

**THE USE OF ELECTRONIC EVIDENCE IN TRIAL ADVOCACY IN
NIGERIA: BENEFITS AND CHALLENGES***

Abstract

For over half a century now, the world has experienced a radical advancement in the area of science and technology. It is indeed an era of unfathomable borderless electronic transactions and communications. This digital development has also re-defined the pattern of legal proceedings in courts of law across the globe; and the law cannot fringe ignorance to this reality. The legal system has equally been affected by the omnipresence of technology which has affected virtually everything we do and fundamentally the way legal proceedings are conducted because information gathered from electronic devices now feature in our courts regularly. In order to catch up with global advancement, Nigeria has enacted legislations like the Evidence Act 2011, Cyber Crime Act 2015, and the Electoral (Amendment) Act 2017. These legislations make for admissibility of computer generated evidence. This article considers the history, conditions for admissibility and the scope of electronic evidence under the extant law, and posits that the provisions for admissibility of electronic evidence are laudable; however, the innovations are not bereft of challenges. These challenges are: the sui generis nature of electronic evidence, lack of detailed provisions or guidelines for the admissibility of electronically generated evidence, third party intervention, misunderstanding between weight and admissibility, and technicality attached to electronic evidence. This article considers similar provisions in other jurisdictions. This article concludes by proffering some realistic approaches for surmounting these lacunas that have now appeared to be a clog in the wheel of progress of this nascent innovation in our evidential jurisprudence.

***Onu, Kingsley Osinachi N.**, LL.B (HONS) (EBSU), BL (Yenagoa), LL.M (Ibadan),PNM, NIM. E-mail: kingsleyonu2020@gmail.com; kingsley.onu@adelekeuniversity.edu.ng. Phone Number: +2348062905222. Lecturer, Faculty of Law, Adeleke University, Ede, Osun State, Nigeria.

***Ikpinyang, Aniekan Andikan**, LL.B, BL, LL.M candidate of the University of Ibadan

1.0 Introduction

The advent of information technology has introduced humanity into an era of hi-tech communication on the digital platform. We are now in the age of swift transfer of information, borderless transactions and electronic transactions (e-transactions). It is the age of unparalleled knowledge, mind boggling discoveries with vast and awesome possibilities. The automation has radically altered the landscape of human activities. This digital development has also re-defined the pattern of legal proceedings in courts of law across the globe. Not unexpected, it is imperative that law must keep pace with modern development¹. This has lent credence to the fact that “*the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer*”². As a result, the legal system has equally been affected by the omnipresence of technology which has affected virtually everything we do and fundamentally the way legal proceedings are conducted because information gathered from electronic devices now feature in our courts regularly³.

Though this essay is not limited to what is obtainable in Nigeria, this paper seeks to factor in international best practices in this regard while proffering same as a guideline for Nigeria's nascent development. This has become particularly necessary because, the issues surrounding the use of electronically generated evidence in particular and cyberspace in general are borderless, and there is a dearth of precedents in Nigeria.

¹ Hon. Justice P. A, Akhiero, “Admissibility of Electronic Evidence in Criminal Trials. How Practicable? A paper presented at the 2013 annual General Meeting of the Magistrates Association of Nigeria, Edo State Branch. Presented on Tuesday, 23rd July 2013. Available online at <http://edojudiciary.gov.ng/wp-content/uploads/2016/10/Admissibility-Of-Electronic-Evidence-In-Criminal-Trials.pdf> Last visited on 7th April, 2017.

² *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194 page 216-217

³ Hon. Justice Alaba Omolaye-Ajileye, “Admissibility of Electronic Evidence in Civil and Criminal Proceedings.” Available online at http://nji.gov.ng/images/Refresher_Magistrates/s09.pdf. Last visited on 7th April, 2017

However, specific interest will be paid to the use of electronically generated evidence in Nigerian in order to examine its challenges and benefits. For a clearer perspective on this subject, a brief synopsis of the history of electronically generated evidence will be carried out.

2.0 History of the Use of Electronically Generated Evidence- The Story So Far!

The Nigerian Law of Evidence is substantially part of the received laws of Nigeria via Section 45 of the Miscellaneous Provision Act of 1945. The Ordinance was passed as Ordinance No. 27 of 1943. It did not take effect till 1st of June, 1945 by virtue of Number 618 of Gazette Number 33 of 1945. Since the 1st of June 1945, there pealed Evidence Act was consistently retained in character in the 1951, 1960, 1963, 1976 and 1990 amendments. It was referred to as Evidence Act Cap 112, 1990, Laws of the Federation⁴. But the old Evidence Act was long overdue and needed an overhaul. In the case of *Egbue v. Araka*⁵, Pats-Acholonu J.C.A, lamented that

...our Evidence Act is now more than 50 years old and is completely out of touch and out of tune with the realities of the present scientific and technological achievements. Most of its sections are archaic and anachronistic and need thorough overhaul to meet the needs of our times. But alas it is with us now as an albatross on our neck...

