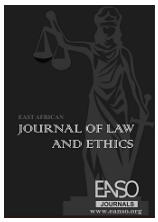
Article DOI: https://doi.org/10.37284/eajle.8.1.3297



East African Journal of Law and Ethics
eajle.eanso.org
Volume 8, Issue 1, 2025
Print ISSN: 2707-532X| Online ISSN: 2707-5338
Title DOI: https://doi.org/10.37284/2707-5338

EAST AFRICAN NATURE & SCIENCE ORGANIZATION

Original Article

The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials

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Article DOI: https://doi.org/10.37284/eajle.8.1.3297

Date Published:

09 July 2025

Keywords:

Civil trial, Attendance, Subpoena, Compellability, Intelligence.

ABSTRACT

A trial is one of the mechanisms set in place for the settlement of disputes and the attainment of justice in society. Trials are conducted on the strength of the evidence of the witnesses adduced through their testimonies. Witnesses can attend the trial voluntarily or under compulsion. This work ventures into the compulsory attendance of child witnesses at trial through the mechanism of subpoena. This work briefly considered the types of subpoena known as subpoena ad testificandum, subpoena duces tecum, and subpoena ad testificandum et duces tecum. The problem with this research is that the requirement of a sufficient intelligence test as required by law has been held that it must not be reduced to the record of the court. This makes it difficult to ascertain whether the stipulation of the law has been complied with or not. It is the aim of this paper to proffer pragmatic suggestions for better administration of justice. This work finds that there is a lack of uniformity in age and a lack of recording sufficient intelligence test questions by the court. Doctrinal methodology was adopted in this research work. It is recommended herein on what constitutes the age of a child and the need for uniformity of age; that sufficient intelligent test questions should be recorded and form part of the record of proceedings.

APA CITATION

Ikimi, I. L. I., Ede, Y. M. & Ihedoro, S. N. (2025). The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials. *East African Journal of Law and Ethics*, *8*(1), 195-206. https://doi.org/10.37284/eajle.8.1.3297

CHICAGO CITATION

Ikimi, Iniye Linda Iyaye, Yakubu Moses Ede and Sylvia Ngozichukwu Ihedoro. 2025. "The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials." *East African Journal of Law and Ethics* 8 (1), 195-206. https://doi.org/10.37284/eajle.8.1.3297.

HARVARD CITATION

Ikimi, I. L. I., Ede, Y. M. & Ihedoro, S. N. (2025) "The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials" *East African Journal of Law and Ethics*, 8(1), pp. 195-206. doi: 10.37284/eajle.8.1.3297.

IEEE CITATION

I. L. I., Ikimi, Y. M., Ede & S. N., Ihedoro "The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials.", *EAJLE*, vol. 8, no. 1, pp. 195-206, Jul. 2025.

MLA CITATION

Ikimi, Iniye Linda Iyaye, Yakubu Moses Ede & Sylvia Ngozichukwu Ihedoro. "The Compellability for Attendance of a Child through the Instrumentality of Subpoena in Civil Trials." *East African Journal of Law and Ethics*, Vol. 8, no. 1, Jul. 2025, pp. 195-206, doi:10.37284/eajle.8.1.3297.

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

INTRODUCTION

A witness in a civil suit is a person, whether natural or artificial, who testifies or gives evidence at the trial or in court to enable a court to reach a just determination of the case. It has been held that the term witness denotes someone who sees, hears, knows, or vouches for something. Jurisprudentially, a witness is someone who gives testimony (evidence) under oath or affirmation either orally in person, or vide a written deposition.[1]

Where a witness is not a party to the suit, his attendance in court may be secured either voluntarily or on compulsion through the instrumentality of a court order known as a subpoena. Subpoena has been defined as a formal document issued by the court commanding a person required by a party to a suit to attend before the court at a given date on his behalf.[2] The general purpose of a subpoena is to command the attendance of a person in court in order for him to give evidence.[3] Such evidence may be oral testimony or documentary evidence, or even real evidence. It may also be a combination of all of these pieces of evidence. There are basically two types of subpoenas, known as subpoena *ad testificandum* and subpoena *duces tecum*. There is also a hybrid type of subpoena, which is a combination of the two types mentioned above. The hybrid type of subpoena is known as subpoena *ad testificandum et duces tecum*.

Subpoena *ad testificandum* requires the witness to attend court and give oral testimony or *viva voce* evidence. Subpoena *duces tecum* requires a witness to attend court to produce a document or some other thing which will be tendered in evidence. The hybrid type of subpoena, which is subpoena *ad testificandum et duces tecum*, requires a witness to attend court to give oral testimony and produce documents or other items to be tendered in evidence. It is important to note that a subpoena is the method used to procure a witness in trials before superior courts of record. A subpoena is used like a witness summons on the application of the party requiring the attendance of the witness. Failure to obey a subpoena has the same effect as failure to comply with a summons.[4]

Securing the attendance of a witness in court through a subpoena *ad testificandum* is not sufficient to enable a witness to testify in court. The witness must also be competent and compellable to elicit material facts which can be admissible in evidence to enable the court to reach a just determination of the case.

