

ARTICLE:

ADMISSIBILITY OF COMPUTER EVIDENCE IN TANZANIA

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This article examines the admissibility of electronic documents by Tanzanian courts. The point of departure for discussion is the Tanzania Evidence Act, CAP 6 (R.E 2002) (TEA) and case law drawn from Tanzania and other common law jurisdictions relevant to the discussion. The first part of this article provides background information to the TEA and provides an outline of the problems of the TEA, illustrating where it needs revising in relation to the admissibility of electronic documents. The second part considers the meaning of the term electronic document. Further discussion in this part focuses on the question whether an electronic document is recognized under the TEA. The third part revisits the concepts of 'original' and 'copy' in the context of an electronic document. The fourth part concludes the article.

Background information

The TEA is the main legislation which regulates the admissibility of evidence in judicial proceedings in Tanzania. The Act was enacted in 1967. It repealed the Indian Evidence Act 1872 which had been in force since 1920. The former statute was the British model statute introduced to India and later transferred to British colonies including Tanzania (formally known as Tanganyika). It incorporated the English rules and principles of evidence in a modified version to suit the circumstances of India. Although the TEA repealed the Indian Evidence Act 1872, it retained most of its provisions.

The TEA, like its counterpart the Indian Evidence Act 1872, dates back to before the age of computer technology. The rules and principles incorporated in the Act were not directly intended to regulate the electronic environment. This was a common trend across many jurisdictions in the 1960s. The period subsequent to the

1960s witnessed rapid technological revolutions. The computer became widely used in the public and private sectors. Most records in these institutions were transformed and kept in electronic format. These could be retrieved and printed in hard copies whenever the need arose. Today many important records are held electronically.

There are three main problems associated with digital documents. First, digital documents are particularly susceptible to being altered. It is possible to make additions or deletions that are not apparent to viewers of the document. The second problem is that it is difficult to tell the difference between the original authentic record and copies of it, which may have been altered. There are also definitional problems, especially what constitutes electronic document. These problems pose challenges to the swift application of the TEA without revising some of its provisions.

The notion of an electronic document

The TEA contains no provision which defines the term electronic document. The only definition which is available is that of a document. It is necessary to determine whether such a definition is wide enough to encompass the term electronic document. In order to answer this question, an analysis of the elements of section 3(1)(d) of the TEA that defines the term document is inevitable. This section defines the term document as follows:

Any writing, handwriting, typewriting, printing, photostat, photograph and every recording upon any tangible thing, any form of communication or representation by letters, figures, marks or symbols or by more than one of these means, which may be used for the purpose of recording any matter provided that such recording is reasonably permanent and readable by sight.

There are four main elements involved in this definition. The first element is recording, the second element is

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any tangible thing, the third element is reasonably permanent and the fourth element is readable by sight.

Recording

The word recording should be accorded meaning in accordance with the rule of statutory interpretation that where particular words are followed by general words, the general words are limited to the same kind as the particular words. This is because it is preceded by specific words such as writing, handwriting, printing, photostat and photograph. These instances of recording are similar in that they involve an element of writing. This is irrespective of the technology used in producing them. Thus an audio tape recording, a video tape recording, a text message on a GSM telephone, an electronic mail on a computer screen, information contained in CDs, VCDs, hard drive or such other things, all constitute recording.

Any tangible thing

For a recording to constitute a document it must be stored upon a tangible thing. A thing is said to be tangible when it possesses physical form. In other words, the thing must be physically touched and seen. Since electronic documents take the form of CD ROMs, CDs, VCDs, hard drive, magnetic tape, and such like, they satisfy the requirement of tangibility under section 3(1)(d) of the TEA.

Reasonably permanent

A recording is said to be reasonably permanent when it lasts for some time in future before it disappears. It is important to emphasize that the above phrase should be interpreted in context. In any case, it should not be transitory. Thus when a recording is electronically stored on a CD ROM, hard drive, magnetic tape or other electronic storage devices, it can be considered to be in a state of reasonable permanence.

