

# THE IMPACT OF DIGITAL PHOTO MANIPULATION ON THE ADMISSIBILITY OF PHOTOGRAPH IN EVIDENCE: THE NIGERIAN EXPERIENCE

By

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## **ABSTRACT**

*Evidence is an important phenomenon in litigations that ascertains the truth of the fact in issue. It includes all the means by which any alleged matter of fact, the truth of which is submitted to adjudication is established or disproved. In legal parlance, the best evidence is documentary evidence based on the fact that it is most original and satisfactory and as such, its proof under any possible circumstances affords the greatest certainty of the fact in question. Photograph is a species of best evidence and this explains why many viewers have trust in the aphorism that camera never lies. However, the emergence of digital photography offers new realms of opportunity for the manipulation, reproduction and transmission of images. This makes it possible for people to be edited in or out of a picture in such a way that judges and other viewers may believe that the manipulated images are accurate depictions of the photograph in reality. This study employs doctrinal research method to discuss the nature of digital photo manipulation and its various techniques, critically assesses the adequacy of the legal framework for admissibility of evidence in Nigeria; as well as examining the extent of the negative impact of photo manipulation on the credibility of tendering photograph in evidence. The paper finds, among others, that the current legal regime in Nigeria that regulates admissibility of documents is inadequate to capture incidences of photo manipulation. Consequently, it suggests amendment to the current Evidence Act to stipulate special conditions for admissibility of photograph to forestall perversion of justice.*

**Keywords:** Photo Manipulation; Digital Photography; Documentary Evidence; Best Evidence

## **Introduction**

Evidence performs a vital function in adjudication of cases. It is a phenomenon in litigations that ascertains the truth of the fact in issue and as such it constitutes a springboard through which justice is attained in any legal proceedings. It comprises of virtually all the classes of facts which are allowed in law to be adduced in courts as proof of other facts subject to certain exceptions.<sup>1</sup> It is technically called judicial evidence and it may take various forms such as oral, hearsay, direct, circumstantial, documentary or real depending on its mode of rendition.<sup>2</sup> When evidence is the *viva voce* testimony given by a witness in court which relates what the witness knows personally, it is said to be oral; but the one given by a witness who relates not what he or she knows

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<sup>1</sup> Fidelis Nwadialo- *Modern Nigerian Law of Evidence* (2<sup>nd</sup> edition), University of Lagos Press, Lagos, 1999, P.4

<sup>2</sup> Garner B.A. *Black's Law Dictionary* 8<sup>th</sup> Edition West Publishing Co. U.S.A ,2009, Pp. 635-640 ,See also Fidelis Nwadialo *op. cit.* .Pp.5-11

personally, but what others have said and what is therefore dependent on the credibility of someone other than the witness is hearsay evidence. Direct Evidence is the evidence that is based on personal knowledge or observation and that if true, proves a fact without inference or presumption while circumstantial evidence is based on inference and not on personal knowledge or observation. Evidence is documentary when supplied by a writing or other document which must be authenticated before the evidence is admissible. Real evidence is the physical evidence that itself plays a direct part in the incident in question.<sup>3</sup>

As a variety of evidence, the scope of documentary evidence under the Evidence Act, 2011 is widely extensive to include items such as books, plans, photographs, and any matter expressed or described upon any substance by means of letters, figures or marks intended to be used or which may be used for the purpose of recording that matter.<sup>4</sup> In whichever form it manifests, documentary evidence is usually believed to be the best evidence because it is most natural and satisfactory, and as such, it is regarded as the kind of proof which under any possible circumstances affords the greatest certainty of the fact in question.<sup>5</sup> In other words it is a credible evidence not susceptible to easy manipulation. Photograph is a variety of documentary evidence as it shares common attributes of credibility and integrity with documents. In the years of traditional photography, camera was used as optic-gathering and focusing system and through film emulsion medium, images are stored, the final results of this are usually in the form of prints and transparencies.<sup>6</sup> This made many viewers have trust in the aphorism that camera never lies. It is believed that it accommodates no manipulation because photography and the technology that made it possible then were rather crude and cumbersome. Over the time, equipment and technology progressed which evolved photography into the digital realm. Consequently, it makes the practice of digital image manipulation available thereby making faked photos harder to detect.<sup>7</sup> The availability of photographic fakery no doubt, casts doubt upon the authenticity as well as admissibility of photograph in evidence in legal proceedings in this era of information and communication technology.