It is a general principle of law that all persons shall be competent to testify.[5] And this includes a child. However, where the court considers that a person whose attendance in court has been secured either voluntarily or by a court order, is prevented from understanding the questions asked or from giving rational answers to the questions put to him as a result of tender years, extreme old age, disease of the mind or body, or for any other reason or cause of the same kind, such person would not be a competent witness to testify in court.[6]

Furthermore, a person of unsound mind; whether a child or an adult, is a competent witness, but where such person is prevented from understanding the questions put to him or prevented from giving rational answers as a result of his mental incapacitation or infirmity, such person would not be regarded by law to be a competent witness, even if his attendance in court has been successfully secured.[7]

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[1] *Umar v State* (2024) LPELR-62409 (SC) (Pp. 13-14 paras. G).
[2] Business Edge Consulting Ltd v Bauchi State Government & Ors (2019) LPELR-50339 (CA) (Pp. 21-22 paras. D).
[3] Ogunpolu & anor v Odugbefun (2015) LPELR-41710 (CA) (Pp. 4-5 para. D).
[4] Gambari & anor v Saraki & ors (2009) LPELR-4182 (CA) (Pp. 14 – 16, para. B).
[5] Evidence Act 2011, s 175(1).
[6] Ibid.
[7] Evidence Act 2011, s 175(2).

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

This study adopts a doctrinal legal research method, relying on statutory provisions, case law, and scholarly commentary to critically examine the legal framework surrounding the compellability of a child's attendance in civil proceedings through the issuance of a subpoena. The objective is to clarify the current position of the law in Nigeria, assess the adequacy of existing safeguards for child witnesses, and propose reforms where necessary to ensure that the use of subpoenas in such cases balances the interests of justice with the protection of the child's welfare.

Attendance of Witness at Trial

A witness may attend court either voluntarily or compulsorily through an order of court known as a subpoena. Where a subpoena is issued to a person to attend court, such person is bound to attend. Disobedience of a subpoena is an offence. It is contempt of court, punishable under the law.

Child Attendance

In an attempt to discuss the attendance of a child in a court proceeding in this context, it is pertinent to answer the inevitable question, i.e., who is a child? Efforts would be made to make a comparative definition of age from different climes for a broader perspective. The United Nations defines a child as a person under the age of 18 unless the relevant laws recognise an earlier age of majority.[8] The African Charter on the Rights and Welfare of the Child defines a child as a human being below the age of 18 years.[9] Although the African Charter on the Rights and Welfare of the Child refers to a child as a person below 18 years of age, there is no specific age for a child that cuts across countries in the African Continent. Different African countries define a child differently and have different age brackets when referring to a child. In Angola, for instance, although the word child is not defined in the Constitution, the Constitution states that the age of majority shall be 18 years.[10] This means that in Angola, any person below the age of 18 is regarded as a child. In Benin Republic and Botswana, Article 2 of the Child Code 2007 and Article 2 of the Children Act 2009 respectively, define a child as any person who is below the age of 18 years. While 18 years is the age of majority for the African countries mentioned above, and some other African countries such as Burkina Faso,[11] Cameroon,[12] Cape Verde,[13] Egypt,[14] Ghana,[15] Kenya,[16] Lesotho,[17] just to mention a few, some other countries such as Libya and Malawi have 16 years as the age of majority.[18]

In Burundi and Côte d'Ivoire, the age of majority is 21 years.[19] But in Sierra Leone, there is a dichotomy between a child and a young person. A child is a person under the age of 14 years,[20] while a young person means a person who is 14 years of age or upwards but under the age of 17 years.[21] In Nigeria, the Child Rights Act, 2003 defines a child as a person under the age of 18 years.[22] However, there is a slight dichotomy with respect to a child who has attained the age of 14 years and a child who has not attained the age of 14 years, in the Nigerian Law of Evidence, but this dichotomy relates to the giving of evidence. The Evidence Act in Nigeria provides that in any proceeding in which a child who has not attained the age of 14 years is tendered as a witness, such child shall not be sworn on oath but shall give evidence

[8] Convention on the Rights of the Child 1989, Article 1.
[9] African Charter on the Rights and Welfare of the Child 1990, Article 2.
[10] Constitution of Angola 2010, Article 24.
[11] Act on the Definition and Prosecution of Trafficking in Children 2003, Article 1.
[12] African Child Policy Forum (ACPF), Second Periodic Report on the Convention on the Rights of the Child: Cameroon 2008, <http://www.africanchildforum.org (December 2013)> accessed 9 February, 2025.
[13] Civil Code 1997, Article 133.
[14] Constitution of Egypt 2014, Article 80.
[15] Children's Act 1998, s 1.
[16] The Children Act 2001, Article 2.
[17] Children's Protection and Welfare Act 2011, s 2(a).
[18] Constitution of Malawi 1994, Article 23(5); Child Care Protection and Justice Act of Malawi 2010, s 2; Children's Protection Act of Libya 1997, Article 1.
[19] Majority Act of Cote d'Ivoire 1970, Article 1; Code on Persons and the Family of Burundi 1993, Article 1. Child Law Resources, Definition of the Child <https://clr.africanchildforum.org/Harmonisation%20of%20Africa/other-documents-harmonisation_i_en.pdf> accessed 9 February 2025.
[20] Children and Young Persons Act 1945, s 2.
[21] Ibid.
[22] Child's Rights Act 2003, s 277.

