

**AN APPRAISAL OF THE OFFENCE OF RAPE AND ITS MEANS OF PROOF UNDER
CONVENTIONAL LAW AND ISLAMIC LAW IN NIGERIA**

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ABSTRACT

Rape is one of the most heinous crimes which attracts severe punishment. But unfortunately, a lot of the culprit easily escape justice due to the lack of evidence. Credible and acceptable evidence is the only means of proving criminal act of rape beyond reasonable doubt. The offence of rape is triable by both State High court and Upper Sharia. In the course of trial before State High Court, the prosecution relies on the principles of common law, while prosecuting the case before the Sharia court, the principles of Islamic law are the law to guide the court. Sometimes confusion arises as to which principle of law before one of the above-mentioned courts with jurisdiction to try the offense of rape. This article analyses the offence of rape and it's means of proof in order to serve as a guide, as to the most appropriate principle of law to apply while prosecuting the case of rape before the State High court or Upper Shariah Court as the case may be. In carrying this research doctrinal research method is employed. Conclusively, it is found that under the principle of the Islamic law, in an effort to dispel any possibility of bias, the victim of the rape and her family are not competent witnesses, for being interested parties. But under the evidence Act, the prosecutrix and her relatives are both competent and compellable witnesses. Finally, it is recommended that Evidence Act be amended by making the victim of rape and their relatives incompetent witnesses in order to weed out possibility of bias and ensure fairness in the administration of justice.

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Introduction

Rape is one of the criminal offences that endangers human person which is widely known as the unlawful carnal knowledge of a woman or girl without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act, or in the case of a married woman by personating her husband. The offence of rape has received serious attention under both the conventional and Islamic law. Both prescribing different severe punishments ranging life imprisonment to death penalty. In the course of discussing, the nature and delicacy of offence, especially in relation to its means of proof would be pointed out and analyzed. Under the conventional law, the law is clear that the most important and essential ingredient of the offence of rape is, penetration. The Court will deem that sexual intercourse is complete upon proof of penetration of the penis into the vagina of the prosecutrix. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Emission or the rupture of the hymen is unnecessary to establish the offence of rape. However, under the principle of Islamic law, eye witnesses account is required to establish penetration. In this regards, confession, circumstantial evidence and expert opinion are considered potent and admissible evidence.

This paper analyses the means of proof in rape cases. The paper is divided into two segments. The first segment deals with means of proof under the conventional court applying the principle of statutory and common law. While the other segment of the paper deals with the means of proving rape under the cardinal principles of Islamic law applicable before the Sharia court.

1.0 The offence of Rape and its Means of Proof Under Common law and Islamic Law

The term rape linguistically has been defined as the act of destroying an area or damaging its surrounding¹. In technical legal sense, it has been defined as unlawful sexual inter-course committed by a man with a woman not his wife through force and against her will. This crime required at least a slight penetration of the penis into the vagina. A husband could not be convicted of raping his wife².Section 282(1) of the Penal Code provides for the definition of rape as follows:

282 (1) A man is said to commit rape who, save in the case referred to in Subsection (2), has sexual intercourse with a woman in any of the following circumstances:

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¹ A.S. Hornby, 'Oxford Advanced Learner's Dictionary of Current English' 10th Ed. Oxford University Press, Oxford

² B. A Garner, 'Black's Law Dictionary' 9th Ed. West, US

(a) against her will;

(b) without her consent

(c) with her consent, when her consent has been obtained by putting her in fear of death or hurt;

(d) with her consent when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married;

(e) with or without her consent, when she is under fourteen years of age or of unsound mind³

Under the Criminal Code Act the offence of rape was defined as follows: -

Any person who has unlawful carnal knowledge of woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by of harm, or by means of false and fraudulent fear representation as to the nature of the act; or in the case of married woman, by personating her husband, is guilty of an offence which is called rape⁴.

