

JOURNAL OF ANTI-CORRUPTION LAW

2020 Volume 4 Number 1 Pages 1 - 31

CYBERCRIMINALS AND NIGERIAN CYBERCRIMES ACT 2015: CONCEPTUALISING COMPUTERS FOR CYBERCRIME JUSTICE.

Felix E Eboibi *

ABSTRACT

Cybercrime being an act committed through the use of the computer either as a tool or target makes the computer an indispensable tool for almost all cybercrimes. The increasing number of persons utilizing computers, the different purposes for which they are put, coupled with the intractable problems of defining what is and what is not a computer under the Nigerian Cybercrimes Act 2015 is central to the determination of guilt or otherwise of cybercriminals brought before the court for prosecution. The conceptualization of computers under the Nigerian Cybercrimes Act 2015 provides the trial judge with so much discretion and little or no guidance as to whether a particular device is, or is not a computer. Moreover, considering the development of information and communication technology, the concept is continuously challenged. This paper examines the difficulties posed by the Act on the meaning of computers and how the identified difficulties can be curtailed. In this regard, this paper, from a comparative perspective, examines the interpretation of computers handed down by judicial personnel of various courts. It thereafter recommends to the Nigerian trial judge to adopt the same under the Nigerian Cybercrimes Act 2015 to do cybercrime justice.

1. INTRODUCTION

Recently, the eradication of cybercrime in Nigeria was boosted by the enactment of the Nigerian Cybercrimes (Prohibition, Prevention Etc) Act, 2015 (NCA).¹ Prior to the enactment of the Act, perpetrators of cybercrime in Nigeria had a field day since they were mostly not being prosecuted as a result of the absence of a comprehensive Cyber Law.²

Considering the emergence of computers from the abacus to more sophisticated machines or devices and its development, which led to the Internet, has created new terrains in space for different purposes. This has heralded what is known as cybercrime. Cybercrime entails a crime in which a computer is used either as a tool or target, or it involves elements of information technology infrastructure, such as illegal access, illegal interception, data interferences, system interferences, forgery (ID theft) and electronic fraud.³ It must be noted that the successful prosecution and finding of guilt of perpetrators of crimes where computer or computer systems are used as a tool or target entails a determination whether the device used in the commission of the crime is a computer or computer system. This determination is germane and regarded as the crux of cyber and computer-related crimes brought before the court because a rejection that a device used is not a computer or computer system by a court invariably leads to an irresistible conclusion that the said perpetrator is innocent and consequently discharged and acquitted.⁴

The Nigerian Cybercrimes Act 2015 (NCA) purports to provide coverage for crimes committed through the use of the computer either as a tool or target. For instance, the Act covers a broad spectrum of cybercrime offences punishable with penalties and fines in Part III, which includes; - Offences against critical national information infrastructure;⁵ Unlawful access to a computer;⁶ System Interference;⁷

* PhD (Law), LLM (Nig.), LLB(Cal), BL(Nigerian Law School); Cybercrime Law Expert, Certified Digital Forensics Examiner; Senior Lecturer, Faculty of Law, Niger Delta University, Wilberforce Island, Nigeria. E-mails: felixboibi@mail.ndu.edu.ng or lixboibi@yahoo.com.

1 The Act was signed into law by former President Dr. Goodluck Ebele Jonathan on 15 May 2015.

2 Constitution of the Federal Republic of Nigeria, 1999 (as amended), s.36(8) & (12).

3 Eboibi(2011) "Cybercrime Prosecution and The Nigerian Evidence Act, 2011: Challenges of Electronic Evidence" 10 *Nigerian Law and Practice Journal*, 139 at 140 - 141.

4 Eboibi (2014) "Legal Approach to Computers in Cybercrime Enforcement in a Changing World" 13 *Nigerian Law and Practice Journal*, 33 at 34.

5 Section 5 of the Nigerian Cybercrimes (Prohibition, Prevention, etc.) Act (NCA).

6 Section 6 of NCA of 2015.

Interception of Electronic messages, e-mails, electronic money transfer;⁸ Tampering with critical infrastructure;⁹ Wilful misdirection of electronic messages;¹⁰ Unlawful interceptions;¹¹ Section Computer related forgery;¹² Computer related fraud;¹³ Theft of electronic devices;¹⁴ Unauthorised modification of computer systems, network data and system interference;¹⁵ Cyber-terrorism;¹⁶ Fraudulent issuance of e-instructions;¹⁷ Identity theft and impersonation;¹⁸ Child pornography and related offences;¹⁹ Cyberstalking;²⁰ Cybersquatting;²¹ Racists and xenophobic offences;²² Importation and fabrication of e-tools;²³ Breach of confidence by service providers;²⁴ Manipulation of ATM/POS terminals;²⁵ Phishing, spamming, spreading of computer virus;²⁶ Dealing in card of another;²⁷ Purchase or sale of card of another;²⁸ Use of fraudulent device or attached e-mails and websites.²⁹

There is yet to be any judicial pronouncement pursuant to the Act as to the concept of a computer. The dilemma that is likely to plague most judicial actors in the above determination is that at first glance, the legislative interpretation of computer in section 58 of the Act, may be seen to be broad. In a real sense, it does not precisely and sufficiently provide the desired certainty of devices that fall within that group to avoid ambiguity in the course of prosecuting cybercriminals

-
- 7 Section 8 of NCA of 2015.
 8 Section 9 of NCA of 2015.
 9 Section 10 of NCA of 2015.
 10 Section 11 of NCA of 2015.
 11 Section 12 of NCA of 2015.
 12 Section 13 of NCA of 2015.
 13 Section 14 of NCA of 2015.
 14 Section 15 of NCA of 2015.
 15 Section 16 of NCA of 2015.
 16 Section 18 of NCA of 2015.
 17 Section 20 of NCA of 2015.
 18 Section 22 of NCA of 2015.
 19 Section 23 of NCA of 2015.
 20 Section 24 of NCA of 2015.
 21 Section 25 of NCA of 2015.
 22 Section 26 of NCA of 2015.
 23 Section 28 of NCA of 2015.
 24 Section 29 of NCA of 2015.
 25 Section 30 of NCA of 2015.
 26 Section 32 of NCA of 2015.
 27 Section 34 of NCA of 2015.
 28 Section 35 of NCA of 2015.
 29 Section 36 of NCA of 2015.

brought before the court. Moreover, the language contained in the Act has failed to keep pace with technological advances. Especially where computers have evolved. In that, it has moved from the realm of what the computer used to be known as, decades and centuries ago, and does not just imply desktops, mainframe, super, and minicomputers, laptops, among other things, but more sophisticated devices like smartphones, pen, goggle glasses, wristwatches etc.³⁰

Based on the Nigerian Cybercrimes Act, there is an apposite inquiry or query that appears apparent yet extremely difficult to catch in terms of the quest for prosecuting cybercriminals and achieving cybercrime justice. What should judicial interpretation be accorded the concept of computers or computer systems by Nigerian trial judges or judicial personnel? Can a smartphone be regarded as a computer under section 58 of the Nigerian Cybercrimes Act? What about a simple cellphone where someone could send a text message to set a chain of events into action that leads to loss or with criminal intent? What about a fax machine, is it a computer? Does the act of reading an e-mail with instructions on how to perpetrate a crime constitute the use of a computer?

This paper examines all of these concerns and additionally contends that where there seems to be uncertainty as to what connotes computers in proceedings for the determination of the guilt or innocence of a cybercriminal, judicial actors should be persuaded by the judicial interpretations offered herein; take judicial notice of modern technological advancement; must not shut their eyes to the mysteries of computers. Moreover, in order to avoid controversies in the determination of what computers are, the National legislature must conform to changing tides by constantly ensuring that the Nigerian Cybercrimes Act undergoes legislative amendments.

This is germane since the attitude of Nigerian courts revolves around the strict interpretation of statutes. Moreover, judicial precedent emanating from the adjudicatory jurisprudence by judicial officers in Nigeria concerning technological innovations or advancement underscores a lack of appreciation or acceptance of modern technologies and conflicting decisions. A case in point is the lack of certainty of reference to electronic documents in the old Nigerian Evidence Act, 1945, while defining documents in section 2. This omission or development brought about conflicting judgments by various courts as to whether or not

30 A good understanding of ICT developments in as far as the apparatus for committing cybercrime is concerned.

electronic documents should be regarded as paper documents until a new Nigerian Evidence Act, 2011, was enacted.³¹

Furthermore, the Nigerian Independent National Electoral Commission (INEC), in a bid to eradicate electoral crimes and malpractices (rigging, over-voting, etc.), introduced a technological requirement for biometric verification of a voter via Smart Card Reader Machine (SCRM).³² Despite obvious and overwhelming evidence of over-voting and rigging discovered through the card reader machine in Election Petitions, the Courts refused to void elections on the ground that the Nigerian Electoral Act 2010 (As Amended) did not specifically mention the use of Smart Card Reader Machine in the conduct of elections.³³ There are also conflicting decisions rendered by the courts as to whether or not the Smart Card Reader Machine can be a basis for the conduct and voiding an election.

