THE CHALLENGES

OF

ELECTRONICALLY GENERATED EVIDENCE

BY

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I am greatly honoured by this invitation to serve as a resource person on this momentous occasion. When I received this invitation from the association, my first instinct was to refuse it. My reason was owed chiefly to two reasons. Firstly, I wondered if I had the muscle to embark on such a rigorous and delicate exercise. Secondly, how could I possibly satisfy a gathering of learned gentlemen whose knowledge of the law is vast. However, I decided to accept the invitation because of the challenges, the pain and confusion we face in a burgeoning world of technology particularly information technology.

It is an undeniable fact that the Evidence Act is Stale. In recent times, judicial pronouncements on electronically generated evidence do not inspire confidence thanks chiefly to the inability of our law makers to comprehend the magnitude of the problem.

It must be said in all conscience that Courts of record, in the absence of clear statutory provisions, have faced odds that would task the capacity of the soundest of minds. Without sounding apocalyptic, I will say we are faced with an emergency of the first magnitude.[2] This paper will cover types of electronic evidence (digital evidence), and judicial pronouncements on this subject. I will also attempt to proffer solutions.

Let me add quickly that this paper is not a compendium of solutions, it is only an attempt to agitate the issues, ventilate opinions on the subject and in the process, stimulate further research on this topic. Permit me to also add that intellectual complacency is not an opinion. The responsibility for the mistakes and shortcomings in this paper entirely mine.

THE EVIDENCE ACT.

The minute sections of the Evidence Act is not my concern neither is it part of my task, however, a brief sketch aimed at supplying a background must suffice. This background will not detain us.

The Nigerian Law of Evidence is substantially part of the received laws of Nigeria via section 45 of the Miscellaneous Provision Act of 1945(3).

The Evidence Ordinance was passed as Ordinance No.27 of 1943. It did not take effect till the 1st of June, 1945 by virtue of Number 618 of Gazette Number 33 of 1945. Since the 1st of June, 1945, the Evidence Act has consistently retained its character 1951,1960,1963,1976,1990 amendemts notwithstanding. Today, it is referred to as the Evidence Act Cap 112, 1990, Laws of the Federation. The Evidence Act remains the reference point on the law of evidence in Nigeria. However, section 5 of the Evidence Acts provides for the reception of evidence not specifically provided for by the act. Let me now proceed to treat some pedestrian issues.

It is elementary law that facts are established in court by credible evidence. Facts must be proved unless they are admitted, presumed or judicially noticed. The facts could be established through oral testimonies,document and real evidence. (i.e. physical object).

Whether a fact is capable of being proved is purely an issue of law not logic. The basis of any judgment is not necessarily the truth but the credibility of the evidence placed before the court. The truth in any given case may never be known. It is also an established principle of law that facts must be proved through three different burdens. In a crime, it is established beyond reasonable doubt, in civil cases, it is on the balanced of probability. In some instances, it must be proved to the satisfaction of the court e.g. matrimonial cases. In my humble opinion, the above encapsulates the fundamental principles of the law of evidence. I will not bore you with the rules of admissibility, relevancy,presumptions etc. These issues are pedestrian and are at the finger tips of your worships.

ELECTRONIC OR DIGITAL DOCUMENT.

It is pertinent, at this juncture, to take a closer look at the meaning of the word document. So many articles (including judicial pronouncements) have been written with respect to the definition of documents as provided for by the Evidence Act Cap 112, Laws of the Federation of Nigeria, 1990. Section 2(1) provides: “document includes books, maps, plans, 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.

Document is also defined in the New Oxford dictionary of English (6th edition) as: "a piece of written, printed or electronic matter that provides information or evidence or that services as an official record".

The question that must be asked is: What is the status of electronically generated documentary evidence?. Our courts and scholars have divided themselves into two road broad camps. There are those who hold that views that digital evidence can never be equated with documents while another school of thought has stretched the word document to cover digital printouts.

For now, Nigeria Courts have continues to hold that prints-out are inadmissible. A case in point is the on-going trial of former Minister of Aviation, Chief Fani Kayode, on money-laundering charges. In a recent ruling at the Federal High Court in Lagos,justice Ahmed Ramat Mohammed rejected a computer-print-out of the defendant's statementof account as evidence. He opined that such a print-out was secondary evidence which was not authenticated and was, therefore, inadmissible under section 97(1)(a) and (2)(e) of the Evidence Act even if the print-out was relevant to the proceedings. His Lordship relied on UBA PLC v S.A.F.P.U. (2004) 3NWLR part 861 page 516 at 543 paragraphs A-Z, and the Supreme Court's decision in Yesufu v ACB Ltd (1976) ANLR Part 1, Page 328. In that case, the apex court ruled in emphatic terms that a computer print out cannot be admissible as an entry in a banks' book.

The reasons for these conclusion are obvious. Electronic evidence and their mode of generation considerably strain the traditional rules of evidence. The distinguishing characteristic of paper based transaction is that they are products of the human mind, they are authenticated by a signature. Most importantly, paper based transactions are in permanent form and can therefore not be easily altered without the alteration on the face of the document.

