INNOVATIONS IN EXCEPTIONS TO THE HEARSAY RULE IN NIGERIA[1]*

Abstract
The popular definition of a hearsay statement originated in Cross on Evidence as: an 'assertion other than one made by a person while giving oral evidence in the proceedings and which is inadmissible as evidence of any fact asserted'. As a general rule, hearsay is inadmissible. The origin of the applicability of the rule against hearsay in Nigeria is the common law as the repealed evidence Act did not employ the word 'hearsay' and did not define it. The rule has applied and developed in Nigeria and has been recently recognized statutorily by the Evidence Act, 2011. This article examines the rule as it was prior to and as presently stipulated in the Evidence Act 2011 together with exceptions to the rule, identifies the changes and highlights the innovations of the Evidence Act 2011.

Keywords: *Hearsay, Evidence, Evidence Act 2011, Proof, Records, Documents*

1. Introduction

Hearsay was before the Evidence Act 2011, not defined in the repealed Evidence Act. It found a place in Nigerian rules of evidence through the received English law. Presently, Hearsay is statutorily provided for in the Evidence Act 2011 and is defined as 'a statement (a) Oral or written made otherwise than by a witness in a proceeding; or (b) Contained or recorded in a book, document, or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.'[2] The unique provision in the Evidence Act 2011 particularly S.37(b) which extends the meaning of hearsay to statements contained in documents, and records whatever, brings to mind the provisions of the Act which includes electronic evidence and computer generated evidence as 'documents'.[3] Hearsay therefore, means a statement oral or written made otherwise than by a witness in a proceeding;[4] or contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the evidence Act,[5] which is tendered in evidence for the purpose of proving the truth of the matter stated in it.[6] Therefore, except as provided in the Evidence Act or any other Act, hearsay evidence is generally inadmissible.[7] The rule is generally applicable to all kinds of assertion either made orally, in documents[8] or by conduct.[9] At common law hearsay evidence is generally inadmissible for the purpose of establishing any fact in court. Hearsay is actually evidence or statement of a witness presented to the court which constitutes of a repetition of what another person told him and is not perceived directly by him.[10] Thus, hearsay arises when a witness in his own testimony repeats a statement; oral or documentary, made by another person in order to prove the truth of the facts stated. Hearsay evidence has been judicially defined in Nigerian courts; In *Ifegwu v UBN Plc*,[11] the Court of Appeal stated: 'Traditionally, testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness, is called hearsay. Under the rules of Evidence, such testimony is generally inadmissible...'[12] Essentially, repetitive statements of what some other person who is not called to testify, by a witness, offered in proof of any fact in judicial proceedings through such witness' testimony whether oral or documentary would be excluded as reliance cannot be placed on such evidence[13]. It remains to be stated that hearsay evidence is not admissible except as provided in S.38 of the Evidence Act, its other provisions and in the provision any other Act.

2. Rationale for the Exclusion of Hearsay Evidence

The exclusion of hearsay evidence has been justified by some well established facts such as: The unreliability of the statement occasioned by the absence of the original maker who has not testified on oath and cannot be subjected to

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[2] S. 37 Evidence Act, 2011.
[3] S. 258(1) Evidence Act, 2011.
[4] S. 37 Evidence Act, 2011
[5] S. 38 Evidence Act, 2011.
[6] S. 37(b) Evidence Act, 2011.
[7] S. 38 Evidence Act, 2011.
[8] S. 37(b) Evidence Act, 2011
[9] *Chandrasekera (alias: Alisandiri) v R* [1937] AC 220, Colin Tapper '*Cross and Tapper on Evidence'* Butterworths, London, 1995. p.564
[10] *Omenga v State* [2006] 14 NWLR pt.1000, 532.
[11] [2011] 16 NWLR pt.1274, 555 @ 588.
[12] S. 38 Evidence Act, 2011.
[13] *Felicia Ojo v Dr. Gharoro & 2 Ors*. [2006] 2-3 SC 105

cross-examination. As exemplified in the quote: 'though a person testify what he hath heard upon oath, yet the person who spoke it was not upon oath; and if a man had been in court and said the same thing and had not sworn it, he had not been believed in a court of justice'[14] It is also justified by the usual inaccuracies associated with stories being retold; the long process that further inquiry might foist on the litigants; the substitution of direct evidence with indirect evidence; and possibility of fraud, misrepresentation and injustice[15].