Apart from the Northern Nigerian penal Code and Criminal Code Act, the legislators have passed another law in the year 2015 providing for the offence of Rape. The law has prescribed a severe punishment for the offence as follows:

(1) A person commits the offence of rape if-

(a) he or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm or by means of false and fraudulent representation as to the nature of the act or the use of any substance or additive capable

³ Penal Code CAP 105 Laws of Kano State 1991 as amended vide Penal Code Amendment (No. 12) Law of 2014

⁴ Section 308 of the Criminal Code Act Laws of Federation

of taking away the will of such person or in the case of a married person by impersonating his or her spouse⁵.

The offence of rape has been judicially defined as:

An unlawful sexual intercourse with a female without her consent. It is an unlawful carnal knowledge of a woman by a man forcibly, and against her will. It is the act of sexual intercourse committed by a man with a woman who is not his wife without her consent.⁶

Looking at the above provisions of the law, it is clear that the laws convey similar position of law with only variation of wordings. However, under the child's Rights Act, it is clearly prohibited for any person to have sexual intercourse with a child. For the transgression and contravention of the law, the culprit would be considered to have committed the offence of rape and is liable on conviction to imprisonment for life. A person is charged with offence of sexual intercourse with a child within the contemplation of Child's Right Act, the claim of the offender that he believed the child victim to be of or above the age of eighteen years; or

the sexual intercourse was with the consent of the child, is immaterial and it cannot avail him⁷.

1.1 Nature of the Offence of Rape

The offence of rape is by nature criminal and unlawful, due to the fact that concept involves an aggressive carnal knowledge of a female without her consent. Consent in this context must be devoid of any form of external unlawful influence. A child who is under age is not capable of giving consent. Rape is by nature grave, devastating, traumatic; it also reduces the totality of the victim's personality. Several definitions given to rape are all characterized by an absence of consent as a common feature. In Nigeria, (before the passage of Violence Against Persons (Prohibition) Act 2015,) rape by its very nature, is an offence committed by men against women. Rape was held to be unlawful sexual intercourse with a female without her consent. In other word, it is an unlawful canal knowledge of a woman by a man forcibly and against her will or the act of sexual intercourse committed by a man with a woman who is not his wife without her consent.⁸

⁵ Violence Against Persons (Prohibition) Act 2015

⁶ Posu v. STATE (2011) 11 WRN 1 at 9

⁷ Section 31 of Child's Right Act 2003

⁸ NDEWENU POSU & ANOR v. THE STATE (2011) LPELR-1969 (SC)

In UK, the nature and the scope of the offence of rape had since been extended. Now the offence of Rape could be committed by a man against another man. It is provided that:

(a) It is an offence for a man to rape a woman or another man;

(b) A man commits rape if he has:

(i) Sexual intercourse (vaginal or anal),

(ii) With woman or another man,

(iii) Who does not consent, and

(iv) He knows or he is reckless as to whether or not the other person (the victim)consent.⁹

The issue of the virginity of the prosecutrix is not one of the requirements to make the offence of rape complete or necessary to ground the conviction of a person accused of the offence of rape¹⁰.

The offence of rape in Nigeria had been in continual increase. According to Punch Newspaper report in 2005, that 513 people, 134 women and 379 men were arrested by the Police in connection with 423 cases of rape in Lagos State during the first four months of 2005. Many of the rape cases were believed to have taken place in institutes of higher education.¹¹This and other reasons prompted Michael Joseph and Toluwani Bamigboje to write an article calling for the amendment of Laws on rape in Nigeria. As result of a legislation that came into life in 20215, the offence of rape has taken a new dimension whereby a woman could now be convicted for the offence. It has been provided that:

A person commits the offence of rape if:

(a) He or she intentionally penetrates the vagina, anus or mouth of another person with any other part of his body or anything else.

