
ELECTRONIC EVIDENCE

A CASE FOR REFORM OF THE LAW OF EVIDENCE IN UGANDA

BY
AISHA NAMUKASA^{1*}

INTRODUCTION

The Law of evidence deals with evidence of information that tends to prove a fact in court. It is the duty of judges to admit or reject evidential material depending on whether the items are relevant or whether the law of evidence excludes it from being admissible².

A new phenomenon has sprung up revolving around the use of the computer leading to new forms of evidence that include computer generated documents. The proliferation of computers has created a number of problems for this area of the Law³. People buy goods and carry out commercial transactions over the internet that has become the primary vehicle for consumer purchases, mass marketing, financial transactions, online information, entertainment and government services among others. There is need for legal regulation of the evidence of these transactions.

This article is concerned with the need to reform the law of evidence to cover computer generated records or specifically cater for electronic documentary evidence. Many legal rules assume the existence of paper records, signed or original records. Traditionally the law of evidence relies on paper records although other kinds of physical objects have always been a part of the court rooms too.⁴ Dealing with records existing in other formats is not specifically regulated as it was not anticipated at the time the law was developed.

1* Lecturer in the Faculty of Law of the Islamic University in Uganda, Mbale, Uganda.

2 Section 4 of the Evidence Act of Uganda Cap 6

3 Collin Taper's Computer Law 4th Edition Butterworths London 1989 at page 367

4 Uniform Evidence Act Consultation Paper www.law.ualberta.ca/a/lri/ulc/current/eelev.htm at page 2

HISTORY

Uganda was colonized in 1894 by the British and was thereby declared a British protectorate. The development of the Law of Evidence in Uganda is closely linked with its evolution in India, a former British colony. The British imposed their English Civil Evidence Act on India in the form of the Indian Evidence Act of 1872. This Act was the work of Sir James Fitz-James Stephen.¹ The Indian Evidence Act contained the English Law of Evidence but in a rationalized form that would be easily comprehensible to the Indian judicial officers in those days.

INTRODUCTION OF THE INDIAN EVIDENCE ACT TO UGANDA.

The British Protectorate Government used the African Order in Council that was promulgated in 1889, to spread Common Law in Uganda and other British colonies. The Foreign Jurisdiction Act provided for the setting up of consular courts in Africa exercising jurisdiction "so far as the circumstances permitted upon the principles of, and in conformity with the substance of the Law for the time being in force in England."² In Uganda, the 1889 enactment was replaced by the Uganda 1902 Order in Council that introduced the operation of certain Indian Codes, although it did not apply the Indian Evidence Act.

However in 1909, the British Protectorate Government enacted an Evidence Ordinance in Uganda. It almost repeated verbatim the terms of the Indian Evidence Act with the mere substitution of Indian place names with those of Uganda in the illustrations. With this background, it should be noted that the advent of colonialism imposed a foreign legal system from England in Uganda.

AMENDMENTS TO THE UGANDA EVIDENCE ACT

Over the years, there has been comparatively little legislative amendment to the Evidence Act since its enactment in Uganda. These amendments

1 Morris, Henry. F & Read James in Evidence in East Africa, University of London, Stevens and Sons, 1966. at page 1

2 Ibid at page 3

included the Ordinances 9 of 1917, 5 Of 1933, 18 of 1935, 1 of 1936 and 20 of 1955. These amendments were made after the administrators made several criticisms of the Evidence Act. They felt that English Law principles regarding certain types of evidence were inappropriate given the conditions in Uganda. They were viewed as foreign and incomprehensible by her inhabitants and often resulted into injustice.

In 1933, a Commission chaired by Sir Henry Graham Bushe, was set up to inquire into the administration of justice in the East African Countries. Although the Commission found much wrong in the manner in which justice was administered, it concluded that English Procedure of evidence in a more or less diluted form was the best way forward for the territories concerned. It was not in the best interests of justice to water down the rules of justice.

