

# ADMISSIBILITY OF ELECTRONIC EVIDENCE IN NIGERIA: SOME CONTENDING ISSUES

*Sam Erugo\**

## **Abstract**

The admissibility of electronic evidence has always been technical, contentious and controversial in Nigeria. Before the enactment of the Evidence Act of 2011, a party wishing to rely on electronic evidence, including emails, computer generated documents, etc., faced an uphill legal task in tendering same before the court. A lot of energy was wasted in objections to the documents being admitted in evidence. The latest Act would appear to have addressed several issues of admissibility of electronic evidence, essentially by an elaborate definition of document to include electronic evidence. The Act also consciously addressed several other issues of admissibility so much so that today most decided cases under the defunct statute have become out-dated and redundant. So far, and correspondingly, the courts have been progressive in interpretation of relevant provisions. Consequently, most age-long preliminary objections to the admissibility of electronic evidence became innocuous. However, the matter is not that simple in practice. This paper emphasizes the real basis of admissibility of electronic evidence and the importance of such in trial, assesses the current legal framework and provisions for the admission of such evidence under the Evidence Act 2011 *vis a vis* the defunct Act, and concludes that there are still contending issues and challenges in the application of extant provisions. In addition, there are the related issues of weight to be attached to admitted electronic evidence as well as the exceptions that call for ingenuity.

## **I. Introduction**

Evidence includes any piece or chunk of information submitted in proof or disproof of a fact in issue. The essence is to clarify the fact in issue, and essentially assist in establishing the truth or justice of a case. So, it could be oral, real or documentary information related to a fact in issue that can be determined either by admission or evidence [unless there is admission]. Accordingly, proof of fact in issue is by evidence, and the basic rule of evidence is encapsulated in various rules of pleading, relevance and admissibility in law. Thus, for any piece of evidence to be useful to the court, it must be both pleaded, relevant and admissible under the extant rules of evidence. From time immemorial, documents or documentary evidence have been accepted as admissible in court as evidence -usually the best as it eliminates much of the challenges of oral evidence. However, the question is usually what form of document is admissible, and the requirements or conditions for such admissibility under the rules of evidence? Admissibility of electronic evidence, a later and dynamic technological development, has always been contentious! The Evidence Act of 2011 would appear to have expanded the repertoires of documents to specifically include electronic evidence and streamlined its admission, but the legal

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\* Sam Erugo, Professor of Law, PhD, LL.M, LL.B, BL., Faculty of Law, Abia State University, Umuahia  
[sam.erugo@yahoo.com](mailto:sam.erugo@yahoo.com)

framework still raises several contending issues in the legal process. This paper attempts to highlight the new position of the law on admissibility of electronic evidence, the potentials, contending issues and challenges in practical application. The article is divided into six sections, the abstract, introduction, conceptual clarification, legal framework, contending issues, and conclusion.

## II. Conceptual clarification

There is need to clarify some concepts commonly used in this work. These include:

### a Admissibility

‘Admissibility’ is the rule of evidence that determines whether evidence can be received in court: *Faramoye v The State*.<sup>1</sup> A piece of evidence is said to be admissible if it is allowed in court. Admissibility is ‘the concept in the law of evidence that determines whether or not evidence can be received by the court. The evidence must first be relevant, but even relevant evidence will be tested for its admissibility.’<sup>2</sup>

### b Document

The Evidence Act 2011 s258 defines a ‘document’ as:

- (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 those means, intended to be used or which may be used for the purpose of recording that matter.
- (b) Any disc, tape, soundtrack 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 of the equipment) of being reproduced from it; and
- (c) Any film, negative, tape or other device in which one or more visual

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<sup>1</sup>

(2017) LPELR – 42031(SC)

<sup>2</sup> *Collins Dictionary of Law* <<https://legal-dictionary.thefreedictionary.com/admissibility>> accessed 14 November 2019

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.

Under same s258, "copy of a document" includes:

- (a) in the case of a document falling within paragraph (b) but not (c) of the definition of "document" in this subsection, a transcript of the sounds or other data embodied in it;
- (b) in the case of a document falling within paragraph (b) but not (c) of that definition, a reproduction or still reproduction of the image or images embodied in it whether enlarged or not;
- (c) in the case of a document falling within both those paragraphs, such a transcript together with such a still reproduction; and
- (d) in the case of a document not falling within the said paragraph (c) of which a visual image is embodied in a document falling within that paragraph, a reproduction of that image, whether enlarged on not, and any reference to a copy of the material part of a document shall be construed accordingly.

