



ADMISSIBILITY OF EVIDENCE GENERATED BY CELL PHONES AND ITS KINDS UNDER THE EVIDENCE ACT, 2011

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Abstract

Evidence generated by cell phones, iPad, android and computer are now widely use and admissible in Nigerian courts though, the previous Evidence Act regulating superior courts of record does not provides for the admissibility of such evidence. Quite interesting enough, the present Evidence Act, 2011 has now provides for the admissibility of such evidence and the conditions to be mate before they are admissible in courts. Though, students, researchers and some lawyers do not always aver their mind to the fact that computer generated Evidence or Electronic generated evidence has wide conception and is not restricted to computer desktop, laptop, and so forth. It involves all forms of electronic generated devices which uses memory card or compacted disk. The aim of this paper is to look at phone generated evidence, under sections 84, 93 and 258 of the Evidence Act. It also looks at the procedures for the admissibility of phone generated evidence in Nigerian Courts, and the conditions for it admissibility. Also, the proper foundations to be laid before admissibility of phone generated evidence or electronic evidence. The research methodology adopted is doctrinal analytical method of research it would analyse the relevant sections of the Evidence Act, 2011 and consult statutes, case laws, articles and existing literature by authors. From this research, recommendations would be made.

Key words; PHONES, IPAD, ELECTRONIC EVIDENCE, ADMISSIBILITY, RELEVANCY, PROCEDURES.

1.1 Introduction

In time past the previous Evidence Ordinance and Acts, most especially the Evidence Act, 1990 which regulates proceedings in Nigerian Courts makes no provision for evidence generated by cell phones, iPad, android and computers in general. This remain the position for the period of about sixty-eight years, (before and after independence). Fortunately, the Evidence Act, 2011 makes such provisions for the admissibility electronic-evidences.

The truth is that advancement in-technology witnessed in the last few decades has evolutionalised the world (which Nigeria is not left out) and lunched the world in an information super high way.¹To put it more succinctly, phone usage and computer technology in every day society has altered the way we view and interact with the world around us and has changed the way we perfume day to day task.

Evidence tendered in Nigerian courts when dealing with electronic generated evidence have some procedure to be followed before its admissibility. This research work tends to look into evidence generated by phones, iPad, android and so forth, issues of admissibility of electronic evidence and conflicting judicial decisions prior to the Evidence Act, 2011, decisions in favour and against the admissibility of Electronic Evidence, the conditions for the admissibility of such evidence and to make suggestion as to the reformation of the section 84 of the Evidence Act, 2011.

1.2 Evidence or information Generated by Phones

¹Alaba Omalaye Ajileye., *A Guide Admissibility of Electronic Evidence* (Abuja: Law Lords Publication 2016)xxxiii.

Section 258 of Evidence Act, 2011 provides that; a “computer” *means 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.*”

From the wordings of this section any device used for storing and processing information is a computer. The wording did not restricts device to desktop or personal computers, i.e., laptop. It conveniently accommodates handsets or cell phones or any electronic devices that accept store and process information. Therefore, any evidence given by such device, is “computer generated evidence.”

By way of illustrations

If Mr. “X” while driving his car from Ugbowo Campus to Ring Road and at Wire Road junction, saw Mr. “Z” and “Y” fighting, Mr. “X” brought out his Nokia Android phone and took the coverage of the fighting incident between Mr. “Z” and “Y” at the scene can tender the video coverage as computer generated evidence in court during proceedings. And same will be admissible as evidence.

