

# Admissibility of electronic Evidence Under the Nigerian Evidence Act, 2011

Ukpai, Moses Chukwuka<sup>1</sup> & Oji, Ebony Onyekachi<sup>2</sup>

## Abstract

*Evidence they say is law. The truth of this assertion lies in the fact that evidence is central to every trial, civil or criminal and serves two major purposes therein. First, it decides what is or is not admissible in the trial for the purpose of proving or disproving facts in issue. Secondly, it determines how, if at all, the admissible fact may or must be presented to the court<sup>3</sup>. Against this background, every jurisdiction tends to have a uniform code on the rules of evidence. In Nigeria for instance; such rules are codified in the Evidence Act<sup>4</sup>. One of the cardinal codifications in this regard is the concept of document. This concept was originally conceived from the common law perspective which viewed documents as legible inscriptions or writings on substances<sup>5</sup>. However, the advent of technological development, and the consequent evolution of paperless transactions have permeated every sphere of life including the legal world. We now live in an electronic age where everyday transactions are conducted on the platform of electronic devices. In the event of dispute, parties are bound to rely on electronic evidence. In view of this, the Evidence Act, 2011<sup>6</sup> provides for admissibility of electronic evidence. The focus of this work therefore is to examine the salient provisions of the Act relating to admissibility of electronic evidence. It will equally enquire into the effect of this technological innovation on the concept of document with emphasis on laying of proper foundation for admissibility. Our methodology will be largely analytical, critical and comparative.*

1. <sup>1</sup> **LL.B Hons (NAU), BL, Email: [nobleceukpai@yahoo.com](mailto:nobleceukpai@yahoo.com)**. No. 45 Owerri Road, Asata Enugu, Enugu State, C/O Ukpai, Daniel.
2. <sup>2</sup> **LL.B Hons (ESUT), BL, Email: [eoji@outlook.com](mailto:eoji@outlook.com)**. Zenith Bank Plc, Okpara Avenue, Enugu, Enugu State, C/O Nwangwu Nwabundo.

<sup>3</sup> Cooper *et al*, *Cases and Materials on Evidence*, 3<sup>rd</sup> ed., London, Blackstone Press Limited, 1994, p.1.

<sup>4</sup> The first one being the Evidence Act by Ordinance No.23 of 1943, but came into effect in 1945. It was later collated into Cap 112, LFN, 1990 and Cap E14 LFN, 2004. In 2011, this Act was repealed and re-enacted into the Evidence Act (No.18), 2011.

<sup>5</sup> Y. Osibanjo, *Cases and Materials on Nigerian Law of Evidence*, Lagos, Macmillan Nigeria Publishers Ltd, 1992, p. 186.

<sup>6</sup> Hereinafter referred to as the Act.

### Keywords:

1. Admissibility;
2. Electronic evidence;
3. Nigeria;
4. Evidence Act;
5. Document.

### Introduction

A learned author defined electronic evidence as:

Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence”.<sup>7</sup>

The above definition has three identifiable elements that highlight the meaning and nature of electronic evidence. In the first place, it covers all forms of evidence that are created, manipulated or stored in a device that can be classified as a computer. Secondly, it aims at including all forms of devices by which data can be stored or transmitted. This aspect is wide enough to include devices such as mobile phones, digital cameras, video recorders, Automated Teller Machines (ATM), satellite devices, car tracking devices and so on. The third element involves the process of adjudication in the court. This part of the definition relates to the aspect of relevance and admissibility of the evidence<sup>8</sup>. The *Evidence Act, 2011* refers to this type of evidence as *statements in documents produced by Computers*.

The Act defined computer as *any device for storing and processing information, and any reference to information being derived from other information is a reference to it being derived from it by calculation, comparison or any other process*<sup>9</sup>.

Traditionally, when the word *computer* is mentioned, what readily comes to mind are desktop and laptop computers which are basically employed for processing and storing information. However, the modern concept of computer has taken a wider meaning and connotation. It has, therefore, gone far beyond the desktop and laptop as computers are now embedded in many devices ranging from MP3 players to fighters' aircraft and from toys to industrial robots.<sup>10</sup> It is now difficult to narrow down the functions of computer as it can be used to perform various functions depending on the interest of the user. Unarguably, the definition of computer under the Act is wide enough to accommodate devices such as GSM phones, digital cameras, ipods, iPads and so on. However, in as much as this definition appears to be all inclusive, it has been argued by a learned author<sup>11</sup> that the definition is too restrictive as it limits the interpretation of computers to only devices that can store and process information. The learned author further opined that: *The interpretation is not only silent about computer accessories such as printers, scanners and other output devices; it plainly excludes them from the interpretation*.<sup>12</sup> We align ourselves with the views of the learned author above and further observe that the difficulty is further compounded by the use of the expression *documents contained in a statement produced by a computer in section 84 of the Act*".

Comparing the definition of *computer* under the *Evidence Act, 2011* with *section 3 of the Singapore Evidence Act*, one would agree that the definition of computer under the Nigerian Act left much to be

<sup>7</sup> S. Manson, *Electronic Evidence*, 2<sup>nd</sup> Ed., Lexis Nexis, Butterworths, 2010, p. 25.

<sup>8</sup> P. A. Akhiero, *Admissibility of Electronic Evidence in Criminal Trial. How Practicable*, A Paper Delivered at the 2013 Annual General Meeting of the Magistrates Association of Nigeria, Edo State Branch on 23 July, 2013, p.6.

<sup>9</sup> Evidence Act Section 258.