### **c Computer**

**"Computer"** means

Any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process.<sup>3</sup>

### **d Electronic evidence**

**‘Electronic evidence’**, sometimes also referred to as ‘digital evidence’ or ‘computer evidence’ is

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<sup>3</sup> EA 2011, s258

curiously not defined by the Evidence Act 2011.<sup>4</sup> Omolaye-Ajileye<sup>5</sup> has adopted the definition by Schafer and Mason:

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 has potentials to make the factual account of either party more probable or less probable than it would be without evidence.<sup>6</sup>

Omolaye-Ajileye rightly posits that the definition consists of three elements:

first, all forms of data created, manipulated or stored in a computer. Second, it encompasses the various forms of devices by which data can be stored or transmitted...third ...attempts to take care of the meaning of the word evidence' as information that has the potentials to make the factual account of either party more probable or less probable that it would be without evidence.<sup>7</sup>

Thus, electronic evidence covers a wide range of electronic materials in various devices, and not restricted to those stored or generated from computers.

### III. Legal framework

The legal framework remains largely under same subject heads as under the defunct Evidence Act 2004 but modified to permit the benefits of technological development. The Evidence Act 2011 simply modified 'the general rules to permit the 'admission of electronically generated documents under certain conditions which are enumerated'<sup>8</sup> thereunder. Before the advent of the current legislation, 'technologically generated evidence was argued to offend some of the following general rules of evidence':

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<sup>4</sup> Evidence Act 2011 recognises a "statement contained in a document produced by a computer": EA 2011, s84(1). The phrase covers all the categorizations: electronic evidence, computer evidence, or digital evidence.

<sup>5</sup> Alaba Omolaye-Ajileye, *Electronic Evidence* (Jurist Publications Series, Lokoja, 2019) 74

<sup>6</sup> *Ibid*, see also Burkhard **Schafer** and Stephen Mason 'The Characteristics of Electronic Evidence'. In Stephen Mason and Daniel Seng (eds.) *Electronic Evidence* (University of London, 2017) 19

<sup>7</sup> *Ibid* 75

<sup>8</sup> Legal Alert – May 2012 – 'Admissibility of Electronic Evidence' <[www.oseroghoassociates.com/articles/30-admissibility-of-electronic-evidence?print=1&download=0](http://www.oseroghoassociates.com/articles/30-admissibility-of-electronic-evidence?print=1&download=0)> accessed 14 November 2019

- (i) The issue of the custody and the reliability of the evidence tendered if it is not the original document.
- (ii) The best evidence rule which requires that a party must produce the original document during a trial or where the original document is not available, secondary evidence of it in the form of a copy, with other corroborating notes, etc, must be produced.
- (iii) The rule against the admission of hearsay evidence which forbids witnesses giving evidence on facts that they do not directly or personally witness or know about.<sup>9</sup>

One of the earliest popular cases on the admissibility of electronic evidence in Nigeria is the Supreme Court case of *Esso West Africa v Oyegbola*<sup>10</sup> where the court held that computer printouts were admissible. Thereafter, there was uncertainty as to when such documents would be admissible. In that case, the court was called to decide the fate of one of documents signed in quadruplicate with carbon copies through one single process as the original copy. The court relying on the repealed Evidence Act s93, held that where several documents have been made by one single act of the use of carbon paper, each of such document so reproduced is primary evidence of the other quadruplicate copies. The court further held, *albeit obiter* that ‘the law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.’ Again, in the latter case of *Oguma Associated Companies (Nig.) Ltd v I.B.W.A Limited*<sup>11</sup> the same Supreme Court advised, *obiter*, that ‘Nigerian Courts need to become circumspect in interpreting Section 96 of the ... Evidence Act in the light of modern day banking procedures and gadgets such as computers which are now increasingly used by businesses.’<sup>12</sup>

