



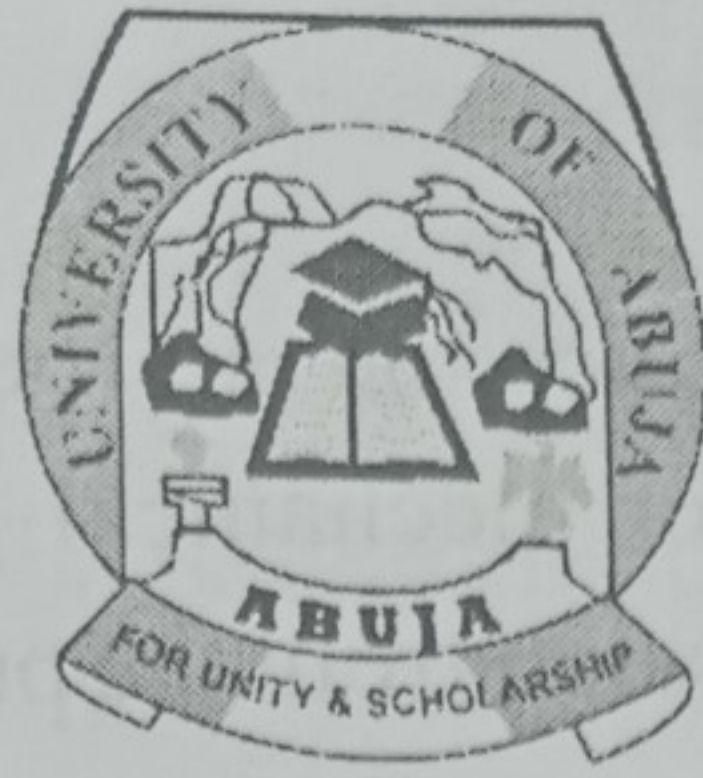
ABUJA JOURNAL OF PUBLIC AND INTERNATIONAL LAW

A Publication of

Department of Public and International Law, University of Abuja, Abuja - Nigeria

December 2018

- | | | |
|---|--|-----------|
| The Nigerian Legal Practitioners' Account Rules: Compliance and Relevance in 21 st Century Legal Practice. | Effiong E.L,
Jemialu M.E &
Shuwa B | 1 |
| An Assessment of the Legal Recognition and Implementation of Electronic Evidence in the Tanzanian and Nigerian Judicial Systems. | Rilwan F. Mahmoud,
Hamza O. Abdulazeez
& Oluwabusayo T.
Wuraola | 19 |
| Appraisal of the Legal Concept of Unitization and Joint Development Agreement in Oil and Gas Industry Operation: Case Study; Nigeria- Sao Tome and Principe Unitization Experience. | Dr. Zuhair Jibril | 34 |
| Burden Sharing in Refugee Protection and the Legal Challenge. | Dr. E. Ibu Otor | 55 |
| Central Banks' Independence and the Imperative of Accountability – A case Study of the Nigerian Central Bank. | Dr. 'Bode Ayorinde | 76 |
| The United Nations Security Council's Permanent Five Veto Power: Time for Reform. | Dr. Aisha Sani
Maikudi | 88 |



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Editor's Note

After a long while, the Journal of Public and International Law of the Faculty of law, University of Abuja is back.

The goal of this publication is to provide answers to challenges being encountered in our modern world through legal research. In this edition, topical issues were discussed. An example is the discussions on the practice of surrogacy and baby factories in Nigeria, refugee burden sharing: A panacea for sustainable peace and development.

I believe that scholars and readers of this journal will find it to be of value.

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TABLE OF CONTENTS

The Nigerian Legal Practitioners' Account Rules: Compliance and Relevance in 21 st Century Legal Practice, by <i>Effiong E.L, Jemialu M.E & Shuwa B</i> -----	1
An Assessment of the Legal Recognition and Implementation of Electronic Evidence in the Tanzanian and Nigerian Judicial Systems, by <i>Rilwan F. Mahmoud, Hamza O. Abdulazeez & Oluwabusayo T. Wuraola</i> -----	19
Appraisal of the Legal Concept of Unitization and Joint Development Agreement in Oil and Gas Industry Operation: Case Study; Nigeria- Sao Tome and Principe Unitization Experience, by <i>Dr. Zuhair Jibril</i> -----	34
Burden Sharing in Refugee Protection and the Legal Challenge, by <i>Dr. E. Ibu Otor</i> -----	55
Central Banks' Independence and the Imperative of Accountability – A case Study of the Nigerian Central Bank, by <i>Dr. 'Bode Ayorinde</i> -----	76
The United Nations Security Council's Permanent Five Veto Power: Time for Reform, by <i>Dr. Aisha Sani Maikudi</i> -----	88
The Common Law Doctrine of Res Gestae under English Law and Nigerian Law of Evidence: An Expansive Exploration, by <i>Jonathan J. Ndana & Gwom S. Gwom</i> -----	101
What Monies and into what Account must they be paid - Consolidated Revenue Fund or Federation Account, by <i>Mohammed Etudaiye & Shaibu Danwanka</i> -----	119
Constitutional Apportionment of Responsibility for Delay in Passage of Nigeria's Annual Appropriation Bills, by <i>Mohammed Etudaiye & Hauwa Kontagora</i> -----	128
Organ Transplantation and Donation: A Review on the Resultant Islamic Perspectives, by <i>Yusuf Abdulrasheed Musa & Yunus O. Murtala</i> -----	135
Social Infrastructure as Catalysts for Sustainable Economic Development in Nigeria: In Search of Law, by <i>Joy C. Mgbeokwere</i> -----	153
The Concept and Practice of Corporate Social Responsibility (CSR) As a Constitutive Solution to the Niger Delta Crisis, by <i>J.J. Ndana & Ndukauba C. Nwagbo</i> -----	181

