

**Evidence under Customary Law: Handling Oral Testimony,
Conflicting Traditions, Appellate Ambiguities, and Weight of
Evidence**

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in Trial in Collaboration with Judicial College of England & Wales**

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I. INTRODUCTION

I consider it a great honour and privilege to be nominated as one of the Facilitators at this year's Refresher Course for Judges of the Lower Courts. I am deeply grateful to the Board of Governors of the National Judicial Institute under the distinguished Chairmanship of the Chief Justice of Nigeria, Honourable Justice Kudirat Kekere-Ekun, GCON, FNJI. I also express my appreciation to the Education Committee of the Board of Governors, under the Chairmanship of Honourable Justice John Inyang Okoro, CFR, J.S.C., as well as to the Administrator of the Institute, Honourable Justice Babatunde A. Adejumo (Rtd.), for affording me this opportunity to share my experiential knowledge as a customary law practitioner of almost two decades.

I further appreciate Honourable Justice Danlami Garba, President, Customary Court of Appeal, Kaduna State, for his permission and institutional support, which made it possible to undertake this assignment and share our experience in customary adjudication in Kaduna State.

I was invited to handle the topic: **Evidence under Islamic and Customary Law: Handling Oral Testimony, Conflicting Traditions, Appellate Ambiguities, and Weight of evidence**. However, having regard to my area of specialization, this presentation focuses exclusively on customary law. Accordingly, the topic is more appropriately reframed as: **Evidence under Customary Law: Handling Oral Testimony, Conflicting Traditions, Appellate Ambiguities, and Weight of Evidence**.

II. OBJECTIVE

At the end of this session, participants should be able to:

- A. Understand the nature of evidence in customary adjudication;
- B. Properly record and assess oral testimony in customary proceedings;
- C. Determine when and how customary law must be proved;
- D. Resolve conflicting versions of customs and testimonies;
- E. Attach appropriate weight to evidence in line with appellate guidance;

- F. Write judgments that reflect the peculiarities of customary adjudication; and
- G. Avoid common errors that lead to appellate reversal, setting aside, or nullification of decisions.

III. LOWER COURTS WITH JURISDICTION OVER CUSTOMARY LAW DISPUTES

Jurisdiction over disputes under customary law is exercised by the following courts, depending on the legal framework of each State:

- A. *Customary Courts*. States that established Customary Courts vest them with jurisdiction to hear and determine all disputes under customary law.¹
- B. *Magistrates Courts (District Courts)*. In States that do not operate Customary or Area Courts, jurisdiction over customary law disputes is conferred on the Magistrate Courts.²
- C. *Area Courts*. These courts are empowered to adjudicate on matters involving customary law, Islamic law, criminal law and/or general law, as may be required by each State.³

IV. THE NATURE OF CUSTOMARY LAW

Customary law is characteristically:

1. Flexible;
2. Generally unwritten; and
3. Contextual.

Its flexibility reflects its capacity to evolve with time. Its unwritten nature reinforces this adaptability, while its contextual character ensures that each community is governed by the customs it recognizes and practices. This explains why there is no customary “common law” or universally applicable customary law.⁴

¹ Ss.10, 20, 21 and Second Schedule Kaduna State Customary Courts Law, 2001 Law (as amended) (KSCCL); Ss.2(1), 15(1)-(2) and Schedule of the Nasarawa State Customary Court Law 2022 (NSCCL); Ss.21, 22, 25, 26 and First Schedule Lagos State Customary Courts Law, 2011 (as amended) (LSCCL); ss.14 – 17, 19, 21 Akwa Ibom State Customary Courts Law 2020 (ASCCL)

² S24 of the Kano State Magistrate Courts Law 2018 (1439 A.H.)

³ Ss. 20, 21 & The Schedule Gombe State Area Courts Law, 2020

⁴ *Nwizi v Oke* (2025) 12 NWLR (Pt. 2000) 589 at 620-621, paras. H-C.; *Yusuff v Dada* (1990) 4 NWLR (Pt. 146) 657 at 673, para. G; *Ohai v Akpoemonye* (1999) 1 NWLR (Pt. 588) 521 at 527, paras. B-C; 528, paras. G-H; *Osolu v Osolu* (1998) 1 NWLR (Pt.535) 532 at 536, paras. D-E; 566, para. D

V. EVIDENCE IN CUSTOMARY ADJUDICATION

A. Nature of Evidence

Evidence in customary adjudication, whether before Customary Courts or other courts vested with jurisdiction, must be received and evaluated in accordance with applicable laws and rules. By design, Customary Courts administer justice in line with the customs, traditions, and usages of the people. Proceedings are informal, community-oriented, and largely dependent on oral testimony.

