**ELECTRONIC EVIDENCE: SUBSTANTIVE AND PROCEDURAL REQUIREMENT UNDER THE EVIDENCE ACT**

***BY:***

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**BEING A PRESENTATION AT THE INDUCTION COURSE FOR NEWLY APPOINTED JUDICIAL OFFICERS OF THE SUPERIOR COURTS OF RECORDS, 7TH MAY, 2024**

***AT THE***

**NATIONAL JUDICIAL INSTITUTE ABUJA**

1. **INTRODUCTION**

At the 2023 induction course for newly appointed judicial officers of superior courts of record, held between 15th – 19th May, 2023, the topic I was invited to talk on was **Admissibility of Electronically Generated Evidence, Practice and Procedure**. And the paper was chaired by no lesser a person than Hon. Justice Tijani Abubakar JSC (of the Supreme Court of Nigeria), today the coincidence is numerous, the chair for today is Hon. Justice Uwani Abba’aji Jsc also from the Supreme Court and I am the discussant, what is today’s topic? It is “**ELECTRONIC EVIDENCE: SUBSTANTIVE AND PROCEDURAL REQUIREMENT UNDER THE EVIDENCE ACT”.**

In a Nigerian dialect we call twins ***“Taiye and Kehinde”*** and for none speakers of our Yoruba language when you have twins you call one Taiye, you call the other one Kehinde, and the follower of twins is called Idowu and then the follower of Idowu is called Alaba, so it’s very common in Yoruba language to say:

“Alaba ati Idowu”

So today’s topic is Electronic Evidence: Substantive and Procedural Requirement Under the Evidence Act.

Ordinarily I will have just reproduce my paper of 2023 verbatim in what we call “cut and paste” and adopt it, and go away, but that is not so not only the chair has changed even though from Supreme Court, but the presenter has not changed, even though the topic has been tinkered with, it is still the same that is what we meant by Taiye and Kehinde, Alaba ati Idowu, Electronic Evidence: Substantive and Procedural Requirement Under the Evidence Act, is almost the same with the previous topic, so this year’s judicial officers are very lucky, they will drink from the 2023 induction course, they will also enjoy their own induction course, why do we say so? Because between that time and now, the law has changed, and judges must keep abreast with the law at all times and the decisions of courts at all time, that is what makes them learned. Therefore we will like to improve on the previous discussions, before we do that, we crave your indulgence to pardon us if you find what was produced earlier is almost reproduced verbatim, we are also learning like you, we are in a profession where learning is a continuous process, what you may find different from the paper is the 2023 amendment shortly after we presented the 2023 lectures.

We will also find useful the views of Atoyebi SAN just like the views of alere which was reproduced before the amendment.

We will find the views of Atoyebi very apt and there is no harm in reproducing their views, we are in a profession where you don’t have to reinvent the wheel, so we will also reproduce verbatim the views on the 2023 amendment in this paper, that is where we will improve.

We are also lucky last year’s paper was chaired by justice of Supreme court and this year’s paper is also going to be chaired by another justice of the Supreme court.

Thank you so much for honoring us and allowing us to continue to learn.

***“He that knows no rules of procedure and admissibility of evidence knows no practice of law”***

According to **Milfred Savage,** in his book titled **“The Knives of Justice”** at Pages 79 and 87 he described the complexity of evidence thus:

***“The evidence never has there been a more deceptive word. It sounds so exact, so definite; in fact, it is so nebulous, so relative, so subject to interpretation. The evidence, in a trial is like a football - it is displayed, manipulated, kicked around, clutched-tight, passed forward and backward and sideways, and by the end of the game it can quite be dirty. But it is the thing the game is played with from start to finish the only thing with which one side or the other can score.”***

***“A trial is brick laying-to build a wall of proof. Each new brick is delivered, inspected, set into place. And then it is tested – tapped, thumped, examined in strong light-to see whether it is sound and solid or full of hole and crumbling. By fitting brick on brick, the state hopes at the end to be able to say THE IS a wall you can’t knock down. And the defense prodding and probing for weaknesses, that’s a wall that won’t standup”***

It is against this backdrop that we’ll try to define what electronic evidence means. According to Mason: electronically generated evidence simply means: ***“data (comprising the output of analogue devices or data in digital format) that is created, manipulated, stored or communicated by any device, computer or computer system or transmitted over a communication system that is relevant to the process of adjudication”***

We live in a digital world, things are done digitally or electronically. The digital world knows no artificial boundary, so electronic evidence in a digital world needs to be understood and how it operates and its reception by our courts. Within the confines of the law, we must do that which has never been done. In Packer v Packer (1954) P. 15 at 22. Lord Denning said:

***“If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both”***

**ACCORDING TO OLAOYE OLALERE:**

When the Evidence Act 2011 was signed into law by former president Goodluck Ebele Jonathan, GCON on the 2nd day of June, 2011, it was received with maximum enthusiasm by the Nigerian legal community; and particularly by trial lawyers. The basis of this enthusiasm was the very many innovations introduced by the amended law, updating the law of evidence which at that point in time had been in force for about 68 years. The law of evidence had, prior to 2011 and except for few amendments, remained significantly stagnant notwithstanding the developments in all other areas of law in the country, and especially in information technology.

