

ADMISSIBILITY OF ELECTRONICALLY GENERATED EVIDENCE UNDER THE NIGERIAN EVIDENCE ACT, 2011: CHALLENGES AND PROSPECTS

SUNDAY JOHN APOCHI

*LLB (Hons.), BL, LLM, (International Law & Diplomacy, Ph.D. Researcher International Environmental Law. Presently the Author is the Group Company Secretary and the Legal Adviser of the Nigerian Army Welfare Limited. He can be reached on Telephone No.08035941096, Email: apochi2@yahoo.co.

Abstract

The golden thread which runs through the gamut of admissibility of evidence is the relevance of the piece of evidence that is sought to be tendered. Evidence presented in court room during trial consist of different types of computer and electronic output, whether printed summary of credit card, telephone messages, audio messages, visual reconstruction of a motor accident, simulation of anticipated wear and tear on an industrial machine. These new forms of computer electronically generated evidence challenge the traditional rules of evidence in Nigeria.

The major challenge has been the absence of a standard rules governing the admissibility of electronically generated evidence. As a result of this, there was the confusion as to whether electronic evidence should be classified as documentary evidence, real evidence or documentary evidence.

Many countries of the world including Nigeria have move ahead beyond this predicament through legislative enactments of various laws governing the admissibility of electronically generated evidence in court, unfortunately, these rule of evidence in Nigeria has not completely resolved the challenges but have created a perplexity in the uncertainties and complexities of the conditions stipulated for admissibility of this type of evidence. This paper therefore, seeks to examine the various conditions germane which must be complied with for the admissibility of electronically generated evidence under the Nigerian evidence Act 2011 Laws of the Federation.

KEYWORDS: Evidence, Computer, Electronic, Data, admissible.

Introduction

There is no cut clear definition of what electronic evidence is in the evidence Act 2011. Most judicial pronouncements in Nigeria avoid defining what electronic evidence is. In some cases, electronic evidence is

defined by the courts in line with the provisions of section 84 of the evidence Act¹ or by reference to the definition of computer under section 258 of the Act.

The terms electronic evidence, digital evidence or computer evidence are used interchangeably to refer to the same thing. Even though, different scholars and jurists have made several attempts in defining the concept, yet none is able to give a clear cut and precise meaning of what the concept is all about devoid of ambiguity.

Definition of Relevant terms

Evidence could be defined as the available body of facts or information indicating whether a belief of proportion is true or valid.²

The expression “evidence” is not defined in any Nigerian statute as stated earlier. However, it is necessary to point out at this stage that the term may be used in two senses: literal and technical. In ordinary parlance, the term means “anything that gives reason for believing something that makes clear or proves something.”³ According to Cross evidence is that which tends to prove something which may satisfy an inquirer of the facts existence.

In the literal sense, evidence connotes no more than a verifying or supporting variable. A thing that lends credence to the existence of a fact. In its technical sense the word “evidence”, according to Blackstone,⁴ means, “that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue.” To Phipson,⁵ evidence is that which may be placed before the court in order that it may decide issues of fact.

The word computer can be defined as an electronic device for storing and processing data, typically in binary form, according to instructions given to it in a variable program.⁶

Computer can also be defined as a programmable electronic device designed to accept data, perform prescribed mathematical and logical operations at high speed, and display the results of these operations. Mainframe, desktop and laptop computers, tablets, and smartphones are some of the different types of computer.⁷ Computer is a device, usually electronic, that processes data according to a set of instructions.

¹ *Rosehill v GTB (2016) LPER 41665*. In this case the Court of Appeal defined Electronically generated evidence in consonance with section 84 of the evidence Act 2011.

² <<https://www.britanica.com>> Accessed 30 September 2020

³ Oxford Advanced Learner’s Dictionary of Current English (3rd edn) 1.

⁴ Blackstone Dictionary of Law 2015

⁵ Phipson, L Law of Evidence (12 edn) 1.

⁶ Oxford Language Dictionary

⁷ <<https://www.dictionary.com>> Accessed 3 October 2020.

