



THE ELECTORAL ACT AND THE ADMISSIBILITY TEST OF FORENSIC EVIDENCE IN NIGERIA

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Abstract

The Electoral Act, 2022, came with innovations that are laudable and commendable, most especially the introduction of technology in the process of general elections in Nigeria. Thereafter, the election petitions took the centre stage with many cases won and lost on the strength of the evidence from both sides. What became obvious was the issues associated with the electronical, digital or computerized evidence which are parts of forensic evidence. In view of the fact that, the deployment of technology into the elections right from registration of voter's accreditation and simultaneous voting up to announcement of the results is worthy of commendation. Nevertheless, there was failures along the way, this forms the bases of some petitions, as well as the issues on evidence and admissibility became imperative and faced with a lot of challenges. This work tried to analysis the Electoral Act vis-à-vis the Evidence Act, thereby making some suggestions into the Evidence Act itself and a recommendation for a purposeful interpretation of the Electoral Act is made to meet the intention of the amendment be brought to bear into the electoral system. The research exposed some silent features of the Evidence Act and marries them with the Electoral Act, thereby bringing out visibly the beauty of forensic evidence, as the law is clear and adequate to address the issue of admissibility. In doing this, doctrinal research approach was employed from both the Electoral Act and the Evidence Act with some explicit decided cases on the subject matter.

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Introduction

The Electoral Act, 2022, introduced very relevant sections that deal with forensic evidence. From the commencement of Voters registration, issuance of Permanent Voter Card (PVC), the accreditation of voters on elections day, Collation of results, transfer or transmission of results and the projection of results at the collations centres are all associated with electronical, digital and computerized devices which can be useful tools for forensic analysis. The law also gives legal backing to the use of electronic card readers for voting and electronic methods for transferring results for collation, a sticking point for some politicians who had argued that the state of the country's telecommunications system could hinder voting in some areas. But the most heated issue that calls for attention is the issue of electronic transfer or transmission of results from polling units by the presiding officer. Consequent upon all these, after the elections, the processes were widely criticized as failing to comply with the requirements of the Electoral Act. The election cases took centre stage across the country and, in some cases, with conflicting judgments from the same tribunals, Court of Appeal and the Supreme Court, which border mostly on the interpretations of the provisions of the Act.

Conceptualization Discourse

The subject matter of forensic science and for that matter, forensic evidence, is a little intricate. Some of the issues involved in forensic trial emanate from sciences with different terminologies and concepts. These have to be clarified to give better understanding to this long- neglected field in Nigeria. A holistic examination of the concepts and the terminologies involved in forensic science would be too encompassing. However, relevant concepts to forensic evidence are discussed here.

i. Evidence

The term evidence continues to elude a precise definition owing to its different perceptions by different scholars in the field. "Evidence is not capable of exact definition because it belongs to the procedural aspect of law. Unlike substantive law, where the legal rules are well established and visible, procedural or adjectival laws are not based on any concise certainty as the rules are objects of contest between the parties in trial,"¹ Several definitions of the term evidence abound locally and internationally with little or no uniformity for one to be generally accepted without another.

This work highlights some definitions of some authors for scholarly purposes. First, Wigmore² states that, it is of little practical consequence to construct a formula defining what is to be understood as "evidence" nonetheless provided a thoughtprovoking definition when he said:

What we are concerned with is the process of presenting evidence for the purpose of demonstrating asserted fact. In this process, then the term evidence

¹ Amupitan, J.O, *Evidence Law Theory and Practice in Nigeria: (Innovative Communication, 2013)* p.1

² Wigmore, J.H.A, *Treatise on the System of Evidence I n Trials at Common Law*. Tillers, P. rev. Boston: Little, Brown, 1983, Volume 1 Section. Print. As cited in Joash O Amupitan, *Evidence Law Theory and Practice in Nigeria, (Innovative Communication,2013,)* p.1.

represents: any knowable fact or group of facts, not a legal or a logical principle, considered with a view to its being offered before a legal tribunal for the purpose of producing a persuasion, positive or negative, on the part of the tribunal, as to the truth of a proposition, not of law or of logic on which the determination of the tribunal is to be asked.³

Wigmore's conception of evidence provides for this work, the foundation and the basics of this research as forensic evidence is captured under any knowable fact or group of facts, not a legal or logical principle, but also of scientific or technological bases. What is of concern in this definition is the fact and the process of proving such facts.

