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Admissibility of Computer and other Electronically Stored Information in Nigerian Courts: Victory at Last.*

Fagbemi, Sunday Akinlolu

Abstract

There is no doubt that Nigeria is getting her own share of action of the fast-growing Information and Communication Technology. These days, financial transactions, communication system and business activities are done electronically. The growth in the amount of computer and other electronically generated evidence in the last three decades had reduced the entire universe into a global village. Contracts and other business transactions are concluded electronically, professionals such as lawyers, bankers, accountants and other allied experts receive instructions for work electronically, accept instructions electronically and send completed work to their clients via computer and other electronic devices. Courts are not left behind as they also face serious challenges foisted on them due to technological advancement and the introduction of electronically generated evidence. The issue of admissibility of evidence is crucial to judicial proceeding as it has the capacity to determine the outcome of a case one way or the other. This article therefore aims at examining the admissibility of computer and other electronically generated evidence under the newly promulgated Evidence Act of 2011. For the purpose of clarity and appreciation of the issues surrounding the amendment of Evidence Ordinance of 1943¹, the paper will go down the memory lane to chronicle agitations and criticisms that led to the amendment of the Evidence Act inherited from the colonial government in 1943 in order to bring its provision at par with advancement in Information Communication Technology worldwide.

Introduction

It is factor, not exclusive to Nigeria, that hitherto the rules of law in existing legal systems are predicated upon and tailored to traditional means of communication though they have been sufficiently adaptable to accommodate developments and

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¹ The Ordinance was based on Sir James Stephen's Digest of the Law of Evidence and came into operation on June 1 1945 having been passed into law as the Evidence Ordinance in 1943, the Act was severally amended and the last one was contained in the Evidence Act, Cap. E 14, Laws of the Federation of Nigeria, 2004.

advancement as they occur, for example, from oral communications to exchange via paper medium, telephone and facsimile.² The evolution of Information and Communication Technology the world over has impacted greatly on law like any other fields of human endeavour. For instance, business transaction has moved from paper to electronically-based; transaction, similarly, documentary evidences are no longer kept solely as hardcopy, but are now stored in computers and other electronic storage devices.

The advent of computer has brought on its heel 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.³ The simplistic division of documents into originals and copies have also been made unrealistic with respect to several materials used in information transmission and storage. Thus, 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.⁴ It is also not easy to classify an audio tape recording, a video tape recording, a text message on a GSM telephone, an electronic mail on a computer screen, information contained in CDs, VCDs or such other things, as originals or copies. Even if such things - when printed out on paper, for instance - and such other things as electronically transmitted mandates in commercial transactions can be regarded as documents, the further doctrine that the maker of a document ought to sign it becomes cosmetic. The use of such media of communication and of personal identification numbers (PINs) is commonplace now in the banking industry.⁵

In the face of such a deeply worrisome situation, the Nigerian Courts with the exception of few, have been very alert in

² Gbenga Bamodu, "Information Communication Technology and E-Commerce: Challenges and Opportunities for the Nigerian Legal System and Judiciary" (2004), *Journal of Information Law and Technology (JIT)* at page 3.

³ Chukwumerie A. I. "Affidavit Evidence and Electronically Generated Materials in Nigeria Courts" (2009), *Scripted- Journal of Law, Teaching & Society*. Available on http://www.law.ed.ac.uk/ahrc.script_ed/vol3-3/affidavit.asp, accessed on 20/9/2011 at 8.25 am.

⁴ Ibid.

⁵ Ibid.

interpreting the repealed Evidence Act and complementary case law or common law principles in a way that principally solves the problem of admissibility of pieces of evidence generated by information technology.⁶ In effect, they have fashioned out rules and principles by which all electronically generated evidences can be admitted and acted upon by Nigerian Courts. However, the hitherto lack of clear statutory provision had resulted into conflicting judicial decisions among the superior courts of record in Nigeria. Due to the foregoing, admissibility of electronically stored information otherwise called digital or computer evidence has been a matter of considerable debates and discourses in Nigeria. The controversy had indeed yielded a positive result by the promulgation of the Evidence Act, 2011.⁷ This article seeks to examine the impact of the new Evidence Act on the admissibility of computer and other electronically generated evidence in Nigeria. In doing this; the article will reflect on the agitations leading to the amendment of Evidence Act;⁸ the meaning of electronic evidence, the types and classifications of electronic and other judicial evidences; the best evidence rule in view of the new Evidence Act; the conditions for the admissibility of electronic evidence and the conclusion.

An Overview of the Agitations Leading to the Amendment of the Evidence Act, 2004

The rule of evidence predated the introduction of computers into the commercial and legal worlds.⁹ Up till 1945, the law of evidence applicable in the courts established by the British Government was the English Common Law of Evidence. In June, 1945, the Evidence Ordinance was brought into operation and has, until recently, remained almost the same in substance and in form although it has been amended from time to time.¹⁰ The amendment

⁶ Ibid.

