A CRITICAL EXAMINATION OF MAJOR CHANGES HERALDED BY THE NIGERIAN EVIDENCE ACT 2011

Abstract

Before the enactment of the Evidence Act 2011, there was a myriad of calls by Legal Practitioners, Judges and other stakeholders in the justice sector for a repeal of the old Evidence Act which was enacted in 1945. The said 1945 Act did not undergo any major amendment prior to the coming into effect of the Evidence Act 2011. The obsolete nature of the old Evidence Act thus made it impossible for the Nigerian legal system to draw from the inestimable benefits inherent in the various advancements in information and communications technologies. In order to answer the said calls for a repeal or amendment of the 1945 Evidence Act, the Nigerian federal legislature, the National Assembly in exercise of its law – making powers under Section 4 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), recently repealed the 1945 Act and enacted a new Evidence Act 2011.On 3rd June, 2011, the President of the Federal Republic of Nigeria, Dr. Goodluck Ebele Jonathan assented to the new Evidence Act 2011, thus bringing into operation a new legal order in the law and practice of evidence in Nigeria. This paper is devoted to highlighting or bringing to the front burner the major far - reaching changes brought about by the 2011 Act.

Introduction

Prior to the enactment of the Evidence Act 2011 **(2011 Act)**, there were calls by both Judges, Legal Practitioners and Justice System stakeholders for a review, amendment or total repeal of the old Evidence Act of 1945 **(old Act)**. The major crux of the said calls was that the old Act had become archaic, backward – looking and obsolete as it failed to meet the needs or demands of current economic activities which now go beyond mere paper – based transactions and transcend into the realm of e-commerce and e-banking.

As a response to the above stated calls, the Nigerian federal legislature, the National Assembly, in exercise of its constitutionally inhered law - making powers under Section 4 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) **(The Constitution)** recently repealed the old Act and in its place enacted a new Evidence Act 2011. The 2011 Act was signed into law by the Nigeria's President, Dr. Goodluck Ebele Jonathan on 3rd June, 2011, thus heralding the coming into effect of a new legal order in the law and practice of evidence in Nigeria.

It is our intention herein, to explore or highlight some far - reaching innovations or changes brought about by the 2011 Act under the following subheadings.

1. RELEVANCE AND ADMISSIBILITY

As a preliminary point on this sub-head, it is imperative to state that the law of evidence is, essentially, concerned with the question of which facts are legally admissible and the legal means by which they may be proved[1]. And the question of which facts are legally

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[1] Dada, J.A., *The Law of Evidence in Nigeria,* (Calabar, University of Calabar Press, 2004), P. 71. See also the case of *Suberu v. State* (2010) All FWLR (Pt 520) 1263

admissible cannot be determined unless and until another question "which facts are relevant to the facts in issue" is first of all asked and determined. Thus, under the old Act, a fact is admissible in evidence if it is relevant to the facts in issue. This hallowed principle is still being retained under the 2011 Act wherein all the provisions of the old Act on relevance and admissibility are retained[2]. However, the 2011 Act has introduced some far-reaching sections which have, in a way, ushered in or codified some age-long judicially affirmed principles on the law of evidence as it relates to relevance and admissibility. To these sections we now turn.

(a) **Admissibility of all relevant evidence**

Perhaps, for the purposes of evincing the clear intentions of the law-makers, the legislators expressly stated in the 2011 Act that all relevant evidence that are given pursuant to the Act shall be admissible unless expressly excluded by a law in force in Nigeria. This is the import of Section 2 of the 2011 Act which provides:

Section 2: For the avoidance of doubt, all evidence given in accordance with section I [relating to facts in issue and relevant facts] shall, unless excluded in accordance with this or any other Act or any other legislation validly in force in Nigeria be admissible in judicial proceedings to which this Act applies.

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

The above – quoted Section, in our view, serves as a further statutory fortification to the age-long principle that all relevant facts are admissible, except those relevant facts that a valid law has expressly excluded from being admissible.

(b) **Admissibility of evidence recognised or permitted under other legislations**

The 2011 Act also innovatively but restrictively recouched the provisions of Section 5 of the old Act which Section hitherto formed the major pillar for the argument that certain English common law doctrines, such as *res gestae*, are applicable in Nigeria notwithstanding that the old Act did not specifically make provisions for them.