A more comprehensive definition of evidence is given by Phipson⁴ thus: "Evidence is a testimony, whether oral, documentary or real which may be legally received in order to prove or disprove certain facts in dispute." This gives us the notion that evidence is that which is required to prove or disprove disputed facts and it could include any scientific or forensic fact as the case may be, that can be admissible in law. Though his definition suffers some setbacks as he took for granted certain facts which require no proof in court of law as well as the fact that evidence is by no means restricted to admissibility. It also deals with exclusion of facts such as bad character evidence, similar fact evidence, opinion evidence and hearsay evidence. Gulson⁵ defines evidence as the science, arts, or process of ascertaining or verifying facts. This definition though appears vague but viewed evidence from a broad and holistic perspective. The definition is wide enough to cover natural evidence, scientific and forensic evidence as part of judicial evidence. This will be glaring as will be seen subsequently how forensic evidence would better affords processes of ascertaining or verifying facts in resolving judicial disputes.

The definitions above would not have been enough without mentioning renowned Nigerian author and jurist like Aguda. According to him, 'judicial evidence' is "the means by which facts are proved but excluding inferences and arguments." His definition was a little different from other authors above as he excludes inferences and arguments from evidence, and it is material to our research because forensic evidence as seen today is a key component means of proving facts in court of law and forensic evidence has nothing to do with inferences or arguments but pure facts. He argued further that "sometimes the word evidence is used in connection with admissibility, for example when it is said something is not evidence, it may mean that the thing is not admissible."⁶

A significant judicial definition is also provided by Supreme Court in the case of *Akintola v Solano*⁷. Where, Oputa J.S.C. (as he then was) defines evidence as a means of establishing a matter of fact. He said:

³ Ibid.

⁴ Howard, M.N. *Phipson on Evidence*. (15th ed. Sweet and Maxwell, 2000) 1 and 2.

⁵ Gulson, J.R. *Philosophy of Proof*. (Routledge & Sons, 1905).

⁶ Aguda, T. Akinola, *The Law of Evidence in Nigeria*. (2nd ed. Sweet & Maxwell, 1974) 11.

⁷ (1986) S.C, 141 at 184.

⁸ Ibid.

If a thing is self-evident, it does not require evidence. What, therefore, is evidence? Simply put, it is the means by which any matter of fact the truth of which is submitted to investigation may be established or disproved. Evidence is therefore necessary to prove or disprove an issue of fact.⁸

Garner in 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 or the collective mass of things, especially testimony and exhibits, presented before tribunal in a given dispute.'⁸ That even the bloody glove is a key piece of evidence for the prosecution. He went further to broadly define evidence as:

...the means from which an inference may be logically be drawn as to the existence of a fact, that which makes evident or plain. Evidence is the demonstration of fact, it signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on one side or on the other, in legal acceptance the term 'evidence' includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved. 'Evidence' has also been defined to mean any species of proof legally presented at the trial of an issue, by the act of the parties and through the medium of witnesses, records documents, concrete objects, and the like...⁹

Furthermore, that evidence is any matter of fact which is furnished to legal tribunal, otherwise than by reasoning or reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact.¹⁰

Our working definition of evidence for this research is that evidence is a testamentary fact which provides for how issues in disputes can be resolved by dispensing or requiring proof by means of oral, documentary, scientific, circumstantial and forensically by the courts, but excludes argument, prayers, legal conclusion and judgment. Evidence, in this sense, has both legal and technical characteristics but can be judicial evidence.

ii. Forensic Evidence

The first major difficulty in this branch of evidence is that of appellation. Forensic evidence has been variously referred to as scientific evidence, technological evidence, digital evidence, electronic evidence, computer evidence.¹¹ Even though these classifications of forensic evidence are not synonymous, but by connotation and denotation they are regarded as forensic evidence, hence, the above stated terms have been applied to describe a congruous legal

⁹ Garner, B.A, (ed) *Black's Law's Dictionary* (9th edition, West Thomson Reuters, 2009) 634.

¹⁰ Ibid.

¹¹ James B Thayer, *Presumptions and the Law of Evidence*, 3 *Harv. L. Rev.* 141, 142 (1889). As cited by Garner, B A, (ed) *Black's Law's Dictionary* (9th edition, West Thomson Reuters USA.2009). p.634.

¹² Ahmad Fenkry Moussa, *Electronic Evidence and its Authenticity in Forensic Evidence Egyptian Journal of Forensic Science*, Vol.11, 2021. Available at <https://ejfs.springeropen.com>. accessed 10th September, 2024.

concept, interchangeably as forensic evidence. Similarly, in the course of this research, the work may be slightly interrelating the terms as scientific evidence or technological evidence.

