

Determination of Paternity of the Nigerian Child – The Law: Past, Present and Future*

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Abstract

This paper chronicles the determination of the paternity of the Nigerian child in the past. It juxtaposes same with the present state of the law on the subject matter and discovers that there is a substantial improvement on the subject in the present. This paper opines that by some amendments of the present law, there shall be a further improvement on the subject in the future. It progresses to suggest areas that call for amendments.

Keywords: determination of paternity, Nigerian child, past, present, future.

1. Introduction

In the past i.e. before year 2003, the courts in Nigeria were not making an order that in event of the paternity of a child falling for determination, recourse should be had to scientific tests. Within that same period, there was no statutory provision on the use of such tests to establish the paternity of a child. The courts resorted to all manner of tests to determine the paternity of a child, which tests are not scientific and therefore lack the precision and exactitude that characterize scientific tests.

In the present i.e. from year 2003, the Child's Rights Act (Cap C.50, Laws of the Federation of Nigeria, 2010, hereinafter simply be referred to as "the Act") was enacted. The Act made provision for a directive of the court, that the paternity of a child be determined by subjecting the child to scientific tests which have the advantage of producing results that are precise and exact. This development led to improved state of affairs from the Pre-Act years, when the courts employed tests that were non- scientific and so lacking in precision and exactitude.

In spite of the improvement introduced by the Act, a further improvement in the future shall be attained if there are amendments to the provisions of the Act. This paper has so opined, and suggested the considerable amendments.

The discussion of this topic shall be under the three broad heads of the Past, the Present and the Future.

2. The Past

Before the enactment of the Act that provided for the scientific determination of the paternity of a Nigerian child, the courts determined the paternity of a Nigerian child (whenever that falls before it) by several tests that had no recourse to science. Those tests constituted mere guesses or conjectures as to the paternity of a child. They relied on presumptions to award or not to award paternity. The courts are either the customary courts where the issue of paternity could fall for determination or the high court, where the issue of paternity could fall for determination either as a court of first instance or as an appellate court. The determination of the paternity of a Nigerian child shall now be analysed from the latitude of the customary courts and high courts.

- **Customary Courts**

Most times, customary courts are the courts of first instance in determining the paternity of a Nigerian child. This is so because in Nigeria, most of the relationships that give rise to a child whose paternity is to be determined are based on native law and custom of the people keeping the relationship. However, Magistrate Courts (in Southern Nigeria) and District Courts (in Northern Nigeria) also try such cases. In Northern Nigeria, the equivalent of customary courts are the area courts, divided into Upper Area Court, Area Court I, Area Court II and Area Court III. Upper Area Court is a court of first instance and also an appellate court to area court I, II and III. In the Eastern States of Southern Nigeria, customary courts are not graded. This is unlike in the Western States of Southern Nigeria, where customary courts are graded into Grade "A" Customary Court, Grade "B" Customary Court and Grade "C" Customary Court. The customary courts in determining the issue of paternity have recourse to the native laws and customs of the parties who are litigating because these laws and customs are binding of the people, whose native laws and customs they are. It is for this reason that native laws and customs (customary laws) are said to be "a mirror of accepted usage" by Bairamian F.J (in *Owonyin v. Omotosho* 1961, 304 at 309). Magistrate Courts and District Courts also apply native laws and customs (customary laws) like customary courts. The difference in procedure however is that customary courts are manned by the indigenes of the area where the courts are situate and so apply the customary laws, since they know the laws. For magistrate courts and district courts, the judicial officers that man them are never indigenes of the *lex situs* of the courts and not knowing the customary laws, only apply them when by evidence, they are established to be in existence in the area and practiced by the people. However a customary court

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can still call for oral evidence to establish a rule of customary law, while a magistrate court or district court that has taken judicial notice of the existence of a rule of customary law, can apply it, without asking that it be established by evidence. According to section 122(1) of the Evidence Act 2011 of Nigeria, “no fact of which the court shall take judicial notice... needs to be proved”.