However, under the new Section 3 of the 2011 Act which has now replaced Section 5 of the old Act, it is doubtful whether such common law principles or doctrines which have not been specifically provided for under the 2011 Act or any other Nigerian law can still be applied to cases in our Courts today. To better appreciate our take herein, we have reproduced below the said Section 3.

Section 3: Nothing in this Act shall prejudice the admissibility of any evidence that is made

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[2] "The Evidence Act 2011-Moving with the Times" – in F.O. Akinrele & Co Newsletter, Vol 5, Issue 001 March 2012, page 1

> admissible by any other legislation validly in force in Nigeria.

Hence, in line with the clear provisions of the aforestated Section 3, it is our humble submission that, further to the 2011 Act and unlike the old Act, no evidence can be receivable or admissible by the Nigerian Courts unless such evidence has been made admissible by either the Evidence Act 2011 itself or by any other Nigerian legislation. This has foreclosed the possibility of having recourse to common law principles on evidence, unless such principles have been statutorily recognised by a Nigerian legislation.

(c) **Admissibility of improperly or illegally obtained evidence**

The old Act was silent on the legal or admissibility status of evidence which was improperly or illegally obtained. But pursuant to the provisions of Section 5(a) of the old Act (which allowed recourse to common law principles)[3], Nigerian Courts relied on English common law in deciding issues or cases relating to improperly or illegally obtained evidence. Under the common law, improperly or illegally obtained evidence are admissible, provided they are relevant to the facts in issue. This statement of the law was well captured by the Privy Council in **Kuruma v. R**[4] where it was held:

> The test to be applied in considering whether evidence is admissible is whether it is relevant to the matter in issues. If it is, it is admissible, and the court is not concerned with how the evidence was obtained.

Also in **R. V. Leatham**[5], Crompton, J. was quite blunt on the legal status of improperly or illegally obtained evidence when he held that, *"It matters not how you get it; if you steal it even, it would be admissible in evidence."*

As earlier stated, the Nigerian Courts had recourse to the above English authorities prior to the enactment of the 2011 Act. Thus in **Musa Sadau & Ors v. The State[6],** the appellate Court rejected the Appellant's contention that the trial Court ought not to have admitted improperly or illegally obtained vehicle licences and papers which formed the basis of the Appellant's conviction. The Court was of the view that there is no rule of law that says evidence which is relevant should not be admitted merely because of the way

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[3] As noted above, this recourse to English common law principles is no longer permissible or allowed under Section 3 of the 2011 Act.

[4] (1955) 1 ALL E. R. 236 at 239.

[5] (1861) 3 L.T. 777; 8 Cox C.C. 498, cited in Osamor, B., - *Fundamentals of Criminal Procedure Law in Nigeria*, (Lagos, Dee- Sage Nigeria Limited), 2004, 72.

[6] (1968) N.M.L.R. 208-See also *Igbinovia v. The State* (1981) 2 S.C.5,

and manner it was obtained. According to a learned author[7], the only exception to the aforesaid rule of admissibility of improperly or illegally obtained evidence relates to cases of involuntary confessions which are inadmissible *ab initio*[8].

One of the things the legislature has successfully achieved through the 2011 Act, is the codification of the above rule of evidence. The rule is now well statutorily flavoured by virtue of Sections 14 and 15 of the 2011 Act which are reproduced below.

Section 14:

Evidence obtained-

(a) improperly or in contravention of a law; or
(b) in consequence of an impropriety or of a contravention of a law, shall be admissible unless the court is of the opinion that the desirability of admitting the evidence is outweighed by the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

Section 15:

For the purposes of section 14, the matters that the Court shall take into account include-

(a) the probative value of the evidence;
(b) the importance of the evidence in the proceeding;
(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
(d) the gravity of the impropriety or contravention;
(e) whether the impropriety or contravention was deliberate or reckless;
(f) whether any other proceeding (whether or not in a court) has been or is likely to be taken in relation to the impropriety or contravention; and
(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law."

