] - ("where murder is charged and infanticide proved" and "where offence proved is included in offence charged") and of *sections 169 to 177 generally, of the CPA* which deal with "conviction of one of several offences and of offences not specifically charged". With due respect, it is submitted that the public interest in a criminal trial has cast the duty on the criminal courts to pay adequate attention to the search for the truth in criminal trials so that the probative value of evidence in such trials are not given a sweeping effect that may let the guilty go scot-free when he might have been punished for a lesser offence on the basis of the available evidence.

Unless the Nigerian Courts of records, deliberately, persist more in the search for the *locus* of truth in their application of the dual facets of probative value of evidence in forensic trials (that is, preponderance of evidence in civil trials and proof beyond reasonable doubt in criminal trials) the consequential occasional injustice would be insidious and self-contradictory but, undoubtedly, avoidable.

161. Cap.C.41, Laws of the Federation of Nigeria, 2004.