The Legal Framework and Importance of Taxation on Fiscal Responsibility of Government in an Oil Dependant Economy, by Dr. Zuhair Jibir -----	205
The Future of the World Trade Organisation in the Light of Globalisation and Emerging Multilateral Trade Blocs, by Maiyaki Theodore Bala -----	218
The African Charter on Human and Peoples Rights as a Tool for Achieving the Sustainable Development Goals in Africa, by Olanrewaju Aladeitan & Nkiruka Chidia Maduekwe -----	241
Judicial Review of Political Questions: Percieved Pitfalls and its Constitutional Prudence in the Light the Nigerian Experience, by Abdulfatai O. Sambo -----	251

AN ASSESSMENT OF THE LEGAL RECOGNITION AND IMPLEMENTATION OF ELECTRONIC EVIDENCE IN THE TANZANIAN AND NIGERIAN JUDICIAL SYSTEMS

By

Rilwan F. Mahmoud

Hamza O. Abdulazeez

&

Oluwabusayo T. Wuraola

Abstract

This article appraises the reception of electronic evidence in African countries with a view to evaluating the developments made with regards to legal recognition, authentication, and ascription of some value of electronically stored information. This is achieved by analysing the implementation of rules governing relevancy, admissibility and the ascription of weight in judicial systems particularly in Tanzania and Nigeria in order to determine if and how they have evolved in response to electronically stored information. The paper reveals that these jurisdictions have a similar pattern of overcautious legislation whereby arduous requirements and complicated hurdles of admissibility and authentication are enforced because the courts are wary of admitting electronically stored information. Also, there are several instances of multiple regulations which make it difficult to determine the appropriate rules to apply in specific circumstances. The paper then makes recommendations on how best to address some of the challenges facing judicial systems in Africa noting that while piecemeal amendments might address some immediate evidential challenges in these jurisdictions, a complete re-enactment of the rules governing electronic information will be the most effective.

Introduction

With significant advancements in information technology around the world, it has been an uphill task for judicial systems to meet up with the demand for fair and effective adjudication. It is well known that judicial systems are traditionally conservative especially with regards to procedural rules and this can present a complication when faced with a type of evidence that is not adequately defined by these procedural rules.¹

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1. M. Watney "Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position" http://go.warwick.ac.uk/jilt/2009_1/watney last accessed on the 5th of June 2016

Today, the courts are faced with a multitude of evidence presented in digital form raising new questions of authentication and value ascription.² This is not helped by the fact that the processes of storing and transferring information have only gotten more technical and complicated with time and this has led to the need for re-evaluation of the laws regulating electronic evidence in many jurisdictions.³ Now more than ever, the judges and legal practitioners need to acquaint themselves with practical knowledge of how electronic messages are processed, stored and presented otherwise electronic evidence will still be evaluated based on some of the traditional rules of evidence thus increasing the chance of a miscarriage of justice.⁴

Both the Tanzanian and Nigerian judicial systems have shown a common trend of amendments and re-enactments of laws governing evidence to accommodate electronically stored information in these jurisdictions in recent times. The Tanzania Evidence Act of 1967 was amended in 2007 by the Written Laws (Miscellaneous Amendments) Act 2007 to include the admissibility of electronically obtained information. There was also a complete transformation with the introduction of the Electronic Transaction Act of Tanzania in 2015 which has substantially improved the regulation of electronic evidence in Tanzania.⁵ In Nigeria, the Evidence Act of 1990 was re-enacted in 2011 with substantial amendments on authentication of computer-generated evidence.⁶

LEGAL RECOGNITION AND DEFINITION OF ELECTRONIC EVIDENCE IN TANZANIA

The Tanzania Evidence Act (TEA) is the primary legislation for the regulation of admissibility and weight of evidence in Tanzania. It is based on the foundational common law procedural rules and modelled after the Indian Evidence Act 1872 retaining most of its provision even after its repeal. The TEA, like many other Common Law jurisdictions, was drafted before the technological revolution and it was not drafted with consideration to the nature of electronically