Thus, it can safely be said that Section 14 of the 2011 Act now empowers Police Prosecutors and other security agencies like the EFCC to tender and urge the Court to

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[7] Osamor, B., op. cit., at 72

[8] See the new Sections 28 and 29 of the Evidence Act 2011 on confession.

admit evidence which they may have improperly or illegally obtained from the accused. The same principle applies to civil proceedings. This, we must say, would boost the fight against corruption, terrorism and internet fraud in that the said section would enable security agencies tender evidence or documents they may have obtained or recovered from the accused even if in violation of the accused person's rights to privacy and dignity of his person[9]. However, our fear is that, as characteristic of our security men, those innovative provisions of Section 14 may be prone to abuse by the security agencies that may hide under the cover of the section to unlawfully invade citizens' rights with impunity. Elsewhere, it has been argued that Section 14 of the 2011 Act could lead to a scenario which may amount to a violation of justiciable fundamental rights[10].

We however find solace in the same Section 14 which places the issue of admissibility of improperly or illegally obtained evidence at the discretion of the Court. As can be seen from the section, the Court may exclude such evidence if it is of the opinion that the undesirability of admitting it outweighs the desirability of admitting it. It bears stating here that, under the common law, the Courts did not seem to have any discretion as regards the issue under consideration. Thus, this Court's discretion under Section 14 is an innovation heralded by the 2011 Act. The Court could exercise this discretion either way, depending on the circumstance of the case. We only hope that this exercise of discretion is done judicially and judiciously[11] and not capriciously or whimsically. Our worry or concern is that the Court's opinion is most times, if not at all times, subjective[12].

Finally on this, involuntary or oppressively obtained confessional statement, as earlier noted, is an exception to the rule under consideration and the said exception has been codified in the 2011 Act[13].

Admissibility of Confessional Statements

It would be recalled that the old Act made provisions for confession under its Sections 27-32. A prominent feature of admissible confessional statement was that it must have been made voluntarily by the accused[14]. Thus a trial within trial was required whenever an accused disputed the voluntariness of his confessional statement[15].

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[9] As provided in Sections 34 and 37 of the Constitution.

[10] Alobo, J.E., -"Innovative Features of the Evidence Act 2011," in *Current Trends in Law & Practice Journal* (2011), Volume 1, p. 13

[11] See. *C.C.B. v. Attorney – General, Anambra State* (1992) 8 NWLR (pt. 261) 558

[12] *Dagayya v State* (2006) 7 NWLR (pt. 980) 1, at 17-18 paras G – E.

[13] See Section 29(2)(a) of the Evidence Act 2011.

[14] See Section 27(2) of the old Act

[15] See *Ehot v. The State* (1993) 5 SCNJ 65.

It has been argued elsewhere that the 2011 Act has removed the requirement for voluntariness of confessional statements.[16] We however, with due respect, disagree with this submission. On the contrary, we rather submit that the 2011 Act has in fact made the requirement for voluntariness stricter or more stringent than it was under the old Act. A reproduction of relevant sections of the 2011 Act would help drive home our point herein.

Section 28: A confession is an admission made at any time by a person charged with a crime, stating or suggesting the inference that he committed that crime.

Section 29:

(1) In any proceeding, a confession made by a defendant[17] may be given in evidence against him in so far it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, it is represented to the court that the confession was or may have been obtained-

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in such consequence, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be

[16] F. O Akinrele & Co Newsletter, op. cit. Note 2, P.1.

[17] Note the use of "Defendant" instead of "Accused". This accords more with the presumption of innocence as enshrined in the Constitution as most laymen usually presume that an accused is already a condemned criminal.

true) was not obtained in a manner contrary to the provisions of this section.

(3) In any proceeding where the prosecution proposes to give in evidence a confession made by a defendant, the court may on its own motion require the prosecution as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in either subsection 2(a) or (b) of this section.

(4) ……

(5) In this section, "oppression" includes torture, inhuman or degrading treatment, and the use or threat of violence whether or not amounting to torture.

A community reading of Section 29, as quoted above, would reveal that a confessional statement must be voluntarily made before same can be admissible in evidence. This is the import and purport of the provisions of Section 29(2)(a) & (b) , Section 29(3) and (5) of the Evidence Act 2011. In fact, unlike the old Act where an involuntary confessional statement was inadmissible only *"if the making of the confession appears to the court…"*[18], the 2011 Act has broadened the circumstances or instances where the Court can refuse the admissibility of an involuntary confessional statement. Thus under the 2011 Act, a confessional statement which was not made voluntarily can be disallowed by the Court where: (1) The Defence Counsel represents to the Court that the statement was obtained involuntarily or oppressively and (2) where the Court, on its own motion, requires the prosecution to prove the voluntariness or non – oppressive nature of the way the statement was obtained and the prosecution fails to do so satisfactorily. Hence, the Court may even protect the interest of an accused person who is unrepresented by Counsel by requiring the prosecution to prove the voluntariness of the accused person's confession[19], and this, to our minds, would not amount to "descending into the arena of conflict".

