An Appraisal of the Law on Admissibility of Electronic Evidence in Civil Litigation in Nigeria

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Abstract

Until 2011, when the current Evidence Act became operational in Nigeria, the repealed Evidence Act together with common law rules of evidence were the principal sources of Nigeria's Law of Evidence from 1945 and 2011. When the Evidence Act 1945 was introduced, no provision was made for the use of electronic evidence in litigation because electronic devices were virtually non-existent. Electronic evidence has since assumed a prominent global position in the adjudication of disputes. Despite its merits, unlike traditional paper evidence whose alteration or manipulation is easily noticeable, electronic evidence can be altered or manipulated with ease. Section 84 of the Evidence Act, 2011 was introduced to regulate the authentication and admissibility of electronic evidence. This article examines the judicial attitude of Nigerian courts in civil litigation to section 84 of the Evidence Act, 2011 and finds that there has been a great level of inconsistency and disharmony in the application of the said provision. The article therefore makes a case for the introduction of a set of rules or guidelines to complement, in detail, the provisions of section 84 of the Evidence Act, 2011 to forestall a return to *status quo* prior to the introduction of the 2011 Act.

Keywords: Admissibility. Authentication. Civil Litigation. Electronic Evidence. Judicial Attitude

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1.0 Introduction

In today's world, it is practically impossible to conduct any activity without the use of computers and electronic technology. In Nigeria, day-to-day transactions, inclusive of commercial and non-commercial activities, have become largely dependent on technology. Consequently, technology and electronic evidence play an increasingly crucial role in civil litigation in Nigeria. The prevalence of the utilization of technology in areas of electronic commerce, electronic governance, and storage of digital information necessitates an appraisal of the law on admissibility and authentication of electronic evidence in Nigeria. In judicial proceedings in Nigeria and indeed other parts of the world, Judges are consistently being faced with issues of electronic evidence with the consequence that their rulings on these issues have great impact on the eventual outcome of litigation.[1]

The various types of electronic evidence such as CD, DVD, hard disk, website data, social media communication, electronic mails, SMS/MMS, instant messages and other computer-generated documents potentially create issues of proper authentication and admissibility in litigation in Nigeria. The courts are expected to assess and authenticate the information obtained from these electronic devices as an exact representation of the original information contained in the electronic device. The justification for the authentication of electronic evidence lies in the fact that manipulation and alteration of paper evidence is easily noticeable.[2]

What is more, with electronic evidence such manipulation, alteration or mutilation may go unnoticed. Has the introduction of section 84 of the Evidence Act, 2011 resolved the problem of admissibility and authentication of electronic evidence in Nigeria? Have the courts been

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1 In the cases of *Dickson v. Sylva* [2017] 8 NWLR (Pt.1567) 167 and *Akeredolu & Anor v. Mimiko & Ors* [2013] LPELR-20532 (CA), the germane issue of determining who was validly elected to the constitutional office of Governor of Bayelsa and Ondo States of Nigeria respectively, turned on the issue of admissibility of electronic evidence.

2 Where such manipulation or alteration is noticed it may raise the allegation of fraud in civil cases and the offences of uttering and forgery in criminal cases. In *Adinnu & Anor v. Adinnu* [2013] LPELR -2151 (CA) the court stated that every forgery involves an alteration of documents but not every alteration of documents amounts to forgery. Similarly, in *Obuladike v. Nganwuchu* [2013] LPELR-21265 (CA) the court held that any alteration of a document is forgery with or without a fraudulent intention but the offence of forgery is proved when there is alteration or uttering of a document coupled with a fraudulent intention.

unanimous in their application of the section? If the courts have not been unanimous in their application, is there a likelihood of a return to the former position pre-Evidence Act, 2011? In light of the foregoing, this article appraises the extant legal framework for and judicial attitudes towards admissibility and authentication of electronic evidence in civil litigation in Nigeria.

The article is divided into five parts. Part one introduces the article. Part two clarifies terms that have been extensively employed in the article. Part three examines the legal framework for admissibility of electronic evidence in Nigeria. In part four, the article examines judicial attitude to electronic evidence by the Nigerian courts since the introduction of the Evidence Act, 2011 and appraises the application of the provisions of section 84 of the Evidence Act, 2011 by Nigerian courts in civil litigation. Part five concludes the article and offers recommendations based on the judicial attitudes of Nigerian courts to the provisions of section 84 of the Evidence Act, 2011 on electronic evidence.

2.0 Clarification of terms

Computer and electronic technology related terms are quite technical. It is, therefore, important that such technical terms are clarified for a proper understanding of the issues that are discussed in this article. The following terms which are extensively employed are explained as follows:

2.1 Computer

An understanding of what a computer is and the way it works is necessary for a proper appreciation of electronic evidence.[3]

A computer is generally defined as a programmable device that stores, retrieves and processes data. Computers are electronic devices that accept data (input), process the data (output) and store the results.[4] Certain statutes in Nigeria have also defined the word ‘‘computer’’, for instance, the Evidence Act, 2011 defines a computer to mean 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

[3] A., Omolaye-Ajileye, *Electronic Evidence* (Jurist Publication Series 2019) 57.

[4] Online Definition at <http://www.computerhope.com/jargon/c/computer.htm> accessed 1/3/2021.

by calculation, comparison or any other process.[5] This definition of a computer may appear vague or ambiguous but is indeed quite wide to cover all manner of devices used in storing and processing information. It goes beyond the ordinary conception of a computer as a complete unit with monitor, keyboard and central processing unit (C.P.U).

The definition of a computer in the National Information Technology Development Agency Act[6] as well as Cybercrimes (Prohibition, Prevention etc.) Act[7] is more technically detailed. Section 34 of the NITDA Act defines a computer thus:

> Computer means any electronic device of computational machinery using programmed instructions which has one or more of the capabilities of storage, retrieval, memory, logic, arithmetic or communication and includes all input, output, processing, storage, software, or communication facilities which are connected or related to such a device in a system or network or control function by the manipulation of signals, including electronic, magnetic or optical and shall include any input, output, data storage, processing or communication facilities directly related to or operating in conjunction with any such device or system or computer network.

As technically detailed as the above definition is, it fails to explain what amounts to computational machinery. Is there a level of sophistication to this computational machinery? The definition also includes any input, output, data storage, processing or communication facilities directly related to or operating in conjunction with such a device which leaves room for many other devices which should not ordinarily be considered as computers to be brought under the umbrella of the definition.[8] Similarly, the Cybercrimes Act defines a computer to mean:

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5 Section 258.

6 NITDA Act 2007 published in the Federal Republic of Nigeria Official Gazette No. 99 Vol.94 of 5th October, 2007.

7 Cybercrimes Act 2015 available online at< http://www.lawpadi.com/wp-content/uploads/2015/08/Cybercrime_ProhibitionPrevention_Act_2015.pdf> accessed 1/3/2021.

8 For example, a printer would qualify as a computer under this definition when in the real sense a printer is not a computer.

