

INFORMATION AND COMMUNICATIONS TECHNOLOGY AND THE NIGERIAN RULES OF EVIDENCE*

*“The ICT age has dawned, but not for all
Kofi Annan”¹*

ABSTRACT:

It is a fact that in Nigeria and the world over, the adoption of Information Communications Technology (ICT) has radically altered the channels and methods of human interaction. Also, the fact that the Nigerian legal jurisprudence must strive to keep up with these advancements in human interaction cannot be over emphasised.

This paper seeks to examine the applicability of the Nigerian Rules of Evidence to Information and Communication Technology (ICT) related matters. Specific issues bordering on the admissibility and relevancy of evidence originating from ICT sources has been considered in this paper with a view to ascertaining the efficacy or otherwise of our existing Rules of evidence in dealing with these advancements in human interaction.

1. INTRODUCTION

The media used in the provision and delivery of services by financial institutions, companies and business concerns are undergoing radical transformation. One of the stimuli for this evolution is the advances in information and communications technology (ICT) as a result of which the traditional brick and mortar media of provision and delivery of service are on the verge of extinction.

Point of Sale (POS) machines, Automated Teller Machines (ATM) are examples of the use to which ICT tools have been put by financial institutions. Furthermore, records of transaction are no longer in ledgers, but in computers and other electronic storage devices. In relation to financial institutions, the pervasiveness of the impact of ICT is aptly explicated thus:

Financial institutions have applied technology to their payment services in a variety of ways. Automated data processing, computers and telecommunication system have made Electronic Banking a reality. Banks use automated equipment to process billions of cheques. Telex machines are used to write money in commercial transactions from Banks in one country to those in other.²

The ease with which financial institutions, companies and business concerns have assimilated ICT and its tools into their operations is worthy of a study and commendation. But the same cannot be said for the rules of evidence for the adoption of ICT by these institutions mentioned above has further exhibited the anachronism in our law and rules of evidence.

Hereafter, pertinent evidentiary issues will be appraised in the light of advances in ICT. In doing this, ICT tools and the use to which they have been put will not be

* **Omiunu Ohiocheoya**, Assistant lecturer of the Department of Business law, Faculty of Law University of Benin, Benin City and **Aniyie Ifeanyichukwu Azuka** Legal Practitioner with **Ighodalo Imadegbello** (SAN) & Co., Benin City.

1 Former Secretary General, the United Nations; Forward to E – Commerce and Development Report 2001 (Internet version) at http://www.ro.untad.org/ecommerce/docs/edr01_en/edr_01pt_0_en.pdf (accessed 07/10/04)

2 Budnit, M., “The Finicky Computer, The Paperless Telex and The Fallible Swiss: Bank Technology and the Law”, (1984) Vol. XXV No. 2 Boston College Law Review, 259

appraised *vis – a – vis* specific evidentiary issues. This is because the legal issues which they raise are the same notwithstanding the technology.³

3 Thomas, J. R., "Legal Responses to Commercial Transactions Employing Novel Communications Media" (1998) Vol. 90 M.L.R. 1178

2. RELEVANCY AND ADMISSIBILITY

Relevancy and admissibility are the foundation of the law of evidence in Nigeria. They are twin concepts central to the Nigerian law of evidence.⁴ Section 6 of the Evidence Act (hereafter referred to as the Act) states that:

Evidence may be given in any suit or proceeding of the existence or non – existence of every fact in issue and of such facts as are hereinafter declared to be relevant.

And the same Act defines “fact in issue” as:

... any fact which either by itself or in accordance or in connection with other facts the existence, non existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows⁵

While stating that:

One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to relevancy of fact.⁶

The foregoing means that for a piece of evidence to be admissible, it primarily must be shown that that piece of evidence is either a relevant fact and is in issue, or in the alternative, the fact must be that which is relevant to a fact in issue.⁷ This means that the admissibility of any evidence presupposes the fact that that evidence is relevant.

Relevancy is judged and/ or gauged by the provisions of the Evidence Act and not the rules of logic, convection or instinct⁸. In *Dr. Tobi v. Chief Ukpabi*⁹ referred to in *B.O.N. v. Saleh*¹⁰ as per *Eso, JSC*, the issue was succinctly put thus:

... admissibility should be based on relevance and not proper custody. Once a matter, be it document or oral evidence is relevant, it is admissible.

