Al-Hikmah Journal of Islamic Studies, UMYUK Vol. 12, No. I, July, 2024 (ISSN 2277-0658)
https://alhikmahjois@umyu.edu.ng

Examination of the Admissibility of Shahadatu Sama'i (Hearsay Evidence) Under Islamic Law of Malikiy School

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Abstract
The importance of the law of evidence in a judicial proceeding could not be emphasized Indeed no legal system by whatever age emerged could claim any justification if lacks laws that govern evidence and procedural justice This article examines the admissibility of shahadatu sama ' i (Hearsay evidence) under Islamic law of Malik school which is the predominant and statutory law to be applied in Nigeria The article using doctorial methodology seeks to identify the extent to which shahadatu sama ' i (Hearsay evidence) may be admitted and applied the conditions for its admissibility its evidential value in the sight of law The article observed that with development in information, technology care must be taken by courts while admitting or acting on same the article recommends that statutes be constantly amended and Islamic scholars should act promptly to accommodate emerging development

1.1 Introduction

The importance of the law of evidence in any judicial proceeding should not be over-emphasized. This is so because evidence forms the basis of proving or disproving the facts in judicial proceedings. Evidence is just like a rail on which courts ride to arrive at a just conclusion in any given case before them. Courts must act on the evidence presented before them and no more. Under Islamic law, the evidence or testimony in terms of strength is divided into three classes. Namely (a) Shahadatu Qati (b) Shahadatu Naql (c) Shahadatu sama'i. Shahadatu Qati refers to testimony or evidence of two credible men or one man and two female who saw or heard about an event directly. Shahadatu Naql refers to the narration of testimony by one person on behalf of another person to court. Shahadatu sama'i refers to evidence in which one or more witnesses relate what they heard from the generality of people, generally conveying the occurrences of a certain act that is of common knowledge. Generally, shahadatu sama'i (Hearsay evidence) is inadmissible under Islamic law, hoverer, this general rule has an exception. In this paper, an attempt is made to look at those exceptions, and the scope of the admissibility of shahadatu sama'i

(Hearsay evidence) with respect to civil and criminal cases.

1.2 Definition of key words

1.2.1 Evidence:

> Under Islamic law, evidence is defined as: Evidence is about the rules and use of evidence in the proof of civil or criminal right, duty and or liability before a court of law or judicial tribunal[1].

According to Tanko I. (JCA): As he then was.

> Shahada/Bayyinah or evidence connotes the true information in a court of law about a fact perceived in order to establish or prove the existence of a certain claim or right or any fact in issue[2]

According to IbnTaimiyya:

> Evidence is a name that explains or clarifies a claim or right. Anyone who limits it to the evidence of two or four witnesses or even a witness does not accord the name its rightful title.[3]

According to *Adamu Abubakar Esq*.:

> Evidence is about the rules and use of evidence in the proof of civil or criminal right, duty and or liability before a court of law or Judicial Tribunal[4].

1.2.2 Admissibility

> Under Islamic law, admissibility means A process of law by which courts should follow to either admit or reject the evidence.[5]

1.2.3 Hearsay

> Under Islamic law, hearsay evidence has been defined as an evidence given by someone in order to confirm what he has been told by another person or evidence a person gives on what he heard from certain

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[1]Abubakar A. (2008) Islamic Law: The practices and procedure in Nigerian Courts Espee Printing and Advertising, Kaduna. p. 4

[2] Babaji B (2007) The Nigerian Law of Evidence and Islamic Law of Evidence (Murafu;at): Similarities, Differences and Contradiction. Being a Paper presented at the 9th Annual Judges forum Conference organized by Centre for Islamic Legal Studies Ahmadu Bello University, Zaria held at Kongo conference Hotel Zaria Kaduna State on 24th – 26th October.

[3] Taimiyah Ibn (1996) Attruqul Hukumiyya Assiyasiyya Asshariyya 1st edition Maktaba Tijariyya Makka 1st edition p. 17

[4]Abukar A., opcitp.4

[5]Zaharaniy S. (2002) Daraiqul Hukm Al-muttafaqialaiha Walmukhtalafi Fihimafisshariatul Islamiyya Makka 3rd edition p.30

people. A widespread news[1.]

Ibn Arafat defined hearsay evidence to mean:

> An expression on the evidence of a witness on what he heard from other persons without identification.[2]

Hearsay evidence is defined to mean:

> The one in which one or more witnesses relate what they heard from the generality of people, generally conveying the occurrence of such act which is of common knowledge.[3]

2.0 The Sources of Islamic Law of Evidence

In respect of Islamic law, Islamic law derived its sources from Qur ' an, Sunnah of the noble Prophet as primary sources. Other secondary and subsidiary sources include *Ijma* (consensus), *Qiyas* (analogical deduction), *masalih* (public interests) *Istihsan Istishab*, Customs and usages, etc. Below is a brief explanation.