Similarly, in the case of *Yesufu v A.C.B.*<sup>13</sup> the document in issue was a bank statement prepared from the Ledger Card of a Bank by a Machinist. The Machinist reportedly obtained the entries from the Bank’s day-to-day Vouchers. Incidentally, the bank officer who tendered the bank statement admitted he neither personally prepared the statement nor did he verify that the

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<sup>9</sup> *Ibid*

<sup>10</sup> (1969) 1 NMLR 194

<sup>11</sup> (1988) 1 NSCC 395, 413

<sup>12</sup> Legal Alert – May 2012 (n8)

<sup>13</sup> (1976) 4SC 1 @ 9-14; cf. *Anyaebo v R. T. Briscoe* [1987] 3 NWLR (Pt 59) 84

statements were correct. The Supreme Court overturned the lower court's admission of the bank statement as offending the provisions of Section 96(1)(h) of the repealed Evidence Act. The court observed that though entries were derived from the day-to-day vouchers of the bank, it did not qualify, without other supporting oral evidence, as a bankers' book and therefore inadmissible. The Court in referring to the *obiter* in *Esso West Africa v Oyegbola*<sup>14</sup> stated that '... it would have been much better, particularly with respect to a statement of account contained in a book produced by a computer, if the position is clarified beyond doubt by legislation as has been done in the English Civil Evidence Act, 1968.' This prediction has come to pass in the Evidence Act 2011 which adopted the suggested approach of the English Civil Evidence Act, 1968.

'The cardinal codifications in the Evidence Act 2011' have been observed<sup>15</sup> to constitute the provisions regarding the concept of document and the admissibility of electronic evidence in sections 84, 258 and 34(1)(b). These provisions received judicial *imprimatur* in the case of *Kubor v Dickson*.<sup>16</sup>

Thus, the change was predicted, and the extant legal framework for the admission of electronic evidence encompasses:

- i. Rules of evidence on pleading, relevance<sup>17</sup> and admissibility<sup>18</sup> which constitute preconditions for admissibility of documents generally.
- ii. The expansive definition of documents: Evidence Act 2011 s258
- iii. Admissibility of electronically generated evidence: Evidence Act 2011 s84 specifying the conditions for the admissibility of such evidence
- iv. Rules of evidence providing exceptions and weight to be attached to documents

#### **a. Pre-conditions for admission**

General rules of evidence on pleading, relevance and admissibility impose pre-conditions.

Section 2 of the extant Evidence Act provides *inter alia*, that:

all evidence given in accordance with section 1 shall, unless excluded in

<sup>14</sup> *Esso West Africa v Oyegbola* (n10)

<sup>15</sup> Olushola Abiloye, 'Impact of Supreme Court's decision on development of e-commerce in Nigeria: Issues and prospects', *The Guardian*, 05 May 2015 <<https://guardian.ng/features/impact-of-supreme-courts-decision-on-development-of-e-commerce-in-nigeria-issues-and-prospects>> accessed 14 November 2019

<sup>16</sup> [2013] All FWLR (Pt 676) 39

<sup>17</sup> EA 2011, s1

<sup>18</sup> *Ibid*

accordance with this or any other Act, or any other legislation validly in force in Nigeria, be admissible in judicial proceedings to which this Act applies:

Provided that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act.

Generally, there are three basic criteria governing admissibility of documents, including electronic evidence: These are:

1. Pleadings: it must be pleaded in civil cases. The rule of exclusion of evidence of facts not pleaded by a party is sacrosanct. The trite position of the law remains that evidence of any facts not pleaded, goes to no issue: *Emegokwe v Okadigbo*.<sup>19</sup>
2. Relevance to the facts in issue: See *Kubor & Anor v Dickson*.<sup>20</sup>  
"Fact in issue" includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows.<sup>21</sup>
3. It must be admissible in law [cf hearsay evidence<sup>22</sup>, opinion evidence<sup>23</sup>, character evidence<sup>24</sup>, etc.] whether relevant or not.