Forensic science is a very broad field as any science or piece of knowledge used to assist in resolving a legal issue or case can enjoy the adjective 'forensic' in such context. Complementing Robertson, Keith Inman and Norah Rudin assert that, as a field, forensic science is very broad because 'any profession, discipline, craft, or art may potentially be invited into the legal arena. Forensic science employs physical, biological, medical and even behavioral sciences to examine, analyze and evaluate physical evidence (biological and non-biological), human beings (victims and suspects) and even trace evidence (e.g. pollutants in air) to matters pertaining to law.¹² Unlike what some may perceive, forensic science is not restricted to criminal law matters and criminal cases. Its landscape expands to cover civil laws and cases. For example, forensic science deals with family litigation (e.g. cases of paternity proof), environmental issues (e.g. suspected source of pollution or contamination) and other security legislation (e.g. custom check). The term 'Criminalistics' is often confused with forensic science; however, criminalistics is 'the largest subdivision of forensic science' that encompasses the collection, preservation, and analysis of physical evidence by applying the laws of physical sciences and natural sciences.

Forensic evidence is a combination of two words, 'forensic' and 'evidence. Evidence has been conceptualized in the last sub-topic, 'forensic' will be considered here. The American National Academy of Science posits that 'forensic' is a term that comes from the Latin word '*forensis*' which literally means public or in the forum or open Court¹³ or public discussion, argumentative, rhetorical, belonging to debate or discussion, it also means "pertaining to the forum"(e.g to the legal public court of justice)¹⁴ *Merriam's-Webster Dictionary* denotes that any science used for the purpose of law is forensic science¹⁵.

With the above interpretations in mind, one can safely say that even related disciplines like computer forensics, forensic anthropology, forensic psychology, forensic pathology, forensic toxicology, forensic chemistry, forensic entomology, ballistics, forensic engineering, forensic psychiatry, DNA profiling, Forensic geology, forensic accounting, forensic nursing, forensic archaeology, forensic dentistry, forensic podiatry, bloodstain pattern analysis etc are all in relation to law, hence the need for forensic evidence.

For working purposes of this research, "forensic" is anything denoting the application of scientific methods and techniques such as electronically and computer gadgets to investigation of crime and establishment of facts in civil matters before the court. It can also be seen as the

¹² College of Pharmacy, Chicago, <<http://www.uic.edu/pharmacy/depts/forensicsci/forensicsci.html>> As cited in Samarji, A.N, *Mapping the Complexity of Forensic Science: Implications for Forensic Science Education*. Available at <https://vuir.vu.edu.au/17880/1/Ahmad_Nabil_Samarji.pdf>. accessed 16th July, 2023.

¹³ Siegel, J.A: *Forensic Science*. Available at: < <http://web.sbu.edu/psychology/lavin/forensic>> accessed on the 12th May 2023.

¹⁴ American Academy of Science: Encyclopedia.com. available at: www.encyclopedia.com/science/encyclopedias-almanacs-transcripts-andmaps/american-acadamy-forensicscience Visited on the 12th may 2023.

¹⁵ www.merriam-webster.com accessed 12th may 2023. ¹⁷ (2017) LPELR – 42031(SC)

application of natural science to matters of law or the documentation of evidence suitable for legal proceedings from any natural or physical scientific method, scientific knowledge or scientific skill to matters of law in any tribunal.

III. Admissibility

‘Admissibility’ is the rule of evidence that determines whether evidence can be received in court: *Faramoye v The State*.¹⁶ A piece of evidence is said to be admissible if it is allowed in court. Admissibility is ‘the concept in the law of evidence that determines whether or not evidence can be received by the court. The evidence must first be relevant, but even relevant evidence will be tested for its admissibility.’¹⁷

The General rules of evidence on pleading, relevance and admissibility impose preconditions. Section 2 of the extant Evidence Act provides *inter alia*, that: 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.

Basically, there are three basic criteria governing admissibility of any evidence, including forensic evidence: These include first, Pleadings: in view of the frontloading system and the special procedure in election petitions lawyers need to plead any evidence and must lay a proper foundation for the evidence. The rule of exclusion of evidence of facts not pleaded by a party is sacrosanct.¹⁷ The trite position of the law remains that evidence of any facts not pleaded, goes to no issue.¹⁸19 "Fact in issue" includes any fact from which either by itself or in connection with other facts the existence, non-existence, nature or extent of any right, liability or disability asserted or denied in any suit or proceeding necessarily follows.²⁰ Thirdly, It must be admissible in law whether relevant or not. In the case of electronic evidence, there are additional conditions prescribed under the new provisions which must be satisfied. This has been illustrated in quite several cases e.g *Kubor & Anor v Dickson*.²¹ This was an election petition matter. The Appellants challenged the election and return of the 1st Respondent as a Governor in the February 11, 2012 governorship election of Bayelsa State. They tendered from the Bar a printout of the online version of the Punch Newspaper and another document from the website of the Independent National Electoral Commission (INEC), the 3rd Respondent in the appeal. While the electronic version of The Punch Newspaper was admitted and marked Exhibit “D”, the document from INEC’s website was admitted and marked Exhibit “L”. Sadly, the Appellants did not satisfy the conditions laid down in section 84(2) of the Evidence Act with respect to the admissibility of electronic evidence. As expected, the matter went on appeal and one of the contentions was that since Exhibits “D” and “L” were public documents, only certified copies thereof were admissible in evidence; and that in any case, the documents having been tendered from the Bar without

¹⁶ *Collins Dictionary of Law*, <<https://www.collinsdictionary.com>> accessed 21 March 2024.