2.1 Qur'an

The Qur'an is the book revealed to the Messenger of Allah Muhammad (peace be on him) as written in masahif and transmitted to us from him through an authentic continuous narration (tawatur) without doubt.[4]

Qur ' an is a book revealed to Prophet Muhammad (S.A.W) for the whole mankind dealing with all aspects of human life. Rules of evidence and procedure are contained in Qur'an. Qur'an as the first among primary sources is the main source of evidence under Islamic law. The Qur ' an was revealed within 1-23 years, gradually, in parts and as the need arises. During the revelation, companions of the noble Prophet use to memorise it and record it in leaf, bones etc. Qur'an is free from any

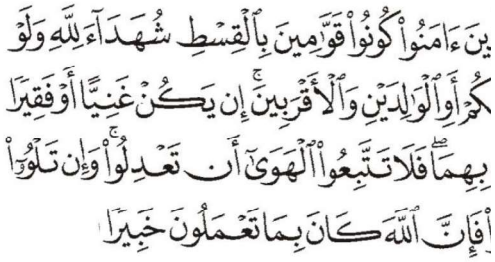
[1]Orire A. (1999) Introduction to Islamic Law of Evidence and some aspect of Islamic procedure. Being a paper presented at Judicial lectures: continuing Legal Education for Judiciary. Pp. 23-26

[2]Zaharaniy S. opcit p.118

[3] Keffi, D.U. (2007) Proof by witness under Islamic Law: being a paper presented at 9th Annual Judges forum Conference organized by Centre for Islamic Legal Studies Ahmadu Bello University, Zaria held at Kongo Conference Hotel Zaria Kaduna State on 24th – 26th October. Pp. 1-2

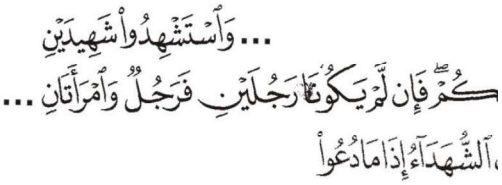
[4] Nyazee K.A.I (2006) Islamic Jurisprudence (Usulul al-Fiqh) Adam Publishers and Distributers, New Delhi India P. 156

corruption, alteration, obliteration etc. It remains perfect till the day of judgment. Some of the verses from the Qur'an dealing with evidence include;



O ye who believe, stand out firmly for justice, as witnesses to Allah, even though it be against your selves, or your parents, or your kin, be He rich or poor, Allah is a Better protector to both (than you). So you follow not the lusts (of your hearts), lest you avoid justice; and if you distort your witness or reference to give it, verily Allah is Ever well acquainted with what you do.[1]

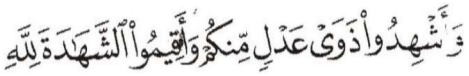
In another verse it is stated:



... And get to witnesses out of your own men. And if there are not two men (available), then a man and two women.

... And witnesses should not refuse when they are called (for evidence).[2]

The Qur'an also stated:



... And take as witness two just persons from among you (Muslims). And establish the testimony of Allah...[3]

2.2 Sunna/Tradition of the noble Prophet

The Sunnah is defined as what was transmitted from messenger of Allah in (peace be on him) of his words, Acts and (tacit) approval. [4]

This is the next source after Qur'an. It is the

[1] Qur'an 4:135

[2] Qur'an 2:282
[3] Qur'an 65:2
[4] Nyazee opcit P. 163

deeds, saying and silent approval of noble Prophet (SAW). One cannot understand Qur ' an without resorting to Sunnah. Prophet (SAW), explained the Qur'an and interpreted it. He can ' t say anything on his own desire that is why the believers in him were enjoin to follow him so that he can convey to them what was revealed. Some of the deed, saying and silent approval of noble Prophet in respect of evidence include;

... I am human being and you may bring your cases before me, perhaps some of you are intelligent in making their cases (through witnesses or evidence) than other and may receive favourable judgement from me. If I adjudicate in favour of a person against his brother which he does not deserves, he is receiving the Hell of fire and it is up to him either to accept it or reject it.[1]

In another Hadith Prophet stated thus:

⋯ if people were to be granted their request `some will claim the blood and properties of others. But establishment (of a claim) (burden or proving the claim) is on the claimant (plaintiff) and the oath is on the defendant.[2]

Also the Prophet said

⋯ Unless you saw as clear as sun you do not give evidence.[3]

The secondary source of evidence under Islam are:

2.3 *Ijmah*

Ijmah is defined as the consensus of mujtahids (Independents Jurists) from the ummah of Muhammad (peace be on him) after his death, in a determined period upon a rule of Islamic Law (hukm shar ' i).[4]

Ijmah is the consensus of the Muslim Jurists, but within the framework of Qur ' an and *Sunnah* of the noble Prophet (SAW). The consensus may take

[1] Alasqalaniy, I.H (nd) BulugulMaramDarulFikr Hadith No.1418 P. 125

[2] Annawawiy, Y.S (nd) Arba'inAnnawawiyDarulFikr Hadith No. 33 P. 58

[3] Aljazairiy, A. (1995) Minhajul Muslim MaktabatulUlumwalhikam, MadinatulMunawwara 1st edition P. 449

[4] Nyazee opci P. 183

shape or reach in a particular period and on a particular subject matter.

It is a secondary source because of argument levelled against it by some Jurists. This is not important here, nonetheless, whether it is against or for, *Ijma* was asserted and agreed to by large number of Muslim Jurist. Some of the verses of the glorious Qur'an which were relied on the application of

Ijmah as source of Law (Evidence inclusive) are:

> ⋯ Those who answered the call of their lord and establish regular prayer and whose affair are matter of counsel[1]
>
> ⋯ But whose make a breach with the messenger after the guidance has become clear to him, and follow a way other than that becoming to men of faith⋯ we shall land him in hell fire[2]

And also Prophet said:

> ⋯my followers would never agree on an error.[3]

The Prophet was also reported to have said:

> ⋯ I asked Allah that my *ummah* not to agree on an error and He granted it (this prayer) to me.[4]

Ijmah first came into being during the reign of Caliph Abubakar. Abubakar used to consult companions of Prophet (SAW) on legal issues. For example excluding son's son if he compete with son in succession. Though *Ijmah* is not practiced during the time of Prophet (SAW), for the fact that, the Prophet (SAW) used to receive revelation, hence there was no need for any consensus on legal matters. But one can infer the element of consensus even on the appointment of Abubakar upon the

[1] Qur'an 42:38
[2] Qur'an 4:115
[3] Dawud, A. (1995) Sunan Abu DawudDarulFikr Vol. 2 Hadith No. 4253 P. 307
[4] Ibid.

consensus of companions, and the consensus of digging a ditch by Prophet (SAW) and his companions during battle of *Khandaq* (Ditch), and the battle of *Ahzab* though not bearing on legal issues.

2.4 *Qiyas*

Qiyas as defined by Jurists, it applies to the assignment of the *hukm* of an existing case found in the texts of the *Qur'an,* the *Sunnah* or *Ijmah* to a new case whose *hukm* is not found in these sources on the basis of common underlying attribute called the "*illah* of the *hukm.*" Another definition is (the equality of a case, whose *hukm* is not mentioned explicitly in the texts, with a case whose *hukm* is mentioned, on the basis of equality between the underlying causes found in the cases.[1]

This is a process of deduction by reasoning on the text of glorious Qur'an or *Sunnah* or *Ijmah* on new development which were not in existence during the life time of noble Prophet but has the same effect with the one during the time of Prophet (SAW) 2 . For example the issue of prohibition of marriage on the basis fosterage under Islamic personal law and the contemporary practice of buying female breast milk in shops, hospitals to breast feed a child can this have the same effect, how could the prohibition be identified.

The authority on *Qiyas* as source of evidence includes the letter of Umar (R.A) written to Abu Musa *Alashariy*, Caliph Umar stated thus:

> ⋯ the claimant must produce evidence ...use your brain about matters which perplex you and which is neither the Qur'an nor the *Sunnah* seen to apply, study cases and evaluate the situation through analogy with those similar cases...[3]

Another example is the famous tradition about *Mu'*

[1] Zaidan, A (1969) Almadhkal Lidirasatishshari'atil Islamiyya, 7th edition Bagdad, P. 197

[2] Muslehuddin, M,(1936) Philosophy of Islamic Law and the Orientalist Taj Company P. 147

[3] Ambali, M.A ,(2003) The Practice of Muslim Family Law Tamaza Publishing Company Ltd Zaria PP. 93-94

az ibn Jabal when he was sent to Yemen as judge. He stated to the Prophet that if he was not able to find direct authority in the glorious Qur'an and the *Sunnah*, he would use his considered opinion and was approved by Prophet (SAW) .This amount to *Qiyas*. [1] With the above example *Qiyas* (analogy) may be used to create the law and procedure concerning legal matters with respect to evidence.