2. Ibid.
3. Ibid.
4. B Schafer and S Mason 'The characteristics of electronic evidence' in Stephen Mason & Daniel Seng (eds) *Electronic Evidence* 4^{ed} (2017) 18–34
5. A. B. Makulilo "The Admissibility of computer printouts in Tanzania: should it be any different than traditional paper documents?" Thesis submitted for the award of degree in master of laws (LL.M Information and Communication Technology Law) of the University of Oslo, 2006 and Kassim Mmbaga Nyangarika 'Legal and Evidential Validity to Electronic Transactions in Commerce and Formation of Contract: Tanzania Perspective' Dissertation submitted in partial fulfilment of the requirement for the Master of Law degree in Information Technology and Telecommunication (LL. M IT & T) of the Open University of Tanzania, 2013
6. Nigerian Evidence Act (Cap 112) Laws of the Federation of Nigeria 1990 was amended in 2011 now the Nigerian Evidence Act, 2011 (Act No. 18)

stored information.⁷ Consequently, it was inadequate in regulating electronically stored information primarily because of the transient nature of electronic evidence i.e. the ease at which it is capable of being altered.⁸ The effect is that the criteria for what constitutes primary and secondary evidence or what falls into real evidence or documentary evidence might not wholly apply to electronically stored information.⁹

An overview of the Regulation of Electronic Evidence in Tanzania

Legal recognition of electronic evidence in Tanzania came by way of an amendment to TEA, 1967 by the **Written Laws (Miscellaneous Amendments) Act 2007 'WLA, 2007'** and the **Tanzanian Electronic Transactions Act, 2015 (TETA)** to include the **admissibility of electronically stored information**. Sections 33, 34 and 35 of the **WLA, 2007** amended sections 40A, 76 and 78A of the TEA, 1967 respectively. This inclusion introduced the recognition of electronic information stored as data in electronic devices and also electronic information presented in the form of printouts.¹⁰

It is worthy of note that the TETA, 2015 is not yet in force in Zanzibar because the Zanzibar House of Representative has yet to consider accented to it.¹¹ The Evidential legislation currently in force in Zanzibar is the Zanzibar Evidence Act No 9 of 2016 which came into force on the 18th of January, 2017.¹² Section 76 of the TEA amended the definition of banker's books to include electronically stored information and now reads as follows:

Banker's books' include ledgers, cash books, account books and any other records used in the ordinary business of the bank or financial institution, whether the records are in written form or a data message or kept on an information system including, but not limited to computers and storage devices, magnetic tape, microfilm, video or computer display screen or any other form of mechanical or electronic data retrieval mechanism.¹³

7. A. B. Makulilo "The Admissibility of computer printouts in Tanzania: should it be any different than traditional paper documents?" Thesis submitted for the award of degree in master of laws (LL.M Information and Communication Technology Law) of the University of Oslo, 2006

8. Ibid. *Trust Bank Tanzania Ltd v Le-Marsh Enterprises Ltd and Ors* [2002] T.L.R 144

9. A. B. Makulilo "Admissibility of Computer Evidence in Tanzania" *Digital Evidence And Electronic Signature Law Review*, (2007) 56

10. Kassim Mmbaga Nyangarika 'Legal and Evidential Validity to Electronic Transactions in Commerce and Formation of Contract: Tanzania Perspective' Dissertation submitted in partial fulfilment of the requirement for the Master of Law degree in Information Technology and Telecommunication (LL. MIT & T) of the Open University of Tanzania. 2013

11. Although Zanzibar is part of the United Republic of Tanzania, it has a semi-autonomous government called the Revolutionary Government of Zanzibar as well as its own House of Representatives, which deal with non-union matters for Zanzibar.

12. Alex B. Makulilo "The admissibility and authentication of digital evidence in Zanzibar under the new Evidence Act" *Digital Evidence and Electronic Signature Law Review*, 15 (2018) 48

13. Section 76 of the TEA, 1967

Another substantial milestone was the inclusion of section 78A in the TEA, 1967.¹⁴ The section provided the much needed legal recognition of electronically stored information in data form and in printouts.

- (1) A printout of any entry in the books of a bank on microfilm, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such printout, and when such printout is supported by a proof stipulated under subsection (2) of section 78 that it was made in the usual and ordinary course of business and that the book is in the custody of the bank it shall be received in evidence under this Act.
- (2) Any entry in any banker's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document" for the purposes of subsection (1) of section 64.¹⁵

The Impact of the Electronic Transactions Act on Evidence in Tanzania

The most relevant piece of legislation for the purpose of legal recognition of data message in Tanzania is the **Tanzanian Electronic Transactions Act, 2015 (TETA)** which expressly proffers legal force on data messages stating that 'In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of a data message on ground that it is a data message'.¹⁶ It also states that a data message shall not be denied legal effect, validity or enforceability on the ground that it is in electronic format.¹⁷ The salient consequence of these declarations is that not only does data message in whatever form admissible in any legal proceedings in Tanzania, there is also the creation of some functional equivalence of electronic and non-electronic records particularly as regards evidential requirements such as relevancy, authentication, and nature.¹⁸ TETA, 2015 seems to confirm this functional equivalency thus:

An expression in a written law, including the terms "document", "record", "file", "submit", "lodge", "deliver", "issue", "publish", "write in", "print" or words or expressions of similar effect, shall be interpreted so as to include or permit such form, format or action in relation to an electronic communication unless it is otherwise provided for in this Act¹⁹

TETA, 2015 also introduced definitions of some crucial terms such as data, data messages, electronic signatures, electronic communications, electronic records, and originator.²⁰ These

14. Section 35 of the WLA, 2007

15. Ibid.

16. Section 18(1) TETA, 2015

17. Section 4 TETA, 2015

18. A. B. Makulilo "Admissibility of Computer Evidence in Tanzania Digital Evidence and Electronic Signature Law Review, 13 (2016) 121

19. Section 11(2) TETA, 2015

20. Section 3 of the TETA, 2015

definitions aid the understanding of the nature of information stored and produced electronically and helps with determining relevancy, admissibility, and weight to be attached to same.

