

Admissibility of Electronic and Computer Generated Evidence in Nigeria: Issues and Responses

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Abstract

The admissibility of computer generated evidence in Nigerian courts as introduced by the Evidence Act, 2011, though nascent, must be considered as a giant step in revolutionizing the Nigerian jurisprudence, thus moving away from the absurd stance of non-recognition of such documentary evidence. Commerce and information have been greatly advanced by computer base technology and it was only wise that our law was brought in tandem with the requirements of the age. The business of this paper is to examine the frontiers of electronic generated evidence in Nigeria, the conditions for their application and issues raised by some of the conditions; with a view to responding to the issues.

Keywords: *Admissibility, Electronic, Computer centred evidence*

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Background to the Study

The most important innovation of the Evidence Act, 2011 is the introduction of provisions which have made it possible for the Nigerian Courts to receive electronic and computer generated evidence, a feat which was impossible under the repealed Act but was left to the conjecture of our judges.

The Evidence Act, 2011 has not just provided for the admissibility of electronic and computer generated evidence but has located electronic and computer generated evidence within the realm of documentary evidence. Thus, like every other documentary evidence, electronic and computer generated evidence may be proved either by primary or secondary evidence.

Additional value which the Act has added to the reception of this genre of evidence is the widening of the scope of what constitutes document. The Act defines the word “document” in relation to electronic and computer generated evidence to include computer print outs, compact disk, electronic messages, video tapes, 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 other equipment) of being produced from it; and 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 any device by means of which information is recorded, stored or retrievable including computer output¹.

The vista of electronic and computer generated evidence is probably beyond what we can envision from the extant provisions of the Evidence Act. This paper seeks to examine some of the aspects of electronic and computer generated evidence, the conditions for their admissibility and issues raised by the conditions. Attempt at responding to the issues would be made.

Admissibility of E-mails, Website Documents, Telephone Messages and Video Tapes

Recalling the words a learned jurist; it cannot be gainsaid that the revolution in information technology has permeated every sphere of life. The trial process cannot, therefore, be an exception. Hence, the revolution has “invaded” the three principal means of proving facts under the Evidence Act, namely:

- (a) Oral testimony (viva voce evidence)
- (b) Documents and
- (c) Material things achieved by physical inspection of things (popularly referred to as visit to the locus in quo)²

The reality of this truism is what led to the provisions dealing with admissibility of computer generated evidence in Evidence Act, 2011.

E-mails are generated by computers and as such the conditions for reception of other computer generated evidence also apply to admissibility of emails. The Court of Appeal was faced with the issue of whether email was a permissive means of communication as envisioned under

¹ Section 258(1), Evidence Act, 2011

² Hon. Justice C. C. Nweze, “The Evidential Landscape in Cyberspace: Implications of Technological Developments on the Law of Evidence in Nigeria” in A. I. Chukwumerie (ed) *Growing the Law, Nurturing Justice* (Port Harcourt: Law house Books, 2005)

Section 76(3) of the English Arbitration Act, 1996, which stipulated that a notice or other document may be served on a person “by any effective means”. The court discountenanced the argument which sought to exclude the evidence as not being one of such “effective means”. It held further, that, e-mail is a form of communication that is set down in writing and the fact that it is electronic is immaterial, adding that, it can be down loaded and it is as real as a hard copy of the letter or mail³.

It then follows that once an e-mail satisfies the conditions for admissibility, it would be admitted in evidence⁴. Just like e-mails evidence, can also be generated from websites through the use of computers. The rules for admissibility of documents generated from websites are virtually the same as the rules guiding admissibility of e-mails. The authenticity of documents printed from websites may be in issue and from decided authorities; the judicial attitude is usually to hold it authentic where the person who printed out the document is called as a witness to testify that the printouts are correct copies of documents downloaded from the internet⁵.

The use of Global satellite mobile systems (GSM) in Nigeria is on the increase for ease of communication. It could rightly be described as the most common form of communication. Mobile phones constitute specie of computers and as such the rules guiding reception in evidence of computer printouts also apply to GSMs. The Evidence Act also recognizes the use of GSMs as a means of communication as well generating evidence.

The definition Section of the Evidence Act⁶, defines “document to include the following:

- (a) Books, maps plans, graphs, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter.
- (b) Any disk, 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) 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.

Telephone containing information falls under Section 258(1) (d) of the Evidence Act and can be tendered as a document. It is also practicable for the contents to be read and recorded by the court so that the telephone could be returned to the owner. Another option is to print out the message which would be compared with the message contained in the telephone to ensure that contents of the printout tallies with the information in the telephone. In this case, the party

³ Continental Sales Ltd v. R. Shipping Inc. (2012) All FWLR (Pt 630) P. 1377

⁴ Such conditions are whether the e-mail was pleaded, whether it is relevant, whether it was frontloaded and whether the test of reliability of the computer has been established. See Klifco (Nig) Ltd v. N.S.I.T.F.M.B. (2005) 6NWLJR (Pt 922) P. 44

⁵ Perfect 10 Inc. v. Cybernet Ventures Inc. 213F. Supp. 2d 1146 (C.D. Cal 2002)

⁶ Section 258 (1) (d)

⁷ See the English case of R.V. Neville (1991) Crim LR 288

seeking to tender the printout has to prove that the enabling computer was working properly as required by law. A party who chooses this option also has to tender the requisite certificate.⁷

Another type of telephone (computer) generated evidence is text messages sent through telephone. This type of evidence is always met with objection on ground of hearsay. The Court of Appeal in England has set relevancy as the test for admissibility of text messages in the case of *R. V. TWIST*⁸. In ruling on objection against the tendering of text messages in evidence on the ground that they constituted hearsay evidence, the court held that the test of admissibility have to be applied; in which case the fact which it is sought to prove must be a relevant fact, otherwise the evidence would be inadmissible on grounds of irrelevance. Having found that the text messages were relevant, the court held that they were not hearsay.

Call logs of communication is also a method of adducing GSM evidence; especially where a third party who is not privy to the communication places reliance on such communication. GSM cannot only be used to prove communication but identity of both the sender and the receiver of the missive. This is obtainable from the service portal of the network provider other than a private owned outfit. In this type of situation, the document qualifies as a public document which can either be tendered by a staff of the service provider; possibly the system operator or secondary evidence of such document may be adduced by certifying and tendering a copy of the document in addition to satisfying the conditions laid down in section 84 of the Evidence Act. The decision in the Indian case of *R V. Singh*⁹, shows that written records kept by a mobile telephone user are admissible to prove or corroborate the call logs on the said GSM telephone. In this case, a mobile telephone owner kept record of the numbers stored in his telephone in a separate notebook. The court held that, the notebook was admissible to show that the particular telephone number in issue was actually that of the defendant.