⁴ Hon. Justice OhimaiOvbiagele, "The Challenges of Electronically Generated Evidence." Available online at <http://edojudiciary.gov.ng/wp-content/uploads/2016/10/The-Challenges-Of-electronically-Generated-Evidence.pdf>. Last visited on the 6th of April, 2017.

⁵ (1996)2NWLR (Pt.433)688 at 710-711

There were some difficulties associated with the non-inclusion of electronic evidence in the Act and there were arguments for and against its admissibility. The first notable pronouncement in Nigeria was that of the Supreme Court in *Esso West Africa Inc. v T. Oyegbola (supra)*, while the Supreme Court in *Yesufu v ACB*,⁶ sounded a note of warning, emphasizing the need for legislative clarification before admitting documents generated from computers. The uncertain situation created chaos within the judicial landscape of Nigeria. The foremost decision was followed in *Trade Bank v. Chami*⁷ and *Anyaebosei & Ors v R.T. Briscoe Nig. Ltd*⁸, amongst others, while the latter in Yesufu's case was followed in *UBA v Sani Abacha Foundation for Peace and Unity (SAPFU)*⁹.

For many years, courts in Nigeria contended with how best to handle electronic evidence. This prevailed until 2011, when the 6th National Assembly enacted Evidence Act, 2011 (Act No. 18). The enactment of the Act represented the response of the Legislature to the ceaseless clamour for the amendment of the old Evidence Act. Though the Legislature acted tardy, it surpassed expectations by repealing the entire Act¹⁰. Significantly, the legislation attempts to bring the law in line with the reality of advancement in the area of electronic and computer technology as it clearly provides for admissibility of electronically generated evidence¹¹.

⁶ (1969) NMLR 198

⁷ (2003) 13 NWLR (pt. 834) 216

⁸ (1987)3NWLR(Pt. 59) 108

⁹ (2010) 14 NWLR (Pt. 1214) 487

¹⁰ See, the Explanatory Memorandum of the Evidence Act, 2011, which repealed the Evidence Act, 2004, Cap.

E14 Laws of the Federation of Nigeria, and now applies to all judicial proceedings in or before any court of law in Nigeria.

¹¹ Hon. Justice Omolaye-Ajileye, *Op. Cit* at Page 7

3.0 Definition of Terms

Key words: Electronic evidence and trial advocacy

3.1 Definition of Electronic Evidence:

This is defined as

Data (comprising output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more probable or less probable or less probable than it would be without the evidence¹².

A simplified definition could also be evidence gotten from computer and other electronic gadgets. These evidence could take the form of photos, videos, sound recording etc.

3.2 Definition of Trial Advocacy

Trial is defined as:

The examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause, for the purpose of determining such issue. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of facts¹³.

¹² Stephen Mason, "Electronic Evidence Disclosure, Discovery and Admissibility (1stEdn, Lexis Nexis, 2007)

¹³ An Online Dictionary, available at <http://thelawdictionary.org/trial/>. Last visited on 10th April

Advocacy is defined as:

The act of pleading or arguing in favour of something, such as a cause, idea, or policy; active support.

From the above, Trial Advocacy may be defined as the act of pleading or arguing for a particular cause in a court of law¹⁴.

4.0 Scope of Documents and Electronically Generated Evidence

The electronically generated evidence is all encompassing and its sources cannot be conveniently enumerated. However, Section 258 (1) of the Evidence Act gives a general tenor of the scope of electronically generated evidence.

4.1 Document includes:

(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 disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it, and

(c)Any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and

14

(d)Any device by means of which information is recorded, stored or retrievable including computer output.

This paper posits that the use of the word 'includes' suggests that the scope of electronically generated evidence is not limited to the above mentioned items. This makes room for mind-boggling innovations that would be introduced in the times. Several judicial pronouncements have been made in line with this thought. In *Ports and Carge Handling Services Company Ltd &Ors v. Migfo Nigeria Ltd &Anor*¹⁵, the Supreme Court explained that the word 'includes' is used in a statute or written enactment to enlarge the scope of the subject matter it qualifies or tends to qualify. As a result, the word document was interpreted to include plastic bottles bearing trademark inscriptions in *Holden International Ltd v. Petersville Nigeria Ltd*¹⁶. In *Federal Polytechnic, Ede & Ors v. Oyebanji*¹⁷, tape recordings were accepted as documents and in *Obtuga & Anor v Oyebokun & Ors*¹⁸, and a video tape was held to qualify as a document¹⁹.

