CRITICAL ANALYSIS ON THE APPLICATION OF WITNESS OATH/ AFFIRMATION *(YAMIN/TAHLEEF AL-SHAHID)* IN SHARI'AH COURTS OF NIGERIA

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ABSTRACT

It is a well-known practice by the Sharia Court that when a witness appears to testify before it, the court subjects him to an oath before giving his testimony. This is to ensure the truthfulness of the evidence. However, according to established principle of Islamic Law, a competent witness should be a just person. And a Muslim is presumed to be just until the contrary is proved, as it was said by Umar bn Khattab (RA) in his letter to Abu-Musa al-Ashari. Hence there is no need for the witness oath. And if this oath could be allowed, then the stage of its administration brings an important question. That is: is it to administer before the testimony or after the testimony? Responsive of these concerns, this study employs doctrinal and empirical research methodologies (combined) and investigates the compatibility of such practice of administering oath on a witness with the principle of adl presumption under Islamic law with a view to finding out the legality or otherwise of such procedural exercise. It is the finding of this paper that, the oath can be applied, but subject to the choice of the witness, where the court entertains doubt in his testimony, and for that reason, the oath ought to be applied after the testimony, unless there is circumstance which creates the doubt before the testimony. Consequently, the paper recommends, in the main, that the rules or practice of Shari'a Courts relating to witness testimony be amended accordingly.

Keywords: *Analysis, Shari'ah Court, Witness Oath, Presumption, doubt.*

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1.1 Introduction

The administration of oath to witnesses commonly referred to as Yamīn or Tahleef al-Shāhid occupies a sensitive and contested position within Islamic procedural law. In classical Islamic jurisprudence, testimony (shahadah) is regarded as a sacred trust founded upon the moral integrity (ʿadl) of the witness. A Muslim witness is, in principle, presumed upright unless proven otherwise, as reflected in the celebrated directive of Umar ibn al-Khattab to Abu Musa al-Ashʿari. This presumption historically minimized the necessity for subjecting a witness to an oath prior to giving evidence. However, contemporary judicial practice in Shari'ah Courts particularly in Nigeria has witnessed an increasing tendency to administer oath or affirmation to witnesses either before or after testimony, raising fundamental questions regarding its juristic legitimacy, procedural propriety, and doctrinal consistency with established principles of Islamic law.

The divergence of juristic opinion on this issue is well documented. The majority of classical jurists from the Maliki, Hanafi, Shafi'i and Hanbali schools generally rejected the routine administration of oath to witnesses, emphasizing the sufficiency of established probity and the dignified status accorded to witnesses under Islamic law. Conversely, some jurists particularly within segments of the Maliki and Hanafi traditions permitted the oath in circumstances of doubt, necessity, or widespread moral decline, grounding their reasoning in Qur'anic authority, juristic policy (siyāsah sharʿiyyah), and practical judicial considerations. This juristic disagreement has, in turn, influenced modern statutory codifications and judicial attitudes in several Muslim jurisdictions.

Within the Nigerian context, the practice of administering Yamīn al-Shāhid has generated doctrinal and appellate controversy. While the Shari'a Court of Appeal Kano State has recognized the permissibility of administering oath to witnesses under certain conditions, the Court of Appeal of Nigeria has cautioned against compelling witnesses to swear before testifying, affirming the elevated status accorded to witnesses in Islamic law. These judicial pronouncements reveal an apparent tension between procedural adaptation and classical orthodoxy, particularly concerning whether such oath should be administered before testimony as a form of tazkiyah (recommendation of credibility), or after testimony where judicial doubt arises.

This paper critically examines the legality, timing, and scope of witness oath in the Shari'ah Courts of Nigeria against the backdrop of classical Islamic jurisprudence and contemporary judicial

practice. It interrogates whether the routine administration of oath aligns with the presumption of justice (ʿadl), whether it constitutes an impermissible innovation in evidentiary procedure, and whether its application can be justified under principles of necessity or public interest. Employing a combined doctrinal and empirical methodology, the study analyses classical juristic authorities, relevant Qur'anic verses and Hadith, statutory provisions, and Nigerian appellate decisions, alongside insights from serving Shari'ah Court judges.

