A CRITICAL ASSESSMENT OF MILESTONE IN THE NIGERIAN EVIDENCE ACT 2011

IKPANG, Aniedi J.
Faculty of Law, University of Uyo, Nigeria

ABSTRACT

The importance of evidence in court trials in both civil and criminal cases is vital in the administration of justice in the courts. Evidence regulates the admissibility of what is offered as proof into the record of a legal proceeding. The goal of this paper is to evaluate the significance and viability of the Nigeria Evidence Act 2011, which by its provision repeals the hitherto applicable Evidence Act of 1945. The findings of this paper are that the Evidence Act 1945 lacked salient provisions on some subject matters and that some of its provisions were out of tune with modern trends in other jurisdictions. There is also the finding that the new Evidence Act 2011 has addressed some of the perceived lapses in the repealed Evidence Act. The conclusion drawn in this paper is that the repeal of the former Evidence Act is worthwhile and the enactment of the new Evidence Act a milestone.

Keywords: Evidence, Repeal, Statutes, Milestone and Defendant.

1. INTRODUCTION

Nigerian law of evidence, like most law of the country, originated from the English common law. The first legislation on the subject of evidence was in 1943. It was known as the Evidence Ordinance No. 27 of 1943. It came into operation in 1945 and was contained in Notice No. 618 in Gazette No. 33 of 1943. It was based largely on Stephen’s Digest of the Law of Evidence (12th edition). On the attainment of independence in Nigeria in 1960, the Evidence Ordinance was renamed the Evidence Act. Since the law of Evidence was in the concurrent legislative list under the 1960 Independence and 1963 Republican Constitutions, the then Regional Government at the material time also enacted laws on the subject.¹

These laws closely followed or basically re-copied the Federal Act on Evidence with little or no significant or remarkable changes. That was the position until the enactment of the 1979 Constitution of the Federation, which placed evidence in the Exclusive Legislative List.² The 1999 Constitution,³ currently in application in Nigeria, also places evidence in the Exclusive Legislative List;⁴ and pursuant to that, a new Evidence Act was enacted in 2011 by the National Assembly. The roadmap of this paper is to examine salient developments in the new Act which were not provided for, in repealed Act. It is that Evidence Act 2011, which forms the basis and currency of the law of Evidence in Nigeria’s municipal jurisdiction. The paper adopts essentially primary and secondary approaches of gathering materials in the sense that it relies principally on the new statute, textbooks, case law, journals, internet materials and many other legal literature which abound.

2. DISCUSSIONS

The current Evidence Act⁵ has 259 sections and those sections are subsumed in parts.⁶ This is a departure from the repealed Evidence Act⁷ which had 230 sections with these sections divided and contained in parts.⁸ There is, therefore, an increase of 29 sections in the present Act. The major highlight of the present Evidence Act could be understood on the basis of the general intendment of the repealed Evidence Act which reads ‘An Act to provide for the law of evidence to be applied in the judicial proceedings in or before courts in Nigeria’.⁹ But the intendment in the present Act is more embracing and encompassing,¹⁰ as it spells out the purpose which it intends to achieve, much more than it was in content, in the repealed Act.

The new Act has been packaged beautifully in terms of style and content. The short title, application and interpretation hitherto contained in sections 1 and 2 of the previous Act have been re-located to sections 259 and 258 respectively. This appears to be in synergy with arrangement in modern legislation wherein the said sections are placed in the last part of the statute. In addition, the short title as a nomenclature in the former Act is now known as citation in the present Act.

Under the repealed Evidence Act, common law was regarded as a source of the law of evidence in Nigeria. This is because before the enactment of the Evidence Act in 1945, the law of evidence which applied in the Magistrate Courts and the Supreme Court was the English common law of evidence,¹¹ and this was made possible by legislation.¹² The recognition of common law as a source of evidence in Nigeria was made possible by virtue of the provision of the repealed Act which read to the effect that “Nothing in this Act shall prejudice the admissibility of any evidence which would apart from the provisions of this Act, be admissible”.¹³ This was consistent with section 6 (2) (a) of the English Evidence Act 1938, the provision of which, was to allow the admission of evidence under the rules of the English Common Law.

