

RUAHA CATHOLIC UNIVERSITY



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**Determining the Genuineness of Electronic Evidence: A Comparative
Analysis between Nigeria and Tanzania**

A Research Paper Submitted in Partial Fulfilment of the Requirements for the
Award of Bachelor of Laws Degree (L.LB) of Ruaha Catholic University

By

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Certification

The undersigned certifies that he has read and hereby recommends for acceptance by the Ruaha Catholic University , a dissertation paper titled: Determining the Genuineness of Electronic Evidence: A Comparative Analysis Between Nigeria and Tanzania, in Partial Fulfillment of the Requirement for the Award of the Bachelor of Laws Degree (LLB).

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Date

Declaration

I, Sabutoke Edgar Thomas, do hereby declare that this dissertation is my own original work and that it has not been submitted to any other University for a similar or any other degree award.

.....

Researcher

Date

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Dedication

I would like to dedicate this research to my lovely parents; my father, Mr. Thomas Sabutoke and my mother, Mrs. Mexina Sabutoke whose love, care, support and encouragement to me are immense.

May God bless them.

List of Legislation

Foreign Instruments

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Federal Rules of Evidence 2013

India Evidence Act 1872

Police and Criminal Evidence Act, 1984

Regional Instruments

Nigeria Evidence Act 2011

Domestic Instruments

The Constitution of the United Republic of Tanzania 1977

The Evidence Act [Cap 16 RE: 2002]

The Finance Act of 2009

Written Laws (Miscellaneous Amendments) Act 2007

List of Cases

Dr. Imoro Kubor & Anor V. Hon. Seriake Henry Dickson & Ors 21(2013) 4 NWLR (Pt.1345), 534

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Trust Bank Ltd V. Le-Marsh Enterprises Ltd.and Joseph MbuiMagari, Lawrence Macharia,
High Court Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 4 of
2000 (Unreported).

UBA V. Sani Abacha Foundation for Peace and Unity (SAPFU) (2004) 3 NWLR (Prt. 861)
516

Yesufu V. ACB(1976)1 All NLR (Prt.1) 328

Abbreviations

All ER	All England Reports
Cap	Chapter
EMAIL	Electronic Mail
ICT	Information Communication Technology
IT	Information Technology
LL.B	Legum Baccalaureus (Bachelor of Laws)
RE	Revised Edition
RUCU	Ruaha Catholic University
TEA	Tanzania Evidence Act
TLR	Tanzania Law Reports

Abstract

Development of science and technology has contributed at large the use of computers in our daily life and due to this change it has brought many challenges, many of them being the use of electronic evidence in courts. This research focuses on determination of the genuineness of electronic evidence in Tanzania by comparing with Nigeria. In Tanzania the court of law have dealt with cases involving electronic evidence and as the result the parliament amended the TEA and incorporate the admissibility of electronic evidence.¹

However, the amendment done by the parliament has not covered some of the challenges which are associated with electronic evidence and one of the challenges is the difficult in determining the genuineness of electronic evidence. Therefore, this research looks on determination of the genuineness of electronic evidence by comparing with the legal position in Nigeria, the researcher have made comparison between TEA with Nigeria Evidence Act on the issue of determination of the genuineness of electronic evidence simply because the position in Nigeria is clear on this issue.

TEA does not cover on the issue of determining the genuineness of electronic evidence unlike Nigeria Evidence Act which have covered the said problem under *Section 84* of the Evidence Act of 2011.

Therefore the study recommends enactment of an efficient and responsive legal framework to address the above issue. Based on the finding of this study enactment of efficient and responsive laws does not only address issues raised by electronic evidence but also keep pace with advancing technologies brought by ICT.

¹ The Written Laws (Miscellaneous Amendments) Act of 2007 amended TEA under Section 40A, section 76 as well as section 78A of TEA.

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CHAPTER ONE

1.0 General Introduction

Basing on the development of science and technology, it has led to the advancement of many things like the use of computers in our daily life, nowadays it is more important in many fields, and due to this it has brought many challenges,² one of them is the use of electronic evidences before the court of law.³ This challenge is posed in our Tanzania Evidence Act⁴ since it did not at first cover electronic evidence that is data stored or transmitted using a computer.⁵

Recently, electronic evidence has become one among the source of evidence worldwide, and it covers every aspect of law that is criminal and civil. Lawyers are supposed to apply internet in their daily practice.⁶ In 2007 the Evidence Act of Tanzania was amended to provide for the admissibility of electronic evidence, but the law did not provide on how to determine the genuineness of electronic before the court of law. Therefore, the researcher intends to make a comparative analysis of the laws in Tanzania and Nigeria respectively on the difficulties in determining the genuineness of electronic evidence before courts of laws.

² <http://tanlex.wordpress.com/2008/10/02/admissibility-of-electronic-evidence-in-tanzania> (accessed on 28 July 2014).

³ A.B. Makulilo, Admissibility of Computer Evidence in Tanzania, 4, *Digital Evidence and Electronic Signature Law Review* 2, 56, (2007), 60. "The development of technology in the last century has had a profound effect on the traditional concepts of law and legal rules in the law of evidence.

⁴ *Tanzania Evidence Act 1967*, Act no. 6 of 1967 RE: 2002.

⁵ E.Cassey, *Digital Evidence and Computer Crime: Forensic science*, Computers, Academic Press, London 2004², 12.

⁶ S. Mason, *Electronic Evidence*, LexisNexis Butterworths, New York 2012³

1.1 Background to the Problem

In Tanzania, the main legislation which deals with evidence is called the Tanzania Evidence Act (herein after referred to as TEA).⁷ Before the amendments which were done in 2007, TEA of 1967 did not provide for electronic evidence in Tanzania. The TEA before 2007, provided for the best evidence rule which did not incorporate the admissibility of secondary evidence unless the secondary evidence is to be corroborated by the primary evidence.⁸ This is because Tanzania adopted the common law legal system, in which most laws related to evidence were made to suit physical world on the use of paper based methods, which emphasized for the mandatory requirement of original evidence also known as best evidence rule. It is also noted that in 1960's there was no such development which required the use of electronic evidence. Therefore, the laws were enacted to serve paper based transactions under the physical world before the development of technology.

However, with the new technological changes, laws could not lag behind; hence the introduction of rules that allowed the use of technologically generated materials in the courts. Such introduction however has not been smooth enough for the new circumstances which have raised complexities in reliability, genuineness and weight of electronic evidence, simply because the documents will be computer generated which in most cases might fall as secondary evidence and not the primary evidence as required by the law.⁹

⁷ *Tanzania Evidence Act 1967*, Act no. 6 of 1967 RE: 2002.

⁸ A.Mambi, Paper on 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,5. Available at www.comcourt.go.tz

⁹ *Idem*

In Tanzania the adoption of electronic evidence is highly contributed by the judiciary. The Judiciary has the duty of interpreting the laws of Tanzania and adjudicating over disputes that may arise among the people.¹⁰ The decisions of the judiciary can lead to the changes which can be amendments, repeal and enactments of the laws. As the results of these constitutional powers and mandates which are vested to the judiciary, the High Court (Commercial Division) played a great role in the legal changes that has now accommodated the admissibility of electronic evidence in Tanzania. TEA was the first law to be amended following the court decision. Before the amendments, electronic evidence was not admissible in Tanzania because most laws provided for the mandatory requirements of the original evidence.

In 2000 it is when the use of electronic generated materials as evidence was seen in Tanzania, in the landmark case of *Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph MbuiMagari, Lawrence Macharia*¹¹, the decision in this case admitted computer printouts and other related electronic evidence under the Evidence Act of Tanzania¹², whereby the court considered the decision of the Court of Appeal in the case of *Tanzania Cotton Marketing Board V. Cogecot Cotton Company SA*¹³ which had earlier allowed arbitration awards to be sent to the High Court electronically, contrary to Rule 4 of the Arbitration Ordinance recently known as Arbitration Act.¹⁴ Also Nsekela, J, adopted the provision of UK law on admissibility of electronic evidence; specifically *section 5* of the English Civil Evidence Act 1968, as well as the court adopted the best evidence rule in admitting computer printouts.

¹⁰ Articles 107, 108 and 116 & 117. Whereby the Constitution of the United Republic of Tanzania provide for the powers of judiciary of Tanzania.

¹¹ *Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph MbuiMagari, Lawrence Macharia*, High Court Tanzania (Commercial Division) at Dar es Salaam Commercial Case No. 4 of 2000 (Unreported).

¹² Act no. 6 of 1967 RE: 2002

¹³ [1997]TLR 165(CA)

¹⁴ CAP 15[R.E 2002]

The court also went further in the case of *Trust Bank Tanzania Ltd. v. Le-marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia* by directing the legislators to consider some key factors from the UK legislation when amending or enacting the Evidence Act in order to recognize electronic evidence like what it was done in England in the Civil Evidence Act, 1968 as well as the Seychelles Evidence (bankers' books) Act, Cap. 75. The court required the parliament to ensure that the law of evidence is constantly revised and adapted to the realities of modern business practices such as e-commerce.

It was until 2007, when the parliament amended The TEA. The Written Laws (Miscellaneous Amendments) Act of 2007 amended TEA and provided for the admissibility of electronic evidence. The said amendments are found under section 40A, section 76 as well as section 78A of TEA.¹⁵ The said sections provide for the admissibility of electronic evidence in Tanzania for the first time.

