

## “WITHOLDING EVIDENCE”- MEANING, LEGAL RIGOUR AND IMPLICATIONS UNDER NIGERIA ADJECTIVAL ECOSYSTEM

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**ABSTRACT:** By recourse to statutory stipulations and judicial authorities, this paper examined the meaning, legal rigour and implications of the “presumption of withholding” evidence under the adjectival laws of Nigeria. The paper established that a party is said to have “withheld evidence if it “deliberately did not present evidence that could be relevant to a case” either because he pleaded it himself or the adverse party demanded it formally. The paper further established that the “presumption of withholding evidence” is not the same thing with “non-production of witnesses” because the latter belongs to the autonomous realm of parties to call or refuse to call any number of witnesses in the conduct of their cases. It was recommended that where successfully established; the Court should not hesitate in holding that evidence that is withheld would if produced be unfavourable to the party withholding it. No party should be allowed to hoodwink the Court or use subterfuge to conduct his case or matter.

**Keywords:** *evidence, presumption, production, withhold, witness.*

### 1.0 Introduction

In Nigeria’s adjectival ecosystem, the “general burden of proof in civil cases is determined by the pleadings”. This is usually

decided by the Court, because it is a matter of law. First and foremost, the general burden is on the plaintiff to establish all facts contained in his statement of claim. Thereafter, the “burden will shift to the defendant to prove contrary facts as canvassed in his statement of defence”. For example, in an action for breach of contract and claim for damages, the burden is on the plaintiff to prove the existence of such contract and the quantum of such damages suffered. Thereafter, the “burden will then shift to the defendant to establish to the satisfaction of the court any contrary facts in rebuttal.” After a careful evaluation of the evidence proffered or presented by both parties, the Court will give a considered judgment on the issue. A Court of law is not to manufacture evidence in a bid to help or assist any of the parties as it were. They are an umpire, having no interest in the matter brought before them.<sup>i</sup> Pointedly, *section 136(1)* of the Evidence Act, 2011 provides that the “burden of proof of any particular fact lies on that person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact lies on any particular person, but the burden may in the course of a case be shifted from one side to the other”. Under *section 136(2)* of the Evidence Act, 2011 as amended, “in considering the amount of evidence necessary to shift the burden of proof, regard shall be had by the court to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties” respectively.<sup>ii</sup>

From the foregoing, it is clear that in civil cases, the burden is on he who asserts the positive. However, the law envisages that the “burden may sometimes shift such as where there are presumptions arising from the state of the pleadings or where the law places the burden on the party who otherwise would not have had that obligation or burden thrust on him”. Briefly stated, such situation, that is the shifting of the burden of proof, may arise in the following isolated instances namely- (i) “where plea of *res ipsa loquitur* is raised”;<sup>iii</sup> (ii) “where constitutionality is presumed”;<sup>iv</sup> (iii) “where presumption of legitimacy is raised”;<sup>v</sup> and (iv) under *section 167* of the Evidence Act, 2011 as amended where the “court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relationship to the facts of the particular case”.

Against this background, this paper addresses the “presumption of withholding of evidence” under *section 167(d)* of the Evidence Act, 2011 as amended, its meaning, legal rigour and implications under Nigeria’s adjectival ecosystem. The paper is further divided into the following parts namely- Statutory provision on withholding evidence; Judicial interpretation of withholding evidence; Implication and rigour of the “presumption of withholding evidence”; Signposting juridical difference between “non-production of evidence” and “non-production of witnesses”; Conclusion and recommendation.

## **2.0 Statutory provision on withholding evidence**

The statutory provision on withholding evidence is traceable to the *section 167(d)* of the Evidence Act, 2011 as amended which enacts

The Court may presume the existence of any fact, which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relationship to the facts of the particular case and in particular the court may presume that-...

(d) evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.

As will be seen shortly, the Courts have interpreted this provision intensely bringing out its meaning and implications.

## **3.0 Judicial interpretation of withholding evidence**

In *Jalico Ltd & Anor v Owoniboy Technical Services Ltd*,<sup>vi</sup> it was decided that withholding evidence refers to the “deliberate act of not presenting evidence that could be relevant to a case. There is a presumption of law that any evidence which could be and is not produced, would if produced, be unfavorable to the person who withholds it. The doctrine of withholding evidence has received very serious

attention in the Courts”. In the case of *Emeka v Chuba-Ikpeazu & Ors*,<sup>vii</sup> it was held that

In the case of *Buhari v Obasanjo* for instance at pages 198-199 Belgore, JSC (as he then was) said: ‘In notice to produce procedure, it is supposed that the person asking for the document knows of the contents, perhaps has a copy of it. If the person to produce fails to produce it, the secondary evidence of it can be admitted in evidence. Chief John Ukpa of the ANPP, if he actually wrote the letter of protest in question, he could bring the copy of it for admission. Either the letter did not exist or it existed but Chief John Ukpa refused to bring its copy. If he brought the copy, the presumption can as well be that the contents would not have supported the case of the appellant’.