<sup>10</sup> J. Okunoye, *Evidence Act, 2011 With Cases and Materials*, Yenagoa, Lexis Juris LP, 2011, p.128.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

desired. Section 3 of the Singapore Evidence Act provides as follows:

‘computer’ means an electronic, magnetic, optical, electrochemical, or data processing device, or a group of such interconnected or related devices, performing logical arithmetic or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or group of such interconnected or related devices, but does not include-

- (a) an automated typewriter or typesetter;
- (b) a portable handheld calculator;
- (c) a device similar to those referred to in paragraphs (a) and (b) which is non-programmable or which does not contain any data storage facility;
- (d) such other device as the Minister may by notification prescribe;

The above definition encompasses such devices as scanners, printers and so on. It not only states what a computer is, but also enumerates what does not fall within the definition of a computer. This view is further strengthened by the fact that the Singapore Act unlike the Nigerian<sup>13</sup> counterpart expressly defined ‘computer output’ or ‘output’ as follows: *computer output or output means a statement or representation (whether in audio, visual, graphical, multimedia, printed, pictorial, written or any other form)-*

- (a) produced by a computer; or

- (b) accurately translated from a statement or representation so produced.

The definition of computer under the Singapore Act lays credence to the fact that ‘computer output’ is not limited to computer printouts as section 84 of the Nigeria Evidence Act tends to suggest<sup>14</sup>. Such computer output may take any of the above possible forms enumerated by the Singapore Act.

Be that as it may, a closer look at section 84(5)(c) of the Act will reveal that in as much as the definition of computer under section 258 of the Act tends to overlook such output devices as printers, scanners and so on, *where a document is produced by a computer directly or indirectly or (with or without human intervention) by means of any appropriate equipment<sup>15</sup>, such documents shall be taken as having been produced by a computer.* Also section 258 of the Act defined document to include, *inter alia, any device by means of which information is recorded, stored or retrievable including computer output<sup>16</sup>.*

Therefore to address the seeming lacuna in the definition of computer under section 258, it is suggested that in determining what qualifies as computer under the Act, the courts should always adopt community reading of the definitions of *computer* and *document* under section 258 and section 84 of the Act<sup>17</sup>. This approach, in our view, gives a clearer picture of the meaning of computer. It is equally suggested that when the opportunity presents itself again for amendment of the Act, the draftsman should follow the example of the Singapore Act in defining computer. Pending any future amendment of the section, it is hoped that the Courts will be minded to adopt liberal approach in

<sup>13</sup> The Nigerian Evidence Act used the phrase *statement contained in documents produced by computers* but did not expressly define the phrase. See the Evidence Act, section 84. Nevertheless, the purport of the phrase can be gathered by conflating the definitions of *statement*, *computer*, and *document* under section 258; and section 84 of the Act. From the combined effect of the above provisions, *statement contained in documents produced by computers* may be defined to include any representation of fact whether made in words or otherwise contained in documents produced by computers.

<sup>14</sup> Section 84 of the Evidence Act provides for admissibility of electronic evidence. The phrase *statement contained documents produced by computers* used by the marginal note and the opening paragraph of subsection 1 of the section tends to suggest that electronic evidence is limited to computer printout.

<sup>15</sup> Which, in our view, include such output devices as printers and scanners.

<sup>16</sup> See paragraph (d) of definition of document under section 258 of the Act.

<sup>17</sup> Particularly section 84(5) of the Act.

construing the provisions because strict approach will, obviously, defeat the purpose of the sections.

### Sources of Electronic Evidence

Given that the phrase electronic evidence is too wide and has relative applications, one cannot conveniently enumerate all the sources of electronic evidence. Nevertheless, we shall make effort to succinctly identify some of these sources to enable us appreciate more the nature of this form of evidence under review before considering the legal machinery for its admissibility. Generally speaking, computer can be regarded as the primary source of electronic evidence. Reference to computer here includes a range of gadgets such as mobile phones, various forms of Personal Digital Assistant (PDA), digital cameras, videos and audio tapes. Others are memory cards, flash drives, calculators, meters, Automated Teller Machines (ATM), traffic lights, car tracking devices and so on. All these devices are computers in their own rights in as much as they have Processing Units (PU), memory for storing data, input and output devices, screen or they are loaded with operating software. These devices are increasingly being used by individuals and organizations as part of their information technology infrastructure. They are used for the storage and processing of electronic data. Invariably a huge chunk of electronic evidence emanate from these sources.

### The Concept of Electronic Document

The importance of document in proving facts in any legal proceeding cannot be overemphasized. Put more strongly, document is one of the three chief means of proving facts under our law of evidence.<sup>18</sup> Needless to say, however, that the present global technological trend has brought about

a paradigm shift in the nature of document. Today, a single document can be in soft copy (digital format) as well as in hard copy (analogue format). Therefore, one must have a firm grasp of the nature of electronic document in order to appreciate the various provisions of the Evidence Act<sup>19</sup> regulating their admissibility in evidence. We must quickly point out that the Evidence Act did not expressly employ the phrase 'electronic document'. Reference to electronic document in the Act can, however, be gathered from the gamut of *section 258(1) of the Evidence Act of 2011* which defined document as

- (a). books, maps, plans, graphs, drawings, photographs and also include 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.*

<sup>18</sup> The other two being oral testimony (*viva voce* evidence); and physical inspection of materials (popularly known as visit to the *locus in quo*). See C.C. Nweze, Contentious Issues and Responses in Contemporary Evidence Law in Nigeria, Vol.2, Enugu, Institute for Development Studies, UNEC, 2006, p. 211.

<sup>19</sup> Such as sections 84; 86(4); 92(2) and(3); 258(1) and so on.

The italicized portion of the above provision takes cognizance of documents in electronic or digital format.

