

ELECTRONIC EVIDENCE IN TANZANIA

By Adam J. Mambi

An overview of the legal status of electronic evidence

The term 'electronic evidence' includes data that comprises the output of an analogue device or data in digital format. Unlike physical evidence, electronic evidence cannot be destroyed easily. Generally, any modern system of commerce depends partly on trust, but mainly on the fact that agreements between the parties are documented. This is a common principle in most transactions that do not involve online communications. However, in electronic transactions, the situation might be different due to the fact that the parties to the agreement may never have physically met or spoken to each other. It is possible for parties to face some problems on the admissibility and weight of evidence in digital format, because the documents will be regarded as computer generated, which in most cases might fall as secondary evidence and not primary evidence. The prosecutors and investigators of crimes also face the same problem when they handle criminal matters.

Most laws related to business, civil matters and evidence are made to suit the physical world based on paper.¹ The best evidence rule requires that only original documents are admissible in legal proceedings. Due to the advancement of digital technology, computers, networks and other related devices, the use and scope of electronic evidence has expanded dramatically over the world.

The legal position of electronic/digital evidence in Tanzania

Tanzania adopted the common law legal system from England. In cases of dispute, it is possible that the parties might face problems on the admissibility and weight of electronic evidence. Most common law jurisdictions recognize the best evidence rule, which requires that the original document in a written form is only admissible in legal proceedings. Notably, before 2007, the Evidence

Act² of Tanzania provided for the requirement for the best evidence rule, which excluded the admissibility of secondary evidence unless corroborated by primary evidence.

Until 2006, electronic documents or data messages were not admissible in legal proceedings under the legal system in Tanzania. However, when admitting electronic evidence, it is not necessary to depart totally from the 'best evidence rule', but rather to provide for the functional equivalence of electronic evidence by putting electronic evidence under an equal footing with paper based methods, as addressed under the UNCITRAL Model Laws on E-commerce and Electronic Signatures.³

The current trend indicates that traditional forms of evidence are rapidly being supplemented by electronic evidence, and changes in criteria and principles for admissibility of electronic evidence have already been formulated.⁴ The nature of electronic evidence can raise issues of complexity in the reliability, authenticity and weight of electronic evidence, which are reflected in the principles for admissibility that have been formulated. Digital evidence also involves computer forensics, which requires proper forensic investigation to identify, extract, preserve and document digital evidence.

The role of the judiciary

The powers of the judiciary of Tanzania are provided under the Constitution of the United Republic of Tanzania and other statutory provisions. Under the Constitution, the judiciary is specifically vested with judicial powers as the sole organ entrusted with the duty of interpreting the laws of Tanzania and adjudicating over disputes that may arise.⁵ The decisions of the judiciary have sometimes lead to legal changes through amendments, repeal and the enactment of new laws. Using these constitutional mandates and powers, the judiciary, through the commercial court, has played a pivotal role in the legal changes dealing with the admissibility of electronic evidence in Tanzania.

¹ Some of these laws include the Evidence Act (Tanzania) Cap 6 [R.E. 2002], Civil Procedure Act (Tanzania) Cap 33 [R.E. 2002], Contract Laws (Tanzania) Cap 345 [R.E. 2002].

² CAP 6, [RE. 2002].

³ 1996 – UNCITRAL Model Law on Electronic

Commerce with Guide to Enactment with additional article 5 bis as adopted in 1998; 2001 – UNCITRAL Model Law on Electronic Signatures with Guide to Enactment.

⁴ Principles of admissibility have been developed, which are set out in Stephen

Mason, gen ed, *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012), chapter 4.

⁵ See article 108 and 117 of *The Constitution of the United Republic of Tanzania, 2008 Version*.