In the case of electronic evidence, there are additional conditions prescribed under the new provisions which must be satisfied. This has been illustrated in quite several cases: *Kubor & Anor v Dickson*<sup>25</sup>, *UBN Plc v Agbontaen & Anor*<sup>26</sup>, *Omisore v Aregbesola*<sup>27</sup> and *Dickson v Sylva*.<sup>28</sup>

The facts of the case of *Kubor & Anor v Dickson*<sup>29</sup> are apt here:

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<sup>19</sup> (1973) 4 S.C. 113; *Ajukwara v Izuoji* (2002) 100 LRCN 1699

<sup>20</sup> *Kubor v Dickson (n16)*; see also EA 2011, ss 4-13 on relevancy

<sup>21</sup> EA 2011, s258

<sup>22</sup> *Ibid* s162. Cf. s 258 defines "real evidence" as meaning 'anything other than testimony admissible hearsay...'

<sup>23</sup> *Ibid* s67

<sup>24</sup> *Ibid* ss78-87

<sup>25</sup> (2012) LPELR 15364 (CA), [2013] 4 NWLR (Pt 1345) 534

<sup>26</sup> (2018) LPELR-44160(CA)

<sup>27</sup> (2015) LPELR 24803 (Sc)

<sup>28</sup> (2016) LPELR 41257 (SC)

<sup>29</sup> *Kubor v Dickson(n16)*, facts culled from Olushola Abiloye (n15)

This was an election petition matter. The Appellants challenged the election and return of the 1st Respondent as a Governor in the February 11, 2012 governorship election. They tendered from the Bar a printout of the online version of the Punch Newspaper and another document from the website of the Independent National Electoral Commission (INEC), the 3rd Respondent in the appeal. While the electronic version of The Punch Newspaper was admitted and marked Exhibit “D”, the document from INEC’s website was admitted and marked Exhibit “L”. Sadly, the Appellants did not satisfy the conditions laid down in section 84(2) of the Evidence Act with respect to the admissibility of electronic evidence. As expected, the matter went on appeal and one of the contentions was that since Exhibits “D” and “L” were public documents, only certified copies thereof were admissible in evidence; and that in any case, the documents having been tendered from the Bar without the foundational conditions set out in section 84(2) of the evidence Act being satisfied, both documents were inadmissible in evidence.

The Supreme Court agreed with the above submissions. In the lead judgment the court stated that:

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 admission 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 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.”

The same conclusion was reached in *UBN Plc v Agbontaen & Anor*<sup>30</sup> where the Court adopted the reasoning of *Kubor & Anor v Dickson*<sup>31</sup> in the following words:

<sup>30</sup> (2018) LPELR-44160(CA), Per Oseji, J.C.A. at 11-22, paras E-B

<sup>31</sup> *Kubor v Dickson*(n16), facts culled from Olushola Abiloye (n15)

..., I am inclined to accept the fact that the case of *Kubor v Dickson* ... is applicable. Therein this Court while analysing the requirements for the admissibility of documents produced by a computer as provided for under the Section 84 (1) and (2) of the Evidence Act 2011 held *inter alia* ... as follows: "Section 84(2) provides for the conditions to be satisfied in relation to the statement and computer from which the documents sought to be tendered and admitted were produced. A party who 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 computer must be called to establish the conditions set out under section 84(2) of the Evidence Act.<sup>32</sup>

The Evidence Act 2011 s84 must be distinguished from the requirements under the Evidence Act 2011 ss51, 89(1) (h) and 90(1)(e). The contending issue and confusion in the two regimes are illustrated by the recent case of *UBN Plc v Agbontaen & Anor.*<sup>33</sup> In this case the issue concerned the conditions for admissibility of computer-generated documents, specifically Bank Statements of Account, and the Court of Appeal observed thus:

The issue in contention between the parties is whether the 2nd Respondent's statement of account sought to be tendered in evidence by the Appellant but rejected by the trial Court for being inadmissible complied with the relevant provisions of the Evidence Act, 2011. For the Appellant, the relevant provisions of the Evidence Act governing the admissibility of the said document is sections 51, 89(1)(h) and 90(1)(e). But the Respondents are of a contrary stance by insisting that the governing provision is Section 84 of the Act which the learned trial Judge relied on rejecting the admissibility of the said statement of account.

