Relevance and Admissibility of Evidence under the Evidence Act[*]

By

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I

1. I must thank the National Judicial Institute (NJI) for the honour of delivering this paper. The issue of relevance and admissibility of evidence is wide and straddles the whole spectrum of the law of evidence. It will be foolhardy to assume that in the few pages of this write-up, every issue relating to relevance and admissibility of evidence was treated. In 43 pages, my learned brother of the Federal Capital Territory (FCT) High Court, Hon. Justice Peter Oyin Affen wrote on only the admissibility of documentary evidence; even at this, the paper concentrated on miscellaneous matters. His paper is titled,"Admissibility of Documentary Evidence: Matters Miscellaneous" and presented on 29th June 2016 at the 3-Day Workshop Organised by Magistrates' Association of Nigeria (FCT Chapter) On the Theme: *Repositioning the FCT Magistrates' Courts for Improved Justice Delivery*. Hon. Justice Alaba Omolaye-Ajileye's "Admissibility of Electronic Evidence in Civil and Criminal Proceedings", a paper delivered at the Refresher course organized for Judicial Officers by the National Judicial Institute(NJI) from 14th – 18th March 2016 available at http://nji.gov.ng/images/Workshop_Papers/2016/Refresher_Magistrates/s09.pdf as accessed on 20th March 2017, as the title suggests, dealt with only the admissibility of electronic evidence. Samuel Ebiye-Khimi Idhiarhi, a Chief Magistrate of the FCT Judiciary in 8 chapters spanning 536 pages, wrote only on evaluation of evidence. His book is titled, *Practice Notes on Evaluation of Evidence* (Imhanobe Law Books Limited: Abuja), 2015 covering such issues as evaluation of oral evidence, evaluation of opinion evidence, evaluation of documentary evidence, evaluation of circumstantial evidence and evaluation of real evidence. There is an orthodoxy that I do not intend to follow in this paper, which is that I take the approach of I take relevance and admissibility as distinct themes and treat them as such after clarifying what is evidence. There is an interrelationship between relevance and admissibility on the one hand, with materiality and cogency (weight) on the other hand. It makes little sense to treat these issues in isolation. The approach I have adopted in this paper, therefore, is to look at these four issues as parts of a whole unit, even if for clarity, I take them one after the other. In this sense, the interplay of the issues are clearly brought out to make a seamless reading. But even at this, I have tried to keep the paper within manageable limits knowing that each of these issues can ground a book in its own right. Accordingly, I crave for understanding of my bird's eye view of the subject.

2. I must caution that I do not lay claims to any special expertise in the law of evidence beyond my day-to-day experience of applying it in adjudicating the cases that come before me. Even at

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this, my case is interesting especially if it is appreciated that I am a judge of a jurisdiction that is not bound to apply the rules of evidence. Section 12(2) of the National Industrial Court (NIC) Act 2006, for instance, provides that my Court may regulate its procedure and proceedings as it thinks fit; and although it shall be bound by the Evidence Act, it may depart from it in the interest of justice. With the passage of the Evidence Act 2011, however, can my Court continue with its policy of not being absolutely bound by the Evidence Act when in the explanatory note as well as section 256 it is made pretty clear that the new Evidence Act in repealing the old one 'shall apply to all judicial proceedings in or before Courts in Nigeria'? I think so. I take solace in four points.The first is section 4(2)(b) of the Interpretation Act Cap. I23 LFN 2004, which provides that where an enactment is repealed and another enactment is substituted for it then any reference to the repealed enactment shall, after the substituted enactment comes into force, be construed as a reference to the substituted enactment. It should be noted that by section 1 of the Interpretation Act, the Interpretation Act "shall apply to the provisions of any enactment except in so far as the contrary intention appears in this Act or the enactment in question". The second is section 2 of the Evidence Act 2011 itself, which provides that 'for the avoidance of doubt, all evidence given in accordance with section 1 shall, unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria, be admissible in judicial proceedings to which this Act applies'. I note the proviso to section 2, which provides that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under the Evidence Act. This notwithstanding, section 2 acknowledges that there are existing laws that exclude the application of even the Evidence Act 2011. The third is section 3 of the Evidence Act 2011, which provides that "Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria".*A fortiori*, if another legislation makes any evidence inadmissible, the intention of the legislature in that regard must be respected. In other words, section 3 must be read to mean nothing in this Act shall prejudice the admissibility or otherwise i.e. inadmissibility of any evidence that is made admissible or inadmissible by any other legislation validly in force in Nigeria. The Fourth point is that section 12(2) is not delimited by time or date. It talks of "Evidence Act", not "Evidence Act 1990 or 2004". So, the argument often advanced that the Evidence Act 2011 is subsequent to the NIC Act 2006 i.e. because the NIC Act was passed in 2006, it cannot be said that the Evidence Act 2011 was contemplated under it, cannot really hold ground as the NIC Act 2006 simply talks of the "Evidence Act". Even if section 12(2) of the NIC Act were delimited by time or date, section 4(2)(b) of the Interpretation Act has taken care of the problem. With very due respect, therefore, I maintain this stance despite *SEC v. Abilo Uboboso* unreported Suit No. CA/A/388/2013 the judgment of which was delivered on 21st December 2016. In this case, the NIC had admitted in evidence public documents that were not certified as such on the ground that section 12(2) permitted the Court to depart from the Evidence Act. The Court of Appeal held that the provisions of section 12(2) of the NIC Act 2006 cannot operate to encumber the provisions of the Evidence Act 2011 contained in section 256(1), which says that the Evidence Act 2011 shall apply to all judicial proceedings in or before any Court established in Nigeria. Part of the reasons upon which the Court of Appeal based its decision was that the Evidence Act 2011 was made by the National Assembly subsequent to the NIC Act 2006. The arguments advanced earlier as to section 4(2)(b) of the Interpretation Act, sections 2 and 3 of the Evidence Act 2011 and the fact that section 12(2) of the NIC Act 2006 is not delimited by time or date were not raised and considered in *SEC v. Abilo Uboboso*; as such it is doubtful if *SEC v. Abilo Uboboso* has any binding effect in terms of the doctrine of *stare decisis*.

3. A decision of my learned brother of the Federal Capital Territory (FCT) High Court, Hon. Justice Peter O. Affen, in *The Federal Republic of Nigeria v. Emmanuel Owoicho & 5 ors* unreported Suit No. FCT/HC/CR/192C/2015 the ruling of which was delivered on 14th December 2015, may be useful here. A preliminary objection had been raised in a criminal trial before His Lordship. One of the grounds of the objection was that the Economic and Financial Crimes Commission (Establishment) Act 2004 does not confer power to prosecute for offences under the Advance Fee Fraud Act 2006. His Lordship, in rejecting this argument held thus:

> It is noteworthy that s. 7(2) of the EFCC (Establishment) Act, 2004 specifically refers to the Advance Fee Fraud and Other Related Offences Act of 1995 which has since been repealed and supplanted by the Advance Fee Fraud and Other Related Offences Act of 2006. On the face of it, it is quite arguable that since specific reference is made to the repealed 1995 Act, offences under the 2006 Act do not fall within the purview of the Acts the EFCC is empowered to administer and enforce. However, the Interpretation Act, Cap. I23 LFN, 2004 has clearly taken the wind out of the sails of that line of argument. The clear and unambiguous provision of s. 4(2)(b) of the Interpretation Act is that where an enactment is repealed and another enactment is substituted for it, any reference to the repealed enactment shall, after the substituted enactment comes into force, be construed as a reference to the substituted enactment. By s. 1 thereof, the Interpretation Act "shall apply to the provisions of any enactment except in so far as the contrary intention appears in this Act or the enactment in question." There is no gainsaying that the 2006 Act is a "substituted enactment" for the repealed 1995 Act of the same title, and it seems to me that a proper application of s. 4(2)(b) of the Interpretation Act would lead inescapably to the conclusion that the reference in s. 7(2)(b) of the EFCC Act of 2004 to the repealed 1995 Act shall be construed as a reference to the 2006 Act.

If the Court of Appeal's attention in *SEC v. Abilo Uboboso* had been drawn to section 4(2)(b) of the Interpretation Act, the more plausible conclusion would have been that the reference to the Evidence Act in section 12(2) of the NIC Act 2006 would have been interpreted to read a reference to the Evidence Act of 2011.

II

4. Commentators (Hon. Justice Affen, *ibid*, citing His Lordship Nweze, JSC) have it that "Evidence is the lifeblood of litigation", the very basis of dispensing justice. This may be so, but the difficulty of proof is the drawback, the Achilles heel. In the world of adjudication, it must be understood that the adjudicator was never at the scene of the events that led to the dispute brought before him/her. Yet he is expected to determine according to law what happened in order to ascribe or apportion blame, or as we would prefer to put it, ascribe liability. Remember, very often this process is an ascriptive one seeking to ascribe liability as between two parties, the claimant and the defendant, or hold the defendant liable in criminal proceedings. The fact that it is the parties that brought themselves and so are before the Court is itself telling; for in reality there may be others involved in the events that gave rise to the dispute but chose to keep out of or were not so brought before the Court. Their absence as such may be telling too as thereby we may never be seised of all that transpired in terms of the sequence of the disputing events. Given this scenario, let us imagine this statement of Donald Rumsfeld, the Defense Secretary in the first government of George W. Bush, in a press briefing regarding the situation in Afghanistan in 2002: "There are known knowns. There are things we know that we know. There are known

unknowns. That is to say, there are things that we now know we don't know. But there are also unknown unknowns. There are things we do not know we don't know" as quoted in Ha-Joon Chang – *23 Things They Don't Tell You about Capitalism* (Penguin Books: London), 2011 at pp. 174 – 175. This is the context, an apt description of the world, I would say, within which we as Judges must work.

