

Silence and Its Implication in Criminal Proceedings: A Comparative Analysis of the English, Ugandan and Islamic Laws

Sowed Juma Mayanja

Faculty of Law and Shariah, Zanzibar University, P.O. Box 2440, Zanzibar, Tanzania

Abstract

It is an undeniable fact that dispensation of justice is the primary objective of every legal system. This objective, however, can only be achieved when there is a fair hearing and the accused is granted the right to defend himself against any allegation made against him. Controversy, however, arises when he chooses to keep silent, as to whether this silence means acceptance of the allegation or not. This paper examines the right of the accused to silence, its origin and implication in criminal proceedings. It makes a comparative analysis of the English, Ugandan and Islamic Laws. It draws a conclusion that the right to silence is firmly grounded in the three legal systems, but an inference may be drawn in certain circumstances which might be used to implicate the accused.

Keywords: right to silence, implication of silence

1. Introduction

Dispensation of justice is the primary objective of every Legal system. However, this objective cannot be achieved without evidence; as evidence is a means by which people establish or protect their rights. It is also a means upon which the judge depends to seek the truth and dispense justice. It is therefore not an exaggeration to say that without evidence no judicial system would exist and consequently no fair judgment can take place.

When an allegation has been made against an accused person before Courts of law, the accused has a right to accept it or deny it. If he accepts it, that acceptance forms enough evidence to implicate him. On the other hand, if he denies it, the burden of proof lies on the one who alleged.

However, controversy arises when the accused person keeps silent and does not or refuses to respond to the allegation. Does that silence mean acceptance of the allegation or not? Does it have an implication in the legal process or not?

This paper examines the issue of silence and its implication in criminal proceedings. It makes a comparative analysis of the English, Ugandan and Islamic laws.

2. Definition of the term “Silence”

Oxford English Advanced Learner’s Dictionary defines Silence in a number of ways, some of which are:

- a) A complete lack of noise or sound.
- b) A situation where nobody is speaking.
- c) A situation in which some body refuses to talk about something or to answer questions.¹

Garner, in his Black’s Law Dictionary defines silence as “a restrain from speaking.” He goes on to say that: “...in criminal law, silence includes the arrestee’s statements expressing the desire not to speak and requesting an attorney.”²

Silence can also be defined as a failure to reveal something required by law to be revealed.³

For purposes of this paper, ‘Silence’ is specific for the Accused person and refers to the situation in which the accused keeps quiet and says nothing in criminal proceedings which include Arrest, Interrogation, Plea taking, Cross-examination of prosecution witnesses, Defence and Mitigation.

3. The Right of Accused Person to Silence

The right to silence in England and Wales is the Legal protection given to a person during criminal proceedings from adverse consequences of remaining silent.⁴ It is sometimes referred to as the privilege against self-incrimination. It is used on any occasion when it is considered the person(s) being spoken to is under suspicion of potential criminal proceedings.⁵

The expression “Right to silence” as Lord Mustill observed in *R. V. Director of Serious Fraud Office, Ex parte Smith*,⁶ encompasses a disparate group of immunities which differ in nature, origin and incidence. He

¹Hornby, A. S. Oxford Advanced learner’s dictionary of current English. 7th edn, oxford university press, pg 1420.

² Garner, B., (2004). Black’s law dictionary, 8th edn, Thomson West. pg 14-16.

³ Ibid.

⁴ https://en.wikipedia.org/wiki/Right_to_silence_in_England_and_Wales. Accessed on 17th March 2017.

⁵ Ibid.

⁶ [1993] A.C 1, 30-31.

identified at least six varieties¹, namely;

- a) A general immunity possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
- b) A general immunity possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
- c) A specific immunity possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority from being compelled on pain of punishment to answer questions of any kind.
- d) A specific immunity possessed by accused persons undergoing trial from being compelled to give evidence and from being compelled to answer questions put to them in the dock.
- e) A specific immunity possessed by persons who have been charged with a criminal offence from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.
- f) A specific immunity (at least in certain circumstances...) possessed by accused persons undergoing trial from having adverse comment made on any failure (a) to answer questions before trial, or (b) to give evidence at trial.