The aforesaid amendments were necessary as illustrated by the definition of evidence in Section 3 of the Indian Evidence Act that was unduly narrow. The Section defines evidence to include all statements that a Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry. These statements are called oral evidence¹. Evidence also included all documents produced for inspection of court that are called documentary evidence.

According to S.C. Sarkar², that definition did not cover everything that the judicial officers find before them when making decisions. With new developments in technology that were not envisaged at the time the Act was enacted, the components of this definition have been broadened. Subsequently it has been held in *R V Raojibhai Girdharbhai Patel and another*³ that since a court is not restricted to what it takes as evidence to the types of evidence defined in the section, a wire recorder, the recording and the transcription should not for that reason alone be held to be inadmissible as evidence.

East African cases also illustrate that tape recordings are admissible. In the case of *Salau Dean v Republic*,⁴ Court held that two (2) spools of

1 Indian Evidence Act S. 3 (1872)

2 S.C. Sarkar Law of Evidence in India and Burma, 11th Edition Sarkar & Sons Private Ltd, 1965 at page 24

3 (1956) 29 KLR 112

4 (1966) EA 272.

tape recording tendered in evidence had been rightly admitted. The Court followed *R v Maqsd Ali*.¹ The recording was however only played in Chambers. The Court of Appeal through Sir John Ainsley CJ observed that if the tape recording had not been played in Court, it was probably wrong for the Magistrate to play it to himself in the privacy of his chambers. Magistrates or judges should hear such evidence in court since a lot of information can be gathered from the tone of voice used by the recorded people.

EVOLUTION OF ELECTRONIC EVIDENCE IN THE UNITED KINGDOM

The law of Evidence is always evolving depending on the social, economic and legal conditions in the world. When the Law of Evidence was developed in the United Kingdom, communities were much smaller, more parochial and not as well funded as they are today.² Most transactions were for cash and involved no need for record keeping since the people knew themselves and the majority of them were illiterate.

This position gradually changed in the United Kingdom, due to the expansion of businesses and improved education levels. Documentation is necessary for conducting business. The process of the production of documents was greatly accelerated with transcript replacing manuscript and duplicate replacing copy. Further in modern times, the versatility of computers allows the process to occur within a single machine by the manipulation of signals. The use of computers and the internet has spread to all parts of the world including most parts of Uganda.

In the United Kingdom, the law of evidence was changed by Legislation to specifically cater for computer-generated records. In the case of *Union Electronic Co. v Mansion House Center North Redevelopment Co*³ the judges took judicial notice that computerized record keeping was rapidly becoming a normal procedure in the business world. Uganda legislators have to adapt to change since the Law of Evidence has already been amended in the United Kingdom where it originated.

1 (1965) 2 All ER 464 / [19

2 Collin Tapper's Computer Law 4th Edition Butterworths London 1989, at page 366

3 494 S. W 2d 309 (Mo, 1973)

EVOLUTION OF ELECTRONIC EVIDENCE IN UGANDA.

Computers were introduced in Uganda over a period of time from the 1980s through the 1990s. During this period, not many people had access to computers that at one point there was only one computer at the Uganda National Examination Board! With time, there was a gradual increase in the number of computers. In the 1990s, the Internet was also introduced in Uganda and several Ugandans'especially those living in urban areas are now able to use it to conduct their businesses and private affairs.

The introduction of computers, the internet and other new technology has brought with it many new items of possible evidence that were scarcely contemplated at the time of enacting the present Evidence Act Cap 6. There has however been no legislation to handle the changes hence leading to uncertainty before the Courts where there is need to address the admissibility of electronic records. This Article probes the need for further changes to the law of documentary evidence in Uganda to clearly cater for computer generated records.

DEFINITIONS OF KEY TERMS

Information technology.

This is a collective term for the various technologies involved in processing and transmitting information. They include computing, telecommunications and microelectronics.²

Internet.