5. In two earlier papers I had cause to draw attention to the problems associated with the question of proof in two areas of the law. The one, dealing with electronically generated evidence, is titled, "Evidential Landscape in Cyberspace: Coping with the Challenges of Electronically Generated Evidence", a paper presented at a Symposium under the theme, "Judicial Accountability and Confidence building in the Administration of Justice" organized by the Benue State High Court to mark the 2011/2012 Legal Year, and which held at the Banquet Hall, Benue State Hotels, Makurdi on September 17, 2011; and the other, dealing with the difficulty of proof in election petitions, is titled, "Election Petitions: the problematic of proof and the quest for electoral justice under the 2010 Electoral Act, as amended", a commissioned paper for publication. Because evidence is the lifeblood of litigation, the very basis of dispensing justice, it at once lends itself to an inherent difficulty. Take this simple question: how many different kinds of evidence do we have? The question sounds foolish given that there are unlimited varieties of evidence. The law student, the lawyer and the Judge may be tempted to say evidence may be oral (unequivocal or equivocal), documentary or real (tangible) or a combination of all of this. This too is true. But in between lies an infinite form of variation of evidence often merely descriptive of either the content or quality of the evidence. For instance, we talk of direct evidence, indirect evidence, circumstantial evidence (evidence that makes the existence of an element of a crime or claim or defense that must be established in other to succeed more or less probable indirectly; subject to rules of admissibility, it can be relevant, valid and of probative value, and not necessarily inferior to testimonial or real evidence), opinion (observatory) evidence, affidavit evidence (see *Nwonu v. Imo State Environmental Sanitation Board* [1990] NWLR (Pt. 135) 688 at 718), hearsay evidence, traditional evidence as in *Ukaegbu & ors v. Nwololo* [2009] 3337(SC), electronic evidence, forensic evidence (addressed fully by O. A. Omonuwa, SAN – *Forensic Advocacy and Election Litigation in Nigeria* (Mindex Publishing Company Limited: Benin), 2015), positive evidence (which reveals the occurrence of an event), negative evidence (which reveals the nonoccurence of an event), etc. There is no order of precedence between positive and negative evidence in terms of relevance or probative value. Negative evidence about the nonoccurence of an event can be just as relevant and inferentially forceful as positive evidence about the occurrence of an event. As the saying goes, *the lie which you know is a lie can be as much revealing as the truth*.

6. Even withholding(failure to bring, or missing) evidence may itself be some form of evidence. See section 167(d) of the Evidence Act 2011, which stipulates that the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. For example, where a party claims to have evidence that goes to show the existence of a document in proof of his case, the document should be tendered; butwhere such evidence could be produced but it is not produced, it is presumed to be against the interest of the party withholding it. By case law authorities, the evidence sought to be presumed in terms of section 167(d) must be identifiable, clear and known to the Court. See *Lawal v. Magaji & ors* [2009] LPELR-4427(CA), *People of Lagos State v. Umaru* [2014] LPELR-22466(SC) and *Mrs.*

Titilayo Akisanya v. Coca-Cola Nigeria Limited unreported Suit No. NICN/LA/40/2012, the judgment of which was delivered on 7th April 2016. In *People of Lagos State v. Umaru*, the Police had investigated the facts of alibi relied on by the accused but the result of the investigation was withheld by the prosecution raising, thereby, a presumption that the evidence if produced would have been unfavourable to the prosecution. But it must be noted: "evidence of absence is not the same as absence of evidence". In other words, having no evidence about an event is not the same as having evidence that the event did not occur.

III

7. The learned authors, Terence Anderson, David Schum and William Twining in their seminal work in the Law in Context series titled, *Analysis of Evidence* (Cambridge University Press), 2005, Second Edition at pages 290 - 291 indicate that the law of evidence is concerned with facts that may be presented to the Court, by whom and the manner of their presentation. To these authors, and for present purposes, four issues are central: materiality, relevance, admissibility and cogency (weight or probative value). To these authors, the standard pattern of evidence involves four questions.

8. First, what facts are to be proved? This is the question of facts in issue or material facts i.e. the issue of materiality, and is governed by substantive law. Section 1 of the Evidence Act 2011, for instance, provides that "evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no others". This provision is, however, subject to two exceptions: where the evidence of facts appear too remote to be relevant; and where a law disentitles giving the evidence of the facts. When it is stated that the facts to be proved is a question of facts in issue or material facts, which is governed by substantive law, what is meant is that for each head of liability in law i.e. for a defendant to be held liable in liable in law, there are requirements of the head of liability that must be proved. In criminal law, for instance, to hold one liable for the commission of a crime means that the requirements that the law lays down for that criminal act must be proved by the prosecutor before the defendant can be convicted of the crime. For example, regarding the conditions for the conviction of dangerous driving i.e. motor vehicle accident cases, proof of an accident and a death is not the end of the matter. The onus is on the prosecution to show that the accident which caused the death of the deceased was due to the negligent or reckless manner in which the appellant drove the vehicle, and the slightest negligence is sufficient to make the appellant guilty of dangerous driving. See *Adewale Joseph v. The State* [2011] Legalpedia SC 0DQN Suit No. SC. 48/2010, the judgment of which was delivered on Friday, June 17, 2011. This means that the material facts needed to secure a conviction here are: that there was death, the death was caused by the defendant driver, and the defendant driver drove dangerously when he caused the death. Material facts (facts in issue) are, therefore, not necessarily disputed facts but are facts constituting the elements of an ultimate probandum, ultimate probandum being the proposition of fact that the party with the burden of proof must establish or negate in order to prevail or succeed in a case. A fact in issue may be one set of jointly sufficient conditions rather than a necessary condition for success in a case e.g. the law may provide a series of defenses (self defense in a criminal case, or justification or qualified privilege in defamation) any of which would exonerate a defendant from liability. Thus in *Dim Chukwuemeka Odumegwu-Ojukwu v. Umaru Musa Yar'Adua & ors* [2007] LPELR-9008(CA), a material fact was held to be one

which is essential to a case and without which a case cannot be supported; it is that which tends to establish any of the issues raised.

9. Of course, it is material facts (not evidence in proof of) that must be pleaded. See *Hon. Taye Adenoma Oyefolu v. Hon. Abayomi Sadiq & ors* [2008] LPELR-4816(CA). Where material facts are not pleaded or are badly pleaded, a damage has been done; and it is not for the Court to fix the damage. As His Lordship Tur, JCA puts it in *Chief James Onyewuke v. Modu Sule* [2011] LPELR-9084(CA), a trial Judge should not embark on a voyage seeking to repair the damage caused by counsel in failing to plead material facts necessary to obtain judgment in the temple of justice since Courts are not carpenter's workshops where Judges toil to mend defects in pleadings. The Supreme Court in *Adebayo & ors v. Shogo* [2005] 7 NWLR (Pt. 925) 467 at 479 per His Lordship Pats-Acholonu, JSC would put it this way: "I fail to understand how the *terse* and *sparsely* worded pleadings could be a foundation for sufficient facts that would ground or gravitate their case when they are seeking for declaratory reliefs and account of the monies realized from the claim of delegation to collect rentals. On the contrary, the respondent in this case comparatively speaking fairly *profuse* in his pleadings and naturally the evidence elicited or adduced ought generally to shore up considerably the material facts pleaded. The weight or substantiality of evidence is what is considered by the court in its adjudication process".

IV

10. Secondly, of any fact offered as evidence or potential evidence, does this fact tend to support or tend to negate one or more of the facts in issue? This is the question of relevance, which is governed by logic and general experience. Relevant evidence is, therefore, said to be evidence which tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would have been without the evidence. This cardinal requirement is governed by section 1 of the Evidence Act 2011 already quoted above and section 4, which provides that "facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places". See *Adeshina (aka Alhaji) & anor v. The State* [2012] LPELR-9722(SC). Sections 5 and 6 extend this rule to include facts which are the occasion, cause or effect of or give the opportunity for relevant facts as well as any fact which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Section 7 - 13 simply proceed to give examples. By *Nasir v. CSC, Kano State & ors* [2010] LPELR-1943(SC); [2010] 6 NWLR (Pt. 1190) 253 SC, *Chabasaya v. Anwasi* [2010] LPELR-839(SC); [2010] 10 NWLR (Pt. 1201) 163 SC, *The State v. Oladotun* [2011] LPELR-3226(SC) and *Nwakonobi & ors v. Udeorah & ors* [2012] LPELR-9721(SC), evidence that is relevant to the issue in controversy, and that is not successfully challenged, contradicted and discredited is good and reliable evidence to which probative value ought to be ascribed and which ought to influence the Judge in the termination of the case. Relevant evidence is of two types: directly relevant evidence and indirectly relevant evidence (or ancillary evidence i.e. evidence about other evidence and its probative strength). This categorization should not be confused with direct evidence (which if believed resolves a matter in issue) and indirect or circumstantial evidence, which requires additional reasoning in order to arrive at the desired conclusion. The directly relevant evidence and indirectly relevant evidence can be illustrated thus. A witness in a case, X, testifies that the defendant was at the scene of the crime at the time the crime happened. This testimony will be admitted because it bears upon the defendant's opportunity to have committed

the crime. The evidence of X is said to be directly relevant evidence. Assume another witness, Y, testifies that he was with X at a place way off the place of the crime. If what Y says is true, then X's testimony cannot be true. Y's testimony about X's location becomes relevant given that it makes it less probable that the defendant had the opportunity to commit the crime. In the light of X's testimony, Y's testimony is also relevant given that it negates the credibility of X's evidence about the defendant. Y's testimony is said to be indirectly relevant evidence for it is ancillary evidence bearing upon X's credibility. All of this must be understood within the context of case law authorities. For instance, the evidence of a witness taken in an earlier proceeding is neither relevant nor admissible in a later trial except for the purpose of discrediting such a witness in cross-examination and for that purpose only. See *Ogunnaike v. Ojayemi* [1987] LPELR-2345(SC); [1987] NWLR (Pt. 53) 760; [1987] 3 SC 213 and *Bayol v. Ahemba* [1999] LPELR-761(SC); [1999] 10 NWLR (Pt. 623) 381; [1999] 7 SC (Pt. I) 92.