The amendments that were made in 2007 did not really cure the problem of legal certainty and admissibility of electronic evidence on how to determine the genuineness of electronic evidence. It is still a problem on how the court can determine whether this is original or forged evidence. To illustrate more on the importance of genuineness of electronic evidence, in the case of *Lorraine V. Markel American Insurance Company*.¹⁶ The court was of the view that, for the electronically stored information to be admitted into evidence, it must be *inter alia* authentic. Because, it is information that is recorded or stored electronically¹⁷ and there is a need

¹⁵ A.J Mambi, *ICT Law Book: A Source Book for Information and Communication Technologies and Cyber Law*, MkukinaNyota Publishers Ltd, Dar-es-Salaam 2010, 185.

¹⁶ *Lorraine V. Markel American Insurance Company* (2007) FRD 534.

¹⁷ A. Mollel & Z. Lukumay, *Electronic Transaction and Law of Evidence*, Peramiho Printing Press, Iringa 2007, 77.

of having proper procedures on how to know the genuineness of electronic evidence due the fact that they can be easily tampered and manipulated.¹⁸

1.2 Statement of the Problem

In 2007, the parliament was motivated by the decision made by J. Nsekela¹⁹ and decided to amend TEA²⁰ via the Written Laws (Miscellaneous Amendments) Act of 2007. The amendment provides for admissibility of electronic evidence under section 40A as well as section 78A of TEA²¹.

Despite these efforts made by the parliament in incorporating admissibility of electronic evidence in Tanzania, the amendments made do not address the determination of the genuineness of electronic evidence; consequently the process of determining whether the document is original or forged before the court of law is still a problem²². Due to this, one can be able to produce forged evidence before the court of law and it will be difficult for the court to determine if it is forged or original evidence.²³ It can therefore say that TEA should be amended and in cooperating the procedures to be followed in order to determine the genuineness of electronic evidence before the court of law as it is the case in Nigeria. The Nigeria evidence Act provides on how the court of law can determine the genuineness of electronic evidence.²⁴

¹⁸ P.R. Rice, *Electronic Evidence Law and Practice*, American Bar Association, Chicago 2004, xvi.

¹⁹ *Trust Bank Ltd v. Le-Marsh Enterprises Ltd. and Joseph Mbui Magari, Lawrence Macharia*, High Court Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 4 of 2000 (Unreported).

²⁰ *The Evidence Act*, Cap 6 R.E 2002

²¹ A.J Mambi, *Supra* note, 8, 185.

²² A. Abdalla, Law and Information Communication Technology: Electronically Generated Materials and the Law of Evidence in Tanzania, 2, *Open University Law Journal*, 2, (2008), 10.

²³ A. Mollel & Z. Lukumay, *supra*, note, 9, 96.

²⁴ *Section 84* of the Nigeria Evidence Act

1.3 Literature Review

Adam J. Mambi²⁵ gives a general outline of the short-comings of the development of digital technology and application of ICT before the court of law as evidence. He argued that these technological changes can and will raise complex issue relating to the genuineness of such evidence if not properly addressed under the relevant laws. According to him, Tanzania is required to make sure that the laws of evidence and other related legislation are revised and adapted to the realities of the modern business practices and technologies also it is necessary for Tanzania to borrow the legal position on other countries on the issue of determining the genuineness of such evidence.²⁶

With due respect to the views of Adam J. Mambi this research goes a step ahead by exploring the possibility of having an active and legally strong laws on evidence in Tanzania that can be useful in easy determination of the genuineness of electronic evidence like what other countries like Nigeria has those directions towards electronic evidence.

Additionally, Adam J. Mambi,²⁷in his article “Electronic Evidence in Tanzania” Argued that the nature of electronic evidence can raise the issue of complexity in determining genuineness of such evidence. He goes further by arguing that despite the fact that electronic evidence in Tanzania is admissible but the issue is on the determining the integrity of such evidence. For him it is necessary to include the standard of proof, presumption of computer or information

²⁵ A.J Mambi, *ICT Law Book: A Source Book for Information and Communication Technologies and Cyber Law*, Mkuki na Nyota Publishers Ltd, Dar-es-salaam 2010, 191.

²⁶ *Ibid*, 192

²⁷ A.J.Mambi, Electronic Evidence in Tanzania, 10, *Digital Evidence and Electronic Signature Law review*, Number 123, (2013),123

system integrity.²⁸ Although the author explain on the issue of complexity in determining the genuineness of electronic evidence but the issue is still how can the court determine the original of such document while there is no a statutory provision on how to determine it and due to this the researcher see that there is a need of conducting a research on how to determine the genuineness of electronic evidence before the court of law.

Moreover, A.Mollel & Z.Lukumay²⁹, argue much on the issue of admissibility of electronic evidence in Tanzania and how the miscellaneous amendment provides for electronic evidence to be admissible in the court of law, they refer to various countries on how they admit electronic evidence like United Kingdom, India, United State of America, Canada and South Africa. In their argument the challenge was only how the court will be able to determine the originality of the document tendered as the evidence generated electronically and they based much on how to determine the originality of electronic signature.³⁰ It is still a big challenge for the court of law in Tanzania to determine the genuineness of electronic evidence before the court of law and Tanzania law is still silent on this issue that is why the researcher see that there is still a gap in this area and it is better to conduct a research based on this area.

Furthermore, Ralph C. Losey³¹ said that it is still a challenge to determine the originality of electronic evidence before the court of law. Due to this there is a need of making a new criteria and procedures of determining the genuineness of electronic evidence and the court must make sure that it is able to determine and observed the unauthenticated of such evidence and advocate

²⁸ *Ibid*,126

²⁹ A.Mollel&Z.Lukumay, *supra*, note, 17,99

³⁰ *Ibid*,73

³¹ R.C.Losey, *E-Discovery: Current Trends and Cases*, ABA Publishing, Chicago 2008, 38

must be trained and prepared on how to recognize and deal with the originality of electronic evidence in general and this will be helpful starting place for understanding the challenges associated with the admissibility of electronic evidence.³²

Allghamdi A, in his book “ the Law of E- Commerce: E- contract, E-business”, is of the view that, the general principle that governs admissibility of all documents in court also governs the admissibility of electronic document hence, the matter or thing offered has to be authentic³³. However, the author only focuses on how to authenticate electronic message whereby he was of the view that, the genuinely of the electronic message can be authenticated by way of putting passwords, expiration date or uses of memory card which contains user’s identification³⁴. With this, it can be seen that the author neglected other forms of electronic evidence such as tape recordings, video recording and so forth and concentrated on the authentication of only electronic message.

Also, Makulilo A,³⁵ in “Admissibility of Computer Evidence in Tanzania”, explains about electronic evidence in Tanzania and in the recommendations the author concentrated much on the definition of electronic document and whether the document is original or a copy³⁶. However, the author only focuses on the admissibility of electronic evidence and did not argue on how one can produce such document in court and how the court can determine the genuineness of such document by considering the fact that electronic evidence can easily be changed and manipulated.

³² *Ibid*, 39

³³ A. Alghamdi, *The Law of E- commerce: E- contract, E- business*, Author House™, USA 2011, 35.

³⁴ *Ibid*, 36.

³⁵ A.B. Makulilo, Admissibility of Computer Evidence in Tanzania, 4, *Digital Evidence and Electronic Signature Law Review* 2, 56, (2007), 60.

³⁶ *Idem*

Keane A & McKeon P, in their work “ The Modern Law of Evidence” they were of the view that tape recording and films should be treated as evidence and should be admissible in the court of law³⁷. Furthermore, they provide for the conditions on how to authenticate such evidence thus the party has to serve the witness statement by the person who took the evidence³⁸. Although, authors did provide for the authentication of it, they did not stress other kinds of electronic evidence considering the fact how rapidly the use of computer in daily life have increased.

Paul R. Rice,³⁹ goes further by explaining the challenge of determining the genuineness of electronic evidence due to the fact that court is still using the same evidentiary standards that apply to all other forms of evidence. Paul goes further by saying that the authentication of electronic evidence taken from the internet poses particular problems because of the unique opportunities for fraud in the electronic format. He provide an example, headers to e-mails can be manipulated and databases can be altered from both within and outside a company. Hence, there is a heightened burden for establishing the authenticity of what is presented in court. Moreover, the all printouts from a computer screen are to be considered as originals and in their absence, mechanically produced copies or duplicates are to be admissible as if they were originals. Despite of his argument but he failed to explain in details way forward toward solving this problem of determining the genuineness of electronic evidence hence the researcher still see there is a gap in the issue of determining the genuineness of electronic evidence.

³⁷A. Keane & P. McKeon, the *Modern Law of Evidence*, Oxford University Press, London 2012⁹, 268.

³⁸*Ibid*, 270.

³⁹P.R.Rice, *Electronic Evidence: Law and Practice*, ABA Publishing, Chicago 2005,1

M. Monir, “Text Book on Law of Evidence”, the author in his book provides for procedure for the admissibility of tape recordings as evidence in the court which includes *inter alia* that, the accuracy of tape recorded statement must be proved by the maker.⁴⁰ Even though what the author provides is not there in our evidence law but the study intended to stress the authentication of all sorts of electronic evidence unlike the author who only concentrated on admissibility and authenticity of tape recording as electronic evidence in the court of law.