The position taken by the Nigerian Courts concerning technological advancement is baffling when juxtaposed against the long-standing attitude of courts, which has always been that cases should not be decided based on technicalities.³⁴ The attitude mentioned above of the Nigerian Courts concerning the issues of electronic documents and Smart Card Reader Machine are arguably statutory technicalities. It amounts to enthrone technicality at the instance of substantial justice.

Against this background, should a dispute or controversy arise as to what devices comprise computers for the perpetration of cybercrime, there is the likelihood of cybercriminals being let off the hook due to the lack of certainty accorded computers in section 58 of the Nigerian Cybercrimes Act 2015. This will not augur well for the quest for cybercrime justice in Nigeria. Besides, the conflicting judgments that may ensue would create confusion in cybercrime law for clients and lawyers as to the judgment that should be followed or the nature of the advice that should be given to clients on the proper application of judicial

31 Eboibi (2014), (n4) 139 at 147 – 151.

32 Manual for Election Officials 2015 & INEC's 2015 General Elections Approved Guidelines.

33 *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, SC 1002/2015, Judgment of the Supreme Court of Nigeria Delivered on 12th day of February 2016; *Udom Gabriel Emmanuel v Umana Okon Umana & Ors*, SC 1/2016, Judgment of the Supreme Court of Nigeria Delivered on 15th day of February 2016; *Okezie Victor Ikpeazu v Alex Otti & Ors* (2016) LPELR-40055(SC); *Edward Nkwego Okereke v Nweze*, SC 1004/2015, Judgment of the Supreme Court of Nigeria Delivered on 5th day of February 2016.

34 *Lawan Abdulahi Babu Wassah & 2 Ors v Tukshahe Kara & 2 Ors*, LegalPedia Electronic Law Report: LER [2014] SC 308/2001.

precedent. The untold hardship these can cause for litigants cannot be overemphasized in a quest for cybercrime justice.

Consequently, this paper tends to bridge the gap in the literature considering the absence of any Nigerian judicial pronouncement on section 58 denoting computers. It examines the importance and relationship of computers to the act of cybercriminality and the impact of technology on cybercrime policies; the problem that a lack of certainty of computers in policy or the Nigerian Cybercrimes Act can pose to the trial judges and its implication for cybercrime justice. In the same vein, comparatively, it takes a critical look at what computers are and advocates possible solutions to be undertaken under the Nigerian Cybercrimes Act and the need to do cybercrime justice. This paper concludes with deductions and conclusions.

2. CYBERCRIME AND THE NEED FOR CONCEPTUALIZING COMPUTERS: ATTITUDE AND TECHNOLOGICAL LESSONS OF NIGERIAN COURTS

Understanding the role computers play in the actualization of cybercrime offences is very important. Cybercrime comprises all criminal enterprises where the computer, computer system, an information network, or data is the target of the crime. Cybercrime also denotes known criminal enterprises or crimes that are actively committed through or with the aid of computers, computer systems, information networks, or data.³⁵ In Unlawful access to a computer, System Interference; Interception of Electronic messages, e-mails, electronic money transfer; Tampering with critical infrastructure; Wilful misdirection of electronic messages; Unlawful interceptions; Computer-related forgery; Computer-related fraud; Theft of electronic devices; Unauthorised modification of computer systems, network data and system interference; Cyber-terrorism; Fraudulent issuance of e-instructions; Identity theft and impersonation; Child pornography and related offences; Cyberstalking; Cybersquatting; Racists and xenophobic offences etc, what a computer is or is not is obviously pivotal.

The central attribute of legal designations of 'computer,' 'computer system,' or 'information system,' for example, is that the device must be 'capable of

35 Karuppannan Jaishankar, *Victimization in the cyberspace: Patterns and Trends*, 93 in Stefano Manacorda(ed.), *Cyber-Criminality: Finding a Balance between Freedom and Security*, Selected papers and contributions from the International Conference on "Cybercrime: Global Phenomenon and its Challenges," Courmayeur Mont Blanc, Italy 2-4 December 2011, available at <www.academia.edu/.../Cybercriminality_Finding_A_Balance_Between_F...>Last accessed 4 February 2015.

processing computer data or information.³⁶ Some legal instruments specify that the processing must be 'automatic,' or 'high speed,' or 'pursuant to a program.'³⁷ While some legal instruments extend the definition to devices that store or transmit and receive computer data or information,³⁸ others include within the definition the computer data that is processed by the system.³⁹ Where the term 'computer system' or 'information system' excludes data stored in the system or other storage devices, these are often handled separately in the substantive legal provisions of the instrument.⁴⁰ Although some instruments define both 'computer' and 'computer system,' the latter includes typically the former, and the context in which both terms are used in the instrument suggests that no meaningful difference arises in practice.⁴¹ Other instruments define both 'computer network' and 'computer system.'⁴² Again, the latter may include the former, and there does not appear to be a distinguishable difference in use within the instrument itself.⁴³

The computer is a word of common usage. However, its meaning varies according to the context and audience.⁴⁴ Considering the rapid evolving nature of technology, our conception of what is a 'computer' is constantly challenged. The nature of processing power once reserved for mainframes occupying whole rooms is now possessed by mobile phones. Moreover, some degree of processing capacity is being possessed by more and more domestic appliances and other everyday items.

Despite these, International and regional cybercrime legal instruments leave the concept undefined, for instance, Australia, Canada, and the United Kingdom. On the other hand, a comprehensive attempt is made of the definition of a

36 See, for example, Council of Europe Cybercrime Convention, Art. 1.

37 See, for example, COMESA Draft Model Bill, Art.1 and ITU/CARICOM/CTU Model Legislative Texts, Art. 3.

38 African Union Convention, Part III, Section 1, Art. III-1(6).

39 EU Decision on Attacks against Information Systems, Art. 1(a).

40 See, for example, Council of Europe Cybercrime Convention, Art. 19, procedural power for competent authorities to search or similarly access (a) a computer system or part of it and computer data stored therein; and (b) a computer-data storage medium in which computer data may be stored.

41 COMESA Draft Model Bill, Part 1, Art. 1(b) and (e).

42 League of Arab States Convention, Art. 2(5) and (6).

43 See generally, United Nations Office on Drugs and Crime, Comprehensive Study on Cybercrime, Draft – February 2013, 13.

44 *R v McLaughlin* (1980) 2 SCR 331 at 338 per Estey J; See also Jonathan Clough (2010) *Principles of Cybercrime*, New York, Cambridge University Press at 52.

computer, for instance, the United States of America and Nigeria. Worse still, they are predominantly 'technology-neutral' in their context. They do not in certainty list devices that might be considered as computers.

From the International and Regional African perspective, the Convention on Cybercrime and the African Union Convention on Cyber-security and Personal Data Protection is of little assistance in this regard. Although the term 'computer' is not defined in both legal instruments, 'computer system' is defined by the Convention on Cybercrime as "any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data,"⁴⁵ while under the African Union Convention on Cyber-security and Personal Data Protection it is "an electronic, magnetic, optical, electrochemical, or other high speed data processing device or a group of interconnected or related devices performing logical, arithmetic, or storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device or devices."⁴⁶ Therefore, by implication, a 'computer' is a processing device that performs logical, arithmetic, or storage functions. The Convention on Cybercrime and African Union Convention on Cyber-security and Personal Data Protection, therefore, do not explicitly address the issue, neither advocating for a particular definition nor leaving the term completely undefined.