It stands clear from this definition that the present Evidence Act is a significant improvement on the definition of *document* under the repealed Evidence Act<sup>20</sup>. The definition of *document* in the repealed Act was restricted to documents in analogue or physical format. It did not cover documents in digital format. This new definition has sufficiently bridged the gap between the digital world and the physical world. In other words, some pieces of evidence that were hitherto inadmissible under the repealed Act can now be admitted under the present regime. Information contained in electronic mails, text messages and other information contained in mobile phones, digital cameras, video and audio tapes constitute electronic documents and are now admissible in evidence<sup>21</sup>.

### **Electronic Evidence, Primary or Secondary Evidence?**

Primary evidence in this sense connotes the original document<sup>22</sup>. Secondary evidence, on the other hand, includes any evidence other than the original document<sup>23</sup>. The general position of the law is that contents of documents may be proved by primary or secondary evidence<sup>24</sup>. But strictly speaking, the law insists that documents shall, first of all, be proved by primary evidence except where the primary evidence is not available. At that time, the person seeking to tender the secondary evidence will lay a proper foundation, explaining why the primary evidence is not available and showing why the secondary evidence should be admitted<sup>25</sup>. After

laying the proper foundation, he can then tender the secondary evidence.<sup>26</sup> This rule is known as *the best evidence rule*<sup>27</sup>. The rationale behind the rule is to eliminate the possibility of admitting erroneous fabrication or inaccurate document by requiring a party to tender the best evidence available which the nature of the case allowed<sup>28</sup>. In the context of documentary evidence, the *Best Evidence Rule* is commonly referred to as the *Original Document Rule*. This Rule was propounded at a time when photocopiers, scanners, ATM and other electronic devices that can duplicate documents were not in existence. Manual copying, which was the only means of reproducing documents, owing to human fallibility, resulted inevitably in discrepancies in replications. Over the years, the Rule has been religiously observed in plethora of cases.<sup>29</sup> The advent of computers, photocopiers and all kinds of software devices now questions the logicity of that historical exigency and introduced uncertainty in the strict applicability of this Rule. This is because under the present technological development, the difference between an original and a copy of a document is extremely difficult to spot. For instance, if the question arises as to between the print out that is been generated by ATM when one does a transaction using the machine and the record of that same transaction contained in the ATM hard drive, which one is the original copy of the transaction? This question is certainly difficult to answer. This is partly because the information contained in the ATM hard drive cannot be accessed for the purpose of tendering same in evidence without the use of additional

<sup>20</sup> Compare the definition of *document* in section 2(1) of the Evidence Act, Cap E14, LFN, 2004 with that in section 258 of the Evidence Act 2011.

<sup>21</sup> See Evidence Act, section 84.

<sup>22</sup> This meaning is evident in section 86 of Evidence Act.

<sup>23</sup> See the various paragraphs of section 89 of Evidence Act.

<sup>24</sup> Evidence Act, section 85.

<sup>25</sup> This popularly called, laying of proper foundation for admissibility of secondary evidence.

<sup>26</sup> This view can be gathered by conflating sections 88, 89 and 90 of the Evidence Act.

<sup>27</sup> The popularity of this rule can be traced to Lord Chief Baron Gilbert, where he placed documentary evidence at the highest category of evidence with public records at the top and which gradually waned through other forms of documentary evidence and oral evidence at the bottom of the hierarchy: B Gilbert, *Gilberts Law of Evidence*, London, A. Strahan & W. Woodfall, 1791, P.4.

<sup>28</sup> J. Okunoye, *op. cit.* p. 105.

<sup>29</sup> See *Daggash v. Bulama & 7 Ors* [2004] ALL F.W.L.R. (pt.212) 1666; *Total Products (Nig.) Ltd v Gbemisilo* (1975) 1 NMLR 385 at 389; to mention but these.

devices such as printers or monitors. Again, the question may arise, between a computer printout of a transaction and a record of that transaction contained in the computer's hard drive or internal memory, which one constitutes the primary evidence? In *Anyaebosi v R.T. Brioscoe (Nig) Ltd*<sup>30</sup> the Supreme Court per Uwais JSC held that computer printout is admissible as secondary evidence if the condition in *section 97 subsections (1) and (2) of the Evidence Act* are satisfied. Going by the above decision, if all computer printouts are secondary evidence, what would roughly approximate to primary evidence of a printout is the information contained in the computer's hard drive. Can this still stand as a correct statement of law in the present regime of the Evidence Act? To conveniently address these questions, reference should be made to various provision of the Act relating to primary and secondary electronic evidence. *Section 86(4) of the Act* provides thus:

where a number of documents have all been made by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical processes, each shall be primary evidence of the contents of the rest; but where they are all copies of the common original, they shall not be primary evidence of the contents of the original".

What can be gathered from the above provision is that the original printout of a document printed from a computer source is a primary evidence of the contents of the document. But any copy made from the original printout by mechanical or electronic processes is a secondary evidence of the contents of the document.<sup>31</sup> It can as well be argued that the soft copy contained in the computer's hard drive or internal memory is also a primary evidence of the content too. Thus, either the original printout or the soft copy contained in the computer's hard drive or internal memory can be tendered as a primary evidence of the content. This is so because *section*

*84 of the Act* has an elaborate provision for admissibility of statements in documents produced by computers; and the definition of document under the Act includes both hard and soft copies<sup>32</sup>. Therefore, each of the soft copy in the hard drive of the computer and the printout qualifies as statements contained in documents produced by computers. It then becomes a matter of choice and convenience to the person seeking to tender the evidence and the court too.<sup>33</sup> In the English case of *Kajala v. Noble*<sup>34</sup>, the Divisional Court held that the primary evidence rule was limited and confined to written documents in the strict sense of the term, and has no relevance to tapes and films. What is more? The issue of dualism of electronic document is not really a case of original or duplicate copy, or a question of primary evidence or secondary evidence. Rather it is more or less a case of the two sides to the same coin.<sup>35</sup> Whichever side of the coin one chooses to adopt in proving his case, it must be authenticated before it can be admitted in evidence.<sup>36</sup>

<sup>32</sup> See Evidence Act, section 258.