Therefore, from the above reviewed literature it can be seen that there is a need to conduct this research so as to tackle the problem on how to determine the genuineness of electronic evidence in Tanzania also most other reviewed literature have not cover all types of electronic evidence and only concentrated in some of them.

1.4 Hypothesis

The Tanzanian Evidence Act does not have provisions that provide on how to determine the genuineness of electronic evidence, unlike the Nigeria Evidence Act which has provision on the said problem.

1.5 Objectives of the Study.

Objectives of this research are categorized as general and specific objectives as follows:-

1.5.1 General objective

The research aims at exploring the challenges facing the court of law on how to determine the genuineness of electronic evidence. More importantly, it seeks to find whether there can be

⁴⁰M. Monir, *Text Book on the Law of Evidence*, Universal Law Publishing Co. Pvt Ltd, New Delhi 2010⁸, 18.

optimistic views for the prospects of the court in future on the issue of determining the genuineness of electronic evidence.

1.5.2 Specific Objectives

The specific objectives of the study are:

- (i) Firstly, making comparison of both laws with regard to the genuineness of electronic evidence and give advisory opinions as to whether there is a need to adopt the provisions on how to determine the genuineness of electronic evidence.
- (ii) Secondly, to identify as to whether there is any role played by the court of law on how to determine the genuineness of electronic evidence.

1.6 Significance of the Study

It is expected that at the end of this research, the following advantages or significances would be achieved;-

- i. Realization of the importance of having a specific provision or law in order to clear the ambiguities on how to determine the genuineness of electronic evidence in Tanzania.
- ii. This research will be a good reference for future researchers and theory makers in developing theories on how to determine the genuineness of electronic evidence

1.7 Methodology

1.7.1 Primary Sources

In primary sources the researcher used statutes thus regional, domestic that is Tanzania Evidence Act Cap 6, Nigeria Evidence Act as well as case laws (particularly from Tanzania and Nigeria). Primary sources were widely used since it offers a better understanding on what the law provides on how to determine the genuineness of electronic evidence.

1.7.2 Primary Data Collection

The researcher also employed primary data collection whereby the information will be gathered through interviewing various legal personnel such as two advocates and the retired judge, for the purpose of getting information on how to determine the genuineness of electronic evidence and how it is in practice since it is in their field that they can easily encounter with the existing problem.

1.7.3 Secondary Sources

In secondary sources the researcher used textbooks, articles from journals, articles from websites and papers presented by various authors so as to get a better understanding on the existing legal problem and how various authors have addressed the problem.

1.7.4 Secondary Data Collection

On another level, the secondary data collection shall encompass visiting libraries at the University of Dar es salaam, University of Iringa as well as Ruaha Catholic University to study more on the issue of determining the genuineness of electronic evidence. Moreover, the researcher employed the internet service to acquire data from international libraries like Google

books, Google Scholars as well as Hein online, which has numerous useful books and articles on how to determine the genuineness of electronic evidence in various jurisdictions.

1.8 Scope and Limitations

1.8.1 Scope of the study.

The scope of a study based on the issue of electronic evidence, regarding critical analysis of Tanzania Evidence law with a comparison to Nigeria Law concerning the difficulty in determining the genuineness of electronic evidence. The Laws which were critically analysed in the study are the Evidence Act Cap 6 of Tanzania, Nigeria Evidence Act of Nigeria in assessing whether TEA should be amended to incorporate the conditions on how to identify the genuineness of electronic evidence in Tanzania.

1.8.2 Limitations of the study

On the other hand, the researcher faced various limitations when conducting the research. Some of the limitations are;

Limitation on the access of case file at the court, it is so difficult to get the cases since they are confidential hence this will be a huge limitation in doing this work because the researcher clearly depend on the cases so as to know the stand of the court toward the determination of the genuineness of electronic evidence.

Also the researcher faced difficult in interviewing some of the advocates because there are less number of the Information Communication Technology (ICT) lawyers to interview; and a busy schedule of interviewees on the basis of the offices they hold.

Also the other limitation which the researcher expects is on the financial aspect since the movements to visit libraries, while other interview will be conducted through telephone, hence it require money and as a student who is off the government loan it will be so hard to cope up since it is not all the time that the money will be available.

To add to the limitation, expect that most of the people that the researcher will interview, will have a low knowledge on the issue of determining the genuineness of electronic evidence as most of them will be having just the idea of the electronic evidence, but will not having a proper knowledge on the issue of determining the genuineness of electronic evidence since they have never handled cases involving electronic evidence that require the determine the genuineness of electronic evidence. Hence, this factor will hinder the conduct of research since the researcher will not be able to get all the proper reliable information that will be required so as to do the research.

CHAPTER TWO

AN OVERVIEW OF ELECTRONIC EVIDENCE IN TANZANIA AND NIGERIA

2.0 Introduction

Examination of electronic evidence is the main issue of this chapter; the researcher focused on the meaning, nature, admissibility as well as the rules on admissibility and the laws that are applicable, that is provided for electronic evidence in both Tanzania and Nigeria and also the challenges that are brought by admitting electronic evidence before the court of law.

2.1 Concept of Electronic Evidence

Before defining what it means by the concept electronic evidence, it is better to explain what is meant by the term evidence and the term electronic. Starting with the term Evidence which means information that is given by a witness whether orally or in writing before the court of law which tend to prove or disprove certain facts at hand.⁴¹ On the other hand electronic means a device or technology associated with the transmission or processing of analog or digital data.⁴²

Therefore, electronic evidence is electronically stored information which is admissible and used as evidence in the court of law.⁴³ Since, it can be stored in any kind of computer device.⁴⁴ Generally, electronic evidence is regarded as documentary evidence.

⁴¹A.Singh, *Principles of the Law of Evidence*, Central Law Publications, Allahabad 2007¹⁶.

⁴²<http://www.businessdictionary.com/definition/electronic.html>(Accessed on 1st November 2014)

⁴³A.J Mambi, *Supra* note (24) 8.

⁴⁴This includes all technology based evidence for instance, e-mails which people tend to use it frequently for communication, also includes video recording, tape recording, short message services and data files are some of examples of electronic evidence. Therefore, they can be produced before the court of law if they contain the

2.2 Admissibility of Electronic Evidence

2.2.1 Admissibility of electronic evidence in Tanzania

Tanzanian legal framework did not incorporate electronic evidence until 2007. When the TEA was amended to incorporate the admissibility of electronic evidence. Before the amendment of 2007 the question of admissibility of electronic evidence was discussed in the landmark case of *Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph Mbui Magari, and Lawrence Macharia*.⁴⁵ However, before the said case, there was a case of *Tanzania Cotton Market Board V. Cogecot Cotton Company SA*⁴⁶ in this case the court had allowed electronic communication mode of sending arbitral award contrary to rule 4 of the Arbitration Ordinance. The award was filed through DHL Courier instead of registered post and it was enforceable. With this case we see traces of admissibility of electronic evidence in Tanzania. That is why, Nsekela J cited this case in reaching to such judgment in the previous mentioned case of *Trust Bank Ltd*.

Even though courts in Tanzania play a great role in introducing the admissibility of electronic evidence before the court of law, the parliament also responds to such judgments made by the court. As a result of the judgment made by J Nsekela (as he then was) the parliament enacted the Written Laws (Miscellaneous Amendments) Act of 2007, No 15; this law amended

evidence needed. To illustrate, for example A and B entered into an agreement through e-mail and one party breaches such agreement then if a matter is before a court of law and considering the fact that they are admissible as evidence then that e-mail can be tendered as an evidence though subject to some conditions available at <http://www.pisa.org.hk/event/eed.pdf>.

⁴⁵*Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph Mbui Magari, Lawrence Macharia*, High Court of Tanzania at Dar es Salaam (Commercial Division) Commercial Case No. 4 of 2000 (Unreported), in this case the court ruled that electronic evidence is admissible and departed from the strict rule of evidence that is the best evidence rule since the question was whether computer print-out is the banker's book and also there was a question whether it is an original document or a secondary document. J Nsekela (as he then was) when deciding this case did not ignore the technological development that exist during that time since adopted the provision of the UK laws that is Section 5 of English Civil Evidence Act of 1968 which provides for admissibility of electronic evidence in civil cases.

⁴⁶ [1997] 165 (CA)

the provisions of the Evidence Act by adding Section 40A which allows the admissibility of electronic evidence in criminal proceedings.⁴⁷ Also the admissibility of electronic evidence was discussed in the case of *Tanzania Bena Co. Ltd v. Bentash Holdings Ltd*⁴⁸ where parties communicated by way of exchanging emails for the purchase of a farm and the court tendered such email and was admitted as one of the exhibits.

On top of that, in the case of *Lazarius Mrisho Mafie & Another v. Odilo Gasper*⁴⁹ the court also faced challenges on the issue of determining the admissibility of electronic evidence in civil proceedings. The court observed that TEA does not cover on the issue of admissibility of e-mails in civil proceedings as evidence before it, since the amendment done only provides for banker's book to be admissible in civil cases. In this case the court sets out some requirements which need to be fulfilled for an electronic generated material to be admissible in the court of law.