1.3 Issues of Admissibility of Electronic Evidence and Conflicting Judicial Decisions Prior to the Evidence Act, 2011

Before the enactment of the Evidence Act, 2011 the issues concerning admissibility of evidence generated from electronic devices became highly contentious, as opinions were divided, even amongst the Superior Courts in Nigeria. All the contentious revolved round the question as to whether the Evidence Act, as it was then constituted, could accommodates the admissibility of electronic evidence in the absence of clear provision for its admissibility? Meanwhile, some of the points that came before the courts for decisions include the following;²

²*ibid*73-74

1. Whether or not computer print outs are admissible in evidence at all.³
2. Whether or not computer printout should be treated as primary or secondary evidence or one of the numerous hearsay exceptions.⁴
3. Whether or not a computer printout not found physically with an accused but printed out of his e-mail box after his arrest can be said to be in his possession.⁵
4. Whether or not computer storage devices such as video cassettes are themselves documentary evidence.⁶
5. Whether or not a video compact disc (VCD) recorded from a television broadcast is admissible as original or secondary evidence.⁷
6. Whether or not electronic evidence is admissible as a means of service of court processes.⁸
7. Whether or not admissibility of tape recordings as evidence in a case is based on the fulfillment of certain conditions.⁹

1.3.1 Decisions in favour of Admissibility of Electronic Evidence

³*Federal Republic of Nigeria v. Femi Fani Kayode* [2010] 14 NWLR 1214,481.

⁴*Ayaebosi v R.T. Briscoe LTD* [1987] 3 NWLR 59

⁵*FRN v. Abdul* [2007] 5 EFCLR 204 at 228

⁶*Udoro & Ors v Governor of Akwa Ibom States & Ors* [2010] 11 NWLR 1205, 322

⁷*INEC v AC* [2009] All FWLR 48, 732 at 799

⁸ *Continental Sales LTD v R Shipping Inc* [2012] LPELR- 7904 (CA)

⁹*Federal Polytechnic Ede v Oyebanji* [2012] LPELR 19696 (CA)

In *Esso West Africa Inc v. T. Oyegbola*.¹⁰It was held that;

The law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproduction and inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to books of accounts

In *Yesufu v. ACB*¹¹ the need for legislative clarification was emphasized before admitting documents generated from computers. It was held that;

while we agree that for the purpose of section 96 (1) (h) and 37 of the Act “bankers books” and “books of account” could include “Ledger Cards” it would have been much better, particularly with respect to a statement of account contained in document produced by a computer, if the position is clarified beyond doubt by legislation as had been done in England in the Civil Evidence Act.

Although, the above two decisions were *Obiter dicta*. It is however, doubtful if any lower court can afford to treat an *Obiter dictum* of the highest court in the land with flippancy without reprehension, as it is good law that an *Obiter* of the Supreme Court, could as well in certain circumstances assume the status of a *ratio decidendi*.¹²

In the recent case of *Federal Republic of Nigeria v. Fani Kayode*¹³the Court of Appeal, set aside the interlocutory decision of the Federal High Court, Lagos in which the said court rejected, as in-admissible, the computer print outs of the accused statement of account, tendered by the prosecutor in the trial involving a former Minister of Aviation, *Femi Fani Kayode*, on the allegation of laundering ₦4 billion. The court stated that the certified true copy of the computer-generated bank statement of account of the respondent, domiciled with the First

¹⁰ [1969] NMLR 19

¹¹ [1976] 4 SC 1

¹²*Nwana v Federal Capital Development Authority* [2009] 10 CLRN 63;*Bamgboye v University of Ilorin* [1991]8 NWLR (pt. 207) 1.

¹³*Femi* (n3).

Inland Bank at warf Road, met all requirements of being admitted as an Exhibit at the trial. Applying the decision of the Supreme Court in *Anyaegebosi's* case the court held further that the document did not fall within the category of evidence made completely in admissible by law.

Nigerian courts creatively took recourse¹⁴ to the application of the principle of judicial notice to admit electronic evidence. Electronic evidence was then treated as matters of science to which courts were entitled to take judicial notice under section 74 of the repealed Evidence Act. The Court of Appeal, for instance, relied on the concept of judicial notice in admitting a computerized document. In *Ogolo v. IMB (Nigerian) Ltd* (supra). The court held that; it had become a notorious fact that commercial and banking operations in Nigeria had changed in keeping with the computer age such that the Court takes judicial notice of them under section 74 of the Old Evidence Act.

