WITNESS PREPARATION.

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Introductory Remarks.

1.1 Colleagues in the legal profession, I am exceedingly honoured to have been given this opportunity to share knowledge, experience and lessons in the field of civil litigation especially on the aspect of witness preparation.

1.2 For any advocate involved in litigation, however experienced he/she may be, and I say this with respect, it is common knowledge that such advocate will always remain a student of the law and practice, given the proliferation of new legal and practical challenges, which continuously emerge.

1.3 Every legal practitioner will always want to perfect the art of litigation so as to register success in any matter being handled by them whether for the Plaintiff/ applicant or for the Defendant/ Respondent.

1.4 However, there are no fast and hard rules on how to prepare for an excellent litigation or for a witness. Normally, each case merits distinctive level of preparation. There are ofcourse varying considerations that may impact on the level of preparation for any excellent litigation.

1.5 Nevertheless, an excellent litigation in my humble view does not necessarily mean that counsel or the litigant represented must win the case, for, success in a matter may be dictated by other material considerations other than excellent preparation of witnesses by counsel. What is pertinent though, is that credible evidence impacts positively on the ultimate decision of the court whether at trial or on appeal.

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2.0 Preparation of Witnesses

2.1 In civi litigation, the decision of the court often times is premised on or guided by the strength, weight and credibiity of the evidence on record.This takes into account the burden and standard of proof.

2.2 Even in matters that proceed ex parte, the burden still lies on the plaintiff to prove their case. It is not uncommon for plaintiffs to have a suit dismissed even where the matter has proceeded ex parte; reason, insufficiency of evidence mainly emanating for ill or inadequate prepration of the witnesses.

2.3 Even when considering appeals, the success or otherwise of an appeal may depend on the question of creditibility of evidence that was adduced before the trial court. Preparation of a witness is thus vital not only during the trial but may play a vital role on appeal, especially the first appeallate court, given its duty to re-appraise the entire evidence on record to a fresh and exhaustive scrutiny.

2.4 It therefore becomes very pertinent for any litigation advocate to place much emphasis on the nature of evidence & witnesses required in order to support the plaintiff or defence case.

3.0 Considerations;

Hereunder are some of the pertinent considerations in the preparation of witnesses.

3.1 First interview before preparation of pleadings;

i) The first interview with the party whether as plaintiff or defendant is very critical. Any attempt to prepare and file pleadings without an extensive interview with the client and potential witness may subsequently generate un desirable and adverse consequences. Witness preperation should therefore start from the first interview.

ii) It is important that where possible, and where circumstances permit, the interview is conducted by two advocates, one being the devil's advocate; one who will ask the party/ witness questions that prompt further information from the party.

iii) It is not uncommon for clients to withhold information unless intensively probed. A case strategy may be appreciated by counsel and the witness during this interview. The questions by the deveils advocate may also provide an insight of the credibility of the information being provided which ultimately becomes the cornerstone of the evidence to be adduced.

iv) The interview helps counsel to identify possible witnesses in the matter, whether as experts or otherwise and areas of relevancy to their intended testimonies.

v) The rationale lies in the rule in Order 6 Rule 7 CPR that parties are bound by the pleadings and can not be allowed to adduce evidence inconsistent with the pleadings.

vi) It is pertinent that the party/potential witness and counsel are in tandem as to the nature of the claim and the witnesses that will be relevant, as well as the strategy for their case.

vii) The interview helps counsel to know the party/ witness well in advance; is it the first time for the party to sue of be sued, have they ever been to court, have they tested the court enviroment before, what are their expectations, the temparament of the Party/witness, the demeanor generally, responsiveness, intelligence, confindence etc.

viii) Identification of other witnesses; the interview & review of the documents with the party helps both counsel and the witness to understand the nature of documents available & to be relied on, any other documents, the availability of such documents, do they need to be certified, translated, registered etc; who will be competent to testify & tender them in evidence, does the party and or the witness understand the documents, are their areas of clarification in the documents, e.t.c

3.2 **Common challenges arising out of failure to have a concrete First interview;**

- Witnesses who deny their own documents
- Withnesses who do not know the contents of their documents
- Witnesses who realise they never executed the documents.
- Witnesses who will approbate and reprobate the same documents.

- Witnesses who will look at the lawyer because they can't find answers to questions put to them based on documents and pleadings.

