

DEOXYRIBONUCLEIC ACID (DNA) EVIDENCE UNDER NIGERIA LAW.

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Introduction

The need for the taking of Deoxyribonucleic Acid tests popularly known as “DNA tests” for good, bad or no reason at all has generated diverse reactions from the public in recent years. Although, the history and concept of DNA is an area of medical science which was first discovered in 1869 by Swiss researcher Friedrich Miescher, who was originally trying to study the composition of lymphoid cells (white blood cells). Instead, he isolated a new molecule he called nuclein (DNA with associated proteins) from a cell nucleus. While Miescher was the first to define DNA as a distinct molecule, several other researchers and scientists have contributed to our relative understanding of DNA as we know it today. And it wasn’t until the early 1940s that DNA’s role in genetic inheritance was even begun to be researched and understood.¹

DNA is self-replicating material that’s in every living organism. In simplest terms, it is a carrier of all genetic information. It contains the instructions needed for organisms to develop, grow, survive, and reproduce. It’s one long molecule that contains our genetic “code,” or recipe. This recipe is the starting point for our development, but DNA’s interaction with outside influences such as our lifestyle, environment, and nutrition ultimately form the human being.² The concept of the DNA evidence have now found its way into and now plays an integral part in the administration of criminal justice in some many jurisdictions in the world today, the aim of this paper is to examine the current framework for the taking and use of DNA tests under Nigerian law.

Brief History of DNA testing/evidence.

In 1984, Alec Jeffreys discovered the technique of genetic fingerprinting in a laboratory in the Department of Genetics at the University of Leicester.³ The introduction of DNA evidence and its use by law enforcement agencies was pioneered by Sir Alec Jeffreys, and it has been extremely successful for testing in crime scenes, paternity testing, and predisposition to disease. Dr. Alec Jeffreys made genetic fingerprinting available to the public. In 1986 was when DNA was first used in a criminal investigation by Dr. Jeffreys.⁴ The investigation used genetic fingerprinting in a case of two rapes and murders that had happened in 1983 and 1986. These crimes happened in a small town called Leicestershire, which is in the United Kingdom. They collected fingerprints and connected them with semen stains collected from where the raping and murders were located. Then in 1987, DNA evidence was first used in the United States on a Florida rapist man, Tommie Lee Andrews. After using DNA evidence in his case, he was then sentenced to 22 years in prison for the rapes that he had committed.

Dr. Jeffreys also made it available for people to perform identity tests. Since the 1980s, DNA testing has just become a popular way of finding out things through people’s DNA. However, the FBI did

¹[https://www.lunadna.com/blog/history-of-dna/#:~:text=DNA%20was%20discovered%20in%201869,proteins\)%20from%20a%20cell%20nucleus.](https://www.lunadna.com/blog/history-of-dna/#:~:text=DNA%20was%20discovered%20in%201869,proteins)%20from%20a%20cell%20nucleus.)

² Ibid.

³ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1200713/>

⁴ <https://easymdna.com.au/knowledgebase/history-testing/>

not start using DNA testing until 1998, but it can become very helpful to those who need to find out something in that area. Thousands of different cases have been cracked and many innocent people have been freed from jail or prison because of the use of DNA provided by family.⁵

The case of *United States v. Jakobetz*, 955 F.2d 786 [2d Cir. 1992] is worthy of note because it was the first case which recognized the use of the DNA evidence in the establishment of a crime in the United States. The facts of the case are as follows are that a Vermont woman was KIDNAPPED and raped in a semi-trailer truck, police identified Randolph Jakobetz, a truck driver, as a suspect in the crime. Officers searched the trailer that Jakobetz had hauled on the night of the crime and found hairs matching those of the victim. After arresting Jakobetz, law enforcement officials sent a sample of his blood to the FBI laboratory in Washington, D.C., for DNA analysis and for comparison with DNA taken from semen found in the victim shortly after the crime.⁶

At Jakobetz's trial, an FBI expert testified that the blood and semen samples were a "match," concluding that there was one chance in 300 million that the semen samples could have come from someone other than Jakobetz. Based on this and other strong evidence, Jakobetz was convicted and sentenced to almost 30 years in prison.

Jakobetz appealed the decision, claiming that DNA profiling was unreliable and that it should not be admitted as evidence. In the first major federal decision on DNA profiling, the U.S. Court of Appeals for the Second Circuit upheld the lower court's decision to admit the DNA evidence.