A landmark case and crucial precedent on electronic evidence

The commercial court has played a significant role in initiating changes to the law of evidence. The strict adherence to the best evidence rule was tested in the case of *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*.⁶ The decision in this case seemed to beneficially erode the best evidence rule by admitting computer print-outs and other related electronic evidence under the Evidence Act of Tanzania.⁷ The court considered the decision of the Court of Appeal in *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA*⁸ which had earlier allowed arbitration awards to be sent to the High Court electronically, contrary to Rule 4 of the Arbitration Ordinance.⁹

In *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*, Trust Bank was seeking a judgment against the defendants. Trust Bank alleged that it had extended credit facilities to the first defendant, and that the second and third defendants guaranteed the credit facilities. The credit facilities remained unpaid. In this case, the content of the affidavit produced and tendered by PW1 set out the basis of the electronic evidence relied upon.¹⁰ This affidavit was made under section 78 and 79 of the Evidence Act in proof of entries in a Bankers Book and in verification of such entries. Part of it reads as follows (with added emphasis):

1. That there have been shown to me *copies of the computer printouts* forming part of the plaint in this suit and collectively marked as 'Annexure C' to the said plaint.
2. That the computer Printouts referred to in the foregoing paragraph represent certain entries in the *computer ledger books* of the plaintiff now known by its new name, The Delphi's Bank (Tanzania) Limited. A copy of the relevant Certificate of Change of name is annexed hereto and marked as 'Annexure – I.'
3. That the entries referred to in Annexure C to the plaint reflect computations of normal interest, penalty interest, bank charges and legal fees on the loan extended by the plaintiff to the 1st defendant in this suit.

4. That the plaintiff maintains all its banker's books on the basis of a *computer system* as opposed to actual paper books, which *computer system* is under the exclusive control of the plaintiff, and the entries in Annexure C were made in the usual and ordinary course of business.
5. That plaintiff computer ledger system is controlled and managed by a computer Supervisor, who has retrieved and printed the entries in Annexure C.¹¹

Factors considered by the court in determining the position of the electronic evidence

The main issue before the court was whether electronic evidence from the computer print-out was admissible under the provision of the Evidence Act 1967. The law regarded the 'best evidence rule' as paramount, which meant that a computer print-out was given less weight, because it was regarded as secondary evidence, or even hearsay evidence. The relevant sections of the law are produced below:

Section 64. (1) Primary evidence means the document itself produced for the inspection of the Court.

(2) Where a document is executed in several parts, each part is primary evidence of the document.

...

Section 66. Documents must be proved by primary evidence except as otherwise provided in this Act.

...

Section 69. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

...

Section 78 (1). A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the

⁶ High Court of Tanzania (Commercial Division) at Dar es Salaam Commercial case no. 4 of 2000 (unreported).

⁷ CAP 6 [R.E 2002].

⁸ 1997 TLR 165 (CA).

⁹ Now CAP 15 [R.E 2002].

¹⁰ Adam J. Mambi, 'A decade after the establishment of the Commercial Court

Division: The role of the Court on the Legal changes towards the use of ICT (electronic evidence) in the administration of Justice in Tanzania, *Tanganyika Law Society Journal*, Volume 5, 2010. See also Adam J. Mambi, *A Source Book for Information and Communications Technologies and Cyber Law*, (Mkuki na Nyota Publishers, 2010), pp

180 – 196.

¹¹ See *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*, High Court of Tanzania (Commercial Division) at Dar es Salaam Commercial case no. 4 of 2000 (unreported).

bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.

(2) Such proof may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any Commissioner for oaths or person authorized to take affidavits.

Section 79 (1). A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is further proved that the copy has been examined with the original entry and is correct. (2) Such proof shall be given by some person who has examined the copy with the original entry, and may be given orally or by an affidavit sworn before any commissioner for oaths or person authorized to take affidavits.

The court found that there was no clear definition of banker's books under the Evidence Act. This moved the court to consult precedents from other jurisdictions to get a clear definition and determine whether the definition caters for and could accommodate the development of technology, especially the admissibility of electronic evidence. Furthermore, the court noted that the definition of banker's books should include computer print-outs in view of the current technological revolution that is taking place, but it would certainly be much better if the legislature took up the matter, as was done elsewhere. The court referred to section 5(1) and (2) of the UK Civil Evidence Act 1968¹² on the admissibility of statements produced by computers, which provided as follows –

'5 (1). In any civil proceedings a statement contained in a document produced by a computer shall, subject to the rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question'.

