

# The admissibility of electronic evidence in Tanzania: new rules and case law

By **Alex Makulilo**

A decade or so has passed since the High Court of Tanzania ruled that a computer print-out is admissible evidence. That decision, which is considered in this article, was decided in the context of the admissibility of electronic records in banking at the time when no statute on electronic evidence existed. A number of evidentiary issues remained uncertain. Subsequent legislation regulating electronic evidence was passed by Parliament through the Written Laws (Miscellaneous Amendments) Act 2007, and Electronic Transactions Act 2015. The aim of this article is to critically analyse the case law prior to and after these enactments to establish the extent to which the new rules have succeeded in filling the legal gap as far as electronic evidence is concerned in the Tanzanian legal system.

## Electronic data message as evidence

An understanding of the concept of data in digital form is a condition precedent to any discussion of the admissibility of electronic evidence. This is particularly important because there is a general misunderstanding among legal practitioners that electronic evidence is a physical object. This is not correct, as two lawyers demonstrated some time ago: Stephen Mason in 2007 with the first edition of *Electronic Evidence*, published by LexisNexis Butterworths, and George L. Paul, whose book *Foundations of Digital Evidence* was published by the American Bar Association in 2008. At a basic level, the claim that evidence in digital form is in a physical form is correct. The hard drive of a computer, or the storage device in a smartphone is the physical object on which the data are stored. However, no lawyer or judge is capable of understanding the data unless it is rendered readable by a human – usually on a screen or on a print-out. It is of no help to anybody to have a hard drive sitting on a table in a court, not being able to understand what data are stored on it. Quite often some legal practitioners insist the production in court of the original to satisfy the writing rule, which requires an original document to be produced in court, and not its copy.

Section 3 of the Electronic Transactions Act 2015 defines a data message as data generated, communicated, received or stored by electronic, magnetic optical or other means in a computer system or for transmission from one computer to another. Although the notion of ‘message’ in this definition confusingly implies some sort of communication, this definition extends to a data record which does not at all relate to any form of communication, but rather to structured or organised digital data in a regular business – hence the concept of business record. In this regard, when a data message is stored in an electronic form it becomes an electronic record. In contrast, communication by means of data message amounts to electronic communication. Be as it may, it can safely be argued that electronic record and electronic communication are sub-sets of a data message.

Most electronic evidence, and in this case data message, is document under section 3 of the Tanzania Evidence Act. This section, as amended, states that a ‘document’ means any writing, handwriting, typewriting, printing, photostat, photography, computer data and every recording upon any tangible thing, any form of communication or representation including in electronic form, by letters, figures, marks or symbols or more than one of these means, which may be used for the purpose of recording any matter provided that recording is reasonably permanent and readable. Being document, a data message may be admissible in evidence subject to the common law rules of evidence and the statutory requirements in the Written Laws (Miscellaneous Amendments) Act and Electronic Transactions Act.

## Statutes on electronic evidence

### Tanzania Evidence Act, Cap.6 R.E 2002

The Tanzania Evidence Act (TEA) is the principal piece of legislation of the law of evidence. It was enacted in 1967 by the Parliament based on the Indian Evidence Act 1872.<sup>1</sup> The TEA applies in criminal and civil

<sup>1</sup> The Indian Evidence Act 1872 was a modified version of the English common law rules of evidence that was transported by Britain to its colonies during colonial rule.

proceedings. Moreover, it applies to all ranks of courts in the Tanzania Mainland, except primary courts.<sup>2</sup> The Act codifies the common law rules of evidence such as relevance, admissibility, authentication, hearsay, the best evidence and corroboration. The TEA is not exhaustive. This means that if there is any other statute or law which specifically regulates certain type of evidence, the latter prevails.

### Written Laws (Miscellaneous Amendments) Act 2007

This piece of legislation (abbreviated as WLA), inserted three sets of important amendments to the Evidence Act, namely sections 40A, 76 and 78A. These changes were made through sections 33, 34 and 35 of the WLA respectively. The first set of amendment i.e. section 40A of the TEA, deals with the admissibility of electronic evidence in criminal proceedings. The focus of section 40A is evidence obtained through undercover operations. It states:

- 40A. In any criminal proceeding-
- (a) an information retrieved from computer systems, networks or servers;
  - or
  - (b) the records obtained through surveillance of means of preservation of information including facsimile machines, electronic transmission and communication facilities;
  - (c) the audio or video recording of acts or behaviours or conversation of personal charged, shall be admissible in evidence.

The second and third sets of amendments (sections 76 and 78A) are closely related. They deal with banker's books. Section 76 of the TEA is amended by addition of a new definition of the term 'banker's books'. It is a response by the legislature to address the limitations in the TEA after *Le-Marsh*,<sup>3</sup> in which electronic print-out of a bank statement was disputed. Accordingly, a banker's book is defined as follows in s 76:

'Banker's books' include ledgers, cash books, account books and any other

records used in the ordinary business of the bank or financial institution, whether the records are in written form or a data message or kept on an information system including, but not limited to computers and storage devices, magnetic tape, micro-film, video or computer display screen or any other form of mechanical or electronic data retrieval mechanism.'

Section 78A of the TEA recognises a print-out of entry in a banker's book admissible evidence. It also treats such entry as primary evidence and 'document' for purposes of section 64 of the TEA, which essentially is the original writing or best evidence rule. This provision states:

78A.-(1) A print out of any entry in the books of a bank on micro-film, computer, information system, magnetic tape or any other form of mechanical or electronic data retrieval mechanism obtained by a mechanical or other process which in itself ensures the accuracy of such print out, and when such print out is supported by a proof stipulated under subsection (2) of section 78 that it was made in the usual and ordinary course of business, and that the book is in the custody of the bank it shall be received in evidence under this Act.