<sup>33</sup> It may be argued that it is more convenient and practicable to tender the printout of electronic evidence than tendering the soft copy in the computer. More so in this era of frontloading when the parties are expected to frontload all the necessary document they intend to rely upon, in the trial, at the time of filing their processes. Complying with this frontloading requirement will be extremely difficult, if not impracticable for a person seeking to tender the soft copy. Nevertheless, the point we are making is that the law does not lean against tendering the soft copy contained in the computer hard drive. It is as admissible, as primary evidence, as the original printout. For instance, in the case of *The State of Lagos v. Okwumo Nwabufo & 3 Ors* ( involving the trial of the four suspects of robbery, rape and murder of Miss Cynthia Osokogu), the 1<sup>st</sup> Defendant's laptop containing the obscene pictures of the deceased was tendered and admitted in evidence by the trial court: See "Court Admits Slain Cynthia Osokogu's Picture as Exhibits", *The Guardian Newspaper*, Tuesday, May 06, 2014, P.4.

<sup>34</sup> [1982] 7 C.R. A.P.P. R. 149 at 152.

<sup>35</sup> P. A. Akhiero, *op. cit.*, p.7.

<sup>36</sup> Evidence Act, *op. cit.*, section 84(4); (law first) *Dr Imoro Kubor & Anor v. Senator Seriake Dickson* [2013] 4.N.W.L.R. (pt.1345) 534.

<sup>30</sup> *supra*.

<sup>31</sup> Evidence Act, section 87(b).

## Authentication/Laying of Foundation for Admissibility of Electronic Evidence

Electronic evidence hardly enjoys trust and confidentiality<sup>37</sup>. This is because computers are generally regarded as novel devices whose internal functions are complex and relatively mysterious. Their use could be abused, and they could fail to operate properly. Electronic evidence, therefore, is seen as been susceptible to all kinds of modifications, distortions, processing errors and contamination. Opposing parties often allege that electronic evidence lack authenticity because they have been tampered with or changed after creation. Electronically generated materials therefore do not lend themselves to effective tests of authenticity that are normally possible with the conventional documents<sup>38</sup>. Consequently, the law insists that the party seeking to rely on it must adduce evidence that confirms that the evidence is what it purports to be in terms of its source (origin) and its substance (what it represents). This practice is popularly referred to as authentication<sup>39</sup>. Our focus in this segment therefore, is to examine the relevant provisions of the Evidence Act relating to authentication of electronic evidence. This is governed by section 84(4) of the Act<sup>40</sup>.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say:

(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<sup>41</sup> mentioned in subsection (2) above relate 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 person stating it.”

Section 84 above is an *ipissima verba* of *section 65B of the Indian Evidence Act of 1872*<sup>42</sup> which was a substantial reproduction of *section 69 of the English Police and Criminal Evidence Act of 1984*<sup>43</sup>.

The provision raises many questions for determination.

The first question that *peters* out of the above provision is: what is *certificate* within the context of *section 84(4) of the Act*? The Act did not define the word *certificate*. It is therefore unclear what a *certificate* is. Nonetheless, it is glaring from the provision is that the authentication required here has to be in writing and not oral<sup>44</sup>. It is our view that

<sup>37</sup> See the dictum of Lord Griffiths in *R v. Shepherd* (1993) A.C. 380.

<sup>38</sup> I A Chukwuemerie, “Affidavit Evidence and Electronically Generated Materials in Nigerian Courts” (inconsistent emphasis. Unquote and italicize) (2006) 3.3Script-ed 17 <<http://www2.law.edu.ac.uk/ahrc/script-ed/vol3-3affidavit.asp>> accessed on 3 March, 2014.

<sup>39</sup> It can as well be referred to as laying of proper foundation for admissibility of electronic evidence. See *Dr Imoro Kubor & Anor v. Senator Seriake Dickson* (*supra*).

<sup>40</sup> See generally section 84 of the Act for a better appreciation.

<sup>41</sup> These conditions will be discussed under admissibility of electronic evidence in civil and criminal trial *vide infra*.

<sup>42</sup> Amended in 2003.

<sup>43</sup> This is the reason behind basing most of the views and opinions expressed in this segment and throughout the work on cases decided on similar provisions in those jurisdictions.

<sup>44</sup> This view is supported by the fact that the section expressly mentioned certificate; and that the certificate has to be signed by a person occupying a responsible position in relation to the operation of the relevant device or management of the relevant

instead of ordinary written certificates, use of affidavits should be adopted in the authentication. This is the practice in majority of the jurisdictions consulted in the course of this work<sup>45</sup>. Out of four jurisdictions consulted, it is only in America that the position makes the nature of authentication needed wide enough to include evidence other than an affidavit<sup>46</sup>.

Secondly, is it only experts that are qualified to sign the authenticating certificate? The Act provides that the authenticating certificate shall 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*. Obviously, it does not insist that only experts can sign the certificate. This view is in line with the position in other jurisdictions. In the English case of *R v. Dean*<sup>47</sup>, it was argued on appeal that since there was no evidence of an expert that the naval computer databases in question were at the relevant time operating properly, the evidence on the searches on those bases generated from them was inadmissible under section 69 of the *Police and Criminal Evidence Act, 1984*. The Court of Appeal rejected this submission, holding that since there had been no known reported problems with the databases, an officer who had carried out the search was qualified to give evidence of the real ability or

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activities. Has it envisaged oral authentication, it would not have required signing.

