

ORAL EVIDENCE AND CERTIFICATE OF AUTHENTICATION IN THE ADMISSIBILITY OF ELECTRONIC EVIDENCE IN NIGERIA: AN IMPERATIVE*

Abstract

Electronic transactions have continued to dominate the modern-day human interactions. This is not unconnected with the tremendous growth and development of Information Technology (IT) as well as the ease at which such transactions can be carried out. Yet, the law continuously struggles to meet with the rising challenges posed by electronic information to be used as evidence. Certainty of the law in this nature of electronic evidence becomes therefore a cornerstone for the effective operation of this unavoidable human interaction. Against this backdrop, this paper examined the continuous imperatives of oral evidence and certificate of authentication in support of electronic evidence. Analysing section 84 of the Evidence Act as well as judicial decisions in some other common law countries, the paper found that admissibility of electronic evidence raises and would continue to raise practical considerations such as the appropriate threshold for admitting it as evidence. Oral evidence and certificate of authentication continues to dominate the centre stage in the admissibility of electronic evidence. The paper therefore suggested that, in line with some common law jurisdictions examined in this paper, there is the need to amend the Evidence Act to incorporate authenticity provisions for electronic documents as section 84 does not sufficiently guarantee the authenticity of such documents.

Keywords: Oral evidence, Certificate of authentication, Electronic evidence, Admissibility, Nigeria

1. Introduction

The convergence of information technology and communication is rapidly changing the way transactions and relationships are carried out in the world today. Almost every aspect of business is contingent on electronic communications and transactions are settled, recorded and reported on complex computer technology platforms. In this age of cyber world as the application of computers became more popular, there has been tremendous expansion in the growth of technology. The evolution of Information Technology (IT) gave birth to the cyber space wherein internet provides equal opportunities to all the people to access any information, data storage, etc. with the aid of technology. This increasing reliance on electronic means of communications, e-commerce and storage of information in digital form has most certainly caused a need to transform the law relating to information technology and rules of admissibility of electronic evidence both in civil and criminal matters in Nigeria. The proliferation of computers and the influence of information technology on society as a whole, coupled with the ability to store and amass information in digital form have all necessitated amendments to the Evidence Act to incorporate the provisions on the appreciation of digital evidence. The Evidence Act of 2011 and its amendment are based on the United Nations Commission on International Trade Law (UNCITRAL) model Law on Electronic Commerce.¹

With the change in law, Nigerian courts have developed case laws regarding reliance on electronic evidence.² Judges have also demonstrated perceptiveness towards the intrinsic 'electronic' nature of evidence, which includes insight regarding the admissibility of such evidence, and the interpretation of the law in relation to the manner in which electronic evidence can be brought, admitted and used before the court. Electronic evidence tends to be more voluminous, more difficult to destroy, easily modified, easily duplicated, potentially more expressive and more readily available. Given the unique nature of computer evidence, its admissibility raises practical considerations such as the appropriate threshold for admitting it as evidence; the burden of proof on the proponent or opponent of the evidence; and the procedural requirements and/or safeguards that need to be put in place to ensure that the electronic evidence tendered before the Court is properly admitted.³

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¹ See the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment. Available at https://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf. Accessed on 14th May, 2018.

² Since 2011, there have been several pronouncements on computer generated evidence by the courts in Nigeria.

³ A Commentary on the Amendments to the Electronic Evidence Provisions in the Singapore Evidence Act. Available at <https://www.lawsociety.org.sg/portals/0/Media%20Centre/Law%20Gazette/pdf/SLG-July-2012.pdf>. Accessed on 11th May, 2018.

Against the above background, this paper aims at examining the continuous imperatives of on computer generated evidence in Nigeria with lessons viz-a-viz related provisions in other jurisdictions. It will also examine judicial pronouncements on the provisions of Section 84 of the Evidence Act as well as issues emanating from the admissibility of computer-generated evidence. The paper would later make recommendations for reforms.