The foregoing discourse makes this paper to explore an in-depth search into the nature of digital photo manipulation and its techniques, critically assess the adequacy of the legal framework for admissibility of photographic evidence in Nigeria; as well as examining the extent of the negative impact of photo manipulation on the credibility of tendering photograph in evidence under the Nigerian legal system. The paper thoroughly dissects the relevant provisions of the Evidence Act, 2011 to confirm if it entails means of evidential authentication of photograph before tendering and admissibility in evidence in order to avoid perversion of justice by incidences of photo manipulation.

### **Explaining Digital Photo Manipulation and Related Terms**

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<sup>3</sup> Fidelis Nwadialo *op. cit.* Pp.5-13 ; Aguda-*The Law of Evidence*, Spectrum Books, Ibadan, 2009, Pp.9-11

<sup>4</sup> Section 258 ,*Evidence Act*, 2011

<sup>5</sup> Garner B.A- *Blacks Law Dictionary*, 8<sup>th</sup> Edition, West Publishing Co. U.S.A ,2009,Pp.635-636

<sup>6</sup> Van Nostrand's *Scientific Encyclopaedia*, Tenth Edition, Volume 2,John Wiley & Sons,Inc.2008, Hoboken, New Jersey, P.4080

<sup>7</sup> [www.brightshub.com](http://www.brightshub.com); What is Photo Manipulation; Really? Accessed on 3<sup>rd</sup> October,2016

Photo manipulation is a technical expression for the application of image-editing or image-changing techniques to photographs. The epithet 'digital' implies computer-based photo manipulation. Initially, machines called digital computers were designed to calculate or compute automatically the answers to simple arithmetic problems or more difficult mathematical problems involving simple and very complex equations of relationship.<sup>8</sup> To computer designers, it soon became evident that the design elements required to perform arithmetic and mathematical calculations also could be used to manipulate information in other ways such as storing, retrieving, sorting, classifying among others and such other duties were added to the computer's computing capabilities.<sup>9</sup> Never the less, digital photo manipulation involves transforming or altering a photograph to achieve desired results such as illusion; deception; allurements, political propaganda and of course criminal indictment or exculpation depending on the application or intent.<sup>10</sup> Its various forms are made possible through the use of different techniques. For instance, photographs may be retouched using ink or paint or air brushed. Instant films may be scratched, and photos or negatives may be pieced together in the darkroom among others.<sup>11</sup> Photo retouching is a type of image manipulation frequently used in the modelling and acting industries. Photos are retouched to correct or perfect shots with refinement such as removing blemishes or moles, brightening eyes, whitening teeth and smoothening wrinkles.<sup>12</sup>

It is expedient to state that this paper does not intend to analyse all aspects of digital photo manipulation but only the area of it that call to question the authenticity of the admissibility of photograph in evidence. To achieve this, the intention of the photo manipulator and the effect of his manipulating act play prominent roles. Take for instance, if the photo manipulation comes in form of photo editing which consists of smaller changes, there may not be any trepidation as in such a situation, the artist or photographer is just trying to please his viewers; as such the manipulation could be said to be innocent one. Compared to a situation where the photograph of an accused person taken at the scene of an alleged crime is edited out and that of an innocent person is brought in; the act changes the image in a fundamental way, and the intention of the manipulator is to deceive or indict. As such this portrays criminal intent to which action in forgery or cheating may lie because in both offences there is deception caused or intended to be caused by false representations.<sup>13</sup> Be that as it may, it is pertinent to state that advancement in technology and equipment now makes incredible photo manipulation possible such that certain elements may be combined to create a unique image that can convince even the most experienced set of eyes of judges thereby giving a realistic view of an unreal picture.<sup>14</sup> Where then is photographic integrity in the era of digital photo manipulation?

