



LEGAL ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE IN NIGERIA AND THE UNITED KINGDOM

By

Taiwo Qasim Aderibigbe*

&

Morayo Kafilat Sholaja**

Abstract

The advancement in the information and telecommunication technology (ICT) sector has impacted human life in ways unimaginable. ICT has advanced to such an extent that man practically cannot do anything without making use of the ICT opportunities and the legal profession is not left behind. One of the major impacts of ICT in the legal profession is the issue of evidence generated electronically. While paper-based evidence used to be the only admissible form of documentary evidence in Nigerian courts, ICT has made it possible for evidence to be stored in a computer system and other electronic gadgets hence the development of what is now known as computer or electronically generated evidence. It is therefore the aim of this research to explore the concept of what may be termed computer-generated evidence and the condition for its admissibility both in Nigeria and in the United Kingdom. This paper identifies the similarities and differences in the forms of admissibility of computer-generated evidence in both jurisdictions. Specifically, this research examines the provision of the Civil Evidence Act of 1968, the Police and Criminal Evidence Act of 1984 (both of the United Kingdom) and the Nigerian Evidence Act 2011 and found that their provisions on the admissibility of computer-generated evidence are substantially the same with just little differences on minor issues like the classification of computer generated evidence into documentary or real evidence, whether oral evidence may be called as substitute to the certificate of compliance required to prove the content of computer generated evidence etc.

* LLB (Hons), BL and NITDA sponsored LLM (Cyber Law) student at the University of Lagos. Email: taiwoqaderibigbe@gmail.com Tel: +2348030498051

** B.sc (Hons), Political Science, LLB Part V student at Al-Hikmah University Ilorin. Email: morayo003@yahoo.com Tel: +2347083008803



Keywords: Evidence, Computer, Admissibility, Jurisdiction and Documentary

1.0 INTRODUCTION

One of the outstanding innovations brought about in the Nigerian Evidence Act 2011¹ is the issue of admissibility of evidence generated by computer and other electronic means. Prior to 2011, the hitherto Evidence Act² did not envisage the use of computer to generate any documentary evidence and as such did not make provision for its admissibility. Although the Supreme Court of Nigeria had long held in the Case of *Esso W.A. v Oyegbola*³ that computer print-outs were admissible as documentary evidence but the issue remained controversial as there was no provision of the law whether in the Evidence Act, decided cases or rules of courts stipulating the conditions for its admissibility. It was therefore a welcome development when the old Evidence Act was repealed and a new one was enacted in 2011 and the issue of admissibility of computer-generated evidence was clarified in section 84 thereof which also received a judicial imprimatur in the case of *Kubor v Dickson* which will be discussed in details later in this paper.

Unlike Nigeria, admissibility of computer-generated evidence is not new in the United Kingdom as it has been in place as far back as 1968. However, unlike Nigeria that has only one law of evidence (the Evidence Act 2011) that is applicable in both civil and criminal proceedings, the United Kingdom has separate laws of evidence in civil and criminal proceedings, i.e., the Civil Evidence Act 1968⁴ is applicable in civil proceedings while the Police and Criminal Evidence Act⁵ which shall simply be referred to in this paper as the PACE Act regulates criminal proceedings in the United Kingdom.

¹ An Act to repeal the Evidence Act, Cap E14, Laws of the Federation of Nigeria, and enact a new Evidence Act which shall apply to all judicial proceedings in or before Courts in Nigeria; and for related matters.

² CAPE14 LFN 2004
³ (1969)NMLR 194

⁴ An Act to amend the law of evidence in relation to civil proceedings, and in respect of the privilege against self-incrimination to make corresponding amendments in relation to statutory powers of inspection or investigation. Available online at <https://www.legislation.gov.uk/ukpga/1968/64/section/5/1991-02-01> and accessed 23-08-2021

⁵ An Act to make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing and for a rank of deputy chief constable; to amend the law relating to the Police Federations and Police Forces and Police Cadets in Scotland; and for connected purposes. Available online at <https://www.legislation.gov.uk/ukpga/1984/60/contents> and accessed 23-08-2021



Before proceeding proper into the issue of admissibility of computer-generated evidence under the Acts identified above, it is of utmost importance to examine the meaning of some terms which we shall come across often in this paper. Therefore, the next few paragraphs will examine the definitions of computer, evidence, document and computer-generated evidence.