The absence of a definition of the concept of a computer in cybercrime legislation in Australia and the United Kingdom was as a result of the recommendation by law reform agencies. This was made on the ground that a definition is likely to be both under-inclusive because it might not keep up with technology and over-inclusive because it might encompass items such as household appliances, calculators, digital watches, and the like.⁴⁷ On the other hand, according meaning to 'computers' gives certainty, in particular clarifying the status of certain devices which might otherwise be ambiguous i.e., the United States and Nigeria.⁴⁸

The problem that the above poses is that where there is a lack of definition or where there is a definition without explicitly listing or determining what devices belong to the group in a cybercrime legislation, it automatically implies an automatic delegation of legislative responsibility to courts and provides a trial

45 Convention on Cybercrime, Budapest, 23.XI.2001, Chap. 1, Art.1(a).

46 African Union Convention on Cyber-security and Personal Data Protection, 2004, Art. 1.

47 Law Commission, *Computer Misuse* (1989), (3.39).

48 Clough (2010), (n44) at 56.

judge with little or no guidance as to whether a particular item is or is not a computer:

Rapid expansion of the functions assigned to computers has eroded, to an uncertain extent, confidence that the limits of computer crime legislation can be determined in this way. The decision to refrain from definition, which seemed reasonable at the beginning of the decade, begins to assume the aspect of an extensive delegation of legislative responsibility to courts.⁴⁹

These are likely to create boundless arguments, and thus confusion for magistrates, juries and judges:

In view of the nature of the proposed hacking offence, especially the *mens rea* required... we cannot think that there will ever be serious grounds for arguments based on the ordinary meaning of the term 'computer'. By contrast, all the attempted definitions that we have seen are so complex, in an endeavour to be all-embracing, that they are likely to produce extensive argument, and thus confusion for magistrates, juries and judges...⁵⁰

The implication of the preceding on the Nigerian polity in the quest for cybercrime justice is further exacerbated by section 50 of the Nigerian Cybercrimes Act 2015. It empowers explicitly the Nigerian Federal High Court located in any part of Nigeria, regardless of the location where the offence is committed to exercising jurisdiction to try and entertain cybercrimes perpetrated by cybercriminals.⁵¹

Apart from the problem of extensive argument and confusion that the absence of precise legislative interpretation concerning computer definition or lack of certainty of devices in the Nigerian Cybercrimes Act can cause, the 36 divisions of the Nigerian Federal High Court have the discretion to give judicial interpretation to the concept. There is currently no pronouncement on the subject by the Nigerian Courts or a write up of this nature. Hence, the Nigerian polity is likely to face a mirage of computer definitions handed down by judicial personnel, which will further compound the already existing lacuna and confusion posed by the Cybercrimes Act.

49 MCCOC, *Computer Offences* (2001), 125.

50 Law Commission, *Computer Misuse* (1989), (3.39); M Wasik (1991) *Crime and the Computer* Oxford: Clarendon Press at 4-5.

51 About Federal High Court, Available at <<http://www.fhc-ng.com/aboutus.htm>> Accessed 22 August 2016.

Moreover, the attitude of most Nigerian courts on the interpretation of statutes has been strict. Judicial personnel are not allowed to import words that are not used in the legislative enactment even if the provision in the statute is ambiguous. This is so even if the strict interpretation will result in punishment to a party or litigant. In *Duke v. Global Excellence Comm. Ltd*⁵² the court held that “in the interpretation of ...statute, words therein should be given their ordinary and simple grammatical meaning, and connotation intended to be conveyed by the legislature and the court should strictly adhere to such strict construction without introducing any extraneous words.”⁵³ In *Chukwuogor & Ors v. Chukwuogor & Anor.*⁵⁴ the court stated thus: “In the interpretation of statutes, a court is obliged to adhere strictly to the interpretation only intended by the legislature even if such strict construction appears punitive to the litigant. Courts do not administer justice in the abstract and the justice administered by the courts is justice in accordance with the law. It is only by the orderly administration of law and obedience to the rules that legal justice can be attained.”⁵⁵ Again the court stated in *Major and St. Mellons Rural District Counsel v Newport Corporation*⁵⁶ that: “The duty of the court is to interpret the words that the Legislature has used; those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly restricted.”

Where a court imports extraneous words in the course of interpreting a statute, the judge is said to have done so on the frolic of his own and such judgment is entitled to be set aside on appeal. In the criminal case of *Fawehinmi v. Inspector General of Police*⁵⁷ their Lordships held as follows:

It is never part of the interpretative function of a judge to import into any legislation words that have not been employed by the legislature and

52 [2007] 5 N.W.L.R. (Pt. 1026) 81 at 117 Paras. C - E (CA).

53 *Duke v. Global Excellence Comm. Ltd* [2007] 5 N.W.L.R. (Pt. 1026) 81 at 117 Paras. C - E (CA)- Per Ibiyeye JCA citing *Ketson Komplex International Ltd. v. Bendel Development & Planning Authority* (1993) 2 NWLR (Pt. 275) 332; *Olarewaju v. Arewa* (1998) 11 NWLR (Pt. 573) 239; *Union Bank of Nig. Plc v. Fajebe Foods & Poultry Farms Ltd.* (1998) 6 NWLR (Pt. 554) 380; *Balogun v. Odumosu* (1999) 2 NWLR (Pt. 592) 590.

54 (2005) LPELR-12894(CA).

55 *Chukwuogor & Ors v. Chukwuogor & Anor.*, Per OMOKRI, J.C.A. (Pp. 21-22, paras. F-D) citing *Alale v. Olu* (2001) 7 NWLR (Pt. 711) 119 at 127; *Willoughby v. International Merchant Bank (Nig) Ltd.* (1987) 1 NWLR (Pt. 48) 105.

56 *Major and St. Mellons Rural District Counsel v Newport Corporation* (1952) A.C 189 at 191 cited in *Alamiyeseigha v. Federal Republic of Nigeria* (2006) LPELR-11670(CA).

57 *Fawehinmi v. Inspector General of Police* (2000) 7 NWLR (pt.665) 481 at 529.

which words will give a different colouration to the text or the law so promulgated. The judge must not bring to bear his personal feelings or prejudices as to what the law should be but what it is as served out in the wordings used by the legislature." It is not open for the court to import its own words in the process but rather to give a straight and an unaided ordinary meaning; to do so would amount to going on a frolic of its own.⁵⁸

An instance of the preceding strict interpretation of statutes that bothers on a computer or technological advancement has been entrenched in two statutes in Nigeria: the old Nigerian Evidence Act of 1945 and the Nigerian Electoral Act, 2010 (As Amended). Due to a lack of certainty of words used in the provisions of the statutes, there was a delegation of legislative responsibility to Nigerian courts. This triggered legal arguments championed by legal practitioners and resulted in conflicting decisions and confusion amongst judicial actors.

The old Nigerian Evidence Act of 1945 did not specifically include electronic documents as part of the definition of documents in section 2 of the Act. A strict interpretation of the section resulted in the inadmissibility of electronic documents in Nigerian courts. Due to this uncertainty, some other courts gave a liberal interpretation and admitted electronic and computer-generated documents in Nigerian courts contrary to section 2 of the Act. Section 2 of the old Nigerian Evidence Act, 1945⁵⁹ defined "documents" to "include books, maps, plans, drawings, photographs and also includes any matter expressed or described upon any substance by means of letters, figures or mark or by one of these means, intended to be used or which may be used for the purpose of recording that matter." A strict, careful, and literal interpretation of the said section excludes electronically generated evidence or modern paperless or electronic storage devices. Arguably, the said definition limits documents to tangible things, i.e., something that is capable of being seen.⁶⁰

The first notable pronouncement on the issue was made in 1969 (over 52 years ago) by the Nigerian Supreme Court in *Esso West Africa Inc. v. T. Oyegbola*,⁶¹ where the court gave a liberal interpretation by allowing the admissibility of electronic documents by stating thus;

58 *Fawehinmi v. Inspector General of Police* (2000) 7 NWLR (pt.665) 481 at 529.

59 Section 2 of the old Nigerian Evidence Act, 1945 became the Nigerian Evidence Act Cap. E14 Laws of the Federation, (LFN) 2004, which remained largely untouched for more than 50 years.

60 Eboibi (2014), (n 4).

61 (1969) NMLR 194.

The law cannot be and is not ignorant of the modern business methods and must not shut its eyes to the mysteries of computer. In modern times reproduction and inscriptions on ledgers or other documents by mechanical process are common place and section 37 cannot therefore only apply to books of accounts.⁶²

Thirteen years later, precisely in 1976, the Nigerian Supreme Court in *Yesufu v. ACB*⁶³ stated thus;

...while we agree that for the purpose of Sections 96(1)(h) and 37 of the Act, “bankers books” and books of account” could include “ledgers cards”, **it would have been much better, particularly with respect to a statement of account contained in document produced by a computer, if the position is clarified beyond doubt by legislation** as had been done in England in the Civil Evidence Act...⁶⁴

The aforementioned decisions of the Nigerian Supreme Court had far-reaching effects on subsequent courts decisions in the determination of whether or not electronic or computer-generated document forms part of the definition of a document to warrant its admissibility. In the divide, some courts liberally interpreted documents to include electronically generated documents based on the case of *Esso v. Oyegbola*⁶⁵ while on the other hand, strict interpretation was employed based on *Yesufu v. ACB*.⁶⁶ For instance, in *Trade Bank v. Chami*⁶⁷ the provisions of Section 38 of the Evidence Act came up for determination. Under the provisions, entries into books of accounts, regularly kept in the course of business, are relevant 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 for liability. Although the provision does not provide for entries in computers, or computer print-outs encompassing entries of account, the Court, applying the Supreme Court dictum in *Oyegbola’s* case⁶⁸ above held that Section 38 of the old Evidence Act should be interpreted to cover computer print-outs. The court stated thus:

The section of the Evidence Act (supra) does not require the production of “books of account” but make entries into such books relevant for

62 *Esso West Africa Inc. v. T. Oyegbola* at 216-217.