(b) The other person does not consent to the penetration

⁹ Section 142 of the Criminal Justice and Public Order Act 1994 UK

¹⁰ State v. Ijiwande(2020) LPELR-51627 (CA)(Pp. 39-40 paras. F)

¹¹ Michael Joseph and Toluwani Bamigboje, 'Rape under The Nigerian Laws and the Need for Amendment' accessible on https://legalpediaonline.com/rape-under-the-nigerian-laws/#_ftn43>>accessed on 5/10/2025 by 12:53 pm

Inherent in that provision, are the elements which constitute the offence of rape under the Act and which the Prosecution must have to prove if he must succeed in his case. Thus, the Prosecution must have to lead evidence to establish:

- (1) That the accused/appellant penetrated his victim*
- (2) The penetration was through the vagina, anus or mouth of the victim*
- (3) That the penetration was intentional*
- (4) That the act (of penetration) was done without the consent of the victim.¹²*

It has been argued by Edor J. Edor, that some of the prominent features of the definitions of rape, from the combination of common-law understanding, the statutory and judicial definitions of rape in Nigeria, appear to be that a woman cannot rape a man, and a man cannot rape a man. To him a woman or girl cannot be convicted of rape, because she cannot rape a man or boy, and she cannot rape a fellow woman or girl. This is because the vital elements that must be considered to ground a conviction on rape is penetration. The penetration of the vagina by the penis is an indispensable/essential element/ingredient of the crime of rape. A woman or girl does not possess a penis, and would therefore be seen to lack the requisite instrument and capability to commit rape.¹³

With due respect, it is the opinion of this paper that, the above opinion of the writer cited above cannot have overriding effect over the lucid, clear and unambiguous provision of Section 1 (1) of the Violence Against Persons (Prohibition) Act, which clearly states that a man or a woman who intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or other object else, without the consent of the victim to the penetration, the man or woman has committed the offence of rape.

1.3 What the Prosecution Must Prove in the case of Rape

In case of rape, for the prosecution to succeed it case, it must prove the followings:

- (a). That the accused had sexual intercourse with the prosecutrix,
- (b). The act was done in circumstances falling under the following:

¹²Section 1(1) of the Violence Against Persons (Prohibition) Act, 2015

¹³ Edor J, ' A JURISPRUDENTIAL AND SOCIO-CULTURAL RECONSIDERATION OF THE RAPE-PHENOMENON' accessible on https://www.researchgate.net/profile/John-Edor-2/publication/352120204_A_jurisprudential_and_sociocultural_reconsideration_of_the_rape-phenomenon/links/60b9e5a4458515218f8aba11/a-jurisprudential-and-socio-cultural-reconsideration-of-the-rape-phenomenon.pdf>> accessed on 5/10/2025 by 2:06 pm

- (i). Against her will.
 - (ii). Without her consent,
 - (iii). With her consent when the consent has been obtained by putting her in fear of death or of hurt,
 - (iv). With her consent when the man knows that he is not her husband,
 - (v). With or without her consent when she is under fourteen years of age or of unsound mind.
- (c). There was penetration.¹⁴

One of the essential ingredients to prove in a charge of rape is penetration of the vagina. The penetration however slight, is sufficient and it is not necessary to prove an injury or the rupture of the hymen to constitute the crime of rape. The fact that a prosecutrix allegedly defiled is found to be *virgo intacta, id est*, a virgin, is not inconsistent with partial sexual intercourse and the court will be entitled to find that sexual intercourse has occurred if it is satisfied on that point from all the evidence led and the surrounding circumstances of the case. Where penetration is proved, but not of a depth as to injure or rupture the hymen, it is sufficient to constitute the crime of rape. This means the proof of the rupture of the hymen is unnecessary to establish the offence of rape.¹⁵

1.4 Means of Proof of Rape

In Nigeria, a crime in conventional law could be proved before the court through any one of the following means:

- i. Confessional statement of the accused person.
- ii. Direct evidence also known as evidence of an eye-witness or witnesses.
- iii. Circumstantial evidence.¹⁶

These means of proof would be analyzed one after another in the following paragraphs.

