Commentary on the Paper Electronic Evidence in Admiralty Practice

by

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1. Introduction

Use of electronic communication and documents to facilitate international carriage of goods is not new in several jurisdictions including Nigeria. What is novel is that Nigerian legislature finally in 2011 amended our Evidence Act of 1958 to accommodate modern realities. In judicial calendar, a law enacted in 2011 is very very fresh and thus one may not find adequate judicial precedence on the subject matter. This is even more so as it relates to shipping litigation. It is for that reason I believe, the two main speakers have relied heavily on non Admiralty case laws to explain the operation of Section 84 of the Evidence Act, 2011. The lead presenters have provided a comprehensive critical review of Section 84 of the Evidence Act. This Commentary attempts to review some of the issues highlighted in the main presentations from a different perspective.

2. Electronic Evidence Prior to the Promulgation of the Evidence Act 2011

Prior to the Evidence Act 2011, the various laws on evidence from 1958 to 2011, were silent on the admissibility of electronic evidence. Admissibility of such evidence depended on fulfilling the requirements that governed the admissibility of documents generally, in their primary or secondary forms. It is interesting to note that the world of commerce and indeed the judiciary long desired the reform of our laws to specifically provide for the peculiarities of electronic evidence and its admissibility in court. The Supreme Court, as far back as 1976 in *Yesufu v African Continental Bank (1976) ALL NLR 264 at 273 to 274,* a banking transaction matter, observed the inadequacy of the Evidence Act, Cap 62 LFN 1958 on the admissibility of electronic evidence. In that case, reference was made by Fatayi-Williams, JSC to Section 5 of the British Civil Evidence Act 1968 which governed the admissibility of computer generated evidence in England as follows:

> "Finally, while we agree that for the purpose of sections 96(1)(h) and 37 of the Act, 'banker's books' and 'books of account' could include 'ledger cards', *it would have been much better, particularly with respect to a statement of account contained in a document produced by computer, if the position is clarified beyond doubt by legislation as had been done in England in the Civil*

Evidence Act 1968. Section 5 subsections (1) and (2) of that Act provide that in any civil proceedings, a statement contained in a document produced by a computer would, 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 certain conditions are satisfied in relation to the statement and computer in question. These conditions are:-

(a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purpose of any activities to store or process information for the purpose 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, 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 documents or the accuracy of its contents; and

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

Although, the procedure stipulated in Section of 5 of the Civil Evidence Act 1968 was not adopted in the *Yesufu's case*, being a foreign law, the Supreme Court's reference to the English legislation expressed the need for codification of similar provisions in our laws. This was eventually achieved in 2011, 35 years after that Supreme Court case. Interestingly, a review of the provisions of Section 5 of this English Civil Evidence Act and Section 84 of the Nigerian Evidence Act 2011, reveals a mirror similarity.

3. Probative Value Accorded Electronic Evidence in Admiralty Practice

3.1. Section 34 of the Evidence Act

The successful use of electronic evidence in our court system requires a litigant to scale two major hurdles i.e. admissibility of the electronic evidence and the weight to be attached to such evidence by the court. Sofowora, SAN has dealt extensively on admissibility of electronically generated evidence under Section 84 of the Evidence Act. In the hierarchy of our adjectival system, probative value comes after admissibility. A document could therefore be admitted but may not have any evidential or probative value and therefore of no benefit to the party who tendered it. Given this scenario, this paper progresses the discuss a little bit further by reviewing the provisions of the Evidence Act with respect to the weight to be attached to admitted electronic evidence. Section 34 of the Evidence Act provides:

(1) "In estimating the weight, if any, to be attached to a statement rendered admissible as evidence by this Act, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and in particular,-

(a) to the question whether or not the statement was made contemporaneously with the occurrence or existence of the facts stated, and to the question whether or not the maker of the statement had any incentive to conceal or misrepresent facts; and

(b) *in the case of a statement contained in a document produced by a computer-*

(i) the question whether or not the information which the statement contained, reproduces or is derived from, was supplied to it, contemporaneously with the occurrence or existence of the facts dealt with in that information, and

(ii) the question whether or any person concerned with the supply of information to that computer or with the operation of that computer or any equipment by means of which the document containing the

statement was produced by it had any incentive to conceal or misrepresent facts".