The subsidiary sources of Islamic law of evidence include:

2.5 *Istihsan*

The *Istihsan* is defined "as sacrificing some of the implications of an evidence by way of exception in so far as the exception opposes of this implication." Also *Albazdawiy* defines *Istihsan* as "moving away from the implications of analogy by an evidence that is stronger than it. *Alhalwaniy* defines *Istihsan* as "the given up of analogy for a stronger than it[2]

This means an opinion of a jurist which must have preference over analogy in order to eliminate hardship in accordance with Allah's command to do *ihsan* (good doing or equity). This was expounded by *Abu Hanifa* based on the saying of Allah.

⋯ Allah commands Justice, the doing of goods and He forbids all indecent deeds.[3]

Istihsan may be used to create the law and procedure concerning legal matters with respect to evidence.

2.6 *Maslaha* or *Istislah*

As for *maslaha* it is essentially an expression for the acquisition of *manfa' ah* (benefit) or the repulsion *madarrah* (injury harm), but that is not what it mean by it, because acquisition of *manfa' ah* and the repulsion of *madarrah* represent human goals, that is, the welfare of human through the attainment of this goals. What we mean by *maslahah*, however, is the

[1] Bambale, Y.Y,(2007)An outline of Islamic Jurisprudence Malt House Press Ltd Zaria pp. 75-76

[2] Khadariy, M. (2003) Usulul Fiqh, Darul Hadith Alqahira Pp 327 – 328

[3] Qur'an 15:90 see also Mansur I.S., (2011) Islamic Criminal Law and Practice in Nigeria Usmanu Danfodiyo University Printing Press, Sokoto pp. 15-16

preservation of the end of the *shar,*[1]

This was expounded by *Malik bin Anas* which connotes extracting rules from *Qur ' an, Sunnah, Ijma* and *Qiyas* for the benefits of public. In this respect, something may be permitted or curtailed for the public interest. *Maslaha* may be used to create the rule of evidence and procedure.

2.7 *Istishab*

This technically refers to the presumption of continuance of an earlier rule or its continued absence, this means the maintenance of status quo with respect to the rule. The previous rules is accepted unless a new rule is found that goes against it.[2]

Like presumptions under Evidence Act, Islamic law has similar principle. The principle is *Istishab*. But like what obtained under Evidence Act on presumptions, like presumption of regularity, and presumption of continuity etc. *Istishab* is the presumption of continuity. For example, the marriage is presumed in continuance except with the evidence that divorce is pronounced. In this respect, *Istishab* may be used to create the rule of evidence and procedure.

2.8 *Istidlal*

This refers to the mode the Jurist stays very close to texts in the effort to discover the true intention of the law giver this area of study is considered to be the most technical and difficult part of *usul-al ' fiqh.*[3]

This means taking things with another. In other words it refers to the process of establishing connection or relation between two things or between one proposition to another. For instance, the divorce is established by existence of marriage. In this respect, *Istidlal* may be used to create the rule of evidence and procedure.

2.9 Custom and Usages (*urf*)

Custom and usages (*urf)* is defined by Abdulwahab Alkhallaf as a matter well known by the majority of people whether it is words

[1] Thahir, A.H, (2019) Ijtihad Maqasidi The interconnected Maslahah-Based Reconstruction of Islamic Laws, Ganeva, Switzerland P. 36

[2] Sa'id, M.I (2011) Islamic Criminal Law and Practice in Nigeria Usmanu Danfodiyo University Printing Press Sokoto, Nigeria P. 16

[3] Ibid P. 17

some practice or some abandonment.[1] But it does not negate any of the book of Allah or the S*unnah* of the Prophet.[2]

Customs and usages can be accepted as source in which law can be deduced provided they are not repugnant with the existing rule of Islamic Law. Though there are some disagreement between Muslim Jurists as to the validity of custom as source of law. That apart, in Nigeria, where *Maliki* school is predominant, custom is used as source of law, since *Maliki* school accepted it as a source of law. In this respect, Customs and Usages (*urf*) may be used to create the rule of evidence and procedure.

2.10 Shar ' i Man Qablana (Earlier Scriptures)

According to Kamali, in a reference to the *Torah,* the Qur ' an confirms its authority as a source of inspiration and guidance: we revealed the *Torah* in which there is guidance (*huda*) and light. And Prophets who submitted to God ' s will have judged the Jews by the standard there of.[3] Though there is no unanimity of the scholars, not withstanding it may be a source of Law of evidence.