Fax Messages

Before the advent of GSM telephones in Nigeria, the use of telex and fax machines were very common to disseminate information and communication. Fax messages are similar to messages processed by computers, although the admissibility of fax messages is not guided by the same principles. By virtue of Section 153(1) of the Evidence Act, the court may presume that a message forwarded from a telephone office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the court shall not make any presumption as to the person by whom such message was delivered for transmission. That falls within the domain of fact to be proved. Thus the message stored in the machine/computer of the telephone office may be used to corroborate the message received by the recipient and vice versa. Similarly, by Section 153(2) of the Evidence Act, the court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission but the court shall not make any presumption as to the person to whom such message was sent.

The presumption here is rebuttable and would be dislodged if the recipient of the message is able to show that what he received differed from the message stored in the server. The possibility

⁷ See the English case of *R.V. Neville* (1991) Crim LR 288

⁸ (2011) 3ALL ER 1055

⁹ (2006) 1WLR 1564. In the case of *RV.Mawji* (2003) ALL ER (D) 285, a print out of text message from a mobile telephone showing threat to murder must held admissible in evidence. See also *RV. Robson* (1991) Crim LR 362

of this happening cannot just be swept under the carpet, especially in view of the fact that it is possible to hack into a person's electronic account. The process of tendering faxed message is easier than that of purely computer generated evidence. What is required for admissibility of fax message is for the document containing the message to be tendered as if it is an ordinary letter. It was held in the case of *Idakwo V. Nigerian Army*¹⁰ that a faxed message is in the form of a written document; hence the easiest way to prove its receipt is by tendering the message. The question of who sent the message is a fact to be proved and not what the court can presume.

Evidence Generated from Automated Teller Machines

Banks generally make use of Automated Teller Machines for payment of customers. It is electronically generated and also functions like the conventional computers. Its functions include:

- (i) Dispensation of cash
- (ii) Arithmetical calculations
- (iii) Recording of transactions of money disbursed and posting of accounts accordingly.
- (iv) Keeping of video records of transactions.

To lead documentary evidence of records of Automated Transmission Machines, its reliability must be proved as the conditions applicable to computer generated evidence also applies to it; *mutatis mutandis*. It is not unusual for lawyers to raise objection to admissibility of Automated Transmission Machine Printouts on the ground of hearsay but the judicial attitude leans in favour of admitting same. In the case of *R. V. Governor of Brixton Prison, ex-parte Levin*¹¹, the tendering of documentary evidence extracted from Automated Transmission Machines for the purpose of establishing that the defendant committed fraud while using the machine, was opposed on the ground that it constituted hearsay evidence and therefore inadmissible. The court over ruled the objection, holding that the printouts were not hearsay but were tendered to show that the alleged fraudulent transfers actually took place and besides that, the Automated Transmission Machines did the recording of the transactions themselves. The House of Lords also likened the printouts to photocopies of forged cheques.

Admissibility of Video Tapes

Most of the objections which usually meet with the tendering and admissibility of video tapes have always been on the premise of the inquiry; whether the person seeking to tender it; is the maker and most often than not, no objection is raised once the person tendering the video tape is the maker. There is dearth of judicial authorities in Nigeria as to admissibility of video tapes in evidence; and as such recourse to foreign authorities becomes more persuasive. The Evidence Act has classified video tapes as “documents¹²” thus subjecting them to the rules guiding primary and secondary evidence as the case may be; and must be pleaded and relevant to the case for them to be admissible in evidence¹³.

Authentication of a video tape is a condition precedent to its admissibility in the United States while in Nigeria certification is required where the video tape is a public document¹⁴. In the case of *Ezeanuna v. Onyema*¹⁵, the Court of Appeal Enugu Division in resolving the issue; whether

¹⁰ (2004) 2NWLR (Pt 857) P. 249

¹¹ (1997) 3ALL ER 289

¹² Section 258 (1)

¹³ See the case of *Maduekwe v. Okoroafor* (1992) 9NWLR (Pt 263) P. 69. Tape record speech and audio also fall within the category

¹⁴ See *Lopez v. United States* (CA 1 MASS) 313 F 2d 641

¹⁵ (2011) 13NWLR (Pt 1263) P. 36

video tape of public documents is admissible in evidence held that:

*Sections 97, 109 and 111 of the Evidence Act insist that only certified copies of public documents are admissible in evidence. Thus, the tribunal's rejection of the appellant's video tape in evidence was proper.*¹⁶

In India, even though tapes are admissible in evidence as relevant facts under Sections 7 and 8 of the India Evidence Act, caution must always be exercised before relying on tape recorded conversation¹⁷.

Tapes form vital facility for storing information or communication and messages stored in a tape can be transferred to various tapes¹⁸. Where this is the case, the admissible evidence must be the original tape. In the English case of *R. V. Stevenson, Hulse and Whitney*¹⁹, it was held that, tape to be admissible in evidence, it has to be established that the tape is an original tape recording of the information sought to be proved else the court would have no choice other than to reject it. The philosophy behind this rule is to guide against the danger of counterfeiting or altering recorded information. This danger is more pronounced in audio voice recordings.

Where a video recording was watched by some people before it was deleted, the evidence of those who watched it constitutes primary evidence of the video recording even to the extent of proving the identity of persons captured in the video recording²⁰; for instance where a crime was captured by a video recorder or closed circuit television²¹. In *R.V. Kenyon*²² tapes recording robbery incident from a closed circuit television which captured some images of the suspects were circulated to the police and members of the public for the purpose of identifying and arresting the suspected criminals. Although in an earlier case the English Court of appeal had warned against the use of security camera pictures because of the danger of giving different impressions of the same person,²³ this does not mean that it cannot be relied upon at all as the court would exercise its discretion to reject the evidence or refuse to attach weight to such evidence where there is doubt as to the identity of the person apprehended.

The case of *Taylor V. Chief constable of Cheshire*²⁴ is instructional in this respect. The appellant was convicted of stealing one Packet of Duracell batteries valued the sum of £1.89; from a shop. His image was captured by two remote cameras fixed in the shop. The images were viewed by a security officer on two monitors. One of the screens was linked to a video recorder, which showed a person with his back to the camera who picked up the batteries and slipped them inside his jacket. He later turned towards the camera, thereby making it possible for the camera to pick the full view of his face. The video tape was thereafter watched by the shop manager, some police officers and lawyer to the accused. By the time the case came up for hearing, the tape had been erased from the video cassette by new security officers. The court

¹⁶ Supra at PP. 74 Paras A-B

¹⁷ Sebastine Tar Hon (SAN) (2013), S. T. Hon's Law of Evidence in Nigeria, Vol. 1, 2nd Edition; Port Harcourt, Peal Publishers, P. 522

¹⁸ Such messages may be transferred into magnetite tapes, CD-ROM and DOD-ROM amongst others (1971) 1ALL ER 678