¹⁷ Erugo, Sam: Admissibility of Electronic Evidence in Nigeria: Some Contending Issues

[http://oer.biu.edu.ng/wp-](http://oer.biu.edu.ng/wp-content/uploads/2020/02/Admissibility_Of_Electronic_Evidence_In_Nigeria_-_1.pdf)

[content/uploads/2020/02/Admissibility_Of_Electronic_Evidence_In_Nigeria_-_1.pdf](http://oer.biu.edu.ng/wp-content/uploads/2020/02/Admissibility_Of_Electronic_Evidence_In_Nigeria_-_1.pdf)

¹⁸ *Kubor v Dickson*; see also EA 2011, ss 4-13 on relevancy

¹⁹ EA 2011, s258. See *Emegokwe v Okadigbo*.²¹ Second, relevance to the facts in issue, for instance See *Kubor & Anor v Dickson*

²⁰ No(30)

the foundational conditions set out in section 84(2) of the evidence Act being satisfied, both documents were inadmissible in evidence. The Supreme Court agreed with the above submissions. In the lead judgment the court stated *inter alia* that: “no evidence on record to show that the appellants in tendering exhibits “D” and “L” satisfied any of the above conditions. In fact, they did not, as the documents were tendered and admitted from the bar. No witness testified before tendering the documents so there was no opportunity to lay the necessary foundations for their admission as e-documents under section 84 of the Evidence Act, 2011. No wonder, therefore, that the lower court held at page 838 of the record thus: “A party that seeks to tender in evidence computer generated document needs to do more than just tendering same ²¹from the bar. Evidence in relation to the use of the computer must be called to establish the conditions set out under section 84(2) of the Evidence Act 2011.” In *UBN Plc v Agbontaen & Anor*,²² the court held that, once the condition for admission of the document have been satisfied and the document, be it one produced by a computer or one properly so called, admitted, there can be no other requirement before the court or tribunal can make use of the statement contained in the document.

The General Condition for Admissibility of Forensic Evidence in Nigeria

It is very pertinent to also examine the basic conditions for the admissibility of evidence in Nigeria. Though the conditions in civil proceedings are different from those one in criminal proceedings. However, we note election cases are civil in nature but have some elements of criminal aspects depending on the claim or allegations against the respondent. Be as it may. In civil matters generally, the conditions for admissibility were stated by the Courts thus: a. Whether such evidence has been pleaded?

b. Whether it is relevant; and

c. Whether its admissibility is not excluded by any rule of law?²³

It has been stated in *Pius v State*²³ that proof of evidence to some extent is to criminal matters what pleadings are to civil trials. In civil trials, where facts are not pleaded, they are inadmissible, while facts which are not stated in the proof of evidence may be tendered and admitted in criminal trials. The principle of law here however is that parties are bound by their pleadings. As such, evidence of facts not pleaded are not admissible. Even where they are admitted, they go to no issue.²⁴ This was the principle of law stated in the case of *Amadi v A-G*.²⁵ Imo State where the court held that proof of evidence does not have to contain every bit of evidence that the prosecution requires as long as it contains relevant and sufficient facts to sustain a prima facie case against the accused person. Thus, in criminal trials, admissibility of facts, whether stated in the proof of evidence or not, is governed by relevance of such facts and other strict rules of admissibility relating to free and fair trial. Furthermore, a court in civil trial may have discretion whether or not to reject a piece of evidence that is inadmissible, but

²¹ (2018) LPELR-44160(CA,

²² Anyebe, P.A, “Appraisal of Admissibility of Electronic Evidence in Legal Proceedings in Nigeria” Journal of Law, Policy and Globalization, (92), (2019) available at<<https://core.ac.uk/download/276531446.pdf>>accessed 15th August,2023.

²³ (2012) LPELR 15347 (CA)

²⁴ See *C.D.C Nig. Ltd v S.C.O.A. Nig. Ltd* (2007) 30 W.R.N 81

²⁵ (2012) 9 NWLR (pt. 1306) 419

in a criminal trial, it is under a duty to reject such evidence²⁶. Consequently, one can safely conclude that rules of admissibility are more stringent in criminal trials than in civil. Section 41 of the Evidence Act provides for an exception to the hearsay rule that relates to electronic evidence when it is a statement made in the ordinary course of business. It provides as follows:

A statement is admissible when made by a person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books, electronic device kept in the ordinary course of business, or in the discharge of a professional duty, or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind, or of the date of a letter or other documents usually dated, written or signed by him. Provided that the maker made the statement contemporaneously with the transaction recorded or so soon thereafter that the court considers it likely that the transaction was at the time, still fresh in his memory.