It is necessary to state that it is not all pieces of evidence that are admissible to prove facts in legal proceedings, the admissible evidence has to be relevant and credible. Admissibility of evidence therefore connotes the quality of state of allowing evidence in a trial.<sup>15</sup> It can best be thought of as a concept consisting of two quite different aspects which are *disclosure of fact to*

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<sup>8</sup> Van Nostrand's *Scientific Encyclopedia*, Tenth Edition, Volume 1, John Wiley & Sons, Inc. 2008, Hoboken, New Jersey, P.1527

<sup>9</sup> Ibid

<sup>10</sup> www.yourdictionary.com Photo manipulation dictionary definition. Accessed on 3<sup>rd</sup> October, 2016

<sup>11</sup> +www.reference.com what is image manipulation, and how is it used? Accessed on 4<sup>th</sup>, October, 2016

<sup>12</sup> Ibid

<sup>13</sup> Chukkol K.S- *The Law of Crimes in Nigeria*, Ahmadu Bello University Press, Zaria, Nigeria, 2010, P.387

<sup>14</sup> www.webdesignerdepot.com ,40 Examples of Incredible Photo Manipulation Accessed on 4<sup>th</sup> October 2016

<sup>15</sup> Garner B.A. *op. cit.* P.53

*the court and express or implied permission to use as evidence.* The former is simple while the latter is complex. The complexity is borne out of the fact that evidence may be admissible for one purpose but not for another. Although section 4 of the Evidence Act, 2011 identifies relevance as the basis of admissibility but admissibility of any evidence is subject to all such conditions as may be specified in each case as regulated by the law.<sup>16</sup> As earlier stated, documentary evidence is the statement made in a document which is offered to the court in proof of any fact in issue, such a statement can be proved by the production of the statement itself in evidence for the inspection of the court.<sup>17</sup> Under the English common law, best evidence is required to be given. The judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will allow.<sup>18</sup> The rule was used to require production of original document in court.

Sight should not be lost of the fact that photograph is a kind of documentary evidence and by extension the *best evidence*. Scholars over the years are in unanimity that best evidence is that evidence which is more specific and definite as opposed to that which is merely general and indefinite or descriptive. It is that particular means of proof which is indicated by the nature of the fact under investigation as the most natural and satisfactory or as that kind of proof which under any possible circumstances affords the greatest certainty of the fact in question or as evidence which carries on its face no indication that better remains behind.<sup>19</sup> With the above highlighted instances and illustrations, has digital photo manipulation not eroded the characteristics originality, certainty and authenticity of photograph in evidence in any judicial proceedings?

## **Theoretical and Legal Framework for The Admissibility of Photograph in Evidence**

### ***Theoretical and Legal Frameworks***

The study adopts legal dynamism theory to explain the changes that occurred because of digital photo manipulation. The theory is built on the responsive nature of law to social, political and technological changes in the society. In other words, the content of the law of any society is usually the product of the prevailing social, political, economic and technological conditions at a particular time.<sup>20</sup> This goes to explain the fact that as photography changes from traditional to electronic there should be provisions in Evidence Act for detecting incidences of electronic photo manipulation otherwise the evidence jurisprudence will be growing at a disproportionate rate to the growth in science and technology.

In Nigeria, the issue of evidence in judicial proceedings is regulated by statutory enactment, which is Evidence Act, 2011. Part (v) thereof classifies documentary evidence into four categories thus: Documents produced by computer; Private document; Public document and affidavits.<sup>21</sup> A document is taken to have been produced by a computer under the Act if it was

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<sup>16</sup> Section 2 & 3, *Evidence Act*, 2011

<sup>17</sup> *Ibid*, Section 86

<sup>18</sup> Aguda *op cit* P 11

<sup>19</sup> Garner B.A. *op. cit.* Pp.635-636, Fidelis Nwadialo *op.cit.*, P.14