> An electronic, magnetic, optical, electrochemical or other high speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility. All communication devices that can directly interface with a computer through communication protocols shall form part of this definition. This definition excludes the following; portable hand-held calculator, typewriters and typesetters or other similar devices.[9]

Interestingly, the above definition of computer includes all communication devices that can directly interface with a computer through communication protocols. This leaves room for open ended ambiguity. The fact that a communication device interfaces with a computer should not automatically translate it to a computer.[10] The above statutory definitions in the NITDA Act and Cybercrimes Act have basically widened the scope of what a computer should be to accommodate everything connected to a computer with the exception of hand-held calculators, typewriters and typesetters. It is noteworthy that although our courts have adjudicated on several matters involving the application of computers, they are yet to undertake the task of offering a judicial definition or interpretation of the statutory definition of a computer. This may be borne out of the seeming understanding in the mind of the courts as to what qualifies as a computer. From the perspective of evidence, a computer contains digital evidence such as files[11] and logs, documents, networks and data that can greatly assist in the resolution of any facts in issue. Information can be retrieved from the computer storage which may be used to arrive at a conclusion in proof or disproof of facts to be adjudicated upon.

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9 Section 58 of the Cybercrimes (Prohibition, Prevention etc) Act 2015.

10 For instance, a handheld Bluetooth device or ear piece cannot rightly be regarded as a Computer.

11 For example, System Files, Program Files, Temporary Files, Cache Files, Deleted Files.

2.2 Electronic Evidence

Electronic evidence has been variously defined to include information of probative value that is stored or transmitted in binary form[12], information stored or transmitted in binary form that may be relied on in court[13] and any data stored or transmitted using a computer that supports or refutes a theory of how an offence occurred or that addresses critical elements of the offence such as intent or alibi.[14] Electronic evidence has also been described as digital evidence, computer evidence or computer-generated evidence.[15] Due to its dynamic nature, having a concise definition has proven quite difficult because of the danger of obsoleteness that may soon befall such definition. However, it has been defined as data (comprising the output of analogue devices or data in digital format) that is manipulated, stored or communicated by any man-made device, computer or computer system or transmitted over a communication system that has the potential to make the factual account of either party more probable or less probable than it would be without the evidence.[16] This definition attempts to be all encompassing to include every form of evidence in a computer or any technological device that can be said to be linked or connected to a computer and is relevant to any judicial proceedings. The following differences between traditional/paper evidence and electronic evidence have been identified by Peter Sommer:

a. In principle, it is hard to change the structure of traditional/physical evidence; whereas electronic data may change within a computer and/or a transmission line at any moment;

b. When physical evidence is altered, it would most probably leave traces or at least the alteration will be perceptible; however, electronic evidence can be easily altered without leaving any trace.

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12 Scientific Working Groups on Digital Evidence and Imaging Technology, 'Best Practices for Digital Evidence Laboratory Programs Glossary: Version 2.7' January 15, 2010.

13 International Organisation on Computer Evidence, G8 proposed principles for the procedures relating to digital evidence (IOCE 2000).

14 E.Casey, Digital Evidence and Computer Crime,(3rd Edition, Academic Press 2011) 7.

15 S.Mason and D.Seng, *Electronic Evidence*, 4th Edition, Institute of Advanced Legal Studies for the SAS Humanities Digital Library (University of London 2017) 18.

16 B.Schafer and S. Mason, The characteristics of Electronic Evidence in S.Mason and D.Seng fn 15 *supra* pg. 19. This definition was adopted by S.Dholam, Electronic Evidence and its challenges available at <http://www.researchgate.net/publication/313649713> accessed 3/3/2021.

c. It may be much easier to change or distort the electronic evidence than the physical evidence during the collection process.

d. Traditional evidence can be perceived at first sight; whereas most of the immediate electronic evidence cannot be read by humans, ‘‘many exhibits are print-outs derived from primary electronic material’’.

e. Electronic data can be obtained to the amount electronic devices record them.

f. The velocity of technology has a profound effect on the quality of electronic evidence and the possibility of obtaining them.[17]

The above differences serve as justification for interrogation of the law of admissibility and authentication of electronic evidence.

3.0 Legal Framework for Admissibility of Electronic Evidence in Nigeria

Until 2011 when the current Evidence Act became operational in Nigeria, the repealed Evidence Act together with common law rules of evidence were the principal sources of Nigeria's Law of Evidence between 1945 and 2011. When the Evidence Act 1945 was introduced, no provision was made for use of electronic evidence in litigation because electronic devices were virtually non-existent.[18] Electronic Evidence has since assumed a prominent global position in the adjudication of disputes. There is hardly any transaction that does not require the use of information technology or electronic devices. This technological shift from manual transactions to electronic transactions has necessitated legislative intervention in most jurisdictions and Nigeria should not be an exception in this regard.

The 2011 Evidence Act, which repealed and replaced the 1945 Evidence Act, has now made provision for electronic evidence. Under the Evidence Act 1945, electronic evidence was for obvious historical reasons not

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[17] P. Sommer, Digital Evidence: Emerging Problems in Forensic Computing available at <https://cl.cam.ac.uk/research/security/seminars/archive/slides/2002-05-21.pdf/ >accessed 8/7/2021.

[18] See the cases of *Yesufu v African Continental Bank* [1976] 4 SC 1 and *Anyaebosi v R.T.Briscoe (Nig) Ltd* [1987] 3 NWLR (Pt.59) 84.

accorded recognition.[19] Further, different evidentiary problems also hindered admissibility of electronic evidence. Rules on directness of evidence, the distinction between primary and secondary evidence and issues of reliability of electronic evidence were some of the problems associated with admissibility and evaluation of electronic evidence. Notwithstanding the absence of electronic evidence in the old evidence Act before 2011, the Supreme Court as far back as 1969 gave a tacit recognition to electronic evidence when it held in *Esso West Africa Inc v T.Oyegbola* [20] thus:

> The law cannot be and is not ignorant of the modern business methods and must not shut its eye to the mysteries of computer. In modern times, reproduction and inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to books of accounts.

In light of the above pronouncement, one would have reasonably expected the Supreme Court to have wholly embraced technological advancements by ensuring that the attitude towards admissibility of electronic generated evidence was liberalized. However, in an unexpected turn in *Yesufu v ACB* [21] the Supreme Court sounded the alarm on admissibility of computer generated evidence and the need for legislative clarification as follows:

> …while we agree that for the purpose of Sections 96(1) (h) and 37 of the Act, "bankers' books" and "books of account" could include "ledgers cards", it would have been much better, particularly with respect to a statement of account contained in document produced by a computer, if the position is clarified beyond doubt by legislation as had been done in England in the Civil Evidence Act.[22]

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19 At the material time when the 1945 Act was enacted, society had not witnessed the current level of technological advancement. The law was made for that moment in history but while other nations reviewed their laws with the times, Nigeria failed to do so and remained rooted in holding on to the vestiges of colonialism.

20 [1969] NMLR 198 at 216-217.

21 [1976] 4SC 1.

22 *Ibid* p.13.

As a result of the pronouncements of the Supreme Court, subsequent cases were sharply divided along the parallel lines of *Esso West Africa Inc v T.Oyegbola*[23] and *Yesufu v ACB*[24]. Electronic evidence enhances communication, accuracy and simplicity of transactions. For instance, in matrimonial disputes where paternity/custody of the children is a central issue to be decided upon, technology/electronic devices can be deployed in deciding issues of paternity of the children of such marriages. In view of the divergent approaches of the courts to issues of admissibility of electronic evidence under the repealed Evidence Act, the Evidence Act 2011 makes provision for admissibility and evaluation of electronic evidence. This was heralded as the new innovation in the Act that would settle any controversy regarding electronic evidence.