Ultimately, the paper seeks to clarify the proper juristic position on Tahleef al-Shāhid within the Nigerian Shari'ah judicial framework and to propose a principled approach that preserves both the integrity of Islamic evidentiary doctrine and the practical demands of contemporary adjudication.

2. Witness Oath/ Affirmation *(Yamin/Tahleef al-Shahid)*

This is an oath subscribed by a witness before testifying in order for a Judge to be sure of the truthfulness of his testimony.[1] Imam Zuhaliy opined that; "*Shari'a* Court Judges in this time have been administering an oath to a witness because of the large population of people instead of recommendation of witness (*tazkiya*).[2] Muslim jurists are not in agreement as to the administration of this oath. The supporters of this view argue that, there is nothing bad for its administration, for the practice of the Prophet to give oath to Rukanah as to his intention for a single divorce or more.[3] This legal authority may not be a sufficient reason since Rukana was not a witness in his case but a defendant. Ibn Wadda'h also reported from Suhnun to have said that because of the corruption of this time, it is preferable for a Judge to administer oath to witnesses.[4] This is also the view of Maliki, Zaidiyya and Zahiri Schools also and of Ibn Abi Laila and ibn Kayyim because of the rampant bad habit of the people in this time.[5] Muhammad bn Basheer, a Judge in Kurdubah, Ibn Najim al-Misri and Ibn Kayyim considered the permissibility as their preferred view.[6] This is also the ruling of the Kano State Shari'a Court of Appeal in Estate of late Binta Yusif Ahmad v. Estate of late Yusuf Ahmad[7] It was held by the court that there is nothing wrong for a court applying

[1] Wahbatuh Zuhaliy, *al-Fighul Islamiy wa Adaillatuhu*, (4th edn Darul-Fikr Publication) Vol. 8 p. 6075 Also maktabatus –Shamila, 4th edn, available at <htt://www.shamela.ws>)
[2] ibid
[3] ibid Vol. 6 P. 223
[4] Muhammad bin Farhun, T*absiratul hukkam*, (Daru ilmu al-kutub printing Press 2003) Vol. 2 p. 170
[5] Wahabatu al-Zuahaliy (n. 1) Vol. 8 p. 6075
[6] Ibid Vol. 6 P. 223
[7] (2007) 2 RSMNW P. 73

Islamic Law to swear a witness before testifying, citing an authority from ibn Farhum that "a Judge can compel a witness to take oath … if he doubts his credibility .."[8]. However, the majority of Muslim Jurists rejected this oath.[9] The court of Appeal in MAIGARI v. BIDA[10] also viewed against the administration of this oath where it was held that:

> *There is no compelling reason why a witness should be sworn in, as it were, before he testifies, a witness in Islamic law and procedure is treated with utmost reverence so much that he will not be subjected and relegated to taking oath before he gives evidence*"

In Garba Vs. Dogon Yaro [11] the Court of Appeal, Jos Division clarified the issue and held that:

> *Under Islamic law procedure a witness shall not be required to subscribe to an oath or be subjected to an affirmation before he testifies, the court may however require any witness to augment his evidence by taking oath to confirm the truth of what he had said.*

The Shari'a Court of Appeal Kano allows the administration of the oath while the Court of Appeal in the Estate of Late Binta's case only disallowed compelling a witness to take the oath. The two rulings may not be in conflict since the former is not advocating compelling a witness to take the oath. That's why the Court of Appeal, Jos Division in Garba's case above, clarified the issue. This should be a better position, thus a witness should not be compelled to take an oath before giving evidence but he might be opted to do so in order to strength his evidence or for a Judge to accept and consider his evidence. The position of some Maliki jurists, as reported from Mudarraf and Ibn al-Majishun, is that:

"لايحلف القاضي الشاهد عدلا أو غير عدل أما العدل فقوله كاف، وأما غير العدل فلا تنفع فيه اليمين".[12]

Meaning that 'a Judge should administer oath to any witness be a just person or unjust one, for a just person his statement is enough while in the case of unjust person oath should not benefit.'