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

otherwise than on oath or affirmation, if in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of his evidence and if he understands the duty of speaking the truth.[23] On the other hand, a child who has attained the age of 14 years shall be subject to sections 175 and 208 of the Evidence Act, give sworn evidence in all cases.[24] If a child, whether or not they have attained the age of 14 years, willfully gives false evidence in such circumstances that would, if the evidence had been given on oath have been guilty of the offence of perjury under section 191 of the Criminal Code, such child shall on conviction be dealt with accordingly.[25]

It appears from the different definitions of a child that the age at which a child can attain before the child can be qualified to testify in court varies from one jurisdiction to jurisdiction. It is also dependent on whether the child possesses sufficient intelligence to justify the admissibility of his evidence and whether the child understands the duty of speaking the truth.

Sufficient-Intelligence Test

By the provision of section 175 of the Evidence Act 2011, a child in Nigeria is a competent witness. However, it is not sufficient for a child to attend court to testify. Such a child should possess sufficient intelligence. It is the duty of each court before which a child appears to give evidence to determine first of all whether the child is sufficiently intelligent to be able to understand questions put to him or to be able to answer the questions rationally. The court does this by asking the child certain preliminary questions that may have nothing to do with the matter before the court. If, as a result of this investigation, the court comes to the conclusion that the child is unable to understand questions or to answer them rationally, then the child cannot be a witness at all in the case.[26] But if the child passes the test, he is submitted to a further test for the determination of a further question, whether, in the opinion of the court, the child is able to understand the nature of an oath.[27] This question is also determined by the court putting questions to the child as to the nature of an oath.[28] If the child fails this second test, he will be able to give his evidence but will not be sworn, provided he has passed the first test and he understands the duty of speaking the truth.[29]

In English law, a sufficient-intelligence test is laid down by section 53(3) of the Youth Justice and Criminal Evidence Act 1999, which refers to criminal proceedings and not civil proceedings. It is apposite to replicate some of the provisions of that section, thus - "At every stage in criminal proceedings all persons are (whatever their age) competent to give evidence."[30] Furthermore, it provides that – "A person is not competent to give evidence in criminal proceedings if it appears to the court that he is not a person who can – (a) understand questions put to him as a witness, and (b) give answers to them which can be understood."[31]

In the United States, where a child witness has been called upon to testify in a case, the court must first determine whether the child is competent or qualified to testify. Usually, Judges decide this on a case-by-case basis. In both federal and state courts in the United States, all children are presumed competent to testify. However, the presumption is irrebuttable after the child must have met certain criteria to the satisfaction of the court. The criteria are that the child must be able to recall events accurately, must be able to communicate, must understand the difference

[23] Evidence Act 2011, s 209(1).
[24] Evidence Act 2011, s 209(2). Section 175 deals with competence of a witness to testify in court except the court considers that the witness is prevented from understanding the questions or giving rational answers due to tender years, extreme old age or infirmity of the mind or body. And section 208 deals with cases in which evidence not given on oath is received by the court.
[25] Evidence Act 2011, s 209(4).
[26] T. Akinola Aguda, *The Law of Evidence* (Spectrum Books Limited, 4th edn., 1999, Ibadan) 339.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Youth Justice and Criminal Evidence Act 1999, s 53(1) <https://www.legislation.gov.uk/ukpga/1999/23/section/53> accessed 26 May, 2025.
[31] Youth Justice and Criminal Evidence Act 1999, s 53(3) <https://www.legislation.gov.uk/ukpga/1999/23/section/53> accessed 26 May, 2025.

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

between truth and lies, and must understand the importance of testifying truthfully.[32]

These tests are based on the intellectual ability of the child and only exempt a child's testimony based on the conclusion made by the court on the child's intellectual ability. It has been opined that the presumption raised by the provisions of section 175 is that a child is competent to testify and the tests stipulated in that section are not, generally speaking, to determine the competence of a child but to determine the non-competence.[33]

"The tests, therefore, do not stand as preconditions for the receipt of a child's evidence but a prerequisite for the rejection of same, if competence is put in issue by the court."[34] Another aspect that has generated a challenge in the process of ascertaining a sufficient intelligence test is whether the questions put forward by the court ought to be recorded to form part of the record of the court or not. The court in the case of *Mutairu v State of Lagos*[35] held that 'it must be noted that Section 209(1) does not provide that a record of the questions and answers put by the trial Judge to the child or minor should be made. Therefore, the record of appeal need not transcribe the questions and answers elicited in preliminary enquiry by the trial Judge. These provisions simply require the Court to form an opinion if the child or minor is possessed of sufficient intelligence to justify the reception of her evidence and understands the duty of speaking the truth'. This position of the court was stated in the case of *Abdu v State*,[36] thus –

There is no rule or law which [*sic*] states or provides that the trial Judge must first of all put on record the questions put to the child or the opinion of the trial Judge in writing. Once a trial Judge is satisfied that the child possesses sufficient intelligence to justify the reception of his or her evidence and understands the duty of speaking the truth, he can proceed to take the evidence. And that is enough compliance with Section 209(1) of the Evidence Act 2011.