2. Computer Generated Evidence as a New Form of Evidence

While there can be no limit to the forms in which evidence exists, they were so far broadly classified into oral and documentary.⁴ Documentary evidence was usually such as could be put down on paper – certificates, executed deeds, photographs, maps, caricatures, etc. Slowly, as records began to be made on objects such as cassettes and gramophone discs, those began being entertained as documents too. Electronic or digital evidence differs from documentary evidence in several ways. First, the contents of a physical document, including any handwritten notations, will be immediately visible on its face. In contrast, an electronic document will contain information generated by, or stored in the computer, which will be readable, but it will also contain other information – metadata – which is not immediately viewable.⁵ Second, the computer material can be modified in the process of collecting it as evidence. Common examples include instances where the file or application is opened, or copied from the computer system into an external hard drive. These acts in fact create changes although they are not immediately visible.⁶ Further, it is easy to modify computer data without leaving any obvious trace of such alteration. Recently, in Offa Kwara State Nigeria, there was a robbery incident where the police have identified some suspects on the basis of a CCTV recording.⁷ The question, therefore, arises as to whether such a recording, which is neither on paper nor on a camera negative nor on a magnetic tape, in fact, not available in any tangible form at all, can be introduced in court as evidence. The only proof available will be that recorded in the computer system controlling the CCTV unit. The above example brings into focus the very recent phenomenon of the increasing use of computers in everyday life. With the facility of writing letters over the internet being widely available now, more and more contracts are being entered into online. Thus, people can now order products online, and the sellers will ship the consignment across, the payment being made through e-banking. A director and actor may enter into a contract regarding the production of a film through emails. The Chief Executive Officer of a company may confirm the job application of an applicant over emails. Thus, if any of the parties to the contract were to sue each other for breach of contract, the only admissible evidence would be the text of the emails.

3. Classification of Electronic Evidence

The words ‘electronic evidence’ has been variously used to also mean ‘digital evidence’ or ‘computer evidence’. Under the Nigerian Evidence Act, any substance on which matter has been expressed or described can be considered a document, provided that the purpose of such expression or description is to record the matter.⁸ There is however no direct or specific definition of what electronic evidence is under the 2011 Evidence Act. There are some references in various sections of the law on what constitutes electronic evidence, for example, S.258 of the Evidence Act defines a computer as any device for storing and processing information, and any reference to information being derived from it by calculation, comparison or any other process.⁹ An electronic record can be safely included under such a definition because matter is recorded on the computer as bits and bytes, which are the digital equivalent of figures or marks.

An electronic document would either involve documents stored in a digital form, or a print out of the same. What is recorded digitally is going by the definition in S.258 of the Evidence Act, a document, but cannot be perceived by a person not using the computer system into which that information was initially fed. A document containing a print out of computer records can be perceived by anybody. Such print outs of documents would amount to secondary evidence going strictly by the provisions of the Evidence Act. Computer records were widely considered to be hearsay statements since any information retrieved from a computer would consist of input provided by a human being. Thus, be it a word document containing statements written by one party, or an image of a missing person generated by the computer based on inputs given to it, all such records will be hearsay. Being

⁴See The Law Teachers on Relevancy and admissibility of Electronic Evidence. Available on <https://www.lawteacher.net/free-law-essays/commercial-law/relevancy-and-admissibility-of-electronic-law-essays.php>. Accessed on 12th May, 2018.

⁵ For example, metadata embedded within an e-mail can reveal information about the sender, the recipient(s), the creation date, whether there are attachments, as well as the string of users involved in the e-mail exchange. See Setec Investigations, ‘The Importance of Metadata’, available at. See also Mark L. Krotoski, ‘Effectively Using Electronic Evidence Before and at Trial’ (November 2011) Vol 59, No 6 The United States Attorneys’ Bulletin (accessed 8th May, 2018).

⁶ Peter Sommer, ‘Downloads, Logs and Captures: Evidence from Cyberspace’ (2002) 8(2) Computer and Telecommunications Law Review, pp 33-42.