[8] Aliyu Ilayash, *Fath al-Aliyi al-Maliki Fi al-Fatwa ala Mazhab al-Imam Malik*, (Dar –al-Fikr, Beirut nd) Vol. 2 p. 311
[9] Wahabatu al- Zuhaliy (n.1) Vol. 8 p. 6075
[10] (2002) FWLR (PT.8)
[11] (2016) 4, SCLR, (Part Iv) (Page: 738 – 739) (para F-A)
[12] brahim. Muhammad Farhun, *Tabsiratul Hukkam fi Usulil Aqdiyatu wa Manahijul Ahkam,* (Daru Alimul kutub Riyadh publisher, 2003) Vol. 2 p. 170

The law is steeled under Islamic law before any person is called upon to take an oath under Islamic Law, the Court is bound to explain to him the implication of his refusal to take such oath.[13]

Therefore, Muslim Jurists, as to the administering an oath to the witness that his testimony is true, divided into two:

a. The first view rejected administering the oath. This is the view of the Majority of Maliki[14] Hanafi[15], Shafi;I[16] and Hambali[17] Schools. Saudi Arabia adopted this position and its courts do not administer the oath to the witness[18]. They argue and rely on the following authorities:
    a. Administering this oath disturbs and presses a witness and the Almighty Allah says in Qur'an that " .. and let either writer or witness be pressed; "[19]
    b. That a witness could either be Just (*adl*) or unjust. For a just person, what he says is sufficient; for an unjust person, the oath will not benefit (i.e will not deter him).[20] Al-Shawkani said' "The only acceptable witnesses are just, upright and competent as mentioned in the Holy Qur'an. If they are as such there should not be any suspicion to their testimony, hence they should not be subjected to an oath, but if they are of suspicious character they should not be just and competent witness hence their testimony should be rejected".[21]
    c. The oath is applied in a case where there is dispute and a witness is not in dispute with any one and not a disputant party.[22]

[13] Umaru v. Muhammad & Ors (2020) LPELR-51139(CA) (Pp. 19-22 paras. D-D)
[14] Ibid
[15] Zain al'abideen bn Ibrahim Ibn Najim, *Ashbah wal Naza'ir ala mazhabi abi Hanifa,* Dariu al-Kutub al-ilmiyyah, Beirut , Lubnan (1980) p. 198
[16]Ahmad Aliyu Ibn Hajr, *Fath al-Bari*, (Daru al-Ma'arifa, Beirut 1379 AH) Vol. 5 p. 308
[17] Abdulrahman bn Muhammad Ibn Kasim, *Hashiyatu al-Raudul Murabba*' (np) (1397 AH) vol. 7 p. 628
[18] Abdullah Ahmed Salem Al Mehmadi, The swearing an oath of Witness in Jurisprudence and Law, *Majallatu al-Ulum al-Shari'ah wa al-Dirasatu al-Islamiyya*, No. 87 Dec 2021 p. 1237 available at https://www.gcc-sg.org/ar-sa/Pages/default.aspx access on 20/10/2024
[19] Q2 V: 282 (translated by A.J. Arberry)
[20] Muhammad Ibn Farhun (n 12) Vol. 2. P. 170
[21] Al-Shawkani, *Al-Sail al-Jarrar* Vol. 3 p. 357
[22] Shamsuddeen Muhammd bn Abi-Sahl al-Sarkhasiy, *al-Mabsud* (Daru al-Fikr Printing Press Beirut Lubnan, 2000) Vol. 16 p. 119

d. A witness's position cannot accept subjecting to an oath. Since we are obliged to treat a witness with utmost respect, it will not serve as respect to subject him to an oath.[23]
e. This Oath is surplus because the word 'testimony' (*shahadah*) implies an oath and to administer the oath after the testimony is the same as repeating the oath.[24]

In line with above opinion, Court of Appeal held that:

> *There is no requirement for any witness generally to swear before giving evidence. Under Islamic law, the quality and integrity of a witness is high. It is even stated in MUWATTA MALIKI, that the qualification of a witness is as high as the qualification of a Judge. A witness should be a person of high moral standing who is known to avoid great sins and to shun minor sins. He has to be a just, fair, equitable and independent person, who could not be influenced by anything. Indeed, the grounds of impeaching a witness include the question that the witness is not a fair, just or upright person or that he is a person of low moral values. A witness under Islamic law is clearly not generally sworn in before he gives evidence. Indeed where a witness shows zeal or eagerness in giving evidence by such action as swearing, his evidence is rejected.*[25]