From the above, it can be seen that world globalisation has invoked an expansive approach to the previously limited definition of evidence and its admissibility before the advent of the Evidence Act, 2011. Electronically generated evidence is now interpreted to encompass emails, instant messaging and histories (SMS and MMS), phone records and logs, ATM transaction logs, print- outs, spreadsheets, information on

¹⁵ (2012) LPELR-9725(SC)

¹⁶ (2013)LPELR-21474(CA)

¹⁷ (2012) LPELR-19696(CA)

¹⁸ (2014)LPELR- 22344(CA)

¹⁹ Also, a Computer is defined in the section 258 as any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process

social media: Facebook, Twitter, LinkedIn, Myspace, WhatsApp, Meetup, Faceparty, Faces.com, Instagram, Netlog, MyLife. Others are files saved from accounting programs, digital photographs and videos such as Youtube videos, DVDS, CDS, and CCTV footages amongst others.

5.0 Discuss of Electronically Generated Evidence and their Admissibility Status in other Countries of the World, to wit: The United States of America, Singapore and South Africa.

In the quest for judicial efficiency and justice among nations of the world, Nigeria is one of the many countries that has incorporated the admissibility of electronic evidence. It is trite that other developed countries have made significant progress in this area; taking a cue from these countries would be of tremendous impact to the Nigerian judiciary. Case studies from these countries will be applied below.

5.1 The United States of America:

The U.S Federal Rules of Evidence (FRE) govern all evidentiary matters. Section 1001(b)(6) of the FRE provides that a reference to any kind of written material or any other medium includes Electronically Stored Information (ESI), which includes emails, text messages, chats, information from websites e.t.c. Nevertheless basic evidentiary rules established under the FRE would have to be satisfied before electronic evidence can be admitted. The Rules provide instructive guidance:

- a. *Rule 901(a)* contains substantive requirement for authentication while Rule 901(b) provides the extrinsic methods of authenticating.
- b. *Rule 902* provides for self-authenticating features in ESI. The rule provides ten non-exclusive ways by which extrinsic evidence may authenticate ESI. This includes the testimony of a witness with knowledge, expert or non-expert evidence, distinctive

characteristics, witness identification, circumstantial evidence, evidence that a document is a public record or ancient document of more than 20 years, and evidence showing that a process or system was used to procure a result and that the process or system produces an accurate result²⁰.

These Rules have helped in its development to foster justice, so that Counsel tendering electronic evidence will be guided by the substantive rules.

5.2 Singapore:

Singapore has journeyed from handling computer output as a special category of evidence to subjecting it to the same evidentiary rules as other types of evidence. In *Malcolmson Nichols Hugh Bertram & Anor v. Naresh* (2001), various emails were admitted into evidence to prove trespass and harassment. In *SM Intergrated Transware Pte Ltd v. Schenker Singapore Pte Ltd* (2005), the court recognised email correspondence to be writing for the purpose of a contract in interests in land²¹.

5.3 South Africa:

Though South Africa's legal system does not always keep up with the pace of technological development. In 2002, the statutory relief came in the form of the Electronic Communications and Transaction Act 25 of 2002.

²⁰ G Radhakrishna, "Challenges in Admitting and Authenticating Emails" in Kuala Lumpur International Business Economics and Law Conference 6, Vol. 4. April, 18-19, 2015 at pg.18 Available online at http://klibel.com/wp-content/uploads/2015/04/KLIBEL6_Law__8_ruJE75P067.pdf. Last visited on 8th April 2017

²¹ *Ibid*, page 21

It provides for various legal issues and not only for the admissibility of electronic evidence²².

6.0 The Benefits of Electronically Generated Evidence

With the appearance of Information technology (IT), many advanced countries have switched over from paper based commerce to e-commerce and from governance to e-governance²³. In today's scenario, Information Technology is pervasive in every phase of our day to day life. Prominently in the service sector involving communications, railways, airways, scientific establishment, banks, universities, business establishments, in our homes and in industrial growth, the inescapable influence is apparent. The internet, with all path-breaking technological developments gives us all the opportunity to act as a global community; advertise and operate across all frontiers; over borders and beyond the control of any national government²⁴. These opportunities come with their own benefits and challenges and the judiciary is always looked upon to solve conundrums that these will pose.

