ADMISSIBILITY OF SECONDARY EVIDENCE UNDER THE EVIDENCE ACT 2011: A CRITICAL ANALYSIS

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ABSTRACT

In every judicial proceeding, the parties involved must prosecute or defend their cases based on credible evidence. It is evidence which shows that something exist or that something is true. The courts would only rely on evidence duly obtained in the course of the proceedings. An attempt has been made to define or explain the meaning of evidence in this paper but suffice it to say that "evidence" is the foundation of every judicial proceeding in the court or tribunal. Evidence has been severally classified by difference authors but the basic concern here is on the primary (original) and secondary (photocopy) evidence. While there is no difficulty in a party tendering primarily evidence due to its originality, it is not always so with the secondary evidence. For a photocopy of a private document, all the party seeking to tender it needs to do under the Evidence Act is to lay a sufficient foundation of what has happened to the original and if satisfied, the court would admit it in evidence. On the other hand, if the photocopy is of a public document, the law requires a certified true copy of the document to be issued by the official custodian of the document. The trend in courts and among legal practitioners is that once public document is not certified by the officer in whose custody it is kept, objections as to its admissibility or otherwise are raised and often upheld by the courts. However, the good news is that recently some courts are favourably disposed at considering the difficulty imposed on litigants who may not procure the certified true copy for one reason or the other, by treating such as an exceptional circumstance. The position of courts on this point has been treated in this paper. This is so because evidence not properly admitted would be expunged on appeal and to admit a piece of evidence, the court considers fundamentally whether it is admissible, whether it is relevant, whether it is not excluded by the force of law and at judgement stage its probative value - whether it is remotely related to the facts in issue.

Keywords*: Evidence; Admissibility and Relevancy; Public Documents; Photocopies and Certified copies*

INTRODUCTION

The Evidence Act 2011, No. 18 Laws of the Federation of Nigeria (hereinafter referred' to as the Evidence Act) did not define 'evidence'.

However, the learned authors of Black's law Dictionary defined Evidence in the following words:

Any species of proof, or probative matter, legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records, documents, exhibits, concrete objects etc. for the purpose of inducing belief in the minds of the court or jury as to their contention…… Testimony, writings, or material objects offered in proof of an alleged fact or proposition. That probative material, legally received, by which the tribunal may be lawfully persuaded of the truth or falsity of a fact in issue[i].

A former professor of English Law[ii] in the University of Oxford had explained evidence as that which tends to prove a fact which may satisfy an inquirer of the fact's existence. Cross further conceptualized the issue when he said:

"Courts of Law usually have to find that certain facts exist before pronouncing on the rights, duties and liabilities of the parties and such evidence as they will receive in furtherance of this task is described as judicial evidence"[iii]

However, section 258 (1) of the Act attempts to define "real evidence" to mean anything other than testimony, admissible hearsay or a document the context of which are affected evidence of a fact at a trial, which is examined by the court as a means of proof of such fact.

In compiling or reproducing the new Evidence Act 2011 for purposes of distribution to the public, Princeton publishing company had provided a definition of evidence as follows:

Evidence is said to be the means by which facts in issue are established by judicial tribunal, such evidence could be oral, hearsay, documenting, things and facts which a court will accept as the fact in issue in a given case. It could be oral, documentary or real, in which the court may be legally received in order to prove or disprove some facts in dispute.[iv]