(2) Any entry in any banker's book shall be deemed to be primary evidence of such entry and any such banker's book shall be deemed to be a "document" for the purposes of subsection (1) of section 64.

Two common mistakes have been made by the High Court of Tanzania about the two sets of amendments in the TEA. The first is to view the introduction of section 78A as being brought about in the TEA by the Written Laws (Miscellaneous Amendments) Act [Act No.2 of 2006]. This amending Act has never existed in the Tanzanian statute books. The error was made in the case of *Lazarus Mirisho Mafie and M/S Shidolya Tours & safaris v Odilo Gasper Kilenga alias Moiso Gasper*.<sup>4</sup> In this case the court observed, at 16:

<sup>2</sup> Primary Courts are at the lowest level in the judicial hierarchy in Tanzania. They have their own simplified code of evidence. The TEA applies to subordinate courts (i.e. Districts Courts and Courts of Resident Magistrates) as well as in the High Court of Tanzania and the Court of Appeal of Tanzania, which is at the apex of the judicial hierarchy.

<sup>3</sup> *Trust Bank Tanzania Ltd v Le-Marsh Enterprises Ltd* (2002) TLR 144.

<sup>4</sup> Commercial Case No.10 of 2008, HCT (Commercial Division), Arusha (Unreported).

'It is encouraging to note however, that the decision of Justice Nsekela (*Le-Marsh*<sup>5</sup>), the legislature in Tanzania embarked, albeit on a piecemeal basis, on a course of amending the Tanzania Evidence Act, first in 2006, vide Written Laws (Miscellaneous Amendments) Act [Act No.2 of 2006] by allowing in evidence in civil proceedings "a printout of any entry in the books of a bank", and though the Written Laws (Miscellaneous Amendments) Act [Act No.15 of 2007] by allowing in evidence "an information retrieved from computer systems, networks or servers" among others, in criminal proceedings.'

The same observation was repeated in the cases of *Exim Bank (T) Ltd v Kilimanjaro Coffee Company Limited* (p. 5)<sup>6</sup> and *Emmanuel Godfrey Masonga v Edward Franz Mwalongo* (p. 12).<sup>7</sup> In contrast, in *William Joseph Mungai v Cosato David Chumi*<sup>8</sup> the court correctly mentions that section 78A was brought in by the WLA. In this case, the court made the following observation at 8:

'In admitting electronic evidence, the High Court Judge stated that, courts of law should not be ignorant of the modern business methods and shut its eyes to the mysteries of the computer. This was responded to the Tanzanian legislature vide amendments to the Evidence Act [Cap.6 R.E 2002] by virtue of the Written Laws (Miscellaneous Amendments) Act, No.2 (sic) of 2007 which provided for provisions for the reception of electronic evidence in courts in Tanzania but narrowed only criminal matters... by introducing subsections including section 40A. Other amended sections of the Evidence Act included sections 76 and 78 to mention but a few.'

The second common mistake is about citation. The High Court of Tanzania (except in *William Joseph Mungai*) erroneously cited section 36 of the WLA as the source of section 78A, instead of section 35. Section 36 of the WLA deals with the amendment of

the Mwalimu Nyerere Memorial Academy Act. It has nothing to do with the TEA.

In summary, the WLA brought about important but restrictive changes in the TEA. First, it introduced the statutory recognition of electronic evidence in the Tanzanian legal system. Such changes are applicable in all criminal proceedings, and to a limited extent in civil proceedings where evidence in the banking business is in question. Also, the WLA clarifies that a print-out of an entry in a banker's book is admissible as evidence. The WLA makes a further clarification in that any entry in a banker's book is primary evidence, and it constitutes a document for the purposes of application of the best evidence rule. Yet in both types of proceedings there are no additional conditions for the admissibility of electronic evidence provided by the WLA – implying that the general rules of admissibility of evidence in the TEA continue to apply.

### The Electronic Transactions Act 2015

The Electronic Transactions Act (ETA) is a significant source of electronic evidence law in Tanzania. The Act was passed by Parliament on 1 April 2015. It was assented to on 25 April 2015 and came into force on 1 September 2015. The scope of this law as far as electronic evidence is concerned is twofold. The ETA covers the admissibility of electronic evidence in criminal and civil proceedings. Geographically, it applies to the Tanzania Mainland as well as Tanzania Zanzibar, except Part III on E-Government Services. This is due to the fact the United Republic of Tanzania is a union of Zanzibar and Tanzania Mainland (formerly the Republic of Tanganyika), and the ETA covers one of the issues falling under union matters. However, in order for a piece of Union legislation to apply in Zanzibar, it has to be submitted to the Zanzibar House of Representative for endorsement.<sup>9</sup> At the time of writing, the ETA has not been submitted to the House of Representatives, which means the ETA is not in force in Zanzibar.

As previously mentioned, the ETA sets out a special regime in Part IV for the admissibility of electronic evidence. This Part is titled *Admissibility and Evidential Weight of Data Messages*. Interestingly, in *Emmanuel Godfrey Masonga*,<sup>10</sup> the court attempted to correct the title of Part IV from *Admission of Evidential Weight of Electronic Evidence* to read

<sup>5</sup> *Trust Bank Tanzania Ltd v Le-Marsh Enterprises Ltd* (2002) TLR 144.

<sup>6</sup> Commercial Case No.29 of 2011, HCT (Commercial Division), Dar es Salaam (Unreported).