63 (1976) 1 All NLR (pt.1) 328.

64 *Yesufu v. ACB* at 524. Emphasis is mine.

65 *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194.

66 *Yesufu v. ACB* (1976) 1 All NLR (pt.1) 328.

67 (2003) 13 NWLR (pt.836) 158.

68 *Esso West Africa Inc. v. T. Oyegbola* (1969) NMLR 194.

admissibility. Exhibit 4 is a mere entry in the computer or book of account. Although the law does not talk of “computer” or “computer print-out” it is not oblivious to or ignorant of modern business world and technological advancement of modern jet age. As far back as 1969, the Supreme Court in the case of *Esso West Africa v T. Oyegbola* (1969) NMLR 194, 198 envisaged the need to extend the horizon of the section to include or cover computer which was virtually not in existence or at a very rudimentary stage at that time... On this authority the provisions of S. 38 covers, in my respectful opinion, also electronic process such as computer and computer printouts comprised in Exhibit 4 are admissible...⁶⁹

Contrary to the above decision, in the case of *UBA v. Sani Abacha Foundation for Peace and Unity(SAPFU)*,⁷⁰ where the Court of Appeal held that a statement of account contained in a document produced by a computer could not be regarded as a document for purposes of admitting the same in evidence under the old Evidence Act until certain sections of the Act were amended. The Court, while applying the dictum of the Supreme Court in *Yesufu v. ACB*⁷¹ stated thus:

Though the appellant’s counsel made reference to the modern-day practice of using computer in the day –to-day business of the bank, it is my opinion that the law still remains as it is. It has not been amended by the National Assembly, although it is high time they did that and I am bound to apply the law as it is.⁷²

The Court stated further thus:

It is quite unfortunate that in Nigeria no clarification has yet been done by way of amendment or promulgation of an Act to exempt the statement of account contained in a document produced by a computer from the conditions stated in Section 97 of the Evidence Act 1990. Hence, I will not deviate from my primary function in interpreting the law as made by the legislature to that of law making. I therefore hold that the lower court was in error when it admitted Exhibit D2 in evidence in this case.⁷³

69 *Trade Bank v Chami* (2003) 13 NWLR (pt.836) 158 at 216 Per Salami, JCA, (as he then was.).

70 (2004) 3 NWLR (pt.861) 516; see also *Numba Commercial Farms Ltd & Anor v. Nal Merchant Bank Ltd & Anor* (2001) 16 NWLR (pt. 740) 510.

71 *Yesufu v ACB* (1976) 1 All NLR (pt.1) 328.

72 *UBA v Sani Abacha Foundation for Peace and Unity (SAPFU)* (2004) 3 NWLR (pt.861) 516 at 543.

73 *UBA v Sani Abacha Foundation for Peace and Unity (SAPFU)* (2004) 3 NWLR (pt.861) 516 at 543.

Recently, in *Femi Fani-Kayode v. The Federal Republic of Nigeria*⁷⁴ in an interlocutory ruling, a Federal High Court in Lagos resorted to a strict interpretation when it held computer printouts tendered by the Prosecution in the trial involving a former Minister of Aviation on an allegation of laundering a sum of N4billion not to be documents. The computer printouts of the defendant statement of accounts which the prosecution tendered as evidence were rejected by the trial court as inadmissible. In reliance of the Court of Appeal decision in *UBA v. SAPFU*,⁷⁵ the court held that the provisions of Section 97 (1) (b) and (2) (c) of the old Evidence Act did not cover Computer printout even if they are duly certified and relevant. The court concluded by stating thus:

I must also express the view that there is the urgent need for an amendment of the Evidence Law to cover admissibility of document made by means of computer printout since it is clear that those technological method of producing document now forms part of day to day business transaction and particularly, in banking circle.⁷⁶

Eventually, it took the Nigerian National Assembly over 50 years amid the controversies and confusion before the old Nigerian Evidence Act was replaced by the Nigerian Evidence Act 2011. The new Act has now expanded the definition of documents to include electronic documents. What this implies for cybercrime justice in Nigeria is that until there is an amendment to section 58 of the Nigerian Cybercrimes Act 2015 curing the lack of certainty of devices that are computers, similar arguments, confusions and controversies are bound to occur in cybercrime matters brought before the courts. This will not augur well for cybercrime justice in Nigeria as this may amount to freeing perpetrators of cybercrimes. The need for conceptualizing computers from the Nigerian perspective becomes very paramount to avoid the confusion above and controversies that pervaded the Nigerian polity and courts.

74 Case No. FHC/L/523C/08 of 26/3/2009 (Unreported).

75 *UBA v Sani Abacha Foundation for Peace and Unity (SAPFU)* (2004) 3 NWLR (pt.861) 516.

76 *Femi Fani-Kayode v The Federal Republic of Nigeria* (supra (n65)) at 6-7. The interlocutory ruling of the Federal High Court was set aside by the Court of Appeal in *The Federal Republic of Nigeria v Femi Fani-Kayode* (2010) All FWLR (pt. 534) 181. Fani-Kayode appealed the decision of the Court of Appeal to the Supreme Court, but while the matter was pending there, the Nigerian Evidence Act was amended, and Computer-Generated Bank Statements were made admissible by virtue of Section 84 of the new Evidence Act.

Again, sequel to the occurrence of electoral crimes and malpractices during elections in Nigeria, the Independent National Electoral Commission(INEC), the body charged with the conduct of elections⁷⁷ introduced a technological requirement for biometric verification of a voter vide Smart Card Reader Machine(SCRM) to eradicate the menace. Section 153 of the Nigerian Electoral Act, 2010 (As Amended) empowers INEC to issue regulations, guidelines or manuals for purposes of giving effect to the Act and for its administration thereof. In this regard, INEC in 2015 set out a technological procedure through her Manual for Election Officials 2015 & INEC's 2015 General Elections Approved Guidelines for the application of the card reader to carry out accreditation of voters in place of manual accreditation provided for in section 49 of the Nigerian Electoral Act, 2010 (As Amended). This technological procedure is in accordance with sections 57⁷⁸ and 153⁷⁹ of the Nigerian Electoral Act, 2010 (As Amended) to enhance and enforce the provisions of section 49⁸⁰ of the Nigerian Electoral Act, 2010 (As Amended).

One of the questions that arose before judicial actors in Nigeria upon presentation of petitions for voiding the elections of successful candidates for the 2015 Governorship and National Assembly Elections was whether or not apparent incidents of electoral crimes and malpractice (over voting, rigging) discovered through the technological procedure of card reader machine can be a ground for

-
- 77 INEC is one of the Federal Executive bodies established by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (Section 153 (1)(f) thereof). Paragraph 15((a)) of part 1 of the Third Schedule empowers INEC to, among other things, organize, undertake and supervise all elections to the offices of the President and Vice President, a Governor, and his deputy; membership of the National Assembly and State Assemblies. It registers and supervises political parties. It is also obligated to arrange and conduct registration of persons qualified to vote; it maintains and revises the Voters Register for any election under the Constitution. It is also under a duty to carry out such other functions as may be conferred upon it by an Act of the Nigerian National Assembly.
- 78 Nigerian Electoral Act 2010 (As Amended), section 57 "No voter shall record his vote otherwise than personally attending at the polling unit and recording his vote in the manner prescribed by the Commission."
- 79 Nigerian Electoral Act 2010 (As Amended), section 153 "The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for purposes of giving effect to the Act and for its administration thereof."
- 80 Nigerian Electoral Act 2010 (As Amended), section 49 "(1) A person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card." (2) The Presiding Officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the Register that the person has voted."

voiding elections. The Nigerian Supreme Court, in the cases of *Wike Ezenwo Nyesom v. Hon. (Dr) Dakuku Adol Peterside & Ors*;⁸¹ *Udom Gabriel Emmanuel v. Umana Okon Umana & Ors*;⁸² *Okezie Victor Ikpeazu v. Alex Otti & Ors*;⁸³ *Edward Nkwego Okereke v. Nweze*⁸⁴ held that the evidence of electoral crimes or malpractice (over voting, rigging, etc.) through the use of the card reader machine and the deliberate non-use of the machine by INEC officials despite express directive by INEC cannot be a ground for voiding elections under section 138 of the Nigerian Electoral Act 2010(As Amended). The court hinged her decision on the lack of certainty and provision of the use of the card reader in the conduct of elections under the Nigerian Electoral Act 2010(As Amended). The court stated that section 49 of the Nigerian Electoral Act 2010(As Amended) did not specifically mention the use of card reader machines for the accreditation of voters except for manual accreditation of voters. It rather advocated for a further amendment of the Nigerian Electoral Act. The Court, through Ibrahimâ Tankoâ Muhammad, (JSC) said thus:

I must commend INEC for its introduction of the Smart Card Reader Machine I must, at the same time, draw attention of the authorities that be, that there is dire need, because of the importance and relevance of the Smart Card Reader Machine, in this our 21th Century of technological development, to recognize the indispensability of the use of the Smart Card Reader Machine in our electioneering processes. But, till today voting through the voters Register, supersedes any other

81 *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, SC 1002/2015, Judgment of the Supreme Court of Nigeria Delivered on 12th day of February 2016; *Udom Gabriel Emmanuel v Umana Okon Umana & Ors*, SC 1/2016, Judgment of the Supreme Court of Nigeria Delivered on 15th day of February 2016; *Okezie Victor Ikpeazu v Alex Otti & Ors* (2016) LPELR-40055(SC); *Edward Nkwego Okereke v Nweze*, SC 1004/2015, Judgment of the Supreme Court of Nigeria Delivered on 5th day of February 2016.

82 *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, SC 1002/2015; *Udom Gabriel Emmanuel v Umana Okon Umana & Ors*, SC 1/2016; *Okezie Victor Ikpeazu v Alex Otti & Ors* (2016) LPELR-40055(SC); *Edward Nkwego Okereke v Nweze*, SC 1004/2015.

83 *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, SC 1002/2015; *Udom Gabriel Emmanuel v Umana Okon Umana & Ors*, SC 1/2016; *Okezie Victor Ikpeazu v Alex Otti & Ors* (2016) LPELR-40055(SC); *Edward Nkwego Okereke v Nweze*, SC 1004/2015.

84 *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, SC 1002/2015; *Udom Gabriel Emmanuel v Umana Okon Umana & Ors*, SC 1/2016; *Okezie Victor Ikpeazu v Alex Otti & Ors* (2016) LPELR-40055(SC); *Edward Nkwego Okereke v Nweze*, SC 1004/2015.

technology that may be introduced through Guidelines or Manuals. To this effect, it is my humble suggestion that the earlier the better. INEC/any other relevant authority takes steps to recommend to the National Assembly, further amendment to the Electoral Act 2010 (as amended) by incorporating in the Act, the use of the Smart Card Reader Machine in future elections.⁸⁵

The above technological pronouncement of the court is nothing but negations of the age-long enshrined attitude and paramount duty of courts to do justice and not clog to technicalities that beat the ends of justice. It is immaterial that they are technicalities arising from statutory provisions or technicalities inherent in the rules of court.⁸⁶ The Nigerian judicial actors have arguably used statutory technicalities in their judicial pronouncements against electronic documents and smart card reader machine. What the card reader decisions have done is to give a nod to perpetrators of electoral crimes in Nigeria, pending a further amendment of the Electoral Act. This portends great danger for the quest for cybercrime justice in Nigeria. It means that if the Nigerian Judicial actors are faced with uncertainty as to devices that comprise computers used in the commission of cybercrime by cybercrime perpetrators under section 58 of the Nigerian Cybercrimes Act 2015, there is the likelihood of these perpetrators being discharged and acquitted pending an amendment to the Act.

Furthermore, before the Supreme Court pronouncement on the use of card readers in elections in Nigeria, the Nigerian Court of Appeal handed down conflicting decisions. For instance, the Court of Appeal, Lagos Division in *All Progressive Congress v. Mr. Joseph Olujimi Kolawole Agbaje*⁸⁷ and Court of Appeal, Benin Division in *Great Overdje Ogboru & Anor. V. Senator (Dr) Ifeanyi Okowa Arthur & Ors*;⁸⁸ *Oghenetaga G. Emerhor & Anor. V. Senator (Dr) Ifeanyi Arthur Okowa & Ors*⁸⁹ accepted the use of manual accreditation of voters as opposed to the smart card reader machine as a result of its lack of specific mention in the Nigerian Electoral Act 2010(As Amended). However, the Court of Appeal, Abuja Division in *People's Democratic Party v. Hon. (Dr) Dakuku Adol Peterside*;⁹⁰ *Independent National Electoral Commission (INEC) v. Hon. (Dr) Dakuku Adol*

85 Per Ibrahimâ Tankoâ Muhammad, (J.S.C) in *Wike Ezenwo Nyesom v Hon. (Dr) Dakuku Adol Peterside & Ors*, (n33).

86 *Matthew Obakpolor v The State* (1991) 1 SC (Pt I) 35.

87 CA/L/EP/GOV./751A/2015, Per Obande Festus Ogbuinya, JCA.

88 CA/B/EPT/359/2015, Per Uwani Musa Abba Aji JCA.

89 CA/B/EPT/360/2015, Per Isaiah Olufemi Akeji, JCA.

90 CA/A/EPT/659A/2015, Per Peter Olabisi Ige, JCA.

Peterside;⁹¹ and *Wike Ezenwo Nyesom v. Hon. (Dr) Dakuku Adol Peterside*⁹² recognized the use of the card reader machine for accreditation of voters and rebuked INEC officials for not using the card reader machine despite its lack of specific mention in the Electoral Act 2010 (As Amended). The court also accepted the same as a ground for nullifying an election.

Similar position on conflicting decisions no doubt on the nature of devices that comprises computers cannot be ruled out in Nigeria's quest for cybercrime justice. The implication of these will have far-reaching problems and difficulties as to which of the conflicting judgments would be followed pending a superior decision or an amendment to the Act as the case may be. The uncertainty and confusion of similar conflicting judgments can create for Nigerian Cybercrime law is enormous. Litigants, clients, and lawyers would be confused about which of the decisions should be followed. The nature of the advice that would be rendered by lawyers to clients on the proper application of the law and judicial precedent would be significantly affected. Untold hardship would be caused to litigants in their quest for cybercrime justice as they are likely to be robbed of justice despite the increasing nature of cybercrime in Nigeria. This may lead to anarchy and acrimony in the area of the affected persons or Nigerians. Apart from the embarrassment, these can cause to the Nigerian judiciary, the reputation and integrity of the judiciary would be damaged. It is also likely to diminish the public respect for the judiciary and legal practitioners and impact negatively on the administration of the criminal justice system in Nigeria. Incessant interlocutory appeals, delay of trials, and overburden of the superior courts cannot be ruled out.⁹³

The technological lessons and attitude of the Nigerian Legislature, Legal and Judicial Actors should not be allowed to circumvent Nigeria's quest to do cybercrime justice. Consequently, the next section of this paper arguably and exhaustively, from a comparative perspective proffers how the issue can be resolved by legal practitioners, IT experts, law students and judicial personnel of courts should they be faced by what devices comprise computers under the Nigerian Cybercrimes Act and the need to do cybercrime justice.

91 CA/A/EPT/659B/2015, Per Adamu Jauro, JCA.

92 CA/A/EPT/659/2015, Per Monica Bolna' an Dongban-Mensem, JCA.

93 Chima Ubeku, *Conflicting Judgments in the Nigerian Courts and the CJN's Lamentation*, *The Nigerian Voice* (18 June 2012), available at <<https://www.thenigerianvoice.com/news/92722/1/conflicting-judgments-in-the-html>> Last accessed 20 December 2017.