3. General Exceptions to the Rule under the Evidence Act 2011

Having provided for the Hearsay rule, the Act proceeds to recognise some exceptions to the rule. These include:

i. Persons who cannot be called as witnesses[16]- this was provided for in S. 33(1) of the repealed Act[17] but has been widened in scope as the Act recognises 4 classes of persons[18] as against only statements made by the dead in the repealed Act. Such statements are admissible under Ss. 40-50.[19]

ii. Dying Declarations or statements as to cause of death[20]- the application of this exemption is again expanded to be admissible in all kinds of proceedings[21]. The repealed Act limited the relevance of this kind of exception to trials for murder and manslaughter[22].

iii. Statement against the interest of maker with special knowledge[23]- the Act provides that statements made against the interest of maker with special knowledge is an exception to the rule against hearsay. Nothing new is added here as it is a repetition of S.33 (1)(c) of the repealed Evidence Act. However, with regard to the provisions of S. 39 and 42(b) of the Act, a novel requirement for admissibility is introduced to wit: that the statement if true would expose the maker to civil or criminal liability. This was not specifically mentioned in S.33 (b) of the repealed Act.

iv. Statements of opinions as to public right or custom and matters of general interest[24]- the Act recognises another exception in this area which is similar to the provision of the repealed Act in this area.[25]

v. Statements relating to the existence of a relationship,[26] this is, an exception also recognized in the repealed Act[27]. However the words 'declaration' and 'declarant'[28] are new as against the use of 'statement' and 'maker' in the repealed Act.

vi. Declarations by testators[29]- this is similar to the provision in the repealed Act[30]

vii. Admissibility of certain evidence for proof in subsequent proceedings the truth of facts stated in it[31]- this is an exception to the rule that in a present proceeding, save for cross-examination as to credit, evidence in a previous proceeding is inadmissible. In addition to the four reasons specified in S.39 of the Act, this section includes a witness who is kept out of the way by an adverse party[32] as a fifth category of witness, it is noteworthy that the applicability of this exception also depends on other conditions such as:
    a. Proceedings was between the same parties or their representatives in interest;
    b. The adverse party in the first proceeding had the right and opportunity to cross-examine[33]; and
    c. The questions in issue were substantially the same in the first as in the second proceeding[34]

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[14] Baron Gilbert, *The Law of Evidence* 2nd ed. 1760 p.152
[15] J. A. Dada, *The Law of Evidence in Nigeria* 2nded. University of Calabar Press, 2015 p. 224
[16] S. 39 Evidence Act, 2011.
[17] Evidence Act, 2004
[18] S.39 (a-d) Evidence Act, 2011
[19] Evidence Act, 2011
[20] S.40 Evidence Act,2011
[21] S.40(2) Evidence Act,2011
[22] See. S. 33 (a) Evidence Act, 2004.
[23] S. 42 Evidence Act, 2011.
[24] S. 43 Evidence Act, 2011
[25] S. 33(d) Evidence Act,2004
[26] S. 44 Evidence Act, 2011
[27] S. 33(e) of the Evidence Act 2004.
[28] S. 42(b) Evidence Act, 2011.
[29] S. 45 Evidence Act, 2011.
[30] S. 33(3)(a)&(b)
[31] S. 46 Evidence Act, 2011.
[32] S. 46 (1) Evidence Act, 2011.
[33] On this, the decision of the Supreme court in *Bartholomew Onwubuariri & Ors. v Isaac Onwuasoiyi & Ors.[2011] 3 NWLR 357* is very apt as it relates to interpretation of S. 34 Evidence Act,2004 which is similar to S.46(1) evidence Act, 2011. But where the party has a right and opportunity to cross-examine but fails to utilize same, he cannot be heard to complain of breach of fair hearing. See*: S & D Construction Co. Ltd v. Chief Bayo Ayoku & Anor [2011] 13 NWLR 487@ 509*.
[34] S. 46(1) (a-c) evidence Act, 2011., the provision of S.46 (1) (c) must be complied with as seen from the decision in *Mohammed Saba Bida & Anor v. Alhaji Usman Abubakar & Ors [2011] 5 NWLR (pt. 1239) 130* where in interpreting S. 34 of the repealed

viii. Statement made under any criminal procedure legislation[35]- this is similar to S.36 of the repealed Act where there are decided cases[36].