The digital computer stores data in discrete units and performs arithmetical and logical operations at a very high speed.⁸

Computer is a programmable machine that performs high-speed processing of numbers as well as of text, graphics, symbols, and sound. It contains a central processing unit that interprets and executes instructions; input devices, such as a keyboard and a mouse, through which data and commands enter the computer, memory that enables the computer to store program and data, and output devices such as printers and display screens, that show the results after the computer has processed the data.⁹

An Electronic on the other hand can be defined as a device having or operating with components such as microchips and transistors that control and direct electric currents.¹⁰

Electronic is a gadget, device, equipment or product which involves the control of electric current by various devices, such as microchips, disk or computer.¹¹ An Electronic can also be defined as an equipment, such as computers and televisions, which uses electricity that has passed through computer chips, transistors etc.¹²

Electronic can also be refer to as an equipment such as television sets, computer, etc, in which the current is controlled by transistors, valves and similar components.¹³

A Data has been defined as facts and statistics collected together for reference or analysis. A data is the quantities, characters, or symbols on which operations are performed by a computer, which may be stores and transmitted in the form of electrical signals and recorded on magnetic, optical, or mechanical recording media.¹⁴ A data is an information, especially facts or numbers, collected to be examined and considered and used to help decision-making. It can also be defined as an information stored in an electronic form that can be used by a computer.¹⁵ A data can also be referred to as facts or figures to be processed; evidence, records, statistics etc, from which conclusions can be inferred.¹⁶

The word Admissible simply refers to the quality of being acceptable or valid, especially as evidence. It is also a term used to describe information that is relevant to a determination of issues in any judicial proceeding so that such information can be properly considered by a judge or jury in making a decision.¹⁷ The term admissible can also be defined as a person or thing that is allowed or accepted.¹⁸

⁸ Ibid

⁹ American Heritage Science Dictionary (Published by Houghton Mifflin Harcourt 2005) 21.

¹⁰ Oxford Languages Dictionary.

¹¹ Cambridge Dictionary <<http://www.dictionary.cambridge.org>> Accessed 5th October 2020.

¹² <<http://www.idoconline.com>> Accessed 5th October 2020.

¹³ Collins English Dictionary (Harper Collins Publishers 4th edn 2010) <<http://www.collinsdictionary.com>> Accessed 5th October 2020.

¹⁴ Oxford Languages Dictionary

¹⁵ <<http://www.dictionary.cambridge.org>> Accessed 5th October 2020.

¹⁶ <<http://www.yourdictionary.com>> Accessed 5th October 2020.

¹⁷ <<http://www.dictionary.thefreedictionary.com>> Accessed 5th October 2020.

¹⁸ American Heritage Dictionary of English Language (Houghton Mifflin Harcourt Publishing 5th edn 2016)

The Genesis of Electronically Generated Evidence in Nigeria before the Advent of 2011

Prior to the enactment of the Evidence Act 2011, there were plethora of conflicting judicial authorities with different views on admissibility of electronically generated evidence in Nigeria. This is because the drafters of the repealed Evidence Act of 1945 did not contemplate issues of admissibility of electronic devices and gadgets in Nigeria during the process of enactment of the Act. The advent of computers, mobile phones and different kinds of gadgets and devices lately transformed the world to a global village which necessitated the enactment of a law specific to regulate the conduct of court proceedings relating to the uses of these gadgets which were use on daily basis in the course of transactions. In the case of *Esso v Oyegbola*,¹⁹ the Supreme Court of Nigeria appreciated the growing importance of computers and other electronic gadgets as a modern business method.

In the case of *Anyaeboji v Briscoe Ltd*, a computer generated statement of account which confirmed the Appellant's indebtedness to the Respondent, was tendered and admitted as secondary evidence without objection during trial. The admissibility of the evidence was later challenged on Appeal. The Supreme Court in that case held that a computer generated statement of account was not a document that was inadmissible under the provisions of the repealed Evidence Act of 1945, and that it is admissible upon the fulfilment of some conditions. The Court further held that the Appellant waived his right to object to the admissibility of the document when it was sought to be tendered in evidence.