The Evidence Act, 2011 was enacted to solve some of the problems highlighted above. Sections 84 and 258 are the relevant provisions of the Act in relation to electronic evidence. Section 84 provides for the admissibility of a statement contained in a document produced by a computer. Section 84(2) states the conditions that must be satisfied before such a statement becomes admissible. Section 84 (4) requires that a certificate must be signed to authenticate the document by a person occupying a responsible position in relation to the operation of the relevant device or management of the relevant activities.

Section 84 has therefore seemingly provided the platform for admissibility of electronic documents and plugged the gap for the admissibility of electronic evidence left out in the old Evidence Act with regard to electronic evidence in Nigeria. Section 258 (1) has also expanded the definition of the word "document" and "copy of document" to include 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, 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

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23 See the decisions in *Anyaebosi v R.T.Briscoe Ltd* [1987] 3 NWLR (Pt.59) 84; *Trade Bank v Chami* [2003] 13 NWLR [Pt.836] 158; *FRN v Fani-Kayode* [2010] 14 NWLR [Pt.1214] 481; *Oghoyone v Oghoyone* [2010] LPELR 4689.

24 See the decisions in *Numba Commercial Farms Ltd & Anor v NAL Merchant Bank* [2003] FWLR (Pt.145) 661; *UBA v Sani Abacha Foundation for Peace and Unity* [2004] 3 NWLR (Pt.861) 516; Charge No. FHC/L/523c/08 *Federal Republic of Nigeria v Fani-Kayode* (unreported).

reproduced from it and any device by means of which information is recorded, stored or retrievable including computer output. The courts have utilized these provisions in admitting tape recordings[25], plastic bottles bearing trademark inscriptions[26] and video tapes as evidence[27].

Laudable as the introduction of the provisions of section 84 of the Evidence Act, 2011 is, courts in Nigeria have been unable to speak with one voice on the admissibility and authentication of electronic evidence.[28] Osipitan argues that although the Evidence Act, 2011 is a welcome legislation which will impact positively on our adjectival law and administration of justice in the long run, the Act does not sufficiently address all the legal problems associated with electronic evidence.[29] Hon also argues that many legal practitioners in Nigeria, apparently owing to dearth of authoritative decisions on the subject matter, have already started misapplying the provisions of section 84 of the Evidence Act, 2011.[30]

In the next part of the paper, the attitude of the courts to the admissibility and authentication of electronic evidence in civil litigation since the enactment of the Evidence Act, 2011, shall be considered.

4.0 Judicial Attitude to Admissibility of Electronic Evidence in Civil Litigation in Nigeria

The provisions of section 84 of the Evidence Act, 2011 have been placed and continue to be placed under judicial scrutiny. Section 84 of the Evidence Act, 2011 provides as follows:

> (1) 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 conditions in subsection (2) of this section are

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25 *Federal Polytechnic Ede & Ors v Oyebanji* [2012] LPELR 19696 CA.

26 *Holdent International Ltd v Petersville Nigeria Ltd* [2013] LPELR-21474 (CA).

27 *Obatuga & Anor v Oyebokun & Ors* [2014] LPELR 22344.

28 T.Osipitan, K.Amusa and A. Odusote, 'An Overview of the Evidence Act, 2011' *The Nigerian Journal of Public Law* [2012] University of Lagos, 1 -29.

29 T.Osipitan, 'Admissibility of Electronic Evidence: The Imperatives of Oral Evidence and Certificate of Authentication' in A. Omolaye-Ajileye *'Electronic Evidence' supra* fn 3, 577.

30 S.T.Hon *' S.T.Hon's Law of Evidence in Nigeria'* Third Edition, Pearl Publishers International Ltd, 2019, 444.

satisfied in relation to the statement and computer in question.

(2) The conditions referred to in subsection (1) of this section 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 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 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 that part period was not such as to affect the production of the document or the accuracy of its contents; and

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

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

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

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

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

(d) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate –

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

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

i. dealing with any of the matters to which conditions mentioned in subsection (2) above relate; and purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities, as the case may be, shall 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.

(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

(b) whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;

(c) 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;

(d) 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.

The judicial attitude of our courts to the above provisions is examined in the following civil cases covering several types of electronic evidence.

i. Election Petitions/Appeals (Website, Audio/CD/Video, Smart Card Reader etc)

Section 84 of the Evidence Act, 2011 on electronic evidence was first judicially tested in the Supreme Court case of *Kubor v Dickson.*[31] This is an election petition case against the election of the 1st respondent to the office of Governor of Bayelsa State. The appellants' case was that the 1st respondent was not qualified to contest the election into the office of Governor of Bayelsa State held on 11th February, 2012 because prior to the date of the election, there was a pending litigation on the question of who was the candidate of the 2nd Respondent for the election. The appellants' counsel tendered, from the Bar, internet print outs of Punch

[31] [2013] 4 NWLR (Pt.1345) 534.

Newspaper and list of candidates posted on INEC's website and both documents were marked Exhibits D and L respectively. In dismissing the petition, the Governorship Election Petition Tribunal rejected exhibits D and L. Appellants unsuccessfully appealed to the Court of Appeal and further appealed to the Supreme Court. One of the issues that came up for determination by the apex court was the admissibility of Exhibits D and L which were expunged by the Governorship Election Tribunal. The court held as follows:

> Granted, for the purpose of argument, that exhibits ''D'' and ''L'' being computer generated documents or e-documents downloaded from the internet are not public documents whose secondary evidence are admissible only by certified true copies then it means that their admissibility is governed by the provisions of Section 84 of the Evidence Act, 2011...There is no evidence on record to show that appellants in tendering exhibits ''D'' and ''L'' satisfied any of the above conditions. In fact, they did not as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundation for their admission as e-documents under section 84 of the Evidence Act, 2011. No wonder therefore that the lower court held, at page 838 of the record thus:
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> A party that seeks to tender in evidence a computer generated document needs to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84 (2) of the Evidence Act, 2011.
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> I agree entirely with the above conclusion. Since appellant never fulfilled the pre-conditions laid down by law, exhibits ''D'' and ''L'' were inadmissible as computer generated evidence documents.[32]

[32] Per Onnoghen, JSC at 577-578 Paragraphs C- D.

The apex court did not mince words in emphasising the importance of compliance with the provisions of section 84 of the Evidence Act, 2011 on admissibility of electronic evidence. The court further made it clear that compliance with section 84 cannot be met by merely tendering the documents from the bar but by evidence being led in support of same. This writer wonders why in a high stake election matter, a party tendering electronic evidence would fail to comply with clear provisions of the Evidence Act on admissibility of electronic document. The point that electronic evidence is too crucial and vital for the proponent to have it excluded was made in the United States case of *Lorraine v Markel Am. Ins. Co*[33] where the Court noted as follows:

> Very little has been written…about what is required to insure that ESI (electronically-stored information) obtained during discovery is admissible into evidence at trial….This is unfortunate, because considering the significant costs associated with discovery of ESI, it makes little sense to go to all the bother and expense to get electronic information only to have it excluded from evidence or rejected from consideration during summary judgment because the proponent cannot lay a sufficient foundation to get it admitted.

