Conceptual and Theoretical Frameworks of Documentary Evidence in Nigeria

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Abstract

Documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue. Documentary evidence is one of the modes of proof of fact before the court. Document is anything upon which a sign can be made including a computer. There are various concepts and theories that regulate the admissibility of documentary evidence in Nigeria; This Article has discussed extensively those concepts and theories. The methodology adopted in this article is doctrinal, the provisions of the Evidence (Amendment) Act 2023 was also explored in this Article. It is the findings of this article that a balanced knowledge of the concept and theories of documentary evidence will give a legal practitioner and his client edge against their opponent. This article will also enhance the preparation to meet the conditions for admissibility of documentary evidence. An in-depth knowledge of the rules that governs admissibility of documentary evidence is crucial to advocacy; the mastery of the concept and theories of documentary evidence will give an advocate a clear edge against his opponent. It is hereby recommended that the concepts and theories of documentary evidence be construed appropriately by courts without recourse to undue technicalities.

Keywords: Evidence, Theoretical Framework, Documentary Evidence, Nigeria

1. Introduction

The concept and theories of evidence is very important to any judicial proceeding; without evidence the court cannot arrive at the justice of any case. The concept and theories of evidence and documentary evidence in particular needs clarification to avoid ambiguity.

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2. Conceptual Framework of Documentary Evidence

The conceptual frameworks examined in this article are Evidence, Document, Relevance Admissibility and Electronic Evidence.

2.1 Definition and Meaning of Evidence

Judicial Evidence is the means by which facts are proved, but excluding inferences and arguments.[1] While inferences and arguments are not evidence, they can help the court to understand the evidence placed before the court. Evidence is a piece of information that is put before a court in order to prove or disprove a fact in issue.[2] Black's Law Dictionary defines Evidence as something (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact.[3] Section 1 of the Evidence Act[4] did not define what evidence means but provided that it may be given in any proceeding of the existence or none existence of any fact in issue. Evidence is the foundation of proof.

It is the acceptance of the statements or things presented by a person testifying in establishing the existence of certain facts by the court that occasions a proven fact. According to Phipson,[5] evidence means the testimony, whether oral, documentary or real, which may be legally received in order to prove or disprove some facts in dispute. The Supreme Court in *Tukor v UBA* and ors[6] defines evidence as:

> … [T]he demonstration of a fact; it signifies that which demonstrates, makes clear, ascertains the truth of the very fact or point in issue, either on the one side or on the other. In legal acceptation, the term 'evidence' includes the means by which any alleged matter of fact the truth of which is submitted to investigation, is established or disproved.

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[1] TA Aguda, *Law and Practice Relating to Evidence in Nigeria* (2nd edn MIJ Professional Publisher Ltd, 1998) 13.

[2] AO Ajileye, *Electronic Evidence* (Rev edn Jurist publications series 2019) 8.

[3] BA Garner, *Black's Law Dictionary* (9th edn Thomas Reuter West Publishing 2009) 635.

[4] Evidence (Amendment) Act, 2023, (herein after refers to as the Act).

[5] MN Howard, etal, *Phipson on Evidence* (15th edn London Sweet and Maxwell 2009) 2.

[6] (2012) LPELR-9337 (SC).

The law of evidence regulates and determines the production of evidence in proof of the existence or non-existence of facts in any judicial proceeding. Judiciary evidence is the means by which facts are proved in court.

Nokes defines judicial evidence to consist of facts which are legally admissible and legal means of attempting to prove such facts. The Law of Evidence determines what facts may or may not be proved, the sort of evidence which may be produced and by which any fact is to be proved.[7] In a criminal trial, evidence consists of facts which the prosecution must establish in order to establish his case and that which the defendant must establish to successfully raise a defence. In civil matters, it entails what the parties put forward before the court to ascertain their pleading.[8]

Oral evidence is the statement of a witness in court which is offered as evidence of the truth of that which is stated. All facts, except the contents of documents may be proved by oral evidence.[9] Oral evidence must in all cases whatever be direct;[10] therefore if oral evidence refers to a fact which could be seen, it must be the evidence of a witness who says that he saw that fact, and if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact. If oral evidence refers to a fact which could be perceive by any other sense,[11] it must be the evidence of a witness who says he perceived that facts by that sense or in that manner. Where there are two or more conflicting documents tendered by parties, the best way to arrive at the justice of the case is to call oral evidence to resolve those conflicts.[12]Real evidence means 'the thing' other than oral testimony or a document the content of which is admissible in evidence as a means of proof of such fact.[13] According to Phipson[14] real evidence

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[7] JA Dada, *The Law of Evidence in Nigeria* (2nd edn Unical Press, 2015) 4.

[8] AO Ajileye, (n2) 8.

[9] Evidence Act, (n4) section 125.

[10] ibid section 126 .

[11] *For example, by touch or smell or in any other manner.*

[12] *AMMC ltd v Spring Bank plc* (2012) All FWLR (pt 613) 1864 (CA).

[13] Evidence Act, (n4) section 258 (1).