Before making a ruling and judgment the court considered various cases from other jurisdictions, such as *Barker v Wilson*.¹³ In his earlier ruling in the case of *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia* (as cited above) as to whether or not a computer-print-out is a banker's book, Senkela J

of the High Court as he then was, stated that:

'The courts have to take due cognizance of the technological revolution that has engulfed the world. Generally speaking as of now, record keeping in our banks is to a large extent "old fashioned" but changes are taking place. The law can ill afford to shut its eyes to what is happening around the world in the banking fraternity.

It is in this spirit that I am prepared to extend the definition of banker's 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'.¹⁴

The court further pointed out that the law must keep abreast of technological changes as they affect the way of doing business. The conclusion that can be drawn from this case is that, although the Evidence Act of Tanzania did not recognize the admissibility of electronic evidence, the court departed from the 'best evidence rule' and accepted electronic evidence by giving it equal weight with physical evidence that is based on original documents. The court indeed made an important statement that was directed to the government and legislators by stating that it would, however, have been much better if the position were clarified beyond all doubt by legislation rather than judicial intervention.¹⁵

Legal changes to accommodate electronic evidence

Following the decision of the court and the Law Reform Commission Report on the legal framework for e-commerce and cybercrimes,¹⁶ the government of Tanzania in 2007 amended the Evidence Act to accommodate electronic evidence by passing the Written Laws (Miscellaneous Amendments) Act, which amends the Evidence Act, 1967. This provides for the admissibility of electronic evidence. Section 76 of the Evidence Act was amended by section 35 of the Written Laws (Miscellaneous Amendments) Act,¹⁷ 2007, in which the following additional definition was included:

'Bankers books include ledgers, cash books, account books and any other records used in the ordinary business of the bank or financial institution, whether

¹² Section 5 was repealed by the Civil Evidence Act 1995.

¹³ 1980] 1 WLR 884, [1980] 2 All ER 81, (1980) 70 Cr App R 283, [1980] Crim LR 373, 124 S.J. 326, DC.

¹⁴ High Court of Tanzania (Commercial

Division) at Dar es Salaam Commercial case no. 4 of 2000 (unreported) at 7.

¹⁵ The Ruling of the case of *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia* High Court of Tanzania (Commercial

Division) at Dar es Salaam Commercial case no. 4 of 2000 (unreported) at 4.

¹⁶ The Commission Report was published and submitted to the Ministry of Justice and Constitutional Affairs in 2006.

¹⁷ No. 15 of 2007.

the records are in a written form or a *data message* or kept on information system including but not limited to computers and storage devices, magnetic tape, micro-film, video or *computer display* screen or any other form of mechanical or *electronic data retrieval mechanism*' (emphasis added).

The amendment introduced fundamental changes as far as the legal status and admissibility of electronic records are concerned. This can be observed under an additional section added to the Evidence Act whereby electronic records or data message are given legal status and can be admissible as evidence in legal proceedings. The relevant section provides that:

'A print out of any entry in the books of a bank on micro-film, *computer, information system*, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print-out, and when such print-out is supported by a proof stipulated under subsection (2) of section 78 that it was made in the usual ordinary course of business, and that the book is in custody of that bank it shall be received in evidence under this Act'.¹⁸

Furthermore section 36(2) provides that 'any entry in any banker's book shall be deemed to be a 'document'...'

In 2009 the government put electronic evidence under an equal footing with physical evidence based on the best evidence rule by amending more statutes. This was done vide the Finance Act, which amended the Excise (Management and Tariff) Act and the Stamp Duty Act¹⁹ respectively. The amending Act re-defined 'document' to include electronic documents or data messages. The amendments further redefined dutiable value to include the mobile telephone. Other laws were amended for the purpose of recognizing the admissibility and legal validity of electronic evidence, electronic documents and the e-taxation system, such as the Airport Service Charge Act; Income Tax Act; Regulation G.N. No.192 on Electronic Fiscal Devices, issued under Value Added Tax Act (that regulates electronic transactions for tax administration) and the Value Added Tax Act.