3.3 Preparation of pleadings and Witness Participation.

i) Pleadings guide the trend of evidence to be adduced; it is pertinent for party/witness to read and understand the pleadings to avoid giving evidence which is inconsistent with the pleadings; (*See the Rule of parties being bound by the pleadings.*
   - Questions may turn on pleadings
   - Witnesses/plaintiff may not know the cause of action
   - Witness may not know what they are seeking from court
   - Witnesses may testify on claims which are outside the pleadings
   - Witnesses do not know what relief they want from court
   - Witnesses turn to counsel who drafted the pleadings when questioned on pleadings for possible answers.

Examples.

- *Fang Min & Crane Bank versus Belex Tours and Travel Limited (SC)*
- *Tropical Africa Bank Ltd versus Grace Were Muhwana (SC)*
- *DFCU Bank Limited versus Dona Kamuli (CA)*

ii) Preparation of pleadings should involve the relevant witnesses and the main party.

iii) Other witnesses must also know about pleadings so that they tender the evidence to court particulary;
- issues that arise from the pleadings
- witnesses who do not know parties in court
- dont know the subject matter before court
- dont know the gist of the dispute before court

3.3 <u>Scheduling Conference and Participation of Witnesses</u>

i) A crucial aspect of procedure; delimits issues for determination by court; admitted facts and documents.

ii) Participation of parties is very crucial, eliminates undesiarable evidence on record, time wasting on admitted documents (trial bundles)

iii) The doucments in trial bundles are normally referred to in the witness statement. Witness must be taken through the trial bundles so that their testimont aligns with the documents.

iv) Some trial bundles may contain more documents than those referred to in the witness statement.

v) Witness who is stuck will either refer to counsel or look at counsel for help.

3.4 The Trial

The choice of mode of adducing evidence is very pertinent, be it oral evidence, or evidence by witness statements;

i) Oral evidence.

- An interview between Counsel and the witness is very crucial.
- Witness must be taken through the pleadings again and the documents to be relied upon–witness must know what issues are in dispute so that the evidence touches such issues as opposed to a general story.
- No need for a mini treat but atleast witness should be advised on relevance of demeanor, confidence, listening carefully, understanding the questions put to them before response, being truthful, answer only the questions asked not guessing answers, being consistent and avoiding loss of temper.
- Witness must know they are testifying not giving a press conference, watch the judge not the lawyer –follow the pace of the court –not rapping anyhow.
- Counsel and the witness must be in tandem as for the flow of evidence – witness should be advised of exam in chief, cross examination & re-examinaton.

ii) Witness Statement

- Rationalised on account of speedy trial but quite problematic – evidence from the bar than from the witnesses.

- Witness should first of all reduce the evidence/chronology of events by themselves.

- Counsel then prepares a witness statement in the proper format – witness statement is different from an affidavit; witness as if they are in the witness box.

- Witness statements should be shared in draft with the witnesses before it is finally signed off and filed; witness must appreciate the content & flow; witness must understand the language used; witness must know the "geography" of the witness statements;

- Where content is not understandable – witness will raise it – evidence does not require use of serious terminologies – simple and straight foward. Witness may fail to understand words used in the statement.

- Witness must read witness statements with the pleadings and documents refered to in the trial bundle so that the content is understood well.

iii) The challenges include;

- Witness statements which are not in tandem with pleadings
- Witness statements referring to documents not in the bundle
- Witness can not explain documents referred to
- Witness turns to counsel for help
- Witness almost denying their own statements
- Witness conceding that parts of the witness statement are not correct.

3.5 Joint Interview of Witnesses

All witnesses should attend atleast one joint interview session, so they all appreciate the gist of the case, and the particular areas when their testimony shall be desirable to avoid inconsistences and rendering earlier witnesses liars.

3.6 Cross Examination.

i) Witness must be advised on cross examination; essence & manner of response; confidence building.

ii) No coaching of witness on exact questions to asked and answers.

iii) Sufficient to identify grey areas where explanations may be needed - areas that relate to issues.

iv) Witness should have read & understood the adversary party's case – area of cross-examination; helps witness to appreciate the case for the adversary.

4.0 Areas of Concern in the Preparation of Witnesses

- Writing specific questions and answers for witnesses
- Advising a witness to cram their evidence
- Assuming that witnesses know everything
- Not taking witness through the pleadings
- Not taking witness through the documents
- Not pointing out possible challenges / areas of clarity in documents or claims
- Making a trial look like a do or die matter where witnesses become too aggressive
- Risking a witness who is not ready to testify.

5.0 Conclusion.

As earlier noted, there are no hard and fast rules that can be adopted. Each case may merit a varying approach depending on the nature of the claim or the witnesses involved but some of the aforementioned arears form the core of what would guide counsel in effective prepration of the witnesses.

Thank you