In the case of *Uba v Sani Abacha Foundation for Peace and Unity*²⁰ the court held that a computer generated evidence is not admissible. This reasoning of the court was on the ground that there was a gap in the repealed Evidence Act of 1945. In the case of *FRN v Fani Kayode*,²¹ the Appeal court reversed the above decision when it held that a computer generated evidence is admissible. If not for the decision, the defendant who was standing trial for the offence of money laundering related offences would have been discharged and acquitted.

Issues of Relevancy and Authentication of Computer Generated Evidence

Relevancy is the platform for the admissibility of evidence. It is therefore off point to mention admissibility of evidence without proving the relevancy of such evidence to the facts in issue. The issue of relevance therefore determines admissibility of evidence. This is the crux of section 1 of the Evidence Act²² which embrace relevancy as the only platform for the admissibility of evidence during trial.

Going by the above provision, an evidence is only admissible if it is relevant. However, a relevant piece of evidence which sought to be tendered may still be admissible where it is affected by the exclusionary rules. The court also have an overriding discretion as to which evidence is relevant

¹⁹ (1969) NSCC 350 at 354.

²⁰ (2004) 3 NWLR (Pt861) 516.

²¹ (2010) 14 NWLR (Pt 1214) 481

²² Evidence Act 2011

and should be admitted or not in evidence, and whose prejudicial tendency outweighs its probative value. This is to say that while admissible evidence must be relevant, it is not every relevant piece of evidence that is admissible before the court during trial.

Section 84 of the Evidence Act 2011 specifically provides for the admissibility of electronically computer generated evidence. Even though there are other provisions in the Act on admissibility of electronically generated evidence. Section 84 of the Act provides the main background for the admission of computer generated evidence, it also authorises the admissibility of documents produced by other electronic devices in evidence.

Section 84 (2) and (4) of the Act provides for the requirements and Authenticity of devices utilized in the production of the computer generated evidence. The provisions provides that a proper foundation must be laid on the trustworthiness of the device or the computer which produces the document which sought to be tendered in evidence. However, there is a challenge as to whether or not an oral evidence and a certificate of trustworthiness of the computer which produces the computer generated evidence must both be presented as conditions for the admissibility of such an evidence or whether either of the two will suffice for the purpose of satisfying the requirement of section 84 of the Act. In the case of *Dickson v Sylva*,²³ the Apex Court held that either oral evidence or a certificate of trustworthiness of the computer which produce the document which is sought to be tendered in evidence will suffice as foundation evidence. The court however acknowledge the overriding discretion of the court to insist on oral evidence in addition to certificate of trustworthiness of the electronic device or computer which produced the document that sought to be tendered in evidence. It is advisable that before a computer generated evidence is admitted in evidence, a proper foundation for its admissibility, authenticating the trustworthiness of the device that produced the evidence must be laid. Where the document is tendered without any objection from the opposing party, it is admissible.

Certification of Devices, Computer or Gadgets which produced the documents to be Tender in Evidence

It is proper in law to insist during trial on the certification of a device, computer or gadget which produced the document which is sought to be tender in evidence. In the case of *Brilla Energy Ltd v FRN*,²⁴ The Appellant stood trial for some fuel subsidy related offences, of obtaining money by false pretence, forgery and uttering of documents. The case for the Prosecution was that a vessel which allegedly conveyed a product to the West Africa was not at the point of loading when it allegedly loaded the products. In other to prove his case, the prosecution tendered the intelligence report on the movement of the vessel.

²³ (2017) 8 NWLR (Pt 1567) 167.

²⁴ (2018) LPELR 43926 (CA).

The hard copies of the report was produced by Lloyds computers and was tendered in evidence. One of the issues that arose at the Appeal Court was whether the certification of the device did not produced the document but merely produced copies of the documents satisfied the requirement of the law as enshrined under section 84 of the Evidence Act 2011. The Appellate Court held that the certification of the computer which was utilized in accessing the Lloyds intelligence report, was sufficient for the admissibility of the document in evidence.