2.11 Amal Ahlul Madinah

This means the practice of the people of Madinah. In other words it refers to the tradition and practice (*Amal*) or consensus *(Ijmah)* of the people of Madinah at the time of *Imamu Malik bn Anas.* This is also attributed to Imam *Malik* who see it as a sources of the legislations and rulings. However, it can be a source of evidence and procedure particularly in Nigeria which is *Maliki* school predominant country. It was reported that a person attended a session of *Imam Malik* and asked him about the measurement of *Zakat al-Fitr*, he replied him that is it 5 1/3, but the person told

[1] Khallaf, A. (2003) Ilmu-Usulul Fiqh, Darul Hadith Alqahirah P. 79

[2] Ghani A.H (2021) conditions of a valid custom in Islamic and Common Laws International Journal of Business and Social Science vol. 3 No 41 Special Issue Forman Christian Collage (A Chartered University) Lahore, Pakistan) P. 1

[3] Shari'ah Intelligence (2015) Da'awa Institute of Nigeria (DIN), Islamic Education Trust (IET) Minna, Niger State Nigeria P75

him different view of *Imam al Hanafiy. Imam Malik* asked for different *Sa ' is* from different houses and told the person that this is what I relied on. *Imam Malik* used to prefer practice of the people of Madina with any Hadith that differed with it. [1]

2.12 Sadd al-Dhari' ah

This term means blocking the lawful means to an unlawful end Sadd al-Dhari' ah is attributed to *Imam Malik.* For example, the cultivation of poppy has been banned in many countries, because, it is leading in most cases to production of opium and heroin which is deadly drug that is being misused. This prohibition in the terminology of the Jurists is called *Sadd al-Dhari ' a* because the Act was basically lawful, however, declared unlawful.[2]

2.13 Qawl al-Sahabi or Amal-assahabi

This refers to what a companion of the noble Prophet (peace be on him) said or did. What he said or did depends upon transmission (*naql*) and not on methods of reasoning. After the death of the Prophet (peace be on him) it was the companions who interpreted law and developed it where needed. The undertook *Ijtihad* rulings, settled cases and became a sources of guidance for late generations.[3]

3.0 Admissibility and the Scope of Hearsay Evidence under Islamic Law

Under Islamic law, for person to give evidence he must have personal knowledge directly to the fact in issue. If you saw the incidence or heard it or perceived it the person should come to court himself for narrate same. Islamic law classified testimony in term of strength into three classes and made circumstantial evidence as another alternative. The three classes are:

(i) *Shahadatu Qati* in i.e. testimony or evidence of two credible men or one man and two female who saw or heard about an event directly.[4]

[1] Abu Zahrah (nd) Malik, Darul Ma'arif Cairo P. 271

[2] Nyazee opcit P. 248-249, see also Ashshadibiy, A.I (2003) Almuwafaqat vol 4, Maktabattaufiqiyyah, Alqahirah, Misr P. 165

[3] Khallaf A. opcit Pp. 85 - 86

[4] Keffi D.U. opcit pp. 1-2

(ii) *Shahadatu Naqli* i.e. the narration of testimony by one person on behalf of another person to court. This arises when a person who is to give direct evidence could not be able to attend the court for one reason or the other. In this situation the narration of evidence is allowed on condition that a witness who is going to narrate must narrate what he or she was told by a person in whose behalf narrate the evidence.[1]

(iii) *Shahadatussama ' i*.e the one which one or more witness relates what they heard from the generality of people, general conveying the occurrence of certain act which is of common knowledge.[2]

The above classification shows that the two categories of evidence i.e *naqli* and *sama ' i* are used and accepted where the original witness cannot be available or present, due to strong reason. For example he is dead, mentally and physically unfit to be present in the court etc. putting confession on one side, verbal testimony is the only direct mode of proof which the law admits as complete judicial evidence.[3] It is against this background prophet Muhammad (S.A.W) is reported to have said:

Unless you saw as clear as sun you do not give evidence.[4]

Despite the above tradition, there are incidents which are mostly effected in privacy, such as suckling, maltreatment of wife, death etc. Jurists developed the exception to this general rule by analogy. For example narration of prophetic tradition, most of which were heard either from his wives and his companions. So in such an incidents and the like jurists allowed testimony to be given based on hearsay evidence. So hearsay evidence is admissible under Islamic law but it is restricted to few numbers of cases only.[5]

As noted earlier, jurist of Islamic law agreed to admit hearsay evidence in some restricted areas. In the same

[1]bid
[2]Abubakar A. opcit, pp 188 – 189.
[3]Ruxton F.H (2004) Malikiy Law Elnahar printing press Cairo, Egypt Pp. 295 -301
[4]Abubakar A. opcit p. 188
[5]Keffi D.U opcit p. 25, Abubakar A. opcit P. 189

vain, jurists of Maliki school are not unanimous as to the exact instance where hearsay evidence could be admissible. But they are unanimous on the following cases:[1]