V

11. Thirdly, of any fact offered as evidence or potential evidence, is there a rule or principle that requires that this item of relevant evidence should be excluded or its use limited because either it belongs to a class of inadmissible evidence or it would be contrary to the policy of the law to admit it in the circumstances of the case? This is the issue of admissibility, which is governed by the law of evidence. Many of the rules of evidence are standards intended to guide the trial judge in exerting his/her discretion in deciding whether evidence should be admitted or its use limited. Take the confessional statement as an example. By *Eke v. The State* [2011] LPELR-1133(SC), the test for admissibility of a confessional statement is its involuntariness; once the issue is raised, it must be resolved or settled one way or the other before its admission or otherwise. And in *Ganiyu Gbadamosi anor v. The State* [1992] LPELR-131(SC); [1992] NWLR (Pt. 266) 465; [1992] 11/12 SCNJ 268, it was held that "a statement wrongly admitted as a confessional statement can, if it has no other defects, be admitted as an ordinary statement and be relied upon as such, as a basis for conviction". Additionally, although not a confessional statement, it was held in *Omega Bank (Nig.) Ltd v. OBC Ltd* [2005] LPELR-2636(SC); [2005] 8 NWLR (Pt. 928) 547 that documentary evidence can be admitted in the absence of the maker, although the Court may attach no probative value to it since admissibility and weight are two different things. See also *Justus Nwabuoku & ors v. Francis* [2006] LPELR-2082(SC); [2006] 5 SC (Pt. III) 103.

12. Thus, one of the basic principles underlying the rules and defining the extent of the judge's discretion under those rules is that a judge should exclude evidence whose improper prejudicial effects substantially outweighs its legitimate probative value. A number of case law authorities may be considered here to show the point being made. In *Ojibah v. Ojibah* [1991] 5 NWLR (Pt. 191) 296 SC, a Deed of Gift was considered weightless partly because the plaintiff failed to call his own brother, who purportedly signed it as a witness, to testify; neither did the plaintiff call any other person who was familiar with his father's signature to testify that the signature on the Deed was his father's. The defendant had in the pleadings challenged the plaintiff's attestation. The second case is *Olale v. Ekwelendu* [1989] 4 NWLR (Pt. 115) 327. The plaintiff's solicitor had written a letter to the defendant describing the plaintiff as the owner and landlord of the property in question. The defendant's reply letter through his solicitor did not challenge that assertion; nor did he lay claim to the property or disclose the root of his title. It was held *inter alia* that the plaintiff is the owner of the building. There was nothing from the defendant to warrant a contrary conclusion, the defendant's letter deemed to be an admission (one against

interest) on his part. In *Ineh Monday Mgbeti v. Unity Bank Plc* unreported Suit No. NICN/LA/98/2014, the judgment of which was delivered on 21st February 2017, I held that the fact that the claimant's solicitor' letter to the defendant referred to the defendant's Employee's Handbook, was sufficient proof that the Handbook was known to the claimant and so applies to his case. And in *Adekunle v. Rockview Hotel Ltd* [2004] 1 NWLR (Pt. 853) 161, a letter written by the appellant to the Manager of Apapa Branch of Arab Bank directed the Bank to pay the respondent the exact amount that is the subject of the claim and thereby debit his account. This letter was held to establish (prove) the indebtedness of the appellant to the respondent. A corollary to the rule being discussed is the admitted facts rule. Under this rule, "evidence, of whatever description, must yield to the extent that it conflicts with admitted or clearly established facts. Thus courts give superior credit to witnesses whose testimonies on material points are in accord with facts already established". See Samuel Ebiye-Khimi Idhiarhi (2015), *ibid*, at page 467.

13. If by law an item of evidence is inadmissible, what it means is that it would not be considered in the determination of a case. The exclusionary rule that permits this simply tells us what goes into the consideration in determining where and on whom to ascribe liability in a case. The cardinal rule, therefore, is that facts which are relevant are admissible; in practice, relevance is determinable by the pleadings in the sense that once a fact is pleaded that which goes to prove or disprove it is said to be relevant. Alternatively put, facts relevant to the proof of an issue in contention must be pleaded by the party intending to rely on it before evidence can be adduced thereon. See *Ojiolgu v. Ojiolgu & anor* [2010] LPELR-2377(SC); [2010] 9 NWLR (Pt. 1198) 1 SC. The Court of Appeal decision in *SEC v. Abilo Uboboso* (*supra*), relying on *Oyediran v. Alkbiosu II* [1992] 6 NWLR (Pt. 249) 550 at 566 and *Okonji v. Njokannma* [1999] 14 NWLR (Pt. 638) 250 puts it that for a document to be admissible and admitted in evidence before a trial Court, the following must be met: the document must be pleaded (CF: *Hon. Taye Adenoma Oyefolu v. Hon. Abayomi Sadiq & ors* [2008] LPELR-4816(CA), which held that it is material facts, not evidence in proof of, that must be pleaded); it must be relevant; and it must be admissible in law particularly under the Evidence Act. My brother of the Federal Capital Territory (FCT) High Court, Hon, Justice Peter Oyin Affen, in a paper titled,"Admissibility of Documentary Evidence: Matters Miscellaneous" and presented at the 3-Day Workshop Organised by Magistrates' Association of Nigeria (FCT Chapter) on the Theme: *Repositioning the FCT Magistrates' Courts for Improved Justice Delivery*, and relying on *Isheno v. Julius Berger (Nig) Ltd* [2008] 6 NWLR (Pt. 1084) 582 at 603,puts it this way: "Relevancy is the cynosure or heartbeat of the law of evidence and all admissible documents must be relevant; but the converse is by no means true, as not all relevant documents are admissible". The Evidence Act of course is littered with provisions (section 14ff) as to admissibility and non-admissibility of facts. For instance, by section 14 improperly obtained evidence is admissible unless the court thinks it undesirable to do so (the factors for determining desirability or otherwise of the evidence are listed in section 15); custom, subject to the rule of public policy, natural justice, equity and good conscience, in given circumstances is admissible (sections 16 - 19 and 73 - 74); admissions are generally relevant and admissible except as may be otherwise provided (sections 20 - 27); confessions are generally relevant and admissible except as may be otherwise provided (sections 28 - 32); hearsay is generally not admissible except as may be permitted (sections 37 and 38); statements by persons who cannot be called given that they are dead, cannot be found, are incapable of giving evidence or whose attendance will yield to unreasonable delay or

expense, are generally admissible (sections 39 - 54); certificates of specified Government officers are generally admissible (sections 55 - 58); judgments of courts of justice are admissible (sections 59 - 65); oral evidence of tradition regarding family or communal land is admissible (section 66); opinion evidence, except as may be allowed e.g. opinion as to custom, expert opinion or in some cases opinion of non-experts as to say handwriting, is not admissible (sections 67 - 76); character evidence in civil cases is generally not admissible, but in criminal cases it is admissible if to show that the defendant is of good character, not to show that he is of bad character except the defendant's character is in issue as where he gave evidence of his good character (sections 77 - 82); documentary evidence (subject to rules as to primary and secondary evidence, rules as to proof of execution, and rules as to public and private documents) as to facts in issue in any proceedings i.e. criminal and civil is generally admissible except as may be disallowed (sections 83 and 85 - 106); statements in documents produced by computers are generally admissible except as may be disallowed (section 84); and where allowed, affidavit evidence is admissible (sections 107 - 120).

14. From what has been said so far, within the general tenor of the law of evidence, certain principles pose their peculiar challenges e.g. the use of electronically generated evidence, a term that is not restricted to only internet-generated documents but covers documents produced by computers. See *Omisore & anor v. Aregbesola & ors* [2015] LPELR-24803(SC) and *P. D. Hallmark Contractors Nig. Ltd & anor v. Gloria Kanrotmwa Gomwalk* [2015] LPELR-24462(CA).To illustrate, the best evidence rule enjoins a witness to provide the best of possible proof of facts to which he attests as opposed to any form of substitutionary evidence. This principle finds expression in the rule that it is the original, not a copy, except as amy be allowed (section 83 of the Evidence Act 2011), of a document that must be tendered. By this principle, the pertinent question is whether electronically generated evidence can be said to be the best evidence in the circumstance especially when the human source of the evidence may be available. Even here, it needs to be noted the problems posed by photoshoots today, what *The Hon. Justice E. O. Arake v. The Hon. Justice Don Egbue* [2003] 17 NWLR (Pt. 848) 1 SC at page 20 noted as photo tricks, a product of "this age of sophisticated technology". Secondly is the hearsay rule which bars oral or documentary statements made by persons who are not parties and who are not called as witnesses from being admissible to prove the truth of matters stated therein. The hearsay rule, whether oral or documentary, is said to be a rule of content, not of form, which is not admissible. See *Obinna Osuoha v. The State* [2010] LPELR-4669(CA). The problem here especially regarding electronically generated evidence is that the information derivable therefrom is keyed in by data entry clerks or purely mechanical intermediaries who routinely carry out several such instructions as the last human functionaries in a chain of command. The question is who, of these numerous data entry clerks, will be called in as a witness. There is the additional problem of documents requiring signatures. Are electronically transmitted mandates in commercial transactions or the use of Personal Identification Numbers (PINs), which are now commonplace in the banking industry signatures for the purpose of the law of evidence?