Unlike superior courts of record, the Courts are not strictly bound by the Evidence Act, 2011.⁵ Nevertheless, they remain bound by the principles of natural justice, logic, and common sense.⁶

The trial judge is the primary evaluator of facts and appellate courts generally defer to such findings when properly made.⁷ However, where the trial court fails to properly evaluate the evidence, the appellate court is empowered to do so.⁸

A recurring challenge arises where Magistrates who are more accustomed to common law procedures, are required to determine or review customary disputes. In Lagos State, for example, appeals from Customary Courts lie to the Magistrates' Courts.⁹ This structural arrangement raises legitimate concerns about effective appellate review, given the informal nature of customary adjudication. The establishment of an Upper Customary Court in Lagos State would enhance the development of customary law and improve appellate consistency, with further appeals lying to the High Court pending the establishment of a Customary Court of Appeal.

B. Applicability and Limits of the Evidence Act

The Evidence Act does not strictly apply to civil proceedings in the Customary Courts and, by extension, to customary adjudication in other lower Courts. Courts with jurisdiction over customary law disputes are to be guided and not

⁵ *ibid.*p.589 at 619-620, paras. H-C

⁶ See *Order 11 Rule 11 Customary Courts and Upper Customary Courts (Civil Procedure) Rules 2013; Arum v Nwobodo* (2004) 9 NWLR (878) 411 at 442; *Agbasi v Obi* (1998) 2 NWLR (Pt. 536) 1 at 14, paras. A-B; *Ede v Mba* (2011) 18 NWLR (Pt. 1278) 236 at 272, para. A

⁷ *Jinadu v Esurombi-Aro* (2005) 14 N.W.L.R. (Pt. 944) 142 at 206, paras C-E

⁸ *Nzekwu v Nzekwu* (1989) 2 NWLR (Pt. 104) 373 at 393, para. F

⁹ *Section 38 of the Lagos State Customary Court Law, 2011*

fettered by the Act. Undue reliance on its technical provisions may occasion a miscarriage of justice and constitutes a valid ground of appeal.¹⁰

VI. RECORDING AND ASSESSING ORAL TESTIMONY IN CUSTOMARY ADJUDICATION

Oral testimony remains the primary mode of proof in customary adjudication. Both the proof of facts and the proof of custom are, in most cases, established through oral evidence. Although parties may rely on textual authorities to prove the existence of a custom, courts must exercise caution in placing undue reliance on such materials.¹¹ Similar restraint applies to judicial precedents, as each case is an authority only for what it decides within its factual context.¹²

A. Nature of Oral Evidence in Customary Law

1. *Most disputes are proved through oral testimony.* Witnesses are typically family members, community elders, neighbours, or traditional leaders. Both men and women are competent witnesses, without discrimination.¹³ In fact, the uncorroborated testimony of a single credible witness, whether male or female, is sufficient to establish a custom.¹⁴

Unlike proceedings under common law, a customary court may, in the interest of justice, invite a witness not called by either party. Such witnesses are not limited to experts, as persons knowledgeable in the custom or relevant books may be consulted.¹⁵ However, fairness demands that parties be afforded the opportunity to cross-examine any such witness.¹⁶

2. *Hearsay evidence is admissible in limited circumstances,* particularly in cases involving proof of title to land through traditional history.¹⁷ Where competing traditional histories are presented, the court must determine which account is

¹⁰ S256(1)(c) of the Evidence Act, 2011; *Arum & Anor v Nwobodo* (2012) LPELR-20390, P. 30, para. D-F

¹¹ *Osolu v Osolu* (1998) 1 NWLR (Pt.535) 532 at 565, para. D; 566, para. C-D

¹² *n.8 p.373 at 394, para. H - 395, para. A; Onyenge v Ebere* (2004) 13 NWLR (Pt.889) 20 at 37, para. D; *Edede v A.G., Fed* (2025) 18 NWLR (Pt. 2016) 1 at 108-109, paras. G-A

¹³ See s42 CFRN 1999

¹⁴ *Okeke v Nwigene* (2022) 3 NWLR (Pt. 1817) 313 at 340, paras. G-H; 348, paras. B-C

¹⁵ Or13 R1 Customary Courts and Upper Customary Courts (Civil Procedure) Rules 2013; *Orugbo v Una* (2002) 16 NWLR (Pt. 792) 175 at 2010-2011, paras. F-A

¹⁶ *Azuokwu v Nwokanma* (2005) 11 NWLR (Pt. 937) 537 at 550, paras. H-B

¹⁷ See *Popoola & Ors. v Adeyemo & Anor* (1992) LPELR-2922 (SC) Pp. 33-34, paras. D-D; s43 of the Evidence Act 2011

more probable and credible in the light of surrounding facts.¹⁸ Outside these limited contexts, hearsay evidence is inadmissible unless corroborated.

