

**EVIDENTIARY RULES ON ADMISSIBILITY OF DOCUMENTARY
EVIDENCE UNDER NIGERIAN EVIDENCE ACT 2011:
A CRITICAL APPRAISAL**

BY

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FEBRUARY, 2016.

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LLM/Law/4904/2010-2011**

**A DISSERTATION SUBMITTED TO THE SCHOOL OF POSTGRADUATE
STUDIES, AHMADU BELLO UNIVERSITY, ZARIA IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE
DEGREE OF MASTER OF LAWS (LL.M) DEPARTMENT OF PUBLIC LAW
FACULTY OF LAW AHMADU BELLO UNIVERSITY, ZARIA, NIGERIA.**

FEBRUARY, 2016

DECLARATION

I declare that the work in this dissertation entitled *Evidentiary Rules On Admissibility of Documentary Evidence Under Nigerian Evidence Act 2011: A Critical Appraisal* has been carried out by me in the Department of Public Law, Faculty of Law, Ahmadu Bello University, Zaria, Nigeria. The information derived from the literature has been duly acknowledged in the text and a list of references provided. No part of this dissertation was previously presented for another degree or diploma at this or any other institutions

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February, 2016

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Signature

Date

CERTIFICATION

This dissertation entitled *Evidentiary Rules On Admissibility of Documentary Evidence Under Nigerian Evidence Act 2011: A Critical Appraisal* by Kehinde Ikeorha meets the regulations governing the award of the degree of Master of Laws (LL.M) of the Ahmadu Bello University, Zaria and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This dissertation is dedicated to the Almighty God for His Divine favour throughout my post graduate studies in Admadu Bello University Zaria. It is also dedicated to my daughter Ifeanyichukwu Kenny Adindu, my Twin Sister, Mrs. Taiye M. Egiogu (nee Ikeorha) and to my late father Chief Emmanuel Ogboragu Ikeorha, FNIACS (UK), a Chartered Secretary, one time in Faculty of Linguistics, University of Ibadan, Nigeria and pioneer officer of UNESCO, my late mother Mrs. Cordilia Ikeorha and my husband, Mr. Ifeanyi Adindu.

ACKNOWLEDGMENTS

My profound gratitude goes to the Almighty God who gave me strength, wisdom, knowledge and understanding in writing this Dissertation

My sincere gratitude goes to my supervisors, Dr. B. Babaji and Dr. A. M. Madaki, for their guidance, directives and for providing me with some materials. Despite their tight schedules, they saw to the success of this study. I'm most grateful for their cherished contributions. May they last long in their life to witness their destined greatness from God.

I am also indebted to those who came before me and have helped me directly or indirectly to achieve this dissertation. My special thanks goes to my dearly beloved husband Mr. Ifeanyi Adindu who encouraged me in this study, my elder brother, Pastor Dele Ikeorha for his immense help, Justice C.C. Nwaeze, who imparted in me the Law of Evidence at the Enugu State University of Science and Technology, Enugu Nigeria, and all the Students I taught at The Nigerian Law School Abuja from 2007 up to date for their immense contributions and brainstorming during my lectures with them which contributed in my interest to write this dissertation.

ABSTRACT

This Dissertation provided a critical conceptual discourse into the *Evidentiary Rules On Admissibility of Documentary Evidence Under Nigerian Evidence Act 2011*. It appraised the bases for the admissibility of documentary evidence, rules of evidence, relevance and conditions for the admissibility of secondary evidence, public document, proof of documentary evidence, custody and production of public documents, proof of execution of documents, admissibility of statements made in computers, and conditions for the admissibility of documentary evidence as to fact in issue. It also appraised the rules on admissibility of documentary evidence under the Nigerian Law to ascertain what factors that determine the admissibility and inadmissibility of documentary evidence and it examined the extent to which computer generated evidence is made part of admissible documentary evidence under the Evidence Act 2011. Evidence is the cornerstone of litigation and indispensable for a fair justice system in Nigeria. This dissertation therefore aimed at bringing out issues faced by the Lawyers, Courts, theorists and Students of Law relating to the admissibility of documentary evidence; solving problems faced by Students of Law and Lawyers on issues of proper foundation to be laid and the mode of tendering the documentary evidence and principally, recommending areas and manner of legal reform as to the admissibility of documentary evidence by making an exposition on a very fundamental rule on documentary evidence. The separation of section 89 and 90 of the Evidence Act and the alteration of sections in 1990 Evidence Act which has the same principles under 2011 Evidence Act, made comprehension and interpretation of above sections difficult. The five subsections in section 83 constitute a sort of nightmare to many Students of Law and even the Lawyers sometimes are confused as to the application of its provisions. Making it worse is the use of the words ‘provided’, ‘except’, and ‘unless’. Also, in addition to the issues raised above, the failure of the Act in not defining the nature of electronic signature compounded the confusion, difficulties and obscurity of meaning of evidence it sought to enshrine, legislate or enforce and so we can only conclude that the provisions of section 83 are cumbersome and they ordinarily portend challenges to understanding and thus interpretation and would need material revision and redrafting. The legal research methodology adopted in collecting information is the doctrinal method. The doctrinal research is priori research method which involves research in text books, statute and cases. The findings of the study significantly included the difficulty which the separation of S. 89 and 90 Evidence Act posed to Students of Law, and the absence of the definition of the nature of electronic signature. It is therefore recommended that there is immediate need for legislative reform to redress the issues for proper drafting, interpretation and understanding for-instance the issues relating to the use of simple English to replace the words ‘provided’, ‘except’, and ‘unless’ for easy understanding. The need for legislative amendment of S. 89 and 90 which was separated, should be redrafted under one section for easy interpretation and understanding and the amendment of Section 83(4) to provide for the nature of electronic signature for its admissibility purposes.

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LIST OF ABBREVIATIONS

A.C.	Appeal Cases
Ampersand (&)	and
All N. R	All Nigerian – Report
Anor.	Another
Cap.	Chapter
C.A.R.	Criminal Appeal Reports
Co.	Company
Cox C.C.	Cox Criminal Case
Cr. App. Rep	Criminal Appeal Reports
D.C.O	Dominion, Colonial and Overseas
Ed.	Edition
E. R.	All England Law Report
E.T.C	etcetera (and so on)
Ex.	Exchequer Cases
F.W.L.R	Federal Weekly Law Report
Ibid	Ibidem
Int’l	International
Inc.	Incorporate
K.B	Kings Bench Report
Ltd	Limited
L.J	Lord Journal Reports
L.T.R	Law Time Reports
N.C.R.	Nigeria Criminal Reports
Nig.	Nigeria
N.L.R	Nigerian Law Report
N.N.L.R	Northern Nigerian Law Report
N.M.L.R	Nigerian Monthly Law Report
N.S.C.C.	Nigeria Supreme Court Cases
N.W.L.R	Nigerian Weekly Law Report
No.	Number
Ors.	Others
Op. cit.	<i>opera citato</i> (latin word which means ‘the same with reference

	previously cited)
P.	Page
Paras	Paragraphs
PP.	Pages
Pt.	Part
PW1	Prosecution Witness one
QB	Queens Bench Report
vsL.R	Victorian Law Reports
Vol.	Volume
Ry and M.	Ryan and Moody's Nisi Prius Reports 1823 to 1826
S.C	Supreme Court
S.C.N.L.R	Supreme Court of Nigerian Law Report
2 nd	Second
<i>Supra</i>	Above
U.T.B.	Universal Trust Bank
W.A.C.A.	West African Court of Appeal
W.L.R.	Weekly Law Report

CHAPTER ONE

GENERAL INTRODUCTION

1.1 Background to the Study

Documentary evidence forms part of the entire gamut of the Law of Evidence. And of course, if a thing is self evident, it does not require evidence.¹Section 88² provide that “document shall be proved by primary evidence except in the cases mentioned in this Act”.

It is submitted that, documentary evidence is anything in which statement is written on, which can be on paper, electronic device, walls, trees, rocks, human body or in picture form.

Documentary evidence is one of the major recognised modes of proof. Documentary evidence is thus of such tremendous importance in Court proceedings as it is the yardstick by which the veracity of oral testimony is tested³ it is for this reason that the Law of Evidence permits trial Courts to substitute the eye for the ear in the reception of evidence when the need arises.⁴

Among the three modes of evidence: oral, documentary and real evidence, oral evidence seems to constitute the platform for the presentation in Court of the other two categories. Truly, it is in the course of oral testimony in Court that a document or some kind of real evidence is tendered. In spite of this, the input of documentary evidence and its significance in the modern probative process seems to almost overshadow the

¹ Onamade, P.A: (2002). *Documentary Evidence – Cases and Materials*. (Philade Co. Ltd. Lagos, Nigeria) Vol. 1. p.1

² Evidence Act, Laws of the Federation of Nigeria 2011

³ Onamade, P.A: op cit p. vii

⁴ *Ibid.* p. 2

other two categories.⁵ Steven Uglow, noting the importance of documentary evidence in the probative process stated that:

Documentary evidence is of considerable importance in both civil and criminal proceeding...reliance on documentary evidence is often worthwhile as it is regarded as having greater weight. often the information has been compiled closer to the events, and unlike a witness, a document will not be shaken by cross Examination⁶

It is submitted that, documentary evidence in essence, is of great significance as a means of proof in any proceeding . It speaks for itself once tendered thereby making Court proceedings easier once the specified conditions are followed and the principles also guide the electronically generated evidence once due compliance to the requirements were followed and if proved abortive, will not be admissible in evidence.

Generally, the rule that governs the admissibility of any document is the test of the relevance of such document. It is the pleading of the parties that streamline the relevance issues/facts between the parties. Thus it is required that for any document to be admissible in the High Court or any Court where pleading are listed, the said document must have been duly pleaded or facts in support of the document pleaded in the pleading of party relying on same.⁷

In *Dr. Torti vs Ukpabi*⁸. The Court held that even if the document is not produced from proper custody, it is admissible once it is relevant. Lack of proper custody may affect the weight the Court will attach to the document when evaluating it and no more. There are tendencies among Judges, Legal Practitioners, Teachers and Students of Law to

⁵ Ashi, B. V: (2008) *Documentary Evidence Selected Issues, Conflicts and Responses*, (Chenglo Ltd. Enugu, Nigeria) (2nd Edition) p. 1

⁶ Uglor S: (2006) *Evidence: Text and materials* (2nd edition) (Thomson Sweet and Maxell) p. 187

⁷ Yagarta, B.N: (1998). *Documentary Evidence: The Law, Practice and Procedure*. (Jos University Press Ltd.) p. 48

⁸ (1984)1 S.C.N.L.R. 214.

confuse conditions of admissibility with that of relevancy and weight of evidence. These terms though related, yet differ in some material respect.

The Nigerian Court of Appeal stated the correct position of the Law on the nature of the relationship of the three terms especially as they affect documents in the case of *Unic Insurance Company Ltd. vs UC and IC Ltd.*⁹ the Court of Appeal declared that:

Admissibility is quite different from weight to be attached to such evidence, be it oral or documentary. A document may be admissible in Law yet it may be lacking in evidential value. Admissibility should be based on relevance and not proper custody. Once a matter, be it oral or documentary evidence is relevant, it is admissible, proper custody only raises an issue, of presumption or the weight to be attached to the evidence documentary or otherwise after admission. For evidence, documentary or otherwise to be admissible, it is sufficient that proper ground of its relevance is laid.

It is therefore important to recognize that admissibility of documentary evidence under the Nigerian Law of Evidence as a matter of Law revolves round the rules of evidence on relevancy.¹⁰ Due to the importance of documentary evidence in which document once tendered speaks for itself except where fraud, illegality, mistake were seen, anything documented once written and signed it is bases for its admissibility even when original maker is not available once proper foundation is laid, as provided by the Law makes it admissible.

Notwithstanding the importance of documentary evidence, it has generated a lot of problems to Lawyers, judges, scholars, Students of Law etc because of the procedure of tendering the documents in Courts are not sequentially arranged by the Evidence Act 2011. In some cases, conflicting judgements of the superior Courts worsened the confusion in reaching an understanding of what documentary evidence is.

⁹ (1999) N.W.L. pt. 593 p.17

¹⁰ Babaji, B: (2008). *An Analysis of The Legal Basis and Foundations for the Admissibility of Documentary Evidence Under Nigerian Law*. Ph.D Seminar Paper (Unpublished) Faculty of Law A.B.U Zaria, Nigeria. p. 1

Evidence is a means, exclusive of mere argument, which tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation¹¹. Evidence, include all means by which a fact in issue is established or disproved; thus, evidence may include documents and tangible objects¹². Evidence, is that which, in a Court of justice, makes clear, or ascertains the truth of the very fact or point in issue either on the one side or on the other. Any matter, lawfully deposed to on oath or affirmation, which contributes to the elucidation of any question at issue in a Court of justice¹³.

Oral Evidence is the statement of a witness in Court which is offered as evidence of the truth of that which is stated. This is the most common type of judicial evidence and “all facts, except the contents of documents, may be proved by oral evidence¹⁴.”

The rules of evidence control the presentation of facts before the Court. Their purpose is to facilitate the introduction of all logical and statutory relevant facts with a view to establishing the truth or otherwise of any assertion of a party in a litigation. Thus, the Law of Evidence regulates:

- (a) What matters are not admissible before the Court and
- (b) The methods by which admissible facts are placed before it.

Therefore, the Nigerian Law of Evidence seeks to guide judges or trials of facts based on the assertions of parties to deduce the truth or otherwise of the facts in disputes for the purposes of determining the claims, charges and defences of the respective parties before the Judges or trials of facts.¹⁵

¹¹ Osborn: (1993) *Concise Law Dictionary*. (Sweet and Maxwell, Australia) (8 Ed.) p. 136

¹² Bryan, A.G: (1995). *A Dictionary of Modern Legal Usage*. (Oxford University Press, New York). (2nd Ed.) p. 332

¹³ John, B.S. Mozley and Whiteley: (1977). *Law Dictionary*. (Butterworths and Co Publishers Ltd. London) (9th Ed.) p. 125

¹⁴ Aguda, T.A: (1999). *The Law of Evidence*: (Spectrum Books Limited Ibadan, Nigeria) (4th Edition) p.9

¹⁵ Babaji, B: (2009). *Admissibility of Documentary And Electronic Evidence under Nigerian Law*. *Ph.D Dissertation* (Unpublished) Department of Public Law, Ahmadu Bello University, Zaria Nigeria, p. 1

When a dispute, whether relating to a civil or criminal matter, reaches the Court there will always be a number of issue which one party will have to prove in order to persuade the Court to find in his or her favour. The Law must ensure certain guidelines are set out in order to ensure that evidence presented to the Court can be regarded as trustworthy.¹⁶

The word, Evidence is traceable to the Latin verb, evidences-*evidere* which means to show clearly, to make plainly; certain; to ascertain; to prove¹⁷.

It is submitted that, evidence can be defined as the admissible ways of proving a fact in issue which must be in consonance with the substantive Law.

1.2 Statement of the Problem

A Court, faced with the problem of determination of a suit before it, can solve such a problem only after making an inquiry into the relevant facts of a case as put before it by the parties, drawing reference from those facts and listening to arguments of parties to the case or the Legal Practitioners representing them.¹⁸

It is common knowledge that a fact can be proved by the oral testimony of persons who perceived the fact or by the production of documents or by inspection of things or places.¹⁹ Law of Evidence is one area of Law that is very complicated and difficult to explain by theories even by those who claim to have understood it more specifically the Lawyers. Hence Dean Wright C. A. once noted that “Certainly no one save a Lawyer

¹⁶ *Ibid.*

¹⁷ Nwaeze, C.C: (2003). *Contentious Issues and Responses in Contemporary Evidence Law in Nigeria*: Institute for Development Studies University of Nigeria Enugu Campus. Vol. p.1

¹⁸ Aguda, T.A: *op. cit.* p.3

¹⁹ *Ibid.* p. 3

can understand the Law of Evidence and no Lawyer though he admits to understand that Law could explain it²⁰.

The primary means of proof under the Nigerian Law of Evidence as sanctioned in the Evidence Act include confession, oral testimony, real evidence and documentary evidence. These are the most important and prominent means of proof under the Nigerian Law of Evidence.²¹ Documentary evidence and its admissibility as one of the most important means of proof under the Nigerian Law of Evidence has indeed generated a lot of problems to Lawyers, Judges, Scholars, and Students.

The first question or problem relates to the separation of sections that provided for the circumstances in which secondary evidence can be admissible and the modes of proof as seen in sections 89 and section 90 Evidence Act²². This poses difficulties in interpretation and application by the Courts, Lawyers, teachers and especially to Students of Law.

There are five subsections in section 83²³. Section 83 constitutes a sort of nightmare to many Students. There are occasions when even Practitioners appear confused about the application of its provisions to practical situations,²⁴ for instance the legislatures avoided using simple language in the use of the word provided, except, unless and the failure of the Act not defining the nature of electronic signature under section 83(4) the evidence Act²⁵.

²⁰ Babaji, B: *op. cit.* p. 2

²¹ *Ibid.* p. 2

²² Evidence Act 2011 *op. cit.*

²³ Evidence Act 2011 *op. cit.*

²⁴ Ashi, vsB: (2008). *Documentary Evidence Selected Issues, Conflict and Responses* (Chenglo Ltd. Enugu, Nigeria) (2nd Edition) p.140

²⁵ Evidence Act 2011 *op. cit.*

1.3 Aim and Objectives of the Study

The aim of the study is to subject the Law on admissibility of documentary evidence under the Nigerian Evidence Act to an in-depth analysis.

- (a) To appraise the rules on admissibility of documentary evidence under the Nigerian Law and to ascertain what factors determine the admissibility or inadmissibility of documentary evidence.
- (b) To examine the extent to which computer generated evidence is made part of admissible documentary evidence under the Evidence Act 2011.
- (c) To proffer recommendations on how best problems associated with admissibility of documents can be solved.

1.4 Justification

This study is beneficial to all those who come into contact with Law and litigation to know how facts in issue and relevant fact as contained in the document are expected to be proved pursuant to the substantive Law for its admissibility and its impact in the administration of justice.

It is hoped that the results and recommendations of this study will be beneficial to Judges, Legal Practitioners, Legal Academics, Students of Law, institutions of higher learning etc.. Furthermore, this research will be an additional reference material in Law of Evidence under Nigerian Law.

1.5 Scope of the Study

The scope of this study is intended to provide conceptual insights into the documentary evidence which is part of modes of proof, under the Evidence Act. Documentary evidence is wide. It also includes presumption, affidavit, pleadings but the researcher is

restricted to make an appraisal as to the admissibility of documentary evidence under the Nigerian Evidence Act 2011.

This study will also include significance of the documentary evidence under the Nigerian Law of Evidence. Brief and necessary explanations of some issues may be made for the purpose of clarity for the achievement of the main objectives of the study.

1.6 Research Methodology

The legal research methodology adopted in collecting information, is doctrinal method.

The Doctrinal research is priori research method which involves research relying on primary sources such as statutes, Case Laws etc. However, other approaches or techniques of research like secondary materials such as textbooks, periodicals like Journals, where necessary, may be used to facilitate the completion of the study and the achievement of the objectives of the study. The use of internet references and other materials would also be used.

1.7 Literature Review

There are several contributions made by both Nigerians and foreign scholars in respect of admissibility of documentary evidence.

Agom Augustine Robert's²⁶ analyses which states that only the certified true copy of public documents is admissible is in support of the decision given by the Tribunal in the case of *Daggash vs Bulama*²⁷ but contradicts the unanimous decision of the Court of Appeal delivered by the lead judgement, Obadina J.C.A. holding that public documents

²⁶ Agom, A. R: (2006) *Admissibility of Public Document: A Commentary on Daggash vs Bulama (2004)* Ahmadu Bello Univeristy Journal of Private and Comparative Law (2006) Vol 1, No. 1. pp. 240-243

²⁷ (2004) (pt. 212) All F.W.L.R. 1666

are provable by the original. Agom Augustine Robert²⁸ stated that the *ratio decidendi* has thrown up controversial issues in our Law of Evidence.

It is submitted that, looking at section 86, 88, 89(e), and 90(c) of the Evidence Act, the researcher concurs with his view that only certified copies of public documents are admissible in evidence because it does not contradict the principles of the Evidence Act.

In the view of Babaji Bala²⁹ which did not support Agom Augustine Robert's³⁰ opinion which states that the proof of content of public document is only achieved by the production of its certified true copy and not by original, is in accordance with the provisions of the Evidence Act especially section 86, 87, 88, 89, 89(e) 90(c) and 102.

Babaji Bala³¹ in his dissertation, supported the view held by scholars and by some judicial pronouncements that the content of public document may be proved by either original or secondary evidence in form of certified true copy and not necessary that you must produce the original if the certified true copy is available.

This view with due respect, to an extent, misconstrued the provisions of the Evidence Act sections 85, 86, 88, 89, 89(e) and 90(c) because notwithstanding that section 85 provided the general way of proving document which is by primary (original) or by secondary evidence, Section 86 now provided that primary evidence which is document itself is produced for inspection of the Court and not for proof which is for establishment of a fact in issue.

Section 88 listed exceptional grounds or cases where secondary evidence is admissible in which section 89 provided for the conditions for the admissibility of this secondary

²⁸ Agom, A. R: (2006) *op. cit.* pp.240-243

²⁹ Babaji, B: (2009) *op. cit.* p.25

³⁰ Agom, A. R: (2006) *op. cit.* pp.252 and 259

³¹ Babaji, B: (2009) *op. cit.* p.25

evidence which included public documents as defined by section 102. Section 89(e) provided where the original is a public document within the meaning of section 102 and for proof section 90(c) provided that the nature or type of secondary evidence is by certified true copy and no other secondary evidence is admissible.

On the issue relating to whether photocopy of certified true copy of a public document is admissible without further proof of certification, Babaji Bala³² in his dissertation justified the view that photocopy of a public document whether or not certified is inadmissible and has no place under the Evidence Act as decided in *Fawehinmi vs IGP*³³

The support is a pitfall in interpretation of section 97(1) (e) and (f) (now section 89 (e) and (f), section 97 (2) (c) (now section 90 (1) (c) Evidence Act 2011. This is because notwithstanding that Babaji Bala is right in his support that photocopy of a public document is inadmissible and has no place under the Evidence Act. There is a misconstruction of the Act by adding that whether certified is also inadmissible because going by the provision of section 89 (e) and (f) provided for where secondary evidence is admissible is also related to public document in which for its admissibility under S. 90 (1) (c) the kind of secondary evidence admissible is certified true copy.

Again Babaji Bala's³⁴ dissertation justified the view that on the admissibility of photocopy of certified true copy of public document, that such kind of secondary evidence is admissible and there is no need for further certification in which the Court of Appeal, per Edozie J.C.A in *Raymond Ihuonu and Another vs Simon Obiukwu*³⁵ held that while photocopy of a public document simpliciter is inadmissible, photocopy of a

³² *Ibid.* p. 26

³³ (2000) 7 N.W.L.R (pt. 665) p. 509.

³⁴ Babaji, B: (2009) *op. cit.* pp. 27 - 28

³⁵ (1994) 1 NWLR (pt 322) p. 59

certified true copy of a public document is admissible. This position is supported by *Magaji vs The Nigerian Army*³⁶ and *Daily Times of Nigerian Plc vs F.R.A Williams*³⁷.

This view having been justified by Babaji Bala, with due respect, is ab initio (from the beginning) erroneous because the photocopy of a certified true copy of a public document is inadmissible by virtue of section 89 (e) and (f) section 90 (1) (c) What is admissible is a certified true copy of a public document as held in *Shell Company Ltd. vs Nworlu*³⁸ which this dissertation is in support. Babaji Bala³⁹ in his dissertation stated that Law of Evidence being a branch of Law of practice and procedure is primary among others given the role of regulating the admissibility of any means of proof of whatever kind of evidence including electronic evidence in the Courts of Law or tribunals.

Therefore, when reference is made to the question of admissibility of electronic evidence, it means, recognition or acceptability of a specie of evidence generated, produced, stored or processed by electronic devices, using primarily computers and their accessories, like discs, CD, Video clips, tapes, microfilms, hard disks, print out etc in the Courts for proof of a party's rights, obligation and liabilities.

Thus, computer or electronically generated evidence has inevitably remained a matter of concern in the context of the traditional conception of document as codified under the Nigerian Evidence Act. On several issues or problems associated with the admissibility of electronically or computer generated information or evidence, Babaji Bala's dissertation observed that as the Law in Nigeria stands today, particularly, the

³⁶ (2007) All F.W.L.R pt 420) p. 603

³⁷ (1986) 4 N.W.L.R (pt. 36) 526

³⁸ (1991) 3 N.W.L.R. 491

³⁹ Babaji, B: (2009) *op. cit.* p.35

Law of Evidence as contained in the Evidence Act, that no direct answers or solutions are available.

Several questions and issues have been posed relating to the legal framework for the evidential status and admissibility of electronic evidence⁴⁰. Some of such questions or issues are in the face of the noticeable differences between the seemingly outdated provisions of the Evidence Act 2004 and the growing societal developments in science and information technology and other innovations and what will be the most pragmatic solutions or approaches to them? Could it be by adopting judicial approach is allowing Case Law to develop the rules or by legislative enactments or by both approaches used together? Other legal issues or questions include:

- (i) Whether computer print-outs are admissible in evidence (in both civil and criminal proceedings)?
- (ii) Whether computer and other electronic data storage and generated devices are themselves documentary evidence?
- (iii) Whether electronic or computer print-outs and other storage devices are presumably taken as documents (which seem to be general inclination of many writers and judicial understanding in Nigeria) will such electronic data document or evidence be admitted as original or secondary evidence, having regards to the present requirement of proof of contents of primary and public documents and the old common Law rule of best evidence. Also relevant to ask is how do we handle the question of proof of due execution of document especially private document in electronic form it is by the use of ordinary handwritten signature or a document or by the use of modern electronic form of personal identification numbers (PIN)?

⁴⁰ *Ibid.* p. 36

- (iv) Whether electronic data or documents can be admissible as one of the several exceptions to the rule against hearsay?
- (v) Whether affidavit evidence can be utilized to admit in evidence computer generated documents and other electronic devices in our Courts?

In view of the above statements on the admissibility of statement in document produced by computers and other electronic devices, section 84 (1) of the Evidence Act 2011 provided that in any proceeding which means both civil and criminal proceeding that a statement in document produced by computer shall be admissible in evidence of any fact of which direct oral evidence would have been admissible once the strict conditions stated in section 84 (2) and (4) are complied with; that the document which contained the statement was produced by computer when the computer was in use, by anybody or corporate; that the information in the document was regularly supplied to the computer in the ordinary course of those activities; that the computer was functional and when it was not functional that it did not affect the accuracy of the content of the document and in Section 84(4) certificate which identifies the document describing the manner of production, giving the particulars of such device and shall be signed by a person occupying a responsible position in respect of the operation of the relevant device or the management of the relevant authorities stating to his best of his knowledge and belief that it is the true fact or matter.

A clear decision was made in the case of *Dr Imoro Kubor vs Seriake Henry Dickson*⁴¹. In this case the Supreme Court upheld the dismissal of the appeal at the Court of Appeal simply because exhibit “D” and “L” which were internet print outs of Punch Newspapers and list of candidates posted on INEC’s website respectively tendered from the bar and admitted in evidence by the appellant’s counsel were not tendered in

⁴¹ (2013) 4 N.W.L.R (pt. 1345) 534, 540, 549 to 551

compliance with the requirements of section 84 of the Evidence Act 2011 which provided for the framework on the admissibility of statements in document produced by computer. Therefore, by virtue of the above provisions, statements produced from computers or other electronic data are documentary evidence and admitted as secondary evidence as stated in *Anyeabosi vs R.T. Briscoe*⁴². Section 87 Evidence Act 2011 also provided that copies made from electronic processes are secondary evidence.

By virtue of section 84 (1) which provided for where direct oral evidence is admissible that statement made in document produced by computer shall be admissible as evidence of any fact stated in it which means that section 84 (1) provided for computer print out as an exception to hearsay evidence because where oral evidence is supposed to be given directly by the maker once produced from computer or any electronic device with the conditions complied with, that it is an evidence of the fact or matter stated in the document. In respect of the issues of affidavit evidence section 84 (4) (c) specifically provided in support of the statement produced by computer that for it to be sufficient matter that statement shall be made to the best knowledge and belief of the person which means that it must be deposed on Affidavit. The Affidavit evidence can be utilized to show sufficiency or compliance to the conditions as an evidence of the matter stated.

In respect of the question as to proof of due execution, for any document to be admissible and be given any evidential weight, proof of its authorship or due execution is necessary and may be easily be obtained where hard papers are used and the maker appends his signature. Where a document is in electronic form or electronically generated, proof of its authorship and due execution can also be done since section 104 Evidence Act provided for the admissibility of a secondary evidence that the conditions

⁴² (1987) 3 N.W.L.R p. 84

to be established in respect of certified true copy of a public document are; that payment of the legal fees prescribed with a certificate written at the foot of such copy, that it is a true copy of such document or part of it as the case may be dated and subscribed by such officer with his name and his official title and shall be sealed is the bases for such copies so certified to be admissible as certified copies.