3. SECTION 58 OF THE NIGERIAN CYBERCRIMES ACT AND THE QUEST FOR CYBERCRIME JUSTICE: THE GERMANENESS OF THE CONCEPT OF COMPUTER

The quest for cybercrime justice under the Nigerian Cybercrimes Act underscores a determination of whether the device used in the commission of a cybercrime counts as a computer or computer system. However, this determination is likely to be affected by the speed of development of computers and the slow pace of the Act. In more recent times, technological improvements have paved the way for more sophisticated forms of computer existence. The tools formerly regarded as computers may no longer be taken to be in the 21st-century world. The legal profession is a dynamic and all-embracing one, in line with changing tides, has also taken its approach and view as regards what computers are. However, while it may at first blush appear simple and obvious what a computer is, as it is gleaned from cybercrime statutes and policies and several courts' interpretations of what constitutes a computer, the answer is not always so obvious.⁹⁴

Considering the growing relevance of computers and their widespread application in cybercrime justice, it is not out of immediate necessity that the term assumes any special or legal meaning derived from statutes and case law. In regulating human activities, the law must, as a matter of importance, give meaning to basic terminologies to avoid conflicts of application, especially with the growing relationship between the legal profession and the computer and ICT related fields as well as its global application. Although there appears to be scanty information as regards this, a look at the Nigerian Cybercrimes Act, different legislative enactments, and case law would reveal the attitude of law towards what computers are.⁹⁵

Generally, from the perspective of law and practice, the concept of 'computer' does not have any particular meaning; it is fraught with different definitions. For instance, in *National Advanced Systems v. United States*,⁹⁶ the United States Court of Appeals, Federal Circuit stated thus:

The term "computer" is not associated with any one fixed or rigid meaning, as confirmed by the fact that it is subject to numerous

94 Eboibi (2014), (n4) at 36.

95 Eboibi(2014), (n4) at 36.

96 *National Advanced Systems v. United States* 26 F.3d 1107, 1111 – 12.

definitions and is used to describe a variety of devices with varying degrees of sophistication and complexity...⁹⁷

Consequently, section 58 of the Nigerian Cybercrimes Act attempts a comprehensive definition of the concept of 'computer' by providing thus:

"computer" means an electronic, magnetic optical, electrochemical or other high-speed data processing device performing logical, arithmetic, or storage functions and includes any data storage facility and all communication devices that can directly interface with a computer through communication protocols, but it excludes portable hand-held calculator, typewriters and typesetters or other similar devices.⁹⁸

The above definition was lifted almost verbatim from the United States of America, Computer Fraud and Abuse Act, by virtue of United States Code, Title 18, Part 1, Chapter 47, Section 1030 (e) (1):

computer means an electronic, magnetic optical electrochemical, or other high-speed data processing device and performing logical, arithmetic, or storage functions and includes any data storage facility or communications facility directly related to, or operating in conjunction with such device, but such term does not include an automated typewriter or typesetter, a portable hand held, calculator or any other similar device.⁹⁹

A critical perusal of the afore quoted definitions under the Nigerian Cybercrimes Act and the United States counterpart shows that from the point of underlining in both quotations, there seems to be a little variation adopted by the Nigerian Legislation. However, merely to justify that it was not copied verbatim; otherwise, both definitions are *pari materia*. Despite over 20 years of the United States' existence of the definition of computer and its attendant problems and judicial confictions, the same definition was still adopted here in Nigeria hook and sinker. Deductions from section 58 of the Nigerian Act affirms that the definition is not precise and certain as it does not particularly clarify the status of devices nor enumerate devices that could be regarded as computers, which might otherwise be ambiguous. In the recent past, smartphones like the iPhone, blackberry has created a revolution in Nigeria. In addition to that, the introduction of new gadgets like iPad, tablets, android phones have changed the dimensions of information

97 *National Advanced Systems v. United States* 26 F.3d 1107, 1111 – 12.

98 Cybercrimes (Prohibition, Prevention, etc.) Act 2015, s.58. Emphasis mine.

99 18 U.S.C. § 1030(e)(1), emphasis mine; see also U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) cmt. n.1 (2009).

exchange. Can we say that these mobile phones are mere phones? Are they computers or extension of computers or something else? Needless to say, that the increasing levels of online activity once confined to desktop and laptop computers take the place of Smartphones. Nevertheless, section 58 of the Act fails to address the issue expressly.

3.1 Cellular or mobile phone as a computer

A cell or cellular or mobile phone¹⁰⁰ is an "electronic"... or other high-speed data processing device" that "performs logical, arithmetic, or storage functions" when used to make calls and send text messages. It is powered by a battery, has a memory; capable of running software, makes use of graphic accelerator to run its colour display screens, has a user-customizable main menu, and comes with preloaded text messages; has a software stored in semiconductor memories or other media. Together, all these are sufficient to show that a cell or cellular or mobile phone makes use of an electronic processor as stated in section 58 of the Act.¹⁰¹

Moreover, the cell or cellular or mobile phone processor executes arithmetic, logical, and storage functions when the phone is used to make a call. A phone keeps lists of incoming and outgoing calls, even for calls that did not connect and shows the phone number for incoming calls in the phones' external and internal displays. Additionally, a phone keeps track of the Network connection time, which is the elapsed time from the moment the user connects to the service provider's network to the moment the user ends the call by pressing the end key. Consequently, a cell or cellular or mobile phone is performing logical and arithmetic operations under section 58 of the Act when used to place calls.¹⁰²

The same is true when a cell or cellular or mobile phone is used to send text messages. Most fundamentally, the phone store sets of characters that are available to a user when typing a message. Upon typing, the phone keeps track of the user's past inputs and displays the entered text i.e., the message being composed. The user of a phone may also delete characters previously entered, either one letter at a time or all at once. Also, phones allow the users to set

100 "A mobile phone is a portable telephone that can make and receive calls over a radio frequency carrier while the user is moving within a telephone service area. See Mobile phone, available at <https://en.m.wikipedia.org/wik>, accessed 26 August 2016.

101 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No. 10-1983.

102 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No.10-1983

different primary and secondary text entry modes and easily switch between modes as needed when they enter data or compose a message, including "iTAP" mode, which uses software to predict each word as it is entered. These capabilities all support a finding that a cell or cellular or mobile phone performs arithmetic, logical, and storage functions as used in section 58 of the Act when used to send text messages.¹⁰³

The wordings of section 58 of the Act: "electronic, magnetic, optical, electrochemical" data processing devices are, by their nature, "high speed" and the language "other high speed" was incorporated to expand the statute to cover other types of high-speed devices that are not, or could not be, enumerated. Smartphones like iPhone, blackberry, and new gadgets like iPad, tablets, android phones, or modern cellular phones are "high speed" electronic devices. Indeed, Smartphones like iPhones, blackberry, and new gadgets like iPad, tablets, android phones, or modernized cellular telephones, process data at comparable or faster rates than desktop computers.¹⁰⁴

The language of section 58 of the Act is exceedingly broad to an extent. It implies that if a device is "an electronic or other high-speed data processing device performing logical, arithmetic, or storage functions," it is a computer. This definition covers any device that makes use of an electronic data processor, examples of which are legion.¹⁰⁵ Apart from the devices stated above, when giving interpretation to the United States Code, Title 18, Part 1, Chapter 47, Section 1030 (e) (1) which is *pari materia* with section 58 of the Nigerian Act, Orin S. Kerr stated thus:

Just think of the common household items that include microchips and electronic storage devices, and thus will satisfy the statutory definition of "computer."¹⁰⁶ That category can include coffeemakers, microwave ovens, watches, telephones, children's toys, MP3 players, refrigerators, heating and air-conditioning units, radios, alarm clocks, televisions, and DVD players, in addition to more traditional computers like laptops or desktop computers. Plus, the definition of "computer" arguably extends to flash

103 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No. 10-1983.

104 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No. 10-1983.

105 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No. 10-1983.

106 18 U.S.C. § 1030(e)(1) *pari materia* with Nigeria Cybercrimes(Prohibition, Prevention, ETC) Act 2015, s.58.

drives, CDs, DVDs, and other electronic storage devices, as the definition "includes any data storage facility ... directly related to or operating in conjunction with" an "electronic, magnetic, optical, electrochemical, or other high-speed data processing device performing logical, arithmetic, or storage functions."¹⁰⁷

The United States Code, Title 18, Part 1, Chapter 47, Section 1030 (e) (1) which is *pari materia* with section 58 of the Nigerian Act was the basis for the determination of whether or not an ordinary cellular phone used only to place calls and send text messages is a computer in *United States of America v. Neil Scott Kramer*.¹⁰⁸ Here, Neil Kramer pleaded guilty in District Court for the Western District of Missouri in charge involving transport of a minor in interstate commerce with the intent to engage in criminal sexual act with her. Kramer also acknowledged that he used his cellular telephone (Motorola Motorazr V3) to send text messages and placed calls to the victim for six months leading up to the offense contrary to 18 U.S.C. § 1030(e)(1) and U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) (2009).¹⁰⁹

During the sentencing of Kramer, it was determined by the District Court of Missouri that Kramer's cell phone was a computer based on the definition of a "computer" under 18 U.S.C. §1030(e)(1) (which is *pari material* with section 58 of the Nigerian Act) and consequently applied a sentencing enhancement for its use to facilitate the offence. Dissatisfied with the District Court decision, Kramer appealed.¹¹⁰

The 8th Circuit Court of Appeals while affirming the decision of the District Court, confirmed the definition under §1030(e)(1) as being broad and that a "cellular phone might not easily fit within the colloquial definition of a computer,

107 Orin S. Kerr, Vagueness Challenges to the Computer Fraud and Abuse Act (2010) *Minnesota Law Review*, 1561, 1577 - 1578. See also *United States of America vs Neil Scott Kramer*(supra); Additionally, each time an electronic processor performs any task-from powering on, to receiving keypad input, to displaying information-it performs logical, arithmetic, or storage functions. These functions are the essence of its operation. See *The New Oxford American Dictionary* 277 (2d ed.2005) (defining "central processing unit" as "the part of a computer in which operations are controlled and executed").