ADMISSIBILITY OF ELECTRONIC EVIDENCE IN TANZANIA

A pertinent reform in the Tanzanian evidential rules is the introduction of the presumption of authenticity of electronic systems and computers. The TETA, 2015 states that the authenticity of systems in which electronic information is recorded and stored will be presumed in any legal proceeding in the absence of evidence to the contrary.²¹ That, at all relevant times, the system was properly operational and that where it was not, it can be reasonably shown that the fact that it was faulty/ non-operational did not affect the integrity of the electronic record.²²

Another interesting presumption of the authenticity of electronic systems created by the TETA, 2015 is where it is established that the electronic information was recorded and stored by a party to the proceedings who is adverse in interest to the party seeking to introduce it or where it was so recorded and stored by a person who is not a party to the proceedings, nor under the control of a party to the proceedings but acted in his/her ordinary course of business.²³

With regards to determining the admissibility of electronic records, the TETA, 2015 states that evidence may be presented in respect of any set standard, procedure, usage or practice on how electronic records were recorded or stored with regards to the type of business, nature, and purpose for which the record was made.²⁴

EVIDENTIAL WEIGHT OF ELECTRONIC EVIDENCE IN TANZANIA

The eliciting of ascription value of electronic evidence as with other common law countries is done at the trial stage after admissibility has been established to afford the opponents the opportunity of disputing the evidence and testing its veracity.

The TEA, 1967 states that in estimating the weight to be attached to a statement admitted in evidence in a civil or criminal proceeding, the court should take into consideration all circumstances from which any inference can reasonably be drawn as to the accuracy of the statement.²⁵ Electronic evidence in Tanzania is no different as the party presenting the evidence must after admissibility, demonstrate the probity and value of the evidence as they relate to the facts of the matter in question.

21. Section 18(3) of the TETA, 2015

22. Ibid.

23. Section 18(3)(b-c) of the TETA, 2015

24. Section 18(4) of the TETA, 2015

25. Section 34A(3) and 34C(6) of the TEA, 1967

The TETA, 2015 states that in determining admissibility and evidential weight of a data message, the court should consider the manner in which the data message was generated, stored and communicated, the manner in which its integrity was maintained and the manner in which the originator was identified.²⁶ With regards to a document in electronic form, the TETA, 2015 states that where any written law requires that a document should be produced, the requirement is met if it is produced in an electronic form considering it can be shown that the integrity of the information contained in the document was maintained with the exception of endorsements or inconsequential changes.²⁷

THE REGULATION OF SEARCH AND SEIZURE IN THE TANZANIAN JUDICIAL SYSTEM

As is the case with many other jurisdictions, the police do not have unfettered and absolute powers to make searches and seizures. The justification to search a member of the public in any circumstance is not a subjective exercise rather, it must be on reasonable grounds. Reasonable grounds in the case of a search and/or seizure is of a high standard and must be above a mere belief but just under irrefutable proof that the person searched is in the possession of an illegal item.²⁸ If such a standard is met, the person being searched has a right to be informed of the purpose of the search or seizure and given as well as the details of the officer carrying it out.²⁹

The Tanzanian Criminal Procedure Act, 1985 (TCPA) provides extensively for the power of search and seizure.³⁰ Regarding the parameters for the seizure of articles found on a suspect, the TCPA requires that only items that are potentially evidence and are relevant to the suspected offence may be seized.³¹ The Act also states that articles that have been seized and brought as evidence to the court may be detained until the conclusion of the case.³²

As regards the admissibility of electronic evidence gotten from search and seizure in a criminal case, the Tanzanian Evidence Act in Section 40A, states as follows:

In any criminal proceeding-

26. Section 18(2) of the TETA, 2015

27. Section 20 of the TETA, 2015

28. Emmanuel .S. Criminal Procedure, 11th Edition New York 1990 at 34.

29. Masawe A.A.F 'The law of criminal procedure with special reference to Tanzania' (1st Edition) T. M. P. Book Department, 1980 at page 78

30. Section 24 of the TCPA grants the power to search, retrieve, and place in safe custody, all articles except for wearing apparels to be carried out by a police officer, or in special circumstances, by a private citizen. Also, section 25 of the TCPA provides for the power, in required circumstances, to search vessels, boats, aircraft or vehicles while section 28 grants the police, the power, upon arrest, to search and retrieve offensive weapons.

31. See section 39 of the TCPA for the list of items that may be seized. See also sections 40, 41, and 42 of the TCPA for relevant circumstances where seizure may be carried out.

32. Section 44 of the TCPA

- (a) [A piece of] information retrieved from computer systems, networks or servers; or
- (b) The records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities;
- (c) The audio or video recording of acts or behaviours or conversation of persons charged shall be admissible in evidence.³³

This inclusion in the TEA by the **Written Laws (Miscellaneous Amendments) Act, 2007** introduced the admissibility of electronic evidence seized in the course of a criminal investigation which was previously absent in the Tanzanian legislation.