This refers to the global computer network connecting governments, companies, universities and many other networks and users. Electronic mail conferencing, educational and chat services are all supported across the network, as is the ability to access remote computers and send and retrieve files. Many people access the Internet across the world.³

1 www.africaaction.com

2 The Hutchinson Dictionary of Computing Multimedia & the Internet. New edition Hellion Publishing Ltd 1997-1999 Oxford at page 147

3 The Hutchinson Dictionary of Computing Multimedia & the Internet. New edition Hellion Publishing Ltd 1997-1999 Oxford page 97

Electronic or computer generated records.

These are documents referred to as 'records' that are created, communicated and stored in electronic form. They may be created through the manual efforts of an individual for example typing an email message, via the automated processing of computers.

Email.

This is an abbreviation for electronic mail. It is a system of using computers for sending messages from one place to another.¹ A computer stores the messages in an electronic mail box.

ANALYSIS OF COMPUTER GENERATED DOCUMENTARY EVIDENCE IN UGANDA

The specific aspect of evidence dealt with in this Article is documentary evidence or computer generated records. To date this type of evidence is governed by the traditional rules of evidence that were in place even before the discovery of the computer. The issue that arises is whether these rules are applicable to computer generated records. These rules include proof of execution of documents which covers their authenticity, and the best evidence rule.

Computer generated documents and other electronic records have different attributes from paper – based documents. Electronic data is in a form of encoded sequence bits of one and zeros. These bits are stored on a magnetic medium such as tape or disk, where they take the form of magnetized and demagnetized portions of the medium, or an optical medium such as a CD-ROM, where they take the form of pitted or smooth portions of the CD's surface.²

By its nature data of this sort must be transformed into something a human can perceive on a screen or a piece of paper. The transformation of the information into a documentary format is an issue of concern in evidence

1 Cambridge International Dictionary of England. Cambridge University Press. London 1995 at page 447

2 Mohammed Mbabazi in E – Transactions Revised. (Unpublished) at page 74

law.¹ Once the information is processed and printed out it is known as a 'computer – generated document.' Judges must determine whether the printout is a copy (secondary evidence) of the originally electronically stored version and their admission will depend on the judges' discretion. Issues of copies and originals have little relevance to computer origins since a single click of a button can print out thousands of uniform computer records. What would be left for the court would be to determine the authenticity of such a document.

The best evidence rule involves producing primary evidence (the original) of a document except where secondary evidence thereof is admissible. In the electronic world there may or may not be an original paper version of the electronic record. Thus the search of the integrity of the document must be done differently. Legislators must move away from "original" to "system" or away from the dependence upon proof of the integrity of the original document, to a dependence on the proof of the integrity of the record keeping system. The focus of admissibility, authentication and the best evidence rules should be on the overall security and reliability of the computer system that produced the document.

When it comes to authentication, a document can not authenticate itself at common law, but must be introduced to the court by a human being² who has the task of explaining its identity, nature, origin and its relevance. Only when these matters are satisfactorily put before court can such a thing be admitted in evidence.

From this section, we must realize that the rules governing the law of evidence can be stretched to encompass computer generated evidence with some adjustments. In Uganda the courts admit computer generated documentary evidence since so many people use the Internet to conduct their business and private affairs. This has led to the call for reform of the law of evidence to specifically provide for electronic records or computer generated evidence.

1 Ibid at page 75.

2 www.law.ualberta.ca/alri/ulc/current/eelev

COMPARISON BETWEEN E-EVIDENCE IN OTHER JURISDICTIONS AND UGANDA

Introduction

The phenomenon of electronic evidence in Uganda can not be handled without looking at further developments of the law of evidence in other jurisdictions. Countries such as South Africa, Canada, the United Kingdom and Singapore are compared with Uganda in order to make suitable recommendations as regards electronic records as evidence. International Regulations in the form of the UNCITRAL Model Law on Electronic Commerce have also been analyzed in this article in order to appreciate the impact of the internet on the Law of documentary evidence.