By contrast, signatures in transactions through e-payment, computers and diskettes etc are replaced by the an electronic key designed to authenticate the message. Such messages may be altered even without the fact being discovered from examination of the medium.

It has also be argued that a computer print-out or other forms of E-evidence cannot be accurately described as written in strict sense and of course are certainly not verbal. Where for example a bank teller keys-in information remains stored in the computer's memory bank such information cannot be described as written. In the bank teller example, it is clear that the information stored cannot be said to have be written by him. It should however, be quickly added that where a computer is used for typing and it is authenticated, it remains a document within the context of the Evidence Act. It is entirely different from a computer generated output.

It has also been contended that the information keyed-in by data entry clerks are products of several instructions, some in a chain of command. These instructions run into tens of thousands, the operators do not have the slightest knowledge of these print-outs. In some cases, the computers have a brain of their own e.g. Computer e-records which authomatically record telephoned calls received. These call can be capture in printouts. What is more, superior courts of records have consistently held that it is desirable to call the makers of documents even in criminal cases. See Okoro v State LRCN Vol. 64 page 5234.

From the foregoing, it is glarring that the position of our courts is fairly consistent on electronically generated evidence even though the Court of Appeal in Ogolo v IMB (1995) 9 NWLR (pt.419) page 314 at 324 almost deepened the confusion when it held that computer printouts could be admitted by way of judicial notice as products of science.

The Supreme Court in Anyaeoboi v V.R.T. Briscoe Nig. (1987) 3NWLR part 59 at page 87 Ratio 7 has finally put this matter to rest. Listen to Mohamadu Lawan Uaise JSC (as he then was).

> "The computer statement of account does not fall into the category of evidence absolutely in admissible by law as it is admissible as secondary evidence under section 96(1) (d)

and 96(2) of the Evidence Act".

In this case, the computerized statement of account which was dully certified by a Senior Accountant was admitted in evidence by the trial court. The Court of Appeal and the Supreme Court sustained the ruling of the trial court.

What can be gleaned from this decision by the Appeal Court is that once the document is authenticated or certified then it is valid and could be admitted even if a computer printout. This is glaringly a distinguishing fact from the cases of Yesufu v ACB (supra) and UBA PLC v S.A.F.P.U. (2004) 3 NWLR part 861 page 516.

MY OWN THOUGHTS

The operative words/phrases for the purpose of this paper are: books,maps,plans,drawings,photographs… includes any matter (whatsoever) expressed or described upon any substance (whatsoever)… used for the purpose of recording that matter (emphasis in brackets,mine). Before attempting the exposition of the effect of the word "includes" one may attempt to give relevant definition of some of the words/phrases highlighted.[3]

BOOKS;

1. A set of printed pages that are fastened inside a cover so that you can turn them and read them.

2. A written work published in printed or electronic form.

3. The written records of the financial affairs of a business – Synonym Accounts.

Record: Verb (keep account) 1. to keep a permanent account of facts or events by writing them down,filming them, storing them in a computer etc.

It is pertinent to mention that with the advancement in technology most of our traditional ideas of how books,maps,plans etc are created largely by physical manual labour have been taken over by electronic input and the finished product as output.[4] (even then, we relied on printed pictures,maps,graphs etc as primary evidence without averting our minds to the possibility that perhaps they are secondary if we go by the argument printed matters from the computer are secondary).

"Includes" means not limited to. Includes means items listed do not encompass the entirety of the possible scope of meanings attributed to the term; hat exterior defining statements may be complied elsewhere and combined with
the statement to complete the scope of the term's meanings.

It is trite that words are imperfect symbols to communicate intent.[5] They are ambiguous and change in meaning over time. One obvious error of the Evidence Act is its descriptive use of words to define documents. In contrast, the English Civil Evidence Act of 1995, defines documents thus:

> "Means anything in which information of any description is recorded,and "copy", in relation to a document, means anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly."

The preposition that could be deduced from the above is that despite the definition of the word "document" by Section 2 (1) of the Evidence Act, a proactive and purposive judicial interpretation of it could, and in fact, should make it sufficient to keep pace with societal realities pending any amendments that may be made to the present law.

Apart from the fact that words are incapable of capturing the whole gamut of its intending meaning there is also the problem our erroneous,traditional definition of abstract concepts within the narrow confines of our experience which sometimes at best have the effect of limiting these concepts rather than expanding them.

One limitation apparent in most interpretation of the definition of documents, as provided, is the unconscious (and may be conscious) interposition of our idea of document as something expressed on paper or some other form of it. Professor Taiwo Osipitan stated that by virtue of Section 2(1) of the Evidence Act, documents are not restricted to pen and paper writings. The scope of document is wide enough to accommodate computerized statements of account and writings produced through electronic/mechanical device."

We should be reminded that law is not an end in itself but a means to an end, which according to Roscoe Pound, is a tool of social engineering.[6]
This view has been given support by Pats – Acholonu, JSC, when His Lordship held in Muhammadu Buhari & 2ors v Chief Olusegun Obasanjo & 266 ors (2004) NWLR pt. 191,1487, 1532 B-C that "The beauty of the law in a civilized society is that…

> "It should be progressive and act as a catalyst to social engineering. Where it relies on mere technicality or out-moded or in-comprehensible procedures and immerses itself in a jacket of hotchpotch legalism that is not in tune with the times, it becomes anachronistic and it destroys or desecrates the temple of justice it stand on".

