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# ADMISSIBILITY OF NON-MUSLIMS EVIDENCE IN CASES INVOLVING MUSLIM PARTIES IN NIGERIA COURT: A CURSORY EXAMINATION OF QUR'AN CHAPTER 5 VERSE 106

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## ABSTRACT

*The interpretation of Qur'an chapter 5 Verse 106 created a lot of divergent opinions among the early Muslim jurists, especially as regards the admissibility of the evidence of non-Muslims (people of scriptures) in cases involving Muslim parties. While some jurists reject their evidence on the basis that the verse in contemplation has been abrogated, others accepted it in line with the letters and spirit of the Qur'an provision solely, that is, in cases of bequest, on a journey and where Muslims are not available. There is also another candid but liberal opinion that allows such evidence in all circumstances where necessity dictates for same. Does this classical discourse represent the same position of our present society, or is it possible to adopt*

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*any of the classical arguments to our current situation, especially in Nigerian society where Muslims and people of other faith (especially Christians) intermingled in several affairs of life? What then will be the situation of the evidence of people who do not qualify as 'people of scriptures'? This piece, through doctrinal analysis, founds that the classical jurists have exhausted all possible argument and their positions (depending on the school) could be adopted depending on the circumstance of each society and the necessity of each transaction. It is concluded that Muslims should be wary and conscious of the company to keep so as not to forestall compliance with the dictate of Shari'ah.*

**Keywords***: admissibility, Muslim cases, non-Muslim evidence, Shari'ah*

## INTRODUCTION

Islam is a religion of the universe. It is guidance and a complete way of life. Shari'ah rulings and guidance are contained in the Qur'an, Sunnah and other sanctioned sources of Islamic Law. It is complete, emphatic and amenable to all situations and circumstances. In fact, nothing has been left undiscussed as it relates to the life and being of human race.[3] Matters of evidence are part of the explicit portion of rulings which Shari'ah deals in detail.

The golden rule in the administration of justice is that: 'the onus of proof is on the party who asserts, while oath is incumbent on him who denies.'[4] The modes of proof in this sense includes using witnesses' testimony, documents, admission and confession, possession, circumstantial evidence, among others.[5] Witnesses however, occupy great latitude in matters of proof. A witness in Islamic Law is a person who has attained adulthood; he is sane, free, upright, a Muslim and who witness the

[3] Qur'ān, Surah al-An'ām, Chapter 6 V 168.

[4] Reported by al-Bayhaqī on the authority of Ibn 'Abbās. See Muḥammad Ibn Ṣāliḥ al-'Uthaymīn, *Sharḥ Arba'ūna an-Nawawiyyah* (Riyāḍ: Dār-Tharayā li al-Nashra, 2004), 3rd ed., Hadith 33, 356.

[5] Abū Bakr Jābir al-Jaza'irī, *Minhāj al-Muslim* (Riyāḍ: Dār al-Salām, 2001) Vol. II, 537-539; Abd al-'Azīz Badawi, *Al-Wajīz fī-Fiqh as-Sunnah aa al-Kitāb al-'Azīz,* Trans. Jamall al-din M. Zarabozo (Riyāḍ: II PH, 2007), 640.

transaction in question. ‘Adāla i.e. uprightness, fairness or impartiality is a term that is usually used as part of the attributes of a Muslim witness.[6]

The requirement for a witness to be *‘ādil* and be a Muslim has been a point of controversy. There are verses of the Qur’an suggesting that people of other religion are allowed as witnesses, while other verses restrict this requirement only to Muslims. Again, whether the verse that suggests acceptability of evidence of non-Muslim is inclusive or restrictive in nature is also part of the discourse among scholars.

In view of the divergence of opinion in respect to the legal position on the admissibility *vel non,* of non-Muslim evidence in cases involving Muslims alone or where parties to the transaction involve both Muslim and non-Muslim, there is a need to ascertain the basic stands of Islamic Law in respect to our present society. This paper by, adopting a doctrinal research approach through consulting viable literature and sources of Islamic Law like the Qur’an, Sunnah, Islamic Law textbooks, articles, cases law, etc. seeks to derive answers to questions such as: are all the interpretation given to Qur’an chapter 5 Verse 106 amenable to today’s circumstance; are evidences of non-Muslims admissible in Nigeria courts that apply Shari‘ah; and is there any remedy for Muslims whose transactions are not within the Shari‘ah Courts jurisdiction, to insist on the requirement of Muslim witness, among others.

The significant aim of a research of this nature is to re-echo the legal position of non-Muslim evidence under Islamic Law and examine in detail the consideration that has been given to same by the classical jurists. While targeting the goal of identifying and understanding the various ways Qur’an chapter 5 Verse 106 was interpreted on one hand, this research will also establish the appropriate interpretation that may suits the Nigerian circumstance and necessity on the other hand.