¹⁴ Benjamin v. State (2019) LPELR 54309 (SC)

¹⁵ The State v Masiga (2017) LPELR (43474) 1 at 7-8

¹⁶Emeka vs State (2002) 32 WRN 37 or (2006) 6 SCNJ 259

i. Confession

Confession has been defined as an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed the crime and this includes both extra judicial and judicial confessions. It also includes an incriminating admission made that is not direct and positive and short of a full confession.¹⁷ For a confessional statement to be relevant for admission by the court it must encompass all the elements and the ingredients that constitute the offence the accused was charged with.¹⁸ For confession to ground conviction, it must admit the elements of the offence and all facts which constitutes the offence. Once a Court is satisfied with the genuineness of a confession, a conviction can be based entirely on it and such a conviction.¹⁹ The law is settled that confessional statement is the most effective compass of navigating culpability of an Accused on the part he played in the commission of the offence, and different principles govern the admissibility of a confessional statement disowned, and the one that is objected to as involuntarily made.²⁰ An extra judicial confession, though made orally, carries equal weight with the one made in writing.²¹

ii. Oral testimony/eye witness's account

In the eyes of the law, an eye witness connotes a person who can give evidence as to what he has seen from personal observation.²² Evidence of a witness which the Court must act on is the direct oral evidence of a witness. If it is a fact which could be seen, it must be the evidence of a witness who says he saw the fact, if it is a fact which could be heard, it must be the evidence of a witness who says he heard that fact; if it is a fact which could be perceived it must be the evidence of the person who perceived that fact etc. That is what it takes to have a fact receivable as direct oral evidence of a witness²³. The evidence of an eye witness, qualifies as one of the three ways of proving commission of a crime. An eye witness gives evidence to what he has seen or observed personally from any of his senses. It ranks second in the methodical ladder of proof of crimes. It concedes the first rung to a confession.²⁴

Under the conventional law, all persons are competent witnesses to testify or give evidence in judicial proceedings of a Court of law²⁵. Eye witness testimony is regarded as one of the best evidence available in

¹⁷ Section 28 of the Evidence Act 2011 as Amended

¹⁸ Kabiru Oriyomi v. Federal Republic Of Nigeria (2023) LPELR-61037(CA)

¹⁹ Okasi v. State (2016) LPELR-40454(CA) (Pp. 25-27 paras. B)

²⁰ Obidiozo & Ors V. State (1987) LPELR-2170 (SC)

²¹ See Uchenna Nwachukwu vs The State (2002) 7SC (pt. 1) 124

²² Ude v. State (2016) 14 NWLR (Pt. 1531) 122.

²³ Yahaya V. Oparinde (1997) 10 NWLR (Pt. 523) 126

²⁴ Ojoh v. State of Lagos (2020) LPELR-50458(C (Pp. 24-25 paras. B-B)

²⁵ Section 175 of the Act 2011 as amended

criminal trial.²⁶ Direct evidence of the eye witness against an accused person is sufficient and enough to nail him down to ground conviction.²⁷ Eye witness account has been held to be the best form of evidence especially where the witness gives direct evidence and an on-the-spot narration of the event as it happened. Furthermore, in criminal proceedings, a conviction could be secured on the credible evidence of a single eye witness that point irresistibly to the guilt of the accused person.²⁸

On the eye witness evidence, the Supreme Court per Rhodes-Vivour, JSC held that:

*Eyewitness evidence is always reliable evidence provided the witness is telling the truth. Such evidence is on what the witness saw. It is almost impossible to dislodge such evidence.*²⁹

In sexual offence sometimes it is difficult to get eye witness account of the incidence, Sex is usually not performed in the presence of a third party. Almost in all cases, it is a hidden act performed behind closed doors, away from the prying eyes of public. It is rare, if not impossible to get a witness to give evidence on oath that he saw the appellant have sex with the prosecutrix.³⁰ However the law treats the evidence of a victim as that of an eye witness.³¹ The evidence of the prosecutrix, if cogent and believed by the Court, can lead to the conviction of the accused without corroboration especially if the prosecutrix attained the age of 14 years.³² The fact the law accept the evidence of the prosecutrix, but on the evidence of penetration, the law is very strict on that as corroboration is required by an independent evidence where the prosecutrix is under 14 year.³³

iii. Direct and circumstantial evidence

Direct evidence is the specie of evidence that establishes a fact without making any inference to connect the evidence to the fact. Thus, direct evidence proves or disproves a fact directly³⁴. Direct evidence is said to be the best evidence. The law requires that oral evidence in all cases must be