<sup>7</sup> Miscellaneous Civil Cause No.6 of 2015, HCT (Iringa District Registry), Njombe (Unreported).

<sup>8</sup> Miscellaneous Civil Cause No. 8 of 2015, HCT (Iringa District Registry), Iringa (Unreported).

<sup>9</sup> Constitution of Zanzibar 1984, Art. 132.

<sup>10</sup> Miscellaneous Civil Cause No.6 of 2015, HCT (Iringa District Registry), Njombe (Unreported).

*Admission and Evidential Weight of Electronic Evidence* on account of an apparent mis-typing. It is not clear which version of the ETA the court was using, as neither of the two purported titles of Part IV ever existed.

Be as it may, Part IV of the ETA uses the term 'data message' which is defined in section 3 of ETA as data generated, communicated, received or stored by electronic, magnetic optical or other means in a computer system or for transmission from one computer system to another. Section 18(1) of the ETA deals with admissibility of data messages. It provides:

In any legal proceedings, nothing in the rules of evidence shall apply so as to deny the admissibility of a data message on ground that it is a data message.

This subsection stipulates the functional equivalent principle, by which an electronic data message is placed on the same footing as traditional paper-based transactions. This implies that the requirements governing the admissibility of documentary evidence, which are relevance, authenticity and originality are still applicable.

The evidential weight of data messages is provided in section 18(2) of the ETA. This subsection sets out guidelines for assessing the evidential weight of a data message as follows:

In determining admissibility and evidential weight of a data message, the following shall be considered-

- (a) the reliability of the manner in which the data message was generated, stored or communicates;
- (b) the reliability of the manner in which the integrity of the data message was maintained;
- (c) the manner in which its originator was identified; and
- (d) any other factor that may be relevant in assessing the weight of evidence.

Although section 18(2) of the ETA refers to the admissibility and evidential weight of a data message, it actually deals with the criteria for determining the evidential weight of a data message. It is submitted that reference to the admissibility of a data message in this subsection is a mis-typing error. The following reasons support this view: first, the Swahili version of

the ETA Bill does not use the word 'admissibility' in section 18(2). Such word is only used in section 18(1) of the ETA. The Bill states:

18.-(1) Katika mwenendo wa shauri lolote la kisheria, matumizi ya kanuni za ushahidi hayataondoa uhalali wa kukubalika kwa ushahidi wa ujumbe data kwa kigezo kwamba ni ujumbe data.

(2) Katika kuamua uzito wa ushahidi wa ujumbe data, yafuatayo yatazingatiwa-

The words *kukubalika kwa ushahidi* in subsection one, which translates into English as 'admissibility of evidence' do not appear in subsection two, where the words *uzito wa ushahidi* appear, which translates into English as 'evidential weight'. These are the only words used. Second, the condition in section 18(2)(d) of the ETA 'any other factor that may be relevant in assessing the weight of evidence' suggests that the preceding conditions in subsection two, that is, section 18(2)(a)-(c), are factors for assessment of evidential weight but not its admissibility. This is because section 18(2)(d) provides for additional factors similar to the previous ones to determine evidential weight. Moreover the word 'and' between section 18(2)(c) and (d) leaves no doubt that the conditions in section 18(2) of the ETA are cumulative.

Third, the initial draft of the ETA, the Electronic Transactions and E-Commerce Act 2013, separates the admissibility of electronic evidence in section 13(1) from factors that may be used to assess the evidential weight in section 13(3). This is also the case for section 17(1) and (3) of the 2014 Draft Electronic Transactions Act which governs the admissibility and weight of electronic evidence respectively. Moreover, it is important to note that this distinction is also provided in section 18(1) and (3) of the Draft Bill on Electronic Transactions and Communications Act 2013. This is the draft that was meant to transpose the Southern African Development Community (SADC) Model Law on Electronic Transactions and Electronic Commerce 2012 into the national law of Tanzania. This draft is commonly known as the HIPPSA Draft Bill because it was implemented through the Harmonization of the ICT Policies in Sub-Saharan Africa, a project sponsored by the International Telecommunication Union. Fourth, sections 18(1) and (2) of the ETA are based on article 9(1) and (2) of the UNCITRAL Model Law on Electronic Commerce with Guide to Enactment (with additional article 5 *bis* as adopted in 1998). These provisions deal with the

admissibility and evidential weight of data message respectively.

For completeness of this part, it is important to cite other relevant provisions that may apply when the admissibility of electronic evidence is in question. Section 18(3) provides conditions in which the authenticity of the electronic record system is presumed in favour of the admissibility of electronic business records. This is what is sometimes known as the presumption of regularity. Accordingly, when the admissibility of an electronic record is in issue under section 18(1) of the ETA, section 18(3) automatically comes into play. However, a point has to be made that this provision does not apply in the case of a bankers book which, though it is a type of electronic business record, it has a special regime for its admissibility and authentication under section 78A of the TEA as amended by the WLA. In the context of electronic communications, section 19 of the ETA deals with the attribution of data message by establishing a presumption that under certain circumstances a data message would be considered a message of the originator. Nonetheless, such presumptions do not apply as to the person by whom such a message was sent.<sup>11</sup> This section is applicable to authenticate an e-mail when its admissibility is in question.

The other important provision in the ETA is section 20. This provision deals with equivalent ways of fulfilling the requirement of the production of an original document in electronic form. It states that if a law requires a person to produce a document or information, that requirement is met if the person produces, by means of an electronic communication, an electronic form of that document or information. This section also envisages other forms of documents made by using output devices such as printers, etc. This is, however, subject to conditions provided in this provision – that is, the integrity of the information contained in a document is maintained if the information has remained complete and unaltered. Additional endorsement or immaterial change, which arises in the normal course of communication, storage or display, does not affect the integrity of the document.