To sum up Lord Mustill's observation, the right to silence in general refers to an immunity possessed by an accused person undergoing trial from being compelled under pain of punishment to give evidence or answer questions with incriminating elements put to him.

4. The Right of Accused Person to Silence under English law

a) The Common law position

The English Common law recognized that an accused person had a right to silence in the sense of privilege against self incrimination.² Prior to the introduction of Criminal Justice and Public Order Act (CJPOA) 1994, Juries and Magistrates could not draw adverse inferences from an accused person's exercise of his right to silence in interview, but such a position had been the subject of judicial criticism.³ The prosecution was also prohibited from commenting on a defendant's failure to testify, while at the same time, judicial comment was restricted.⁴

b) The Criminal Justice and Public Order Act (CJPOA) of 1994

The CJPOA of 1994 introduced reforms and made provisions for adverse inference to be drawn in certain circumstances from the accused person's silence during interrogation. Sections 34, 36 and 37 of the Act which overlap with one another to a certain degree, set out to transform English evidential culture in relation to the investigation of crime.

Whereas before the CJPOA Act of 1994, a suspect was under no more than a civic obligation to assist the police with their enquiries and could freely decline to answer questions without fear of legal reprisal, the new provisions proceed upon the assumption that a suspect, as a rule, ought to cooperate with the investigating authorities.⁵ Unless he has good reasons for with-holding cooperation, a defendant's refusal to respond to certain questions for information is capable of grounding an adverse inference if the tribunal feels appropriate to draw one. Section 35 additionally permits the tribunal to draw an adverse inference from the defendant's failure to give evidence at trial in most circumstances.⁶

5. The Implication of Silence under English law

The silence of a party will not normally render statements in his presence admissible evidence against him. However, in some circumstances an adverse inference may be drawn from such a silence.⁷

Starmer and Others state that "The right to silence was not an absolute right. It was self evident that it was incompatible with the right to silence to base a conviction wholly or mainly on the accused's silence. Nevertheless, it was equally obvious that the right to silence should not prevent the accused person's silence in situations which clearly called for explanation from him, from being taken into account in assessing the persuasiveness of the evidence adduced."⁸

¹ See Howard, M. N., Crane, P. & Hochberg, D. A. (2000). Phipson on Evidence, 15th edn, London, Sweet & Maxwell, pg 777.

² Munday R. (2003). Evidence. 2nd edn, Butterworths. pg 392.

³ Starmer K. and Others, (2001). Criminal Justice, Police Powers and Human rights, Oxford university press. pg 216.

⁴ Ibid.

⁵ Munday R., (2003). Evidence, pg 394.

⁶ Ibid.

⁷ Howard, M. N., Crane, P. & Hochberg, D. A. (2000). Phipson on Evidence, pg 736-737.

⁸ Ibid pg 218.

In *John Murray V. UK*¹, the European Court pointed out a series of important safeguards designed to respect the rights of the accused and to limit the extent to which reliance can be placed on inferences. These safeguards are;

- a) Appropriate warnings must be given to the accused as to the legal effects of maintaining silence. The caution to suspects upon arrest and prior to interview is such an appropriate warning.
- b) A judge has discretion as to whether adverse inferences should be drawn. A judge who has doubts about whether the accused understood the nature of the warning would not invite the jury to draw an adverse inference
- c) The prosecution must first establish a prima-facie case, that is, a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements is proved. The prosecution evidence must be “sufficiently strong” to require an answer and only common sense inference can be drawn.
- d) An accused cannot be convicted on the basis of inference alone.

Section 36 of the CJPOA 1994 makes it possible in the circumstances stated, for a court to draw inferences from an accused person’s silence when challenged about the presence at the time of arrest, of objects, or substances which are found:

- a) In or on the accused person’s clothes
- b) On the accused person
- c) In the place where the accused was arrested.