¹⁹ *R. V. Jones* (1994) TLR 23

²⁰ Commonly referred to as CCTV

²¹ (2000) ALL ER 962

²² *R.V. Downey* (1995) Crim LR 44

²³ (1986) 1WLR 1479, (1987) ALL ER 225

permitted those who watched the tape to testify as to what they saw. The appellate court affirmed the reliance placed on the evidence as primary evidence that identified the accused and stated thus:

*In substance I accept the contention made for the prosecutor. I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shop lifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of these activities on a camera, or a view of these activities on a recording of what the camera recorded.*²⁵

In the English case of *Kajala v. Noble*²⁶, it was held that the primary evidence rule applied only to written documents in the strict sense and did not apply to new category of documents-tapes and films. The court therefore upheld the admissibility of a video recording of the original BBC news film, which showed the defendant taking part in a riot. The court may decide to look for corroboration to video tape evidence, so as to accord it the necessary weight and may be satisfied by evidence of witnesses who are able to identify the accused or any of the accused persons at large from the video tape instead of insisting on evidence of eye witnesses who saw the accused persons commit the crime²⁷.

In the case of *Innocent Ekeh v. Ukachi Amachi & Ors*²⁸, the petitioner contested the election into the Imo state House of Assembly on the platform of A.P.G.A. while the 1st respondent was the candidate of People's Democratic Party (P.D.P) at the election. The 1st respondent was declared and returned as the winner of the election. Aggrieved, the petitioner filed a petition at the governorship and legislative Houses Election Petition Tribunal in Imo State, challenging the result of the election. According to him he was declared to be the candidate who scored the highest number of votes cast at the election and was assured that the result sheet and certificate of return would be issued to him later but the electoral body instead, later announced the 1st respondent as the winner and ascribed bogus scores to her. He also contended that the 1st respondent was not qualified to contest the election. The tribunal dismissed the petition for lacking in merit thus resulting in the petitioner's appeal to the Court of Appeal. The Court of Appeal could not find corroboration to video tape evidence either in the picture recording itself or even in the viva voce evidence before the tribunal as to strengthen the weight of the evidence. The Court of Appeal noted:

The appellant's case was that he was declared elected by the 3rd respondent at the conclusion of collation at the Local Government Headquarters Umuguma and was issued Form EC8B(1)-exhibit I. That one Emeka Nnodim-PW3 was engaged to film the collation exercise. The video clip was admitted as exhibit 2. Nothing else was tendered that he won the election in question. I agree too that his evidence is against the appellant's case, because PW1 and PW2 said it was the appellant that was declared as winner of the election and used exhibits 1 and 2 to support his claim. However, in the video clip, a man purported to be DW3 was seen announcing results which allegedly declared the appellant as the winner of the election. The same video man stated oath under cross-examination that exhibit 2 covered the declaration of the 1st respondent as the elected candidate. Nowhere in the video clip was the said declaration of the 1st respondent seen. The Tribunal made a definite finding that the

²⁵ Per Ralp Gibson LJ at 326

²⁶ (1982) 75 Cr. APPR. 149

²⁷ *Bowie v. Tudhope* (1986) SCCR 205

²⁸ (2010) ALL FWLR (Pt. 512) P. 1132

*video was neither clear nor reliable... The tribunal also accepted the DW3's evidence that the voice of the person seen in the video clip was not his. This further lends credence to the overwhelming evidence of the respondents' witnesses that exhibit 2 was heavily doctored.*²⁹

This case also highlights the dangers of placing so much reliance on video tapes as same is possible to be doctored by simulations. It is very possible to manipulate video recording especially with respect to voice recording. This is more of the reason why the courts should securitize video recordings and take into account findings from cross-examination before attaching weight to such video recording; while not losing sight of the importance of videos, and computer-generated displays as emergent and effective mode of presentation of evidence in contemporary court proceedings. It must be pointed out that, advancement in technology have now made possible the reception of testimonies of experts through live video conferencing link³⁰, and the Evidence Act, 2011 has strengthened the possibility of this being practiced in our today courtrooms rather than excluding it. The international tribunals are taking advantage of this technology, thus in the case of Prosecutor v. Tadic³¹, the international criminal tribunal for Yugoslavia was faced with lack of co-operation in the area of evidence, especially from the Republic of Srpska. The tribunal therefore, set up a video conference link from a secure location in the territory of the former Yugoslavia to allow numerous defense witnesses otherwise unable or unwilling to give evidence to be able to do so.

One of the issues submitted for the determination of the appeal in the case of Barrister Sullivan Chime & Anors v. Hon. Dubem Onyia & 2798 Ors³² was whether the trial tribunal rightly directed itself on the evidential value of the VCD recording exhibit P7.

At the Governorship election conducted by the Independent National Electoral Commission at Enugu State on 14th and 18th April, 2007, the appellants having polled the highest number of votes at the election were duly returned and declared the Governor and Deputy Governor of Enugu State by INEC. Dissatisfied with the return, the respondents petitioned the Governorship/Legislature Houses Election Petition Tribunal at Enugu on grounds inter alia that the 1st appellant was not validly elected and that the election was not conducted in substantial compliance with the provisions of the Electoral Act, 2006. The appellants' reply was struck out on the ground that the documents pleaded in the reply were not filed along with it. The appellants were thus unable to call witnesses in defense of the petition and as such the tribunal nullified the return of the appellants as Governor and Deputy Governor of Enugu State. The appellants appealed to the Court of Appeal. After consolidating three appeals arising from the decision of the tribunal, two of the appeals were upheld and one dismissed. Although the Court of Appeal found that since the issue of breach of fair hearing was raised and established it would amount to a wasteful academic exercise to proceed to determine the rest of the issues³³, the court however, held with respect to the issue reproduced above as follows:

²⁹ Per Galadima, J.C.A., as he was; at P. 1153 Paras C-H

³⁰ R. Widdison, "Electronic Law Practice. An Exercise in Legal Fulurolo in the modern Law Review, Vol 60 N0. 2, 161 Case No IT-94-1

³² (2009) ALL FWLR (Pt. 480) P. 673

³³ Supra at P. 731 PARAS B-CJ

*Exhibit P7 is a video compact Disc (VCD) tendered by the petitioner as i.e. (1st respondent herein) as a recording of events at the C.B.N. in the morning of Election Day 14th April 2007. It was stated by learned senior counsel for the appellants that when exhibit P7 was played at the trial it turned out that the recording related to two different locations and dates. One scene being Central Bank of Nigeria (CBN) premises in the morning of 14th April 2007 i.e. election day and the other scene being, vicinity of INEC (Enugu) office on 15th April, 2007 i.e. a day after the election....learned counsel for the 1st respondent submitted that after the incident occurred at CBN, it behoved the appellants to show that the materials were shared out in the presence of the polling agents and that election had taken place even after the incident. Exhibit P7 in my view, did not contain any evidence capable of voiding the election.*³⁴

Video tapes or recordings like any other documentary evidence may be impeached on the ground that it was made in anticipation of litigation or that it was made by a person interested in a legal proceeding³⁵.