Admissibility is a rule of evidence and it is based on relevancy. In determining the admissibility of a piece of evidence, the court will not occupy itself with the question of the source of the evidence or how it was obtained;¹¹ rather the court is bound to determine whether what is to be admitted is relevant to the issue being tried.¹² In *Abubakar v. Chuks*,¹³ it was stated that:

“A document is admissible in evidence if it is relevant to the facts in issue and admissible in law. The converse position is also the law, and it is that a document which is irrelevant to the facts in issue is not

4 Osipitan, T., “Admissibility of Computer Printout under Nigerian Law of Evidence” (Oct. 1995) Vol. 2 No. 2 Lawyers’ Bi-Annual, 236 at 239

5 Section 2 (1)(b), Evidence Act, Cap. E.14, LFN 2004

6 Section 3, *ibid*

7 See *Abubakar v. Chuks* (2008) 152 LRCN 1, 17, per Tobi, JSC, where the Supreme Court held that the provision of section 7 and 8 of the Evidence Act goes further to expand and illustrate the requirements of relevancy in section 6.

8 *Katto v. CBN* [1991] 9 NWLR (Pt. 214) 126 at 145 - 146

9 [1984] SCNLR, 214

10 [1999] 9 NWLR (Pt. 618) 331, 344

11 *Supra*, n. 7

12 *Igbinovia v. The State* (1981) 2 SC 5

13 *Supra*, n. 7

admissible. In other words, a document which is consistent with the pleadings is admissible, if the document is admissible in law.”

Thus, it is the Act that determines whether a computer or electronically generated evidence is relevant and/ or admissible. Consequently, the evidence generated when a bank cashier enters into the institution’s electronic data base, the records of deposits and withdrawals made by a customer; or the records created when a ATM card user interacts with a financial institution or when an EFT is made insofar as it is connected with a fact in issue in any of the ways referred to in the Evidence Act relating to relevancy of fact, becomes a relevant fact and is therefore admissible. The, submission, would be the same where a printout or a record of a transaction carried out vide the instrumentality of ICT tools which contains facts that are the occasion, cause or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction is sought to be tendered.¹⁴ This assertion is premised on a communal reading of the aforementioned provisions of the Act.

A video tape made of a withdrawal by the camera or the records made by the biometric reader incorporated into an ATM machine are admissible insofar as the transaction and particulars recorded are relevant to the matter before the court. Also, a video tape of a transaction between the parties to a transaction which contains relevant statement is also relevant and admissible insofar as proper foundation has been laid prior to the tendering of the evidence¹⁵, the entire transaction was recorded, the recording is audible and intelligible, the maker is called as a witness and the accuracy of the records is proved and the sounds recorded are identified.¹⁶

Consequently, it is submitted that any evidence of financial transactions and services whether electronically generated or created are relevant and admissible whenever there is a nexus between them and a matter before a court of law in Nigeria notwithstanding the fact that records of these transactions and services are nowadays being stored in electronic form or vide electronic means. The basis of the foregoing submission is *section 38* of the Act, which unequivocally provides that entries in books of account regularly kept in the course of business are relevant, whenever they refer to a matter into which the court has to inquire.¹⁷

The foregoing submissions are further premised on the principle that in determining admissibility of evidence, it is the relevancy of the evidence that is important and not how the evidence was obtained,¹⁸ provided that the piece of evidence is not remote in relation to a matter into which the court has to inquire¹⁹, or the evidence if a document is consistent with the pleadings filed in the suit²⁰ as well as the fact that the admissibility of that evidence is not contrary to law.²¹

14 See section 8, Evidence Act, supra n. 5; Abubakar v. Chuks (2008) supra, n.7

15 See Myers v. D.P.P. (1965) AC 1001, 1024; Abadom v. State [1997] 1 NWLR (Pt. 479) 1, 24; Okafor v. Okpalla [1995] 1 NWLR (Pt. 374) 749, 757

16 See Halbury’s Laws of England, Vol. 17, 158, para. 225

17 See Gnanasegaren Pararajasingam v. Public Prosecutor (1997) 3 Malayan LJ 1 cited in Sarkar’s Law of Evidence in India, et al., (16th ed.) Vol. 1 (New Delhi: Wadhwa & Company Nagpur, 2007) 1174 where a submission akin to this was made in relation to the law of evidence in Malaysia