In *Omisore v Aregbesola*[34], the 1st appellant and 1st respondent contested for the office of Governor of Osun State, Nigeria on 9th August, 2014. The 1st appellant was the gubernatorial candidate of the 2nd appellant while the 1st respondent was the gubernatorial candidate of the 2nd respondent. At the conclusion of the election, the 1st respondent won the majority of lawful votes cast and was declared Governor-elect of Osun State by the 3rd respondent, Independent National Electoral Commission (INEC). Following the declaration, the appellants filed a petition at the Governorship Election Petition Tribunal, Osun State challenging the declaration and return of the 1st respondent in seventeen out of the thirty Local Government Areas of the State. At the hearing of the petition, the 1st respondent objected to the admissibility of exhibits 243 and 342 being computer-generated documents tendered in breach of section 84 of the

33 241 F.R.D 534, 537-38 (D. Md.2007).
34 [2015] 15 NWLR (Pt.1482) 205.

Evidence Act, 2011. Appellants argued that only internet generated documents are caught by the provisions of section 84 of the Evidence Act, 2011. At the close of hearing and final addresses, the Election Tribunal delivered its judgment in which it overruled the objection and dismissed the petition. On a further appeal and cross-appeal to the Court of Appeal, Akure Division, the court dismissed the appellants' appeal and affirmed the judgment of the Tribunal affirming the declaration of the 1st respondent as the winner of the election. The 1st and 2nd respondent's appeal was allowed in part. The appellants lodged another appeal to the Supreme Court while the 1st and 2nd respondents' also cross-appealed against part of the judgment in the cross-appeal which discountenanced the objection against the admissibility of computer-generated documents tendered at trial. In allowing the cross-appeal, the Supreme Court held:

> As noted above, the main plank of the argument of the first and second cross respondents, with regard to the second issue above, was that only internet-generated documents are caught by the admissibility requirements of section 84 of the 2011 Evidence Act. With profound respect, this argument is untenable. Even the very chapeau or opening statement in section 84(1) contradicts this submission. The relevant phrase here is ''a statement contained in a document produced by the computer…''. Interestingly, the draftsperson did not leave the meaning of the word ''computer'' to conjecture. In section 258 (1), the Act defines ''computer'' to mean ''any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process''.
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> In effect, exhibits 243 and 342, being computer-generated documents, could only have been admissible in evidence upon compliance with the requirements of section 84(*supra*), *Kubor* v *Dickson* (*supra*). The lower court was therefore, in error in this regard.[35]

[35] Per Nweze, JSC at page 295 Paragraphs B-G.

The *Omisore v Aregbesola* case put to rest the untenable argument of counsel which sought to create a distinction between internet generated documents and electronic evidence, when obviously the internet is electronic by nature and functions using a computer. It is noteworthy that in the *Omisore case*, the lower courts refused to be bound by the decision of the apex court in *Kubor v Dickson* (supra). This refusal to be bound by the decision led to both courts adopting the submission of appellants' counsel that section 84 of the Evidence Act, 2011 only applies to internet generated documents because the documents in issue in the *Kubor case*, were internet downloads. The apex court took the opportunity to re-emphasise that a statement contained in a document produced by a computer must necessarily comply with the provisions of section 84 of the Evidence Act, 2011 thus nullifying the argument on the attempt to limit the scope of the section. Ordinarily, the drafters of section 84 of the Evidence Act, 2011 would not have envisaged that the words 'internet generated document' and 'electronic evidence' will be up for debate not to talk of being a subject of litigation from the election petition tribunal to the apex Court.

In *Dickson v Sylva*[36] , the appellant and 1st respondent contested the election into the office of Governor of Bayelsa State conducted by the Independent National Electoral Commission (INEC) on 5th and 6th December, 2015 and 9th January, 2016. At the conclusion of the election, the appellant was declared winner of the election and sworn in as Governor of the State. Aggrieved by the said declaration, the 1st respondent filed a petition at the Governorship Election Tribunal on 30th January, 2016. On 29th April 2016, the Tribunal, at the instance of the 1st respondent, issued a *subpoena duces tecum ad testifcandum* on one Pedro Innocent, the production manager of Channels Television, Lagos to testify and produce DVD/CD/VCD/audio recording and video clips of the coverage of the 5th and 6th December 2015 Governorship Election in Bayelsa in respect of the Southern Ijaw Local Government Area of the State. On 10th May 2016, one Emmanuel Ogunseye was put in the witness box as PW51. Pursuant to section 84 of the Evidence Act, 2011 a certificate of compliance/identification and a DVD were admitted as exhibits P42A and P42B respectively. After the admission in evidence of the certificate and the DVD, counsel to the 1st respondent applied to the

[36] [2017] 8 NWLR (Pt.1567) Page 167.

Tribunal that the DVD (exhibit P42B) be played in open court with the use of a laptop, a projector and an electronic screen different from the computers contained in the certificate tendered as exhibit P42A. Counsel to the appellant objected on the grounds that the computers sought to be used to play the DVD were not certified as required under section 84 of the Evidence Act, 2011. The Tribunal agreed with the appellant, upheld the objection and rejected the application to play the DVD. The Tribunal held that when a document is sought to be given in evidence and also to be demonstrated in court, the means of production of which document falls within the definition of computer in the Evidence Act, then two different steps and stages are involved: (1) the one used to store the information and; (2) the one to be used to retrieve and if need be demonstrate or play them out- are involved. Both categories of computers must be certified as required by section 84.[37]

Evidently dissatisfied with the decision, 1st respondent appealed to the Court of Appeal, Benin Division which upturned the decision of the Election Tribunal and ordered the Tribunal to forthwith recall PW51 for the purpose of demonstrating the contents of exhibit P42B in open court. The Court held:

> If the conditions for the admissibility of electronically generated evidence are fulfilled, there ought to be no other impediment to it being demonstrated. The certification provided for in section 84 relates to the computer(s) or gadget(s) from which the electronic document is generated or produced. While by virtue of the provisions of section 258 the computer or gadget to play or demonstrate the electronic document falls under the definition of computer, by virtue of the provisions of section 84, which governs admissibility of electronically-generated documents, there is no requirement for the certification of that other computer or gadget employed to demonstrate or play the electronically-generated document already admitted in evidence.[38]

[37] Page 195 Paragraphs G- A.
[38] Page 198 Paragraphs E-G.

Being aggrieved by the judgment of the Court of Appeal, appellant appealed to the Supreme Court. The Supreme Court dismissed the appeal and affirmed the decision of the Court of Appeal. In this case, there was compliance with the provisions of section 84 (2) of the Evidence Act, 2011 on certificate of compliance before the election petition tribunal. Notwithstanding the said compliance, the Tribunal placed further obstacles devoid of legal basis to prevent the demonstration of the electronic evidence in open court. The attitude of the Election Petition Tribunal to the provisions of section 84 of the Evidence Act, 2011 only shows that there is need for clarity on the guidelines for admissibility of electronic evidence. A sensitive, volatile and time-bound gubernatorial election petition made its way to the Supreme Court on account of non-certification of computers and gadgets i.e. DVD used to demonstrate already admitted evidence. It is noteworthy that the Tribunal was comprised of three High Court Judges who followed the decision in *Kubor* v *Dickson* but now went beyond the scope of section 84 of the Act by introducing new conditions outside those specified in section 84 (2) of the Act.