In India there is move to insert a new section to the Indian Evidence Act to make the video tape or other statement of a minor complainant of sexual assault admissible in evidence as follows:

*In any trial or inquiry related to the sexual assault of a minor under Section 375, 376 and 509 of the Indian Penal Code, the videotaped statement of the minor made to a magistrate is admissible in evidence if the complainant while testifying adopts the contents of the videotaping.*³⁶

This development is persuasive and ought to be followed in Nigeria. The Court may also seek corroboration of recorded voice or recorded telephone conversation from an expert³⁷, especially in view of the fact that telephone conversations are not subject to strict application of the hearsay rule. A person who eaves drops into a conversation can competently give evidence of what he heard so long as he is able to prove the identity of the person whose voice he heard. This he can do either by direct oral evidence or by circumstantial evidence which must be compelling enough to establish such assertion³⁸. In *R.V. Deenik*³⁹, a custom officer impersonated the voice of the wife of a suspect in some telephone conversations. Upon the apprehension and questioning of the suspect, the officer who was passing by recognized the voice of the suspect from the answers he was giving. The prosecution sought to rely on the evidence of the officer identifying the voice of the suspect, the defense strenuously opposed it but the Court of Appeal rejected the argument in opposition to the admissibility of the officer's evidence and held admissible the officer's evidence.

Although one may tend to agree, that the evidence of the police officer was prejudicial and that he enticed the suspect to further cage himself in the web of the crime with which he was charged but the fact remains that, in criminal prosecution illegally obtained evidence is admissible in evidence⁴⁰. Similarly, *R.V. Neville*⁴¹, in a charge of stealing against the accused, telephone

³⁴ Supra at PP 709 -710 Per Bada J.C.A

³⁵ Supra at P. 710 Paras F-G. See also *Chinwuba v. ModupeAlade* (1997) 6NWL (Pt. 85)

³⁶ Legal, India Admin, Miscellaneous Legal Articles, <http://www.assessed.com> on 28/7/2008 at about 3:00pm

³⁷ See *R.V. Robb* (1991) 93G. APP R. 161

³⁸ See *Planter's Cotton Oil Co. v. Weston Telephone C.* 126 GG 621

³⁹ (1992) CRM LR 578

⁴⁰ See also Sections 14 and 15 of the Evidence Act, 2011

⁴¹ (1991) Crim LR 288

account relating to his mobile telephone was held to be admissible in evidence.

Evidence of call log recorded in a machine of the service provider is direct evidence and admissible, in evidence. In the case of R.V. Robson⁴², the accused was charged with robbery and the prosecution sought to tender computer print outs of telephone calls made on his mobile telephone linking him with the robbery. Objection was raised by the defense on the ground that the print outs are pieces of hearsay evidence. The court rejected the objection and admitted the print outs; on the ground that since the machine observed and recorded the facts, the record was not hearsay and since there was no human intervention such as programming the information. The court also held that the prosecution proved proper use of the computer and that the computer was at all materials times operating properly.

On the contrary where there is no proof that the print out came from the call recording machine but a mere assertion that a number of calls were made by the accused to certain telephone number the court would require corroboration either by requiring the tendering in evidence of the other telephone or calling its owner to testify.⁴³

It is submitted that a mobile telephone containing call identity facility capable of identifying any registered caller even when the caller has hidden his number, can also serve as proof of the identity of the caller. This technology is also helpful to the Economic and Financial Crimes Commission in the discharge of their duties⁴⁴

Electronic Signatures

Section 93 of the Evidence Act has provided the needed Succor for e-commerce thus bringing our law to intentional standards. The Section provides thus:

- 93(1). If a document is alleged to be signed or to have been written wholly or in part by any person the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his writing person, the signature or the handwriting of so much of the document as it alleged to be in that person's handwriting must be proved to be in his writing.*
- (2). Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed an electronic signature satisfies the 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.*

In the case of Forsythe v. Afilaka⁴⁵ signature was defined as either the name of a person or some written contraption not easily decipherable. To sign also means to affix one's name to writing or instrument, for the purpose of authenticating or executing an instrument as one's act. In the case of Tsalibawa v. Habiba⁴⁶, it was defined as, any mark which identifies it as the act of the

⁴² (1991) Crim LR 362

⁴³ See R. V. Burke (1990) Crim LR 401

⁴⁴ Section 13 of the Advanced Fee Fraud and other Related Offences Act, 2004 makes it mandatory for all persons who in their course of business provide telecommunication or internet services etc to register with the Economic and Finances Crimes Commission

⁴⁵ (2000) 1LHCR 123 at 129

⁴⁶ (1991) 2NWLR (Pt 1740 P. 461 at P. 481

party making it. It has also been defined as, the act of signing one's name to something⁴⁷.

Electronic signature is defined in Section 7(2) of the English Electronic Communications Act 2000 as, being so much of anything in electronic form as is incorporated into or otherwise logically associated with any electronic communication or data; and purports to be so incorporated or associated for the purpose of being used in establishing the authenticity of the communication or data, the integrity of the communication or data or both.

This simply means the identification of a maker of a document which is peculiar to the maker of the document either on a document or by electronic means. The demand of e-commerce makes the requirement very imperative; that maker of any electronic document authenticates the document by indicating that he is the maker and adopts the contents of the document; thus making it legally binding on him.

Hon has quoted an online explanation of the word “signature” which seeks to draw a distinction between a digital signature and an electronic signature thus:

*A digital signature (standard electronic signature) takes the concept of traditional paper based signing and terms into electronic “fingerprint” or coded message, is unique to both the document and the signer and binds both of them together. The digital signature ensures the authenticity of the signer. Any changes made to the document after it is signed invalidate the signature, thereby protecting against signature forgery and information tempering. Digital signatures help organizations sustain signer authenticity, accountability, data integrity and non-repudiation of electronic documents and forms.*⁴⁸

The Nigerian Evidence Act has not drawn any distinction between a digital signature and an electronic signature, they mean the same thing and each can be proved by any of the means stipulated in Section 93(3) of the Evidence Act, as against the English Law, which has classified electronic signatures into:

- (a) Typing of a name into a document
- (b) Email address
- (c) Checking the “I accept” icon
- (d) Personal identification number (PIN)
- (e) Biodynamic signature
- (f) Scanned signature and
- (g) Digital signature⁴⁹

The question arose in the case of SM Integrated Transware Pte Ltd v. Schenker Singapore (Pte) Ltd⁵⁰, as to whether e-mail communications constituting the terms of lease were signed by the parties, since Section 6(d) of the Singaporean Civil Law Act requires documents evidencing interest in land such as a lease to be duly executed. The court held that Section 8 of the Electronic Transactions Act did not apply since a lease is a contract for the sale or other disposition of immovable property or any interest in land and has been excluded from the

⁴⁷ Merriam-Webster Dictionary, (2014), Merriam Webster Inc.