18 Elias v. Disu (1962) 1 All NLR 214

19 Section 6 (a), supra, n. 5

20 Supra, n. 7

21 For example, under section 15, Land Registration Act, an instrument affecting land though relevant is inadmissible in evidence in court if not registered. Also, if the evidence is a letter or communication marked “without prejudice” saved or stored using ICT tools is inadmissible in a proceedings relating

Furthermore, it is submitted that the Act does not directly or indirectly make inadmissible a piece of evidence generated and/ or created via the use of ICT tools. And since the Act did not state so, evidence created, generated, saved or stored using the diverse and burgeoning media of ICT tools are *prima facie*, admissible evidence in Nigeria.²² Consequently, where a bank or a business concern uses a computer to store information regarding customers' accounts and the sums of money or account balance is sought to be established, a computer print – out of the account's standing can be properly admitted as evidence if it is established that the computer operator who fed into the computer information regarding the customer's account cannot reasonably be expected to have recollection of dealing with a particular payment into the account. The basis of the foregoing submission is that the computer operator who imputed the information could give direct evidence and the print – out is a record which amounts to a document prepared and maintained in the ordinary course of business and as such it is relevant if it relates or is connected to issue being tried by a court.²³

3. NATURE OF EVIDENCE GENERATED AND/OR CREATED USING ICT

The discourse on the aforesaid subject has as its start point the assertion that evidence generated and/ or created using ICT are documentary evidence, since holding otherwise – that, they are oral evidence – would amount to standing logic on its head. This issue is fundamental because evidence generated sequel to the adoption, utilisation and incorporation of ICT tools into the mechanics of service delivery in Nigeria, does not *strictu sensu*, come within the ambit of the definition of a document under the Act.

The Act states that a document:

... includes books, maps plans, drawings, photographs and also includes any matter expressed or described upon the any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which be used for the purpose of recording that matter.

The subject of the nature of evidence generated and/ or created using ICT tools had before now attracted comments akin in proportion to the famous Fuller – Hart Debate. One school is of the opinion that the definition of document reproduced above cannot encompass evidence generated and/ or created using ICT stored in diskettes, tapes, microfilms or in the form of print outs since the Act defines a document in terms of legibility and that these forms of evidence ultimately needs deciphering, if it would be of any good.²⁴ While the other school is of the opinion that by virtue of the use of the word “includes” in the definition of document in *section 2 (1)* of the Act, the categories of what could come within the ambit of the definition under the Act is not limited to those specified therein.²⁵

It is here submitted that the latter school provides us with a better interpretation of the provisions of *section 2 (1)*. Lego-lexically, the word “document”, it is submitted is

to the issue forming the subject matter of the former or parties thereto; see *Nwadike v. Ibekwe* [1987] 4 NWLR (Part 67) 715

22 *Osipitan*, supra n. 4, 240

23 *R. v. Ewing* (1983) 2 All E.R. 645; see also section 38, Evidence Act, supra.

24 See the argument of the learned authors in *Osinbanjo, Y.*, “Electronically Generated Evidence” in *Law and Practice of Evidence in Nigeria* (Babalola, A., ed.) (Ibadan: Sibbon, 2001) 243, 257 and *Oyewo, O.*, “Legal Implication of Electronic Banking in Nigeria” (2003) Vol. 7 Nos. 1 – 2 M.P.J.F. & I.L., 160, 174

25 See *Osipitan*, supra n. 4

at the core of this impasse, has been defined as *something tangible on which words, symbols or marks are recorded*.²⁶ Diskettes, tapes, microfilms and printouts are tangibles; on the first three, words, symbols or marks are recordable. Consequently, computer and/ or electronically generated evidence stored in electronic storage devices – diskettes, tapes, micro-films – or produced as print outs are documents within the provisions of the Act, insofar as what is contained in them or printed out is relevant to the matter before the court.

The foregoing submission finds support in the decision in *Trade Bank Plc v. Cham*²⁷ where the court held while holding that a computer printout of a statement of account is relevant and admissible evidence of the content of the banker's book, that section 38 of the Act covers electronic process such as computer and computer print outs; and the decision of the Supreme Court in *Esso West Africa Inc. v. T. Oyegbola*²⁸ where it was stated that the provisions of section 37 of the Evidence Act (now section 38) cannot be said to only apply to bound books of account which the pages cannot be removed but could also be interpreted to apply to entries in the books of account kept in computers. Also, in *Anyeabosi v. R.T. Briscoe (Nig.) Ltd.*²⁹ the court admitted a print out of the appellant's statement of account as documentary evidence against him.