In *Akeredolu & Anor v Mimiko & Ors*[39], the 1st appellant and 1st respondent along with others contested the Governorship Election in Ondo State on 20th October, 2012. The 1st respondent was declared winner of the election. Appellants were dissatisfied with the outcome of the election and challenged the declaration and return of the 1st respondent at the Governorship Election Petition Tribunal. In the course of the proceedings, appellant sought and obtained the order of the Tribunal for their experts to testify and tender receipts of analysis conducted by them. The appellants called PW 35 who was alleged to have conducted physical inspection with his team on electoral materials and particularly the 2011 and 2012 voters' registers. While leading the witness in evidence, the learned senior counsel for the appellants applied that the appellants be allowed to demonstrate using electronic gadgets, through the said PW 35, the electronic voters' register for 2011 and 2012 already admitted in evidence as Exhibits P50 (A) and P50 (B) which were produced by INEC under a *subpoena duces testificandum*. The Tribunal refused appellants' application for an electronic demonstration. Aggrieved, appellants appealed to the Court of Appeal. The court held:

[39] [2013] LPELR-20532 (CA).

Furthermore, exhibits P50A and P50B being soft copies of the voters' register are subject to the provisions of section 84 of the Evidence Act, 2011 being that they are computer generated documents. The devices to be used in the demonstration are computers within the meaning of section 258(1) of the Evidence Act(*supra*) and it defines computer to mean ''any device for storing and processing information and any reference to information being derived from it by calculation, comparison or any other process''. Now on reading through the statement on oath of PW 35, I observed that there was nothing in it to the effect that the computer used to generate the exhibits and or to be used to carry out the demonstration before the Tribunal has been used ''regularly to store or process information for the purpose of any activities carried out over that period''. It is specifically provided in Section 84 of the Evidence Act as it relates to admissibility of statement in document produced by computers that:

84 (1) 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 will be admissible, if it is shown that the conditions in subsection (2) of this section are satisfied in relation to the statement and computer in question.

Going by the foregoing provision, it is discernible that the appellants who were desirous of demonstrating electronically the content of exhibits P50A and P50B failed to lay the necessary foundation regarding the condition of the electronic gadget or computer they were going to use. To the extent that those conditions as spelt out in section 84 were unfulfilled, the demonstration ought not to be allowed.

As rightly submitted by the Learned Senior Counsel for the 1st Respondent, a prior notice to the respondents regarding the proposed demonstration of the soft copies of the voters' register would have enabled the said respondents to get

> their own expert to observe and in turn advise them on the accuracy or otherwise of the computer gadgets the appellants proposed to use. It is no secret that such electronic devices as computers are subject to being hacked and or manipulated.[40]

In this case, the appellate court rightly affirmed the decision of the Election Petition Tribunal by following the decision in *Kubor v Dickson*[41] on mandatory compliance with the provisions of section 84 of the Evidence Act.

In *PDP v Abiodun & Ors*[42], the 1st and 2nd respondents challenged the election conducted by the Independent National Electoral Commission (INEC) for the Ogun East Senatorial District wherein the 5th respondent, Prince Buruji Kashamu, as candidate of the appellant was declared winner. At the conclusion of the petition before the Ogun State National and State Houses of Assembly Election Tribunal, the Tribunal cancelled several identified polling units and ordered fresh election relying on the report of PW 44. Appellant's counsel argued that the provisions of section 84 of the Evidence Act is not applicable to the report of PW 44. Appellant further argued that section 84 of the Evidence Act is not applicable to the testimony (statement on oath) which emanated from PW 44's inspection of the electoral materials and forms. In other words, it was not a case of production of a document by computer but a reduction into writing of his oral testimony in line with paragraph 4(5) (b) of the 1st Schedule to the Electoral Act.[43] In resolving the issue, the court held thus:

> The next germane issue is whether PW 44's report is computer generated and therefore subject to the requirements of section 84 (4) of the Evidence Act, 2011. I have elsewhere in this judgment reproduced the evidence of PW 44 wherein he stated that his report is based on the INEC certified true copies forms and that appendix A, B and C are printed from computer as every data from the spread sheet of the computer. Learned counsel to the 1st and

40 Per Jombo-Offo, JCA pg 29- 32.
41 *Supra* fn 31 .
42 [2015] LPELR-42158 (CA).
43 *Ibid*, pages 11- 12.

> 2nd Respondents profusely argued that PW 44's report formed part of his statement on oath and not documents requiring certification under section 84 of the Evidence Act. In effect, the report was not produced by a computer. However, in *Omisore* v *Aregbesola* (supra), it was held that not only internet generated documents that are caught by the admissibility requirements of section 84 of the Evidence Act, 2011. Thus, section 258 (1) of the Evidence Act defines ''Computer'' to include any device for storing and processing information and any reference to information being derived from other information. Therefore, the report put together by PW 44 having failed to meet the mandatory admissibility requirements in section 84 (4) of the Evidence Act, 2011 ought not to have been relied upon by the Trial Tribunal.[44]

The Court of Appeal in this instant appeal restated the need for computer generated evidence to comply with the requirements of section 84 of the Evidence Act thereby upturning decision of the Tribunal. However, the decision of the election petition tribunal further confirms that there is need for clear guidelines to assist the bench in admitting and authenticating electronic evidence.

In *Adeyela & Anor v Safiriyu & Ors*[45], the appellant sought to tender from the Bar, certified true copy of the smart card readers report with a certificate attached. The Tribunal rejected the document. The Court of Appeal held that the conditions stipulated in section 84 (2) of the Evidence Act cannot be fulfilled without some sort of foundational evidence by a witness in the witness box.[46] Consequently, non-compliance with the provisions of section 84 (2) was fatal to the case of the appellants.

ii. Electronic Mails and Statements of Account

In *Impact Solutions Ltd v Int'l Breweries Plc*[47] the Court of Appeal had to determine the question whether electronic mail correspondence falls

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44 Per M.L.Shuaibu, JCA at page 19.
45 [2015] LPELR-41782 (CA).
46 Per Mojeed Owoade, JCA page 15. See also *Collins Commermex Nigeria Limited & Anor v Skye Bank Plc* [2019] LPELR-46892 (CA) per Obaseki-Adejumo, JCA.
47 [2018] 16 NWLR (Pt.1645) 377.

within the category of documents produced by a computer. Before the appeal was lodged by the appellant, the issue had been raised at the trial court in the appellant's final written address that the documents tendered by the respondent are electronic mails which are computer-generated and ought to comply with the mandatory provisions of section 84 of the Evidence Act, 2011. The trial court overruled the objection raised on the ground of non-compliance with section 84 of the Act due to the fact that the appellant failed to object to the admissibility of the documents when they were tendered at trial. In resolving the issue, the court of appeal chastised the trial court for admitting the electronic mails in flagrant disregard for the mandatory provisions of section 84 of the Act. The court therefore held:

> In total loyalty to the dictate of the law, I have given a microscopic examination to exhibits A, B, C, D, E, E1, E2 and G sought to be expelled by the appellants. They are e-mail correspondence/messages exchanged *inter partes*. They fall, squarely, within the wide definition of document as ordained in section 258 of the Evidence Act, 2011 because their contents are ''expressed or described upon any substance by means of letters, figures or marks''. They were procured from computers…It stems from these, that the exhibits, in question, are classic exemplification of internet/computer-generated documents. Curiously, the witnesses of the parties, failed in their viva voce evidence/testimonies, wrapped in their statements on oath, failed to comply with the mandatory requirements of section 84 (2) and (4) of the Evidence Act, 2011. The *raison d'etre* for the satisfaction of the requirements of the sacred provision is to ''ensure the authenticity of the document and the integrity of the procedure used to bring it into being.''