[14] Phipson, *Law of Evidence* (13th edn) 1-5 quoted in T A Aguda, *The Law of Evidence* (4th edn spectrum Law

consist of material objects other than the contents of documents produced for inspection by the court. Real evidence can be produced in court for inspection if it is portable; otherwise inspection can be done at the place where the object situates.

Documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue. Documentary evidence is one of the means of proof of facts in a court of law. When the facts are contained in a document the document must be produced in court as evidence in proof of the fact in issue. Thus in *Abubakar v Waziri*,[15] the Supreme Court held that where a party leads evidence as to the existence of a document in proof of his case the document should be tendered as the law generally does not allow oral evidence to be lead in proof of such document. Where facts are contained in a document, no oral evidence is allowed[16] during trial to prove those facts. As a general rule the document must be produced before the court.[17] Documentary evidence often supersedes any other form of proof, as it is regarded as the best form of evidence to prove any fact in issue. In *Egharevba v Osagie,*[18] the Supreme Court held that documentary evidence is the best evidence and that it is the best proof of its contents; hence no oral evidence will be allowed to discredit or contradict the contents thereof except where fraud is pleaded. Where there is oral as well as documentary evidence, the latter should be used as a hanger from which to assess the oral evidence.

Also in *Ogundele v Agiri,*[19] it was held that oral evidence is inadmissible to contradict the contents of a document. In other words oral testimony cannot be used to state the contents of a document and no extraneous matter can be imported into the record of proceedings of a court. This according to the apex court is because documents when tendered and admitted in court are like words uttered and do speak for themselves; such documents are more reliable and authentic than

Series 1999) 141.

[15] (2008) ALL FWLR (pt 192) 167 (SC).

[16] Part viii of the Evidence Act provides for exclusion of oral by documentary evidence and the exceptions therein.

[17] JO Amupitan, *Documentary Evidence in Nigeria* (2nd edn Innovative Communications) 1.

[18] (2010) All FWLR (pt 513) 1255 (SC).

[19] (2010) All FWLR (pt 507) 1 (SC).

words from vocal cord of man, as the document are neither transient nor subject to distortion and misinterpretation but remain permanent and indelible through ages.[20]

2.2 Documents

Document is any written thing capable of being evidence and it is immaterial on what the writing may be inscribed; paper has been preceded by parchment, stone, marble, clay and metal.[21] Documents by their nature are records of facts, happenings, transactions, activities and events; indeed, it is recorded in the Holy Bible that the Ten Commandments God gave to Moses were inscribed on tablets of stone.[22] A proper understanding of the meaning of the word 'document' involves the appreciation of two elements; an inscription and; object upon which the inscription is made, document does not necessarily need to be a paper, as it can be any material upon which an inscription is made.[23] In defining document, the information contained in the writing is as important as the object upon which it is written. Document is defined by the Act[24] as follows:

> 'documents' includes
> books, maps, plans, graphs, drawings, photographs, and also includes 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;
> any disc, tap, 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
> 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 other equipment) of being reproduced from it; and
> any device by means of which information is recorded, stored or retrievable including computer output.

[20] *Enabuzor v State* (2022) 10 NWLR (pt 1839) 509 (SC).
[21] *R v Daye* (1908) 2KB 333.
[22] The Holy Bible Exodus chapter 21 verse 18.
[23] AO Ajileye, (n2) 100.
[24] Evidence Act (n4) section 258.

The definition of document under section 258 of the Act seems all encompassing; the use of the word 'includes' by the Act indicates that the category of 'documents' under the section is not exhaustive.[25]
In *New Nig. Dev. Co. Ltd v Ugbabe*[26] It was held that the use of 'includes' prefacing the definition of a word or phrase shows its meaning is not limited to that stated in the definition. Unlike the former Evidence Act[27] (now repealed) that narrowly and restrictively defined documents as:

> 'Books, maps, plans, drawings, photographs and also includes 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 me be for the purposes of recording that matter'[28]

The limited scope of interpretation of documents under the repealed Evidence Act posed a serious challenge and made the admissibility of electronically generated evidence controversial. Gratefully section 258 of the new Act[29] has seemingly settled the controversies and categorically made electronically generated documents admissible evidence. The court of Appeal held in *Holdent International ltd v Peters Ville Nigeria ltd,*[30] that plastic bottles bearing trademark inscriptions are documents. Tape recordings tendered in *Federal Polytechnic, Ede & Ors v Oyebanji*[31] were also accepted by the court as documents. In *Obatuga & Anor v Oyebokun & Ors*[32] video tape was also held to qualify as a document.

