



eGovernance Conference

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***“Information and Communication
Technologies for Governance in
Nigeria: Achievements, Challenges
and Opportunities”***

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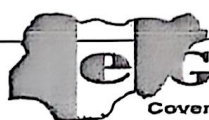


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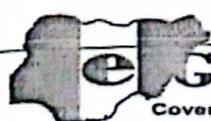
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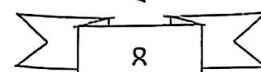
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ADMISSIBILITY OF ELECTRONIC EVIDENCE UNDER NIGERIA'S EVIDENCE ACT: A MILESTONE OR STUMBLING BLOCK TO EFFECTIVE ADMINISTRATION OF JUSTICE?

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Abstract

It is both commonsensical and statutorily codified that a person who makes an assertion or allegation of a fact must prove same. In proving such assertion, therefore, that person is duty bound to produce evidence to substantiate his claims. The same applies to matters before the court, hence the enactment of the Evidence Act to determine and regulate how evidence should be produced and what types of evidence will be admitted by the court. The evidence can either be viva voce (oral) or documentary. By section 258 (a)-(d) of the extant Evidence Act, document includes books, photographs, any disc, tape, sound track, or any device by means of which information is recorded, stored or retrievable including computer output, among others. It is worthy of note that the old Evidence Act which was repealed just as recent as 2011 had been in use for about 65 years, having been enacted and in force since 1945. In fact, as at the time of its repeal, some of its provisions had become otiose and inadequate. One of such instances is the absence of a provision that recognizes computer-generated document or evidence. Fortunately, the amended Act in 2011 brought about the improvement by introducing a new section 84 which provision now recognizes the need for admissibility of statements in documents produced by computers, otherwise known as electronic evidence. This paper shall consider the practicability of the new provision(s), as well as its inherent challenges, in the light of modern realities in the Nigerian courts.

Keywords: Document, Electronic Evidence, Admissibility, Court

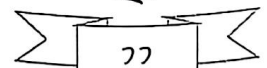
1.0 INTRODUCTION

Reducing delay, improving the economy, efficiency and effectiveness and the general objective of promoting confidence in justice system through the use of new technologies are laudable aims and are unlikely to generate much dissension. However, given the nature and importance of the judiciary as the third pillar of the State authority, and compared to other public services, due



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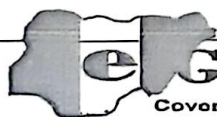
process, impartiality and independence should also be carefully taken into account. This is especially so when structural and procedural changes, such as the one driven by the introduction of the new technologies, take place (Loveday, 2000, p. 23).

Almost every aspect of business is contingent on electronic communications and transactions are settled, recorded and reported on complex computer technology platforms. The use of computers and other forms of electronic storage and communication systems has risen sharply in commercial and financial transactions in Nigeria (Ajomale, 1990). Modern business has moved from paper and book keeping into an electronically recorded system which is capable of taking in a lot of information without taking much space and time. Electronic evidence is very important in commercial transactions especially in the banking sector. All the banking operations in Nigeria are now fully computerized and the use of Automated Teller Machine (ATM) is common place (Amupitan, 2013, p. 69).

The advent of computer, for instance, brought with it new forms of record keeping in software-microfilms, microchips, diskettes, flash discs etc. that are not by any means within the former understanding of the word "document" which was a written matter on a surface. The simplistic division of documents into originals and copies has also been made unrealistic with respect to several materials used in information, transmission and storage. For instance, when information recorded or stored in the memory of a computer is printed out on paper, it is not easy to say that the version in the memory is a document. Nor is it easy to assert that the print out is an original or a copy (Chukwuemerie, 2006, p. 178).

Not until recently, Nigeria's Evidence Act did not recognize any computer generated document as either primary or secondary evidence in court, the position which was contrary to the practice in many countries, such as United States, South Africa and others which have recognized the indispensability and ubiquity of computer technology and made computer generated documents admissible under their rules of evidence (Ali, 2010, p.67). For example in South Africa, the computer Evidence Act of 1983 was passed to allow e-evidence in civil cases only, but same was found to be ineffective, and this paved way for Electronic Communications Act 2002 to cover e-evidence in both civil and criminal cases (Watney, 2009, p.3).