1. **Pregnancy**: hearsay evidence is admissible where a slave woman alleges that her master is responsible for her pregnancy and witnesses testify that they have been hearing from people or from men of worthy of belief or other certain sources that the person impregnated his female slave or he is responsible for her pregnancy. In this circumstance she will have all the right and privileges of *ummulwalad* (slave woman who was impregnated by her master). Here hearsay evidence is admissible.[2]
2. **Marriage**: hearsay evidence is admissible to establish valid marriage between the couples. This is in order to have all the rights accrued during the subsistence of the marriage. Here hearsay evidence is admissible if two credible witness testify that they heard that they are married to each other.[3]
3. **Breast feeding**, where there is widespread news within the community and it is of common knowledge that a woman breast feed a child, a legal incident is created. Thus he cannot marry her and her ascendant or descendant how high and how law so ever, similarly those children who were breast feed by the same woman became his brothers and sisters on the basis of fosterage. Where direct evidence is not available hearsay evidence is admissible.[4]
4. **Period of menstruation**: The waiting period of a divorced woman counts some responsibilities and rights. If a man divorces his wife especially the revocable divorce (DalaqRajai), either of them has the right of inheritance should either dies during that period. If there is argument between the heirs that her waiting period elapsed before the death, hearsay evidence is admissible to ascertain it.[5]

[1] Abubakar A. opcit p. 189
[2]Ibid, see also Roxton opcit p.301
[3]Abihassan T. (1996) Bahja commentary on Tuhfatul Hukkam Darul Firik Beirut Vol. 1 p. 258, see also Aishatu Haruna V. Estate of late Abdu Isah (2007) 1 RSMN
[4]Ruxton, opcit p. 301
[5]Abubakar A, opcit p. 190 - 191

5. **Inheritance** : when a person died leaving no heir, and another person comes claiming the existence of relationship either by patronage (*wala*) or blood relationship that will enable or give him the right of inheritance. Such claim can be supported by hearsay evidence that it is of common knowledge the claimed relationship exist.[1]
6. **Apostasy**: In Islamic law a Muslim cannot inherit a non Muslim. This is the view of majority and a non Muslim cannot inherit a Muslim, this is unanimous. In this circumstance, hearsay evidence can be admitted that it is wide spread news that person has converted to other religion, hearsay evidence is admissible to establish his conversion.[2]
7. **Birth**: giving birth for somebody by a woman either slave woman or free one and there is argument as to the delivery and that her waiting period elapsed. Hearsay evidence is admissible to establish the delivery of a child.[3]
8. **Islam**: when a person embrace Islam, and there is argument between his relations who are non Muslim and Muslims, hearsay evidence that has been spread over and to common knowledge that he became a Muslim is admissible.[4]
9. **Credibility of witness**: when there is dispute between two or more persons before a court of law. One of them called witnesses and other party impeached them on the ground they are not credible. The person brought them to court can call some witnesses to establish to the court that they are credible. Here if there is no direct evidence, evidence of witnesses based on hearsay evidence that they are credible is admissible.[5]
10. **Impeachment of a witness**: This is the opposite of the above, here it means evidence of witness character through hearsay is admissible. For example if one claims that he loaned some amount of money to one person. The claimants called witnesses but the defendant impeach the witnesses by saying they are not just (Adilun) he may call witnesses who

[1]Abilhasan, opcit p.250
[2] Ibid.
[3]. Abilhassan T. opcit, p. 260
[4]Ibid
[5]Abubakar A.opcitp. 193

heard from other people that they are not credible.[1]

11. **Guardianship**: admissibility of hearsay evidence under this heading may arise where there is a dispute as to guardianship of a girl child and the right to give her out for marriage. If two or more persons are disputing before the court as who has the right of guardianship or who should take preference over the other. The hearsay evidence of close relationship could be admissible, e.g. paternal uncle of a girl takes preference over any other guardian in the absents or death of her father.[2]
12. **Prodigality**; some people are interdicted under Islamic law to take charge of their own affairs. The reason being that either they are minor or though matured but they are not of prudent judgments. At this juncture their property should not be handed over to them because they can easily mismanage it. Hearsay evidence here is admissible that they are not matured enough to take charge of their own belonging3
13. **Maturity**: This means '*Rushd*' in Arabic language. It means when a person is interdicted, but later becomes matured hearsay evidence can be admitted that there is wide spread news that he becomes matured enough to handle his own affairs.[4]
14. **Will**; if somebody claims that a will was made in his favour by a deceased person and there is dispute as to the existence of the will, hearsay evidence is accepted upon the testimony of two credible witnesses that they heard from people of worthy or otherwise that the will was made.[5]
15. **Long possession (*Hauz*)** ; where there is wide spread news and it becomes so strong that a subject matter of dispute or litigation is, at the time of litigation in possession of the defendant for a period not less than ten, forty or sixty years. Here hearsay evidence is accepted even if the plaintiff called witnesses and the defendant called credible witnesses that they heard that he came into possession through purchase or gift from the