15. On the question of electronic signatures, the issue arose in *Mrs. Titilayo Akisanya v. Coca-Cola Nigeria Limited* (*supra*), a case I handled. In the case, Document 15 had no signature on it i.e. it was unsigned. The defendants, however, argued that the name of Anna Geraci was inscribed on it. Now, beyond the fact that the words "Anna Geraci- COBC Supervisor" was

written as one of two names from which the document emanated, I did not see any inscription of the name "Anna Geraci" on the document. It was also the contention of the defendants that the inscription of Anna Geraci's name is an electronic signature and so satisfies the requirement of section 93(3) of the Evidence Act 2011, which provides that –

> An electronic signature may be proved 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.

16. Aside from the issue of electronic signatures, other issues of evidence revealing the interplay and complexities of the points I have so made and so relevant for present purposes also arose in the case. I crave the indulgence to quote from the judgment in *Akisanya* extensively. I held thus:

> In the first place, for section 93(3) of the Evidence Act to apply, there must be a signature for which the status of it being electronic can be ascribed. The argument of the defendants is that "typing a name into a document" qualifies as electronic signature, relying as it were on Stephen Mason's *Electronic Evidence*. If this were so, then any name can be typed on a document and authorship of the document will simply be said to be that of the person whose name was so typed on it. Now, by definition, "an electronic signature, or e-signature, is any electronic means that indicates either that a person adopts the contents of an electronic message, or more broadly that the person who claims to have written a message is the one who wrote it (and that the message received is the one that was sent by this person). By comparison, a signature is a stylized script associated with a person. In commerce and the law, a signature on a document is an indication that the person adopts the intentions recorded in the document. Both are comparable to a seal". See https://en.wikipedia.org/wiki/Electronic_signature as accessed on April 2, 2016. To start with, Document 15 is a typed document, not an electronic message i.e. one sent through any electronic channel, including email, social media, voicemail, text and instant messages. As frontloaded, tendered and admitted, Document 15 is not an email (there is no email address on it, nor does it indicate that it is an attachment to any email). So the contention of the defendants that the typing of Anna Geraci's name on it is the signature (an electronic one at that) does not and cannot thereby arise.
>
> The further contention of the defendants that Document 15 is an internal memorandum of the 1st and 2nd defendants, and because it can only be signed by natural persons, the typed name of Anna Geraci (a natural person) in Document 15 suffices as her signature on behalf of the 1st and 2nd defendants and thus satisfies the condition of signature, is accordingly neither here nor there. I do not know by what rule the defendants are coming to contend that internal memoranda of artificial entities such as the 1st and 2nd defendants do not require signatures of the person(s) who wrote or released such internal memoranda, and that merely typing a name on it would suffice as signature. The logic of this argument is that anyone can simply write out a name on a typed document and the document would be said to have been signed by that person whose name is typed on the document. It must be noted that Document 15 was not even on the letter-headed paper of either the 1st or 2nd defendant as to lay a modicum of authenticity to it.

At least, the defendants acknowledged that lack of signature on a document will affect the probative value of the document, although they qualified this by submitting that this will be so only where such a document is required to be signed; and that since Document 15 is not required by any law or rule to be signed, the failure to sign the document is, therefore, not fatal. No authority was given by the defendants for the proposition that Document 15 is of such a character that it is not required by any law or rule to be signed. I stated earlier that Document 15 is a typed document said to emanate from Anna Geraci and Paul Docekal. It is meant to be the report of the investigation panel that looked into the concern raised regarding the claimant's expense report (i.e. "certain expenses submitted for reimbursement that appeared to be airline tickets for her family members, but submitted as business expenses") and breach of confidentiality by the claimant. How can the defendants argue that a report of this sort does not require a signature? Or that it was duly signed by the maker (Anna Geraci) on behalf of the panel that investigated the claimant? In fact, the report requires not just a signature but the signatures of both Anna Geraci and Paul Docekal to show not just that they are the authors but that there is agreement between the two of them as to the contents of Document 15. A signature does not just authenticate a document it also proves that there is agreement as to its content. How is this Court to know that both Anna Geraci and Paul Docekal are agree[d] on the contents of Document 15 if the two do not sign it? Merely typing out the names of Anna Geraci and Paul Docekal on Document 15 cannot establish that.

On the argument that Document 15 is a computer generated document which failed the test of authenticity according to section 84(2) of the Evidence Act, the defendants had contended that they filed a Certificate of Authenticity dated 20th September 2013 for all computer generated documents tendered, including Document 15. No doubt, Document 15 was typed or retrieved from a computer. On record, the defendants filed on 4th October 2013 a certification as to the authenticity of computer-generated documents pursuant to section 84 of the Evidence Act 2011. The certification was by Orok Efiom (whose identity was not disclosed as per the certification – it was not disclosed whether he is a staff of the defendants) and was on 9 [a] paper having the defendants' counsel (Strachan Partners') address. The certification is accordingly unconvincing more so as the IBM Lenovo Computer from which the information was said to be retrieved and the Kyocera Printer from which the information was said to be printed were not even shown to be the defendants'. As it is, they could be from a business centre.

The defendants called on this Court to rely on section 12(2)(b) of the National Industrial Court (NIC) Act 2006, which allows this Court to depart from the Evidence Act in the interest of justice. While it is true that this Court can depart from the Evidence Act when the interest of justice demands, this has never been the case where the authenticity of a document is in issue. An unsigned document calls to question its authenticity. The interest of justice in that regard cannot justify this Court departing from the Evidence Act in that regard and in the manner canvassed by the defendants. The authenticity of Document 15 has been called to question. This Court cannot answer that question by jettisoning the Evidence Act and its rules as to authenticity. This Court cannot accordingly call to aid section 12(2)(b) of the NIC Act 2006 as canvassed by the defendants.

On the whole, it is my finding and hence holding that Document 15 requires the signatures of Anna Geraci and Paul Docekal but were not so signed. As an unsigned document, Document 15 has no evidential value. See the cases of *Nwancho v. Elem* [2004] All FWLR (Pt. 225) 107, *Aiki v. Idowu* [2006] All FWLR (Pt. 293) 361; [2006] 9 NWLR (Pt. 984) 47 and *Sarai v. Haruna* [2008] 23 WRN 130, which held that any document which ought to be signed and is not signed renders its authorship and authenticity doubtful; and *Global Soaps & Detergent Ind. Ltd v. NAFDAC* [2011] All FWLR (Pt. 599) 1025 at 1047 and *Udo & ors v. Essien & ors* [2014] LPELR-22684(CA), which held that it is the law that unsigned and undated document has no evidential value.

There is also the issue whether the choice of words used in the body of Document 15 does not deter the probative value and relevance to be placed on Document 15. All through Document 15, it will be found littered such words as 'I', 'me' and 'my' indicating that the investigation was conducted and the report written by one person, [not] two as made out by the defendants. In other words, Document 15 is supposedly authored by 2 persons yet all through the narration is in the first person. At page 1 of Document 15, it will accordingly be found phrases such as: "it was communicated to me", "I conducted an email review", "My review found", "Below is a summary of my findings", "during my interview", and "email I received". At page 2, we have "In my interview", "In the interview I asked TA", "When I asked if she carved out any of the airfare" and "I learned that Iberia is". At page 3, we have "TA sent me an email", "TA sent me her expense reports", "When I specifically asked Mr. Martin" and "I followed up with TA's direct manager". At page 4, we have "During a follow-up conversation I had with TA", "my email review", "On November 29, 2010, I obtained a fresh copy of TA's email file", "During my review, I found an email sent to TA's husband's work email", "after I had sent TA an email requesting a meeting", and "I interviewed TA about the issue". And at page 5, and even under the summary and recommendation, we have "My investigation found TA has exhibited a pattern of behaviour which shows she is often combining personal and business travel without carving out any personal costs" and "Based on emails provided and conversations I have had with her direct manager". The answer of the defendants to this is that the use of these words shows no more than the fact that Anna Geraci wrote the document in a representative capacity for both members of the Panel. I do not think that the defendants are any serious with this contention. How can a categorical assertion such as "My investigation found TA has exhibited a pattern of behaviour which shows she is often combining personal and business travel without carving out any personal costs" be said to be by Anna Geraci and for and on behalf of a panel of two as argued by the defendants? This is certainly turning logic on its head. If anything, all of this further supports the doubts as to the authenticity of document 15; and I so find and hold.

There is a further spurious thing about Document 15. At page 4 under the heading "Breach of Confidentiality", the writer of the document said he/she obtained a [fresh] copy of TA's email on November 29, 2010. Document 15 itself is dated November 29, 2010. Yet the last sentence of the paragraph on breach of confidentiality states: "On December 2, I interviewed TA about this issue. She did not provide any logical

explanation as to why she sent this confidential document to her husband". Now, if Document 15 was written on November 29, 2010, what interview of December 2, can it is refer to here? When DW was asked under cross-examination he said he has no idea why for a document sent on November 29, 2010 an interview of December 2 is being referred to.