2.0 DEFINITION OF TERMS

2.1 Computer

Dictionary.com has defined computer as a 'programmable electronic device designed to accept data, perform prescribed mathematical and logical operations at high speed, and display the results of these operations'. Similarly, section 5(6) of the Civil Evidence Act and section 258 (1) of the Nigerian Evidence Act 2011 have defined computer thus:

"Computer" means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

From the two definitions above we can simply conclude that any device for storing and processing data qualifies as computer. Therefore, Mainframes, desktop and laptop computers, tablets, and smart phones, etc. are some of the different examples of computers'.⁶

2.2 Evidence

Although neither the Civil Evidence Act, the PACE Act, nor Nigerian Evidence Act 2011 define the term 'evidence', the Black's Law Dictionary,⁷ has defined evidence as anything that has to do with testimony, documents and tangible objects that tends to prove or disprove the existence of an alleged fact. Also, the Supreme Court of Nigeria, in the case of *Awuse v. Odili*⁸ defined evidence as:

Any species of proof, or probable matter legally, presented at the trial of an issue by the act of the parties and through the medium of witness, records, documents, exhibits, concrete objects, etc for the purpose of inducing belief in the minds of the court or jury as to their contention.

Similarly, in *Eze v Okoloagu*,⁹ the Supreme Court of Nigeria, while defining evidence has this to say:

⁶ <https://www.dictionary.com/browse/computer>

⁷ 8th Edition

⁸ (2005) 16 NWLR (Pt 952) Pg.443.

⁹ (2010) 3 NWLR (Pt 1180) Pg 185.



As it is known, the term evidence is defined as, the facts; signs or objects that make you believe that something is true; or the information that is used in a court of law to try to prove something see Oxford Advanced Learner' Dictionary P. 398 while in Black's Law Dictionary, 7th Edition, page 76 the term evidence is defined to mean something including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact. Case Law authorities defined "evidence" as to the means whereby the court is informed as to the issues of facts as ascertained by the pleadings; it is the testimony, whether oral or documentary or real which is produced before a court or tribunal to some facts in dispute. See Fed. Milt Governor V Sani (No. 2) (1989) 4 NWLR (Pt 117) 624, Lawal V Union Bank of Nigeria Plc (195) 2 NWLR (Pt 378) 407".

From the above definitions we can define evidence as documentary, oral, or any tangible testimony that may be legally received in order to prove or disprove some facts in dispute.

2.2 Document

Again, both the Civil Evidence Act and the PACE Act did not attempt to offer any definition to the meaning of document. But the Nigerian Evidence Act 2011 in Section 258(1) has defined document thus:

"Document" includes:

- (a) books, maps, plans, graphs, drawings, photographs, and also includes any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;
- (b) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
- (c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
- (d) any device by means of which information is recorded, stored or retrievable including computer output

It is important to note that the definition starts with the word 'includes', which thereby enlarges the scope of the meaning of document to items listed in the definition. Therefore, the *ejusdem generis* rule of interpretation must be adopted so that anything similar to those listed in the definition will also qualify as document in judicial proceedings. It is also worthy to note that the above



definition of documents has incorporated modern means of information storage and retrieval such as computer databases contained in hard drives, CD-ROMs, Magnetic Discs, Flash Disks, and Floppy Diskettes as well as Motion Pictures recorded in Videotapes, Cassettes, Compact Discs, Micro Films, Micro Fiches, etc. Therefore, any information stored in a mobile phone for example, will qualify as document within the context of the definition. Similarly, by paragraph (d) above, document may also be interpreted to include smart phones, laptop and desktop computers, digital cameras, etc. as they are devices capable of recording, storing or retrieving information.