Sequel to this, "the inestimable benefits of the various advancements in information and communication technology (hereinafter referred to as "ICT") have until the enactment of the new Evidence Act in 2011 remained a matter of much debate and judicial uncertainty. Tendering of electronic mails ("e-mails"), for example, are usually as contentious as the litigation itself, with opposing party usually relying on the hearsay rule, among other forms of objections under the old Evidence Act 1945, to prevent the admission of such electronically generated evidence. The reason is not far-fetched. In the 1945 Evidence Act which is now repealed, technologically generated evidence was argued to offend some of the following general rules of evidence, namely, the issue of the custody and the reliability of the evidence tendered, if it is not the original document; the best evidence rule which requires that a party must produce the original



document during a trial or where the original document is not available, secondary evidence of it in the form of a copy, with other corroborating notes, etc, must be produced; the rule against the admission of hearsay evidence which forbids witnesses giving evidence on facts that they do not directly or personally witness or know about, etc. (Oserogho & Associates, 2012, accessed on 24-11-2015).

Essentially, this paper seeks to examine the general nature of the Nigerian law of evidence with particular interest on the admissibility of electronic evidence, as newly provided for in the new evidence Act, the issues therein, challenges and options.

2.0. DEFINITION AND IMPORTANCE OF EVIDENCE

2.1. Definition

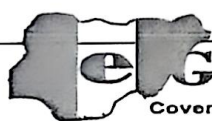
Evidence is the means by which the facts are proved, but excluding inferences and arguments. It is a common knowledge that a fact can be proved by oral testimony of persons who perceived the fact, or by the production of documents, or by the inspection of things or places. All these come within the meaning of judicial evidence. From a very broad view it is sometimes permissible to include in this list such other means of proving a fact like admissions and confessions, judicial notice, presumptions and estoppels (Aguda, 1999, p.3).

The law of evidence encompasses rather broader functions. It includes rules regulating the means by which facts may be proved to the satisfaction of the court; it allocates burdens of proof between the parties, and it prescribes the standard of proof which a court must require before it can make a finding on a given issue. The law of evidence also prescribes the relative functions of judge and jury in respect of the receipt and evaluation of evidence (Hirst, 2001, p. 1). Evidence is something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact. It is also the body of law regulating the admissibility of what is offered as proof into the record of a legal proceeding (Black's Law Dictionary, p. 635).

In *Kolo v Lawan* (2011) *ALL FWLR* (Pt. 597) 725, the Court of Appeal defined evidence as any type of proof or probative matter legally presented at the trial of an issue, by the act of the parties, and through the medium of witnesses, records, documents, exhibits, concrete objects etc., for the purpose of inducing belief in the mind of the court or jury as to their contentions.

2.2. Importance/Relevance of Law of Evidence

In any judicial proceeding, the importance of evidence cannot be over emphasized. According to a learned author, it is altruistic to state that proof by evidence forms the fulcrum of all judicial proceedings, especially where issues of fact are raised or relied upon. The reality is that Judges, Jurors or Judicial Officers before whom those matters come up for adjudication are not super-humans, neither are they magicians who could just look at the faces of litigants and pronounce their judgments; rather they (Judges, Jurors or Judicial officers) merely act on facts as are



presented to them or are adduced in evidence before them by the disputants (Hon, 2012, p. 3). This undisputable position has been given judicial flavor in the case of *Neka B.B.B. Manufacturing Co. Ltd V A.C.B. Limited* (2004) All FWLR (Pt. 198) 1175 @ 1191 when His Lordship, Pats Acholonu, J.S.C. (as he then was) held among others that “neither the pleadings nor the most forensic eloquence of any brilliant lawyer can be a substitute for evidence... Evidence whether oral or documentary consists of facts, and facts are the fountainhead of law.”

Flowing from the above, it suffice to say that evidence is the bedrock of any proceeding in court, as same determines and dictates the pendulum upon which the hand of justice swings. This is because, in law, cases are determined on the basis of the evidence led and each case must, therefore, be determined in accordance with its peculiar facts as disclosed in the evidence put forward by the parties (See *Ukaegbu v Nwololo* (2009) All FWLR (Pt. 466) 1852 S.C.).