By virtue of section 103 of the Act[33] any document that is not a public document is a private document. The Supreme Court held in *Ekere v Emmanuel*[34] that Private documents may be of different kinds e.g. letters, documents of business transactions amongst others, these

[25] *Ports and Cargo Handling Services Company Ltd and ors v Migfo Nigeria Ltd and Anor (*2012) LPELR – 9725 (SC).
[26] (2022) 16 NWLR (pt 1855) 101 (SC).
[27] Evidence Act 2004 CapE14 LFN.
[28] ibid Section 2.
[29] Evidence Act, (n4).
[30] (2013) LPELR-21474 (CA).
[31] (2012) LPELR-19696 (CA).
[32] (2014) LPELR-22344 (CA).
[33] Evidence Act, (n4).
[34] (2022) 11 NWLR (pt 1841) 339 (SC).

documents emanates from private persons or public persons but in their private capacities.[35] Documents emanating from private body needs no certification;[36] the document however should not be dumped on the court but the courts' attention should be drawn to the relevant portions applicable to the case.[37] Consequently the following documents are not public documents but private documents within the meaning assigned to the phrase under the Act.[38]

(i) A clearance certificate issued by the National Electric Power Authority to a party to import designated generators; because the document was not a document made available for public inspection, and it was not also brought into existence for that purpose.[39]
(ii) A letter of employment issued by the government as the employer.[40]
(iii) A document which ordinarily is a public document but which has been marked 'secret' is no more a public document, because the hall- mark of a public document is its openness and its accessibility to members of the public.[41]

The secondary copy of the above listed documents needs no certification before it can be admissible in evidence.[42]
Public document is statutorily defined as follows:

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.[43]

[35] J A Dada, (n7) 277.
[36] *Dawan v EFCC* (2020) 5 NWLR (pt1717) 226 (CA).
[37] *Markinde v Adekola* (2022) 9 NWLR (pt 1834) 13 (SC).
[38] Evidence Act, (n4).
[39] *Dale Power System plc v Witt and Busch ltd* (2007) All FWLR (pt 394) 358 CA.
[40] *Governor, Ekiti State v Ojo* (2006) All FWLR (pt 331) 1298 (CA).
[41] Evidence Act, (n4) section 104.
[42] *Unity Bank Plc v BCC (Nig) Ltd* (2020) 16 NWLR (pt 1749) 132 (CA).
[43] Evidence Act (n4) Section 102.

The phrase 'documents forming the official acts or records' in section 102 (a) brings documents that proceeds from the authorities and persons named therein within the ambit of public documents, so long as those documents were executed while such officials were acting in their public capacities. The Court of Appeal held in *Kwara State Water Corp v AIC (Nig) Ltd*[44] that both a letter from a State Ministry of Justice and a private solicitor's letter to the ministry squarely fall under the phrase 'document forming official acts or records' of the ministry. The solicitor's letter qualifies as a public document under section 102 (b) of the Act,[45] since the said letter once received by the ministry will be kept as a public record; however where solicitor's letter was not sent to and received by the said ministry, it will not be a public document, because record of it would not have been kept by the said ministry.

It was also held in *FRN v Danladi*[46] that a letter, petition, or complaints written by an individual, persons or organization to a public establishment like the Independent Corrupt Practices and Other Related Offences Commission (ICPC) and received by its officials becomes a public document in the official records or records kept by the ICPC or any Government parastatal or other organs of government to whom such letter, petition or compliant is sent. In this case though the petition was written by a legal firm on behalf of one Mrs. Victoria Bobai to the chairman of ICPC as private letter or document however, the moment it was received by ICPC, the letter become public document in the official or public record of ICPC kept in its office in Nigeria of private document.

On the other hand, the phrase 'sovereign authority' means the authority of any tier of government in Nigeria; while 'official bodies' includes all arms of Government of Nigeria and institutions or parastatals or organizations established by them, whether by law or by executive or legislative fiat. 'Tribunals' include courts. 'Public officers' here has the meaning assigned to it under section 318 of the Constitution.[47] In *Adekola v Ailara*[48] it was held that a public document

[44] (2009) All FWLR (pt 485) 1738 (CA).
[45] Evidence Act (n4).
[46] (2020) 17 NWLR (pt 1752)130 (CA).
[47] Constitution of the Federal Republic of Nigeria 1999 as amended.
[48] (2011) All FWLR (pt 572) 1696 (CA).

is one made by a public officer for the purpose of the public making use of it and being able to make reference to it or a document of public interest issued or published by a political body or otherwise connected with public business. For a document to be classified as a public document, two conditions must co-exist: first, its availability must be for public inspections; and second, the fact that it was made or brought into existence for the purpose of its utility by the public.[49]

Also in *Amadu v Tantumaki*[50] the court of Appeal held that the attributes of a public document are that they are created over a public matter, preserved for the good of the public and open for inspection and use. The several documents that can be classified as public documents under section 102 (a) of the Act[51] are:

(i) Certificate of incorporation of a company and its memorandum and articles of association[52]
(ii) A registered power of attorney[53]
(iii) A letter emanating from the state ministry of justice[54]
(iv) A document in custody of the police[55]
(v) A document attached to a public document[56]
(vi) Intelligence report compiled by the British Colonial authorities[57]
(vii) A report of a government pathologist[58]
(viii) Nomination form filled and submitted to an electoral body by a contestant[59]

The Court of Appeal in *Stirling Geotechnical (Nig) Ltd v Galmas International Ltd and Anor,*[60] held that a certificate of incorporation of