As a result, legal climes have enacted various legislations to cope with these issues when they arise²⁵. In Nigeria, the enactment of the Evidence Act 2011 marks a watershed in the evolution of our legal system.

²² Prof Murdoch Watney, "Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position." *Journal of Information, Law and Technology*(2009) at page 2. Available online at <https://www.yumpu.com/en/document/view/16185420/journal-of-information-law-amp-technology> technology. Last visited on 8th April 2017

²³ B Nanda and R KTewari, 'Cyber Crime- A challenge to Forensic Science', *The Indian Police Journal*, (2000)102.

²⁴ B Odoh, "Information Technology and the Challenges Facing the Legal Profession in Nigeria" *International Journal of Business & Law* 3(2) (2015)110.

²⁵ The United Kingdom's Police and Criminal Evidence Act, 1984; Indian Evidence Act, 1872 (as amended)

A major area where the current Evidence Act has introduced radical change is section 84 which incorporates the admissibility of electronic evidence²⁶, and thus, it is pertinent to reproduce its sub-sections (2) and (4) *verbis*:

- (2) *The conditions referred to in subsection (1) of this section are-*
- (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 an 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 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.*

²⁶ Hon justice P A. Akhiero *Op. Cit.* at pg. 4

- (4) *In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate –*
- (a) *Identifying the document containing the statement and describing the manner in which it was produced;*
 - (b) *Giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*
 - (c) *Dealing with any of the matters to which the conditions mentioned in subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be. Shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.*

Similar legislations have been enacted in Nigeria to aid the admissibility of electronic evidence to wit, the Cyber Crime Act, 2015, the Electoral Act, 2017 (as amended), The Electronic Transaction Bill 2015, which is modeled after the United Nations Commission on International Trade Law (UNCITRAL) is still in the offing.

The Evidence Act, 2011 which is the focus of this essay and its towering provision (Section 84), has to a large extent clarified Nigerian law on electronically generated evidence and has consequently calmed the agitations and confusions that were witnessed before the advent of the Act. The following are the benefits deduced from this advanced provisions:

6.1 Proof Of Conditions For The Admissibility Of Electronic Evidence

The ease, with which electronically generated evidence can be falsified, is a major area that caused some jurists to grapple with the acceptance of e-documents as falling within the purview of documents in the old Evidence Act. This is distinct from the reason that it was not even included in the Evidence Act of 1945. The import of Section 84 of the Evidence Act, 2011 is to the effect that once a statement contained in a document is produced by a computer, it has to scale the hurdle and fulfil the conditions for admissibility prescribed not only in Section 84(2) which sets the general conditions, but also Section 84(4) of the Evidence Act. This means that an extra certificate to authenticate the veracity of the information as contained in the document produced by that computer and the state of the computer itself is required.

In *Omisore v. Aregbesola*²⁷, Nweze JSC puts the law thus:

“...The relevant phrase here is “a statement contained in a document produced by the computer ...” Interestingly, the drafts person did not leave the meaning of the word “computer” to conjecture. In section 258(1), 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”.

²⁷ (2015) (pt. 1482) 205 at p. 295, paras. B – f

In effect, exhibits 243 and 342, being a computer-generated documents, could only have been admissible in evidence upon compliance with the requirements of section 84 (supra), Kubor v. Dickson (supra).”
(Emphasis Supplied)

The rationale is to accord credibility to the process used in the generation or manufacturing of such statements. In *DPP v. Mckeown* (1997)²⁸, Lord Hoffman noted that:

The purpose of Section 69 of the UK PACE²⁹ therefore is a relatively modest one. It does not require the prosecution to show that the statement is likely to be true. Whether it is likely to be true or not is question of weight for the Justices and Jury. All that Section 69 requires as a condition of the admissibility of computer-generated statement is positive evidence that the computer has produced, stored and reproduced whatever information it received. It is concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states.

The reasoning is ascribed to the nefarious activities of hackers who have become notorious. Onyemenam, JCA in *Ekiti State Independent Electoral Commission & Ors v. PDP & Anor*³⁰ states that: “with our modern information communication technology, anything is possible.

²⁸ Retrieved from <https://www.publications.parliament.uk>>Last visited on 9th April 2017.

²⁹ This is similar to Section 84 of the Evidence Act, 2011

³⁰ (2001) LPELR-20411 (CA)

Documents and signatures are easily manipulated to the extent that genuineness of documents can no longer be ascertained by mere observation with the eyes.”