2.3 Computer-Generated Evidence

Computer or electronically generated evidence, or in fact digital evidence (or whatever name it is called) is nowhere defined in the Civil Evidence Act, the PACE Act or the Nigerian Evidence Act 2011 even though the word electronic is used about ten times in the latter.¹⁰ Similarly, while 'computer generated evidence' is not stated in the Evidence Act, a computer is stated in the Act to mean 'any device for storing and processing information'.¹¹ However, computer or electronically generated evidence has been defined by Stephen Mason¹² as 'Data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system, that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence'. Similarly, VivekDubey has defined digital evidence as information of probative value that is stored or transmitted in binary format.¹³

Stemming from the above definitions, we can define computer-generated evidence as such evidence generated from the computer or other digital devices such as telecommunications or electronic multimedia devices. It also includes

¹⁰ Samuel IdhiarhiEsq., 'Evaluation of Electronically Generated Evidence: Practice and Procedure'. Being a paper delivered at an Orientation Course for newly Appointed Magistrates at the National Judicial Institute, Abuja, on the 10th July, 2019). Available online at [Paper-on-Evaluation-of-Electronically-Generated-Evidence2.pdf](http://www.nji.gov.ng/Paper-on-Evaluation-of-Electronically-Generated-Evidence2.pdf) (nji.gov.ng) and accessed on 25-08-2021.

¹¹ Section 258

¹² Cited by P.A. Akhiero, 'Admissibility of Electronic Evidence in Criminal Trials: How Practicable?' (Being Paper delivered at a General Meeting of the Magistrates Association of Nigeria, Edo State Branch on 23rd of July, 2013.

¹³ VivekDubey, 'Admissibility of Electronic Evidence: An Indian Perspective', (2017) 4(2) Forensic Res. Criminol. Int. J available online at <http://medcraveonline.com/FRCIJ/FRCIJ-04-00109.pdf> and accessed 25-08-2021



such evidence found in e-mails, digital photographs, ATM transaction logs, word processing documents, instant message histories, files saved from accounting programme, spreadsheets, internet browser histories databases, Contents of computer memory, Computer backups, Computer printouts, Global Positioning System tracks, Logs from a hotel's electronic door locks, Digital video or audio files, etc.

Having examined the meaning of some key concepts relevant to this paper, it is equally important to briefly list the conditions for the admissibility of any evidence in a court of law.

3.0 CONDITIONS FOR THE ADMISSIBILITY OF EVIDENCE

Generally, for evidence (whether oral, documentary or real evidence) to be admissible in any judicial proceedings, such evidence must satisfy some conditions stipulated by law. These conditions include:

- (a) The evidence must be relevant;¹⁴
- (b) The evidence must be pleaded;
- (c) Necessary foundation must be laid as precondition for its admissibility e.g., photocopy of a lost document;
- (d) The evidence is not disallowed or excluded by the Evidence Act or under any other statute¹⁵ (s1(b)); and
- (e) It complies with requirements of law for its admissibility.

It is the compliance with the requirement of the law for its admissibility in (e) above that is the subject of discussion in this paper.

Having stated the general conditions for the admissibility of evidence in a judicial proceeding, the stage is now set to examine the admissibility of computer-generated evidence under the Civil Evidence Act, the PACE Act and the Nigerian Evidence Act 2011.

4.0 ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE UNDER THE CIVIL EVIDENCE ACT 1968

The relevant provision of the Civil Evidence Act that relates to the admissibility of computer-generated evidence is section 5 thereof which provides thus:

5(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question.

(2) The said conditions are:

¹⁴ Section 1 of the Evidence Act 2011

¹⁵ Section 1 of the Evidence Act 2011



(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by any body, whether corporate or not, or by any individual;

(b) that over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;

(c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

(d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities.

(3) Where over a period the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in subsection (2)(a) above was regularly performed by computers, whether—

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

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

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

(d) 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 for the purposes of this Part of this Act as constituting a single computer; and references in this Part of this Act to a computer shall be construed accordingly.

(4) In any civil proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in



subsection (2) above relate, and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Part of this Act—

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities 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;

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

(6) Subject to subsection (3) above, in this Part of this Act “computer” means any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

5.0 ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE UNDER THE PACE ACT

The relevant provisions of the PACE Act on the admissibility of computer-generated evidence are section 69 of the Act and paragraph 8, Part II of Schedule 3 to the Act. Section 69 provides thus:

69(1) In any proceedings, a statement in a document produced by a computer shall not be admissible as evidence of any fact stated therein unless it is shown—

(a) that there are no reasonable grounds for believing that the statement is inaccurate because of improper use of the computer;

(b) that at all material times the computer was operating properly, or if not, that any respect in which it was not operating properly or was out of operation was not such as to affect the production of the document or the



accuracy of its contents; and

(c) that any relevant conditions specified in rules of court under subsection (2) below are satisfied.