This piece highlighted the divergence of early jurists as regard evidence of non-Muslims and brings to the fore the rationale for the argument of the jurist in that line. Contemporary implications of the juristic conclusion, using Nigeria as a case study, is also adumbrated before it concludes with some underlined recommendations which includes among others; making a case for the adoption of all Shari‘ah Schools of Law opinion in courts applying Shari‘ah as circumstances and necessity may demand, and also make a case for the expansion of the jurisdiction of Shari‘ah Court of

[6] al-Mālikī Ibn Farḥūn, *Tabṣirat al-Ḥukkām, fī Uṣūl al-Aqḍiyyah wa Manāhij al-Aḥkām* (Bayrūt: al-Maktabah al-Aṣrīyyah, 2011), Vol. 1, 254.

Appeal to cover all matters of Islamic Law with the power to apply Shari'ah fully.

## INTERPRETATION OF QUR'AN CHAPTER 5 VERSE 106

The verse provides thus:

يَٰٓأَيُّهَا ٱلَّذِينَ ءَامَنُواْ شَهَٰدَةُ بَيۡنِكُمۡ إِذَا حَضَرَ أَحَدَكُمُ ٱلۡمَوۡتُ حِينَ ٱلۡوَصِيَّةِ ٱثۡنَانِ ذَوَا عَدۡلٖ مِّنكُمۡ أَوۡ ءَاخَرَانِ مِنۡ غَيۡرِكُمۡ إِنۡ أَنتُمۡ ضَرَبۡتُمۡ فِي ٱلۡأَرۡضِ فَأَصَٰبَتۡكُم مُّصِيبَةُ ٱلۡمَوۡتِۚ تَحۡبِسُونَهُمَا مِنۢ بَعۡدِ ٱلصَّلَوٰةِ فَيُقۡسِمَانِ بِٱللَّهِ إِنِ ٱرۡتَبۡتُمۡ لَا نَشۡتَرِي بِهِۦ ثَمَنٗا وَلَوۡ كَانَ ذَا قُرۡبَىٰ وَلَا نَكۡتُمُ شَهَٰدَةَ ٱللَّهِ إِنَّآ إِذٗا لَّمِنَ ٱلۡأٓثِمِينَ ﴿١٠٦﴾

*"O you who believe! When death approaches any of you, and you make a bequest, then take the testimony of two just men of your own folk or two others from outside, if you are traveling through the land and the calamity of death befalls you. Detain them both after the Salah (the prayer), (then) if you are in doubt (about their truthfulness), let them both swear by Allah (saying): We wish not for any worldly gain in this, even though he (the beneficiary) be our near relative. We shall not hide the testimony of Allah, for then indeed we should be of the sinful".*

(Surah al-Māidah, 5: 106)

According to the commentary of Ibn Kathīr, it was said that there was a claim that this verse had been abrogated, referring to the narration of Ibn al-Awf which he attributed to Ibn 'Abbās and the narration of Hammand Ibn Sulaymān on the authority of Ibrahim.[7] Ibn Jarīr on the other hand says that this commandment is fundamental and as such inaccessible to abrogation. He further requested for proof from anybody who claim that it has been abrogated.[8]

[7] Al-Ḥafiz Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, trans. Mahdi al-Sharif (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2006), vol. 3, 383.

[8] Al-Ḥafiz Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 383.

The reason for the revelation of the above verses has been reported in several Qur'anic commentaries. The commentary of Jalālayn and Ibn Kathīr have much semblance and it is reproduced here as follows:

> *"This [incident], as reported by al-Bukhārī, involved a man from the Banū Sahm who had set out on a journey with Tamīm al-Dārī and 'Adiyy b. Baddā', when they were both [still] Christians. The man from the Banū Sahm died in a place where there were no Muslims. When the two came back with his bequest, they [his relatives] found that a silver bowl plated with gold was missing and so the two were brought before the Prophet (SAW); thereupon this verse was revealed. The Prophet (SAW) made the two swear oaths. The bowl was later discovered in Mecca, where the owners said that they had bought it from Tamīm and 'Udayy. The next verse was then revealed, after which two of the Sahmī man's close kin came to swear their oaths; in al-Tirmidhī's version, 'Amr b. al-'Ās, who was closer to the deceased man, stood up with one other from among the kin, and they swore an oath; in yet another version, the [Sahmī] man fell ill and instructed them as to his bequest and asked them to deliver what he had left to his family, but when he died, they took the bowl [and sold it] and then gave what remained [of that money] to his family."*[9]

Ibn Kathīr also related that "from among you" in the verse means that those witnesses should be Muslims. He referred to the narration of Ibn Abu Hatim to 'Abbās, Mujāhid, Ibn Al-Muṣayyab and others. It was however, narrated from Ikrimah, Ābidah and others by Ibn Jarır that "of your own (brotherhood)" means from among the kinsmen of the testator. Consequent upon the above interpretation, Ibn Kathīr held that "or others from outside" means non-Muslims, who are people of the scripture, while Ibn Jarīr maintained that it means witnesses from a tribe other than that of the testator.[10]

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[9] Jalāl al-Dīn al-Maḥallī and Jalāl al-Dīn al-Suyūṭī, *Tafsīr al-Jalālayn*, trans. Feras Hamza (Jordan: Royal Ala al-Bayt Institute for Islamic Thought, 2007), 130; see also al-Ḥafiz Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 386 and Ibn Qayyim al-Jawzī, *al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Shar'iyyah al-Islāmīyyah*, vol. 1 (n.p. Dār `Alim al-Fawā'id, n.d.), 490-500.