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<sup>32</sup>See further cited Supreme Court cases of *Omisore v Aregbesola* (2015) LPELR 24803 (SC), per Nweze, JSC, and *Dickson v Sylva* (2016) LPELR 41257 (SC) that such electronic generated evidence must be certified and must comply with the pre-conditions laid down in Section 84(2) ... whether tendered as original or secondary evidence

<sup>33</sup> (2018) LPELR-44160(CA), Per Oseji, JCA at 11-22, paras E-B

The Court of Appeal in analysing the relevant provisions of the Evidence Act 2011, ss 51, 84(1), 89(1)<sup>34</sup> and 90(1)<sup>35</sup>, stated as follows:

It is however worthy of note that while the learned counsel for the Appellant insists that the provisions of section 84 of the Evidence Act, 2011 is of general application and sections 89(1) (h) and 90 (1) (e) of specific application in which case they take priority over the former. I do not however see it that way. It is ..., the other way round(sic). What is more, while section 84 prescribed the conditions for the admissibility of statements in documents produced by computers, sections 89(1) (h) and (90) (1) (e) deal with admissibility of secondary evidence generally, and the conditions for their admissibility... It thus emphasises the imperative nature of the provisions of section 84 of the Act with regard to admissibility of document produced by computer whether being tendered in evidence as a primary (original) or secondary evidence...on the other hand, sections 89 (1) (h) and 90(1)(e) deal with the admissibility of secondary evidence generally, including banker's books and not limited to electronic or computer derived documents. In the instant case, I believe that there is no disputing the fact that the statement of account sought to be tendered had its origin from a computer whether or not it is asserted to be extracted from an electronic ledger which to all intents and purposes the information therein was imputed through a computer and the print out also derived therefrom. The point that I am trying to make here is that, whether the statement of account or electronic ledger is to be tendered either in its original form or as a secondary evidence it is required that it must satisfy the conditions prescribed by Section 84 of the Act.

Thus, the pre-conditions are settled.

**b. The expansive definition of documents**

The definition under the Evidence Act s258 is wide enough to include electronic evidence, though the expression is not used. By this definition, document:

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<sup>34</sup>Secondary evidence may be given of the existence, condition or contents of a document in the following cases:.. (h) when the document is an entry in a banker's book.'

<sup>35</sup> 'The secondary evidence admissible in respect of the original documents referred to in the several paragraphs of Section 89 is as follows: ...'

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 for the purpose of recording that matter.

The definition expands the meaning of the word ‘document’ beyond paper-based materials, and more extensive than the definition under the defunct Evidence Act. Section 258 is widely interpreted, unlike the repealed Act where the word was restrictively interpreted, and that had posed serious challenge to admissibility of electronic documents. For instance, in *Nuba Commercial Ltd v NAL Merchant Bank*<sup>36</sup> bank’s record of transactions between the parties stored in the bank’s computer and reproduced was held inadmissible. Again, in *Udoro & Ors v Governor Akwa Ibom State*<sup>37</sup> the definition of ‘document’ under the repealed Act did not include a video cassette. Under the previous regime it was not predictable.

### **c. Admissibility of electronically generated evidence**

Section 84 of the Evidence Act, 2011 specifically provides for admission and the conditions for admissibility of electronically generated evidence. The section has five subsections streamlining the admissibility of electronic evidence while stipulating processes and conditions.<sup>38</sup> Section 84(1) provides that:

In any proceeding, a statement contained in a document produced by computer shall be admissible, if it is shown that the conditions in subsection (2) of this Section and satisfied in relation to the statement and computer in question (Emphasis supplied)

So, while section 84 (1) renders electronic evidence admissible, section 84(2) prescribes four conditions to be fulfilled:

- a) the statement sought to be tendered was produced by the computer during a period when it was in regular use, to store or process information for the purpose of any activity regularly carried on over that period;
- b) during that period of regular use, information of the kind contained in the document or statement was supplied to the computer;

<sup>36</sup> [2003] FWLR (Pt 145) 661

<sup>37</sup> [2010] 1 NWLR (Pt 1205) 322

<sup>38</sup> See Omolaye-Ajileye (n5) 74

- 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.