Section 37 of the CJPOA 1994 permits court to draw inferences from an accused person’s failure or refusal to account for being present at a particular place at or about the time the offence for which he was arrested is alleged to have been committed.²

Since these provisions entered into force on 10th April 1995, both the prosecution and the Judge have been authorized to comment on pre-trial silence where the accused fails to mention when questioned under caution, or at the time of being charged, some fact that he later relies on at trial, or when questioned after arrest about incriminating articles in his possession or marks on his clothing or about his presence at the scene of the crime.³ In view of the formidable case against John Murray, his refusal to explain his presence at the scene of the crime meant that the drawing of adverse inferences was a matter of common sense and was not unfair or unreasonable in the circumstances.⁴

It should be noted however, that silence alone cannot give rise to an inference that the defendant accepts the truth of the accusation. This was reflected in the case of *Hall V. R.*,⁵ in which “A” was jointly charged with “B” and “C” before a Jamaican court with possession of a drug called ganja. A search was made of a house in which it was alleged all three defendants lived together. Ganja was found in two rooms occupied by “B” and “C”. In the case of “B”’s room it was found in a shopping bag brought to the premises by “A”. “A” was not on the premises when the search was conducted but was brought there shortly afterwards by police officers. One of the officers told “A” without cautioning him that “B” had said that the ganja belonged to “A”. “A” made no comment on this and remained silent. The Privy Council held that his silence did not give rise to an inference that the truth of the statement was accepted and Lord Diplock made this comment:

“Although in very exceptional circumstances an inference may be drawn from a failure to give an explanation or disclaimer... silence alone on being informed that an accusation has been made against him cannot give rise to an inference that the defendant accepts the truth of the accusation.”

6. Accused person’s right to silence under Ugandan law

Uganda is a former protectorate of Great Britain and much of the philosophy which underlies the nature and make up of its legal system is derived from the latter. Uganda’s legal system is based on English Common Law and African customary law. However, customary law is in effect only when it does not conflict with statutory law.⁶

Given this background, it is crystal clear that the right to silence in the Ugandan legal system originated from the Common law of England. Indeed, the Constitution, which is the supreme law of Uganda, has confirmed the right of an accused person to silence. Article 28(3)(a) provides;

“Every person who is charged with a criminal offence shall be presumed to be innocent until proved

¹ (1996)22 EHRR 29 at para 51.

² See: Starmer K. & Others, (2001), pg 218.

³ Roberts, P. & Zuckerman, A., Criminal Evidence pg 440.

⁴ See: Starmer K. & Others, (2001). pg 219.

⁵ (1971) 55 Cr. App. R. 108.

⁶ Mahoro, B. (2016). Uganda’s legal system and legal sector, available at: www.nyulawglobalex/Uganda1.html. accessed on 12/4/2017.

guilty or until that person pleaded guilty.”¹

It is therefore the duty of the prosecution to prove the guilt of the accused and not the accused to prove his innocence. This agrees with the famous case of *Woolmington V DPP*²

Article 28(11) also provides;

“Where a person is being tried for a criminal offence, neither that person nor the spouse of that person shall be compelled to give evidence against that person.”

Thus the accused has a right to say nothing in his defence during the trial.

Other statutory laws like the Magistrate Court Act (M.C.A) and the Trial on Indictment Act (T.I.A) provide that if the accused person refuses to plead to the charge or indictment, the court records a plea of not guilty on his behalf and the trial will proceed.³ Under Section 102(3) of the M.C.A. Court can still dispose of a case relying on the available evidence before it where the accused person keeps quiet.

In criminal cases, the burden of proof lies on the prosecution and it is based on the constitutional presumption of innocence. The accused person has no duty to prove his innocence. It is therefore upon the prosecution to prove its case beyond reasonable doubt as stated in *Woolmington V. DPP*.⁴ The burden of proof is governed by the Evidence Act, which is to the effect that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.⁵ Section 110(2) of the same Act is to the effect that when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.⁶

Odoki, B. J., explains that whenever a police officer has decided to charge a person with an offence, he must administer a caution before questioning or continuing to question them... For the caution to be administered, it must be in this form: “*You need not say anything unless you wish, but whatever you do say will be taken down in writing and may be given in evidence.*”⁷ This clearly supports the right to silence even before an accused person is charged in court.