⁴⁷In 2007 the parliament enacted the Written Laws (Miscellaneous Amendments) Act of 2007, No 15; this law amended the provisions of the Evidence Act thus by adding Section 40A which allows the admissibility of electronic evidence in criminal proceedings which states "In any criminal proceedings –

(a) An information retrieved from computer system, network or servers, or
 (b) The records obtained through surveillance of means of preservation of information including *inter alia* electronic transmission

(c) The audio or video recording of acts or behaviors or conversation of person charge,
 Shall be admissible. Furthermore, the Act amended section 76 of Evidence Act with regard to bankers' book whereby the amended definition of bankers' book was that which also covers computer print-outs. In addition to that, the Act also amended the Evidence Act by adding section 78A which provides for the admissibility of electronic evidence with regard to banker's book hence, the admissibility of records stored electronically to be used as evidence. However, the Act from the amendment it can be said that it has covered the admissibility of electronic evidence of bankers' book only with regard to civil proceedings.

⁴⁸*Tanzania Bena Co. Ltd v. Bentash Holdings Ltd*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No. 71 of 2002 (Unreported).

⁴⁹*Lazarius Mrisho Mafie & another v. Odilo Gasper*, High Court of Tanzania at Dar-es-Salaam (Commercial Division) commercial case No. 10 of 2008 (Unreported).

Therefore, in Tanzania, electronic evidence is recognized and admissible as evidence,⁵⁰ however the admissibility of electronic evidence is not that perfect since, the use of electronic stored information as evidence in civil proceedings is not that enough compared to the development that are occurring.⁵¹ Hence, there are more challenges which are associated with electronic evidence that needs to be accommodated by the Tanzania law of evidence. Those challenges have been discussed below by the researcher in this chapter. Therefore, it can be said that the admissibility of electronic evidence in Tanzania is not that satisfactory because it does not cover all the aspects related to electronic evidence.

2.2.2 Admissibility of Electronic Evidence in Nigeria

Electronic evidence is an aspect of evidence that is very a controversial subject when it comes to evidence, however, when it comes to Nigeria, this kind of evidence is accepted and admissible before the courts of law and its main principle for its admissibility, and the law regulating it is the Nigeria Evidence Act of 2011. Before the repeal of the 1945 Evidence Act, the laws of Nigeria were silence on the admissibility of electronic evidence. The Supreme Court of Nigeria in the case of *Yesufu V. ACB*⁵² advised the government to amend the Evidence Act in order to in-cooperate the admissibility of computerized statements of account.⁵³ Also, in the case *UBA v.*

⁵⁰The Finance Act of 2009, No 14, section 4 as addition of section 10A provides "A court or any other quasi-judicial body shall accept a copy of a book, document, record or an extract thereof collected or procured in pursuance of section 10 as conclusive evidence of the nature and contents of an electronic document unless the contrary is proved".

⁵¹The Written Laws (Miscellaneous Amendments) Act of 2007, No 15 amended The Evidence Act Cap 6 of 1967 by adding section 78A, which provides for the admissibility of banker's book as an electronic evidence in civil proceedings.

⁵² (1976)1 All NLR (Prt.1) 328.

⁵³ "....while we agree that for the purpose of Sections 96(1) (h) and 37 of the Act, bankers books and books of account could include ledger cards, it would have been much better, particularly with respect to a statement of account contained in document produced by a computer, if the position is clarified beyond doubt by legislation as had been done in England in the Civil Evidence Act....."

*Sani Abacha Foundation for Peace and Unity (SAPFU)*⁵⁴, the Court of Appeal emphasized that a statement of account contained in a document produced by a computer could not be admitted in evidence under the old Evidence Act until the amendment of certain sections of the Act.

The 2011 Evidence Act has introduced a new type of primary evidence to include a number of documents made by one uniform process which includes computer or other electronic or mechanical process. Section 86 (4) of the Evidence Act 2011 provides that where a number of documents have all been produced by one uniform process as in the case of printing, lithography, photography, computer or other electronic or mechanical process, each of such documents shall be the primary evidence of the contents of all the documents so produced by this one uniform process. Also, the 2011 Evidence Act provided for the definition of a Computer which was not included in the 1945 Evidence Act.⁵⁵ Generally the computer or electronically generated evidence is not automatically admissible, it has to be relevant to the facts in issue of a particular case, and then they will be admissible in evidence.

2.3 Rules on admissibility in relation to electronic evidence

(a) The Best Evidence Rule

The best evidence rule can be traced back in 18th century specific in the case of *Omychund v Barker*⁵⁶. Tanzania adopted common law legal system, whereby most common law jurisdictions recognize the best evidence rule, which requires that the original document in written form is

⁵⁴ (2004) 3 NWLR (Prt. 861) 516

⁵⁵ Section 258 evidence Act, a Computer is defined as “any device for storing and processing information, and any reference to information being derived from other information is a reference to its being derived from it by calculation, comparison or any other process.”

⁵⁶ (1745) 1 Atk, 21, 49; 26 ER 15, 33, Lord Harwicke stated that “no evidence was admissible unless it was the best that the nature of the case will allow”.

only admissible in legal proceedings,⁵⁷ unless it is not available due to some circumstances like maybe it is destroyed then its copy will be acceptable.⁵⁸ The issue of acceptance of the copy under the best evidence rule was developed by Lord Denning MR in the case of *Garton v. Hunter*⁵⁹. With modern developments in technologies some legal academics like Denis have argued that the rationale behind the best evidence rule is no longer valid.⁶⁰ With regard to electronic document, the best evidence rule raises questions as to whether computer print-out is a copy or an original document, and how should this rule be applied in admitting computer printouts in courts? In answering the above question one must consider the fact as to whether computer printouts constitute a document. In the case of *Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph MbuiMagari, Lawrence Macharia*⁶¹ the main issue was whether bankers' book in a computer printout constitutes documents under the law of evidence. In the above case it was confirmed that the computer printout constitutes documents, because the judge departed from the Best Evidence Rule by admitting computer print-out as an original copy. Due to this case electronic evidence is regarded as original document under the Best Evidence Rule.

(b) The Rule against Hearsay.

⁵⁷ A.J.Mambi, Electronic Evidence in Tanzania, 10, *Digital Evidence and Electronic Signature Law review*, Number 123, (2013),123

⁵⁸Section 66 of Tanzania Evidence Act Ca 6 provides "document must be produced by primary evidence except otherwise provided in this Act"

⁵⁹ [1969] 1 All ER 451 where by Lord Denning MR stated that "The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available on one's hands, one must produce it; that one cannot give secondary evidence by producing a copy. Nowadays we do not confine ourselves to the best evidence. We admit all relevant evidence. The goodness or badness of it goes only to weight, and not to admissibility"

⁶⁰ I.H.Dennis,*The Law of Evidence*, Sweet & Maxwell, London 2002²,408

⁶¹*Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph MbuiMagari, Lawrence Macharia*, High Court of Tanzania at Dar es Salaam (Commercial Division) Commercial Case No. 4 of 2000 (Unreported).

This is one of the most complex and confusing rule of evidence, on the basis of its complexity and confusion of this rule Lord Reid in the case of *Myres V. DPP*⁶² stated that “it is difficult to make a general statement about the law of hearsay.” According to Gardner defined hearsay to mean a statement offered in evidence to prove the truth of the matter asserted.⁶³ Therefore, hearsay evidence is the statement that is provided by the third party other than the maker of the statement in proving certain matter before the court.⁶⁴ Also in the UK case of *Subramaniam V. Public Prosecutor*⁶⁵ the Privy Council held that “evidence of statement made to a witness by a person who is not himself called as a witness may or may not be hearsay.”

The rationale for the rule against hearsay was stated by Lord Normand in the case of *Taper V. R*⁶⁶ whereby it was expressed that prattle confirmation is prohibited on the grounds that it is not the best proof and it is not conveyed on promise, significance the honesty and exactness of the individual whose words are addressed by another witness can't be tried by interrogation.

Electronic evidence in its nature may be regarded as hearsay evidence⁶⁷ although in examining as to whether electronic evidence is hearsay evidence or not, the different between computer-generated and computer-stored electronic evidence has to be made. Due to this the rules against hearsay do apply in electronic evidence like in any other kinds of evidence. Generally the rules on admissibility which were applicable to paper evidence are now applicable to electronic evidence.

⁶² (1965) A.C. 1001, 1019, HL

⁶³ T. Gardner & T. Anderson, *Criminal Evidence: Principles and Cases*, Cengage Learning, New York 2012⁸, 202.

⁶⁴ C.S Michelle, et al, *Electronic Evidence and Discovery: What Every Lawyer Should Know Now*, American Bar Association, New York 2009, 145.

⁶⁵ (1988) 1 W.L.R. 7, HL

⁶⁶ (1952) A.C 480, 486

⁶⁷ D.R Mathews, *Electronic Stored Information: The Complete Guide to Management, Understanding, Acquisition, Storage, Search and Retrieval*, Taylor and Francis Group, New York 2013, 17.