108 *United States of America v Neil Scott Kramer* 2011 U.S. App. Lexis 2367, February 8, 2011, No. 10-1983.

109 U.S. Sentencing Guidelines Manual § 2G1.3(b)(3) provides a two-level enhancement for "the use of a computer to persuade, induce, entice, coerce, or facilitate the travel of, the minor to engage in prohibited sexual conduct. "

110 *United States of America v Neil Scott Kramer* 26 F.3d 1107, 1111 – 12.

however they are bound, not by the common understanding of the word computer, but by the specific definition set forth in §1030(e)(1). Furthermore, there is nothing in the statutory language that purports to exclude devices because they cannot connect to the Internet and thus concluded that nothing in the language of §1030(e)(1) excludes cellular phones from the definition of computer."¹¹¹

The corollary of the preceding is that a cybercriminal standing trial before any of the Federal High Court Divisions in Nigeria for an offence in contravention of the Cybercrimes Act for committing cybercrime and computer-related crime through the devices mentioned above or possessing their characteristics arguably commits such a crime through a computer.¹¹²

3.2 Calculator, portable handheld and smart net (using a chip) as a computer

Although, section 58 of the Act attempts a 'lower technology' limit on the meaning of a computer – stating that: “...but it excludes portable hand-held, calculator, typewriters and typesetters or other similar devices.” The inference that can be drawn here is that typewriters and typesetters are not computers. There is no problem with this exclusion. The grouse is the reference to a calculator and a handheld computer like Bluetooth-capable devices. Such as an automobile or a microphone headset and a mobile device equipped with an operating system and the ability to run various application software known as apps, with Wifi, Bluetooth, GPS capabilities that can allow connections to the internet manufactured by Samsung, Sony etc. are excluded from the statute's definition of computers. This is inexplicable when juxtaposed against the backdrop that as the world moves towards an 'internet of things' and nano-computing, descriptions such as 'computer' will likely need to be interpreted as encompassing a greater range of devices. "A Calculator today can be programmable and be as powerful as a minicomputer with limited storage. Tomorrow it could be equivalent to some of the largest computers in use today and be able to store millions and billions of bits of data."¹¹³

It is submitted that, contrary to the express exclusion of calculators from the meaning of computer by section 58 of the Nigerian Cybercrimes Act, the Supreme Court of Canada in *R v. McLaughlin*¹¹⁴ defined 'computer' as “...a

111 *United States of America v Neil Scott Kramer* 26 F.3d 1107, 1111 – 12.

112 Eboibi (2014), (n4) at 39.

113 DB Parker, *Fighting Computer Crime* (New York: Scribner, 1983) in Jonathan Clough, (n44) at 57.

114 (1980) 2 SCR 331 at 339 per Estey citing Webster's Third New International

calculator esp. designed for the solution of complex mathematical problems; specific: a programmable electronic device that can store, retrieve, and process data..." or "...a mechanical or electronic apparatus capable of carrying out repetitious and highly complex mathematical operations at high speeds."¹¹⁵ Moreover, calculators have been held to be computers by the United States Court of Appeals, Federal Circuit. *In Re David C. Paulsen*,¹¹⁶ the Court stated that a calculator might be a "limited function" computer as opposed to a "full function" computer does not change the fact that it is nonetheless a computer and in *National Advanced Systems v. United States*¹¹⁷ the Court stated that "however, despite the lack of any standard definition for the ubiquitous term, it is commonly understood by those skilled in the art that at the most fundamental level, a device is a computer if it is capable of carrying out calculations."¹¹⁸

Sequel to the above, trial judges seized of cybercrime matters are enjoined to adopt the meaning of computers espoused by the Supreme Court of Canada and United States Court of Appeals, Federal Circuit, should the issue of what is or is not, a computer becomes relevant in the determination of the guilt or otherwise of cybercriminals.

Based on the development of technology, it becomes exigent to determine whether a particular device falls within terms such as '*portable hand-held/calculator*.' Consequently, for remaining current, section 58 of the Act, may require constant legislative amendments by the Nigerian National Assembly. This point is well illustrated by the decision of the Seventh Circuit in *US vs. Mitra*.¹¹⁹ Here, radio hardware and computer equipment were used by the defendant to monitor communications on Smartnet II system. A computer-based radio system meant for emergency communications. He then sent strong signals that prevented the computer from receiving essential information. Hence emergency services could not co-ordinate their activities. On the other hand, the defendant would leave the communication channels open and would append sound, such as a woman's sexual moan, towards the end of each one communication. The

Dictionary (1976) and Random House Dictionary of the English Language (1973) respectively.

115 *R v McLaughlin* (1980) 2 SCR 331 at 339

116 30 F.3d 1475 3 August 1994.

117 26 F.3d 1107 9 June 1994.

118 See also *In Re Berwyn E. Etter* 756 F.2d 852 (1985); *DPP v. Mckeown* [1997] All ER 1 737, where a measuring device (Lion Intoximeter 3000) which detects alcoholic intake while driving was referred to as a computer.

119 405 F 3d 492 (7th Cir 2005) in *Jonathan Clough*, (n44) at 57.

defendant was convicted pursuant to 18 USC §1030(a)(5). The prosecution argued that Smartnet II was a 'computer' under the meaning of the provision as it comprised a chip that performs high-speed processing, and is a 'communication facility directly related to or operating in conjunction' with the computer chip. The defendant argued that the statute was intended to apply to more traditional examples of 'hacking' such as stealing financial data from banks, erasing data or disseminating worms or viruses. It was not intended to apply to situations such as this where all he did was 'gum up a radio system.' If the radio system was a computer, then "every cell phone and the cell tower is a 'computer'...; so is every iPod, every wireless base station in the corner coffee shop, and many other gadgets."¹²⁰ The court rejected the defendant's argument. While Congress may not have contemplated or intended this particular application, that is precisely why some statutes are written in general terms. The section provides exceptions for 'automatic typewriters, typesetters and handheld calculators' which demonstrates that the definition covers other devices with embedded processors and software:

As more devices come to have built-in-intelligence, the effective scope of the statute grows. This might prompt congress to amend the statute but does not authorize the judiciary to give the existing version less coverage than its language portends...¹²¹

3.3 Computer system as a computer, Telephone line connected to interactive computer system and smartphones as computer systems.

The determination of what constitutes computers is further compounded by the meaning ascribed to 'computer system' in section 58 of the Act. It states:

"Computer system" - (a) refers to any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automated or interactive processing of data; (b) covers any type of device with data processing capabilities including, computers and mobile phones; (c) consists of hardware and software which may include input, output and storage components that may stand alone or be connected in a network or other similar devices; and (d) includes computer data storage devices or media.

It is surplusage for section 58 of the Act to define both 'computer' and 'computer system.' While section 58 of the Act defines both 'computer' and 'computer

120 *US v Mitra* at 495.

121 *US v Mitra* at 495-496.

system,' the latter includes typically the former, and the context of the use of both terms in the instrument suggests that no meaningful difference arises in practice. Again, in an attempt to expand devices that can form the basis of cybercrime under the Nigerian Cybercrimes Act for enforcement, computers, and mobile phones seem to be listed without specificity in the meaning of 'computer system.' What kind of computers are computer systems? What kind of phone qualifies as a computer system? Is a smartphone, a mobile phone, or computer system? The answer to these questions is not clear cut and worsened against the backdrop of the decision of the Alberta Court of Appeal in *R v. Cockell*,¹²² where similar wordings of 'computer system' in section 58 of the Nigerian Cybercrimes Act was given a judicial interpretation.¹²³

In *R v. Cockell*,¹²⁴ two girls who were 12 and 13 years old were the complainants. They first met the accused through the use of chat service Nexopia, after that exchange of cell phone numbers and text messages, physical meetings which led to series of sexual encounters with each of the complainants followed. A Blackberry smartphone was used by the accused to send the text messages. The offence of 'Luring a Child' against the accused under s. 172.1(1) requires that the offence be committed using a computer system within the meaning of subsection 342.1(2) of the Criminal Code of Canada. 'Computer system' by virtue of the section means "a device that, or a group of interconnected or related devices one or more of which, (a) contains computer programs or other data, and (b) pursuant to computer programs (i) performs logic and control, and (ii) may perform any other function." The trial court convicted the accused on three counts charge of child luring using a computer contrary to s.172.1(1) of the Criminal Code. On appeal, the Court reversed the conviction of the accused because it was not proved that the Blackberry smartphone used to commit the offense was a computer system.