⁷ The new Evidence Act, 2011 was signed into law by President (Dr.) Goodluck Ebele Jonathan on the 3rd June, 2011.

⁸ Cap E 14, Laws of the Federation of Nigeria, 2004.

⁹ Olumide K. Obayemi. "FRN v. Femi Fani-Kayode and the Admissibility of Computer-Generated Evidence in Nigeria". Available in

<http://proshareng.com/article123222>, accessed on 19/9/2011 at 19.20pm

¹⁰ Yusuf O. Alli (SAN), "The Nigerian Evidence Act and Electronically-Generated Evidence: A Need for Fast Track the System". (2010). In *Akin*

did not however reflect the advancement in technology. The truth of the fact is that statutory provisions generally in Nigeria apart from the Law of Evidence have remained virtually the same while the society marched on in dynamism.¹¹ Commenting on this, Chukwuemerie in his article rightly observed that such legislative inertia and deadening anachronism make the law only a social relic of a less wizeden past governing the present. This is exactly what has happened with respect to the law of evidence in Nigeria, while the Evidence Act made by the British Colonial Government in 1945 continued in operation as about the only sources of the Law of Evidence in the country, developments in such areas as Information Technology have gone way beyond what that statute could have envisaged at its enactment.¹²

There is no doubt that one of the greatest achievement of man in the 20th century is the invention of computer, since its arrival, computer and other storage devices have played a key role in aiding business both domestically and internationally.¹³ Gone were the days when people carry huge cash on them for every transaction. Business has moved from paper-based to electronic-based. Electronic fund transfer and Automated Teller Machines have taken over business. Because of this achievement by man, many countries in the world have amended their laws to be computer compliant.¹⁴ Of course, that documentary evidence is admissible in Nigeria in certain circumstances is a matter of fact. However, the admissibility of electronically stored information was a matter of considerable debates. It was a topical issue among litigation lawyers as well as opinion moulders in Nigeria. The controversy is particularly evident from the conflicting decisions of the Supreme Court, Court of Appeal and the Federal High

Onigbinde and Seun Ajayi (eds), Contemporary Issues in the Nigerian Legal Landscape, Crown Goldmine Communications Limited, at page 69.

¹¹ Chukwuemerie A. I. op. cit, p. 1.

¹² Ibid.

¹³ Okojie, Douglas. "Electronically Generated Evidence under the Nigerian Evidence Act: Admissible or

Inadmissible". Available in <http://www.documents.juspura.com/C8f667b3-89d2-48c5-9591-be5863c0c0.pdf>,. Accessed on 6/10/2011 at 10.48am.

¹⁴ Ibid.

Courts.¹⁵ While the Supreme Court has tended to consistently interpret the repealed Evidence Act liberally to accommodate Electronically Stored Information Evidence, its immediate subordinate, the Court of Appeal, would seem to be less favourably disposed. Far worse is the Federal High Court, though supposed to be bound by the principle of precedent.¹⁶

As far back as 1969 in the case of *Esso West Africa Inc v. T. Oyegbola*,¹⁷ the Supreme Court acknowledged the relevance of computer generated evidence.¹⁸ In that case, the issue for determination was whether or not computer statement of account and their ledger copies were receivable in evidence as “books of account” under section 37 of the (repealed)¹⁹ Evidence Act. In proof of a claim for the balance of an amount due and owing for petroleum products sold to the Respondent, the Appellants stated that they normally kept the Respondent’s accounts and that at the end of each month statements of account were made out and sent to the Respondent. The Appellants’ attempt to tender the ledger copies of the statements of account already sent to the Respondent in the manner stated above was rejected by the trial Court on the ground that they did not constitute the type of books of account contemplated by the law; that the ones contemplated by the law were “usually bound and the pages are not easily replaced.” In rejecting that line of thought the Supreme Court stated at page 198 of the report thus:

Besides, section 37 of the Evidence Act does not require the production of “books” of account but makes entries in such books relevant for purposes of admissibility... 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

¹⁵ Niche Konsult Releases Green Paper on the Nigerian Evidence Act (Amendment) Bill, 2009. Available in <http://www.nichekonsult.com/> assessed on 6/10/2011 at 1.40pm.

¹⁶ Ibid.

¹⁷ (1969) 1 NMLR 194 at 198.

¹⁸ Taiwo Osipitan, SAN, “Why Computerized Statement of Account is Admissible as Evidence in Nigerian Courts”. Available in <http://www.nigerian/lawguru.com/article.practice> and procedure/Why Computerised Statement of Account. Accessed on 6/10/2011 at 9.50am.