The Competent Authority that can certify a Device/Computer which produced a Document

In the case of *Brilla Energy Ltd V FRN*,²⁵ the Appeal Court held that a professional and non-professional experts as well as regular users of the device or computer which produced the evidence sought to be tendered in court are competent to certify and adduce evidence on the trustworthiness state of the computer at the time it produced the document.

Similarly, in *Braise v FRN*,²⁶ the Court of Appeal rightly held that an experts, non-experts or any regular users of a computer which produced a document can competently adduce evidence on the trustworthiness state of the computer in court during trial.

Apart from the issues of certification, there is the need for a proper foundation to be laid for the purpose of authenticating the trustworthiness state of the computer which produced a statement which is sought to be admitted in evidence. In the case of *Kubor v Dickson*,²⁷ the prosecution tendered a certified online copy of a newspaper from the Bar, the Apex court endorsed the decision of the Appeal court to the effect that the newspaper was inadmissible because of non-compliance with the foundation requirements as provided under section 84 (2) and (4) of the Evidence Act 2011. The Apex Court held that a party who seeks to tender in evidence a computer generated evidence needs to do more beyond just tendering same from the Bar. That evidence in relation to the use of the computer must be called to establish the conditions or the workability of the computer as provided under Section 84 (2) of the Act.

However, it is good to note that electronic devices, gadgets and computers used in storing information do not requires certification under the law before they can be admitted in evidence. In *Dickson v Sylva*²⁸, the Supreme Court held that while the computer which produced a document requires certification, electronic gadgets and devices which were used to play or print the already produced electronic documents or evidence does not require certification before they can be admitted in evidence during trial. It is trite that Section 84 of the Act applies to all manners, of computer generated evidence whether internet source or not, and for such there must be compliance with the certification requirements of section 84 of the Act before such a

²⁵ *supra*

²⁶ (2017) 6 NWLR (Pt 1428) 295.

²⁷ (2013) 4 NWLR (Pt 1345) 534 at 578.

²⁸ *Supra*.

document will be admissible in evidence. It is a settled law that for a computer generated evidence to be admissible, section 84 of the Act stipulates certain conditions that must be complied with which are as follows:

- 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 an activities regularly carried on over that period, whether for profit or not by any body, whether corporate or not, or by any individual;
- b. That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- c. That throughout the material part of that period, the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its; 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.

From the first condition, the provision can be said to relate only to admissibility of statements in documents produced by a computer. Just as we have seen earlier, section 258 of the Act specifically 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”. Apart from being a computer, the condition also requires that such computer must be reliable in the sense that it was used regularly to store or process information for the purpose of activities regularly carried on over a period of time. However, the view that has been expressed over time now is whether with the advance of technology as it is, devices such as recording devices, tapes, television, radio broadcasts, soundtracks, films negative which are ordinarily not contemplated in the above definition of computer in the Act can be construed as computer devices. Just as it can be deduced from the wide definition of document in section 258 of the Act, which also extends to include all forms of electronic device(s). The use of the word “include” and “any” clearly shows the generic and exclusive nature of the definition which thus extends the scope of the definition.

The Court in the case of *Omisore & Another v Aregbesola & Ors*,²⁹ held that it is not only internet computer generated documents that are caught by the admissibility requirements of section 84 of the Act but all kinds of computer and electronically generated evidence. Furthermore, this has demonstrated the importance of computer in the administration of justice system in the Nigerian legal evidentiary jurisprudence. The use of computer even though commendable however, it presents a negative effect to the justice system as it could also introduce some erroneous, misleading and unreliable evidence.³⁰ This is

²⁹ (2015) 15 NWLR (Pt 1482) 205.

³⁰ Jerome, Robert. ‘Practitioner’s Primer on Computer-Generated Evidence’

<<https://chicagoonbound.unchicago.edu/cgi/viewcontent.cgi?article>> accessed 15 October 2020.

because computer can be manipulated by individual operating it, the computer can only process the data supplied to it, if the data is inaccurate and undetected, the output will also be in error.