3.0.HISTORY AND SOURCES OF THE NIGERIAN LAW OF EVIDENCE

3.1. History of the Nigerian Law of Evidence

Before elucidating the current basis of the law of evidence in Nigeria, it is imperative to take a look at the position prior to independence. Before the establishment of the British courts, the courts in Nigeria were mainly customary courts (Aguda, 1999, p. 3-4), and as such, the rules of evidence in the customary courts were the applicable customary rules. To a large extent, those rules are still applicable in those courts today, depending on the area or region in question, but that is not the focus of this paper. Of utmost importance to this piece of work is the rules of evidence applicable in the courts established by the British government as subsequently developed, namely, the Magistrate courts, the High Courts, the Court of Appeal and the Supreme Court.

Up to the year 1945, the Nigerian law of evidence in the courts just mentioned was the English common law of evidence including rules of evidence contained in applicable English statutes, as there was no local legislation dealing with the matter. On June 1, 1945, the Evidence Ordinance was brought into operation and has, until the present day, remained almost the same in substance and in form, although it has been amended from time to time.

While the Evidence Act made by the British colonial government in 1945 continued in operation as the only source of the Law of Evidence in the country, it was later enacted into law in 1990, then re-packaged as Cap. E14, LFN 2004. An Evidence Bill prepared, even belatedly, in 1998 has failed to be enacted into law by the successive governments that have ruled the country ever since; developments in such areas as information technology have gone way beyond what that statute could have envisaged at its enactment (Chukwuemerie, 2006, p.178). As rightly observed by a learned author, “save



for law making in the political sphere where the politicians (who populate the legislative and executive arms of government) dutifully watch over their interests and, lately, in areas of economic reform such as the concerted legal war against corruption, statutory law in Nigeria has hardly kept pace with social realities. This is despite the fact that between such realities and the law there should ordinarily be a mutual beneficial interpretation. This has ensured that in some important areas of life and business statutory law has remained in yesterday while the society marched on in dynamism. (Chukwuemerie, 2006, p.177).

Sequel to the above assertion, the Evidence Act enacted into law in 1945 became otiose and inadequate, in that, same could not be relied upon in proving cases in this contemporary era due to its several anachronistic provisions, particularly, its non-recognition of modern documentary evidence like computer generated print outs, electronic digital messages etc., hence, its repeal and the emergence of Evidence Act, 2011 (See Section 84 of the Evidence Act, 2011).

The question now is, how effective and relevant is the new Evidence Act, especially the provision dealing with electronic evidence vis-à-vis the modern trend in technology? Secondly, how relevant and sufficient is this provision for quick dispensation of justice in dealing with issues arising therefrom by the Nigerian Courts? Attempt to answer this poser will be grossly inadequate without first taking recourse to the sources and classification of evidence under the Nigeria's Evidence Act.

3.2 Sources of Nigerian Law of Evidence

It is a common practice in law to consider the root whence any law derives. The case with the Nigerian law of evidence is not an exception. It has been argued that the Nigerian law of evidence traces its root to the following sources, namely, the Nigerian Constitution; the Nigerian Evidence Act; rules of court; Criminal Procedure Code and Criminal Procedure Act; and Common law. Each is being aptly explained hereunder as follows:

- i. **The Nigerian Constitution:** The National Assembly is by Section 4 (2) & (3) of the 1999 Constitution of the Federal Republic of Nigeria empowered to make laws for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List set out in Part 1 of the second schedule to the Constitution. Also, item 23 in the Second Schedule to the Nigerian Constitution provides for evidence as one of the items within the Exclusive Legislative List.
- ii. **The Evidence Act:** This, without doubt, constitutes the main source of the Nigerian law of evidence. The Act covers a wide range of matter like relevance and admissibility of a piece of evidence, presumptions recognized by law, admissions, confessions,



corroboration, privilege, judicial notice, estoppels, affidavit evidence, hearsay evidence, similar fact evidence, character evidence, opinion evidence, burden of proof, documentary evidence, competence and compellability of a witness etc.

However, despite the provisions of the bulk of the rules of evidence applicable in Nigerian courts in the Act, it does not pretend to be an exhaustive legislation, as it evidently does not cover the whole field of the law of evidence. The Act frankly admits limitation and in-exhaustiveness in Section 5A which states that "nothing in this Act shall prejudice the admissibility of any evidence which would apart from the provision of this Act be admissible". This, in essence, makes room for admission of evidence under any other statutory enactment, both under the current laws applicable in Nigeria and those that existed prior to the existence of the Act.