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[49] *Ukana v COP* (1995) 8 NWLR (pt 416) 705 (CA); *Shallom v University of Ibadan* (2007) 1 NWLR (pt 104) 11 (CA).
[50] (2012) All FWLR (pt 626) 503 (CA).
[51] Evidence Act, (n4); J Amadi, *Contemporary Law of Evidence in Nigeria* (Vol 1Pearl Publishers 2012) 1066-1068.
[52] *Dana Impex ltd v Awukam* (2006) All FWLR (pt. 311) 1924 (CA).
[53] *Okamgba v Eke* (2010) All FWLR (pt. 517)755 (CA).
[54] *Kwara State Water Corp v AIC (Nig) ltd* (2009) All FWLR (pt 485) 1738(CA).
[55] *Tabik Investment ltd v GTB Plc (2011) All FWLR* (pt. 602) 1592 (SC).
[56] *Onwumelu v Duru* (1997)10 NWLR (pt 525) 377 (CA).
[57] *Ogologo v Uche* (1998) 11 NWLR (pt 572) 34 (CA).
[58] *Ogbera v State* (1985) 3 NWLR (pt 11) 120 (CA); Evidence Act, (n4) section 54.
[59] *Progressive Action Congress v INEC* (2009) All FWLR (pt. 478)260 (CA).
[60] (2010) 4 NWLR (pt 1134) 361 (CA).

a company is a public document within the provisions of section 109 (b) of the repealed Evidence Act (now section 102 (b) of the Evidence (Amendment)Act 2023). In *Bob-mannuel v Woji*,[61] it was held that a deed of conveyance, though a private document becomes a public document within the meaning of section 109 (b) of the repealed Evidence Act (now section 102 (b) of the Evidence (Amendment) Act 2023) once it is registered. As such by section102 paragraph (b) of the Act[62] some private documents have been elevated to public documents. Such documents are newspapers and journals, and registered title deeds affecting lands which are registered with the registrar of titles. Such documents attained the status of public document because a government department has taken custody of them, to be inspected and accessed by members of the public.[63]

The types of primary documents are: document executed in several parts, document executed in counter-parts, and document made by One Uniform Process. Where a document has been executed in several parts, each part shall be primary evidence of the document.[64]In *Nwobodo v Onoh*[65] the Supreme Court held that signed copies of the result sheets of the Anambra State Governorship election, distributed to political party agents were original, since they were documents executed in several parts and each part was an original of the other.

Where a document has been executed in counterpart, each counter-part being executed by one or some of the parties only, are primary evidence[66] against the party executing it. The meaning of counterpart is best appreciated when related to conveyance. It is the corresponding part of an instrument when an instrument is executed by all the parties in duplicate or triplicate and each keeps one, each instrument is treated as an original and each is primary evidence of all the other.[67]

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[61] (2010) 8 NWLR (pt 1196) 260 (CA).
[62] Evidence Act, (n4).
[63] *Onochie v Ikem* (1989)4 NWLR (pt 1114) 458 (CA); S T Hon, *Law of Evidence in Nigeria* (2nd edn Pearl Publishers vol 2 2013) 967.
[64] Evidence Act, (n4) section 86 (2).
[65] (1984) 1 (SC).
[66] Evidence Act (n4) section 86 (3).
[67] *Aja v Odiri* (2011)5 NWLR (pt 1242) 509, A O Ajileye (n2) 114.

Where a number of document have all been made by one uniform process, as in the case of printing, Lithography, photography, computer or other electronic or mechanic process, each shall be primary evidence of the content of the rest; however where they are all copies of a common original, they shall not be primary evidence of the content of the original.[68] In *Esso West African v Oladiti*[69] a carbon copy of a document signed in quadruplicate through one single process was held to be primary evidence of the other copies since process of signing all the copies consisted of one single process. Secondary document is the evidence of the document made available in the absence of the primary document.[70] Secondary document is normally allowed where for one reason or the other the original document cannot be tendered in court either because the original is not available or cannot be conveniently brought to the court without a considerable difficulty, associated with the movement of such document or risk of loss, theft and mutilation.[71]

The types of secondary documents are: Certified true copies (CTC), copies made by mechanical or electronic process, copies made from or compared with the original and counter-parts of documents. Certification is a means of verifying the authenticity of a document. The process of certifying a document is provided for in section 104 and 105 of the Act.[72] It is only the certified through copy of a public document that is admissible as a secondary evidence and no other. For a public document to be said to be truly certified for the purpose of it being admitted in Evidence, it must be shown to exist on such document the payment of Legal Fees in respect of certification of the document; a certificate written at the foot of that copy that it is a true copy of such document or part thereof; the date when the certification was made the name and official title of the certifying officer; and where use of seal is authorized, the affixing of a seal in the document.[73]

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[68] Evidence Act, (n4) section 86 (4).
[69] (1968) NMLR 453.
[70]Evidence Act, (n4) section 89.
[71] J O Amupitan (n17) 38.
[72] Evidence Act, (n4).
[73] ibid section 104, (1) – (3).