⁷ The Robbery incident took place on the 5th April, 2018 where about 33 Innocent Persons were killed by the Armed Robbers.

⁸ See S.258 of the Evidence Act on the definition of document.

⁹ See *Omisore v. Aregbesola* (2015) NWLR Pt 1482 205 pt 295 A-E

both hearsay as well as secondary evidence, there was much hesitation regarding the admissibility of electronic records as evidence.

4. Shifting Paradigms – Admitting Electronic Records as Evidence

Prior to the enactment of the Evidence Act of 2011, there was no direct provision relating to the admissibility of computer-generated evidence under Nigerian laws. Before the year 2011, issues concerning the admissibility of evidence generated from electronic devices became highly contentious. All the contentions revolved around the question as to whether or not the then Evidence Act¹⁰ could accommodate the admissibility of evidence electronically generated in the absence of a clear and definite provision for its admissibility. Some of the issues that came for determination before the courts included the following:¹¹

1. Whether or not computer printouts are admissible in evidence at all?¹²
2. Whether or not computer printout should be treated as primary or secondary evidence, or one of numerous such exceptions?¹³
3. Whether or not a computer printout not found physically with an accused but printed out of his email box after his arrest can be said to be in his possession?¹⁴
4. Whether or not computer storage device such as videocassette are themselves documentary evidence?¹⁵
5. Whether or not a video compact disc (vcd) recorded from a television broadcast is admissible as original or secondary evidence?¹⁶
6. Whether or not electronic evidence is admissible as a means of service of computer process?¹⁷
7. Whether or not the admissibility of tape recordings as evidence in a case is based on the fulfilment of certain conditions?¹⁸
8. The conditions required to be fulfilled to make a computer printout of a statement of account admissible?¹⁹

In Nigeria, the first notable judicial pronouncement on admissibility of computer printout was first made in the case of *Esso West Africa Inc. v. Oyegbola*²⁰ where the Supreme Court stated that the law cannot be, and is not ignorant of the modern business method and must not shut its eyes to the mysteries of computer. Also, in *Oghoyone v. Oghoyone*²¹, Rhodes-Vivour, JCA (as he then was) stated the position admirably that ‘the issue as of admissibility of computer generated evidence has been the subject of controversy for quite some time now, in Nigeria, and presently the legislature is working on appropriate amendments to accommodate such evidence’. In *Trade Bank v. Chami*²² the Court of Appeal held that computer printout of bank statements of account can be admitted in evidence.

5. Admissibility of Electronic Evidence under Section 84 of the Evidence Act

Just like the provisions contained in Sections 35 and 36 of the Singaporean Evidence Act 2012, Electronic Communications Transaction Act 25 of 2002 of the Republic of South Africa and Section 65B of the Indian Evidence Act 1872(As Amended) in 2000, the National Assembly amended the evidence Act to among others, include the provisions of S.84 which provides for the admissibility of computer or electronically generated evidence. As stated earlier, the purport of the section 84 of the Evidence Act is that it renders admissible, statement contained in a document produced by a computer or any electronic device upon the fulfilment of the conditions stipulated in Subsections (2) and (4) therein. Under the repealed Evidence Act, three main points of objection dominated arguments whenever attempt was made to tender electronically generated documents.²³ First, there was always the argument that, since such document was not recognised by the repealed Evidence Act, it was not admissible in Evidence. Secondly, objections were raised to the effect that electronically generated evidence is not original evidence. This is because almost every electronic document will invariably be stored magnetically in a way that the original version of it cannot be examined directly. Third, it was also argued that electronic evidence

¹⁰ See the 2004 Evidence Act

¹¹ Alaba Omolaye-Ajileye, *A Guide to Admissibility of Electronic Evidence*. LawLord Publications. Pages 73-74.