> The parties' flagrant defilement of this inviolable provision is fraught with far-reaching consequence. It renders the documents, wholly, inadmissible. Put simply, their admission by the lower court is offensive to the adjectival law.[48]

The decision of the trial court to discountenance the non-compliance of electronic mails with the provisions of section 84 of the Evidence Act, 2011 which was roundly criticised by the Court of Appeal is a further indication of the lackadaisical attitude of some judges to the mandatory provision of the Act. It also shows that the provisions of section 84 of the Evidence Act, 2011 are not explicit in enumerating the admissibility requirements of all categories of electronic evidence.

In *U.B.N Plc v Agbontaen & Anor*[49] there was a disagreement between the parties over a loan facility. During trial, a computer printout of the statement of account was to be tendered by the appellant. The respondent objected to the admissibility of the statement of account for non-compliance with section 84 of the Evidence Act, 2011. Learned trial judge upheld the objection and rejected the document. Aggrieved by the ruling, appellant approached the Court of Appeal. Appellant argued that the statement of account was admissible under sections 51, 89 (1) (h) and 90 (1) (e) of the Evidence Act, 2011. The appellant's reasoning was that section 84 of the Evidence Act is a general provision while sections 51, 89 (1) (h) and 90 (1) (e) of the Evidence Act are specific provisions on statements of account. The respondent insisted that section 84 applies to the statement of account being a computer generated document. In resolving the issue, the Court of Appeal held that the distinction between the provisions of section 84 of the Evidence Act on the one hand and section 89 (1) (h) and 90 (1) (e) on the other hand can be gleaned from their marginal notes. While the marginal note for section 84 reads ''admissibility of statement in document produced by computers'', sections 89 and 90 read ''cases in which secondary evidence relating to documents are admissible'' and ''nature of secondary evidence admissible under section 89''. The court further held that in the instant case, there is

[48] At page 398 Paragraphs B-G per Ogbuinya, JCA.
[49] [2018] LPELR-44160 (CA).

no disputing the fact that the statement of account sought to be tendered had its origin from a computer whether or not it is asserted to be extracted from an electronic ledger which to all intents and purposes, the information therein was imputed through a computer and the print out also there from.[50] The reasoning of the Court of Appeal cannot be faulted in this case, considering the fact that all Nigerian banks have migrated from the analogue means of producing account statements to a modern, digital and technology friendly mode of sending account statements to customers. The appellant's argument that section 84 of the Evidence Act is a general provision clearly flies in the face of the specific provisions of the section which are centred on computer generated documents.

In *Rosehill Ltd v GTB Plc*[51] where the Court had to determine whether computer generated statements of account tendered from the bar are admissible in law. The decision of the Court on this point is quite illuminating:

> I have had a dispassionate perusal of the entire proceedings of the lower court, particularly the pages of the record of appeal where the aforementioned documents were admitted in evidence. I have not been able to trace or find any statement of facts or evidence proffered in satisfaction or fulfilment of the provisions of sub-sections (1), (4) and (5) of section 84 of the Evidence Act, 2011 which has qualified any of the documents admitted in evidence as Exhibits 1A, 1B, 26, 27 and 30 as computer generated documents. I therefore hold that the said documents were wrongly admitted in evidence under the provisions of section 84 (1) and (2) of the Evidence Act, 2011. Therefore, having been wrongly admitted in evidence under section 84 (1) and (2) of the Evidence Act, 2011, the said documents ought to have been expunged as evidence and the lower court ought not have relied on them in taking a decision.
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> At the lower Court, Exhibits 1A, 1B, 26, 27, and 30 were tendered from the Bar and admitted in evidence by the

[50] Per Oseji, JCA at pp. 11-12 paragraphs E-B.
[51] [2016] LPELR-41665 (CA).

> Lower Court without any witness giving evidence laying the foundation for the admission of the said document in evidence as provided by section 84 (1) and (2) of the Evidence Act, 2011. Surely, Exhibits 1A, 1B, 26 , 27 and 28 were not admitted in evidence by the Lower Court as provided for under Section 84 (1) and (2) of the Evidence Act.[52]

The above decision of the Court of Appeal finds philosophical backing in evidence theory. It has been said by a writer[53] that for computer generated evidence to be admitted, it is important that it satisfies certain steps, including foundation requirements, to guarantee its authenticity. Again, *Rosehill Ltd v GTB Plc* further confirms that the nonchalant attitude of some Judges to the provisions of Section 84 of the Evidence Act, 2011 is not an isolated incident.

In *Uli Microfinance Bank (Nig) Ltd v Okwuchukwu*[54] the issue that arose was whether the trial court was right when it admitted and acted on Exhibit P1, a ledger, being a computer printout (e-document) without strictly complying with the mandatory provisions of section 84 of the Evidence Act, 2011. In resolving this thorny issue, the Court of Appeal held:

> Judicial notice may be taken of the fact that many banks now operate their banking business through computer generated documentary evidence. The computers are not in the custody of the customers but the bank. The customer supplies information to the banks which are fed into the computers in the custody of the bank. The customers' accounts are kept and maintained by the bank. I can take judicial notice of these facts under the provisions of Sections 84 (1) – (5), 124 (1) – (3), 125, 126 (a) – (d) of the Evidence Act, 2011. Where a dispute has arisen between a customer and the bank that is said to be in the custody of the customers money and would not release same on demand as per the terms of the documents

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52 Per Ibrahim Bdliya, JCA at pages 14- 16 and 23.

53 A.Awobiyide, 'Theoretical Framework of the Law of Evidence' *Adeleke University Law Journal* (2019) Vol. Number 1, 83- 109.