Although the first case resolved through DNA testing was an immigration case popularly known as the Ghana immigration case where there was a need to determine the maternity of a child who had referred to his mother as "aunty" at the Heathrow airport in the United Kingdom on his return from his visit to his father in Ghana, DNA testing for the purpose of determining the paternity of a child became available in 1988.⁷

Legal position on DNA testing in other jurisdictions.

Overtime various jurisdiction have enacted different laws with respect tpo the use propriety or otherwise of DNA tests for instance, in Australia Peace-of-mind parentage tests are widely available on the internet. For a parentage test (paternity or maternity) to be admissible for legal purposes, such as for changing a birth certificate, Family Law Court proceedings, visa/citizenship applications or child support claims, the process must comply with the Family Law Regulations 1984 (Cth).⁸ Further, the laboratory processing the samples must be accredited by the National Association of Testing Authorities (NATA).⁹

In the United Kingdom there were no restrictions on paternity tests until the Human Tissue Act 2004 came into force in September 2006.¹⁰ Section 45 states that it is an offence to possess without

⁵ ibid

⁶ History and Process of DNA Analysis - <https://law.jrank.org/pages/6227/DNA-Evidence-History-Process-DNA-Analysis.html#:~:text=DNA%20analysis%20was%20first%20proposed,Jeffreys.&text=If%20a%20match%20occurs%20C%20a,DNA%20profile%20as%20the%20suspect's>.

⁷ <https://geneticsunzipped.com/news/2020/3/26/family-fingerprints>

⁸ <https://www.identilab.com.au/blogs/education/requirements-of-a-legal-paternity-test>

⁹ <https://www.nata.com.au/accredited-facility>

¹⁰ https://en.wikipedia.org/wiki/DNA_paternity_testing#cite_note-12

appropriate consent any human bodily material with the intent of analysing its DNA. Legally declared fathers have access to paternity-testing services under the new regulations, provided the putative parental DNA being tested is their own. Tests are sometimes ordered by courts when proof of paternity is required. In the UK, the Ministry of Justice accredits bodies that can conduct this testing. The Department of Health produced a voluntary code of practice on genetic paternity testing in 2001. This document is currently under review, and responsibility for it has been transferred to the Human Tissue Authority.¹¹ In the 2018 case of *Anderson V Spencer*¹² the Court of Appeal permitted for the very first time DNA samples taken from a Deceased person to be used for paternity testing.

In Germany, under the Gene Diagnostics Act of 2009, secret paternity testing is illegal. Any paternity testing must be conducted by a licensed physician or by an expert with a university degree in science and special education in parentage testing, and the laboratory carrying out genetic testing must be accredited according to ISO/IEC 17025.¹³ Full informed consent of both parents is required, and prenatal paternity testing is prohibited, with the exception of sexual abuse and rape cases. Any genetic testing done without the other parent's consent is punishable with a €5,000 fine.¹⁴

In the United States, paternity testing is fully legal, and fathers may test their children without the consent or knowledge of the mother. Paternity testing take-home kits are readily available for purchase, though their results are not admissible in court and are for personal knowledge only.¹⁵

Only a court-ordered paternity test may be used as evidence in court proceedings. If parental testing is being submitted for legal purposes, including immigration, testing must be ordered through a lab that has AABB accreditation for relationship DNA testing.¹⁶

The Nigerian Law Position

The basis upon which DNA evidence can be relied on by the courts in Nigeria is contained in the provisions of the Evidence Act 2011 (“the act”). In the act, opinions of witnesses are inadmissible as far as Section 67 of the Evidence Act 2011 is concerned, however there are exceptions provided for under sections 68-76 of the Evidence Act especially under Section 68 which states thus;

“when the court has to form an opinion upon a point of foreign law, customary law, or custom, or of science or art or as to identity of hand writing or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law, or custom or science or art or in questions as to identity of hand writing or finger impressions are admissible.”

“Persons specially skilled as mentioned in subsection (1) of the section are called experts.”

By the above cited provision, it is incumbent on Nigerian courts in the determination of the right of the parties before it, to consider relevant opinions of persons who are specially skilled to give defence

¹¹ Ibid page 3

¹² [2016] EWHC 851 (Fam)

¹³ ISO/IEC 17025 General requirements for the competence of testing and calibration laboratories is the main ISO standard used by testing and calibration laboratories. In most countries, ISO/IEC 17025 is the standard for which most labs must hold accreditation in order to be deemed technically competent.