¹⁹ Bracket supplied

reproduction or inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore apply to "books" of account... so bound and the pages... not easily replaced.

The decision was followed in subsequent cases like *Yesufu v. ACB*,²⁰ and *Mrs. Elizabeth Anyaebosi v. R. T. Briscoe (Nig) Ltd*²¹ where a statement of account was tendered and admitted as Exhibit P4 without any objection. On appeal, an objection to its admissibility was raised under section 97. Uwais, JSC (as he then was) overruled the objection.²² Similarly, in the case of *Chief Joseph Ogolo v. IMB (Nig) Ltd*.²³ Honourable Justice Onalaja, JCA (as he then was) stated as follows:

The commercial and banking operations in the keeping of accounts by the old system has changed to computer, which makes Nigerian business to be modernised and in keeping with the computer age which system is so notorious that judicial notice of it can be taken under section 74, Evidence Act.

Again, in the case of *Trade Bank Plc v. Chami*²⁴ The Court of Appeal, Lagos Judicial Division presided over by Honourable Justice Salami, (as he then was), relied on the previous decisions/pronouncements of the Apex Court, and advocated the admissibility of computerized statement of account as documentary evidence when it concluded thus:

This Section of the Evidence Act (Supra) does not require the production of "books of Account" but makes entries in such books relevant for admissibility. Exhibit 4 is a mere entry in the computer or book of account. Although the law does not talk of "computer" and "computer print-out" it is not oblivious to or

²⁰ (1976) 4 S.C.1.

²¹ (1987) 3 NWLR (Pt. 59) 84

²² Chukwuemerie I.A, op cit.

²³ (1995) 7 NWLR (Pt. 419) 314 C.A.

²⁴ (2003) 13 NWLR (Pt. 836) 216.

ignorant of modern business world and the technological advancement of the modern jet age. As far back as 1969, the Supreme Court in the case of *ESSO WEST AFRICA INC. V. T. OYEGBOLA* (1969) NWLR page 194, 198 envisaged the need to extend the horizon of the section to include or cover computer which was virtually not in existence or at very rudimentary stage ...

In spite of the above wonderful and progressive decisions of the apex court and contrary to the hallowed principle of *stare decisis*, which presupposes that the decisions of the superior court are binding on the courts below them²⁵, some of the Courts in Nigeria have taken a conservative view on this issue and have held that computer generated evidences are not admissible under the repealed Evidence Act. For example, in the case of *Nuba Commercial Farms Ltd & Anor v. NAL Merchant Bank Ltd & Anor*.²⁶ The Respondent's counter-claim at the High Court succeeded based on a statement of account printed out of the computer. In this case, the relevant issue with respect to the statement of account was whether or not the bank could go on in calculating interest against the Appellant after filing the counter claim in Court. Taking on more issues than were necessary for the decision of that narrow point the Court of Appeal asserted,

Section 97(1) provides for the admissibility of secondary evidence in certain stated cases including when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or any person legally bound to produce it. In (1) (h), it provides "when the document is an entry in a bankers book". The first issue that falls to be determined in the issues in this appeal on the admissibility of the banker's particulars stored in a computer, is that in the proper interpretation

²⁵ See the cases of *Alfred Omyemaizu v. His Worship J.A. Ojiako & Others* (2000) 6 NWLR (Pt. 659) 25 at 3; *Robinson Nwangwu v. Emenike Ukachukwu & Other* (2000) FWLR (Pt. 2) 273 at 289; *Adegoke Motors Ltd. v. Adesanya* (1989) 3 NWLR (Pt. 109) 25.

²⁶ (2003) 16 NWLR (Pt.740) 517, (2003) FWLR (Pt/145) 661

of the statute the words in the Evidence Act does not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellants cannot be said to have in his possession copies of its contents. More importantly the contents of such information have never been in the possession of the person against whom it was used. It is therefore right to conclude that the information retrieved from the computer being made by the respondent for its own use, is wrong to be used in the trial against the appellants.

It is clear from the statement that the Honourable Court took the view that such a statement of account printed from computer memory was not a "banker's book" and that even if it was it must be shown to have been in the possession of a party before it could be used against him in evidence.²⁷ The high point on the controversy surrounding the non-admissibility of electronically stored information comes to a head in the high profile case of *Federal Republic of Nigeria v. Chief Femi Fani-Kayode*²⁸ before Honourable Justice Ramat Mohammed. The defendant was arraigned before the Federal High Court by the Economic and Financial Crimes Commission (EFCC) on a 47 counts-charge of money laundering. During the trial, the prosecution called an officer of First Inland Bank to give evidence and sought to tender a certified copy of the computer generated statement of account of the respondent domiciled with the Bank. Respondent opposed the application on the ground that the computer generated statement of account is inadmissible under section 97 of the repealed Evidence Act. The learned trial judge upheld the objection and rejected the statement of account.

