

AN EXAMINATION OF THE EVIDENCE (AMENDMENT) ACT OF 2023

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Abstract

The Evidence (Amendment) Act, 2023 was enacted to modernize the use of evidence in legal proceedings. The Act aims to improve efficiency and access to justice by making significant changes to the way evidence is managed in the Nigerian legal system. The Act provides for the use of electronic records and digital signatures, allowing for the modernization of evidence management and increasing the efficiency of the legal system. Using a doctrinal research methodology, this paper examined the key provisions of the Evidence (Amendment) Act and the challenges that may arise in putting it into practice. The paper also considered the impact of the Amendment Act on judicial proceedings in Nigeria Courts. The paper found that there are a number of potential challenges to the successful implementation of the Evidence (Amendment) Act; these include a lack of infrastructure, technical expertise and the need for training. However, if these challenges are addressed, the Amendment Act has the potential to bring significant improvements to the legal system in Nigeria.

KEYWORDS: EVIDENCE, AMENDMENT, EXAMINATION AND EVIDENCE (AMENDMENT) ACT 2023

1.0 Introduction

The Evidence Act of 2011, which was derived from the earlier Evidence Ordinance of 1943, was a significant step forward in Nigeria's legal system. The Act drew heavily from Sir James Fitzgerald Stephen's Digest of the law of Evidence, and sought to codify the English Common Law of Evidence into a national legal framework. While the Act was initially effective and widely applicable, it remained largely unchanged for many years, even after Nigeria's independence.¹ Despite its significance, the Evidence Act of 2011 did not adequately address the modern day use of electronic evidence and its admissibility in Nigerian Courts. Not only was the Evidence Act 2011 outdated in terms of its treatment of electronic evidence, but it also lagged behind in keeping up with the rapid changes in technology and the widespread use of electronic devices in everyday life. One example of this was its narrow definition of 'document', which was limited to traditional paper-based documents. As a result, the Act required amendment to better reflect the evolving nature of evidentiary matters. To address these issues, the Nigerian Legislature enacted the Evidence (Amendment) Act of 2023,² which was signed into law by President Bola Ahmed Tinubu on 12th June, 2023. The Evidence (Amendment) Act does not repeal the Evidence Act of 2011,³ but builds on its foundations while introducing significant innovations. The Amendment Act's Primary focus is to modernize the admissibility of evidence by transitioning from traditional forms to

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¹ M **Ayojimi**, 'The Evidence Act of 2023: A Remarkable Advancement in Nigeria's Jurisprudence,' <https://lawpavilion.com/blog/the-evidence-act-of-2023-a-remarkable-advancement-in-nigerias-jurisprudence/#:~:text=It%20builds%20upon%20historical%20foundations,of%20storage%20mediums%20as%20evidence>, accessed 16 January 2024.

² Hereinafter referred as the 'Evidence (Amendment) Act' or 'Amendment Act.'

³ Evidence Act No. 18, 2011, Hereinafter referred to as 'The Principal Act'

contemporary considerations.⁴ This update is intended to foster a more robust and efficient adjudicative environment for the Nigerian Courts, better serving the needs of the modern legal system.

2.0 Key Changes Introduced by the Evidence (Amendment) Act 2023

The Evidence (Amendment) Act introduced several key changes to the country's legal system, including electronic oath-taking, electronic gazettes and expanded definitions for computer-generated evidence and the authentication of electronic records. The changes are considered below:

2.1 Computer Generated Evidence Provisions

Prior to the Evidence Act, 2011, there was little clarity around the admissibility of electronic documents as evidence in court. This was due to the fact that most laws and regulations on evidence focused on paper documents.⁵ In addition, there were no clear rules for determining whether electronic evidence was reliable. This led to confusion and uncertainty when electronic evidence was introduced in court cases. Thus, Nigerian Courts had differing opinions on the admissibility of computer-generated evidence. In the case of *Esso West Africa Inc v Oyegbola*,⁶ the Supreme Court commented on the benefits of recognizing computer-generated evidence in court proceedings. The Court stated that the law should not be ignorant of modern business methods and should acknowledge the role of technology in business record-keeping. The Court also noted section 37 of the Evidence Act, which deals with documentary evidence, should not be limited to only books of account. While the Supreme Court's observations in the case of *Esso West Africa Inc. v Oyegbola*,⁷ were not binding, they did reflect the court's desire to embrace modern technology and its application in the legal system.