In the Indian case of *Nivrutti Pandurang Kokate & Ors v State of Maharashtra*,[37] the Indian Supreme Court, commenting on the sufficient-intelligence tests where a child is a witness, held that –

The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial judge who notices his manners, his apparent possession or lack of intelligence, and the said judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if, from what is preserved in the records, it is clear that his conclusion was erroneous.

In the Nigerian context, this poses a serious challenge in the judicial process because it would become quite difficult to ascertain whether the court indeed conducted a sufficient intelligence test or not. It is our opinion that such an important issue of evidence, such as a sufficient intelligence test, should not be relegated to the subjective opinion of the judge without recording it to form part of the record of the court. The questions administered by the court and answers extracted from the child or minor should be recorded to avoid doubt. This would also lend credence to the proceedings that the requirement of the law was indeed complied with, instead of leaving it to the judge to conduct just to form an opinion. The record of the court always outlives us, and the issue of whether it was administered or not can be the subject of appeal, which should not result in the word of the judge against that of the litigant.

[32] Robert B. George, DiOrioSereniLLP, 'Out of the Mouths of Babes: Can Children be Forced to Testify in Court?' <https://dioriosereni.com/out-of-the-mouths-of-babes-can-children-be-forced-to-testify-in-court/> accessed 22 May, 2025.

[33] Benson Ayodele Oloworaran, Uchechukwu Esther Oloworaran and Emmanuel Olufemi Olowononi, *A Guide to the Law and Practice of Evidence in Civil and Criminal Litigation in Nigeria* (Institute of Human Capacity Development and Continuing Education, 2019, Port Harcourt) 511.

[34] Ibid.

[35] (2021) LPELR-56754(CA) (Pp. 55-57 paras. D-D).

[36] (2021) LPELR-55097(CA) (Pp. 28-29 paras. G-C).

[37] AIR 2008 SC 1460.

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The practice in India is quite different from Nigeria, as the decision by a judge as to whether a child has the requisite intelligence to understand a reasonable question can be challenged by a higher court based on what is preserved in the records. This shows that the test administered by the trial judge should and ought to be recorded to enable any party that wishes to discredit such procedure to satisfactorily do so. We recommend this approach in order to avoid leaving the discretion to the whims and caprices of the judge.

In Zimbabwe, the courts usually apply the cautionary rule when dealing with a child witness. The Supreme Court of Zimbabwe set out the rule *per* Ebrahim JA, in the case of *S v Sibanda*[38], thus –

A rational decision as to the credibility of a witness (especially a child witness) can be arrived at only in the light of a proper analysis by means of [*sic*] testing it against likely shortcomings in such evidence…. To reach an intelligent conclusion in such an analysis [*sic*] it is necessary to apply… a certain amount of psychology and to be aware of recent advances in that discipline. This will undoubtedly mean an increase in the workload of judicial officers and the machinery of justice generally, but ways must be sought of accommodating this, as it is the price to be paid for professionally administering justice in an increasingly complex society.

This position of the Supreme Court was, following the doctrine of stare decisis, restated by the Harare High Court, *per* Hlatshwayo J, in the case of *S v Musasa*.[39] It is worth noting that what is obtainable in Zimbabwe is not just the sufficient-intelligence rule, but the cautionary rule that a court must carefully analyse the evidence of the child and satisfy itself that it can credibly believe a child without any dangers of false incrimination.[40]

In South Africa, the court has laid down certain general guidelines which assist it when warning itself of the dangers of relying on a single witness who is also a child witness in a criminal case. The guidelines include, amongst others, the need for the court not just to articulate the warning in the judgment but also the reasons regarding the circumstances of each case. Another guideline is that the court will examine the evidence in order to satisfy itself that the evidence given by the child witness is substantially satisfactory in all respects.[41]

Issuance of Subpoena to a Child

Generally, it appears that the attendance of a child in court to give evidence usually comes to the fore where the child has been the victim of abuse or neglect. Consequently, the attendance of the child in such circumstances would generally not require a court order. Although reference to subpoena of a child is rare in most of the books by authors cited in this article, it is doubtful to imply that a child cannot be subpoenaed. If a child is a competent witness, generally, except found by the court not to possess sufficient intellectual capacity or intelligence to understand the questions put to him, then it is the submission of this paper that a child can be subpoenaed. This is because a subpoena is issued to a person to give evidence in court; whether oral, documentary, or real. Such a person issued with a subpoena is compelled, by that subpoena, to attend court. It is in court that the sufficient intelligence test is conducted to determine, not the competence, but the incompetence of such a person – in this instance, a child. This means that a child is a competent witness. Put differently, a child is presumed to be competent to testify in a case in court, until found otherwise by the court. The court cannot determine the incompetence of a child until the child is in court.