In all, Document 15 has no probative or evidential value whatsoever; and I so find and hold. In fact, the evidence of DW under cross-examination as it relates to Document 15 leaves much to be desired. A look at the evidence will show that DW did not know if Document 15 contained ALL the recommendations or conclusions of the audit panel, DW does not know whether the E & C Committee has any other document other than Document 15, DW does not know if Document 15 was ever shown to the claimant, DW does not know if the claimant was afforded any opportunity to make a representation to the E & C Committee, DW does not know whether the review of the recommendations at page 5 of Document 15 took place, etc. In short, most of the answers of DW to questions asked under cross-examination are simply that he does not know. This being so, what it means is that the supposed actions taken by the defendants on the basis of Document 15 have no basis at all.

17. Section 84 of the Evidence Act in providing that 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 ties the admissibility of a document produced by a computer to the rules pertaining to oral evidence. In this regard note must be taken of sections 125 – 130 of the Evidence Act 2011. Section 125, for instance, provides that all facts, except the contents of documents, may be proved by oral evidence; and by section 126, oral evidence, subject to the rules of relevancy and admissibility, must be direct, and positive as per *Labaran Abdul v. Hon. Isa Harba & ors* [2010] LPELR-9132(CA), if it refers to a fact that could be seen or to a fact that could be heard or to a fact that could be perceived by any other sense or manner or if it refers to an opinion or the grounds upon which that opinion is held; but the opinion of an expert expressed in a treatise commonly offered for sale may be proved by the production of the treatise. Generally speaking, however, parol evidence is disallowed in respect of documentary evidence under section 128 (see also *Baliol Nig. Ltd v. Navcon Nig. Ltd* [2010] LPELR-717(SC)) except where any of the following is in issue: fraud, intimidation, illegality, want of due execution, wrong dating, existence or want or failure of consideration, mistake in fact or law, want of capacity to contract, the existence of any separate oral agreement, the applicability of any custom or usage, the proof of the existence of a legal relationship and where the documentary memorandum in question was not intended to have legal effect as a contract, grant or disposition of property. Evidence (presumably oral or otherwise) under section 129 may be given to show the meaning of illegible or unintelligible characters in a document, to show the relationship of words in a document to acts and to show that the language of the document applies equally well to more objects than one. By section 130, the rule as to parol evidence applies only as between parties to the document in question. It has no application where third parties are involved.

18. *Akisanya* also raised interesting issues regarding communications between spouses. This is how I treated it. Once again, I quote extensively:

There is, however, the charge of the disclosure of confidential company information by the claimant to an outside party. Under cross-examination, the claimant acknowledged that Document 13 consists of emails between her and her husband; and that from Document 13, she discussed via email a case she was investigating with her husband. She then rationalized that she does not consider her husband as coming within the definition of family as she and him are one. Document 23 at page 16 provides for use of information, and in respect of nonpublic information, states as follows –

> Do not disclose nonpublic information to anyone outside the Company, including to family and friends, except when disclosure is required for business purpose. Even then, take appropriate steps, such as execution of a confidentiality agreement, to prevent misuse of the information.
>
> Do not disclose nonpublic information to others inside the Company unless they have a business reason to know, and communications have been classified according to the Information protection Policy.

…the Court had noted that Document 13 consists of email communication from a wife (the claimant) to her husband, which thus raised the issue of admissibility. Parties were asked to address the Court on this issue if they so wish. Incidentally, none of the parties did. The email in issue had actually been sent to the claimant by Anita M. DeMyers and deals with a new workplace rights case filed in Cairo. The claimant was told in the email that the matter will require an investigation in accordance with the WR policy. She was then asked to investigate and provide a summary of her findings. The workplace rights case was the decision of an employee to leave his employment because of the overbearing attitude of his manager who was inconsiderate, who incessantly complains about low performance, not easily accessible, does not give good example, does not accept criticism, etc. It was this matter that the claimant forwarded to her husband and which the defendants held to be a breach of the confidentiality agreement between the claimant and her employers. Section 187 of the Evidence Act 2011 dealing with communications during marriage provides that –

> No husband or wife shall be compelled to disclose any communication made to him or her during marriage by any person to whom he or she is or has been married nor shall he or she be permitted to disclose any such communication, unless the person who made it. or that person's representative in interest, consents, except in suits between married persons, or proceeding in which one married person is prosecuted for an offence specified in section 182 (1) of this Act.

Section 187 of the Evidence Act 2011 recognises the spousal unity between husband and wife and so does not compel the disclosure of any communication made between the two during marriage. The section, however, is not absolute and so does not foreclose the disclosure of such information through means other than from the husband or wife, or where the maker consents to such a disclosure. It should be noted that section 187 of the Evidence Act actually deals with the issue of compellability of either a husband or wife to disclose communication made between them. See *Adisa v. State* [1991] 1 NWLR (Pt. 168) 501 and *Oniya v. Koliko* [1992] 7 NWLR (Pt. 254) 507, which acknowledged the

compellability of a wife to give evidence in certain circumstances. In the instant case, the email detailing the communication between the claimant and her husband was frontloaded (hence disclosed) by other than the claimant or her husband. It was disclosed by the defendants. In any event, under cross-examination, the claimant acknowledged Document 13 and then rationalized that she does not consider her husband as coming within the definition of family as she and him are one. In other words, there was no objection on her part as to the admissibility and hence evidential value of Document 13. As it is, therefore, Document 13 was properly admitted and has evidential value in this suit; and I so find and hold.

What, therefore, remains is to determine the question whether the communication between the claimant and her husband as evidenced by Document 13 amounts to breach of Document 23 by the claimant as to justify her dismissal by the defendants. I quoted earlier that Document 23 at page 16 bars employee from disclosing "nonpublic information to anyone outside the Company, including to family and friends, except when disclosure is required for business purpose". At page 17, Document 23 then goes on to give examples of nonpublic information to include information related to employees amongst others. Is the communication between the claimant and her husband as evidenced in Document 13 one relating to employees? Given the narration I made earlier as to the issue in Document 13, the answer is in the affirmative. Was the disclosure to the claimant's husband one for business purpose? I do not think so. The Court was not told that the claimant's husband also works for the defendants. Even if he did, Document 23 also bars disclosure of "nonpublic information to others inside the Company unless they have a business reason to know". The only defence of the claimant is that she does not consider her husband as coming within the definition of family as she and him are one. This defence to my mind is lame. How can spousal unity (the idea that the husband and wife are one) be said to mean that the husband does not thereby come within the definition of family? Once it is noted that even under section 187 of the Evidence Act 2011 spousal unity was not used as an absolute proposition, then the claimant's argument that she did not regard her husband as coming within the definition of family cannot be sustained. In this sense, the claimant in making communication of the sort of Document 13 to her husband breached Document 23; and I so find and hold. Her letter of appointment (Exhibit C1) barred her from discussing with any person information as to the affairs of the company and enjoined her to sign a non-disclosure agreement and the Code of Business Conduct. Under cross-examination, the claimant acknowledged signing the Code of Business Conduct and knew that it was binding on her, and that she believed she signed a document on non-disclosure of information. There is no question, therefore, that the claimant breached her obligation as to non-disclosure.

19. I need to stress that relative to conventional (hard) documents, where an electronic message has been tampered with, it may be very difficult to detect that fact.The courts, therefore, run a far higher risk of being misled through electronically generated evidence than through other types of evidence.The situation may even be made worse in some cases when electronically generated evidence is attached to an affidavit as an exhibit than would be the case if the exhibit was tendered though oral evidence. A witness tendering such an exhibit through oralevidence can be cross-examined on the authenticity and integrity of the document. In affidavit evidence the

deponent or witness is not subjected to any such cross-examination. So, if an electronically generated piece of evidence contains hearsay evidence but is an exhibit to an affidavit, the rule against hearsay may not affect it. It would be so even if it is attached in support of depositions that are themselves hearsay. The effect then is that hearsay evidence, which may itself even be lacking in authenticity and integrity, gets admitted and acted upon when it would otherwise not be admissible at all if the trial was not by affidavit evidence. In making this point, I note that the Court reserves the right to hear oral evidence from the deponents of conflicting affidavits or other witness(es), or rely on an authentic documentary evidence, so as to clarify issues. See *Adkins scientific Ltd v. Dr Michael Aladetoyinbo & anor* [1995] LPELR-187(SC), *Okwara Agwu & ors v. Julius Berger (Nig) Plc* [2011] LPELR-4731(CA) and *Elder Asme Akan v. Ekanabasi Asibong Ubong* [2013] LPELR-20418(CA).

VI

20. Lastly, what weight should be given to an item of evidence (or the evidence as a whole) in the circumstances of the case? This is the issue of evaluation of weight (or cogency or probative value), which is governed by logic and general experience; and is the primary duty of the trial Court who had the opportunity to see and hear the parties and assess the witnesses. See *Haruna v. The AG of the Federation* [2012] LPELR-7821(SC). This aspect of the law occupies a place of preeminence that one of your own, Samuel Ebiye-Khimi Idhiarhi, a Chief Magistrate in the FCT Judiciary took the pains to write on it in his book titled, *Practice Notes on Evaluation of Evidence*, 2015. His Lordship, Hon. Justice John Inyang Okoro, JSC in the Foreword to the book described this book as "the foremost attempt at an in-depth and incisive work on the subject of evaluation of evidence…" The author himself in the Preface to the book puts the issue of weight in the following words: "…in appreciating the facts before a court and deciding what value to attach to particular facts, apart from recourse to relevant legal provisions (such as the admissibility and relevance of such facts), the decision maker must seek guidance from the principles of jurisprudence". The ascription of weight to a very large extent discretionary; and this can be seen in the provision of section 34(1) of the Evidence Act, which is as follows:

> In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular -
>
> (a) to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts; and
>
> (b) in the case of a statement contained in a document produced by a computer-
>
> (i) the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, and
>
> (ii) the question whether or not any person concerned with the supply of information to that computer or with the operation of that computer or any equipment by means of which the document containing the statement was produced by it, had any incentive to conceal or misrepresent facts.