[10] Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 383.

Further, Ibn Jarīr makes traveling on a journey and making bequest a condition for the acceptance of witnesses of people of the book *Ahl al-kitāb* that is, Christians and Jew. Shuriaih Al-Qāsim sees these two conditions as separable, that is, such witnesses are allowed when setting on a journey and or when making bequest. All jurists however, agreed that according to Sunnah, evidence of unbelievers who are not *Ahl al-kitāb* (for or against Muslim) is not acceptable, be it in residence, on a journey or in matter of bequest.[11]

Another area of interpretation where there is divergence of opinion is as related to whether bequest is to be made to non-Muslims for them to carry it out (as Executors) or they should just be made witnesses. While some group of jurists adhere to the former opinion, others accept the latter. Another group also agree that where there is no third person who can attest to the bequest, such non-Muslims can be made as witnesses and executors at the same time.[12]

## EVIDENCE OF NON-MUSLIMS IN CASES INVOLVING MUSLIM PARTIES

The admissibility of the evidence of non-Muslims or otherwise in cases where Muslim parties are involved, creates a scenario of divergence of opinion among Muslim jurists, depending on their interpretation of the verse. Some of them reject it on the bases that the verse in contemplation has been abrogated, while others accept it in line with the letters and spirit of the Qur'an provision solely, that is, in cases of bequest on a journey and where a Muslim is not available. There is also another candid but liberal opinion that allows such evidence in all circumstances where necessity dictates for same. The details are explained hereunder.

The first group of jurists that do not accommodate or allow the evidence of peoples of other faith considers the provision of Qur'an chapter 5 V 106 alongside the meaning and interpretation of Qur'an chapter 65 V 2 and 2 V 282. The verses go thus, for ease of reference.

[11] Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 384.
[12] Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm*, 384.

The verse provides thus:

...وَٱسۡتَشۡهِدُواْ شَهِيدَيۡنِ مِن رِّجَالِكُمۡۖ فَإِن لَّمۡ يَكُونَا رَجُلَيۡنِ فَرَجُلٞ وَٱمۡرَأَتَانِ مِمَّن تَرۡضَوۡنَ مِنَ ٱلشُّهَدَآءِ... ﴿٢٨٢﴾

*"...And get two witnesses out of your own men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her..."*

(Surah al-Baqarah, 2: 282)

... وَأَشۡهِدُواْ ذَوَيۡ عَدۡلٖ مِّنكُمۡ وَأَقِيمُواْ ٱلشَّهَٰدَةَ لِلَّهِۚ ... ﴿٢﴾

*"...And take as witness two just persons from among you. And establish the testimony for Allah..."*

(Surah at-Talaq, 65: 2)

It is the argument of this group that both Qur'an chapter 5 V 106 and chapter 2 V 282 are addressed only to the adherent of the Islamic faith, and Qur'an chapter 65 V 2, while towing the same path, is addressed to the holy prophet, to which all Muslim faithful are also mandated to follow. They posited that if the three verses are read and interpreted together, the inevitable conclusion that could reasonably be made is that only adherents of the Islamic faith are competent to testify in any case between Muslims and in court applying Islamic Law.[13]

They argued further that one of the attributes of a competent witness in Shari'ah is *'Adāla*, which is only available to the adherence of Islamic faith. If the faith is missing, such a person cannot by whatever strength of argument be clothed with *'Adāla*, to which his competency as a witness has been inhibited.[14]

The argument of this group was quickly welcomed and sanctioned by another group of Muslim jurists on another footing. They held that Qur'an chapter 5 V 106 had been abrogated and the ruling in it therefore does not

[13] M. A. Ambali, *The Practice of Muslim Family Law in Nigeria* (Zaria: Tamaza Publishing Co. Ltd., 2003), 2nd ed. 112-113; M. A. Ambali, *Ash-Shahādah: Evidence in Islamic Law* (Ijebu-ode: Shebiotimo Publications, 2005), 16-17.