Although, it was reported that after rejecting the computerized statement of account/document in evidence, his lordship urged the National Assembly to quickly amend the Evidence Act in order to ensure admissibility of computer print outs thus:

There is urgent need for an amendment of the evidence law to cover admissibility of documents made by means of computer printout since it is clear that

²⁷ Chukwuemerie A.I. op, cit

²⁸ FHC/L/523C/08

technological methods of producing document now form part of day to day activities in business transaction particularly in business circle.

The decision of his lordship had received criticisms in some quarters. For instance, Professor Taiwo Osipitan condemned the decision in a clear term as a direct affront on the principle of judicial precedent in view of the several decisions of the Supreme Court on this matter by virtue of the doctrine of *stare decisis* binding on his lordship. In the case of *Clement v. Iwuanyanwu*²⁹ the Supreme Court observed that 'the doctrine of *stare decisis* presupposes that the law has been solemnly declared and determined in the former case thereby in a hierarchical judicial arrangement precluding judges of subordinate courts from changing what has been determined'. Clearly, the decision of Honourable Justice Ramat Mohammed is against the principle of *stare decisis*, and there well condemned by Professor. Taiwo Osipitan. It is noted that one thread that had run through most of the cases in which electronically generated evidences were rejected was the fact that the repealed Evidence Act did not recognize such evidence. Due to these lacunae in the Evidence Act and in order to do away with conflicting decisions by courts, legal practitioners as well as other stakeholders joined forces to call for the amendment of the 2004 version of Evidence Act to bring it in tandem with the advancement in technology.

Premised on the foregoing, successive administrations have made attempts to bring the Act into conformity with modern realities and technological developments, so that such evidence can be admitted by our courts.³⁰ For instance, Chief Bayo Ojo (SAN) during his tenure as the Attorney-General of the Federation set up a Committee to review the Evidence Act making electronically generated evidence its high point. His successor in office, Chief Michael Kaafe Aondoaka (SAN) equally canvassed for the amendment of the rules and Act in his key note address at the opening of a four days seminar on Digital evidence for Law

²⁹ (Supra) at 39.

³⁰ John Austin Unachukwu. "For a new Evidence Act". Available in <http://www.the-nationonlineng.net/web2/article/20081/1/For-a-new-Evidence-Act/Page/html>, accessed on 6th October, 2011 at 1.15pm.

Enforcement Officers.³¹ While talking about the inadequacy of the existing procedural and Evidence Laws as a factor militating against crime bursting and prosecution in Nigeria vis-à-vis advancement in e-crime. The former Chairman of Economic and Financial Crimes Commission (EFCC), Mallam Nuru Ribadu Esq stated thus:

On the heels of the foregoing problems is the inadequacy of existing procedural and evidence laws for the prosecution of offenders. Quite a number of economic and financial crimes these days are carried out through the use of computers, word processors, telex machines, fax machines, etc. The problem that has arisen from the use of the above stated gadgets is the evidential value and admissibility of the materials generated by them vis-à-vis the law of evidence and proof of the guilt of a culprit of economic or financial crime. The evidential status and admissibility of computer and other electronically generated statements of account or printout, e-mails, telegraphic transfers, telefaxes, etc, have been issues of controversy in the courts, law institutions, workshops, bar conferences and seminars.

In view of the agitations from several quarters for the amendment of the repealed Evidence Act, the Chairman of the Senate Committee on Drugs, Narcotics, Financial Crimes and Anti-Corruption, Sola Akinyede,³² rose to the occasion by sponsoring a bill to amend the Evidence Act. While making a case for the amendment of the 64-year old Evidence Act at the floor of the Senate Chamber, Senator Akinyede observed as follows:

Since all banks now use computer print-outs as bank statements, the reason to amend the Evidence Act has become compelling owing to the fact that there will be a large number of cases of recovery of debts under the Failed Banks (Recovery of Debts) and Financial Malpractices in Bank Act Cap F2 LFN 2004, as well

³¹ Ibid.

³² Sola Akinyede represents Ekiti West in the National Assembly.

as other criminal cases resulting from the recent action of the Central Bank of Nigeria in trying to stave off the loss of confidence and crisis in the banking industry.³³

The bill had since been passed and signed into law by the President and Commander-in-Chief, Dr. Goodluck Ebele Jonathan on the 3rd June, 2011, thus paving way for the admissibility of computer and other electronically generated evidence in Nigeria. The controversy surrounding the admissibility of electronic stored evidence has become a thing of the past. It is therefore apposite at this juncture to examine the relevant sections of the new Evidence Act on this point.