The attendance of a child in court needs to be secured to give evidence before a sufficient intelligence test can be conducted. Consequently, a child who does not attend court voluntarily can

[38] S v Sibanda 1994 (1) ZLR 394.
[39] (HH 52 of 2002) [2002] ZWHHC 52 (8 April 2002).
[40] S v Madzomba 1999 (2) ZLR 214; S v Mushore (CA 245 of 2006) [2011] ZWHHC 188 (7 September 2011).
[41] S. Monyai (A 716/2015) [2018] ZAGPPHC 405 (17 May 2018).

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

be subpoenaed. In the United States, for instance, a subpoena can be issued to mandate any person to testify in court, and where the witness is a child, a subpoena can equally be issued as if the witness were an adult. The parent of the child is responsible for taking the child to court in compliance with the subpoena. Where a parent fails to bring a child to court after the child has been subpoenaed, the defaulting parent can be cited for contempt of court.[42]

It is trite that there are certain classes of persons who have legal disabilities concerning being parties to litigation or a court case.[43] Persons under legal disability include infants, persons of unsound mind, and lunatics.[44] Infants, in law, are not restricted to neonates and children only. In law, an infant is a person who has not attained the age of majority.[45] The age of majority differs from jurisdiction to jurisdiction, as pointed out earlier. Even in Africa, there is no uniform age of majority. While 16 years is the age of majority in some countries or jurisdictions, in others it is 18 years, and in some others, it is 21 years. Due to the legal disabilities of infants - and by extension, minors or children – infants institute actions by their guardian *ad litem* and defend actions by their guardian *ad litem*, who is usually their parents. All court processes in the suit or court case to which an infant or a minor is a party, are served on the guardian *ad litem* either personally or through their legal representative, and not on the minor. In the same vein, it can be asserted that in the circumstance of a witness who is a child, and securing his attendance in court through the instrumentality of a subpoena, such a child should not be personally served with the subpoena. This is because the child may not understand the full import of the subpoena, which is an Order of the court, and the implication for failure to obey such Order. Rather, a child can be issued with a subpoena through his parent or guardian *ad litem*.

This is particularly so for a child who has not attained the age of 14 years. The emphasis here is 14 years because, as stated earlier, there is a dichotomy in some jurisdictions, such as Sierra Leone and Nigeria, between a child and a young person. A child is a person under the age of 14 years,[46] while a young person is regarded as a person who is 14 years of age or above but under the age of 17 years.[47]

Where the child is an emancipated minor - such as a child who has or has not attained the age of 14 years but who is married; whether forcefully or otherwise, or a child below or above 14 years who is a street child - there should be a different approach depending on the condition of the emancipated minor. For the child who is married, usually a female, the subpoena should to be served on the husband, referred to as the guardian in this paper. But for a street child,[48] the approach is likely to be different depending on whether the street child is not homeless and has a guardian, or is homeless and without a guardian. For a street child who is not homeless, a subpoena should be served on the guardian. Where the guardian cannot be found, the subpoena can be served by substituted means by pasting it at the last known address of the child or giving it to any adult member in the home of the street child. But for a street child who is homeless, it would have been suggested that a subpoena should be issued and served on him since he lacks a guardian, but such a child, particularly if he is below the age of 14 years, may not know the import of the court process served on him. It is therefore suggested that no subpoena should be issued and served on

[42] Daniella Rousseau, 'Testimony from a Child', <https://sites.bu.edu/daniellarousseau/2022/08/11/testimony-from-a-child/> accessed 22 May 2025; Robert B. George, DiOrioSereniLLP, 'Out of the Mouths of Babes: Can Children be Forced to Testify in Court?' <https://dioriosereni.com/out-of-the-mouths-of-babes-can-children-be-forced-to-testify-in-court/> accessed 22 May, 2025.

[43] Fidelis Nwadialo, *Civil Litigation in Nigeria* (University of Lagos Press, 2nd edn., 2000, Lagos) 123.

[44] Ibid.

[45] D. I. Efevwerhan, *Principles of Civil Procedure in Nigeria* (Chenglo Ltd, 3rd edn (Revised), 2020, Enugu) 181.

[46] Children and Young Persons Act 1945, s 2.

[47] Ibid.

[48] Child's Rights Act 2003, s 277 defines a street child to include a child who is homeless and forced to live on the streets, in market places and under bridges; and a child who, though not homeless is on the streets engaged in begging for alms, child labour, prostitution, and other criminal activities which are detrimental to the well-being of the child.