iii. **Rules of Court:** The rules are made by the heads of the various courts as empowered by the Constitution. Every court has rules that govern the procedure to be adopted in taking any steps in courts. For instance, the new civil procedure rules of courts of most states provide for the frontloading of documents that will be relied on in a trial alongside the statement of claim and defence (See Order 13 rule 1 (1 & 2) Federal High Court Civil Procedure Rules 2004; Order 27 Rule 1 & 2 Kwara State High Court Civil Procedure Rules 2005; Order 3 rule 2(2), Lagos State High Court Civil Procedure Rules 2004, etc). It also provides that all the claims or defence of the parties be included in their pleadings before evidence is led on it, at the trial. Thus, any evidence adduced on a matter not pleaded goes to no issue and the same applies to facts pleaded on which no evidence is led at the trial.

iv. **Criminal Procedure Act (CPA) and Criminal Procedure Code (CPC):** These are the two principal enactments governing criminal procedure in Nigeria. Initially, the CPA enacted in 1945 was of general application throughout the country, but was confined to Southern region upon the attainment of independence on the 1st of October, 1960. With the creation of some states from the defunct southern region, the successive states adopted the CPA, though states have amended certain sections of the Act applicable in their territory, nonetheless, the provisions of the principal enactment as they applied in the states are substantially similar.

The Criminal Procedure Code (CPC) was enacted in 1960 to apply to Northern Nigeria. It applies in all states created in the defunct Northern region and the Federal Capital Territory (FCT). Its provisions apply to trials in Magistrate Courts, State High Courts, and the Area Courts.

These two enactments also have their part to play as sources of the Nigerian law of evidence. For instance, Section 287 (1) (a)(iii) of the CPA and Section 236 (1)(a) of the CPC, both provide for the right of an accused person to be silent. Also, Section 186, 194

& 285(3) of the CPA and Section 287 and 230 of CPC are provisions on the procedure for giving evidence in court. (Ali, 2010, p.71-74). But just recently, administration of Criminal justice Act, 2015 was enacted for the administration of criminal justice in the courts of Federal Capital Territory (FCT) and other Federal Courts in Nigeria.

All these sources explained above are by no means exhaustive and conclusive of the sources of the Nigerian law of evidence. That being the case, it is however, important at this juncture to give classification of evidence before delving into what electronic evidence is all about for better elucidation and appreciation of this paper.

4.0 SCOPE AND CLASSIFICATION OF EVIDENCE

Evidence or judicial evidence has been subjected to several classifications from different perspectives, however, the main division of judicial evidence under the Act is into oral evidence, real evidence and documentary evidence which, by the new Act, now includes computer generated evidence (i.e. electronic evidence). Apart from these, other types of judicial evidence include circumstantial evidence, Direct and hearsay evidence; and primary and secondary evidence, each of which is briefly discussed as follows:

- i. **Oral Evidence:** This is the statement of a witness in court which is offered as evidence of the truth of what is stated. It includes statements and assertions of a witness in court offered as proof of the truth of that which is asserted. It is also usually referred to as testimonial evidence and the most common type of judicial evidence. This, however, does not mean that it is the most credible means of establishing a case in court. The new Evidence Act (i.e. 2011 Act) is emphatic on the importance of oral evidence. Oral evidence is an important class of evidence. Section 125 unambiguously states that "all facts, except the contents of documents, may be proved by oral evidence".
- ii. **Real Evidence:** This type of evidence entails the production before the court of any material thing including even human beings, which may be ordered by court for inspection, or the court itself may inspect or permit a jury to inspect any movable or immovable property which is in dispute.
- iii. **Documentary Evidence:** This is the statement made in a document which is offered to the court in proof of any fact in issue. Such a statement can be proved only by the production of the document itself (See Section 96).of the Act). This is called primary evidence. However, in exceptional circumstances, certified or other copies, counterparts and oral accounts of the contents of the document may be used, and in such circumstance, the evidence given shall be referred to as secondary evidence (Aguda, 1999, p.10).



- iv. **Electronic Evidence:** It is a kind of evidence which deals with the tendering of the output of electronic gadgets or equipment as evidence in court. This will be discussed extensively *infra*.