Electronic Evidence

Electronic evidence is the evidence generated by some mechanical or electronic process.³⁴ The use of computers and other forms of electronic storage and communication systems have largely replaced the traditional method of keeping records and communication in written documents.³⁵ Essentially, the introduction of computer and other electronic devices had increased the storing of information in electronic form. The computer has been defined variously both by text writers as well as in statute books; hence, it is necessary to look into some of these definitions to drive the point home. According to Yusuff, computer is a device, an "intelligent" electronic devise, constructed to receive and process information and data, bringing out the desired output.³⁶ A more comprehensive definition of computer is contained in the South African Computer Evidence Act of 1983.³⁷ Section 1 of the Act defined computer as:

³³ Alita Daniel and Azimazi Momoh Jimoh. "Senate Reviews Act to make Electronic Evidence Admissible. Available in <http://news.on;inenigeria.com/?k=Economic+and+Finacial+Crimes+Commission>, accessed on 19/9/2011 at 19.01pm

³⁴ Yusuf O. Alli (SAN), op cit at page 68.

³⁵ Ibid.

³⁶ Yusuff A.O. "Computer Technology and Copyright Eligibility Under the Nigerian Copyright Law" (2005), *Igbinedion University Law Journal Vol. 3*. Page 41

³⁷ Now repealed.

Any device or apparatus, whether by electronic, electro-mechanical, mechanical or other means is capable of receiving or absorbing data and instructions supplied to it, of processing such data according to mathematical or logical rules and in compliance with such instructions of storing such data before or after such processing and of producing information derived from such data as a result of such processing.

Similarly, in the newly promulgated Nigerian Evidence Act, computer is defined as

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.³⁸

'Electronic evidence' has been defined as any information stored or transmitted in digital form that a party to a court case may use at trial³⁹. From the various definitions above, a computer is any device used for storing or processing information. The product of such information is electronic evidence. However, before information stored or processed by computer is admissible in evidence; its mechanical accuracy must be guaranteed, the print out information must be capable of being compared with the copy. Once these conditions are met and there is no proof that the process had been tampered with in any material particular, it is safe for the court to admit same as electronic evidence.

Types and Classification of Electronic Evidence

According to Black's Law Dictionary, evidence is "something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact."⁴⁰ From the above definition, evidence could be basically classified into three namely: oral, real and documentary. We will briefly examine the three in turn.

³⁸ See section 258 (1) of the Evidence Act, 2011.

³⁹ Digital Evidence. Available in http://en.wikipedia.org/wiki/Digital_evidence.. Accessed on 19/9/2011 at 18.46pm.

⁴⁰ Black's Law Dictionary, 8th Edition at page 595.

Oral Evidence

Oral evidence could be described as verbal disposition of a witness. The usual method of proving facts in court is by the oral testimony of witness. For this purpose, section 125 of the Evidence Act provides that “*all facts, except the contents of documents, may be proved by oral evidence.*” Section 126 of the Act further states *inter alia* that oral evidence shall in all cases whatever, be direct. The section goes further to give instances of direct oral evidence. That is, witness must give evidence of testimony that he has direct knowledge and not hearsay evidence, which is an exception to section 126 of the Evidence Act. Such evidence must also be given in the presence of the parties to the case. The rationale for this is to enable the opponent to cross examine the witness and to test the credibility and veracity of the witness testimony in the open court.

Real Evidence

Phipson in his book, Law of Evidence⁴¹ defined ‘real evidence’ as material objects other than documents produced for inspection by the court. A fuller definition is given under section 258 (1) of the Evidence Act, which defines it as follows:

‘real evidence’ means anything other than testimony admissible heresy or a document the contents of which are offered as evidence of a fact at a trial, which is examined by the court as a means of proof of such fact

From the above definitions, real evidence may include anything, person or place which is observed by the court in order that a conclusion may be drawn as to any fact in issue.⁴² The following are some of the types of material objects used as real evidence: the weapon used in the commission of a crime, the appearance of persons, tape recordings, fingerprints, photographs, films, video recordings, hand writing, documents (when presented as a chattel rather than for their contents) and blood tests. The list is by no

⁴¹ Sidney L. Phipson. *The Law of Evidence*, 16th Edition, London, Sweet & Maxwell, 2005, at page 5.