[1].Ibid
[2].Ibid
[3].Ibid

[4]Ibid
[5]Orire A. Opcit Pp 22-23

plaintiff or his ascendant. This testimony though hearsay is admissible.[1]

16 **Endowment or Hubs**: Hearsay evidence is admissible to establish endowment or trust if a property is in the possession of a group of Muslims such as a house or compound for over 20 years later some people or persons came to claim that the property belonged to their ancestors. The group of Muslims may call two credible witnesses who could state that they heard from people over years that property is on endowment or a trust property to the group.[2]

17 **Appointment of a judge**; when the dispute arises as to the judgment of a particular judge which vested any right to a person., the one in whose judgment was given in his favour claims that the judge who gave such judgment was appointed before the date of judgment, while the other party claims that the judgment was given before he was appointed as a judge. In situation like this hearsay of two credible witnesses that they heard as a matter of common knowledge that he was appointed before the judgment was given is admissible.[3]

18 **Removal of a judge**: as discussed above, when there is dispute as to whether a judge gave his judgment when the was a judge and when he was removed from the office, hearsay evidence is admissible.[4]

19 **Maltreatment of wife**: Marriage is a very private life the affairs of the house become very difficult to know what is happening. In this kind of situation, witnesses can be produced to testify that they heard from credible persons and other that: "A" maltreats his wife "B" The court will nonetheless act on their testimony and divorce the wife.[5]

20 **Emancipation**; where there is wide spread news that "A" who is a slave has been freed by his master, and his master is dead and there is no direct evidence that will lead to the truth

[1]Abubakar A. opcit P. 195

[2]. Ibid. Note that the two cases here mentioned will not have any effect now a days. This is because of the development in the field of administration. The procedure of appointment of judges constitutionally are vested in National Judicial Council and state Judicial Service Committee or Commission respectively

[3]Abubakar A, opcit P. 195

[4]Roxton F.H opcit P.301

[5]Ibid

of his assertion, the common reports from witnesses could be used to established his manipulations.[1]

21 **Bankruptcy** (*Falas*) this means insolvency which is declared judicially. Thus where a person is sued by his debtor and he claims the insolvency, he can bring witness to establish his claim. But now, this subhead should be put to rest. The reason is that most of courts declarations and judgments are in writing. So if a person claimed that he is bankrupt before the Court and the court declared to be so it will right same. So there is no need for calling witness to testify his bankruptcy as the court record will show same.

22 **Purgation of a witness**: This is called *ATTAZKIYYAH* in Arabic language. It is a process of identifying the credibility of a witness who is unknown. The judge can write secretly to one or more of the male persons who are respectful members of the public so as to accord credibility to his evidence.[2] In other words Purgation or *Tazkiyyah* is commendation that the potential witness is just an agreeable.

This process is employed by Islamic law for the reason that a person must be just (*Adil*) before his testimony be admitted in Court. But this procedure could not stand today because of the development in legal system. Cross examination takes of this. And just (*Adala* which is refer to by Islam may never be achieved in its real meaning today. Be it as it may where a witness is commended as to it credibility hearsay evidence of witnesses that they heard from reliable and others that he is credible and was relied and considered by the court is admissible.[3] Some schools of Islamic thought maintained that hearsay evidence is admissible in cases of sales , gifts and Hire transactions.[4]

Also hearsay evidence in respect of accusation of brigandage, captivity in war and grave presumption of murder are admissible

[1]Abubakar A. opcit P. 171

[2]Barkindo, I. (2007) The Role of lawyers and Examination of witnesses under Islamic Law. Being a paper presented at 9th Annual Judges Conference organized by C.I.L.S ABU Zaria held at Kongo Conference Hotel Kaduna State on 24th – 26th October, pp. 9-11.

[3] Ibid

[4] Ashshafiy,A.Z (nd) Asnalmadalibi Darul Fikr Bierut Lebanonp. 35-36.

though jurist are not unanimous on this. [1] The case for grave presumption of murder would be discussed in the next chapter. In exceptional cases also, hearsay evidence may be accepted in proof of ownership (*Mulk*) on condition that the hearsay evidence on the subject matter of dispute or litigation is at the time of litigation is in possession of a defendant for a period of not less than ten, forty or sixty years[2] as a case may be.

