

THE EVIDENCE ACT 2011 – A REVIEW

The recent decision by the President of Nigeria to sign into law the newer version to the, needless to say, archaic **1945 Evidence Act**, is indeed a welcome development. The previous Evidence Act, often described by numerous legal commentators as embarrassing, was replete with several obsolete provisions.

Most laughable, at least for the writer, was its use of condescending words such as native, colonial. More entertaining was the former law's reference to a Jury in a judicial system that does not use a Jury. It is pleasing to note that all these anomalies have no place under the new Act.

IMPROPERLY OBTAINED EVIDENCE:

Prior to the introduction of the later statute the Courts were at liberty to admit into evidence any piece of evidence considered relevant to the facts in issue, irrespective of the manner in which such evidence was obtained.

Under the new Act the Courts are asked to exercise discretion in the admission of **improperly obtained** evidence and in exercising the discretion the Courts are bound to take into consideration the following:

- a. the probative value of the evidence;
- b. the importance of the evidence in the proceeding;
- c. the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
- d. the gravity of the impropriety or contravention;
- e. whether the impropriety or contravention was deliberate or reckless;
- f. whether any other proceeding (whether or not in court) has been or is likely to be taken in relation to the impropriety or contravention.
- g. the difficulty, if any, of obtaining the evidence without impropriety or contravention of law. (Section 14)

Improperly obtained evidence is defined as evidence obtained improperly or in contravention of a law or evidence obtained in consequence of an impropriety or in contravention of law.

CUSTOMS:

Under the new Act, a custom may be judicially noticed when it has been adjudicated upon once by a Superior Court of Record. Previously the Courts were not permitted to take judicial notice of a custom unless the custom had been acted upon repeatedly by a Court of Superior or co-ordinate jurisdiction to the extent that persons or classes of persons in that area look upon it as binding in relation to circumstances similar to those under consideration.

ELECTRONIC EVIDENCE:

The introduction of this section can easily be described as the key catalyst for the new law. The statutory recognition of electronic communication, though long overdue, is without doubt the most valuable contribution, by Nigeria's legislature, to the progress of our challenged Justice system.

In various parts of the Act, electronically generated evidence is admissible when it is made as a statement in the ordinary course of business provided that the maker made the statement contemporaneously with the transaction recorded so soon thereafter that the Court considers it likely that the transaction was at that time still fresh in the maker's memory.

However, in any proceeding where a statement contained in a document produced by a computer is sought to be admitted in evidence, the statement would be admissible if it is shown to have satisfied the following conditions:

- a. That the document containing the statement was produced by the computer during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody, whether corporate or not, or by any individual;
- b. That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived;
- c. That throughout the material part of that period. the computer was operating properly or, if not, that in any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and
- d. That the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities. (Sections 41, 153 and Section 84)

CONFESSIONS:

Involuntary statements are inadmissible. The Act goes further by defining the scope of "inducement, threat, promise or oppression". (Section 27 and 29)

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES:

Statements made by a person as to the cause of his death is admissible in all proceedings where the cause of death is in controversy. Under the old Act such statements were admissible strictly in murder and manslaughter Trials. (Section 40)

EVIDENCE AS TO STATE OF AFFAIRS AND EXCLUSION OF EVIDENCE ON GROUNDS OF PUBLIC INTEREST:

Unpublished official records by public officers are now admissible subject to the exercise of discretion by the Court. This proviso supports the spirit and intention of the recently enacted Freedom of Information Act 2011. (Section 190, 191)

Similarly a Minister, Governor or any person nominated by the Governor can no longer on grounds of Public interest object, unquestionably, to the production of documents or the admission of oral evidence. (Section 243)

SPECIAL RESTRICTIONS IN RESPECT OF PERMISSIBLE EVIDENCE IN TRIAL FOR SEXUAL OFFENCES:

When a person is being prosecuted for rape or attempt to commit rape or for indecent assault, no evidence shall be adduced except with the leave of Court. The leave of Court is also required during cross examination to ask questions which tend to show the sexual experience of the complainant with persons other than the accused. This is a drastic change from the position under the repealed Act where the complainant could be asked any question relating to sexual habit. (Section 234)

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