Other types of evidence include the following:

- v. **Circumstantial Evidence:** This means evidence offered to the court for the purpose of the court inferring therefrom the existence of fact(s) in issue. It is generally in the form of oral evidence. It is usually contrasted with "direct evidence".
- vi. **Direct Evidence:** This is the evidence that straightforwardly supports the innocence or guilt of a person on trial in a criminal case or of facts in a civil case. It is evidence offered by a witness in proof of the truth of the fact asserted by him. Direct evidence also includes real evidence.
- vii. **Hearsay Evidence:** Generally, statements, written or oral, made by persons who are not called as witnesses are not admissible in evidence but are relevant and admissible in the circumstances.
- viii. **Primary and Secondary Evidence:** This has been defined to mean the best or highest kind of evidence; that which the law regards as affording the greatest certainty of the fact in question. Thus, in respect of documentary evidence, the production of the original document, or proof of an admission of its contents by the party against whom it is tendered, is regarded as primary evidence in this sense (See *Jacob v. A.G. Akwa Ibom State* (2002) *FWLR* (Pt. 86) 578 @ 590). Also, other species of primary evidence are direct oral evidence and inspection of locus in quo. Secondary evidence can only be better appreciated from the dictum of Lord Asher in *Lucas v Williams* (1892) 113 at 116 to this effect "primary evidence is evidence which the law requires to be given first; secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given (Hon, 2012 , p.5-6).
- ix. **The Best Evidence Rule:** It is a rule of comparative antiquity emanating from the old rule of English Common Law, which requires that the best evidence in possession of a third party must be given.

5.0 NATURE AND SOURCES OF ELECTRONIC EVIDENCE

5.1 Nature & Definition Electronic Evidence

Electronic evidence and computer forensics are relatively recent in addition to the means of proof in legal proceedings. Unlike many other forensic disciplines that were introduced into the trial process with little or no legal debate, electronic evidence has sparked considerable and often controversial debates among legal professionals. Different legal systems reacted in different



ways to this new challenge (Mason, 2010. p.21). Some felt the need to introduce new legislation specific to digital evidence. Others tried to establish a “close match” to existing evidentiary concepts and applied the rules by analogy. In some jurisdictions, both strategies were applied. Whatever the approach, it is expedient to identify the nature and sources of this type of evidence (Akhiero, 2013), p.5).

This type of evidence has been variously described in different words such as ‘electronic evidence’, ‘digital evidence’, or ‘computer evidence’. All these terms are used interchangeably, but the word e-evidence has been adopted for the purpose of this work. What then is electronic evidence?

E-evidence also known as digital evidence can be referred to as information stored or transmitted in electronic or digital form which is then sought to be used in evidence which may include emails; instant messaging and histories; phone records and logs; print-outs; spreadsheets; information on social media, facebook, twitter; videos- you tube; digital photographs; DV- you tube; digital photographs; DVDs, CDs; files saved from accounting programs, etc. (Osinbajo, p. 5-6, accessed on 15-01-2016). It has also been defined as legal evidence found in computers and digital storage media or evidence scientifically processed using computer technology. It is information in digital format (including electronic records and digital media) used to prove allegations or arguments useable in internal investigation, trial before a tribunal or court and in civil or criminal action. It is also used to establish facts- prove or disprove allegations e.g. creating data on a device, copying data from or to a device, deleting logs or database, establishing consistency or continuity of an action or activity, etc. (Owasanoye, 2015, p. 5).

Having said that, for counsel, the crucial question in knowing what rules to apply is, what type of evidence is the particular e-evidence e.g. is an email before being printed out a document, is a DVD or CD a document, is a posting on facebook documentary?(Osinbajo, p.8,). What then, is a document? Section 258 of Evidence Act 2011 defines document to include “...any disc, tape, sound track, or other device in which sounds and other data (not being visual images) are embodied so as to be capable of being reproduced. Any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it any device by means of which information is recorded, stored or retrievable including computer output.

The same Section 258 defines computer to mean “any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process”.



5.2 Electronic Documents

An important form of evidence in legal proceedings is proof by documents. The Evidence Act of 2011 has taken a cognizance of this radical change in its definition when its definition of document in section 258(1) includes:

- (a) Books, maps, plans, graphs, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means; intended to be used or which may be used for the purpose of recording that matter;*
- (b) Any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and*
- (c) Any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it.*
- (d) In the case of a document not falling within the said paragraph (c) of which the visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged or not, and any reference to a copy of the material part of a document shall be construed accordingly."*

Certainly, the above definition is a significant improvement on the definition of the word 'document' as defined in the repealed Evidence Act which confined the meaning of the word 'document' in section 2 only to what we now have in section 258 (1)(a), to the exclusion of other definitions. What is so apparent in the said section 2 of the repealed Evidence Act is the fact that the definition was limited to documents in the physical format to the exclusion of documents in digital format. The fate of e-document under the repealed Evidence Act was that such evidence was not admissible in the Nigerian Courts up till the emergence of the new Act.