3.1 Conditions for the Admissibility of Hearsay Evidence

Unlike the condition for the admissibility of hearsay under the Evidence Act in which each case has its own condition, Islamic law prescribed the conditions for the admissibility of hearsay evidence that covers each and every case. The conditions are:

1. The news must be wide spread among the people, and the number of people who heard it should not be known.
2. The people from whom the news was heard must not be identified
3. Witnesses must say that they heard clearly credible people and others were talking on the incidence.
4. The testimony must be free from mistakes lies and doubt, thus if two witnesses give evidence (hearsay) and over or about hundred people of the same age with the witnesses say that they have no knowledge of the fact it is inadmissible.
5. Large number of credible witnesses is not required but only two unimpeachable credible witnesses.
6. The condition precedent to the admission of hearsay evidence of two witnesses is that it must to be supported by the oath of the claimant otherwise it cannot be acted upon.
7. The witness shall be male not female and must be two witnesses.[3]
8. Other writers explain that the confirmation of the case should not be contrary to custom.
9. There should be no direct or real evidence otherwise it must be rejected. That is hearsay evidence must not

[1]Ruxton, opcit p.301, see also Ashshafiiy opcit, see also Indabo V Kano NA (1957) N.S.C Vol. 1 .13

[2]Keffi D.U opcit P.25

[3]Abubakar A. opcit Pp. 196 – 197

be admitted to contradict direct and real evidence.[1]

10. The fact to be proved dates from long age.[2]

If any of the condition disappear the hearsay evidence stands rejected.

4 Evidential Value of Hearsay and Circumstantial Evidence under Islamic Law

Like Evidence Act Islamic law attached more value in the direct oral evidence. Under Islamic law, the hierarchy of evidence in terms of strength is direct evidence, transmitted evidence and hearsay evidence. Hearsay evidence is the weakest means of proof under Islamic law. Because of its weakness, hearsay evidence admissibility is restricted to some cases only. This evidence can only be accepted in the absence of the direct witness, the Almighty Allah when telling the history of Prophet Ibrahim A.S. said:

قَالُوٓاْ مَن فَعَلَ هَٰذَا بِـَٔالِهَتِنَآ إِنَّهُۥ لَمِنَ ٱلظَّٰلِمِينَ ﴿٥٩﴾
قَالُواْ سَمِعْنَا فَتًى يَذْكُرُهُمْ يُقَالُ لَهُۥٓ إِبْرَٰهِيمُ ﴿٦٠﴾ قَالُواْ فَأْتُواْ
بِهِۦ عَلَىٰٓ أَعْيُنِ ٱلنَّاسِ لَعَلَّهُمْ يَشْهَدُونَ

They say who did abominable acts to our Gods, he is a transgressor, they say we heard a youth abusing them in person of Ibrahim. They say bring him before congress so that people will bear witness…[3]

The above verses show that unless if a direct witness is not available, hearsay evidence is not admissible. Had hearsay evidence be accepted by congress in the first place, there is no need to arraign Prophet Ibrahim before the congress. Also no matter the
number of the witnesses of hearsay evidence, they are treated as two credible men. And in circumstance which oath is needed for the credible men. And in circumstance which oath is needed for prove of particular civil claim, the witnesses no matter the number, are treated as only one witness,. While the oath stands in place of another witness.[4]

So under Islamic law, the value of Hearsay evidence is very low and weak that is why the evidence must

[1]Orire, opcit, P.23
[2]Ruxton, opcit, P. 301
[3]Qur'an chapter 21: 59-61
[4]Keffi D.U. opcit pp. 2-3

be supported by oath by a person in favour of whom the judgment is to be given. Also even if a person brings a hearsay witness the judgment will not be given in his favour unless the other party did not produce a direct and real witness Orire stated thus:

A defendant who produces real witness as against a plaintiff who produces hearsay evidence will have a judgment in his favour.[1]

5 Observation

The world now became a global village. Shahadatu sama'i (Hearsay evidence) can be manipulated and fabricated through different social media platforms. If care is not taken courts may be misguided in admitting and applying shahadatu sama'i (Hearsay evidence) in judicial proceedings.

6. Recommendation

In view of the observation so far identified above, it is recommended that laws that govern evidence and procedural justice should constantly and consistently be amended. So also Islamic scholars, judges and legal practitioners should act promptly while considering the admissibility and application of shahadatu sama'i (Hearsay evidence)

7. Conclusion

The attempt in this article has been made it to examine the admissibility of hearsay evidence under Islamic law of Malik school. It is identified that hearsay evidence is inadmissible under Islamic law. However, its admissibility and application is only right when direct and physical evidence are absent. The article also observed that with development in information and communication technology especially social media platforms hearsay evidence may be used to fabricate stories. Thus, the courts must be extra cautious when admitting same. The article recommends that the Statutes with respect to evidence be in constant amendment and that Islamic scholars be proactive when giving Fatwa (answer) to accommodate emerging developments.

[1]. Orire opcit p.28