(2) Provision may be made by rules of court requiring that in any proceedings where it is desired to give a statement in evidence by virtue of this section such information concerning the statement as may be required by the rules shall be provided in such form and at such time as may be so required.

While paragraph 8 Part II of Schedule 3 provides that:

In any proceedings where it is desired to give a statement in evidence in accordance with section 69 above, a certificate—

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters mentioned in subsection (1) of section 69 above; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the computer, shall be evidence of anything stated in it; and for the purposes of this paragraph it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

It is clear from the provisions of the PACE Act reproduced above that computer-generated evidence is admissible in a criminal proceeding in the United Kingdom. One thing that must also be pointed out is that the provision of paragraph 8 part II of Schedule 3 to the Act is a reproduction of section 5(4) of the Civil Evidence Act.

6.0 ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE UNDER THE NIGERIAN EVIDENCE ACT 2011

As a result of colonization from the British government, most of the laws enacted by the Nigerian legislatures are replica of the laws applicable in the United Kingdom. It therefore did not come as a surprise that the provision on the admissibility of computer-generated evidence in the Nigerian Evidence Act 2011



is entirely the same with that of the Civil Evidence Act. In other words, section 84 of the Nigerian Evidence Act 2011 that guides the admissibility of computer-generated evidence is copied (word for word) from section 5 of the Civil Evidence Act of the United Kingdom. The only difference is that subsection 6 of the Civil Evidence Act that defines computer is omitted in section 84 of the Nigerian Evidence Act 2011 but reproduced in section 258 (1) thereof.

7.0 SUMMARY OF SECTION 5 OF THE CIVIL EVIDENCE ACT AND SECTION 84 OF THE NIGERIAN EVIDENCE ACT 2011

The summary of section 5 of the Civil Evidence Act and section 84 of the Nigerian Evidence Act 2011 is that a computer or electronically generated evidence is admissible in Nigerian and in the United Kingdom. However, because of the nature of computer-generated evidence, particularly its ability and or ease by which it can be altered, falsified, distorted, interposed or varied, subsection 2 of both sections imposed some conditions that must be fulfilled before such evidence will be admissible. They are:

- (a) That the statement sought to be tendered was produced by the computer during a period when it was in regular use, to store or process information for the purpose of any activity carried on over that period
- (b) During that period of regular use, information of the kind contained in the document or statement was supplied to the computer
- (c) The computer was operating properly during that period of regular use or if not, the improper working of the computer at any time did not affect the production of the document or the accuracy of its contents; and
- (d) That the information contained in the statement was supplied to the computer in the ordinary course of its normal use.

It must be emphasized that because the provision of section 84 of the Nigerian Evidence Act 2011 is novel in Nigeria, it has continued to be one of the major issues in matters before the Supreme Court of Nigeria and as such the Supreme Court has had several opportunities to interpret the provision of the section in a number of cases. Prominent among those cases is the case of *Kubor v Dickson*¹⁶

7.1 KUBOR VS. DICKSON

The case was an election petition matter wherein the appellants challenged the election and return of the first respondents as the Governor of Bayelsa State during the February 11, 2012 governorship election. One of the documents tendered by the appellants was a computer printout of the online version of the Punch Newspaper and other document from the website of the Independent National Electoral Commission (INEC), being the 3rd Respondent, while the

¹⁶ (2014) 4 NWLR (Part 1345) 534-594



electronic version of The Punch Newspaper was admitted and marked Exhibit “D”, the document from INEC's website was admitted and marked Exhibit “L”. However, the appellants did not satisfy the conditions laid down in section 82 (2) of the Evidence Act, 2011 in respect of the admissibility of the electronic evidence. The matter went on appeal based on the lack of satisfying the conditions laid down under section 84 (2) of the Evidence Act and the Supreme Court per Onoghen JSC (as he then was) decided thus:

There is no evidence on record to show that the appellants in tendering exhibits “D” and “L” satisfied any of the above conditions. In fact, they did not as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admissions as e-documents under section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held at page 838 of the record thus: 'A party that seeks to tender in evidence computer generated documents needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84 (2) of the Evidence Act, 2011.' I agree entirely with the above conclusion. Since the appellants never fulfilled the pre-conditions laid down by law, Exhibits “D” and “L” were inadmissible as computer generated evidence.