A copy made by Mechanical or Electronic Processes refers to all copies made from the original by the mechanical or electronic processes which ensure the accuracy of the copy. Documents such as photocopies made from the original.[74]Copies of document made from the original or copies compared with the original are admissible as secondary evidence.[75] Copies such as scanned copies, screen shots and snapshots. When counterparts of a document are tendered against the parties who did not execute them, they are admissible as secondary evidence.[76] For examples where documents are made in counterparts and a party did not execute the document, such document is admissible against such party that did not execute the document.

2.3 Relevance

Relevance is the important or value of a piece of evidence to any judicial proceeding. A document that is relevant is one that can throw light on any fact in issue in a proceeding. The Supreme Court held in *Okonji v Njokanma,*[77] that relevancy is determined by the surrounding circumstances of a case. It is established that only facts which are relevant and are in issue may be admitted in court.[78] Relevancy is not the only test for admissibility of evidence. A document may be relevant and still may be excluded where there are circumstances or law which renders it inadmissible. It is worthy to note that the crux of the entire law of evidence is depended, in the main on the rules governing admissibility and in admissibility 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 facts in issue, relevancy is regulated by the provisions of the Evidence Act and not by rules of logic. In *African Continental Bank v Gwagwada*[79] it was held that documents that are relevant to a proceeding are admissible in evidence.

In law, relevancy is the hallmark of admissibility of evidence, and therefore, even where a document or the facts are duly pleaded but the

[74] ibid section 87 (b).
[75] ibid section 87 (c).
[76] ibid section 87 (d).
[77] (1999) 12 SCNJ 259.
[78] *Faramoye v The State* (2017) LPELR -42013 (SC).
[79] (1994) LLJR-SC.

document itself is irrelevant, it would still not be admitted in evidence.[80] There are generally three main criteria that govern admissibility namely: whether the document is pleaded; whether the document is relevant and; whether the document is admissible in law.[81]

In *UTC v Lawal*[82] the court held that it is also important to note that admissibility of a document is quite different from the probative value to be attached to it; while admissibility is based on relevance, probative value depends not only on relevance but also proof. It is the pleadings of the parties that streamline the relevant issues between the parties in a proceeding. Thus it is required that for any document to be admissible in any superior courts, the said document must be pleaded or facts in support of the document be pleaded in the pleadings of the party relying on same; this was the position in *Aminu v Hassan*[83] where Odili JSC held that documentary evidence needs not be specifically pleaded it suffices once facts relating to it are pleaded.

In every case, whether civil or criminal, objection to admissibility of a document must be made when the document is tendered in evidence, where no objection is raised when tendered, the document will be admitted and the opposing party cannot later complain on its admissibility, unless the document is by law inadmissible.[84]The trial court has unbridled liberty to expunge admitted inadmissible evidence at the judgment stage. An appellate court enjoys the same right so far as the document is inherently inadmissible;[85] but if it is admissible only upon fulfillment of certain conditions, failure by a party to object to its admissibility when it is tendered in evidence will preclude the defaulting party from objecting later on appeal.[86] Where a document is rejected for lack of proper foundation and not for inherent inadmissibility, it can be re-tendered as exhibit after the required proper foundation has been laid.[87]

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[80] *Ochigbo v Ameh* (2023) LPELR-59616 (CA) 51.
[81] *Tukor v Gongola* (1989) 3 NSCC 225*, Progressive Action Congress v INEC* (2009) All FWLR (pt 478) 260 (CA).
[82] (2012) 1-2 MJSC 156 per Kekere-Ekun JSC.
[83] (2014) 57 NSCQR 44.
[84] *Archibong v State* (2006) 14 NWLR (pt 1000) 349 (SC).
[85] *Multichoice Nig Ltd v MSCN Ltd/Gte* (2020) 3 NWLR (pt 1742) 415 (SC).
[86] *Ntuke v NPA* (2007) ALL FWLR (pt 57) 809 (SC).
[87] *Diverse Asset Mgt Ltd v Wema Bank Plc* (2023) 12 NWLR (Pt 1897) 121.

Admissibility and relevancy are intertwined concept which serves as the basis for receiving any piece of evidence in proof of the existence or non-existence of any fact before the court.[88] However, relevancy and admissibility of documents are not one and the same concept, therefore cannot be used interchangeably. While admissible facts are relevant, not all relevant facts are admissible. In the main, relevancy and admissibility of evidence stands out as the fulcrum of the entire Law of Evidence and indeed, the sum total of judicial proceedings, for without relevant and admissible evidence judicial process will drift into the abyss.[89] The principle of relevance of a document before its admissibility was stressed in the case of *Oyediran v Alebiosu 11 and ors.*[90] Where a document is inadmissible in all events, whether or not objected thereto, it remain inadmissible and even an appellate court has the inherent jurisdiction to exclude it; save that in civil cases where the inadmissible document is admissible upon the fulfillment of certain conditions; failure by a party to object to its admissibility when tendered in evidence will preclude the defaulting party from objection later on appeal.[91] Section 1 of the Evidence Act made admissibility evidence subject to relevance.[92]

Both in civil and criminal proceedings, the source of evidence generally, and documentary evidence in particular is irrelevant. Thus once a document is relevant and admissible in law, it will be admitted in evidence, the fact that it was criminally, fraudulently or unlawfully obtained notwithstanding.[93]