In *Kubor v. Dickson*³¹, The Supreme Court held thus:

a party that seeks to tender in evidence computer generated documents needs to do more than just tendering same from the bar. Evidence relating to the use of the computer must be called to establish the conditions set out under section 84(2) of the EA,2011. This requirement of certification did not however obviate other rules of evidence applicable to admissibility of documentary evidence such as pleadings, relevancy and admissibility in law pursuant to section 102 of the Evidence Act.

It was explained that laying the foundation for admissibility of electronically generated documents under Section 84(2) is to authenticate it and establish the reliability of the computer that produced it. There must be evidence sufficient to establish or support a finding that the document in question is what the proponent claims it to be³². The authenticating witness is to provide evidence about the process by which the electronically generated document was created, acquired, maintained, and preserved without alteration or change³³. The rationale of authenticating an electronic evidence is to have some checks and balances in place to ascertain the history of how the data had been

³¹ (2013) 4 NWLR (PT 1345) 534.

³² *Lorraine v. Market American Ins Co.* 242 FRD 534 (D.Md 2007) cited in Justice Omolaye -Ajileye, *Op. Cit.* 14.

³³ Justice Omolaye-Ajileye *Op. Cit.* 14

managed, which leads to the assertion that the data has not been modified, altered, replaced or corrupted and must therefore be genuine³⁴.

Authentication is simply the process of verification or identification that establishes that the particular document is what it is purported to be³⁵. This is because, a computer without any form of manipulation can malfunction. It may be infested with viruses and a malfunctioned computer has the tendency of producing inaccurate data. The law, therefore, requires foundational evidence to show that at the relevant time, the computer operated properly³⁶.

There is also another underlying reason for authentication, which is that possibility that a third party could have used the particular gadget in question to perpetrate the crime. For instance, a text message may not have originated from the person who appears to have sent it.

The second step requires the tendering of a certificate to authenticate the document. Justice Omolaye-Ajileye explained that production of a certificate is an additional step required by the Evidence Act, to establish the fact that the computer that produced the document is reliable. He said that “*it is not a way of avoiding or dispensing with the viva voce evidence of a witness who seeks to establish the foundation required under Section 84(2)*”³⁷. The two steps of laying foundation and tendering a certificate of authentication are intricately interwoven and linked in an inseparable union.

³⁴ Justice P.A Op. Cit. at 22

³⁵ *Ibid* at pg.19

³⁶ Justice Omolaye-Ajileye *Op. Cit.* at 14

³⁷ *Ibid*

Subsections (2) and (4) of Section 84 complement each other in such a way that one cannot be an alternative to the other³⁸. He further advised that tendering a certification of authentication under Section 84(4) should not be seen as a tedious exercise but a mandatory and necessary step.”

The above provisions, though stringent can be seen as a way to nip crime in the bud. The letters of the law must be kept, on the production of a certificate to ensure the credibility and evidential value of the electronically generated evidence. Nigeria should take a cue from India's mandatory approach to the production of certificate of authentication which was reiterated in *Anvar v P. K. v. Basheer, & Ors* (2014)³⁹, where it was stated that: “*Electronic records being more susceptible to tampering, alteration, transposition, excision etc., without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.*”

It is to be noted that the Evidence Act, 2011 was lifted from Section 65b of the Indian Evidence Act. This posits that Nigeria can borrow a leaf from India to solve her challenges where there is a dearth of domestically generated precedents.

6.2 A New Dawn for Crime Combat in Nigeria

The Cybercrime Act, 2015 was enacted to help solve the menace posed by criminals on the cyberspace. The Act has made provisions for the extraction of documents online to try various cyber offences like: cyber-squatting, cyber-bullying, child pornography offences, identity theft, amongst others.

³⁸ *Ibid*

³⁹ (2014) 10 SCC473

It allows the interception of electronic communication, by way of a court order; where there are reasonable grounds to suspect that the content of any electronic communication is reasonably required for the purposes of a criminal investigation or proceedings⁴⁰. With a combination of the relevant Acts, observers on the scene can now document the details of event and present it before the court, having fulfilled the requisite foundation to its admissibility through the testimony that the photograph is an accurate representation of the scene or object it captured⁴¹. This is also applicable to digital videos.

Criminals can no longer be exonerated based under the objection that electronically generated documents should not be admitted because they are not provided for in legislations⁴², and contracts can no longer be cancelled as a result of being in the form of an electronic document. This is given effect in the Electronic Transaction Bill, 2015, which states that information shall no longer be denied legal effect solely on the grounds that it is in the form of an electronic document⁴³.