[14] M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 114, citing Salih Abdus Sami' al-Azhari, *Jawāhir al-Iklīl, Commentary on Mukhtaṣar Khalīl*, vol. II, 232.

operate anymore. Imam Mālik and Shafi'i belongs to this group.[15] The group was stoutly and quickly opposed that the theory of abrogation (*naskh*) is usually brought to play in this circumstance to end an argument abruptly. It was also reported that 'Āisha (RA) was quoted saying that none of the verses in *Surah al-Mā'ida* was abrogated.[16]

There is also another argument that can be used against this supporting group. Some jurists who worked on the theory of abrogation also have a divergence of opinion on the details. In fact, while all the four Sunni schools accepted it, modern scholars are denying same.[17] Imam Sayūtī was reported to have worked on the abrogated verses and reduced them to fourteen, to which Qur'an chapter 5 V 106 is not among, while Muhammad 'Ali whose work is predicated on that of Sayūtī concluded that no single verse of the Qur'an was abrogated.[18]

Another group of jurists oppose the above views by positing that, the caliber and number of witnesses required to prove a claim depends on the nature of the claim itself. For example, in proving the offence of *zina*, the evidence of four unimpeachable male witnesses is required, while in some other instances like the case of homicide, only two witnesses are required. In this wise, when Qur'an chapter 65 V 2 is considered, it is apparent that, in the decision of a Muslim to recall his divorced wife back after the expiration of the waiting period, the witness required is that of two just persons, while in Qur'an chapter 2 V 282 which deals with loan transaction requires two just men as witnesses or a man and two women, where two men are not available, are required.

It is based on the above analysis that the provision of Qur'an chapter 5 V 106, is seen as wider in scope than Qur'an chapter 65 V 2 and chapter 2 V 282. The group admitted that while these two provisions restrict witnesses to Muslims, there is no evidence in the verses or elsewhere that suggest that the restriction is general. In essence, '*…or two others not from among you…*' is then interpreted to mean peoples of other faith, which they

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15 As-Sayyid Sābiq, *Fiqh al-Sunnah* (Lebanon: Dār al-Ḥarb Fikr, 1983), 4th ed., vol. III, 227.

16 Muhammad Aliy Asayis, *Tafsīr Ayah al-Aḥkām* (Cairo: n.p., n.d.) vol. III, 226; M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 113.

17 Imran Hassan Khan Nyazee, *Islamic Jurisprudence 'Usūl al-Fiqh'* (India: Adamu Publishers & Distributers, 2006), 318.

18 Mohammed Ali, *The Religion of Islam* (U.A.E: National Publication & Printing House, n.d.), 40-43; M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 113.

held to be sufficiently categorical.[19] Imam Ahmad bin Hanbal and his disciples like Ibn Taymiyyah support this opinion.

A rebuttal was also made to the position of *'Adāla* that, the honesty of a person counts more than the faith he adheres to, and as far as a witness is seen as honest, his evidence becomes reliable. With reference to non-Muslims, they held that, the holy Qur'an also allude to the fact that not all non-Muslims are dishonest, and if the circumstance of the occasion of the revelation of Qur'an chapter 5 V 106 is considered, the incident happened before the revelation and yet, the Qur'an stipulates that '*…or two others not from among you….*'[20] The verse in support of the honesty of non-Muslims goes thus:

۞ وَمِنْ أَهْلِ ٱلْكِتَٰبِ مَنْ إِن تَأْمَنْهُ بِقِنطَارٍ يُؤَدِّهِۦٓ إِلَيْكَ وَمِنْهُم مَّنْ إِن تَأْمَنْهُ
بِدِينَارٍ لَّا يُؤَدِّهِۦٓ إِلَيْكَ إِلَّا مَا دُمْتَ عَلَيْهِ قَآئِمًا ۗ ذَٰلِكَ بِأَنَّهُمْ قَالُوا۟ لَيْسَ عَلَيْنَا
فِى ٱلْأُمِّيِّـۧنَ سَبِيلٌ وَيَقُولُونَ عَلَى ٱللَّهِ ٱلْكَذِبَ وَهُمْ يَعْلَمُونَ ﴿٧٥﴾

*"Among the People of the Scripture is he who, if entrusted with a Qintar (a great amount of wealth), will readily pay it back; and among them there is he who, if entrusted with a single silver coin, will not repay it unless you constantly stand demanding, because they say: "There is no blame on us to betray and take the properties of the illiterates (Arabs)." But they tell a lie against Allah while they know it.)"*

(Surah al-'Imrān, 3: 75)

Imam Abu Ḥanifa while supporting this view, held that the evidence of non-Muslims for or against a non-Muslim party is valid, whether the other party is a Muslim or not. This view is supported with the *hadith* reported by Jābir bin 'Abdullah, may Allah be pleased with him, that a group of Jews came to the prophet (PBUH) to complain against a woman who committed adultery. He enquires from them what is obtainable in their scripture and applied it on them, having accepted the evidence of Jews.[21] It is also noted that the provision of the Qur'an supports the above position.[22]

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19 M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 113.
20 M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 114.
21 Al-Sayyid Sābiq, *Fiqh al-Sunnah*, 227.
22 Qur'ān, Surah al-Mā'idah, Chapter 5 V 47.