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

a street child who is not only homeless and lacks a guardian, but who is also below the age of 14 years.

It is further suggested that a child should only be subpoenaed if he is to give direct evidence, whether oral or documentary. Direct evidence is evidence of a witness who saw or watched the act in question. This type of evidence, as opposed to circumstantial evidence, is evidence, if admitted, that proves a fact in issue without the court resorting to inference or presumption.[49]

Failure to comply with an issued subpoena is disobedience to a court order, and such a defaulter can be cited for contempt. The punishment for contempt is imprisonment and/or a fine. In Nigeria, where a child is issued a subpoena through his parent or guardian, and there is a default, it is submitted that the child should not be personally subjected to any criminal sanction. This is on the authority of Section 204[50], which provides that no child shall be subjected to the criminal justice process or criminal sanctions, but a child alleged to have committed an act which would constitute a criminal offence if he were an adult shall be subjected only to the child justice system. Thus, a child, particularly a homeless street child, who is in disobedience of a subpoena should be subjected only to the child justice system. The submission of this paper on this point is that the child should not be personally subjected to any criminal sanction.

Alternatively, such a child should be punished for contempt of court through his parent or guardian, except it is proved that there were prevailing circumstances that prevented the parent or guardian from bringing the child to court.[51] It is suggested that since the punishment for contempt is a committal order/imprisonment or fine, or both committal order/imprisonment and fine - which are criminal sanctions - the punishment that should be meted out for disobedience to a subpoena issued to a child through his parent or guardian should be a fine, and such fine should be paid by the parent or guardian as provided in the Child's Right Act.[52] On the other hand, a fine may not be the appropriate punishment for a street child who is either homeless or not. Rather, such a child should be remanded to a State Government accommodation[53] where rehabilitation of the child can be done, as applicable in a situation where a child has committed an offence and not released on bail. However, remanding a child in a State Government accommodation or institution is usually the last resort taken by the court, and is usually for grievous offences committed by a child. Contempt of court cannot be classified as a felony or a grievous offence to warrant remanding the child. The purpose for which a street child is remanded is for rehabilitative and developmental measures. The institution shall provide care, protection, education, and vocational skills for the street child to assist the child to assume socially constructive and productive roles in society.[54]

Imprisonment, which is one of the punishments for contempt of court, should not be meted out to any child. The law expressly provides that no child shall be ordered to be imprisoned.[55] It is suggested that imprisonment should also not be meted out to a child's parent or guardian for disobedience of a subpoena. Other than the above suggested punishments, which are payment of a fine through the parent or guardian, unless such parent or guardian cannot be found,[56] and remanding a street child to a State Government accommodation for rehabilitative purposes, there are different methods which a court can deal with a child offender. The law provides that where a child charged with an offence is tried by a court, and the court is satisfied that such child committed the offence, the court may dismiss the charge or discharge the child offender on his entering into a recognizance,[57] just to mention a few and the ones relevant to this discourse. Consequently, it would

[49] Sebastine Tar. Hon, *S.T. Hon's Law of Evidence* (Volume I, Pearl Publishers, 2012, Port Harcourt) 6.
[50] Child's Right Act 2003.
[51] Child's Rights Act 2003, s 220(1)(b).
[52] Child's Rights Act 2003, ss 220(1) and 223(1)(e)(i).
[53] Child's Rights Act 2003, s 218 (1).
[54] Child's Rights Act 2003, s 236(1).
[55] Child's Rights Act 2003, s 221(1)(a).
[56] Child's Rights Act 2003, s 220(1)(a).
[57] Child's Rights Act 2003, s 223(1)(a) and (b).

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

not be out of place if the court pardons and discharges a child who has disobeyed a subpoena.

Compellability of a Child

The word 'compellable' has to be construed in terms of people whose physical attendance in court may be legally enforced by the invocation of the court's coercive powers of subpoena or any other lawful means.[58] A compellable witness may lawfully be required to give evidence and, while separate from the question of competence, witnesses who are competent to testify are generally also compellable.[59] The compellability of a child will be considered in two different limbs. One of which is the compellability to secure attendance in court as a witness, and the compellability to testify in court. The first part has been dealt with above. The paper submits on this point that a subpoena should be issued to a child through his parent or guardian. In the case of emancipated minors, such as a female child who is married and a homeless street child who is above the age of 14 years, a subpoena should be served on the husband and the homeless street child, respectively. It is suggested above that no subpoena should be issued and served on a street child who is not only homeless and lacks a guardian, but who is also below the age of 14 years. Thus, it is submitted that a homeless street child below 14 years should not be compelled to attend court. It is so submitted because there is the possibility that the child may or may not pass the sufficient-intelligence test set for him by the court. If the child's testimony is required in court for the just determination of the case, the party requiring the child's attendance in court should add such child to the List of Witnesses of that party, and secure his attendance without a subpoena. To secure the presence of a witness in court to testify in a civil case or the presence of any person to produce books or documents, it is usual and sometimes essential to apply for the issuance of a subpoena on the witness or the person concerned when it is feared that such presence cannot otherwise be obtained.[60] This means a subpoena is usually issued for unwilling witnesses. It is doubtful whether a homeless street child below 14 years would resist being a party's witness to warrant the issuance of a subpoena, if the party does the needful to cater for one or two necessities of life of the homeless street child. In the case of a street child who is not homeless, a subpoena can be served on the child through the guardian. Where the guardian cannot be found, the subpoena can be served by substituted means by pasting it at the last known address where the child resides or giving it to any adult member in the home of the street child.

