Presumption of Monogamy in Nigeria and the New Evidence Act: The Supreme Court Decision in *Okoro v The State* Revisited*

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Abstract

Prior to the Nigerian Evidence Act, 2011, the nature of the marriage contracted by a person, especially an accused, determines his entitlement to some of the spousal protections available under the old Evidence Act and the Criminal Code. The Court and certain learned writers have not been consistent on whether all marriages are presumed to be monogamous, and thus placing the burden of rebutting this presumption on the adverse party, especially the prosecution in criminal proceedings. This work is intended to bring out the contradictions and concludes with the view that both in law and in reality of our social context, there is no basis to hold that all marriages in Nigeria are presumably monogamous.

1. Introduction

"It is gratifying that a rebuttable presumption of monogamy exists in favour of every marriage."[1] Is the above statement true?

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1 T. Osipitan; "Public Law Perspectives of Rights of Women in Nigeria," in *Justice in the Judicial Process* (*Essays in Honour of Hon. Justice Eugene Ubaezonu,* JCA) (Enugu: Fourth Dimension Publishing Co. Ltd, 2002), p. 247. Similar statement is made by the same learned author in another work; "Competence and Compellability of Witness," in, Afe Babalola, (ed) *Law & Practice of Evidence in Nigeria* (Ibadan: Sibon Books Ltd, 2001), p. 389. Fidelis Nwadialo, *Modern Nigerian Law of Evidence*, (2nd ed.),

If yes, is there any statutory premise for this rebuttable presumption? If at all such presumption was ever held under our laws, is it still feasible or defensible? If there is change of position, is there any justification for such change of position? We intend to proffer answers to the above questions in this work.

It is our contention, that there is no basis for holding such presumption in the Nigerian legal and social context[2] In this regard, the decision of the Supreme Court in *Okoro v State*[3] is considered in order to ascertain whether it emphasises the existence or otherwise of the presumption of monogamy in Nigeria. This analysis is imperative considering the position of our laws that accord special privileges to spouses of monogamous marriage especially under the repealed Evidence Act[4] and the Criminal Code.[5]

2. Definitions

For a better appreciation of our contention, it is imperative that we proffer definitions to some of the terms that are central to our discussion. These are terms such as 'presumption,' 'monogamy' and 'polygamy.'

The word 'presumption' is not defined anywhere in the Evidence Act, 2011.[6] Yet the term is used in several sections.[7]

(Lagos: University of Lagos Press, 2000), p. 481 appears to restrict this presumption to where the spouse swears on the Bible.

2 Evidence Act, Cap. E14, *Laws of the Federation of Nigeria*, (LFN) 2004.

3 (1998) 14 NWLR (Pt. 598) 181.

4 Cap. E14, LFN, 2004. Provisions relating to matrimonial communications are in sections 182(3), 186 and 187, Evidence Act, 2011.

5 Criminal Code Act, CAP. C38, LFN, 2010. These are provisions such as accessory after the fact in s. 10; defence of compulsion in s. 33; and conspiracy in s. 34.

6 Act No. 18, 2011 with commencement date as 3rd June, 2011.

According to *Black's Law Dictionary*,[8] presumption is defined as:

> A legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts.

It is therefore, a conclusion of the existence of a fact which a court must, or should or may draw, which conclusion may or may not be contradicted. This is discernible from section 145 (1)-(3) of the Evidence Act which gives instances in which a fact presumed may or may not be rebutted. Under the Evidence Act, 2011,[9] there are essentially two main types of presumption and these are presumption of law, which may be rebuttable or irrebuttable; and presumption of fact. A fact that is presumed needs no further proof by the person in whose favour the presumption exists. It is therefore a 'substitute for evidence.' It also affects the burden of proof in that once a given fact is presumed in favour of a party, the burden to disprove such fact is automatically placed on the adverse party.[10] Therefore to say there is a rebuttable presumption of monogamy in Nigeria means that the party in whose favour the presumption exists does not have the burden to establish the existence of monogamy.