The second view, attracted support of administering the oath. A judge can ask a witness to take an oath if his testimony is true. This is the view of some Hanafi [26]and Malliki Schools[27]. It is also the view ibn Abi Laila[28], Muhammad bn Basheer, a Judge in Kurduba, Ibn Waddah[29] and Ibn Qayyim.[30] Ibn Taymiyya also said that any witness who his testimony is based on necessity, should be subjected to an oath[31]. According to the Hambali School, as reported from Khadi, this oath is administered to a witness in two instances only: the first one is where a non-Muslim testifies on a Will for a Muslim in a journey; the second one is where a woman testifies alone in breast-feeding. She should take an oath, according to one of the two views from Imam Ahmad.[32] Rules 1727 of Majallah also provide for the administration of the oath that: -

[23] ibid
[24] Aliyu Haidar, *Duraru al-Hukkam fi sharhi Majallatu al-Ahkam,* (1st edn *Daru al-Jeel* 1991) Vol. 4 p. 356
[25] Maigari & ors v. Bida (2001) LPELR-7024(CA) (Pp. 10-14 paras. C)
[26] Zainul abideen bin Ibrahim Ibn Najim, *al-Ashbahu wa al-Naza'ir, (*Daru al-Kutubu al'ilmiyya 1980) p. 198
[27] Ibn Farhun, *(n 1*2) Vol. 2 p. 170
[28] Zainul abideen bin Ibrahim Ibn Najim, *al-bahru al-Ra'ik,, (* Daru al-ma'arifa , Beirut, nd) vol. 7 p. 63
[29] Ibn Farhun, (n 12) Vol. 2 p. 170
[30] Muhammad bin Abubakar Shamsuddin Ibn Qayyim, *al-Durukul Hukmiyya*, (Daru alimul fawa'id, Makkah al-Mukarramah, 1428 AH) p. 123
[31] Ibid
[32] ibid

> *In case the person against whom evidence is given, before judgment, ask the judge, saying "Administer the oath to the witnesses that they have not told untruths in their evidence," and it became necessary to strengthen the evidence by oath, the judge can administer the oath to those witnesses. And the judge can say to the witnesses "I will accept your evidence, if you swear to its truth, if not, I will not accept it.*[33]

The jurists in support of the oath rely on the following authorities:

1. Allah the Almighty in Ma'ida says;

> *O believers! When death approaches any one of you, let two just men from among yourselves act as witnesses at the time of making your last will; or from the non-Muslims if you are travelling through the land and the calamity of death overtakes you….. If you doubt their honesty, detain them after prayer and let them both swear by Allah: "We will not sell our testimony for any price, even to a relative, and we will not hide the testimony which we will be giving for the sake of Allah; for we shall be sinners if we do so.*[34]

In this verse Allah almighty legislates administering oath to a witness who are non-believers in a Will during a journey.[35] Based on this verse, Sheikh Muhammad Salih al-Usaimin said,

> '*It is allowed to administer oath to a witness when a judge feels doubt or suspicion in his testimony, this is because the essence of administering the oath is 'doubt' not because it is form non-Muslims.*[36] Ibn Qayyim was reported to have said, "*If a judge is entitle to disperse / separate between witnesses when he feels suspicion as to their veracity, it would be even more proper in that case to administer oath to them*'[37].

2. It is reported by Turmizi that: "Ibn Abbas says a testimony of one woman is allowed with her oath. And this is the view of Ahmad and Ishak[38]. Here the evidence of one woman is accepted based on necessity. That is why Sheikh Ibn Taymiyya says; "*By analogy any testimony accepted based on necessity, the witness should be subjected to oath*"[39].