The foregoing seems to have changed significantly as a result of the application of the new Evidence Act 2011. The said Act has made an honest though feeble attempt to shoot down the English common law as a source of evidence in Nigeria. This is manifest in the provision of the Act which states that “Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria”.¹⁴ By this provision, admissibility of evidence under legislation (such as the constitution) other than the applicable Evidence Act is not allowed by law. It is one thing to legislate against the English common law as a source of evidence in Nigeria; it is another thing to attempt to fill any lacuna in the body of our law of evidence if the provisions of the current Evidence Act do not cover an issue or issues of evidence. The settled law has always been that whenever there is a lacuna in our law in which local enactment has not provided for, the resort must, in such circumstance, be held to the rules of common law. It is, therefore, the lofty view of this piece that should there arise any lacuna in the law of evidence in Nigeria, the rules of common law on similar issue would be invoked to arrest the anomaly, to that extent, the exclusion of section 5 (a) of the repealed Act in the drafting of section 3 of the current Act is effortless and goes to no issue.

One of the milestones in the new Act is in respect of development in section 14 (1) of the repealed Act. In the repealed Act, section 14 (1) dealt with the type of customs which were admissible.

---

⁵ Evidence Act 2011 and is contained in Federal Republic of Nigeria official Gazette No. 20, Vol. 98, Government notice No. 103.
⁶ Parts 1 – xvi.
⁷ Evidence Act 1945
⁸ Ibid, Parts 1 – xiii.
⁹ This is the general intendment of the Evidence Act 2011.
¹⁰ The intendment is an Act to repeal the Evidence Act, Cap. E 14, Laws of the Federal of the Nigeria and enact a new Evidence Act which shall apply to all judicial proceedings in or before court in Nigeria; and for other related matters.
¹² Such legislations are Provincial Court Ordinance 1914, s. 10; and Supreme Court Ordinance 1943, s. 14.
¹³ Evidence Act 1945, S. 5 (a)
¹⁴ Evidence Act 2011, S. 3
That section has now been broken into section 16 (1) and (2) in the new Act. It reads that ‘a custom may be adopted as part of the law governing a particular set of circumstances if it can be judicially noticed or can be proved to exist by evidence’\(^{15}\) and that ‘the burden of proving a custom shall lie upon the person alleging its existence’\(^{16}\).

Similarly, section 14 (2) of the repealed Act which was on judicial notice has now been inserted in section 17 of the new Act\(^ {17}\). Section 17 has been aptly and tersely couched thus ‘a custom may be judicially noticed when it has been adjudicated upon once by a superior court of record’\(^ {18}\). Furthermore, section 14 (3) of the repealed Act now assumes a full section\(^ {19}\) instead of a sub-section which it was under the repealed Act. Still, section 14 (3) and its proviso in the repealed Act has now been broken into section 18 (1) & (3) in the new Act. A new subsection (2) of section 18 which did not exist in the repealed Act has been inserted in the new Act to the effect that:

Where the existence or the nature of a custom applicable to a given case is in issue, there may be given in evidence the opinions of persons who would be likely to know of its existence in accordance with section 73.\(^ {20}\)

Also, the proviso hitherto contained in section 14 (3) of the repealed Act is now articulated in section 18 (3) of the current Act. Confession which was provided for in section 27 (1) of the repealed Act is now contained in section 28 of the new Act. The definition of confession has not changed. It remains intact as it was in the repealed Act. Besides, section 27 (2) of the repealed Act now becomes section 29 of the new Act. Added to that is the fact that the said section 29 of the new Act has been enlarged in scope and applicability. Section 27 (2) of the repealed Act provides for voluntary confessions relevant against the maker and in particular states that ‘confessions if voluntary, are deemed to be relevant facts as against the persons who make them only’. In the new Act, the word ‘voluntary’ obviously has been removed, but phrases such as ‘by oppression of the person who made it\(^ {21}\) or ‘in consequence of anything said or done…’\(^ {22}\) have been introduced as criteria for the admissibility or inadmissibility of confessional statement made by the defendant.