Some of these native laws and customs in respect of paternity, do not award paternity to the biological father of a child (E.I. Nwogugu 2011). Examples of these native laws and customs include the following:

- (i) Where a man does not have a male child, such a man may allow one of the daughters to remain unmarried and at home, allow her to procreate. The aim is for the daughter to raise male child(ren) for him. All children begotten by such daughters have their paternity as vesting on the father of their mothers (and share the same surname with their mothers) instead of on their biological fathers. The biological fathers however do not claim or contest the paternity of such children, because by native law and custom, they are not entitled to paternity, for reason of not having paid bride price on the mothers of the children.
- (ii) Where a childless widow desires to beget children for the late husband so that on her death, the family of the late husband would not go into extinction, she ‘marries’ a wife, who procreates on her behalf. In this circumstance, the widow pays bride price on a woman and marries her for herself. The woman that was married begets children for the widow that married her for the late husband. Such children have their paternity as vesting on the late husband of the widow and not on their biological father(s). Again, the biological father(s) of such children do not contest the paternity, for by native law and custom, they are not so entitled, not having paid any bride price on the ‘wife of the widow’.
Where a single girl becomes pregnant, the child begotten out of the pregnancy becomes the child of the girl’s father (who assumes paternity) and bears the same surname with the mother. The biological father does not have paternity because he paid no bride price on the mother of the child. The biological father can however assume paternity, if he subsequently marries the mother of the child. In this circumstance, the bride returns to the matrimonial home with the child.
- (iii) Where a single girl becomes pregnant and within the period gets married to a man different from the one that made her pregnant, on the birth of the child, the husband and not the biological father of the child assumes paternity. Again paternity is on the husband who paid bride price and not on the biological father of the child, who paid no bride price.
- (iv) Where a husband and wife are separated or even divorced but the bride price paid on the wife had not been returned, all children begotten by the wife are those of the estranged husband, and not of the biological father(s). The reason still is, that the estranged husband’s bride price is subsisting, while the father(s) of the children paid none.
- (v) Closely related to the above circumstance is where a married woman is a widow and the bride price paid on her was not returned. All children begotten by the widow are those of the deceased husband (whose bride price has not been returned) and not of the biological father(s) who never paid any.
- (vi) Where a man is late and the family is desirous of raising children for him, a wife could be ‘married for him’ who begets children for him. Here, a bride price is paid on a woman by the family of the deceased. The woman returns to the family of the deceased and procreates for her ‘husband’. The children begotten, bear the name of the deceased, on whom paternity vests. Paternity is not on the biological father(s) on account of non-payment of dowry.
- (vii) Where the husband of a woman is late, the brother of the late husband or the relative or son can inherit the widow and procreate. The children begotten, are those of the deceased on whom paternity vests, not on the brother, relative or son who is the biological father of the children. The obvious reason is that it was the deceased, and not the biological father of the children, that paid the bride price.

Customary courts have in several decided cases relied on these various rules of customary law, to award paternity to non-biological parents. In any of such awards, no fuss has been raised as such awards are made based on the native law and custom of the people, which are the ways of life of people and so binding on them.

- **Customary Courts**

Most times, cases determined at the customary courts so also, those determined at the Magistrate Courts and the District Courts proceed to the High Courts on appeal. Sometimes, the matter could commence at the High Court as a court of instance for reason that the relationship that led to the issue of paternity was not anchored under native law and custom, or it was, but the parties elected to have their case entertained and determined, at the High Court. Where the relationship emanated from a relationship

governed by native law and custom, so that the judgment of the court must be based thereon, the High Court must regard an alleged rule of native law and custom to be existence and binding on the parties if there such proof. However the court will not insist on proof, but apply the rule of native law and custom, if it has taken judicial notice of it. Magistrate courts and district courts determine issues that border on paternity in relationships governed by native laws and customs, although customary courts have the jurisdiction. The jurisdiction of the customary courts are not exclusive of the jurisdiction of the magistrate courts and the district courts. Where the relationship is not governed by native laws and customs, magistrate courts and district courts entertain suit in respect thereto, also without excluding the customary courts from do doing.

In any of these circumstances that matters are before the High Court, the Court insists on awarding paternity to the biological parent. If the matter before the court has emanated from the customary court or Magistrate Court or District Court and the customary court has awarded paternity to a non-biological parent, the Court reverses the judgment of such customary court. Almost always, the reason for the reversal is that any custom that allows the award of a child to a non-biological parent is contrary to natural justice, equity and good conscience and therefore invalid. Such native law and custom is said to have failed the Repugnancy Test of validity of native laws and customs. Some cases that were dealt with by the court on appeal shall now be examined, to establish this attitude of the Court. In *Edet v. Essien* (1932, 47), a case that emanated from the *Efik* tribe in the Southern part of Nigeria in the present Cross River State of Nigeria, that is situate within the South-South geo-political zone of Nigeria, the plaintiff married Inyang when she was young and paid bride price on her. Inyang later married the defendant and had two children for him. The bride price that the plaintiff paid on her was not returned to him. For reason of non-return of bride price (so that even when Inyang was married to the defendant who also paid bride price on her) she was still the wife of the plaintiff under Calabar native law and custom, the plaintiff sued the defendant for the return to him of the two children that Inyang gave birth to. The plaintiff instituted the suit at the Native Court where the children were handed over to him. The suit was later transferred to the Provincial Court where the Commissioner made a reverse order, against which order the plaintiff applied to the Divisional Court, presided over by Justice Carey. Justice Carey declined to uphold and apply the custom for reason of such native law and custom that awards paternity of a child to a non-biological father being repugnant to natural justice, equity and good conscience. The court allowed the paternity of the two children to remain with the defendant who was their biological father.