7. The Implication of Silence of the Accused Person under Ugandan Law

Under the Ugandan legal system, when an accused person keeps silent and refuses to plead, a plea of not guilty is entered. It is upon the prosecution to prove his guilt and not him to prove his innocence.

This position has been reflected in various court decisions in Uganda. For example, in the case of *Col. (RTD) Kiiza Besigye V. Uganda*,⁸ the accused elected not to say anything by way of his defence or to call witnesses. Justice John Bosco Katutsi in his judgment observed;

“I find that the prosecution has dismally failed to prove its case against the accused. He is accordingly acquitted and set free forthwith.”

In *Uganda V. Mawejje Ronald*,⁹ Mawejje was accused of defiling a girl of less than 14 years of age. He decided not to say anything in his defence and left it on the court to decide. In his judgment, Justice Rubby Aweri Opio held;

“I find that all the ingredients of this offence have been proved beyond reasonable doubt. I therefore find the accused guilty as charged and convict him accordingly.”

However, the law has now been settled. Although the accused has no duty to prove his innocence, an inference can be drawn from his silence if he fails by cross examination from challenging the evidence of the prosecution. In *Uganda V. Sande Martin*,¹⁰ Martin was accused of defilement of a 14 year old girl. In his defence, he elected to keep quiet. The learned trial judge found that the prosecution had proved the charge against him. He convicted him and sentenced him to 8 years imprisonment. Martin appealed against the conviction. In its judgment, the Court of Appeal stated that “the law is now settled that though the accused has no duty to prove his innocence, he must by cross-examination challenge the evidence of the prosecution that implicates him. Failure to cross-examine leads to the inference that the evidence is accepted as being true.”¹¹

In *James Sawoabiri & Another V. Uganda S.C.*¹² it was stated;

“An omission or neglect to challenge the evidence in chief on a material or essential point by cross-

¹ The 1995 Constitution of the Republic of Uganda as amended.

² [1935] A.C 462.

³ See S. 124(4) of M.C.A Cap 16 of Laws of Uganda, and S. 62 of T.I.A. Cap 23 of Laws of Uganda.

⁴ [1935] A.C 462.

⁵ S. 110 (1) of Evidence Act, Cap 6 of Laws of Uganda.

⁶ *Ibid.*

⁷ Odoki, B. J., *Aguide to Criminal Procedure in Uganda*, 3rd edn, Kampala, LDC publishers, pg 22.

⁸ High Court Criminal Session no. 149/2005.

⁹ HCT. Criminal Session no. 0122 of 2006.

¹⁰ Criminal Session, case no. 254 of 2003, in the High Court of Tororo.

¹¹ Criminal Appeal no. 278 of 2003.

¹² Criminal Appeal no. 5 of 1990.

examination would lead to an inference that the evidence is accepted, subject to its being assailed as inherently incredible or possibly untrue.”

Conclusively, it can be said that although the accused has a right to silence in criminal proceedings in the Ugandan legal system, this silence is not absolute as an adverse inference can be drawn when the accused fails to challenge the evidence of the prosecution in cross examination. This inference, therefore, can be used to implicate the accused as it infers that the evidence adduced by the prosecution is accepted by the accused.