3. *Documentary evidence is a mere surplusage in customary adjudication.* Documents should be admitted on the basis of relevance, notwithstanding objections grounded in technical rules of admissibility, provided they assist the court in achieving substantial justice. Documents written in local languages should be admitted and translated into the language of the court. The strict rules governing documentary evidence under the Evidence Act do not apply in customary adjudication.¹⁹

B. Judicial Duty in Assessing Oral Testimony

Judges engaged in customary adjudication bear a heightened responsibility in evaluating oral evidence. In discharging this duty, the court must:

1. *Observe demeanour and consistency.* The demeanour of a witness, coupled with internal consistency, remains a vital tool in assessing credibility. This underscores the importance of concluding cases timeously as such observations are rarely captured in the record.

2. *Consider witnesses' relationship to the parties.* Mere familiarity or blood relationship with a party does not, without more, justify rejecting a witness' evidence, even in criminal cases where the burden of proof is higher.²⁰ However, in land disputes, the exclusive reliance on family members as witnesses may justifiably arouse suspicion.

3. *Evaluate interest or bias.* The court must identify interested or tainted witnesses and treat their evidence with appropriate caution.²¹

4. *Assess probability in the light of community practice.* A custom may appear illogical when viewed through a common law lens, yet remains valid if accepted and practiced by the relevant community and if it passes the repugnancy test.²²

¹⁸ *Biariko v Edeh-Ogwulle* (2001) 12 NWLR (Pt. 726) 235 at 263-264, paras. G-H.

¹⁹ See s256(1)(d) of the Evidence Act 2011; *Gaji v Paye* (2003) 8 NWLR (Pt. 823) 583 at 606 – 607, paras. H -A; *Olubodun v Lawal* (2008) 17 NWLR (Pt. 1115) 1 at 34, paras. B-C.

²⁰ *Ude v State* (2016) 14 NWLR (Pt. 1531) 122 at 159, paras. B - E

²¹ *Udo v Eshiet* (1994) 8 NWLR (Pt. 363) 483 at 501, para. G

²² n.4 p.589 at 619-620, paras. H-C.

5. *Prioritize substantive justice.* Technical justice must yield to substantial justice. Excessive reliance on procedural technicalities undermines the very foundation of customary adjudication.

C. Practical Challenges for Trial Judges

1. *Assessing credibility in cases with oral evidence only.* In the absence of documentary evidence, judges must rely on demeanour, consistency, and corroboration.

2. *Language barriers and interpretation issues.* Many litigants testify through interpreters. Where the judge does not understand the language spoken, reliance on interpretation becomes inevitable, making it imperative that interpreters are sworn and competent to avoid a miscarriage of justice.

3. *Recording oral evidence adequately.* While verbatim recording may initially be advisable, experience enables judges to distil and record only material facts. Nevertheless, caution should be exercised to avoid omitting vital evidence.

4. *Managing self-represented litigants.* Given the prevalence of unrepresented parties, the presiding judge must actively guide proceedings to elicit relevant facts, while maintaining impartiality. Knowledge of the applicable laws and rules will aid the judge in effectively discharging this duty.

VII. PROOF OF CUSTOMARY LAW IN CUSTOMARY ADJUDICATION

A. Custom as a Question of Fact

Customary law must be proved by evidence unless it is so notorious that the court may take judicial notice of it.²³ Courts must exercise restraint in applying judicial precedents, as customs evolve and may differ even within the same ethnic group plus the fact that a case is only an authority for what it decides in the context of facts of the case.²⁴

B. Limits on the Enforcement of Customary Law

A custom will not be enforced where it is:

1. Repugnant to natural justice, equity, and good conscience;
2. Contrary to public policy; or

²³ n.4 p.589 at 627, paras. C-G

²⁴ See *Abioye v Ismail* (2023) 13 NWLR (Pt. 1902) 431 at 479-480, paras. H-A; *Ekpan v Uyo* (2007) 4 NWLR (Pt. 26) 63 at 78, paras. F-G

3. Incompatible with any written law.²⁵

These limitations are entrenched in the statutes establishing courts with jurisdiction over customary matters.

