

# Admissibility of digital records as evidence in Bulawayo High Court in Zimbabwe

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## Abstract

Evidence plays an important role in the administration of justice and the protection of citizens' rights. Without evidence, cases may be delayed, thereby denying justice and this consequently infringes on the rights of the individual. This qualitative study collected data through questionnaires, interviews and content analysis to investigate the admissibility of digital records as evidence in Zimbabwe's Bulawayo High Court. The study focused on establishing how digital records are admissible as evidence in courts of law, taking into consideration that they are subject to manipulation, tampering, deletion and alteration, among other challenges. The population and sample included court officials such as the judge, prosecutors and lawyers as they are custodians of the law. Findings revealed that digital records were admissible as evidence although the focus at the moment was on audio-visual records. Acts relating to the issue of evidence were enacted years ago when technology was still far off. There were also no policies in place for the use of digital records as evidence. The National Archives Act of Zimbabwe (1986) does not adequately cater for the management of digital records generated within the public sector of Zimbabwe. The other finding was that there were no guidelines on the authentication of digital records. In view of the results, the study recommended that laws of evidence be amended to incorporate all forms of digital records as evidence in courts of law in a bid to guide legal practitioners.

**Key words:** digital records, evidence, legal records, high court, Bulawayo

## 1. Introduction and background to the study

Evidence plays an important role in the administration of justice. It is regarded as an integral component in a court of law as it serves to facilitate for prosecution, conviction and acquittal processes. The way in which evidence is acquired, stored, preserved, retrieved and handled is of particular importance before the evidence can be declared admissible in court. In line with the above sentiment, Motsaathebe and Mnjama (2009) argue that records are fundamental to the efficient and effective operations of the legal system as they contribute in the

administration of human rights. In support of the above scholars, Ngoepe and Makhubela (2015) state that records and justice are inseparable as they can serve as critical proof that a particular action or transaction took place.

Without access to records, cases may be delayed, thus denying justice, as well as infringing on the rights of the individual (Dewah & Mutula 2015). Abioye (2014) and Barata, Cain and Thurston (2000) are of the view that the absence of reliable and authentic records hinders the government from achieving their mandate, thus leading to miscarriage in the delivery of justice. This results in offenders being set free, whilst victims are denied justice which damages the general public's perceptions of the justice system (Ngoepe & Makhubela 2015). In order for the efficient administration of justice to be achieved, there is a need for complete and correct information. Roper and Millar (1999) opine that, for records to be well managed within courts, records management standards should be developed and implemented. They further state that standards ensure that records are kept in a systematic and planned manner, thereby maintaining their authenticity, reliability, usability and integrity. While paper records have been the source of information in terms of decision-making in courts of law in Zimbabwe, the unfolding information and communication technology revolution has resulted in the birth of digital records which can be used as evidence in a court of law.

The technological era has resulted in people creating, storing and exchanging information through digital means. This has had a tremendous impact on the way that activities are done in the legal fraternity as evidence of crimes committed can now be found in different modes and places, some of which include mobile phones, emails and social media platforms. This new phenomenon has created challenges as current laws do not cater for the authentication of digital records and other complexities associated with electronic transformation of the information landscape, thus courts are still grappling in terms of the administration of justice. Digital records play a significant role in the successful prosecution of crimes, hence the need for them to be regarded as admissible evidence in courts of law (Aljneibi 2014). The advent of the technological age has had a tremendous effect on litigation practice, particularly in the area of evidence gathering and presentation in court. Digital records, just as paper records, have steadily assumed a very important position in the adjudication of disputes or cases, as anything done on the computer or the internet usually leaves traces or digital footprints that can serve as evidence in legal proceedings (Galves & Galves 2004).

Within the judiciary system in Zimbabwe, each judge is free to dismiss evidence on the basis of the courts' independent evaluation of the authenticity of a given document (Ncube 2015). The court must believe that records admitted before it, are trustworthy and relate to the facts of what originally transpired to enable the right decisions to be made in cases. Failure to provide this information will impinge on the efficient administration of justice, hence justice delayed is justice denied (Dewah & Mutula 2015).

Courts of law in some developing countries like Zimbabwe rely on paper records, although of course oral testimony and other kinds of physical objects have always been part of the courtrooms (Tion 2014). Tion (2014) further stipulates that as much as paper records are important, the advent of information and communication technologies has brought about a new phenomenon which should be given special attention. The information age has had a tremendous impact on humans' everyday transactions. To a certain extent, this increases chances of cybercrime. The increase in crimes committed using information and communication technologies will result in an increased number of cases pending at the courts, which rely on digital records for trial processes to be completed fairly. Social media is a relatively new phenomenon in Zimbabwe and laws have not yet been comprehensively amended to cater for such records, hence it is critical for those in the legal fraternity to have standards in place to verify and authenticate information within social media records before reaching a verdict.

Digital records in courts can aid the investigation and resolution of crimes by law enforcement agents. This is possible within the current era as most of the things which are done manually are now done on computers, computer-like devices, or with the aid of computers and computer networks (Tion 2014). However, the existing laws in Zimbabwe such as the Civil Evidence Act [Chapter 8:01] (2001) and the Criminal Procedures and Evidence Act [Chapter 9:07] (2016) are silent on this. The Civil Evidence Act [Chapter 8:01] (2001) only recognizes computer evidence in the form of documents only and does not include voice or video recordings. In addition, the Criminal Procedures and Evidence Act [Chapter 9:07] (2016) is silent on the admissibility of digital evidence thus creating uncertainty with regard to decisions made within the courts. These statutes arguably restrict evidence to paper-based documents, creating a legal vacuum in the online world. The Computer Crime and Cyber Bill states that the rules of evidence shall apply in any criminal proceedings, taking into consideration the reliability, integrity and manner in which the originator or recipient of the data is identified. However, the bill has not yet been approved and gazetted as legislation, therefore the notion that the admissibility

of digital records is silent within Zimbabwean legislation statutes. This raises queries with regard to how decisions are made in court as there is no uniform standard concerning the authentication of digital records.