5.3 Sources of Electronic Documents

There are different techniques that are capable of creating evidence in digital format. It is crucial to identify some of these sources before the consideration of the legal machinery for the admissibility of e-evidence. Generally speaking, the computer can be regarded as the primary source of e-evidence. The term 'computer' includes a range of gadgets such as mobile phones, various forms of personal digital assistant (PDA), cameras, music players, calculators, meters, ATM machines, traffic lights, car tracking devices etc. All these are computer devices in their own right in as much as they have a CPU, memory, input and output devices, screen they are loaded with operating software. These devices are increasingly being used by individuals and

organizations as part of their IT infrastructure. They are used for storage and processing of e-data. A huge chunk of e-evidence emanate from these sources. Sometimes these computer devices operate to generate e-evidence on standalone basis. For example, a single desktop computer in an office may generate such evidence without any connection to any other system. At other times, more than one computer may operate together to generate the data. Such arrangement is called a network, which may take different forms i.e. internet, intranet. A recent development in the field of networking is the introduction of wireless networking. This form of technology uses radio waves to transmit data. Another wireless technology known as Bluetooth actively connects devices within a short range, using another radio frequency band. All these are some sources of the e-evidence. The sources of e-evidence are being proliferated by the day with modern technological developments (Akhiero, 2013, p.9 -11).

6.0 ADMISSIBILITY OF ELECTRONIC E-EVIDENCE

6.1 The Attitude of Court to Electronic Evidence

Before the enactment of the Evidence Act 2011, there were no express provisions on computer based or electronic evidence or any prescribed rule for their admissibility. However, the court heavily relied on Section 2 of the repealed Evidence Act to justify the extension of documents to computer printout and other electronic devices (Amupitan, 2013, p. 79). The earliest and most commonly referred case on admissibility of e-evidence was the obiter of the Supreme court in the case of *Esso West Africa INC. V. Oyegbola (1969) 1 NMLR 194*, where section 37 of the old Evidence (now section 51 in the new Act) was held not to only apply to books of account. The Court observed that “the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer. In modern times, reproductions or inscriptions or ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to “books of account” so bound and the pages not easily replaced (See also the case of *YESUFU V ACB (1976) 4SC (Reprint) 1 @ 9-14*, where the court relied on the decision in *Esso West Africa Inc. v Oyegbola (Supra)*. Similarly, in the case of *Trade Bank Plc v Chami (2004) ALL FWLR (Pt. 235) 118*, the Court of Appeal relied on section 38 of the repealed Evidence Act (now section 51 of the Evidence Act 2011) to admit computer printout.

More recently in *Federal Republic of Nigeria (FRN) v Femi Fani-Kayode (2010) 14 NWLR (Pt. 1214) 481*, at the trial of the respondent for money laundering, a certified true copy (CTC) of the computer generated statement of account of the respondent was to be tendered as evidence. The respondent opposed the application on the ground that the computer generated statement of account was inadmissible under section 97 of the Evidence Act. The trial Judge upheld the objection and rejected the statement of account, the Court of Appeal held that the term “banker’s books” include all other books used in the ordinary course of business in the bank and could as well include other methods and devices used to keep records in the bank. Acknowledging this



deficiency, the Court of Appeal, per Rhodes Vivour JCA (as he then was) in *Oghoyone v Oghoyone* (2010) ALL FWLR(Pt 543) 1844 @ 1860, Para C, held inter alia that "... the issue as to the admissibility of computer generated evidence has been the subject of controversy for quite some time now in Nigeria and presently the legislature is working on appropriate amendments to accommodate such evidence".

As rightly observed, the new definition has sufficiently bridged the gap between the digital world (which appears so unfamiliar to the uninitiated) and the physical world (with all the familiar trappings of paper documentation). The present legislation has introduced the legal profession to the reality of the current regime of e-data management (Akhiloro, 2013, p.9).

Basically, Section 84 of the Act makes copious and elaborate provisions for the admissibility of electronically generated evidence, the section states that:

84 " (1) In any proceedings a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

(2) the conditions referred to in subsection (1) of this section are-

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly, or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) of this section was performed by computer, whether-



- (a) by a combination of computers operating over that period;
- (b) by different computers operating in succession over that period;
- (c) by different combinations of computers operating in succession over that period; or
- (d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers.