⁴⁸ Op cit P. 517 Footnote 72

⁴⁹ Ibid P. 519.

⁵⁰ (2005) 2SLR

scope of Electronic Transactions Act. The court further held that, a type written or printed term of the party originating the message was sufficient even if this took the form of e-mail address of the originating party.

It is humbly submitted that since the court held expressly that documents of title or interest in land are not covered by the Act, it was of no use to add that the email address suffices. The email correspondences can only represent intention to enter into a lease which must be done in accordance with statutory requirement⁵¹.

The Indian jurisprudence empowers a court to form an opinion as to the digital signature of any person by relying on the opinion of the certifying authority which has issued the digital signature certificate⁵². This provision takes care of contentious cases, such as issues relating to digital signatures on credit card, smart cards, ATM cards, password etc as against mere reference to an e-mail address. In a situation like that, authentication of the signature by the service provider becomes relevant. The cases of *United States of America v. Siddiqui*⁵³, *Zealand Services Inc. v. Lozen International, LLC*⁵⁴ and *McGuren v. Simpson*⁵⁵ are distinguishable in this respect. In the case of *United States of American v. Siddiqui*⁵⁶, a combination of an email address and a user password of the internet service provider were held to be an electronic signature by an American Court; while in another American case⁵⁷, it was held that an internal company email address was admissible evidence of electronic signature.

*McGauran v. Simpson*⁵⁸ is a decision of an Australian Court in which a name in an email address was held to be a signature for the purpose of Section 54(4) of Australian Limitation Act 1969. The issue of authentication of electronic signature may also arise, where for instance; an unauthorized withdrawal is made from a customer's account with a bank; probably through unauthorized use of the customer's Automated Teller Machine card. The machine is capable of blocking an intended withdrawal where the intruder has wrongly signed the electronic signature of the actual owner (i.e. personal identification number-PIN) but the situation would be different where the intruder successfully signed the proper electronic signature of the actual owner.

It is submitted that for Nigerian Courts to fully appropriate the advantages of Section 93(3) of the Evidence Act, recourse must be had to foreign authorities until our case law authorities are fully developed with respect to admission into evidence, of electronic evidence.

Electronic Evidence by Expert Witnesses

The major area of documentary proof that the Nigerian Evidence Act has left in the domain of expert witnesses is as provided by Section 68 of the Act. The Section provides thus:

68(1) When the court has to form an opinion upon a point of foreign law, customary law or custom or of science or art, or as to identity of handwriting or

⁵¹ In Nigeria, where a statute has prescribed a particular mode for doing an act, no other mode can be resorted to. See the case of *Malah v. Kachalla* (1999) 3NWLR (Pt. 594) P. 309

⁵² Section 47A Indian Evidence Act 1872 (As amended)

⁵³ 235 F.3d 1318 (11thCor 2000) US

⁵⁴ 258 F. 3d 808; 2002 WL 496943 (9thCor 2002)

⁵⁵ (2004) NSWSC 35

⁵⁶ *Supra*. See also *Tribuimate v. Mondovi* 7Guinna2004 n.375(deer)

⁵⁷ *Sea-Land Services Inc. v. Lozen International LLC*, *Supra*

⁵⁸ *Supra*

finger impressions, the opinions upon that point of persons specially skilled in such foreign law, customary law or custom, or science or art or in questions as to identity of handwriting or finger impressions, are admissible.

(2). *Persons so specially skilled as mentioned in subsection (1) of this Section are called experts.*

There is no doubt that an expert may demonstrate his opinion through the use of computer or electronic evidence; for instance where the expert is faced with the determination of series of handwritings or finger prints. Experts are in most cases required to assist the court unravel the mysteries and complexities of obtaining and presenting computer desired evidence that require special skill. In explaining to the court the evidence being adduced, the expert may need to support his demonstration with electronic or computer generated documentary evidence since much computer-derived evidence is unintelligible to the ordinary person who does not possess such skill. According to Lord Mansfield in *Folkes v. Chadd*⁵⁹, an expert essentially acts as an interpreter addressing those matters likely to be outside the experience of and knowledge of a judge or jury.

Since the court is not bound to rely on and ascribe weight to the evidence of an expert, it then follows that the usefulness of his evidence would most depend on how impartial he is, given the fact that in Nigeria a party may out of his own volition pay and bring an expert to testify for him especially in election matters. In civil law systems such as France and Germany an official expert will be nominated by the court, and has a different status from an ordinary witness. Evidence of finger impression is said to be one of the strongest evidence of identifying a person in that, the chance of two individuals bearing the same continuation of papillary ridges on fingertips or bulbs is negligibly small.

Identification by finger print impressions is very useful in criminal prosecution and this point was underscored by Rose L.J; in *R. V. Buckey*⁶⁰, in the following words:

Fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. It may so tend even if there are only a few similar ridge characteristics but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value.

The fact that an expert's finger print evidence is admissible does not therefore mean that it must be accorded weight simpliciter rather; the courts have always made it their practice as in admission and ascribing weight to confessional statement; to require corroborative evidence. The English court stated clearly in the case of *R. V. Court*⁶¹ that, opinion of an expert on finger print or thumb impression is not conclusive proof of that fact.

Evidence of Blood Samples⁶²

This is yet another form of evidence that may be obtained by forensic proof; born out of the experiment which has proved that the blood composition of a child can show proof of its

⁵⁹ (1782) 2Dough 157

⁶⁰ (1999) 13 JP 561

⁶¹ (1960) 44 Cr. APP. R. 242

⁶² Commonly referred to as "DNA"

paternity. Thus, blood sample test is admissible. In the Nigerian case of *Adeyenu v. Abayonu*⁶³, three ladies claimed the maternity of a baby girl. The police obtained their consent to subject themselves to DNA test which was conducted in the United Kingdom with their blood samples. The result eventually revealed that the baby belonged to the 3rd defendant. The plaintiffs in this suit were dissatisfied with the result of the DNA and therefore brought the suit that led to the appeal in the instant case; contending that the test was not foolproof. The action was dismissed and the counter-claim granted in favour of the 3rd defendant who was granted the maternity of the child.