Section 101 (1) Evidence Act 2011 also provided that to know if a signature, writing, seal or finger impressing is that of the person, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved also that signature, writing, seal or finger impression has not been produced or proved for any other purpose.

Section 101 (2) Evidence Act 2011 also provided that the Court may direct any person in Court to write word, figure or to make finger impressions for the purpose of enabling the Court to compare the words, finger or finger impression alleged to have been written or made by such person. Therefore, because electronic or computer print-out and other storage devices are admissible as documentary evidence the same procedure to prove the execution of private and public document for its authorship or proof of due execution is the same for proof of due execution of private document in electronic form. This can also be by ordinary handwriting which has to be signed through electronic device for the purpose of comparison by the Court with the alleged writing made by such person, as provided by section 101 (2) Evidence Act 2011 and section 93 (3) which provided, that it can be done in any manner. Section 93 also provided for proof of electronic signature. Provided the requirements in the Evidence Act are complied with.

There are other writers such as Phipson Sidney Lovell, Cross R, Stephen James Fitzjames, Nwadialo Fidelis, Aguda T. Akinola, Osinbajo Yemi etc, who among other things, defined evidence, documents, documentary evidence and the admissibility of documentary evidence. The researcher briefly reviews below, some of the central contributions of these scholars.

Osinbajo Yemi observed that the Nigerian Law of Evidence as well as judicial interpretations of some provisions of the Evidence Act with a view to accommodating electronically generated evidence as specie of documentary evidence are inadequate and not clear and even sometimes leading to absurdity⁴³.

Osinbajo Yemi asserted that there are differences between paper and paperless transactions. The advent of paperless transaction (which represents electronic record or data or documents) has exposed the present concept of document used in the Evidence Act. Therefore, Osinbajo Yemi submitted that electronically recorded or generated records are for example recorded in magnetic materials to describe such records as inscriptions on substance would be absurd⁴⁴. He noted that certain computer related records in the form of tape recorded evidence, cinema films etc were accepted as documents and species of documentary evidence and same extended interpretation of documents may be allowed in Nigerian Courts.⁴⁵ Yet it is not clear how a Nigerian Court would respond to the question of what category of evidence is computer or electronically generated evidence, oral, documentary or real.

In respect of Osinbajo Yemi's observation, section 258 of Act Evidence Act 2011 provided for the definition of documentary evidence which includes computer and

⁴³ Osinbajo, Y: (1992) *Cases and Materials on Nigerian Law of Evidence* (1st Edition) (Macmillian Nigeria Publishers Ltd Lagos, Nigeria.) p. 186

⁴⁴ *Ibid.* p. 186

⁴⁵ *Gani Fawehinmi vs N.B.A.* (1986) 2 N.W.L.R part 21 p. 244

section 84 Evidence Act provided for the admissibility of electronically generated evidence with an elaborate conditions that must be established for the statement (document) produced by computer to be admissible in evidence thereby preventing an ambiguity in its admissibility. These conditions makes clear the distinction between paper and paperless transaction and that the computer produced document by virtue of section 84 is a documentary evidence which can be tendered as secondary evidence⁴⁶.

Phipson Sidney Lovell⁴⁷ definition on evidence as testimony whether oral, documentary or real is listed as modes of proof but he did not include electronic and circumstantial which are also among the modes of proof.

The view of Cross R.⁴⁸ in respect of the definition of evidence as the testimony, hearsay, documentary, things and fact are also modes of proof with exception of hearsay evidence because hearsay evidence is not admissible in evidence as it is evidence of a second person who does not have direct contact of the fact in issue and whose evidence can introduce fraud, leading to a prolonged enquires because of the weaker evidence and depreciation of the truth. These are bases for the inadmissibility of hearsay evidence but exceptions are admission, confession, dying declaration, res gestae etc.

Also Cross R.⁴⁹ in his definition did not include electronic evidence as part of mode of proof.

Another important view held by Best⁵⁰ is that evidence is any matter of fact, the effect, tendency or design of which is to produce in the mind a persuasion, affirmative or

⁴⁶ *Anyeabosi vs R. T. Briscoe* (1987) 3 N.W.L.R. p. 84

⁴⁷ Buzzard John H., Amlot Roy D. and Mitchell Stephen: (1970) *Phipson On Evidence*. (Eleventh Edition). The Cambridge Law Journal Vol. 29, Issue 01. The Common Law Library No. 10, London, (Sweet & Maxwell Ltd.) Quoted in Nwadialo F: (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria). p.1

⁴⁸ Mathieson D. L. (1989) *Cross On Evidence (4th Edition)*, (Butterworths Law, New Zealand)

⁴⁹ *Ibid.*

disaffirmative of the existence of some other matter of the facts. In his definition he explained the achievements of the modes of proof or the purpose of the modes of proof but did not state the means of proving those facts that will lead to persuasive story to establish the fact in issues in Court.

Stephen James Fitzjames⁵¹ acknowledges the fact that evidence involves questions: what facts may or may not be proved, what sort of evidence must be given but did not categorically specify the modes of proof.

In Babaji Bala's⁵² contribution, circumstantial evidence as different from direct evidence means evidence of the surrounding circumstances, event and signs or marks and can be evidence or testimony and not evidence of the fact in issue.

The erudite scholar's definition is in order but did not specify that circumstantial evidence is indirect evidence which can be evidenced through documentary, real evidence which are also circumstances in which the truth of the fact in issue can be inferred. For-instance, where Miss X was raped without her consent by Mr. Y in the bush and when the act was on, Mr. A on the tree heard Miss X shouting, Supposing the Parents to Miss X took her to the hospital where the Medical Doctor examined her, made his diagnosis and prescriptions written on a document mean while the parents of Miss X also instituted an action in which they tendered the medical report, the clothe tore and stained with blood during the forceful penetration which is real evidence and Mr. A gave oral evidence of what he heard and saw through all these modes of proof

⁵⁰ Best (1922) Principles of Law of Evidence, pp 2, 22 and 23. Quoted in Nwadialo F. (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria). p.1

⁵¹ Stephen F, Sir James: (1892) Laws of Evidence. (First Edition). Quoted in Nwadialo F.: (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria). p.1

⁵² Babaji B. (2009) *op. cit.* p. 279

the truth of the fact can be inferred which means that, all the modes of proof are under circumstantial evidence.

Nwadialo Fidelis⁵³ stated that the statutory definition of a document under the Evidence Act is very wide and is not merely restricted to ordinary papers but also included books, plans, photographs any matter expressed or described upon any substance by means of letters, figures or marks intended to be used or which may be used for the purpose of recording that matter but the learned author did not extend the meaning of documents to cover electronic records or computer printout.

Another erudite author, Aguda, T. Akinola made extensive discussion on the admissibility of a document on the ground that what constitutes the primary evidence of a document that the obvious one is the original document itself. If objection is taken to the admissibility of a document on the ground that it is not an original, the onus is on him who is seeking to put the document in evidence to show on the balance of probabilities that is an original.⁵⁴

Also in his contribution on the interpretation of section 258 of the Evidence Act on the definition of document, Aguda T. Akinola expatiated by stating that; the substance used for making the document, for instance, writing, typewriting, printing, is immaterial. A writing projected on a cinema screen will come under the definition of document under this provision. Aguda T. Akinola observed that there are two types of documents under the Evidence Act public and private document and he stated that the general method of

⁵³ Nwadialo F.: (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria). p.5

⁵⁴ Aguda, T. A: (1998). *Law and Practice Relating to Evidence in Nigeria*. (MIJ Professional Publishers Ltd. Lagos, Nigeria). (2nd Ed.) p. 248-249.

proving a public document is by production of a certified copy of it or the parts of it that are required for proceeding in Court.⁵⁵

The question whether this assertion is correct statement of the Law or not will be examined further in this study. Another important view held by Ashi, Valentine B.⁵⁶ which this dissertation also accepted as the true and correct interpretation of the Law is that, by section 86 of the Evidence Act, 2011 which provides types of primary Evidence to include:

- (1) Primary evidence means the documents itself produced for the inspection of the Court
- (2) Where a document has been executed in several parts, each part shall be primary evidence of the document.
- (3) Where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it.
- (4) Where a number of document have all been made by one uniform process, as in the case of printing, lithography, photograph, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.

The learned author Ashi Valentine B.⁵⁷ was quick to point out that under Section 86(3) pointed above, where document is executed in counterpart that today, for practical purposes, the application of this subsection is not quite different from Section 86(2) but

⁵⁵ Aguda, T. A.: (1989). *The Law of Evidence* (3rd Ed.) (Spectrum Law Publishing Ibadan, Nigeria), p. 151.

⁵⁶ Ashi VSB.: (2008). *Documentary Evidence, Selected Issues, Conflicts and Responses*. (Chenglo Limited, Enugu, Nigeria) (2nd Ed.) pp. 17-19

⁵⁷ Ashi, VS B.: *op. cit.* pp. 17-19

there is a measure of confusion, which often seems to introduce a strange categorization. For example, where four copies of a tenancy agreement are executed between Landlord and the Tenant, each of the copies is primary evidence of the rest. In relation to the terms of the tenancy agreement, in the light of Section 86(2) above. It does not matter that the other three copies were photocopies of the first copy produced from the printer. What is important here is an affirmative answer to the question; did the parties sign each of the documents with their signature in ink? of course, the situation would be different where the photocopies are made from one that is already signed.

Ashi Valentine B submitted that, it is regrettable that even solicitors are sometimes confused and they end up confusing other people when they arbitrarily stamp the first document produced from, the printing machine as ‘original’ and stamp others made from the photocopying machine as ‘copies’ and still present each of them to the parties to append their signatures on both simultaneously.

Ashi Valentine B.⁵⁸ submitted that this is certainly erroneous and misleading. All of them are primary copies of one another, unless the photocopies were made after the parties had signed, in which case one would be right to consider the photocopies as ‘copies’ properly so called. In terms of the foregoing, it seems appropriate to conclude that the ideas of counterpart in its orthodox context as understood even as late as 1945 when the Evidence Act came into force has naturally collapsed into a single dimension as documents produced in several copies, in terms of sub-section (2) above.

The contribution made by Ashi Valentine B. on Proof and the admissibility of Banker book in evidence. The provision of section 90(1)(e)⁵⁹ seems not to properly understood due to the unclear nature of the provision. It is noted that the provisions of section

⁵⁸ Ashi VSB *op. cit.* pp. 17-19

⁵⁹ Evidence Act 2011 *op. cit.*

90(1)(d) and section 89(h)⁶⁰ of the Evidence Act 2011 permit the Proof of document that is an entry in bankers book to be made by secondary evidence even though the original document is available and it provides that the prove must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit section 90(1)(e) but the learned author Ashi Valentine B. added that such a person could be an external auditor or even a crime detective.⁶¹

It is submitted that, this addition is not stated in the Evidence Act because it did not specify the kind of secondary evidence but by implication stated the modes of Proof under the proper foundation to be laid. One will observe that the above referred literary materials or works on the admissibility of evidence indicates that there are still unsettled issues of Law regarding what is a document and how public documents may be proved. Additional procedures are expected to be taken to remedy some areas.

Courts have various effort made to extend the meaning of document and statement like typed records, film and video and computer printout but more explanation is needed to help in our modern system under the Nigerian Law because of some issues not properly treated by the scholars in respect to the admissibility of documentary evidence. This research will redress some uncleared issues.

Yargata B. Nimpar⁶² in her book stated that for there to be compliance with section 91(1) (now section 83(1)) of the Evidence Act, it is mandatory that the maker testifies on the documents. That the only exception to this rule is section 91(2) (now section 83(2)) of the Evidence Act 2011. That so far as a witness is not the maker of a

⁶⁰ *Ibid.*

⁶¹ Ashi, VS B. *op. cit.* p. 36

⁶² Yargata, B. *op. cit.* p. 50 See *Salu vs Eyebom* (1994) 6 N.W.L.R (pt. 438) 2B, *Okafor vs Okpala* (1995) 1 N.W.L.R (pt. 374) 749, *Amobi vs Amobi* (1996) 8 N.W.L.R (pt 469) 638.

document, he cannot similarly give oral evidence of the contents and therefore cannot tender same without compliance with the other requirements of the Law.

From the foregoing, it is clear that it is not enough that the statement is made by a person in document and that the statement tends to establish the fact. It is in addition obligatory that the original of the document be tendered and where not available, proper foundation should be laid for the admissibility of the alternative document that is available⁶³.

It is submitted that in respect of the above prepositions, section 83(1) is specifically provided where oral evidence is supposed to be given in any proceeding that another person can tender the original document if established that the maker of the document is either dead or unfit by reason of his body or mental condition to attend as a witness or if he is outside Nigeria and it is not reasonably practicable to secure his attendance or if all reasonable efforts to find him have being made without success and the witness established that the maker has knowledge of the matters dealt with by the statement or where the document in question is or forms part of a record purporting to be a continuous record but it is not within his personal knowledge which information is given to him by another person who had knowledge of the matter which was made in the performance of his duty during which, he recorded the information. Therefore, this provision of the Act does not in any way supports that it is mandatory that the maker testifies on the document because the above section established that the witness is dispensed with once any of the above conditions is established.

In respect of Yargata B. Nimpar's position that the only exception to this rule is section 91(2) (now section 83(2)) makes the interpretation of the Law ambiguous because the

⁶³ *Ibid.* p. 50 See *Anatogu vs Iweka II* (1995) 8 N.W.L.R (pt. 415) 547.

bases for the document made by the maker to be tendered by another and be admissible, the procedures or conditions listed under section 91(1) (now section 83(1)) must be complied with in respect of the cases or circumstances listed under section 83(1) and 83 (2).

Again the position of Yargata B. Nimpar in establishing that for the admissibility of the alternative document that is available, that proper foundation must be laid does not contradict the provisions of the Evidence Act because section 83(2) Evidence Act 2011 provides that the Court may at any stage of the proceeding, if having regard to all the circumstances of the case, it satisfied that undue delay or expenses would be caused notwithstanding that the maker is available but is not called as a witness and the original is not produced if in lieu of it, there is produced a copy of the original or of the material part of it certified to be a true copy in such manner as may be specified in the order or as the Court may approve. This makes the alternative to be admissible because it is subject to Courts discretion and subject to the conditions for the admissibility of a certified true copy and it refers to public document as provided by section 89(e) and 90(c) Evidence Act 2011. Therefore, it is not automatic for the admissibility of the alternative because it is also subject to the Courts discretion.

Yargata B. Nimpar's⁶⁴ submission on section 91(3) (now section 83(3)) is correct where she stated that even where the Court satisfies itself that though the maker is unavailable or the original copy of the document is not available and yet desires to exercise its discretion in favour by admitting the document, that the trial Court must of necessity also ensure due compliance with section 91(3) (now section 83(3)) of the Evidence Act 2011.

⁶⁴ *Ibid. op. cit.* p.53

It is submitted that this interpretation is in consonance with the totality of the reasons behind the admissibility of document made by the maker in which his presence is dispensed with once the conditions are complied with provided the document was not made by the maker when the case was pending or anticipated.

1.8 Organisational Layout

This study is structured as follows:

Chapter One introduces the work and deals with general introduction which covers the background to the study, statement of problems, aim and objective of the study, justification of the study, scope of the study, methodology, literature review, organisational layout and characterisation.

Chapter Two deals with the nature, scope, meaning, types of primary and secondary documentary evidence, admissibility and weight of evidence, types of primary evidence, documents itself as primary evidence, documents executed in several parts, document executed in counterpart, document made in uniform process, types of secondary evidence.

Chapter Three is on introduction, proof of content of documentary evidence, proof of public documents, proof of content of private document, admissibility of secondary evidence, circumstances or conditions in which secondary evidence may be admissible in evidence, foundation to be laid, admissibility and proper custody of documents, admissibility, custody and production of public documents, proof of execution of document, evidence of handwriting and evidence of signature.

Chapter Four provides a critical appraisal of the rules on admissibility of documentary evidence as to fact in issue under Sections 83 and admissibility of statements in documents produced by computers under Sections 84 of the Evidence Act 2011 which

includes admissibility of document made by a person in any proceeding, if the maker of the document had personal knowledge of the matters dealt with by the statement, where the document forms part of the record purporting to be continuous record, if the maker of the statement is called as a witness in the proceeding, the discretion of the Court to admit a statement made by the maker in any proceeding, the inadmissibility of the document made an interested person when the proceeding is pending or anticipated, admissibility of document signed or initialed by the maker, basis for admissibility of certificates of a registered medical practitioner, admissibility of computer generated document and conditions to be laid, admissibility of statement produced from different or combination of computers, basis for admissibility of certificate signed by a person in a responsible position, and conditions to be laid for an information to be duly supplied or produced by computer.

Chapter Five is the final chapter and provides for summary of the entire dissertation. It also contains summary, findings, recommendations and conclusion.

Bibliography provides the list of the material used by the researcher.

CHAPTER TWO

NATURE, SCOPE, MEANING AND CLASSIFICATION OF DOCUMENTARY EVIDENCE

2.1 Introduction

The main aim of this chapter is to examine various types of oral and documentary evidence, how they are classified as public and private documents, and to appraise the rules on admissibility of documentary evidence under Nigerian Evidence Act 2011. In order to achieve the main objectives, some preliminary or conceptual classification like documentary evidence and its classification would be made. Therefore this chapter is structured as follows: Nature, Scope, Meaning and Classification of Documentary Evidence.

2.1.2 Nature of Documentary Evidence

Courts as the machinery for the administration of justice between litigants have the ultimate duty of determining the legal rights and duties of parties before them. This task cannot be achieved without proper enquiry and investigation of the Courts about the facts and the relevant facts in dispute. Thus, the Courts must determine a particular case before them on the strength of the evidence presented to them by the litigants.¹

The term 'evidence' is not actually defined in the Evidence Act 2011. It merely explained evidence.

Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereafter declared to be relevant, and of no others.

Provided that:

- (a) the Court may exclude evidence of facts which though relevant or deemed to be relevant to the issue, appears

¹ Babaji, B.: (2009). *Admissibility of Documentary And Electronic Evidence under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University, Zaria. Nigeria. pp. 80-81.

to it to be too remote to be material in all the circumstances of the case, and

- (b) this section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the Law for the time being in force.²

Section 86 (1) provides that Primary evidence mean the document itself produced for the inspection of the Court.³

Evidence has been defined in *Akintola v Solano*⁴ by Oputa J.S.C (as he then was) as follows:

If a thing is self-evident, it does not require evidence, what therefore is evidence? Simply put, it is the means by which any matter of fact the truth of which is submitted to investigating may be established or disproved. Evidence is therefore necessary to prove or disprove an issue of fact.

Evidence, include all means by which a fact in issue is established or disproved; thus, evidence may include documents and tangible objects.⁵

Evidence, is that which, in a Court of justice, makes clear, or ascertains the truth of the very fact or point in issue either on the one side or on the other. Any matter, lawfully deposed to on oath or affirmation, which contributes to the elucidation of any question at issue in a Court of justice.⁶

Evidence' is concerned with the means of proving or disproving a fact or facts⁷. Thus according to **Phipson Sidney Lovell**⁸, evidence “means the testimony, whether oral,

² Section 1 Evidence Act, Laws of the Federation oof Nigeria 2011

³ *Ibid.*

⁴ (1986) 4 S. C. p. 114 at 184

⁵ Bryan, A.G.: (1995). *A Dictionary of Modern Legal Usage*. (Oxford University Press, New York). (2nd Ed.) p. 332

⁶ John, B.S. Mozley and Whiteley: (1977). *Law Dictionary*. (Butter worths and Co Publishers Ltd. London) (9th Ed.) p. 125

⁷ Osinbajo, Y.: (1992). *Cases and Materials on the Nigerian Law of Evidence*. (Macmillan, Nigeria), p.1

⁸ Buzzard John H., Amlot Roy D. and Mitchell Stephen: (1970) *Phipson On Evidence*. (Eleventh Edition). The Cambridge Law Journal Vol. 29, Issue 01. The Common Law Library No. 10, London, (Sweet & Maxwell Ltd.) Quoted in Nwadialo F.: (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria) p.1

documentary or real, which may be legally received in order to prove or disprove some facts in dispute”.

To **Cross R.**⁹, it is “the testimony, hearsay, documents, things and facts which a Court will accept as evidence of the facts in issue in a given case”. There is also the definition by **Best**¹⁰ that evidence is “any matter of fact, the effect, tendency, or design of which is, to produce in the mind, a persuasion, affirmative or disaffirmative, of the existence of some other matter of facts”.¹¹ According to **Stephen James Fitzjames**¹², evidence involves the questions: what facts may or may not be proved, what sort of evidence must be given of a fact which may be proved and by whom and in what manner the evidence must be produced by which any fact is to be proved.¹³ Each of the above definition of evidence is geared towards modes of presenting a persuasive story to establish an affirmative case in the Court.

2.1.3 Scope of Documentary Evidence

Scope is defined as the range of things that a subject deals with.¹⁴

The erudite scholar Afe Babalola stated that the basic function of evidence is to ensure that justice is done and the truth is as far as practicable, ascertained¹⁵ and the fact in issue in any case are determined by the applicable substantive law because the Law of

⁹Mathieson D. L. : (1989) *Cross On Evidence (4th Edition)*, (Butterworths Law, New Zealand)

¹⁰Best (1922) *Principles of Law of Evidence*, pp 2, 22 and 23. Quoted in Nwadialo F. (1981). *Modern Nigerian Law of Evidence*. Ethiope Publishing Corporation, Ring Road, Benin City. p.1

¹¹ Nwadialo F.: (1981). *Modern Nigerian Law of Evidence*. Ethiope Publishing Corporation, Ring Road, Benin City. p.1

¹²Stephen, Sir James: (1892) *Laws of Evidence*. (First Edition). Quoted in Nwadialo F. (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria.) p.1

¹³ *Ibid.* p.2

¹⁴ Hornby, A. S.: (2010). *Oxford Advanced Learners Dictionary* (8th Edition). Oxford University Press, London.

¹⁵ Babalola, A.: (2001). *Law and Practice of Evidence in Nigeria* (Sibon Books Ltd. Ibadan, Nigeria). p. 15.

Evidence deals with the legally accepted means of proving or disproving the fact in issue and standard of proof required in any particular case.¹⁶

It is submitted, that the scope of documentary evidence is very wide but this study covered some areas like meaning, types and classification of documentary evidence, admissibility and weight of evidence, types of primary and secondary evidence, proof of content of private and public documents, admissibility and proper custody of document, proof of execution of document, evidence of handwriting and signature, admissibility of documentary evidence as to fact in issue, and admissibility of document or statement produced by computer.

2.1.4 Meaning of Documentary Evidence

Document includes:

- (a) books, maps, plans, graphs, drawings, photographs and any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of these means, intended to be used or which may be used for the purpose of recording that matter;
- (b) any disc, tape, sound track or other device in which sounds or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced from it; and
- (c) any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some equipment) of being reproduced from it, and
- (d) any device by means of which information is recorded, stored or retrievable including computer output.¹⁷

Section 51¹⁸ provides:

Entries in books of account or electronic records regularly kept in the course of business are admissible whenever they refer to a matter into which the Court has to inquire, but such statement shall not be sufficient evidence to charge any person with liability.

¹⁶ *Ibid.* p.1

¹⁷ Section 258 (1) Evidence Act 2011 op cit.

¹⁸ *Ibid.*

In *Anyaebose v Briscoe (Nig) Ltd.*¹⁹ By an agreement between the Appellant/Defendant and the Respondents/Plaintiffs, the Appellant was appointed to sell the Respondents' motor spare parts. On the basis of this agreement, various motor spare parts were supplied to the appellant on credit. The transaction between the parties was computerized by the Respondent. Demand letters were written by the Respondent's solicitor to the appellant on various occasions. Each of the letters ending with a threat of litigation against the Defendant/Appellant if the demand was not settled. The Plaintiffs/Respondents thereafter brought this action against the Defendant/Appellant for the debt. During the course of the action, a computerized statement of account showing the Defendant/Appellant's indebtedness to the Plaintiff/Respondent which was prepared before the commencement of the proceeding as tendered and admitted in evidence as exhibit P4 without objection. The said exhibit was duly certified as a true copy by the respondent's Senior Accountant. The trial Judge entered judgment in favour of the Plaintiff. The Defendant then appealed to the Court of Appeal where for the first time the defendant raised objection on the admissibility of Exhibit P⁴ on the ground that it was prepared by a person interested at a time when proceedings were anticipated. The Court of appeal rejected the contention and hence dismissed the appeal. The defendant thereafter appealed to the Supreme Court stating inter alia that Exhibit P⁴ was wrongly admitted in evidence contrary to section 90 (2) (now S. 83(3))²⁰ and that it was prepared by an interested person in anticipation of litigation.

Held:

- (1) It is the primary and crucial importance that a document used in litigation must not only be relevant, it should also be admissible,
- (2) Where a documentary evidence is only rendered admissible on the fulfillment of certain conditions, such

¹⁹ (1987) 3 NWLR 84

²⁰ Evidence Act 2011 *op. cit.*

documentary evidence is admissible, if admitted without any objection by other party.

- (3) The computerized statement of account (Exhibit P⁴) does not fall into the categories of evidence absolutely inadmissible by Law as it is admissible as secondary evidence. Hence exhibit p4 as rightly admitted without objection and since it was not a document which is inadmissible in any event under the Law, the appellant could not be heard to complain on appeal;
- (4) Although from the facts of the case, Exhibit P⁴ was prepared in anticipation of Litigation, it was not prepared by a person interested in the proceeding;²¹
- (5) Documentary evidence is statement contained in documents tendered as a means of proving a fact. The meaning of a document under the Evidence Act is very wide and is not merely restricted to ordinary papers but also includes such others items as books, plans, photographs and any matter expressed or described upon any substance by means of letters, figures or marks intended to be used or which may be used for the purpose of recording that matter. Generally, where documentary evidence is tendered, no oral version of the same evidence is admissible. The document speaks for itself. When tendered a document becomes an exhibit²²

It is submitted that the controversy that surrounded the admissibility of computer generate evidence under the repealed Evidence Act 1990 no longer exist under the Evidence Act 2011. It is as a result of the elaborate definition of ‘document’ under Section 258²³ which has cured the narrow definition of ‘document’ under Section 2²⁴. There was controversy whether computer generated evidence was admissible or not in our Courts, and if admissible, whether it is primary or secondary evidence.²⁵ With the evidential rules introduced by the Evidence Act 2011 the shortcoming that existed in the above cases no longer arise because of the provision of Section 51²⁶.

²¹ Olakanmi, J. et al. *op. cit.* p. 178, 179

²² Nwadialo, F. *op. cit.* p.5

²³ Evidence Act 2011 *op. cit.*

²⁴ Evidence Act Cap 112 Laws of the Federation of Nigeria 1990

²⁵ See Okon Aaron Udoro vs the Governor of Akwa Ibom State (2010). I N.W.L.R. (pt. 1205) 322.

²⁶ Evidence Act 2011. *Op. cit.*

In the case of *U.B.A. Plc. vs Sani Abacha Foundation for Peace and Unity*,²⁷ appeal was made against the judgment of the High Court of the Federal Capital Territory. The respondents as plaintiffs in their writ of summons originally placed under the undefended list claimed against the appellant as defendant the sum of N25.3million (Twenty five million, three hundred thousand naira only) being money wrongfully and / or negligently “transferred” from the 1st respondent’s account No: 201078886 with the Abuja Branch of the appellant bank and also interest on the said sum. The action was later transferred to the general cause list for hearing. Pleadings were filed and exchanged on the order of the trial Court. Hearing then commenced in earnest. At the conclusion of each part’s case both Counsel addressed the Court. The trial Judge in his judgment, gave judgment in favour of the respondent. It is against this judgment that the appellant had appealed to the Court of Appeal. The Court of Appeal considered Section 97(1)(h) and (2)(e)²⁸ (now section 89(h) and 90(1)(e)²⁹ which provides as follows:

“Section 97 (1)³⁰ (now section 89 (h))³¹. Secondary evidence may be given of the existence, conditions or contents of a document in the following cases:

Section 97(h) when the document is an entry in a bankers book.

Section 97(2)(e) in paragraph 1 (h) (now section 90 (1) (e))³² the copies cannot be received as evidence unless it be first proved that the book in which the entries, were made was at the time of making one of the ordinary books of the bank and that the entry was made in the usual and ordinary course of business and that the book is in the custody and control of the bank which proof may be given orally or by affidavit by a partner or officer of the bank and that the copy has been examined with the original and is correct which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit”.

²⁷ (2003) F.W.L.R. (pt. 178) 997-998

²⁸ Evidence Act 1990, *op. cit.*

²⁹ Evidence Act 2011, *op. cit.*

³⁰ *Ibid.*

³¹ Evidence Act 1990, *op. cit.*

³² Evidence Act 2011. *Op. cit.*

The court held; allowing the appeal and cross-appeal in part stated;

On whether statement of account contained in a document produced by a computer is admissible under section 97 1(h) and 97 (2)(e)³³ (now section 89(h) and 90(e)³⁴

Per Muntaka – Coomassie, J.C.A: stated

while I agree with the appellant’s counsel that the document is relevant under section 38 and 39³⁵ (now section 51 and 52)³⁶ but it did not satisfy the conditions necessary for its admissibility as evidence under section 97(1) (c) and 2(e) of the Evidence Act 1990 (now section 89 (c) and (e) of the Evidence Act 2011. Though the appellant’s counsel made reference to the modern day practice of using computers in the day to day business of the bank. It is my opinion that the Law remains as it is. It has not been amended by an Act of the National Assembly, although it is time they did that and I am bound to apply the Law as it is.