All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) in any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate-

- (a) identifying the document containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above related, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be,

Shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the persons stating it.

(5) for the purposes of this section-

- (a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;
- (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information,



if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment”.

It is crystal clear that the provision is voluminous and cannot be easily digested, and as such, the entire condition for the admissibility of e-document in that section has been succinctly simplified and summarized as follows:

- i. “That the computer is in regular use for storage or processing of information with regard to activity in question,
- ii. That the computer was operating properly or if temporarily out of service, that condition did not affect production and accuracy of content of computer,
- iii. That information tendered as evidence is derived from information supplied to the computer,
- iv. That information stored or processed by single, combination or network of computers will be treated as information derived from a single computer,
- v. That information may be supplied to computer directly or indirectly with or without human intervention,
- vi. That the transferred or processed information moving from another computer (e.g. handheld device) to the main storage computer is admissible so long as it is supplied in appropriate form {Sec. 84 (5)}.
- vii. That information produced or processed with or without human intervention is admissible
- viii. That a certificate must be produced, signed by a person responsible for management of the activities for which the computer is used.
- ix. That certificate must describe manner in which document was produced and provide particulars of device involved in its production;
- x. That it is sufficient if certificate states that it is to the best knowledge and belief of person issuing it (Owasanoye, 2015, accessed on 12- 02-2016)”.



Notwithstanding the voluminous nature of the position, it has been rightly observed that “the new Evidence Act has to be commended for removing the first problem of admissibility associated with computer generated evidence making it admissible in both civil and criminal proceedings. Documents produced by a computer are now admissible under the provision as evidence of any fact stated therein of which direct oral evidence would be admissible (Amupitan, 2013, p.89-90)”.

6.2 Challenges of Admissibility of Electronic Evidence in Nigerian Courts.

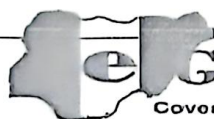
There appears to be a dearth of cases on e-evidence in Nigeria since the coming to force of the new Act. The case of *Kubor v Dickson (2013) 4 NWLR 427 SC*, appears to be the first testing ground for the new Act. The documents in that case were two printouts from the website of an online newspaper. The Supreme Court, per Onnoghen, J.S.C. held that the documents were inadmissible for failure to satisfy the four conditions stated under section 84(2) of the new Act. This case appears to be the locus classicus on the admissibility of e-evidence for now but it presents fresh dilemma as it ignores role of technology and impact of e- governance e.g. INEC website, etc. the decision implies that electronic alerts and e-mails of bank transactions have no value without certification (Owasanoye, 2015, p.31).

Recently, allowing the appeal of the appellant, the Supreme Court in *Wike Nyesom V Dakuku Peterside & Ors (2015) LPELR-SC1002/2015*, disagreed with the Tribunal and Court of Appeal that the use of the card reader (an electronic means) was complementary to the use of the voters register and intended to strengthen the application and efficacy of the Electoral Act, by ensuring a credible election in Nigeria when it held that the usage of card reader would “dethrone” and ‘depose’ the voter register. This position, with due respect, portrays the court to be taking a step forward and two steps backward towards the on adoption of ICT and admissibility of e-evidence in Nigeria.

The rationale behind the conditions in Section 84 of the Act, is to have some checks and balances in place to ascertain the history of how the data have been managed, which leads to the assertion that the data have not been modified, altered, replaced or corrupted and must therefore be genuine (Akhihero, 2013, p.23).

Issues arising from this provision can be categorized into various ways, but the writer has chosen to examine same in two ways, namely scientific and legal issues. The scientific issues shall be considered first and same has been cursorily highlighted as follows:

- The requirement that information tendered as evidence is derived from information supplied to the computer may likely generate an issue in that, in a global network of computers, each transmission from one to other may be modified, thus the notion of “derived from” must be carefully considered.



- Furthermore, the issue of whether information moving from one computer to another in appropriate form as required under Section 84(5) is software driven and not human determined, e.g. data sharing via network; cloud; same wifi; devices of one registered user, etc.
- The provision is silent on the appropriate designated person(s) responsible for the purpose of signing certificate- is it Network Administrator; IT Manager, Supervising Officer; Data Processor; HOD or just any designated officer within an organization? And if this is satisfied, what particulars of device are to be included in the certificate particulars- hardware or software details, model description? (Owasanoye, 2015, p.29).