1.3.2 Judicial Decision against Admissibility of Electronic Evidence

Most of the courts decisions contrasted with the admissibility of computer generated evidence on the ground that, the Evidence Act 1990 do not recognize it. for instance, in *UBA v SaniAbacha Foundation for Peace and Unity (SAPFU)* the Court of Appeal held that a statement of account contained in a document produced by a computer could not be admitted in evidence under the Old Evidence Act until certain sections of the Act were amended.

According to Omolaye¹⁵ computerized documents were also rejected under the repealed Evidence Act because some courts were not comfortable, with the fact that such documents are capable of being manipulated. It is recognized that records in computers can be tampered with

¹⁴Alaba (n2) 78-79

¹⁵*ibid.*

ease or even changed completely. There was no safeguard against such manipulation under the repealed Act.¹⁶

In *Nuba Commercial Ltd v NAL. Merchant Bank*¹⁷ one of the issues that arose for determination was whether the banks record of transactions between the parties, stored in the computer and reproduced was admissible. The court while holding such documents in admissible stated;

In the proper interpretation of the statute, the words in the evidence that does not contemplate in its ambit the information stored by the respondent to be other than in a book and the appellant 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 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 appellant.¹⁸

In *Udora & Ors v Governor of Akwalbom State & Ors (supra)* the Court of Appeal held that; the definition of documents in section 2(1) of the repealed Evidence Act was “conscience and precise” and did not include a video cassette since a video cassette shows a motion or moving picture on a magnetic tape and not a paper. The Court stated after quoting section 2 of the repealed Evidence Act.

By the above definition, it is crystal clear that it was never contemplated that document should be interpreted to include video tape alone, interpreting photograph in a like manner. It is also clear that if the legislature had intended to include video cassette in the class of photograph or document, it would have expressly done so and it would not have resulted to one now trying to smuggle in through the back door. What was never in contemplation by our Evidence Act... a court of law is without power to import into the meaning of a word, clause, or section of statute something that it does not say, indeed, it is a corollary to the general rule of literal construction that nothing is to be added to or taken from a statute unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.¹⁹

¹⁶*Araka v Egbue (Tobi)* [2003] 17 NWLR 848, 1.

¹⁷ (2003) FWLR 145, 661.

¹⁸ P. 582

¹⁹ Per Orji-Abadua JCA at336

The above conferred were some of the cases against the admissibility of computer generated evidence before the repealed Evidence Act, 2011.

1.4 Admissibility of Evidence Generated by Cell phones, iPad and so forth

The new Evidence Act, 2011 brought about innovations and one of these innovations is the computer or electronic generated evidence. These was envisaged by the provisions of section 84 of the Act, it provides that;

- (1) In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.*
- (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 purpose of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual.*
 - (b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived.*

(c) that throughout the material part of that period of 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.

(3) Where over a period the function of storing or processing information for the purpose of any activities regularly carried on over that period as mentioned in subsection (2)(a) of this section was regularly performed by computer, whether

(a) by a combination of computers operating over that period;

(b) by different computers operating in succession over that period;

(c) by different combinations of computers operating in a succession over that period; or

(d) in any other manner involving the succession operating over that period, in whatever order, of one or more computers and one or more combinations of computers.

All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and reference in this section to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of 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*
 - (i) dealing with any of the matters to which the conditions mentioned in subsection 2 above relate; and*
 - (ii) 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*
 - (iii) 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.*

(5) For the purpose of this section

- (a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;*
- (b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities, that information, if duly supplied to that computers, shall be taken to be supplied to it in the course of those activities;*

(c) A document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Section 258 (1) of the Act define “documents” includes; -

- (i) any disc, tape sound track or other device in which sound 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
- (ii) 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
- (iii) any device by means of which information is recorded stored or retrievable including computer output;

Although, section 2 of the Old Act made provisions for documents but it does not include electronic document, data images and so forth.

