

Oaths, Affidavits, and Admissibility: *What Katagum v. Umar* Means for Witnesses and Counsel in Litigation



Introduction

The statement on oath of a witness (the *statement*) constitutes the totality of that witness's written evidence before the court. The facts deposed to, as well as the documents sought to be relied upon, derive their evidential force from the statement. Consequently, where a witness statement is incompetent or absent, the testimony of that witness, together with any annexed documents, becomes incapable of sustaining the case in which it is relied upon. The object of this rule is to secure fairness in trial preparation and ensure that no party is taken by surprise.

Beyond this, the requirement that a witness statement be made on oath serves a more fundamental purpose. By insisting that statements be sworn before a designated oath officer, the law seeks to impress upon the deponent the solemnity of the testimonial act, discourage falsehood, and provide an objective assurance of authenticity to the court and opposing parties. This consideration is particularly important in modern trial practice, where written depositions increasingly replace viva voce evidence-in-chief.

By the provisions of the relevant oath laws, including *Sections 1, 2, 6 and 10 of the Oaths Act 2004* and *Sections 112 and 117 of the Evidence Act 2011*, a statement is expected to be sworn before a competent authority and not before parties or their counsel. Non-compliance with this requirement raises questions as to the competence of the statement and, in appropriate cases, may go to the root of the witness's evidence.

In practice, counsel often seeks to undermine an opposing party's case by eliciting, under cross-examination, admissions that a witness signed or swore to the statement in a lawyer's office, at home, or elsewhere outside the presence of an oath officer. Judicial responses to such situations have not been entirely consistent, with courts divided between strict compliance and a more liberal emphasis on presumptions of regularity and absence of prejudice. It is against this background that the Supreme Court's decision in *Katagum v. Umar & Anor* becomes particularly instructive.¹

Contextual History

In the Supreme Court cases of *Buhari v. INEC & Ors* (2008),² and *Nammagi v. Akote* (2021),³ as well as the Court of Appeal decisions in *Buba & Anor v. Mahmud & Anor* (2020)⁴ and *Nwakolobi v. Ejemeli & Anor* (2020),⁵ the witnesses admitted during cross-examination at the trial courts that they had signed their witness statements on oath in their lawyers' offices. The Courts held that such statements were incompetent and inadmissible and accordingly expunged them from the record.

However, the Court of Appeal in *Ayih & Ors v Jatau & Ors* was not inclined to follow these precedents *stricto sensu*.⁶ In dismissing the appellant's argument, the Court held that the statement remained competent and ought not to have been expunged from the record of the lower court. The Court relied on the following reasoning:

- The commissioner's stamp and signature invoke a presumption of regularity.
- There is a distinction between signing and swearing, as the law only mandates swearing before the commissioner and not signing.

- Evidence elicited under cross-examination on a fact not pleaded goes to no issue.
- The statement bearing the commissioner's stamp and signature is documentary evidence and supersedes the oral evidence of signing before a lawyer.

This formed the basis of the National Industrial Court's decision in *Halogen v Melie* (2024), as argued by some of the authors.⁸ However, six days after the Court of Appeal's decision, the Court in *Wurbo & Anor v. Ahmed* (2024) overruled itself.⁹ The Court held that a witness's admission that the statement was signed elsewhere was fatal to the deposition, rendering it incompetent to sustain the case. The Court further held that the mere swearing of an oath in open court would not cure or regularise the defect.

the Supreme Court

Key Precedents Timeline

Buhari (2008)
Nammagi (2021)
Strict compliance enforced; statements signed in lawyer's office expunged.

Ayih v Jatau
Presumption of regularity upheld; distinction made between signing and swearing.

Halogen (2024)
NICN follows Ayih, sustaining the presumption of regularity for the statement.

Wurbo (2024)
Court of Appeal overrules itself; admission of defect deemed fatal.

Decision of the Supreme Court in *Katagum v. Umar & Anor*

In *Katagum v. Umar & Anor*, the Supreme Court revisited the issue and appeared to depart from its earlier approaches while settling the conflicting positions at the Court of Appeal, holding that the lower court ought not to have expunged the statement from the record, as it was not incompetent.¹⁰ The reasoning of the five Justices is outlined below:

01. Form Irregularity Not Fatal

No irregularity in the form of an oath will render it incompetent, and as such, the alleged failure to sign before the commissioner is not fatal.

02. Duty to State Truth Remains

The Court also considered that failure to take an oath does not affect the duty of a witness to state the truth, as provided under Sections 4(2) and (3) of the Oaths Act; hence, it will not matter before whom the oath was taken.

03. Subsequent Oath Cures Defect

The subsequent oath taken by the witness in open court when called to the witness box will regularise and cure any defect in the earlier deposition.

04. Unpleaded Evidence Goes to No Issue

There was no pleading to establish the signing or swearing of the statement before the lawyer, as evidence not pleaded goes to no issue.

05. Objection Must Be Timeous

The appellant failed to object to the competence of the statement at the proper time. The Court held that the appropriate stage to object was before the statement was adopted. Once adopted without objection, the statement becomes the witness's evidence-in-chief. The objection was therefore not raised timeously.

06. Estoppel From Raising Issue

The appellant was estopped from raising the issue on appeal, having filed processes, including the final written address, which relied on facts contained in the said statement.