What the courts condemn is the award of paternity to a non-biological father and should not be mistaken for the court condemning the award of paternity to a former or deserted husband whose bride price has not been returned. These were made clear in the case of *Mariyama v. Sadiku Ejo* (1961, 81). In this case that emanated from *Igbirra* tribe in Kogi State, which is in the Middle Belt region of Nigeria, within the North-Central geo-political zone of Nigeria, the custom is that if a woman deserts her husband and delivers of a child(ren) within ten (10) months of desertion, such child(ren) is/are that/those of the deserted husband whose bride price has not been returned. One may comment that this native law and custom is not repugnant to natural justice, equity and good conscience because in such circumstance, the deserted husband whose bride price has not been returned is the biological father of such child(ren). Furthermore, one may further comment that where the ten (10) months desertion prior to delivery were preceded by several months of staying apart, it shall not be repugnant to natural justice, equity and good conscience to award paternity to the present husband, for in the circumstance, the former husband cannot and could not have been responsible for the conception of the deserting wife. It would on the converse be repugnant to natural justice, equity and good conscience to award such child(ren) to the deserted husband whose paid bride price has not been returned. The facts of this case were that the plaintiff was the husband of the defendant who deserted him and delivered of a baby within ten (10) months of desertion which desertion was preceded by several months of separation and staying apart. The plaintiff laid claim on the child, contending that paternity was on him, because the child was delivered within ten (10) months of desertion by the defendant. The Native Court gave judgment in favour of the plaintiff against which judgment the defendant appealed. The High Court found as a fact that although the child was born within 10 months of desertion, that the last time the appellant and the respondent had sexual intercourse was about 15 months before the child was born. Consequent upon this finding, the Court allowed the appeal of the appellant, for the simple obvious reason that since the ten (10) months desertion was preceded by several years of separation and staying apart, the plaintiff was not and could not have been the biological father of the child that was born. The court however declared the native law and custom that confers paternity of a child born within ten (10) months of desertion on the deserted husband valid, but refused the claim of the plaintiff because of its peculiar circumstance that the ten (10) months of desertion was preceded by several months of

separation and staying apart, so that the plaintiff was not the biological father of the child born within the ten (10) months of desertion.

Not only has the Court reversed the judgments of customary courts, for awarding paternity to a non-biological father (as seen in the two cases just examined), but has, as the court of first instance, insisted upon an award of paternity to biological fathers. This has been exemplified in the case of (*Okonkwo v. Okagbue* 1994, 301). In this case that emanated from *Ibo* tribe in the present Anambra State of Nigeria, that is situate within the South-East geo-political zone of Nigeria, two sisters of the deceased 'married' a wife for the deceased, more than thirty years after the death of the deceased. The 'wife' had several children who bore the name of the deceased as their surname and paraded themselves as the children of the deceased. The plaintiff for himself and on behalf of four (4) other sons of the deceased filed a suit at the High Court contending *inter alia* that the children begotten were not the children of their late father and were not entitled to inherit from the estate of their late father. The plaintiff lost the suit at the High Court and the Court of Appeal. He further appealed to the Supreme Court where the appeal was allowed. The Supreme Court allowed the appeal, again, for the reason that the children begotten by the 'wife' of a man who was dead more than thirty years before the marriage were not and could not have been the biological children of the dead man, and that the native law and custom that supports such award of paternity is repugnant to natural justice, equity and good conscience. The Supreme Court Per *Ogundare*, J.S.C at p. 344 was of the view that it was unfair for the children not to be made to know who their biological father(s) are/were. In the words of the learned Justice of the Supreme Court, "it is in the interest of the... children to let them know who their true fathers are(were) and not to allow them to live for the rest of their lives under the myth, that they are the children of a man who died many decades before they were born. The attitude of the Courts towards determining the paternity of a child is more advanced, more realistic and more acceptable than the attitude of customary courts that apply the hard and fast rules laid down by native laws and customs. However, two adverse comments shall now be made of the attitude of the Courts. First, the attitude of the Courts though better than that of customary courts (that employ native laws and customs) is not error proof. The reason for this contention is that the repugnancy test that the courts employ is not anchored on a scientific determination of the paternity of a child, but on the presumption that the paternity of a child rests or does not rest on a person. This has been illustrated in the judicial authorities so far referred to in this paper. The presumption is quite rebuttable. Using the *Igbirra* custom as a case study, while there is a presumption that a child born within ten (10) months of desertion belongs to the deserted husband who is likely the biological father of the child, the child may well not be the biological child of the deserted husband if the wife was an unfaithful wife and was pregnant for the man he relocated to (or even some other man) before deserting her husband. If this has happened and paternity was awarded to the deserted husband, paternity has been awarded to the non- biological father of the child. Also, to award the paternity of a child to the man with whom a deserting wife was staying several months before deserting her husband could also be erroneous. This is so because she could be having an affair with yet another man, who was responsible for her pregnancy. Subscribing to this possibility, Nwogugu opined as follows:

Under *Igbirra* Customary Law, for instance, any child born within ten calendar months of a divorce is regarded as the legitimate child of the former husband even though he cannot possibly be the father of the child. Such native law and custom is said to have failed the Repugnancy Test of validity of native laws and customs. Some cases that were dealt with by the court on appeal shall now be examined, to establish this attitude of the Court. In *Edet v. Essien* (1932, 47), a case that emanated from the *Efik* tribe in the Southern part of Nigeria. This part of Southern Nigeria is in the present Cross River State of Nigeria, that is situate within the South-South geo-political zone of Nigeria, the plaintiff married Inyang when she was young and paid bride price on her. Inyang later married the defendant and had two children for him. The bride price that the plaintiff paid on her was not returned to him. For reason of non-return of bride price (so that even when Inyang was married to the defendant who also paid bride price on her) she was still the wife of the plaintiff under Calabar native law and custom, the plaintiff sued the defendant for the return to him of the two children that Inyang gave birth to. The plaintiff instituted the suit at the Native Court where the children were handed over to him. The suit was later transferred to the Provincial Court where the Commissioner made a reverse order, against which order the plaintiff applied to the Divisional Court, presided over by Justice Carey. Justice Carey declined to uphold and apply the custom for reason of such native law and custom that awards paternity of a child to a non-biological father being repugnant to natural justice, equity and good conscience. The court allowed the paternity of the two children to remain with the defendant who was their biological father.