(c) The Authentication Rule

Authenticity or genuine means characteristic of a document or record created by the entity represented as its creator, and preserved in its original form without any falsification or tampering.⁶⁸ It is argued that it is not about the contents of the document but about the process of compiling that document.⁶⁹ Hence, authentication entails what is the document, where did the document come from and who or how was it created.⁷⁰ Since, the process of authentication with regard to document evidence is a “means by which the document is verified and examined, its accuracy and formalities observed in the execution of the document”.⁷¹ In the other word authentication can be termed as integrity of a document.⁷² The rule of authentication is applied in writings, documents, photograph and other similar instruments.⁷³

At common law the main rule with regards to authentication is that the document or other thing must be introduced to the court by human being whose task is to explain its identity, nature, provenance as well as relevance.⁷⁴ At common law a document or other thing cannot authenticate itself, simply because authentication is a question of fact and not of law hence it may be proved through direct evidence such as oral or circumstantial evidence.

⁶⁸ Dawie de Villiers, Adequacy of SA Law: Electronic Evidence, University of Johannesburg, Paper based on The Social & Economic Impact of Commercial Crime on 23-24 July 2012

⁶⁹ Cormic, *Cases on Evidence*, West Publishing Co, New York 1956, 395

⁷⁰ A.Best, *Evidence: Examples and Explanations*, Aspen Publishers, New York 2009⁷, 213.

⁷¹ A. Alghamdi, Supra note (33) 10.

⁷² Y.Lim, *Cyber Laws, Commentaries and Materials*, Oxford University Press, South Melbourne 2002, 32.

⁷³ N.C.Blond, *Evidence*, Aspen Publishers, New York 2009, 161.

⁷⁴ *Idem*

Electronic Evidence like any other evidence must be authenticated before admitting it in the court of law.⁷⁵ However, the rule of authentication with regard to electronic evidence is one of the challenges posed by this kind of evidence and this is so, because of the nature of such evidence. For example in the case of *Lorraine V. Markel American Insurance Company* as cited above the court has its own view in the consideration of the Federal Rules of Evidence.⁷⁶

In India, under Indian Information Technology Act⁷⁷ for the conditions to be met so as electronic evidence to be admissible before the court of law. In addition under Section 5 of the English Civil Evidence Act 1968, provides for the conditions in which computer generated documents to be admissible before the court of law.⁷⁸

Therefore, the position in the current TEA does not have a comprehensive legal framework as far as the legislation is still lagging behind simply because it has failed to provide for the manner of authentication as far as its legal certainty in admissibility of electronic evidence, though amendment was done by the Act but such amendment did not cover mechanism of authentication as far as its admissibility is concerned before the court of law.

⁷⁵*Lorraine V. Markel American Insurance Company* (2007) FRD 534.

⁷⁶ (2007) FRD 534, “Evidence must be authenticated before it is admitted into evidence. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims”

⁷⁷ Act No. 21 of 2000 under Section 3(1)

⁷⁸ English Civil Evidence Act 1968, “(a) that the document containing the statement was produced during a period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period, whether for profit or not, by anybody whether corporate or not, or by any individual; (b) That over that period there was regularly supplied to the computer in the ordinary course of those activities information of the kind contained in the statement or of the kind from which the information so contained is derived; (c) that throughout the material part of that period the computer was operating properly or, if not, that any respect in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and (d) that the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of those activities”.

2.4 Nature of Electronic Evidence and how it is created

Electronic evidence is one of the kinds of evidence whereby information and data of value to an investigation that is stored on, received or transmitted by an electronic device.⁷⁹ Electronic evidence includes all digital data that can establish that a crime has been committed or can provide a link between a crime and its victim or a crime and its perpetrator⁸⁰.

The making of the electronic evidence is a process which include the putting or adding of data to the computer and the first part of the making of electronic evidence is adding data to the computer through typing or recording⁸¹, as well as through the use of scanner, also by creating programs which do the recording automatically to the computer and a good example to this is the usage of Automatic Teller Machine and in the event of dispute, the data can be brought to light⁸². Generally every evidence has its own nature and after seeing how electronic evidence is created now we will look on its nature.

Volatility, comes from Latin word known as *volatilis* meaning that to fly. Volatile is an adjective used to describe something unstable or changeable.⁸³ This is one of the natures of electronic evidence. It is very volatile thus it is fragile because it can be changed or altered as well as manipulated much more easily than the other forms of evidence especially paper work.⁸⁴ This is because a mere click can tamper the whole document in a computer since it can change

⁷⁹ Electronics CSI, *A Guide for First Responders*, National Institute of Justice, April 2008²

⁸⁰<http://infohost.nmt.edu/~sfs/students/harleyKozushko/presentations/DigitalEvidence.pdf>(accessed on 21 October.2014).

⁸¹Mollel&Lukumay, *supra*, note, 9, 78.

⁸²*R V. Masquid Ali (1996) 1 Q.B. 688.*

⁸³ Y.Lim, *Supra* note (66), 37

⁸⁴L.Volonino, “*Electronic Evidence & Forensics*” available at <http://www.ncids.com/forensic/digital/digital.shtml> (accessed on 21 October, 2014)

the content of the document if the one who typed it was not careful with it when typing and leave a chance for another person to come and tamper with such document.⁸⁵ Hence, with this reason electronic evidence should be taken with special precaution that is in preserving it, collecting it and in examining it unless otherwise it may lead to an inaccurate conclusion.⁸⁶ Therefore, electronic evidence contrary to documentary evidence is a very fragile kind of evidence that need special attention from the person who is handling it.⁸⁷

2.5 Challenges Associated with Electronic Evidence

Basing on the fact that electronic evidence is a new law in Tanzania legal system it has got some of the challenges. The following are some of the challenge facing electronic evidence in Tanzania;

Firstly, electronic evidence can easily be altered or forged; this means that the nature of electronic evidence in some circumstances it is very easily to be distorted by someone else in order to destroy the evidence. This includes the issue of hackers who can be able to access what you have saved in your computer and they can change it as the way they need the document to be looked. Whereby in normal documentary evidence it is not easily to alter such evidence because it can be seen that the evidence have been altered by someone.

Secondly, a stored electronic record is vulnerable to deterioration caused by viruses, the impact of magnetic, electrical or electronic interference, and software bugs. Data in the electronic record

⁸⁵ J.M.Barkett, *The Ethics of E-Discovery*, ABA Publishing, Chicago 2009,4

⁸⁶ <http://www.7safe.com/electronicEvidence/ACPO-guidelines-computer-evidence.pdf>.

⁸⁷ J.M.Barkett, *The Ethics of E-Discovery*, ABA Publishing, Chicago 2009,4

may then be deleted.⁸⁸ The tendency of using computers in accessing different data from the internet can lead someone to allow virus to enter into his computer by way of accessing. Also the tendency of taking data from one computer to another can lead someone to take a virus from such computer and you may find he does not have ant-virus in his computer hence lead to some file to be distorted by the virus.

Thirdly, confidentiality is also another challenge that electronically generated document is confronted; with electronically generated materials hardly enjoy confidentiality since they are legitimately or illegitimately easily reached to third parties or detrimental/unpermitted readers. Any information posted on the internet or used in processes and e-trial and associated procedure in the United State of America for instance is accessible to many more people than the immediate parties and court staff that directly deal with or treat the documents.

2.6 Conclusion

Despite the fact that the Tanzania Evidence Act and the Nigeria Evidence Act, originated from Indian Evidence Act, and they provide for the admissibility of electronic evidence in their jurisdiction, the admissibility of electronic evidence is covered differently from each countries.

Tanzania Evidence Act has not covered on the procedures to be followed in order to admit electronic evidence before the court of law so as to ensure its reliability, while in Nigeria, the Nigeria Evidence Act covers for the procedures to be followed for the legal recognition and its certainty of electronic evidence as well as the manner through which electronic evidence may be

⁸⁸http://www.americanbar.org/publications/scitech_lawyer/2013/winter_spring_2013/mobile_devices_new_challenges_admissibility_electronic_evidence.html(Accessed on 21st October 2014)

authenticated so as to ensure it is reliability, it is through this comparative analysis the research was geared upon.

CHAPTER THREE

DETERMINING THE GENUINENESS OF ELECTRONIC EVIDENCE IN TANZANIA: A COMPARATIVE STUDY WITH NIGERIA

3.0 Introduction

This is the part that evaluates the difficulties of determining electronic evidence in Tanzania. There are legal basis which govern the determination of electronic evidence. It is the part which provide for the deciding cases which have involves the genuineness of electronic evidence in both countries, that is Tanzania and Nigeria as well as the importance of determining the genuineness of electronic evidence so as to show how is it so important for Tanzania to in cooperate provision of law which determine the genuineness of electronic evidence.

3.1 The Evidence Act and the Genuineness of Electronic Evidence

Tanzania Evidence Act as amended by The Written Laws (Miscellaneous Amendments) Act of 2007, it is the main statute that deals with evidence in Tanzania including electronic evidence and its admissibility before the court of law. Much as the researcher in chapter two discussed about the admissibility of electronic evidence in our laws was the result of court decision made by J Nsekela (as he then was).⁸⁹ Despite, of the effort which were done by the parliament did not cover some important aspects in electronic evidence and in this it appears that TEA does not have any provision which provide for the procedures to be followed in determining the genuineness of electronic evidence.