For a court to accord probative value to an electronic evidence two critical steps must be satisfied - (a) the maker of the electronic evidence sought to be tendered must be the one to tender same and (b) the maker of such evidence must present himself for cross-examination as to whether the requirements in section 84(2) of the Evidence Act were complied with. Where the information supplied to the computer was not so supplied by the person proposing to give evidence on same, the Court will accord little or no probative value to the electronic evidence. This principle has been upheld in a plethora of cases. We will mention just two of such cases.

Applicability of Section 34 and Section 84 of the Evidence Act to admissibility and probative value of electronic evidence was very recently considered by the Supreme Court in *Udom Gabriel Emmanuel v Umana Okon Umana & Ors (2016) LPELR-40037(SC).*

The Appellants appealed to the Supreme Court against the judgments of both the Governorship Election Tribunal and of the Court of Appeal which admitted and relied on the video recordings and compact disc of interviews of key APC members tendered by 3 of the Petitioner's witnesses. None of the Petitioners' Witnesses were the makers of the video clips which fact they admitted under cross-examination by Mr. Paul Usoro, SAN who represented the 1st Respondent. The Tribunal's admission of these electronic evidence and reliance on same as basis for nullifying elections in some Local Government Areas in Akwa Ibom State was affirmed by the Court of Appeal, but reversed by the Supreme Court.

The Supreme Court in the lead judgment delivered by Nweze, JSC reinforced the position of the law on admissibility and weight to be attached to electronic evidence as follows:

> "What is more, there is, even, authority for the view that 'as cross-examination plays a vital role in the truth-searching process of evidence procured by examination-in-chief it relates to authenticity or veracity of the witness, a court of law is entitled not to place probative value on evidence which does not pass the test of cross-examination…' Buhari v INEC [2008] 19 NWLR (pt 1120) 246, 414-415; Shinkafi and Anor v. Yari and Ors (unreported decision of this court on January 8, 2016). *In my*

view, therefore, the lower court fell into grave error on placing reliance on the said exhibits, whose makers were not available for cross examination, in tampering with INEC's declaration in favour of the appellant in the election in the said eighteen LGAs of Akwa Ibom State. The same things applies to exhibits 5 and 6 which were not tendered by their makers. Worse still, these exhibits did not indicate the date and time they were made".

In *Buhari v. INEC (2008) 19 NWLR (pt. 1120) 246 at 414-415 paras H-D*, Tobi, JSC in his leading Judgment, held thus:

> "In my humble view, the documents were rightly expunged for the following reasons: First, the witnesses who tendered them were declared incompetent by the court and so the documents cannot stand in law. This is simple logic. If the pillars supporting a building collapse, the building itself will collapse because there is no more foundation or prop upon which the building will stand. Second, the witnesses who tendered the documents were not the makers and so cannot be cross-examined on the contents of the documents. As cross-examination plays a vital role in the truth searching process of evidence procured by examination in-chief it relates to authenticity or veracity of the witness, a court of law is entitled not to place probative value on evidence which does not pass the test of cross-examination."

It is evident from the pronouncements of the Supreme Court in the two cases mentioned that compliance with section 34 of the Evidence Act by calling the maker of computer generated evidence to testify is as important as compliance with section 84 of the Evidence Act.

3.2. Electronic Evidence Obtained in Contravention of the Law

Information technology presents different challenges for admissibility and the probative value of electronic evidence. Where electronic evidence is procured improperly or in contravention of the law, will such evidence be admissible? If admitted, will the Court attach any probative value to it? Consider a scenario where Mr. A, armed with Mr. B's password accesses Mr. B's computer, without the latter's authority and retrieves highly classified information which Mr. A intends to use against Mr. B in court. The conduct

of Mr. A is an offence under the Cybercrime (Prohibition Prevention ETC) Act, 2015 ("Cybercrime Act") which provides in its Section 6(4) as follows:

> "A person or organization who knowingly and intentionally trafficks in any password or similar information through which a computer may be accessed without lawful authority, if such trafficking affects public, private or individual interest within or outside the Federation of Nigeria, commits an offence and is liable on conviction to a fine of not more than N7,000,000.00 or imprisonment for a term of not more than 3 years or both".