07. No Miscarriage of Justice

The appellant did not demonstrate that the alleged signing of the statement in the lawyer's office occasioned a miscarriage of justice, as contemplated under Section 112 of the Evidence Act.

08. Presumption of Regularity

The statement on oath attracted a presumption of regularity, given that it bore the stamp and signature of the Commissioner for Oaths.

Implication of the Decision

A. Difficulty in Rebutting the Presumption of Regularity

A significant implication of the decision relates to the presumption of regularity attached to a witness statement bearing the stamp and signature of a Commissioner for Oaths pursuant to Section 168(1) of the Evidence Act. Ordinarily, such a document is presumed to have been properly sworn in compliance with the law. However, in practical terms, the only realistic way to challenge that presumption is by cross-examining the witness who made the statement.

In many cases, a party can only discover that the witness did not sign or swear the statement before the appropriate officer by asking the witness directly during cross-examination. If the objection must be raised before the statement is adopted, this poses a practical difficulty. At that stage, the opposing party would ordinarily have no factual basis to challenge the statement, as the irregularity would not yet have been revealed. It is also not practical for the party to include such an objection in the pleading.

The implication is that the decision may inadvertently make the presumption of regularity almost irrebuttable in practice. Since the most effective method of exposing irregularities is cross-examination, and objections raised after adoption may be considered untimely, lawyers may find it extremely difficult to challenge defective witness statements, even when irregularities actually occurred. This development may reduce the effectiveness of cross-examination as a tool for exposing procedural defects in the preparation of witness statements.

Moreso, the requirement to raise such an objection before adoption would be procedurally premature, as there would be no factual basis upon which the objection would be based.

B. Timeous Objection

The need for lawyers to raise a timeous objection to the competence of a witness statement on oath cannot be overemphasised. It is rooted in judicial economy and fundamental principles of procedural fairness. In courtroom advocacy, particularly in common law jurisdictions such as Nigeria, objections to the competence or admissibility of a witness statement should generally be raised at the earliest opportunity, otherwise it may be regarded as belated and therefore untenable.

Hence, lawyers will need to be prepared to object to the statement before it is adopted. The real challenge, however, lies in laying a factual foundation for such an objection at that stage, given that any irregularity in the swearing of the statement would typically only be revealed under cross-examination, which remains the primary procedural tool for testing the credibility of a witness's evidence.

C. Emphasis on Substantive Justice Over Procedural Technicalities

The decision reiterates the Court's continuous preference to do substantive justice over technicalities. Practically refusing to take cognisance of the possibility that an oath was sworn to in the office of a lawyer, as against before the commissioner for oath, reinforces the commitment to admitting evidence based on substance and justice of the case rather than mere formality and procedures.

Recommendation and Conclusion

While the Court's inclination towards substantive justice over procedural technicality is understandable, the decision, in practical terms, narrows the avenues available to litigants seeking to challenge the competence of witness statements on oath. The combined effect of the presumption of regularity, the insistence on timeous objection, and the discountenancing of defects revealed only under cross-examination introduces a procedural tension that may, in appropriate cases, undermine the effectiveness of cross-examination as a tool for testing evidence.

A more balanced approach would be to recognise the realities of trial practice by permitting objections based on facts elicited during cross-examination, particularly where the basis for such an objection could not reasonably have arisen earlier. In addition, where the competence of a statement on oath is challenged, the opposing party may be afforded a limited opportunity to demonstrate that the deposition was in fact made before a competent authority, whether by affidavit evidence or other credible means. This would preserve the Court's commitment to substantive justice while ensuring that the procedural safeguards governing oath-taking are not rendered otiose.

1. LPELR- 83085 (SC)
2. (2008) LPELR-814 (SC)
3. (2021) 3 NWLR (Pt. 1762) 170 SC
4. LPELR – 51404(CA) (pp 8-9, paras A-A)
5. LPELR-51357(CA).
6. (2024) LPELR— 61775 (CA) (pp.21-27 Paras D -C). As in the earlier cases, the witness admitted under cross-examination that he had signed the statement elsewhere.
7. The statement of the witness that he signed before his lawyer was taken as a piece of evidence that was never pleaded.
8. SUIT NO. NICN/LA/39/2024 Unreported
9. (2024) LPELR-61855(CA)
10. LPELR- 83085(SC). As in the earlier authorities, the witness admitted during cross-examination that he had signed his witness statement on oath in his lawyer's office.



Ituah Imhanze, FCArb
Partner, Dispute Resolution
& ADR



Olusegun Akeju, ACArb
Associate, Dispute Resolution
& ADR



**Muhammad Yasir
Abubakar-Sadiq, AICM**
Associate, Dispute Resolution
& ADR



CONTACT US

LAGOS

KENNA Place
8, Ogunyemi Road, Palace Way, Oniru
PO Box 73002, Victoria Island, Lagos

ABUJA

1st Floor, Novare Central
Plot 502 Dalaba Street,
Wuse Zone 5, FCT 900285, Abuja

ENUGU

Michael Place
3, Emmanuel Ngwu Street,
Thinker Corner,
400211 Enugu State.

+234 811 395 1052, +234 811 395 1053
counsel@kennalp.com