One of the most significant provisions in the 2011 Evidence Act is section 84 of the Act which deals with the requirements and procedure for admissibility of computer-generated evidence. Section 84 of the Evidence Act reads:

"84. (1) In any proceeding a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question the conditions referred to in subsection (1) of this section are that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual; that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived; that throughout the period the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities;

Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2) (a) of this section was regularly performed by computers, whether –by a combination of computers operating over that period, by different computers operating in succession over that period, by combinations of computers operating in succession over that period; or in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers all the computers used for that purpose during that period shall be treated as constituting a single computer; and references in this section to a computer shall be construed accordingly.

In any proceeding where it is desired to give a statement in evidence by virtue of this section a certificate Identifying the document containing the statement and describing the manner in which it was produced; giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.

Dealing with any of the matters to which the conditions mentioned in subsection (2) above relate; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

For the purpose of this section-information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment; where in the course of any activities carried out by any individual or body, information is supplied with a view to its being stored or processed for the purpose of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities; a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment."

Interestingly, an amendment of the Evidence Act 2011 has been signed into law by His Excellency, President Bola Ahmed Tinubu in the year 2023. The amendment further broadens the scope of electronically generated evidence by introduction of electronic signature, electronic oath taking, electronic gazette etc. Below is a brief highlight of some of the key areas introduced by the new amendment:

1. **Electronic records** **as admissible evidence**: Section 2 of the Amendment Act amends the Section 84 (2)(a) (c), (4)(a), (b) and (5) (c) of the Evidence Act 2011, by inserting the words “electronic records” after the word “document,” and by inserting the words ***“electronic records”*** after the word ***“statement”*** in subsection (2)(d) of the Evidence Act 2011 along with the new definition of ***“electronic records”*** which broadens the classification of the varying forms of electronic records which exist today and can be considered as admissible in court.

2. **Digital signatures**: Section 3 of the Amendment Act recognizes the use of digital signature as a valid means of authentication of electronic records. This simply means that documents can be authenticated by e-signature without the need append physical signature. Parameters for verifying the authenticity of the e-signatures were laid down by the new amendment. For example, the Corporate Affairs Commission (CAC) which regulates the operation of companies in Nigeria has moved its entire operation online. One can transact with the CAC from start to finish without the need to meet with any person physically. Documents emanating from the CAC such certificates of incorporation carries the online signature of the Registrar-General. This new innovation therefore makes such kind of documents authenticated online admissible in evidence where the need so arises.

3. **Introduction of Electronic Depositions**: Section 5 of the Amendment Act which amended Section 108 of the Evidence Act, 2011 sanctions deposing to Affidavits electronically before duly authorized persons (listed in Section 13 of the Oaths Act). This new innovation will reduce the risk of litigants having to travel to distant locations for the purpose of deposing to an affidavit before a person authorized such as the Commissioners for Oaths. Challenges faced in cases like ALIYU vs. BULAKI (2019) LPELR-46513(CA), wherein the witness deposition was signed before a person not authorized to take depositions was struck out alongside all the documents tendered through the witness. The case was lost on that account. This new provision therefore enables deponents to depose to their affidavits electronically from the comfort of their homes or even at lawyer’s office provided it was done before the person authorized to take same.

4. **Audio-visual means of deposing to Affidavits**: The amendments to Sections 109 and 110 of the Evidence Act now allow affidavits sworn before any judge, officer, or authorized person in Nigeria or any other country whether in person or through audio-visual means, to be used in Court. This means that individuals can now provide their affidavits remotely via audio or visually.

5. **Jurat requirements**:  Section 8 of the Amendment Act inserts a requirement in Section 119(2) of the Evidence Act that the audio-visual method used and the date on which it was used must be stated. This amendment was introduced in addition to the other requirements where the deponent is illiterate or blind and must be stated under the accompanying jurat as a requirement for its validity.

6. **Electronic Gazettes**:  by Section 9 of the Amendment Act ***“Electronic Gazette”*** has been introduced as valid means of gazetting laws, orders, etc.

See also **O. M. Atoyebi S.A.N FCIArb. (U.K.). in his paper titled AN OVERVIEW OF THE EVIDENCE (AMENDMENT) ACT, 2023**

***“There is no gainsaying the fact that technology remains the principal revolutionary agent of the human society. [1] Its impact has been felt in every sector of human interactions and interrelations. From medicine to agriculture, communications, aviation, sports, arts, law, etc., technology has permeated human affairs. Hence nations across the world are fast yielding to the legal demands necessitated by the evolution of technology. This is imperative as a result of the fact that law is the foundation of a modern society [2] and as such must be in tune with the demands of the modern society.***

***On the 12 of June 2023, President Bola Ahmed Tinubu, the President of the Federal Republic of Nigeria, signed the Evidence Act (Amendment Act) 2023 into law. The aim of the law was to make provisions in relation to the admission of evidence, which is in tune with international best practices. Hence, several adjustments were made to the provisions of the Evidence Act 2011 (the Principal Act) which took cognizance of the growing impact of technology even on the matters of evidence. This article will therefore be giving an overview of the provisions of the 2023 Amendment Act.***

***KEYNOTE PROVISIONS OF THE EVIDENCE (AMENDMENT) ACT 2023***

***The Act, in order to bring the provisions of the Evidence Act 2011 up-to-date in accordance with global technological advancements in evidence-taking, [3] made the following amendment:***