Having established that the procedure for procuring the electronic evidence by Mr. A contravenes the law, will the said document be admissible if it complies with the provisions of Section 84 of the Evidence Act? In making this determination, the Court would have to consider the provisions of Sections 14 and 15 of the Evidence Act which provide as follows:

> "14. Evidence obtained-
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> a) improperly or in contravention of a law; or
> b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is out-weighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained".
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> "15. For the purposes of Section 14, the matters that the court shall take into account include-
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> a) the probative value of the evidence;
> b) the importance of the evidence in the proceeding;
> c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
> d) the gravity of the impropriety or contravention;
> e) whether the impropriety or contravention was deliberate or reckless;
> f) whether any other proceeding (whether or not in court) has been or is likely to be taken in relation to the impropriety or contravention; and

g) the difficulty, if any of obtaining the evidence without impropriety or contravention of law".

All the conditions in Section 15 of the Evidence Act must first be complied with before a court can admit a document admissible under section 84 of Evidence Act if such evidence was obtained improperly or in contravention of the law. This appears to be one of the rare instances where the court must first consider and determine the probative value of the electronic evidence prior to admitting same into evidence. Apart the fact that it is in public interest to protect the sanctity of our Cybercrime laws, the use of the conjunction "and" in Section 15 of the Act signifies that all the conditions listed therein must be contemporaneously considered in determining the admissibility of an illegally obtained electronic evidence. Consequently, if any of the conditions in Section 15 is resolved against the party who seeks to tender such electronic evidence, the evidence will be rejected in evidence having been obtained in contravention of the Cybercrime Act.

3.3. Electronic Evidence: Susceptibility to Alteration

Another challenge in determining the probative value of electronic evidence, is the susceptibility of such evidence to alteration. Will the court accord an original email the same probative value as a forwarded copy of that email? Will the court accord the PDF copy of a document the same probative value as a non-protected Word version of the said document? This scenario has not been tested but it appears to me that the courts will be very cautious in attaching weight to a forwarded email or a non-protected Word version of a document even if it complies with Section 84 of the Evidence Act and admitted in evidence because such documents are susceptible to editing and may be different in content from the original versions.

Where it is established that the electronic evidence is in fact different from the original version, such evidence should be rejected as it will contravene the provisions of Section 16(1) of the Cybercrime Act which provides that:

> "A person who, with intent and without lawful authority, directly or indirectly modifies or causes modification of any data held in any computer system or network, commits an offence and is liable on conviction to

imprisonment for a term of not more than 3 years or to a fine of not more thanN7,000,000.00 or both".

4. Electronic Evidence and Hearsay Evidence

Section 84 of the Evidence Act which governs the admissibility of electronic evidence comprises 5 subsections. Sofowora, SAN has dwelt extensively on 4 subsections ((1)-(4)) and I will, in this section dwell on the 5th subsection. It has been argued in some quarters[1] that if the electronic evidence sought to be tendered is not computer designed or automatically processed by the computer, but is inputted into the computer by an individual (e.g. an email, letter etc), then the output it produces, which is the computer generated evidence amount to an inadmissible hearsay.

First, this argument is unfounded considering the fact that if the maker of such electronic evidence is called to give oral evidence on such document in line with section 34 of the Evidence Act, that amounts to a direct evidence given by the person who inputted the information into the computer. Section 84(5) was codified in the Evidence Act to correct this erroneous argument. It provides:

(5) "For the purpose of this section-

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

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

[1] Donald Cameron on Electronic Evidence. http://www.jurisdiction.com/ecom4.htm

The clause, "with or without human intervention" in section 84(5)(a-c), clearly shows that an electronic product of information automatically stored in the computer or inputted into the computer by an individual, will not amount to an inadmissible hearsay evidence. As earlier stated, the court will not accord any probative value to the said electronic evidence if the maker of such evidence is not called to tender same.