Furthermore, it is submitted, in tandem, with the submission of Osipitan³⁰ that the word "includes" makes the group of what would amount to a document an open one; thus making the categories of documents within the purview of the Act not restricted to that specified therein.

4. THE BEST EVIDENCE RULE

The "Best Evidence Rule" is an antique common law rule of evidence and it is to the effect that only the best evidence is to be produced or relied upon in court by a party in proof of the content of a document. However, this requirement is to be met according to the dictates of the peculiarities of the case.³¹ Thus, where the evidence tendered by a party to an action is not the "best" in the circumstances, it might be excluded.

It is here submitted that the utilisation of the "best evidence rule" in Nigeria as a basis for the admission or exclusion of evidence is an error in law. The foregoing submission is premised on the fact that admissibility or non – admissibility of evidence is based on the sole consideration of whether the evidence is relevant and nothing more.³² As already submitted, evidence generated with the media of ICT tools are documents.³³ The issue that is now of importance to this discourse is the question of which method is to be used in the proof of the content of this specie of documentary evidence; that is, whether the content of the aforementioned evidence is to be proved by either primary or secondary evidence.

In *Anyeabosi v. R.T. Briscoe (Nig.) Ltd.*³⁴ it was held in action filed by the respondent for the recovery of money owed it by the appellant that a computer print out of the appellant's statement of account tendered in evidence by the respondent was admissible as secondary evidence under the condition set out in section 97 (1) (d) and

26 Black's Law Dictionary (7th ed.) (St. Paul, Minn.: West Group, 1999) 498

27 [2003] 13 NWLR (Pt. 836) 158, 216 - 217

28 (1969) NMLR 194, 198

29 [1987] 3 NWLR (Pt. 59) 84

30 Supra, n. 4

31 In *Omichund v. Baker* (1774) Willes 538, 540 it was stated that "there is but one general rule of evidence, the best that the nature of the case will allow".

32 See paragraph 2 ante, especially the decision in *Abubakar v. Chuks* (2008) 152 LRCN 1

33 See paragraph 3 ante

34 Supra, n. 27

(g) of the Act. It is submitted that the court in the above case did not unilaterally hold that all computer print out amount to secondary evidence but that where the original is as envisaged by the provisions of section 97 (1) (d) and (g), secondary evidence of it could be given.

It is submitted that evidence generated and/or created using ICT tools and the knowledge of ICT is admissible as primary evidence based on the provisions of sections 38, 39 and 91 of the Act. This is because; the aforementioned sections make reference to the putting down of information on a permanent medium, whether book or record.

Consequently, in this era of ICT advancement where records are digitalised and stored using ICT tools, records of transactions in electronic form stored by financial institutions qualify to be called books, records, register and documents as referred to in the aforementioned sections. Thus the presentation of these records, books, registers or documents in a form, which the court can appreciate, amounts to proof by primary evidence and so also is the computer printouts of records of financial institutions created and/ or stored using ICT tools.³⁵

5. CONCLUSION

There is no gainsaying the fact that the rules of evidence in Nigeria was not prepared and is still not prepared for ICT and its adoption, but this is no justification for the stand that our rules of evidence as it is cannot be used as a basis for the determination of the status, nature and admissibility of evidence created in the course of the operations of companies, business concerns and financial institutions who have embraced ICT in their quest for better service provision and delivery.

Thus it would be wrong to say that the rules and/ or law of evidence in Nigeria do not recognise evidence generated and/ or created with ICT. The position is that, it does require some expounding of the law so as to successfully bring evidence of the specie described above within the penumbra of our rules and/ or law of evidence for the law is not ignorant of modern business methods and media of service delivery.³⁶ Consequently, it is submitted that it would amount to a miscarriage of justice for a court of law to refuse to consider and/ or over look evidence because it was generated, created and/ or stored using ICT knowledge and/ or tools.³⁷

35 Supra, n. 4. See Osipitan, T., "Legal Impact of Technology on the Rules of Evidence in Banking and Commercial Litigation" (1998) Vol. 2 No. 4 M.P.J.F. & I.L. 71

36 Esso West Africa Inc. v. T. Oyegbola (1969) NMLR 194, 198

37 Lado v. The State [1999] 9 NWLR (Part 619) 369 at 383 as per Uwaifo, JSC; Osifo v. Okogbo Community Bank [2006] 15 NWLR (Part 1002) 260 at 282 as per Abba Aji, JCA