Having tried a conceptualization of the term "evidence" it is worthy of note that the main attention in this discourse is on the Evidence Act, 2011 which repealed the 1945 Act that had existed and applicable in Nigeria between 1945 and 2011. The 1945 Act was fashioned in atonement with the English principles of evidence.[v] Although most of the provisions of the 1945 Act were reproduced and bundled into the 2011 Act, nevertheless there are outstanding changes in the 2011 Act not just by re-arrangement of sections but in content, especially in the area of electronic evidence and a clear departure from hitherto wholesale application of Section 5(a) of the 1945 Act. Under the 2011 Act matters concerning evidence as may be provided for in any other Act or legislation in force in Nigeria should be relied upon by Courts and Judges in taking evidence and reaching a final decision after hearing. It is no more (as understood by courts now) imperative for courts to resort to English law and judgments as prescribed by section 5 (a) of 1945 Act, which states that "nothing in the Act shall prejudice the admissibility of any evidence which would apart from the provisions of the Act be admissible". The effect of this provision is both to allow evidence to be admitted under any other law in force in Nigeria as well as admission of evidence which would have been admissible if the Act was not passed. What the last lap of the provision means is that nothing stops the courts from resorting to the provision of English law and decisions. The consequence of this provision was that most of Nigerian courts based their judgments on the English Act especially where the 1945 Act is silent on certain facts in issues. The situation is different under the new 2011 Act and for purposes of certainty of understanding permit us to reproduce the relevant sections at this stage to wit:

Section (1) - Evidence may be given in any suite or proceedings 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 include evidence of facts which though relevant or deemed to be relevant to the issue, appears 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.

Section 2- for avoidance of doubt, all evidence given in accordance with section 1 shall, unless excluded in accordance with this or any other Act, or any other legislation validly in force in Nigeria be admissible in judicial proceedings to which this Act applies; provided that admissibility of such evidence shall be subject to all such conditions as may be specified in each case by or under this Act.

Section 3: Nothing in this Act shall prejudice the admissibility of any evidence that is made admissible by any other legislation validly in force in Nigeria.

Our clear understanding of the above provisions of the 2011 Act are that:

(a) Evidence may be given to establish the existence or non-existance of every facts in issues.
(b) Evidence may be given of facts that are relevant.
(c) Evidence of facts which though relevant may be excluded by the courts if considered to be too remote to be material in all the circumstances of the case.
(d) Evidence shall not be allowed to be given of a fact which a witness is not entitled to provide by law.
(e) Evidence made admissible by any other legislation validly in force in Nigeria would be allowed.

From the foregoing, evidence is the cornerstone of any judicial proceeding and so occupies a center page in the determination of civil and criminal actions in courts and tribunals. To effectively utilize any piece of evidence in any proceeding, considerations must be made to its proper admissibility, relevancy and lastly probative value. These three fundamentals must go together. Admissibility of evidence is very crucial in juridical proceedings. When evidence is said to be admissible, it means that the evidence is of such a character that the court ought to receive it or allow it to be introduced at trial as part of the records and act on it. To be an admissible evidence, it must be relevant and capable of establishing a material fact in issue. However, a piece of evidence may be relevant but inadmissible if it is excluded by the Act or any other legislation validly made by the legislature. Thus Ejembi Eko, JSC in Kekong V. State[vi] held that that the provisions of the Land Instrument Registration Law of Ogun State are not inconsistent with the provisions of the Evidence Act. Similarly, Ogebe J.C.A. (As he then was) in Remm Oil Services Ltd V. Endwell Trading Co. Ltd[vii] said; "the two witnesses called by the respondent in the Court below to prove the contract were not involved in the negotiation

of the contract. These two witnesses are Pw1, Ndubuisi Ogbona who was a supervisor with the respondent Co. and Pw2, Jonah Okpara who was employed by the respondent to cut iron scraps. It follows, therefore that his evidence on the contract can only be hearsay. We know that hearsay evidence is excluded in law save in certain circumstances. This is because (as earlier stated herein) Section 1 of the Act 2011 precludes any person from giving evidence of fact which he is disentitled to provide by any provision of the law for the time being in force. Finally, it is apparently settled that relevancy is not the only qualification of admissibility of evidence. It has to be free from restriction by law, thus in Kekong V. State[viii], Ejembi Eko, JSC further observed that "there is no doubt that by virtue of Section 2 of the evidence Act, that a piece of evidence excluded by either the Act itself or any other legislation validly in force in Nigeria cannot be admissible in evidence. It is therefore, not only relevancy that governs admissibility. A piece of evidence may be relevant and yet could by operation of law be inadmissible."