Ogunbiyi, JSC (as he then was) reasoned further that the electronically generated documents were in the nature of secondary evidence and that both documents being public documents needed to have been certified before being tendered in evidence.

From the above decisions of the Supreme Court, the following can be deduced:

- (a) The admissibility of computer-generated document or document downloaded from the internet is governed by the provisions of section 84 of the Evidence Act, 2011.
- (b) A party that seeks to tender in evidence a computer-generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under Section 84(2) of the Evidence Act, 2011. In other words, a party must fulfil the pre-conditions laid down by law, and if not, such computer-generated evidence or documents would be inadmissible.
- (c) Where documents are essentially public documents, they remain public documents and the fact that they are computer generated documents does not change their nature and character as public documents as it is settled law that the only admissible secondary evidence of public documents is a certified true copy of same.¹⁷

¹⁷ Section 90 (1) (e) of the Evidence Act



There is however, one misconception about this case that needs to be clarified. Some scholars have erroneously interpreted the decision in *Kubor v Dickson*¹⁸ to mean that where a computer-generated document is sought to be tendered in evidence, such document, in addition to its compliance with section 84 of the Evidence Act must also be certified.¹⁹ It is however my opinion that such argument does not represent the truth of what was decided in the case. The documents that necessitated the Supreme Court's decision in *Kubor v Dickson*, apart from being generated by electronic means are also public documents which ordinarily are not admissible as secondary evidence unless they are certified. Therefore, where a computer-generated document sought to be tendered is a private document e.g., a print-out of an e-mail correspondence or a bank statement, such document does not need to be certified provided it satisfies the requirement section 84(2) and the proper foundation has been laid before tendering it in secondary form.

Another important issue that needs to be discussed on the admissibility of computer-generated evidence under the Evidence Act 2011 is that apart from the provision of section 84 of the Act, evidence generated electronically can be admitted in evidence under other sections. For example, by the provisions of section 41 of the Act, when a statement consisting of an entry or memorandum is made by a person in the ordinary course of business in books and electronic devices kept in the ordinary course of business, such statement is admissible provided the maker makes the statement contemporaneously with the transaction recorded or so soon thereafter that the court considers it like that the transaction was at that time still fresh in his memory.²⁰ The plausible conclusion from section 41 of the Act is that electronic evidence is admissible just like in section 84. However, unlike section 84 which stipulates the conditions for the admissibility of computer or electronically generated evidence, section 41 and its kindred provisions of sections 51 and 52 of the Act do not lay down such conditions.

It is therefore glaring from the above that there is a conflict between sections 84 of the Act on the one hand and sections 41, 51 and 52 on the other hand. It is therefore my opinion that section 84 is the general rule on the admissibility of electronic evidence in Nigeria while sections 41, 51 and 52 are the exceptions to the rule. This is hinged on the Supreme Court decision in *Jack v Unam*²¹ where it

¹⁸ n. 16

¹⁹ See for example, P.A. Anyebe, "Appraisal of Admissibility of Electronic Evidence in Legal Proceedings in Nigeria" available online at Microsoft Word - JLPJ-Vol.92 2019 (iiste.org) and accessed 23-08-2021

²⁰ Similar provisions are contained in sections 51 and 52 of the Act

²¹ (2004) 5 NWLR (Pt. 865) 208



was held that where there is a special provision in a statute, a later general provision in the same statute capable of covering the same subject matter is not to be interpreted as derogating from what has been specially provided for individually, unless an intention to do so is unambiguously declared.

It is also an accepted canon of construction that where there are two provisions, one special and the other general, covering the same subject matter, a case falling within the words of the special provision must be governed thereby and not by the terms of the general provision.²² Therefore, it is my conclusion on this issue that while section 84 of the Evidence Act 2011 is the general provision for the admissibility of computer-generated evidence provided all the conditions stipulated therein are satisfied, computer-generated evidence pursuant to sections 41, 51 or 52 of the Act needs not satisfy those conditions as they constitute the exceptions to the general rule.