The Child Rights Act offers a useful guide concerning DNA test as it empowers the courts to rely on results of scientific tests when tendered and admitted in evidence. Section 63 thereof provides as follows:

63 (1) In any civil proceedings in which the paternity or maternity of a person fails to be determined by the court hearing the proceedings, the court may, on an application by a party to the proceedings, give a direction for -

(a) *The use of scientific tests, including blood tests and Deoxyribonucleic Acid tests, to ascertain whether the tests show that a party to the proceedings is or is not the father or mother of that person; and*

(b) *For the taking within a period to be specified in the direction, of blood or other samples from that person, the mother of that person, the father of that person and any party alleged to be the father or mother of that person or from any two of those persons.*

The court is vested with discretion to either specify the person or persons who would undergo the test or to give such direction where it considers that it would be inappropriate to give such specification where such would be contrary to any provision of the regulations made under Section 65 of the Act or for any other reason. It is submitted that the court may in reliance on this provision, order an expert to conduct the test on a child and the contestants for the child or may direct the contending parties to submit themselves and the child to test to an expert of their choice. The most important thing to the court is that a documentary evidence of the result of the test be submitted to it. The result is to state the following:

(I) *Whether the party to whom the report relates is or is not indicated by the results as the father or mother of the person whose paternity or maternity, as the case may be, is to be determined; and*

(ii) *If the party is so indicated, the value, if any, of the results in determining whether that party is actually the father or mother of that person.*

The maker of the report may also make additional written statement or document explaining the contents of his report where any party to the proceedings has sought such explanation with leave of the court or where the court *Suo Motu* directs. Such, document shall also be admitted as forming part of the report of the tests already tendered and admitted.

The Act prohibits a party from calling as a witness any expert, who has conducted test pursuant to court's directive, in which case such a witness would be treated as a neutral witness and not a witness to any of the parties. Section 63(8) makes the provision thus:

⁶³ (2002) FWLR (PT. 132) P. 136

63(8) *Where a direction is given in any proceedings, a party to the proceedings shall not, unless the court otherwise directs, be entitled to call as a witness.*

(a) *The person who carried out the tests taken for the purposes of giving effect to the direction; or*

(b) *Any person who did anything necessary for the purpose of enabling those tests to be carried out, unless within fourteen days after receiving a copy of the report that party serves notice on other parties as the court may direct of his intention to all that person, and where a person is called as a witness the party who called the person shall be entitled to cross-examine that person.*

The party on whose application the court made the direction authorizing the conduct of the blood sample test is the person to pay the cost of conducting the test and any expenses reasonably incurred, not only by the expert but also any person who had taken any step required of him by the court order. Nobody shall be compelled to submit to such test. The law requires that any person to be so tested gives his consent before he could be subjected to test.

Section 64 provides:

- (1) Subject to the provisions of subsections (3) and (4) of this Section, scientific sample which is required to be taken from any person for the purpose of giving effect to a direction under Section 63 of the Act shall not be taken from that person except with his consent.
- (2) The consent of a child who has attained the age of sixteen years to the taking from himself of a scientific sample shall be as effective as it would be if he had attained the age of majority and where a child has by virtue of this subsection given an effective consent to the taking of a scientific sample, it shall not be necessary to obtain any consent for it from any other person.
- (3) A scientific sample may be taken from a child under the age of sixteen years, not being a child as is referred to in subsection (4) of this Section, if the person who has the care and consents.

Similarly, scientific sample may be taken of a child who is suffering from mental disorder and is incapable of understanding the nature and purpose of scientific tests, if the person who has the care and control of the child consents and the medical practitioner in whose care he is, has certified that the taking of the scientific sample from the child shall not be prejudicial to his proper case and treatment. The result of test obtained pursuant to the consent given by the person who gave his consent or the person on whose behalf consent was obtained becomes admissible documentary evidence.

Forensic analysis is also useful in criminal trials though it entails a higher level of burden of proof. It then follows that a blood stained glove or short found in possession of an accused is not conclusive evidence that he committed the crime or that the blood belongs to him except same is subjected to forensic analysis and so proved.

The trend of match probability of DNA in many sampled subjects operated to reduce the weight that may be attached to the result where such probability is very possible. In this case, the

court would caution itself of the danger of misjudging a person's blood component with that of another person with similar blood component. This situation creates a doubt that must be resolved in favour of the accused.

Proof of Handwriting by Expert Evidence

Where handwriting or signature is in issue, it may be proved by the court requiring that signature or writing be reduced on a piece of paper for purposes of comparison without calling evidence of handwriting expert. A judge has some limitations in matters of comparing signatures or handwriting in that, where the comparison is not very obvious but involves matters which are within the competence of an expert, it would not be proper for the judge to constitute himself an expert and proceed to form his own opinion on a handwriting issue. Where a judge causes a witness to write on a piece of paper for comparison, such piece of paper would be admitted in evidence and if found similar to the writing or signature with which it is being compared, it becomes conclusive proof of same. The Supreme Court cautioned in the case of *Ezeonwu v. Onyechi*⁶⁴, that, mere dissimilarity in signature is neither conclusive evidence nor a rational basis to ground a finding that such signatures were in fact not made by one and the same person.

Another mode of proving signature or handwriting is by calling evidence of an expert as provided in Sections 68, 72 and 93-101 of the Evidence Act.

Section 68(1) provides that:

When the court has to form an opinion upon a point of foreign law customary law, or custom, or of science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons skilled in such foreign law, customary law or custom or science or art, or in questions, as to identity of handwriting or finger impressions are admissible

Subsection 2 of the Section describes such persons as expert. Mere Claim by a witness that he is an expert or handwriting expert is not enough, there has to be proof that he is qualified to be rated an expert in a particular field. In the case of *Fashugba v. I.G.P.*⁶⁵, the appellant was convicted on the evidence of a police officer who claimed to be a handwriting analyst. There was no proof that he has ever analyzed handwritings or that he had such training. The Magistrate relied on his evidence and convicted the appellant. The conviction was eventually quashed on appeal, as the appellate court did not find enough proof to regard the evidence of the police officer as expert evidence.

The opinion of a handwriting expert may be in form of documented report; although a court is not bound to accept or ascribe weight to the evidence of an expert but then, the court cannot discountenance such evidence without first evaluating it, so as to test its veracity or authenticity and then determine whether or not to ascribe weight to it.

By virtue of Sections 72 to 76 of the Evidence Act, the court may also rely on opinions of non-experts. When such opinion relates to handwriting, the court may rely on the evidence of a person who is acquainted with the handwriting of the person by whom it is supposed to be written or signed. The evidence or opinion of such a witness may be that the writing is or is not that of the person who is alleged to have made it.

⁶⁴ (1996) 3NWLR (Pt. 438) P. 499

⁶⁵ . (1964) 2 ALL NLR 15

A person can only be said to be acquainted with the handwriting of another person when he has seen that person write or when he has received documents written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him. In the case of *Salami Lawal v. C.O.P.*⁶⁶, a witness gave evidence to the effect that he was conversant with the appellant's signature having worked together with him. He identified the signature in issue as that of the appellant; although he is not an expert, the trial court relied on his evidence; on appeal, it was held that the trial court was right to have relied on the evidence of the witness.