For purposes of this work, we are concerned with judicial evidence which can be primary or secondary. A primary evidence' is that which does not, by its nature, suggest that better evidence may be available; 'secondary evidence' is that which by its very nature does suggest that better evidence may be available[ix]. Simply put, the original of a document is a primary evidence while a copy of the original is a secondary evidence. By Section 85 of the Evidence Act, the content of documents may be proved either by primary or secondary evidence.

Section 87 of the Evidence Act has categorized secondary evidence to include the following:-

(a) Certified copies given under the provisions hereinafter contained;

(a) (b) Copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(b) Copies made from or compared with the original;

(c) Counterparts of documents as against the parties who did not execute them;

(d) Oral account of the contents of a document given by some person who has himself seen it.

From the above categorization, we can easily identify the fact that Section 87 would include oral evidence and photographs given in relation to inscriptions on a tombstone or on a wall which are of such nature that they cannot be easily movable[x].

We are, however, of the view that whenever a photograph is to be tendered as evidence in any proceeding, the photographer has to be called as a witness and he should tender both the negative and photograph together. The exception could be where the photographer is dead or is in overseas and cannot be available to testify. In such circumstance, the party seeking to rely on that evidence must lay a credible foundation by informing the court of why the photographer cannot be called.

ADMISSIBILITY UNDER SECTIONS 89 AND 90 OF THE EVIDENCE ACT

The essence of the Evidence Act is to formulate and establish rules of practice relating to admissibility and value of evidence. By Section 88 of the Evidence Act, documents must be proved by primary evidence except in the cases stipulated in Section 89.

Since this work is concerned with that Section, it is considered pertinent to reproduce same for ease of reference.

Accordingly, under Section 89 Secondary evidence may be given of the existence, condition or contents 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, or

   ii) of any person legally bound to produce it, and when, after the notice mentioned in section 91 of this Act, such person does not produce it;

b) 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 sector 102;

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) When the documents is an entry in a banker's book,

Furthermore, the Act has made provisions about the requirement of notice to produce the original documents which are in custody of the adverse party. It is in the event of failure to produce the original by the adverse party that the other party, would be 'allowed to tender the photocopy (secondary evidence) for purposes of admissibility.

Section 91 of the Evidence Act, 2011:

Secondary evidence of the contents of the documents 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 produce it as is prescribed by law; and if no notice to produce is prescribed by law then such notice as the court considers reasonable in *the Circumstances of the case.*

Provided that such notice shall not be required in order to render secondary evidence admissible in any or the following cases or in any other case in which the court thinks fit to dispense with it:

(a) When the document to be provided 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 possession of the original by fraud or force;
(d) When the adverse party or his agent has the original in court, or
(e) When the adverse party or his agent has admitted the loss of the document,

Under section 90 (1) the secondary evidence admissible in respect of the original documents referred to in the several paragraphs of section 89 is as follows-

(a) In paragraphs (a), (c) and (d) any secondary evidence of the contents of the document is admissible
(b) In paragraph (b) the written admission is admissible;

(c) In paragraph (e) or (f) a certified copy of document, but no other kind of secondary evidence, is admissible;

(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 be first proved 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 custody and control of the bank, which proof may be given orally or by affidavit by a partner or 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 original entry and may be given orally or by affidavit.

(2) When a seaman sues for his wages he may give secondary evidence of the ship's articles and of any agreement supporting his case, without notice to produce the originals.

With respect to subsections 1 (a) (i) (ii) of 89, 1t is of the other party who asserts that the original is in the possession of the other party to State that fact in his pleadings and testify to that effect before applying to tender the secondary evidence. Failure to do this will deny him of the benefit of that subsection and the court may refuse to admit that material fact. Once the court is satisfied that the original is in the possession or power of the adverse party, the party seeking to tender the secondary evidence, which could be the Photostat copy of the original[xi] can do so without giving prior notice to produce the original.

Under subsection 1 (b) the written admission is relevant and has to be produced at trial to enable the court admit in evidence any facts relating to the content of the original.