<sup>45</sup> For instance, in *DPP v. Mckeon* [1993] 1 E.L.L. E. R. 225, the English Court while interpreting *paragraph 8 schedule 3 of the United Kingdom Police and Criminal Evidence Act (in pari materia section 84(4) of our Evidence Act)* admitted a computer printout authenticated by a certificate, filled in the form of a standard statement on oath, which stated that to the best of the knowledge of the maker, the requirements of *section 69(1) of the Police and Criminal Evidence Act*.

*Section 3 of the South African Computer Evidence Act* which makes *authenticated computer print-out* admissible defines *authenticated* to mean that the print-out must be accompanied by an authenticating affidavit or other supplementary affidavit necessary to establish the reliability of the information contained in the printout. Under *section 7 of the Canadian Uniform Electronic Evidence Act*, evidence may be given by way of affidavit to prove the authenticity of electronic records.

<sup>46</sup> See American Federal Rules of Evidence, 2014, Rule 109.

<sup>47</sup> [1998] 2 C.A.R. 171.

accuracy of the databases. While we commend the liberal approach of the court, the point must, however, be made that each case must be considered in the light of its peculiar circumstances. Situations may arise where only the evidence of an expert may suffice<sup>48</sup>.

Thirdly, it is the requirement of section 84(4) that the authenticating certificate 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*. What happens where the evidence sought to be authenticated is to be tendered against the interest of the person or company in charge of the computer? It has been argued by a learned author<sup>49</sup> that such situation presents a number of difficulties. That since it is the person or employee of the company that will be required to sign the certificate, he may refuse to sign it or even disown the electronic evidence. It is our view that in such circumstance, a way out of the difficulty will be for the party seeking to tender the electronic evidence to serve a notice to produce, pursuant to *section 89(a) of the Act*, on the person or company refusing to sign the authenticating certificate. Upon the failure of the person or company so served to sign and produce the authenticating certificate, the other party will then be at liberty to give evidence<sup>50</sup> explaining the circumstances leading to his inability to accompany the electronic evidence with the authenticating

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<sup>48</sup> Even in such situation, the evidence of a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities may, *ceteris paribus*, still suffice as evidence of an expert since an expert under our law of evidence does not only include a person who has acquired his skill through academic qualification or training but also include a person who acquired his skill by experience. Therefore, if by virtue of occupying that responsible position or management of the relevant activities, he possesses the necessary skills, he can then sign the authenticating certificate as an expert. See *Seismograph Services Nig Ltd v. Ogbeni* [1976] 4 SC 85; *Seismograph Nig. Ltd v Onakpasa* (1972); *Shell Petroleum Development* (1996) 4 NWLR

<sup>49</sup>J. Okunoye, *op. cit.*, p.114.

<sup>50</sup> Preferably by way of an affidavit.



certificate<sup>51</sup>. It is hoped that when that is done, the court will admit the electronic evidence even though not authenticated as required by the section.

Lastly, what is the effect of failure to authenticate electronic Evidence before tendering same in evidence? This issue arose for determination before the Supreme Court of Nigeria in the case of *Dr. Imoro Kubor & Anor v. Hon. Seriake Henry Dickson & Ors.*<sup>52</sup> In that case, the appellants were challenging the election of the 1st respondent as the Governor of Bayelsa State in the February 11, 2012 governorship election. At the Election Petition Tribunal, the learned counsel for the petitioner/appellant tendered from the Bar, a computer printout of the online version of the *Punch Newspaper* and another printout from the website of the Independent National Electoral Commission. Both documents were not authenticated. The counsel for the respondents did not object to the tendering of the two documents and they were admitted and marked as exhibits “D” and “L” respectively. On appeal the admissibility of the two exhibits was seriously contested on two grounds. First, that they were public documents which ought to have been certified. Secondly, that the documents having been tendered from the bar, evidence were not adduced to meet the foundational conditions stipulated in *section 84(2) of the Act*. It was contended that the documents ought to be expunged from the records. The Supreme Court agreed with these submissions and held *inter alia* as follows:

Admissibility of a computer generated documents or document downloaded from the internet is governed by the provision of section 84 of the Evidence Act....A party that seeks to tender in evidence a

computer-generated document needs to do more than just tender same from the bar. Evidence in relation to the use of the computer must be called to establish the above conditions.... Since the appellants never fulfilled the pre-conditions laid down by law, exhibits ‘D’ and ‘L’ were inadmissible as computer generated evidence.<sup>53</sup>

The above case is the *locus classicus* on admissibility of electronic evidence under the new Evidence Act. The decision is in line with the ones reached in cases decided on similar provisions in other jurisdictions<sup>54</sup>. This decision having emanated from the Supreme Court which is the apex court of the land stands as the law and is cloaked with finality<sup>55</sup>. However, the operation of its finality does not preclude fair and objective academic comments. It is on the above premise that we stand to make the following comments on the decision. There is no gainsaying that the issue of admissibility of electronic evidence has, over the years, been a serious source of controversy<sup>56</sup>. As such one would have expected that this case, been the first litmus test of the provisions relating to the issue, the Supreme Court should have made decisive decisions on certain questions arising from section 84 of the Act. For instance, the nature of certificate required for authentication is still questions begging for an answer. Regrettably, the Court failed to utilize that opportunity, thereby leaving the above question to speculation. It is, however, hoped that when the opportunity presents itself again, the Court will set the on law on that issue clearer.