Shortly after the *Esso West Africa Inc* case, the Supreme Court made another *obiter* statement in the case of *Festus Yesufu v ACB*.⁸ In this case, the court expressed the view that computer generated evidence was not admissible under the repealed Evidence Act. Although the Supreme Court's observations were made *obiter* in both the *Esso West Africa Inc* and *Festus Yesufu* case, lower courts may find it difficult to ignore these comments. In fact, lower courts have applied these statements to the question, with inconsistent results. As such, the lack of a clear legal framework for the admissibility of computer-generated evidence led to inconsistent decisions across different courts. This issue was finally addressed by the enactment of the 2011 Evidence Act, and the status of computer-generated evidence was finally settled. The Act states that computer-generated documents can be admitted as evidence if certain conditions are met. Specifically, section 84 (1) of the Act states that these documents can be admitted as evidence for any fact that would be admissible as direct oral evidence. This admission is subject to the conditions outlined in section 84(2), which are as follows:

- (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

⁴ The Evidence Act (Amendment) 2023', < https://www.linkedin.com/pulse/nigerian-politics-ii-omaplex-law-firm-wmkrf?trk=article-ssr-frontend-pulse_more-articles_related-content-card > accessed 16 January 2024, see also Explanatory Memorandum of the Amendment Act.

⁵ For example, section 2 of the Evidence Act Cap E14 2004 only included a definition of 'document' in terms of paper documents. Sections 38, 91 and 93 to 97, which deal with documentary evidence, also do not seem to contemplate admission of documents other than paper documents.

⁶ (1969) NMLR page 194.

⁷ *Ibid.*

⁸ (1976) 1 All NLR (Prt.1) 328.

- of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;
- (b.) That over the 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 in any respect in which it was not operating properly or was out of operation during the 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. In view of the above, it is clear that electronic evidence can now be admitted in the court, subject to the fulfillment of certain conditions.

In summary, it is clear that computer-generated evidence is now admissible in Nigerian Courts provided the conditions set out in the Evidence Act of 2011 are met. However, the 2011 Act was considered out of date in light of the rapid advancement of technology. The Amendment Act of 2023 was intended to address this issue and provide for the admission of a broader range of evidence, including electronic records. These changes reflect the reality of how evidence is generated and used in today's world, and should make it easier for courts to deal with electronic evidence.

2.2.1 Electronic Records

The Amendment Act introduced the concept of electronic records, which are documents that exist in electronic form, such as digital images, audio recordings or video footage. Electronic records can be considered valid evidence if they are stored in a way that allows them to be accessed later.⁹ The Act, defines an electronic record as data, record or images that are generated, stored, received, or sent electronically, including data that has been converted to a microfilm form.¹⁰ In short, electronic records are considered documents under the Act, even though they exist in a digital format rather than on paper.

Moreover, according to the Amendment Act, any information required by law to be in a written, typewritten, or printed format can be considered admissible if it is in electronic form and can be made accessible. In other words, any electronic record, such as information stored on a computer hard drive or printed out on paper, can be deemed a document and admitted as evidence in court proceedings.¹¹ This applies to electronic records regardless of whether they are stored on optical or magnetic media, or in a cloud computing database. Therefore, electronic records stored in optical or magnetic media or in a cloud computing database, are now generally considered documents and are admissible as evidence without the need for further proof or production of the original record. However, this is only the case if the record meets the requirements outline in the Principal Act.¹² *Perhaps, the insertion of Section 84B to the Principal Act does not override any portion of Section 84 of the Principal Act but simply expands the scope of the meaning of 'document'.* This means that the requirements listed in section 84(2) of the Principal Act, which apply to statements in computer-generated documents, also apply to electronic records under the Amendment Act. Therefore, electronic records must meet the same requirements as computer-

⁹ Amendment Act, s 3 (1) (insertion of s 84A to the Principal Act).

¹⁰ Ibid, s 10 (Amendment of Section 258 of the Principal Act being the Interpretation Section)

¹¹ Ibid, s 3(1) (Insertion of Section 84B to the Principal Act).

¹² Evidence Act of 2011.

generated documents. In other words, in order for an electronic record to be admissible, the person presenting the record must fulfill all the requirements listed in section 84(2) of the Principal Act.