Search and Seizure under the Tanzanian Cybercrimes Act Of 2015 (tcca)

The TCCA, 2015 was enacted as a focused regulation on crimes committed via electronic means such as Illegal access and interference, data espionage and a host of other electronically related offences.³⁴ Part IV of the Act specifically deals with search and seizure of computer devices, data, and other electronic communications.

Under the TCCA, a police officer may, upon being satisfied that there are reasonable grounds to suspect that a computer system may be used as evidence in proving an offence, search for and seize the system and secure the data stored on it.³⁵

The act enjoins the officer carrying out the search and seizure to prepare a list of the items and give a copy of it to the person having control of the computer system.³⁶ Also, where the disclosure of data is required for the purposes of a criminal investigation the TCCA grants the Police the power to issue an order to any person in possession of the device containing the data, compelling the person to disclose it.³⁷ In the alternative, a police officer may request that the person submits a specific set of data that is in his possession or control in a form that is legible and can be taken away.³⁸

Legal Recognition and Definition of Electronic Evidence in Nigeria

The Nigerian procedural law has had a very slow jumpstart in the recognition and regulation of electronic evidence and this has been because of the extreme caution and overtly conservative approach to judicial reforms in the Country. As is the case with several common law countries, the traditional procedural rules of civil or criminal law are not

33. Section 40A of the TEA, 1967

34. Part II of the TCCA, 2015

35. Section 31 of the TCCA, 2015

36. Section 31(4) of the TCCA, 2015

37. Section 33 of the TCCA, 2015

38. Section 34 of the TCCA, 2015

dynamic enough to accommodate all of the electronically stored information and the need for clear and concise definitions of fundamental terms of electronic evidence is most glaring.³⁹ Nigeria has only recently made provided for the admissibility of electronically stored information in the Nigerian Evidence Act, 2011 (Act No. 18) 'NEA, 2011'.⁴⁰

One of the most apparent changes in the Evidence Act was the legal recognition of a "statement contained in a document produced by a computer".⁴¹ Before the NEA, 2011, the Nigerian courts relied on deductions from procedural rules as well as obiters to admit and rely on electronically stored information. Even so, the scepticism and over caution was still very evident in some cases. An example of this was brought to light in *Esso West Africa Inc v. T. Oyegbola*⁴² where the court had to determine whether computer statements of account and copies of their ledger were admissible as books of accounts under section 37 of the previous Nigerian Evidence Act 'NEA, 1990'. The Trial court rejected the evidence as a book of account as contemplated by the section on the ground that they did not constitute the type of books of account envisaged by the law. While disagreeing with the line of reasoning by the trial Judge, The Supreme Court in recognising the limitations of legal recognition of electronically stored information held as follows:

*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 inscriptions on ledgers or other documents by a mechanical process are commonplace and section 37 cannot, therefore, apply to "books" of account ... so bound and the pages ... not easily replaced.*⁴³

The absence of the legal recognition of electronically stored information was also evident in *Nuba Commercial Farms Ltd & Anor v. NAL Merchant Bank Ltd & Anor* where in the court decided against admitting banking records produced electronically because its nature made it unsuitable for the requirements of banking records as contemplated by the NEA, 1990.⁴⁴ The Court held as follows:

The first issue that falls to be determined in the issues in this appeal on the admissibility of the banker's particulars stored in a computer, is that in the proper interpretation of the statute the words in the Evidence Act does not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellants cannot be said to have in his possession copies of its contents. More importantly, the contents of such information have never been in the possession of the person against whom it was used. It is

39. Chinwe J., 'Admissibility of Documentary/ Electronic Evidence Issues, Challenges and Options' (Ibadan, University Press, 2009), p. 15.

40. Section 84 of the NEA, 2011

41. Ibid.

42. (1969) 1 NMLR 194, SC

43. Supra at 198

44. (2003) FWLR (pt. 145) 661

*therefore right to conclude that the information retrieved from the computer being made by the respondent for its own use, is wrong to be used in the trial against the appellants.*⁴⁵

The Impact of the Nigerian Evidence Act, 2011 on Electronic Evidence

The NEA, 2011 brought about the much needed legal recognition for electronic evidence particularly on statements contained in a document produced electronically with or without human intervention.⁴⁶ The Act also broadly redefines 'document' to include *film, tape, soundtrack as well as any device by means of which information is recorded, stored or retrievable with or without the aid of some other equipment.*⁴⁷ The Act also states that for the purpose of a statement contained in a document produced by a computer, *it shall be taken to have been produced by the said computer whether or not it was produced with or without any human intervention.*⁴⁸ The NEA, 2011 also states that information contained therefrom shall be taken to be supplied to a computer if it is supplied to it in any appropriate form whether it is supplied directly with or without human intervention by means of any appropriate equipment.⁴⁹ *What's more, where such data is supplied in the course of activities carried on by any person or body with a view to its being stored or handled by an electronic device operated by someone other than the person that supplied the data, the information will be taken to be supplied to it in the course of those activities.*⁵⁰