There is little or no problem as to the condition posed in subsection 1 (c) because all that is required from the party seeking to tender the secondary evidence is to inform the court the efforts he has made in search of the lost original[xii]. It is the duty of the opposing party to promptly reply by way of objecting to the evidence that proper search for the original has been made. If for any reason the opposing party neglects to object at the time the evidence was being

tendered, he will be legally estopped from calling evidence to contradict the content of the document[xiii]

When the original is incapable of being moved as contemplated in subsection 1(d) oral evidence and photograph of the object can be given to prove its existence. But where the court on its motion decides, or on the application of either party, the court can move to the location of the object for inspection.[xiv]

Under section 89 1 (e) and (f) the situation is different. While, under sections 90 1(a), (c) and (d), Secondary evidence for instance, photostat copies are admissible upon certain explanation first made. On the other hand, Photostat copies of public documents are not admissible irrespective of any explanation relating to the where- about of the originals. This is because, by the combined effect of sections 89 (e) and (f) of the Evidence Act, it is either the originals or certified copies of public documents that are admissible in evidence[xv].

In other words, no other kind of secondary evidence is admissible. We are of the view that under section 90 (1) (c) of the Evidence Act photocopies of public documents are absolutely inadmissible in Law. In other words, no explanation as to what happened to the original will render the photocopy admissible.

However, the effect of Section 90(1)(c) of the evidence Act, 2011 and the concept of fair hearing, should not be left unattended to. Some scholars have made beautiful arguments linking the section with the danger in denying parties to an action of fair hearing. They imagine the hardship that may be imposed on a litigant who has lost his public document either by fire, during accident by road, sea or air etc. could be compelled to procure the certified true copy of such original which the official custodian is unable to produce. To insist on compliance with section 90 (1)(c) would certainly cause injustice and indeed denial of fair hearing. In making beautiful but persuasive arguments on this point Professor Taiwo Osipitan, SAN did say: "it is practically impossible for the legal custodian of a lost, destroyed or non-existing public document to issue a certified true copy of such document. It will therefore be futile to cling to section 90 (1)(c) of the which insists that certified true copy and no other secondary evidence is admissible:[xvi] Also, Osipitan, SAN (supra) quoted in approval the relieving comment by Mary Odili, JSC when she said that *"it behoves a party who seeks a certified copy of a public document and encounters difficulties to go the extra mile to establish same so that the court can make an exception to the secondary evidence".*

Agreed that the position and instruction given by Hon. Justice Mary Odili JSC is very relieving and promising some hope, it is however advisable that for a litigant to leverage on this to benefit from the exceptional remedy, the party seeking to tender a secondary evidence of a public document must demonstrate that he or she has exhausted all that is needed to be done to procure the certified true copy. And that is to say, he must show that he has paid for the certified copy together with the application for it, efforts made to get the copy certified at the registry of the legal custodian, response from the official custodian to the effect that it was impossible or difficult to get the document. This caveat is necessary because, for the court to grant an application to allow in an uncertified public document is not as a matter of course. In other words it is not automatic, but granted under an exceptional circumstance as exponentially opined by Justice Odili (supra).

At least this shows that in appropriate cases exception can be made to admit as secondary evidence of a public document without being certified by the legal custodian. Akinola Auda, T (Supra) has also elaborately talked about the relationship between the Evidence Act and the observance of fair hearing. We think, like Osipitan, SAN suggested, the said Section 90(1)(c) of the Act ought be amended since the hardship it imposes is glaring and fundamental and goes to affect the root of fair hearing.

It is trite law that where a document which is inadmissible in evidence is admitted, by the trial court such document must be rejected on appeal[xvii]. In cases where the evidence is absolutely inadmissible by virtue of some statutory provisions, the evidence if erroneously admitted by court cannot be acted upon whether it was by consent of the parties or otherwise. The result being that such evidence will be rejected on appeal even if it was not objected to at the lower court. Pieces of evidence that fall within the ambit of sections 89 (e) (and 90 (i) (c) are in this category or class of evidence[xviii].