On the other hand, the word 'monogamy' is equally not defined in the Evidence Act. The Act[11] merely interprets "wife' and 'husband' to mean respectively the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic Law or a Customary Law applicable in Nigeria, and

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7 Part X, See sections, 145-168, Evidence Act, 2011.

8 *Black's Law Dictionary*, (7th edn.), (St. Paul, Minn, USA: West Group, 1999), P. 1203.

9 The Evidence Act, 2011 is intended whenever 'Evidence Act' is mentioned unless otherwise stated.

10 S.136, Evidence Act.

11 S. 258, Evidence Act.

includes any marriage recognised as valid under the Marriage Act.[12] A monogamous marriage is one which is recognized by "the law of the place where it is contracted as a valid union of one man and one woman to the exclusion of all others during the continuance of the marriage."[13] Such voluntary union does not have to last for life.

This makes monogamy as given in the Interpretation Act different from the English concept of monogamy. In *Hyde v Hyde*[14] it was held to mean "a voluntary union for life of one man and one woman to the exclusion of all others." This accords more with the definition of Christian marriage in the Criminal Code.[15] Monogamy as construed in the Interpretation Act is intended in this article.

To the contrary 'polygamy' has been interpreted to mean "the state of being simultaneously married to more than one spouse."[16] This presupposes the marriage of a person to more than one spouse at the same time. However, this is distinct from the English law concept of polygamy which considers every marriage that has the possibility or potentiality of either spouse getting married to another person during the subsistence of the first marriage to be polygamous; whether or not either of the spouses actually gets married to another person.[17] It is therefore intended, in this work, to describe all forms of marriages that are not monogamous in the term of the Interpretation Act as being polygamous.

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12 Cap M6, LFN, 2010. This clearly deviates from the previous position under the repealed Evidence Act, s. 2(1) which defines 'wife' or 'husband' to mean 'wife' or 'husband' of a monogamous marriage.

13 Interpretation Act CAP 123, LFN, 2010, s. 18(1).

14 (1866) L.R. 1 P&D 130.

15 Criminal Code Act, Cap C38, LFN 2010, Schedule, part 1.

16 *Black's Law Dictionary*, above, note 8 at 1180.

17 *Sowa v Sowa* (1961) 1 All E.R. 687.

3. Facts of the case- *Okoro v State*[18]

The appellant was charged with the murder of his brother. At his instance and in his defence, the statement of the appellant's wife made at the police station was admitted. The statement indicted the appellant to the extent that it was the appellant that shot the gun that killed the deceased, contrary to the story of the appellant that it was PW1 that fired the gun that mistakenly hit the deceased. The trial court believed the story of the prosecution that it was the appellant that shot the gun that resulted in the death of the deceased. In coming to this conclusion, the trial court acted on Exhibit E, the statement of the wife of the appellant, the evidence of PW1 who was around at the material time. The appellant challenged the conviction by the trial court. The Court of Appeal confirmed the conviction. On further appeal to the Supreme Court, it was argued on behalf of the appellant that the statement of the wife of the appellant relied upon by the trial court and the Court of Appeal was inadmissible as the spouse was incompetent to give evidence against the appellant. Amongst other provisions submitted for consideration for the purpose of the appeal, the Supreme Court considered sections 2(1) and 161(2) of the old Evidence Act.[19]

The Supreme Court, in the leading judgment delivered by Honourable Justice Ogundare, dismissed the appeal holding, amongst other things, that the appellant did not establish that the marriage between him and the wife, who made statement that indicted him at the police station, was monogamous, entitling him to the protection in section 161(2) of the Evidence Act.

4. Earlier Position

There is no statutory provision as to the presumption of monogamy or otherwise of all marriages. In fact as earlier

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18 Above note 3.