ix. Statement of defendant at preliminary investigation or coroner's inquest[37]- this was similarly provided for in the repealed evidence Act[38]. The only changes are that the words 'accused person' were replaced with 'defendant'. Again cases decided in interpretation of the repealed Act apply[39]to support this provision.

x. Written statements of Investigating Police Officers who cannot attend criminal trial[40]- the words of the Act reveal that where a person has been charged with a crime, a written investigative report by a police officer which is signed by that officer could be admitted subject to the conditions in the section[41].

xi. Absent public officers[42]- a similar provision existed in the repealed Act.[43] The innovations are that the Evidence Act, 2011 recognises the use of e-mail or electronic messages instead of the federal gazette or telegram in the repealed Act. It also makes no mention of public officers who are not engaged in the public service of a state or federal government. This silence on Local government officers creates a lacuna with regard to the excuse of Local Government officials who are absent in judicial proceedings[44].

4. Novel Exceptions under the Evidence Act 2011

The repealed Evidence Act did not recognise electronically generated evidence and thus created challenges to the proof of electronically generated evidence. The appellate courts in trying to cure the lacuna, embraced judicial activism to a great extent[45]. However, upon amendment of the Evidence Act, electronically or computer generated evidence was finally recognised. Like all evidence, electronically generated and computer generated evidence have to pass the usual tests of admissibility especially the hearsay rule. The counsel who has to tender evidence governed by these evidentiary rules need a proper understanding of the rule against hearsay as it is inseparable whenever the adversarial system applies. An understanding of the hearsay rule is helpful and aids accuracy when determining the exclusion of relevant evidence. Like earlier stated, hearsay involves the report by a person of what someone else said or wrote. Hearsay is therefore a practical matter encountered in the daily lives of legal practitioners. In the Evidence Act 2011, there are numerous exceptions to the hearsay rule. Most of them are not new but there are a few novel innovations to these exceptions.

5. Exceptions to the Hearsay Rule Connected to Records

This broad category of records exception to the hearsay rule is not exactly novel. It was indeed recognised under the repealed evidence Act[46]. By their very nature, records are extra-judicial statements, and could be excluded as hearsay if offered to prove the facts contained in them. This is subject however to admissibility under any provisions of the Evidence Act[47]. Exceptions to the hearsay rule dealing with records is tripartite and is covered in three sections under the Evidence Act[48].

Statements Made in the course of business[49]

A perusal of the words in the relevant sections will reveal that relevancy is critical as many conditions of relevancy have to be fulfilled.

Evidence Act which is similar to S. 46 Evidence Act, 2011, it was held that such evidence cannot even be admitted by consent. It cannot also be waived, see; *Eghobamien v. FMBN [2002] 17 NWLR (PT. 797) 488 @ 500* On when the Section can apply, all three provisos must co-exist before an exhibit can be admitted. See: *Elegushi v. Oseni* [2005] 14 NWLR (Pt. 945) 348 at 371, para F.

[35] S. 47 evidence Act, 2011.

[36] See: *Ajibona v Kolawole* (1996) 10 NWLR pt 476, 22.

[37] S. 48 Evidence Act, 2011

[38] S. 37 Evidence Act, 2004.

[39] See *Olalekan v. State* [2001] 18 NWLR (pt. 746) 793 @ 824-825; *Queen v. John Agariga Itule* [1961] 11 ANLR (pt 3) 462; Egboghonome v. State [1993] 7 NWLR (pt. 306) 383; and the dictum of Onu JSC in *Micheal Peter v. State* [1997] 12 NWLR (pt 531)1.

[40] S.49 Evidence Act, 2011.

[41] S. 49(a-b) Evidence Act, 2011. See also: See: *State v Samson Omoraka* (1971) University of Ife L.R. 26; *Yaya Idrisu v. State* [1967] All NLR 12. In interpretation of S. 36 of the repealed Evidence act which is consubstantial with S.49 Evidence Act, 2011.