On the other hand, a document which is a photocopy that has to be tendered upon certain conditions is admissible if there was no objection to it and in such a case, the document cannot be rejected on appeal. In fact, the position of the law is that the party who should nave objected to it and didn't will not be allowed to raise an objection on it on appeal. Sections 90 1 (a) (c) and (d) of the Evidence Act contemplates this class of evidence, the reason being that they are not absolutely inadmissible. Thus, in GILBERT V. ENDEAN, Cotton L. J. made the following observations:

But I must add this: where in the court below the evidence not being strictly admissible, not being that on which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the court of appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible[xix].

This distinction has well been made by Nigerian courts. For instance, in considering the position of the law in relation to admissibility of photocopies of public documents, the Supreme Court of Nigeria had this to say:-

The document now marked Exhibit 2 is not a certified true copy but a Photostat copy and is therefore inadmissible as secondary evidence of a public document which it purports to be. There was no objection as to admissibility when it was produced but it is not within the competence of parties to a case to admit by consent or otherwise a document which by law, is inadmissible[xx]

Commenting on the nature of proof of documents which are not public document and so not absolutely inadmissible, Idigbe, J.S. C. clearly stated the position as follows:

Dealing with the latter class of cases, however, this court in Cavollotti Govianni V. Bonaso Luigi SC 402/67 of 31/10/69 held that a document (a photocopy) which did not comply with section 96 (1) (b) of the Evidence Act and which had been admitted without objection by the appellant was legal evidence upon which the court could properly act…… Accordingly, in those cases where the evidence complained of is not, by law, inadmissible in any event a party may by his own conduct at the trial, be precluded from objecting to such evidence on appeal[xxi]

Under Section 90 (1) (e), what the party relying on the evidence to prove his case ought to do is to call oral evidence of an expert to prove the document. This view is wholly supported by Akinola Aguda, J. when he said:-

In this case oral evidence as to the general result of the documents may be given by any person who has examined them and who is skilled in the examination of such documents[xxii].

The last segment of this consideration is in section 90 (1) (e) and (i)-iv) which concerns the admissibility of documents which are entries in a banker's book. This subsection makes copies of entries in a banker's book admissible upon strict compliance with in a banker's book admissible upon strict compliance with standard of proof therein stipulated.

Banker's book has been defined by the Evidence Act to include ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank[xxiii]. Although this definition is not restrictive and accordingly could be extended to things which it does not ordinarily mean, the Supreme Court of Nigeria has, however, held that "vouchers" cannot be banker's books.[xxiv]

In that case the Nigeria Apex Court said:

Admittedly, this definition is not restrictive and could therefore be extended to mean something else which it does not ordinarily mean. Therefore, while the phrase may include "a ledger card", although even this is far from clear, we do not think it could be extended to mean a "voucher" from which according to the evidence, the entries in the Statement of Account (Ex. B) were obtained. That being the case, the statement could not be admitted as secondary evidence of the entries in a banker's book by virtue of the provisions of section 96 (1) (h) of the Act and the Learned Trial Judge was in error in admitting it as such[xxv].

With the greatest respect to the Learned Justices of the Supreme Court, we believe that it is not fair to exclude vouchers from the meaning of bankers' books as defined by the Act. A voucher is a banker's account book which for instance certifies the receipts, acquaintances or release in relation to customer's obligations. Although, the Act did not specifically define "voucher", we submit that vouchers are covered by the words "and all other books used in the ordinary business of a bank".

A voucher has been defined in Black's Law Dictionary in the following terms

A receipt, acquaintance, or release, which may serve as evidence of payment or discharge of a debt, or to certify the correctness of accounts. An account-book containing the acquaintances or receipts showing the accountant's discharge of his obligations. When used in connection with disbursement of money, is a written or printed instrument in the nature of an account, receipt, or acquaintance that shows on its face the fact, authority, and purpose of disbursement. A document that serves to recognize a liability and authorize the disbursement of cash. Sometimes used to refer to the written evidence documenting an accounting entry, as in the terms of journal voucher[xxvi].

It is believed that if the attention of the Supreme Court was drawn to the above definition of "voucher" it would have no doubt accepted the evidence of entries in a voucher kept by the bank to be banker's book.