²⁶ Shurumo V. State (2010) LPELR-3069 (SC)

²⁷ Adekunle v. State (2024) LPELR-62879(CA) (Pp. 40 paras. B)

²⁸ Olakunle v. State (2017) 6 S.C. (PT. 111) 1

²⁹ Udo V. State (2018) 8 NWLR (PT. 1622) 462

³⁰ Odionye v. FRN (2024) LPELR-62923(CA) (Pp. 24-25 paras. F)

³¹ Lawal vs. State of Lagos (2021) LPELR-53456(CA)

³² Yahaya v. state (2015) LPELR-40856 (CA) (Pp. 14 paras. C)

³³ Okoyomon v. The State (1972) 1 NMLR 272.

³⁴ Paul v. State (2019) LPELR-47386(SC) (Pp. 27-28 paras. B)

direct. Evidence is direct when, if the fact to be proved was seen, then by the witness who saw it. If it was heard, then it must be the evidence of the witness who heard it³⁵. However, where direct evidence of an eye witness is not available, the court is empowered to infer from the facts proved, the existence of other facts that may logically tend to prove the guilt of an accused person³⁶.

Circumstantial evidence is the evidence of surrounding circumstances which by its nature is capable of establishing a proposition, such as the criminality of an accused with the highest exactitude. It is a combination of evidence of circumstances against an accused when taken together, creates strong conclusions of his guilt with high degree of certainty.³⁷For circumstantial evidence to ground a conviction, it must lead to one irresistible conclusion, that is, the guilt of the accused. Any slight doubt must lead to an acquittal.³⁸

It is not in all cases that direct evidence is available to prove a charge before the Court. In the lack of direct evidence, circumstantial evidence has been held to be as good as direct evidence, and sometimes even better than any other sort of evidence. This specie of evidence is indicative of the existence of a number of circumstances which are accepted so as to make a complete unbroken chain of evidence upon which the court may properly act. In order to secure a conviction in a criminal trial through circumstantial evidence, the evidence must be cogent, complete and unequivocal. Such evidence must be compelling and must lead to the irresistible conclusion that the accused and no one else must have committed the crime.³⁹

iv. Medical evidence

The law is settled that, a medical evidence is not mandatory for proof of the commission of the offence of rape, but once there is a denial of the commission of the alleged offence of rape, the court is duty bound to look at the medical evidence so as to ascertain whether there was penetration or perhaps injuries sustained in the vagina or any other part of the body of the alleged rape victim.⁴⁰

³⁵ Usman v. State (2018) LPELR-46568(CA) (Pp. 15 paras. B)

³⁶ Adepetu v. State (1998) 9 NWLR (Pt. 565) p. 186

³⁷ Oketaolegun v. State 2015 ALL FWLR (Pt.979) page 677.

³⁸ Omoregie v. state (2017) LPELR-42466(SC) (Pp. 21 paras. B)

³⁹ Pius Nweke v State (2001) 4 NWLR (Pt. 704) 588;

⁴⁰ Iko v The State (2001) SCNJ p.39

2.0 Rape Under Islamic Law

Rape in Arabic is known as *ightisab* or *zina bi al-ikrah*, which literally can be translated into English as seizure, coercion, ravishing, violation and rape. According to Ibn Manzur, both *ightasaba* and *ghasaba* are interchangeable in Arabic when used to mean rape. He quotes a hadith that includes the phrase *annahughasabahanafsaha* to illustrate this meaning. He argues that *ightasaba* is used metaphorically because it refers to the usurpation of one's property. The terms *ghasaba* and *ightasaba* have been used by classical jurists to express the meaning of sexual assault. The jurists also use a direct conclusive legal meaning of rape, that is, *al-ikrah 'ala al-zina*. Meaning forcing a woman to commit Zina.⁴¹