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Second, Courts have the flaw of not being constant and consistent in employing the rule of repugnancy to natural justice, equity and good conscience. A close look at the facts and judgments in the cases decided by the Courts shall reveal this inconsistency. In the case of *Edet v. Essien*, the children begotten by Inyang, the ex-wife of Edet, for Essien were not returned to Edet because Edet was not the biological father of those children and to do so will amount to awarding paternity to the non-biological father of those children and a practice repugnant to natural justice, equity and good conscience. In the case of *Nwaribe v. President Oru District Court* (1964, 24), paternity was awarded to a non-biological father, in contradiction to awarding paternity to the biological father of the child, as in *Edet v. Essien supra*. The award in *Nwaribe v. President Oru District Court* was in non-compliance with the principle in the case of *Edet v. Essien* that to award paternity to a non-biological father is repugnant to natural justice, equity and good conscience. In the case of *Nwaribe v. President Oru District Court*, the facts of the case were that one Oyibo remained in her matrimonial home after the death of her husband, Obiora, in 1952. She was impregnated by the appellant, Nwaribe. She left her matrimonial home and returned to her family of birth with the pregnancy. She was delivered of the baby that the appellant was responsible for and sued for the formal dissolution of her marriage with her late husband, Obiora. One of the issues raised in the suit (and relevant to this write-up) was the paternity of the child that the appellant was biologically responsible for. The court i.e. Customary Court where the suit was instituted awarded the paternity of the child to the brother of late Obiora, reasoning that the death of Obiora in 1952 did not dissolve the marriage between him and Oyibo, so that Oyibo at all material times, including the delivery of the child and the time she sued for formal dissolution of the marriage between her and her late husband, Obiora, was the wife of Obiora and the child born, that of the family of late Obiora. Here, the paternity of the child was awarded to the brother of late Obiora, who was not the biological father of the child, instead of to the appellant who was the biological father as was done in the case of *Edet v. Essien*. It is worthy of note, that at the customary court where the suit was instituted, tried and determined, the appellant was aware of the pendency of the suit and never participated therein to contest the paternity of the child for the reason that under native law and custom of the area, paternity was on the family of late Obiora since the marriage between late Obiora and Oyibo had not been dissolved. However, when paternity was awarded to the brother of late Obiora at the customary court, the appellant appealed against the award, to the High Court. At the Court, the appellant deposed to an affidavit that the native law and custom have always remained that on the death of a husband, the paternity of any child that the late husband was not responsible for the pregnancy remains in the family of the deceased, in the absence of the formal dissolution of the marriage between the deceased and his widow. With the twin facts that the appellant did not participate in the proceedings at the lower court to contest paternity of the child and the native law and custom deposed to in the affidavit at the High Court, the Court dismissed the appeal of the appellant. With due respect to Egbuna, J the learned Judge, the two reasons were not sufficient to justify the award of paternity of a child to a non-biological father and a departure from the precedent set by the earlier decision in *Edet v. Essien*. The decision in *Edet v. Essien* is a better decision. The decision in *Nwaribe v. President Oru District Court* cannot be correct in so far as it was arrived at without allowing it to go through the test of repugnancy to natural justice, equity and good conscience, which test, the case would certainly have failed, in view of the earlier decision in the case of *Edet v. Essien*. The test of repugnancy to natural justice, equity and good conscience could not have been sacrificed at the altar of non-participation in the suit at the Customary Court and the concession in the affidavit at the High Court. The decision in *Nwaribe v. President Oru District Court* is not standing alone. A similar decision was arrived at by Brett F.J in the case of *Cole v. Akinyele* (1960, 84). In this case, a husband during the subsistence of his marriage had a child outside wedlock. He had yet another, a month and two weeks after the death of the wife. Denying paternity to the biological father of the two children, the court *inter alia* held that the claim and award of such paternity was contrary to public policy because, as expressed in the case of *Re Adadevoh Suit* (1952, 1) unreported, to award paternity to such biological fathers might encourage promiscuity, which is contrary to public policy.

The decisions in the two cases of *Edet v. Essien* and *Nwaribe v. President Oru District Court* were High Court decisions. The latter decision never made reference to the previous decision with the effect that both decisions constitute judicial precedents in this area, thus making the position of the law, in this area, unsettled. This uncertainty in the law was however settled by the 1994 decision of the Supreme Court in *Okonkwo v. Okagbue* (1994, 301) where the trial court i.e. High Court and the Court of Appeal awarded paternity to a non-biological father and the Supreme Court reversed it, holden that to make such an award shall be repugnant to natural justice, equity and good conscience, with an advice that the children should be made to know who their biological fathers are or were.

3. The Present

In the 2014 Supreme Court decision in the case of *Ukeje v. Ukeje* (2014, 384), the Supreme Court held that where a certificate of birth has been issued, evidencing the parents of a person, the content of the certificate is conclusive proof that the persons named therein (in the absence of proof that the certificate was not genuine) are

the parents of such person. According to the Supreme Court, a birth certificate is conclusive proof that the person named therein was born on the date stated, and the parents are those spelt out in the document. It does not really matter the person who gave information for the birth certificate to be issued. Whether it was the father or mother...who gave the information, the fact remained that an authorized person issued the birth certificate.

From the pronouncement of the Supreme Court, the paternity or maternity of a person vests on the person who have been disclosed on the certificate as the father or mother, irrespective of who it was, that gave the information contained in the certificate.

Relating this principle of law to the facts of the case in *Ukeje v. Ukeje*, the Supreme Court further stated that in the instant case, the appellants did not attack the origin of the certificate but that it was not the late Ukeje who gave information for the registration of the birth of the respondent in 1952. Since the appellants were unable to lead evidence to rebut the presumption that Exhibit "H" [the birth certificate] was genuine, the court was right to hold that the respondent was able to establish that she was the biological daughter of law Ukeje (*Ibid*). This decision of the Supreme Court that late Ukeje was the father of the respondent was predicated on the contents of a birth certificate and the presumption that the contents thereon were true. One is of the considered opinion that the origin of a birth certificate may be genuine (as in the case) but the contents un-true. In other words, that the truthfulness of the contents of a birth certificate that has a genuine origin, is rebuttable. By these, relying on birth certificate and the contents are not infallible.