¹² *Federal Republic of Nigeria v. Femi Fani Kayode* (2010) 14 NWLR(pt 1214) 481

¹³ *Anyabosi v. R.T Briscoe Ltd* (1987) 3NWLR (pt 59) 108

¹⁴ *Federal Republic of Nigeria v. Abdul* (2007) 5 EFCLR 204 at 228

¹⁵ *Udoro & ors v. Governor of Akwa ibom state & ors* (2010) 11NWLR (pt 1205) 322

¹⁶ *INEC v. AC* (2009) All FWLR (Pt 480) 732 at 799

¹⁷ *Continental Ssles Ltd v. R. Shipping Inc.* (2012)LPELR-7904 (CA)

¹⁸ *INEC v Action Congress* (2009) 2 NWLR (PT 1126) 524.

¹⁹ *Oghoyone v. Oghoyone* (2010)LPELR-4689 (CA)

²⁰ (1969)1 NMLR 194 at 198

²¹ (2010) 3NWLR (pt 1182) p. 564

²² (2003) 13NWLR (pt836)158.

²³ Alaba Omolaye-Ajileye, *A Guide to Admissibility of Electronic Evidence*. LawLord Publications. Pages 96-97.

is hearsay and therefore inadmissible. It was to meet the above legs of objection and to bring the provisions of the Evidence Act to what was obtainable in other common law countries that made the Legislature to enact the provisions of Section 84 in the Evidence Act 2011. Nigerian courts have given the above mentioned section judicial nod. In *Kubor v. Dickson*²⁴ where the Supreme Court held that computer generated evidence of a document is admissible. Onnoghen CJN stated thus:

Admissibility of a computer-generated document or document downloaded from the internet is governed by the provision of section 84 of the Evidence Act, 2011. By section 84(1) of the Evidence Act, in any proceeding, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible if it is shown that the following conditions are satisfied in relation to the statement and the computer in question; that is:

- (a) that the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not by anybody, 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 time of that period the computer was operating properly or, if not, that in respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its content; 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.

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 the computer must be called to establish the above conditions. In the instant case, there was no evidence on record to show that the appellants in tendering exhibits 'D' and 'L' satisfied any of the conditions. In fact, they did not, as the documents were tendered and admitted from the bar. No witnesses testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admissions as e-documents under section 84 of the Evidence Act, 2011. Since the appellants never fulfilled the pre-conditions laid down by law, exhibits 'P' and 'L' were admissible as computer-generated evidence/documents.

Also, in *Seriake Dickson v Timipreya Sylva & Ors*²⁵, the Supreme Court, after holding that Computer-generated evidence has come to stay by virtue of Section 84 of the Evidence Act also went further to state that documents produced by computers are increasingly common features of all businesses and more and more people are becoming familiar with its uses and operations. Oral evidence and authentication continues to play critical role in the admissibility of electronic evidence. In actual fact, Section 84 of the EA provides for two methods of proof, either by oral evidence under Section 84(1) and/or by a certificate under Section 84(4). In *Kubor v Dickson*, the Supreme Court emphasised the requirement of a certificate that must accompany the computer generated evidence before it could be admissible. This is in addition to the oral evidence of the witness who seeks to establish his case. In fact the Supreme Court in *Andrew v INEC*²⁶ noted that evidence of all the witnesses who either made the electronic evidence or witnessed the entries contained in electronic evidence is admissible. Okoro JSC held thus: 'The requirement of the law is that a petitioner must call eye witnesses who were present when the entries in the forms were being made and can testify to how the entries in the documents are arrived at.'

There are recent decisions of the Court of Appeal to the effect that *viva voce* evidence of a witness as long as it is in line with the requirements of *S. 84 (2) of the Evidence Act* is admissible. This latter decision was expressed by the Court of Appeal in the cases of *Brila Energy Limited v. Federal Republic of Nigeria*²⁷ and *Jubril v FRN*²⁸. In *Brila Energy Ltd v FRN* the Court of Appeal stated the position admirably thus:

whether an expert is competent in his field is a matter for the court to decide, applying the credibility test after hearing the testimony. Section 84 which is similar to Section 69 of UK PACE 1984, does not require the prosecution to show that the statement contained in the document is likely to be true. Whether it is likely to be true or not is a question of weight for the court to decide. Instead, all it

²⁴ *Supra*, pages 577-578.