Admissibility of Electronic Evidence in Nigeria

In determining the admissibility of evidence, relevancy is the primary requirement for admissibility of evidence in Nigeria like other common law countries. The conditions for relevancy are set out in Parts II and III of the NEA, 2011.⁵¹ The NEA, 2011 also specifically set out requirements for the admissibility of statements in documents produced by computers. Statements in this category are admissible as evidence of the facts contained therein if it is shown that the document containing the statements was produced by a computer during a period over which it was used regularly to store or process information for the purposes of any activities regularly carried on over that period.⁵² It must also be shown that 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

45. Ibid. See also *Anyaebo v R. T. Briscoe* (1987) 3 NWLR (pt. 59) 84, 2 NSCC (vol. 18 pt. 2) 805 where the Supreme Court held that a computerized statement of account is merely secondary evidence which will only be admissible as secondary evidence upon the fulfilment of proper foundation.

46. Section 84 of the NEA, 2011

47. Section 258 (1) of the NEA, 2011

48. Section 84 (5) (c) of the NEA, 2011

49. Section 84 (5) (a) of the NEA, 2011

50. Section 84 (5) (b) of the NEA, 2011

51. Relevancy of facts, statements, admissions and improperly obtained evidence Sections 4 to 36 NEA, 2011

52. Section 84 (2) (a) of the NEA, 2011

or the accuracy of its contents and that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.⁵³

For the purpose of determining what a computer is with regards to the admissibility of a statement in this form, the NEA, 2011 construes a computer to include combinations of computers used for the production of such statements so far as the computers have been and are being regularly used to carry out such activities.⁵⁴ The NEA, 2011 also requires that for such a statement to be admissible, it should be accompanied by a certificate attested to by a person responsible for the operation and management of the computer or any other relevant device.⁵⁵ The certificate shall detail the manner in which the document was produced or any other relevant particulars regarding the production of the document as well as his/her position in relation to the operation and management of the relevant device.⁵⁶

Although the legislative intention behind Section 84 of the NEA, 2011 is to ensure that statement in documents produced electronically are *prima facie* reliable and represent accurately, what was fed into the computer, the process set out is rather overarching and overcautious. This was evident in *Akeredolu & Anor. Vs. Mimiko & Ors* where the Court of Appeal, while affirming the decision of the trial tribunal, rejected a vital piece of electronic evidence for not meeting fully meeting all of the requirements as set out by the NEA, 2011.⁵⁷ The Court's justification read as follows:

*Going by the foregoing provision it is discernible that the appellants who were desirous of demonstrating electronically the content of Exhibit P50A and P50B failed to lay the necessary foundation regarding the condition of the electronic gadget or computer they were going to use. To the extent that those conditions as spelt out in section 84 supra were unfulfilled, the demonstration ought not to be allowed*⁵⁸

Similarly, in *Kubor vs Dickson*, the Supreme Court rejected evidence of a newspaper and information from a website of the Nigerian Electoral commission that have previously been admitted in the trial court not because they were not relevant or admissible in law but because they did not fulfil the conditions set out in 84 (2) of the NEA, 2011. The Court said:

A party that seeks to tender in evidence a computer-generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act, 2011. ... Since appellants never fulfilled the pre-conditions laid

53. Section 84 (2) (c) and (d) of the NEA, 2011

54. Section 84 (3) of the NEA, 2011

55. Section 84 (4) of the NEA, 2011

56. Ibid.

57. *Akeredolu & Anor. v. Mimiko & Ors.* (2014) NWLR (Pt. 1388) 402

58. Ibid.

59. (2013) 4 NWLR (Pt. 1345), 534.

down by law, Exhibits “D” and “L” were inadmissible as computer-generated evidence/documents.⁶⁰

The requirements of section 84 are very much similar to the requirements in the now repealed Computer Evidence Act 57 of 1983 of South Africa which was also vilified for not achieving its purpose due to its “over-cautious approach” in placing a high premium on authenticity and reliability.⁶¹ The requirements in the Computer Evidence Act were: an authenticating affidavit establishing the reliability of the generated document, the deponent to the authenticating affidavit must have been a person qualified in knowledge and experience of the particular system in question, s/he had to verify the facts if s/he had control of the computer in the ordinary course of her/his business and if not, there would be another affidavit deposed to by a person who had such control and access.⁶²

EVIDENTIAL WEIGHT OF ELECTRONIC EVIDENCE IN NIGERIA

The requirements of admissibility of electronic evidence in Nigeria like other common law countries, do not automatically confer ascription value on the evidence. While admissibility is predicated on relevancy to the fact of the case at hand i.e. the evidence is deemed to have the potential to make the facts in issue more or less probable, the ascription of weight involves a critical examination of the probity of the evidence in establishing the truth or falsehood of the facts in issue. The eliciting of ascription value of electronic evidence is often done by trial and maybe by demonstration in open court, this would also afford the opponents the opportunity of testing the accuracy and veracity of the evidence by cross-examination of a witness who is brought forth to speak to the truth of the content of the evidence.⁶³ In *Buhari v. INEC* the court held as follows:

Weight can hardly be attached to a document tendered in evidence by a witness who cannot or is not in a position to answer questions on the document. One such person the law identifies is the one who did not make the document. Such a person is adjudged in the eyes of the law as ignorant of the content of the document.⁶⁴