5. Tendering of an Electronically Generated Email

A scenario where a Plaintiff seeks to tender an email (originated by him) sent to his lawyer and downloaded from the Plaintiff's computer was considered in the lead presentation with the conclusion that the document will not be admissible as an original since it was produced from the Plaintiff's computer and not from the Plaintiff's lawyer's computer. In his opinion, it is the Plaintiff's lawyer that can tender the original and it is he who must comply with the provisions of section 84(2) and 84(4) of the Evidence Act. He further reasoned that being a copy, the Plaintiff may tender same as evidence under Section 87(b) of the Evidence Act.

These submissions, with respect, appears to overstretch the provisions of Section 84 of the Evidence Act. A computer-generated document, whether printed from the computer of the originator of an email or the recipient of such email, is an original document in my opinion. Such computer generated evidence does not fall under the documents described as "copies of a document" under section 258(1) (a)-(d) of Evidence Act, 2011:

> "Copy of a document" includes-
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> 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 of images embodied in it whether enlarged or not;
> c) in the case of a document falling within both of 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 or not, and any reference to a copy of the material part of a document shall be construed accordingly"

To better appreciate the point, the definition of document in section 258 of the Evidence Act, 2011 provides more clarity:

"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".

Category (d) in the definition of documents above, was deliberately excluded from the definition of "copy of a document". It follows therefore that where a document is generated from any computer device, be it that of the originator of an email or the recipient or any other person in copy, such electronic evidence is an original document which must comply with Section 84 of the Evidence Act on admissibility.

This position is buttressed by the age old principle that provisions of a statute be given its literal interpretation. I refer to the case of DURU v. FRN (2013) LPELR-19930(SC) where the Supreme Court, Per Muhammed, JSC held thus:

"In Sagay v. Sajere (2000) 6 NWLR (part 661) 360 at 364 and 365, this Court has held that for courts to reach correct and just decisions, it is incumbent on them not only to properly ascertain the facts in contention but to deftly apply the law relevant to the issue in controversy to the ascertained facts. In the instant case, the court below stands in breach of this very rewarding principle. Both counsel

are rightly one that whenever the words that make-up a statute, be the statute substantive or adjectival, the intendment of the law giver and the meaning of the statute is necessarily deciphered by assigning the clear and unambiguous words which make up the statute their ordinary literal meaning. I further agree with learned appellant's counsel that the duty of the court of law is limited to interpreting the law within the context of its constitutive words. It is not within the province of the court to seek the meaning of the statute outside the clear words the legislators employed. A court does not rewrite the law. See N.D.I.C. v. Okem Enterprises Ltd. (2004) 10 NWLR (part 880) 107; Adigun v. AG Oyo State (1987) 1 NWLR (part 53) 678; Ojokolobo v. Alamu (1987) 3 NWLR (part 61) 377 SC and Tasha v. UBN Plc (2002) 3 NWLR (part 753) 99".

Flowing from the above, until a judicial precedent pronounces otherwise, it may not be correct to say that a document produced from the computer of the originator of the email will not be admissible as section 84 of the Evidence Act should be interpreted within the context of its constitutive words.

To round up this point, a "computer" from the perspective of the Evidence Act is:

> "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 other process"

Given this broad definition, devices like mobile phones, ipads, compact disc, still camera, video camera would qualify as a computer. Text messages sent to or received in a mobile phone would qualify as a document. The information and data contained in these devices would therefore be subject to the same method of admissibility, and evidential weight attachable thereto.

6. Section 84 of the Evidence Act and the CBN's Approved Format for Electronic Evidence

The Central Bank of Nigeria ("CBN") pursuant to Section 47(4) of the CBN Act issued the "Approved Format of Evidence for Electronic Transactions, 2013" ("Approved Format"). The preamble to the Approved Format reads as follows:

> "Pursuant to the provisions of Section 47(4) of the Central Bank of Nigeria Act, 2007 which states that 'In furtherance of the objection of a sound financial

system and notwithstanding the provision of the Evidence Act, any physical or electronic record of transactions that is in a format approved by the Bank shall constitute sufficient proof of such transaction', the Central Bank of Nigeria hereby approve this format of physical or electronic record of transactions relating to electronic payment".