A person who witnessed the signing of a document is also competent to testify as to the handwriting or signature of any of the persons who signed the document; especially when the witness was the person who prepared the document. In the case of *Adenle v. Olude*⁶⁷, one of the issues submitted to the Supreme Court for the determination of the appeal was:

Whether the Court of Appeal was right in making comparison between exhibits A, B and C and thus coming to the conclusion that DWI was a signatory to both exhibits A and C.

The action was instituted by the respondent who claimed that a parcel of land was sold to him from the layout made by Iyade family of their land in Ikeja, Lagos. He relied on the purchase receipt (EXHIBIT 'A') showing that accredited representatives of the family including the DWI (MomoduIlo, the Olu of Ikeja, who duly conveyed the land to him by virtue of EXHIBIT "C" -registered deed of conveyance). The respondent claimed that he bought the land through one Odunsi who also had a conveyance of a parcel of land from the family (EXHIBIT D). The lawyer who prepared the conveyance testified that he prepared EXHIBIT "C" for the respondent and EXHIBIT "D" for Odunsi. According to the lawyer the deeds of conveyance were executed before a magistrate; because the vendors were illiterate persons. He also gave evidence to the effect that Oba MomoduIlo (DW I) signed the deeds as the head of the family with other vendors and principal members of the family, although, DW I. denied signing the deeds. The appellant claimed that the land was sold to him and that a purchase receipt (EXHIBIT "E") and a deed of conveyance (EXHIBIT "F") were executed in his favour by the family.

The trial court believed the evidence of the DW I that he did not sign EXHIBIT "C" and dismissed the case on the ground that the respondent ought to have called a handwriting analyst to show that the signature on EXHIBIT "C" which was alleged to have been signed by the DW I was actually signed by him. The judgment was overturned by the Court of Appeal and being dissatisfied with the judgment the appellant appealed to the Supreme Court which upheld the appeal.

On how to ascertain the authenticity of signature alleged to be forged; the apex court stated as follows:

In resolving the issue of the due execution of a document where the alleged maker denies the signature, the course or options opened to the court would be the following-
(a) *To receive evidence from the attesting magistrate if there is such an attestation and if it is still possible to call the magistrate.*

⁶⁶ (1988) 3NWLR (Pt. 85) P. 670

⁶⁷ (2003) FWLR (Pt. 157) P. 1074

- (b) *To hear evidence from a person familiar with the signature of the alleged signatory or who saw him write the signature.*
- (c) *To compare the signature admitted by the alleged signatory to be his own with the one under contention.....*
- (d) *To direct the person to sign his signature for the purpose of enabling the court to compare the signature alleged to have been written by him.*

Conditions for Admissibility under Section 84

Section 84 of the Evidence Act deals with the conditions for the admissibility of computer generated evidence in both civil and criminal proceedings. The provision is strictly on admissibility of statements in documents produced computer and should not by any means be construed to cover other electronic generated evidence which gadget does not fall within the ambit of the definition of “Computer” if statement is to be strictly construed as on paper output from a computer. For ease of clarity the Act defines computer to mean any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process.⁶⁸

What constitutes a computer therefore depends on the ability of the device to manifest the characteristics stated in the provision. Such devices as calculator, mobile telephone handset, camera etc cannot be ignored as qualifying as computers in the definition of the Evidence Act; but they can only fall within the scope of Section 84 of the Act, if they are capable of producing the information stored in them, in documentary form.

The conditions spelt out by S-84 (2) of the Evidence Act relate to the documentary statement produced by the computer and the state of the computer itself.

The conditions are:-

- 84 (2)(a). that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody whether corporate or not,, or by any individual;
- (b). that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- (c) that throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of the 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.

The summary of the conditions listed above is that, a party seeking to rely on such document must prove that the document was stored in the computer which produced it in the ordinary course or usage of the computer for such purpose and that the computer was in good condition,

⁶⁸ Ibid

reliable and that the output correctly represents what was stored in the computer. Further threshold requirements for admissibility of computer generated document are as found in sub sections (3) and (4) of Section 84 of the Act. While subsection (3) permits the treatment of combinations of computers responsible for the output sought to be tendered, as a single computer, subsection (4) requires the corroboration of the Section 84 (2) conditions by a certificate; which must identify the document, state how it was produced and giving particulars of the device used or involved in the production. The certificate is to be signed by the producer or any person whose position is relevant to the production of the document. This certificate which has attracted the judicial reference of the word “certificate” may be made on oath or the maker stating that he made the certificate to the best of his knowledge and belief. These provisions have been put to rest by the Nigerian courts of record including the apex court.

Like every other documentary evidence, computer generated evidence may be proved either by primary or secondary evidence. It is also classified into private and public document. When any computer generated evidence is sought to be tendered, the law requires the tendering of the primary evidence of it except where secondary evidence is permissible; for instance a copy of public document that is computer generated must be certified to make it admissible. This issue was discussed at length by the Supreme Court in the case of Kubor V. Dickson⁶⁹. The appellants in this case presented petition before the Governorship Election Tribunal, Holden at Yenagoa, against the respondents. The appellant's case was that the 1st respondent was not qualified to contest the election into the office of Governor of Bayelsa State which was held on 11th February, 2012 because prior to and up to the date of the election there was a pending litigation in court over the question of who was the candidate of the 2nd respondent for the election. In reaction to the pleaded facts in the petition, the 3rd respondent filed a reply in which it pleaded, inter alia, that on the 1st day of January, 2012, the Federal High Court, Abuja ordered the 3rd respondent to restore the name of the 1st respondent as the 2nd respondent's (PDP) candidate for the Governorship election of Bayelsa State, which order was complied with by the 3rd respondent (INEC). The order of the Federal High Court was admitted as exhibit “N”. The tribunal in dismissing the petition for lacking in merit rejected exhibits “D” and “L” which were internet print outs of punch newspaper and list of candidates posted on INEC's website respectively tendered from the bar and admitted in evidence. The appellant's appeal to the Court of Appeal was dismissed and on further appeal to the Supreme Court, the appeal was unanimously dismissed. On the admissibility of computer generated document or document downloaded from the internet the Supreme Court pointed out that the governing provision is section 84 of the Evidence Act, 2011; and the conditions listed under that Section must be satisfied before the document would be admitted in evidence. Reacting to the conditions stipulated under Section 84 of the Evidence Act, 2011 the Supreme Court stated emphatically that:

A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the above conditions. In the instant case, there was no evidence on record to show that the appellants in tendering exhibits “D” and “L” satisfied any of the above conditions⁷⁰.