In determining the weight of electronic evidence it must not only be shown that the evidence is admissible but also that its content is the truth of what it purports to be, thus any witness speaking to it must be in the position of verifying its content as was pointed out in *Okereke v. Umahi & Ors*:

60. Ibid.
61. M. Watney 'Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position' Journal of Information, Law & Technology http://go.warwick.ac.uk/jilt/2009_1/watney last accessed on the 18th June 2016; see also Section 65B (1) and (2) of the Indian Evidence Act, 1872
62. Section 2 of the Computer Evidence Act 57 of 1983 (South Africa)
63. *Alhaji Onibudo & Ors v. Alhaji Akibu & Ors* [1982] 7 SC 60
64. *Buhari v. INEC* (2009) 19 NWLR (pt 1120) 246, 391 -392

Surely, since the witness [PW1], was not "in any polling unit in Ebonyi State on the day of election;" "had never worked at INEC office;" "did not participate in the offloading of information from the Card Reader Machine to the INEC Database" and "was not part of the team that came to Abakaliki for the exercise," the Lower Court, rightly, affirmed the position of the trial Tribunal that no weight could be attached to his evidence for he was "ignorant of [their] content."⁶⁵

It is pertinent to point out that it is not sufficient for the purpose of eliciting evidential value that a witness was brought to court to fulfil the requirements of section 84 of the NEA, 2011. This is because the purpose of a witness at that point is merely to certify that the statements in the document produced electronically represent accurately, what was fed into the computer. The party presenting the evidence must after admissibility, demonstrate the probity and value of the evidence as they relate to the facts of the matter in question. This issue was brought to light in *Dickson vs Sylva & Ors*⁶⁶ where the Supreme Court, overruling the trial court's decision not to allow a witness to return to the stand for the purpose of demonstrating the value of the already admitted evidence. The Supreme court in reaching its decision aligned itself with the reasoning of the Court of Appeal (which also overruled the trial court) as follows:

One may ask, if electronically-generated evidence is already an exhibit before the trial Tribunal or Court, in this case, the DVD, was not to be demonstrated or played, what was the purport of admitting it in evidence? Was it simply to dump it on the lower Tribunal ... In the same vein, when it is an electronically-generated document which has been admitted in evidence, upon fulfilling all pre-conditions and it is not taken as read by consent, then it ought to be demonstrated or played to prove the facts alleged. Otherwise, it remains a closed or 'sleeping' document, which is unusable and which need not have been brought before the trial Court or Tribunal in the first place as it would merely amount to clutter.⁶⁷

Regulation of Search and Seizure in the Nigerian Judicial System

The NEA, 2011, The Nigerian Criminal Procedure Act (NCPA), the Nigerian Administration of Criminal Justice Act (NACJA) as well as Nigerian Cybercrimes Act (NCA) of 2015 all set out provision regulating the search and seizure of evidence in Nigeria. As is the case in other jurisdictions, a police officer is empowered to carry out searches and should any seizures be made, they are obligated to keep in safe custody, the object of their findings.⁶⁸ They are also enjoined to utilize reasonable etiquettes like the searching of a woman should be carried out by only another woman.⁶⁹

Under the Nigerian Cybercrimes Act of 2015 (NCA, 2015) the court set out provisions for the regulation of search and seizure of electronic evidence. It states that where necessary, a law

65. *Okereke v. Umahi & Ors* (2016) LPELR-40035(SC)

66. *Dickson v. Sylva & Ors* (2016) LPELR-41257(SC)

67. *Ibid.*

68. Section 6(1) of the Nigerian Criminal Procedure Act, Chapter 80 LFN, 1990

69. Section 107(2) of the NCPA

enforcement officer may upon the grant of a warrant by a court, seize and retain any computer and electronic devices that may be relevant to the commission of a computer-related crime.⁷⁰ The warrant, in this case, shall only be granted where there are reasonable grounds for believing that the person or material sought to be seized has either committed or is preparing to commit an offence.⁷¹ The NCA, 2015 also states that where a seizure and detention of this sort is effected in the course of search, a copy of the list of all the items, documents, and other materials seized shall be made, duly endorsed and handed to the person on whom the search is made or owner of the premises where the search was conducted.⁷²

Admissibility of Illegally Obtained Evidence from Search and Seizure under the Nigerian Evidence Act, 2011

The NEA, 2011 introduced the admissibility of improperly obtained evidence which was absent from the previous Evidence Act.⁷³ Section 14 of the NEA, 2011 grants a court, the power to admit evidence that will otherwise be inadmissible, provided it is satisfied that the desirability of admitting the evidence is outweighed by the undesirability of admitting it, regardless of the manner in which it was obtained.⁷⁴ Section 15 further provides for the considerations the court must make before it admits illegally obtained evidence.⁷⁵

Common Themes and Trends in The Reception of Electronic Evidence in Nigeria and Tanzania

Both Nigeria and Tanzania have come a long way in recognising and regulating electronic evidence particular in relation to search and seizure of evidence from electronic devices. The recent amendments to the Evidence Act in both countries show a trend of the recognition of the nature of electronic evidence as distinct from other forms of evidence.