A critical view of the new Act shows that section 28 of the repealed Act which provided for confession caused by inducement, threat or promise and when they are relevant in criminal proceedings is no longer contained in the new Act. However, although it has not been completely thrown away, it has been re-couched or retouched and enacted in section 29 (2) (a) and (b) of the new Act by different wordings therein introduced. It is worthy to opine that section 29 (3) of the new Act is an innovation in the sense that it was not provided for in the repealed Act. The said innovation entails the court \textit{suo motu} requiring the prosecution to show that the confession was not obtained contrary to section 29 (2) (a), (b) of the new Act.

On hearsay, the general rule is that hearsay evidence is inadmissible and this originally flowed from the common law rule. Hearsay evidence arises where a witness in his own testimony repeats a statement; oral or written, made by another person in order to prove the truth of the facts stated.\(^ {23}\) Although the term ‘hearsay’ was not used in the repealed Evidence Act, the rule against hearsay was of common law origin; and nevertheless, was part of the law in Nigeria because it was incorporated into it by statute\(^ {24}\). The Supreme Court, in \textit{Ijioffor v. The State}\(^ {25}\), after citing with approval the

\(^{15}\) Evidence Act 2011 S. 16 (1).
\(^{16}\) Ibid S. 16 (2)
\(^{17}\) With the note or heading captioned ‘what customs admissible’.
\(^{18}\) Evidence Act 2011, S. 17
\(^{19}\) Ibid; s. 18
\(^{20}\) Ibid S. 18 (2). For clarification, s. 73 mentioned therein is on when opinion as to existence or general custom or right is admissible.
\(^{21}\) Ibid, S. 29 (2) (a).
\(^{22}\) Ibid, S. 29 (2) (b).
\(^{24}\) The said incorporation was by virtue of section 77 of the repealed Evidence Act with the marginal note providing that oral evidence must be direct.
formulation of the hearsay rule by Cross, stated that the formulation ‘encompasses the provisions of section 77 … of the (repealed) Evidence Act’. But the new Evidence Act, in section 38 thereof has gone further to fill the lacuna created in the law by the repealed Act, by inserting therein hearsay and its rule. In particular, the said section 38 provides that ‘hearsay evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act’. Furthermore, hearsay which was never defined in the repealed Act is now so clearly defined to the effect that:

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

A major breakthrough of the new Act is in the area of admissibility of statement in documents produced by computers. This was not provided for in the repealed Act of 1945. The new Act provides that ‘in any proceeding, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible…’, provided ‘it is shown that the conditions in subsection (2) of this section are satisfied, in relation to the statement and computer in question’.

The new Act further provides, in relation to computer generated evidence, that a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment. For clarity, electronic evidence is any information created or stored in digital form that is relevant to a case. The use of computers and other forms of electronic storage devices have invaded every sphere of human life on a cross-continental basis. This is the situation in the United Kingdom, Australia and the United States of America. In R v. Robinson, the court held that a tape recording is a document if what was recorded was information or evidence and a tape recording of a conversation could probably be described as documentary evidence of the conversation. Equally, in Grant & Anor v. South Western and Country Properties, the court accepted a tape recording as a document and reiterated that the mere fact that an instrument is required for deciphering the information cannot make any difference in principles. Similarly, films were held to be documents in Senior v. Houldsworth. The position these days is that most western countries mentioned above, admit electronic evidence as original document.