⁶⁹ (2013) 4NWLR (Pt. 1345) P. 534

⁷⁰ Supra at PP: 577-578 PARAS D-E

The Supreme Court went ahead to consider the type of secondary evidence of public document that is admissible in respect of computer generated document, and stated as follows:

The only admissible secondary evidence of a public document is a certified true copy of same. In the instant case, exhibit "D" which was an internet print out of the public newspaper was by nature a secondary evidence of the original by reason of the provisions of Section 85 and 87(a) of the Evidence Act 2011. On the authority of Sections 90(1) (c) and 102(b) of the Evidence Act, it is only the certified true copy of the document as secondary evidence and non-other that was admissible. Therefore the absence of certification rendered exhibit "D" a worthless document and inadmissible. Similarly, exhibit "L" which was a computer/internet generated document allegedly printed by the appellants from the website of the 3rd respondent was by Section 102(ii) of the Evidence Act, classified as a public document and only a certified true copy of same was admissible in law.⁷¹

The numerous conditions attached to computer generated documents as well as its subjection to the classification of private and public document is unfortunate and cumbersome. The law would have been better if every internet generated document was made admissible in evidence. The likelihood of wrongful refusal by concerned authorities to certify documents generated from their websites cannot be ruled out.

Mere satisfaction of the conditions stipulated in Section 84 of the Evidence Act, does not automatically entitle the document to be ascribed weight by the court but, the hurdle posed by Section 34 (1) (b) of the Act must be passed. The said provision requires the following to be considered, in the determination of whether or not weight should be ascribed to a document produced by a computer:

- (a) The question whether or not the information which the statement contained, reproduced or is derived from, was supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information; and
- (b) The question whether or not any person concerned with the supply of information to that computer or any equipment by means of which the document containing the statement was produced it; had any incentive to conceal or misrepresent the fact⁷². Failure to comply with these conditions would result in the evidence being expunged.

Issues raised by admissibility of electronic and computer generated Evidence and Responses.

Electronic Evidence and the Hearsay Rule

Electronic evidence is viewed as specie of documentary evidence and as such the rule against admissibility of hearsay evidence also applies to electronic generated evidence. Thus direct electronic generated evidence must be given by the maker. If it is a record compiled and fed into a computer, the person who computed the record is the maker for purposes of tendering and admissibility of the document.

⁷¹ Supra at P. 579 PARAS B-F, 593 PARAS E-H

⁷² Dickson v. Sylva (2017) 8 NWLR (Pt 1567) 167 at P. 209 Paras A-B

Computer generated evidence is therefore said to be hearsay evidence where:

The document or printout sought to be tendered is not what the computer stored and processed itself in an automatic manner or produced at the trial by the maker and the veracity of such a document is in issue.

In the English case of *Rv. Patel*⁷³, a computerized immigration record tendered in proof of the fact that the accused was an illegal entrant was rejected in evidence. The court regarded the document as hearsay evidence since the officer who compiled the list was not called as a witness. The court also observed that, the document did not fall within a class of document which is made admissible in criminal proceedings as evidence of fact contained in them.

Electronic evidence can also be made in the ordinary course of business. This is common with banks and big corporate bodies. The condition for the admissibility of this kind of evidence is that, the maker must have made the statement contemporaneously with the transaction recorded or so soon thereafter that the court, considers it likely that the transaction was at that time still fresh in his memory⁷⁴.

Section 84(5) (a) and (c) of the Evidence Act, 2011 has made a remarkable shift from the distinction between when there is human intervention in storage of information into computer and when the information is automatically stored by the computer itself. The said provision applies the phrase “with or without human intervention”. The effect of the provision is that the possibility of documentary hearsay of computer generated documents or evidence has been minimized to a large extent.

The issue of who satisfies the conditions stipulated in Section 84 of the Act calls for discussion. There is no doubt that some judges and lawyers alike, misinterpret the purport of that provision. The said conditions are guidelines for proof to the party who has the onus of proof. Apparently, the onus lies on the party who wants to tender and rely on a computer output. But, situation may arise where a party would wish to tender a computer output issued him by the opposing party, for instance, where a customer to a bank wishes to tender a statement of account issued to him by a bank which is a party to the suit. The question is whether the customer is required to satisfy the conditions led down in Section 84 (1), (2) and (4) of the Evidence Act, 2011. It is the writer's view that the customer has no onus to prove the conditions afore-said. This is common sense, the customer does not know anything about the computer that printed output, how it has been used over time, the state of the computer and authenticity of the information contained in the output. As a matter of fact, the customer may even be challenging the accuracy of the computer and the authenticity of the information. Would it then be reasonable to expect him to give evidence against himself and in favour of his opponent who manned the computer that produced the statement? Not to talk of requiring him to issue a certificate authenticating the information. That cannot be the intention of those who drafted the provision. It is then erroneous for any court to require a party under such situation to satisfy the conditions or require him to state that he believe in the accuracy of such an output, if the party is not the maker of the document and the operator of the computer. The English example appears more helpful and less confusing.

⁷³ (1981) 3ALL ER 94

⁷⁴ See Section 41 Evidence Act, 2011

The law in England does not require the satisfaction of any condition before an electronic or computer generated evidence is received in evidence, the rule remains that of relevance, except in criminal proceedings.⁷⁵

It is further submitted that, the Act ought to be amended to state specifically who has the onus of proving the conditions contained in Section 84 of the Evidence Act, 2011; by specifically apportioning the onus to the maker of the document or operator of the computer which produced the statement.

The conditions spelt out in section 34(1)(b) of the Act ought to have been the only condition for admissibility of electronic and computer generated evidence. Section 84 requirements are not just cumbersome but unnecessary surplusage to Section 34(1)(b); which aptly captures the essence or grounds for scrutinizing electronic and computer generated evidence.

The conditions contained in Section 84 of the Evidence Act, 2011 also raises the question whether, the type of evidence required to enable admissibility of electronic and computer generated evidence is expert evidence or a non-expert evidence, merely to satisfy all righteousness. If the evidence required by that provision is not meant to be probed then it is devoid of any seriousness. If for instance a person occupying a reasonable position in relation to the operation of the device, does not possess any technical knowledge of the device, would he be taken as a witness of truth if he merely signs a certificate authenticating the device from which the output sought to be admitted is produced? It is therefore submitted that for any credible evidence to be given concerning the operation and condition of a device, such evidence has to come from an expert witness. Granted that some litigants may not afford the cost of hiring expert witnesses, the way out is for the judiciary to employ independent computer experts whose services would be easily accessible as those of the bailiffs of the registry. The alternative to this, is training of more police forensic experts who will come to court to testify or examine electronic and computer generated documents, upon being subpoenaed

Conclusion

There is no doubt that the admissibility in evidence of electronic and computer generated evidence is yet to be fully mastered in Nigeria, the issues raised in this work, as well as the responses are important to ensuring smooth practice of this new regime. Reliance must also be placed on persuasive decisions from other jurisdictions; to make our law grow.

⁷⁵ House of Lords – Science and Technology Committee Fifth Report, accessed from www.parliament.uk. The stationary – off.co.uk p. hton, visited on 12/11/2013