***a. Inclusion of Electronic records.***

***The Act amends the provisions of Section 84 of the principal Act relating to the admissibility of electronically generated evidence, [4] particularly subsection 2 of the section which provides for the conditions for their admissibility. More specifically, Subsection 2 (a) was amended to the words ‘electronic records’ implying that a statement contained in a document or an electronic record must satisfy the conditions stated therein for its admissibility. Thus, where an electronic record is sought to be tendered, it must be contained in the certificate of compliance that the computer which produced same was in regular use during that period. Also, a new condition was substituted for Section 84(2)(b) of the Act providing to the effect that information contained in the electronic record, or such information forming a part of a larger body of information must be shown to be regularly fed into the computer in the ordinary course of activities during that period. [5] Furthermore, the conditions stipulated under Section 84 (2) (c) and (d) were amended to apply to electronic records. Thus, the provisions of 84 (2) now apply not only to documents generated from computers in paper form, but also to electronic records.***

***b. Information in Electronic Form [6]***

***New sections (Sections 84A – 84D) have been inserted after the provisions of Section 84 of the principal Act recognising the existence, validity and admissibility of any information produced and tendered in electronic form. Hence, where any law in Nigeria provides for an information to be hand or typewritten or printed, such law will be deemed to be complied with where the information is produced in electronic form and accessible for subsequent reference. [7] c. Admissibility of Computer Records [8]***

***The Act further expands the meaning of a document to include information contained in an electronic record provided the conditions stipulated by the Act are met, and same shall be admissible in evidence without the necessity of producing the original of such document. [9]***

***d. Introduction of Digital Signature [10]***

***In line with the requirement of the law that for a document to be admissible in evidence, same must be duly executed or authenticated, the Act has provided for the authentication of electronic records through the use of digital signatures in such manner or by such technique as may be stipulated by the Act or such other technique as the Court may consider reliable. [11] The Conditions for reliability as provided by the Act include:***

***1. The data for creating the signature or the authentication data, within the context of usage, can only be linked to the signatory or authenticator and none other,***

***2. Where an alteration is made to the digital signature, after affixing it to the electronic record for authentication, such alteration must be detectable,***

***3. Where the information contained in the electronic record is altered after same has been authenticated by the digital signature, such alteration must be detectable, and such other conditions as may be prescribed by law.***

***Additionally, for a duly authenticated electronic record to be admissible, a digital signature alleged to have been affixed by a person must be proven to belong to such person. This however does not apply to a secure digital signature and a digital signature will be deemed to be secure if:***

***1. The creation data of the signature was under the exclusive control of the signatory alone, and***

***2. Same was stored or affixed in an exclusive manner as may be prescribed.***

***Besides, the provisions of Section 93 of the Evidence Act 2011 relating to the proof of signature, handwriting or electronic signature were amended to include a digital signature. [12]***

***e. Electronically Generated Affidavits [13]***

***The Act amends the provisions of Section 108, 109, 110 and 119 of the principal Act relating to the deposition of affidavits. In line with the new provisions, affidavits can now be deposed to electronically before such persons as may be duly authorised to take same but a copy of such must be filed in the registry and may be recognised for any purpose for which it is intended to be used in the court. Hence affidavits deposed to whether in Nigeria [14] or, subject to the provisions of Section 110, outside Nigeria, [15] in person or through audio-visual means, are admissible before any court in Nigeria. Furthermore, the requirement of a jurat to accompany an affidavit under Section 119 of the Principal Act also applies to an electronically generated affidavit. Hence where an affidavit is taken via audio-visual means, the electronic record must state which audio -visual method was made use of and the date on which it was used. [16]***

***f. Recognition of an Electronic Gazette [17]***

***The Amendment Act now recognises an electronic gazette and provides to the effect that any regulation, rule or such other matters required to be published in the Federal Government Gazette will be deemed to have been validly published if same is published in an electronic Gazette.***

***Finally, the Act amended the interpretation Section of the Principal Act by providing interpretations of technological terms used in the Act.***

***CONCLUSION***

***Technology continues to shape the human society in more ways than man is conscious of. There is however, a need to provide legal basis for the interaction of man with technology in the different spheres of human interconnection, as the law gives validity to human actions, generally. Thus, the amendment of the Evidence Act 2011 can be regarded as a step in the right direction, in alignment with international best practices, aimed at providing relative ease to the system of justice administration, curbing administrative bottlenecks in the system and generally changing the face of litigation practice in Nigeria.***

***[1] Mishra, Sriya Shubhalaxmi, “The Advent of Technology and its Impact on the Society” (2019). Available at SSRN:*** [***https://ssrn.com/abstract=3598962***](https://ssrn.com/abstract=3598962) ***(***[***https://ssrn.com/abstract=3598962***](https://ssrn.com/abstract=3598962)***) Or*** [***http://dx.doi.org/10.2139***](http://dx.doi.org/10.2139)

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***man, (https://www.e-ir.info/author/jason-neidleman/)***

***[2] See Jason Neidleman, “The Social Contract Theory in a Global Context” (2012) E-International Relations; https://www.e-ir.info/2012/10/09/the-social-contract-theory-in-a-global-context/ (https://www.eir.info/2012/10/09/the-social-contract-theory-in-a-global-context/)***