It is worthy to observe that section 91 of the repealed Act on the admissibility of documentary evidence as to facts in issue has been replicated in section 83 of the new Act, But the novelty therein

26 Cross on Evidence, 6th edn p. 387.
27 Ijioffor v. The State (note 25 at 1457).
28 Evidence Act 2011 S. 38.
29 Ibid, s. 37.
30 Ibid, S. 84. In addition, computer means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process.
31 Ibid.
32 Ibid, s. 84 (2) - (5).
33 Ibid.
34 Ibid, S.84 (5) (c).
36 (1972) All ER 699.
38 [1975] 2 All ER 465.
39 Federal Rules of Evidence, Rule 1001 (3) United States which provides that if data are stored in a computer, any printout or other output readable by sight, shown to reflect the data accurately is an original. In Aguimatang v. California State lottery 34 Cal. A pp. 3rd 769, 798, the court held that the computer printout does not violate the best evidence rule because a computer printout is considered an original.
contained is that section 91 (5) of the repealed Act has been shortened and made smaller in content to
the extent that part of it dealing with what the court may do where proceedings are with a jury, has
been removed, presumably because the jury system does not apply in Nigeria. The provision on
weight to be attached to evidence which was the hallmark of legislation in section 92 (1) & (2) of the
repealed Act has been done away with by the new Act. Section 69 of the repealed Act provided for
evidence of character of the accused in criminal proceedings\textsuperscript{40}. Unlike the repealed Act which had four
sub-sections in section 69, the new Act provides for the same issue in section 82 which has been
enlarged and new sub-section 5 and 6 have been added to section 82 of the new Act in order to
strengthen the law. Under the repealed Act, section 111 (1) which dealt on certified true copies of
public documents has been enacted in section 104 (1) (2) of the new Act. In other words, section 111
(1) of the repealed Act has now been broken into section 104 with additional subsection 2 thereof. Put
another way, subsection 2 in the new Act is extricated from section 111 (1) of the repealed Act and
articulated in section 104 (2) of the new Act.

Admittedly, Part IV of the new Act provides for proof and in particular section 121 thereof
provides for proof of facts. It provides that a fact is said to be ‘proved’ when after considering the
matters before it, the court either believes it to exist or considers its existence probable that a prudent
man ought, in the circumstances of the particular case, to act upon the supposition than it does exist. It
also states that the word ‘disproved’ means when, after considering the matters before it, the court
either believes that it does not exist or considers its non – existence so probable that a prudent man
ought in the circumstances of the particular case, to act upon the supposition that it does exist, and
finally the phrase ‘not proved’ as ‘when it is neither proved nor disproved’\textsuperscript{41}.

At this juncture, it is suitable to opine that the words ‘proved’, ‘disproved’ and the phrase ‘not
proved’ were defined in the repealed Act as is being done currently in the new Act. Whereas these
definitions were contained in the interpretation section\textsuperscript{42} of the repealed Act, same definitions are now
contained in the body of the statute dealing with proof generally. Section 77 of the repealed Act
provided that oral evidence must be direct\textsuperscript{43}. But it should be observed that section 77 (d) (ii) has now
been transformed into a full – fledged section\textsuperscript{44} of the new Act. This section has been further divided
into two subsections and paragraphs\textsuperscript{45}. This is designed to ensure lucidity and clarity of style in terms
of presentation and understanding of the new Act.

The repealed Act in section 160 thereof, provided for the competency of persons charged to
give evidence. This is replicated in section 180 of the new Act. But it is important to emphasize the
fact that section 160 (b) and (c) have not been repeated in the new Act. Instead, a new section 181
which deals with comment on the failure by defendant to give evidence has been enacted in the new
Act to cover section 160 (b) of the repealed Act. There is however a slight modification in content.
Whereas the repealed Act provided that ‘the failure of any person charged with an offence to give
evidence shall not be made the subject of any comment by the prosecution’, section 181 of the new
Act, provides, on the reverse, to the effect that:

\[ \ldots \text{ In any criminal proceeding, where a defendant has not given evidence, the court, the prosecution or any other party to the proceeding may comment on the failure of the defendant to give evidence but the comment shall not suggest that the defendant failed to do so because he was, or that he is, guilty of the offence charged.} \]