6.3 Provisions for Electronic Signatures

The argument that electronically generated documents are not signed, have been dealt with by legislations in different countries. It is now generally accepted that signature can be affixed electronically which may be as simple as typing the signatory's name at the end of an email with the intention to authenticate the document or scanning a regular signature onto an electronic document or using an electronic signature mechanism⁴⁴.

⁴⁰ Retrieved from <https://www.lawpadi.com> visited 9the April 2017

⁴¹Justice Omolaye-Ajileye Op. Cit at 22

⁴² See, UBA v Sani Abacha Foundation for Peace and Unity (1995) 9NWLR (pt.419)324, *Yesufu v ACB* (2004)3NWLR(Pt. 861)516

⁴³ See section 4 of the Bill

⁴⁴ Section 93 of the Evidence Act provides for electronic signature

6.4 Other Provisions Relating to Electronic Evidence

In the Evidence Act, 1945 (now repealed), technologically generated evidence was argued to offend some of the following general rules of evidence.

- i) The issue of the custody and the reliability of the evidence tendered if it is not the original document
- ii) The best evidence rule which requires that a party must produce the original document during trial or where the original is not available, secondary evidence of it in the form of a copy, with other corroborating notes e.t.c, must be produced.
- iii) The rule against the admission of hearsay evidence which forbids witnesses giving evidence on facts that they do not directly or personally witnessed or knew about.

The general basis for the admissibility of documentary evidence under the Evidence Act, 2011 has not changed as documentary evidence is still largely admissible where the original hard copy of such document is produced in a court of law⁴⁵.

There are also other Sections in the Evidence Act, 2011 that make provision for admissibility of electronic evidence. It is pertinent to note that relevant to the admissibility of electronic evidence are the common rules governing the admissibility of evidence generally. Under the Evidence Act, 2011, facts which are in issue and facts which are relevant to the facts in issue, are generally admissible in evidence⁴⁶. The Evidence Act has however expanded this basic general rule to enable the admission of electronically generated documents under certain conditions which are enumerated below:

⁴⁵ See Section 83 of the Evidence Act, 2011

⁴⁶ Section 4 of the Evidence Act, 2011

- (a) **Hearsay and Electronic Evidence:** One of the exceptions to the hearsay rule of evidence in the 2011 Act is the provision that where the maker of the evidence cannot be called to give primary evidence on the “hearsay evidence,” such evidence is admissible if it is established to have been made and kept contemporaneously in an electronic device, in the ordinary course of business or in the discharge of a professional duty or in acknowledgement, written or signed, of the receipt of money, goods, securities or of property of any kind⁴⁷. Where the statement and the recording of the transaction are not instantly contemporaneous, they must occur such that a court of law will consider it most likely that the transaction was at the time of the record, still fresh in the memory of the maker of the recorded statement.
- (b) **Proof of Electronic Signature:** The provision for an electronic signature satisfies the legal requirement that a document must be signed, where the electronic signature shows that a procedure was followed whereby the person that executed a symbol or followed some other security procedure for the purpose of verifying that an electronic signature was made to an electronic record, actually followed such procedure⁴⁸.
- (c) **Books of Account:** Entries in books of accounts or electronic records regularly kept in the ordinary course of business are admissible whenever they refer to a matter into which the court has to inquire⁴⁹. However, there is a caveat, that such statements alone shall not be sufficient evidence to discharge any person of liability⁵⁰.

⁴⁷ Section 41

⁴⁸ See Section 93

⁴⁹ Section 51

⁵⁰ *Ibid*, Section 53

- (d) **Public books:** Any entry in any public or other official books, registers or record including electronic records made by a public servant in the discharge of his official duties, stating a fact in issue, are now admissible⁵¹.
- (e) **Primary and secondary electronic evidence:** Primary documentary evidence is the original document itself produced for the inspection of the court. Secondary evidence is the direct opposite of primary evidence. Section 86(3) of the Evidence Act 2011, provides that:

“Where a number of documents have all been produced by one uniform process as in the case of printing, lithography, photograph, computer or other electronic or mechanical process, each of such documents shall be the primary evidence of the contents of all the documents so produced by this one uniform process.”