(2) PROOF OF FACTS

Another area of innovation under the 2011 Act is in respect of matters the Court may judicially notice, and thus need no further proof. The areas that are positively affected in this regard are:

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[18] See Section 28 of the old Act

[19] Pursuant to Section 29(3) of the new Evidence Act 2011

Custom

Under the old Act, custom was one of those matters that needed no proof by evidence provided such custom had been judicially noticed[20]. However, there was an unsettled controversy as to the number of times a Superior Court would pronounce on a custom before lower Courts or Courts of coordinate jurisdiction could take judicial notice of the custom. Whereas **Cole & Anor v. Akinyemi & Ors**[21] was to the effect that a single previous judicial pronouncement on a custom would be sufficient authority to enable lower Courts or equal Courts to take judicial notice of a custom, the Supreme Court however held in **Ibrahim Olabanki & Anor v. Salami Adeoti Omokewu**[22] that *"A custom can only be judicially noticed after it has been considered, accepted and applied in many decisions."*

Thus, before the coming into effect of the 2011 Act, the Supreme Court had settled with firm finality the issue of notoriety of custom to the effect that a custom must have been severally acted or pronounced upon by the Courts before it can be taken judicial notice of.

Interestingly however, the legislators have pitched their tent with the former case of **Cole v. Akinyemi**[23] in the enactment of the new Evidence Act. According to Section 17 of the 2011 Act:

> A custom may be judicially noticed when it has been adjudicated upon once by a Superior court of record.

The implication of Section 17 of the 2011 Act is that the aforesaid Supreme Court authority in **Omokewu case** has been legislatively displaced and same no longer represents the true or extant position of the law. The current legal position is that when a Superior Court of record has pronounced on the existence of a custom **ONCE**, the Court and indeed lower Courts may judicially notice such a custom. This, in our view, is a welcome simplification of the requirement of judicial notice, vis-à-vis custom.

(b) Broader Scope for Judicially Noticed Matters

Another interesting attribute of the 2011 Act is that it has widened the sphere of matters of which the Court can now take judicial notice. Thus, the following matters no longer require proof by evidence as same are now subject matters of judicial notice:

(a) Matters of common knowledge within the locality of the forum or Court.
(b) Matters or facts which are capable of verification by reference to a document, the authority of which is not reasonably open to question.

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[20] See Section 14(2) of the old Evidence Act.

[21] (1960) 5 F.S. C.84

[22] (1992) 6 NWLR (pt 68); (1992) 7 SCNJ (pt 11) 266 at 280.See also *Romaine v Romaine* (1992) 5 S. C.N.J 1; (1992) 4 NWLR (pt 238) 650 at 669 and *Oko v Ntukidem* (1993) 2 SCNJ

[23] Supra.

We now take the liberty to produce the section that provides for the matters under consideration.

Section 124:

> (1) Proof shall not be required of a fact the knowledge of which is not reasonably open to question and which is –
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> (a) common knowledge in the locality in which the proceeding is being held, or generally; or
>
> (b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.
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> (2) The court may acquire, in any manner it deems fit knowledge of a fact to which subsection (1) of this section refers, and shall take such knowledge into account.
>
> (3) The court shall give to a party to a proceeding such opportunity to make submission, and to refer to a relevant information, in relation to the acquiring or taking into account of such knowledge, as is necessary to ensure that the party is not unfairly prejudiced .

The above is self – explanatory, only to add that the Court is obliged by subsection (3) to accord all parties concerned fair hearing as regards acquiring knowledge, subject matter of the judicial notice.

(3) CODIFICATION OF FALOBI V. FALOBI

One of the achievements of the Evidence Act 2011 is the codification of the judicial precedent in **Falobi v. Falobi**[24] as it relates to resolution of conflicting affidavits. In that case, the Court held:

> When a court is faced with affidavits which are irreconcilably in conflict, the judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witness as the parties may be advised to call.[25]

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[24] (1976) 7 -10 S.C.