2.4 Admissibility

[88] A S Agoli, 'Documentary Evidence: Rudimentary Hints for Admissibility Under the Evidence Act' [2009]
Journal of Contemporary Legal Issues (vol 1 No 1) 148.
[89] ibid 148.
[90] (1992) 7 SCMR (pt 1) 291.
[91] *Ntuke v NPA* (2007) ALL FWLR (pt 357) 809 SC; S E Kabo, 'The Circumference of the Concept of Wrongful
Admission and Rejection of Evidence: An Appraisal' *[2013]Benue State University Journal of Private and Public*
Law (vol No 2) 161.
[92] Evidence Act (n4).
[93] *Ukachukwu v Uba* (2006) All FWLR (pt 300) 1736 (CA).

In any proceeding a court is entitled to admit and act on only evidence that is admissible in law,[94] for admissibility, the court has to consider all the rules of exclusion[95] and decide whether there are grounds for which the court cannot look at the evidence at all.[96] Where the law declares a document inadmissible for non- compliance with the provisions of the Act, the document cannot be admitted in evidence, not even by consent of parties.[97]

A witness through whom a document is to be tendered in evidence must identify same before tendering it. The identification is done by laying foundation to satisfy the court that the witness knows and has had contact with the document previously by pointing out some salient features on the document without looking at it. Where a document tendered for admission is accompanied with attachments, the document must be construed as a whole and admitted together with those attachments.[98] Admissibility of a document during cross-examination is permissible and unimpeachable; where the witness unequivocally admits or acknowledges the existence and content of the document upon production, or such as to tender a previous statement of a party to a proceeding or a witness in order to contradict or discredit the evidence led on oath before the court.[99] However prior to the tendering of such document in evidence the Counsel must draw the attention of the witness to the areas of conflicts.

By virtue of section 46 (1) of the Act, evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is admissible for the purpose of proving in a subsequent judicial proceeding or in a later stage of the same proceeding the truth of the facts which it states, when the witness cannot be called for any reason specified by section 39 of the Act or is kept out of the way by the adverse party. Provided that the proceeding was between the same party or their representative in interest, the adverse party in the first proceeding had the right and opportunity to cross examine the witness,

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[94] *Okonji v Njokanma* (1999) 11 and 12 SCNJ 259.
[95] Evidence Act (n4), Section 82 and196
[96] A O Ajileye, (n2) 8.
[97] *Abasi v The Stat*e (1992) 10 SCNJ 113.
[98] *Textile Applied Products Ltd v H Stephens Shipping Ltd*.(1989) 1 NWLR (pt 95)115.
[99] Evidence Act (n4).

and the question in issue were substantially the same in the first as in the second proceeding.[100]

1.1.5 Electronic Evidence

Electronic evidence falls within the ambit of documentary evidence[101] section 84 of the Act[102] is titled admissibility of statements in documents produced by a computer. Computer is an electronic device; electronic evidence means evidence generated by some mechanical or electronic storage. Schafar and Mason[103] proffered a definition of electronic evidence as:

> Data (comprising the output of analogue devices or data in digital format) that is created, manipulated, stored or communicated by any manufactured device, computer or computer system or transmitted over a communication system that is, that has the potentials to make the factual account of either party more probable or less probable that it would be without the evidence.

A document which was typed using a computer is not a computer generated document.[104]Electronic evidence is not limited to that which is found on computers but may also extend to include evidence on digital devices such as telecommunication or electronic multimedia devices. Electronic evidence can be found in e-mail, digital photographs, Automated Tell Machine (ATM) transaction logs, word processing documents, instant message histories, files saved from accounting programs, spreadsheets, internet browser histories data bases, contents of computer memory, computer backups, computer printouts, Global positioning system tracks, logs from hotels' electronic door locks, digital video or audio files.

Digital evidence tends to be more voluminous, more difficult to destroy but easily modified,[105] easily duplicated, potentially more expressive and more readily available.[106] It is worthy of note that

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[100] *A G Abia v A G Fed* (2022) NWLR (pt.1856) 410-411 (SC).
[101] Evidence Act (n4)
[102] ibid.
[103] B Schafer, S Mason, 'The Characteristics of Electronic Evidence' in S Mason, D Seng (eds) *Electronic Evidence*
(2017) 19.
[104] *A G Fed v Anuebunwa* (2022) 14 NWLR (pt 1850) 211 (SC).
[105] *Abubakar v INEC* (2020) 12 NWLR (pt 1737) 37 (SC).
[106] B Schafer, S Mason, (103).

whether this classified specie of documentary evidence is described as computer evidence, electronic evidence or digital evidence the purport is to cover a species of evidence of forensic value tied to technology in their creation; storage and retrieval. Use of computers and other forms of electronic storage and communication systems are fast replacing the traditional method of keeping records and communications in written form; this class of document is unless printed paperless contained intangible objects visible but intangible. The Act[107] has defined computer as any device for storing and processing information; and also any device by means of which information is recorded, stored or retrievable including computer output to be a document.