The jurists of Shafi'i school, regards rape as forcing a woman to commit zina against her will. According to the Hanafites, illicit illegal intercourse is considered rape when there is no consent and no deliberate action from the victim. In Malik's view, rape refers to any kind of unlawful sexual intercourse (*zina*) by usurpation and without consent, which includes instances when the condition of the victims prevents them from expressing their resistance, such as insanity, sleep or being underaged. The Hanbalites, similar to the Malikites, take into account any kind of force used as a denial of consent from the victim. They even consider the threat of starvation or suffering the cold of winter to be regarded as against one's will.⁴² From these juristic opinions, rape can be defined in Islamic law as forcible illegal sexual intercourse by a man with a woman who is not legally married to him, without her free will and consent.⁴³ Considering illegal sexual intercourse (*zina*) as part of rape reveals the criminal conceptual elements in which the purpose of rape is to have sexual excitement and pleasure regardless of the means and extent of the force used.⁴⁴

Under Sharia penal Code, rape has been defined as follows:

126(1) A man is said to commit rape if he has sexual intercourse with a woman in any of the following circumstances:

(a) Against her will; or

⁴¹Dr Azman M. Noor, 'Punishment for Rape in Islamic Law Malayan' Law Journal Articles/2009/Volume 5

⁴² Ibid note No. 40

⁴³ Ibid note No 40

⁴⁴ Ibid note No.40

- (b) Without her consent,
 - (c) With her consent, when her consent has been obtained by putting her in fear or of hurt;
 - (d) With her consent, when the man knows that he is not her husband and that her consent is given because she believes herself to be lawfully married; or
 - (e) With or without her consent when she is under fifteen years of age or of unsound mind
- (2) Sexual intercourse by a man with his own wife is not rape

2.1 Proof of the Offence of Rape Under Islamic Law

The applicable laws and rules of procedure for the hearing and determination of all civil and criminal proceedings before the Sharia Courts shall be as prescribed under Islamic law, codified practice and procedure of the court made by the Grand Kadi of the State in pursuant to Section 279 of the 1999 of the Federal Republic of Nigeria and the amendments to Criminal Procedure Code⁴⁵

The law is trite under Islamic Law that a court is duly accorded with an unfettered discretion to consider facts and circumstances of the case before it and do justice to the respective parties devoid of technicalities. The courts look at the substance rather than the form. Thus, a Court under Islamic Law is not restricted to the issues raised by the parties for determination in the case or appeal, provided there are sufficient materials upon which a just decision can be reached by the Court. The grounds of appeal or issues raised before a Court under Islamic Law need not to be framed in a technical manner or legal phraseology. What shall be of paramount consideration to the court is doing substantial justice to all and sundry.⁴⁶The provisions of Evidence Act is inadmissible to the proceedings before Sharia courts. It has been held that:

Let it be noted and instructively significantly too, that the Evidence Act does not bind Islamic law Courts. Similarly, principles of English Law or English Law case law authorities do not bind or guide matters which are

⁴⁵ Section 7 of the Kano State Sharia Court Law 2000

⁴⁶Umaru v. Muhammad & Ors (2020) LPELR-51139(CA) (Pp. 18-19 paras. D-D)

*governed by Islamic law. Hence, all such matters should be governed by Islamic law.*⁴⁷

The offence of rape under Islamic law is proved through the following means of proof under Islamic law:

1. Eye witness's account

Under the cardinal principle of Islamic law, a claimant in a claim founded under Islamic Law can lead evidence to prove his case or claim by: -

- (a) Evidence of two male unimpeachable witnesses or
- (b) Evidence of one male witness and two or more female unimpeachable witnesses or
- (c) Evidence of one or two female or more witnesses with claimant's Oath in either case.⁴⁸ This requirement of law is in respect of civil cases.