### **The Electronic and Postal Communications Act 2010**

The Electronic and Postal Communications Act (EPOCA) was enacted prior to the Electronic Transactions Act. Section 164(1) of the EPOCA states that notwithstanding any other law to the contrary:

- (a) any document, or copy of or extract from any document, relating to the affairs of any person that has been seized or obtained by;
- (b) any statement of a person relating to the affairs of any person has been seized or obtained by; or
- (c) any statement of a person relating to the affairs of the person that is made to, an officer of the Tanzania Communications Regulatory Authority in accordance with the provisions of this Act, is admissible in any proceedings with respect to any offence under this Act.

This provision is limited to criminal proceedings and offences in the EPOCA. This Act also provides, in ss 2, that the admissibility of documents is not affected by a claim that in the course of a criminal investigation an accused was induced by the authorities of the Tanzania Communications Regulatory Authority to provide evidence on account that no prosecution will be instituted against him.

### **Prevention of Terrorism Act 2002**

The Prevention of Terrorism Act deals with lawful interception of communications. The definition of communication in section 3 is broad, and may include electronic communications. Section 30(4) defines the word 'data' as information recorded in a form that can be processed by equipment operating automatically in response to instructions given for that purpose. As far as evidence is concerned, section 31(4) provides that any information contained in a communication intercepted shall be admissible in proceedings for an offence under the Act as evidence of the truth of its contents, notwithstanding the fact that it contains hearsay. Arguably this section modifies the application of the hearsay rule in the context of electronic evidence in criminal proceedings under the Act.

### **Tax related statutes**

The statutes under this heading include the Stamp Duty Tax, the Regulation on Electronic Fiscal Devices and Income Tax Act. All of these statutes have been amended to include a definition of document to

<sup>11</sup> *Republic v Mark Lloyd Steveson* [2016] eKLR.

include data messages. Although no detailed rules of evidence are provided in these statutes, they provide the basis for the application of such laws as the WLA and the ETA, which are specifically applicable regarding the admissibility of data messages.

### Admissibility of electronic evidence: case law

#### Pre-Electronic Transactions Act

The landmark case that considered the issue of admissibility of electronic evidence in Tanzania is *Le-Marsh*.<sup>12</sup> In this case, records of a bank statement in the form of a computer print-out were produced in court to prove how loan interest claimed had been computed. The evidence produced on behalf of the bank was in the form of affidavit. The defendant objected to the production of this piece of evidence alleging that the printed statement was not an original document. The court had to deal with whether the computer print-out was a banker's book under the TEA.

Relying on foreign law, in this case section 9 of the UK Bankers Books Evidence Act 1879 as amended in 1979, the court held that a banker's book includes evidence emanating from computers. Accordingly a computer print-out was held to be a banker's book. However, the court went further and held its admissibility in evidence was subject to the conditions set out in sections 78 and 79 of the TEA. The court also considered section 77 of the TEA, which states that:

Subject to this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded.

Under section 78 of the TEA, the following conditions must be satisfied for a copy of an entry in a banker's book to be received in evidence:

78.-(1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it is first proved that the book was

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

(2) Such proof under subsection (1) may be given by a partner or officer of the bank and may be given orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits.

Moreover, section 79 of the TEA requires a further verification to prove that a copy of any entry in a banker's book has been examined with the original entry and is correct. This section states:

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

(2) The proof under subsection (1) shall be given by person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner for oaths or a person authorised to take affidavits.

#### After the 2007 Amendment to the TEA

In the next case of *Lazarus*,<sup>13</sup> the plaintiff sought to tender e-mails in evidence to prove a claim for defamation. The court considered whether an e-mail, being electronic evidence, is admissible in civil proceedings. This followed a preliminary objection raised by the defendant in the context of the amendment of the TEA by the Written Laws (Miscellaneous Amendments) Act, 2007 which introduced sections 40A and 78A. These provisions deal with the admissibility of electronic evidence in criminal proceedings as well as in banking business respectively.

Relying largely on the US case of *Lorraine v Markel*,<sup>14</sup> Makaramba J held:

<sup>12</sup> *Trust Bank Tanzania Ltd v Le-Marsh Enterprises Ltd* (2002) TLR 144. This case is also considered in Alex B. Makulilo, 'Admissibility of computer evidence in Tanzania', 4 *Digital Evidence and Electronic Signature Law Review* (2007), 56 – 60; Adam J. Mambi, 'Electronic evidence in Tanzania', 10 *Digital Evidence and Electronic Signature Law Review* (2013), 123 – 127.

<sup>13</sup> Commercial Case No.10 of 2008, HCT (Commercial Division), Arusha (Unreported).

<sup>14</sup> 241 F.R.D. 534 (D. Md. 2007), 73 Fed. R. Evid. Serv. 446, 2007 WL 1300739 (D.Md May 4, 2007), 2007 ILRWeb (P&F) 1805; Brian W. Esler, 'Lorraine v Markel: unnecessarily raising the standard for admissibility of electronic evidence', 4 *Digital Evidence and Electronic Signature Law Review* (2007), 80 – 82.

(a) For purposes of admissibility in civil proceedings, evidence generated by computers including e-mails constitutes a document in terms of section 3 of the TEA, subject to the general evidentiary rules on documentary evidence found in Part III of TEA. (pp.20-21).

(b) Much as issues of admissibility of electronically produced document in evidence may arise, the standards to be set by courts as to authentication go more to the weight to be attached by courts to such evidence in the event it is admitted. (p.21).