8. The Right of the Accused Person to Silence under Islamic Law

The right to silence of an accused person emanates from three principles of Islamic jurisprudence, namely;

الأصل براءة الذمة

“The fundamental principle is the presumption of non-liability.”¹

الأصل بقاء ما كان على ما كان

“It is a fundamental principle that a thing shall remain as it was.”²

ما ثبت بزمان يحكم ببقائه ما لم يوجد دليل يغيره

“Anything which has been proven at any particular time will continue to exist unless proven otherwise”³

The first principle is to the effect that a person is free from any liability until confirmed by law. The second and third principles are to the effect that a thing which was legally established in the past shall remain as established until the contrary is proved. In other words, the principles refer to the continuity of a legally established fact until the centrally is proved.⁴

From these three principles, it can be discerned that the party which alleges against another party is the one to prove its allegation since the rule of law is that a person is presumed innocent and that presumption continues to subsist until the contrary is proved. Thus, the party against whom the allegation is made has a right to silence until the other party proves its case. That is why the Prophet (S.A.W) said:

البينة على المدعي واليمين على المدعى عليه

“The burden of proof lies upon one who alleges and an oath may be extracted from the defendant.”⁵

When *Hilaal bin Umayyah* accused his wife of adultery, the Prophet (S.A.W) demanded from him to prove his case and not the accused to prove her innocence.⁶

The above quoted authorities serve to confirm the right to silence of an accused person in Islamic criminal proceedings. This is because the accused is usually a defendant whereby the allogger is usually the prosecution granting the accused the right to keep quiet and to prove nothing except as wished usually in defence. However, elements of negative inference from keeping silent cannot be totally ruled out as shall be discussed.

9. The Implication of Silence under Islamic Law

In adjudicating cases under the Islamic legal system, the implication of silence is extracted from a principle of Islamic jurisprudence which states that:

لا ينسب إلى ساكت قول، لكن السكوت في موضع الحاجة إلى البيان بيان

“No statement can be attributed to a silent man. However, silence, when an explanation is required, may imply an explanation.”⁷

This means that we cannot attribute any statement to a silent man, but an inference may be drawn from his silence when an explanation is required from him.

The implication of silence under Islamic criminal law is mainly manifest under two circumstances.⁸

a) Silence of an accused person when he is requested to defend himself

In such a situation, silence does not mean acceptance of the claim. Rather it means that the accused denies the claim and a plea of not guilty is entered.⁹ The judge now has to look into the evidence of the alleging party.

b) Refusal to testify in the case of adultery.

Under Islamic law, adultery is a criminal offence and its punishment is death by stoning. However, for a person to be convicted, the accusing party must produce four witnesses. Allah says: *And those*

¹ As-Suyutwi, A. (1990). *Al-Ashbaah wa Nazhairr*. 1st Edn, Beirut, Dar Al-Kutub Al-Ilmiyyah, pg 53.

² Az-Zarqa, A (1989). *Sherh Al-qawa'id Al-Fiqhiyyah*. 2nd Edn, Damascus, Dar Al-Qalam, pg 87.

³ Al-Bauranu, M. (1990). *Al-Wajiz Fi Idhahi Qawa'id Al-Fiqh Al-quliyyah*. 2nd Edn, Riyadh, Maktabat Al-Ma'rif, pg 108.

⁴ Mayanja, S. (2014). *Al-Qawa'id Al-Fiqhiyyah*, The Islamic Legal Maxims, pg 29.

⁵ Attirmizhi, Sunan Attirmizhi, Vol 3, pg 626, Hadith no. 1341.

⁶ Al-Bukhari, Swahih Al-Bukhari, Vol 3, pg 518.

⁷ Az-Zarkah, A. (1989). *Sherh Al-qawa'id Al-Fiqhiyyah*, pg 337.

⁸ Mayanja, S. (2014). *Al-Qawa'id Al-Fiqhiyyah*, The Islamic legal Maxims, 1st Edn, Zanzibar, College of Education press, pg 119.

⁹ Az-Zarkah, A. (1989). *Sherh Al-qawa'id Al-Fiqhiyyah*, pg 340.