2.2.2 Digital Signatures

The Amendment Act introduces the concept of digital signatures¹³ in addition to electronic signatures. The Act amends section 93 of the Principal Act to include ‘digital signatures’ after the phrase ‘electronic signatures’. This change broadens the scope of the Act to include digital signatures, which are a form of electronic signature that uses encryption to validate the identity of the signer and ensure the integrity of the document being signed. Indeed, the Amendment Act allows for the authentication of electronic records using digital signatures or other electronic authentication techniques. An electronic authentication technique would be considered reliable if the signature is linked to the signatory, and any alterations to the signature or information being authenticated are detectable.¹⁴ The addition of section 84C to the Principal Act provides a legal framework for the authentication of electronic records. This is an important change as it recognizes the use of electronic signatures and authentication techniques as valid methods of verifying the authenticity of electronic records. The reliability of a digital signature or electronic authentication technique is based on a set of specific conditions. First, the signature or authentication data must be linked to the signatory or authenticator. Second, any changes made to the signatory or information after authentication must be detectable. Finally, any other conditions required by law must be met.¹⁵ By satisfying these requirements, a digital signature or electronic authentication technique can be considered reliable.

In most cases, when a person claims that a digital signature was attached to an electronic document, he must prove that the signature is genuine. However, the Amendment Act recognizes the concept of a ‘secure digital signature’,¹⁶ in which the burden of proof is reversed. In cases where a secure digital signature is used, the burden of proof lies with the person claiming that the digital signature is not genuine. This change is intended to provide additional protection for the use of secure digital signatures. Perhaps, a digital signature is considered secure if the data used to create the signature was exclusively under the control of the signatory at the time of signing and was stored and affixed in accordance with prescribed standards.¹⁷ The law recognizes that digital signatures are used to prove the authenticity of documents in court proceedings, and it provides for the proof of these signatures in accordance with the standards set out in section 84D. Unless the digital signature in question is a secure digital signature, the person alleging that a digital signature was affixed to an electronic record must prove that the signature is genuine. The law therefore allows for different standards of proof depending on the type of digital signature that is used.

The Amendment Act clearly distinguishes between electronic signatures and digital signatures. Electronic signatures are defined as any method of authenticating an electronic record by using electronic techniques, as defined in the second schedule.¹⁸ Digital signatures are a subset of electronic signatures that serve the specific purpose of verifying the sender’s identity and

¹³ Amendment Act, s 3(1) .(insertion of s 84C (2) to the Principal Act)

¹⁴ Ibid.

¹⁵ Amendment Act, s 3(1) .(insertion of s 84C (2) to the Principal Act)

¹⁶ A digital signature shall be deemed secure if the signature creation data at the time of affixing the signature, was under exclusive control of the signatory and no other person and was stored and affixed in such an exclusive manner as may be prescribed. S 3(1) of the Amendment Act (insertion of s 84D to the Principal Act)

¹⁷ Ibid.

¹⁸ Amendment Act. s 10.

confirming the document's contents.¹⁹ In this way, the amendment Act provides clarity on the distinction between these two types of signatures.

2.2 Electronic Oath Taking

Sections 6 and 7 of the Amendment Act allows for the electronic oath taking of Affidavit, which is a significant departure from traditional paper-based affidavits. These sections amend section 109 of the Principal Act to allow for affidavits to be sworn via audio-visual²⁰ means, provided that the person taking the affidavit is authorized to do so and a copy of the Affidavit must also be filed in the court's registry. The Amendment Act therefore expands the methods by which an affidavit can be sworn, making it possible for individuals to swear affidavits remotely, without physically being present in front of the authorized person. This means that individuals can now swear affidavits from anywhere in the world, as long as they have access to the necessary technology and an authorized person to witness the affidavit. This is a significant innovation that makes the process of swearing affidavits more accessible and efficient. The recognition of electronic Affidavits reflects a broader shift towards digital documentation, which offers increased convenience and efficiency. It is important to note that when affidavits are taken by audio-visual means, the electronic record must include information about the method used and the date on which it was used.²¹ As such, section 119(2) of the Principal Act, as amended, now requires that affidavits taken by audio-visual means must include information about the specific method used and the date on which it was used. This ensures that the affidavit is properly documented and can be easily verified. It is important to note that this requirement applies only to affidavits taken via audio-visual means, and not to those taken in person.

In addition, the Amendment Act amends section 108 (1) by adding a new subsection, 108(2). This new subsection allows for affidavits that are sworn electronically before an authorized individual to be filed in copy form at the court registry, and used for any purpose in court.²² This change recognizes the growing use of electronic affidavits and allows for them to be used in court proceedings. Thus, the Amendment Act provides an exception to the requirement that an affidavit must be filed in its original form. Instead, a copy of an electronically sworn affidavit may be filed in court, if the electronic version meets certain conditions.