This doctrine is not a magic wand as there are instances where the presumption of “withholding evidence” would not apply. For example, in the case of *Kwenev v State*,<sup>viii</sup> the appellant invited the Court to invoke the provisions of *section 167(d)* of the Evidence Act, 2011 as amended. It was held that

Commonly, this provision relates to the withholding of documentary evidence. Where a Party is in possession of a document, contents of which are material, he is expected to produce it. If he fails to, it may reasonably be presumed that if the Party had produced it, the contents would have spoken against that Party. In this case, the Appellant contends that the failure of two lower Courts to apply the said *section 167(d)* of the Evidence Act, 2011 in this case, is wrong. He

argued that the Court of Appeal erred in relying on *Aremu v State* (supra), wherein this Court held that failure to tender a similar statement was not fatal; and that it should have relied on this Court's decision in *Ogudo v State* (supra) - (2011) 18 NWLR (Pt. 1278) 152-53, wherein Fabiyi, JSC, stated as follows: 'The Appellant said he made a Statement at Birnin Gwari Police Station. The same was not tendered during his trial. The Prosecution has a duty to tender any Statement made by an Accused Person during the investigation of the offence with which he was charged, whether or not, it is in his favour. This must be so in order to avoid the invocation of the provision of *section 149(d)* of the Evidence Act (now *section 167(d)* 2011 Act) against the Respondent.'

Now, every case stands on its own, and is determined purely on its own merits. In this case, the Court of Appeal used the word 'remarkable' in relation to what transpired at the trial Court. It is, indeed, remarkable that a Defence Counsel representing two Accused Persons, had the presence of mind to request for the earlier Statement made by one of the Accused Person, and it was produced and tendered in evidence, but did not see fit to do same for the other Accused. *Section 167(d)* of the Evidence Act deals with withholding evidence and to withhold is "to refuse to give (something that is due to or desired by another)" - Oxford Languages. The Prosecution did not refuse to produce the Statement made earlier

by the second Accused Person when asked by Defence Counsel. In my view, it is easier to presume that the Prosecution would have done same for the Appellant if Defence Counsel had asked for the Appellant's Statement, than to presume that the Prosecution deliberately withheld his own Statement. The Prosecution should have attached his earlier Statement but invoking *section 167(d)* of the Evidence Act in this case is, certainly, out of the question.

#### **4.0 Implication and rigour of the “presumption of withholding evidence”**

it should be noted that the implication of rule in *section 167(d)* of the Evidence Act, 2011 as amended is encapsulated in the Latin maxim "omnia praesumuntur contra spoliatores." Thus, where party wrongfully withholds evidence, every presumption to his disadvantage consistent with the facts admitted or proved will be adopted. The withholding of useful evidence naturally leads to the inference that the evidence if produced would go against the party who withholds it. So, where the prosecution is served with “Notice to produce evidence” that the defendant needs for his defence and the prosecution willfully refuses to produce the said evidence, the Courts would act on the natural inference that the evidence is held back because it would be unfavourable. Another implication is that the defence is entitled to demand for documents it considers relevant for its defence and this is done by serving a subpoena/Notice to produce on the prosecution to produce the documents. When this is done the presumption in *section 167(d)* arises and the Court is “entitled to presume that documents in possession of the prosecution would be unfavourable to the prosecution's case if the prosecution after service of Notice to produce still refuses to produce the documents”. This was the decision in a number of judicial authorities.<sup>ix</sup> In *Irimi v State*,<sup>x</sup> it was held as follows

...The said two boys were in the best position to tell the Court who beat them, tie them and cut them with cutlasses. The consequence of failure to call the

alleged two boys if the police had called them, their evidence would have been unfavourable to the prosecution's case. In *Sunday v State* (2010) All FWLR Part 548 at Page 874, it was held that where an eye witness that ought to be called by the prosecution was not called, there is a presumption of withholding evidence against the prosecution as such evidence will be unfavourable to them.

In relation to pleaded documents, however, the party must make a demand for documents that was made either orally or in writing by the adverse party. This is done by “serving of notice to produce which process must be duly served on the party required to produce the documents”. In the absence of service or proper service of notice to produce on the adverse party, the presumption in *section 167(d)* of the Evidence Act, 2011 as amended will not apply. To assert otherwise is clearly an afterthought that is futile in the extreme. There will be no withholding of evidence when at no time in trial Court did the party ask orally or formally for any document to be produced by the adverse party.