The implication of the CBN Act is that where the Approved Format is complied with, the need to comply with section 84 of the Evidence will be obviated. Though well intended, CBN regulation runs into problem there because the Evidence Act specifically governs the admissibility or otherwise of evidence in judicial proceedings involving banking transactions and all others. Accordingly, any regulations which tends to derogate the provisions of the Evidence Act should be declared void to the extent of such inconsistency. Your Lordships are constitutionally imbued with the power to make such declarations. Section 315(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) provides:

> "Nothing in this Constitution shall be construed as affecting the power of a court of law or any tribunal established by law to declare invalid any provision of an existing law on the ground of inconsistency with the provision of any other law, that is to say-
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> (a) any other existing law;
> (b) a Law of a House of Assembly;
> (c) an Act of the National Assembly; or
> (d) any provision of this Constitution".

However, it is safe to say that in determining the weight to be accorded electronic evidence in relation to electronic payments, compliance with the Approved Format could be considered. As an example, under the Approved Format, an email containing record of electronic transactions shall satisfy the following conditions: (a) come from the service provider's domain name; and (b) be received through the registered email of the customer. Compliance with these conditions will further strengthen the veracity of such electronic records and will ultimately increase the probative value of such evidence.

7. Controversy regarding the Certificate Required in Section 84 (4) of the Evidence Act

Regarding the certificate required to be issued under Section 84, subsection Section 84 (4) of the Evidence Act provides that:

> "(4) in any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate –
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> "s*hall* 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."

Though there is no judicial pronouncement on mode of production of the Certification required, a consideration of two legal principles resolves the seeming confusion. First, use of the language "shall" in the section according the Court of Appeal in *Emeje v Positive (2008) LPELR-4102 (CA*) means:

> "…when the word 'shall' is used in the mandatory sense like it is in the instant case, the legislature typically intends and the courts typically uphold the standard required is strict. The action to be taken must obey or fulfill the mandate exactly."

Secondly, application of simple, grammatical and ordinary meaning of the language in the section, it is evident that a Certificate must be produced as evidence. It does not accommodate the notion that the certification can be made orally once the e-document has been pleaded and/or the witness has stated the conditions to be met in Sections 84(2) and 84(4) of the Evidence Act in his Witness Statement on Oath or even orally in the witness box before the e-document is tendered.

8. Conclusion

The use of electronic documents has become ubiquitous in today's commerce, domestic and international. This requires familiarity of key players including the judiciary with ICT and a clear understanding of the application of the Evidence Act to electronic documents. Section 84 of the Evidence Act is a good attempt in bridging the gab between modern commercial transactions and administration of justice. Some gray areas remain as highlighted in the lead papers. The procedures in some common law countries mentioned by Sofowora, SAN is worth considering as we seek to further reform the laws governing electronic evidence in Nigeria.

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References

Nigerian Statutes

1. Central Bank of Nigeria Act 2007, S. 47(4),
2. Constitution of the Federal Republic of Nigeria 1999 (as amended) S. 315 (3),
3. Cybercrime (Prohibition Prevention ETC) Act, 2015, S.6(4) ,S.16(1)
4. Evidence Act 2011, Sections.14, 15, 34, 84, 258

Foreign Statute

5. Civil Evidence Act 1968, S.5

Judicial Authorities

6. Buhari v. INEC (2008) 19 NWLR (pt. 1120) 246
7. Duru v. FRN (2013) LPELR-19930(SC)
8. Emeje v Positive (2008) LPELR-4102(CA)
9. Udom Gabriel Emmanuel v Umana Okon Umana & Ors (2016) LPELR-40037(SC)
10. Yesufu v African Continental Bank (1976) ALL NLR 264

Other References

11. Donald Cameron on Electronic Evidence. http://www.jurisdiction.com/ecom4.htm