***[3] See the long title to the Evidence Act (Amendment) Act 2023***

***[4] Section 2 of the Evidence Act (Amendment) Act 2023.***

***[5] Section 2 (b) EA(A)A 2023.***

***[6] Section 3 EA(A)A 2023.***

***[7] See Section 3 EA(A)A 2023***

***[8] Section 3 EA(A)A 2023.***

***[9] Section 84B of the Evidence Act.***

***[10] Section 3 EA(A)A 2023.***

***[11] Section 84C of the EA.***

***[12] Section 4 EA(A)A 2023.***

***[13] Section 5 EA(A)A 2023.***

***[14] Section 6 EA(A)A 2023.***

***[15] Section 7 EA(A)A 2023.***

***[16] Section 8 EA(A)A 2023.***

***[17] Section 9 EA(A)A 2023.”***

Back to Olalere

***“The second leg of the paper deals with the procedural aspect of dealing with electronically generated evidence in Nigeria. That can only be best understood upon a careful analysis of decided cases. Michael Connelly once said:***

***“In the courtroom there are three things for the lawyer to always consider: the knowns, the known unknowns and the unknown unknowns. Whether at the prosecution or defense table, it is the lawyer’s job to master the first two and always be prepared for the third.”***

***My lord BELGORE JSC (as he then was) in FGN & ORS V. ZEBRA ENERGY LTD (2002) LPELR-3172(SC) (PP. 33 PARAS. D) Described procedure thus:***

***"Procedure is a guide to smoothen passage of suit; to direct the parties what to do and to guide the court to arrive at the justice of a case.”***

***To drive home the point, we’ll attempt to look at some decided cases.***

***Aside the case of Kubor v. Dickson decided by the Nigerian Supreme Court in 2012, we have not had many cases or opportunities for the interpretation of section 84 of the Evidence Act 2011 concerning the requirements for the admissibility of computer-generated or electronic documents in our corpus Juris. The ongoing trial in the Dana Air crash cases pending before the Federal High Court in Lagos and its peculiar facts presented a better opportunity for the court to interpret the provisions of section 84 of the Evidence Act in broad terms, in line with statutory and decided authorities.***

***The relevant facts of the two (2) Dana cases in which the Federal High Court has been presented with the opportunity to elaborate on the provisions of section 84 of the Evidence Act are as follows. The two victims of the air crash worked for organizations based in the UK.***

***The two victims' families are being represented by a consortium of lawyers in Nigeria, UK and USA i.e., the Aviation Aviation Group (AAG). In the course of gathering evidence and documentation from the former employers of the victims, the Plaintiffs' lawyers based in the UK wrote letters which they sent by emails to the employers requesting certain information and documents concerning the employment of the victims. The employers responded to these requests by emails and sent the information and documents to the lawyers based in the UK, who in turn forwarded the documents/information to the Nigerian lawyers by emails for use in pleadings and at trials.***

***The Nigerian lawyers (the law firm of SPA Ajibade & Co.) frontloaded these documents/emails/letters etc., as prescribed under the Rules. During the course of trial in the two cases, objections were taken by the judge from the Defendants' lawyers on admissibility of the documents. In the opinion of defence counsel these documents did not meet the requirements for admissibility as computer- generated evidence under section 84 of the Evidence Act.***

***Apart from the two (2) Dana cases in which the court has now provided some guidance, there was a 'pilot' case7 in the Dana cases in respect of which the presiding judge had ruled on similar objections. In the pilot case, the judge held that some of the email documents do not bear the email address/signature of the recipient through whom the documents were sought to be tendered, i.e., that there was no correlation between the sender of the email, the UK lawyers and the Nigerian lawyers who received the front-loaded emails (and whose email addresses appeared on the email) and the witness in the box through whom they were sought to be tendered in evidence.8***

***Strategy Adopted to comply with the provisions of Section 84***

***In view of the Judge's ruling on the objections in the pilot case, and to avoid a similar ruling in the two (2) cases that are the subject of this practice note, the Nigerian lawyers instructed their UK counterparts to forward the emails with their attachment as sent and received from the victims' employers directly to the email addresses of the witnesses (plaintiffs) who will tender them in evidence. As soon as this was done, the Nigerian lawyers prepared additional list of documents together with two sets of certificates of authentication in line with the requirements of section 84 of the Evidence Act. The UK lawyer who sent or received the letters/emails/documents and information was requested to sign one set of the certificate of authentication stating that the email and documents were properly received by her before they were sent to the witnesses/plaintiffs. The witnesses/plaintiffs in turn signed a second set of certificate of authentication stating that the email and documents were properly received by them. In addition to these steps and even though it is not a requirement of section 84 of the Evidence Act, the plaintiffs' lawyers filed the two back-to-back certificates of authentication at the court's registry as though they were court processes. The certificates together with a table of schedule of the emails/documents indicating where the emails and documents were frontloaded in the additional list of documents were tendered in evidence along with the letters, emails and documents. Again, and just as was the case in the pilot case, objections to the admissibility of the entire computer generated documents, letters and emails and the certificates of authentication were raised by the defendants' lawyers and arguments taken on these objections as follows:-***

***Grounds of Objections***

***The first ground of objection made was a challenge to the admissibility of the certificates of authentication attested to by one of the UK lawyers on the ground that the attestor has to personally attend court to depose to the certificates of authentication.***