It is imperative to point out that, the divergence of the Muslims jurist on the admissibility or otherwise of the testimony of non-Muslims, is a clear one. While some jurists reject it completely on the basis of *naskh* and considering other Qur'anic provisions that only allow evidence of Muslims alone, another group accepts it following the spirit to which Qur'an chapter 5 V 106 is revealed, that is, when a Muslim is on a journey, and on the occasion of *waṣiyyah.* Ibn Taymiyyah took a step further by allowing such evidence in all cases of necessity. It is however, unambiguous that the non-Muslims referred to in the argument of the jurist and the interpretation of the Qur'an are people of the book, i.e. Christians and Jews. Pagans and others are thereby out rightly excluded.

It is pertinent to point out that the view of Ibn Farḥūn and Ibn Qayyim on the issue at hand flow from their scholastic differentiation of the terms *Al-Bayyinah* and *Al-Shahādah*. Unlike majority of contemporary jurists, they postulate that *Al-Bayyinah* is wider in scope than *Al-Shahādah*. Therefore, the two terms cannot be said to be synonymous as wrongly treated by many jurists. It was argued that the meaning of *al-Bayyinah* as can be gleaned from various verses of the Qur'an entails anything, be it oral, factual or real, that unfolds the truth. Therefore, *al-Bayyinah*, unlike *shahadah*, may be in form of a pointer (*dalālah*), an evidence (*ikhbar shāhid*), an authority (*al-hujjah*), a clarification (*burhân*), a sign (*âyât*), sighting (*tabsirah*), a symptom (*alâmah*) or symbol (*âmârah*).[23] To take home this point, jurists exemplified their stands by stating that sighting a cutlass stained with blood from a person accused of cutting another person's hand on one hand and seeing a person whose hand has been cut off could unfold the truth or be a pointer to the fact that the first person actually cut off the other person's hand.

Against the forgoing, it is descendible that in certain circumstances, the *'Adāla* of a witness may be unnecessary where there exist factual situations that unfold or point at the state of thing or truthfulness of a claim independent of oral testimony of the claimant or the defendant.[24] For instance, a non-Muslim institutes a case of trespass against a Muslim and the claim of the plaintiff (non-Muslim) demonstrates the extent or demarcation of his land as well as erection of the defendant's building on

[23] Ibn Qayyim al-Jawzī, *I'lām al-Muwaqqi'īn an-Rabb al-'Ālamīn*, vol. 2 (n.p.: Dār Ibn al-Jawzī, 1423AH), 26; al-Mālikī Ibn Farḥūn, *Tabṣirat al-Ḥukkām, fī Uṣūl al-Aqḍiyyah wa Manāhij al-Aḥkām*, vol. 1, 238.

[24] Ibn Qayyim al-Jawzī, *al-Turuq al-Ḥukmiyyah fī al-Siyāsah al-Shar'iyyah al-Islāmīyyah*, vol. 1, 512.

his land. Despite the non-Muslim claim/testimony lacking *'Adāla*, the judge may rely on factual or real evidence where he orders a visit to *locus inquo* and finds out that the defendant actually trespassed. Premised on the analysis of *Al-Bayyinah*, this piece aligns with juristic views that allow evidence of non-Muslim in deserving circumstances.

## CONTEMPORARY APPROACH TO EVIDENCE OF NON-MUSLIMS

There appears not to be a strong departure from the rule laid down by the early Muslim jurists in respect of the admissibility or otherwise of the testimony of non-Muslims in cases involving Muslim parties. Contemporary literature explains and adopts the views of the modern jurists.[25] Most contemporary scholars admittedly tilt to the liberal approach of Imam Ahmad Ibn Hanbal and his disciples, Ibn Taymiyyah and Ibn Qayyim.[26]

While giving a short exposition of the concept, Deribe and Buba explain:

> *"According to Imam Malik, Imam Shafi'i and Imam Ahmad, the evidence of a non-Muslim is not admissible neither for or against a Muslim nor for or against a non-Muslim. They base their view on the verse of the Holy Qur'an, 'And to call to witness two 'adil persons among you.' And a non-Muslim can't be 'adil. But according to Imam Abu Hanifah, the evidence of a non-Muslim is admissible for or against each other. He bases his view on the reasoning that though they are not 'adil for Muslims but they may be reliable for one another. Moreover, the Holy Prophet (PBUH) has accepted the evidence of Christians among themselves. This is also one*

[25] M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*, 113; M. A. Ambali, *Ash-Shahādah: Evidence in Islamic Law*, 17; Anwarullah, *The Islamic Law of Evidence* (New Delhi: Kitab Bhavan, 2000) 1st ed., 20.

[26] See B. Tarek, 'Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses' *Arab Law Quarterly*, vol. 23/3 (2009): 292-293; M. A. Deribe and T. M. Buba, 'Appraisal of the Admissibility of Electronic Evidence in Nigeria and the Possibility of its Application Under Sharia,' http://www.unimaid.edu.ng/per/Journals-oer/Law/Private%20Law/20.pdf :249 accessed last on 1st May, 2022; p. 249.