The *Cockell's* case decision is inexplicable, especially when weighed against the backdrop that a Court in Alberta had previously decided without recourse to proof or evidence that sequel to the broad meaning of 'computer system,' a cell

122 2013 ABCA 112.

123 Note that this is a case under the Canadian Provision which do not refer to a 'computer' as such, but rather to 'computer system' by virtue of Criminal Code (Can), s.342.1(2) (in *pari materia* with s. 58 of the Nigerian Cybercrime s Act) which states: "A computer system is a device that, or a group of interconnected or related devices one or more of which, (a) contains computer programs or other data, and (b) pursuant to computer programs, i. performs logic control, and ii. May perform any other function."

124 2013 ABCA 112.

phone could fall within the meaning of computer system in *R v. Rocha*.¹²⁵ The Court stated thus:

A cell phone is a "device that ... contains data, and ... may perform any other function including ... storage and retrieval and communication or telecommunication to, from or within a computer system. Data includes representations of information or concepts. It is common knowledge that pictures(data) taken with a cell phone can be downloaded onto computers. As well, depending on the cell phone features, it may also have direct internet capabilities."¹²⁶

Barry Sookman, took a swipe on the *Cockell's* case decision when he stated that:

It is surprising that in 2013 a court in Canada would have any difficulty in putting a child molester who uses a smartphone to lure 12 and 13-year-old girls for sexual encounters behind bars. A smartphone like a BlackBerry is a computer with a mobile operating system (computer programs) with computer capabilities that run applications (also computer programs) including text messaging applications. See, Wikipedia in describing BlackBerry, Apple IOS and Google powered android smartphones saying: "A smartphone is a mobile phone built on a mobile operating system, with more advanced computing capability and connectivity than a feature phone"; Smart Phone" is a Misnomer: It's a Computer, not a Phone "The smart phone is not a phone. It's a computer. It's like your desktop or laptop. It stores data. It connects to the Internet. It runs applications. It's a computer, not a phone."¹²⁷

125 2012 ABPC 24.

126 *R v Rocha* 2012 ABPC 24; see also the cases of *R v Woodward* 2011 ONCA 610 – Here the Ontario Court of Appeal held that a text message sent using a cell phone met the statutory requirement hence a computer system because of the combination of the cell phone and the carrier network used to route messages; *R v Snow* 2011 ONCJ 180.

127 Barry Sookman, Are smartphones computer systems under the Criminal Code? *R v Cockell* available at <<http://www.barrysookman.com/2013/05/21/are-smartphones-computer-systems-under-the-criminal-code-r-v-cockell/#sthash.QGlnkb5m.dpuf>> Last accessed 11 February 2015.

There are dissensions in other decisions handed down by courts of other jurisdictions. For instance, in *State v. Rowell*,¹²⁸ both the District Court and Court of Appeals held that the use of a telephone to access a long-distance communications network was accessing a computer for purposes of the state computer crime statute. On a further appeal, the Supreme Court of New Mexico disagreed. It held that the use of computerized switches to make telephone call did not fall under the computer crime statute as a computer. However, in *People vs Rice*¹²⁹ the trial court determined that a telephone line connected to an interactive computer system was a computer system and that calling the line and entering responses by telephone constituted "accessing" a computer system. On appeal, the Colorado Court of Appeals determined that the trial testimony regarding the nature of the line was sufficient to support a finding that it was a computer system by communicating directly with the line by inputting data in response to computer-generated questions.

3.4 Voice mailbox and facsimile machine as a computer

In another development, in *Commonwealth v. gerulis*¹³⁰ the appeal court held that a voice mailbox was a computer as defined under state statute because the telephone was linked to a sophisticated computerized communication system, including a computerized electronic message answering system and hard disk drive. The Indian case of *Brightpoint Inc. vs. Zurich American Insurance Co.*¹³¹ held that a facsimile machine is a computer. The voice mailbox and facsimile are not specifically listed as computers or computer systems under section 58 of the Nigerian Cybercrimes Act 2015. To do cybercrime justice, reliance should be placed on the aforementioned cases where it seems that perpetrators of cybercrime brought before court facilitated the crime through the devices.

It must be noted that for the Nigerian courts to give positive cognizance to the various devices held to be computers or computer systems discussed above due to the lack of certainty in section 58 of the Act, a liberal interpretation must be imbibed. It is only in this regard that when there seems to be uncertainty as to

128 908 P.2d 1379 (N.M. 1995); see generally SE Jones, Computer Fraud Coverage: An Examination of Developing Issues, being a paper presented at the Twentieth Annual Northeast Surety and Fidelity Claims Conference, 24 & 25 September, 2009, 4-5.

129 198 P .3d 1241 (Colo. Ct. App. 2008); SE Jones, Computer Fraud Coverage: An Examination of Developing Issues (n128).

130 616 A. 2d 686 (1992), appeal denied, 633 A. 2d 150 (1993); SE Jones, Computer Fraud Coverage: An Examination of Developing Issues (n128).

131 No. 1:04-CV-2085-SEB-JEG, 2006 WL 693377 (S.D. Ind. 2006); SE Jones, Computer Fraud Coverage: An Examination of Developing Issues (n128).

what connotes computers in determining the guilt or otherwise of a cybercriminal, judicial actors can adopt the computer interpretations in this discourse. This can be easily resorted to by judicial personnel taking judicial notice of modern technological advancement and recognize the mysteries of computers. Moreover, the Nigerian National Assembly must be at alert by constantly amending the definition of computer in section 58 of the Act. The preceding will avoid the confusion and controversies that emanated from the lack of certainty in both section 2 of the old Nigerian Evidence Act 1945 and Electoral Act 2010(as amended) in enforcing section 58 of the Act particularly and generally the Nigerian Cybercrimes Act.

4. CONCLUSION

Given the global new technological innovations and the never-ending introduction of new and improved models of electronics, a computer cannot be referred only to as an electronic box that sits on a desk anymore. From a general legal point of view, a device that possesses the capabilities to receive, store, process, and retrieve data or information is a computer.¹³² It covers any computer device, including devices with data processing capabilities like mobile phones, smartphones, computer networks, and other devices connected to the internet.¹³³ Computers now come in different shapes, sizes, colours, and capacities. Just think of iPhone, iPads, more significant, brighter, thinner televisions to Ultraviolet with the ability to connect to the internet. The new "Play Anywhere" format on the home entertainment front, to the Ultrabook, a unique, fragile type of laptop, to lots of mobile computing products such as smartphones and tablet computers. Smart washers and dryers that adjust to the type and load of clothes and even send a message to the owner's mobile device when clothes are washed and dried. To smart refrigerators that sense when daily food products, scanned when first put into the refrigerator, are almost finished and send a list of what is needed to the purchaser or the store, cars that communicate to each other with the possibility of accessing the internet and make decisions relative to speed, directions and distance from other cars and other intriguing devices.

132 *Director of Public Prosecutions v Jones* (1997) 2 CR APP, 155HL, 163; *National Advanced Systems v United States* 26 F.3d 1107, 1111 – 12; David I. Bainbridge, *Introduction to Computer Law*, (2nd edn., Pitman Publishing, 1994), xx; Stephen Mason with Specialist Contributors, *Electronic Evidence Disclosure, Discovery & Admissibility*, (1st edn., Lexis Nexis Butterworths, 2007), 2.

133 Philippines Cybercrime Prevention Act of 2012, s.3(d)

133 Nigerian Evidence Act, 2011, Section 258 (d).

Someone who commits a cyber and computer-related crime using the aforementioned electronic devices is arguably likely to have done so through a computer.¹³⁴ Although, the Nigerian Cybercrimes Act seems not to have incorporated these devices specifically in the definition of computers or computer systems.¹³⁵ However, where there looks to be uncertainty as to what connotes computers in proceedings for the determination of the guilt or innocence of a cybercriminal, judicial actors must not shut their eyes to the mysteries of computers and technology development. Consequently, there is no gainsaying that for the purpose of doing cybercrime justice, it would be legally appropriate for judicial personnel to adopt the aforementioned devices in this work as computers.

134 Emilio Viano, *Balancing Liberty and Security Fighting Cybercrime: Challenges for the Networked Society*, 33-34 in Stefano Manacorda(ed.), (n35).

135 Gadgets like iPad, tablets, android phones have changed the way information is propagated. Consequently, these mobile phones are computers or extension of computers. Increasing levels of online activity that was previously confined to desktops and laptops take place on Smartphones and these new intriguing devices. See Karuppannan Jaishankar, *Victimization in the Cyberspace: Patterns and Trends*, 97 in Stefano Manacorda(ed.), (n35).