¹⁴ https://www.bionews.org.uk/page_91083

¹⁵ Ibid page 3

¹⁶ AABB is an association founded in the United States in 1947 as the American Association of Blood Banks

in their respective field of discipline. The courts have recognized this duty and have taken the liberty to define who an expert is for the purpose of evidence in a plethora of cases. See; **Shell Petroleum Development Co (Nig) Ltd v Tiebo (1996) 4 NWLR (part 445) page 657** and **Aigbadion v. State (1999) 1 NWLR (Pt. 586) 284 CA**.

The courts have also recognized the use of DNA tests as one of the means to determine the paternity of child when the question arises for determination. In the case of **Olayinka v. Adeparusi & Anor (2011) LPELR-8691(CA)** the Court of Appeal held that:

“To my mind the paternity of the disputed res has not been determined, anybody can be awarded custody of a child but the most important thing is that if a party is claiming paternity it is trite that a court of Law should be allowed to determine same on proof of evidence relating to paternity, which could only be done by referral for a DNA test of the parties involved. After such test the court has a duty to declare the actual father of the child in dispute, in consonance with the evidence at its disposal.”

See also **Ibeabuchi v. Ibeabuchi (2016) LPELR-41268(CA)** where the Court of Appeal noted that by the combined effect section 165 of the Evidence Act and section 84 Matrimonial Causes Act a legal presumption is also created in respect of the legitimacy of a child. This position was recently confirmed by the Supreme Court in **Idahosa v. Idahosa (2020) 6 NWLR (Pt. 1720) 254 S.C** where the apex court held inter alia that: -

“Any person born during the continuance of a valid marriage shall be presumed to be a child of that man. The burden of proving otherwise rests with the party alleging the contrary. Under the Nigerian law, evidence to dislodge paternity requires proof beyond reasonable doubt. Under section 165 of the Evidence Act, any person born during the continuance of a valid marriage between his mother and any man, or within 280 days after the dissolution of the marriage, the mother remaining unmarried, shall be presumed to be a child of the man.”

In addition to the above, Section 63 of the Child Rights Act governs the taking and use of DNA tests in Nigeria by providing that in a civil proceeding where the paternity/maternity of a person is to be determined by the courts, either of the parties to the suit can apply for the administration of scientific tests including blood tests and Deoxyribonucleic Acid (DNA) tests to ascertain the parentage of such person.

The courts also reserve the rights to revoke or vary their order for same where an application is made for it. Where the person whose parentage is being contested is under 18, the application shall specify who is to carry out the test.

After carrying out the test, a report made in conformity with section 65 of the Act shall be given to the courts with the following details;

1. Test results
2. Indication of who the parents are
3. The value of the results in determining true parentage

This report is received by the court as evidence in respect of the matter where the order was given. Parties to the proceedings can upon seeking the leave of the courts may obtain from the report-maker, a written statement explaining the report. That statement shall form part of the reports to the court. Leave of court must also be sought before a party to the suit can call these persons as witnesses;

1. The person who carried out the tests
2. Persons who did things incidental to carrying out the test. With the exception that the said party can serve a notice on the other parties 14 days after a copy of the report is received of his intention to call these persons.

The party who makes the application for the test is responsible for costs of taking and testing blood samples plus other reasonable expenses incurred

Consent

Consent of a everyone be sought before scientific samples are taken from them. Where a child is 16 years, his consent is equal to that of an 18-year-old and consent of his ward, parents or guardian shall not be needed for the purpose of the test.

But where the child is under 16 years, consent of persons charged with his care must be obtained.

1. A child suffering from mental disorder within law in Nigeria
2. Is incapable of understanding the nature and purpose of the tests.

Where a child is under the following conditions, the consent of the persons in care of the child and the opinion of the medical practitioner caring for the child must be obtained to the effect that the test shall not be prejudicial to the child's wellbeing.

The minister may by regulations make provisions on the directions to be taken for orders given under section 63 of the Act.

Conclusion

Having examined the various statutes, case laws and the positions in other jurisdictions, are there any restrictions to the rights of an individual to carry out DNA test for personal use in Nigeria? The extant body of Nigerian law on the subject would appear to be silent on this point. However, appears that parties do not need to obtain a court order before conducting a DNA test in so far as the intention behind such test is for private use and not for the court to admit as evidence in a matter before it. Although, it is further noted that the Child Rights Act does not specify that only court ordered DNA tests are admissible in court as evidence.

Suffices to say that are no requirements for court orders to be presented at the point of testing. Thus, genetic testing may be done with only one person (either the father or the mother) of the child provided the child is still a minor which dispenses with need for the child's consent to such testing. However, where that child is more than 18 years old or the person seeking to do the DNA test is not in care of the child, there is requirement of consent.