A legal commentator Adrew I Chukwuemerie in his article title" Affidavit Evidence and Electronically – generated materials published in LASU LAW JOURNAL Vol.13 of June 2006 at pages 177 – 178, has expressed reservations that:

> "Statutory law in Nigeria has hardly kept pace with social realities. This is despite the fact that between such realities and the law there should ordinarily be a mutually beneficial interpretation… whatever the arguments may be in theoretical jurisprudence on whether or not the courts should make law, in developing legal cultures, they should and actually to make law."

One may state here briefly the various methods of the canons of interpretation. It suffices, for the purpose of this paper to mention the literal Golden and Mischief Rules of interpretation. For the literal rule judges are required to consider what the legislation actually says rather than considering what it might mean. They are to give the words in the legislation its literal meaning, that is, in its plain, ordinary, everyday meaning, even if the effect is to produce what might be considered unjust, absurd or undesirable outcome.

The golden rule may be used when the application of the literal rule would result in what appears to the court to be absurd.[7]

The mischief rule allows the court to go beyond the actual wording of statute in order to consider the problem or mischief that the particular statute was aimed at remedying.

There is fourth category worth mentioning, the purposive approach. It is theory of statutory interpretation that holds that courts should interpret legislation in light of the purpose behind the legislation. It is pertinent here to emphasis the purposive method of interpretation.[8]

As earlier pointed out, the Evidence Act uses the word "includes" rather than "means" to define document. One may be bold to say that depending on the generics of the words/expression used after "includes" the listed items may be either "ejusdem generic" (i.e having a circumscribed embit) or generally expressive (i.e. any other thing that could come within the description).

Professor Osipitan stated that, "…the Evidence Act makes no specific mention of computerized statement of account,documents produced through typewriters and other mechanical and electronic devices.

The act is, however, generally not silent on documentary evidence. A computerized statement of account is a document and, therefore, admissible as documentary evidence the same way that typewriter document and printed books have been and are being admitted as documents by the courts. By virtue of Section 2 (1) of the Evidence Act, documents are not restricted to pen and paper writings. The scope of document is wide enough to accommodate computerized statements of account and writings produced through electronic/mechanical device…

The Evidence Act does not pretend to be an exhaustive legislation. It evidently does not cover the whole field of the law of evidence. The Act frankly admits its limitation and in exhaustiveness in section 5A, which states: nothing in this ACT shall prejudice the admissibility of any evidence which would apart from the provision of this Act be admissible'.

In addition to the words of the above learned professor, the Evidence Act in Section 121 recognised some form of document produced by an electrical device when it provides: "The court may presume that a message, forwarded from a telegraph 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".

The Oxford Advance Learner 's Dictionary, 6th edition defines "telegraph" as "a method of sending messages over long distances, using wires that carry electrical signal"(emphases mine).

All the above expository prepositions notwithstanding, it is gratifying to observe that courts in Nigeria have been proactive in the admissibility of documents under the Evidence Act despite its perceived shortcomings.

In the case of Esso West African INC v Oyegbola as reported in (1969) NSCC at pages 354 – 355, the Supreme Court held, "Besides Section 37 of the Evidence Act does not require the production of "books" of account but makes entry in such books relevant for purposes of admissibility… The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.

In modern times, reproduction or inscription on ledges or other documents by mechanical process are common place and section 37 cannot, therefore, only apply to books of account… so bound and the pages not easily replaced." This was equally the position of the court in the case of Anyaebosi v RT Briscoe Ltd as reported in (1987) 3 NWLR pt. 59,pg. 108 and Trade Bank Plc v Chami (2003) 13 NWLR pt.836, pg.216.

Borrowing further from Professor Osipitan "The list of the negative impact of exclusion of computer generated evidence is endless. Admittedly, e-specific evidence law is desirable. However, the existence of a specific legislation/provisions is not necessary condition for the admissibility of computerized statements of account and other electronically – generated evidence in Nigeria"

Obviously there are undoubted challenges bedeviling computer generated documents other than their admissibility like categorization i.e. primary or secondary; authenticity, integrity,confidentiality e.t.c. which would affect the weight attachable to the evidence and not their admissibly.[9] However, the courts cannot because of these challenges stick to its head in the sand like an ostrict. It would not only be absurd but a perpetuation of injustice to disregard technological advance, [10] and end which is clearly not what law seeks to achieve.

CONCLUSION

I, urge you as judicial officers to continue to bow to the wind of judicial precedence which, in a nutshell, are the principles as enuciated in the case of Yesufu v ACB (supra) Anyaebosi v RT Briscoe Ltd (supra) and Trade Bank Plc v Chami (2003) 13NWLR part 836 page 216. For now, in spite of my views or other views, we have no option should they not follow purposive approach?

I thank you all for your time and patience

May God bless us all.