<sup>20</sup> Abiola Sanni –*Introduction to Nigerian Legal Method*, Obafemi Awolowo University Press Ltd, Ile-Ife, 2012, P.19,

<sup>21</sup> Section 83-120, *Evidence Act*, 2011

produced by it directly with or without human intervention or by means of any appropriate equipment;<sup>22</sup> while computer itself means any device for storing and processing information.<sup>23</sup> Therefore, one may not be under any fault to assert that the digital camera used by a photographer as well as the electronic medium used in the studio are computer devices. To that extent, the photograph generated from them falls under the documents produced by computer as provided for under the *Evidence Act*. Section 84 (1) of the Act provides that in any proceeding, a statement contained in a document produced by a computer shall be admissible as evidence of any fact stated in it of which direct oral evidence would be admissible provided it is shown that the conditions in sub -section (2) of the section are satisfied in relation to the statement and computer in question. The conditions referred to are stated below in verbatim:

- a) That the document containing the statement was produced by the computer 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 of that period the computer was operating properly or, if not, that in 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.

However, in any proceeding where it is desired to give a statement in evidence by virtue of the section, a certificate must be issued identifying the document containing the statement and describing the manner in which it was produced or the certificate must give such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer.<sup>24</sup> At this juncture, the question that comes to mind is whether meeting up with the above highlighted conditions backed up with presentation of certificate is adequate enough to detect photo manipulation in court. To be precise, photo manipulation is achieved through discrete electronic computer. Can an opposing counsel or the judge in the hallowed temple of justice detect the manipulation manually? The basic function of the evidence law is to ensure that justice is done, and the truth is as far as practicable, ascertained. The adversary system that Nigeria operates confines a judge to the evidence before him adduced by parties, and he is not allowed to take an active part in fact finding through interrogation of the accused or examination of documents as in the inquisitorial

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<sup>22</sup> Ibid, Section 84(3) (c)

<sup>23</sup>Ibid ,Section 258

<sup>24</sup> Ibid, Section 83 (3)

system. It is therefore paramount that there should be an effective system of discerning which evidence is admitted or rejected in proof of a matter.<sup>25</sup> The fact that photograph is a documentary evidence presupposes that there must be a means of authenticating it before the evidence is admissible. What section 84 provides for are conditions for laying foundation for admissibility and some of the conditions are more appropriately considered as affecting weight attachable to computer generated evidence and in this discourse digital photograph. A basic defect of the provision is in the absence of a requirement for verifying the accuracy of the input or data from the digital camera.<sup>26</sup> Considering the section very critically, it generalizes computer and it uses rather than distinguishing between the use of computer as a mere calculator where it is used to perform computations from information supplied to it, and a computer used as an independent data recorder into which the human agent enters statement of facts or opinion and from which such statements are subsequently retrieved.<sup>27</sup> The conditions highlighted in section 84 of the Evidence Act lean more towards the use of computer as a mere calculator for computation and the conditions may hardly be adequate to capture the incidences of the use of computer as a discrete data recorder obtainable in digital photography. In any event, there are other challenges incidental to the accuracy of digital photograph for the purpose of admissibility in evidence such as the problem of proof and problem of identifying the maker among others.

### ***Challenge of Proof***

Proof is essential to the admissibility of digital photograph in evidence. It establishes or refutes an alleged fact by evidence. It is a well-established law of evidence that the contents of documents are proved either by primary or secondary evidence regardless of whether the document is generated by computer or not.<sup>28</sup> Primary evidence in the context of this discourse is the digital photograph itself produced for the inspection of the court.<sup>29</sup> By virtue of section 86(1) of the *Evidence Act*, photographs are classified as documents made by one uniform process and each shall be primary evidence of the contents of the rest. But where they are all copies of a common original, they are not to be primary evidence of the contents of the original. Hitherto the negatives of photograph used to be the primary evidence while the print-outs are secondary; but for the fact that the images are captured by digital camera and translated to another computer in the laboratory or studio before being assembled in the form of print-outs, which one will be the primary or secondary evidence? The images are stored on either internal or external memory card in the camera. Can one say this storage device belongs to a known category of evidence? Even the evidential status of the print out is not free from controversy?<sup>30</sup>