(c) If the admissibility of the document is being disputed, evidence as to its authenticity will be required. In criminal proceedings, where the burden of proof is much higher than in civil proceedings, it will always be necessary for the party seeking admissibility of a particular document to be able to produce some founding testimony as to the source and authenticity of the document, especially if it is an image, otherwise the courts may refuse to admit the evidence. (p.24).

(d) In criminal proceedings, a prosecutor or party to civil litigation will always be prepared to offer further evidence about the source of electronic evidence and the processing and storage it has undergone since it was first recorded. (p.24).

(e) A party in civil proceedings must meet the following standards rules (hurdles) before an electronically generated document is admitted in evidence (p.36):

(i) Is the e-mail relevant as determined under the Evidence Act, 1967 [Cap.6 R.E 2002] (does it have any tendency to make some fact that is of consequence to the litigation more or less probable than it otherwise would be)?

(ii) If relevant under the Evidence Act, 1967 [Cap.6 R.E 2002] as amended, is it authentic in the sense that, can the proponent show that the-mail is what it purports to be?

(iii) If the e-mail is offered for its substantive truth, is it hearsay as defined under the rules in the Evidence Act, [Cap.6 R.E 2002] as amended, and if so, is it covered by an applicable exceptions(sic) to the hearsay rules under the Evidence Act, 1967[Cap.6 R.E 2002] as amended?

(iv) Is the e-mail that is being offered as evidence an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of the e-mail?; and

(v) Is the probative value of the e-mail substantially outweighed by the danger of unfair prejudice or other identified harm?

The court observed, at 37, that the above standards set court rules for guiding courts in determining the admissibility of electronically stored information is not limited to e-mails only, but may encompass other forms of electronic evidence such as computer print-outs, website messages etc.

Also important to note, the court made two remarks (p. 23) that in civil proceedings where fraud is alleged and if a signature is at issue, it is obviously better to produce the original document rather than an electronic image or even a photocopy of it. Similarly, the court remarked, at 23, that in civil proceedings where issues relating to authenticity in relation to computer generated records are likely to arise, the process of discovery in which parties exchange various documents in their possession, power and control may resolve problems.

In a subsequent case of *Exim Bank*,<sup>15</sup> which is similar to *Le-Marsh*, the court determined whether computer print-out statements extracted from an account operated by the plaintiff bank were admissible in court. The defendant objected to the admissibility of computer print-out statements on two grounds. First, that pursuant to section 78 of the TEA, the plaintiff had not proved that the print-out statements in the entries of the alleged bank accounts were made (i) in the usual and ordinary books of accounts of the

<sup>15</sup> Commercial Case No.29 of 2011, HCT (Commercial Division), Dar es Salaam (Unreported).

plaintiff bank, or (ii) in the usual and ordinary course of business of the bank, and that (iii) the statements were in the custody and control of the plaintiff bank. Second, that plaintiff had not proved that the print-out statements or documents were examined with the original entries and certified to be correct pursuant to section 79 of the TEA.

The court adopted the guidelines from India where the TEA finds its origin. The court held that in fulfilling the requirements of sections 78 and 79 of the TEA, the electronically generated information in the form of print-outs have to be accompanied by three certificates (pp. 9-11 of the court's ruling):

- (a) A certificate to the effect that it is a print out of such an entry by the accountant or branch manager of the relevant bank.
- (b) A certificate by a person in charge of a computer system containing a brief description of the computer system and particulars of:
  - (i) The safeguards adopted by the system to ensure that data is entered or that any other operation is performed by an authorised person.
  - (i) All safeguards adopted to prevent and detect an authorised change of data.
  - (iii) The safeguards available to retrieve data that is lost due to systems failure or any other reasons.
  - (iv) The manner in which data is transferred from the system to removable media like floppies, disks, copies or other electronic magnetic data storage devices.
  - (v) The mode of verification in order to ensure that data has been accurately transferred to such removable media.
  - (vi) The mode of identification of such data storage devices.
  - (vii) The safeguards to prevent and detect any tampering with the system and,
  - (viii) Any other facts which will vouch for the integrity and accuracy of the system.
- (c) A further certificate from the person in charge of the computer system to the effect that to the best of his personal knowledge

and belief, such computer system, operated properly at the material time of when he was provided with all the relevant data and the print out in question represent correctly or is appropriately derived from the relevant data.

Applying the above guidelines, the court rejected the computer print-outs, as the plaintiff failed to provide the proof or certificates required in terms of the provisions of sections 78 and 79 of the TEA.

### Post-Electronic Transactions Act

The first case to be decided by the High Court of Tanzania on the admissibility of electronic evidence following the enactment of ETA is *Emmanuel Godfrey Masonga*.<sup>16</sup> This was an election case in which the respondents raised a preliminary objection against the production of a Video Compact Disc (VCD), sought to prove utterances of discriminatory words against the petitioner resulting in his loss of the election.

The objection was based on sections 18(2)(a)-(c) and 18(3) of the ETA. The respondents raised questions regarding the reliability and authenticity of the electronic data that was produced. In the first place, the original record was captured by a mobile telephone which was lost after the video clip was sent to the petitioner. Subsequently, the petitioner returned the video clip to the witness who made a DVD from a computer. How the VCD was generated, stored and communicated was cast into doubt, as no evidence was led to show that the computer from which the VCD was made could not be accessed by any other person. Other grounds of objection included that there was no proof of identification of the brand of the cell phone that was used to capture the video; no evidence that the cell phone was functioning properly; the VCD was not made by the first respondent who is an adverse party to the person seeking to produce the evidence in court; the witness was acting under the control of the petitioner contrary to section 18(3)(c); there was no evidence of loss of the cell phone; no evidence to comply with section 67(c) of the TEA, which requires that where original evidence is not available, secondary evidence may be provided; and also the continuity of custody of the electronic data sought to be tendered left doubt that the VCD might have been tampered with.