The real essence of the conditions stipulated under section 84(2) is the requirement of the witness to lay proper foundation for admissibility of electronically generated evidence: See *Kubor v Dickson*<sup>39</sup>, on the need to lay ‘necessary foundations for admissibility of e-documents.’ The rejection of the Internet Printouts, Exhibit “D” and “L” in *Kubor & Anor v Dickson & Ors* was on the basis that there was insufficient foundational evidence to render the document admissible. There was no fact in the deposition of the affected witness to fulfil the conditions in Section 84 (2)-facts required by section 84[2] must be contained in the Statement of Witness on Oath. In criminal cases facts must be stated.<sup>40</sup>

Fulfilment of section 84(2) is mandatory.<sup>41</sup> This point is clear and evident from the cases of *Kubor v Dickson & Ors*<sup>42</sup>; *Akeredolu & Anor v Mimiko & Ors*;<sup>43</sup> *Omisore & Anor v Aregbesola & Ors*;<sup>44</sup> and *Dickson v Silva & Ors*.<sup>45</sup>

The next question is who should prove the conditions under Section 84(2)? This need not be an expert: *R v Shephard*.<sup>46</sup>

Section 84(3) provides that where the function of storage or processing is performed by combination of computers or different computers, all the computers used for that purpose shall be treated as constituting a single computer.

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<sup>39</sup> [2013] 4 NWLR (Pt 1345 )534

<sup>40</sup> Omolaye-Ajileye (n5) 74

<sup>41</sup> Omolaye-Ajileye, (n5) 75

<sup>42</sup> *Kubor v Dickson* (n29)

<sup>43</sup> (2013) LPELR-20532

<sup>44</sup> [2015] 15 NWLR (Pt 1482)205

<sup>45</sup> (2016) LPELR-41257(SC)

<sup>46</sup> (1993) 1 All ER 225

Section 84(4) requires the production of a certificate of authentication. This means that the party offering electronic evidence must adduce enough evidence to support a finding that the document in question is what it purports to be.<sup>47</sup> It must be genuine!

Why does electronic evidence require authentication? Vulnerable to manipulation - can easily be altered or manipulated-can be copied, forwarded, updated, intercepted or even deleted; changes to photographs and videos can easily be made by using Photoshop and graphic design programs. See *Araka v Egbue*<sup>48</sup>:

in this age of sophisticated technology, photo-tricks are the order of the day ... Phototricks could be applied in the process of copying the original document with the result that the copy which is secondary does not completely or totally reflect the original... Courts have no eagle eye to detect such tricks.

The question is how do you satisfy this requirement of certificate of authentication? No form is prescribed in the Act. In India, affidavit is required.<sup>49</sup>

Exceptions to Section 84(4) include where it becomes impossible to tender a certificate; and where the opponent is in control of the computer that produced the electronic document.

#### **IV. Contending issues:**

Contending issues include

##### **i. Wider ambit of definition of document**

There is no argument that the legislature intended wide scope, and the courts appear to give the section expansive interpretation in a seeming change of attitude: Tape recordings were tendered and accepted as documents in *Federal Polytechnic, Ede & Ors v Oyebanji*.<sup>50</sup> Video tape was admitted in *Obatuga & Anor v Oyebokun & Ors*<sup>51</sup> and held to qualify as a document; and hand-held devices like smartphones are documents as well.

<sup>47</sup> See *Omolaye-Ajileye*, (n5) 75; *Mason & Stanfied*(n6) 19

<sup>48</sup> (2003)7 SCNJ 114, *Tobi*, JSC at 126

<sup>49</sup> *Omolaye-Ajileye* (n5) 241

<sup>50</sup> (2012) LPELR – 19696(CA)

<sup>51</sup> (2014) LPELR – 22344 (CA)

- ii. There is still need to lay foundation in view of listed conditions -as demonstrated by *Kubor v Dickson & Ors.*<sup>52</sup>
- iii. There is clear recognition of the vulnerability of such documents- hence certificate of authentication is required
- iv. There is presumption as to electronic messages: Section 153 of the Evidence Act presumes the accuracy of electronic mails, etc. The court may presume the accuracy of an electronic mail message but shall not make any presumption as to the person to whom the message is sent.
- v. Weight  
Section 34(1)(b) guides the court weight to be ascribed to electronically generated evidence already admitted. See *Jibril v FRN*<sup>53</sup> - it may be admitted but will not pass the accuracy test under section 34(1) - need to lead evidence to create doubt. Evidence Act, 2011 s34 recognises the possibility of reproduction of electronic documents and therefore prescribes it as one of the factors to be considered by the court in ascribing weight to such evidence.
- vi. Some objections to admissibility of electronic evidence under the repealed Act would not stand under the Evidence Act, 2011. For example:
  - a) Section 84(1) now recognises “a statement contained in document produced by a computer” as a document
  - b) As against argument that electronic evidence is hearsay and inadmissible - Section 41 now provides as an exception to hearsay rule where it “consists of any entry or memorandum made... in electronic device kept in the ordinary course of business...”
  - c) In any event, the fact that a document is produced by computer does not necessarily make it a hearsay.