The milestone there created means that silence or failure on the part of the defendant to
give evidence in any criminal proceeding in which he stands accused of any offence and comment on

\textsuperscript{40} Evidence Act 1945, S. 69 (1) – (4).
\textsuperscript{41} Evidence Act 2011 s. 121 of the new Act.
\textsuperscript{42} Evidence Act 1945 s. 228 which was the interpretation section of the repealed Act.
\textsuperscript{43} Evidence Act 1945, S. 77 (a) – (d) (ii).
\textsuperscript{44} Evidence Act 2011, S. 127 of the new Act which now deals on inspection when oral evidence refers to real
evidence.
\textsuperscript{45} Ibid, S. 127 (1) & (2) (a) & (b)
same by the court or the prosecution or any other party to the proceeding does not amount, or imply guilt on the part of the defendant. The prosecution still has a burden to discharge on proof beyond reasonable doubt. In section 179 (2) (a) of the repealed Evidence Act, provision was made for treason and treasonable offences. But the said section 179 (2) (a) has been captured and enacted as new and full-fledged section 46 in the new Act, instead of a subsection which it was. In addition, section 198 (1) of the new Act provides for an accomplice in much the same way as was done by section 178 (1) of the repealed Act but the proviso hitherto contained therein has been shortened in the new Act to the extent that the phrase ‘though they have a legal right to do so and in all other cases the court shall so direct itself’, is no longer contained in the new Act 47. Again, the word “accomplice” which had not been defined in the repealed Act has now been explicitly defined in the new Act. In the new Act, an accomplice is any person who, pursuant to section 748 of the Criminal Code, may be deemed to have taken part in committing the offence as the defendant or is an accessory after the fact to the offence, or a receiver of stolen goods. 49This is one piece of the definition which was obviously lacking in the repealed Act, but which has now been entrenched in the new Act.

In the repealed Act, section 183 provided for un-sworn evidence of a child but the new Act, in also providing for un-sworn evidence of a child, makes it splendid and innovative by introducing and inserting the age of the child into the legislation. It goes further to provide that “in any proceedings in which a child who has not attained the age of fourteen years is tendered as a witness, such child shall not be sworn and shall give evidence otherwise than on oath or affirmation, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking truth.” 50 One could observe, therefore, that the new Evidence Act has a knack for details. This knack for details is expressed in the interpretation section51 and in the entire body of the Act. It is further expressed in the new Act to the effect that:

… Any reference to a section or other provision of the Criminal Code Act or the Criminal Procedure Act shall, as the case may be, be construed as including a reference to the corresponding section or provision of the Criminal Code Law or Penal Code Law or the Criminal Procedure Code Law or Penal Code Law or the Criminal Procedure Code Law of a State or in respect of the Federal Capital Territory, Abuja, the Penal Code Act or the Criminal Procedure Code, whichever may be appropriate. 52

The foregoing provision was however not captured or contained in the repealed Act, but in the present Act, it offers a sound explanatory effect relating to other criminal statutes for a better appreciation of the law. Section 33 of the repealed Act states that “statements, written or verbal, or relevant facts made by a person who is dead are themselves relevant facts …”53 The scope of that section which is now enacted in section 39 of the new Act, has been expanded to include persons who cannot be found; who had become incapable of giving evidence, or whose attendance cannot be