The effectiveness of the Evidence Act

It is not certain that the Written Laws (Miscellaneous Amendments) Act, 2007 has fully dealt with the problem of legal certainty and the admissibility of electronic evidence. The changes appear to be mainly based on electronic evidence for banking transactions and the admissibility of such evidence in criminal proceedings. Because of the narrow focus of the changes, it might be difficult to apply the rules to electronic evidence in wider civil proceedings. The amendments provide for the admissibility of electronic evidence adduced from the banks whereby the provisions start with the definition of Bankers Books, which include ledgers, cash books, account books and any other records used in the ordinary business of *the bank or financial institution* (emphasis added). This law should recognize the admissibility of electronic evidence adduced from any computer or information system and other related devices, whether be it transactions, communications or related to cyber crimes, rather than referring only to financial transactions.

The question of proof of the integrity of the electronic records or electronic evidence has also not been considered. The other important issues that were supposed to be included in the amending legislation are the standard of proof, presumption of computer or information system integrity,²⁰ proof by affidavit, burden of proof and the discretion of the court to consider common law or statutory rule relating to the admissibility of records in other circumstances. The fact is, that computer output (that is, electronic evidence) is no longer confined to computer print-outs and scanned documents, but extends to electronic records generated and stored by an increasing multitude of data processing, storing and transmission devices such as mobile telephones, electronic organizers and digital cameras. Technology-centric evidentiary provisions are viewed as somewhat dated.

These factors are very important in determining whether electronic evidence is admissible or not. Some countries such as India, Malaysia, Canada, Singapore, Malta, South Africa, and England and Wales have amended their laws, and in respect of criminal proceedings, have provided for substantive offences by enacting cyber laws that accommodate electronic

¹⁸ See Section 36 of the Written Laws (Miscellaneous Amendments) Act, 2007. See also Section 78A of the Evidence Act, CAP 6, [RE. 2002].

¹⁹ Cap 189 [R.E. 2002].

²⁰ On a critique of the presumption that a computer is deemed to be working properly, see Stephen Mason, *gen ed*, *Electronic*

Evidence (3rd edn, LexisNexis Butterworths, 2012), chapter 5.

evidence. These conditions and factors were considered by the Commercial Court of Tanzania in the case of *Trust Bank Tanzania Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*,²¹ and the court directed the legislators to consider some significant factors from the UK legislation when amending the law.²²

For instance, it is necessary to consider redefining the word ‘document’ to include data message or electronic information. The definition of ‘document’ under section 3 of the Evidence Act, 1967 as revised in 2002, is defined in the basis of the physical world as follows:

‘document’ means *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; (emphasis added).*²³

In addition, section 66, which provides for applicability of the best evidence rule whereby documents have to be proved by primary evidence, needs to be amended to accommodate electronic evidence.

In summary, the judiciary led the way in Tanzania

regarding the inclusion of electronic evidence into legal proceedings. Of significance to the change in law in Tanzania was the decision in the case *Trust Bank Ltd. v Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*,²⁴ in which the court considered the decision of the Court of Appeal in *Tanzania Cotton Marketing Board v Cogecot Cotton Company SA*.²⁵ This earlier case had allowed the use of electronic communications to send arbitration awards to the High Court, contrary to Rule 4 of the Arbitration Ordinance.²⁶ In this case, the issue before the court was whether the filing of an arbitration award by a DHL courier and not by registered post, as required by the law, was enforceable – and it must be right that the court demonstrated a willingness to move with the times, otherwise a change in the law might have taken even longer.

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²¹ *High Court of Tanzania (Commercial Division) at Dar es Salaam Commercial case no. 4 of 2000 (unreported).*

²² Adam J. Mambi, *A Source Book for Information and Communications*

Technologies and Cyber Law, pp 180 – 196.

²³ CAP 6 [RE. 2002].

²⁴ *The High Court of Tanzania (Commercial Division) at Dar es Salaam Commercial case no.4 of 2000 (Unreported).*

²⁵ 1997 TLR 165 (CA).

²⁶ Now [RE 2002 CAP.15].