54 [2018] LPELR-44956 (CA)

> governing their relationship, there is the presumption in law that the bank is under an obligation to produce the computer generated evidence in respect of the customer's account in her possession to prove or disprove the facts in dispute.[55]

In this case, the court created a presumption in favour of the customer in a banker/customer relationship that the bank has custody of electronic bank statements and should consequently be compelled to produce it when there is a dispute in respect of a customer's account. The presumption created by the court in this case is most unlikely to survive judicial scrutiny if a further appeal is lodged against the judgment to the Supreme Court particularly that the burden of complying with the provisions of section 84 of the Evidence Act, 2011 is on the party who has generated the electronic document.

iii. GSM (Short Service Messages and Call Logs), Memory Cards and Pictures

The case of *N.B.A v Kalejaiye*[56] provides another instance of the seeming difficulty in application of the provisions of section 84. The respondent, a legal practitioner and Senior Advocate of Nigeria (SAN), was engaged as counsel in the conduct of the defence of an election petition before an Election Petition Tribunal headed by Hon.Justice Thomas Naron as the chairman. A petition was written on behalf of a political party, the Action Congress, against the respondent. The petitioner alleged that the respondent, while engaged as counsel in the conduct of the defence of the gubernatorial election before the Election Petition Tribunal, exchanged several voice calls, multimedia services (mms) and short messages services (sms), text messages, with some of the Judges who were members of the Election Petition Tribunal especially the chairman, Hon.Justice Thomas Naron. In proof of the allegations contained in the petition, the petitioner identified telephone number 08034062075 as the telephone number of the respondent and telephone number 08037035105 as the telephone number of Hon. Justice Thomas Damar Naron. The petitioner also attached certified true copies of MTN call logs which he claimed he obtained from the judicial proceedings in Suit No. LD/1046/08 between

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55 Per Tur, JCA at pages 28, 34- 35.

56 [2016] 6NWLR (Pt.1508) page 393.

Independent Communications Network Ltd (Publishers of the News Magazine) and Lasisi Olagunju wherein an order of court was obtained directing MTN Nigeria Communications Ltd to make available to the claimant copies of all call logs in respect of telephone numbers 08034062075 and 08037035105. The call logs revealed that during the pendency of the several petitions before Justice Naron-led Tribunal, the respondent and Justice Naron were in constant telephone communication which neither Hon. Justice Naron nor Kunle Kalejaiye, SAN brought to the attention of opposing counsel in all the election petitions.

At the disciplinary hearing of the complaint, the respondent who earlier denied being involved in any telephone exchanges with Hon.Justice Naron or any other Judge on the Election Petition Panel turned around to allege spoofing[57] of his telephone number. The respondent also called an expert witness to demonstrate how spoofing of a telephone number works. The issue before the Committee then turned on the authenticity of the call logs and sms exchanges between the respondent and Hon. Justice Naron. Was there really direct communication between Learned Silk and the Noble Lord? Whereas, the petitioner relied on the Certified True Copy of the call logs obtained in Suit No: LD/1046/08, the respondent relied on expert witness of one, Dr. Peter Olu Olayiwola. The respondent challenged the certification of the call logs for non-compliance with the provisions of section 84 of the Evidence Act, 2011. The Committee effectively captured the issues in controversy as follows:

> From the evidence before us, it is clear that the main matter in context has been reduced to whether the respondent was consciously engaged in telephone communication exchange with the Chairman of the Osun State Governorship and Legislative Houses Election Petition Tribunal, Hon.Justice Naron while engaged as counsel in the defence of the election petition filed by the petitioner or whether his telephone No.08034062075 was merely cloned or spoofed. This is so because, although the respondent initially

[57] Spoofing occurs when a hacker or information technology expert or others with knowledge of information technology, clone a GSM telephone number belonging to an unsuspecting or ignorant third party, use the cloned number to call another phone number and sent text messages to another without the knowledge, authority or consent of the unsuspecting or ignorant third party. See page 417 Paragraphs A-C.

> maintained a stance in his reply to the petitioner's petition to the N.B.A., exhibits P.16 – P.25, that the call logs published in the News Magazine did not emanate from MTN, he eventually settled for the line of defence of spoofing.[58] We hold that the line of defence of spoofing is not consistent with a denial of the existence of a call log which shows that the respondent's phone number was employed to engage in telephone communications with the phone number of the Hon.Justice Naron. To the contrary, the defence of spoofing is an admission that the respondent's phone number was indeed used in the questionable telephone conversations but without his knowledge of consent.[59]

The Committee further held that the documents tendered to evidence the log of telephone exchanges between telephone Number 08034062075 and 08037035105 which were admitted in evidence as exhibits P.104 to P.620 inclusive of receipts of payment for certification and other related documents bear the mark of certification by the High Court of Lagos State and that the respondent's argument. That, although the record of proceedings could be certified by the registrar of the Lagos High Court, the call log being a computer generated document cannot be so certified except in strict compliance with section 84 of the Evidence Act, 2011 was untenable.[60] The Committee held that the documents in issue being part of the record of proceedings of the High Court of Lagos State falls within the category of documents described as public documents under Section 102 of the Evidence Act, 2011 and are therefore admissible and can be tendered from the Bar without the need to call any witness for the purpose of tendering it.[61] It was also decided that the presumption of genuineness in favour of all certified copies of public documents under section 146 of the Evidence Act, 2011 can be invoked in favour of the documents and it is the duty of any person challenging the content of a certified public document to lead the necessary evidence in rebuttal of the certified public document.[62] On the larger issue of non-compliance of the log of telephone

[58] Page 420 Paragraph F-H.
[59] Page 421 Paragraph F-G.
[60] Page 422 – 423 Paragraphs H-B.
[61] Page 423 Paragraphs D.
[62] Page 423 Paragraphs G-H.

exchanges with the requirements of section 84 (1) (2) and (4) of the Evidence Act, 2011, the Committee held as follows:

> The respondent has also argued that the certified copy of the log of telephone exchanges admitted in evidence did not satisfy the requirements of section 84(1) (2) and (4) of the Evidence Act, 2011. We do not think that section 84 of the Evidence Act constitutes an ouster clause against the admissibility of other types of documents which though might have been processed partially through the computer, such as using the computer and its accessories to type, scan, photocopy or print documents, even where such documents may require other processes for completion, such as signing, stamping or franking. Such documents which though may have passed through the computer are admissible under other provisions of the Evidence Act such as under sections 83, 87, 89, 90 and 104 among others. The case of *Kubor* v *Dickson* (2013) 4 NWLR (Pt.1345) 534 cited by the respondent himself supports this position. The excerpt of the judgment quoted by the respondent in paragraph 4.45 of his final written address in itself gives vent to this position of the law. The Supreme Court therein said at page 577 as follows:
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> ‘‘Granted, for purpose of argument, that exhibits ‘D’ and ‘L’ being computer generated documents or e-documents downloaded from the internet are not public documents whose secondary evidence are admissible only by certified true copies, then it means that their admissibility is governed by the provisions of section 84 of the Evidence Act, 2011.’’
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> It is clear to us from the above excerpt that secondary evidence of a public document even when generated from the computer is admissible in evidence if it satisfies the requirement of certification. It is also clear from that case that exhibits ‘D’ and ‘L’ under consideration therein were downloaded from the internet and thus fitted the description of computer generated documents. That does not fit the

> description of the case we have at hand which is now under consideration. The document in issue here is a certified true copy of proceedings of the High Court of Lagos State. That apart, although the respondent had ample opportunity through his expert witness to demonstrate to us how a call log is generated in order to show that it is a download from the internet, no such evidence was given. It appears to us that in order to establish that a document is computer generated, there must be evidence to satisfy the provisions of section 84(5) of the Evidence Act. That unfortunately is not the case here and we are in the circumstance unable to find persuasion in the argument of the learned senior counsel for the respondent.[63]

With due respect to the Committee, it took extraneous matters into consideration in determining the narrow issue of whether or not the log of telephone conversations between the Respondent and Hon.Justice Naron was indeed a computer generated evidence requiring certification under the provisions of section 84 of the Evidence Act, 2011. The Committee also misapplied the decision in *Kubor v Dickson* in refusing to hold that the call logs were inadmissible. In *Kubor v Dickson*, the apex court held that evidence must be led in receipt of computer generated evidence. In this case, the Committee relied on call logs which were obtained from a judicial proceeding which did not proceed to trial. In other words, the call logs, exhibits P104 to P620, were dumped on the court in Suit No: LD/1049/2008. The certification of the record of proceedings by a registrar of the High Court of Lagos State does not automatically obviate the need for compliance with the mandatory provisions of section 84 of the Evidence Act, 2011. The primary custodians of the log of telephone exchanges did not give evidence either in Suit No: LD/1049/2008 or before the Committee. It was therefore wrong of the Committee to hold that section 84 is not an ouster clause and to have admitted exhibits P104 to P620 in evidence under other provisions of the Evidence Act. This case was an opportunity missed by the Committee to further cement the mandatory status of section 84 of the Evidence Act, 2011.