***Second, defendants' counsel challenged the admissibility of the emails on the ground that the plaintiff is not the maker of the emails and as a result he cannot give evidence of the emails.***

***Third, that some of the emails were neither signed nor dated. Counsel to the 2nd Defendant further contended that the emails and some of the victims' employment documents and all other letters to and from the employers are not originals and no evidentiary foundation was laid before tendering them.***

***Fourth, it was also contended that some of the letters written by the victims' former employers did not have addressees and as a result the contents are mere statements and that the plaintiff/witness not being the author of the aforementioned documents could not testify to the content of these letters. The defendants' lawyers contended that this was a breach of section 39 of the Evidence Act.***

***Response to Objections***

***In response to the objections above, the plaintiffs' lawyers contended that the objections were misconceived. Relying on the provisions of section 84 (4) (b) (i) of the Evidence Act, it was argued in rebuttal that a certificate of authentication is not equivalent to an affidavit, neither is there any provision of the law which requires such a certificate to be in the form of an affidavit. In other words, the Evidence Act does not require a certificate of authentication for computer-generated documents to be sworn before a Commissioner for Oaths for the purpose of admissibility.***

***It was also argued that proper foundation was laid before the documents were sought to be tendered. In this wise, plaintiff's lawyers argued that the plaintiff, during his testimony stated that the documents were obtained from his late brother's employers by his UK lawyers. It was further argued that it is not a requirement of the law that the makers of the documents must necessarily be brought to court to tender the documents in view of the difficulty and impracticability of doing so without incurring unreasonable expenses. Counsel submitted further that it is for the Court to determine whether it is reasonable or unreasonable in the circumstances to bring to Nigeria the victims' employers, who are based in the UK, for the purpose of tendering documents only.***

***The plaintiffs' lawyers further contended on behalf of the plaintiffs that section 84 of the Evidence Act presupposes that being computer-generated documents, the documents are not originals, and if the authenticity of the documents are challenged, that goes to weight to be attached and not admissibility of the documents. Counsel further submitted that the documents had been pleaded and frontloaded and therefore the objections were not valid. Reliance was placed on Section 39 of the Evidence.***

***The Decision of the Court***

***Relying on the provisions of section 84(4) as reproduced above and the English case of R v. Shepherd, the court dismissed the first objection. The court distinguished between the competence of a witness to sign a certificate envisaged by paragraph 84 (a) of schedule 3 of the English Police and Criminal Evidence Act11 and his competence to give oral evidence on the reliability of the computer. In R. v. Shepherd, the English court had held, while interpreting paragraph 8 (d) of schedule 3 of the English PACE Act in pari materia with section 84 (4) of the Evidence Act regarding matters contained in section 69(1) of the PACE Act (equivalent to section 84 [4]) of the Evidence Act, that although the store detective understood the operation of the computer and could speak to its reliability, she had no responsibility for its operation but that both the oral evidence or written certificate duly signed in terms of paragraph 8 of schedule 3 is acceptable to prove the reliability of the computer. The court in the two Dana cases followed the decision of R. v. Shepherd to the effect that once the certificate was signed by somebody whom from his job description can confidently be expected to be in a position to give evidence, is fully familiar with the operation of the computer stores and could speak to its reliability, that was sufficient. The judge held on this score that nothing in the Evidence Act 2011 requires the UK lawyer who attested to the certificate of authentication to be present in court or before a commissioner for oaths to depose to the certificate. All that the law requires is that the certificate should identify the device used, the condition of the device and the name and signature of the officer responsible for the operation of the device.***

***Regarding the arguments on inadmissibility of emails on the ground that the witness is not the maker, the court agreed with the plaintiffs that there are at least two (2) exceptions to the rule that a maker of a document should tender same in evidence. The court relied on the Evidence Act and the Nigerian Supreme Court's decision in Mega Ban Plc. v. O.B.C. Limited12 and held the exceptions to be where (1) the maker is dead or***

***(2) the maker can only be procured by involving the party in so much***

***expense that it would be outrageous in the circumstances of the case. The arguments that the emails were not signed were also rejected. The court also relied on the English case of Pereira Fernands v. Mehta13 and held that the emails contained the names of the authors, the positions they occupy and above all, it was signed with their email addresses and phone numbers. The court held that there has been full and substantial compliance with the requirements of the Evidence Act. On the objection of not laying proper evidentiary foundation for the documents, the court found in favour of the plaintiff and held that the necessary foundation had been laid before the documents were sought to be tendered.***

***Concluding Comments***

***Counsel should anticipate and be wary of objections, leaving little or no room for superior arguments that may be raised by opposing counsel. This requires adequate preparation weeks and days before scheduled trials. Arguments and indeed cases are won during preparations.***

***Counsel should strive to comply fully with the provisions of the Evidence Act, and if in doubt, go the extra mile to ensure that critical documents necessary to prove client's claims are admitted in evidence. An example of going the extra mile was the filing of the certificate of authentication as a process of court in the two Dana cases.***

***Note that a document generated electronically or via computers must still satisfy other requirements for admissibility of documents in order to be admitted in evidence. In other words, the document must be primary evidence except where secondary evidence of the document is admissible by law, in which case, only admissible secondary evidence of the document must be tendered.”***

**ANOTHER CASE REVIEW:**

CHARGE NO: FHC/EN/CR/1312020- FEDERAL REPUBLIC OF NIGERIA V. GODSWILL NDUBUISI (UNREPORTED) JUGEMENT OF I. N. BUBA J. OF 2ND DAY OF MARCH 2022 SITING AT ENUGU DIVISION.