Another important issue raised in the section is proof of the secondary evidence (i.e. the copy). Before admitting the evidence, it must be proved that:

(a) There was in existence a banker's book from which the entries about the said Account were made;

(b) The book was at the time of making the entries, one of the ordinary books of the bank;

(c) The entries were made in the usual and ordinary course of business;

(d) The book is in the custody and control of the bank: and

(e) The copy of the entries sought to be tendered has been examined with the original entries and found correct[xxvii].

The above proof must be done by a partner or an officer of the bank and may be given orally or by an affidavit properly sworn to.[xxviii]

In a number of cases the Supreme Court has held that in proving the elements catalogued above, the witness need not use the exact words of the status nor does the length of evidence matter much[xxix]. In the Asylum for Idiots' case (supra) the court held thus:

A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry 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 or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorized to take affidavits[xxx].

The crux of the matter is that the party relying on a copy of a banker's book must properly prove it before it is admitted in evidence. And to successfully do this, the party must establish the following in his evidence and that is to say:

a) Where it is not possible to produce the book of the bank (originals), a certified true copy of the account is enough.

b) The certified copy has to be tendered by an official of the bank or any other competent person who must have compared the copy with the original before the certification.

c) The books must have been in the custody and control of the bank.

In practice, the Statement of Account of the customer is usually or most commonly produced to the court. Certainly the Statement of Account is usually copied from the ledger card or other books. It follows from what we have been saving that the machinist who produced the Statement of Account or the officer who compared the statement of Account with the Original books are vital witnesses.

The effect of failure to comply with the provisions of this subsection is that the evidence will be rejected. If evidence is erroneously admitted, it will be rejected on appeal[xxxi]. Cases must be decided on legal evidence.

One other aspect to this matter is where the claim before the court is placed on the undefended list. The uniform High Court Rules in Nigeria accept a claim which is founded on liquidated demand to be placed on the undefended list. To do this, an affidavit has to be sworn to support the writ of summons stating that the defendant has no defence. Consequently, a photocopy of the Statement of Account or the ledger card or any other books are exhibited to the affidavit. It does follow that the deponent of the affidavit must as a matter of necessity comply with the requirements of section 90. In other words, stating how the copy was produced. There is no difficulty in appreciating and accepting that position to be the legal course especially as the subsection itself has clearly recognized the use of affidavit to satisfy those requirements. The same shall apply to claims filed in the District Courts on the Default Summons which also requires an affidavit to support the writ. These are special procedures that in most cases the courts summarily enter judgment for the plaintiff if the affidavit evidence is accepted and unchallenged.

But, we must place caution here that an affidavit which does not comply with the requirement of the subsection concerning admissibility of secondary evidence of entries in the banks' books must be rejected whether objected to or not. That will be a good reason for transferring the matter to the general cause list for trial.

Furthermore, Subsection (2) simply requires a seaman who sues for his wages to give secondary evidence of the ship's articles or of any other agreement supporting his case. Here, the seaman does not need to give any notice to produce the originals.

We have tried to put the law as it is and the reaction of courts of various jurisdictions on the matter, including the views of erudite scholars, but what happens in a situation where the

plaintiff is not represented by counsel? of course, a layman (who is not trained as a lawyer) will not know that:

(a) He needs to lay a foundation before he can tender a secondary evidence; or

(b) He needs to get a certified copy of his statement of Account if he must prove his case against the bank if the original is missing. The situation is even more difficult where the party who must get the copy certified is a customer to the bank and not the bank itself. This is because even when notice to produce the originals is given to the bank, the photocopy will yet not be admissible if it is not certified by the bank.

In most cases a party cannot prove his case without the statement of Account. What is the fate of the party who cannot lay hands on the original or certified copy? Will his claim be allowed to fail on this technical ground?

We are of the firm view that the courts should give a human face to the statutory provisions of Sections 89 and 90 of the Evidence Act in exceptional cases. To do this, where the opposing party cannot provide a better evidence adverse to the photocopy produced in court, the court should accept the photocopy and act on it.