Readable by sight

The final requirement for recording to amount to a document is that it should be able to be read by sight. To read a document presupposes the normal functioning of the human eye. It is doubtful if electronic documents fulfill this criterion. This is because electronic documents cannot be read by sight. It is impossible to read by sight the contents of a CD ROM, hard drive, or magnetic tape without hardware and software. Normally, particular software is deployed to convert digital data stored in a CD ROM, hard drive or magnetic tape in a form that can be read. The data are in the form of binary digits, that is the zeros and ones, which are only machine-readable. This is contrary to physical documents, which can be read immediately when viewed.

Two approaches can therefore be considered in interpreting the element of what is meant by being able to read by sight. The first is a narrow approach, while the other is broader approach. The narrow approach rests on immediate sight, while the broader approach looks beyond this criterion. The later approach focuses on the final ability of a person to read data by sight. It disregards any intervention of hardware and software, which facilitates the ability to read data by sight. The narrow approach therefore excludes the concept of an electronic document from the scope of definition of a document under the TEA. The broader approach, on the other hand, accommodates electronic documents within the meaning of the term document under the TEA. Either of these interpretations will depend on the decision of the presiding magistrate or judge.

Electronic document: original or copy

The fundamental rule of admissibility of documentary evidence is that a party wishing to rely on the contents of a document in proof of his or her case must tender an original document before the court. This is otherwise called the best evidence rule. A copy of a document may

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only be tendered in court as an exception to the best evidence rule after certain conditions have been fulfilled. It is not always easy, however, to determine what is considered to be the original document, which constitutes primary evidence in this sense, and sometimes the same document is primary for one purpose and secondary for another.¹ The presence of computers has created additional complexities and definitional problems within the accepted rules of evidentiary procedure.² Gahtan underlines such complexities in the following paragraph:³

‘In the case of computer-produced evidence, it is not always clear what is an “original” and what is a “copy”. When information is first entered into a computer system, it is commonly stored in the system’s memory (for instance, read/write or RAM memory on a PC, which generally has the quickest access time). It is then usually quickly copied to a semi-permanent storage device such as a hard disk so that the system’s core memory can be freed up of other tasks. At some point it may also be copied or moved to a magnetic tape or optical disk storage media for longer-term storage. The information, as stored in any of the foregoing digital storage mediums, is not perceived by humans and must be printed out in hardcopy form, or displayed on a computer monitor. Courts have not always been consistent as to when a record stops being an “original” and becomes a “copy” during this process.’

Major approaches of distinguishing original from copy

There are currently two major divergent approaches by courts and legislation in determining what constitutes

an ‘original’ and what is a ‘copy’ of a document in the electronic environment. The first approach is followed by jurisdictions like the United States of America. Under the US Federal Rules of Evidence (US FRE) an original document is a computer print-out or other output of data stored in the computer device.⁴ Rule 1001(3) states as follows:

‘If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an “original”’

The second approach is the opposite of the first approach. It treats computer print-outs as copies.⁵ This approach is followed by such jurisdictions like Nigeria. In the landmark case of *Anyaeboji v R T Briscoe*,⁶ the Nigerian Supreme Court confirmed in a unanimous decision that computer print-outs are admissible in evidence under the provisions of the Nigerian Evidence Act, with the underlying assumption by all the members of the court that such evidence amounts to secondary evidence.

It is interesting to note that both of these approaches present difficulties in their application. They fail to precisely distinguish between ‘original’ and ‘copy’. For example, when the US FRE categorically states that a computer print-out is an original, the same piece of legislation is silent on the status of computer data of which the print-out originates. Similarly, when the Nigerian Supreme Court ruled that a computer print-out is a copy in *R T Briscoe*, it did not proceed to determine the status of computer data of which the print-out was admitted as a copy. This omission to determine the status of computer data in both cases must not be taken to mean that if a computer print-out is held to be

¹ Hodge M. Malek, general editor, *Phipson on Evidence*, (16th edn. Sweet & Maxwell, 2005), 41-08.

² Michael Rostoker and Robert Rines, *Computer Jurisprudence: Legal Responses to Information Revolution* (Oceana Publications, New York, 1986), 349.

³ Alan M. Gahtan, *Electronic Evidence* (Scarborough:

Carswell, 1999), 152.

⁴ US States which have not enacted legislation to govern admissibility of electronic documents have always relied on the common law to admit computer printouts as secondary evidence on account that the ‘original’ was unavailable, being in a form which was not readable. For instance, see the Mississippi case of *King v State ex rel Murdock*

Acceptance Corporation, 222 So.2d 393 (Miss. 1969).