A comparison between electronic documentary evidence in other jurisdictions and Uganda

Electronic records as evidence before the courts have been dealt with in different ways in South Africa, Canada, the United Kingdom and Singapore. All of these countries have made reforms to the Law of Evidence to make it cater for computer generated records.

Uganda can pick a leaf from Singapore regarding the issue of electronic evidence. Singapore has struggled to remain a progressive and developed nation in this information technology era. Once a British colony, Singapore's legal system is based on English Law and it has been reformed following the changes in the English legal system. For instance, in the English Civil Evidence Act of 1968, computerized records are admissible evidence¹ provided that the computer that produced them was in good working order among other conditions.

Similarly the reformed Singapore Evidence Act contains guideline for dealing with electronic evidence. Section 35 of the Act provides specific definition to the process for extraction and presentation of electronic evidence, which include the media, the computer and the person extracting the information. Electronic data records and other computer generated documents are legal and accepted as evidence in Singapore Courts.

¹ Cross & Wilkins Outline of the Law of Evidence 5th Edition Buttersworths, London 1980 at page 140

Canada as early as 1997 felt the urge to have a Uniform Electronic Evidence Act in order to address the problems associated with the use of computer generated records as evidence. This led to the Uniform Law Conference of Canada¹ modernized evidence law to accommodate the use of new technology. Technology evolves so fast that any law which is tied too closely to a particular technology risks being outdated before its even enacted.

From Africa, Uganda must look at South Africa where the small commonwealth jurisdictions' model law on electronic evidence was drafted. South Africa is the best example that Uganda can use simply because she is a developing country in some aspects. The common law rules of evidence were recognized in South Africa as too inadequate² to deal with the technological advances and that the Law had to be modernized. This led to the enacting of the Electronic Evidence Model Law for South Africa.

As illustrated above, other jurisdictions recognized that the law on admissibility of evidence had to be reformed. The legal principles affecting the use of computer records as evidence were improved in order to eliminate unnecessary obstacles to their admission and to ensure that the rules are consistent with the developments in technology. It was essential to provide appropriate means for courts to evaluate the credibility of the computer generated documents and records.

Furthermore, International Law regulation of electronic evidence is available in form of the United Nations Commission on International Trade Law (UNCITRAL), which provides guidance to States in removing obstacles to the use of electronic based evidence. It lays down provisions addressing both the admissibility and the evidential value if data messages in legal proceedings.³

1 Consultation Paper on Facilitating Electronic Commerce Statutes, Signature and Evidence.

2 South African Law Reform Commission Committee Paper on the Model Law on Electronic Evidence.

3 www.jus.uio.no/lm/un.electronic.commerce.mode.law.1996/art.9

Article 9 provides:

1. In any legal proceedings, nothing in the application of the rules of evidence shall apply so as to deny the admissibility of a data message in evidence:
 - (a) on the sole ground that it is a data message; or,
 - (b) if it is the best evidence that the person adducing it could reasonably be expected to obtain, on the grounds that it is not in its original form.
2. Information in the form of a data message shall be given due evidential weight. In assessing the evidential weight of a data message, regard shall be had to the reliability of the manner in which the data message was generated, stored or communicated, to the reliability of the manner in which the integrity of the information was maintained, to the manner in which its originator was identified and to any other relevant factor.

Paragraph 1 clearly states that data messages should not be denied admissibility on the sole ground that they are in electronic form. The reference to the best evidence rule is necessary for Uganda. While paragraph 2 sets out the criteria to be applied in assessing the evidential weight of a data message, including the reliability and credibility of the method by which the data message was generated, stored, communicated or maintained, as well as the method of identification of the originator and any other relevant factors.

IMPACT OF THE INTERNET ON THE APPLICATION OF THE LAW OF EVIDENCE IN UGANDA

Due to the fact that some business transactions are carried out over the internet through computer mediums, courts of law must be able to expressly admit evidence of such dealings of evidence where the parties have expressly agreed to be bound by them. The emergence of evidence in electronic form¹ for example emails from the internet, presents a challenge to judges when they are applying the Evidence Act rules and common law.