The cited case of *Yesufu vs A.C.B. Ltd.* the Supreme Court made the same point, at page 273, when it held thus:

Finally, while we agree that for the purpose of sections 96(1) (c) and 37³⁷ “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 a document produced by a computer, if the position is clarified beyond doubt by legislation as has been done in England in the Civil Service Act, 1968...

It is quite unfortunate that in Nigeria no clarification has been done yet by way of amendment or promulgation of an Act to exempt the statement of account contained in a document produced by a computer from the conditions stated in section 97 (h) and 97 (2) (e)³⁸ (now section 89 (h) and 90 (1) (e)³⁹. Hence, I will not deviate from my primary function of interpreting the Law as made by the legislature to that of law making. I therefore hold that the lower Court was in error when it admitted exhibit D2 in evidence⁴⁰.

³³ Evidence Act 1990. Op. cit.

³⁴ Evidence Act 2011. Op. cit.

³⁵ (1976) I ALL. N.L.R. (pt. 1) 328

³⁶ Evidence Act 1990. Op. cit.

³⁷ Evidence Act 2011. Op. cit.

³⁸ Evidence Act 2011. Op. cit.

³⁹ Evidence Act 1990. Op. cit.

⁴⁰ *Egbue vs Araka* (1996) 2 N.W.L.R. (pt. 433) 688 at 708.

It is submitted that the Court of Appeal was correct in its decision when it held that conditions under section 97 (1) (h) and 97 (2) (e) Evidence Act 1990 (now section 89 (h) and 90 (1) (e) Evidence Act, 2011 was not satisfied and that the lower Court was in error when it admitted exhibit D2 in evidence.

Documentary evidence is of tremendous importance in Court proceeding. Indeed, it is the yardstick by which the veracity of oral testimony is tested. It is for this reason that the Law of Evidence permits trial Court to substitute the eye for the ear in the reception of evidence when and as the need arises. With the eyes the Judge can thoroughly perceive and evaluate the oral and documentary evidence before him. The importance of documentary evidence is well enunciated in the dictum of Lord Mcnaghten when he asserted in *Hennessey v Keating*.⁴¹ That the eye is no doubt the best test. While enjoining Judges in *Payton and Co v Snelling Lampard and Co*.⁴² that when they look at the documents before them and pay due attention to the evidence adduced, they must not surrender their own independent judgment to any witness be he an expert.⁴³

Documentary evidence refers to evidence:

- (a) in any form of writing or printing or making or device,
- (b) relevant to an issue before the Court,
- (c) which is in the form in which it could be admitted
- (d) which fulfils all the conditions precedent to its admission
- (e) which finally is admitted in evidence.⁴⁴

⁴¹ (1908) 421 L.T.R. 169

⁴² (1901) A.C. 308

⁴³ Onamade, P.A. *op. cit.* p.2.3

⁴⁴ Onah, C.O. (1996). *Evidence Law in Action*. Eunis Educational Publishers, Victory Palace Enugwu Ukwu, Nigeria p.1

Documentary evidence refers to statements in a document and tendered for purposes of establishing a fact.⁴⁵

Documentary evidence is therefore any statement made in a document which is offered to the Court in proof of any fact in issue. Central to the analysis of documentary evidence are issues of admissibility, custody and relevancy of such documents. Three main conditions govern admissibility of documentary evidence which are:

- (i) Is the document pleaded?
- (ii) Is it relevant to the enquiry being tried by the Court?
- (iii) Is it admissible in Law?⁴⁶

It is submitted that, documentary evidence can be defined as information received from a relevant document or any storage device for the purpose of tendering it as an admissible evidence and as exhibit to establish a fact in the Court.

2.1.5 Types and Classification of Evidence

There are various types of evidence namely:

1. Direct
2. Hearsay
3. Circumstantial
4. Oral
5. Documentary
6. Real
7. Other types such as insufficient, original, judicial evidence as seen under the British Legal System.

⁴⁵ Osinbanjo, Y. *op. cit.* p.3

⁴⁶ Olakami, J. *etal op. cit.* p.147 See also *Okonji and Ors v George Njokanma* (1999) 12 SCNJ 254 at p. 273

(i) Oral/Direct Evidence:

This is also known as ‘original’ or “testimony”. This is the testimony concerning a fact actually perceived by a witness with one of his senses. This is evidence of a fact actually in issue. Examples:

- (a) The fact in issue is whether A had been driving on the wrong side of the road. B gives evidence of seeing A driving his car at the time in question on the wrong side of the road.
- (b) The fact in issue is whether Sule stole Yusuf’s purse. Bala’s evidence that he had observed Sule putting his hand in Yusuf’s pocket and taking out a purse may be adduced as direct evidence of Sule’s having appropriated Yusuf’s property.
- (c) The fact in issue is whether A and B were present when C signed his Will. D gives evidence of having seen A and B together with C at a table on which there was a document which C was signing.

Section 126⁴⁷ provides, subject to the provisions of Part III, oral evidence shall, in all cases whatever, be direct, if it refers to –

- (a) A fact which could be seen, it must be the evidence of a witness who says he saw that fact;
- (b) To a fact which could be heard, it must be the evidence of a witness who says he heard that fact;
- (c) To a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner;

⁴⁷ Evidence Act, 2011 *op. cit.*

- (d) If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable.

(ii) Hearsay Evidence:

Section 37⁴⁸ provides that; hearsay means a statement –

- (a) Oral or written made otherwise than by a witness in a proceeding; or
- (b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it. Section 38⁴⁹ provides that hearsay evidence is not admissible except as provided in this part or by or under any other provision of this or any other Act.

Hearsay evidence is repetition in Court by a witness of what some other person had told him. It should be noted that “hearsay” evidence in its legal sense is all evidence which does not derive its values solely from the credit given to the witness himself but rests, in part; on the veracity and competence of some other person.

Although the term is not used in the Evidence Act, It is of Common Law origin and embodied in our Laws by Section 1 and Section 126 of the Evidence Act 2011.

⁴⁸ Evidence Act, 2011 *op. cit.*

⁴⁹ *Ibid.*

Ijiofor v The State.⁵⁰ A classical exposition of the rule was given by the *Judicial Committee of the Private Council in Subramanian v Public Prosecutor*.⁵¹

There are exceptions to Hearsay Evidence. Paradoxically, the hearsay rule is better known for its numerous exceptions than the rule itself. Some of the well known exceptions are:

- (a) Admission.
- (b) Confession.
- (c) Dying Declarations section 39 and section 40 Evidence Act 2011
- (d) Affidavit Evidence
- (e) Admissibility of documents under section 83 Evidence Act 2011.
- (f) Evidence of traditional or communal history of Land section 66 Evidence Act 2011.
- (g) Res gestae – section 4 Evidence Act 2011
- (h) Opinion of experts expressed in treatise section 126 Evidence Act 2011.
- (i) Statements made by persons who cannot be called as witnesses S. 39 Evidence Act 2011.

(iii) Circumstantial Evidence:

“This is the evidence of surrounding circumstances and facts from which an inference of the existence or otherwise of a fact in issue can be made”.⁵² “... circumstance evidence is very often the best. It is evidence of surrounding

⁵⁰ (2001) 4 S.C. (Pt. 11) at 6.

⁵¹ (1956) 1 W.L.R. 965

⁵² Nwadialo, F. (1981) *Modern Nigerian Law of Evidence*, (Ethiopia Publishing Corporation. Benin City, Nigeria). Quoted in Okekeifere, A. I, (2000) *Circumstantial Evidence in Nigerian Law*. Law House, Port Harcourt p.1.

circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics.”⁵³

“Circumstantial evidence is evidence, not of fact in issue but of other facts from which the fact in issue can be inferred”.⁵⁴

“Circumstantial evidence is evidence offered to the Court for the purpose of the Court inferring therefrom the existence of a fact in issue. It is generally in the form of oral evidence”.⁵⁵

It is submitted that circumstantial evidence is an indirect evidence of a fact not actually in issue but through which the truth of the fact in issue can be inferred. For instance, where Mr. X on a palm tree saw Obi raping Ada without her consent, and Ada was shouting. Later, Ada’s parent took her to the hospital and also instituted an action immediately. During the trial, the Prosecutor can tender the clothe torn, pants stained with blood. The medical doctor can tender the result of his medical examination, lab results and diagnoses. Mr. X on the palm tree can give evidence of what he heard, saw when Obi raped Ada. Through all these means of proof, the truth of the fact that Obi actually raped Ada can be inferred by the Court, which means that all the modes of proof are under circumstantial evidence.

(iv) Documentary Evidence:

Documentary evidence is any statement made in a document which is offered to the Court in proof of facts in issue.⁵⁶ Oral and documentary evidence are the cornerstones of every judicial proceeding.⁵⁷

⁵³ Lord Heward, Lord Chief Justice of England in *P.L. Taylor & Ors. vs R 21 CAR 20. 21*; cited by Uwais J.S.C. in *Valentine Adie vs State* (1982) 1 N.C.R. 375. Quoted in Okekeifere, A.I.: (2000) *Circumstantial Evidence in Nigeria*, (Law House, Port Harcourt, Nigeria).

⁵⁴ Nwadialo, F.: *op. cit.* p.3

⁵⁵ Aguda, T.A.: (1974) *The Law of Evidence in Nigeria*. (Sweet & Maxwell Ltd, London), p.14

(v) Real Evidence:

Section 127(1)⁵⁸ provide; if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it deems fit –

- (a) Require the production of such material thing for its inspection, or
 - (b) Inspect any movable or immovable property the inspection of which may be material to the proper determination of the question in dispute.
- (2) When an inspection of property under this section is required to be held at a place outside the Courtroom, the Court shall either –
- (a) Be adjourned to the place where the subject-matter of the said inspection may be and the proceeding shall continue at that place until the Court further adjourns back to its original place of sitting, or to some other place of sitting; or
 - (b) Attend and make an inspection of the subject-matter only, evidence, if any of what transpired there being given in Court afterwards, and in either case the defendant: if any, shall be present.

Real Evidence is also known as “objective” or demonstrative evidence is derived by the Court from inspection of physical objects (Entities) other than documents, which could be a place, person, animal or thing. Examples:

- (a) In an action relating to injuries caused by a “fierce and mischievous dog”, the animal is produced for examination in Court⁵⁹.
- (b) Evidence of parentage may be derived from bringing of a child to the Court so that resemblance to its alleged father or mother may be observed. The term “real evidence” covers not only material objects and the general appearance of persons but also the demeanour of a witness and a view of scene of crime that is visit to Locus in quo.

⁵⁶ Olakanmi, J. et al.: (2011) *Evidence Act 2011, Synoptic Guide*, (Panaf Press Abuja, Nigeria). (First Ed.) p. 147

⁵⁷ Agom, A.R.: (2006) *Admissibility of Public Document a commentary on Daggash vs Bulama* (2004). Ahmadu Bello University Journal of Private and Comparative Law Vol. 1 No. 1 p. 239

⁵⁸ Evidence Act, 2011 *op. cit.*

⁵⁹ See *Line v Taylor* (1862) 3, F and F 731

The purpose of the visit is to clear conflicting evidence especially relating to physical facts⁶⁰.

Evidence or judicial evidence has no uniform pattern of categorization or classification. Therefore, it may be classified into various types on different bases. This may be understood from the observation made by Peter Murphy⁶¹, to the effect that, no subject has suffered more from a hopeless diversity and inconsistency of terminology than evidence. It is impossible to reconcile the various usages, judicial and extra-judicial which have been made of the terms employed to identify and separate kinds of evidence. It has no scientific categorization as it was not developed in a scientific way.

Evidence is the most pragmatic of subjects having been developed not by any desire to create a scientific or consistent code, but by the necessities and realities of practice. It underlines the whole practice of Law in every field of litigation. Thus, it does not lend itself easily to academic classifications. Consequently, there are varieties of evidence differently categorized by scholars and jurists who excelled in the area. For example, Sarkar in one of his categorization of evidence classified it according to its usage in the Evidence Act of India 1872 and based on English common Law. Thus, he identified division of Evidence into direct and indirect, original and unoriginal or hearsay as typical divisions under the common Law of Evidence. However, the Indian Evidence Act 1872 did not classify evidence as done under the common Law. Hence it reduced the classification according to means of proof which are primarily three namely, oral evidence, documentary evidence and material or real evidence. The above style of classifying evidence by Sarkar was also followed by Aguda though with some modifications. Aguda emphasized that the main division of judicial evidence under the

⁶⁰ See *Seismograph Service Nig. Ltd. v Ogbeni* (1976) 4 S.C 85.

⁶¹ Murphy, P.: (1985) *A Practical Approach to Evidence* (2nd Edition).(Financial Training Publications Limited. (F.L.B.S) London) pp. 5-7.

Nigerian Evidence Act 1945 (as amended) is into oral evidence, real evidence and documentary evidence. He added that other kinds of evidence include circumstantial evidence, hearsay evidence and the Best Evidence' Rule.

On another approach, Peter Murphy⁶², decided to classify evidence according to two main heads namely;

- (a) Evidence according to substance or content, for example, Direct versus Circumstantial evidence and
- (b) Evidence according to the form in which it is presented to the Court, for instance, oral evidence, documentary evidence and real evidence

Again, Collins Tapper⁶³, in contributing to the discussion on the categories of evidence, explained that, divisions of evidence may be understood from the purposes or objects of judicial evidence on the one hand and the means of achieving the objects or purposes of judicial evidence on the other. Hence, evidence may be categorized according to its purpose i.e. proof of facts by the facts in issue or relevant facts. They include direct evidence for facts in issue and circumstantial evidence for relevant facts. Next are kinds of evidence according to means of proof of such facts in issue and relevant facts. They include testimony, hearsay, documents and things or real evidence.

It is evident from the above expositions that scholars have not found it easy in making uniform classes of evidence. This was further explained to be due to the fact that Law of Evidence suffers from vitiated and incoherent vocabulary of key terms. Terms in evidence are used in different senses and so there are places of overlap in that more than one term can be used to explain one concept. Therefore one may not be surprised if no

⁶² *Ibid.* pp. 5-7

⁶³ Cross, R. & Tapper, C.: (1990), *Cross on Evidence* (7th Edition) (Butterworth and Co Publishers Ltd. London). pp. 37-44

water-tight classification of evidence is found among scholars as they are all trying to divide one and the same entity, i.e. evidence for the understanding of people and Practitioners as well as Judges. In whatever is an item of evidence if classified, for example, an item of documentary evidence, it may still be testimonial, hearsay or circumstantial. Again oral evidence may be direct original and even in some cases real evidence.⁶⁴

According to the general trends of scholars in the area, however, it can be observed that evidence may be classified or categorized according to the three broad considerations, namely;

- (a) Evidence according to its substance or contents⁶⁵ (or purposes and objects) Thus evidence in this category may consist of: direct versus circumstantial evidence; direct versus hearsay evidence; primary versus secondary evidence (the Best evidence rule) and presumptive or prima-facie versus conclusive evidence.
- (b) Evidence according to its forms or means of proof (or under the Act). This means that evidence which falls into any of the above categories in its substance or content can be put into a form in which it can be presented to the Court. This categorization is according to which evidence may be presented or received by a Court as a means of proof of the facts in issue or relevant facts. This classification, according to Aguda T. Akinola, is the one recognized under the Nigeria Evidence Act. In fact, most if not all available literature on the topic

⁶⁴ Eliot, D.W.: (1980) *Phipson and Elliot Manual of Law of Evidence*. (1st Edition) (Sweet and Maxwell, London). p.317-337. Quoted in Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria. pp. 91-92

⁶⁵ Murphy, P.: (1985) *op. cit.* p. 5. Quoted in Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria. p.92

recognized and adopted this classification of evidence. Thus, evidence in its forms or means of proof may include:

- i. Oral (testimony) evidence
- ii. Documentary (the Best evidence rule) evidence
- iii. Real (material) evidence
- iv. Electronically generated or stored evidence.

This simply means that evidence in this category is the most popular among writers and indeed, it is the approach accepted under the Nigerian Evidence Act. Evidence according to its forms or means of proof explains how the substantive evidence can be presented or received by a Court of Law. Evidence under this categorization as recognized under the Evidence Act is mainly three namely: - oral evidence, documentary evidence and real evidence. However, some writers consider other means of proof under this categorization such as Admissible hearsay, facts which a Court will accept in evidence of the facts in issue and electronically generated or stored evidence. Documentary evidence and electronically generated evidence are also within these types of evidence.

- (c) Evidence according to other considerations: The categorization of evidence under this division is not based on any of the above three cited situations. It is not done based on the provision of the Evidence Act. It is done randomly and particularly based on what is obtained in the English common Law of Evidence.

The different types of evidence here include: insufficient, original, judicial, extra judicial, corroboration, indispensable, satisfactory evidence.⁶⁶

⁶⁶ Babaji. B. *op. cit.* p. 90-93.

Classification of Documentary Evidence

- Public and Private document

Public documents by section 102⁶⁷ is defined as

- (a) Documents forming the official acts or records of the official acts of
 - (i) the Sovereign authority,
 - (ii) official bodies and tribunals or
 - (iii) public officers, legislative, judicial and executive, whether of Nigeria or elsewhere and
- (b) public records kept in Nigeria of private documents.

It is submitted that, the above provision was not able to state specifically the kinds of public documents. For-instance, public documents in respect of the sovereign authority may include letters from the President, Governors, proceedings and judgment of tribunals, minutes of meetings of Public officer, Bills for an Act passed in the National assembly or a Bill for a Law passed in the House of Assembly, Court's originating processes and so on. It also lacks the explanation to what amount to public records kept in Nigeria of private documents such as Educational Certificates from Government Schools, Birth Certificates. Title documents like certificate of occupancy which is registered under the Land Registration Act for the purpose of investigating the title of the owner, Memorandum and Articles of Association of a Company filed with the Corporate Affairs Commission, Marriage Certificates and so on. With the explanation of the above instances it means that public documents are those Government document found in the any of the government Agencies or parastatals.

⁶⁷ Evidence Act, 2011. *op. cit.*

Private Document by section 103⁶⁸ provides all documents other than public documents are private documents.

It is submitted that, the classification of document into public and private document is rightly made due to differences in the mode of admissibility. For instance, before the secondary evidence of a public document is admissible, a certified true copy of that public document must be produced and such certified true copy is admissible in evidence provided proper foundation is laid, to prove that it is a public document. For instance, Section 90(1)(c), Section 104 and Section 106⁶⁹ are used for proving the contents of a public document but the contents of private documents are proved by primary (original) and secondary (photocopy) evidence when proper foundation has been laid for it to be admissible in evidence.

2.5 Types of Primary and Secondary Documentary Evidence

2.5.1 Types of Primary Evidence

Section 86⁷⁰ provides:

- (1) Primary evidence means the document itself produced for the inspection of the Court
- (2) Where a document has been executed in several parts, each part shall be primary evidence of the document
- (3) Where a document has been executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart shall be primary evidence as against the parties executing it.
- (4) Where a number of documents have all been made by one uniform process, as in the case of printing lithography, photograph, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest, but where they are all copies of a common original, they shall not be primary evidence of the contents of the original.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

2.5.2 Document Itself as Primary Evidence

Section 86⁷¹ states that primary evidence means the document itself produced for inspection of the Court. Section 88⁷² of the Evidence Act 2011 provides that all documents must be proved by primary evidence except in the circumstances mentioned in this Act. Such exceptions are provided under Section 89⁷³ of the Evidence Act which states the cases in which secondary evidence relating to document is admissible and the nature of secondary evidence admissible under the section are set out in Section 90⁷⁴ as follows:

Section 89⁷⁵ provided that secondary evidence may be given of the existence, condition or content of a document when-

- a) “The original is shown or appears to be in the possession or power
 - (i) of the person against whom the document is sought to be proved;
 - (ii) of any person legally bound to produce it; and when after the notice mentioned in section 91 such person does not produce it”.

Section 89(b)⁷⁶ provides;

- The existence condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
- (c) The original has been destroyed or lost and in the latter case all possible search has been made for it;
 - (d) The original is of such a nature as not to be easily movable;
 - (e) The original is a public document within the meaning of section 102.⁷⁷

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

- (f) The original is a document of which a certified copy is permitted by this Act or by any other Law in force in Nigeria, to be given in evidence;
- (g) The originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection; or
- (h) The document is an entry in a banker's book.

S. 90(2)⁷⁸ provide;

when a seaman sues for his wages he may give secondary evidence of the ships articles and of any agreement supporting his case, without notice to produce the original.

89 (a) foundation to be laid is that the other party must prove that the original is in the hand of the person obliged to produce it and notice has been given to that person and he failed to produce it.

The mode or type of secondary evidence admissible is any secondary evidence of the contents of the document is admissible by virtue of section 90 (1) (a)⁷⁹

In respect of section 89 (b) foundation to be laid is that the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. The mode or type of secondary evidence admissible is the written admission section 90 (1) (b)⁸⁰

In respect to section 89 (c) foundation to be laid is that either the original is lost in which all possible search has been made or that the original is destroyed.

of section 89 (d), the proper foundation to be laid is that the document is not easily moveable for instance on inscription on a wall or stone, any secondary evidence is admissible by virtue section 90 (1) (a)⁸¹ .

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

In respect of section 89 (e), the proper foundation to be laid is that the original is a public document within the meaning of section 102 (a) of the Evidence Act 2011 and the type of secondary evidence admissible is a certified copy of the document but no other secondary evidence is admissible by virtue of section 90 (1) (c)⁸²

In respect of section 89 (f), the proper foundation to be laid is that the original is a document of which a certified copy is permissible by Law and the type of secondary evidence admitted is a certified copy of the document, but no other secondary evidence is admissible by virtue of section 90 (1) (c)⁸³

Section 89(g), the proper foundation to be laid is that the original is a document which consists of numerous accounts or other documents which cannot be conveniently examined in Court and the fact to be proved is the general result of the whole collection. The type of secondary evidence that is admissible is that evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such document by virtue of section 90(1) (d).⁸⁴

In respect of section 89 (h) the proper foundation to be laid or proved is that,

- (i) The book in which the entries copied were made was at the time of making one of the ordinary books of the bank,
- (ii) The entry was made in the usual and ordinary course of business,
- (iii) The book is in the control and custody of the bank, which proof may be given orally or by affidavit by an officer of the bank, and
- (iv) The copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

entry and may be given orally or by affidavit. By virtue of section 90 (1) (e)⁸⁵

The obvious one is the original document itself. If objection is taken to the admissibility of a document on the ground that it is not an original, the onus is on him who is seeking to put the document in evidence to show on the balance of probabilities that is an original.⁸⁶

The rule which obliges a plaintiff to produce the original document which contains an alleged libel is subject to the following exceptions⁸⁷:

- (i) Where secondary evidence is by Law admissible
- (ii) Where the document is shown to be in the possession of the defendant or his Legal Practitioner, and the plaintiff has served a subpoena duces tecum on either or both of them.
- (iii) Where the alleged libel is contained in a document or an immovable structure which would be physically impossible or highly inconvenient to produce in Court.⁸⁸

If under (ii) the plaintiff has not served notice as required, then a copy of such a document is not admissible.⁸⁹ Under the Common Law of England, the best evidence rule postulates that facts are best proved when presented or produced before the Court not in their substituted form but in their Law, natural and unaltered form.⁹⁰

⁸⁵ *Ibid.*

⁸⁶ Aguda, T.A.: (1998). *Law. and Practice Relating To Evidence in Nigeria*. (MIJ Professional Publishers Ltd. Lagos, Nigeria). (2nd Ed.) p.248. 249

⁸⁷ *Ibid.* See *R v Robson* (1971)56 Cr.App.R.450,(1972)2 All ER.699

⁸⁸ Aguda, T.A *op. cit.* 249

⁸⁹ *Emmanuel Ogunbadejo vs Owoyemi* (1993) 1 N.W.L.R 517,SC

⁹⁰ Ashi, VSB. (2008). *Documentary Evidence, Selected Issues, Conflicts and Responses*. (Chenglo Limited, Enugu, Nigeria) (2nd Ed.) p.16

2.5.3 Document Executed in Several Parts

An example of the above provision may be given of a document such as statements of election results each of which has been jointly signed by the Electoral official and the Agents of the political parties. Each of such statements that are retained by any of those persons is primary evidence of the content of the rest as documents executed in several parts.

The case of *Nwobodo v Onoh and Ors*⁹¹ can serve as a further illustration of the point. It was held that the result of polls signed in multiple copies and issued to candidates or their Agents was admissible as primary evidence of the contents of that which is retained by the Electoral Commission. To this end it is appropriate to reason that whenever an application is completed in duplicate, triplicate or quadruplicate, each of the copies is primary evidence of the rest as an example of documents executed in several parts but a photocopy of any of them is secondary evidence of all.⁹²

2.5.4 Document Executed in Counterpart

If many copies of an agreement are made by the process of typing with carbon papers, each copy, including the carbon copies, is primary evidence of the provisions of the agreement provided they are all signed or executed by all parties to the agreement⁹³. But unsigned carbon copy of a letter is not the primary evidence of the contents made by a duplicating machine⁹⁴. Similarly, where a letter is typed from a draft each copy of the letter is a primary evidence of the contents of the other copies, including the top copy, but not of the draft.⁹⁵ Where a number of documents have all been made by one

⁹¹ (1984) 1 SC.1

⁹² Ashi, VSB. *op. cit.* p.17

⁹³ Aguda, T.A. *op. cit.* p.249 See *Forbes v Samuel* (1913) 3 K.B. 706.

⁹⁴ *Ibid.* p. 249 See *Nodin v Murray* (1812) 3 Camp.228; 170 E.R. 1363.

⁹⁵ Aguda, T.A. *op. cit.* p.249

single act by the use of carbon paper each of such documents is primary evidence of the other.

In *Esso West Africa INC. vs Oladiti*⁹⁶. During the hearing of an action for the sum of money said to be the balance of the price of goods sold and delivered to the defendant by the plaintiff's counsel, the defendant sought to tender a documents which was one of the copies of a document signed in quadruplicate by one of the plaintiffs agents acknowledging that the defendant was entitled to credit a sum of money in his account with the plaintiffs. The document a carbon copy was however, signed through one single process with the original. Counsel for the plaintiffs objected inter alia on the grounds that it was a copy and there being no evidence that notice to produce has been served, the document would be inadmissible.

The written message handed over to the counter clerk in a post office for dispatch by telegraph or cable is the primary evidence of the message sent by the sender⁹⁷. But if the question is as to the message received by the addresses, then the actual written message handed over to him will be the primary evidence of the message.⁹⁸

In earlier times, when modern system of filing, storage and retrieval of information was unknown; especially in the days of the parchment, legal instruments were executed by parties alternatively. In other words, in the case of a tenancy, for example, provision was made for the Landlord to execute only one part, together with his witnesses, while the Tenant executed the counterpart, duly witnessed as provided. This is orthodox sense of having a document executed in counterparts. It was for security reasons in the sense that one needed the two documents together in order to make a complete whole. If a

⁹⁶ (1968) N.M.L.R. 453

⁹⁷ Aguda, T.A. *op. cit.* p.250 See *R v Regan* (1887) 16 Cox C.C. 203

⁹⁸ Aguda, T.A. *op. cit.* p.250

person stole or otherwise illegitimately got hold of the counterpart, he could not utilize it for any purpose unless the primary lease was also produced to be read together. In terms of Section 86(3)⁹⁹ the lease and each of the counterparts constitute primary evidence against the Landlord and Tenant, but a counterpart constituted secondary evidence against a third party who did not execute it.

Today, for practical purposes, the application of this Section 83(3)¹⁰⁰ is not quite different from Section 86 (2)¹⁰¹ but there is a measure of confusion, which often seems to introduce a strange categorization. For example, where four copies of a tenancy agreement are executed between the Landlord and the Tenant, each of the copies is primary evidence of the rest. In relation to the terms of the tenancy agreement, in the light of Section 86(2)¹⁰², it does not matter that the other three copies were photocopies of the first copy produced from the printer. What is important here is an affirmative answer to the question: did the parties sign each of the documents with their signatures in fresh ink? Of course, the situation would be different where the photocopies are made from one that is already signed. It is regrettable that even solicitors are sometimes confused and they end up confusing other people when they arbitrarily stamp the first document produced from the printing machine as ‘original’ and stamp others made from the photocopying machine as ‘copies’ and still present each of them to the parties to append their signatures on both simultaneously.

It is submitted that this is certainly erroneous and misleading. All of them are primary copies of each other, unless the photocopies were made after the parties had signed, in which case one would be right to consider the photocopies as ‘copies’ properly so

⁹⁹ Evidence Act 2011 *op. cit.*

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

called. In terms of the foregoing, it seems appropriate to conclude that the idea of counterpart in its orthodox context as understood even as late as 1945 when the Evidence Act came into force has naturally collapsed into a single dimension as documents produced in several copies, in terms of Section 86(2) above.¹⁰³

2.5.5 Documents Made by One Uniform Process

Section 86(4)¹⁰⁴ provides, where a number of documents have all been made by one uniform process as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each shall be primary evidence of the contents of the rest. But where they are all copies of a common original, they shall not be primary evidence of the content of the original.