VIII. RESOLVING CONFLICTING VERSIONS OF CUSTOMS AND TESTIMONIES IN CUSTOMARY ADJUDICATION

A. Conflicting Versions of Custom

Conflicts frequently arise where witnesses present divergent accounts of the same custom or where parties originate from different communities. In resolving such conflicts, the court should:

1. Treat each version as evidence;
2. Examine the extent of acceptance and practice within the relevant community;
3. Invite expert witnesses, including traditional leaders or persons versed in the custom; and
4. Prefer the version that is credible, consistent, widely accepted and valid.

B. Conflicting Oral Testimony

Where oral testimonies conflict, the court must resolve the contradictions expressly, provide reasons for preferring one version over another, and avoid glossing over material inconsistencies. Failure to do so constitutes an error of law.²⁶

IX. JUDGMENT WRITING IN CUSTOMARY ADJUDICATION

A. Recording Oral Evidence

Judges must ensure that testimony is recorded clearly, accurately, and faithfully, notwithstanding the informality of proceedings. While brevity is desirable, summaries must ensure the record reflects the substance of evidence given and not omit material facts.

B. Writing Judgments in Customary Disputes

Judgments in customary disputes should reflect clarity of thought, proper evaluation of evidence, and a conscious focus on substantive justice. In this regard, a well-reasoned judgment should:

²⁵ *Omaye v Omagu* (2008) 7 NWLR (Pt. 1087) 477 at 507, para. D

²⁶ See *Iloabachie v Iloabachie* (2005) 9 NWLR (362) at 369, para. G; 368, paras. C-D; 369; para. C

1. *Identify the issues for determination framed as questions.* Framing issues as questions often aids clearer resolution at the trial level than abstract “issues for determination,” which are more suited to appellate adjudication. Question-based framing enables the judge to directly address the real points in controversy between the parties. This approach accords with the principle that a trial court exercising jurisdiction in customary adjudication may distil the issues in dispute notwithstanding the claims of the parties. This is particularly important because pleadings are not filed in customary adjudication, and trial courts must guard against injustice occasioned by a rigid reliance on the parties’ stated claims.

2. *Summarize relevant evidence.* This exercise requires a proper understanding of the evidence and the ability to state the pith of each witness’ testimony. The use of expressions such as “corroborates,” “aligns with,” “tallies with,” “supports,” or “conflicts with,” “contradicts,” “controverts,” “discrepant,” “material,” or “immaterial” are operational tools that demonstrate effective evaluation of evidence.

3. *Resolve conflicts in the evidence clearly.* All material facts on which issues have been joined must be resolved. This obligation is limited to material conflicts and does not extend to every minor or inconsequential discrepancy in the evidence.

4. *State findings of fact and reasons.* A central feature of evidence evaluation is the making of findings of fact by the trial court. Proper appraisal of the evidence enables the judge to identify the facts found to be credible. These findings form the foundation of the decision reached, and it is upon them that the applicable law is applied, with reasons supplied in justification of the court’s decision.

5. *Apply the relevant and valid custom.* The applicable custom must be clearly stated and applied to the facts accepted by the court. This is crucial, as appellate courts may rely on the evidence taken by trial courts to determine the existence and applicability of a custom.²⁷ It is also at this stage that any custom which fails the validity test should be declared repugnant and unenforceable.

²⁷ n.4 p.589 at 620, paras. F-H

6. *Focus on substantive justice.* The court must resist the temptation to lean towards technicalities and technical justice. While technical justice may appear attractive, it more often than not occasions a miscarriage of justice.

It should be noted that these features are not mutually exclusive and may overlap, depending on the judge's style of judgment writing. Judges are encouraged to identify a style that best suits them while remaining open to learning, unlearning, and relearning. Various styles may be gleaned from reported decisions.

C. Attaching Appropriate Weight to Evidence in Customary Adjudication

Although the statutes and rules conferring jurisdiction to administer customary law guide the court, judicial authorities provide valuable illumination on the principles governing the attachment of weight to evidence in trial courts.

1. Governing Principles on Weight of Evidence

a. Evidence must be weighed, not counted. It is the quality, and not the quantity, of evidence that matters. The credible evidence of a single witness, whether male or female, is sufficient to prove a fact. If murder can be proved by the testimony of one witness, how much more a fact in civil adjudication.²⁸

b. Selective consideration of evidence is improper. A judge must not pick and choose portions of the evidence that support one party's case while ignoring those that do not.²⁹

2. Factors Affecting Weight of Evidence

a. Consistency and coherence. Evidence must be consistent with earlier statements and logically coherent; otherwise, the credibility of the witness may be undermined.

b. Corroboration by surrounding facts. Independent facts or evidence that support a witness' testimony enhance its probative value. Like pieces fitting a puzzle, corroborative facts strengthen credibility.

c. Conduct of parties before and after the dispute. The conduct of a party who destroys or attempts to destroy evidence, or harasses an opponent's witness, may negatively affect the weight to be attached to such party's evidence.