2.3 Electronic Gazette

The Amendment Act further introduces the Electronic Gazette, which is simply an official gazette published in the electronic form²³ and serves as an online publication of official notices, laws, regulations, and other legal documents. While the traditional paper-based gazette may be inaccessible or hard to distribute, the electronic version offers a more convenient, up-to-date, and widely accessible source of legal information. It allows for instantaneous publication and distribution to a global audience, eliminating physical limitations and ensuring that anyone can access important legal documents. In addition, the electronic gazette helps to streamline administrative processes and increase efficiency in the legal process. It is stated in the Act that where a law provides for a rule, regulation, or notification or any other matter be published in a Federal Government Gazette, the requirement shall be deemed to have been satisfied if such rules, regulation, notification, or any other matter is published in the Federal Government gazette or

¹⁹ Ibid.

²⁰ Section 10 of the Amendment Act defines audio-visual communication as being able to see, hear and communicate with another individual in real time, using electronic means.

²¹ Amendment Act, s 8. (Amendment of s 119 of the Principal Act)

²² Ibid, s 5. (Substitution of section 108 of the Principal Act)

²³ Ibid, s 9 (substitution of section 255 of the Principal Act)

electronic gazette.²⁴ The Electronic Gazette therefore provides easy access to official notices, laws, regulations, and other legal documents, available anywhere and anytime. Unlike printed gazettes, the electronic gazette is accessible to everyone, anytime, without the need for physical distribution. The electronic gazette makes legal information more accessible than printed gazettes, regardless of location or time constraints. Switching to the electronic gazette is faster, more efficient, and reduces the environmental impact of legal publishing, since it eliminates paper consumption and transportation costs.

In addition, the Amendment Act modifies the interpretation section of the Principal Act to include definitions for new terms introduced by the Amendment Act, including audio-visual communication, cloud computing, digital signature, electronic gazette and electronic record. It also includes definitions for terms that were previously not defined, such as computer, electronic signature, magnetic media, and optical media.²⁵

3.0 The Implications of the Evidence (Amendment) Act, 2023 on the Judicial Proceedings in Nigerian Courts

The Amendment Act has several implications on judicial proceedings in Nigerian Courts. The Act introduces a number of new provisions and amendments to the existing law, with significant potential effects on the judicial system. In particular, the Amendment Act has the potential to improve efficiency, increased accessibility, reduce administrative burden and improve record-keeping.

A. Improved Efficiency

The use of digital signatures and the electronic gazette can reduce the time and resources required for the legal process, making it more efficient. Under the Amendment Act, the same rules that apply to documents created by a computer apply to electronic records. This helps to speed up judicial process and improve efficiency. The introduction of electronic records not only streamlines the storage and retrieval of evidence but also addresses the increasing demand for efficiency in legal proceedings. The Amendment Act reduces the need for physical filing and storage of original documents, lowering costs and boosting efficiency in the court system. The recognition of digital signatures and the use of audio-visual means in oath taking are significant steps forward that may affect the entire Nigerian legal system. The Amendment Act therefore reflects a willingness to embrace modern technology, making court processes more efficient and accessible.

B. Increased Accessibility

Digital tools like electronic signatures and the electronic gazette allow for easier communication and information access, regardless of location or time constraints. By introducing electronic records, the Amendment Act recognizes the growing role of digital information in modern society. It makes digital evidence more accessible to judges and lawyers, which streamlines the process of introducing electronic records as evidence in court. Additionally, the Amendment Act updates the oath-taking process by allowing individuals to swear affidavits electronically through audio-visual means. In addition, digital signatures make it easier and faster to sign documents remotely, without the need to physically be in the same location as the document signer. This flexibility and convenience offer significant benefits for all parties involved. This innovation enhances accessibility while maintaining the involvement of authorized individuals, recognizing the role of audio-visual communication in modern legal practice. Overall, the introduction of electronically sworn affidavits

²⁴ Amendment Act, s 9 (substitution of section 255 of the Principal Act)

²⁵ Section 10 of the Evidence (Amendment) Act 2023

is a major advancement in the use of digital technology in court proceedings. Practically, it provides greater flexibility and convenience for deponents who cannot appear physically before the authorized person.