8.0 ISSUES FROM THE ADMISSIBILITY OF COMPUTER-GENERATED EVIDENCE IN NIGERIA AND THE UNITED KINGDOM

8.1 One of the major issues worthy of discussion on admissibility of computer generated evidence in Nigeria and the United Kingdom is the classification of such evidence generated from a computer system. Although computer generated evidence are admissible in evidence in both jurisdictions and the provisions of their respective laws are basically the same, they are however different on the classification of such evidence. While the issue of classification of computer-generated evidence is not a problem under Nigerian Evidence Act 2011, as computer and other electronic or telecommunication devices qualify as document within the meaning of section 258(1) of the Act.²³ It is therefore safe to conclude that computer generated evidence, by whatever form it comes is always classified as documentary evidence²⁴ in Nigeria especially by the provision of section 258 (1) (d) of the Evidence Act (2011).²⁵ In fact, in the Nigerian case of *Orogun & Anor v Fidelity Bank*,²⁶ the court held that a mobile phone tendered in evidence is admissible as documentary evidence.

²² *F.M.B.N. v Oloho* (2002) 9 NWLR (Pt. 773) 475 per Uwaifo, JSC

²³ By the definition of 'computer' and 'document' above

²⁴ Documentary evidence is such evidence derived by the court from the inspection of some documents produced before it.

²⁵ Which defines computer to include any device by means of which information is recorded, stored or retrieved

²⁶ (2018) LPELR-46601 (CA)



In the United Kingdom however, because neither the Civil Evidence Act nor the PACE Act defines document, the classification of evidence into documentary or real evidence has always been left for the courts to decide. Therefore, in *R. v Spiby*,²⁷ the English Court of Appeal held that printouts from an automatic telephone call logging computer installed in a hotel were admissible as they constituted real evidence.²⁸ A similar decision was reached in *Castle v Cross*.²⁹ The implication of the above is that while any electronic evidence, be it a print out of an email correspondence, a computer system or any electronic device is treated as documentary evidence within the meaning of section 258(1) of the Nigerian Evidence Act 2011, such evidence is regarded as real evidence in the United Kingdom.

8.2 Another major issue that must be clarified on the admissibility of computer-generated evidence is the difference between the conditions stipulated in section 84(2) of the Nigerian Evidence Act which is equivalent with section 5(2) of the Civil Evidence Act and the requirement of production of certificate of compliance in subsection 4 thereof. While subsection 2 imposes the conditions to be satisfied for computer-generated evidence to be admissible in evidence, subsection 4 only relates to production of a certificate to prove the content of a computer-generated document so tendered and admitted. By way of illustration, let us assume that the document to be tendered in court is a laptop computer, a digital camera or a compact disc in which certain information is stored or recorded (computer or digital camera qualifies as a document under section 258(1) (d) of the Evidence Act 2011), the conditions contained in section 82 (2) must be satisfied before the laptop, digital camera or compact disc would be admitted in evidence. However, to prove the content of the said laptop, digital camera or compact disc, a certificate of compliance must also be produced to show compliance with the conditions contained in 84(4) which are to:

- (a) Identify the document containing the statement and describe the manner it was produced.
- (b) Give such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer
- (c) Treat or deal with any matter under section 84(2).
- (d) The certificate is to be signed by a person occupying a responsible position in relation to the operation of the relevant device used or the management of the relevant activities

²⁷ [1991] *Crim. L.R.* 199 (C.A.Cr.D.)

²⁸ Real evidence is such evidence derived by the court from the inspection of physical objects other than documentary evidence which could be a place, a person or anything.

²⁹ [1985] 1 *ALL ER* 87



8.3 Similarly, it needs to be clarified that while section 84(4) of the Evidence Act 2011, which is equivalent with sections 5(4) of the Civil Evidence Act and section 69 of the PACE act only provides for production of certificate to prove the content of computer-generated evidence, oral evidence may be called as substitute to the certificate of compliance. Therefore, with utmost respect to the view expressed by Honourable Justice Alaba Omolaye-Ajileye that oral evidence may not be used as substitute to the certificate stipulated in section 84(4) of the Evidence Act 2011,³⁰ I strongly hold be view that oral evidence can be used as a substitute. This is because, in the United Kingdom, even though by virtue of section 5(4) of the Civil Evidence Act and paragraph 8 part II of Schedule 3 to the PACE Act, a certificate of compliance is required to prove the content of computer-generated evidence, the court may still call for oral testimony as substitute to the certificate as paragraph 9 part II of the Schedule provides that 'notwithstanding paragraph 8 above, a court may require oral evidence to be given of anything of which evidence could be given by a certificate under that paragraph.'