Several documents produced at the same time, by inserting a carbon copy in between have been held to fall under the category of documents produced from the same uniform process.¹⁰⁵

Under the sub-section therefore, where a number of documents have all been made by one single act by the use of carbon papers each of such documents is primary evidence of the other but not of the draft.¹⁰⁶

It has been suggested that the list of what may be considered as documents made from the same uniform process is not exhaustive as those (printing, lithography or photography) specified in the sub-section are only examples of the kind of uniform process contemplated by the sub-section.¹⁰⁷

¹⁰³ Ashi, VSB. *op. cit.* pp.17-19.

¹⁰⁴ Evidence Act 2011

¹⁰⁵ Ashi, VSB. *Ibid.* p.21

¹⁰⁶ Nwadialo, F. *op. cit.* p.131

¹⁰⁷ Ashi, VSB. *op. cit.* p.21

It is submitted that, an example of document made by one uniform process is the issue of compact disc (CD) which is often given to The Nigerian Law School Students as Electronic Hand Book for use to produce hard copy of the handbook using a printer. Each of such document is original which is primary evidence of the contents of the rest. But where Mr. X carries his own document (i.e. the produced electronic handbook in hardcopy) and make several copies from the common original, each shall not be primary evidence of the contents of the original but secondary.

2.5.6 Types of Secondary Evidence

Section 87¹⁰⁸ provides, secondary evidence includes;

- (a) Certified copies given under the provisions hereafter contained in this Act;
- (b) Copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy and copies compared with such copies
- (c) Copies made from or compared with the original.
- (d) Counterparts of documents as against the parties who did not execute them, and
- (e) Oral accounts of the contents of a document given by some person who has himself seen it.

It is submitted that, the first category of type of secondary evidence which is certified copies refers to public documents as provided by Section 102.¹⁰⁹ Those in the second category include, but are by no means limited to pictures printed from the negative (film). Here, the negative is the original while the picture is the copy or secondary evidence.

However, the images that appear in the negative are usually blurred so that even on very close inspection a Court may not be able to indentify whose photography appears in the negative. Thus, for practical purposes, it is usually prudent to tender the negative along

¹⁰⁸ Evidence Act, 2011 *op. cit.*

¹⁰⁹ *Ibid.*

with the film so as to enable the Court interpret the negative. Also, in the second category are copies of a common original, such as printed matter made from a plate in a printing press, the printed matter is secondary evidence of the contents of the plate, although they constitute primary evidence of each other. Thus each copy of a book titled 'Nwadialo on Evidence' is primary evidence of other copies, but each such copy is secondary evidence of the contents of the plate in the printing press from where they were printed.

Document in the third category would include photocopies or scanned copies of the original as well as hand written re-statements of the content of the original¹¹⁰

In the fourth category, counterparts of originals as against those who did not make them, include registered deeds of conveyance, memorandum and articles of association, copies of tenancy agreement required by third parties other than the landlord and tenant¹¹¹. Oral accounts of lost or destroyed documents constitute an acceptable form of evidence¹¹²

It is submitted that, the oral accounts of the contents of a document given by someone who has himself seen it, can be referred to an instance where the maker of the document was subpoenaed to come and give oral evidence in respect to the document he made but was asked by his employer not to produce it. For instance, where the receptionist who gave the hotel room to Mr. X and Mrs. Y to sleep after writing their names, amount paid and number of days, can be called to give the oral account which is secondary evidence of the content of the document.

¹¹⁰ Ashi, VSB. *op. cit.* pp.22-23

¹¹¹ *Ibid.* p.23

¹¹² *Ibid.* p.23

2.6 Admissibility and Weight of Evidence

2.6.1 Admissibility:

As a general rule, it is only facts which are relevant to the fact in issue or some other fact relevant to the fact in issue that can serve as the foundation for the admissibility of a piece of evidence. In other words, evidence will be admitted only in proof of facts in issue, facts relevant to the issue and facts relevant to some other facts which are relevant to the facts in issue by virtue of section 1¹¹³. The basic principle is that facts which are irrelevant are inadmissible¹¹⁴. But the reverse is not to be taken as generally true. Not every relevant fact is admissible this is clear from the provision of section 1 of the Act.¹¹⁵

Relevance and admissibility are closely related terms but with certain distinction. While relevance is based on ordinary logic, admissibility depends on Law. The Supreme Court stated in *Agunbiade v Sasegbon*¹¹⁶ Per Coker JSC that “admissible evidence under the Act is evidence which is relevant and it should be borne in mind that what is not relevant is not admissible”

Admissibility in the Law of Evidence refers to evidence which is legally relevant, whether it is logically probable. In general, admissible evidence is that which is relevant and which is not excluded by rules of Law or practice¹¹⁷. Admissibility is a rule of evidence and it is based on relevancy.¹¹⁸ The way you present your evidence will affect the weight given to it. You need to get both the evidence and the presentation right to be

¹¹³ Evidence Act 2011 *op. cit.*

¹¹⁴ Aguda, T.A.: (1974). *The Law of Evidence in Nigeria*. (Sweet and Maxwell, London). (2nd Edition) pp. 23-24 See *Salawu Agunbiade v A.O. Sasegbon* (1968) N.M.L.R 223 at p. 226

¹¹⁵ *Ibid.* p. 226

¹¹⁶ *supra*

¹¹⁷ Olakanmi, J. and et al.

¹¹⁸ *Ibid.* p. 98

as effective as possible.¹¹⁹ The general rule is that the Court may attach whatever weight it chooses to any of the items of evidence it hears and does not have to look for corroboration.

In conclusion, this chapter has shown that the basis for the admissibility of documentary evidence under the Nigerian Law, is anchored on the test of relevance of such documents. It has also explained the nature, scope and meaning of the above stated terms in the Nigerian Law of Evidence. The terms are 'evidence', 'documentary evidence', 'classification of documentary evidence', 'admissibility' and 'weight of document'

¹¹⁹ Onigbo, W.I.B.: (2007). *Expert Evidence*. (Medical Foundation Publishers (M.F.P), Enugu, Nigeria). p.27

CHAPTER THREE

PROOF OF DOCUMENTARY EVIDENCE

3.1 Introduction

The main objective of this studyresearch is to examine the basis for proof of documentary evidence. Therefore this chapter is structured as follows: Proof of content of documentary evidence, foundation to be laid, admissibility and proper custody of the documents, proof of execution of documents and evidence of handwriting.

Documentary evidence has been accorded great value and importance as a means of proof under the Nigerian Law, it represents one of the best and most reliable legally admissible proofs in judicial proceedings¹.

The admissibility of documentary evidence is primarily dependent upon same being found to be relevant. Thus, relevancy is the first test of admissibility of documentary evidence. Thereafter, a party who wishes to rely on a document as a means of proof particularly in civil proceedings where pleadings are formally exchanged, must also satisfy the other conditions of admissibility of documents as might be required under various rules of Courts regarding pleadings. Further, even where a party has succeeded in satisfying the requirement of relevancy and pleading of documents, he must proceed for the Court to rely on his documents to prove to the Court the contents and due execution of such a document.²

Sometimes, a party to the proceedings in Court may find it necessary to rely on the contents of a document to the notice of the Court. In some cases, it is sufficient if the

¹ Babaji, B.: (2008). *An Analysis of The Legal Basis and Foundations for the Admissibility of Documentary Evidence Under Nigerian Law*. Ph.D. Seminar Paper (Unpublished) Faculty of Law A.B.U. Zaria, Nigeria. p. 8

² *Ibid.* p. 15

document or certified copy of it is tendered before the Court but in some cases, it may be necessary to prove that the document has been properly executed.³

The entire Law of Evidence, is dependent in the main, on the rules governing admissibility and inadmissibility of evidence and whether a piece of evidence is admissible or not is dependent upon whether the fact to be established by the evidence is relevant to the fact in issue, relevancy being judged by the provisions of the Act and not by any rules of logic. Although it is obvious that the rules of relevancy under the Act are generally speaking, based upon logical relevancy⁴.

Where a document is tendered in evidence, the party tendering it must also prove that it was duly executed. This means in essence that the person who appears on the face of the document to be its author was really the author, or in the case of public document that it is genuine and authentic. Except where due execution of a document is admitted or where it may be and is presumed, it is something that must always be proved before the Court can treat the document as valid.⁵

3.2 Proof of Contents of Documents

We shall look into how private and public documents are to be proved. The Proof depends on the kind of document whether public or private. Section 85⁶ provides that the contents of documents may be proved either by primary or by secondary evidence.

Section 86 (1)⁷ provides primary evidence means the document itself produced for the inspection of the Courts. Section 88⁸ provides that documents shall be proved by primary evidence except in the cases mentioned in this Act.

³ Aguda, T.A.: (1989). *The Law of Evidence*, (Spectrum Law Publishing Lagos, Nigeria). (3rd Ed.) p. 151

⁴ *Ibid.* p. 23

⁵ Nwadialo, F.: (1981). *Modern Nigerian Law of Evidence*, (Ethiopia Publishing Corporation Ring Road, Benin City, Nigeria). p. 139

⁶ *Evidence Act, Laws of the Federation of Nigeria 2011*

Section 103⁹ provides all documents other than public documents are private documents. With respect to private document its content as a general rule must be proved by the production of the original document itself that is by primary evidence subject to exceptions expressly provided in the Evidence Act.

3.3 Proof of Contents of Public Documents

The contents of public documents even where the original are known to be in existence are generally in practice proved by secondary evidence usually, primary evidence are not adduced in proof of the contents of public documents and this is done not because the evidence Act has made inadmissible proof of contents of public documents by primary Evidence. It is only not resorted to because it entails so many inconveniences, risks and may negatively affect public policy.¹⁰ The best evidence of proof of public evidence is by producing the public document or by tendering a certified copy of the document as held in the case of *Dana Impex Ltd. vs Malcom Awukam*¹¹.

The 1st appellant, a buyer of cocoa for export, retained 2nd appellant as its manager in Ikom. The 1st respondent borrowed the sum of N345,000 (Three hundred and forty five thousand naira) from the 1st appellant for the purchase of cocoa which was misappropriated. Based on a report by the 1st appellant to the Commission of Police, the 1st respondent was arrested but released on bail on the same day. Thereafter instituted an action in the trial Court claiming a sum of N20,000,000 (Twenty million naira) for instigating his arrest and detention, a declaration that the detention was illegal and a release of his Cocoa measuring scale from the custody of the 2nd respondent. The matter was settled out of Court and the terms of settlement was filed in court as consent judgment with the agreement of both parties. Instead of the respondent paying the installmental sum on the consent judgment, he applied by

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ Babaji, B. (2009). *Admissibility of Documentary and Electronic Evidence under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University, Zaria, Nigeria. p. 305

¹¹ (2006) All F.W.L.R. (pt. 311) 1924 at 1928 – 1929.

way of motion to have the consent judgment set aside which prayer was granted. Aggrieved by the decision, the appellants appealed to the Court of Appeal. The Court held; (allowing the appeal). On Best evidence of proof of public document. The best evidence of proof of a public document is by producing the public document or by tendering a certified copy of the document.

On availability of incorporation documents as public document for inspection –

the Court held that Articles and Memorandum of association, Certificate of incorporation and the incorporation documents as contemplated under section 36 (6)¹² are lodged with the Corporate Affairs Commission. They are all public documents available for inspection. In the instant case, the 1st respondent is deemed to have notice of the 1st appellant's document of incorporation lodged with the Corporate Affairs Commission.

It is submitted that this decision expounded correctly the provision of section 89 of the Evidence Act 2011 which states instances when secondary evidence of a public document may be given. Section 89 (e)¹³ reads when the original is a public document within the meaning of section 102, section 89 (f)¹⁴ reads “when the original is a document of which a certified copy is permitted by this Act or by any other law in force in Nigeria, to be given in evidence”. However, the Supreme Court being the apex court in Nigeria, its decision in the case of *Daily Times Nigeria Plc. vs F.R.A. Williams*¹⁵ remains the guiding authority that only a certified true copy of a public document is admissible and not the original of a public document.

It is submitted that, the reasons why our Courts don't collect the original document in respect of public documents is because of the need to preserve the originals from wear and tear, loss and it may be demanded for in other fields of life.

¹² Companies and Allied Matters Act, Cap. 59 Law of Federation of Nigeria 1990.

¹³ Evidence Act 2011. op. cit.

¹⁴ *Ibid.*

¹⁵ *Supra*

Cases in which secondary evidence is admissible in respect of public documents is provided in Section 89 (e) and (f)¹⁶ which provides when the original is a public within the meaning of Section 102, the original is a document of which a certified copy is permitted by this Act or by any other Law in force in Nigeria, to be given in evidence;

The kind of secondary evidence admissible as provided in Section 90(1)(c)¹⁷ is a certified copy of the document, but no other secondary evidence, is admissible.

Section 102¹⁸ provides that, the following documents are public documents-

- a. Documents forming the official acts or record of the official acts of-
 - (i) The sovereign authority,
 - (ii) official bodies and tribunals, or
 - (iii) Public officers, legislative, judicial and executive, whether of Nigeria or elsewhere, and
- b. Public records kept in Nigeria of private documents.

In respect of section 89 (e), the proper foundation to be laid is that the original is a public document within the meaning of section 102 (a) of the Evidence Act 2011 and the type of secondary evidence admissible is a certified copy of the document but no other secondary evidence is admissible as provided by section 90(i)(c)¹⁹

In respect of section 89(f), the proper foundation to be laid is that the original is a document of which a certified copy permitted by Law and the type of secondary

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

evidence admitted is a certified copy of the document, but no other secondary evidence is admissible as provided by section 90(i)(c)²⁰

In *Daggash vs Bulama*²¹ the appellant and respondent were contestants in the 2003 National Assembly election for the Borno North Senatorial district. At the conclusion of the election, the appellant was returned as validly elected with majority of votes cast. The respondent felt aggrieved by the result of the election and filed a petition at the National Assembly / Governorship and Legislative Houses Election Tribunal Sitting at Maiduguri. The appellant, as the first respondent, filed a notice of preliminary objection pursuant to section 66 of the Constitution of the Federal Republic of Nigeria 1999 on the ground that the petitioner suffered a legal disability having been indicted for fraud and embezzlement by a panel of inquiry set up by the Borno State Government and the said indictments have been accepted by the Government of Borno State. Attached to the notice of preliminary objection as “Ex. A” was the document titled “Government White paper on the Report of the Panel of inquiry on Revenue Generation and utilization by the Maiduguri Metropolitan council from April December 1994”. After the conclusion of arguments on the preliminary objection by a majority of four to one, the objection was overruled. At the hearing, the appellant sought to tender in evidence the original copy of the report of the panel of inquiry and the Government White paper on the said report. Upon objection, the tribunal rejected the document on the ground that it was the original of a public document and that “only certified true copy of public documents are admissible in evidence and not the original”. The tribunal relied on the cases of *Lawson vs Afani Continental Co. Nig. Ltd.*²², *Philip Anatogu vs Igwu Iweka II*²³.

²⁰ *Ibid.*

²¹ *supra*

²² (2002) pt 109 F.W.L.R p. 1730 (2002) 2 N.W.L.R pt 752, 585

²³ (1995) N.W.L.R pt. 415, 547

On appeal, the Court of Appeal unanimously allowed the appeal. Delivering the lead judgment, Obadina J.C.A inter-alia held:

...The Tribunal relied on the case of *Lawson vs Afani Continental Co. Nig. Ltd. (2002) F.W.L.R pt 109 1730, 1736*. With the greatest respect possible to my Lord, Salami J.C.A I do not agree with the view expressed by his lordship that only certified copies of public documents are admissible. My Lord, Salami J. C. A. seems to have relied on the case of *Obadina Family and Ors. (1969) N.W.L.R. 25, 30*. A critical examination of that case shows that what his lordship was considering was the admissibility of various types of secondary evidence and in particular a certified copy and a photocopy... the net effect of sections 91(1) (a), 93, 94 (1) 95, 97 (1) (e) and 112 Evidence Act (now sections 83 (1) (a), 85, 86, 87, 89 (1) (e) and 105 Evidence Act 2011 respectively) is that the contents of public documents may be proved by producing the originals themselves for the Court to inspect as primary evidence. By virtue of section 96 of the Evidence Act (now section 88 Evidence Act 2011) it is my view, that public documents are provable by their originals. It says:- “Document must be proved by primary evidence excepts in the cases herein after mentioned”.

Although section 112 (now 105 Evidence Act (2011) allows certified true copies thereof to be used as well, it does not make original inadmissible. Public documents, could be admitted in evidence either under section 91(1) (now section 83 (1)) or section 112 (now 105) of the Evidence Act. If a party intends to tender under section 91 (1) now section 83 (1)) he must comply with the procedure under section 91 (1) (now section 83 (1)) by producing the original documents, provided the maker of the statement therein who had personal knowledge of the matter dealt with by the statement is called or by complying with the provisions of section 111 (now 104 Evidence Act 2011) by producing a certified true copy of the document and tender it under section

112 of the Evidence Act 2011.²⁴ The *ratio decidendi* in this case has thrown up controversial issues in our Law of Evidence²⁵.

It is submitted that, going by the provision of section 85²⁶ which provides that the content of a document can be proved by primary (original) or by secondary evidence which can only be admissible when proper foundations (procedures) have been followed: section 86²⁷ defined primary evidence as the document itself produced for inspection which is for the Court for identification purposes.

Section 87²⁸ also provided instances of secondary evidence admissible which includes certified copies. Section 88²⁹ crowned it all by providing the means of proof for admissibility purposes as follows, that documents shall be proved by primary evidence except in the cases mentioned in the Act which is by virtue of section 89³⁰ which provides cases or circumstances in which secondary evidence is to be admissible after proper foundations have being laid and it includes section 89(e) where the original is a public document within the meaning of section 102³¹ which means that the exceptional cases where proof by primary evidence does not include public document.

Therefore, in the above case, the tendering of the primary (original) copy of the report of the panel of enquiry which is within the meaning of section 102 and of the Government white paper on the said report which is also provided as public document under section 102 being the primary (original) can be provided for inspection of the

²⁴ *Anatogu vs Iweka II* (1995) 8 N.W.L.R (it. 415) 547

²⁵ Agom, A. R: (2006) *op. cit.* p. 240-243

²⁶ Evidence Act 2011

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*

Court as provided by section 86³² but for proving or establishing a fact and for its admissibility, the secondary evidence of this primary document that will be admissible after proper foundation has being laid, that it is a public document the nature or kind or types or method of secondary evidence admissible in evidence is the certified copy but no other secondary evidence as provided by section 90(1) (c)³³ this section 90 (1) (c) is clear without ambiguity and did not include primary or original. Therefore, the decision of the tribunal³⁴ is in accordance with the provision of the Act.

With greatest respect to his lordship, the unanimous decision on appeal at the Court of Appeal delivered by the lead judgment, Obadina J.C.A holding that public document are provable by their original contradicts the provision of Evidence Act and to that extent it is erroneous because public documents are among the exceptions listed by virtue of section 88³⁵.

Again based on the provisions of section 112 (now section 105 Evidence Act) provides that the bases for the admissibility of the certified copy, is that it must meet the conditions provided by section 104³⁶ for proof of the content of the public documents or part of the public document of which they purport to be copies for admissibility purposes and these conditions are as follows, that the document shall be given to the person on payment of the legal fees prescribed, the public officer shall write that it is a true copy of such document or part of it, shall be dated and subscribed by such officer with his name and his official title, and shall be sealed and such copies so certified shall be called certified copies.

³² *Ibid.*

³³ *Ibid.*

³⁴ *supra.*

³⁵ Evidence Act *op. cit.*

³⁶ *Ibid.*

An illustration of certified copies of public document is as follows:

Supposing Taiye's Call to the Bar certificate is lost and she wants to tender it in Court, what she will do, is to go back to the Nigerian Law School Abuja which is the head quarter for a demand of certified copy. The public officer in charge will only give Taiye a certified copy after payment of the prescribed fee in which the officer will sign it, date it, seal it, stating that it is a true copy of such document and it is called certified copy which is admissible not original.

Therefore the assertion that section 112 allows certified true copies and does not make original inadmissible is a wrong construction of section 112 because base on the above illustration, Taiye will not be given original again by the Nigerian Law School but the certified copy of the original after fulfilling the prescribed conditions as provided by section 104³⁷ which is admissible in evidence.

In the case of *Lawson vs Ajani Continental Nig. Ltd*³⁸, a locus classicus, Salami. J. C. A held.

An examination of the provision of section 96 and 97 of the evidence Act Cap. 112 Laws of the Federation of Nigeria 1990 (now section 88 and 89 evidence Act 2011) does not make the original of a public document admissible. Those sections along with section 111 of the Evidence Act (Now section 104) effectively excludes admissibility of primary evidence of a public document. Therefore, only certified copies and not the original of the documents which qualify as acts of public officers within the contemplation of section of section 109 of the Evidence Act (now section 102) are admissible. The tendering in evidence of the original of such public document is erroneous and should be expunged where admitted³⁹.

³⁷ *Ibid.*

³⁸ *Supra*

³⁹ Agom, A.R: (2006) *op. cit.* pp. 243-244.

It is submitted that, this view is in accordance with the provision of the Act and it is correct.

In *Lucas vs Williams*⁴⁰ where Lord Esther stated, “Primary evidence is evidence which the Law requires to be given first; Secondary evidence is evidence which may be given in the absence of that better evidence, when a proper explanation of its absence has been given”.

It is submitted that, section 88⁴¹ specified exceptions to the rule in which primary evidence is not necessary, which includes public document. Section 89 also provided those exceptions and cases in which secondary evidence can be admissible in evidence after the conditions or proper foundations must have been laid.

Again section 86⁴² provided primary evidence is produced for inspection and the word inspection means to cross check or examine but for admissibility purposes which must be marked as exhibit for the purpose of determining a case the secondary evidence admissible is a certified copy.

Therefore, primary evidence is not what the Law requires to be given first for its admissibility relating to public document but for an inspection by the Court. Again the condition for admissibility of secondary evidence is related to specified exceptions as provided by section 89 must be followed.

Secondary evidence is used in proof of the content of public documents⁴³ In *Bisichi Tin Company Ltd vs Commissioner of Police*⁴⁴ the Appellant Company was charged for unlawfully mining on State Land contrary to Section 3(2) of the Minerals Ordinance.

⁴⁰ (1892) 2QB 116

⁴¹ Evidence Act 2011 *op. cit.*

⁴² Evidence Act 2011 *op. cit.*

⁴³ Nwadialo, F. *op. cit.* p. 135.

⁴⁴ (1963) 2 ALL N.L.R. 11

The prosecution's case was that the company's employees had mined in the area comprised in a mining lease which had expired. The lease was not produced and no certified copy of it was tendered. Two prosecution testified that it had expired on the relevant date. It was held that the mining lease being a public document, its contents must be proved by certified copy and not oral evidence. The fact that the oral evidence was not objected to do not make it admissible. A deposition of a witness in previous proceeding being a public document may be proved by certified copy. A photocopy of a certified true copy of a public document is not admissible as secondary evidence of the public document.⁴⁵

In the case of *Great Ovedje Ogboru vs Dr. Emmanuel Ewetan Uduaghan*⁴⁶, on 14th April, 2007 the 3rd respondent conducted gubernatorial election in Delta State. The 1st appellant was the candidate of second appellant. The 2nd respondent was the sponsor of the 1st respondent. At the end of the election. The 3rd respondent returned the 1st respondent as the winner of the election. The appellants were dissatisfied and they filed a petition at the Governorship / Legislative House Election Tribunal, holden at Asaba, Delta State. Pleadings were settled and the petition went to trial. By their pleadings and evidence, it was the case of the appellants that gubernatorial election did not hold in Delta State. On the other hand, the 1st and 2nd respondents pleaded affirmatively that the gubernatorial election properly held in Delta State. However, they failed to backup this affirmative pleadings by concrete positive evidence.

During the trial, the Tribunal admitted in evidence photocopies of temporary voters cards, which by implication were public documents. The tribunal also raised suo motu

⁴⁵ Nwadialo, F. *op. cit.* p. 135

⁴⁶ (2011) 12 N.W.L.R (pt. 1232) 538 at 550.

an issue that the statement on oath of the Pw 65 and Pw 66 did not comply with the Oaths Act.

At the conclusion of the trial, the tribunal delivered its judgment on 19th October, 2009. In the said judgment, the Tribunal struck out the statement on oath of the Pw 65 and Pw 66 without affording the parties an opportunity of addressing it on the issue. It also held that the burden of proving that Delta State Gubernatorial Elections did not hold vested on the appellants and that the appellants failed to discharge the burden placed on them by the law in respect of proof of the non-conduct of the appellants.

Dissatisfied, the appellants appealed to the Court of Appeal. At the Court of Appeal, the 2nd and 2975th respondents and the 3rd – 2974th respondents filed a preliminary objection each against the reply briefs filed by the appellants. However, the preliminary objections did not comply with the provision of Order 10 Rule 1 of the Court of Appeal Rules.

The Court of Appeal unanimously allowing the appeal held; on when secondary evidence of a document is admissible that by virtue of the provision of section 97(1) (e) (f)⁴⁷ (now section 89 (e) (f)⁴⁸, secondary evidence may be given of the existence, condition or contents of a document in the following instances:

- (a) Where the original is a public document within the meaning of section 109 of the Act⁴⁹ (now section 102)⁵⁰.
- (b) When the original is a document of which a certified copy is permitted by the Act or by any other Law in force in Nigeria to be given in evidence.

⁴⁷ Evidence Act, Cap. 112 Law of the Federation of Nigeria 1990.

⁴⁸ Evidence Act 2011. *op. cit.*

⁴⁹ Evidence Act 1990. *op. cit.*

⁵⁰ Evidence Act, 2011, *op. cit.*

On type of secondary evidence of a public document admissible in evidence Court of Appeal stated;

By the provision of section 97 (2) (c) of the Act⁵¹ (now 90 (1) (c)⁵² the only secondary evidence admissible in respect of a public document is a certified copy of the document, but no other kind of secondary evidence. In the instance case, the appellants' Counsel was right in his contention that exhibits R2, R2A, R2B, R2C, R2D, R2E, R2F, R2G, R2H, R2I, R2J, R2K, R2L, R2M, R2N, R2P, R2Q and R2R, (photocopies of public documents) tendered by the first respondent's witness and admitted by the Tribunal were inadmissible in evidence⁵³.

It is submitted that by virtue of Sections 102, 89(e) and 90(1) (c)⁵⁴ the acceptance in evidence of photocopies of temporary voters card by the Tribunal with due respect is erroneous because it contradicts the Evidence Act 2011. Also, the decision of the Court of Appeal holding that the photocopies of public documents tendered by the first respondent's witness and by the Tribunal were inadmissible in evidence and it is in consonance with the provisions of the Evidence Act, 2011.

In *A.C.B Plc. vs David O. Nwaodika*⁵⁵ The respondent, as plaintiff, in the High Court sued the appellant as defendant claiming thus;

- (a) "A declaration that his purported dismissal from the defendant's service is unlawful, invalid, null and void.

⁵¹ Evidence Act, 1990, *op. cit.*

⁵² Evidence Act, 2011, *op. cit.*

⁵³ See *Kwara State Water Corp. vs A.I.C (Nig.) Ltd.* (2009) 47 W.R.N 90; *Onobruchere vs Esegie* (1986) 1 N.W.L.R. (pt. 19) 799; *Minister of Lands, Western Nig. vs Azikiwe* (1969). I ALL N.L.R. 49; *Araka vs Egbue* (2003) 17 N.W.L.R (pt. 848) I referred to (p. 578. Paras.AD).

⁵⁴ Evidence Act, 2011. *op. cit.*

⁵⁵ (1996) 4 N.W.L.R. (pt. 443) 470.

- (b) An order of the Honourable Court re-instating him to his duty post as at 2nd July 1986, with full right to his salaries, allowances and other privileges as adjusted”.

The respondent who was as employee of the appellant commenced the action because by a letter dated 22nd April 1988, the appellant dismissed him from its services on an allegation of fraudulent dealings with its customers’ accounts. In paragraph 9 of his statement of claim, the respondent pleaded the Collective Agreement Between the National Union of Banks, Insurance and Financial Institutions Employees and that the said Collective Agreement regulates condition of service of Bank staff including junior staff and is binding on the appellant and the respondent and gave the appellant notice to produce its original and in response to the above, the appellant in paragraph 13 of its statement of defence admitted the facts pleaded by the respondent relating to the Collective Agreement but maintained it does not cover issues relating to summary dismissal based on gross misconduct.

At the trial, the respondent sought to tender a photocopy of the Collective Agreement. Before it was tendered, he had given evidence to the effect that the said agreement governs the suspension of officers in the employment of the appellant. He stated further that both himself and the appellant were bound by the terms of the Collective Agreement. The appellant witness also testified to the effect that the appellant was bound by the terms of the document.