¹ Kenneth J. Withers in Electronic Disclosure and Discovery in Civil Litigation www.kenwithers.com/articles

The development of the Internet means that judges have to move away from rigidly applying the traditional rules of documentary evidence in order to ensure that the rules are positively applied to electronic records. Article 126 (2) (e) of the Constitution¹ provides that in adjudicating cases of both a civil and criminal nature, the courts shall subject to the law, apply the principle that substantive justice shall be administered without undue regard to technicalities. Courts must apply the evidence rules of procedure as handmaidens of justice and not to defeat it.

In an interview with the Honorable Lady Justice Arach,² she emphasized that the High Court of Uganda and other courts have been accepting emails and other computer – generated records as evidence depending on the source. Where all the parties to a suit agree to the content and source of such documents, judges admit electronic records as evidence. She stressed that this was due to the fact that the courts do not want to prolong suits and waste time on none contentious matters.

In addition to this, she contended that in order to facilitate international transactions and other business dealings, judges have become proactive and act in the interest of the people in attaining substantive justice. Judges apply the evidence rules of authentication and best evidence where they feel the rules are relevant.³ She expressed concern that there was need to streamline the process of electronic evidence through the legislative regulation of the practice. In the meantime judges have to apply the law as it is till the new regulations are provided by the Parliament.

Under the Civil Procedure Rules SI 71-1 of the Laws of Uganda, during the pre trial process all the parties produce their proposed evidence. What they agree on becomes the evidence and this shortens the time of the proceedings. Judges must handle all cases involving electronic records evidence with an open mind that such evidence can easily be forged. Hence judges insist that the person who alleges that the document is forged must prove it. The main measurement used as a guideline is systems reliability⁴.

1 The 1995 Constitution of the Republic of Uganda

2 Interview held on May 25th

3 Ibid

4 South African Law Reform Commission Draft Model Law on Electronic Evidence Committee Paper. 1025

There are not so many cases dealing specifically with electronic records as evidence in Uganda according to the Registrar of the Commercial Division of the High Court, Mr. John Eudes Keitirima¹. People present emails, printouts, copies and electronically signed documents among others as evidence which may be admitted only when the Evidence Act of Uganda is liberally applied to them and such evidence must have been subjected satisfactorily to the rules of authentication and best evidence.

In *Digital Solutions v MTN*,² the High Court organized a scheduling conference where email messages were brought as evidence to the commercial Court by both parties. Justice Bamwine admitted the email messages as exhibit evidence in proof of what the parties were claiming. The matter was settled out of Court after the parties came to an amicable agreement as regards the evidence and other factors that were in issue therein. Thus judges ought to admit electronically generated evidence as the evidence of agreements between the parties to the matter in contention especially where there is nothing to prove the same.

The spread of the use of the internet means that judicial officers must be flexible in their dealing with cases that involve electronic transactions and the production of electronic records as evidence. They have to admit electronic records as evidence where it deemed necessary. A case in point was that of *Media Plus (U) Limited v APTN London Limited*³ wherein a lawyer presented email from his client to the Court as evidence of the correspondence between him and the client. The judge accepted the email as evidence of the instructions given to the lawyer by his client.

Most members of the legal fraternity clearly proclaim that electronic evidence in some cases was not allowed in Court and that there had to be clear law guiding the courts when dealing with that evidence. Courts mainly reject electronic records from the internet because they are easily altered and sometimes the systems used to produce them are unreliable. Furthermore opposing parties may challenge their admissibility as evidence that is not specifically catered for under our Law.

1 Interview held with Mr. Keitirima on May 22nd 2007

2 High Court Civil Suit No. 570 of 2004. (Commercial Division)

3 High Court Civil Suit No. 947 of 2000 (Commercial Division)

With computer – generated documents, its hard to know which document is the original which may make it hard for the courts to determine the authenticity of the same. Questions arise as to how electronic records should be tendered as evidence. Should the whole computer, mobile phone or the diskette/flash disk be presented before the Court? Don't computer printouts amount to tampering with evidence?