²⁵ (2016) LPELR 41257 S.C

²⁶ (2018) 9 NWLR (pt. 1625)

²⁷ (2018) LPELR 43926-CA

²⁸ (2018) LPELR-43993(CA)

requires as a condition for the admissibility of a computer generated statement/document is positive evidence that the computer processed, stored and reproduced whatever information it received. It is majorly concerned with the way in which the computer has dealt with the information to generate the statement which is being tendered as evidence of a fact which it states. See *DPP v. Mckeown* (1997) 1 ALL ER 737. If an authentication certificate is relied on, it should show on its face that it is signed by person, who from his job description can confidently be expected to be in a position to give reliable evidence about the operation of the computer. The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. See *R v. Shephard* (1993) 2 WLR 102. There is no single approach to authentication applicable across board. Instead, the most appropriate form of authenticating electronic evidence will often depend on the nature of the evidence and the circumstances of each particular case. However, such evidence may be authenticated by direct testimony from a witness with personal knowledge by comparison with other authenticated evidence or by circumstantial evidence.⁷

The above judicial decision is in line with the provisions S.84 (4) (c) of the Act which requires a statement of affirmation which could either be in a certificate or viva voce. For sake of emphasis, the above stated subsection provides: 'For the purpose of this section, it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it' In either case, conditions stipulated in Section 84(2) must be satisfied'. The cases of *Brila Energy Limited v. Federal Republic of Nigeria and Jubril v FRN* though, not Supreme Court decisions, represent the main purport of S.84 of the Act.

6. Electronic Evidence Vis-A-Vis the Best Evidence Rule and Rule against Hearsay

It is important to determine that whether following the introduction of S.84 of the Evidence Act, electronic evidence is subject to the same rules of admissibility like other types of evidence, and rules of exclusion, such as the hearsay rule and the rules on authentication.²⁹ However, owing to the very nature of electronic evidence, it is doubtful whether the traditional evidentiary rules of admissibility will similarly apply to electronic evidence as they do to other types of evidence.³⁰ It should be stressed that the nature of electronic records presents unique challenges to the traditional rules of admissibility and have complicated matters of establishing authenticity and foundation. In *Kubor v Dickson*, the Supreme Court emphasizes the need to lay 'necessary foundation' for admissibility of e-documents. Clearly, the whole essence of the conditions stipulated under Section 84(2) is to enable the witness lay proper foundation for admissibility of electronically generated evidence. The basic issue is, computer generated evidence must be found reliable and trustworthy to be admitted in evidence.

Under the best evidence rule, the proponent of the document must prove its contents by producing the original document for verification by the Court³¹ unless the exceptions apply, in which case secondary evidence may be used to prove the contents of a document. The purpose of the rule³² is to 'eliminate the possibility of admitting an erroneous fabrication or inaccurate document'³³ and to enable the Court to determine whether the integrity of the record has been compromised such that there are differences between the recorded and its original version.³⁴ In the context of electronic records, it is unclear what an 'original document' is for the purposes of the best evidence rule. It has been argued that where the electronic print-out is accurate, it would qualify as an 'original' and, therefore, overcome any objections based on the best evidence rule. It should be stated that Section 84 of the Evidence act does not recognise the existence of any dichotomy in the nature and character of electronically generated documentary evidence. It only recognises 'a statement in a document produced by a computer'.³⁵ It does not also state whether the document to be produced must be original document or otherwise. In addition, the section does not also provide for an explanation on how a witness came about the document. Once it is a statement contained in a document and produced by a computer, it is qualified to be tendered provided it has fulfilled the conditions laid down in Section 84 (2) of the 2011 Evidence Act.