This position has also been supported by the English case of *R v Sheperd*³¹ where it was held that where a certificate of compliance is not produced, oral evidence of a person familiar with the operation of the computer can be given of its reliability and functionality, and that such a person need not be a computer expert. This decision has also been followed by Nigerian courts in cases like *Jubril v FRN*³² and *Brila Energy Ltd v FRN*.³³ The summary of the above is that even though section 5(4) of the Civil Evidence Act which is equivalent with section 84(4) of the Evidence Act 2011 only provides for the provision of certificate of compliance, call for oral evidence as a substitute to the certificate.

A question may then be asked that since the means of proving the conditions in section 84(4) of the Nigerian Evidence Act is by production of a certificate, how will a party who intends to tender a computer-generated document in evidence show compliance with the provision of subsection 2? The simple answer to the poser is that compliance with the conditions under subsection 2 is by oral

³⁰ Alaba Omolaye-Ajileye, "Administration of Justice in Electronic Age: Pertinent Issues". Being a paper delivered at the 2017 Induction Course for Newly Appointed Judges and Kadis in Nigeria, organized by the National Judicial Institute, Abuja on Monday, 10th day of July 2017. Available online at Microsoft Word - NJI ADMINISTRATION OF JUSTICE IN ELECTRONIC AGE..doc and accessed 23-08-2021

³¹ (1993) AC 380

³² (2018) LPELR-43993 (CA)

³³ (2018) LPELR-43926 (CA)



evidence. This has been given a judicial backing by the Supreme Court of Nigeria, per Onoghen JSC (as he then was) in the case of *Kubor v Dickson*,³⁴ where he affirmed the decision of the trial court with approval that:

A party that seeks to tender in evidence a computer-generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act, 2011.

It is therefore clear from the above that there is no special procedure to show compliance with the conditions stipulated in section 84(2) of the Evidence Act 2011. It is sufficient for a party who seeks to tender a computer-generated document to simply call oral evidence either by way of an affidavit or a witness statement on oath. Once this is done, the conditions contained in section 84(2) have been sufficiently complied with.

9.0 CONCLUSION

The advancement in the information and telecommunication technology (ICT) sector has impacted human life in ways unimaginable. ICT has advanced to such an extent that man practically cannot do anything without making use of the ICT opportunities and the legal profession is not left behind. One of the major impacts of ICT in the legal profession is the issue of evidence generated electronically. While paper-based evidence used to be the only admissible form of documentary evidence in Nigerian courts, ICT has made it possible for evidence to be stored in a computer system and other electronic gadgets hence the development of what is now known as computer or electronically generated evidence.

Although the Supreme Court of Nigeria has long held in the case of *Esso W.A. v Oyegbola* that documentary evidence is admissible in judicial proceedings in Nigeria, it was only in 2011 that the issue of admissibility of computer-generated evidence is statutory recognised in section 84 of the Evidence Act 2011.

Unlike Nigeria which only statutorily recognised the admissibility of computer-generated evidence in 2011, computer evidence has been recognised in the United Kingdom as far back as 1968 in section 5 of the Civil Evidence Act of 1968 and section 69 of the PACE Act of 1984. As most of the legislations enacted by the Nigerian legislatures are copied from the United Kingdom, it does not come as a surprise that the provision of section 84 of the Evidence Act 2011 of Nigeria is entirely copied from section 5 of the Civil Evidence Act of the United Kingdom.

³⁴ *Kubor v. Dickson* (n. 16)



Despite the similarities in the two provisions however, they have some dissimilarities in their applications. One of such dissimilarities is the recognition of computer evidence as real evidence in the United Kingdom while such evidence is classified as documentary evidence in Nigeria.

The conclusion of this paper is therefore that even though the provisions of the Civil Evidence Act of 1968, the PACE Act of 1984 (both of the United Kingdom) and the Nigerian Evidence Act of 2011 are essentially the same on the admissibility of computer-generated evidence, they still differ on some issues especially on the classification of such computer evidence into documentary or real evidence. However, their differences on the identified issues are minute and of no great significance.