Compellability to testify is another factor that determines whether a witness, whose attendance has been secured, would testify in court. The law in Nigeria provides that a person is not bound to answer any question asked in court if the answer to such question would in the opinion of the court tend to expose such person or the wife or husband of such person, to any criminal charge or to any penalty or forfeiture which the Judge regards as reasonably likely to be preferred or sued for.[61] This suggests that in a civil trial, where a question is asked which answer may incriminate the witness or the spouse of the witness, such a witness is not bound to answer such a question. This may appear to have nothing to do with the attendance of a child in court, but with the bizarre and unlawful practice of child marriage in certain parts of the country, despite its prohibition,[62] compellability is a major consideration where the child whose attendance has been secured is married.

In law, a person is said to be competent to testify in a given case if he can lawfully testify in that case. In other words, such a person is said to be competent if the law recognises him as having the capacity to give admissible evidence as a witness.[63] A person may be competent to give

[58] Afe Babalola, *Law and Practice of Evidence in Nigeria* (Sibon Books Ltd, 2001, Ibadan) 400.
[59] <https://www.lexisnexis.co.uk> accessed May 5, 2025.
[60] T. Akinola Aguda, *The Law of Evidence* (Spectrum Books Limited, 4th edn., 1999, Ibadan) 379.
[61] Evidence Act, s 183.
[62] Child's Rights Act 2003, s 21.
[63] Sebastine Tar. Hon, *S.T. Hon's Law of Evidence* (Volume II, Pearl Publishers, 2012, Port Harcourt) 1255

Article DOI: https://doi.org/10.37284/eajle.8.1.3297

admissible evidence but may not be compellable to give such evidence. This means he has the discretion to testify in court. For a witness to be compellable, such a witness must first be competent to testify.[64] According to Hon, it will be acting in vain to compel a person who cannot legally testify to enter the witness box.[65] The question to be posed at this juncture is whether a child can be compelled to testify in court. Although every child is a competent witness unless the court is satisfied that the child is prevented from understanding the questions asked or prevented from giving rational answers due to tender years, this paper questions whether a child should be a compellable witness in a civil trial. When a child's presence has been secured in court, and a sufficient intelligence test has been conducted and ascertained by the court or the cautionary rule in some jurisdictions has been followed, then the issue of compellability may arise. Generally, under the Evidence Act in Nigeria, a child does not fall under the categories of persons who cannot be compelled by the court to give evidence. This means that a child is a compellable witness. In English law, child witnesses are treated in the same way as adult witnesses to determine competence. The age of the child is not the determining factor. Whether the child satisfies the sufficient-intelligent test is what is paramount.[66] Consequently, if competent, children generally, like other witnesses, are also compellable.[67] However, the sufficient-intelligence test, as stated earlier, is laid down by section 53(3) of the Youth Justice and Criminal Evidence Act 1999, and refers to criminal proceedings, not civil proceedings.

In the United States, Rule 45(a)(1)(A)[68] authorises a subpoena to command "each person to … attend and testify" at a particular time and place. There is no age carve-out or restriction. The Rule provides that every subpoena must command each 'person' to whom it is issued to, at a designated time and place, do one or more of the following: attend and testify; produce specified documents, electronically stored information, or tangible items in their possession, custody, or control; or allow the inspection of premises.[69] The word "each person" used in the aforementioned Rule encompasses every person capable of suing and being sued, irrespective of age. The Rule does not contemplate a restriction on children or minors.

Rule 45(d)(1)[70] also provides that a party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena, but there is no direct mention of a child's rights. However, the right of a child could come into play indirectly in several ways:

- If a subpoena is directed at a child (for testimony, documents, *et cetera*), the duty to prevent undue burden would require additional care because children are commonly seen as more vulnerable than adults.
- Courts recognise that children need special protection. Even if not spelt out in this particular rule (which mainly protects "a person" in general), considering the attitude of the law towards children, subpoenaing a child must be handled with heightened sensitivity.