<sup>53</sup> Per Onoghen, JSC at pp. 577 -578.

<sup>54</sup> See for instance *R v. Dean* [1998] 2 C.A.R. 171; *R v. Spiby* [1991] C.L.R. 199; *US v. Linn* 840 F 2d 209 (9<sup>th</sup> Cir. 1989).

<sup>55</sup> Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 235; In *Adegoke Motors Ltd v. Adesanya* [1989] 3 NWLR (pt 109) 250 at 274 – 275, Oputa JSC, speaking for the Supreme Court, stated that “we are final not because we are infallible; rather we are infallible because we are final”.

<sup>56</sup> See *Esso West Africa Inc. v. T. Oyegbola* [1969] N.S.C.C. 350; *Egbue v. Araka* [1996] 2 N.W.L.R. (pt. 433) 710; *Ogolo v. I.B.M.* [1995] 9 N.W.L.R. (pt. 419) 324 e.t.c.

<sup>51</sup> This approach will suffice because it has been held in plethora of cases that the purpose of issuing notice to produce is to allow the person who gives the notice to tender secondary evidence of the required document where the adverse party fails to produce them: *Agha v IGP* [1997] 10 N.W.L.R. (pt 524) 317; *UBN PLC v. Idrisu* [1999] 7 N.W.L.R. (pt 609) 105.

<sup>52</sup> *Supra*. See also *Oluwotarotutimi, SAN & Anor. v. Rahman O. Mimiko* [2013] L.P.E.L.R.-20532 (CA).

## Admissibility of Electronic Evidence in Civil and Criminal Trials

It is an elementary principle of the law of evidence that before considering the admissibility of any piece of evidence, it must be shown to be relevant<sup>57</sup>. Thus, before we go into admissibility of electronic evidence proper, we shall first of all comment briefly on the issue of relevancy.

### Relevancy

It needs but a simple statement of the nature of relevancy to demonstrate its sacrosanct nature in all questions of admissibility of facts in civil and criminal trials. Section 1 of the Evidence Act provides that: *Evidence may be given in any suit or proceedings of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no other.*

The use of the phrase...*in any suit or proceeding* in section 1 of the Act implies that the principle of relevancy is not restricted to civil proceedings. It also applies to criminal proceedings<sup>58</sup>. In the case of *Ogu v. M.T. & M.C.S. Ltd*<sup>59</sup>, the Court of Appeal stated that:

The admissibility of evidence is governed by the provisions of section 6 of the Evidence Act (now section 1 of the 2011, Act). Once a piece of evidence is relevant, it is admissible in evidence irrespective of how it was obtained. In other words, admissibility of evidence is based on relevance. A fact in issue is admissible if it is relevant to the matter before the court. In that respect, relevancy is a precursor to admissibility”.

<sup>57</sup> *Abubakar v. Chuks* [2007] 18 NWLR (pt1066) 386 at 402; *Umogbai v. Aiyemhoba* [2002] 8 NWLR (pt 770) 687.

<sup>58</sup> See for instance, *Samuel Thomas v. C.O.P.* [1949] 12 W.A.C.A. 490; *Akinmoju v. The State* [2000] F.W.L.R. (Pt. 11)1893 ; *Emeka v. The State* [1998] 7 N.W.L.R. (Pt. 559) 556; *Nweke v. The State* [2001] F.W.L.R. (Pt. 40) 1595

<sup>59</sup> [2011] 8 N.W.L.R. (Pt. 1249) 345

In essence, the starting point in the issue of admissibility of any piece of electronic evidence is to first determine whether the evidence is relevant to the fact in issue.

### Admissibility

It is pertinent to point out that the parameters for the admissibility of evidence in civil proceedings are not the same as in criminal proceedings. In civil cases, the conditions for admissibility were stated by the Supreme Court in *Torti v. Ukpabi*<sup>60</sup> as follows:

- a. whether such evidence has been pleaded;
- b. whether it is relevant; and
- c. whether its admissibility is not excluded by any rule of law.

Proof of evidence, to some extent, is to criminal matters what pleadings is to civil trials<sup>61</sup>. However, as opposed to civil trials where facts not pleaded are inadmissible<sup>62</sup>, facts which are not stated in the proof of evidence may be tendered and admitted in criminal trials<sup>63</sup>. Therefore, in criminal trials, admissibility of facts, whether stated in the proof of evidence or not, is governed by relevance of such facts and other strict rules of admissibility relating to free and fair trial<sup>64</sup>. Furthermore, a court in a civil trial may have discretion whether or not to reject a

<sup>60</sup> [1984] 1 S.C.N.L.R. 214. See also *Okonji v. Njokanma* [1999] 12 S.C.N.J. 259 at 273 – 275; *Danniya v. Jomoh* [1994] 3 N.W.L.R. (Pt.334) 609 at 617.

<sup>61</sup> See *Pius v The State* (2012) LPELR-15347 (CA).

<sup>62</sup> The law is trite that parties are bound by their pleadings. As such evidence of facts not pleaded are not admissible. Even where they are admitted, they go to no issue. Such evidence is strictly inadmissible in law as it is not relevant- if it were, it ought to have been pleaded. See the dictum of Onnoghen, JSC in *C.D.C. Nig. Ltd. v S.C.O.A. Nig. Ltd.* (2007) 30 W.R.N. 81 at 118 to 119. See also *Hashidu v Goje* (2003) 15 N.W.L.R. (pt. 483) 325 at 379 to 381; *Adeye & Ors. v Adesina* (2010) 18 NWLR (pt.1225) 449.