⁴² Schwikkard P.J. & Van Der Merwe S.E. *Principle of Evidence Second Edition Cape Town Paarl Print, 2002 at page 366.*

means exhaustive⁴³. Real evidence usually owes its efficacy to the evidence of a witness who explains or produces the exhibit in court. Section 127 of the Evidence Act deals with the inspection of either movable or immovable property if oral evidence refers to the existence or conditions of any material thing other than a document. In order to resolve the issue, the court may require the production of such material things for its inspection or it may inspect any movable or immovable property to see firsthand the object being referred to for the proper determination of the question in dispute.⁴⁴ The major essence of inspection of locus is to bring to the fore the evidence of both parties without bias. It is a forum to allow parties show the court important boundaries and landmarks to enable the court decide the issue or issues in dispute. In the case of *Obi & Ors v. Mbionwu*⁴⁵ the Supreme Court held as follows:

It has been said that the purpose of an inspection of a locus is not to substitute "the eye for the ear" but rather to clear any ambiguity' that may arise in the evidence or to resolve any conflict in the evidence as to physical facts. In other words, the purpose of an inspection of a locus in quo is primarily for the purpose of enabling the court to understand the questions that are being raised at the trial and to follow the evidence and apply such evidence.⁴⁶

Documentary Evidence

Documentary evidence consists of statements made in writing which are intended to be relied on. Three main rules have to be complied with before a document will be admissible: (a) the statement contained in the document must be relevant and admissible; (b) its authenticity must be proved; and (c) the original document must normally be produced. There are various exceptions to the last rule.⁴⁷ The greatest challenge to admissibility

⁴³ Ibid.

⁴⁴ See section 127 (1) (a) and (b) of the Evidence Act, 2011.

⁴⁵ (2002) 14 SCM 189 at 204

⁴⁶ See further the case of *Orugbo & Another v. UNA & 7 Others* (2002) 13 SCM 153 at 165-166.

⁴⁷ Schwikkard P.J. & Van Der Merwe S.E. op. cit at 372.

of electronic evidence under the repealed Evidence Act relates to the definition of the word 'document' under the said Act.⁴⁸

'Document' is defined under the repealed Evidence Act as:

Document includes books, maps, plans, drawings, photographs, and also includes any matter expressed or described upon any substances 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.⁴⁹

Although the above definition of document is still maintained in the newly promulgated Evidence Act, however, it has been expanded to include computer evidence and other evidence generated electronically. Under the new Act, other forms of electronic evidence are contained in paragraphs (b) to (d) as addendum to the above definition of document in the following terms:

(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; and (d) any device by means of which information is recorded, stored or retrievable including computer output.⁵⁰

With the above provision, the obstacle against the admissibility of electronically generated evidence in the repealed Evidence Act had been removed. However, there are few conditions which parties to judicial proceeding must satisfy before the evidence is admitted and these will be discussed shortly in order to appreciate the new position.

⁴⁸ Honourable Justice Alaba Omolaye-Ajileye. "Admissibility of Electronic Evidence in Criminal Trials". Available at http://alabajileye.org/admissibility_of_electronic_evidence.ht.. accessed on 23/10/2011 at 7.25AM.

⁴⁹ Section 2 (1) of the Evidence Act, Cap E 14, Laws of the Federation of Nigeria, 2004.

⁵⁰ Section 258 (1) of the Evidence Act, 2011.

Best Evidence Rule

The "Best Evidence Rule" is an antique common law rule of evidence and it is to the effect that only the best evidence is to be produced or relied upon in court by a party in proof of the content of a document.⁵¹ The rule was made use of as far back as 1729 in the case of *Chenie v. East India Co.*⁵² to exclude copies or counterparts of agreement excluding oral evidence of article in dispute. The rule was further stated by Lord Hardwicke in the case of *Omichund v. Baker*⁵³ in the following term:

The judges and the sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.

Literally, the best evidence rule holds that when there is an allegation and there is more than a fact or proof to affirm or disprove the allegation, the most original or most proper of all the facts should be adopted. This position is applicable to all forms of judicial evidence. With the electronic evidence, the fact of the matter is that electronic evidence is almost never in a format readable by humans, requiring additional steps to include computer documents as evidence (i.e. printing out the material).⁵⁴ In view of this additional processing, it has been argued in the past that this change of format may mean that electronic evidence does not qualify as evidence under the best evidence rule and at best will qualify as secondary evidence. This was the position of the Supreme Court in the case of *Anyabosi v R.T. Briscoe Nigeria Ltd.*⁵⁵ where the Supreme Court unanimously confirmed that computer print outs are admissible in evidence under section 97 of the repealed Evidence Act as secondary evidence.

Now with the coming into operation of the new Evidence Act, the evidential status of computer and other electronically generated evidence has been resolved under section 86 (4), this section provides thus:

⁵¹ Omiunu Ohiocheoya, Ifeanyi Chukwu Asuka & Ighodalo Imadegbello "Information and Communication Technology and the Nigeria Rules and Evidence, (2008) 11 (1&2) *University of Benin Law Journal* at page 91.