7.0 Challenges to the Admissibility of Electronically Generated Evidence

As laudable as the provisions for the admissibility of electronic evidence are, the innovations are not bereft of challenges. One of the reasons for this is because electronically generated evidence is sui generis. They are unique documents in a class of their own. The admissibility of electronic evidence has always presented a very special challenge in the process of adjudication. There are several controversial areas that are quite uncertain and unsettled⁵². Some of the challenges faced are outlined below:

⁵¹ Section 52

⁵² Justice P. A Akhiero *Op. Cit.* at 14

7.1 Lack of Detailed Provisions or Guidelines for the Admissibility of Electronically Generated Evidence

For Nigeria, the mere fact that the gamut of Section 84 does not mention any specific form for the certification of a computer-generated document, poses a challenge. This is also the case for South Africa where it was noted that:

what is missing in the South African law of evidence are detailed procedures that the court have approved as complying with the general law and with the Constitution for collecting evidence, storing it and presenting it in court. Only when these procedures are in place will the South African law of evidence be fully effective⁵³.”

This is unlike the United States of America where Federal Rules of Evidence make elaborate provisions on how authentication should be done⁵⁴.

This lacuna has generated opinionated advice on the means of its procedures. Some quarters posit that there is no hard and fast rule on how certification should be done, the most appropriate method for authenticating electronic evidence being dependent upon the nature of the evidence and the circumstances of a particular case⁵⁵. Where the House of Lords decided that:

documents produced by computers are an increasing common feature of all businesses and more people are becoming familiar with their uses and

⁵³ J Hofman (2006), “Electronic Evidence in South Africa” cited available at <http://hofman@law.uct.ac.za> cited in Prof. Watney Op. Cit at pg. 12

⁵⁴ Michael Numa, “Certification of Computer Generated Evidence and other Related Matters” available online at <http://www.nigeriabar.com/mobile/2016/08/certification-of-computergenerated-evidence-and-other-related-matters>. Last Visited on 6th April, 2017

⁵⁵ *Regina v. Shepherd* (1993)1 ALL ER 225, 231

operation."Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer will inevitably vary from case to case. I suspect that it will very rarely be necessary to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what is required to do and who can say that it is doing properly⁵⁶.

However, some quarters suggest that where a court is to rely on mere certificate for the admissibility of electronics evidence, it should and must be tendered by an expert. This will be in tandem with the usual trend of such certificate under the Act. There is a further argument that the concluding phrase of *Section 84(4)* has whittled down the whole process by stating that it shall be sufficient for a matter to be stated to the best of the knowledge and the belief of the person stating it, as it gives room to all kinds of quacks and mediocrities to issue certificates to the best of their beliefs⁵⁷. This succinctly disabuses the argument in support of transposing what is obtainable in Section 69 of the PACE ACT 1984 and the decision of the *House of Lords in R v Shepherd (supra)*, and states that the legislation and the case law cannot be appropriate authorities for the proposition within the context of Section 84⁵⁸.

⁵⁶ *Ibid*

⁵⁷ Justice P.A. Akhiero, *Op.Cit.* at 11

⁵⁸ *Ibid*

7.2 The Challenge of Third Party Intervention

There is also the possibility of third party intervention by which electronically generated evidence could be generated under the guise of the named sender. Courts have been wary in attributing for instance, a text message exclusively to the person to whom the phone number is assigned. This is contrary to the presumption and estoppel rule of the Evidence Act, 2011 which is to the effect that an electronic message forwarded by the originator of the message through an electronic mail server corresponds with the message as fed into his computer for transmission; though the court shall not make a presumption as to the person to whom such message was sent without corroborating evidence⁵⁹.

Also perpetrators of these criminal acts could use fake name and aliases to prevent them from being tracked⁶⁰.

7.3 Misunderstanding between Admissibility and Weight

There is the misunderstanding between admissibility and weight to be attached to electronically generated documents. This is as a result of the clamour on the volatility of the electronic evidence. But physical evidence can be forged too and the witnesses' competencies can also be questioned due to perceptive defects. All these elements will affect only the weight to be attached to such evidence but it will not affect its admissibility. Similarly, electronic evidence should not be excluded simply because of its vulnerability to being tampered or altered.

⁵⁹ Section 153 (2)

⁶⁰ In *Shell International Petroleum co. v Allen Jones*, it was said that 'no one knows you are a dog' because it is very easy for a person using the Web to disguise their identity and to hide behind aliases, cited in *odoh*, Wipo case No. D2003-0821 of 18 December 2003, <http://arbitrator.wipo.int/domains/decisions/html/2003/d2003-0821.html/> accessed 6th April, 2017

In Germany, electronic evidence is usually regarded as preliminary evidence and the admissibility and probative value is decided based on a judge's discretion. To adopt such high admissibility criteria for electronic evidence and to exclude such evidence due to the insufficiency of authentication misses the difference between admissibility and the weight of electronic evidence. In China, a survey of 69 criminal judges shows that in criminal cases, when evaluating electronic evidence, quite a portion of judges do not distinguish between admissibility and weight, because of lack of awareness, inability to evaluate the evidence or for avoiding unnecessary troubles⁶¹.