<sup>63</sup> This is because proof of evidence does not have to contain every bit of evidence that the prosecution requires as long as it contains relevant and sufficient facts to sustain a prima facie case against the accused person. See *Amadi v AG Imo State* (2012) LPELR- 15347 (CA).

<sup>64</sup> Take for example, the requirement of voluntariness as a prerequisite for the admissibility of a confessional statement pursuant to sections 28 and 29 of the Act.

piece of evidence that is inadmissible<sup>65</sup>, but in a criminal trial, it is under a duty to reject such evidence.<sup>66</sup> Hence, one will be right to conclude that rules of admissibility are more stringent in criminal trials than in civil.

Turning to the issue of admissibility of electronic evidence, it must be understood that electronic evidence are *sui generis*. Therefore, in determining the admissibility of electronic evidence, the court has to look beyond the conditions for admissibility of evidence in civil and criminal trials stated above.

In other words, the court must resort to the provisions of section 84 of the Act. Section 84(1) of the Act is to the effect that *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 section 84 (2) of the Act are satisfied*.

It follows from the above provision that for a fact to be admissible as electronic evidence under the Act, the party seeking to tender it must establish that:

- a. such fact qualifies as statement contained in a document produced by a computer<sup>67</sup>;
- b. direct oral evidence of the fact would be admissible<sup>68</sup>; and

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<sup>65</sup> A distinction must, however, be drawn between those cases where the evidence in question is in no circumstance admissible in law as against where the evidence is one which by law is, prima facie, admissible upon fulfillment of other stipulated conditions. In the former class of cases, the court cannot exercise such discretion. Even when it is admitted with the consent of the parties, the trial court cannot act upon it. If it does, the Court of Appeal can entertain complaint on the admissibility of such evidence by the lower court. See *Comp. Comm. & Ind. Ltd. v O.G.S.W.C.* (2002) 9 N.W.L.R. (pt.773) 629; *Unity Life & Fire Insurance Co. Ltd. v I.B.W.A. Ltd.* (2001) N.W.L.R. (pt.713) 610.

<sup>66</sup> See *Raimi v. Akintoye* [1986] 3 N.W.L.R. (Pt.26 97; and *Dagaci of Dere v. Dagaci of Ebwa* [2006] All F.W.L.R. (Pt.306) 786.

<sup>67</sup> The Act did not expressly define the phrase. Nevertheless, the purport of the phrase can be gathered from conflating the definitions of *statement*, *computer*, and *document* under section 258; and section 84 of the Act. From the combined effect of the above provisions, *statement contained in documents produced by computers* may be defined to include any representation of fact whether made in words or otherwise contained in documents produced by computers.

c. the conditions in subsection (2) are satisfied. To meet the requirements of subsection (2) in this respect, the person seeking to tender the evidence must, via a certificate<sup>69</sup>, show that:

- a. the document containing the statement was produced by the computer during a period over which the computer was regularly used to store or process information for the purpose of regular activities carried out by the user;
- b. information of the kind contained in the statement was supplied to the computer in the ordinary course of activities over that period;
- c. the computer was operating properly throughout the material part of the period; and that if there was a time it did not operate properly, that improper operation did not affect the production of the document or accuracy of its contents; and
- d. the information contained in the statement was reproduced or derived from information supplied to the computer in the ordinary course of activities.

The meaning therefore is that the salient consideration on the issue of admissibility of electronic evidence is<sup>70</sup> to determine whether proper foundation has been laid to meet the requirements of section 84(1), (2) and (4) of the Act. If the foundation is laid, the electronic evidence, *ceteris paribus*, will be admitted in evidence. If the foundation is not laid, the evidence will be rejected<sup>71</sup>.

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<sup>68</sup> Section 125 of the Act is to the effect that oral evidence of all facts, except the contents of documents, is admissible. The import of this provision is that all facts stated in documents produced by a computer will, without prejudice to other conditions, be admissible as electronic evidence of the stated facts.

<sup>69</sup> See the combined effect of section 84(2) and (4) of the Act. The import of the word *certificate* within the context of section 84(4) of the Act had been considered under *laying of foundation for admissibility vide supra*.

<sup>70</sup> In addition to the general conditions for admissibility of evidence stated above.

<sup>71</sup> *Dr Imoro Kubor & Anor v. Senator Seriake Dickson (supra)*.

## Admissibility of Electronic Signature.

Before going into the discussion of electronic signature, we shall briefly examine the meaning of *signature*. Frankly speaking, there is no Nigerian Legislation known to the writers that defined the word *signature*; not even the Evidence Act or the Interpretation Act. Consequently, we shall adopt judicial definition. In *Akinsanya & Anor v. FMLFL*<sup>72</sup> signature was defined as *a person's name, mark or writing made or written by the person or at the person's direction with the intention of authenticating a document*. It can be seen from the above definition that the underlining consideration when deciding whether a mark or writing of any kind qualifies as a signature is the intention with which it is made or written. If it was written or made with the intention of authenticating a document, it would qualify as a signature.

Just as the concept of document has taken a wider meaning as a result of technological advancement; so has the concept of signature. With this advancement, a lot of contracts are initiated and concluded on the internet. A lot of deals are made through telephone conversation, exchange of e-mails, short message system (SMS), chats and other forms of communication on facebook, WhatsApp, 2go, BlackBerry message and other social networks. In most cases, the parties to the contract hardly meet face to face; and nothing is written down on paper to evidence the contract. If a dispute arises, it is usually difficult to prove such contracts as the defaulting party may disown the conversation if produced on the ground that he never signed them. It will also be more difficult to link the document to the party who disowns it unless he signs it. With commercial documents becoming increasingly reliant on electronic devices, it then becomes imperative to have a legal framework validating electronic signatures and making them admissible in legal proceedings. Our target in this segment is to examine the provisions of the Act relating to admissibility of electronic signature aimed at

tackling the challenges identified above. *Section 93 of the Act* recognizes electronic signature and makes it admissible in proving execution of documents follows:

(2) Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed, an electronic signature satisfies that rule of law or avoids those consequences.