Legal Issues

- The section assumes that computer evidence will be from a computer within a jurisdiction of court. In today's world of global corporations and businesses, this assumption is forlorn (Owasanoye, 2015, p.28);
- The proof that a computer is operating properly may not always require expert evidence as stipulated in Sec. 68 (1) E.A. 2011.
- Going by the provision of section 1 of the new Act, what is the relevance to be attached to such evidence, was it properly obtained, can such evidence be categorized as hearsay or direct evidence, would such document be regarded as a photocopy or original and, what weight is to be attached to it going by section 39 of the new Act?
- The concluding phrase of Section 84 (4) states that ... "for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it". The quality of the certificate issued is whittled down, as the phrase permits all kinds of quacks and mediocres to issue certificates to the best of their knowledge and belief. Simply put, it permits every tom, dick and harry to issue such certificate, the position which is not a good practice.
- The whole of section 84 has to be interpreted conjunctively, hence, failure to satisfy any of the condition would be tantamount to rejection of such evidence sought to be tendered. This, in the opinion of the writer, makes the section very tedious and laborious.

7.0 RECOMMENDATION AND CONCLUSION

We live in an age where transactions are conducted on the electronic platform. The digital technology has compressed the world into a global village. The masses have embraced information technology. The use of electronic devices like GSM mobile phones is no longer the preserve of the elites or the wealthy. The volume of electronic data is on the increase. Most of



these transactions are captured by electronic devices. In the event of dispute, parties are bound to rely on electronic evidence. In essence, e-evidence has come to stay. Hence, the law must be made in such a way that it will pace or run *pari passu* with the reality on ground.

Ordinarily, it appears that section 84 of the Evidence Act 2011 seeks to guard against manipulation of computer generated document, but complying with the procedure and rules can be a herculean task for parties or witnesses who intend to tender such document. As rightly observed by a learned author, the rule of admissibility of electronically generated evidence is very complex (Amupitan, 2013, p.96), and therefore, it will not be incorrect to say that the provision is too strict and does not reflect the seriousness and readiness of Nigeria to face the reality of modern times. Hence, the Nigerian courts are enjoined to adopt liberal interpretation of the section.

Furthermore, if the nation must win the battle against corruption and other social vices like terrorism, kidnapping, etc, which have eaten deep into every facet of the nation's affairs, it must be ready to face the battle with a sharpened weapon. One of the strong machinery to fight this menace is to have an effective, unambiguous and relaxed legal framework on the admissibility of e-evidence. It is a known fact today, that almost all the wealth of this nation is being stolen electronically. Huge amounts are being electronically transferred to foreign accounts by corrupt leaders. To this effect, the law has to be virile and strong in such a way that no one should be able to defeat the nation in its battle against corruption on technical ground, by hiding under the *lacuna* in our laws relating to admissibility of e-evidence. Therefore the Evidence Act must not be couched in a way that it will look like pouring a new wine into an old bottle.

A holistic perusal of the Act shows that the procedure for the admissibility of electronic document in court is not impossible, but practically difficult and does not justify the true reflection of a legal framework which has embraced the adoption of ICT in full blown, thus, bringing the position of the writer of this work to believe that the said provision is just a cosmetic provision on e-evidence.

The issue of admissibility of e-document remains a very technical subject. As rightly observed, the Evidence Act 2011 continues with this tradition by failing to simplify the evidence rules for both legal practitioners and non- legal practitioners, to easily read and understand the provisions of this law (Oserogho & Associates, 2012, Accessed on 12-2-2016). Therefore, the provision should be more simplified.

Ordinarily, the new Evidence Act seeks to guard against manipulation of e-document, but complying with the procedure and rules stated in Sec. 84 can be an herculean task for parties or witnesses who seek to tender such document. The fact must be said that the requirements for its admissibility are too strict and burdensome.



Where the court is to rely on a mere certificate to lay foundation for the admissibility of e-evidence, the certificate should be issued by an expert. This will be concomitant with the usual trend of such certificates under the Act. (See for example section 68 to 71 of the Act). Issue of designated person(s) responsible for the purpose of signing and the particular of device to be included on the certificate which is at large should also be resolved before parties begin to use same as a cover up, by raising unnecessary objections.

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