Ajileye[108] defined electronic evidence as any electronically stored information or device that may be used in court to prove or disprove a fact. It includes documents, files and records that are stored by network or internet service providers. The devices for storage or transmission include but not limited to a wide range of gadget such as mobile phones, various forms of personal digital assistant cameras, music players, calculators, meters, Automated Teller Machine (ATM) machines, traffic lights, car tracking devices, card readers etc.[109] Electronic evidence consists of three concepts; computer data, soft copy and hard copy. Computer data is the information fed into the computer and stored in the systems' memory. It is stored in the hard disc so that the computer can perform other functions. The main circuit of computer data stored in hard disk then the soft copy is available on computer monitor and other devices like floppy disk, Universal Serial Bus (USB), mass storage devices etc., capable of being printed as hard copy. Until the information is printed it remains only machine readable except it is displayed on the computer monitor.[110] A server is a computer program that controls or supplies information to several computers connected in a network to the main computer on which it is run.[111] Bank statement is computer generated evidence and it has to be certified since the entire ledger is not tendered in evidence.[112] Video

[107] Evidence Act, (n4) being the definition section.
[108] A O Ajileye, (n2)76.
[109] ibid 77.
[110] ibid 285-286.
[111] *Abubakar v INEC* (n105) 119 (SC).
[112] *A G Fed v Anuebunwa* (n129) (SC).

recording in visual images are electronically generate evidence.[113] Global Satellite Mobile (GSM) is a computer.[114]

3. Theoretical Frameworks

The various theories that regulate the admissibility of documentary evidence in Nigeria are examined here under.

3.1 The Hearsay Rule Theory

Hearsay evidence is the presentation by a witness what some other persons had told him, generally statements written or oral made by persons who are not themselves called as a witness are not admissible in evidence, save in exceptional circumstances. By virtue of section 37 of the Act[115] hearsay means a statement, oral or written made otherwise than a witness in a proceeding; or contained in a book, document or any record, proof of which is not admissible under any provision of the Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.[116] The hearsay rule is that hearsay evidence is not admissible except as provided for under the Act.[117]

Hearsay evidence is generally not admissible because it is capable of being distorted at the process of conveying it; hearsay evidence is subject to human frailty such as misrepresentation and errors in reporting or recalling past events. The rule against hearsay emerged as one of the bulwarks for securing the reliability and credibility of evidence in the early years of common law. At that period, common law thrived on oral presentation of evidence. In the case of documentary hearsay, the witness who is not the maker of the statement may not know the circumstances surrounding the making of the document and thereby unable to answer questions under cross examination. The exceptions to the hearsay rule include:

i Statements made by persons who cannot be called as witness[118]

[113] *Enabuzor v State* (2022) 10 NWLR (pt 1839) 509 (SC).
[114] *Orogun and Anor v Fidelity Bank* (2018) LPELR-46601 (CA).
[115] ibid.
[116] *Muhammed v AG, Fed* (2021) 3 NWLR (pt 1764) 394.
[117] Evidence Act, (n4) section 38.
[118] ibid section 39; *Alli v Alesinloye* (2000) 4 SC (pt1) 111.

i. Statement relating to cause of death; also known as dying declarations[119]
ii. Statements made in the course of business contemporaneously[120]
iii. Confessions and admissions against interest[121]
iv. Statements of opinions as to right or custom and matters of general interest[122]
v. Statements relating to the existence of certain relationships[123]
vi. Declarations by testators[124]
vii. Statements made in previous proceedings[125]
viii. Expert opinions[126]
ix. Documents admissible under the proviso to section 83 of the Act[127]
x. Evidence of traditional history of land[128]
xi. Affidavit Evidence[129]

All these exceptions are made applicable only upon the laying of the requisite foundations provided in the Act and not admissible as a matter of course.

3.2 Authenticity Theory

Any person may authenticate an electronic record by affixing his digital signature on it.[130]By virtue of Section 258 of the amended Act 'digital signature means an electronically generated signature which is attached to an electronically transmitted document to verify its contents and the sender's identity.'

[119] ibid section 40.
[120] ibid section 41.
[121] ibid section 42.
[122] ibid section 43.
[123] ibid section 44.
[124] ibid section 45.
[125] ibid section 46.
[126] ibid section 126.
[127] *Anyaebosi v R T Briscoe (Nig) Ltd* (1987) 6 SC.
[128] Evidence Act (n4) section 66; *Anka v Lokoja* (2001) 4NWLR (Pt 702) 178.
[129] ibid section 107.
[130] Evidence Act (n4) section 84C (1).