> *view of Imam Ahmad and the view of Ibn Al-Taymiyyah and Ibn Al-Qayyim".*[27]

Al-Badawy gave similar explanation in his work as follows:

> *"Most jurists agreed that for a testimony to be considered, the eyewitness must be Muslim. This will be refuted below insofar as crimes against persons are concerned. Scholars also agreed that non-Muslims might testify against each other, but not against a Muslim. The Hanafis accept a non-Muslim testimony against a Muslim if his testimony can be supported by a Muslim witness. Some jurists such as Ibn Taymiyyah and Ibn al-Qayyim allow non-Muslims to testify against Muslims if no Muslim witnesses are found".*[28]

The burning question now, is whether it is practicable in today's settings to exclude non-Muslims from giving evidence in cases where Muslims are involved. We do not think so and the reason is not farfetched. At first, the situation of the present day has greatly become different. Muslims now reside side by side with non-Muslims. In fact, Muslims reside in non-Muslim states and many non-Muslims are also resident in Muslim states. Persons of both religions are bound to deal with each other in a great length, both in commercial transactions, affairs of state, marriage, and so on.

Apart from that, the laws in operation in the state may be one that does not accommodate Shari'ah application and practices. It should be noted that even if Shari'ah is in place, it should also be remembered that all the states of the world are now tied with one another through mutual contracts and various international and territorial organisations through which each state is bound to give rights to all its residents which are available to the residents of other states. Laws or what can be called mutual agreement (*pacta sunt servanda*)[29] have been signed by states to this effect. The Geneva Convention, Charter of Human Rights, etc. demand that states treat non-Muslims the same way as their Muslim counterparts, keeping in view

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[27] M. A. Deribe and T. M. Buba, 'Appraisal of the Admissibility of Electronic Evidence in Nigeria and the Possibility of its Application Under Sharia,' 249.

[28] B. Tarek, 'Towards a Contemporary View of Islamic Criminal Procedures: A Focus on the Testimony of Witnesses,' 292-294.

[29] Se eI. I. Lukanshuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law,' *The American Journal of International Law*, vol. 83/3 (1989).

the laws of Islam. Hence, depriving non-Muslims from giving evidence in cases where they also witnessed transactions may be difficult to accomplish in the present-day circumstances.

It is observed from literature however, that evidence of non-Muslims is deemed admissible in circumstances where a Muslim is not available to witness the transactions. Ambali, while concluding on the issue, explains thus:

> *"We have seen that one fixed standard is not used to decide the competence of witnesses. It is the nature and circumstances of event that dictate both the caliber and number of witnesses in Islamic Law cases. The nature of Nigeria being a multi-religious society where Muslims and people of other faiths freely mix in political, social, cultural and economic interactions recommends that Qur'an chapter 5:106 should be critically examined and intellectually interpreted to give a meaningful procedural law to use in Nigerian Courts where Islamic Law is applied. Analogy occupies a prominent place in Islamic Law."*[30]

The above conclusion tallies with what one would deem appropriate except with the consideration of *ḥudud* offenses. So far as *hudud* crimes are concerned, their evidence for or against each other will be acceptable but the accused shall not be punished with *ḥadd* but will be punished with *ta'zir*. Moreover, the evidence of a non-Muslim may also be accepted for or against a Muslim in matters other than *hudud* because there is no express verse of the Holy Qur'an or Hadith of the Holy Prophet (PBUH) which prohibits the acceptability of non-Muslim evidence. On the contrary and considering the provision of chapter 5:106 of the Holy Qur'an, the evidence of two non-Muslims for a Muslim is acceptable in connection with his will at the point of his death during a journey when Muslims are not available there.[31]

It is imperative to mention that in the application of all the above arguments, non-Muslims referred to are Christians and Jews, and that makes it not the end of the matter. In present day life, we now have worshippers of unimaginable things. Are their evidence accepted on the

[30] M. A. Ambali, *The Practice of Muslim Family Law in Nigeria*,115.

[31] M. A. Deribe and T. M. Buba, 'Appraisal of the Admissibility of Electronic Evidence in Nigeria and the Possibility of its Application Under Sharia' 249.

same parallel as those of *Ahl al-kitāb*[32] or they are plainly excluded? It is the position of this piece considering the spirit of Qur'an chapter 5 V 106 and the interpretation alluded to by Ibn Taymiyyah and Ibn Qayyim that, all non-Muslims in the present day are to be accorded with the benefit of the circumstance.

However, it is preferable if the situation can be avoided. This is because, the Qur'an carefully exclude other non-Muslims who are not *Ahl al-kitāb* from clothing them with element of sincerity.[33] It is advised that, Muslim should be careful in selecting friends and allies. Transacting with Muslim colleagues keeps us more in remembrance of our obligation towards the lawgiver.