Also, under the business record exceptions to hearsay rule, section 51 of the Act provides that the electronic records regularly kept in the course of business are admissible whenever they refer to a matter before the court, but such statements alone shall not be sufficient evidence to charge any person with liability. Equally, section 52 of the Evidence Act makes electronic records made by public servants admissible if made in performance of their duties.

Generally speaking, admissibility of forensic evidence under hearsay rule is unlike the position under the repealed Evidence Act, wherein the exclusion of hearsay evidence in judicial proceeding was not explicitly stated, but rather inferred from the combined provisions of Sections 77 and 79 of the repealed Evidence Act. However, by virtue of section 38 of the Evidence Act, 2011, “hearsay evidence is not admissible except as provided in this Part or by or under any other provision of this or any Act”. By literal interpretation of this provision, it is clear that the admissibility of hearsay evidence is permissible either under the Act itself or by virtue of the provisions of any other Act of the National Assembly.²⁷ Thus, the statement of exclusion of hearsay evidence under section 38 of the Evidence Act, 2011 is subject to exceptions provided in the Act or any other Act of the National Assembly. Therefore, forensic evidence is viewed as specie of documentary evidence, and as such the rule against admissibility of hearsay evidence applies to forensic evidence. Thus, direct electronic generated evidence that is admissible forensic evidence, must be given by the maker²⁸. In any event if forensic evidence is recorded or compiled and fed into a computer, the person who computed the record is the maker for the purposes of tendering and admissibility of the document. Computer generated evidence is therefore said to be hearsay evidence where the document or the printout sought to be tendered is not what the computer stored and processed itself in an automatic manner or produced at the trial by the maker and the veracity of such a document is in issue³⁰

²⁶ *Raimi v. Akintoye* (1963) 3 NWLR (pt. 26), 27

²⁷ Anyebe, P.A, “Appraisal of Admissibility of Electronic Evidence in Legal Proceedings in Nigeria” *Journal of Law, Policy and Globalization*, Vol.92, 2019, available at<<https://core.ac.uk/download/276531446.pdf>>visited 15th August, 2023.

²⁸ *Ibid.*

³⁰ *Ibid.*

Furthermore, in proving an e-mail in an evidence, section 153 (2) of the Evidence Act, 2011 comes handy. It provides for a presumption as to electronic messages. The court may presume the accuracy of an electronic mail message but shall not make any presumption as to the person whom the message is sent. Therefore, in order to render a printout of e-mail admissible, conditions stipulated in section 84 (2) and (4) must be fulfilled. i.e. relevance, authentication or identification of the e-mail, integrity of the email, reliability of the computer that produced it and production of certificate of authentication.²⁹

Litigation involving ATM may take many forms. The most rampant usually takes the form of allegation of unauthorized withdrawal of funds using a customer's ATM card. The underlying supposition of the proponent is that a thief took advantage of the negligence of the bank and the weakness inherent in the IT systems of the bank to perpetrate the fraud. He attributes no negligence to himself. The onus thereafter shifts to the bank. The way and manner the burden of proof shifts see section 132, 133 and 140 of the Evidence Act, 2011. The bank must produce evidence that the payment transaction was authenticated. i.e. the bank must demonstrate as follows: (a) the method it uses to verify the use of the debit card and ATM or online banking account, (b) how all of the personalized security features (PIN, password) work; (c) that the transaction was accurately recorded and entered in the payment service provider's accounts; (d) that the transaction was not affected by a technical breakdown or some other deficiency; (e) the bank must prove that the payment transaction was authorized by the payer; (f) evidence must be produced that the customer's card was inserted into the machine and the customer's PIN was keyed in; (g) that the customer or a person authorized by the customer was responsible for carrying out the transaction³⁰. Thus, in the Nigerian case of *Geoffrey Amana v. United Bank for Africa (UBA) PLC*, the Court held that based on the circumstance of the facts and evidence in the case, the withdrawal of the sum of #149,000.00 from the account of the claimant was unauthorized, and the bank, who has the duty of care to ensure that the funds of the customer in its custody are safe, and should only be withdrawn upon due authorization by the customer. The bank had failed in the discharge of its duty of care towards the claimant and was therefore liable in negligence³⁴. Also, of importance, is the case of *Benjamin Agi v. Access Bank PLC*³¹ the case was dismissed as the claimant/appellant failed to prove that the respondent was negligent in failing to safeguard his funds and allowed unauthorized withdrawal of the appellant's money with an ATM debit other than the one issued to the appellant by the respondent bank.