The issues for determination were:

Whether the certificate of identification dated the 12th day of February 2020 together with documents allegedly printed out from the defendant's laptop and flash drive (Exhibit P8) which was tendered in evidence at the trial by PW1 (who was not the maker of the said certificate of identification and who did not print out the alleged documents from Defendant's laptop and flash drive are not documentary hearsay.

Whether the offence to which the defendant was charged were proved beyond reasonable doubt by the prosecution.

Whether Exhibit Pl, Exhibit P4 and Exhibit P8 were not dumped on this court by the prosecution.

Learned counsel for the Defendant submits that at the trial, PW1 tendered in evidence Certificate of Identification dated the 12th day of February 2020 together with documents allegedly printed out from Defendant's Laptop and Flash Drive (Exhibit P8). That PW1 was not the maker of the said Certificate of Identification and he did not print out the alleged document from Defendants Laptop and Flash Drive. That the following were elicited from PW1 during his cross-examination by the defence counsel.

Q. Do you know what a forensic analyst does?

A. I am not one.

Q. Certificate of identification. please show him?

A. Yes. my lord.

Q. You printed those documents from the devices?

A. I did not.

Q. Who did?

A. The forensic unit.

That before this Court is a Certificate of Identification made pursuant to Section 84 of the Evidence Act dated 12th day of February 2020 and admitted in evidence together with some documents allegedly printed from Defendant's devices as Exhibit "P8". The said certificate under Section 84 bears Ahmed Mahmud Hadji as the person who made and signed same. The said Ahmed Mahmud Hadji who allegedly conducted forensic analysis on the Defendant's Laptop and Flash drive failed to come to this Court to give evidence and be cross-examined to prove whether or not the documents were in fact printed from the Defendant's Laptop and Flash drive, as alleged by the PW1 who was not there when the document was allegedly printed. The prosecution also failed to lay any foundation as to why the maker of Exhibit "P8" did not come to this Court to testify and be cross-examined on how he came about the purported computer generated documents.

Section 84 (1) of the Evidence Act provides that:

***"In any proceeding a statement contained in a document produced in a computer shall be admissible in evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question".***

That the import of Section 84(1) of the Evidence Act above, is that, a certificate is only admissible in place of oral evidence. If it is so, who is in position to testify orally as to the procedure in coming about of Exhibit P8? it is submitted that it is the said Ahmed Mahmud Hadji who printed the alleged computer generated documents that is in position to testify and be cross- examined as to the process he (Ahmed Mahmud Hadji) went through in printing the said Exhibit P8 and the particular application or folder in the device he found them. To do the contrary will be a contravention of the provisions of Sections 37 and 38 of the Evidence Act.

That under Section 37 of the Evidence Act, hearsay statement means-

* + 1. oral or written made otherwise than by a witness in a proceeding; or
    2. contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the Evidence Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.

The Apex Court held in the case of EDOSA & ANOR V. OGIEMWANRE (2018) LPELR-46341(SC) PER GALINJE, J.S.0 ( PP. 48-49, PARAS. B-E) that:

'Traditionally, testimony that is given by a witness who relates not what he or she knows personally but what others have said and that is therefore dependent on the credibility of someone other than the witness, such testimony is generally inadmissible under the rules of evidence." The Supreme Court in the case of POPOOLA v. STATE (2018) LPELR 43853(SC) on what amounts to hearsay evidence held as follows:

***“My learned brother, Rhodes-Vivour properly dissected the evidence adduced by the prosecution and sifted the grain from the chaff. The extra judicial statement of PW3 admitted as Exhibit C and his oral evidence pointed to the fact that he was not present at the scene when the appellant attacked the deceased with the iron rod. He gave an account of what happened after the fight and not before or during the fight His evidence therefore is hearsay evidence and inadmissible. The same goes with Exhibits F3 - F4 which PW6 recorded with the help of an interpreter who was not called to testify. It became hearsay documentary evidence. See: KAJUBO V. STATE (1988) 1 NWLR (PT. 73) 721; EREKANURE V. STATE (1993) 5 NWLR (PT. 294) 385; ANTHONY NWACHUKWU V. STATE (2007) 17 NWLR (PT. 1062) 31."Per AKA'AHS, J.S.C. (Pp. 26-27, Paras. D-A)".***

It is further contended that as the Supreme Court also explained in BUHARI v. INEC (2009) 19 NWLR (PT 1120) 246, 39 -392, weight can hardly be attached to a document tendered in evidence by a witness who cannot or is not in a position to answer questions on the document. One such person the law identifies is the one who did not make the document. Such a person is adjudged in the eyes of the law as ignorant of the content of the document.

That PW1 did not produce and is not in position to give evidence or answer questions on Exhibit P8. Ahmed Mahmud Hadji is the maker of the computer generated documents together with the certificate (in obedience to Section 84(1) of the Evidence Act as an alternative to giving oral evidence). It is only the maker of Exhibit P8 Ahmed Mahmud Hadji that can testify and be cross-examined on them and urged the court to so hold and expunge Exhibit "P8" as a wrongly admitted exhibit or if the Court is not mind to expunge same, to discountenance the entire evidence as documentary hearsay to which no probative value is attachable.