[42] S. 50 Evidence Act, 2011

[43] S. 34 (3) Evidence Act, 2004

[44] N. O. Obiaraeri, '*Contemporary Law of Evidence In Nigeria'*, Whitmont Press Limited, Kent, UK. (2012) p.108.

[45] The Supreme Court had long held in the case of *Esso W.A. v. Oyegbola* (1969) NMLR 194 that computer print-outs were admissible.

[46] S.33 (1) (b) Evidence Act 2004.

[47] This is clear from a S. 38 Evidence Act, 2011.

[48] Ss. 41, 51, and 52 Evidence Act, 2011

[49] S. 41 Evidence Act, 2011.

a. In the first instance, the repealed Act only related to statements made by deceased persons while the Evidence Act, 2011 has widened the scope and provided for four categories of persons[50] which include: dead persons, missing persons, persons incapacitated, or persons whose presence could not be commanded as a result of unreasonable delay or expense which could be incurred.
b. Again, the evidence Act now included computer output and electronic records[51]. The Act specifically refers to 'electronic devices', this was not the case in the repealed Act.
c. The Act has specific requirements as to the origin of the statement which is required to have been kept in the ordinary course of business, in the discharge of a professional duty, an acknowledgement written or signed of the receipt of money, goods, securities, or other property, or a commercial document written or signed, or the date of a letter usually dated, written or signed by him. It is however submitted that the 'ordinary course of business' is vague and does not easily lend itself to definition. Even the word 'business' is not defined in the Act but has been defined to mean a commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain[52]. If this definition is adopted, it would imply that statements made in the business records of non-profit organisations are excluded, it is doubtful that this was the intendment of the draftsman. Again, as the language is not so precise, one could be at a loss when determining if a memorandum was made in 'the ordinary course of business' which should help to determine the trustworthiness of the record, but how would one know if it was made in the ordinary course of business or otherwise? This could be through looking at the repetitive nature of the practice or if it was routine or regularly conducted activity because the word 'ordinary' connotes usual, standard, customary, established, habitual, expected, traditional practice. In any case, this would be a matter for the courts to determine depending on the peculiar facts and circumstances of any particular case.
d. These conditions do not have to co-exist to warrant an exception and the exception could apply in any of the ways stated in the section. However, the maker must have made the statements contemporaneously as the transaction in question occurred or must have been recorded so soon thereafter to enable the court consider it likely that the transaction was still fresh in the memory of the maker. The contemporaneous nature of statements would apparently enhance reliability of such statements. By necessary implication, a court could therefore refuse to admit statements if it believes that the records were not made contemporaneously with the recorded transactions. This is a new requirement of relevance introduced by the Evidence Act, 2011.
Essentially, three classes of statements fall into this category:

i. Receipt of property of any kind, for example: goods, money, securities
ii. Commercial documents written or signed by the maker, and
iii. The dates on letters or other documents usually written, signed or dated by the maker.

Furthermore, where the statements are not electronic in nature, it is likely that only originals or certified copies may be tendered for use in courts, while electronic statements should pass all the tests required in the Act[53] particularly identification by a person familiar with the procedure for record keeping and such statements.

Statements made in special circumstances and entries in books of accounts in books of accounts or electronic records[54]

A statement is defined in the act as 'any representation of fact whether made in words or otherwise'[55]. Statements made in special circumstance have been long entrenched in Nigerian jurisprudence[56]. Entries in books of accounts or electronic records regularly kept in the course of business are admissible whenever they refer to a matter into which the court has to inquire but such statements shall not alone be sufficient evidence to charge any person with liability[57]. Regularly kept records exception means that a record regularly kept in the course of business either in books of account or as electronic records by a person who has a duty to observe and record the facts and keeps a record of facts from his personal knowledge of the facts but who cannot be called as a witness are admissible. This is likely because there is no strong motive at the time of making the entries to misrepresent. This may include books kept by third parties or individual parties. The provision of S. 51 is similar to that contained in S. 38 of the repealed Act. The major difference is that while the repealed Act merely makes such records relevant, the current law makes it admissible. This increases the legal value of such records[58] and makes light work of the duty of presentation to court of such document by counsel