²⁹ A Commentary on the Amendments to the Electronic Evidence Provisions in the Singapore Evidence Act. Available at <https://www.lawsociety.org.sg/portals/0/Media%20Centre/Law%20Gazette/pdf/SLG-July-2012.pdf>. Accessed on 11th May, 2018.

³⁰ *Ibid.*

³¹ See S. 86(1) of the Evidence Act which states that Primary evidence means the document itself produced for the inspection of the court.

³² The Best Evidence Rule.

³³ Law Reform Commission of Ireland, Consultation Paper: Documentary and Electronic Evidence (LRC CP 57, 2009), p 30 (hereinafter 'Ireland Consultation Paper').

³⁴ Nance, Dale A., 'The Best Evidence Principle' (1987-1988) 73 *Iowa Law Review* p 227.

³⁵ See *Omisore & Anor v. Aregbesola* (2015) 15 NWLR (pt 1482) pg 205.

Under the Constitution of the Republic of South Africa, Section 35(5) provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or will otherwise be detrimental to the administration of justice.³⁶ The constitutional court stated this in *Key v. Attorney-General, Cape Provincial Division*³⁷. Since the South African Evidence Act takes its root from the constitution, the provisions in S.35 (5) of the constitution are also applicable to computer generated evidence in that country.

In Nigeria, Section 84 of the Evidence Act has however not abrogated other rules of evidence that are applicable to documentary evidence. For example, documents that require certification in accordance with Sections 104 and 105 of the Evidence Act would still require those conditions stated therein. What makes a document public or private is not the technology involved, but the way it is kept or the addressee. Thus, computer print-out issued by a public institution remains a public document which will require certification.³⁸ In addition, video recorded on a Compact Disc (CD) obtained from a public institution like the Nigerian Television Authority would still require certification. Failure to certify the above-mentioned documents will render them inadmissible.³⁹ In *Kubor v. Dickson* the Court maintained that the only admissible secondary evidence of a public document is a certified true copy of same. In that case, Exhibit D which was an internet print-out of public newspaper was by nature a secondary evidence of the original by reason of the provision of Sections 85 and 87(a) of the Evidence Act 2011.

Also, by bringing all forms of computer evidence into the fold of primary evidence, the statute has effectually blurred the difference between primary and secondary forms of evidence as contained in Sections 85-87 of the Evidence Act. While the difference is still expected to apply with respect to other forms of documents, it appears that an exception has been created with respect to computer generated documents. This, however, is essential, given the complicated nature of computer evidence in terms of not being easily producible in tangible form. Thus, while it may make for a good argument to say that if the word document is the original then a print out of the same should be treated as secondary evidence, it should be considered that producing a word document in court without the aid of print-outs or CDs is not just difficult, but quite impossible.

7. Computer Generated Evidence and the Risk of Manipulation

While allowing all forms of computer output to be admissible as primary evidence, the statute has overlooked the risk of manipulation. Tampering with electronic evidence is not very difficult and miscreants may find it easy to change records which are to be submitted in court. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice. Under the South African law of evidence, there is a requirement that anyone who wants to use a document as evidence has to satisfy the court that it is authentic. In other words, that the document is what it claims to be. Section 15(4) of the ECT Act provides that a data message made by a person in the ordinary course of business, or a certified copy, printout or extract from such data message is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law or the common law, admissible in evidence against any person*until rebutted*. An evidential burden is therefore placed on the party contesting the facts contained in it. Where a data message does not fall under this provision, it will usually be necessary to call the person who was responsible for the data message to establish its authenticity.