### ***Problem of identifying the Maker***

The maker is the person who caused digital photograph to exist either with or without manipulation. In a proceeding where direct oral evidence of a fact is admissible any documentary evidence which seems to establish that fact shall on production of the original document be

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<sup>25</sup> Workshop Papers on Reform of the Evidence Act, 1995, P.16

<sup>26</sup> Yemi Osinbajo – Electronically Generated Evidence in Afe Babalola -*Law & Practice of Evidence in Nigeria*, Sibon Books Ltd, Ibadan, 2001 P.243

<sup>27</sup> Ibid, P.248

<sup>28</sup> Section 85, *Evidence Act*, 2011

<sup>29</sup> Ibid, Section 86

<sup>30</sup> Yemi Osinbajo op. cit 247

equally admissible as evidence of that fact whether or not the maker had personal knowledge of the content of the document provided the maker is called as witness in the proceeding.<sup>31</sup> To qualify as the maker, a person must have made or produced the photograph (document) or the material part of it by himself with his own hand.<sup>32</sup> To produce photograph digitally, the photographer is involved as well as the computer operator in the studio, the duo of who participated in the making of the photograph. The photographer does the snapping while the studio operator does the manipulation. Who between the two can be said to be the maker of the photograph in view of the provision of the *Evidence Act*. The requirement that to be regarded as the maker of the photograph, the person must have made or produced it by his own hand is one which certainly seals hope of any extensive use of the section to admit print-outs.<sup>33</sup> Besides it is clear that the provision of Section 83(4) to the effect that the maker must be one who makes or produces with his own hand does not envisage computer-generated evidence like digital photography.

### ***Problem of Authentication***

To expect a judge to detect manipulation for any desire of the maker of digital photograph is akin to the difficulty in expecting a camel to pass through the eye of a needle. As earlier stated, the advancement in technology and equipment now makes incredible photo manipulation possible such that certain elements may be combined to create a unique image that can convince even the most experienced set of eyes of judges thereby giving a realistic view of an unreal picture. Section 84 of the *Evidence Act* in its entirety cannot assist a judge in detecting the manipulation since he is neither an expert in photography nor in digital computer and he is not a super human with a wand to detect the manipulation. For instance, how can an accused person that put up the defence of *alibi*<sup>34</sup> be exonerated when he was fraudulently edited- in as being physically present at the scene of a crime in a photograph tendered in evidence before a court? To this extent, the provision of section 84 is weak in detecting digital photo manipulation and there is need for amendment to cater for evidential means of authenticating digital photo manipulation.

### **Conclusion**

Digital photography is a product of advancement in technology but with attendant challenges and problems. One of the problems is the one that can be brought about by manipulation of digital photograph particularly for negative desire. The paper, while discussing the impact of digital photo manipulation on the admissibility of photograph in evidence found that Section 84 of the *Evidence Act* though purportedly provided for admissibility of statement in document produced by computers, is complex by generalizing computer and it uses and by providing for cumbersome conditions which may confuse the understanding of the people in the administration of justice. Besides, the section of the law is weak by not providing for mode of evidential authentication of fake photograph in any judicial proceeding. The paper also found that the mode of generating digital photograph strain the traditional rule of proof of evidence. It is therefore suggested that section 84 of the *Evidence Act* be amended to particularly distinguish computer and its uses for the purposes of admissibility of computer generated evidence in court. The

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<sup>31</sup> Section 83 (1) (a) & (b), *Evidence Act*, 2011

<sup>32</sup> Ibid Section 83(4), *Evidence Act*, 2011

<sup>33</sup> *Andrews v Cordiner* (1947) 1KB 655; Per Oliver J. quoted in Yemi Osinbajo *op. cit.* P.255

<sup>34</sup> The defence that the accused person or defendant was elsewhere when an offence was committed

amendment suggested should equally provide for electronic means of detecting digital photo manipulation to eschew perversion of justice in Nigeria.