⁸⁹*Trust Bank Ltd v. Le-Marsh Enterprises Ltd., Joseph MbuiMagari, Lawrence Macharia*, High Court Tanzania (Commercial Division) at Dar es Salaam Commercial Case No. 4 of 2000 (Unreported).

Determining the genuineness of electronic evidence is one of the challenges which face the issue of electronic evidence in Tanzania as well as many other legal systems.⁹⁰ The TEA does not provide for the procedure to be followed in order to determine the genuineness of electronic evidence. Despite the efforts made by the parliament of incorporating electronic evidence in Tanzania by amending the TEA in order to provide for the admissibility of electronic evidence but it left an important part on how such evidence can be determined its genuineness before the court of law.

3.1.1 Role Played by the Courts in Dealing with the Genuineness of Electronic Evidence.

TEA as the main legislation dealing with evidence in Tanzania is silent on how electronic evidence can be tendered before the court of law and how the court can be able to know it is genuine or forged evidence and what are the procedures of determining the genuineness of such evidence. Even though the law does not provide for the procedures to be followed in determining the genuineness of electronic evidence, justice must be done and due to this the courts of law have played a great role in it as far as the court of law cover the cases with this nature and as the result of the decision those cases become binding to our legal system in order justice to be done to everyone.⁹¹

With regard to the issue of genuineness of electronic evidence in Tanzania the great role played by the court can be seen in the case of *Lazarius Mrisho Mafie & Another V. Odilo*

⁹⁰ S. Mason, *Electronic Evidence*, Lexis Nexis, Butterworths 2010², 21

⁹¹ In the case of *Lazarius Mrisho Mafie & Another v. Odilo Gasper*, case No. 10 of 2008, the court took a liberty of developing the law by setting out guiding standards for recognizing admissibility of electronic evidence in Civil Proceedings. Furthermore, the role of the judges as social engineers can be seen in the case of *Packer V. Packer [1954] P 15* where Lord Denning was of the view that “If we never do anything which has never been done we will never get anywhere”. Hence, with thus statement we see that judges play a role in coping up with the changes in the society although they do not make law since it’s the job of the parliament.

*Gasper*⁹² whereby, Makaramba J tried to address the problem of determining the genuineness of electronic evidence. He stated that “the only thing which is missing is standards to determine authenticity of electronic document”.⁹³ Makaramba J, further provide for the requirements which must be met before the court admit email as electronic evidence. With regard to the mentioned case above he addressed the problem by providing the requirements which must be met. With that regard the following requirements were provided by the judge as requirement in admitting electronic evidence thus emails in civil proceedings;

- a) Before the court can admit email as electronic evidence, then the court must make sure that email is relevant to the case at hand. The term Relevant Evidence means “evidence having tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”⁹⁴
- b) If such email is relevant to the case under TEA, then the court should look as if it is genuine and should look on the nature in which such evidence was stored and is it not easy to forge it. The burden of proving the genuineness of such evidence is vested to the one who want to use such email as evidence. In this requirement Makaramba J. Meant that in order for the court to admit e-mail as an evidence before it, then the court must look on the nature of such electronic document on how it was installed or storage as well

⁹²*Lazarius Mrisho Mafie & Another v. Odilo Gasper*, High Court of Tanzania (Commercial Division) at Dar es Salaam, Commercial Case No 10 of 2008 (Unreported).

⁹³Lukumay, *supra*, note, 22, 305.

⁹⁴ M.Spencer & J.Spencer, *Evidence Concentrate Law Revision and Study Guide*, Oxford University Press, Oxford 2013,5

as looking on the challenges that can be associated with using such document as an evidence before the court of law.

- c) If relevant under TEA as amended is it genuine in the sense that, can be proponent show that the e-mail is what it purports to be; considering the nature of an electronic stored information thus easily to be manipulated. Hence, the one who wants to produce an e-mail as evidence before the court of law has to prove that such e-mail is what it is purported to be. That is, proving the genuineness of it, because one may produce a printed e-mail as evidence but you may find out that it is not an original e-mail since some alteration has been made. Therefore, it can be said that, Makaramba J in providing this prior requirement to be met before using an e-mail as evidence, he considered the nature of electronic document and the challenge that is imposed when it comes to the admission of it before the court of law.
- d) Is the email tendered before the court of law as evidence, is it original or has been duplicated? Under Tanzania legal system, the original evidence should be tendered before the court of law as primary evidence but if the original document has been lost then duplicated evidence can be tendered and it can be considered to be secondary evidence. Among the challenge that facing electronic evidence is against the best evidence rule which required that one should not testify the contents of writing unless the original of that writing is produced.⁹⁵
- e) The one who produce an email as evidence should prove before the court of law the genuineness of such evidence and identify the email. Once the court decided to admit the

⁹⁵ A.Keane & P.Mckeown, The Modern Law of Evidence, Oxford University Press, Oxford 2014,267

email as evidence it should look on the weight and value of it as to whether it will led justice to be done in deciding the case. Also one of the ways of proving the genuineness of such email is for that email to have the time stamp as well as sender's ID.⁹⁶

The requirements which were provided by Makaramba J were trying to address on the requirements that should be considered before admitting electronic evidence before the court of law. But the question is on how to determine the genuineness of electronic evidence, but unfortunately the requirement are not provided in the TEA.

Basing on Tanzania legal system, especially under TEA it shows directly that it lack the provision on how to determine the genuineness of electronic evidence, despite of the effort which have been done by the court of law, even though the court has not address the issue perfectly as we can see Makaramba J has only addressed the issue with regard to emails in civil proceedings. Hence there is a need for Tanzania laws to in cooperate the requirements of determining genuine of electronic evidence before the court of law. It is very important to have such provisions in order to resolve the challenge which can be associated with evidence.

Even though the TEA have provide for the admissibility of electronic evidence before the court of law but the TEA is still silent on the issue of procedures and requirements to determine the genuineness of electronic evidence. This is quite different from Nigeria legal system which provide for the procedures and requirements to be followed in order to determine the genuineness of electronic evidence that is why the researcher saw a need of comparing the laws

⁹⁶ D.R.Matthews, *Electronically Stored Information: The Complete Guide to Management*, Understanding, Acquisition, Storage, Search and Retrieval, CRC Press, Boca Raton 2012, 47

of these two countries on the issue of procedures and requirements to be followed in order to determine the genuineness of electronic evidence.

3.1.2 The Issue of Genuineness of Electronic Evidence in Practice.

Much as the TEA is silent on the issue of procedures for determining the genuineness of electronic evidence. However, that does not mean that electronic evidence is inadmissible, courts in practice have admitted electronic evidence even though due to the absence of proper procedures for its addition, courts face challenges when it comes to satisfying themselves on the originality and genuine of such document.

In this part the researcher has elaborated what he has observed from different legal personnel, he has interviewed.

Rtd Judge Raymond Mwaikasu was of the opinion that since the Tanzania Evidence Act was amended to in-cooperate the admissibility of electronic evidence but it fails to provide on how such evidence can be admitted and how to determine it's genuine. In his opinion he said that he has never dealt with cases which require the determination of the genuineness of electronic evidence but it is necessary for the Tanzania Evidence Act to be amended and in-cooperate the specific provision on the procedures and requirements in determining the genuineness of electronic evidence before the court of law in order to ensure justice is achieved by parties to the case. He further said that the court is facing a challenge on how to determine the genuine of electronic evidence. This is due to the advancement of science and technology, whereby it is very easy for the experts of Information Technology (IT) to forge electronic evidence adduced and prove before the court of law that, such electronic evidence is genuine and basing on the

technicality of technology the court may admit such electronic evidence as the evidence hence hinder the justice to be done.⁹⁷

On the other hand, when interviewing Mr. Dominick N. Ruhamvya the State Attorney on 17 September 2014 at Kibondo district in Kigoma region, he was of the view that, in order for the justice to be done there is a need for the Tanzania Evidence Act to in-cooperate the requirements and procedures on how to determine the genuineness of electronic evidence because recently it is very easy to fabricate the evidence due to the advancement of science and technology. Hence there is a need of court of law to cope with the advancement of technology in conducting the cases and on how evidence can be admitted and the procedures to be followed by the court of law. Also he was of the view that, it is the time for the court of law to have a department of forensic experts which can be dealing with the issue requires experts instead of relaying to experts from other institution but when you have this department the experts must pass through the evidence adduced before the court of law and determine if such evidence is genuine or forged one. Example in the recent case of *The State V. Oscar Leonard Carl Pistorius*, on how the forensic experts in South Africa work day and night to find the truth on the evidence adduced. According to him all of these must be in both criminal cases as well as civil cases.⁹⁸

But when interviewing Mr. Idd Ndabhona who is the advocate of the High Court of Tanzania, in Kigoma region on 09 September 2014 he was of the view that, it is necessary for the court to have expert who can determine the genuineness of such evidence and in order to avoid the challenge of corruption to those expert it is better for the expert who can determine such

⁹⁷Interviewed Rtd Judge Raymond Mwaikasu at Ruaha Catholic University in Iringa on 6 March 2015

⁹⁸ Interviewed Mr Dominick Ruhamvya a State Attorney at Kibondo-Kigoma on 17 September 2014

evidence, he should come from different region so as to avoid him to be bribed though it will be expensive but this is due to the fact of ensuring justice is done to both parties to the case. Then the Tanzania Evidence Act must incorporate the procedures and requirements to be followed in order to know the evidence is genuine or not.⁹⁹

It is therefore the researchers' opinion that, there is a great need of the Tanzania Evidence Act to be amended and provide for the procedures and requirements of admitting electronic evidence before the court of law. Also it is better for the parliament to enact a specific law other than Tanzania Evidence Act which can be dealing with the issue of electronic evidence.