[25] See also *Military Administrator, F.H.A. & Anor V. C. O. Aro* (1991) 1 NWLR (pt. 168) 405 at 410-411, *Ajani v Taiwo* (2012) 5 NWLR (pt. 1292) 141 at 156 – 157 paras C-D.

The above judicial statement of the law has now been statutorily embedded in Section 116 of the Evidence Act 2011 which provides:

> When there are before a court affidavits that are irreconcilably in conflict on crucial facts, the court shall for the purposes of resolving the conflict arising from the affidavit evidence ask the parties to proffer oral evidence as to such facts, and shall hear any such oral evidence of the deponents of the affidavits and such other witnesses as may be called by the parties.

Section 116 has thus clearly laid down the procedure for resolving irreconcilably conflicting affidavits. The Court must call oral evidence to resolve such conflict. However, the question that arises is, in view of the mandatory word "*shall*" used in Section 116, can the Court go ahead to resolve conflict in affidavit in ways different from oral evidence as prescribed by Section 116? Before the coming into effect of the Evidence Act 2011, the Supreme Court had held in **Osita Nwosu v Imo State Environmental Sanitation Authority**[26] that:

> It is not only by calling oral evidence that a conflict (in affidavit) could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another. In a trial by affidavit evidence, that document is capable of tilting the balance in favour of the affidavit which agrees with it. After all, even if oral testimony had been called, such documentary evidence would be a yardstick with which to assess the oral testimony.

Can the Supreme Court's pronouncement in the above case still stand in view of the provisions of Section 116 of the Evidence Act 2011? With utmost humility, we answer the question in the affirmative. The intention of the law-makers is that oral evidence should be called to resolve conflicts in affidavits only where the affidavits themselves (including the exhibited documents) are incapable of resolving themselves. Thus, if there are exhibited documents in one of the affidavits which documents make the depositions in the affidavit more believable than the other, we humbly submit that such documents or documentary evidence should be used by the Court in resolving the conflict without the need of calling oral evidence under Section 116.

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[26] (1990) 4 S.C.N.J. 97

(4) ADMISSIBILITY OF ELECTRONIC EVIDENCE

Unarguably, the most radical change introduced by the new Evidence Act 2011 is in the area of admissibility of electronic or computer – generated evidence. Before the 2011 Act, the legal position as regards the admissibility of electronic evidence was far from being clear.[27] In fact, in **Yesufu v. A.C.B.**[28], the apex Court openly called for a legislative intervention towards clarifying the legal or evidential status of computer - generated evidence. We believe strongly that, the Evidence Act 2011 was majorly an answer to the Supreme Court's call for legislative or statutory position. Some of the ways the 2011 Act has affected or changed the law of evidence in Nigeria vis-à-vis electronic evidence would now be examined.

(a) Definitions of "document" and "computer"

The word ***"document"*** has been given a wider definition under the 2011 Act to expressly include computer – generated records. Thus, by Section 258(1)(d), document includes "*any device by means of which information is recorded, stored or retrievable including computer output* " Hence, for the purposes of evidence law, it is no longer in doubt whether computer output or printout is a document.

On the other hand, the same Section 258 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 by calculation, comparison or any other process.*" There is a view that this definition appears wide enough to include smart phones or other devices that process information.[29]

(b) Admissibility of computer evidence

As earlier noted, admissibility of computer - generated or electronic evidence is the headline change brought about by the Evidence Act 2011. Thus, Section 84 of the Evidence Act 2011 is the section of focus as it lays down the conditions for admissibility of electronic evidence by Nigerian Courts. To the section we now turn.

Section 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 would 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.

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[27] See for example, Yemi Osinbajo – " Electronically Generated Evidence" in Afe Babalola (ed.) *Law & Practice of Evidence in Nigeria*, 2001 , p. 243; the cases of *Esso West Africa Inc v. T. Oyegbola* (1969) I NMLR 194, *Yesufu v. A. C. B.* (1976) 4 SC (Reprint) 1 at 9-14 and *Federal Republic of Nigeria v Femi Fani-Kayode* (2010) 14 NWLR (pt.1214) 481 at 506 paras E – H.

[28] See also a similar call by the Court of Appeal in *UBA Plc v Sani Abacha Foundation for Peace and Unity & Ors* (2004) 3 NWLR (pt 861) 516 at 542-543 .