This shall be, notwithstanding that there is no strict compliance to the statutory provisions. After all said and done, in law, admissibility of evidence is based on relevancy[xxxii]. Furthermore, we do think that strict adherence to the provisions of the section under consideration will be unnecessarily relying on technicalities which must not be allowed to defeat end of justice[xxxiii] Every case must be judged on its own merits and peculiar circumstances.

In a fast developing business environment like Nigeria, strict enforcement of the procedural provisions of Sections 89 and 90 in all cases will be a great impediment to commercial transactions. Experience has shown that most cases are lost not on their merit but on the non-compliance with the rules of procedure. Our Evidence Act, therefore, needs a radical re-view to effectively accommodate our local circumstances. This view is founded on the fact that the Evidence Ordinance No. 27 of 1943 which metamorphosed into the Evidence Act Cap. 62 Laws of the Federation and Lagos 1958 and lastly 2011 are still largely based on Stephen's Digest of the Law of Evidence (12th Edition). We will point out here that, unfortunately, the provisions in the 1958 Act are reproduced in the Evidence Act Cap.112 Laws of the Federation,

1990 as well as the Evidence Act 2011. The need for urgent review of the Evidence Act to properly take care of our local circumstances and level of growth should be treated as a national issue. Again, we stand firm on this demand considering the fact that most of the English Statutes on which we based our pre-independence laws and even after independence have been reviewed and amended many years back. However, the consolation introduced by the Evidence Act 2011 is the broad definition of document under its Section 258 which has removed the controversies always attached to electronically generated evidence under the repealed law. This is because the use of the word "includes" had made the category of documents wider. That subject is not for discussion here.

We therefore, use this opportunity to call on the Law Review Commission of Nigeria to as a matter of urgency set the necessary machinery in motion towards attaining this goal. No case can be decided without evidence and that understanding necessitates this advice.

CONCLUSION

The cornerstone of any judicial proceeding is the quantum and quality of evidence presented before the arbitrating body over disputes. Evidence therefore constitute the fulcrum on which the arbiter (i.e. court, tribunals) based their decisions at the end of hearing the parties to proceeding. The evidence could be primary (original) or secondary (photocopy or photostat) depending on the circumstance of the case. The evidence Act 2011 has categorised the various types of evidence and prescribes the way they can be admissible in law. There are the private and public documents which in most cases form part of the evidence to be adduced or tendered in court, while the party seeking to tender a photocopy of a private document needs to lay a foundation on why the original is not available and efforts he has made to get it, on the other hand a party seeking to tender a photocopy of a public document must go extra mile to show that he has paid for the certified true copy; that the official custodian is not co-operating of proving difficult to issue a certified true copy or that the office is extinct. All these steps are to enable the party enjoy the sympathy of the court who may decide to admit the uncertified copy. It is worthy of vote that until recently courts were adamant but insisted on admitting only certified true copy of public documents. However, it is now tilting to a positive direction where courts begin to reason that insistence on certified true copy even on the face of glaring difficulty to procure one causes hardship and indeed denial of justice on the platform of fair leaving. But

courts would only do that under exceptional circumstances and not as a matter of routine. That being the case the Evidence Act need further amendment on Section 90 (1) (c) to accommodate the new thinking of courts, and legal practitioners.

In conclusion the courts before whom trial proceedings are holding should face the basic task of ensuring that the evidence is admissible; the evidence is relevant; the evidence is not remotely connected to the facts in issue and at the judgement stage that the evidence has a probative value. It is therefore not only relevancy that determines admissibility but all these other factors including that it is not in any way excluded by law, either the evidence Act or any other legislation made by the National Assembly.

ENDNOTES

[i] Black's Law Dictionary, with pronunciations, Sixth Edition at Page 555

[ii] Professor (Sir) Rupert Cross on Evidence, Fifth Edition Page 1

[iii] *Ibid*

[iv] Evidence Act 2011, with cases & Materials p.133 (Princeton Publishing Company)

[v] See Aguda, Akintola, T. The Law of Evidence, (2009) Spectrum Law Series P.6 for further reading.