3.2 Nigeria Legal Framework.

In 2011 there was an enactment of the Evidence Act which repealed the old Evidence Act 1945. The Evidence Act of 2011 attempted to correct the difficulties on the issue of admissibility of electronic evidence as well as it provide for the procedures to be followed in order to determine the genuineness of electronic evidence before Nigerian courts and the enactment of this Evidence Act led to the evolution of Nigeria legal system.¹⁰⁰ This is a result of the advice from the court of law in the case of *Esso West Africa Inc. V. T. Oyegbola*¹⁰¹ the court observed that “The law cannot be and is not ignorant of modern business methods and must not shut its eyes to the mysteries of the computer.” As well as in the case of *Egbue V. Araka*¹⁰² the court observed the same thing as in the above case mentioned.

⁹⁹Interviewed Mr Idd Ndabhona advocate of the High Court at Lake Tanganyika Attorney's in Kigoma on 09 September 2014

¹⁰⁰<http://www.proshareng.com/articles/2437/Legal-Alert--May-2012--Admissibility-of-Electronic-Evidence> (Accessed on 14th October 2014)

¹⁰¹ (1969) 1 N.M.L.R. 194 at 198

¹⁰² (1996) 2 NWLR (Pt. 433) 688 at 710 – 711 “Pats-Acholonu, JCA lamented that “.....our Evidence Act is now more than 50 years old and is completely out of touch and out of tune with the realities of the present scientific and

3.2.1 Nigeria Evidence Act and the Genuineness of Electronic Evidence

Nigeria Evidence Act of 2011 is the main legislation dealing with the law of evidence in Nigeria and it applies to judicial proceedings in most courts in all the states of the Federation.¹⁰³

Section 84 of the Evidence Act 2011 provides for the procedures to be followed before admitting electronic evidence before the court of law. The provision provide further for the statement contained in a document produced through computer is relevant to the facts in issue and if it is, then is admissible before the court of law on the fulfillment of the conditions;

(a)The computer, from which the record was delivered, was utilized frequently amid the material period to store electronic data or to process data of the kind expressed in the archive;

(b)The computer from which the record was delivered likewise had put away in it other data of the kind contained in the archive or of the kind from which the data contained in the report was inferred;

(c)That all through the material period, the computer was working legitimately; and where it was not, confirm must be given to build up that amid the period when the computer was not working appropriately, the generation of the archive or the exactness of its substance were not traded off or influenced;

(d)That the data in the announcement is duplicated or got from the data supplied to the Computer in the conventional course of the exercises being referred to.¹⁰⁴

technological achievements. Most of its sections are archaic and anachronistic and need thorough overhaul to meet the needs of our times. But alas it is with us now like an albatross on our neck.....”

¹⁰³ Cross on Evidence, 5th Edition, London Butterworths,1979.

The Act goes promote under Section 84(4) to give that under the above conditions then one must give the Certificate of Authenticating Computer Generated Documents. Whereby, it is alluring to give an announcement in proof by uprightness of Section 84 of the Evidence Act 2011, a Certificate recognizing the archive containing the announcement and depicting the way in which the record was created, with the particulars of any gadget included in the generation of the report, marked by a man possessing a dependable position in connection to the operation of the electronic gadget, might be essential and adequate confirmation of the matters expressed in the Certificate.¹⁰⁵

Basing on the above provision it shows that Nigeria Evidence Act has provided for the conditions which must first be fulfilled before admitting electronic evidence before the court of law. Basing on such comparison and with consideration of the nature of electronic evidence in mind that is for it to be easily manipulated and tampered with the reliability of such evidence without proving its genuineness becomes questionable.

Therefore, in admitting such evidence before the court of law , then the court will have to consider whether the conditions provided by the Nigeria Evidence Act as to whether they have been met or not.

¹⁰⁴ *Section 84* of the Nigeria Evidence Act, 2011

¹⁰⁵<http://www.proshareng.com/articles/2437/Legal-Alert--May-2012--Admissibility-of-Electronic-Evidence> accessed on 14th October 2014

3.2.2 Role Played by Nigerian Courts in Determination of Genuineness of Electronic Evidence.

The courts of law in Nigeria have played a great role on the issue of determination of the genuineness of electronic evidence before it. In this part the research has discussed some of the cases which have been determined by the courts of law on the issue of how to determine the genuineness of electronic evidence before it and how to know the forged one.

Basing on the cases, it is clear that the Nigeria Evidence Act especially provision of Section 84 must be observed by the court of law in order to see as to whether the evidence tendered will be admitted basing on the conditions provided by the law on admitting electronic evidence and how to know its genuineness. The evidence acceptable by virtue of *Section 84(2)* of Nigeria Evidence Act will be considered as direct oral evidence as it have been provided under *Section 84(1)* of the Act but it must meet all conditions prescribed under *Section 84(2)* of the Act.

In cause of this research, the land mark case in Nigeria which looks on the conditions of determining the genuineness of electronic evidence is the case of *Dr. Imoro Kubor & Anor V. Hon. Seriake Henry Dickson & Ors*¹⁰⁶ whereby in this case the supreme court of Nigeria held that

¹⁰⁶ (2013) 4 NWLR (Pt.1345), 534 “In the said case, the appellants were challenging the election of the 1st respondent as the Governor of Bayelsa State in the February 11, 2012 governorship Election. At the Election Petition Tribunal, the learned counsel for the Petitioner/Appellant tendered from the Bar, a computer printout of the online version of the Punch Newspaper and another print out from the website of the Independent National Electoral Commission. The counsel for the respondents did not object to the tendering of the two documents and they were admitted and marked as Exhibit “D” and “L” respectively. On appeal the admissibility of the two exhibits was seriously challenged on two grounds. Firstly that they were public documents which ought to have been certified and secondly that the documents having been tendered from the bar, evidence were not adduced to meet the foundational conditions stipulated in section 84(2) of the Act. It was contended that the documents ought to be expunged from the records.”

“Admissibility of a computer generated documents or document downloaded from the internet is governed by the provision of section 84 of the Evidence Act.....A party that seeks to tender in evidence a computer-generated document needs to do more than just tender same from the bar. Evidence in relation to the use of the computer must be called to establish the above conditions.....Since the appellants never fulfilled the pre-conditions laid down by law, exhibits “D” and “L” were inadmissible as computer generated evidence.”¹⁰⁷

This case is the landmark case in Nigeria on the issue of determining the genuineness of electronic evidence. The decision of Nigeria Supreme Court is the same as the decisions from other foreign jurisdictions. For example in the English case of *R V. Dean*¹⁰⁸ it was argued on appeal that since there was no evidence that the naval computer databases in question were at the relevant time operating properly, the evidence on the searches on those bases generated from them was inadmissible under *Section 69* of the Police and Criminal Evidence Act, 1984. The Court of Appeal rejected this submission, holding that since there had been no known reported problems with the databases, an officer who had carried out the search was qualified to give evidence of the real ability or accuracy of the databases. As well as in the case of *R V. Spiby*¹⁰⁹ the court held that a hotel manager was competent to give evidence to satisfy the conditions in *Section 69* of the Police and Criminal Evidence Act, 1984 that the computer was working properly at the relevant time. The argument that only an engineer who had been servicing the computer or another expert in the field was the competent person to give such evidence was rejected by the Court of Appeal.¹¹⁰

¹⁰⁷ *Idem*

¹⁰⁸ (1998) 2 CAR 171

¹⁰⁹ (1991) CLR 199

¹¹⁰ Hon. Justice P.A. AKhihiero, A paper on “*Admissibility of Electronic Evidence in Criminal Trials: How Practicable?*” At the 2013 Annual General Meeting of the Magistrates Association of Nigeria, Edo State Branch, 21

Nigeria Evidence Act of 2011 has tried to set some standards and conditions for the determination of genuineness of electronic evidence. Furthermore, the court of law in Nigeria have played a great role in the issue of determination of the genuineness of electronic evidence as it have been discussed above by showing some of the cases which have stand as the precedent on the issue of determining the genuineness of electronic evidence in Nigeria.

3.3 Why Genuineness of Electronic Evidence?

Via the issue of determining the genuineness of electronic evidence the court of law can be able to determine which kind of evidence is original and which one is not original. Basically all evidence must be authenticated before it is considered by the court of law.¹¹¹ Determination of the genuineness of electronic evidence requires establishing evidence's integrity in addition to its identity. Integrity refers to soundness of evidence; for instance, that document has not been altered or corrupted. In United State America under the Federal Rule of Evidence 901(a) provides for the requirement of authentication or identification as the condition for the admissibility of evidence.¹¹² The determination of genuineness of electronic evidence lay a foundation for the integrity of a document then counsel must show that the electronic documents presented for admission as evidence at trial have not been altered and not to left such task to the court itself.