The two jurisdictions have taken the significant step of declaring admissible, evidence obtained in a manner that will otherwise be inadmissible in recent amendments of their Evidence Acts.⁷⁶ The implication of these provisions extends beyond admissibility of certain evidence but the recognition of the transient nature of electronic evidence that cannot always be placed on the same footing as documentary evidence.

70. Section 27 of the NCA, 2015 and section 333 and 335 of the NACJA, 2015

71. Ibid.

72. Section 28 of the NCA, 2015 and Section 337 of the NACJA, 2015

73. Section 14 of the NEA, 2011

74. Ibid.

75. Section 15 of the NEA, 2011 states that for the purpose of section 14, the matters that the court shall take into account include, the probative value of the evidence, the importance of the evidence in the proceeding, the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings, the gravity of the impropriety or contravention, whether the impropriety or contravention was deliberate or reckless, whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention, and the difficulty, if any, of obtaining the evidence without impropriety or contravention of the law.

76. Section 40A of the TEA, 1967 and Section 14 and 15 of the NEA, 2011

Another milestone reached by both Nigeria and Tanzania is the enactment of the Cybercrimes act in both countries for the purpose of providing a unified legal framework for the prohibition and prosecution of Cybercrimes in both countries.⁷⁷ This Acts introduced a focused regulation of search and seizure of data messages as well as electronic devices as well as much needed legal recognition and definitions of electronic evidence.⁷⁸

Limitations on the Regulations of Electronic Evidence in both Nigeria and Tanzania

While there have been many pertinent amendments to the procedural rules in both Nigeria and Tanzania, it is apparent that there still remains a lot of room for growth on the regulation of electronic evidence in both countries.

In Nigeria for instance, there are no evidentiary regulations on the admissibility and weight of electronic data messages aside from section 84 of the NEA, 2011 which deals broadly with 'computer-generated statements. On the contrary, Part IV of the Electronic Transactions Act in Tanzania addresses the admissibility of electronic evidence but it is an act designed specifically to regulate electronic transaction. It is in fact, very similar to the South African Electronic Transactions Act, (ECTA), the United States of America's Uniform Electronic Transactions Act 25 of 1999, Canada's Uniform Electronic Commerce Act of 1999, Mauritius' Electronic Transactions Act of 2000, Singapore's Electronic Transactions Act 25 of 1998, Australia's Electronic Transactions Act of 1999, Bermuda's Electronic Transactions Act of 1999, and The Philippines' Electronic Communications Act of 2000.⁷⁹ The provisions addressing the admissibility of electronic evidence in these acts give legal force to electronic evidence and define a degree of functional equivalence between electronic data and writing which can assist courts in how to receive electronic information.⁸⁰

However, just like the ECTA, there is a lack of clarification in both Nigeria and Tanzania of the differences between an original and a copy of electronic evidence in the ECTA. While the TETA, 2015 provides that courts should not deny admissibility of data messages merely for the reason of not being in their original form, it does not provide the definition of "original" or "copy" of a data message.⁸¹ An argument against this position is that it provides

77. TCCA, 2015 and the NCA, 2015

78. Ibid.

79. M Reimann "Comparative Law and Private International Law" in *The Oxford Handbook of Comparative Law* (2006) 1388.

80. Ibid.

81. Section 11 ECT Act, 2002

for functional equivalence which essentially means that the law should treat paper-based and electronic transactions in the same way, without prejudicing either or favouring one above the other.⁸²

The TETA, 2015 state that the requirement of originality will be satisfied if the data message is capable of being produced, either in electronic or paper format and that the integrity of the data message must be assessed by considering whether it is complete and unaltered and also considering the purpose for which it is generated.⁸³ It is submitted that it is necessary to clearly differentiate between an original and a copy of a data message because unlike documents in paper form, a data message on an electronic device may be transferred through different storage media or another form of software causing it to undergo changes.⁸⁴

Another limitation of both jurisdictions in the regulation of electronic evidence is the lack of clarification as to whether data message as contemplated falls within the classification of real evidence or documentary evidence. Neither the Nigerian or Tanzanian laws on evidence make this distinction and seem to lump all forms of electronic evidence into their definitions of documents.

Conclusion

It is evident from the foregoing that although tremendous progress has been made, both jurisdictions have a similar pattern of overcautious legislation whereby arduous requirements and complicated hurdles of admissibility and authentication are enforced because the courts are wary of admitting electronically stored information. Also, there are several instances of multiple regulations which make it difficult to determine the appropriate rules to apply in specific circumstances.

While both countries have taken positive first steps in the regulation of electronic data messages, it is recommended that there should be specific legislation for the regulation of electronic evidence in both Nigeria and Tanzania so as to avoid overlaps between evidence sought to be used for civil or criminal cases or to be used exclusively for electronic transactions.

82. A. B. Makulilo "Admissibility of Computer Evidence in Tanzania Digital Evidence and Electronic Signature Law Review, 13 (2016) 121

83. Section 20 of TETA, 2015

84. South African Law Reform Commission *Report Review of the Law of Evidence " Electronic evidence in criminal and civil proceedings: admissibility and related issues"* (Issue paper 27, project 126) 2010 Para 6.29