'Electronic signature means authentication of any electronic record by a subscriber by means of the electronic technique specified in the second schedule and includes digital signature.'[131]

An electronic record can also be authenticated by electronic authentication technique which is considered reliable or may be specified by the Act.[132] Any digital signature or electronic authentication technique will be considered reliable if the signature creation data or authentication data are, within the context in which they are used, linked to the signatory or , as the case may be, the authenticator and of no other person.[133]

Where a digital signature is not secured it has to be proved, a digital signature is deemed to be secured if the signature creation data at the time of affixing the signature was under the exclusive control of the signatory and no other person; and was stored and affixed in such exclusive manner as may be prescribed.[134] By virtue of section 17 (2),[135] the burden of proving that the electronic signature does not belong to a purported originator lies contender.The following are some of the ways of affixing an electronic signature:

(i) A manual signature transmitted by facsimile; this is where a handwritten signature on paper is scanned to an image and the image is placed on a document electronically.
(ii) Typing a name in a document electronically
(iii) Using a personal identification number (PIN)
(iv) Using a password
(v) Biometric measurements, such as measuring a person's physical characteristic
(vi) Biodynamic measurement; series of measurements which record the behavior of the person
as he performs that action
(vii) clicking 'I agree', I accept'
(viii) Alphanumeric string or asterisk to confirm an intention to enter into online transactions, amongst other means.

[131] ibid section 258.
[132] ibid section 84C (2).
[133] ibid section 84C (3).
[134] ibid section 84D.
[135] Cybercrimes (Prohibition, Prevention, etc) Act, 2015.

While digital signature refers to the entire document, the technology used is Public Key Infrastructure; the procedure is to create a public-private key pair, then sign the message by creating a unique digest of the message and encrypting it; the digital signature will be attached to the message and sent to the recipient. The recipient will decrypt the digital signature. If the decryption is possible, the recipient knows the message is authentic; finally, the recipient will create a second message digest of the communication and compare it to the decrypted message digest; if they match, the recipient knows the message has not been altered. Because of this verification process digital signatures are the most secured type of electronic signature.[136]

3.3 Reliability Theory

The reliability theory of admissibility of documentary evidence is a legal framework that assesses the trustworthiness and credibility of a document. This theory has to do with factors such as, authorship of the document and probative value; these will help the court to determine whether a document is reliable, also from the nature of the document and other circumstances surrounding it. A document that is fraudulent cannot be relied on by the court also a document that emanated from an illegal transaction cannot be relied on by the court. For a document to be admitted in evidence it must have integrity clear of any form of mutilations or cancellations which may suggest fraud.

3.4 The Best Evidence Rule Theory

Primary evidence means the original evidence itself, where the evidence is in the form of document, it will be the document itself that will be produced for the inspection of the court[137] the best evidence rule is that facts are best proved when presented in their raw, natural and unaltered form. With regard to document, the primary evidence is the original document, as such the content of a document except in legally recognized cases, must be proved by primary evidence, the Act defined primary evidence: 'means the document itself produced for the inspection of the court';[138] by the use of the word 'means' in the

[136] AO Ajileye, (n2).
[137] Evidence Act (n4), section 86 (1).
[138] ibid.

definition, it connotes that the definition is a hard and fast one that does not accommodate any enlargement whatsoever.[139]

Primary document means the document itself produced for the inspection of the court.[140] Primary/original document of a transaction in writing as the document itself should be produced in the original form to prove the items of the transaction or the contract.[141] Primary document is referred to as the best evidence rule, it is the document itself produced before the Court.[142] Where a document has been executed in several parts, each part is primary evidence of the document.[143] Where a document has been executed in counter- parts, each counter parts being executed by one or some of the parties is primary evidence of the document.[144] Where a number of primary document have all been made by one uniform process, as in the case of printing, Lithography, or photography, each is the primary evidence of the content of the rest, but where they are all copies of a common original, they are not primary evidence but only evidence of the content of the original.[145] A party who seeks to tender documentary evidence in court to prove or disprove a fact in issue has to plead whether such document was processed or generated by one uniform process, as in the case of printing, lithography, photography, computer or other electronic or mechanical process, for each shall be primary evidence of the contents of the rest of the document.[146]

4. Conclusion

The concept and theories of documentary evidence are germane to advocacy, the meaning of evidence has to be understood and also what constitutes a document, relevance being the hallmark of admissibility also must be well understood, admissibility is another concept that is

[139] *Ibrahim v State* (1991) 4 NWLR (pt 186) 426 (SC).

[140] ibid section 86 (1); *Aromalaran v Agoro* (2014) 18 NWLR (pt 1438) 153 (SC); *Ioropuu v State* (2020)1 NWLR (pt 1706) 391 (SC).

[141] *Onwuzuruike v Edoziem* (2016) 6 NWLR (pt 1508) 215 (SC), Sudipto, VR Manohar, *Law of Evidence* (Lexis Nexis Butterworths Wadhva Nagpur 17th ed) 1405.

[142] JO Amupitan, (n17) 29.

[143] Evidence Act, (n4) section 86 (2).

[144] ibid section 83 (3); *Maersil v Noky Invest Ltd* (2000) 7 NWLR (pt 666) 587 (CA).

[145] Evidence Act, (n4) section 86 (4).

[146] *Julius v FRN* (2021) LPELR-54201 (CA).

vital to documentary evidence, understanding the meaning and constituents of electronic evidence is also pivotal to advocacy. The in-depth knowledge of the various theories of documentary evidence will aid the bar and the bench to arrive at the justice of a particular case. It is hereby recommended that the concepts and theories of documentary evidence be construed appropriately by courts without recourse to undue technicalities.