---

46 Evidence Act 2011, s. 201.
47 Ibid, s. 198 (1).
48 Criminal Code Act, S. 7 deals on principal parties to an offence.
49 Ibid, s. 198 (2).
50 Ibid, s. 209 (1). Compare s. 183 (1) of the repealed Act to s. 209 (1) of the new Act for a better appreciation of the milestone introduced by the new Act.
51 See S. 258. for the interpretation of ‘banking business’, ‘the constitution’, ‘copy of document’, ‘computer’, ‘film’, ‘financial institution’, ‘person interested’, ‘Public Service of the Federation, or of a State’, ‘real evidence’. The latitude for the definition of ‘documents’ has been enlarged, so also is the interpretation of the phrase ‘wife and husband’. The current interpretation of ‘wife and husband’ to the extent of including ‘marriage validly contracted … under Islamic law or a customary law applicable in Nigeria …’, is contrary to section 10 of the Criminal Code which defines ‘wife and husband’ to “mean respectively the wife and husband of a Christian marriage”, no more and no less. There is therefore the need for a synergy in the definition of the phrase ‘wife and husband’ by statute in Nigeria.
52 Ibid, s. 258 (2).
53 Evidence Act 1945, S. 33 (1).
procured without an amount of delay or expense under which the circumstances of the case appears to the court unreasonable, are admissible under section 40 to 50.

A critical look at section 33 of the repealed Act shows that its paragraphs have assumed full sections in the new Act. For example, section 33 (1) (a) of the repealed Act now becomes section 40 in the new Act, section 33 (1) (b) now becomes section 41 in the new, section 33 (1) (c) is enacted as section 42 of the new Act, section 33 (1) (d) is now legislated as section 43 of the new Act. Furthermore, section 33 (1) (e) of the repealed Act is now articulated in section 44 of the new Act while section 33 (3) (a) on declaration by testators is now replicated in section 45 of the new Act. It is important to observe that there are however, some modifications in terms of grammar.

In Nigeria, under the repealed Evidence Act, when a woman complained of rape, it could be shown in evidence that she was of a generally immoral character, that she had sexual intercourse with other men and that she had sexual intercourse with the accused on other occasions. In the case of rape, it appeared literally to say the accused the winner of the contest. This was premised on the fact that a false allegation of rape was particularly difficult to disprove the most damaging evidence of the complainant’s past sexual history, which could be admitted as being relevant to the issue of consent. The presumption appeared to be that a woman with a lot of sexual experience was more likely to have consented to sexual relations with the accused.

Therefore, the indiscriminate use and acceptance of evidence as contained in section 211 of the repealed Evidence Act posed a threat to the complainant’s right to privacy as guaranteed in section 37 of the 1999 constitution. It also discouraged the reporting and prosecution of the crime. Under the new Evidence Act, the law in respect of the shield has changed in terms of title in the marginal note and content in the body of the Act. It provides that where a person is prosecuted for rape or attempt to commit rape or for indecent assault, except with the leave of the court, no evidence shall be adduced, and except with the like leave, no question in cross-examination shall be asked by or on behalf of the defendant, about sexual experience of the complainant with any person other than the defendant.

Whereas the former or repealed Evidence Act was specific as to the gender of the perpetrator (as man), the current Evidence Act is gender-neutral because it uses the phrase ‘a person’. This is a departure from previous enactments in Nigeria, which adopt gender-specific approach with regard to the perpetrator of the crime of rape. This appears to be in confluence with the law on the subject in respect of the crime in other jurisdictions. The reason seems to be that it is not only a man that could commit the crime of rape; that besides a man being an accomplice to the crime, a woman could also commit the crime within the meaning of the Code relating to parties to an offence. The foregoing is suggestive of the fact that the law on rape in Nigeria should be amended and particularly should be couched in a gender-neutral fashion to be in conflux with what obtains currently in other jurisdictions herein articulated.

Furthermore, the phrase ‘immoral character’ which hitherto had been used in the former Act to describe the assumed immoral content or disposition of the female complainant had been removed by the new Act. Similarly, the provision relating to any question on cross-examination as to whether the