The learned trial Chief Judge granted the respondent’s claim in its entirety. Being dissatisfied with this judgment, the appellant appealed to the Court of Appeal which in

its determination of the appeal considered the provisions of section 96, and 97(1)(a)(b) and (d)⁵⁶ (now section 88 and 89(a)(b)(d))⁵⁷ which states as follows:

“Section 96 (now section 88) Documents must be proved by primary evidence except in the cases hereinafter mentioned”.

“Section 97 (1) (now section 89 (a) (b)(c)) secondary evidence may be given of the existence, condition or contents of a document in the following cases.

- (a) When the original is shown or appears to be in the possession or power.
 - (i) of the person against whom the document is sought to be proved, or,
 - (ii) of any person legally bound to produce it and when after the notice mentioned in section 98 of this Act⁵⁸ (now section 91)⁵⁹ such person does not produce it.
- (b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest.
- (c) When the original is of such a nature as not to be easily moveable”.

The court held (unanimously allowing the appeal in part).

- (i) On admissibility of photocopies of documents:
Photocopies per se of a document, without more, are not admissible. Proper and sufficient foundation must be laid in order to make photocopy of a document admissible. This is so because a photocopy is not a primary evidence but a secondary evidence and documents are only provable by primary evidence under section 96⁶⁰ (now section 88)⁶¹ unless secondary evidence of them can be subsumed under the exceptions set out under section 97(1)⁶² (now section 89)⁶³.

⁵⁶ Evidence Act, 1990. *op. cit.*

⁵⁷ Evidence Act 2011. *op. cit.*

⁵⁸ Evidence Act 1990 *op. cit.*

⁵⁹ Evidence Act 2011 *op. cit.*

⁶⁰ Evidence Act, 1990. *Op. cit.*

⁶¹ Evidence Act 2011. *Op. cit.*

⁶² Evidence Act 1990. *op. cit.*

⁶³ Evidence Act, 2011. *op. cit.*

On whether photocopy of public document is admissible: the Court held that:

photocopy of a public document is not per se admissible unless it is further established to be a certified true copy of the said public document. In the instant case, the learned trial Judge was in error in holding, inter alia, that “Exhibit E”, the photocopy of the Collective Agreement, was a public document and thus admissible on that ground.

It is submitted that this decision is in compliance with the Law of Evidence.

Section 106⁶⁴ provides for proof of other official documents. The following public documents may be proved as follows.

- (a) Acts of the National Assembly, Laws of the House of Assembly of a state or bye-Laws of a Local Government Council, proclamations treaties or other acts of state, orders, notifications, nominations, appointments and other official communications of the Government of the Federation, State or Local Government in Nigeria.
 - (i) which appear in the Federal Gazette or the Gazette of a State, by the production of such Gazette, and shall be prima facie proof of any fact of a public nature which they were intended to notify,
 - (ii) by a copy of the document certified by the officer who authorized or made such order or issued such official communication.
 - (iii) by the record of government departments concerned certified by the heads of those departments respectively or by the Minister, or in respect of matters to which the Executive authority of a State or Local Government extends by the Governor or the Chairman of the Local Government Council, or any person nominated by such Governor or Chairman, or
 - (iv) by any document purporting to be printed by order of Government;
- (b) The proceeding of the Senate or of the House of Representatives by the minutes of that body or by published Acts or abstracts, or by copies purporting to be printed by order of Government;
- (c) The proceeding of a State House Assembly, by the minutes of that body or by copies purporting to be printed by order of Government;
- (d) The proceeding of a Local Government Council, by the minutes of that body or by published bye-Laws, or by

⁶⁴ *Ibid.*

- copies purporting to be printed by order of the Local Government;
- (e) The Acts or Ordinances of any part of the Common Wealth, and the subsidiary legislation made under their authority by a copy purporting to be printed by the Government printer of any such Country;
 - (f) Proclamations, treaties or Acts of State of any other Country by journals published by their authority or commonly received in that Country as such, or by a copy certified under the seal of the Country or Sovereign;
 - (g) Books printed or published under the authority of the Government of a Foreign Country, and purporting to contain the Statutes, Code or other written Law of such Country, and also printed and published books of the reports of decisions of the Courts of such Country and book proved to be commonly admitted in such Court as evidence of the Law of such Country, shall be admissible as evidence of the Law of such foreign country.
 - (h) Any judgment, order or other judicial proceeding outside Nigeria, or any legal document, filed or deposited in any Court.
 - i. by a copy sealed with the seal of a foreign or other Court to which the original document belongs or, in the event of such Court having no seal, to be signed by the Judge or, if there be more than one Judge by anyone of the Judges of the said Court, and such Judge, must attach to his signature a statement in writing on the said copy that the Court of which he is Judge has no seal or
 - ii. by a copy which purports to be certified in any manner which is certified by any representative of Nigeria to be the manner commonly in use in that Country for the certification of copies of Judicial records; and
 - (i) public document of any other class elsewhere than in Nigeria, by the original, or by a copy certified by the legal keeper of such documents, with a certified under the seal of a Notary Public, or of a Consul or Diplomatic Agent that the copy is duly certified by the officer having the legal custody of the original and upon proof of the character of the document according to the Law of the Foreign Country.

As the content of a public document are almost proved by a certified copy, the due execution of the certified copy is presumed if ex facie, the copy confirms with certain laid down conditions. Some of such conditions are that the public officer who purports to have certified it, is the one duly authorized in Law to do so and that the copy is

substantially in the legally prescribed form. Once these basic requirements are fulfilled, there is a presumption of genuineness of the certified copy as of the fact that the officer by whom it is purported to have been certified did actually certify it.⁶⁵

It is submitted that, the provision of section 106 Evidence Act as provided above is stated rightly. It distinguished the methods of proving certified copy of public document, in which if not done properly as stated, makes the document inadmissible in evidence, which denotes that the ordinary photocopy of a certified true copy of any public documents inadmissible in evidence. In respect of this an objection can be taken to the admissibility of such photocopy of the certified true copy which the Court will uphold by virtue of section 90(1)(c).⁶⁶ Which provides that in paragraph (e) of (f), a certified copy of the document, but no other secondary evidence is admissible. This means that photocopy of the certified true copy is not admissible in evidence *Shell Company Ltd v Nworlu*⁶⁷ in this case, the Court of Appeal held that the photocopies of the certified true copy were inadmissible in evidence.

The case of *Daily Times of Nigeria Plc v F.R.A. Williams*⁶⁸ is an authority for the view that such a photocopy of a certified document is admissible in evidence.⁶⁹

It is submitted that, this does not connote or interpret the Law because a photocopy of a certified true copy of a public document is ab initio (from the beginning) inadmissible in evidence. A combined reading of section 89 and 90(1)(c)⁷⁰ seems to suggest that the idea of producing a certified true copy of a public document is when the original is unavailable, in the same way as other type of secondary evidence listed in the section

⁶⁵ Nwadialo, F. op. cit p.140

⁶⁶ Evidence Act, 2011 op. cit.

⁶⁷ (1991) 3 N.W.L.R 491

⁶⁸ (1986) 4 N.W.L.R (pt.36) 526

⁶⁹ Afe B.: (2001). *A. Law and Practice of Evidence in Nigeria*. (Sibon Books Limited Ibadan, Nigeria.) p.214

⁷⁰ Evidence Act, 2011 op. cit.

may be produced in lieu of the original. Moreover, section 9(1)(c) has gone a step further to state that no other kind of secondary evidence is admissible. But what the subsection has not said is whether primary evidence of a public document is admissible.⁷¹

It is submitted that the decision in the case of *Anatogu v Iweka II and Ors*⁷² may not be the correct interpretation of relevant sections of the Evidence Act 1990 (now Evidence Act 2011) on when secondary evidence of a public document may be given in evidence. For instance, Section 97(1)(d) and Section 97(2)(a)⁷³ (now Section 89(d) and Section 90(1)(a))⁷⁴ states that secondary evidence of a document may be given when the original is not movable. However, in *Anatogu v Iweka II and Ors*⁷⁵ the Supreme Court stated that there is no provision in the Evidence Act justifying the admissibility of the original of a public document. Indeed, the Court ruled out that possibility and held that the only form in which public documents are admissible is by means of certified true copies. This decision has been followed by lower Courts in a number of cases.⁷⁶

Moreover, it seems that Courts in Nigeria have not been consistent on this issue. For instance in the case of *Dana Impex Ltd. vs Micolm Awukam*⁷⁷ the Court of Appeal held that the best evidence of a public document is by tendering the certified true copy of the document.

⁷¹ Ashi, VSB. (2008). *Documentary Evidence Selected Issues, Conflicts and Responses*. Published by Chenglo Limited, Enugu (2nd Edition). p.37

⁷² (1995) 8 N.W.L.R (pt.415) 547

⁷³ Evidence Act 1990 *op. cit.*

⁷⁴ Evidence Act, 2011 *op. cit.*

⁷⁵ *supra*

⁷⁶ Ashi. vsB. *op. cit.* p.37

⁷⁷ *supra*

It is submitted that these decision expounded correctly the provision of Section 89⁷⁸ which states instances when secondary evidence of a public document may be given. Section 89(f)⁷⁹ reads “when the original is a document of which a certified copy is permitted by this Act or by any other Law in force in Nigeria, to be given in evidence” , Section 90(c)⁸⁰ provides “a certified copy of the document, but no other secondary evidence is admissible.”

Until the Supreme Court changes its position in the future, the Law for now is that only certified true copies of public documents are admissible in judicial proceedings. In other words, only secondary evidence of a public document is admissible. It is hoped that the Supreme Court would, sooner than later see the need to shift its position. This is because the decision, with due respect, was taken without regard to other provisions of the Evidence Act which allow for the admissibility of public documents without the need to have the certified first. Again the Court glossed over the practical problems that would arise if all manner of public documents have to be certified before they are made admissible.

There are other provisions in the Evidence Act, especially in section 113 (now 106)⁸¹ which permits the Court to admit certain classes of public documents in their original form for example, it cannot be denied that a Government gazette is a public document, but it is admissible without recourse to certification⁸² in view of the above statement, with due respect, the Supreme Court is still not correct because it would have founded the justification of original of public document which is admissible in section 106(1) (a)

⁷⁸ Evidence Act, 2011 *op. cit.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

⁸² Ashi, VS B.: p.37, 38, 39 *op. cit.*

(i)⁸³ which stated how public document may be proved by production of such gazette and section 106(a)(ii)⁸⁴ also stated that the public document may also be proved by certified copy therefore, it is not only by a certified copy which is mainly accepted in Court for the purpose of preserving the original from loss and it may be needed to be tendered for other uses.

Also section 106 (b) (c) and (d)⁸⁵ also stated that the proceeding of the Senate, State House of Assembly and of the Local Government respectively, should be proved by tendering the minutes of that body. It did not state a certified copy of that document should be produced.

Section 146(1)⁸⁶ provides that, the Court shall presume every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Nigeria who is duly authorized in that behalf to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by Law in that behalf.

The Court shall also presumed that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.

Under the admissibility of secondary evidence, the contention that a photocopy of a certified true copy of a public document is not admissible as secondary evidence of the

⁸³ Evidence Act, (2011) *op. cit.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

public document as provided by Section 90(1)(c)⁸⁷ what is admissible is certified copy which is type of secondary evidence. This provision was supported by an erudite Nigerian Scholar Prof. Nwadialo.⁸⁸ It was also established in the cases of *Bisichi Tin Company Ltd v Commission of Police*⁸⁹, *Shell Company Ltd v Nworlu*⁹⁰ but the case of *Daily Times of Nigeria Plc v F.R.A. Williams*⁹¹, with due respect, was erroneous because it does not interpret the Law. Some scholars misinterpret the provisions of this Evidence Act because of the structure.

It is submitted that, the simple explanation about the admissibility of original document of a public document need to be stated adequately. For instance, by virtue of Section 104⁹² which provides for the conditions to be complied with or established in respect of certified true copy of a public document are; that payment of the legal fees prescribed with a certificate written at the foot of such copy, that it is a true copy of such document or part of it as the case may be dated and subscribed by such officer with his name and his official title and shall be sealed is the bases for such copies so certified to be admissible as certified copies.

3.4 Proof of the Contents of Private Documents

According to the last surviving part of the Best Evidence rule, the party wishing to rely on the content of private documents whose admissibility is objected must produce the primary or original documents for the Courts inspection and reliance. This is because there is but one general rule of evidence, the best is the nature of the case will allow.

⁸⁷ *Ibid.*

⁸⁸ Nwadialo, F. *op. cit.* p 135

⁸⁹ (1963) 2 All N.L.R. 11

⁹⁰ (1991) 3 N.W.L.R. 491

⁹¹ *Supra*

⁹² Evidence Act, 2011 *op. cit.*

This rule is however today relaxed under the common Law and according to the case of *Kajala v Noble*⁹³ is limited to written documents in its strict sense. Hence, it is not relevant and therefore, not applicable to documents admitted as real evidence or for the purpose of identification such as tapes and films. Ackner L. J. giving the judgment of the Divisional Court of England in the said Kajala's case on the present status and or relevance of the Best evidence rule said.

The old rule that a party must produce the best evidence that the nature of the case will allow; and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available, in one's hands, one must produce it, that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes to weight and not to admissibility.

It is therefore understandable from the above that primary evidence for purposes of proof of content of a private document is different from secondary evidence.

The general rule simply and strictly requires that where evidence is contained in a document (private) then the document itself must be given first and so easily admitted. This is exactly in accordance with the requirement of section 88 Evidence Act. However, in the absence of that better and original document or evidence, the secondary evidence by way of exception may be given when a proper foundation or explanation is advanced for its reception in evidence⁹⁴.

3.5 Admissibility of Secondary Evidence

Section 88⁹⁵ provides that “document shall be proved by primary evidence except in the cases mentioned in this Act”.

⁹³ (1982) 75 Cr. App. Rp. 149 at 152

⁹⁴ Babaji, B.: *op. cit.* p. 306-307

⁹⁵ Evidence Act, 2011 *op. cit.*

Secondary evidence is resorted to where primary evidence of a document is not available or convenient to be produced.⁹⁶ A foundation must be laid of these facts by first proving them before the secondary evidence is admitted.⁹⁷

3.6 Circumstances Or Conditions In Which Secondary Evidence May Be Admissible In Evidence

Section 89⁹⁸ provided that secondary evidence may be given of the existence, condition or content of a document when-

- b) The original is shown or appears to be in the possession or power
 - (iii) of the person against whom the document is sought to be proved;
 - (iv) of any person legally bound to produce it; and when after the notice mentioned in Section 91⁹⁹ such person does not produce it.

Section 91¹⁰⁰ provides for circumstances in which notice can be dispensed with and secondary evidence is admissible in evidence as follows;

Secondary evidence of the content of the document referred to in section 89 (a) shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to a legal practitioner employed by such party, such notice to produced it as is prescribed by Law, and if no notice to produced is prescribed by Law then such notice as the Court considered reasonable in the circumstance of the case provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court think fit to dispense with it.

- (a) when the document to be produced is itself a notice;
- (b) when, from the nature of the case, the adverse party must know that he will be required to produce it;
- (c) when it appears or is proved that the adverse party has obtained possessions of the original by fraud or force;

⁹⁶ Nwadialo, F. *op. cit.* p. 131

⁹⁷ *Ibid.* p.132

⁹⁸ Evidence Act, 2011 *op. cit.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

- (d) when the adverse party or his agent has the original in Court;
- (e) when the adverse party or his agent has admitted the loss of the document.

The notice contemplated here must take exceptional situations which necessitate dispensing with such notice, as specified in section 98 (now 91) of the Act. These situations when a notice to produce would not be necessary include:

- (i) when the document to be proved is itself a notice. Example a notice to quit a notice of demolition of an illegal structure, a notice of that assessment, notice of dismissal or termination of employment, and so on;
- (ii) when, from the nature of the case, the adverse party must know that it will be required to produce it. If there are conflicting claims to a plot of land the subject of a statutory right of occupancy granted by the Governor of a state, for example, the parties ought to be assumed to be aware that documentary evidence of the respective claims would be required of them.
- (iii) when it appears or is proved that the adverse party is obtained possession of the original by fraud or force. For-instance, if the police forcefully entered upon and searched a house, in the cause of which original of certain certificates were recovered and retained by them in their custody it would be unnecessary, in the event of a Law suit, to still give them notice to produce the original at the trial.
- (iv) when the adverse party or his agent has the original in Court. These however should not be assumed unless there is compelling evidence to believe that the adverse party has them in Court.
- (v) when the adverse party or his agent has admitted the loss of the document. It should be kept in mind that where a document is in the possession of an adversary party, the service on him of notice to produce, as specified above is not intended to compel him to produce it but to put him on notice that if he fails to produce the original the opposite party shall lead secondary evidence of its content.¹⁰¹

The Evidence Act does specify the form in which a notice to produce should take. It therefore, should be as near the form of similar notice as possible. What is important is

¹⁰¹ Ashi, VS B.: pp. 31-33 *op. cit.* See *Agha v IGP* (1997) 10 NWLR

to bring to the attention of the opposite party your intention to tender the secondary evidence and make him produce the original of the document in his possession or control.¹⁰²

It is submitted that, the essence of the above section is that where the person served with notice to produce the original document fails, secondary evidence can be tendered.

Section 89(b)¹⁰³ provides the existence condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

- (c) The original has been destroyed or lost and in the latter case all possible search has been made for it;
- (d) The original is of such a nature as not to be easily movable;
- (e) The original is a public document within the meaning of section 102.¹⁰⁴
- (f) The original is a document of which a certified copy is permitted by this Act or by any other Law in force in Nigeria, to be given in evidence;
- (g) The originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection; or
- (h) The document is an entry in a banker's book.

Section 90(2)¹⁰⁵ when a seaman sues for his wages he may give secondary evidence of the ships articles and of any agreement supporting his case, without notice to produce the original.

3.7 Foundation to be Laid

For the interpretation of the Evidence Act, there are reasons or foundation which parties must establish before a Court of competent jurisdiction can accept secondary evidence

¹⁰² *Ibid.* pp.31-33

¹⁰³ Evidence Act, 2011 *op. cit.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

in substitution of the primary (original) document. Following the provision of Section 89(a)¹⁰⁶ foundation to be laid is that the other party must prove that the original is in the hand of the person obliged to produce it and notice has been given to that person and he failed to produce it.

The mode or type of secondary evidence admissible is any secondary evidence of the contents of the document is admissible by virtue of Section 90(1)(a)¹⁰⁷

In respect of Section 89(b)¹⁰⁸ foundation to be laid is that the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest. The mode or type of secondary evidence admissible is the written admission Section 90(1)(b)¹⁰⁹

In respect to Section 89(c)¹¹⁰ foundation to be laid is that either the original is lost in which all possible search has been made or that the original is destroyed.

The mode or type of secondary evidence admissible is any secondary evidence of the contents of the document as provided by Section 90 (1)(a)¹¹¹ in *Mika v The Queen*¹¹² the confessional statement of the accused was reduced to writing. This was however not tendered before at the trial. It had been tendered before at the Magistrates Court in the preliminary investigation and was said to have got lost thereafter. The Exhibit Clerk of the Magistrate Court was not called at the trial to testify that it was lost and that all possible search had been made for it so as to satisfy the conditions laid down in Section

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² (1963) 1 ALL N.L.R.220

89(c)¹¹³ above, oral evidence was given of what the accused had stated in the confession. It was held that before the oral evidence was admitted, the Exhibits Clerk of the Magistrate Court ought to have been called to testify to the loss of the written statement and that it could not be found after all possible search had been made. An objection to admissibility of secondary evidence on the ground that all possible search has not been made must be clearly made at the time the secondary evidence contradicted the document¹¹⁴ in *Okpalo v Commissioner of Police*¹¹⁵ the Appellant was convicted of forging and writing a local purchase order. The local purchase order was not produced at the trial. Instead there was evidence that the Appellant had destroyed it by swallowing it upon being apprehended. It was held that secondary evidence was admissible to prove the contents of the forged document.

In respect of section 89(d)¹¹⁶, the proper foundation to be laid is that the document is not easily moveable for instance on inscription on a wall or stone, any secondary evidence is admissible by virtue section 90(1)(a)¹¹⁷.

In respect of section 89(e)¹¹⁸, the proper foundation to be laid is that the original is a public document within the meaning of Section 102(a) of the Evidence Act 2011 and the type of secondary evidence admissible is a certified copy of the document but no other secondary evidence is admissible by virtue of section 90(1)(c)¹¹⁹

In respect of section 89(f)¹²⁰, the proper foundation to be laid is that the original is a document of which a certified copy is permissible by Law and the type of secondary

¹¹³ Evidence Act, 2011 *op. cit.*

¹¹⁴ Nwadiolo, F. *op. cit.* p.132, 133

¹¹⁵ (1962) N.N.L.R. 14.

¹¹⁶ Evidence Act, 2011 *op. cit.*

¹¹⁷ Evidence Act, 2011 *op. cit.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

evidence admitted is a certified copy of the document, but no other secondary evidence is admissible by virtue of section 90(1)(c)¹²¹

Secondary evidence is used in proof of the content of public documents¹²². In *Bisichi Tin Company Ltd v Commissioner of Police*¹²³ the Appellant Company was charged for unlawfully mining on state land contrary to Section 3(2) of the Minerals Ordinance. The prosecution's case was that the company's employees had mined in the area comprised in a mining lease which had expired. The lease was not produced and no certified copy of it was tendered. Two prosecution interest testified that it had expired on the relevant date. It was held that the mining lease being a public document, its contents must be proved by certified copy and not oral evidence. The facts that the oral evidence was not objected to do not make it admissible. A deposition of a witness in previous proceeding being a public document may be proved by certified copy. A photocopy of a certified time copy of a public document is not admissible as secondary evidence of the public document¹²⁴.

In respect of Section 89(g)¹²⁵, the proper foundation to be laid is that the original is a document which consists of numerous accounts or other documents which cannot be conveniently examined in Court and the fact to be proved is the general result of the whole collection. The type of secondary evidence that is admissible is that evidence may be given as to the general result of the documents by any person who has examined

¹²¹ *Ibid.*

¹²² Nwadialo, F.: *op. cit.* p.135

¹²³ (1963) 2 ALL N.L.R. 11

¹²⁴ Nwadialo, F. *op. cit.* p. 135

¹²⁵ Evidence Act, 2011 *op. cit.*

them and who is skilled in the examination of such document by virtue of Section 90(1)(d).¹²⁶

In respect of Section 89(h)¹²⁷ the proper foundation to be laid or proved is that,

- (i) The book in which the entries copied were made was at the time of making one of the ordinary books of the bank,
- (ii) The entry was made in the usual and ordinary course of business,
- (iii) The book is in the control and custody of the bank, which proof may be given orally or by affidavit by an officer of the bank, and
- (iv) The copy has been examined with the original entry and is correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit. By virtue of section 90 (1) (e)¹²⁸

In *Olorunfemi v Neb Ltd*¹²⁹ it was held that the foundational testimony in regard to foundation (a), (b) and (c) (now Section 89(h)(i), (ii) and (iii))¹³⁰ above should be made by an officer of the bank, either orally or by affidavit. But in regards to foundation (d) (now Section 89(h)(iv))¹³¹, it can be made by any person who has made the examination. It may be added that such a person could be an external auditor or even a crime detective¹³².

The type of secondary evidence to prove a document which is an entry in a banker's book that is paragraph (h) above is not expressly stated. But the use of the word "copies" in section 90 (1)(e) Evidence Act 2011 that deals with the matter, makes it abundantly clear that the intended type of secondary evidence is a copy of the entry. The matter that should first be established before such a copy is received in evidence

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ (2003) 5 N.W.L.R (Pt.812) 1

¹³⁰ Evidence Act, 2011 *op. cit.*

¹³¹ *Ibid.*

¹³² Ashi, VSB.: *op. cit.* p. 36

are clearly set out in *Yassin v Barclays Bank D.C.O.*¹³³ As follows; the copy cannot be received as evidence unless it is first proved that the book in which the entries copied were made was at the time of the making one of the ordinary books of the bank. It must also be proved that the entry was made in the usual and ordinary course of business and that the book is in the custody and control of the bank. These facts may be proved orally or by affidavit by a partner or officer of the bank furthermore, it must also be proved that the copy has been examined with the original entry and found correct by someone who had examined it with the original. Such proof may also be oral or by affidavit. In proving these facts it is the substance of what is proved and not words used that is decisive. So failure by a witness to use the precise statutory words governing the conditions of admissibility does not render the copy inadmissible¹³⁴. Where a witness said that he had compared the statement of account with the books of the bank kept in the ordinary course of business is established that they were ordinary books of the bank and from the same phrase, it is clearly implied that the entries were made in the usual and ordinary course of business. The phrase in the usual and ordinary course of business relating to the books of the bank in Section 90(1)(e)¹³⁵ does not imply that the books have to be in daily use; it is sufficient if the bank keeps the books as to be able to refer to them when necessary.¹³⁶

Banker's Books include ledgers, days books, cash books, account books and all other books used in the ordinary business of a bank... but it does not extend to "voucher" from which entries in a statement of account were obtained, although it may include a "ledger card" A bank statement of account of a customer produced by a bank official is therefore not a copy or secondary evidence within the meaning of the Act: it is in fact

¹³³ (1968) N. M. L. R.380

¹³⁴ Nwadiolo, F.: *op. cit.* pp. 133-134. See *Yassin v Barclay Bank D.C.O (supra)*

¹³⁵ Evidence Act, 2011 *op. cit.*

¹³⁶ Nwadiola, F.: *op. cit.* p. 134

primary evidence being part and parcel of what constitutes “Bankers Books” so where the prosecution calls bank officials to tender such statements it is not availing itself of the provision of section 90 (1) (e) whereby it could merely inspect the statements and make extracts thereof to be tendered¹³⁷ Therefore profound that the conditions laid down in section 90(1)(e)¹³⁸ are complied with, third parties are allowed to make copies of entries in Bankers books and have such copies tendered in evidence¹³⁹

In respect of section 90(2)¹⁴⁰ the proper foundation to be laid is that it is a seaman who sues. The type of evidence admissible is secondary evidence of the ships articles and of any agreement.

It is submitted that, even though the Evidence Act did not explicitly list this under Section 89 it can be found under the provisions made for the type of proving those secondary evidence. It will be necessary to insert it under the provision where notice need not be given under Section 91¹⁴¹.

3.8 Admissibility and Proper Custody of Documents

3.8.1 Admissibility:

The entire Law of Evidence is dependent, on the rules governing admissibility and inadmissibility of evidence and whether a piece of evidence is admissible or not is dependent upon whether the fact to be established by the evidence is relevant to the fact in issue. Relevancy being judged by the provisions of the Act and not by any rules of

¹³⁷ *Ibid.* p. 134

¹³⁸ Evidence Act, 2011 *op. cit.*

¹³⁹ Nwadialo, F.: *op. cit.* p. 134 See *Oguntonade v Police.* (1959) W. R. N. L. R. 289

¹⁴⁰ Evidence Act, 2011 *op. cit.*

¹⁴¹ *Ibid.*

logic. Although it is obvious that the rules of relevancy under the Act are, generally speaking, based upon logical relevancy.¹⁴²

Evidence may be given in any suit or proceeding of the existence of every facts in issue and of such other fact as are declared to be relevant, and of no others,

Provided that:

- (a) The Court may exclude evidence of fact which though relevant or deemed to be relevant to the issue appears to it to be too remote to be material in all the circumstance of the case; and
- (b) This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the Law for the time being in force¹⁴³. It is clear from this provision that the Court may exclude evidence of a fact even though it is relevant, if in the opinion of the Court, it is too remote to be material when all the circumstance of the case are taken into consideration¹⁴⁴

It is submitted that, admissible evidence or facts must be relevant fact. Non relevant facts are inadmissible in evidence. Therefore, the legally admitted fact must be proved or established and without the Law providing it to be relevant it cannot be admissible because evidence is the legally admitted fact.

Section 156¹⁴⁵ defined document in proper custody. Document are said to be in proper custody within the meaning of section 148 to 155 of this Act if they are in the place in which and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

¹⁴² Aguda, T.A.: (1974). *The Law of Evidence in Nigeria*. (Sweet and Maxwell, London.) (2nd Ed.) p.23

¹⁴³ Evidence Act 2011 *op. cit.*

¹⁴⁴ Aguda, T.A.; *op. cit.* p.24

¹⁴⁵ Evidence Act, 2011 *op. cit.*

In *Ogbunyiya v Okudo*¹⁴⁶ it was held, to the effect that newspapers, gazettes and journals need not be produced from proper custody before they can be presumed as genuine under section 116 (now section 148).¹⁴⁷

Section 148¹⁴⁸ provides:

The Court shall presume the genuineness of every document purporting to be

- (a) The official Gazette of Nigeria or of a State
- (b) The official Gazette of any Country other than Nigeria
- (c) A newspaper or journal;
- (d) A copy of the resolution of the National Assembly or House of Assembly of a state, printed by the Government Printer or
- (e) A copy of a document directed by any Law to be kept by any person, if such document is kept substantially in the form required by Law and is produced from proper custody.

Section 149¹⁴⁹ provides;

when any documents is produced before any Court purporting to be a document which by the Law in force for the time being in any country other than Nigeria would be admissible in proof of any particular in any Court of Justice in that country, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume –

- (a) That such seal, stamp or signature, is genuine; and
- (b) That the person signing it held, at the time when he signed it, the judicial or official character, which he claims, and the document shall be admissible for the same purpose for which it would be admissible in the country where the document is produced.