[29] F. O. Akinrele & Co Newsletter, op. cit., 1.

Section 84 (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 of that period was not such as to affect the production of the document or the accuracy of its contents; and

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

Section 84 (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 computer, 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 computer 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.

Section 84 (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 the 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.

Section 84 (5):

For the purpose of this section-

(a) information shall be taken to be supplied to a computer if it is supplied to it in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;
(b) where, in the course of activities carried on by any individual or body, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;
(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Still as a preliminary note on the above quoted Section 84, it is pertinent to note that the said section is indeed a near - reproduction of Section 84 of the then proposed Evidence Decree of 1998 as suggested by the Nigerian Law Reform Commission[30]. Further, it should also be noted that the provisions of the said Section 84 were taken from the English Civil Evidence Act of 1968[31] which only applies to civil proceedings before the English Courts unlike our Section 84 of the Evidence Act 2011 which applies to "*any proceeding*"[32], whether civil or criminal.

(c) **Conditions for Admissibility of Computer - generated Evidence**

As can be seen from the aforequoted Section 84 of the 2011 Act, certain conditions must be met before a computer – generated evidence can be admissible in law. These conditions are:

(i) The statement contained in the computer evidence must be one in respect of which direct oral evidence can be given[33]. However, we are worried that this now statutorily recognised condition may be in conflict with an equally statutorily recognised but more settled legal position which states that extrinsic (whether oral or documentary) evidence, cannot be used to vary or contradict the contents of a document[34], except the circumstance is captured within the exceptions to this rule which exceptions are contained in Section 128(1) of the Evidence Act 2011. In view of the fact that computer – generated evidence is documentary evidence pursuant to section 258(1)(d), we humbly submit therefore, that the contents of an electronic or computer evidence cannot be varied or contradicted by oral or other extrinsic evidence under the guise of Section 84(1) of the Evidence Act 2011.

(ii) The document containing the statement, subject matter of the proceedings must have been produced during a period when the computer was in regular use.

(iii) During the said period of regular use, the computer must have been regularly supplied with information of the same kind contained in the statement, subject matter of the proceedings.

(iv) During the period, the computer must have been operating or functioning properly; if not functioning properly, then the malfunction must not have materially affected the accuracy of the output or outcome of the computer, i.e., the statement, subject matter of the proceedings.

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[30] Kankip, B.B., "Evidential Landscape in Cyberspace: Coping with the Challenges of Electronically Generated Evidence" in *Current Trends in Law & Practice Journal*, (2011), Vol. 1, pp. 46 – 47

[31] Yemi Osinbajo, op. cit., 269 at 272

[32] See Section 84 (1).

[33] See Section 84 (1), Sections 125 and 126 of the Evidence Act 2011.

[34] See Section 125 of the Evidence Act, See also the cases of *Union Bank of Nigeria Plc v Akinrinmade* (2000) FWLR (pt. 5) 855 at 865*; Layade v Panalpina* (1996) 7 SCNJ 1 at 14-15

(v) That the information contained in the statement, subject matter of the proceedings, is derived from the information supplied to the computer in the ordinary course of those activities.

(d) Requirement for Certificate

Apart from meeting the above stated conditions, a party wishing to rely or urge the Court to admit electronic evidence must take a further step to obtain and file a certificate. By the tenor of Section 84(4) of the 2011 Act, a party who desires to tender a computer - generated or electronic evidence would have to obtain and file a certificate from the person who operated or had charge over the operation of the computer or device as at the time the information was fed into the system.

The Certificate shall identify the document containing the statement, subject matter of the proceedings, it shall also describe the manner the document was produced as well as furnish any other particulars regarding the device used in producing the document with the aim of showing that the document was actually produced by a computer.

(e) Presumption relating to Telegraphic and Electronic Messages

Another novel contribution of the Evidence Act 2011 to the Nigerian Law of Evidence is its presumption as to telegraphic and electronic messages. This is the import of Section 153 of the 2011 Act which provides:

Section 153 (1):

> The court may presume that a message forwarded from a telegraph office to the person to whom such message purports to be addressed corresponds with the message delivered for transmission at the office from which the message purports to be sent; but the court shall not make any presumption as to the person by whom such message was delivered for transmission.

Section 153(2):

> The court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission; but the court shall not make any presumption as to the person to whom such message was sent.