---

54 Evidence Act 2011, S. 39 (b) (c) & (d).
55 A comparison of section 33 (1) with sections 40 – 45 of the new Act confirms the analysis offered in the body of this paper.
56 Evidence Act 2004, s. 211.
57 In the Constitution of the Federal Republic of Nigeria, Cap. C 23, (LFN) 2004, (as amended), section 37 states that the privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected.
58 Evidence Act 2011, s. 234. the marginal note, now reads: “Special restrictions in respect of permissible evidence in trial for Sexual Offences”.
60 See, Combating of Rape Act 2000 (Namibia), s. 1 (1); Sexual Offences Act 2003, (England), s. 1 (a) (b) (c); German Civil Code 1896 (Germany), s. 177 (1) (as variously amended); Canadian Criminal Code 2008, (Canada), part xxii; Offences of Zina (Enforcement of Hudood Ordinance 1979 (Pakistan), s. 6 and Penal Code 1915 (Indonesia), Article 285.
complainant had previous sexual connection with men, other than the accused person, is no longer contained therein. The beauty of the provision and indeed the shield contained in the new Act is that, no question in cross-examination shall be asked by or on behalf of the defendant about the sexual experience of the complainant with the defendant except with leave of the court. Following from the above, it appears that the provision relating to the said leave of court creates a procedural impediment to the defendant before he or his counsel dabbles in the past sexual history of the complainant because of the inconveniences he would encounter and the storms he would weather before obtaining the law. Again, this seems to be a shield or milestone inserted by the draftsman or the enacting authority in order to protect the complainant.

Under the repealed Act, it was not mentioned who could probe into the sexual or the amorous history of the complainant. But it was assumed that the accused person could do so. It could also have been assumed that it was the court. But the new Act is explicit, express and clear on the issue. It is the defendant or someone on his behalf (apparently his counsel) that can cross-examine the complainant on her past sexual history with him (accused person).

A comparative view of the repealed Act and the present Act shows a predilection for the use of the word ‘admissible’ in the new Act for the word “relevant” in the repealed Act and the use of the word ‘inadmissible’ in the new Act for the word ‘irrelevant’ in the repealed Act. The interchanges highlighted above cut across the entirety and generality of the present Act. This is the preferred style or choice of words by the draftsman in the new Act. But there seems to be no difference amongst those words. According to the Black’s Law Dictionary, the word ‘relevant’ means:

… Logically connected and tending to prove or disprove a matter in issue, having appreciable probative value, that is, rationally tending to persuade people of the probability or possibility of some alleged facts.

In the same vein, the word ‘admissible’ in relation to evidence means evidence that is relevant and is of such a character (e.g. Not unfairly prejudicial, based on hearsay, or privileged) that the court should receive it. Under the repealed Act, it was not mentioned who could probe into the sexual or the amorous history of the complainant. But it was assumed that the accused person could do so. It could also have been assumed that it was the court. But the new Act is explicit, express and clear on the issue. It is the defendant or someone on his behalf (apparently his counsel) that can cross-examine the complainant on her past sexual history with him (accused person). Besides, the word “defendant” referred to, in section 234 of the new Act, has previously been used exclusively in a broad popular sense in civil causes or matters, but its import to the realm of criminal law now, in place of the phrase “accused person” in the present Act, is what surprises the present writer. Perhaps, Nigeria is adopting the approach of developed jurisdictions like the United States and Canada in referring to accused persons as defendants in their jurisprudential writings.

In respect of affidavit evidence, the marginal note in section 86 of the repealed Evidence Act is still retained in the new Evidence Act, but the provision on ‘no extraneous matter’ grounds of


\[63\] Ibid. Similarly, the word ‘relevant’ also means that any two facts to which it is applied are related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non – existence of the other” p. 1404, Per Stephen, *A Digest of the Law of Evidence* (4th edn, 1881) in B. A. Garner, *Black’s Law Dictionary*, 9th edn p. 1404.

\[64\] B.A. Garner, note 63 at 635. Further than this, the word ‘irrelevant’ when used against the backdrop of evidence means evidence “having no probative value, not tending to prove or disprove a matter in issue” per B.A. Garner, op. cit, p. 906, as well as the word ‘inadmissible’ in relation to evidence means evidence excludable by some rule of evidence.

\[65\] Evidence Act 2011, s. 115.

\[66\] Evidence Act 1945, s. 87.
belief to be stated 67 and informant to be named 68 which had full-fledged sections in the repealed Act have now been made subsections 69 in the new Act.