It has been held that under Islamic law, where the law prescribes a severe punishment for an offence, the procedure to establish the offence is rigid and cumbersome such that it may turn round to be formidable or even impossible to prove; for example, the standard of proving adultery and rape in Islamic criminal law is very high and rigid. It is hardly proved⁴⁹. Under the Islamic law in the allegation of fornication it cannot be proved with less than four male witnesses who saw them in the act (intimate or pants down), Failure to have such four witnesses testifying to the act would make those who made the allegation and the witnesses liable on conviction to 80 lashes of the cane to be administered in front of large gathering of people.⁵⁰ But unlike the offence of fornication and adultery, the offence of rape is established by the evidence of two unimpeachable male witnesses. This is because, some Muslim scholars view rape as a form of armed robbery, due to the fact that

⁴⁷Ustaz v. Abdullahi (2015) LPELR-40740(CA) (Pp. 22 paras. D)

⁴⁸ Kakale & anor v. Noma (2021) LPELR-55093(CA) (Pp. 19 paras. B)

⁴⁹ Rungumawa v Rungumawa (2002)1 NWLR (Pt. 747) 153 (Pp. 163-164, paras. D-E)

⁵⁰Rungumawa v Rungumawa (supra)

the woman is robbed of her chastity and reputation. Through unlawful threat of violence or something similar to violence.⁵¹

Under Islamic Law, for the validity of the testimony of a witness, the witness must be a Muslim, sane of high quality and integrity. He should be a person of high moral standing who is known to avoid great sins and to shun minor sins. He has to be just, fair equitable and independent person who could not be influenced by anything.⁵² A party to the suit is disqualified from giving evidence in his own case under Islamic law.⁵³

2. Through confession

Iqrar is an Arabic word which has many meanings which include avowal, confession, admission and lack of denial from part of the defendant⁵⁴. In its technical legal sense, it has been defined by different Islamic schools of jurisprudence. According to Hanafi School, “it is a self-narration establishing a legal right of another person on the maker of the narration.”⁵⁵ Maliki school defined admission as “A narration by a person or through his legal representative, if believed, it creates a personal binding legal obligation on the maker”⁵⁶

The scholars of Maliki School are on the opinion that a single confession is sufficient evidence to ground conviction of the accused person in all manner of case including the offence of rape. The authority for this could be found in a prophetic tradition where it was reported that the Holy prophet (SAW) to have said in a case involving adultery between a houseboy and his master’s wife:

اغدى يا أنيس علي امرأة هذا فإن اعترفت فارجمها", فغدا عليها فاعترفت فرجمها⁵⁷

Meaning:

*O Unais. Go to the wife of this man, and if she confesses, then stone her to death." Unais went to her and she confessed. He then stoned her to death*⁵⁸.

⁵¹Dr Abdufatah Ahmed Abu Khliyah ,‘Responding to the suspicion of settlement between the crimes of adultery and rape and its impact on Islamic Jurisprudence, accessible on https://jcia.journals.ekb.eg/article_301521_265c45b5e1b63c742db0ea18c84cf8b2.pdf> accessed on 13/9/2025

⁵² Shehu v. Bello & ors (2021) LPELR-54785(CA) (Pp. 14 paras. C)

⁵³ Ibrahim & ors v. Ibrahim & Ors (2020) LPELR-51310(CA) (Pp. 16 paras. A)

⁵⁴ Dr. Wasil N.F “Nazriyyah Al Da’awa wa Al Ithbat fi Al Fiqh Al Islamiy” Dar Al Shuruq, 1st ed. 2002

⁵⁵ Ibid Note 50

⁵⁶ Ibid Note 50

⁵⁷M Ibn Isma’il Al-Bukhari, Sahih Bukhari, The Translation of the Meanings of Sahih Al-Bukhari Arabic-English Volume 3, translated by: Dr. Muhammad Muhsin Khan, Darussalam, Riyadh (1997)

⁵⁸ Ibid Note No. 54

Supreme court held that:

It is trite law in Shariah that a free admission made by a mature and sane person against his interest in favour of another is binding and enforceable against the maker. See Page 39-40 Vol. I Fathul-Aliyyal Malik wherein admission is given the following definition and effect: "Admission is a binding declaration by its maker in favour of another. It must be clear and devoid of ambiguity." Also in Bidayatul Mujtahid Vol II page 352 it is stated that: "Where an admission (its wording and context) is clear, it is binding on the court to act upon it"⁵⁹