An Analysis of Forensic Parts of Evidence Act

The Evidence Act, 2022, clearly makes provision for the unique application and admissibility of technological, electronical, computerized and scientific gadgets or modalities all which constitute forensic approach in elections activities in Nigeria. Though some of the provisions require constructive and purposeful interpretation, while others require a literal interpretation which reveals the innovations

²⁹ Anyebe, P.A, "Appraisal of Admissibility of Electronic Evidence in Legal Proceedings in Nigeria", *Journal of Law, Policy and Globalization*, Vol.92, 2019, available at <<https://core.ac.uk/download/276531446.pdf>> visited 15th August, 2023

³⁰ Ibid. ³⁴ Ibid.

³¹ *Benjamin Abi v. Access Bank Plc* (2014) 4 NWLR (pt. 1345) 534-594

³⁴ Electoral Act, 2022 ³⁷ Ibid.

brought about by the Act. For instance, Section 60(5)³⁴ of the Act provides that “The presiding officer shall transfer the results including a total number of accredited voters and the results of the ballot in a manner as prescribed by the Commission”. This provision reemphasized the provision of Sections 50(2).³⁷ Fundamentally, the Act provides that: the Commission shall compile, maintain and update, on a continuous basis, a register of election results to be known as the National Electronic Register of Election Results which shall be a distinct database or repository of polling unit by polling unit results, including collated election results, of each election conducted by the Commission in the Federation, and the Register of Election Results shall be kept in electronic format by the Commission at its National headquarters.³²

Meanwhile, Section 148 of the Act provides “The Commission may, subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act and for its administration”. In pursuance of the provisions of sections 50(2), 60(5), 62(1) and 148 of the Act, INEC issued its Regulations and Guidelines for Conduct of Elections 2022 which then became, still is, Subsidiary Legislation under the Electoral Act 2022, binding and enforceable. Clause/Paragraph 38 of the Regulations and Guidelines makes Electronic Transmission of Results and Upload of Results to IReV from the polling units, and manual collation mandatory.

Accreditation is the most critical aspect in the elections processes, and the Act has provided for the ways the accreditation should be handled using the PVC and the Card Reader. Any person intending to vote in an election shall present himself with his voter’s card to a Presiding Officer for accreditation at the polling unit in the constituency in which his name is registered³³. Section 47(2) further states that: ‘to vote, the presiding officer shall use a smart card reader or any other technological device that may be prescribed by the Commission, for the accreditation of voters, to verify, confirm or authenticate the particulars of the intending voter in the manner prescribed by the commission. Again, where a smart card reader or any other technological device deployed for accreditation of voters fails to function in any unit and a fresh card reader or technological device is not deployed, the election in that unit shall be cancelled and another election shall be scheduled within 24 hours if the Commission is satisfied that the result of the election in that polling unit will substantially affect the final result of the whole election and declaration of a winner in the constituency concerned.⁴⁰ This provision is critically germane and before it can be applied, the card reader should be subjected to forensic analysis, to ascertain whether it actually failed.

Similarly, when one looks at section 64(5)(6), and (7) of the Electoral Act, one would see that INEC is mandated to electronically transmit all election results directly from the polling units on election day. For the avoidance of doubt, Section 64(4) and (5) of the Act provides:

(4) A collation officer or returning officer at an election shall collate and announce the result of an election, subject to his or her verification and confirmation that the— (a) number of accredited voters stated on the collated result are correct and consistent with the number of accredited voters recorded and transmitted directly from polling units under section 47 (2) of

³² Section 62(2) Ibid

³³ Section 47(1) Electoral Act, 2022. ⁴⁰ Section 47(3) Ibid

this Act; and (b) the votes stated on the collated result are correct and consistent with the votes or results recorded and transmitted directly from polling units under section 60 (4) of this Act. (5) Subject to subsection (1), a collation officer or returning officer shall use the number of accredited voters recorded and transmitted directly from polling units under section 47 (2) of this Act and the votes or results recorded and transmitted directly from polling units under section 60 (4) of this Act to collate and announce the result of an election if a collated result at his or a lower level of collation is not correct.

From these provisions, it is observed that the work of the Collation Officer might be seriously jeopardized, especially where the manually-collated results are disputed, in the absence of results electronically transmitted direct from the polling units. This is because, as it appears from the aforesaid provisions, the Collation Officer or Returning Officer is not entitled to announce the result of the election unless and until he has satisfied the following conditions:³⁴

- a. Must confirm that the number of accredited voters as stated on the manually collated result is correct and consistent with the number of accredited voters recorded and transmitted directly from polling units;
- b. Must confirm that the votes or results as stated on the manually-collated result is correct and consistent with the votes or results recorded and transmitted directly from polling units;
- c. Where the election is disputed, the Collation/Returning Officer shall use a number of accredited voters and the results/votes recorded and transmitted directly from polling units to collate and announce the result of the election.