Although the above Rule protects all persons, including children, if a child is subpoenaed, the issuing party must take even greater steps to avoid harm, stress, or undue burden. Emphasising the importance of Rule 45(d)(1),[71] the law provides in

[64] Ibid.
[65] Ibid.
[66] Peter Murphy, *Murphy on Evidence* (Oxford University Press, 11th edn., 2009, New York) 549.
[67] Peter Murphy, *Murphy on Evidence* (Oxford University Press, 11th edn., 2009, New York) 551.
[68] Federal Rules of Civil Procedure, 2024 <https://www.law.cornell.edu/rules/frcp > accessed 29 April 2025
[69] Ibid.
[70] Federal Rules of Civil Procedure, 2024 <https://www.law.cornell.edu/rules/frcp> accessed 29 April 2025
[71] Federal Rules of Civil Procedure, 2024 <https://www.law.cornell.edu/rules/frcp> accessed 29 April 2025

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Rule 45(d)(3)(d)[72] that a subpoena can be quashed or modified if it subjects a person to undue burden.

While it has been established that a child can be compelled to testify as a witness in any judicial proceeding, Article 24.011[73] reiterates the Nigerian position albeit expressly that if a witness is younger than 18 years, the court may issue a subpoena directing a person having custody, care, or control of the child to produce the child in court and if a person, without legal cause, fails to produce the child in court as directed by a subpoena issued under this article, the court may impose on the person penalties for contempt provided by this chapter. The court may also issue a writ of attachment for the person and the child, in the same manner as other writs of attachment are issued. The above provision leaves no conjecture as to the mode of securing the attendance of a child to testify in court.

CONCLUSION

In conclusion, attendance of witnesses is quite imperative for the just determination of matters, save for matters to be determined based on affidavit evidence. This is hinged on the fact that the witnesses are the plank that bridges the gap between justice and injustice in a judicial system. The court often relies on the testimony of the witnesses and documentary evidence, where necessary, before delivering judgment. The attendance of a witness in a trial is meant to be voluntary, but sometimes the witness deliberately refuses to attend. Where a witness chooses not to attend the trial voluntarily, he would be compelled through the instrumentality of the law.

The power to compel a child's attendance in civil trials through a subpoena is legally recognised under Nigerian law, which presumes all persons, including children, to be competent witnesses. However, this must be carefully weighed against the need to protect the child from potential emotional or psychological harm. As such, the process must be guided by the sufficient-intelligence test and reinforced by clear procedural safeguards to ensure the child's welfare is not compromised in the pursuit of justice.

This study demonstrates that, while the law does not prohibit the subpoena of a child, such power must be exercised judiciously. The role of the parent or guardian ad litem in receiving and responding to a subpoena on behalf of a child is critical, especially where the child is below the age of 14 or falls within vulnerable categories such as street children or emancipated minors. In such instances, a context-sensitive approach is required, one that avoids blanket compulsion and upholds the best interests of the child as the primary consideration.

Comparative legal systems, such as those in the United States, India, and South Africa, emphasise both the competence and the protection of the child witness through judicial discretion, evidentiary safeguards, and special accommodations. In particular, Rule 45 of the U.S. Federal Rules of Civil Procedure underscores the importance of avoiding undue burden when subpoenaing any person, a principle that takes on greater urgency where a child is involved. Nigerian law can benefit from these comparative insights, particularly in ensuring that court procedures are not only legally effective but also developmentally appropriate for child witnesses.

FINDINGS

There is a lack of uniformity in the age of a child: it was discovered in this research that there is no uniformity in the definition of a child. The age of maturity of a child in a particular jurisdiction does not mean that the same child in another jurisdiction would not be mature. This is likened to the puberty age of a child in one climate being the same as in another, without any form of dichotomy.

[72] Federal Rules of Civil Procedure, 2024 <https://www.law.cornell.edu/rules/frcp> accessed 29 April 2025

[73] Title 1 of the Code of Criminal Procedure Texas <https://statutes.capitol.texas.gov/Docs/CR/htm/CR.24.htm> accessed 29 April 2025.

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There is a lack of recording sufficient intelligence test questions. This is illustrated in decided cases that the statutory test to be administered on a child to ascertain the intelligence of the child must not be recorded by the court.

In the course of this research, it was discovered that a subpoena can be rightfully issued and served on a child, but through the child's parent or guardian. For emancipated minors, such as a female child who is married, whether forcefully or otherwise, a subpoena can be served on the husband, which this paper refers to as the guardian.

RECOMMENDATIONS

There is a need for uniformity in the age of a child that would be generally acceptable. Frantic efforts need to be exerted to ensure that the dichotomy is bridged in the interest of the entire society.

It is pertinent that the law be amended to the effect that the sufficient intelligence test questions administered by the court be recorded to form part of the record of the court. This would lend more credence to the record of the court. It would dispel likely doubts as to whether the court indeed complied with the requirement of the law and administered the test. Sufficient intelligence test questions should be recorded so that it would form part of the record.

It is recommended that a homeless street child under 14 years should not be compelled by subpoena to attend court.

Furthermore, a child should only be subpoenaed if he is to give direct evidence, whether oral or documentary.

A child's attendance in court can be secured by means of a subpoena, but the subpoena should be served on the child through the child's parent or guardian.

Another recommendation of this paper is that fines may not be the appropriate punishment for a street child who is homeless. Rather, the child should be remanded to a State Government accommodation or institution, as a last resort, where the child's rehabilitation can be undertaken.