3. Through expert evidence

In addition to using eyewitness testimony, medical data and expert testimony are acceptable evidence in prosecution of rape. A witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise. The Quran has given due recognition to expert opinion. It is thus difficult to say in general terms that medical evidence or opinion of experts is inadmissible in evidence in Islamic Law. However, it can safely be said that jurists are not unanimous in their views as to the application of expert opinion on some matters like adultery, fornication and rape.⁶⁰ This is because Islam has given due regard to the evidence or opinion given in relation to some scientific, technical or professional matter by experts. It assists the Judge to determine a fact in issue. A witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.⁶¹

4. Through digital evidence

Due to the advancement of science and technology, the importance of electronic evidence in today's world cannot be denied because most of the criminals are caught on the basis of CCTV films, video, recordings, pictures, call records, etc. These evidences are very strong in nature and play focal role in proof of some cases. These are the proofs and if authenticated properly cannot be denied by the accused. So, there is a possibility that the guilty party is made to confess to the commission of the crime during cross-examination or interviews. But the majority of the Muslim scholars are on the firm opinion that *Hudud* and *Qisas* offences could not be established on the

⁵⁹ Hada v. Malumfashi (1993) LPELR-1348(SC) (Pp. 13 paras. A)

⁶⁰ Rabi v. Amadu (2002) LPELR-9161(CA) (Pp. 15-24 paras. F)

⁶¹ Ibid Note No. 57

basis of electronic evidence alone. In that case, judge has very vast powers under ta'zirpunishments. In order to keep the peace and harmony of society, such criminals must be given deterrent punishments⁶².

According to Dr Abdullahi Al Ajlaan, digital photograph is relevant and admissible evidence in rape case especially if the photograph is obtained from the accused person which he snapped during the indecent act which he kept for future pleasure and cherishing of his indecent act. If authenticated and acknowledged by the accused the court can act on it.⁶³

It is to be noted that the offence of rape is an offence which involves commission of adultery in respect of which strict means of proof is required. Four witnesses are required for the proof of the offence.in this respect Allah said:

﴿وَالَّذِينَ يَزْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ﴾⁶⁴

Meaning:

And those who accuse chaste women, and produce not four witnesses, flog them with eighty stripes, and reject their testimony forever, they indeed are the Fasiqun (liars, rebellious, disobedient to Allah)⁶⁵

⁶²Hafsa Abbasi and Dr. Hafiz Anwar, 'Admissibility of Computer Evidence inIslamic Law and Common Law: A Preliminary Analysis'

⁶³ Dr A.S. Al Ajlani *Al Qada'u Bi Al Qara'in Al Mu'asirah*, Silsila Al Rasa'il Al Jami'iyya Saudi Arabia, Vol 2D

⁶⁴ Quranic 24 verse 4

⁶⁵ Quranic 24 verse 4, The Quran, Arabic Text with English Meaning, Dar Aljumuah for Pub & Dist, Riyadh (2019)

3.0 Findings

1. Under the conventional law, the victim of the rape is both competent and compellable witness in a trial, especially if the victim is not a minor. But under the principle of Islamic law, the victim as an interested party in the trial is not a competent witness.
2. Under Islamic law and conventional law, a husband cannot be convicted for raping his wife.
3. Under Islamic law, a woman or girl cannot be convicted for the offence of rape but now under the conventional law a woman could be convicted for the offence of rape.
4. Under Islamic law for the witness to be competent he must to be just and pious, but this requirement being just and piety is completely out of question under conventional law every person is a competent witness.

4.0 Recommendations

It is hereby recommended that Evidence Act be amended by making the victim of rape and their relatives' incompetent witnesses in order to weed out possibility of bias and ensure fairness in the administration of justice.

5.0 Conclusion

From the above discussion, it is clear that, rape is a criminal act prohibited by both Sharia and conventional law. The process of proving the offence in the two legal systems seems to be identical in form but different in both content and substance. The offence of rape could be established under the both conventional and Islamic law through oral evidence of eye witness and confession of the offender.