From the above, it could be seen that where the manually-collated records (whether of the accredited voters or of the results) conflict with the e-transmitted version, the e-transmitted version must be preferred by the Collation or Returning Officer. Thus, for the Collation or Returning Officer to have the opportunity of making a decision where there's a dispute, or to be able to confirm that/whether the manually-collated results are correct, the Etransmitted version must necessarily be present during collation. Etransmission of results directly from the polling units is therefore, an indispensable condition precedent for the collation and announcement of election results under the Act; it appears there is nothing that can be validly or lawfully done in the absence of results electronically transmitted directly from the polling units. This raises serious questions as to the legality or validity of any results declared by the Collation or Returning Officer without following this procedure and without complying with these mandatory conditions.⁴²

Now, one other reason why e-transmission of election results directly from the polling units is provided in the Act, is that where the manually-collated results are disputed during collation, the version of results on the IReV which were e-transmitted direct

³⁴ Sylvester Udemezue, 2023 And Legal Consequences Of An Ugly Subversion Of Beautiful Laws [Part 2] available at <<https://lawpavilion.com/blog/nigerias-presidentialelection-2023-and-legal-consequences-of-anugly-subversion-of-beautiful-laws-part2/>> accessed 22nd August, 2023.

from the polling units must be produced and presented for the purpose of forensic resolution of such election disputes at that stage, before the declaration of results and return could be made. In other words, it may be legally impossible for a Returning Officer to effectively resolve a case of disputed election results in the absence of the results e-transmitted direct from the polling units and subsequently by forensic experts at the courts. Section 64(6) provides:

Where during the collation of results, there is a dispute regarding a collated result or the result of an election from any polling unit, the collation officer or returning officer shall use the following to determine the correctness of the disputed result— (a) the original of the disputed collated result for each polling unit where the election is disputed; (b) the smart card reader or other technology device used for accreditation of voters in each polling unit where the election is disputed for the purpose of obtaining accreditation data directly from the smart card reader or technology device ; (c) data of accreditation recorded and transmitted directly from each polling unit where the election is disputed as prescribed under section 47 (2) of this Act; AND (d) the votes and result of the election recorded and transmitted directly from each polling unit where the election is disputed, as prescribed under section 60 (4) of this Act.

Even under the grounds for the election of results, the relevant section could be analyzed to bring to bear for the usefulness of forensics. Section 134(1) of the Act sets out four grounds for successful election petitions. The section provides that an election may be questioned on any of the following grounds. For the sake of precision, the Act provides that:

An election may be questioned on any of the following grounds: (a) a person whose election is questioned was, at the time of the election, not qualified to contest the election; (b) the election was invalid by reason of corrupt practices or noncompliance with the provisions of this Act; or (c) the respondent was not duly elected by a majority of lawful votes cast at the election³⁵.

Note that in an election petition the ground that is always difficult to prove is ground lifted from proviso (b) which is ‘the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act’ the first limb ‘Corrupt Practices’ will require stricter proof, hence the use of forensic evidence will reduce the huddle.

Similarly, the non-compliance with the provision of the Act such as non-transmission of election result electronically or nonusage of the card reader will be easily be proved by forensics. Finally, Section 137 of the Act provides that it is “not necessary for a party who alleges non-compliance with the provisions of this Act for the conduct of the elections to call oral evidence of the originals or certified true copies manifestly disclose the non-compliance”.³⁶ It therefore means where one can secure services of expert forensic evidence to prove any of the grounds or all will be accommodated by the Act.

A³⁵ Ibid

³⁵ Section 134(1)(b) Electoral Act, 2022

³⁶ Ibid.

This part discusses some of the immediate legal and institutional reforms that are required to advance a reliable, credible and sustainable admissibility of electronic and forensic evidence admissibility arising from the electoral Act and the judicial components in Nigeria. However, the recommendations here are not exhaustive.

1. Need for expansion and Harmonization of Enabling Electronic and Forensic Legislative framework

Nigeria's current electoral law does not envisage or recognize e-voting. Attempts to introduce e-voting have therefore been analogous and derivative. Analogous reference to e-voting is not in the best interest of Africa's largest democracy. There should be specific legislation to support e-voting, e-admissibility and forensics in Nigeria.