*of your women who commit illegal sexual intercourse, take the evidence of four witnesses from amongst you against them.*¹

As for husbands who accuse their wives of adultery and fail to bring four witnesses, their case is explained in the following verses;

*And for those who accuse their wives but have no witnesses except themselves, let the testimony of one of them be four testimonies, swearing by Allah that he is of those who speak the truth. And the fifth testimony should be the invoking of the curse of Allah on him if he be of those who tell a lie against her.*²

The wife who is accused can avert the punishment from herself by testifying four testimonies by Allah that her husband is telling a lie, and she invokes Allah's curse on herself if her husband is telling the truth. Thus Allah says;

*And it shall avert the punishment from her if she gives testimony swearing by Allah four times that he is telling a lie. And the fifth testimony should be that the wrath of Allah be upon her if he speaks the truth.*³

The implication of silence arises when the husband testifies the four testimonies and invokes Allah's curse on himself on the fifth, but the wife keeps silent and refuses to testify. This indeed like under Ugandan law is not a shift of the duty to speak with its attendant burden to prove what is alleged, but is a right which once opted for, carries with it a duty to say something truthful.

The majority of Muslim Jurists, among whom is Imaam Shafie, Imaam Maalik, and Imaam Ahmad, are of the opinion that the wife's silence in this situation implies that she has accepted the accusation of adultery and therefore she is convicted of the crime.⁴ They base the conviction on the inference drawn from the wife's refusal to testify in addition to the husband's testimony.

Imaam Abu Hanifah on the other hand objects to that view and opines that the wife cannot be convicted because of her silence but she is remanded until she testifies or confesses.⁵ He refuses to draw inferences from her silence since conviction in criminal offences must be based on concrete evidence or confession and not on inferences. This view of Abu agrees more with the English and Uganda positions.

10. Discussion

From what has been quoted above, it is observed that the right to silence (keeping quiet) by the accused is recognised and enjoyed by an accused person under the English Legal system, the Ugandan Legal system and the Islamic Legal system, and does not mean acceptance of the stated facts. It is further observed that under English law, the right to silence originated from Common Law, while under Ugandan Law it originates from the 1995 Constitution of Uganda as amended, yet under Islamic Law it originates from principles of Islamic Jurisprudence.

Silence under English Law has some implication in criminal proceedings as provided for by the Criminal Justice and Public Order Act (CJPOA) of 1994, whereby in some circumstances an adverse inference may be drawn from the accused's silence. Under Ugandan Law, the implication of silence can be seen in drawing an inference when the accused fails to challenge the evidence against him through cross examination.

Under Islamic Criminal Law, silence has an implication in the case of adultery, where the husband testifies and the wife abstains from or refuses to testify. In such a case silence implies acceptance of the accusation and a conviction can be based on it in addition to the husband's testimony as according to the opinion of the majority of Muslim Jurists.

It should be noted, however, that a conviction cannot be based on inference alone drawn from silence under English, Ugandan and Islamic laws. There must be some other evidence because inference is weak evidence and it might be too easy to jump to wrong conclusions. This means that inference must be backed by other types of evidence if a person is to be convicted.

It is worthy to note that of the three types of Laws, i.e. the English Law, the Ugandan Law and the Islamic Law, Islamic law took the lead in granting the accused a right to silence as it dates as far back as 610 A.D. when the Prophet of Islam received the revelation in form of the Qur'an.

11. Conclusion

From the fore going discussion, it can be concluded that the accused has been granted the right to silence in all

¹ Surat Annisa, (4: 15).

² Surat Annur (24: 6-7)

³ Surat Annur (24: 8-9).

⁴ Ibn Rushid, M. (1995). Bidaayatul- Mujtahid Wanihaayatul- Muqtaswid. 1st Edn, Cairo, Dar Assalaam, Vol 3, pg 1540.

⁵ Ibid, pg 1541

the three legal systems, i.e. the English Legal system, the Ugandan Legal system and the Islamic Legal system, and that his silence does not mean acceptance of the stated facts. However, this silence is not absolute as an adverse inference can be drawn in some circumstances and used to implicate him. Nevertheless, a conviction cannot be based on inference alone drawn from silence as inference is weak evidence, and therefore it must be backed by other types of evidence.

It can also be concluded that of the three Legal systems, the Islamic Legal system took the lead in granting the accused a right to silence in criminal proceedings.

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