Additionally, if there is a deficiency in the manner in which the computer is told to process the data, the output will be in error.³¹ Thus, the condition under section 2 (b) is to further ensure that the computer does exactly what it was instructed to do and the document produced in court during trial consists of the data supplied to it. If there is any discrepancy between what is contained in the computer and what is produced, such document will be considered unreliable and the entire information could be found to be unreliable and may be inadmissible.

As to the third condition which seek to ensure that the computer is functioning properly, and that there is no any malfunction which might have affected the output or the document which is sought to be admitted in evidence, the condition under subsection 2 (b) is to ensure that the computer does exactly what it was instructed to do and the document was exactly what was produced by the computer. If there is any discrepancy between what is contained in the computer and what is produced, such document will be considered unreliable and the entire document and the information which is sought to be tendered in evidence could be inadmissible in evidence. This will be done properly by the counsel raising an objection to the admissibility of the document in evidence by the court before it is admitted.

Furthermore, it is pertinent to note that a defect as to the functioning of the computer which produced the document sought to be tendered in evidence prior to the trial will not affect the admissibility of the computer generated evidence in court, unless it is established before the court that the defect is material in such that it is reasonable to have affected the production of the document. This was the position of the court in the English case of *DPP v Mckeown*,³² The defendant in this case challenged the admissibility of a computer generated document on the basis that there is a discrepancy in the document as a result of the malfunctioning of the computer which was used in generating the evidence. The court after examining the document held that section 69 of the Police and Criminal Evidence Act 1984,³³ for the purposes of section 69 of the Act, the basis of malfunction is irrelevant to the admissibility of the document unless it is prove that the way in which the computer processes, store or retrieves that information/data or generate the statement is in such a way that it could have affected the substance or the content of the document.

The fourth condition which must be followed in the admissibility of a computer generated evidence seeks to ensure the reliability of the data processed by the computer which sought to be admitted in evidence. The condition is considered as important in other to establish the genuineness or otherwise of the computer generated evidence which sought to be tendered in evidence. The condition in other words seeks to ensure that the document is not tempered in any way and that it worth been admitted in evidence by the court. However, this condition does not make the admissibility of the document automatic as it is discretionary to the court for consideration which must be exercise judicially and judiciously.

³¹ Ibid.

³² (1997) 1 ALL ER 737.

³³ This law was repealed by s 60 of the Youth Justice and Criminal Evidence Act 1999.

In determining the accuracy of a document, these conditions will guide the court in determining the weight to be attached to the document in question.³⁴

In *Kubor v Dickson*,³⁵ the Supreme Court of Nigeria held that the fulfilment of the above conditions (under section 84 (2) of the Evidence Act 2011) are key to the admissibility of electronically generated evidence. The court further held that before a computer generated evidence will be admitted in evidence all the conditions referred to in paragraphs (a) to (d) of section 84 (2) of the Act must be complied with. That a witness must testify to lay the necessary foundations referred to under the subsection and that such an electronically generated evidence cannot be tendered from the bar.

It is also worthy of note that the fact that a document in a computer generated evidence and having satisfied all the above requirements for admissibility does not preclude the document if it's a public document from the certification requirement as provided under the Act.³⁶

Challenges posed by Admissibility of Electronically Generated Evidence and Prospects in Nigeria.

One of the major shortcomings of the admissibility of electronically generated under the Nigerian Evidentiary jurisprudence is the inadequacy of the provisions of section 84 of the Act which is inadequate as to the addressing of issues of admissibility of electronically generated evidence in court. What the Act needs is a model of the provisions of the United Nations Commission on International Trade Law Model on Electronic Commerce. This law was drafted in such a way that it comprehensively provides and facilitated the easy way of admitting electronic transactions in evidence during trials.

Unlike the Evidence Act 2011, the law exclusively defined all relevant terms that are germane to the concept.