An infallible or near infallible way of determining the paternity of a child, is by scientific tests. The Child's Rights Act statutorily introduced the use of scientific tests in the determination of the paternity or maternity of a person in Nigeria. In the words of the Act, in any civil proceedings, in which the paternity or maternity of a person falls to be determined by the court hearing the proceedings, the court may, on application by a party to the proceedings, give a direction for the use of scientific tests, including blood tests and Deoxyribonucleic Acid (DNA) tests to show that a party to the proceedings is or is not the father or mother of that person (Section 63(1)(a) of the Act).

The provision of the Act is quite laudable as it eliminates the possibility of awarding paternity to a non-biological father or mother simply because a birth certificate and the content have represented the person mentioned thereon, as the father or mother. The provision for the use of scientific tests is quite acceptable because the accuracy of the results generated from such tests are infallible or near it.

Inspite of the advantage of use of scientific tests, the provisions in the Act are not devoid of criticisms. These criticisms include

- i. The use of scientific tests can only be "in any civil proceedings" implying, that such tests cannot be used in criminal proceedings. The express use of the words "in civil proceedings" by implication excludes 'in criminal proceedings' for the maxim has always been, *expressio unius est exdusio alterius* meaning the express use of a word or words is an implied exclusion of another or others, (*Azubuike v. Government of Enugu State* 2014, 364 ratio 31) and (*Attorney-General of Lagos State v. Attorney-General of the Federation* 2014, 217 ratio 7). It is at the pleasure of the court to ask for scientific tests. This is evidenced in the use of the words "the court may". The obvious other side of the coin, is that 'the court may not'.
- ii. For a court to consider whether or not it would direct that scientific tests be undertaken, "a party to the proceedings" must make an application to that effect. The converse is that the court may not give such direction, *suo motu*.
- iii. On successful application by an applicant, the court "give[s] a direction", rather than 'makes an order'.

4. The Future

The Child's Rights Act has made provision for the scientific determination of the paternity of a Nigerian child. Unfortunately, the good intentions of the legislature were reflected in the Act in an inelegant manner, with all due respect to the legal draftsmen. The justification for this contention is evinced in the four criticisms leveled against the statutory provision. The criticisms show that there was need for the provision to reflect the following:

- i. That scientific tests should also be employed in criminal proceedings.
- ii. That the court should mandatorily make an order for scientific test, once an application for same is made.
- iii. That the court should be able to make an order *suo motu*, for the use of scientific tests, to determine the paternity of a child.
- iv. That on the grant of an application, the court should not "give a direction", but make an order.

With the recommended amendments to each of the four complaints, the provision could read, in any civil or criminal proceedings in which the paternity or maternity of a person falls to be determined by the court hearing the proceedings, the court shall, on application by a party to the proceedings or suo

motu make an order for the use of scientific tests, including blood tests and Deoxyribonucleic Acid tests to show that a party to the proceedings is or is not the father or mother of that person.

5. Conclusion

This paper has succinctly narrated the determination of the paternity of the Nigerian child in the past, where the determination could be fallible as determination was not based on scientific tests and results that are known to be exact. It progressed to note that the problem has been solved by the introduction of scientific tests in the Child's Rights Act, but that there is need to amend the provision in the Act, so as to increased the ambit of the coverage of the provision. The suggested amendments were set out. With the introduction of the suggested amendments, the ambit of the use and coverage of the provision shall more readily increase. By the amendments, there shall in the future and from the amendments, be an improvement in this area of law, from what it presently is.

References

- Attorney-General of Lagos State v. Attorney-General of the Federation* (2014) 9 NWLR (pt 1412) 217-322
Azubuike v. Government of Enugu State (2014) 5 NWLR (pt 1400) 364-411.
Child's Rights Act Cap C50 Laws of the Federation of Nigeria, 2010, 1-198.
Cole v. Akinyele (1960) 5 FSC 84-89.
E.I. Nwogugu, *Family Law in Nigeria* (Ibadan: HEBN Publishers Plc, 2011reprint) 286, 1-441.
Edet v Essen (1932) 11 NLR 47-48.
Evidence Act 2011, 1-141.
Mariyama v Sadiku Ejo (1961) NRNLR 81-83.
Nwaribe v President Oru District Court (1964) 8 ENLR 24-27.
Okonkwo v Okagbue (1994) 9 NWLR (pt 368) 301-346.
Owonyin v. Omotosho(1961) 1 ANLR 304-306.
Re Adadevoh Suit No: AL/68/1952, 1-11.
Ukeje v Ukeje (2014) 11 NWLR (pt 1418) 384-414.