<sup>16</sup> Miscellaneous Civil Cause No.6 of 2015, HCT (Iringa District Registry), Njombe (Unreported).

In determining the objections, the court raised three questions, namely: whether the VCD was admissible in evidence; if so, how was admissible, and whether the VCD in this case was admissible. The court held that the electronic evidence, and in this case the VCD, was admissible in both criminal and civil proceedings by virtue of the Electronic Transactions Act as amended by section 64A to the Evidence Act. The court also referred to the case of *Salum Said Salum*,<sup>17</sup> decided by the High Court of Zanzibar, in which the admissibility of a VCD was in question. In this case, High Court of Zanzibar admitted a VCD into evidence based on three guidelines: the accuracy of the VCD, proper identification of the voices and picture, and its relevance to the issue in litigation. The court rightly observed that the hallmark of the conditions for admissibility of electronic evidence under section 18(1) is authenticity. However it confusingly went on to hold that admissibility of electronic evidence is subject to the conditions set out in section 18(2). Most of the criteria in this subsection are about reliability. The court held that the electronic data sought to be tendered (VCD) was inadmissible in evidence due to doubts of the reliability how the evidence was generated and stored. Moreover, no evidence was led to prove authenticity of the VCD as well as the chain of custody.

With regard to the application of the best evidence rule, the court held that the data recorded in the cell phone was the original document. As data was transferred to the petitioner's cell phone and then returned to PW6 and subsequently to the computer before it was produced as VCD, what was sought to be produced (i.e. VCD) in evidence was secondary evidence. No foundation of production of secondary evidence was laid down as required by the TEA.

In the subsequent election case of *William Joseph Mungai*,<sup>18</sup> the court was called on to determine a preliminary objection closely similar to *Emmanuel Godfrey Masonga*. In this case, PW14 sought to tender on behalf of the petitioner an audio CD to prove allegations of violence in the election by the first respondent. The respondents raised two grounds, first that the PW14 was not a competent witness to tender the audio CD, as he was not its author and second, that there were possibilities of tampering

with the audio CD. In overruling the preliminary objection, the court held that his affidavit, together with an extended examination in chief PW 14's evidence, presented prima facie evidence that satisfied the conditions set out in section 18(2) of the ETA. In this case, the court also made two important remarks. First, admissibility of electronic evidence is one thing and assessing its weight is another thing. In this case, the court admitted the evidence pending its subsequent discrediting on merit. The second important remark made by the court is that sustaining an objection cannot be based on the mere assumptions that it is easy to tamper with electronic evidence.

### Case commentary

The case law of the High Court of Tanzania before and after the enactment of the Electronic Transactions Act leaves many uncertainties as to evidentiary issues of electronic evidence. Generally speaking it is not clear to what extent the exclusionary common law rules of admissibility of evidence, namely authenticity, hearsay and best evidence codified in the Tanzania Evidence Act apply in the context of electronic evidence. The effect of the amendments brought about by the Written Laws (Miscellaneous Amendments) Act 2007 to the TEA as well as the ETA in admissibility of electronic evidence in criminal and civil proceedings has yet to be thoroughly assessed. It is difficult to determine the extent the new rules in the WLA and ETA modify the existing common law rules of evidence. The case law does not provide sufficient guidance to this issue. Perhaps subsequent case law, including references to Court of Appeal of Tanzania, may offer clarification in future.

As a first point to note, the Electronic Transactions Act is based on an inclusionary rather than exclusionary approach to the admission of electronic evidence. Accordingly, section 18(1) of the Act prohibits the application of rules of evidence to deny admissibility of data message (i.e. electronic evidence) on the ground that it is a data message. Since the ETA provides for a special regime of the admissibility of electronic evidence, it prevails over any general law regulating the admissibility of evidence, in this case the Tanzania Evidence Act. This overall scheme of the ETA has not been read in by the High Court of Tanzania in the TEA in the two cases that were decided on this Act, that of *Emmanuel Godfrey Masonga* and *William Joseph Mungai*. Nonetheless, in

<sup>17</sup> *Salum Said Salum v DPP*, Criminal Appeal No.3 of 2013, HCZ, Vuga (Unreported).

<sup>18</sup> *William Joseph Mungai v Cosato David Chumi*, Miscellaneous Civil Cause No. 8 of 2015, HCT (Iringa District Registry), Iringa (Unreported).

*William Joseph Mungai*, the court did reflect the ETA. In this case the court overruled the objection against the production of an audio CD on the mere assertion that the audio CD, being in digital form, was easily tampered with.

The other difficulty in the case law of the High Court of Tanzania in deciding the admissibility of electronic evidence is the failure by the court to make a clear distinction between questions of admissibility and weight of evidence. These are separate issues. Once a piece of evidence is admitted in evidence and it has formed the record of the court, only then the question of its weight arises. Weight of evidence goes to its merit. Accordingly, it is suggested that the court has erroneously applied the criteria in section 18(2) of the Electronic Transactions Act to determine admissibility of electronic evidence in section 18(1) of this Act. *Emmanuel Godfrey Masonga* and *William Joseph Mungai* have all relied on section 18(2), although the court in *William Joseph Mungai* did not go further to evaluate how the criteria in this sub-section were met. Nonetheless, the court correctly held that the question of weight of the audio CD could be tested through cross-examination and re-examination. As pointed out (para 2.3), the word 'admissibility' which inadvertently appears in section 18(2) of the ETA, might be the source of this confusion. The other confusion arises from section 64A (2) of the TEA, which directs generally that admissibility of electronic evidence shall be determined in the manner prescribed in section 18 of the Electronic Transactions Act. To be sure, this section has four subsections, each of which is confined to a specific issue. Section 18(1) of the ETA deals with the admissibility of data messages, while section 18(2) deals with the determination of evidential weight of data messages. The authentication of the electronic record is governed by section 18(3), and guidance to determine the admissibility of the electronic record is provided in section 18(4). By using the criteria in section 18(2) to determine admissibility of electronic evidence, the High Court of Tanzania has unnecessarily raised the standard too high to the extent of excluding electronic evidence, contrary to the spirit of section 18(1) of the ETA.