## THE NIGERIAN SCENARIO

Nigeria is a multi-religious society, and the alpha of all the laws is the 1999 Constitution of the Federal Republic of Nigeria (as amended). The law claimed superiority over all other laws in the state and declare any inconsistency in any other law with itself to be null and void to the extent of its inconsistency.[34] The constitution in the same vein declared that, no state in the country shall declare a particular religion as its own.[35] This goes a long way to support that, Nigeria is a multi-religious nation. In another provision of the law, religious rights are granted to individuals to the extent that it does not limit or derogate another person rights as it relates to religion.[36] Finally, it prohibits discrimination on account of birth, sex and religion among others.[37]

The chief law as regard evidence in Nigeria is the Evidence Act.[38] The law takes care of the procedure for giving evidence and decides the testimony that is admissible and those that are not.[39] One should be bold to

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[32] It is also noted that there are arguments from different quarters that Christians and Jews of the present day do not even qualify as *Ahl al-Kitab*. That position is however, outside the scope of this piece and same is not considered.

[33] See Qur'ān, Surah al-'Imrān, Chapter 3 V 75.

[34] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 1(1&3).

[35] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 10.

[36] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 38.

[37] Constitution of the Federal Republic of Nigeria 1999 (as amended), Section 42.

[38] Evidence Act 2011.

[39] Hanafi Adekunle Hammed, *Islamic Law of Evidence and Administration of Justice in Nigeria (Shar'iyyat al-Islamiyyat fī Idharat âdhalat Walida-hijaj bi-*

state that it does not in any provision cater for the situation of Muslim law of evidence.[40] Admittedly, it does not apply in courts where Shari'ah operates, that is, in Area Court and Shari'ah Court of Appeal,[41] although such court may be guided by the rules of evidence. The principles of Islamic Law is mostly applicable in cases before these courts.[42] It is observed that a wide range of transactions to which conflicts are bound to ensue are outside the scope of these Shari'ah courts.[43] Note that the law is also subject to the provision of the constitution. What is then the position of non-Muslim evidence in courts applying Shari'ah in Nigeria?

This was part of the crux in the Nigerian case of *Dorawa, Tela Rijiyan v. Hassan Daudu*.[44] In this case, the dispute between the parties is on a parcel of land to which one John (an Ibo man) testified on behalf of the appellant who is a non-Muslim against the respondent, a Muslim. Although the trial Area Court accepted John's evidence, the Upper Area Court rejected it on appeal on the ground that he is a non-Muslim and the respondent is a Muslim, whereas evidence of non-Muslim is not acceptable in Islamic Law.

On further appeal to the High Court of North-Western State, the court while referring to the commentary from *Jawāhir al-Iklil*, Volume II, page 48 and *Khirshi*, Volume IV page 60, held as follows:

> *"The evidence of people who are disqualified (to give evidence) because they are regarded unjust (justice is a prerequisite qualification to a Muslim witness) is acceptable in Islamic Law even if they are non-Muslim, in all cases of necessity."*[45]

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*dawlat Nigeria)* (Lagos-Nigeria: Princeton & Associate Publishing Co. Ltd., 2022), 226.

40 One of the areas that is a bit relevant to the religion is Section 207 of Evidence Act which was given accurate consideration in the Court of Appeal case of *Maigari v. Bida* (2002) FWLR (Pt. 88) 917. It deals with swearing to an oath before giving evidence. A Muslim objected to that procedure but the court considers it in line with Islamic Law and held that it is not contrary to Shari'ah.

41 Section 256 of Evidence Act 2011.

42 See Section 13 Sharia Court of Appeal Law, Cap. S4 Laws of Kwara State and Section 22 of Area Courts Law, Cap. A9, Laws of Kwara State.

43 Abdullateef F. Kamaldeen, Comparative Analysis of the Jurisdiction of Sharia Court of Appeal and Customary Court of Appeal in Nigeria (LL.M Thesis, Department of Islamic Law, Faculty of Law, University of Ilorin, 2019), 62-70.

44 Dorowa, Tela Rijiya v. Hassan Daudu (1975) NNLR 87.

45 Dorowa, Tela Rijiya v, Hassan Daudu (1975) NNLR 88.

One cannot be sure if the above position will still represent the position of law in Area Court and Shari'ah Court of Appeal. This poser is made in view of the provision of the law in Nigeria that empowers these courts to apply Islamic Law of Maliki School,[46] and the fact that this case was not appealed beyond the High Court of Northern Nigeria. In any event, the stand of the court appeals more to this piece, in that, it moves the law farther than the restrictive position of these court's Laws. How then can the position of our laws still restrict the implementation of the law to a certain school of law?