The summary of this presumption is that the Court may presume that a telegraph or email sent to a person corresponds with the message actually fed into the computer and transmitted to him. We guess this is to protect the email sender or originator against liability arising from the work of hackers who may "*intercept*" the email and totally alter the contents, unknown to the sender or originator.

(f) Provisions on Electronic Signature

The legislators, in the process of enacting the Evidence Act 2011, took cognizance of the fact that the shift from paper – based to paperless or mobile/online transactions[35] is fast gaining grounds in Nigeria. This is an era of dematerialization[36] and the question that arises is, how do we execute (sign) paperless transactions? When can it be said that a mobile or online transaction, say, via the Automated Teller Machine (ATM) has been legally executed or signed? These are questions Section 93 of the Evidence Act 2011 seeks to answer. It provides:

Section 93 (1):

> If a document is alleged to be signed or to have been written wholly or in part by any person the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his hand writing.

Section 93 (2):

> Where a rule of evidence requires a signature, or provides for certain consequences if a document is not signed; an electronic signature satisfies that rule of law or avoids those consequences.

Section 93 (3):

> An electronic signature may be proved in any manner, including by showing that a procedure existed by which it is necessary for a person, in order to proceed further with a transaction to have executed a symbol or security procedure for the purpose of verifying that an electronic record is that of the person.

Hence, under the extant legal regime as heralded by the Evidence Act 2011, electronic signature is now a recognised and admissible signature. A critical analysis of Section 93(3) would suggest that one of such electronic signatures would be Personal Identification Number (PIN) which is always a requirement for ATM transactions. More often than not, a user of an ATM is greeted by the ATM with *"Welcome, please enter your secret number."* Unless you obey the machine voice by correctly entering your PIN, you would not be able to use the ATM for any transaction. But immediately, you enter

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[35] Yemi Osinbajo, op. cit.

[36] Kankip, B. B., op. cit., Note 29, p. 37

your correct PIN, the ATM gives you access to your bank account details. The entry of your PIN therefore serves as electronic signature to your transaction with the ATM.

A learned author has criticised Section 93(3) to the effect that it fails to take into account the fact that the ATM or other system where electronic signature is used, is prone to viruses and hacking which could lead to distortion or compromise of the electronic signature.[37]

MISCELLANEOUS

Other noteworthy innovations introduced by the Evidence Act 2011 are as follows:

(a) Section 154 gives the Court the power to presume that every document called for and not produced after notice to produce is given was attested, stamped and executed in the manner required by law.

(b) The exceptions to the hearsay rule have been extended from dead persons to those who cannot be found, those who have become incapable of giving evidence and those whose attendance cannot be procured without an amount of delay or expense. This can be found in Section 39 of the Evidence Act 2011 which replaces Section 33 of the old Act.

(c) By Section 41 of the Evidence Act 2011, any statement stored or recorded in an electronic device may now be admissible as an exception to the hearsay rule provided that the recorder of the statement recorded it contemporaneously, in the electronic device, with the making of the statement by the maker. The statement can also be admissible even when the making of the statement and the recording of same were not contemporaneous provided it is proved to the Court that the recorded transaction/statement was still fresh in the memory of the recorder of the statement in the electronic device.

(d) By Section 50 of the Evidence Act 2011, the attendance of a Public Officer in Court may now be dispensed with provided his head of department sends a gazette, telegram, email or letter to Court explaining the officer's absence in Court.[38]

(e) **Codification of the "Without Prejudice" Rule**
There is a common law rule that a document marked "*without prejudice*" in the course of negotiation towards amicable settlement of a dispute is not admissible in evidence[39]. This common law principle has been codified in Section 196 of the Evidence Act 2011.

(f) **Legislative Powers of the Attorney – General**
An entirely new addition to the Nigerian Law of Evidence is the powers that have been given to the Minister of Justice and Attorney General of the Federation to

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[37] Alobo J. E., op. cit., Note No.10, p. 11.

[38] By Section 258, Public Service has the same meaning ascribed to it under section 318 of the Constitution.

[39] See *U. B. A. Ltd v. IAS & Co. Ltd (*2001) FWLR (pt 75) 578.

make rules or regulations on evidence. Section 255 of the Evidence Act 2011 provides:

Section 255:

> The Minister charged with responsibility for justice may, from time to time, make regulations generally prescribing further conditions with respect to admissibility of any class of evidence that may be relevant under this Act.