The Supreme Court in *Marcus Ukaegbu & ors v. Mark Nwololo* [2009] LPELR-3337(SC) puts the issue thus: "…when a judge has to evaluate the evidence on every material issue in the case, he ought to put all the evidence called by each side on that issue on either side of the imaginary

scale of justice and weigh them together, of course taking care that only the evidence of the same kind ought to be weighed together…whichever side outweighs the other in probative value, ought to be accepted or believed…not to lose sight of the onus of proof, he should weigh them together to arrive at a decision, based on the facts as found, as to which of the conflicting cases before him is the more probable view of the law applicable to the case". But it must be noted that the evaluation of evidence entails much more than the Judge saying "I believe" or "I didn't believe a witness". There must be on record the reasons why the Court arrived at its conclusions for preferring one evidence to the other. See *Emirate Airline v. Miss Promise Mekwunye* [2014] LPELR-22685(CA).

21. Here the Court must evaluate the totality of the evidence called in order to determine whether the case has been proved; and the fact that a witness has been treated as a hostile witness, or has been so totally discredited under cross-examination that his testimony is entirely valueless, are matters that should be taken into consideration in evaluating the testimony of a witness. See *Boy Muka & ors v. The State* [1976] LPELR-1924(SC)' [1976] 9 - 10 SC (Reprint) 193. Lord Neuberger, President of the United Kingdom (UK) Supreme Court, in his 2017 Neill Lecture titled, "Twenty Years a Judge: Reflections and Refractions", which held at Oxford Law Faculty on 10th February 2017 is, however, at paragraphs 10 and 11 skeptical of judges' reliance on their impression of witnesses. In his words:

> …I am very sceptical about judges relying on their impression of a witness, or even on how the witness deals with questions. Honest people, especially in the unfamiliar and artificial setting of a trial, will often be uncomfortable, evasive, inaccurate, combative, or, maybe even worse, compliant. And our assessments of people are inevitably based on our particular experiences and subconscious biases. Sometimes it might appear that factual disputes are being resolved by reference to who calls the best-performing witness, not who calls the more honest witnesses. Indeed, there is an argument for saying that, at least in some cases, it is safer to assess the evidence without the complicating factor of oral testimony.
>
> Of course, both these points are based on impression and experience, and at best on anecdotal material, whereas in the present world of evidence-based assessments, one would hope for a statistically reliable analysis. I suspect that it would be hard to devise a practically feasible experiment which could convincingly establish whether my impressions about the value of disclosure and cross-examination are correct. But it might be interesting to try and devise an experiment, and it would be fascinating to see the results.

22. In fact it is not the law that every document admitted by a Court of law must be assigned probative value. A document could be admitted on the ground of relevancy but the Court may not attach any weight on it. See also *Justus Nwabuoku & ors v. Francis Onward & ors* [2006] LPELR-2082(SC); [2006] 5 SC (Pt. III) 103. The broader principle is that the fact that evidence, oral or documentary, is admissible does not mean that it has weight; it may not have any probative value or any weight at all, though admissible. See *Stephen Haruna v. The AG of Federation* [2012] LPELR-7821(SC). Except as may be provided by statute, it should be noted that it is not the number of witnesses that is conclusive on the weight to be attached to the evidence led on a particular fact. In other words, the evidence of one credible witness accepted

and believed by the trial Court may be enough. See *Inyang Etim Akan v. The State* [1994] LPELR-382(SC); [1994] 9 NWLR (Pt. 368) 347. Where the statement of a witness is unintelligible or ambiguous, the Court should ordinarily not attach any weight to it. See *Olorunfemi & ors v. Asho & ors* [2000] LPELR-2592(SC); [2000] 2 NWLR (Pt. 643) 143; [2000] 1 SC 15; [2000] 20 WRN 43 SC.

23. A case I did in which an interplay of some of theses issues may be found is *Mr Charles Ughele v. Access Bank Plc* unreported Suit No. NICN/LA/287/2014 the judgment of which was delivered on 10th February 2017. In that case, the evidence in issue of the claimant (CW) was oral; and it was that he was verbally invited to a meeting with the outgoing and incoming Group Managing Director (GMD) of the defendant bank, and that the meeting held between the three of them with no other in attendance. The rebuttal evidence of the defendant, which was also oral, was given by its witness, Olakunle Olashore (DW), who works for the defendant as Bank Manager in Human Resources Department. Counsel to the defendant then submitted that the evidence of DW must equate with that of the claimant as to make the word of the claimant to be that against the defendant's. In other words, the claimant's oral evidence cannot be held to have sufficiently proved the assertion that he was orally invited to a meeting and the meeting held. Now, DW was not at the meeting and was not held to be one of those invited for the meeting as to categorically know whether the meeting held or not. In reviewing the evidence, I held thus at paragraph 56:

> For the argument of the counsel to the defendant to hold ground that it is the word of the claimant against that of the defendant, the evidence of the defendant must be in equal stature and quality as that of the claimant. Only the outgoing or incoming GMD can testify orally denying what the claimant said before the denial argument of the defendant can hold sway. Someone (DW in the instant case) who was not at the meeting, who in one breath categorically said there was no invitation to a meeting and no meeting held but changed to say he is not aware of any meeting, cannot supply the quality of evidence needed to make the oral testimony of CW to be one of his word against that of the defendant.I have often lamented and cautioned employers for refusing to call as witnesses those who were actually involved in the facts leading to the dispute in issue. No doubt, an employer reserves the right to call whoever it wants as a witness. However, an employer who simply calls anyone to testify stands the risk that if the claimant's testimony is more believable, that defence witness who was not involved in the facts leading to the case but is called as a witness, would end up an unbelievable witness. This is exactly the scenario playing out in the instant case. I believe the testimony of the claimant that they were invited to a meeting and the meeting held with the outgoing and incoming GMDs and that in that meeting they were asked to resign. The evidence of CW is more qualitative and believable than that of DW who was not said to be invited to the meeting as to be at the meeting, and who himself testified that he is not aware of any meeting held between the claimants and the GMDs.

VII

24. I indicated earlier that evidence is the lifeblood of litigation, the very basis of dispensing justice; but adherence to its precepts have never always yielded to justice in the true sense of the word and in all cases. The application of the public/private documents rules is a case in point. In the first place, section 88 of the Evidence Act 2011 requires that"documents shall be proved by

primary evidence except in the cases mentioned in this Act". Section 89(e) and (f) then provides that "secondary evidence may be given of the existence, condition or contents of a document whenthe original is a public document within the meaning of section 102; or the original is a document of which a certified copy is permitted by this Act or by any other law in force in Nigeria, to be given in evidence. By section 90(1)(c), the secondary evidence admissible in respect of the original documents referred to in section 89(e) and (f) a certified copy of the document, and no other secondary evidence, is admissible. Section 104 then proceeds to provide the prerequisites of the certification of a public document can be given i.e. payment of legal fees, certification as to the document being a certified true copy being at the foot of the document, dating, subscribing the name and official designation of the certifying officer, and sealing if the certifying officer is authorised by law to make use of a seal. Case law authorities have insisted that all of these requirements are mandatory. The rule, therefore, is that, given the phrase "but no other secondary evidence, is admissible" in section 90(1)(c), when it comes to public documents the only type of secondary evidence permitted is s certified true copy. Space will not allow me a more detailed look at each of these prerequisites; as such I recommend to the reader the more detailed discussion by Hon. Justice Peter Oyin Affen (2016), *Ibid*. The problem I, however, have with this rule is its sacrosanct/absolute nature. It applies, as was the case in *The Hon. Justice E. O. Arake v. The Hon. Justice Don Egbue* (*supra*), for instance, even in cases where the certifying officer who is the defendant refuses to so certify the document in issue. The Supreme Court upheld the rule as one that is absolute. But speaking frankly and more realistically, can this rule withstand the fair hearing/fair trial rules? Where is the logic of the rule? Is it logical that under section 39 of the Evidence Act 2011, statements by persons who cannot be called given that they are dead, or cannot be found, or are incapable of giving evidence or whose attendance will yield to unreasonable delay or expense, are generally admissible in the circumstances of section 40 - 50, yet the evidence of uncertified public documents even where the content is not contested, is not? I am of the firm view that the absolute requirements of including certification in order to prove the content of a public document need to be looked into by the legislature, and indeed amended. I hold this view notwithstanding the authenticity and preservation of public documents argument advanced in *The Hon. Justice E. O. Arake v. The Hon. Justice Ison Egbue* (*supra*) at page 20 as the basis for the rigid rule.

25. The absurdity of the requirement of certification of public documents can be further illustrated by an experience I had on 18th August 2015 (the 10th day of the trial proper) when I was chairing an Election Tribunal in Osogbo. The case was *Francis Adenigba Fadahunsi & anor v. Christopher B. Omoworare* Petition No. EPT/SN/OS/3/2015. As Chairman of the tribunal, I had earlier signed a subpoena on an INEC staff to produce certain documents before the Court. The INEC staff was taken as PW24. Learned senior counsel to the petitioners sought to tender a copy of the subpoena upon which the INEC staff was subpoenaed. Each of the three respondents' counsel objected on the ground that the subpoena was not certified, it being a public document, and despite that I as Chairman signed it. For over an hour we took objection upon objection from the respondents' counsel on the matter. What saved the day was that while the objections and reply to the objections were going on, the learner senior counsel to the petitions simply asked a junior counsel to go the tribunal secretary's office and have the subpoena certified. Meanwhile over an hour of valuable judicial time had been wasted. It fell on deaf ears when I asked in open court why a document I signed should require certification, even when such a document was already in the case file and can be judicially noticed without more. I also wondered aloud

whether the Court of Appeal would spare me if I were to uphold the objections of the respondent and refuse to admit the subpoena I personally signed. I even jokingly asked the respondents' counsel whether I should go into the witness box and depose that I signed the subpoena. Is it not funny (and does it not sound illogical) that a document I signed had to be certified by other than myself, the 'author' so to speak, as genuine?