¹⁴⁶ (1979) 6.9 S.C 32 at 43

¹⁴⁷ *Ashi, VSB. op. cit.* p.60, 61

¹⁴⁸ Evidence Act, 2011 *op. cit.*

¹⁴⁹ *Ibid.*

Section 150¹⁵⁰ provides;

The Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Notary Public or any Court, Judge, Magistrate, Consul or representative of Nigeria, or as the case may be, of the President, was so executed and authenticated.

Section 151(1)¹⁵¹ provides

All maps or charts made under the authority of Government, or of any public municipal body, and not made for the purpose of any proceeding, shall be presume to be correct, and shall be admitted in evidence without further proof.

(2) Where maps or charts so made are reproduced by Printing, Lithograph, or other mechanical or electronic process all such reproductions purporting to be produced under the authority which made the originals shall be admissible in evidence without further proof section 152¹⁵² provides; the Court may presume that any book to which it may refer for information on matters of public or general interest, the statements of which are relevant facts and which is produced for its inspection was written and published by the person, and at the time and place by whom or at which purports to have been written or published.

Section 153(1)¹⁵³ provides:

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 a 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.

(2) The Court may presume that on electronic message forwarded by the originator through an electronic mail server to the addresses 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

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

any presumption as to the person to whom such message was sent.

Section 154¹⁵⁴ provides;

“The Court shall presume that every document called for and not produced after notice to produce given under Section 91¹⁵⁵, was attested, stamped and executed in the manner required by Law”.

Section 155¹⁵⁶ provides;

where any document purporting or proved to be 20 years old or more is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person’s handwriting, and in the case of a document executed or attested that it was duly executed and attested by the persons by whom it purports to be executed and attested.

3.8.2 Custody and Production of Public and Private Document

Section 148¹⁵⁷ provides:

The Court shall presume the genuineness of every document purporting to be

- (a) The official Gazette of Nigeria or of a State
- (b) The official Gazette of any Country other than Nigeria
- (c) A newspaper or journal;
- (d) A copy of the resolution of the National Assembly or House of Assembly of a state, printed by the Government Printer or
- (e) A copy of a document directed by any Law to be kept by any person, if such document is kept substantially in the form required by Law and is produced from proper custody.

The Court dissected the wordings of the section into two and read it disjunctively. The upper Limb which ends with “... printed by the Government printer...” was read

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

disjunctively from the lower part which begins from “... and every document purporting to be document directed by Law to be kept by any person...”

The Court concluded that it is only such documents that fall within the lower Limb of the section that are required to be produced from proper custody. On the strength of the interpretation, therefore, newspaper need not be produced from any extra-ordinary source before they can be presumed genuine under Section 148¹⁵⁸. It is submitted that if newspaper, by the above Judicial interpretation of Section 148¹⁵⁹ need not be produced from proper custody. It is unnecessary to insist that each time a newspaper is sought to be tendered as primary evidence, it must be certified by the National Library.

Moreover, a careful and studious reading of the provision of section 86, which prescribes forms of primary evidence, would appear to suggest that a newspaper bought across the street from a Vendor is primary evidence of the copies deposited with the National Library pursuant to Section 4 of the National Library Act. Although the National Library requires that it should be deposited, it has not made the production of a newspaper from the Library’s archives a condition precedent to its admissibility in a probative process in a Court of Law. If the Legislative had intended such a condition, it is further submitted, it would have expressly said so, in this regard a clue be taken from the provision of Section 15 and 16 of the Land Instrument Registration Act, which expressly makes the non-registration of a registerable instrument ineffectual and admissible in evidence.

Again the Stamp Duties Act has made elaborate provision on the effect of issuing an unstamped receipt of payment and its bearing on admissibility in judicial proceedings.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

The foregoing contention is fortified by the Court of Appeal, in its recent decision in *Bello HO vs I & S Int'l Ltd*¹⁶⁰ which has somehow shed some light on this issue, although it has not put it to rest, held that newspapers are not provable in Court as public document under the Evidence Act. One is not unmindful of the same Court of Appeal's earlier decision in *Fawehinmi v IGP*¹⁶¹ on the point. Regrettably, the Court in that case merely alluded to newspapers as being public document like other document before the trial Court were public document. Yet, its later decision in *Bello HO v I & S Int'l Ltd*¹⁶² has not helped matters. Stanley Alagoa JCA, who delivered the lead judgment, inadvertently downplayed the earlier case of *Fawehinmi vs IGP*¹⁶³ even though it was cited by Counsel to the Appellants. Perhaps, if he did, he might have afforded us an opportunity to understand whether it is always necessary to tender certified copies of newspaper from the National Library as the only admissible evidence of their content. To this end any copy bought across the Street can be tendered and admitted in evidence like any other primary document, unless what is in contention is the authenticity of the newspaper, or if the particular edition is not easily available anywhere else¹⁶⁴.

In *Bello HO vs I & S Int'l Ltd*¹⁶⁵ Stanley Alagoa, JCA stated that; Newspapers and Magazines in Nigeria and indeed the World over have come to command such aura of respectability and reliance among the reading public that surprisingly, even among learned gentlemen of the Legal profession, the tag "public document" is better ascribed to them than private document; this is a wrong concept for as far as the Nigeria Law of Evidence is concerned, they are not public document but private documents. This

¹⁶⁰(2005) All F.W.L.R (Pt.254) 822

¹⁶¹ (2000) 7 N.W.L.R (Pt.665)481

¹⁶² *supra*

¹⁶³ *supra*

¹⁶⁴ Ashi, VSB. *op. cit.* pp.61-63

¹⁶⁵ *supra*

decision suggests that a newspapers bought across the street from a vendor can be tendered and admitted in evidence like any other private document.

A careful scrutiny of the circumstance which led to the tendering of newspapers produced from the National Library in some libel cases have sometimes misled Practitioners to assume that whenever the contents of a newspaper are to be proved in Court, one must obtain a certified true copy from the National Library it is submitted that this is a complete misconception because firstly, the National Library Act has not made the production of a newspaper from the Library's archives a condition precedent to its admissibility in the probative process in a Court of Law. If the legislature had intended such a condition it is further submitted, it would have expressly said so.¹⁶⁶

Secondly, it is submitted further that it is a cardinal principle in the Law of defamation that unless the alleged defamatory statement is published to a third party, the tort of defamation has not been judicially established and to constitute "publication" in our context, there must be evidence that a third party has read the statement.¹⁶⁷ such a third party should be in Court and state so from the witness box.¹⁶⁸ In *Ugo v Okafor*¹⁶⁹ the Court stated that where a certified true copy of a newspaper is produced from the National Library that constitute clear evidence of publication. Again *Awoniyi v Amorc*,¹⁷⁰ the Court admitted as clear evidence of publication, the newspaper which contained the libelous statement. They were certified by neither the National Library in neither *Ugo v Okafor*¹⁷¹ nor *Awoniyi v Amorc*¹⁷² nor other cases where Certified True Copy of newspaper produced from the National Library was there a condition precedent

¹⁶⁶ Ashi, VS B. *op. cit.* pp.64- 65

¹⁶⁷ Ashi, VS B.: *Ibid.* pp. 65-66. See *Ugo v Okafor* (1996) 3 N.W.L.R (pt. 438) 542

¹⁶⁸ *Ibid.* pp.65-66

¹⁶⁹ *supra.*

¹⁷⁰ (1990) 6 N.W.L.R (Pt.154) 42

¹⁷¹ *supra*

¹⁷² *supra*

to admissibility of newspaper in any evidence that such newspaper must be certified and produced from the National Library. The only reasons that can be deduced from those decisions in this point are that the plaintiffs only went on extra miles to produced clear evidence publication which they could have otherwise tendered. The fact that the newspaper were in the custody of National Library justifies an assumption that the National Library and its Staff did read them.

The third point to note is that, for the sake of argument only, if a newspaper must be produced in a special way, otherwise than from a vendor, there is no statutory inhibition against its production from any source, including a private Library, so long as it can fulfill the objection of showing that the alleged libel was communicated to a third party¹⁷³. In *Dr. Torti v Ukpabi*¹⁷⁴ the Court held even if the document is not produced from proper custody, it is admissible once it is relevant. Lack of proper custody may affect the weight the Court will attach to the document when evaluating it and no more.

There the basis for admissibility of document whether the document is relevant and admissible under the Law.

Section 148¹⁷⁵ By virtue of the provision of this section the genuineness of any document purporting to be the official Gazette of the Federation of Nigeria of any of its States is to be presumed. From time immemorial the London Gazette has been accepted by the Courts in England, followed later by Court of the Commonwealth Countries, as evidence of Acts of State, for example addresses to the *Crown R v Holt*¹⁷⁶ various proclamation of the Crown as well as *Privy Council Proclamation R v McCarty*¹⁷⁷

¹⁷³ Ashi, VSB. *op. cit.* p.66, 67

¹⁷⁴ (1984) 1 S.C.N.L.R 214

¹⁷⁵ Evidence Act, 2011, *op. cit.*

¹⁷⁶ (1793) 5 Term Rep. 436: 101 E.R.245

¹⁷⁷ (1903) 2 I.R. 146

newspapers reports were never admissible evidence of the colonial status of any particular territory, but the Gazette has ever been held as the authority for such an allegation.¹⁷⁸

The mere production of a paper which purports to be an official Gazette of the Federal or State Government which contain any Laws, Proclamation or Regulation issued by the Government concerned is presumptive evidence of the fact contained therein¹⁷⁹. It seems clear that Section 148¹⁸⁰ makes provision from two groups of documents namely:

- (a) official Gazette, newspaper and journals and
- (b) Any other document directed to be kept by any person by Law.

The proper interpretation of the provision of the section would appear to be that it is only a document within the second group that need to be proved to have been kept substantially in the form required by Law, and to be shown to have been produced from proper custody any document purporting to be any of the official gazette mentioned will, on mere production be presumed to be genuine as held in *Ogbunyiya & Ors v Okudo & Ors*¹⁸¹ and in such cases, the question of proper custody does not arise.

It is important to take note of Section 29 of the interpretation Act (cap.192) which provides as follows:

The production of a copy of the Gazette or a State Gazette containing any Order, Regulations, Rule of Court, Proclamation, Government or Public notice, or State notice or State public notice or of any copy of any Order, Regulation, Rule of Court, Proclamation, Government or Public notice or State notice or State public notice purporting to be printed by the Government printer, shall be prima facie evidence, in all Court and for all purposes whatever, of the due making and tenor of such order,

¹⁷⁸ Aguda, T.A.: (1998) Law and Practice Relating to Evidence in Nigeria. (MIJ Professional Publisher Ltd Lagos, Nigeria) p.291, 292

¹⁷⁹ *Ibid.* p. 292 See *Fallshaw Brothers v Ryan*. (1902) 28 vsL.R. 279

¹⁸⁰ Evidence Act, 2011, *op. cit.*

¹⁸¹ (1979) 3 L.R.N. 318

regulation, rule of Courts, Proclamation, Government or public notice, or state notice or state public notice.¹⁸²

3.8.3 Proof of Execution of Document

Section 104¹⁸³ provides;

conditions for the admissibility of a certified true copy (C.T.C)

- (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be.
- (2) The certificate mentioned in subsection (1) of this section shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by Law to make use of a seal, and such copies so certified shall be called certified copies.
- (3) An officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

Section 146(1)¹⁸⁴ provides that;

The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by Law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in Nigeria who is duly authorized in that behalf to be genuine, provided that such document is substantially in the form and purports to be executed in the manner directed by Law in that behalf.

- (2) The Court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document is duly certified.

In *Boye Industries Ltd. vs Adisa Sowenumo*¹⁸⁵. The respondents herein instituted an action against the appellants in the High Court of Lagos State, claiming as per their

¹⁸² Aguda, T.A. *op. cit.* 292 and 293

¹⁸³ Evidence Act, 2011 *op. cit.*

¹⁸⁴ *Ibid.*

amended writ of summons and amended statement of claim for a declaration that the purported sale of the Land in dispute, covering 1, 452 hectares situate opposite the International Trade Complex along Badagry Express Road Onireke, Lagos to the appellants and the subsequent certificate of occupancy issued to the 1st appellant's vendors. Also a declaration that the 1st respondent is entitled to the statutory right of occupancy over the Land in dispute. They also claimed for injunction against the appellants on the Land in dispute against the respondents. After the filing and exchange of pleadings the matter went for trial. At the conclusion of trial, the trial Court found in favour of the respondents and dismissed the appellant's counter claim. The Appellants being dissatisfied appealed to the Court of Appeal but the appeal was dismissed.

Section 101(1)¹⁸⁶ provides;

In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.

(2) The Court may direct any person present in Court to write word or figure or to make finger impressions for the purpose of enabling the Court to compare the words, figure or finger impression alleged to have been written or made by such person:

Provided that where a defendant does not give evidence he may not be so directed to write such words or figures or to make the finger impressions.

(3) After the final termination of the proceeding in which the Court required a person to make is finger impressions, such impression shall be destroyed.

¹⁸⁵ (2010) All FWLR (pt. 521)

¹⁸⁶ Evidence Act 2011 *op. cit.*

To prove the execution of a private document is in essence to prove that a person claimed to be its author is in fact the author. This may involve evidence that the signature on the document is that person's or that the handwriting of the whole document is his. Thus the Act provides that 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 handwriting Section 93¹⁸⁷ such handwriting may be proved by expert or non-expert evidence or evidence of the writer or of a witness who saw the document signed or written.

Proof that a person executed a document may also be by means of evidence of identification of that person with the maker of the document. As the Act provides, evidence that a person exists having the name, address, business or occupation as the maker of a document purports to have is admissible to show that such document was written or signed by that person as provided section 94¹⁸⁸.

Also evidence that document exists to which the document the making of which in issue purports to be a reply, together with evidence of the making and delivery to a person of such earlier document is admissible to show the identity of the maker of the disputed document with the person to whom the earlier document was delivered as provided by Section 94 (2)¹⁸⁹ proof of execution may also involve evidence of sealing, delivery or attestation. To prove sealing, evidence that a person signed a document containing a declaration that a seal was his seal, is admissible to prove that he sealed it as provided by Section 95¹⁹⁰ Delivery could be a matter of intention. Thus evidence that the granter

¹⁸⁷ *Ibid.*

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid.*

¹⁹⁰ *Ibid.*

on executing any document requiring delivery expressed an intention that it should operate at once is admissible to prove delivery as provided by section 95(2)¹⁹¹. In addition, oral evidence of someone who actually saw the sealing or delivery may be necessary.

Another method of proving signature is by comparison. In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing or seal is by comparison. In order to ascertain whether a signature writing seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose by virtue of Section 101(1)¹⁹².

Furthermore, the Court may direct any person present in Court to write any words or figures or to make finger impression for the purpose of enabling the Court to compare the words, figures or finger impression so written or made with others alleged to have been written or made by such person defendant who does not give evidence may not however, be so directed to write any words or figures or make finger impression by virtue of section 101(2)¹⁹³.

For the proof of execution of a document required by Law to be attested, the general rule is that the attesting witness must be called to testify as to that execution as held in

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

*Whyman v Garth*¹⁹⁴ under the Act however, the execution of such a document may instead of being proved by an attesting witness, be proved in the manner in which it might be proved if no attesting witness were alive as provided by section 96 (1).¹⁹⁵

This manner of proof is by showing that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in that person's handwriting by virtue of section 96 (2)¹⁹⁶ This provision do not however apply to the proof of wills or other testamentary document but apply to proof of other attested document in both civil and criminal proceeding¹⁹⁷ the admission of a party to an attested document of its execution by himself is sufficient proof of its execution as against him, though the document is one required by Law to be attested as provided by section 97¹⁹⁸. If an attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence Section 99¹⁹⁹. The evidence of an attesting witness is not conclusive or exclusive of other evidence. Therefore, if he gives evidence that the requirements of Law as regards the attested document were not observed, other evidence is admissible to controvert him and to show that the document was duly executed as held in *Re Vere-Wardale*²⁰⁰. An attested document not required by Law to be attested may be proved as if it was unattested section 100 Evidence Act²⁰¹.

¹⁹⁴ (1853) 8 Ex. 803

¹⁹⁵ Evidence Act, 2011 *op. cit.*

¹⁹⁶ *Ibid.*

¹⁹⁷ Nwadialo, F. *op. cit.* p.141

¹⁹⁸ Evidence Act, 2011 *op. cit.*

¹⁹⁹ *Ibid.*

²⁰⁰ (1949) p.395

²⁰¹ Evidence Act 2011

3.8.4 Evidence of Handwriting

Section 68²⁰² provide that,

When the Court has to form an opinion upon a point of Foreign Law, Customary Law or Custom, or of science or art or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such Foreign Law, Customary Law or Custom, or science or art, or in questions as to identity of handwriting or finger impressions, are admissible.

Section 72 (1)²⁰³ provides;

When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was not written or signed by that person, is admissible.

(2) A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.

When the objection is that the handwriting is not that of the person by whom it purports to have been made, the need then arise to prove that the writing was made by him. The Law provides how such proof should be made. The handwriting may be proved by a person who has knowledge of the writer's handwriting either because he has seen him write at least once as held in *R v MC Cartney*²⁰⁴ or has regularly corresponded with him or acted upon such correspondence as held in *Harrington vs Fry*²⁰⁵. Also a witness may be called to compare a disputed handwriting with the one admitted to have been made by the person. Because of the high standard of proof required in criminal proceedings, it is desirable that such a witness in a criminal proceeding should be an expert as held in *R*

²⁰² *Ibid.*

²⁰³ *Ibid.*

²⁰⁴ (1928) 20 CR. App. Rep. 179

²⁰⁵ (1824) RY. and M. 90

*v Richard*²⁰⁶. The question as to who is an expert is also one that has been settled by Law. He must possess adequate qualification, knowledge and skill as to handwriting.²⁰⁷

4.0 Opinion Evidence In Relation To Handwriting

4.1 (a) Non Expert Opinion

In certain cases, expediency and the demands of justice may necessitate the admission of opinions of non-experts as evidence in Court explaining the Common Law on this subjects; Cross R. has observed that there is nothing in the nature of a closed list of cases in which non-expert opinion evidence is admissible. Typical instances would include questions concerning speed, age, weather, handwriting and identity in general. Thus at Common Law, non-experts are allowed to speak on the result of their observations in circumstances where the facts are too complicated to be narrated distinctly. But under the Evidence Act, non-experts can only testify on some specified matters of which they have or are likely to have special knowledge. These matters are handwriting, native Law and Custom, general custom or right, usages and tenets and the relationship between persons. Presently, the focus is on the opinions of non-experts in relation to handwriting.²⁰⁸

In *Salami Lawal v Commissioner of Police*²⁰⁹ the Court upheld the decision of a Magistrate to admit the evidence of opinion of a witness who was not an expert but who testified that he was acquainted with the Appellant's signature as they had worked together.

²⁰⁶ (1918) 13 Cr. App. Rep. 140

²⁰⁷ Onah, C.O.: (1996). *Evidence Law in Action*, (Eunis Educational Publishers, Victoria Palace Enugu, Ukwu, Nigeria) pp. 19-20

²⁰⁸ Babalola, A. *op. cit.* p.150

²⁰⁹ (1960) W.N.L.R. 72

4.2 (b) Expert Opinion

The opinions of experts may also be admitted in evidence in order to prove handwriting or finger impressions such opinions are declared to be relevant by Section 68 of the Evidence Act. In *Aloba Pharmaceutical Chemist Limited v Balogun*,²¹⁰ it was held that the genuineness of a party's handwriting or mark may be proved by the opinion not only of experts but of non-experts, and that the admissibility of expert opinion is one of the exceptions to the hearsay rule. This is because when a handwriting analyst gives expert opinion on a disputed handwriting or signature, there is an underling application of scientific skill to the formation of judgment or opinion. This is because the handwriting analyst cannot base his opinion on comparison done by someone else of a specimen writing and the disputed writing. Where he applies his own scientific skill in making the comparison and comes to a judgment or expresses an opinion thereon, his evidence of opinion of expert cannot be excluded on the basis of the hearsay rule.

In this case, the proposition inherent in the appellant's argument that when a Solicitor has prepared a document allegedly signed by a party thereto, a handwriting analyst cannot give evidence on the genuines or otherwise of the signature thereon has no foundation in Law.

Where the Solicitor who can testify thereto, gives evidence as to the person who signed the document, his evidence, if contradictory to that of the handwriting analyst, is to be weighed and evaluated by the trial Judge. That such Solicitor may be called as a witness but had not been called at all, or had not been called at the time the analyst gave evidence would not make the latter's evidence inadmissible.

²¹⁰ (1997) 6 N.W.L.R. (Part 509) 509

The issue of expert opinion in proof of handwriting also in the case of *U.T.B. v Nwanzigana Enterprises*²¹¹. Here, the Respondent claimed against the Appellant general damages for the negligence of the Defendant in payment of N100,000.00 out of the Respondent's account without authorization and payment of the said sum. In order to establish that the cheque in which the payment was made was forged, the Respondent called expert evidence although the Court refused the Appellant leave to call an expert witness. The decision of the trial Court was that the cheque was forged and he accordingly gave judgment for the Respondent

Dissatisfied the Appellant appealed to the Court of Appeal. Unanimously allowing the appeal, the Court of Appeal considered and applied inter alia the provisions of section 93 and section 101²¹²Section 93(1) provides, 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 handwriting. Section 101 provides; In order to ascertain whether a signature, writing, seal or finger impression is that of the person by whom it purports to have been written or made, any signature, writing, seal or finger impression admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved although that signature, writing, seal or finger impression has not been produced or proved for any other purpose.

In the end, the Court held, that the opinion of handwriting experts as well as that of lay witnesses are admissible depending on the point in issue. Thus, a person's handwriting may be proved by the opinions of persons who are acquainted with it. The knowledge necessary for this purpose may have been acquired by the witness at any time having;

²¹¹ (1994) 6 N.W.L.R. (Part 348) 56

²¹² Evidence Act, 2011 *op. cit.*

- (a) seen the party write,
- (b) received communications purporting to come from him in answer to those addressed to him by the witness, or
- (c) Observed documents purporting to be in the party's handwriting in the ordinary course of business.

Delivering the judgment of the Court, Uwaifo, J.C.A. stated the principles applicable to expert opinion in regard to handwriting thus:

Moreover, the opinions of handwriting experts are admissible to decipher words beneath obliterations, erasures or alterations, although it is for the Court to determine what the words are. Experts may also give their opinions as to whether handwriting is natural or imitated, and whether it shows points of comparison, but it is for the Court to determine whether a particular piece of writing is to be assigned to a particular person, and documents may be submitted to the Court for comparisons to be made. The weight to be attached to any expert evidence depends upon the skill of the expert.

A Court is entitled to accept the evidence of an expert if it is credible, particularly if it is not changed and comes from an expert with demonstrable skill. But the evidence of an expert is generally an aspect of the entire evidence to be evaluated by a Court. The trial Court must full be in control of all the evidence before it and must not abdicate its role to perform its primary duty of assessing the evidence and forming its clear opinion in relation thereto, including any expert evidence.²¹³

Under section 101 Evidence Act 2011 the comparison of signature, writing and so on, can be made by the Court and it is not unusual for the Courts, in a clear case, to form, its own opinion as to handwriting. In this case, the trial Judge should have taken advantage of the documentary evidence before him by comparing Exhibits 8 and 9 with

²¹³ Babalola, A.: *op. cit.* pp. 151-153

Exhibits 3, 3A – 3J, 4, 4A and 4B as well as other documents (such as exhibit 16) such were admitted in evidence through the handwriting analyst to form his own opinion as to how true it is that the signatures on Exhibits 8 and 9 were forged. He did not allow all these to guide him.

A Court including an Appeal Court is entitled and competent to form its own opinion by examining and comparing documents in cases of disputed handwriting. Apart from the way, in which I have shown that the conclusion of the handwriting analysis in this case that the signature on Exhibits 8 and 9 are forgeries has been discredited, I have myself compared the said questioned and undoubted signatures. I think it is absolute mischief to suggest that the signature on Exhibits 20 and 20A made by the handwriting analyst carry the enlarged characters of the said, signatures in comparison with the undoubted signatures. The similarities in the signature are outstanding and in my view beyond contention. There is nothing to suggest simulations in their formation, no blunt end, no ink deposit at the beginning and end, no evidence of pen lifts. The cross-examination of the handwriting analyst confirms these. He himself admitted that “it is true that forgeries have blunt ends” I am satisfied that the signature are those of one person, namely Alhaji Abba Mustapha (P.W.1) it should be noted that for purposes of opinion as to handwriting, handwriting in the Evidence Act is an expression referring to writing and it includes typing.²¹⁴

In *R v Onitiri*²¹⁵ the Appellant against his conviction for forgery He was alleged to have forged some receipts by using a machine to alter them. It was contended on his behalf that typescript was not within the meaning of handwriting in Section 56 of the Evidence Ordinance. Rejecting this contention, Verity, C J upheld the conviction of the

²¹⁴ *Ibid.* pp. 153-154

²¹⁵ (1946) 12 W.A.C.A. 58

appellant²¹⁶. In section 101 (2) provides, the Court may direct any person present in Court to write word or finger or to make finger impressions for the purpose of enabling the Court to compare the word, figures or finger impression so written with any word, figure or finger impression alleged to have been written or made by such person.

Provided that where a Defendant does not give evidence he may not be so directed to write such words or figures or to make finger impressions.

However, this power cannot be used in the case of an accused person who does not give evidence in Court. Where there is expert evidence on the matter, the Judge cannot disregard such evidence and resolve the matter himself by making comparison under this provision²¹⁷ as held in *R v Micheal Adedapo Omisade and Ors*²¹⁸. In order to prove that one of the accused person paid a visit to the naval base in furtherance of an alleged conspiracy the prosecution produced the visitor's book of the Institution. A police handwriting expert gave evidence which would appear to favour the defense that the signature in the book alleged to be that of the particular accused person was in fact not his. The trial Judge discarded the evidence of the expert, described him as expert and resolved the matter himself by comparing the signature on the visitors' book with other writings of the accused and found as a fact that it was the accused who made the signature.

In holding that the trial judge was in error in so doing, Ademola C.J.N said "we do not share the view of the learned Judge that he can so discard the evidence of the handwriting expert, confused though it was" it would have been a different matter had there been evidence from a person familiar with the writing of the accused which

²¹⁶ Babalola, A.:. *op. cit.* p. 154

²¹⁷ *Ibid.* p. 154

²¹⁸ *supra*

contradicts that of the expert. Then in deciding the issue the trial Judge would have been justified in himself comparing the dispute writing with the writing of the accused, with a view to coming to a conclusion as to which of the two witnesses to believe, provided, as it has been admitted above, the writing purports to be of the accused. It must be emphasized that the trial Judge has always been free to compare disputed handwriting with the admitted writing in order to confirm the evidence of an expert or debunk it²¹⁹ as held in *Universal Trust Bank of Nigeria Ltd v Amwazigana Enterprises*²²⁰.

4.3 Evidence of Signature

When the dispute as to the admissibility of document center around its signature, such a signature must be proved to be that of the person who purports to have signed it, then all that has been stated as to proof of handwriting applies *mutatis mutandis*²²¹

Section 101(3)²²² provides; After the final termination of the proceeding in which the Court require a person to make his finger impression, such impression shall be destroyed.

Section 98 (1)²²³ provides;

A person seeking to prove the due execution of a document is not bound to call the party who executed the document or to prove the handwriting of such party or of an attesting witness in any case where the person against whom the document is sought to be proved.

- (a) Produces such document and claims an interest under it, in reference to the subject-matter of the suit; or
- (b) Is a public officer bound by Law to produce its due execution and he has dealt with it as a document duly executed.

(2) Nothing contained in this section shall prejudice the right of a person to put in evidence any document in the

²¹⁹ *Ibid.* p. 271

²²⁰ *supra*

²²¹ Onah, C.O. *op. cit.* p. 20

²²² Evidence Act, 2011 *op. cit.*

²²³ *Ibid.*

manner mentioned in Section 89 and 90 or under section 155 of this Act.

4.4 Presumption as to handwriting in documents twenty years old.

Section 155²²⁴ provides;

Where any document purporting or proved to be 20 years old or more is produced from any custody which the Court in particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and in the case of a document executed and attested by the person by whom it purports to be executed and attested.

Generally speaking, a person seeking to prove the due execution of a document or that the writing on a document (either as the maker of the document or as an attestation witness) is that of a particular person has to call the person who is alleged to have executed the document or made the writing as a witness. But Section 98(1)²²⁵ provides two exceptions to that general rule²²⁶ Also Section 98(2)²²⁷ it must be remembered that as a matter of general proposition the formal proof of the due execution of a document can always be waived by parties to a civil suit, but not by parties to a criminal case²²⁸.