Furthermore, under this heading section 93 (3) provides that;*(3) an electronic signature may be prove in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.*

This was completely not provided under the Evidence Act 1990

5. Conditions for the Admissibility of Evidence Generated by iPhone (s), iPad, android and so forth.

For an evidence to be admitted as electronic generated evidence it must fulfilled certain conditions. These conditions are simultaneously and not alternatively. Section 84 (2) specifies the conditions which must be proved as follows;²⁰

- i. That the statement sought to be tendered was produced by the computer during a period when it was in regular use, to store or process information for the purpose of any activity regularly carried on over that period.²¹

This condition shows that the output produced by the electronic device was obtained when the device was regularly functioning. This is meant to ensure that the device from which a document was generated is reliable. The reliability of the device is established by the fact that, there is evidence to show that it was used regularly, to store or process information for the purposes of activities regularly carried on over a period.²²

- ii. During that period of regular use, information of the kind contained in the document or statement was supplied to the computer;²³

The second condition shows that there must be proof that the document itself, produced by the device is authentic. The susceptibility of computer records to manipulation and tempering is directly in point here. Of course, a device will only produce what is programmed into it (garbage in garbage out (GIGO)). Evidence must, therefore, establish that the device did exactly what it was instructed to do, and the document produced in Court consists of what was fed into the device.

²⁰I.K.E Oraegbunam., “Admissibility of Electronic Evidence under section 84 of Evidence Act. 2011: Examining the unresolved Authentication Problem” *UNIZIK Law Journal* Vol.II 2015

²¹ Section 84 (2)(a)

²²Alaba. (n 14)108

²³ Section 84 (2) (b)

If there is discrepancy between what is contained in the device and what is produced, such document will be considered unreliable and the entire information could be found to be unacceptable.²⁴

iii. That the computer was operating properly during that period of regular use or if not, the improper working of the computer at any time did not affect the production of the document or the accuracy of its contents.²⁵

On the third condition, a device without any form of manipulation, can malfunction. It may be affected by “bugs” or infected with viruses. A malfunctioning device has the tendency of producing inaccurate data. The law, therefore, requires foundational evidence to show that at the relevant time, the device was operating properly and if there was ever a time it malfunctioned it did not in any way affects the accuracy of its contents. Evidence of malfunction of a device is relevant, if it affects the way the electronic device processes, stores or retrieves the information used to generate the statement tendered in evidence it will inadmissible.²⁶

iv. That the information contained in the statement was supplied to the computer in the ordinary course of its normal use.²⁷

This condition simply requires that the information contained in the statement was supplied to the device in the ordinary course of its normal use.²⁸

²⁴Alaba, (n 14).

²⁵ Section 84 (2) (d)

²⁶Alaba., ff see also *DPP v Mckeowu*(1997) 1 ALL .ER 737

²⁷ Section 84 (2)(d)

²⁸Alaba, (n 14)

v. The document produced by the computer must be supported by an affidavit sworn by the operator or manager of the computer.

This condition was envisaged by section 84 (4) of the Evidence Act, it provides that; the document should be supported by a certificate identifying the document, describing the manner in which it was produced, give particulars of any device or the computer used, and purporting to be signed by a person occupying a responsible position in relation to the operation of the device in his knowledge or belief. In proving the conditions in (i-iv) above it must be supported by an affidavit deposed to by the manager of the device.

In *Jagdeo Singh v The State & Ors*²⁹ while dealing with the admissibility of intercepted telephone calls in a CD and CDR which were without a certificate under section 65B of the Indian Evidence Act, the Court observed that the secondary electronic evidence without certificate is in-admissible and cannot be looked into by the Court for any purpose whatsoever.