In Nigeria, there is an absence of other provisions or laws to cover for the inadequacies of the Evidence Act 2011 beyond what is currently obtainable under the Act. Unlike in other climes like Ghana where in addition to the general provision of its Evidence law the country has a more elaborate legal framework such as the Electronic Transaction Act 2008 which provides for the admissibility of a computer generated evidence where there is a lacuna in the main Evidence Act. South Africa also has such legislation which is an adoption of the UNCITRAL Model Law. Nigeria needs to take a lift from these countries.

Furthermore, another challenge of the admissibility of electronic generated evidence in Nigeria is the issues of lack of understanding by legal practitioners and Judges of the nature of what constitute electronic evidence. This is so because of the contradictory decisions of the courts on the issues regarding the understanding of computer operations which has created a more confusing situation and a gap as to what is an electronic evidence and when it should be admitted in evidence, inadmissible or rejected. There is a

³⁴ Osibanjo, O. 'Electronically Generated Evidence: Law and Practice of Evidence' (Sibon Books Ltd 2011) 243

³⁵ (2013) 4 NWLR (Pt 1345) 534.

³⁶ S 90 (a) Evidence Act LFN 2011

need for the Nigerian courts to be consistent in making its reasoning as to the admissibility of electronically generated evidence.

Another challenge of the admissibility of computer generated evidence in Nigeria is the issues as to the certification requirements under the Act which requires that a witness must appear in court to testify as to the trustworthiness of the computer which produces a computer generated evidence which is sought to be tendered in evidence. In other jurisdictions like Canada, Section 7 of the Uniform Electronic Evidence Act 1998 provides that instead of having to call a witness to prove computer which produces a document trustworthiness, under Section 4 (2), Section 5 and 6 of the Act provides that such issues could be proven by affidavit evidence. A witness does not need to be physically present in court during proceedings to testify; unless the other party applies to court to cross examine the witness. Therefore there is a need for the provision of section 84 of the Nigerian Evidence Act 2011 to be reviewed to provide for a similar situation as that of the Canadian Uniform Electronic Evidence Act. In another development, Article 31.4 of the Canada Evidence Act 2019 vested the Governor Council with the powers to make regulations establishing evidentiary presumptions in relation to electronically generated documents. There is a need for the Nigerian Evidence Act 2011 to provide for the various States in Nigeria to independently make their own regulations regarding the admissibility of electronically generated evidence.

Conclusion

Section 84 of the Evidence Act 2011 is the only legal framework on the admissibility of electronically generated evidence in Nigeria. For such provisions will continue to raise issues that are capable of divergent views which is capable of endangering legal debate in the Nigerian evidentiary jurisprudence. However, it behoves on the judiciary to be more consistent and very analytical when making pronouncement on the relevant provisions of the law on issues of electronically generated evidence.

References/Citations

Cases

Rosehill v GTB [2016] LPER 14665

FRN v Fani Kayode [2010] 14 (pt 1214)

Anyaebosei v Briscoe Ltd

Esso v Oyegbola [1969] NSCC

Dickson v Sylva [2017] 8 NWLR (pt 567) 167

Brilla Energy Ltd v FRN (2018) LPER 43926

Braise v FRN (2017) 6 NWLR (1428)

Kubor v Dickson [2013] 4 NWLR (pt 1345

Omisore and Anor v Aregbesola and Ors [2015] 15 NWLR (pt 1482)

DPP v Mekeown [1997] 1 ALLER 737

Books

Phpson, L. Law of Evidence

Oxford Language Dictionary

Blackstone Dictionary 2015 edn

Cambridge Dictionary 11th edn

Collins English Dictionary

American Heritage Science Dictionary

Jerome, R. 'Practitioner;s Primer of Computer Generated Evidence 3rd edn

Osibanjo, O. 'Electgtronically Generated Evidence: Law and Practice of Evidence' (Sibon Books Ltd 2011)

Internet Sources

<https://www.britanica.co> Accessed 30 September 2020

<https://www.dictionary.com> 3October 2020