That the said certificate of identification together with the purported computer generated documents admitted as Exhibit P8 are all documentary hearsay evidence, learned counsel thus urged the court to treat same as a pieces and tissues of documentary hearsay which cannot be relied on by this Court. See ABADOM v. STATE (1997) 9 NWLR (PT. 479) 1 AT 24 PARAG G.

It is further argued that the hearsay rule is to protect an accused person from being convicted upon the testimony of a witness who did not see, hear or perceive in any other manner, the facts given in his testimony. See: SIMEON V. STATE (2018) LPELR-44388(SC) PER KEKERE-EKUN, J.S.0 (PP. 25-26, PARAS. B-D).

Learned counsel urged the court not to convict the Defendant upon the testimony of PW1 who neither saw the purported incriminating materials in the Defendant's devices nor witnessed the printing of same from the devices, and to resolve issue one in favour of the Defendant.

It is submitted that the law is clear on the issue that where there is a certificate pursuant to section 84 of the Evidence Act it is not mandatory for the said Hadji to come before the Court to testify. Such Certificate dispensed with the presence and testimony of the said Hadji. Where he is produced it is a mere surplus. See Section 85 (4) b. That the evidence of Hadji was not necessary by the production of the certificate and learned counsel urged the court to so hold. In any proceedings where it is desired to give a statement in evidence by virtue of this section a certificate identifying the documents containing the statement and describing the manner in which it was produced, giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer, dealing with any of the matters to which the conditions mentioned in sub-section 2 above relates and purported to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate and for the purpose of this subjection, it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it, See DICKSON vs. SYLVA & ORS (2016) LPELR-41257 (SC).: and that the Prosecution has proved beyond reasonable doubt all the ingredients of the offence.

In DICKSON V. SYLVA & ORS (2016) LPELR-41257(SC) did not decide that where there is a certificate pursuant to section 84 of the Evidence Act the maker of the document need not testify in Court. In that case, DICKSON V. SYLVA & ORS (supra), the Apex Court held, per NWEZE, J.S.0 (Pp. 23-24, Paras. A-E) thus:

***"Interpreting provisions similarly worded like Section 84 (supra), the defunct House of Lords [per Lord Griffiths] had this to say in R v. Shepherd [1993] 1 All ER 225, 231, paragraphs A-C, [HI]: Documents produced by computers are an increasingly common feature of all businesses and more and more people are becoming familiar with its uses and operation. Computers vary immensely in their complexity and in the operations they perform. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly, [*italics supplied for emphasis].**

In actual fact, Section 84 (supra) consecrates two methods of proof, either by oral evidence under Section 84(1) and (2) or by a certificate under Section 84(4). In either case, the conditions stipulated in Section 84(2) must be satisfied. However, this is subject to the power of the Judge to require oral evidence in addition to the certificate. As the eminent Lord Griffith explained in the said case [R v. Shepherd]. Proof that the computer is reliable can be provided in two ways: either by calling oral evidence or by tendering a written certificate subject to the power of the Judge to require oral evidence. If is understandable that If a certificate Is to be relied upon if should show on its face that if is signed by a person who from his Job description can confidently be expected to be In a person to give reliable evidence about the operation of the computer.

That Section 84 of the Evidence Act 2011 provides as follows:

***'84. (1) In any proceeding a statement contained in a document produced by a computer shall be admissible evidence of any fact stated in it of which direct oral evidence would be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.***

1. ***The conditions referred to in subsection(1) of this section are -***
   1. ***That the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;***
   2. ***That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;***
   3. ***That throughout the material part of that period the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and***
   4. ***That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.***
2. ***In any proceeding where it is desired to give a statement in evidence by virtue of this section a certificate -***
   1. ***Identifying the document containing the statement and describing the manner in which it was produced; giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.***
   2. ***Dealing with any of the matters to which the conditions mentioned in subsection (2) above relate; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall be evidence of the matter stated in the certificate; and for the purpose of this subsection it shall be sufficient for a matter to he stated to the best of the knowledge and belief of the person stating it."***
3. For the purpose of this section-information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment; where in the course of any activities carried out by any individual or body, information is supplied with a view to its being stored or processed for the purpose of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities; a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

That Section 84 of the Evidence Act stipulates two methods of proof, either by oral evidence under Section 84(1) and (2) or by o ………… certificate under Section 84(4). In either case, the conditions stipulated in Section 84(2) must be satisfied. This does not change the position of the law that the maker of a document is in position to give evidence in respect of same.

That the correct position of the law is that a person who is not the maker of a document is not in position to answer questions on the document. This is because the credibility of such witness is dependent on the credibility of some other person and such evidence is generally inadmissible in law. See EDOSA 8 ANOR V. OGIEMWE (2018) LPELR 46341 (SC) PER GALINJE, J.S.0 at (Pp.48-49, Paras B-E).