26. Other interesting issues regarding public documents have arisen. One came before me regarding the requirement of signatures pertaining to legislative proceedings. In *Mr Godwin E. A. Okhavhe v. Nigerian Postal Service* unreported Suit No. NICN/LA/345/2013, the judgment of which was delivered on 10th February 2017. The case of the claimant was that the defendant without justification retired him from service with immediate effect vide a letter dated 6th June 2007. After several representations to especially the House of Representatives, he was ultimately recalled back to duty with effect from 1st July 2011 vide a letter dated 5th July 2011, invariably pursuant to the resolution of the House of Representatives directing that he be so recalled and paid all his salaries and entitlements including promoting him so that he can be at par with his colleagues. However, while he was recalled, he was not paid his lost entitlements including promotion as to enable him be at par with his colleagues. He accordingly filed an action praying *inter alia* for the arrears of his salary and allowances as well as promotion to enable him be at par with his peers. The document evidencing the resolution of the House of Representatives that the claimant be recalled and paid his lost entitlements including promotion is titled, "House of Representatives Federal Republic of Nigeria Votes and Proceedings of Wednesday, 7 May, 2008". It was admitted and marked as Exhibit GO3, whichthe defendant argued against, submitting that it is unsigned (and so has no evidential value), and is not biding on the defendant, it being only persuasive. The practice in the NIC is that documents frontloaded are deemed admitted, although arguments as to admissibility and evidential value of the documents are generally reserved for the final written addresses (I return to this issue below). Two issues accordingly called for determination regarding the said Exhibit GO3: the one regarding its evidential given that it was not signed, and the other regarding its effect i.e. whether it is binding on the defendant or merely persuasive. Although not relevant for present purposes, I need to point out that in respect of the issues whether the content of the document was binding or persuasive, I held it to be merely persuasive since resolutions of the legislature are advisory and persuasive, not binding. As for its evidential value, I held thus at paragraph 19:

> The argument of the defendant here (an argument that the claimant was silent on) is that because it is not signed, Exhibit GO3 has no evidential value. In other words, it is worthless. There is no gainsaying that an unsigned document is worthless and has no evidential value. This rule, however, applies only where the document in issue ought to be signed. In *Nwancho v. Elem* [2004] All FWLR (Pt. 225) 107, *Aiki v. Idowu* [2006] All FWLR (Pt. 293) 361; [2006] 9 NWLR (Pt. 984) 47 and *Sarai v. Haruna* [2008] 23 WRN 130, it was held that any document which ought to be signed and is not signed renders its authorship and authenticity doubtful. And by *Madam Jaratu Abeje & anor v. Madam Saratu Apeke* [2013] LPELR-20675(CA), though unsigned documents should attract little or no evidential weight or value, it is not everything in writing that goes under the rubric of "document" that will lose its evidential worth simply because it is not signed. Is Exhibit GO3 a document that ought to be signed? Alternatively put, is the requirement of signing one that extends to Exhibit GO3 in so much so that the fact that it is not signed automatically makes it evidentially worthless? I do not think so. Section 106 of the

> Evidence Act 2011 provides how certain public documents can be proved. The relevant provision for present purposes is section 106(b), which provides that "the proceeding of the Senate or of the House of Representatives [may be proved] by the minutes of that body or by published Acts or abstracts, or by copies purporting to be printed by-order of Government". This provision does not suggest that the proceedings of the Senate or of the House of Representatives require signature for it to be valid and valuable so long as the minutes of such proceeding is printed by order of Government. Exhibit GO3 satisfies the requirements of section 106(b) of the Evidence Act 2011 and so has evidential value for purposes of this suit. I so find and hold.

27. I indicated that in the NIC the practice is that documents frontloaded are deemed admitted, although arguments as to admissibility and evidential value of the documents are generally reserved for the final written addresses. This is something that I suggest should apply in all cases and in all trial Courts if we are serious about saving precious judicial/adjudicating time. Presently, the rule is that a document wrongly admitted can still be expunged at the point of judgment or even on appeal. See *Akinduro v. Akaya*[2007] 15 NWLR (Pt. 1057) 338, *Enwerem v. Abubakar &anor* [2016] LPELR-40369(CA) and *Okafor v. Okpala*[1995] 1 NWLR (Pt. 374) 749 at 758. Moreover, by *Ntuks v. NPA* [2007] LPELR-2076(SC);[2007] 13 NWLR (Pt.1050) 392; [2007] 5-6 SC 1, even "where a document is wrongly admitted in evidence,its wrong admission *per se* is not sufficient to vitiate the judgment". This thing about arguing on admissibility during trials for which a ruling is made, which ruling may be appealed against sure slows down the trial time. The Supreme Court had to comment on the issue. In *Araka* (remember the case dealt with an interlocutory appeal over the issue of certification and hence admissibility of a public document), His Lordship Tobi, JSC (of blessed memory) at page 23 noted as follows:

> While the parties have exercised their constitutional right of appeal, not much could have been lost if the issue before us was taken at the end of the case together with any other ground or grounds of appeal, if the respondent lost out at the end. The action was filed in October, 1985 and we are still on an interlocutory appeal, about eighteen years after…a little discretion would have taken this matter lesser period in the courts.

The solution I suggest actually played out in *SEC v. Abilo Uboboso* (*supra*), an appeal against the final decision of a colleague of the Abuja Division of the NIC. The copies of the public documents in issue were admitted though not certified. The case was heard to conclusion and judgment was delivered. It was on appeal that the issue of the non-certification and hence admissibility of the documents was raised and resolved. Precious judicial and trial time was thereby saved unlike in *Araka*.

28. There is an issue that is rarely raised or addressed i.e. the effect of the absence of stamp duties regarding the admissibility of documents. The applicable provisions are those of sections 22(1) and (4), and 91(3) and (4) of the Stamp Duties Act Cap. S8 LFN 2004. Section 22(1) and (4), dealing with terms upon which instruments not duly stamped may be received in evidence, provides as follows:

> (1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in Nigeria, or before any arbitrator or referee, notice shall be taken by the judge, magistrate, arbitrator, or referee of any omission or insufficiency of the stamps thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read

the instrument, or to the arbitrator or referee, of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of two Naira, be received in evidence, saving all just exceptions on other grounds.

(4) Except as aforesaid and subject to the provisions of section [91(3)] of this Act, an instrument executed in Nigeria, or relating, wheresoever executed, to any property situate or to any matter or thing done or to be done in Nigeria, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force in Nigeria at the time when it was first executed.

29. Section 91(3) and (4) on its part states thus:

(3) Where in any legal proceedings or before any arbitrator or referee a receipt is inadmissible by reason of it not being duly stamped, the officer presiding over the court, the arbitrator or referee may, having regard to the illiteracy and ignorance of the party tendering the receipt in evidence, admit the receipt upon payment of a penalty of four Naira and the officer presiding over the court, the arbitrator or referee, as the case may be, shall note the payment of the penalty upon the face of the receipt so admitted and a receipt shall be given for the same.

(4) A receipt so admitted in evidence shall not be deemed to be duly stamped but shall be available for the purposes of the suit in which it is tendered in evidence and for the purpose only.

30. Sections 22(1) and (4), and 91(3) and (4) of the Stamp Duties Act seem to suggest that the recovery of the money (stamp duties), and hence revenue generation/recovery, rather than the issue of admissibility, is the essence of the provisions. It should be so; after all the provisions are to be fond in a statute called Stamp Duties Act. My research did not reveal many case law authorities on the issue the effect of the non-payment of stamp duties on admissibility. In fact I came across only one recent case, *Brossette Manufacturing Nig. Ltdv. M/S Ola Ilemobola Ltd & ors* [2007] LPELR-809(SC); [2007] 14 NWLR(Pt.1053) 109 SC; (2007)5 SC 84. Even in this case, it was the concurrent judgments of their Lordships Tobi and Ogbuagu, JJSC that the issue was actually considered. In this case, the plaintiff was granted the right of occupancy over a plot. Sometime in the year 1981 it extended into a Lease Agreement with the 4th defendant for a ten year period,the consideration of which was N18,000.00 per annum. By the plaintiff's admission, it was paid the sum of N180,000.00 for the ten year period. The plaintiff, however, neglected to apply to the Governor for consent to lease. It nonetheless put the 4th defendant into possession of the property. The 4th defendant complained to the Governor of Kaduna-State. After exchange of correspondence, the Governor having satisfied himself that the refusal of the plaintiff to apply for requisite consent was willful, revoked the right of occupancy granted to the plaintiff. The plaintiff then brought this action challenging the revocation of the statutory right of occupancy. The learned trial Judge held that the revocation order was valid and consequently dismissed the plaintiff's action.The plaintiff appealed against the dismissal of his claim to the Court of Appeal, which appeal was allowed.Being dissatisfied with the judgment of the Court of Appeal, the 4th defendant Brossette Manufacturing Nigeria Ltd has appealed to the SupremeCourt. The Supreme Court dismissed the appeal.