These questions can not be answered without amending the law of evidence or coming up with a new law guiding the courts on how to apply the principles of evidence to electronic records. Uganda has to enact a law expressly catering for electronic evidence or amend the Evidence Act as has been done in other jurisdictions.

STEPS TAKEN BY UGANDA TO REFORM THE LAW

It is clear that all the jurisdictions have made several reforms in the application of the traditional rules of evidence to electronic evidence. Uganda has also recognized the importance of doing this and in order to boost electronic commerce and our foreign exchange earnings, Uganda is working on legislation that will recognize contracts entered into electronically.¹ This law will also regulate electronic documentary evidence of electronic transactions.

According to the Principle Legal Officer of the Law Reform Project, Peter Edopu, the e-commerce law under the Electronic Transactions Bill, was the first of its kind in East Africa. This Bill recognizes electronic transactions in business transactions. Upon its enactment, electronically adduced documentary evidence will be expressly and formally admissible in Ugandan Courts.

The Uganda Law Reform Commission, Uganda Revenue Authority and the Uganda Investment Authority have proposed the Electronic Transactions Bill to protect the interests of people conducting business electronically. The study adopted much of the Electronic Communications and Transactions

¹ Esther Nakazzi E- Commerce Law: Uganda leads the Law. The East African Monday March 15 2004.

Act of South Africa and used the Singapore Legislation, as a basis for the proposed legislation since it fit well with Uganda's economic climate. The Ugandan Electronic Transactions Bill has several sections dealing with electronic evidence and will greatly facilitate e- transactions by removing certain legal impediments¹.

The Electronic Transactions Bill has not yet been presented before Parliament nor passed and with the present hullabaloo about CHOGM, the Domestic Relations Bill among others, it is not about to be presented before the Legislative arm of Government which is such a blow to electronic evidence law enthusiasts.

RECOMMENDATIONS

Uganda can not address the issues of electronic evidence and electronic transactions on her own without paying due regard to what has been done internationally to address the problem. In fact uncoordinated, inconsistent national policies for electronic evidence in order to advance e- commerce, no matter how well intentioned could be worse than no action at all. An internationally coordinated approach is necessary and Uganda's legislators must consult other foreign jurisdictions.

I thus recommend that Ugandan legislators should adopt the principles of the UNCITRAL Model Law on electronic evidence in order to have a convergence of laws from different jurisdictions.

The Law on computer generated evidence must be modernized so that the public and private sectors alike can make the best possible decisions possible about how to produce and keep records, with minimum uncertainty about how their legal rights will be affected. A law that provides clear guidelines on the admissibility and evidential weight of electronic records is required.

Such law should possibly draw a distinction between computer evidence created with and without human intervention. Amendments in the current

¹ www.ucc.co.ug/telecomsPolicyReview/presentations/performance.

law should be made to provide for the admissibility and evidential weight of electronic communications and the considerations that should be taken into account. For instance there is need to amend the Law to ensure that the quest for an original electronic record or the original of an electronic record is abandoned.

CONCLUSION

The Law of Evidence as it is today in Uganda can only be stretched to cover electronic evidence but with the passage of time it must be amended, reformed and modernized to meet the needs of the present and the future computerized era. The Parliament may expressly enact a new statute to cater for electronic evidence and electronic transactions as it has done for pornography and the Penal Code Act. This is essential because the Evidence Act as it is today sometimes acts as a direct limitation to what could be admitted as evidence.

Reform is necessary since the courts need a streamlined and effective regulation of the law of evidence that can stand the test of the information technology revolution.

The demand for reform on a statutory – by statutory basis should also be disposed of. In other words the Parliament should not simply reform the Evidence Act unsystematically as the case is with most of our laws. The Parliament may enact the *Electronics Transactions Bill* since it has specific provisions on electronic evidence. This will also save on costs of amending old evidence legislation.