Also, an interesting survey found that less technically aware judges were more wary of electronic evidence than their technically knowledgeable peers, which shows that the attitude of judges towards electronic evidence is closely related with their comprehension of modern computer technology. Thus, whether or not electronic evidence can be applied appropriately is decided by not only its character but also the attitude of people towards it⁶².

7.4 Electronic Evidence Classified as Sui Generis

The peculiarity of each case also poses a challenge. The dearth of precedents leaves the parties unsure of the outcome of their cases.

⁶¹ Alexander Duuisberg and Henriette Picot, "Germany" in International Electronic Evidence, article in British institute of International and comparative law, 2008 at 337

⁶² Bo Liu 2005, "Problems on Admissibility of Electronic Evidence in the Chinese Context." Digital Evidence and Electronic Signature Law Review. Available online at [http://www.google.com.ng/search?rlz=1C1_____enNG606NG612&sourceid=chrome&ie=UTF-8&q=Bo+Liu+2005,+\"Problems+on+Admissibility+of+Electronic+Evidence+in+the+Chinesse+Context.\".Last accessed on 8th April, 2017.](http://www.google.com.ng/search?rlz=1C1_____enNG606NG612&sourceid=chrome&ie=UTF-8&q=Bo+Liu+2005,+\)

The fact that there are different procedures for different electronically generated documents is also a challenge to the legal practitioner who is not well abreast with these detailed intricacies. For instance, the procedure for admitting Short Message Services (SMS) and E-mails are different from how an ATM fraud can be prosecuted and this is different from how an INEC Smart Card Reader can be presented before the court. All these variances in evidence tendering serve to throw an unprepared legal practitioner off balance and may lead to travesty of justice because of the proliferation of procedures for each case which seems to be unique. It is recommended that this area of law be developed holistically to the point where there is sync between all the procedures.

7.5 Technicalities Attached To Electronically Generated Evidence

Another area where the use of electronically generated evidence faces challenge is its technicality. A good example is the Section 4(2) Law of Contract Act of Tanzania, which requires communication to be complete and which in essence recognizes only contracts which are done in a hard copy and not digitally contracted⁶³.

8.0 Recommendations

The following recommendations are made:

- 1) The lawyers and judges should be e-prepared for the challenges posed by electronically generated evidence. It is a natural reaction for people to treat electronic evidence with tremendous caution because of its embryonic stage of development. A lawyer should not therefore rely on irrelevant evidence to prove facts⁶⁴.

⁶³ Can electronic document be used as evidence <<https://www.lawteacher.net>>Last accessed on 8th April 2017

⁶⁴ This was seen in *Perforaciones Maritimas Mexicanas S. A de C. V v Seacor Holdings Inc* (2006), where the plaintiffs referred to a publication from the internet to prove the existence of contract, without the contract documents being provided to the court cited in Bo Liu *Op. cit.* 43

- 2) There should be detailed procedures for authentication in Nigeria as found in the United States of America's substantive laws. The process of authentication should be thorough and the argument that it is not necessary for an expert to be called as a witness is faulty because it is certain that there are peculiar areas which can only be explained by an expert. Also, the testimony of an expert will educate the judge, and provide additional insight into the intricacies involved in the case.
- 3) The Judges also ought to be trained and re-trained by the National Judicial Institute, Nigeria as well as similar bodies of other countries on new and nascent areas of law which require specialty such as this.
- 4) More advocacies in this area of evidence will enable the subject matter to be adequately understood. Parties should not shy away from this area of litigation, because frequent advocacy in courts will build precedents and subsequent stability in the use of electronically generated evidence.

9.0 Conclusion

Technology can live up to its billing of making life easier and more efficient for all of us, despite how criminals may employ it, if we effectively use electronic evidence to prosecute those criminals and reduce the opportunities for technology to be used against us⁶⁵.

⁶⁵ Galves, C and Galves, C (2004), "Ensuring the Admissibility of Electronic Forensic Evidence and Enhancing its Probative Value at Trial." American Bar Association Criminal Justice Magazine. cited in Prof. Watney Op. Cit at pg. 3

Technology is now part of life and as such must be used to benefit life. The world is now a global community and from the above, legal communities have made efforts to be at par with the astronomical rate of development in the IT world, though it is not arguable that there are some lapses. The best practise is for all stakeholders to continue in proffering solutions when challenges arise, because there will always be challenges as far as the world is dynamic.