Also, due to the fact electronic evidence can be altered or distorted requires the retention of computer expert to analyze the accuracy of computer data. Despite of the presumption that

¹¹¹ M.C.S.Lange & K.M.Limsger, *Electronic Evidence and Discovery: What Every Lawyer Should Know Now*, American Bar Association, New York 2009,143

¹¹² Federal Rule of Evidence 901(a) 2008 state that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

emails and electronic texts are accurate and credible, however there is no proof that electronic information cannot be manipulated and altered. Basing on the fact that recently the issue of hackers have been increasing not only to the electronic texts and emails but also even in electronic transaction the problem have increased. Therefore counsel must examine electronic evidence and the retention of a computer expert should be considered in order to know exactly the evidence is genuine.¹¹³

Furthermore, it is necessary to determine the genuineness of electronic evidence due to the fact that basing on the advancement of technology now days it is very possible for the scientist to create software which can mislead the court that the document is genuine while it has been altered. Much as the software is the result of programming and therefore if the programming is careless then will result to the alteration of the evidence.¹¹⁴

Therefore, when one is able to understand the importance of determining the genuineness of electronic evidence one will be able to distinguish with other evidence simply because electronic evidence is somehow complicated compare with other kind of evidence since it can be altered as well as many fraud can be involved but basing on the issue of determining its genuineness then we can be in a position of understanding the real evidence because under genuineness of electronic evidence will provide the origin of such evidence and the device used to produce such evidence and from there we can be able to know the validity of the document and persons involved in such evidence.

¹¹³ R.C.Clifford, *Qualifying and Attacking Expert Witnesses*, James Publishing, Costa Mesa 1998,246

¹¹⁴ S.E.Friedman, *The Litigator's Guide to Electronic Evidence and Technology*, Bradford Publishing,Colorado 2005,105

3.4 Conclusion

Basically, under this chapter the researcher attempted to show the position of law of Tanzania and of Nigeria on the issue of determining the genuineness of electronic evidence, whereby Tanzania law is silent on the procedure and conditions on how to determine the genuineness of electronic evidence before the court of law and how electronic evidence can be tendered. Even if the parliament in-cooperate the admissibility of electronic evidence before the court of law then it was supposed to go further and provide for the procedure and conditions upon admitting such evidence before the court of law. Despite the effort which has been done by the court of law in dealing with this problem Makaramba J, tried to tackle the problem though he only based on one issue which is only emails and the court did not show any effort into criminal cases.

On the other hand the researcher also looked on Nigeria law on this issue of determining the genuineness of electronic evidence whereby, they have in-corporated into their law what are the procedures and conditions to be followed by the court of law when dealing with electronic evidence and the researcher provide the landmark case of Nigeria on the procedures and conditions to be followed when determining the genuineness of such evidence. Hence, when compare the two countries we can see how Nigeria have been advanced into their law on the issue of genuineness of electronic evidence and there is a need for Tanzania to enact law which will in cooperate the procedures and conditions of determine the genuineness of electronic evidence since both Tanzania and Nigeria follow under common law legal system.

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.0 General Conclusion

The objective of the research was to make comparison with regard to the determination of the genuineness of electronic evidence between Nigeria and Tanzania, and to provide advisory opinion as to whether there is a need to adopt the provisions on how to determine the genuineness of electronic evidence. Also, to identify as to whether there is any role played by the court of on how to determine the genuineness of electronic evidence.

The study was guided by the hypothesis, that, the Tanzanian Evidence Act does not have provisions that provide on how to determine the genuineness of electronic evidence. Therefore, with the existence of the gap in the TEA, justice may not be obtained. The methods used in the study are both library research and field research, where helped him to gather information related to the subject matter.

According to the research findings, the researcher has observed and satisfies that, the hypothesis was proved. This is due to the fact that, the law of Tanzania relating to evidence especially Tanzania Evidence Act Cap 6 does not provide for the procedures of determining the genuineness of electronic evidence.

Despite of the fact that the law provides for admissibility of electronic evidence before the court of law, but it cannot be denied that, the procedure of determine the genuineness of electronic evidence before the court of law is of great importance because of the nature of the evidence

which can be easily altered or manipulated and one cannot understand if it have been manipulated or altered.

In addition, even the court of law has not taken a huge step toward overcoming the problem. Hence the problem is still there and the court only uses its wisdom when dealing with the case involving electronic evidence because it have not yet generated precedent which could be their guide line. Despite of the effort taken by Makaramba J, but he only set precedent on the issue involving only emails and in civil suit.

Therefore the researcher come up with the conclusion, Tanzania Evidence Act is still silent on the issue of determination of the genuineness of electronic evidence and there is a need of Tanzania to follow what have been done by Nigeria since their Act provide for the procedures and conditions to be followed to determine the genuineness of evidence which the court must follow as well as the court of Nigeria has precedent on this issue.

4.1Recommendations

The researcher's recommendations have been addressed into specific group which would help to bring changes on how electronic evidence can be admitted before the court of law.

4.1.1 Recommendation to the Legislature/Parliament

The researcher recommends that, it would be better for the Tanzania parliament to take measures which was taken by Nigeria parliament in 2011 by deciding to change the whole evidence act which they inherited from the colonialist. Hence due to the development of science and technology also the court should be changed and catch the challenge of science and technology in administer justice. Also the legislative body of Tanzania it should do as it did by taking the

decision of *Nsekela J*, in *Trust Bank Ltd v. Le-Marsh Enterprises Ltd.*, *Joseph Mbui Magari, Lawrence Macharia*, High Court of Tanzania at Dar es Salaam (Commercial Division) Commercial Case No. 4 of 2000 (Unreported), when it in cooperated the admissibility of electronic evidence where the law was still silent on the issue. The court is suppose to adopt also the decision of *Makaramba J*, on the issue of determining the genuineness of emails before the court of but it should advance it and provides the conditions and procedures of determining the genuineness of electronic evidence in general.

Also, the legislature should be active in look the law which are outdated and amend them so as to facilitate justice to be done and not to wait for so long without amend the old law which hinder justice to be done.

4.1.2 Recommendation to the Court/Judiciary.

The researcher recommends that, the court of law should always be active in playing their role of administer justice to all. Basing on the issue of determination of genuineness of electronic evidence the court of law is supposed to play its role of developing case law in the areas where the law is silent so as justice to be done. Much as the legal system which we are falling accepts case law as the law and is used in determining the matter before the court of law. Basing on this problem it is important court of law to develop many case law like what have been done by *Makaramba J*, who have tackled the problem of determine the conditions and procedures to be taken when admitting emails. Hence there is a need for the court to tackle the problem in other angles like in the issue of conditions and procedures of admitting evidence generated from computer or mobile phone.

Also, the researcher recommends that, Judges and Magistrates should be flexible when interpreting the law and avoid the elements of rigidity. This is due to the fact that, they should not keep its eyes to the mysteries of computer or technological advancement, therefore the court should be flexible depending on the social, economical and technological changes in the society. The researcher also recommends, Judges and Magistrates should pay attention when examining for admissibility of electronic evidence on how they can determine the genuineness of electronic evidence. This is due to the reason that the current situation in the world has changed, following the development of science and technology has contributed at large the use of computers in our daily life and due to this change it has brought many challenges, many of them being the use of electronic evidence in courts.

4.1.3 Recommendation to the Government.

The researcher recommends that, the government particularly the executive should make sure that there is additional budget, which will be directed to the judiciary, as one of the important arm of the government. The budget will be for the court to conduct training and various seminars which will be used to inculcate Judges, Magistrates, and Advocates, Public Prosecutor, Lawyers as well as Registrar and Court clerk in different areas of law. The research findings show that, the interviewed have no knowledge on the issue of determination of genuineness of electronic evidence before the court of law.

The researcher also recommends that, the Ministry responsible for legal affairs shall ensure correct information and skills are timely provided to the general public on how electronic evidence can be admitted before the court of law. In circumstances where the Government has had a limited ability to reach rural communities; the civil society can be successful in

supplementing the efforts of the public sector. All of these can be achieved through education which will make people to be aware on how electronic evidence is generated as well as on how such electronic evidence can be admitted before the court of law in order to ensure justice is done to everyone.

4.1.4 Recommendation to the community/society

The researcher also recommends that, the development of science and technology has contributed at large the use of computers in our daily life and due to this change it has brought many challenges, many of them being the use of electronic evidence in courts. Therefore, it is the time for the community to be aware of this kind of evidence on its admissibility and procedures to be followed before tender it as evidence before the court of law. For that reason, it is the duty of each and every member of the community to educate the society on this kind of evidence.

Therefore the researcher recommend that, there is a need of making sure that the legislature enact a specific law which will be dealing with electronic evidence and it must provide for the procedures of determining the genuineness of electronic evidence before the court of law as the Nigerian Evidence Act in-cooperate the procedures.

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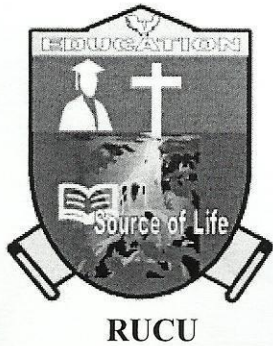
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