31. For present purposes, the evidence before the Court was that Exhibit 3, the agreement to sublease, was not dated (because parties were awaiting Governor's consent) and was not delivered. Although Exhibit 3 was admitted in evidence, the learned trial Judge expunged it in the course of his judgment. On this, His Lordship Tobi, JSC said:

> In rejecting Exhibit 3, the learned trial judge said at page 153 of the Record: "The provisions of Section 15 of the Land Registration Law and S. 21(4) of the Stamp Duties Law make Exhibit 3 inadmissible in evidence. Exhibit 3 ought not to have been pleaded or tendered in evidence and its admissibility by the court were wrong. Accordingly therefore, Exhibit 3 is hereby expunged from the record." The learned trial judge however relied on the oral evidence on the issue of lease agreement. He said on the same page: "The abundant oral evidence before the court that the plaintiff entered into a lease agreement with the 4th defendant without the consent of the 1st defendant and without same being stamped and registered is however admissible evidence, and same remains part of the records of this court." With the greatest respect, the learned trial judge got it wrong. *While he got the one expunging Exhibit 3 right*, he got the one where he relied on what he called 'the abundant oral evidence before the court' wrong. Where there is documentary evidence on an aspect of a party's case, no oral evidence is admissible on that aspect. This is because our adjectival law does not admit oral evidence on an aspect or area covered by a document. A party cannot benefit from two ways: documentary evidence and oral evidence. He can only lead evidence in respect of one and not the two of them. But this principle of law is subject to an important qualification and it is this. If the parties by their *ad idem* agree by oral agreement to change part of the written agreement, the court will not reject the oral agreement. But that is not the position here. *As the learned trial judge rightly rejected Exhibit 3*, he was no more competent to fall back on the oral evidence on the same aspect or area. My learned brother, has usefully cited the case of *Olaloye v. Balogun*[1990] 7 SC (Pt. II) 135; [1990] 5 NWLR (Pt. 148) 24 on the issue. I need not go further. I also agree with him that Exhibit 3 is a mere escrow [the emphasis is mine].

32. To His Lordship Ogbuagu, JSC in same case:

> …I note that the learned trial Judge at page 15/153 of the records, held that exhibit 3, was inadmissible in that it constituted a breach of the conditions for the grant of the certificate of occupancy.
>
> Although, His Lordship raised this issue *suo motu* in his judgment, he proceeded to expunge it from the records. I am aware and this is settled that neither a trial court, nor the parties have the power to admit without objection, a document that is no way or circumstances, admissible in law. See *Alase & Ors. v. Olori Ilu & Ors*. (1965) NMLR 66 at 77; *Okulade Abolade v.Agboola Alade* (1976) 1 ANLR (Pt.1) 67 and *Oba Oseni & 14 Ors. v. Dawodu & 2 Ors*. (1994) 4 NWLR (Pt.339) 390 at 395; (1994) 4 SCNJ (Pt.11) 197. In my respectful view, if a trial court during its final judgment, finds out that it erroneously admitted a document that is definitely inadmissible in law, in any event, it can ignore/discountenance the same. *But erroneously with respect, exhibit 3 was voided as inadmissible on the ground that it was a registrable instrument and that it was not stamped or registered under Sections 15 of the Land Registration Law and 21 (4) of the Stamp Duties Law*. Now, what is the effect or consequence of the learned trial Judge

> expunging exhibit 3 from his records? [I] or one may ask. In my respectful view, having expunged it, it is no longer of any moment or consequence. It no longer forms a part of his record. That beingthe position, the appellant, cannot now eat his cake and have it so to say. It can no longer anchor or find its case on exhibit 3 that is no longer part of the records. Its case or appeal to this court, is founded on quick sand with no foundation at all. I note that the appellant has not appealed against the said fact or order expunging exhibit 3 from the records. As far as I am concerned that is the end of this appeal. This court or a court, cannot act on a document or evidence, not before it. This is trite. On this ground/point and on any of the first and second points discussed by me in this Judgment, or on all the three (3) points this appeal has collapsed like a pack of cards. But I am not yet done [emphasis is mine].

33. It does seem that their Lordships are not agreed on the issue whether the absence of stamping i.e. paying stamp duties affects the admissibility of documents that ought to have been stamped. His Lordship Tobi, JSC held that the learned trial Judge rightly rejected Exhibit 3; but His Lordship Ogbuagu, JSC seems to suggest that the absence of stamp duties should not affect the admissibility of the document given this statement of his: "But erroneously with respect, exhibit 3 was voided as inadmissible on the ground that it was a registrable instrument and that it was not stamped or registered under Sections 15 of the Land Registration Law and 21(4) of the Stamp Duties Law". The older cases as reviewed by Hon. Justice P. A. Onamade in his book, *Documentary Evidence - Cases and Materials Vol. 1* (Philade & Co. Ltd: Lagos), 2002 at pages 745 - 746 are not any better. In *Candido Da Rocha & anor v. M. A. Hussain* [1958] 3 FSC 89, a document did not comply with the provision of the Stamp Ordinance in that it was not duly stamped as a receipt. It was held that it was wrong to admit it in evidence as the proper stamp duty had not been paid. The then Federal Supreme Court went on to state that it is the duty of the Appeal Court to pay due regard to the provisions of the Stamp Ordinances introspect of the duty of the Court to take notice of any omission or insufficiency of a stamp on a document, referring to *Routledge v. Mckay* [1954] 1 All ER 855 at 856. This decision appears to be, however, overruled in *R. G. Okuwobi v. Jimoh Ishola* [1973] All NLR 233, where the Supreme Court held that it is wrong to hold that a document is inadmissible merely on the ground of non-stamping, since the purpose of the requirement of stamping is to ensure revenue; in which event, the Court can direct that the document be duly stamped and then received in evidence. This view, and hence that of Ogbuagu, JSC, is preferable on the rationale that since the essence of the Stamp Duty Act is raising revenue for the Government, failure to pay stamp duty should not render a document inadmissible. The Court can always insist that the duty be paid before the document can be admitted. It is when the duty is still not paid that the document should then become inadmissible.

34. I want to conclude this discourse by remarking on a very common phenomenon of especially the adjudication of civil cases; and that is the fronloaded witness deposition. Since 2004 when the Lagos State High Court introduced the concept of frntloading, it is now a feature of all the Civil Procedures of the Courts in the country to demand that the depositions of witnesses, always on oath, be front loaded before trial commences. It is not uncommon to hear lawyers during trial and after the adoption of the sworn depositions praying the Court "to admit" the sworn deposition in question. A number of issues arise here. Is the sworn deposition documentary evidence to be admitted? What actually is the character of a sworn deposition? Does the witness

who swore to the deposition need to take an oath in the witness box in order to adopt it? I was part of the research team when I was at the Nigerian Institute of Advanced Legal Studies that did the background research that yielded in the 2004 Civil Procedures Rules of the Lagos State High Court, which for the first time introduced the frontloading concept (including the frontloading of worn depositions) in our civil adjudication. I accordingly have noticed over time a complete misunderstanding of the frontloading concept not just by the lawyers but also by our courts. For instance, in *Okpa v. Irek & anor* [2012] LPELR-8033(CA), relying on *Akpokeniovo v.. Agas* [2004] 10 NWLR (Pt. 881) 394, it was held thus:

> This court has consistently held that a witness statement on oath is different from affidavit evidence. An affidavit is a statement of fact which the maker or deponent swears to be true to the best of his knowledge. It is a court Process in writing deposing to facts within the knowledge of the deponent. It is documentary evidence which the court can admit in the absence of any unchallenged evidence.
>
> On the contrary a witness statement is not evidence. It only becomes evidence after the witness is sworn in court and adopts his witness statement. At this stage at best it becomes evidence in chief. It is thereafter subjected to cross examination after which it becomes evidence to be used by the Court. If the opponent fails to cross examine the witness, it is taken as the true situation of facts contained therein.

35. Now, and this is where I have issues with the current case law authorities, the witness statement on oath to be frontloaded must be sworn to before the Commissioner of oath; as such it approximates to an affidavit - indeed, it has all the features of an affidavit, the only difference being that the deponent cannot depose to hearsay evidence, that evidence as to what another told him and he believes, as is the case with affidavits. The deponent met depose to all that is within his/her own knowledge. In this sense, the witness deposition is even stronger than affidavit evidence. So I take a different from view from the judicial view, which held that a witness statement on oath is different from an affidavit.

36. The second point is that because the witness statement on oath had been deposed to, there is no need for the witness to be sworn in before he can adopt it. Unnecessary repetition of oaths is generally uncalled for. That is why when a witness is sworn on oath and his testifying has to be adjourned to another date, he is merely reminded on the succeeding date that he is already under oath. When a witness is actually sworn in the witness box before he adopts his/her sworn deposition, that oath taking is necessary not for the already sworn deposition but because of the evidence to be elicited under cross-examination. I think that this distinction has not been brought before the Court of Appeal, hence decisions such as *Okpa v. Irek & anor*.

37. Lastly, I do not think that the sworn deposition, or affidavit, is documentary evidence to be admitted. That the deposition is made in a document does not give it the character of documentary evidence. So, I do not think that the rules regarding the admissibility of documentary evidence can be applied to sworn depositions or affidavit evidence in the true sense of the law. I agree that the witness statement on oath takes the place and is the evidence-in-chief of the witness, which can and should be used as such even without more. It may be that we may have to wait awhile for our appellate courts to come to terms with this reality if the proper use of the frontloading system in adjudication is to be appreciated by all.

38. I thank you.