There is no reason why this rule should be confined to civil suits only and why it should not be extended to criminal trials in the High Court where accused is represented by a Legal Practitioner who is satisfied of such due execution and is willing to waive proof thereof. If this rule were extended to such cases this must lead to the reduction of the length of time required for the trial of cases in which the question arises²²⁹

²²⁴ *Ibid.*

²²⁵ *Ibid.*

²²⁶ Aguda, T.A. *op. cit.* p. 268, 269

²²⁷ Evidence Act, 2011 *op. cit.*

²²⁸ Aguda, T. A.: See *Nathaniel Okeke v Okunkwe Obidife and Others* (1965) N.M.L.R. 113, (1965) 1 All N.L.R. 50

²²⁹ Aguda, T.A *op. cit.* p. 269

It is submitted that, both expert and non-experts opinion is relevant in assessing handwriting to aid the Court in determining who actually is the writer of the document for its admissibility. The Court on its motion may invite the person to write and compare the writing and signature. Immediately after the comparison the document where the person wrote on must be destroyed at the end of the proceedings. Where the document is written by a blind or illiterate person, for its admissibility must have illiterate Jurat in compliance with the Illiterate Protection Law failure, it will be inadmissible in evidence²³⁰.

In view of this study, this chapter demonstrated the basis of proof of documentary evidence, the contents, foundation to be laid for proof, admissibility and proper custody of documents, proof of execution of documents and evidence of handwriting. It has also shown that there is need to merge the sections that provided for circumstances in which secondary evidences can be admissible and the modes of proving the secondary evidence.

²³⁰ See *Baclays Bank v Hassan* (1961) All N.L.R. 836.

CHAPTER FOUR

ADMISSIBILITY OF DOCUMENTARY EVIDENCE UNDER SECTIONS 83 AND 84 OF THE EVIDENCE ACT, 2011

4.1 Introduction

The main aim of this chapter is to examine the various conditions or procedures that must be complied with before a document made by the maker can be admissible in any proceeding under Sections 83 and 84 of the Evidence Act 2011; with the view to discuss the problems faced by persons seeking to tender documents under Sections 83 and 84 of the Evidence Act 2011.

Sections 83 and 84¹ are exceptions to hearsay evidence because where oral evidence can be given, the sections allow documentary evidence to be tendered by another person once the conditions prescribed in the Evidence Act are complied with.

Section 83 of the Evidence Act 2011 is a reproduction of Section 91 of the repealed Evidence Act 1990 which is also a reproduction of Section 1 of the English Evidence Act 1938. It makes certain statements contained in document admissible subject to specified conditions, some forms of the statement so admissible are hearsay. In fact the reason for its provision is to avoid certain difficulties created by a strict adherence to the hearsay rule.

Another effect of the provision is that it makes admissible in evidence a document which under the Common Law could only be used for refreshing memory by its maker while testifying. The Common Law does not allow a witness to state in his evidence-in-chief a former statement made by him which are consistent with his present testimony. Thus in an action where a worker's case was that she sustained injuries while

¹ Evidence Act, Law of the Federation of Nigeria, 2011

performing her duties under her employer and not at home, previous statement by her in support of her contention was rejected as evidence in the action. For instance, in the case of *Jones v South Eastern and Chatham Rail Company's Managing Committee*² such previous statements were described as self-serving or self corroborating statements. The provision of Section 91³ (now section 83)⁴ applies to any proceeding and solely to statements in documents. It is applicable to arbitration. As the section does not provide any special definition of “statement” and “document” these two terms bear their general meanings under the Act.

Although in practice, its application is mainly to private documents, it has been applied to public documents in an English case of *Andrew v Cordiner*⁵. Discussion of the provisions of Section 83 and 84 Evidence Act 2011 have been deemed to be interesting because of the decisions by the Courts and has made it possible for a Court to admit a statement made by another person once proper foundation is laid which having regard to other rules of admissibility, such a statement would not have been admissible.

“Computer output” is defined as

“a statement or representation (whether written, pictorial, graphical or other form) purporting to be a statement or representation of fact –

- a. produced by a computer or
- b. accurately translated from a statement or representation so produced”⁶

² (1917) L.J.K.B. 775

³ Evidence Act, Cap. 112 Law of the Federation of Nigeria 1990

⁴ Evidence Act, 2011 *op. cit.*

⁵ (1947) K.B. 655

⁶ Babalola, A.: (2001). *Law and Practice of Evidence in Nigeria*. (Sibon Books Ltd. Ibadan, Nigeria.) p. 256

There is a problem of whether computer storage devices are themselves documentary evidence.⁷ This issue came up because of the requirement of Section 97(1) (h) and Section 97(2)(e) (now section 89(1)(h) and Section 90(1)⁸. In *Anyeabosi vs R.T. Briscoe*⁹ the Court admitted a computer printout as secondary evidence of entries made in a bankers books by section 90(1) (e) of the Evidence Act 2011.

Another important issue is bordered on the nature of computer signature which is very essential. Evidence Act 2011 did not specify the nature of the signature. But in practice and technically, signatures are introduced into documents using digital systems such as signature pad whose function is to add a signature to a document e.g. an international passport, an agreement, a banking document etc. The nature or to use a computer term the formats include portable data format (PDF) or any graphic format or type of computer storage file nature such as jpeg (Joint Photographic Export Group format), bitmap, Tiff, png or even part of word processors such as Microsoft Word, Wordstar 2000 or even as a visual or video file (e.g. a *.wmv, *.3gp, *.mp4 where asterisk (*) represents any applicable name) which the Evidence Act 2011 did not provide for in terms of its variety or specificity.

Signatures, can exist electronically as a computer file with its own independent computer name e.g. signaturekeny.jpg without being part of a textual document with textual content. The nature of computer signature is not provided for in the Evidence Act 2011 even though for practical purposes it may be assumed that the Courts may request for comparison as stated in Section 101(1) and (2) of the Evidence Act 2011.

⁷ *Ibid.* pp. 244-245

⁸ Evidence Act, 2011 *op. cit.*

⁹ (1987) 3 N.W.L.R p. 84

Computer signature has four vital components: Signature Capture, Signature File Storage and Signature File Transmission and signature integration which could be carried out using specific or general computer devices. Technically the definition of what constitutes a computer is broader than the layman's view which is restricted to personal computers and laptops.¹⁰

Device for capturing signatures are many for example signature can be captured using cameras or signature pads that allow individuals to handwrite their signatures and the digital signature is now saved in a computer file format. This digitally stored signature can now be transmitted into any computer document using import, scan into, insert etc and integrated into the document.

The methods and systems of recording data, information, facts or transactions in Nigeria and the world at large have received different stages of developments and changes. Records of human endeavours civil or criminal, private or public were made, kept and generated first by use of materials such as parchments stones, marble clay and even metal. Thereafter, recording of facts or statements in writing got on papers. Thus communications and transactions has been generally recorded on papers as specie of documents.

However, not long ago, the advent of Information Technology (IT) provided another shift and development in the way and manner in which we record or document our human transaction. The Information Technology brought about new electronic modes of communication and recording of business, governance, education, banking, crimes etcetera. This led the world in general and Nigeria in particular, to move away from

¹⁰ Ikeorha, D.: (2001) *Dynamics of Computer Strategies and Documentation*, (unpublished), Tutorial Manual for Non-Computer Professionals, Kaduna, Nigeria, p. 35

paper based systems of recording data, facts and information as traditionally done, to making such records and transaction electronically.

Having analyzed the problems related to the admissibility of statement made from computers, it is essential to recognize that statements in documents produced by computers are admissible in evidence as secondary evidence as established in *Anyeabosi v R.T Briscoe*¹¹. By virtue of Section 84 of the Evidence Act 2011, where proper foundation has to be laid before the admissibility of the secondary evidence which was not laid the opposing party should promptly raise an objection on the admissibility before such secondary evidence is allowed to be tendered.

Therefore, this Chapter is structured as follows: Section 83 is based on the appraisal of the rules on the admissibility of documentary evidence as to fact in issue which is broken into five segments of sections, while Section 84 is based on admissibility of statement in document produced by computer. It also has five sub-sections to be discussed on.

4.2 APPRAISAL OF THE RULES ON ADMISSIBILITY OF DOCUMENTARY EVIDENCE AS TO FACTS IN ISSUE UNDER SECTION 83

4.2.1 Admissibility of Document made by a Person in any Proceeding

Section 83 (1)¹² provides;

In any proceeding where direct oral evidence of a fact would be admissible, any statement made by a person in a document which seems to establish that fact shall, on production of the original document, be admissible as evidence of the fact if the following conditions are satisfied:

- (a) if the maker of the statement either;

¹¹ *supra*

¹² Evidence Act 2011 *op. cit.*

- (i) had personal knowledge of the matters dealt with by the statement,
- (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with by it are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matter; and
- (b) if the maker of the statement is called as a witness in the proceeding;

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his body or mental condition to attend as a witness, or if he is outside Nigeria and it is not reasonably practicable to secure his attendant, or if all reasonable efforts to find him have been made without success.

4.2.2 If the Maker of the Document had Personal Knowledge of the Matters Dealt with by the Statement

A document is admissible in evidence, if it is tendered by the person who prepared it and not by the person who signed it. Although the latter might be available but not called to testify on it¹³. The admissibility of documentary evidence in place of direct oral evidence, particularly if the documentary evidence is in form of a statement tending to show or establish the fact which is in issue, provided the maker of the statement had personal knowledge of the matters dealt with therein.¹⁴

4.2.3 Where the Document Forms Part of a Record Purporting to be a Continuous Record

Under category (b), it is mandatory that the statement or document forms part of the “continuous record”. In the case of *Ioannou vs Demetriou*¹⁵, the Court per Lord Tucker at page 92 held that “the mere existence of a file containing one or more documents of a similar nature dealing with the same or kind of subject matter does not necessarily

¹³ Yargata, B.N.: *op. cit.* p. 49 See also *Ordia v Piedmont (Nig) Ltd.* (1995)2 N.W.L.R. (pt. 379) 516

¹⁴ Babalola, A.: *op. cit.* p. 95

¹⁵ (1952) A.C. 84

make the content of the file a continuous record within the meaning of the section”. From the foregoing, it does appear that the requirement can only be satisfied where the information recorded therein forms part of a continuous record of the matters dealt with it.¹⁶

The opening sentence in Section 83(1)¹⁷ quoted above, seems to indicate that a document, the subject matter of admissibility under Section 83¹⁸ is a mere documentation of oral evidence. It stands to reason that such a document must be regulated by Section 126¹⁹ to the end that it ought to be tendered by someone who said he saw, heard or otherwise perceived the fact sought to be proved by it. But as stated above, Section 83(1) (a)(ii)²⁰ has dispensed with that requirement. It is for this reasons such as this, that Section 83²¹ is sometimes said to have made provision for the “admissibility of documentary hearsay”.²² Section 83 (1) Evidence Act 2011 applies to the statement in documents in any proceeding.

Section 83(1)²³ provides for the two distinct situations where the maker has personal knowledge of the matter dealt with in the document and called as a witness in the proceedings. The other is where the document in issues is or forms part of a continuous record made in the performance of a duty to record information supplied to the maker by a person who had personal knowledge of the matters and he is called as a witness. It is the latter situation which created problem in its application as the document must form part of a “continuous record.”

¹⁶ Yargata, B.N.: *op. cit.* p. 49

¹⁷ Evidence Act, 2011 *op. cit.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² Ashi, VSB.: *op. cit.* p.140, 141

²³ Evidence Act, 2011 *op. cit.*

4.2.4 If the Maker of the Statement is Called as a Witness in the Proceeding

In *Adekunle Coker v Alberf Fahat*²⁴, the Plaintiff bought the premises in dispute in 1950 with a conveyance from the Vendor, the conveyance contained recitals proving the Vendor's title and the right to convey. As the Vendor who was dead had personal knowledge, it was not necessary to call him as a witness under Section 91 (1)(a)(i) and (b) (now Section 83(1)(a) (i) and (b))²⁵. The defendant contended that before a statement in a document would become evidence of a fact under Section 83(1)²⁶ the requirement that direct or oral evidence of the fact would be admissible had to be satisfied. It was held; "That the mere recital was not sufficient evidence of the fact contained in it and that before a statement contained in a document can become evidence of a fact under Section 83(1)²⁷ the requirement that direct oral evidence of the fact would be admissible has to be satisfied". Section 162²⁸ raises a presumption as to the correctness of a recital in a document 20 years old, while Section 83(1)²⁹ provides for the admissibility on certain conditions being fulfilled of a statement in a recital no matter what the age of the document containing it.³⁰

In *Coker v Farhat*³¹ the Court rejected a recital in a conveyance as not admissible under Section 91 (now Section 83)³² Here, the recital traced the Vendor's root of title to a Will. But the Will itself was not tendered, only the conveyance wherein it was recited. It was held that if the Vendor had been alive he could not have given evidence of the content of the Will. The Court's reasoning is justifiable on the basis that, bearing the

²⁴(1952) 14 W.A.C.A 116

²⁵ Evidence Act, 2011 *op. cit.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Babalola, A. *op. cit.* p. 199

³¹ *supra*

³² Evidence Act, 2011 *op. cit.*

recognized exceptions under section 128(1)³³ the Will ought to speak for itself. However, in *Ogunsanya v Taiwo*³⁴ the scenario was different. Here the recital in conveyance stated that the Vendor was the head of the Family that originally owned the Land in dispute. The Vendor had died when this proceeding commenced and the issue was whether he was truly the head of the Family. The Court allowed the conveyance to be put in evidence in proof of that fact because had the man been alive he could have led oral evidence in proof of the same fact.³⁵

4.2.5 The Discretion of the Court to Admit a Statement Made by the Maker in any Proceeding

Section 83(2)³⁶ provides

“In any proceeding, the Court may at any stage of the proceeding, if having regard to all the circumstance of the case it is satisfied that undue delay or expense would otherwise be caused order that such a statement as is mentioned in subsection (1) of this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence notwithstanding that;

- (a) The maker of the statement is available but is not called as a witness; and
- (b) The original document is not produced, if in lieu of it there is produced a copy of the original document or of the material part of it certified to be a true copy in such manner as may be specified in the order or as the Court may approve, as the case may be”.

Section 83 (2)³⁷ vests a discretion in the trial Court to admit a statement mentioned in Section 83(1)³⁸ or a certified true copy even though the maker of the statement is available and not called as a witness, and the original not produced if in the circumstance of the case, the Court is of the opinion that undue delay or expenses

³³ Evidence Act, 2011 *op. cit.*

³⁴ (1970) I ALL N.R. 147

³⁵ *Ashi, VSB. op. cit.* 143

³⁶ Evidence Act, 2011 *op. cit.*

³⁷ *Ibid.*

³⁸ *Ibid.*

would otherwise be caused. The discretion must not preclude the other party from being heard that is to dispense with the rule of natural justice of *audi alteram partem*.³⁹

A summary of requisite foundation as could be gathered from the above quotations is that the applicant must show either that the maker is dead or that although he is alive undue delay would be caused in an effort to secure his attendances in Court. It cannot however, be highly assumed that the Court would exercise its discretion to admit the document as a matter of course. Rather, if Counsel desires such discretion he must lay the foundation for it⁴⁰

4.2.6 The Inadmissibility of Document Made by an Interested Person When the Proceeding is Pending or Anticipated

Section 83(3)⁴¹ provides:

“Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish”.

Section 8 (3) Evidence Act 2011 can be said or treated as follows. Two phrases namely, “A Person Interested” and “When Proceedings were Pending or Anticipated” need elucidation.⁴² In *Barkway v South Wales Transport Co. Ltd.*⁴³ It was held that a statement made by a person interested at a time when a dispute was anticipated was inadmissible, as a person interested is not confined to the maker of the document. It means any person, whatsoever, provided that he is interested. There must be a real likelihood of bias before a person making a statement can be said to be person interested. Whereas a person who has no temptation to depart from the truth on one side

³⁹ Babalola, A. *op. cit.* p. 199

⁴⁰ Ashi, VSB. *op. cit.* pp. 147-148

⁴¹ Evidence Act, 2011 *op. cit.*

⁴² Babalola, A.: *op. cit.* p. 199

⁴³ (1949) I K.B. 54 at p. 61

or the other, a person not swayed by personal interest but completely detached, judicial, impartial and independent is not a person interest.

In *Miss Ihuoma Nwangwa & Anor v Mrs. Eugbaria E.U Uzoma Ubadan*.⁴⁴ In the instant case, as there is overwhelming evidence that Mr. Ubani who executed Exhibit “N” is a person interested in the litigation and that the Exhibit was made when proceedings were pending, Exhibit N was therefore, wrongly admitted.⁴⁵ The essence of the test for determining whether a person is interested under Section 83 (3) Evidence Act 2011 is whether the circumstance are such that the statement in question is likely to be tainted by incentive to conceal or misrepresent facts. It is evident that the test is not limited to the mere evidence of direct pecuniary or financial interest, even though where such exists there would be no need to look further for a determinant of the maker’s interest the pecuniary or financial interest may be indirect, as were the result of the proceedings may lead to financial liability of the maker.

A statement does not become inadmissible if made by a person interested unless the proceeding involved “A dispute as to any fact which the statement may tend to established”.⁴⁶

The contentious issues under this section are personal interest, pecuniary interest and employment interest shall be discussed under this section.

Personal interest needs not always reside in a party to the proceedings. Rather, it works in this way; where a person has personal knowledge of the facts and makes or signs a document, it is his interest in the outcome of the proceedings that is important, notwithstanding that he is not a party and he has no personal knowledge of what he

⁴⁴ (1997) 10 N.W.L.R. (pt.526) 559 at 572

⁴⁵ Babalola, A. *op. cit.* p.199, 200

⁴⁶ *Ibid.* p. 201

writes but makes or signs the document, based on facts supplied to him by someone who has personal knowledge of those facts. It is the interest of the suppliers of the facts that is in issue, whether or not the supplier of the facts is a party to the proceedings. Thus, in *Barkway v South Wales Transport Co. Ltd.*⁴⁷ The Defendant Company employed the service of a tyre tester to determine the road worthiness of the type of its vehicle which had been involved in an accident. In previous proceedings the tyre tester had given evidence of the result of his test but died before his attention was needed again in the present proceedings. The previous testimony was sought to be tendered in the present proceedings under an equivalent of Section 83⁴⁸. But it was rejected because the tyre tester, though not a party to the previous proceeding was considered as someone interested in its outcome, since his skill and competence as a pneumatic specialist would be exposed to doubt if the result of his test failed to impress the Court.

Again in *Susano Pharm Co. Ltd. v SOL Pharm Ltd.*⁴⁹ the Respondent, a Foreign Company, executed a power of attorney wherein it appointed P.W.1 as its attorney to enforce its contractual rights. Before the Federal High Court, the Defendant's (Appellants) Counsel objected to its admissibility on grounds, among others, that it was made on a day after the proceedings had been filed. On this basis he submitted, the document (Exhibits 'K') should not be admitted in evidence. The trial Court had no difficulty in recognizing that the Donee had no personal interest to protect regarding the contents of the document. In relation to the outcome of the proceedings, rather, the interest in issue here ought to be that of the Donor. But in this case, unlike that of *Barkway*, the 'donor's skill and competence was not an issue; and its corporate interest

⁴⁷ (1950) 1 All E.R. 392

⁴⁸ Evidence Act, 2011 *op. cit.*

⁴⁹ (2000) F.W.L.R. (pt.10) 1595

has not been shown to be protected by its contents any more than merely instructing the Donee to defend his interest.

The recent case of *Agballah v Chimaroke Nnamani & Ors*⁵⁰ is another good example of personal interest. This was an election petition filed at the Governorship Election Tribunal for Enugu State. The governing statute is the Electoral Act 2002, section 146 (1) provides that; an order for an inspection of a polling document or an inspection of a document or any other packet in the custody of the Chief National Electoral Commissioner or any other officer of the commission may be made by the Electoral Tribunal or the Court if it is satisfied that the order required is for the purpose of instituting or maintaining an election petition. Pursuant to the above provision, the Appellant, obtained an order from the Tribunal to inspect electoral materials before filing a petition before it. Beside the electoral materials obtained pursuant to the order of the tribunal, PW1 also prepared a report (marked 'rejected A') partially based on his observations during the inspection indeed, the PWI described himself as the Legal Adviser of the APGA and its Director of operation and logistics. The appellant described him as his 'commissioned agents/inspector'. When the PWI tendered the said report ("rejected A") it was rejected as a document made by a person interested when proceedings were anticipated or contemplated. In the words of Fabiyi J.C.A.

No doubt, the report marked 'rejected A' prepared by the PWI, an agent of the Appellant and an interested person at the time when proceeding were anticipated, was designed to blur the vision of the Tribunal. It is clearly inadmissible vide the dictates of section 83 (3) of the Evidence Act⁵¹...Having regard to the part played by the Appellant and taken together with his further testimony at page 216 of the record... It goes without saying that with him having prepared the report, the subject matter of the controversy, it is obvious that he was a person interested in the outcome of the instant proceedings at the time he prepared same.

⁵⁰ (2005) All F.W.L.R. (pt. 245) 1052

⁵¹ 2011

In more frontal language, Dongban-Mensem, J.C.A, in her supporting Judgment stated that;

The palpable and undeniable desire of every normal human being, and particularly so in Nigeria, who contests in an election is to win. Thus knowing the extent of his interest, the Petitioner erred irretrievably when he commissioned his agent to be his inspector and witness after obtaining the order of the Tribunal to inspect.

Pecuniary interest might just be an aspect of personal interest, in the sense that one's personal interest in the proceedings could be the pecuniary benefit or loss he stands to gain or incur should the judgment go one way or the other.

But because personal interest may not always be pecuniary or financial in nature (as illustrated by the cases of *Barkway and Agballah* above) it is considered safe to treat it separately here.

There is an English authority for the view that a professional consultant, such as a consultant chemist or some other independent contractor engaged to carry out valuation or prepared some other kind of report for a party to the proceeding could be someone interested, to the extent that the outcome of proceeding may affect the payment or non-payment of his fee. If the action succeeds, he is more likely to be paid and promptly too. But should his client lose in the suit, his fear naturally would be how to recover his full payment and as promptly as he desire. This was the ratio of the decision in the English case of *Plomien Fuel Economizer Co. Ltd. v National Marketing Co Ltd*⁵² which was an action to recover damages for a breach of contract and the tort of passing-off. The Plaintiff engaged a Chemist to test the products the subject matter of the action. The report he produced at the end of his exercise was tendered but rejected by the Court as one produced by a person interested in the result of the proceedings as this

⁵² (1941) Ch. 248

might affect the prospect of his pay. But a contrary position was taken in *Gbadamosi v Kabo Travel*⁵³ where an Estate Valuer was engaged by the Respondent to value property the subject of a mortgage sale. At the time of valuation, proceedings were anticipated and the report was intended to be used as evidence in Court. The Appellant's attempt to impeach the report on the basis of Section 91(3) (now section 83(3))⁵⁴ was unsuccessful. The Court of Appeal equally dismissed an appeal anchored on this, among other issues. Ayo Salami. JCA had this to say;

Evidence of experts are not excluded from being admitted in Court by virtue of section 83 (3) of the Evidence Act 2011. They are mere opinions of the Experts and not the hard facts on which the cause of action is founded. To form an opinion on the technical matter, the Court has no alternative but to fall back on the opinion of an Expert or persons technically equipped to assist them provided always that such an Expert opinion is relevant. There cannot be a situation of that nature where the evidence will not be prepared in anticipation of an action. In the instant case, the relevant value of the property in dispute is the one at the time the cause of action arose and that has to be determined when the action has already commenced or when same is anticipated.

Closely associated with the above point is the dimension of the interest which an employee possesses in relation to proceedings instituted by or against his employer. Judicial attitude so far seems to lean in favour of protecting the employee against any arbitrary linkage of his interest with that of his employer. Rather a cautious and critical approach appears more prevalent here. However, the elements which have been identified as capable of making an employee an interested person to the end that his statement would be rendered inadmissible include consideration such as;

- (a) Whether the employee's skill or competence is involved
- (b) His conduct in relation to the events which led to the litigation is directly called in question; or

⁵³ (2000) 8 N.W.L.R. (pt. 668) 243

⁵⁴ Evidence Act, 2011 *op. cit.*

(c) His association with the events is otherwise called in question.

In *Gwar v Adole*⁵⁵ the respondent was given a plot of land in exchange for another by the Benue State Government. This land however formed part of larger parcel of land which the appellant and his co-heirs inherited from their late father who was the first settler on the land. The respondent filed an action against the appellant claiming a declaration that he is the owner of the land in dispute. At the conclusion of the trial, the trial Court gave judgment in favour of the respondent. The appellant was aggrieved with the judgment and he appealed to the Court of Appeal. He also challenged the refusal of the trial Court to admit some documents he tendered on the ground that they were made when proceedings were pending. In resolving the appeal, the Court of Appeal considered the provision of section 91(3) of the Evidence Act 1990 (now section 83(3) of the Evidence Act 2011) among other provisions.

Held: Magaji, J.C.A. The word “anticipated” used in section 91(3) of the Evidence Act 1990 (now section 83 (3) Evidence Act 2011) could be define to include “likely”. Also “a person interested in the content of the section is not confined to the maker of the document but to any person whoever, provided that he is interested. Section 91(3) of the Evidence Act 1990 (now section 83(3) of the Evidence Act 2011) provides for a situation in which documents are made inadmissible where the maker being an interested person, prepared same when proceedings were pending or anticipated. The section was enacted to render inadmissible a document prepared by an interested person in order to defeat through its clear wordings the course of justice. Such a document is rendered inadmissible when the maker knows about the pendency of the suit to which the document is made and even where he does not know about the existence of suit, he anticipated that a dispute might arise. The wisdom in having the section is that a person interested might easily be tempted to depart from telling the truth by reason of the interest he has. In the instance case, having regard to the provisions of section 91(3) of the Evidence Act 1990 (now section 83(3) of the Evidence Act 2011), the contents of page 39 and 41 of Exhibit 10 are

⁵⁵ (2003) 3 N.W.L.P (pt. 808) 516 CA.

inadmissible as they were made when proceedings were being anticipated.”

It must be remembered that “a person interest” is not confined to the maker of the document. It means “any person whatsoever provided that he is interested”⁵⁶. A person not “interested” and therefore does not come under this provision is a person who has no temptation to depart from the truth on one side or the other a person not swayed by personal interest, but completely detached, judicial, impartial, independent. There must not be real likelihood of bias before a person making a statement can be said to be a “person interested”.

In *Bearmans L.T.D. v Metropolitan Police District Receiver*,⁵⁷ a night watchman had made a statement to an insurance assessor concerning the circumstance in which the Plaintiff’s premises were broken into by criminals who were more than three in number. In proceedings under the Riot Damage Act, the Master admitted the statement and this was held to be correct, the night watchman could not in the circumstance be regarded as a person interested. The mere fact that the maker of a statement is the servant of one of the parties to the suit will not make him a person interested. But where the servant or the other employee has a direct interest (financial or otherwise) he will be considered as a person interested.⁵⁸

It is submitted that, in respect to my submission pursuant to section 83(3) Evidence Act 2011, looking at the provision of Section 83(1) and (2), once proper foundation for the admissibility of document, whether private or public, is laid, that document made by the maker can be tendered by another person in a suit after laying the proper foundation that either the maker is dead, or insane, cannot be found, is unfit by reason

⁵⁶ Aguda, T. A.: (1998), Law and Practice Relating to Evidence in Nigeria. (MIJ Profesional Publishers Ltd. Lagos, Nigeria) p. 237. See *Evon v Noble*. (1949) I K.B. 222, 225

⁵⁷ (1961) I W.L.R. 634

⁵⁸ Aguda, T.A. *op. cit.* p. 237, 238

of his bodily or mental condition, or if he is outside Nigeria and it is not practicable to bring him to Court, and undue delay or expenses will be caused, the Court can dispense with the appearance of the person who made the statement and admit same in evidence.

Section 83(3)⁵⁹ now crowned the whole matter by providing that, if the document to be tendered is made by a person who is involved in the case, that nothing will make it admissible if tendered by another person because the maker as an interested person, made the document when the suit is already pending in the Court or that he wants to institute an action and he decided making the statement.

Notwithstanding the exception to the rule under Section 83(3)⁶⁰ where statement was made when a case was pending or anticipated, it will still be admissible because the maker is not an interested person. For instance experts who are independent persons like Medical Doctors, Surveyors, Legal Practitioners etcetera. Lets illustrate using Medical Doctors as an instance, where Miss X had an accident and was taken to Dr. Y's hospital while the treatment was going on the Dr. Y made some prescriptions and diagnosis which he wrote down after the total charge, there and then, Miss X's parent instituted a civil suit for damages, the statement made by the Doctor Y can be tendered by another person and it will be admissible because it is an evidence of the fact that there was an injury in which the Doctor Y is not involved in that matter and he is not an interested person.

4.2.7 Admissibility of Document Signed or Initialed by the Maker.

Section 83 (4) provides:

For the purpose of this section, a statement in a document shall not be deemed to have been made by a person unless the document or the material part of it was written, made or

⁵⁹ Evidence Act, 2011 *op. cit.*

⁶⁰ *Ibid.*

produced by him with his own hand, or was signed or initiated by him or otherwise recognized by him in writing as one for the occurrence of which he is responsible.