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[33] Al-Majalla al-Ahkam Al-Adaliyyah (the ottoman Court Manual (Hanafi) Rule 1727. Also cited in Aliyu Haidar, *Duraru al-Hukkam fi sharhi Majallatu al-Ahkam, (1st Daru al-Jeel*, 1991) Vol. 4 p. 357
[34] Q5 V: 106 (translation of F. Malik).
[35] Muhammad bin Abubakar Shamsuddin Ibn Qayyim (n 68) p. 123
[36] Muhammad Salih al-Usaimin, *Tafsiru al-Qur'an al-Kareem Suratul Ma'idah*, Vol. 2 p. 487
[37] Muhammad bn Abubakar Ibn Kayyim, *al-Duruku al-Hukmiyyah*, (*Maktabatu Daru al-Bayan* nd) p. 123. See also Mohamad Ismail Bin Mohamad Yunus, "The Position and Application of Islamic Legal Maxims (*Qawaaid Al-Fiqhiyyah*) in the Law of Evidence (*Turuq Al-Hukmiyyah)*", *Fiat Justisia*, 13 (1), (2019)
[38] Imam al-Tirmizi, *Sunanu al-Tirmizi* Vol. 2 p. 446
[39] Ibn Qayyim,(n 68) p. 123

3. Administering the oath to a witness is based on Shari'a politics. Umar bn Abdul'aziz said, '*It is cause to people a new legal ruling (aqdiyatun) as much as they cause immorality*'[40].
4. It was reported from Muhammad bn Basheer, a Judge in Kurdubah, that he administered the oath to some witnesses in the distribution of estate and that their testimonies was true. Likewise, Ibn Waddah said; 'because of the corruption of this time, I see it better for a Judge to administer oath to witnesses"[41].
5. The recommendation of witnesses (*tazkiyatu al-shuhud*) is impracticable in this time; simply because a witness real character is unknown. Likewise the person to recommend. The witness (*muzakki*) usually and an unknown person (*Majhul*) cannot define unknown an person. That is why administering the oath to witnesses applies to attain some levels of certainty.[42]
6. The trustworthiness of witnesses in this time is in doubt and should be reinforced by oath.[43]

We can understand from the above discussion that the jurists in support of the administration of the oath are not advocating for its application at all cost or generally, so it should not be administered to a just and upright witness. The jurists are just suggesting its application in certain situations, as an exception to the general rule, such as where a Judge doubts the trustworthiness of a witness or where the necessity warrants or to replace the recommendation of a witness (*tazkiya*) where it is impracticable. In addition to that, there is no clear and definite textual authority that disallows the administration of this oath, especially in this instance. It is even encouraged for the above verse where Allah says, '*If you doubt their honesty, detain them after prayer and let them both swear by Allah* ..." but where a witness refuses to take the oath he should be let to go his way without be punished or disturbed, for the above cited verse " .. *And let either writer or witness be pressed; .. "*[44]. This is unlike the view of Participant No. 3, when he said 'since the people in this time are more likely to tell lies, I administer this oath based on the famous statement of Umar bn Abdul'aziaz, who says; '*It is cause to people a new legal ruling (aqdiyatun) as much as they cause immorality*'

[40] Ibn Farhun, (n 12) Vol. 2 p. 170
[41] Ibid
[42] Zainul abideen bin Ibrahim Ibn Najeem, *al-bahru al-Ra'ik,, (* Daru al-ma'arifa , nd) Vol. 7 p. 63
[43] Ibn Farhun, (n 12) Vol. 2 p. 170
[44] Q2 V: 282 (translated by A.J. Arberry)

It is clear from the above that the jurists in support are not in agreement as to when this oath should be administered. It is before testimony or after the testimony. From the above juristic views, some authors like Zuhailiy categorically stated that it is administered before the testimony and we can also deduce and infer that, those who considered this oath to serve as a recommendation of a witness (*Tazkiya*) are of the view that it is administered before giving evidence since the recommendation (*tazkiya*) is done before testifying. Most of the modern codes in Arabian Countries like Eqypt, Urdun, Syria and the United Emirates adopted this procedure and have on the whole called for the administration of the oath by codifying that '*a witness must be administered an oath before his testimony in court to say, 'I swear with Almighty Allah that I will say the all true and nothing but the true*'[45]. However, Rules 1727 of Majallah [46] quoted above suggests the administration after the testimony of a witness and before the judgment. This is the view of some contemporaries of the Maliki School.