C. Reduced Administrative Burden

Digital tools can streamline the administrative processes involved in the legal process, reducing the workload on judges, lawyers and other practitioners. The use of digital signatures allows documents to be signed and exchanged electronically, reducing delays and increase efficiency. This not only benefits businesses and individuals but also the court registries, as digital signatures streamline workflows and reduce paperwork. The Amendment Act's inclusion of the electronic gazette as an official communication channel reflects a growing reliance on digital platforms. This recognition ensures that information shared digitally is considered just as official as its printed counterparts, eliminating administrative bottlenecks and reducing judicial workload.

D. Increased Transparency

Digital tools make it easier to track and verify information, enhancing the transparency of the legal process. The Amendment act also clarifies how to authenticate electronic evidence, which can ensure its integrity. While electronically generated affidavits must still be filed, the Amendment Act mandates that certain details, such as the specific audio-visual method and date of execution, must be included. This enhances transparency and may help address challenges to the validity of electronic affidavits

Ultimately, the Amendment Act's technological innovations can help to streamline legal proceedings and improve access to justice. With the legal and judicial process involving significant information gathering and communication, the adoption of technological innovations is key to making this process more efficient. The Amendment Act's use of digital platforms for communication and information storage can help streamline legal proceedings and improve data management. These innovations can have a significant impact on courtroom efficiency, reducing the need for paper-based communication and storage.

4.0 The Potential Challenges of Implementing the Evidence (Amendment) Act 2023

The lack of digital infrastructure and access to technology is a significant challenge in implementing the Amendment Act, as some parts of Nigeria lack the infrastructure and resources to fully utilize the Amendment Act's provisions. This could create a digital divide, with some individuals being unable to take advantage of the Amendment Act's benefits. In addition, lack of training and education may constitute a challenge to the implementation of the Act. Without adequate training and education, legal professionals and individuals may not understand the Amendment Act's provisions or how to use them. This could lead to confusion and inefficiency, reducing the benefits of the Act. There is also the challenge of data protection. The Amendment Act involves a significant amount of sensitive data, including personal information and legal documents. This data must be protected from unauthorized access, alteration or destruction. Without proper security measures in place, the Amendment Act could be vulnerable to cyber-attacks and data breaches. Moreover, the Amendment Act requires a certain level of technical expertise to operate effectively, including knowledge of electronic record-keeping systems, digital signatures and other related technologies. There needs to be a sufficient number of individuals with the necessary technical expertise. However, there may be a shortage of such individuals, particularly in rural areas where access to technology is limited. This could create a bottleneck, preventing the Amendment Act from being

fully implemented and limiting its potential benefits.²⁶ Indeed, there are a number of challenges to the successful implementation of the Amendment Act, these include a lack of infrastructure, technical expertise and the need for training. However, if these challenges are addressed, the Amendment Act has the potential to bring significant improvements to the legal system in Nigeria.

5. 0 Conclusion and Recommendations

The Evidence (Amendment) Act, 2023 is a significant step towards modernizing the Nigerian legal system and aligning it with technological advancements. The provisions of the Amendment Act provide a clear framework for using electronic records, digital signatures, electronic Affidavits, and electronic gazette in legal proceedings. These changes will help to streamline the judicial process, improve transparency and enhance overall efficiency of the legal system. The Evidence (Amendment) Act not only accommodates technological progress but also sets the foundation for a more efficient, secure, and accessible legal system. It recognizes the need to keep pace with the technological advancements, and harnesses their potential to achieve the goal of justice. This new legal framework will have a positive impact on the process of litigation and evidence –taking in Nigeria, with the potential to significantly improve the quality of justice. However, it is important to note that appropriate safeguards must be put in place to protect the integrity and authenticity of electronic oaths. This will help to ensure the continued success of the Amendment Act and its ability to deliver justice. Safeguards must be put in place to protect against identity fraud, ensure accurate identification of witnesses, and maintain the confidentiality of sensitive information. This requires robust security measures, data protection protocols and regular assessments. Awareness of the changes introduced by the Act is also essential for achieving its goal of efficiency and timeliness. It is important to have systems in place to authenticate electronic documents, including verification of the document owner’s identity, digital transaction certificate, audit trails, unique IDs, and user-friendly interfaces. To guarantee the authenticity and integrity of electronic documents, technological solutions should verify the document owner’s identity and provide a digital transaction certificate and audit trail. Documents should also have unique identification numbers for tracking purposes. Technological solutions should offer user-friendly interfaces for verifying the authenticity of documents, establishing trust in the systems and its processes.

²⁶ N J Rubenking,, ‘The Real-World Challenge of Electronic Evidence’<<https://www.natlawreview.com/article/real-world-challenge-electronic-evidence>>accessed 17 January 2024.