19 Now section 182, Evidence Act, 2011.

indicated, only those marriages that are voluntary union between one man and one woman to the exclusion of others are regarded monogamous, and these are essentially Christian marriages or marriages conducted in accordance with the Marriage Act.[20] But, as was observed by a learned writer, Osipitan:[21]

> Judicial decisions, have tried as far as they can, to blur the distinction between spouses of monogamous and non-monogamous marriages. A rebuttable presumption of monogamy exists in favour of every marriage thereby making the spouse of the accused to be *pre-facie* incompetent to testify except on the application of the accused. The burden of therefore proving the non-existence of a monogamous marriage is on the prosecution.

Some of the cases usually cited in support of the above view are *R. v Udom*,[22] *R. v Idiong*,[23] *R.v Laoye*,[24] *R.v Adeshina*[25] and *Lamu v State*.[26] In these cases, the marriage between the accused and their respective wives were held to be monogamous and consequently such wives were held, *prima facie*, to be incompetent to testify for the prosecution. By these cases, there is therefore a presumption that all marriages, notwithstanding the mode of oath taking adopted by the spouse- witness, are monogamous.

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20 Cap M6, LFN, 2010.

21 Osipitan, T "Competency and Compellability of Witness," in Afe Babaloba (ed) *Law & Practice of Evidence in Nigeria* (Ibadan: Sibon Books Ltd, 2001), p. 389.

22 12 WACA 227.

23 (1950) 13 WACA 30.

24 6 WACA 6.

25 (1958) 3 FS C 25.

26 (1967) N. M. L. R. 228; (1967) 1 ALL NLR 114.

In *R v Udom*[27] the accused persons were tried jointly and one of the Crown witnesses, Adiaha Atat, who was sworn on the Bible stated in her evidence that the first accused person was her husband. The first accused was also sworn on the Holy Bible. They were convicted and on appeal, Lucie Smith, C.J of the West African Court of Appeal, said:

> Sections 160 and 161 of the Evidence Ordinance deal with the compentency and compellability of husband and wife. There have been cases before this Court where it has been laid down that, where a husband or wife of an accused is called by the Crown and is sworn on the Koran or Bible, a presumption arises that such husband or wife was the husband or wife of Mohemmedan or Christian marriage respectively (*Rex v Momodu Laoye* (1) and *Rex v Ajiyola & Ors* (2). In the first case, the appeal was allowed on the ground of failure of identification of the body examined by a medical witness. In the judgment of the Court, we find the following passage:
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> > "Another minor point is that the wife of the second accused was called as a witness for the prosecution without it being definitely given in evidence that she was not the wife of a monogamous marriage. It is true that she was sworn on the Koran and was therefore presumably a Mohemmedan; but a point of this importance should not be left to presumption.

In the second case the material part of the judgment reads as follows:

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27 Above note 22.

> "there is only one point of substance in this appeal and that is that the conviction of the appellant rested upon the evidence of a woman named Eunice Adeye who is the wife of a co-accused named Daniel Ajiyola. Both the woman and the co-accused in giving evidence were sworn on the Bible, she said 'the first accused is my husband', and he described her as his wife. It must be taken that they are husband and wife of a 'Christian marriage' and the woman was only a competent witness if called upon the application of the person charged. She was not so called and consequently was not a competent witness. The case of Rex v. Mount & Another, 24 C.A.R, p.135, is an authority deciding that in such circumstances the conviction cannot stand.

In *R v Laoye,*[28] the accused persons were charged with murder and convicted of the offence. One of the witnesses that gave evidence for the Crown was the wife of one of the accused persons. They were convicted and appealed to the West African Court of Appeal, in the judgment *per* Kingdon, C.J, Butler Llyod and Carey, JJ., the Court stated on the issue of the wife of one of the appellants giving evidence for the crown without the consent or application of the husband thus:[29]

> Another minor point is that the wife of the 2nd accused was called as a witness for the prosecution without it being definitely given in evidence that she was not the wife of a monogamous marriage. It is true that she was sworn on the Koran and was therefore presumably a Mohemmedan; but a point of this importance should not be left to presumption.

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28 Above note 24.

29 *Ibid*, at 8.