⁵ These are sometimes known as secondary evidence.

⁶ (1987) 3 N.W.L.R. 84 (part 59).

The question that will be determined by the courts is what is a copy of a computer print-out, when the former is held to be an original and vice versa.

a copy, then the computer data automatically constitutes an original document and vice versa. For if that were the case then it could be logically difficult to comprehend a situation where a computer print-out is held to be an original document while the computer data which existed before is held to be a copy.

There is yet another problem which has seldom been addressed in most evidence legislation, case law and in academic discussion. This is on the status of the soft copy available on the computer monitor. It is a fact that hardware and software operation on the data input may result into two types of output namely, soft copy on the monitor and the printed hard copy. A soft copy stands in the middle of computer data and computer print-out. Unless it is printed a computer print-out remains in the machine as either computer data or soft copy available to view on the monitor.

The other problem that has been overlooked is relevant to the admissibility of secondary evidence. Usually, secondary evidence is admitted in the form of copies of the original document. The question that will be determined by the courts is what is a copy of a computer print-out, when the former is held to be an original and vice versa. This is an important question since it triggers the application of the best evidence rule. If care is not exercised there is always a danger of categorizing computer print-outs as primary evidence or secondary evidence.

The Tanzanian approach

The TEA does not contain any reference to ‘computer’, much less print-outs from computer memory. It therefore remains the duty of the courts to develop the law through interpretation on a case-by-case basis, otherwise computer print-outs would be inadmissible. In the landmark case of *Trust Bank Tanzania Ltd v Le-Marsh Enterprises Ltd and Others*,⁷ the High Court of Tanzania⁸ considered the admissibility of computer

evidence. The issue before the court in this case was whether or not a computer print-out is a bankers’ book under the TEA. The court answered this issue in the affirmative. Briefly, the facts of this case were as follows. The plaintiff company advanced a loan to the defendants. Upon default to repay the loan and interest, the plaintiff instituted a commercial case against the defendants to recover the principal sum and interest. In the course of the proceedings, the plaintiff wished to tender a print-out of a bank statement. Counsel for the defendants vigorously objected, because it was a photocopy, and not an original. In overruling the objection and admitting the print-out the learned judge, Nsekela J, (as he then was) had the following to say:

‘It is in this spirit that I am prepared to extend the definition of bankers’ books to include evidence emanating from computers *subject of course to the same safeguards applicable to other bankers books under sections 78 and 79 of the Evidence Act*’ (Emphasis supplied).

The safeguards in sections 78 and 79 of the TEA refer to an original and a copy. For appreciation of these provisions, it is pertinent to set out the relevant sections:

‘78. (1) *A copy of an entry in a banker’s book shall not be received in evidence under this Act.*

79 (1) *A copy of an entry in a banker’s book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct.*’ (Emphasis supplied)

Section 79(1) of TEA requires proof that the copy of an entry be examined with the original for integrity. Since the original entry in the computer is in binary code format, and which is only machine-readable, this

⁷ *High Court of Tanzania (Commercial Division) at Dar es salaam, Commercial Case No. 4 of 2000 (Not reported).*

⁸ *This is the second highest court in the judicial hierarchy after the Court of Appeal of Tanzania.*

requirement becomes difficult to prove. This may, however, be achieved by comparing the information on the computer screen and on the print-out. It is therefore suggested that although the court did not direct itself to the complexities arising in admitting computer print-out as a banker's book, computer print-outs are admitted as copies.

Conclusion

The development of digital technology in the last century has had a profound effect on the traditional concepts of law and legal rules in the law of evidence. The body of rules governing the admissibility of documentary evidence has been severely strained. The principle problem lies in the definition of electronic document that, under the TEA, is not adequately defined. The other concepts, which have brought difficulties in the interpretation of evidence statutes, are 'original' and 'copy' of an electronic document. The issue is whether it is possible to distinguish between an original and a copy as between the electronic document and the computer print-out. These two questions have rarely been precisely answered. In some common law jurisdictions a computer print-out is considered as original, while in others a copy. In each case the status of electronic document is left undetermined. In order to amend the TEA swiftly to deal with the electronic environment, it is suggested that the concept of a document should be redefined to accommodate electronic document. Similarly, the notion of original and copy should also be reviewed.

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