Under this Act the maker of a document is limited to who writes, signs, initials, makes or produces it, or part of it with his own hand, or recognized by him in writing as one for the accuracy of which he is responsible. In *Ordia v Piedmont (Nig) Ltd*⁶¹, the Court of Appeal, in holding that a document written by a staff of a company and signed by the Managing Director, was admissible held further that the tendering of the document through PW1 who testified as having written the document signed by his Managing Director was proper having regard to Section 91(4) (now Section 83(4) Evidence Act 2011) which states that a document could be written by somebody and signed by another particularly in the administration of companies where the Managing Director signs the document prepared by his subordinates. From this provision, a witness tendering or identifying the document for the purposes of its admissibility is obliged to identify the maker by the written signature or initials before producing same.⁶²

In *Powe Re, Powe v Barclays Bank Ltd*.⁶³, it was held that the note written by a solicitor, but typed by somebody is admissible provided he saw it, checked and wrote on it to establish this. It is submitted that the handwriting, signature or initial of the maker must be proved by (a) calling the writer, (b) calling a witness who saw the document signed, (c) by comparison of the writings of the maker by someone who has done comparison. In *A.C.B. Plc. v Haston (Nig) Ltd*.⁶⁴ the Court of Appeal per Achike J.C.A. held,

...to sign a document or place one's mark or to thumb impress a document as it applies to any person implies to affix one's signature or that which he regards as his mark

⁶¹ *supra*

⁶² Yargata, B.N. *op. cit.* p. 57

⁶³ (1956) p. 110

⁶⁴ (1997) 8 N.W.L.R. (pt. 515) 110 at 125

or to affix his thumb impression on the document... the requirement for introduction of one's signature on a document prima facie envisages the act of affixing what a person affirms to be his signature and this may well be his mere mark, or sign or simply writing his initials thereon. Whatever is done to represent a person's signature, it is manifest that it requires doing something overt on the document which is recognizable by any interested person. It is therefore untenable to hold that merely typing of a person's name on a document, without more will by any imagination amount to affixing one's signature therein.⁶⁵

Section 83(4)⁶⁶ provides the answer, namely "...unless the document or the materials part of it was written made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible" This Section 83(4)⁶⁷ along with Section 83(1)⁶⁸ spell it out that it must be the original document. As a matter of fact, there can be no great difficulty in determining which of the several documents is the original, but it is sometimes necessary to have regard to the purpose for which the documents are being used.⁶⁹

4.2.8 Basis for Admissibility of Certificate of a Registered Medical Practitioner

Section 83(5)⁷⁰ provides:

For the purpose of deciding whether or not a statement is admissible as evidence by virtue of this section, the Court may draw any reasonable inference from the form or content of the document in which the statement is contained, or from any other circumstances, and may; decide, whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a registered Medical Practitioner.

This provision gives the Court discretion to act on a certificate purporting to be a certificate of a registered Medical Practitioner for its basis of admissibility while

⁶⁵ Yargata, B.N. *op. cit.* p. 57 to 58

⁶⁶ Evidence Act, 2011 *op. cit.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Onah, C.O.: (1996). *Evidence Law In Action.* (Eunis Educational Publishers, Enugu Ukwu, Nigeria.) pp.10-11

⁷⁰ Evidence Act, 2011 *op. cit.*

drawing an inference from the form and content of the document in which it may decides whether or not a person is competent to attend as a witness.

It is submitted that, the summary of Section 83(1) and (2)⁷¹ is that where oral evidence is admissible in any proceeding, any statement made by a person in a document which seems to establish that fact is admissible if the original document is produced, provided the conditions mentioned in Section 83(1)(a) and (b)⁷² are satisfied.

5.0 ADMISSIBILITY OF STATEMENTS IN DOCUMENTS PRODUCED BY COMPUTERS UNDER SECTION 84

5.1 Admissibility of Computer Generated Document and Conditions to be Laid

Section 84(1) and (2)⁷³ provides:

Section 84(1)⁷⁴ 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.

(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

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ *Ibid.*

- (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 87(b) of the Evidence Act 2011 provides that secondary evidence includes –

- (b) “copies made from the original by mechanical or electronic processes which in themselves ensure the accuracy of the copy and copies compared with such copies”;

Section 88⁷⁵ provides that;

“Documents shall be proved by primary evidence except in cases mentioned in this Act”.

Section 89⁷⁶ provides;

That secondary evidence may be given of the existence, conditions or contents of a document when

- (g) the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection; or
- (h) the document is an entry in a banker’s book.

Section 90(1)⁷⁷ provides that the secondary evidence admissible in respect of the original document referred to section 89 are as follows:

- d. in paragraph (g) evidence may be given as to the general result of the documents by any person who has examined them and who is skilled in the examination of such documents and
- e. in paragraph (h) the copies cannot be received as evidence unless it is first be proved that
 - (i) the book in which the entry copied were made was at the time of making one of the ordinary books of the bank,
 - (ii) the entry was made in the usual and ordinary course of business,
 - (iii) the book is in the control and custody of the bank, which proof may be given orally or by affidavit by an officer of the Bank and

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

- (iv) the copy has been examined with the original entry and it correct, which proof must be given by some person who has examined the copy with the original entry and may be given orally or by affidavit”.

Babaji Bala observed⁷⁸ that as far back as 1969, the Supreme Court of Nigeria had taken a somewhat liberal and pragmatic view and interpretation on what amount to books of account under Section 37 (now 38) (now section 89 and 90 section)⁷⁹. The issue was whether or not computer statement of accounts was admissible in evidence under the above section of the Evidence Act. The Supreme Court in *Esso West Africa Inc. v T. Oyegbola*⁸⁰ held that

Besides, section 37 (now section 89 and 90 of the Evidence Act does not require the production of books’ of account but makes entries in such books relevant for purposes of admissibility... The Law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of the computer. In modern times reproduction or inscription process are common place and section 37 (now section 89 and section 90) cannot therefore apply to books of account... so bound and the pages... not easily replaced.⁸¹

Also Nnamani JSC had in 1988⁸² expressed the view that

One has to be circumspect in interpreting section 96 (now 97) and (now 89) in the light of banking procedures and gadgets such as computers being used” these and many more liberal interpretations of the same provisions of the Evidence Act relating to documentary evidence are indication that computer evidence (particularly its printout)

⁷⁸ Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria. p. 146

⁷⁹ *Ibid.*

⁸⁰ (1969) NML .R. p. 198

⁸¹ Lord Aguda (as he then was) in *Esso West Inc. vs Oladiti* (1968) N.W.L.R. p.453. See also the Supreme Court in *Festus Yusuf vs A.C.B.* (1986) 4 S.C. p.1 and the Court of Appeal decision Per Onalaja J.C.A. in *Chief Joseph Ogolo vs I.M.B. (Nig.) Ltd.* (1995) 9 N.W.L.R. (pt. 419) p. 314 C.A. taking judicial notice of how commercial and banking operations, in keeping of accounts by the old system, has changed to computer. Quoted in Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria. p. 146

⁸² *Oguma vs IBWA* (1998) 1 NSCC Vol. 19 (pt. 1) p. 395 at 412 Quoted in Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria. pp. 146-147

and other electronically generated or stored information using electronic gadgets and devices brought by modern system of information technology can be defined as documents and documentary evidence.

The conditions for admissibility of computer output under the provisions is concerned with establishing that the device from which the statement was generated had been regular, routine and substantially faultless during the period when the document was produced.⁸³

In *Dr. Imoro Kubor vs Seriake Henry Dickson*⁸⁴ the appellant presented a petition on the 1st day of March 2012, the appellants presented a petition before the Governorship Election Tribunal, holden at Yenagoa, against the respondent claiming three (3) reliefs. The appellants' case was that the 1st respondent was not qualified to contest the election into the office of Governor of Bayelsa State which was held on 11th of February, 2012 because prior to and up to the date of the election, there was a pending litigation in Court over the question of who was the candidate of the 2nd respondent for the election.

In reaction to the facts pleaded in the petition, the 3rd respondent filed a reply in which he pleaded, inter alia, that on the 1st day of January 2012, the Federal High Court, Abuja ordered the 3rd respondent to restore the name of the 1st respondent as the 2nd respondent's candidate for the Governorship Election of Bayelsa State, which order was complied with by the 3rd respondent. The order of Federal High Court was admitted as exhibit "N". In the final address of the appellants, the learned Counsel for the appellants abandoned relief No (b) by urging on the tribunal to grant reliefs set out in paragraphs 9 (a) and (c) of the petition.

⁸³ *Babalola A.: op. cit.* p. 272

⁸⁴ (2013) 4 N.W.L.R (pt. 1345) 534, 540, 549-551

In its judgment, the Tribunal rejected exhibit “D” and “L” which were internet print outs of punch newspaper and list of candidates posted on INEC’s website respectively, tendered from the bar and admitted in evidence by the appellant’s counsel.

The appellant’s appeal to the Court of Appeal was dismissed. Still aggrieved, the appellants further appealed to the Supreme Court.

Section 34⁸⁵, 2010 as (amended) states as follows: “The commission shall at least 30 days before the day of the election, publish by displaying or causing to be displayed at the relevant office or offices of the Commission and on the Commission’s website, a statement of the full names and addresses of all candidates standing nominated”.

On the admissibility of computer-generated document or document downloaded from internet governed by Section 84 of the Evidence Act 2011, the Supreme Court held that a party that seeks to tender in evidence a computer generated document need to do more than just tendering same from the bar. Evidence in relation to the use of the computer must be called to establish the above conditions in the instance case there was no evidence on record to show that the appellants in tendering exhibits “D” and “L” satisfied any of the above conditions. In fact they did not, as the document were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay necessary foundations for their admission of e-documents under Section 84 of the Evidence Act, 2011. Since the appellants never fulfilled the pre-conditions laid down by Law, exhibit “D” and “L” were inadmissible as computer-generated evidence/documents.

On type of secondary evidence of public document admissible the only admissible secondary evidence of a public document is a certified true copy of same. In the instant

⁸⁵ Electoral Act, 2010 (as amended)

case, exhibit “D” which was an internet print out of the public newspaper, was by nature a secondary evidence of the original by reason of the provision of section 85 and 87(a) of the Evidence Act 2011. On the authority of Section 90(1) (c) and S. 102 (b) of the Evidence Act 2011, it is only the certified true copy of the document that is admissible as secondary evidence and no other that was admissible.

Therefore, the absence of certification rendered exhibit “D” a worthless document and inadmissible. Similarly, exhibit “L” which was a computer internet generated document allegedly printed by the appellant from the website of the 3rd respondent was by section 102 (ii) of the Evidence Act 2011 classified as a public document and only a certified true copy of same was admissible in Law. The Court of Appeal was therefore on a sound footing in upholding the tribunal’s stand by expunging the documents relying on⁸⁶. The Supreme Court held the entire appeal on the deduction I hold is devoid of any merit and I also dismiss same in terms of the lead judgment of my learned brother, Onnoghen, JSC.

It is submitted that, subject to the provision of section 84(1)(2) Evidence Act for a statement in a document produced by a computer to be admissible in evidence proper foundations must be laid as follows that the document was produced during the time the computer was used by anybody, corporation etcetera, that it was done in the course of its business, that the computer was functional and when it was not operational it did not affect the accuracy of the contents of the document and that the computer derived it’s information from the statement during the ordinary course of business.

⁸⁶ See *NIPC Ltd. vs Thompson Organization Ltd* (1969) 1 SCNLR 279; *Kankia vs Maigemu* (2003) 6 N.W.L.R (pt. 817) 496; and *Owoniye vs Omotosho* (1961) 2 SCNLR 57 referred to J (p. 579, Paras B.F 593. Paras E.H)

In addition to these conditions, a certificate signed by a person in responsible possible who had knowledge of the content of the information produced by the computer can be tendered as an evidence as a proof for the admissibility of the statement produced by computer in any proceeding whether in civil or criminal proceeding etcetera. It does not restrict it to civil only. Therefore, the Supreme Court in affirming the Court of Appeal decision dismissing exhibit 'D' and 'L' in the case of *Dr. Imoro Kubor vs Seriake Henri Dickson*⁸⁷ is valid as the appeal did not meet up with the provisions on conditions for the admissibility of statement produced by computer where oral evidence is admissible.

5.2 Admissibility of Statements Produced from Different or Combination of Computers

Section 84(3)⁸⁸ provides:

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 combinations 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 computer shall be construed accordingly.

Various forms of computer and computer-generated evidence have emerged in the past few years. The use of ledger cards and vouchers in the bank has given way to magnetic

⁸⁷ *supra*

⁸⁸ Evidence Act, 2011 *op. cit.*

tapes and other automated and electronic devices.⁸⁹ An obvious criticism of the provisions is the unnecessarily complex provision for admissibility of computer output especially where such are made by the use of more than one computer. The general tendency in other jurisdiction including England is now to simplify such provisions and gradually blur a distinction between manual and computer generated output. In summary, the provision should suffice for admissibility of most forms of computer generated or telematic⁹⁰ evidence.

In respect of Network or System Computers, Section 84(3) Evidence Act 2011 provided in recognition of the fact that even moderately – sized organization have systems in place not single computers. The sub-section therefore covers every ramification of computer installations, whether as individual work station, system of computers or network.

A network is a system that links computers together within or defined geographical area, such as a home, office or small group of buildings.

The arrangement of the computers on the network can differ from case to case. The computers may be connected in the form of a ring or in a straight line. The protocol will determine how data will be sent over the network. A network may use a computer – computer – to – computer protocol or each computer may act as a client to the main server. The physical connection may be by way of cable, fibre optic or via wireless technology. The aim is for each computer connected to the network.⁹¹

⁸⁹ Babalola, A.: *op. cit.* 245

⁹⁰ The blending of computers and wireless telecommunication technologies. (www.businessdictionary.com/definition/telematics.html). Visited April 10 2015. A branch of information technology which deals with the long distance transmission of computer information. (www.oxforddictionaries.com/definition/english/telematics). Visited April 10 2015.

⁹¹ Nwamara, T.A.: (2012) *Electronic Evidence in Nigeria Law*. (Educational Publishers Ltd. Aba, Nigeria) pp. 207 - 208.

5.3 Basis for Admissibility of Certificate Signed by a Person in a Responsible Position

Section 84(4)⁹² provides:

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
- (c) dealing with any of the matters to which the conditions mentioned in subsection (2) above related, 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 persons stating it.

The Act laid down comprehensive provisions on the foundation to be laid for reliability of the computer. However, in order to prevent this from being a hindrance to tendering computer-output section 59(4) (now S. 84(4) allows a person with appropriate qualifications in computer system analysis and operations to give a certificate with respect to the reliability issues. The certificate would be conclusive in the absence of contrary evidence.⁹³

In respect of Computer Certificate, Section 84(4) provides that Where a witness intends to tender a document produced by a computer, there should be in place, a certificate, conventionally known in many foreign jurisdiction as a computer certificate.⁹⁴

In practice, compliance with the section will require a certificate which is endorsed on or attached to the first page of the statement or attached to the “device by means of

⁹² Evidence Act, 2011 *op. cit.*

⁹³ Babalola, A. *Op. cit.* p. 246

⁹⁴ *Ibid.* p. 208.

which information is recorded, stored or retrievable” the advantage of a computer certificate is that it simplifies admissibility and burden of proof.

The evidential value of a computer certificate as an advancement in the Law of Evidence can be appreciated.⁹⁵ In the case of *R vs John Eric Spiby*⁹⁶ the defence argued, unsuccessfully, that the sub-manager of a hotel could not discharge the burden under section 69 of the English Police and Criminal Evidence Act 1984 to show that the computer was working properly. It was submitted that only a service engineer or an expert on the use of a particular computer system would have been able to say whether the machine was working correctly. Taylor LJ agreed with the decision of the trial Judge and considered that the positive evidence of the sub-manager that the device was working was sufficient in this instance. Commentary: I submit that the issue as to whether the computer was working properly would have been settled by the production of a computer certificate. The sub-manager was only competent to give evidence of his reliance on the output of the device for the purpose of submitting a record of the telephone calls made from particular extensions in the hotel and recorded by the machine for purpose of billing customers for the calls made. An assertion, that the output is considered reliable could have been settled by a computer certificate⁹⁷.

In respect of Signature on the Certificate, Section 84(4)(b)⁹⁸ provides that such a person generally may be designated “systems operator or the “information systems manager” holding a responsible position in relation to the operation and management of the relevant computer system. With regard to this provision, it seems an omission that the Evidence Act does not recognize that for stand-alone computers and small local

⁹⁵ *Ibid.* p. 209

⁹⁶ (1990) 91 Cr. App. Rep. 186 at 192

⁹⁷ Nwamara T.A.: *op. cit.* 209-210

⁹⁸ Evidence Act, 2011 *op. cit.*

area networks an organization may not have such a dedicated system operations or information systems manager. In that case it is permissible for the certificate to be signed by a person responsible for making a copy, to certify that the computer output is obtained from an approved process⁹⁹.

It is submitted that, the above stated section makes the tendering of the certificate admissible in evidence in any proceeding by fulfilling the condition precedence if the certificate identifies the document containing the statement, states particulars of the device involved in the production of the document with the following conditions that it was produced by computer during the ordinary course of business and during the time the computer was in use the information contained in the statement is reproduced from information supplied to the computer in the ordinary course of those activities, which must 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 which must be stated to his best knowledge and belief.

5.4 Conditions to be Laid for an Information to be Taken as Duly Supplied or Produced by Computer

Section 84(5)¹⁰⁰ provides that:

For the purposes 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 if 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,

⁹⁹ *Ibid.* p. 211-212

¹⁰⁰ *Ibid.*

- (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.

This section is also geared towards support of Section 84(1) and (2)¹⁰¹ that for the admissibility of the statement or information supplied to the computer whether directly or indirectly, once done in the course of those activities it is admissible thereby satisfying the laid down conditions.

In view of the issues considered in Chapter Four, it has shown the basis for the admissibility of documentary evidence: The proper foundations to be laid before the original document is tendered under Section 83 of the Evidence Act 2011 and conditions for the admissibility of statement made in document produced by computer under Section 84 of the Evidence Act 2011 applicable in any proceeding and admissible as secondary evidence.

¹⁰¹ *Ibid.*

CHAPTER FIVE

SUMMARY AND CONCLUSION

This Dissertation analyses the evidential rules on admissibility of documentary evidence under the Nigerian Law. The Dissertation considered issues under statement of problems, aim and objective, justification of the study and provided for a literature review. Contributions of many Authors both within and outside Nigeria were reviewed.

5.1 Summary

There are problems in the rules of evidence which were observed under the documentary evidence. There are difficulties in explaining some provisions by the Theories, Courts, Lawyers, Students of Law and because the provisions of the Evidence Act is not liberally interpreted some Lawyers lose cases because they are not versatile in the provisions of the Evidence Act since everything a Lawyer need to do in the Law Court, hinges on Law of Evidence. This is because evidence is the cornerstone of litigation and cuts across all facts relating to Legal practice whether criminal or civil and in every case a Lawyer must lay proper and adequate foundation before presenting his evidence in Court.

For a fair justice system, evidence is indispensable. Majority of the scholars however, called for legislative reforms for proper drafting and interpretation of the Evidence Act 2011. This Dissertation also analyses key terms for instance “evidence”, “documentary evidence” and “relevancy” of evidence. Evidence, though not defined by the Evidence Act 2011, it provided uniform definition among scholars. Evidence is the legally admitted fact and legal means of proving such fact in judicial proceedings, is by oral evidence, documentary evidence, real evidence, electronic evidence and other kinds of evidence admitted under the Evidence Act 2011.

Section 258 of the Evidence Act 2011 made an improvement by closing the lacuna seen in the Evidence Act 1990. It defined what is documentary evidence to include computer, disc, tape, sound track or other device in which sounds or other data are embodied so as to be capable of being reproduced from information stored or which may be retrievable. This definition is adequate to deal with the challenges of electronic evidence as brought by the modern information technology storage device. Electronic recording evidence includes computer, internet, telex machines, video and audio tapes etcetera. Section 84 Evidence Act by providing for the admissibility of statements in documents produced by computers in any proceeding of which direct oral evidence would be admissible.

Other improvements brought by this Evidence Act are seen in S. 40 which provided for statement relating to the cause of death of a person which is admissible in whatever may be the nature of the proceeding which is applicable in both civil and criminal proceedings. But the repealed Act section 33(1)(a) 1990 restricted its application to only trials for murder and manslaughter. Section 83 of the Evidence Act also provided for its application in any proceeding: both in civil and criminal proceedings. But the repealed Act S. 91(1) 1990 is relevant only in civil proceedings.

The concept of admissibility and relevancy of evidence has been analyzed and it is established to be interrelated because for any evidence to be admissible, it must be relevant and supported by the Evidence Act which shows that admissibility is a matter of Law and fact.

5.2 Findings

In the final analysis of this Dissertation, the following findings have been made as follows:

- (a) Separation of sections that provided for the circumstances in which secondary evidence can be admissible and the modes of proof as seen in sections 89 and section 90 Evidence Act, creates some interpretation problems especially to the Students of Law.
- (b) Another finding is in respect of electronic signature which the Evidence Act 2011 did not provide for the nature of electronic signature
- (c) Another finding is with regards to Evidence Act 2011 which altered some number of sections in the old Evidence Act, 1990. Instead of leaving the sections and still effect the intended amendment (rather than making an alteration and making things difficult for the people). This was not done. The alterations so made pose a lot of difficulties to Lawyers, Courts and Students of Law

The altered sections are so many. But to mention few of the sections: Sections 6, 7, 8, 67, 68, 76, 79, 83, 84, 85, 91, 93, 94, 95, 96, 98, 109, 110, 130, 132, 138 of the Evidence Act 1990 are respectively the same with Sections 1, 4, 5, 78, 81, 125, 108, 112, 113, 114, 83, 85, 86, 87, 88, 91, 102, 103, 162, 128 and 135 of the Evidence Act 2011.

5.3 Recommendations

It is therefore recommended that in view of the shortcomings highlighted in this study, *Evidential Rules on Admissibility of Documentary Evidence Under the Evidence Act 2011*. There is need for legislative reforms to redress the issues for proper drafting,

interpretation and understanding. For instance, the issues in respect of amendments of the use of simple English to replace the word 'provided' for easy understanding.

The Evidence Act also needs legislative amendment in respect to sections 89 and 90 of the Evidence Act 2011. In essence, the separation of Sections 89 and 90 of the Evidence Act 2011 should be redrafted together under one section and each foundation to be laid should be supported with mode of secondary evidence admissible for simplicity, understanding and interpretation. The Evidence Act 2011 should be amended to provide for the nature of electronic signature for its admissibility purposes.

The Evidence Act 2011, notwithstanding its improvement in respect to some terms used, for easy interpretation of words like provided, unless, except, as seen in Sections 128(1), 91, 83(1) and (4), etcetera of the Evidence Act 2011, needs to be amended. All these terms meaning the same, can be replaced with conditions or foundations to be laid for the admissibility of any evidence in any proceeding, for easy understanding and interpretation by the Lawyers, Scholars, Courts and Students of Law.

Documentary evidence has a great advantage because once a document or any memorandum is written, signed, dated it is admissible in evidence and document speaks for itself which needs no oral, alteration, contradiction or variation except where fraud, mistake, illegality, wrong date, etcetera is seen.

5.4 Conclusion

In conclusion, the researcher recommends legislative reforms/amendments to Sections 83, 89 and 90 of the Evidence Act 2011 to redress the problems of lack of understanding, misunderstanding, misinterpretation and misapplication by Lawyers, the Courts, and Students of Law, caused by the separation of Sections 89 and 90 of the Evidence Act 2011; the use of the words “provided” and “unless” in Section 83 of the Evidence Act 2011; and non provision of the definition of the nature of electronic signature under Section 83(4) of the Evidence Act 2011.

BIBLIOGRAPHY

(A) Textbooks

Aguda, T.A.: (1974) *The Law of Evidence in Nigeria* (Sweet and Maxwell, London.)
(2nd Ed.)

Aguda, T.A.: (1998) *Law and Practice Relating to Evidence in Nigeria*. (MIJ Professional Publishers Ltd. Lagos, Nigeria.) (2nd Ed.)

Aguda, T.A.: (1999) *The Law of Evidence*. (Spectrum Books Limited Ibadan, Nigeria.)
(4th Edition).

Aguda, T.A.: (1989) *The Law of Evidence* (3rd Ed.) (Spectrum Law Publishing Ibadan, Nigeria.)

Ashi, VS B.: (2008) *Documentary Evidence, Selected Issues, Conflicts and Responses*
(Chenglo Limited, Enugu, Nigeria.) (2nd Ed.)

Babalola, A.: (2001) *Law and Practice of Evidence in Nigeria* (Sibon Books Limited Ibadan, Nigeria.)

Best (1922) *Principles of Law of Evidence*, pp 2, 22-23. Quoted in Nwadialo F.: (1981).
Modern Nigerian Law of Evidence. (Ethiopia Publishing Corporation, Ring Road, Benin City, Nigeria.)

Buzzard John H., Amlot Roy D. and Mitchell Stephen: (1970) *Phipson On Evidence*.
(Eleventh Edition). (London, Sweet & Maxwell Ltd.) Quoted in Nwadialo F.
(1981). *Modern Nigerian Law of Evidence*. (Ethiopia Publishing Corporation, Ring Road, Benin City, Nigeria.)

- Cross, R. & Tapper, C. (1990), *Cross on Evidence (7th Edition)* (Butterworth and Co. Publishers Ltd. London.)
- Eliot, D.W.: (1980) *Phipson and Elliot Manual of Law of Evidence*. (1st Edition) (Sweet and Maxwell, London).
- Mathieson D. L.: (1989) *Cross On Evidence (4th Edition)*, (Butterworths Law, New Zealand)
- Murphy, P.: (1985) *A Practical Approach to Evidence (2nd Edition)*. (Financial Training Publications Limited. (F.L.B.S) London)
- Nwadialo, F.: (1981) *Modern Nigeria Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benn City, Nigeria.)
- Nwaeze, C.C.: (2003) *Contentions Issues and Responses in Contemporary Evidence Law in Nigeria*. Institute for Development Studies University of Nigeria Enugu Campus.
- Okekeifere, A. I.: (2000) *Circumstantial Evidence in Nigerian Law*. (Law House, Port Harcourt, Nigeria.)
- Olakanmi, J. et al.,: (2011) *Evidence Act 2011, Synoptic Guide*, (Panaf Press Abuja, Nigeria.) (First Ed.).
- Onah, C.O.: (1996) *Evidence Law in Action*. (Eunis Educational Published, Victory Palace Enugu Ukwu, Nigeria.)
- Onamade, P.A.: (2002) *Documentary Evidence - Cases and Materials*. (Philade Co. Ltd. Lagos, Nigeria.) Vol. 1.

Onigbo, W.I.B.: (2007) *Expert Evidence*. (Medical Foundation Publishers (M.F.P.) Enugu, Nigeria.)

Osinbajo, Y.: (1992) *Cases and Materials on the Nigerian Law of Evidence*. (Macmillan, Nigeria.)

Stephen, Sir James: (1892) *Laws of Edition*. (First Edition). Quoted in Nwadialo F.: (1981). *Modern Nigerian Law of Evidence*. (Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria.).

Urglor, S.: (2006), *Evidence Text and Materials* (2nd Edition) (Thompson, Sweet and Maxwell, London.)

Yagarta, B.N.: (1998) *Documentary Evidence: The Law, Practice and Procedure*. (Jos University press Ltd, Jos, Nigeria.)

(B) Articles :- Journal Publication

Agom, A. R.: (2006) *Admissibility of Public Document: A Commentary on Daggash vs Bulama* (2004) Ahmadu Bello Univeristy Journal of Private and Comparative Law (2006) Vol 1, No. 1.

(C) Unpublished, Ph.D Dissertation and Ph.D Seminar Paper

Babaji, B.: (2009) *Admissibility of Documentary and Electronic Evidence Under Nigerian Law*. Ph. D. Dissertation (Unpublished) Department of Public Law, Ahmadu Bello University Zaria, Nigeria.

Babaji, B.: (2008) *An Analysis of The Legal Basis and Foundations For The Admissibility of Documentary Evidence Under Nigerian Law* Ph.D. Seminar Paper (Unpublished) Faculty of Law A.B.U. Zaria, Nigeria

(D) Unpublished Manual

Ikeorha, D.: (2001) *Dynamics of Computer Strategies and Documentation*, (unpublished), Tutorial Manual for Non-Computer Professionals, Kaduna, Nigeria.

(E) Internet

www.businessdictionary.com/definition/telematics.html. Visited April 10, 2015

www.oxforddictionaries.com/definition/english/telematics. Visited April 10, 2015

(F) Dictionary

Briyan, A.G.A.: (1995) *Dictionary of Modern Legal Usage*. (Oxford University Press, New York.) 2nd Ed.

Business Dictionary www.businessdictionary.com/definition/telematics.html

Honby, A. S.: (2010) *Oxford Advanced Learners Dictionary*. (8th Edition) (Oxford University Press, London).

John, B.S. Mozley and Whiteley's Law Dictionary (Butterworths and Co. Publishers Ltd. London) (9th Ed. 1977)

Osborn's Concise Law Dictionary (1993), (Sweet and Maxwell, Australia.) (8 Ed.).

Oxford Dictionary www.oxforddictionaries.com/definition/english/telematics