In *R v Idiong*[30]the two appellants were convicted of murder of a woman by attempting to procure abortion through a native doctor. The first appellant's wife gave evidence for the Crown after swearing on a gun and her husband was stated to be a pagan. The Court held that the evidence of the 1st appellant was not admissible, as it was not proved affirmatively that she was the wife of a polygamous marriage and no presumption against the appellants arose from the nature of the oath taken or from the fact that her husband was a pagan. The West African Court of Appeal, per Verity, C.J in his judgment, relying on the cases of *R v Laoye*[31]; *R v Ajiyola & Ors*,[32] *R v Ajoobodu Afenya*,[33] and *R v Udon & Ors*[34] said:[35]

> It is clear from these decisions that while the testimony of the spouse of an accused person who is sworn on the Bible will be excluded on the presumption that the marriage was a Christian marriage and therefore necessarily monogamous, no contrary presumption arises from the fact that witness was not sworn on the Bible. The Evidence Ordinance does not define a wife as the wife of a Christian marriage but of a monogamous marriage and there may well be forms of monogamous marriage between parties who are not Christians and who will not be sworn on the Bible, as, for example, a marriage under section 27 of the Marriage Ordinance (Cap 128). In our view, therefore, in the present case, no presumption arises from either the facts that the witness was sworn on gun or from the

30 *Ibid.*
31 *Ibid.*
32 9 WACA 22.
33 Cited as WACA judgments, January-February, 1947, p. 9, in the judgment.
34 2 WACA 227.
35 At page 31.

> facts that first appellant is stated to be a pagan. There is no proof that the marriage was not a monogamous marriage; the witness not having being called upon the application of the person charged was not a competent or compellable witness and her evidence was inadmissible.

In *Lamu v State*[36] the accused was charged with culpable homicide punishable with death. The evidence of the prosecution was mainly from two witnesses, one of which, Saduja, was the wife of the accused, who was a pagan and sworn on a knife during the trial. In the cause of the trial, the prosecution did not prove that the marriage was non-monogamous. On appeal against the conviction to the Supreme Court, Brett, JSC, held:[37]

> Saduja, who was a pagan and was sworn on a knife, was not proved by the prosecution to have been the appellant's wife by a non-monogamous marriage. The onus of proving that the spouse of an accused person is a competent witness for the prosecution on any charge not coming within section 160(1) of the Evidence Law is on the prosecution and no presumption arises from the nature of the oath taken or from the religious belief professed by the spouse: R v Idiong (1950) 13 WACA 30. It follows that Saduja's evidence was wrongfully admitted and that the appeal must be allowed unless this Court can hold that no substantial miscarriage of justice has occurred and apply the proviso to section 26(1) of the Supreme Court Act.

From these cases, the conclusion made by the Courts is that once it is shown that the wife of one of the accused persons gave evidence in the proceeding for the prosecution, that

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36 *Supra*.

37 (1967) 1 ALL NLR 114 at 116.

evidence is inadmissible as the wife is not a competent witness unless upon the application of the accused-spouse. This remains the same notwithstanding the manner of oath taken by the spouse witness. Where the wife was sworn on the Koran, or the fact that the wife was sworn on a gun or any other object outside the Bible, the presumption that their marriage was a Mohemmedan or polygamous would not be sufficient. The wife remained incompetent unless there is concrete evidence that the marriage was not monogamous marriage. Implicitly, this establishes that there is a presumption that every marriage in Nigeria, no matter the manner of the oath taken by the spouse of an accused, is monogamous until the contrary is positively proved by the prosecution.

Fidelis Nwadialo appears to limit the presumption of monogamy to instance where the spouse witness is sworn on the Bible. He observed:[38]

> Where a charge is not specified in section 161(1) the spouse can only be competent if the accused applies for him/her to testify for the prosecution or if the marriage is a polygamous one. As the accused can hardly be expected to make this sort of application, the only way of getting the spouse's evidence is to show that the marriage is not monogamous, if in fact it is so. The onus of proving this is on the prosecution. Where the spouse is sworn on the Bible, a presumption arises that the marriage is a 'Christian marriage' and necessarily monogamous. On the other hand, no presumption arises from either the fact that the witness is sworn 'on gun' and not the Bible or that the accused is stated to be a pagan.