⁵² (1729) Peake Add. Cas 123 or 170 ER 217.

⁵³ (1744) Willes 538 at 550.

⁵⁴ Digital Evidence op cit.

⁵⁵ (1987) 6 S.C 15

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 process, each should be primary evidence of the contents of the rest; but where they are all copies of a common original, they shall not be primary evidence of the content of the original.

In law admissibility as a rule of evidence is based on relevancy⁵⁶ again, in practice, courts of law do not bar printouts under the best evidence rule. In the case of *Aguimatang v. California State Lottery*,⁵⁷ it was held that

The computer printout does not violate the best evidence rule because a computer printout is considered an original.

Consequently, the best evidence of records or transactions stored in electronic device is the printout of such information in its original form. However, where a copy is made from the original by mechanical or electronic processes, for instance, by means of photocopying, it becomes secondary evidence of the original.⁵⁸

Conditions for the Admissibility of Electronic/Computer Evidence

Now that an electronic or computer generated evidence is admissible as primary evidence of the contents of the document sought to be tendered in court, the admissibility of such evidence is subject to the fulfillment of some conditions. These conditions are the subject of this section. As stated above, electronic evidence is the evidence generated through mechanical or electronic processes. These forms of evidence are facilitated by the wide acceptance of the use of computer in both private and commercial transactions. As a matter of fact, the advancement in the use of information and communication technology has aggravated and is fast replacing the traditional methods of keeping records and communications in

⁵⁶ *Abubakar v. Chuks* (2007) 12 SCM (Pt. 2) 28 at 39

⁵⁷ 234, Cal. App. 3d 768, 798.

⁵⁸ See section 87 of the Evidence Act, 2011.

written documents.⁵⁹ Examples of electronic evidence are computer print-outs, information storage devices such as disks, tapes and microfilms, telegraphic transfers, faxes and electronic funds transfers.⁶⁰

A major characteristic of this class of documents is that unless printed, they are paperless and though contained in tangible objects are visible but intangible. These would include bankers' books of various types, e-mails, telephone records, text messages, digital cameras, mobile phones, letters or other documents processed in a computer-based storage device.⁶¹ Under the new Evidence Act, the general rule for the admissibility of computer generated evidence is contained in section 84 (1) which provides thus:

In any proceeding 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.

The operative word in the above subsection of the Evidence Act is the word "shall". Going by the interpretation given to this word over the years by superior court record, the word when used in statutes connote obligation and mandatory, it is binding and not left to the discretion of the person to whom the enactment imposes the duty.⁶² Computer and other electronic evidence cannot be rejected by the court unless the party seeking to tender same fails to comply with the provision of subsection (2) of section 84 of the Evidence Act. A litigant purporting to tender computer generated evidence must therefore show that:

- (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

⁵⁹ Yusuf O. Alli (SAN), *op cit* at page 68

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See the following cases: *Olanrewaju v. Governor of Oyo State* (1992) 9 NWLR (Pt. 265) 335 at 368; *Captain E.C.C. Amadi v. NNPC* (2000) FWLR (Pt. 9) 1520 at 1540.

- purpose of and 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 or, if not, that in any respect in which it was not operating 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.⁶³

Apart from the above conditions precedent for the admissibility of computer generated evidence, the new Evidence Act also provides for the admissibility of information generated from one or more or combination of computers operating over a period of times. This is known in the field of Information and Communication Technology (ICT) as 'computer networking'. Computer Networking or the worldwide interconnection of many Computers and Computer networks allows information flow through now interconnected networks to any particular computer within the networks at a very high speed⁶⁴. Through computer networking, a thousand or more computer systems and networks could be electronically linked. Illustrating computer networking, Yusuff stated that it is like comparing or to imagine a large empty warehouse, the size of a standard football field, containing several Spiders each spinning its web in different directions within the field such that anyone of them can get to any part of the field just by moving on any web it can hook to in that direction, it will also be able to jump into a nearby web in case it encounters obstruction or heavy traffic in its path. The internet works in much the same way.⁶⁵

⁶³ See section 84 (2) of the Evidence Act, 2011.

⁶⁴ Yusuff. A. O. op cit at page 43

⁶⁵ Ibid.

The above illustration vividly represents the manner of keeping entries in the bank nowadays unlike in the past, banker entries are no longer done in paper form but in electronic form. We now have Automated Teller Machine (ATM); there is also Electronic Fund Transfer (EFT). Presently money could be transferred on line services among banks within few seconds and when there is dispute on such transaction, the print-out from one or combination of computers used during the transaction is relevant to the case as bankers' book and will be admissible in evidence under section 84 (3) of the Evidence Act as if these combinations of computer is a single computer. The sub-section provides thus:

Where over a period the function of storing or processing information for the purpose of and activities regularly carried on over that period as mentioned in subsection (2) (a) of this section was regularly 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;
- (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 computer 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 as constituting a single computer; and references in this section to a computer shall be construed accordingly.