While we commend the federal legislators for delegating some legislative powers to the Minister of Justice - considering how long it takes before laws are reviewed by the legislature in Nigeria, we however have our reservations. Our fear stems from the fact that the powers granted to the Minister by the section under review is subject to abuse. It is rather too sweeping without any modicum of control mechanism. An overzealous Minister of Justice may hide under the cover of Section 255 to make some regulations that are personally or sectionally laced. In fact, there is every possibility for him to make regulations just for the purposes of aiding his criminal or corrupt family and friends to escape from justice. We humbly suggest that this section should be amended to the effect that the exercise of this power by the Minister should be subject to the Court's supervision.

(g) **Interpretations of some key words and phrases**

Unlike the very limited ten words defined by Section 2 of the old Act, Section 258 of the new Evidence Act 2011 commendably has a wider definition scope. The section makes provisions for 18 definitions, including such important words or phrases as "copy of a document," "computer", "document", "film" "financial Institution", "person interested", "public service of the Federation or of a State", "real evidence", "Statement" and "wife and husband" which have been defined to mean "the wife and husband of a marriage validly contracted under the Marriage Act, or under Islamic Law or a Customary law applicable in Nigeria …", thus bringing to an end the age-long statutory discrimination against polygamous marriage vis – a – vis the definition of "wife and husband".

(h) **Dispensing with corroboration**

In contrast to the old Act which required corroboration before conviction in sexual offences, the 2011 Act is completely silent on it. It is therefore safe to say that the express mention of one thing (in this case, the express mention of corroboration in respect of treason, perjury, exceeding speed limit and sedition – see Section 201 - 204 of the Evidence Act 2011) means the express exclusion of those not mentioned. Hence, corroboration is no longer a requirement for sexual offences. It is assumed that the legislators, in dispensing with it, appreciated the difficulty in getting corroborative evidence to confirm a sole witness' evidence since, more often than not, sexual activities, lawful and unlawful, are done in the private or closet.

Furthermore, Section 203 has also "lessened" the requirement of corroboration in cases involving exceeding speed limit. Under the proviso to the section, a traffic warden or other authorized traffic officer can tender an electronic or mechanical device wherein he recorded

the defendant's or accused person's commission of the offence of exceeding speed limit and such device would be taken as additional or corroborative evidence to his oral evidence and would need no further oral corroborative evidence. Under this rule, a traffic warden's camera phone may just be the corroborative evidence needed to convict a person who has exceeded speed limit, though we doubt the possibility of a camera phone or similar devices recording the speed of a moving vehicle on the highway.

(i) **Evidence of a child**

Under the new Evidence Act 2011, the question of whether a child understands the nature of oath does no longer arise. Before now, questions were thrown to a child to know whether he understood the nature of oath[40] before he could be allowed to give evidence on oath. Otherwise, he could still competently give evidence but that would be unsworn evidence, provided he understood the questions put to him and was capable of giving rational answers thereto as well as understanding the duty of speaking the truth.[41]

However, under Section 209 of the 2011 Act, the question is whether the child has attained the age of 14 years. If he has, he must automatically be sworn, unless where the Act provides otherwise.[42] If he has not, then he must give unsworn evidence. This 14 years rule has helped to dispense with the second preliminary questions stage the Judges normally conduct. All that is required now is the first preliminary questions as to finding out whether the child understands the questions put to him, whether he can furnish rational answers and whether he understands the duty of speaking the truth. In point of fact, and using the exact words of the 2011 Act, any child is competent to testify in Court provided the Court is of the opinion that "he is possessed of sufficient intelligence to justify the reception of his evidence and understands the duty of speaking the truth."

Conclusion

It is commendable that the National Assembly finally heeded the call for amendment of the old Evidence Act. While we have attempted to examine and analyse some of the headline contributions heralded into the Nigerian legal space by the new Evidence Act 2011, we however opine that the effectiveness of the new Act would better be felt or appreciated through the fires of judicial pronouncements by the Courts. For the Courts we now eagerly wait.

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[40] See *William Omosivbe v. C.O. P*. (1959) WNLR 209
[41] *Onyegbu v The State* (1995) 4 SCNJ 275
[42] See Sections 175 and 208