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63 Pages 424-426 Paragraphs G-A.

The case of *P.D.Hallmark Contractors (Nig) Ltd & Anor v Gomwalk*[64] offers another instance of the misapplication of section 84 of the Evidence Act, 2011 by the appellate court. In that case, the appellants sought to tender a memory card and pictures during trial. The trial court rightly rejected the documents for failure to comply with the mandatory provisions of section 84. With the greatest respect to their Lordships, it is immaterial that the respondent indicated that he would not be objecting to the admissibility of the documents. The law has since been settled that parties cannot by consent admit a legally inadmissible document.[65] The provisions of section 84 of the Evidence Act lay down mandatory provisions for the admissibility of computer generated documents. Consequently, it was therefore incumbent on the appellants to comply with the law. Learned Justices of the Court of Appeal were therefore in error when they excused the non-compliance of the Appellants with section 84 of the Evidence Act, 2011 on the grounds that the documents were already pleaded.

In *Orogun & Anor v Fidelity Bank*[66] an sms message was tendered as Exhibit P5 to establish that the indebtedness of the appellants had been written off. The Court of Appeal held that an sms message is electronic or computer generated from global satellite mobile (GSM) system into mobile phones which are also computers by virtue of Section 258 (1)(d) of the Evidence Act. A GSM gadget with useful information can be tendered in evidence together with useful information stored by it. Once tendered and admitted in evidence, it becomes documentary evidence and the duty behoves on the party that tendered it in evidence to read the message or information in open court as is the case with documentary evidence, or the parties may by consensus take the document as read and/or the gsm gadget may be admitted in evidence as computer generated evidence under section 84 of the Evidence Act.[67] The court further held:

> In this case, the respondent denied/disputed the GSM message in Exhibit P5. At that stage it was incumbent on

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64 [2015] LPELR- 24462 (CA).

65 In the cases of *Ugwu v Ararume* [2007] All FWLR (Pt.377) 807 at 869 para D-E and *Ezeama v State* [2014] LPELR-22504 (CA) the court held that the law is sacrosanct that inadmissible evidence cannot be admitted by consent or collusion.

66 [2018] LPELR-46601 (CA).

67 Per Ikyegh, JCA at page 44-45.

> the appellant to tender call logs/evidence of communication from the central portal of the service delivery company, or identification evidence of the sender/receiver of such message should have been called by the appellant under sections 94, 125 and 126 of the Evidence Act. None of the options was adopted by the appellant in the instant case, therefore Exhibit P5 has no weight or probative value and cannot be relied upon as evidence that the respondent wrote off the huge debt of =N=29, 257,743.51 by GSM message in Exhibit P5. I believe or think the essence of the law of evidence is discovery of the truth. Genuineness of any piece of evidence sought to be relied upon by a party in the case unless the document is admitted by the adverse party must of necessity be properly ascertained and verified to weed out or eliminate suspicious or spurious documents.[68]

This decision emphasizes the essence of the law of evidence being the discovery of truth. This by extension underscores the importance of the courts leaving no doubt as to the genuineness of evidence sought to be relied upon.

5.0 Conclusion and Recommendations

This article examined the importance of electronic evidence in judicial proceedings specifically its admissibility and authentication. The justification for admissibility and authentication requirements for electronic evidence lies in the ease with which electronic evidence can be altered and manipulated in contrast to paper evidence whose manipulation or alteration is easily noticeable. Consequently, the article identified that Nigerian courts must be able to assess and authenticate electronic evidence in accordance with the provisions of Section 84 of the Evidence Act, 2011. The article also discussed the legal framework for admissibility of electronic evidence in Nigeria pre and post 2011 when the new Evidence Act was introduced with the landmark introduction of section 84 on admissibility of computer generated documents. The parallel divide which existed between the decisions of the Supreme Court in *Esso West Africa Inc v T.Oyegbola* and *Yesufu v A.C.B* pre-2011 was also highlighted.

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[68] Per Ikyegh, JCA at page 46.

The article further appraises the attitude of Nigerian courts in civil litigation to the provisions of section 84 of the Evidence Act, 2011 on electronic evidence especially the conditions stipulated in section 84 (2) thereof on the admissibility of electronic evidence. The article found, through the civil cases examined, that although the provisions of section 84 (2) of the Evidence Act seemingly appear unambiguous, there has been a great level of inconsistency in the interpretation and application of the conditions. The case of *Kubor v Dickson* decided by the apex court was the first judicial decision on the provisions of section 84 of the Evidence Act, 2011. The court held that the said provisions of section 84 are mandatory and should be complied with. Notwithstanding the said decision of the Supreme Court, the cases examined in the article have shown that there has been a great level of misunderstanding of the nature and scope of the provisions of Section 84 of the Evidence Act, 2011 especially by trial courts and election petition tribunals. In the cases of *N.B.A v Kalejaiye*, *P.D. Hallmark Contractors v Gomwalk*, *Uli Microfinance Bank v Okwuchukwu* examined in the article, the Court of Appeal continued to dwell on the error of the lower courts by refusing to apply the mandatory provisions of section 84 of the Evidence Act, 2011. However, in the cases of *Dickson v. Sylva*, *Omisore v Aregbesola*, *Akeredolu v Mimiko*, *P.D.P v Abiodun*, *Adeyela v Safiriyu* and *Rosehill v GTB*, it took the intervention of the Court of Appeal to reverse the decision of the trial courts which wrongly applied the provisions of section 84. The cases of *Impact Solutions Ltd v Int'l Brewries Plc* and *U.B.N Plc v Agbontaen* are the only cases examined above where there was a concurrent finding by both the lower and appellate courts on the mandatory provisions of section 84 of the Evidence Act, 2011.

In light of the foregoing, the article recommends that in order to clear the confusion and provide a more harmonious interpretation of the provisions of section 84 of the Evidence Act, 2011 by our courts, there is an urgent need for the introduction of supplementary rules or guidelines as regards authentication and admissibility of electronic evidence in Nigeria to complement the provisions of section 84 of the Evidence Act, 2011. These set of guidelines or rules will attempt to resolve technical details of various classes of electronic evidence to guide the courts in the application of the provisions of Section 84 of the Evidence Act, 2011 and avoid a return to the former position prior to the introduction of the Evidence Act, 2011.