Apart from section 84 (3) of the Evidence Act, section 51 of the new Evidence Act, also recognizes and supports the admissibility of electronic entries of the book of accounts. The section provides as follows:

Entries in books of accounts or electronic records regularly kept in the course of business are admissible whenever they refer to a matter into which the court

has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.

Although, one may not be culpable under section 51, however, the entries in such book of account are sufficient to prove evidence of such transaction in court. Furthermore, the new Evidence Act has also introduced the production of certificate by party seeking to use the print-out of computer evidence for the following purposes:

- (i) identifying the document containing the statement and describing the manner in which it was produced
- (ii) 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;
- (iii) dealing with any of the matters to which the conditions 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.

The above provisions, it is observed are to guarantee the authenticity of evidence generated electronically. Furthermore, apart from the foregoing conditions, it is also pertinent for the court to take cognizance of the condition laid down under section 84 (5) before admitting electronic evidence. The subsection provides as follows:

- (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.

As noted earlier, admissibility of evidence be it oral, documentary, real or computer evidence is generally premised on the relevance of the evidence to the issue being examined by the court. Procedurally, the rule of relevancy under the Evidence Act is generally speaking, based upon logical relevancy⁶⁶. However, admissibility is a matter of law.⁶⁷ In other words, evidence, though relevant to the case in hand may not be admissible, if it violates any known principle of law or if it is too remote as to be material in all the circumstances of the case.⁶⁸ In the like manner, before evidence generated electronically is admissible in evidence, it must be relevant to the issue before the court. Similarly, it is a different ball game altogether to admit evidence and the probative value it attracts from the court. Thus, if for any reason, a computer print-out fails to comply with required conditions as stated in the Act, the court may not attach much weight to it due to the circumstances surrounding its procurement. In the case of *S. v. Fourie*,⁶⁹ Lansdown & Campbell state that:

If what is adduced can in law properly be put before the court, it is admissible. It is only once it has been or could be admitted that its persuasiveness, alone or in conjunction with other evidence, satisfying the court as to the facta probanda has to be considered.

⁶⁶ Aguda T. Akinola, *Law and Practice Relating to Evidence in Nigeria*, Second Edition, Lagos, MIL Professional Publishers Ltd, 1998, at page 33.

⁶⁷ *Ibid.*

⁶⁸ See section 1 (1) of the Evidence Act, 2011.

⁶⁹ (1973) 1 & A 100 (D) 102H-103A.

In the determination of relevancy of evidence, reference must of necessity be made to the potential weight of the evidence.⁷⁰ Section 34 (1) (b) (i) and (ii) of the new Evidence Act governs weight of evidence to be attached to computer evidence, thus, in estimating the weight to be attached to an electronic or computer generated evidence, court shall have regard to the following questions:

- (i) the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, and
- (ii) The question whether or not any person concerned with the supply of information to that computer or with the operation of that computer or equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent facts.

From the foregoing, before evidence generated through computer or other electronic devices attract probative value, it must be shown that it was obtained contemporaneously with the occurrence or existence of the facts dealt with in that information. Similarly, it must be proved that any person concerned with the supply of information did not have any intention or motive to conceal or misrepresent the facts.

Conclusion

With the signing into law of the New Evidence Act, the Act has now paved the way for the admissibility of computer and other electronic stored information in the Nigerian Courts. Electronically generated materials have, as it were, become indispensable in life and business and it is extremely commendable that the court will

⁷⁰ Schwikkard P.J. & Van Der Merwe S.E. *Principle of Evidence Second Edition Cape Town Paarl Print, 2002 at page 20.*

now admit and act on them in relevant cases.⁷¹ However, as in all other pieces of evidence, it will depend on a party to exercise appropriate vigilance to ensure that any undesirable piece of evidence- electronically generated or not- is not admitted from the other party⁷². Even if such a piece of evidence is admitted on the ground of relevance, he needs the same vigilance to ensure that it is not accorded any weight by the court⁷³.

With the coming into operation of the new Evidence Act having admissibility of computer and other electronically generated evidence has its high point, Nigeria has now been brought at par with other jurisdictions where electronic evidence had hitherto been admitted. It is indeed a victory at last for agitations for the amendment of the Evidence Act, 2004. It is to be hoped that the Nigerian judiciary will apply itself to tackling the legal issues that will arise out of the admissibility of computer and other electronically generated evidence in an informed and accurate manner as envisaged under the new Evidence Act.

⁷¹ Chukwuemerie A.I. op, cit

⁷² Ibid.

⁷³ Ibid.