Invoking the provisions of section 18(2) of the ETA to determine the admissibility of electronic evidence means that the court has missed the opportunity of providing guiding criteria of admissibility of electronic evidence. Generally, the ETA does not provide such

criteria, although there are presumptions in the Act that may offer assistance in determining admissibility. However these are far from being sufficient. Since section 18(1) of this Act puts electronic evidence on an equal footing with paper-based evidence, the ordinary rules of relevance, authentication and originality may equally apply to the admissibility of electronic evidence. Accordingly, sections 7-18 of the TEA, which provide that to be admissible, evidence must be relevant to the issue in litigation, may be applicable. Moreover, in case of electronic evidence, such evidence must also be authenticated before it is admitted. Yet authentication of digital data must reflect its unique characteristics. At the moment, since there is no guidance from the High Court of Tanzania how digital data should be authenticated, the guidance provided in chapter 4 on 'Authenticating digital data' in Mason *Electronic Evidence*, and which is the subject of the proposed *Convention on Electronic Evidence*<sup>19</sup> provides a useful starting point for the Tanzanian judges. The guidance has five tests, at 130:

- (a) The data (both the content and associated metadata) that a party rely upon have not changed (or if the data have changed, there is an accurate and reliable method of recording the changes, including the reasons for any such changes) from the moment they were created to the moment they were submitted as evidence.
- (b) As a corollary to (1) above, it is necessary to demonstrate a continuity of the data not being altered between the moment the data were obtained for legal purposes and their submission as an exhibit.
- (c) As corollary to (2) above, it should be possible to test any techniques that were used to obtain and process the data.
- (d) The data can be proven to be from the purported source.
- (e) The technical and organizational evidence demonstrates the integrity of the data is trustworthy, and is therefore considered to be reliable.

<sup>19</sup> Draft Convention on Electronic Evidence, Article 4, <http://conventiononelectronicvidence.org/>. Editor's note: Please note that the tests from Mason have been adjusted in the Draft Convention on Electronic Evidence, which is published in this edition of the journal.

Rarely has the court considered these principles. The court correctly, but only partly, dealt with these principles in *Lazarus*, but subsequent case law has not applied the guidance set out in this case. It is noteworthy that the use of secure electronic signatures in electronic communication such as e-mail, as provided in sections 7 and 8 of the ETA, may be sufficient to authenticate an e-mail and other forms of electronic communications. Also, the ETA presumes, in section 18(3), the authentication of an electronic record system where the admissibility of an electronic record is in question.

While relevance and authentication of electronic evidence is somehow less problematic, difficulties have arisen with regard to the application of the original writing rule in determining the admissibility of electronic evidence. Part of this problem is attributed to the fact that the distinction between 'original' and 'copy' of a document is blurred in the digital environment. Moreover, it is impossible to make an original electronic document viewable and readable by sight without some assistance of software and hardware in the nature of output devices such as computer screen, printer or data projector.<sup>20</sup> In the above cases, the court has, over and over again, insisted that an electronic document must comply with the best evidence rule that whenever a party wishes to produce a document in court as evidence he must provide an original of that document, which is called the primary evidence. By way of exception, a copy of such a document may only be admitted as secondary evidence in the circumstances stipulated in the TEA. This rule applies in the case of a private document. However, the court has not clarified how secondary evidence of an electronic document may be produced in legal proceedings. In *Emmanuel Godfrey Masonga*, for example, the court observed that data recorded in the cell phone that was lost was the original document. It simply said the VCD that was made, could be produced as secondary evidence without further clarification. It can be argued that the concept of 'original' cannot be applied to electronic evidence in the same manner as it can be applied to paper-based evidence.<sup>21</sup> Accordingly, different approaches

have been used to define the concept 'original' broadly. It is deemed that print-outs are originals, and they are admitted because of the liberal admission of copies of documents.<sup>22</sup> The Electronic Transactions Act addresses the problem of the original writing rule in the context of electronic evidence. It provides, in section 20, the manner by which the production of the 'original' document in electronic form may be met. It is surprising that the court did not address itself to this provision in the case of *Emmanuel Godfrey Masonga*, which was decided after the ETA became operational.