It is argued that the situation of this country, where Shari'ah is applied side by side with other laws and subject to them albeit; where Muslims and non-Muslims intermingled in all affairs of life, it is undesirable that the application of Shari'ah be limited by another law or restricted to Maliki School only. Although this position does not form part of the court's decision in the above-mentioned case, the court alluded to similar conclusion while referring to *Hidāyah al-Tullab* where the learned Sheikh Uthman said:

> *"It is obligatory upon every adult Muslim to believe that all the founders of Islamic schools had divine Guidance…it is also compulsory upon every adult Muslim not to himself from acting and working in accordance with their (founders of Islamic schools) opinion. Some people nowadays used to remark as follows, 'we follow the opinion of so and so through necessity only.' They say this whenever occasion makes them adhere to a learned opinion from a different Islamic School other than the one, they follow. They seem to regard this practice as an act of sin. But their assumption (that they have committed a sin) is in fact the sin itself and they must repent from the same.*
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> *This useful guidance as outlined by the learned Sheikh Uthman bn Fodio has given us the green light to have recourse to other Islamic Schools other than Maliki in solving any problem which our school (Maliki) has provided otherwise."*

[46] See section 2 and 4 of Area Court Law, 1968; Order 11 of Area Court (Civil Procedure Rules) 1971; Section 2 and 11 of Sharia Court of Appeal Law Cap. S4 Laws of Kwara State 2006 and Order III Rule 7(5) of Sharia Court of Appeal Rules.

The above position however, relates to courts where Islamic Law is applicable. In other courts where Islamic Law is not applicable, the issue of admissibility or otherwise of evidence of non-Muslim cannot arise. This does not again mean that some transactions that are Shari'ah oriented cannot go to this court. For instance, if a partnership (*mushārakah)* agreement between two Muslims ended in litigation and the amount it covers is outside the jurisdiction of the Lower Court, parties in this circumstance are bound to approach the High Court for instance, where Shari'ah has no place at all or at best has very limited application.

It should be remembered again that in courts where Shari'ah is not strictly applicable, the High Court for example, parties are taken to be bound by their agreement.[47] This will mean that the term of a *mushārakah* agreement can still be enforced in a common law court. Practically, witnesses in this circumstance could mean those that actually signed the *mushārakah* agreement as witnesses apart from the parties themselves (who may also be Muslims or a Muslim and a non-Muslim), or other persons that witnessed the transaction between the parties who are not privy to the execution of the agreement. In any case, no distinction is made under the common law with regard to the religion a witness adheres to as such, both Muslims and non-Muslims are competent witnesses provided they satisfy the provision of the Evidence Act.[48]

With the above, Muslims are advised that in the ordinary cause of their relationship, they should be given prevalence to witness it, whether it is a deed of assignment, sale or employment contract, etc. This is to show how conscious Muslims are to the principles of Shari'ah. It should also be noted that the verses dealing with evidence are constant in the request of Muslims and as must be fulfilled.

47 See Idufueko V Pfizer Products Limited (2015) 8 EJSC 68 at 83 para D-E.

48 Section 175 of Evidence Act (2011).

## CONCLUSIONS AND RECOMMENDATIONS

This research has identified the discussion of the jurist with regards to the admissibility or otherwise of the evidence of non-Muslims in cases involving Muslim parties and where the parties are both Muslim and non-Muslims. The contemporary approach of this discussion and in particular the Nigerian scenario has been considered. The research found that, traditionally, some jurists reject evidence of non-Muslims on the bases that the verse in contemplation (Qur'an chapter 5 V 106) has been abrogated, others accepted it in line with the letters and spirit of the Qur'an provision solely, that is, in cases of bequest on a journey and where a Muslim is not available. There is also another candid but liberal opinion that allows such evidence in all circumstances where necessity dictates for same.

It is also the findings of this research that, there is no departure from the rulings of this concept as laid by the classical jurists in this contemporary situation. The circumstance we find ourselves however, makes a difference of the consideration from the traditional view. Even in the Nigerian case cited, the court adopts the liberal and reasonable view of Ibn Taymiyyah and Ibn Qayyim as it is the most appropriate in relation to a contemporary society like Nigeria. What is left however, is the implementation of this principle in other Muslims transactions which are outside the scope of the Shari'ah jurisdiction in Nigeria. This is part of what informed the underlisted recommendations.

1. The jurisdiction of Sharia Court of Appeal should be extended to cover all other matters of Islamic dispute, with the power to apply Shari'ah fully.
2. The Laws applicable in Sharia Courts should also be amended from restricting the Court to apply only Islamic Law of the Maliki School. This is because the stands of other schools are also paramount and may be most suitable for the situation at hand.
3. More Shari'ah experts should be employed as judges in Courts of Appeal and the Supreme Court, who shall solely attend to Shari'ah cases on appeal.
4. The procedural law, including Law of Evidence, based on Shari'ah should be codified to guide all Shari'ah Qadis.
5. Muslims are encouraged to always insist on Muslim witnesses for themselves in a bid to fulfill the requirement of Shari'ah.

6. Each and every individual Muslim who is aware of this requirement is also encouraged to create the awareness among other Muslims.

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