Emphatically, the point must be made here, that what is required under section 84 (4) is not certificate of a document by mere stamping, but a certificate. The language in the subsection bears this point out very clearly. What is not clear, however, is whether the certificate can take the form of an affidavit. This is against the backdrop of the statement of affirmation required in section 84 (4) (b) (i) that *“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.”* under the Singapore’s Evidence Act (as amended) authenticity of electronic records reliability and accuracy of the process of their production can be established by affidavit. Our courts should find nothing offensive in the use of affidavits to establish the facts required under section 84 (4). After all, a

²⁹ Juris the Law <<https://www.the-laws.com>> accessed on the 15th October 2023

certificate has been defined as “a document in which a fact is formally attested.”³⁰In *EDU v CAWRRD*³¹ it was held that; an affidavit is a statement of fact which the maker or deponent swear to be true to the best of his knowledge, information or belief. It must contain only those facts of which the maker or deponent has personal knowledge, or which are based on information which he believes to be true and he should state the name and full particulars of his informant.

Notwithstanding that the celebrated case of *Kubor v. Dicson* (supra) and the recent cases of *Omisore & Anor v. Aregbesola & Ors*³²the Supreme Court did not avert their mind to affidavit but emphasized the need for foundational evidence and the conditions provided under section 84 (2)

1.6 Summary

The research appraised the position of the old Evidence Act, 1990 and the proceedings based on the law. It discussed evidence generated by phones under section 258 of the Evidence Act, 2011 that any device used for storing and processing of information is a computer.

It further shows that before the enactment of the Evidence Act 2011, there were conflicting courts decisions as to the admissibility of computer generated evidence while some decisions are for others are against the admissibility of computer generated evidence.

The research discussed the conditions for the admissibility of evidence generated by Iphone (s), Ipad android and so forth. The conditions for the admissibility of evidence generated by

³⁰Alaba(n 1) 114; Black’s Law Dictionary (9thedn) 255

³¹ (2001) FWLR 55, 433 CA

³² [2015] 15 NWLR 1482, 204-205

computer must coexist simultaneously. These are; the evidence sought to be tendered must be produced from the device at the period it was regularly used, the information of the kind produced was the one supplied to the device, the regular operation of the device at the time the evidence was produced and the improper operation of the device did not affect the evidence produced, the evidence was supplied to the computer in the ordinary course of its normal use and a sworn affidavit by the manager of the device affirming all the above conditions.

1.7 Conclusion

It is of no doubt that the use of computers and electronic devices permeates our day to day activities. As the result of which Nigerian courts are duty bound to jurisprudentially apply and decides right and duties arisen from information technology i.e., electronic devices to determine justice in the relevant cases.

We are proud that the Nigerian legislature made provisions for the admissibility of electronic evidence under the Evidence Act, 2011. This now forms a demarcation to the previous decided cases against electronic evidence in superior and inferior courts respectively.

Though, there are some lacunas in the Evidence Act, 2011 section 84 which the Act did not dealt with, for example, express provisions of affidavit under section 84 (4) in place of which certificate was mentioned, and others which were not discussed in this paper.

However, under section 84 sub (3) it was provided that; activities regularly carried out by the computers. Whether it is the combination of computers over that period, by difference computer operating in succession over that period, by different combination of computer, in any mater constitutes a single computer.

The Supreme Court of Nigeria has pronounced on the conditions stipulated under section 84 (2), in *Kubor v. Dicson*, holding that fulfillment of the said conditions is mandatory if a party desires to tender e-documents. The court of Appeal, in *Akeredolu & Anor v. Mimiko & Ors*³³ reaches the same conclusion.

1.8 Recommendations

1. It is hereby recommended that the Nigerian law makers should amend section 84 of the Evidence Act 2011 to give a proper meaning of the word “certificate”.
2. Section 84 (3) is also vague, it should be drafted accommodate the state or condition of a device wherein it product will not be admissible in evidence.

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³³ (2013) LPELR-20532 (CA)