The other recurring problem that has troubled the court is the application of the hearsay rule in the context of the admissibility of electronic evidence. Generally speaking, hearsay evidence is inadmissible unless it falls in one of the exceptions provided under the law. Under the TEA, there are several hearsay exceptions, and the business record exception is relevant to the present discussion. A bankers book is one of the examples of the business record exception of the hearsay rule. Part IV of the TEA (ss.76-82) provides a special regime for the admissibility of evidence in banking. Prior to the amendment of the Tanzania Evidence Act through the Written Law (Miscellaneous Amendments) Act, the court held in *Le-Marsh* that the admissibility of a computer print-out of a bankers book is subject to the safeguards provided in sections 78 and 79 of the TEA. The court considered section 77, which states that a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of such entry and of the matters, transactions and accounts therein recorded. However, after the amendments by the WLA, section 78A deals specifically with the business record exception of the hearsay rule in the context of electronic banking. Section 78A provides clearly that any entry in the banker's book is deemed as primary evidence of such entry, and such a banker's book is deemed as document for purposes of section 64(1) of the TEA. What it means is that section 78A does away with the concept of an electronic record in the banking business (a bankers book) being hearsay. It is interesting to note that in *Exim Bank*, a case that was decided after section 78A was inserted in the TEA, the

<sup>20</sup> For a detailed discussion about the characteristics of electronic evidence, see Burkhard Schafer and Stephen Mason, Chapter 2 'The characteristics of electronic evidence in digital format', in Stephen Mason, (ed), *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012).

<sup>21</sup> Stephen Mason, 'Electronic Evidence and the Meaning of "Original"', *Amicus Curie*, 2009, No.79, pp. 26-28, available at <http://sas-space.sas.ac.uk/2565/>; reading this article, one can take the author to infer that when you send an e-mail, the recipient only

receives a copy of the e-mail sent – so which is the 'original' – the e-mail on the sender's device or on the recipient's device? What if both e-mails are sent and received over the 'cloud' and both are stored on servers in other countries? Does it mean that the server must be sent to Tanzania for the original to be admitted into evidence?.

<sup>22</sup> Proposed Final Draft: Tanzania Evidence Act 2014 from the Chief Consultant and Drafting Committee, May 7, 2014, p.16 <https://www.bu.edu/ilj/files/2015/03/Proposed-Final-Draft.19.pdf>.

court unnecessarily raised the bar inconsistently with the statutory mode of proof that is provided in sections 78 and 79 of the TEA. Instead of confining matters to proof by oral testimony or affidavit, the court decided on the need for three certificates. Moreover, the court restricted the competent witness to a bank manager or accountant, as against a partner or officer of the bank, as required in sections 78 and 79 of the TEA. It also required a person in charge of a computer system to make a certificate as to the proper functioning of the computer. Although the court did not specifically deal with section 78A of the TEA, it held that evidence has to be led to show that the computer system from where a print-out of electronic record was made operated properly at the material time and that the print-out in question represents correctly or is appropriately derived from the relevant data. Perhaps this may be taken to be in line with section 78A, which partly states that ‘...obtained by a mechanical or other process which in itself ensures the accuracy of such print out...’ The court’s approach reflects the dominant statutory and judicial approach in many jurisdictions that, if evidence from computers and computer systems is to be admitted, it is presumed that ‘mechanical instruments were in order at the material time.’<sup>23</sup> However this approach is problematic for several reasons, as pointed out by Mason. In broad terms, it is not possible to know that a computer is working properly, even for highly skilled professionals. Part of the problem is that computer fail in discontinuation ways, unlike most mechanical devices.<sup>24</sup> This problem is demonstrated in the evidence of expert witnesses in *Regina v Seema Misra*.<sup>25</sup> The other problem with a presumption that a computer is deemed to be reliable is that as systems have become more complex, and it has become progressively more challenging to test software to reflect the way the users will use the product. No evidence has been adduced to demonstrate the accuracy of such a presumption. And above all, there is no authoritative judicial guidance in

relation to the meaning of the words ‘reliable’, ‘in order’ or ‘working properly’ in the context of digital data.<sup>26</sup>

### Future prospects

The admission of electronic evidence presents challenges due to its unique nature. The common law rules of evidence, notably authenticity, hearsay and best evidence have been strained with digital technology. The analysis of the case law from the High Court of Tanzania demonstrates the limitation of the common law rules of evidence that are codified in the TEA. The case law is inconsistent. It is predicted that uncertainties may still arise in procedural issues, such as discovery in civil proceedings. This may also happen in criminal proceedings in the course of the investigation, search and seizure based on the recently adopted Cybercrimes Act 2015. The Tanzanian courts have the judicial duty of ensuring consistency in interpreting relevant statutes specifically developed to regulate admissibility of electronic evidence. The effect of in the Written Laws (Miscellaneous Amendments) Act and the Electronic Transactions Act over the existing rules of evidence must be thoroughly examined. While the WLA and ETA do not entirely abolish the common law rules of evidence in Tanzania, it is important for courts, advocates and other legal practitioners to understand the domain and extent of their application. It is recommended that seminars on issues of electronic evidence may offer insights to these legal practitioners.<sup>27</sup>

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<sup>23</sup> Stephen Mason, Chapter 5 ‘Mechanical Instruments: the presumption of being in order’, in Stephen Mason, (ed), *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012).

<sup>24</sup> Stephen Mason, Chapter 5 ‘Mechanical Instruments: the presumption of being in order’, in Stephen Mason, (ed), *Electronic Evidence* (3rd edn, LexisNexis Butterworths, 2012), p.153. See also Stephen Mason and Timothy S. Reiniger, “‘Trust’ Between Machines? Establishing Identity Between Humans and Software Code, or whether You Know it is a Dog, and if so, which Dog?”, *Computer and Telecommunications Law Review*, 2015, Volume 21, Issue 5, 135 – 148.

<sup>25</sup> See comments by Stephen Mason in *Regina v Seema Misra*, published in the *Digital Evidence and Electronic Signature Law Review* in 2015.

<sup>26</sup> See Stephen Mason, Chapter 5 ‘Mechanical Instruments: the presumption of being in order’, generally.

<sup>27</sup> A syllabus was published in the *Digital Evidence and Electronic Signature Law Review* in 2013.