(3) An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction, to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

Regrettably, the Act did not in anywhere define electronic signature. Therefore, in order to understand what electronic signature is we have to look beyond the Act. At the time of writing this work there is no statute in force in Nigeria known to the writers that defined 'electronic signature'. Nonetheless, recourse may be had to the definition of the phrase in the *Electronic Transaction Bill*<sup>73</sup>. *Section 23 of the Bill* defines electronic signature as follows:

*Electronic signature means information in electronic form that a person has created or adopted in order to sign a document and that is attached to or associated with a document.*

From the above definition and the provisions of *section 93(2) and (3) of Evidence Act*, the following can qualify as electronic signature: entering a personal identity number (PIN), entering personal

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<sup>73</sup> This is a Bill currently before the National Assembly. The Bill, when passed into law, will facilitate electronic commerce and related matters. It is modeled towards the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce which is aimed at harmonizing and unifying the law on international trade so as to create global uniformity in laws relating to e-commerce.

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<sup>72</sup> [2010] L.P.E.L.R.-3687.

password, signing a credit or a debit slip with a digital pen pad device, pasting electronically captured thumb print on online document, and so on. All of the above qualify as electronic signature especially as *section 93(3)* used the phrase *symbol or security procedure for the purpose of verifying that an electronic record is that of the person*. The emphasis is on the intention and not on the form of the signature. Therefore, any electronic symbol or information in electronic form made by a person for the purpose of verifying that an electronic record is that of the person making it qualifies as electronic signature and is admissible in evidence to prove execution of electronic document.

### **Admissibility of Text Messages and other Information Contained in Mobile Phones**

The use of mobile phones features increasingly in social and business transactions. Phones are used for making calls, sending text messages, various chat messages are sent on social media platforms such as facebook, blackberry, yahoo messenger, 2go and many others. Millions of people all over the world enter into contracts using their phones on daily basis.<sup>74</sup>

The above excerpt captures the place of GSM phones in daily commercial and social dealings. Our task in this segment is to examine the admissibility in evidence of information contained in mobile phones in trials. The *terminus adquem* here is to determine whether mobile phones qualify as computers under the Act so as to make such messages and information contained in them qualify as *statements in documents produced by computers*. We have established earlier in this work that GSM phones qualify as computers under section 258 of

the Act<sup>75</sup>. Also, in the American case of *US v. Neil Scott Kramer*<sup>76</sup>, a Motorola Motorazr cell phone was held to qualify as a computer under the American Law. Therefore, text messages, chats and other information contained in or produced by GSM phones qualify as *statements in documents produced by computers* and are admissible under *section 84 of the Act*.

One major problem that may affect the tendering of messages and information from GSM phones in evidence is the issue of authenticity and verification. Most of such messages are not signed. They are usually sent inform of casual chats. Again the memories of GSM phones are usually small and there is always the need to delete older messages in order to create room for new ones. Most chat applications like BlackBerry Messenger, facebook chat, whatsApp, 2go and so on can only preserve a very short thread of messages. Older ones are automatically lost when they hit a certain limit. In addition, it may be very difficult, if not impossible to link a particular message to a particular person. This is because anybody can pick any phone, send a message to any person and assume any identity he chooses. Most people also join social media forum using fake or assumed names. The question then is what precautions are available to persons contracting via phone or over the internet? A learned author has suggested the following precautionary measures:

1. It is important to realize that social media is what it says it is. It is most suitable for social activities and not business activities;
2. When entering into a contract ensure that you use emails rather than chat applications that have no record storage facilities;
3. When contract is entered into via the internet, always confirm the

<sup>75</sup> See comment on definition of computer under *Introduction vide supra*.

<sup>76</sup> 10-1983 (Feb. 8, 2011). Ultimately, the Court found that a cell phone can be considered a computer if the phone performs arithmetic, logical and storage functions.

<sup>74</sup>J. Okunoye, *op. cit.*, p. 134.

terms in writing and demand written confirmation via traditional letters<sup>77</sup>.

We are of the view that the above precautions are about the best means of linking the messages to the authors. They also help to have records of the transaction for reference purposes in the event of dispute.

technologies; thereby making for effective administration of the provisions of the Act relating to admissibility of electronic evidence.

## Conclusion

In the course of this work, we have come to appreciate that the present technological trend and the consequent evolution of paperless transactions have permeated every sphere of life including the legal world. In the light of these developments, the enactment of the provisions of the Evidence Act guaranteeing admissibility of electronic evidence is a step in the right direction. On the whole, we have examined the nature of electronic evidence, laying of foundation for admissibility of electronic evidence, the effect of technological advancement on the concept of document; and admissibility of electronic evidence in civil and criminal trials. We have also pointed out the challenges which tendering and admissibility of electronic evidence under the Act may pose to legal practitioners and courts and how the same can be tackled. What is more? It is imperative to emphasize that for smooth operation and effective implementation of the provisions of the Act; those involved in the arts of trial and adjudication, to wit; Judges, Magistrates, Legal Practitioners, Court Registrars and Clerks embark on continuous ICT training aimed at upgrading their computer literacy. ICT facilities in courts and law offices should be continuously upgraded. This will definitely help in bringing those involved in the art of adjudication, court and law office facilities in tune with the realities of modern

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<sup>77</sup> J. Okunoye, *op. cit.*, P. 136.

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