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<sup>52</sup> *Kubor v Dickson*(n29)

<sup>53</sup> (2018) LPELR – 439931(CA)

- d) As against objection to electronic evidence as not original but secondary evidence requiring foundation being laid “Section 84 does not recognise the existence of any dichotomy in the nature and character of electronically generated as to qualify it as primary, original or secondary evidence. It only recognises a statement contained in a document produced by computer.”<sup>54</sup> Again, the facts required to be proved as conditions under section 84(2) constitute foundational evidence: *Kubor & Anor v Dickson & Ors*<sup>55</sup> on “necessary foundation.” Thirdly, the very nature and process of generating electronic document make it look like and it should be treated as original.<sup>56</sup>
- e) As against objection on the ground that the maker of an electronic document has not been called as a witness. Section 84 does not focus on the maker of a document but its producer, that is, the computer: *Brila Energy Ltd v FRN*<sup>57</sup> held that section 83 is inapplicable to electronically generated document – ‘when it comes to computer generated documents, the provision of section 83 has been excluded.’<sup>58</sup>
- f) There is need for extra caution as the admissibility of electronic evidence remains technical despite the improvement on the regime. It has been rightly observed that:

Electronic evidence is becoming more and more prevalent in lawsuits. Therefore, significant time should be devoted to identifying and analysing the authentication and admissibility issues relative to the electronic data involved in the litigation. Addressing these issues at the earliest possible phase is critical to a successful evidentiary presentation on summary judgement, at a hearing or at trial. The groundwork for establishing the

<sup>54</sup> Omolaye-Ajileye, (n5)182

<sup>55</sup> *Kubor v Dickson*(n16)

<sup>56</sup> Omolaye-Ajileye (n5) 290. Contrast, *Anyaebosi v R.T. Briscoe* (1987) NSCC (Pt 11) 805, the Supreme Court recognised a computer printout as secondary evidence decided under the repealed Act.

<sup>57</sup>(2018) LPELR-43926(CA)

<sup>58</sup>*Ibid*, Jummai Hannatu Sankey, JCA

authenticity and admissibility should begin as soon as the information is gathered and reviewed as additional discovery may be required to ensure that the electronic evidence can be used in Court.<sup>59</sup>

## V. Conclusion

By the copious provisions of the Evidence Act 2011, the admissibility of electronic evidence has become firmly established in Nigeria. Essentially, the provisions accord due recognition to human development, specifically in the area of information or computer technology. This has seen an extensive repertoire of admissible documents including, electronic, digital or computer evidence, though without precise statutory definition of any of those terms. Consequently, the admissibility of electronic evidence is streamlined in a regime that incorporates general rules of admissibility of documentary evidence, in processes and under conditions that take into consideration current realities. The courts have risen to the occasion in proactively wide interpretation. However, despite the prospects of the new provisions for admissibility of such electronic evidence, there are several contending issues and challenges in the practical application of the law. The most critical issues include the failure of legislature to define electronic evidence and prescribe the form of certification required to make such evidence admissible. Accordingly, there is possibility of admission of every electronically generated document that satisfies the requirements of the Evidence Act 2011, s84. This is so because the issues of custody, reliability and best evidence rule would appear to have given way without adequate assurance of authenticity. There is need for urgent statutory intervention to assuage the contentions of practitioners and stakeholders.

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<sup>59</sup> Zachary G. Newman and Anthony Ellis, 'The Reliability, Admissibility and Power of Electronic Evidence' January 25, 2011, *Litigation Section of the American Bar Association Journal*; see also, *Legal Alert – May 2012*, (n8)