Under the Singaporean Evidence Act, there are presumptions relating to electronic records which are contained in S. 116A of the amended Evidence Act. There is a presumption relating to accuracy and reliability as well as presumptions relating to authenticity of electronic records. These two presumptions were based on the Canadian Uniform Electronic Evidence Act 1998. In the United Kingdom, where an issue relating to non- authenticity of electronically generated evidence has been raised, the court is required to hold a trial within trial to determine whether or not the document is authentic and whether the necessary foundation has been laid under Section 69 of the Police and Criminal Evidence Act, 1984.⁴⁰

The hearsay rule is premised on the principle that a maker of a statement must be examined in Court on the truth of the statements made. It may not always be possible to have the maker attend in Court. Problems may arise, for example, in internet communications where authors of various statements remain anonymous. Out-of-court statements which are not verified by its maker cannot otherwise be used to affirm the truth of the facts contained

³⁶ Prof. Murdoch Watney, Admissibility of Electronic Evidence in Criminal Proceedings: An Outline of the South African Legal Position. Journal of Information, Law and Technology. Retrieved from https://warwick.ac.uk/fac/soc/law/elj/jilt/2009_1/watney/watney.pdf. Accessed 16 May, 2018.

³⁷ (1996 (6) BCLR 788 (CC))

³⁸ See S. 104 of the Evidence Act.

³⁹ *Okoh v Igwesi* (2005) All FWLR (PT 264) 891

⁴⁰ *Alaba Omolaye-Ajileye* (supra).

in these statements.⁴¹ Generally, computer-generated records which do not contain human information are not subject to the hearsay rule. The traditional exceptions to the hearsay rule are, however, likely to remain applicable and electronic records may still fall within such exceptions to constitute admissible evidence.⁴²

8. Conclusion and Recommendations

Given the unique nature of computer-generated evidence, there is no doubt that its admissibility raises and would continue to raise practical considerations such as the appropriate threshold for admitting it as evidence. In this paper, the writers have analysed some decisions of our courts Vis-a- vis the provisions of Section 84 of the Evidence Act 2011. In the course of the discussion, salient issues emanating from the interpretation of S.84 of the Evidence Act have also been examined drawing lessons from the positions in United Kingdom, India, South Africa and Singapore. The following suggestions are made on how to avoid some identified pit-falls in the practical applications of the provisions. There is no doubt that the provisions relating to admissibility of electronic evidence is still novel in Nigeria, both the body of legal practitioners and judiciary should be continuously educated on the application of this crucial provisions. Continuous legal education is necessary. The judicial scrutiny mentioned in S.84(2) of the Evidence Act on the conditions to fulfil before admitting electronically generated evidence cannot alone ensure that the documents sought to be admitted are authentic. Photo-tricks could be applied in the process between copying the original document and printing. Unlike the Singaporean and the South African evidence laws where statutory presumption on authenticity and reliability have been introduced, there is no provision under the Nigerian Evidence Act for such. There is the need to amend the Evidence Act to incorporate authenticity provisions for electronic documents. There are no clear provisions to determine the authenticity or otherwise of a document through trial within trial under the Nigerian laws. This is very important in the settlement of any dispute or issues raised concerning admissibility of electronic generated evidence. It is imperative to have such in our law or practice direction. Computer generated documents should be subjected to the traditional criteria for admissibility of such documents where applicable. Relevancy and proper foundation should be properly laid and considered before such document is admitted by the court. It is suggested that in order to avoid conflicting interpretation of Section 84 of the Evidence Act, there should a template of how the section should be interpreted to be issued by the Chief Justice or the National Judicial Council or as a form of practice direction. The decisions in *Brila Energy Limited v Federal Republic of Nigeria* and *Jubril v FRN* are apposite and have further simplified the position of the law in respect of admissibility of computer-generated evidence.

⁴¹ See *Kwale v State* (2003) FWLR (PT 159) 1504. In this case, the court held that evidence of a witness in court based on a report written by a person not himself called as a witness is hearsay.

⁴² A Commentary on the Amendments to the Electronic Evidence Provisions in the Singapore Evidence Act. Available at <https://www.lawsociety.org.sg/portals/0/Media%20Centre/Law%20Gazette/pdf/SLG-July-2012.pdf>. Accessed on 11th May, 2018.