A key step to be taken in harmonizing Nigerian legislation to reflect electronic voting, electronic and forensic admissibility is to adopt a comprehensive review of other relevant legislations to ensure that all aspects of e-voting are legally covered and appropriately regulated. Apart from the Constitution and the Nigerian Electoral Act, other legislations which impinge on elections, such as Criminal law, Evidence law, Contract laws, administrative laws, Cybercrime Prohibition Prevention Act, and so on should be amended. New provisions should be included to deal with any legitimate challenges on electronic and forensic admissibility, this will go a long way in promoting a healthy judicial interpretations of election cases in Nigeria. It has been suggested that electronic voting is not merely an extension of everyday transaction and internet applications in commerce and government, but a way to exercise political rights, deeply embedded in democratic transaction and constitutions and that its acceptability will safeguard and promote the principle of fair play and strengthening the component of democracy.³⁷

- ii. **Addressing Technological challenges in electronical processes** The outcome of the elections showed also that the deployment of technology is not enough. While voter accreditation was largely carried out with the Bimodal device, the electoral commission's failure to carry out real time transmission of the presidential election results created room for alleged result manipulation. Despite the electoral body's assurance that its decision to deploy the Bimodal Voter Accreditation System for voter accreditation and real time transmission of results to its result viewing portal was irreversible, the latter was disregarded. While the accreditation system was used, results were not transmitted to the viewing portal. It is not surprising that this was one of the issues before the presidential election tribunal in a petition filed by the Labour Party.

iii. Avoidance of Political Interference with the Judicial Decisions of Election Cases

³⁷ Obinne Obiefuna Oguejiofor 'Advancing Electronic Voting Systems in Nigeria's Electoral Process: Legal Challenges and Future Directions" available at:

<<https://www.ajol.info/index.php/jsdlp/article/view/181264>> accessed 7th July, 2024. ⁴⁶ Kennet Okonkwo and Kennet Nweke. Post Elections Litigations and Judicial Integrity in Nigeria's Fourth Republic. <https://media.neliti.com/media/publications/391978-postelection-litigations-and-judicial-i5148b7e5.pdf> accessed 7t July. 2034

While commenting on this, Udenwa⁴⁶ noted that the illicit cordiality that exists between political party members and members of the Judiciary goes a long way to compromise the integrity of the Nigerian judiciary. Udenwa observed that the undue influence of political party members on Judges through activities of financial lobbying and other aspects of monetary inducements undermine the virtue of neutrality that should guide judges as they preside over election petitions that involve rival political parties. Udenwa reveals that political parties in Nigeria have Judges who are their covert members and as such, would be ready to take sides with them in the event of any election petition. In a similar view, the former Chief Justice of Nigeria, Walter Onnoghen confessed that his removal as the Chief Judge of Nigeria was fundamentally informed by the belief of the ruling APC that he (Onnoghen) was fraternizing with the opposition party, the PDP. According to him, the ruling APC was apprehensive of the possibility of him, influencing the 2019 post-election litigations to the advantage of the PDP. You will recall how it became an issue of embarrassment at the floor of Senate when Sen. Bulkachuwa stated that many politicians used to come to his wife (Justice Zainab Bulkachuwa) through him for a favour.

iv. Political Will and Commitment

The political class must be intentional and deliberate in having a concerted efforts in doing the needful particularly in accepting positive views of electoral reforms even if the views are that of their political rivals, for instance, a passionate sponsorship of a Bill to capture provision for electronic voting and live transmission of electoral results from polling units to the national collation centre. This will go a long way in elevating the electoral and judicial processes in Nigeria. Political will exists when a sufficient

set of policy makers with a common understanding of a particular problem on a formal agenda is to supporting a perceived, potentially effective policy solution. Particularly, government must be committed and deliberate to the eradication of electoral fraud and all manner of electoral malpractices.

Conclusion

Despite the challenges faced by Lawyers and Judges on the admissibility of forensic evidence in election matters, there seems to be a light after the tunnel. The combine effect of both the Electoral Act 2022 and the Evidence Act 2011 particularly with the amendment of the Evidence Act 2023 the admissibility of forensic evidence has become firmly established in Nigeria. Essentially, the provisions accord due recognition of Forensic Evidence, specifically in the area of information or computer technology. This has seen an extensive repertoire of admissible documents including, electronic, digital or computer evidence, though without precise statutory definition of any of those terms. Consequently, the admissibility of forensic evidence is streamlined in a regime that incorporates general rules of admissibility of documentary evidence, in processes and under conditions that take into consideration current realities. The courts have risen to the occasion in proactively wide interpretation. However, despite the prospects of the new provisions for admissibility of such forensic evidence, there are several contending issues and challenges in the practical application of the law. The most critical issues include the failure of legislature to define forensic evidence and prescribe the form of certification required to make such evidence admissible. Accordingly, there is possibility of admission of every electronically generated document that satisfies the

requirements of the Evidence Act 2011, particularly under Section 84 of the amended Act of 2023.