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38 Nwadialo, above note 1 at 481, (underlining mine for emphasis).

Certainly, this presumption is not based on any statutory provision in the Evidence Act or any other legislation. It is however easily discernible that it is rooted in the common law which essentially reflects the English society where polygamy is an exception rather than the rule. From this position, the following conclusions can be made, namely:

1. There is the presumption that every marriage in Nigeria is monogamous;
2. This presumption is not rebutted by the fact that the witness is a pagan or is sworn on any other object other than the Holy Bible.
3. The prosecution bears the onus to rebut this presumption by showing that the marriage is non-monogamous.
4. Until such contrary evidence from the prosecution, the evidence of a spouse of an accused remains inadmissible.
5. Conviction of an accused whose spouse gave evidence for the prosecution without any proof by the prosecution that the marriage is non-monogamous will be upturned unless it is shown that no substantial miscarriage of justice occurred thereby.

5. Current Position

Whether or not the presumption of monogamy of all marriages in Nigeria truly reflects the Nigerian society is contestable. In fact, polygamy is the rule rather than the exception in Nigeria. That majority of marriages in Nigeria are polygamous is a fact that our courts can rightly take judicial notice of as being notorious.[39]

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[39] The courts have taken judicial notice of other similar notorious facts such as (i) that the value of Naira has been plummeting since 1982 (see *Gbadamosi v Kabo Travels Ltd* (2000) 8 N.W.L.R. (Pt. 668) 243 at 288-289; (ii) Inflationary trends in the country (*Audu v Alabo*

It seems that placing the burden to rebut this presumption on the prosecution is unnecessary and against the clear provisions of the Evidence Act, on the question of who has the onus to prove a particular fact that is within the special knowledge of a party. Certainly, only the accused could rightly be said to have knowledge of the kind or form of marriage celebrated by him. In fact the court in the cases in support of such presumption held that whether or not the spouse-witness is sworn on the Bible, Koran, Iron or even merely affirmed, cannot be basis to hold such marriages to be polygamous. It is therefore not a reasonable expectation for the prosecution to prove the form of marriage between the accused and the spouse-witness. Section 140 of the Evidence Act provides:

> When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.[40]

We submit that it is more rational to expect the accused who raises objection to the competence of his or her spouse to testify, on the basis that their marriage is monogamous, to establish this fact to sustain his objection. This he can easily do by producing their certificate of marriage or certified true copy of the entries in the marriage register.[41] The spousal protection under sections 182(2)-(3) and 187 of the Evidence Act are for the benefit of the accused and therefore, he should bear the burden of bringing his defence or claim to the protection within the provisions of the Act.

(2000) 6 NWLR (Pt. 661) 482 at 496; incidents of violent crime being on the increase- *Ogbembe v C.O P* (2001) 5 NWLR (Pt. 706) 215.

40 S. 142, repealed Evidence Act.

41 Sections 25 and 32, Marriage Act, Cap M6, LFN, 2010.

In this light, we entirely agree with the position taken by Ogundare, JSC in *Okoro v The state*[42] where he held the accused as having onus of establishing that his marriage with the wife is a monogamous one. His Lordship said:

> To avail himself of s. 161 (2), therefore appellant must prove that his marriage to his wife was monogamous. I can find no evidence on record in proof of this fact. All that the appellant said in evidence was 'I am married.' This is no evidence that the marriage was monogamous in nature.

Consequently, there are two seemingly contradictory positions of the Supreme Court on whether all marriages in Nigeria are presumably monogamous. Though the Supreme Court did not in *Okoro's* case expressly overrule its earlier decision in *Lamu v the State*,[43] this pronouncement nonetheless, clearly contradicts the earlier decision. It may therefore be said that the decision of Ogundare, JSC was given *per incuriam*.[44] Yet it is not correct. Though the Supreme Court would not ordinarily disregard its earlier decision,[45] it is not bound by its

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42 Above note 3 at p. 207 paras A-C.