The Court of Appeal had this say on the issue in the case of MOTHERCAT (NIG) LTD L ANOR V. AKPAN (2019) LPELR-47158(CA) Per OGBUINYA J.C.A (Pp. 33-34, Paras, E-

A), thus:

***"Incontestable a document must be tendered by its maker or else it will be declared a documentary hearsay, see Buharl v. INEC (2008) 18 NWLR (Pt. 1120) 246; Nyesom v. Peterside (2016) 7 NWLR (Pt 1512) 452; Ikpeazu v. Otti (2016) 8 NWLR (Pt. 1513) 38; Okereke v. Umahl (2016) 11 NWLR (Pt. 1524) 438. Undeniably, the respondent, who tendered the medical report, was not the author of it howsoever. In this wise, he was not in a position to he cross-examined on it. The lower Court, with due respect, desecrated the law when it placed reliance on medical report, exhibit 7, in evidence as it is devoid of any probative value."***

Also in ABDULMALIK & ANOR V. TIJANI & ORS (2012) LPELR 19731(CA) Per BADA, J.C.A (Pp. 17-19 Para. E). the Court of Appeal held thus:

***"It is also trite that evidence on the contents of documents or circumstances under which such documents were made by a person who was not their maker or present when the documents were made will be hearsay. The above view is supported by the following cases:- In Obinwunne vs. Okoye (Supra) this Court per Umoren JCA held among others that:- "PW3 the Appellant himself, tendered Exhibits 164-259, the CTC of Exhibits 1-99. PW3 was neither at the polling station or booths nor at the wards. His evidence viva voce is based on what he was told by his agents. PW1 was not an eye witness so his evidence of what took place at the polling station was hearsay and had no probative value" Also in the case of Hashidu vs. Goje (Supra) it was held by this Court per Onnoghen JCA (as he then was) that:- "On the other hand, apart from the fact that the documents relied upon by the Appellants in an attempt to prove their case were not pleaded as found by the lower Court, they were not tendered by those who made them - the party agents who signed them and the INEC official who completed and signed them. These are the proper persons to tender the documents in law because they are the makers. If they had tendered the documents one would have said that the documents are evidence of what they state. But they were tendered by a person who never made them nor was present when they were made. In law the documents are at best pieces of documentary hearsay and it is trite law that hearsay evidence is inadmissible in proof of any cause."***

Learned counsel further submits that in considering the innocence or guilt of the Defendant in this charge, the evidence of PW1 who was not the maker of Exhibit P8 and was not present when that Exhibit P8 was produced is nothing but a documentary hearsay which is inadmissible in law.

Put differently, PW1 cannot competently give evidence on the contents of or circumstances under which the Exhibits were made because his credibility is dependent on the credibility of some other person (the maker of Exhibit P8) who was nowhere to be found.

Learned counsel thus urged this Court to discountenance the misleading submissions of learned Counsel for the Prosecution and urged the court to discharge and acquit the Defendant of all the three count charge and order the release of all his items in the custody of the Complainant.

From the totality of the 3 counts charge, the evidence oral and documentary, the court agrees that the issues for determination are rightly stated by learned counsel to the defendant and the prosecution and shall anon proceed to retire them.

Let the court also take the liberty to state that the facts leading to the 3 counts charge were also correctly stated by learned counsel to the defendant.

The certificate of identification in this matter dated 2/2/20, Exhibit P8, was tendered in this court by PW1 who in his evidence on oath confirmed that 'he is not a forensic analyst. He did not print exhibit P8. That the forensic unit did. PW1 is the only witness in this matter, yet the prosecution wants this court to hold that Exhibit P8 is not a documentary hearsay in the light of the authorities and the provision of S.84(1) of the Evidence

This court has no difficulty in upholding the arguments of the learned counsel for the defence in paragraph 4:4 - 4:16 & paragraph 2:14 - 2:21 reproduced elsewhere, and accordingly resolve issue one argued by the defendant in favour of the defendant.

Section 84(1) of the Evidence Act 2011 has been with us for some time and there are several legions of authorities interpreting the said section. It is time we all become acquainted with the provisions in order to advance the administration of justice; especially in criminal procedure and evidence, where the burden on the prosecution is heavier than that of the defence. It is not 99% proof but 100%, because a single doubt will always be resolved in favour of the defense.

The amendment on 2023 Act is yet to receive judicial blessings up to the Supreme Court.

# **CONCLUSION**

We live in a DIGITAL world and cannot afford to be manual. Consequently, while the evidence Act need to be tinkered with continuously, to fall in line with the realities of the evolving and developing world, as Judges and Learned minds, we must move with time in understanding and appreciating issues of development.

We would soon be in the meta-verse world, Digital or Electronic Evidence has come to stay. The courts must be in the vanguard of not only interpreting the provisions of the Evidence Act, but must be vigilant in noticing these changes and the implication of the reception evidence. A simple example, if a party comes to court and says his data is stolen. What will the court inquire into?

This question is not rhetorical, because the courts will be dealing with tangible and intangible, animate and inanimate and sometimes even imaginary. What happens when one’s documents in a drop box are published without his consent? Therefore, the procedure and practice is not only dependent on the law but how vast our judges understand technology and the evolving world.

Thank you.

**REFERENCES**

1. Admissibility of Electronically Generated Evidence, Practice and Procedure by Hon. Justice I. N. Buba at the induction course for newly appointed judges of the superior court, 2023
2. An overview of the Evidence (Amendment Act 2023) by O. M Atoyebi and Bibiana A. Adeniji October 9th 2023
3. Critical analysis of the Electronic Evidence uniuyolawclinic:wordpress.com
4. Hon. Justice Alaba Omolaye Ajileye book titled “Electronic Evidence with cybercrime 2015 revised”