#### **5.0 Signposting juridical difference between “non-production of evidence” and “non-production of witnesses”**

The difference between “non-production of evidence” and “non-production of witness(es)” must be established and signposted in this paper. Parties to a case are autonomous in their decisions on the number of witnesses they will choose to call or not to call. Subject to legal stipulation on statutory corroboration, no Court can determine for a party the number of witnesses it should call. However, a party is under a legal obligation to adduce evidence in support of pleaded or asserted facts. *Section 167(d)* of the Evidence Act, 2011 as amended deals with the non-production of evidence and not non production of witness(es). It is clear that the section deals with the failure to call evidence and not the failure to call a particular witness." This is because, in a civil case, “the burden of proof lies on the person who would fail, assuming no evidence had been adduced on either side. Further, in respect of particular facts, the burden rests on the party against whom judgment would be given

if no evidence were produced in respect of those facts. In *Musa v Yerima*,<sup>xi</sup> it was held that

Once that party produces the evidence that would satisfy a jury then the burden shifts on the party against whom judgment would have been given if no more evidence were adduced. However, the Court is to presume, without any proof that evidence which could be produced by a person and is not produced by that person but withheld by him would go against that person who withholds such evidence. Thus, the Court must be satisfied:

- (1) That the evidence exists;
- (2) That it could be produced;
- (3) That it has not been produced; and
- (4) That it has been withheld by the person who could produce it.

Before the Court can get along with such presumptions in the instant case, there must be proof that such evidence which the learned trial Judge held to have existed has been withheld by the defendant. Merely not producing evidence would not necessarily amount to withholding such evidence. The two are not synonymous. The Court would have to be satisfied however in each case whether the circumstance justifies a finding that the evidence has been withheld.

Furthermore, “withholding evidence is applicable to evidence and not to physical attendance of persons or couriers of evidence”. In *Sawa v Zabadne*,<sup>xii</sup> it was

reiterated that this point came to the fore in the case of *Ngoka v A-G Imo State*<sup>xiii</sup> where it was held that:

*Section 167(d)* of the Evidence Act referred to by the learned Appellant has to do with withholding evidence and not failure to call a particular witness. Section 167(d) is not concerned with failure to call a particular witness. It only applies where a party withholds evidence. Therefore, where a party has called other evidence on an issue, failure to call a particular witness to give evidence on that piece of evidence will not raise the presumption.

## **6.0 Conclusion**

The presumption of withholding evidence is not to be raised lightly. The party alleging withholding of evidence is under a legal obligation to make out the claim before the presumption will avail. It is also distinguishable from withholding or “non-production of witnesses” which falls within the remit of parties in litigation. It is thus recommended that where withholding evidence is successfully raised and established, it should count heavily against the party that withheld the evidence. The Court should not hesitate to hold that “such evidence, if produced, will be unfavourable to them.” That will run against the principle of estoppel by representation. In *Accord Engineering Ltd v Fajuke*,<sup>xiv</sup> it was held that

"The principle upon which estoppel by representation is founded is that the law should not permit an unjust departure by a party from an assumption of fact which he has caused another party to adopt for the purpose of their legal relations - *First Bank of Nigeria Plc v Songonuga* (2007) 3 NWLR (Pt 1021) 230. To hold otherwise will be to encourage, support and sanction the use of

subterfuge, deceit and underhand dealings by parties  
in legal relations.

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## REFERENCES

- <sup>i</sup> See *Kaydee Ventures Ltd v Honourable Minister of FCT & Ors* (2010) 2 SCNJ 276; *Aboyeji v Momoh* (1994) 4 SCNJ 302.
- <sup>ii</sup> For further reading, see Obiaraeri, N. O., *Contemporary Law of Evidence in Nigeria*, (Crayford Kent, United Kingdom, Whitmont Press Ltd, 2012).
- <sup>iii</sup> See the old but important case of *Igbokwe & Ors v UCH Board of Management* (1961) WNLR 173.
- <sup>iv</sup> See *Cheranchi v Cheranchi* (1960) NRNLR 24
- <sup>v</sup> Under *section 84* of the Matrimonial Causes Act. See also *section 165* of the Evidence Act, 2011 as amended.
- <sup>vi</sup> (1995) LPELR - 1591 (SC).
- <sup>vii</sup> (2017) LPELR-41920(SC) (Pp 27 - 28 Paras E - B) per Ogunbiyi, JSC.
- <sup>viii</sup> (2022) LPELR-57561(SC).
- <sup>ix</sup> See *Queen v Itule* (1961) 1 ALL NLR 462 and *Aremu v State* (1991) 7 NWLR (Pt. 201) 1.
- <sup>x</sup> (2018) LPELR-45042(CA) (Pp. 30 paras. B).
- <sup>xi</sup> 1997) LPELR-1928(SC) (Pp. 37-39 paras. F).
- <sup>xii</sup> (2023) LPELR-60809(CA) (Pp. 33-34 paras. E-E) per Goodluck, JCA.
- <sup>xiii</sup> (2014) LPELR 22532 CA.
- <sup>xiv</sup> (2022) LPELR-58074(CA).