43 Above note 37. The decisions in the other cases cited are those WACA and the Federal Supreme Court, which decisions are not binding on the Supreme Court in that by the hierarchy of courts, The West African Court of Appeal and the then Federal Supreme Court are lower courts to the Supreme Court.

44 A decision of court is said to be given *per incuriam*, where it was delivered without reference to applicable statutory provision or decision of superior court or court of coordinate jurisdiction on the point.

45 The Supreme Court will overrule its previous decision, in the interest of justice, where such decision has become a vehicle of injustice; or was given *per incuriam*; or is clearly erroneous in law; or is contrary to public policy; is inconsistent with the provisions of the Constitution; or capable of fettering judicial discretion of the court.

earlier or previous decision. Lower courts therefore have the option to choose the earlier position or rely on the current position as espoused in *Okoro's* case.[46] Such lower courts are however urged to adopt the current position as stated by Hon. Justice Ogundare of the Supreme Court for it is a better reflection of the law on the point.

It must however be noted that the new Evidence Act does not discriminate against non-monogamous marriages as its predecessor did. Husband or wife must be husband or wife of a valid marriage whether it be marriage under the Act, custom or Islamic practices. All marriages are now protected. The premise for holding to the protection under sections 182 and 187 of the Evidence Act is validity of the marriage.[47] However to be entitled to the protection, the claimant must establish that there is a valid marriage between him and the witness. He therefore needs to lead evidence to be entitled to the presumption of marriage under the Evidence Act.[48]

6. Conclusion

We have shown the two contradictory positions of the Supreme Court on the issue of presumption of monogamous marriage in Nigeria. Both decisions of the Supreme Court were decided under the old Evidence Act. Yet, none of the decisions was premised on any provisions of the Evidence Act or any other

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See *Alhaji Karimu Adisa v Emmanuel Oyinwola* (2000) 6 SCNJ 290. See also Osita Nnamani Ogbu, *Modern Nigerian Legal System*, (Enugu: CIDJAP PUBLISHERS, 2002) pages 127-130.

46 Where a lower court is faced with two seemingly contradictory decisions of a superior court, it has the right to chose which of the conflicting decisions to follow. See *Peter Onwumelu v Ezeanya Duru* (1997) 10 NWLR (Pt. 525) 377.

47 As earlier quoted, section 258 of the Evidence Act, 2011 defines wife or husband in terms of the validity notwithstanding the type of marriage or ceremony followed.

48 S. 166, Evidence Act, 2011.

legislation. Also, two learned writers, Taiwo Osipitan and Fidelis Nwadialo accepted the earlier position of the West African Court of Appeal; Federal Supreme Court and the Supreme Court, on the issue that there is such presumption. We strongly feel otherwise. There is no basis to hold such presumption under our Evidence Act (whether repealed or current Evidence Act, 2011). Rather the presumption of polygamy should be the position. Also we have equally shown that to impose onus to prove that the marriage between an accused and the wife is non-monogamous on the prosecution rather than the accused who contracted the marriage is a breach of our evidential rule that requires a party with special knowledge of a given fact to prove such a fact. These two conflicting positions of the Supreme Court and the opinions of the writers introduce uncertainty into this aspect of our evidence law. This must not be allowed to remain. This is imperative due to the consequences of the evidence of the spouse as it relates to the conviction of the accused person.

It is hoped that the Supreme Court would have another opportunity soon to pronounce on the position of the law and should such opportunity arise, it is urged that the earlier decisions be expressly overruled in that they do not truly reflect what is obtainable in the Nigerian society and the provision of the Evidence Act; and the view expressed by Ogundare, JSC in *Okoro v State* be upheld, for it is more pragmatic and in consonance with the Evidence Act. If this is done, it would bring certainty into the position of the law. Lower courts and legal practitioners will no more have difficulties in asserting the true position of the law on the point.