A novel provision which had not been provided for in the repealed Act is now contained in the current Evidence Act. It centres on conflicting affidavits and states that:

… When there are before a court affidavits that are irreconcilably in conflict or crucial facts, the court shall for the purpose of resolving the conflict affidavits arising from the affidavit evidence, ask the parties to proffer oral evidence as to such facts, and shall hear any such oral evidence of the deponents of the affidavits and such other witnesses as may be called by the parties.70

The foregoing is consistent with the case of Ogunsakin v. Ajidara 71 in which the Court of Appeal held that where there are conflict in the affidavit, the principle is that where the affidavits conflict on a disputed material, a court called upon to resolve an issue of fact sought to be established by the conflicting affidavits should not resolve such issue merely on the conflict affidavit but should hear oral evidence from the deponent and such other witnesses as the parties may be induced.

The repealed Evidence Act did not pointedly provide for hearsay, its definition and the rule articulated therein. Hence, reliance was placed greatly on the common law, case law and the work of authors. But in the new and extant Act, hearsay is defined and it means oral or written made otherwise than by a witness in a proceeding; or contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. 72

Hearsay rule as contained in the new Act is that hearsay evidence is not admissible except as provided in this part (of the Act) or under any other provision of this and any other Act. 73 That was one of the manifest weaknesses of the repealed Act which has now been assuaged or rectified by the new Act.

The scope of the new Act has been enlarged to provide for matters which had not been legislated upon in the repealed Evidence Act. This gravitates on discretion to exclude improperly obtained evidence. It provides that evidence obtained improperly or in contravention of a law, or in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained. 74 In pursuance of section 14 of the new Evidence Act, the matters the court shall take into account include, (a) the probative value of the evidence, (b) the importance of the evidence in the proceeding, (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, (d) the gravity of the impropriety or contravention, (e) whether the impropriety or contravention was deliberate or reckless, (f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention and, (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law. 75

67 Ibid, s. 88. 
68 Ibid, s. 89. 
69 Evidence Act 2011, s. 115 (2), (3) & 4. 
70 Ibid, s. 116. 
71 (2010) All FWLR (pt. 507) 109, see also the case of P. A. S. & T. A. Ltd v. Babatunde (2008) 8 NWLR (pt. 1089) 267 where it was held that an oral evidence will only be necessary to resolve a conflicting affidavit. 
72 Evidence Act 1945, s. 37 (a), (b). 
73 Ibid, s. 38. 
74 Ibid, s. 15. 
75 Ibid, s. 14 (a) & (b).
3. CONCLUSION

The dynamic nature of human society is associated with change and change is constant. The inevitability of change straddles all human and even natural endeavours including the making of statutes. In most circumstances, the age of a statute and the inadequacy of its provisions can necessitate or engender the repeal of such statute. Worthy is the fact that a statute is enacted to solve a particular or some specific problems. When a statute fails to address such problems, there is a need either for an amendment or repeal. The failure can arise by way of a vacuum or lacuna inherent in it and which cannot be rectified by an amendment or amendments. Thus, an outright or total repeal of such statute becomes imperative. This is exactly the fate of the former Evidence Act 1945 which was repealed in order to herald the cradle of a new and current Evidence Act 2011, a product of purposeful legislative law-making by the National Assembly in Nigeria.

The repeal of the Evidence Act 1945 is seen as a welcome development by the entire legal fraternity in Nigeria. This is because it had since become a worn out statute not suitable for the purpose (s) for which it was enacted, particularly as a result of the inadequacy of some of its provisions. The Evidence Act 2011 is one piece of legislation which has further enhanced the dispensation of justice in our courts. It shows that the legal system in Nigeria responds admirably to the aspirations and advocacies of key players in the mainstreaming of a new Evidence Act in Nigeria.

©British Academic Journals 2011-2013