Nigerian Shari'a Court Judges are not in agreement to that effect. For instance, Participant No 1 is of the view that it applies after testimony, where he said, "... *This procedure of administering this oath after the testimony is current position (ma'aulun bihi) of Maliki School, unlike the procedure of the conventional court, whereby affirmation or administering oath to a witness is before his testimony.."* but when he was asked about any authority to that he said; '*I don't have any authority to refer you to, but I know this is the practice*" He continued to say that the rational of this is that a witness may takes oath before the testimony and his testimony might be rejected by the court for a different legal ground. To secure his oath, it is safer and better to take the oath after testimony. Participant No 2 who is also a Shari'a Court Judge said, "*I administer witness oath when a witness comes before me to testify, even if the other party doesn't request for it, when I discover any sign of discrepancy from him at the time he starts answering a preliminary questions* .." So, according to him, this oath is administered before the testimony but after answering preliminary questions within which a Judge may sniff doubt against the witness. He continued to say "*This oath is consider as recommendation (Tazkiya)*". Participant No 4 shared a similar view with Participant No 1. He said; " I ask witness to subscribe to *Yamin al-Shahid* after his testimony when I observe

[45] Abdullah Ahmed Salem Al Mehmadi, Op Cit (n 52) p. 1226 – 1230 see also Mohamad Ismail Bin Mohamad Yunus, (Op Cit Note 38)

[46] Al-Majalla al-Ahkam Al-Adaliyyah (the ottoman Court Manual (Hanafi) Rule 1727. Also cited in Aliyu Haidar, *Duraru al-Hukkam fi sharhi Majallatu al-Ahkam, Daru al-Jeel,* 1st edtn (1991) Vol. 4 p. 357

the body language and disposition of his testimony to extent that I cannot convince myself since I don't have a personal knowledge of his trustworthy or otherwise and other party is unable to impeach him or object to the testimony" while Participant No. 5 had a different view and practice and said " *I only administer Yamin al-Shahid where a witness is unknown (majhul al-hal) and there is no any witness to recommend him (Tazkiya) since Tazkiya is now impracticable*". He continued to say "I *give the oath before the testimony no after, and it is not acceptable after the testimony*" it is clear that Participant No. 5 considered *Yamin al-shahid* to replace recommendation of the witness (*Tazkiya*).

3. Conclusion

Finally, flowing from the above considerations, it can be sum up that a judge can administer this oath before the testimony to serve as a recommendation of a witness or where he already doubts or suspects the witness before he testifies, otherwise it is better to administer it after the testimony for the following reasons:

I. A witness could have said nothing relevant to the fact of the case in his testimony or said nothing at all, etc. and subsequently his oath becomes wasted. or
II. A witness might be disqualified or impeached during or after his testimony in which case there is no need for the oath. In addition to that, according to Ibn Abdulsalam after an oath, his (a witness) testimony must not be rejected.[47]
III. The wording of the authorities supporting the administration of the oath, especially of the Maliki School cited above, suggests the administration after the testimony. Such as Ibn Bsheer administered the oath to witnesses in the distribution of estate to affirm that what they testified was true.[48] Also Ibn Abdulsalam says, 'if a witness testified and then administers an oath (by the court) his testimony should not be rejected.'[49] Equally, the above Qur'anic verse "... If you doubt their honesty, detain them after prayer and let them both swear by Allah ..."[50] Abu-al-Dayyib commenting on this verse said, if the

[47] Abu al-Hassan Al-Tasuliy, *Al-bahjatu Fi sharhit Tuhfah*, (3rd edn (Darul Fikr publisher, Lubnan/Beirut 1996) Vol. 2 p. 105
[48] Ibn Farhun (n 12) p. 170
[49] Abu al-Hassan Al-Tasuliy, (n 45) 2 p. 105
[50] Q5 V: 106 (n 32)

heirs of the testator doubt the honesty of the two witnesses, the witnesses should swear with the Almighty that their testimony is true and didn't close or maneuver anything in the testimony nor hid anything from the estate. [51] All these authorities suggest and infer the administration of oath after testimony.

[51] Sadik Hassan Khan al-Bukhari, *Nail al-Muram Min Tafseer ayat al-Ahkam,* (*Daru al-Kutub al-ilmiyya* Publisher, 2003) p. 289