[vi] (2017) 18 NWLR (Pt. 1596) 108; (2017) LPELR 42343

[vii] (2003)FWLR (Pt. 152) 98 CA

[viii] *Supra*

[ix] *Ibid* at page 15

[x] See Akinola Aguda, Law and Practice Relating to Evidence in Nigeria. 1980 Edition at page 186.

[xi] See Esso West Africa Inc. V. Y. ALLT (1968) NMLR 414

[xii] See Section 91 (b) of the Evidence Act dealing on rules as to notice to produce

[xiii] See Aguda, *Ibid*d at page 186. See also the case of Minister of Lagos Affairs V. Federal Administrator or Ors (1961) W.N.L.R 159.

[xiv] This is refered to as visit to the Locus in quo or in relation to commission of an offence the Locus Delicti

[xv] Osipitan Taiwo SAN, A decade of the 2011 Evidence Act: Some Developments, problems & Prospect, NIALS fellows' Lecture series, 2022 pp36-27.

[xvi] Osipitan Taiwo SAN, A decade of the 2011 Evidence Act: Some Developments, problems & Prospect, NIALS fellows' Lecture series, 2022 pp36-27.

[xvii] See Ajayi Fisher 1 FSC 97; Esso West Ajrican Incorporated V. Ali (1968) NMLR 414 at page 423; Anyaebosi V. R. T. Briswe (Nig) Ltd. (1987)6 SCNJ 9 at page 20.

[xviii] See OKULADE Vs. ALADE (1976) ALL NLR 56 at page 62; OWONIYIN V.OMOTOSHO (1961) All NLR 304 at page s08; YASSIN V BARCLA YS BANK DCO (1 968) 1 all NLR 171, 179

[xix] (1878)09 Ch. D. 259.

[xx] See CAVOLLOTI GOVIANNI V. RONASO LUIGI Unreported Supreme Court case SC 402/67 of 31 1069; CHUKWURAH AKUNNE V. MATHIAS EKUNNO' ORS (1952) No. 14 WACA 59, See also Minister of Lands, Western Nigeria V. Dr. Nnamdi Azikiuwe & Ors Unreported Case No. SC 169/68 of 31/1/69

[xxi] Okulade V.. Alade (*Supra*)at page 62. Note also, that all that is required to be done in tendering such evidence is to lay a proper foundation as to what happened to the original.

[xxii] Aguda, *Supra* Page 186

[xxiii] See Section 258 of the evidence Act.

[xxiv] See Festius Sunmoila Yesufu V. Continental Bank Ltd (1976) 4 SC 1 at Page 13.

[xxv] *Ibid*

[xxvi] See Black's Law Dictionary Sixth Edition page 1,577

[xxvii] Yesufu's case *Supra* page 7, see also Aguda, lbid at page 187; Asylum for V. Handysides (1906) 22 T.L.R. 573 Idiots

[xxviii] See Asylum of Idiots' case *Supra* where the court was considering a similar provision of S. 4 of the Bankers' Evidence Act 1879

[xxix] Yesudu's case *Supra* at page 14-15; see also the state V. Olomo (unreported supreme court case No. SC. 1/1970 dated 29/10/70

[xxx] See Asylum for ldiots V. Handysides 1906) 22 T.L.R. 573; see also YASSIN V Yesufu's case *Supra* at page 14-15; see also the State V. Olomo (unreported Supreme Court case No. SC. 1/ 1970 dated 29/10/ 70.

[xxxi] See the cases already referred to in this work. See also owonyin V. Omotosho (1961) all NLR 304 at 308

[xxxii] In Nigeria admissibility of evidence is based on relevance irrespective of the evidence was O 20 lgbinov A. V. The State (1981) 2 SC 5 at row the evidence was obtained. See Sandu Musa & (1968) ALL NLR 125 at page 129 1gbinov A. V. The State (1981) 2 SC 5 at page 15-16; Torti V. Ukpabi (1984) 1 S S/0 at page 392.

[xxxiii] See Nneji Chukwu & Ors (1988) 6 S.C.N.J. 132 at page 145-146.