²⁸ *Samuel v. State* (2025) 4 NWLR (Pt. 1982) 329 at 367, paras. C-F

²⁹ See *Amokomowo v Andu* (1985) LPELR-469, pp. 15 – 16, paras. D-G; *Samuel v Amoyegun* (1992) 4 NWLR (Pt. 237) 527 at 547-548, paras. C-A; 553, paras. B-C on the art of judgment writing.

d. Interest, bias, or neutrality of witnesses. A witness' interest in the outcome of a case, bias towards a party, or neutrality is a relevant consideration in assessing the probative value of the testimony.

D. Avoid Common Errors Leading to Appellate Reversal or Setting Aside of Decisions.

1. *Technical justice.* Appellate courts adopt a liberal approach to decisions of trial courts in customary disputes, with emphasis placed on whether substantial justice has been done.³⁰ Appellate courts respect findings of fact by trial courts and will rarely interfere except where such findings are: unsupported by evidence, perverse, or based on wrong principles.³¹

2. *Assumption of the existence of a custom without proof.*³²

3. *Failure to resolve conflicting evidence.*³³

4. *Denial of fair hearing.*³⁴

5. *Undue reliance on the Evidence Act.* Technical rules on admissibility should not defeat substantive justice. Nevertheless, decisions must be rational, fair, and supported by evidence. The Act must not be relied upon to reject documentary evidence in customary adjudication.³⁵

6. *Non-evaluation or improper evaluation of evidence.*³⁶

7. *Non-statutory panel.* The law establishing a court specifies the composition of its panel, which varies from State to State. Any failure to adjudicate with the proper panel constitutes a ground upon which an appellate court may nullify the decision and order a retrial.³⁷

X. CONCLUSION AND RECOMMENDATIONS

A. *Strengthening judicial competence in non-statutory evidence.* Statutory evidence refers to evidence governed by specific statutes, such as the Evidence

³⁰ *Erhunwunse v Ehanire* (2003) 13 NWLR (Pt. 837) 353 at 377, paras G-H

³¹ See *Olanrewaju v. Gov. of Oyo State* (1992) 9 NWLR (Pt. 265) 335 at 360, paras. B-E; 361, paras. B-C; *Olohunde v Adeyoju* (2000) 10 NWLR (Pt. 676) 562 at 568, paras. C-D

³² *Onyenge v Ebere* (2004) 13 NWLR (Pt. 889) 20 at 38, paras. C-E

³³ *Samuel v Amoyegun* (1992) 4 NWLR (Pt. 237) 527 at 549, paras. E-G

³⁴ *Ojengbede v Esan* (2001) 18 NWLR (Pt. 746) 771 at 783, paras. D-E

³⁵ See s256(1)(d) of the Evidence Act 2011; *Gaji v Paye* ; *Olubodun v Lawal*

³⁶ *Emmanuel v Aliyu* (2024) 1 NWLR (Pt. 2000) 589 at 619, paras. E-H

³⁷ *Abodunrin v Arabe* (1994) 5 NWLR (Pt. 393) 77 at 94-95, paras. H-A

Act. Managing statutory evidence generally requires less specialized training than handling non-statutory evidence, hence the need for focused and topical training of this nature.

B. Continuous judicial education. The importance of continuous judicial education cannot be overemphasized. Beyond the limited number of judges who can attend centralized programmes, State Judiciaries should organize periodic workshops for their lower court judges. Experienced judges of superior and lower courts can share practical insights with younger judges, thereby ensuring the smooth transmission of judicial knowledge and promoting a more effective and efficient administration of justice.

C. The need for improved procedural guidelines. Rather than allowing lower court judges exercising jurisdiction in customary adjudication to adopt a haphazard approach to evidence management, steps should be taken to develop general procedural guidelines for customary adjudication. Such guidelines would serve as a reference tool for presiding officers, enhance the recording and handling of evidence, improve its evaluation, and promote the writing of judgments that meet legal requirements and are less likely to be set aside on appeal or nullified for procedural errors—outcomes that unnecessarily delay justice and increase the cost of litigation.

Thank you for listening.

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