[50] As in S.40 evidence Act, 2011.
[51] Ss. 41, 258 and 84 Evidence Act, 2011
[52] Garner B, *Black's Law Dictionary* (9th. Ed), west, 2009, p.226
[53] S. 84 Evidence Act, 2011. See also; *Dr. Imoro Kubor & Anor. v. Hon. Seriake Dickson & Ors*[53] [2013] 4 NWLR (Pt. 1345) 534
[54] S. 51 Evidence Act, 2011.
[55] S.258(1) Evidence Act, 2011
[56] S. 38 Evidence Act, 2004
[57] S.51 Evidence Act, 2011
[58] See *Rochkonoh Property Co. Ltd v Nitel Plc* [2001] 14 NWLR (pt 733) 468; [2001]7 SC(pt III) 154

because there remains the fact that while not all relevant documents are admissible, all admissible documents are relevant. Again, there is no gainsaying that electronic records are recognized and stated to be admissible. The Act imposes a limitation to the utility of such documents by the expression 'such statements shall not alone be sufficient evidence to charge any person with liability'[59]. By this, it is apparent that to establish civil or criminal liability, reliance could not be placed only on such records except there is some other evidence which corroborates the facts. To qualify for this exception therefore, it must be shown that the entrant is unavailable for testimony. This could be demonstrated by showing that the production of the entrant to testify would occasion unnecessary great hardship. It is suggested that the records should have been made contemporaneously with the transactions for it to be relied upon. It should be made by a person who had a duty to observe and record the facts. Where the record is automated, it should satisfy all the requirements of admissibility for computer generated evidence and electronic evidence.[60]

Entries in Public Records Made in the Performance of Duty

'An entry in any public or other official books, register or record, including electronic record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself admissible.[61] Again, unlike the repealed Act, the law recognizes that records could be electronic in addition to book form or any other form. It is important to note that the electronic records which could be admissible under this section must have also been kept or entered for official purposes or in the execution of a public duty. Again, such records are 'admissible' in contradistinction to the repealed Act which merely makes them relevant[62]. Public documents are defined in the evidence Act[63] to be documents forming the official acts of the sovereign authority; official bodies and tribunals; or public officers, legislative, judicial, executive, and public records kept in Nigeria of private documents. It is important to remember that the definition of 'document' now includes numerous kinds including electronic records.[64]

6. Conclusion

The novel innovations per the exceptions to the hearsay rule vide records created in the Evidence Act could be summarised into: Business records; Entries in books of account; Entries in public or other official books, register or record, including electronic record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in the performance of a duty specially enjoined by the law of the country in which such book, register or record is kept where such persons are unavailable by reason of any of the conditions in S. 40 or where production of such persons would be too much of a burden or cumbersome. The Evidence Act has brought about a great reform in the admissibility of evidence generally especially electronic evidence in Nigerian courts. On account of its novel provisions[65], conflicts which hitherto had marked Nigerian jurisprudence in this regard could be laid to rest.[66] The next frontier is the successful tendering of evidence including electronic evidence in court and navigating the hearsay rule to ensure success. This article has made inroads to the description and use of the newly recognised innovations in the area of exceptions to hearsay evidence. It is not hereby claimed that the work is exhaustive for that was not the intention. The intention was to consider the problems posed to the admissibility evidence and the challenges bordering on relevance, authenticity, integrity, and confidentiality of such evidence and to offer solutions to the problems or challenges such as hearsay that evidence may likely be facing. Legal practitioners, jurists, and scholars should be mindful of the pitfalls that may be encountered in the use of records in evidence. It is hoped that this effort has clarified substantially this area of the law and would help prevent uncertainty in this area in future.

[59] S. 51 Evidence Act, 2011
[60] S. 84(1-5) Evidence Act, 2011.
[61] S 52 Evidence Act, 2011
[62] See. S. 39 Evidence Act, 2004.
[63] S. 102 evidence Act, 2011.
[64] S. 258 of the Evidence Act, 2011 "includes …any disc, tape, soundtrack, or other device in which sounds and other data(not visual images) are embodied so as to be capable of being reproduced; Any film, negative, tape or other device in which one or more visual images are embodied; Any device by which information is recorded, stored or retrievable including computer output.- this may include phones etc.
[65] See for example, Ss. 51 and 52 Evidence Act, 2011
[66] See. UBA *Plc v. Abacha Foundations* [2003] FWLR (PT. 178) 997