## 2. Contextual background

The judicial system in Zimbabwe operates under the constitutional court, supreme court, high court, magistrate district court, community courts, and village courts. Figure 1 is an illustration of the hierarchy of the courts in Zimbabwe.

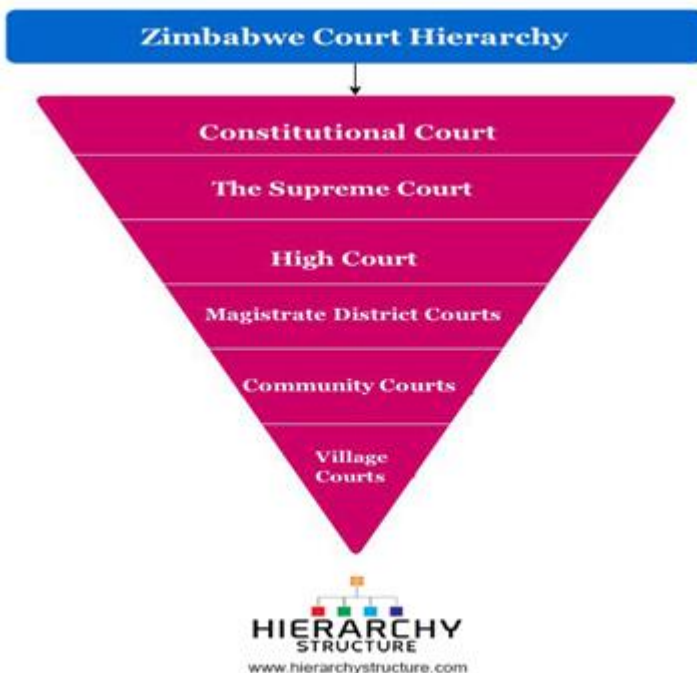


Figure 1 Zimbabwe Court Hierarchy (Hierarchy Structure Website 2017)

The lowest level courts are the village courts which handle petty issues of the village. The second level of the hierarchy of the courts is the community courts which handle cases related to different communities within one area or district. Every district in Zimbabwe has a regional magistrate district court which sits at the third level of the hierarchy. The regional magistrates have jurisdiction in civil and criminal cases. The next level of the court is the High Court of Zimbabwe (Hierarchy Structure Website 2017). This court has general and appellate

divisions across the country. The head of the courtroom in the high court is the chief justice who is appointed by the President upon recommendation from the Judicial Service Commission. Next in the hierarchy of courts is the supreme court, which is basically an appellate body for the decisions from the high court and the labour court of the country. Lastly, is the constitutional court which has jurisdiction over alleged violations of fundamental rights which are guaranteed by and in the constitution of Zimbabwe (Hierarchy Structure Website 2017).

For the purpose of this study, the researchers focused on the Bulawayo High Court. The Bulawayo High court, like any other court in Zimbabwe, is under the auspices of the Judicial Service Commission whose mandate is to ensure the well-being and good administration of the judicial service and its maintenance in a high state of efficiency. Its vision is to promote and facilitate the delivery of world-class justice (Judicial Service Commission Website 2016). The high court deals at first instance with all high value and high importance cases. It is a court of first instance, possessed of inherent and unlimited criminal and civil jurisdiction, over all persons and over all matters (Judicial Service Commission Website 2016). The high court tries criminal and civil cases. Criminal cases involve an action that is considered to be harmful to society and are punishable by law. In criminal matters, the high court has jurisdiction over all criminal offences recognised by the law, which include murder, theft, arson, rape, treason and assault, while civil cases involve private disputes between persons or organizations (Madhuku 2010). Examples of civil cases include divorce, rent agreements, evictions and damage to property.

The Bulawayo High Court is administered through the Constitution of Zimbabwe (2013) and the High Court Act [Chapter 7:06] (2014) and relies heavily on paper records to serve as evidence within their proceedings, as the belief is that paper records provide more authentic and reliable information than to digital records. The National Archives of Zimbabwe (NAZ) Act (1986) administers the manner in which public records are created, used, maintained and disposed of. However, it is silent on whether these records are either in paper or electronic format. The Act merely defines a record as any medium in or on which information is recorded (National Archives Act, 1986) and is not explicit about electronic records. This definition on its own does not guarantee the provision of digital records or the manner in which they should be managed.

In a preliminary investigation with the head of the Information and Communication Technology Department, it was availed that high court records are digitised and stored in what is referred to as the request management system,

which is only accessed by the officials within the department in the case that the evidence is requested by the judge. The only security measure in place is a password; yet passwords are prone to hacking, which may result in the evidence being altered and manipulated. This has a serious impact on the legal field as there are no specific guidelines for the handling of digital records considering their volatility and susceptibility to manipulation and change. The authenticity, integrity and reliability of digital records are difficult to prove, hence, courts are left to apply their judicial discretion, indicating that there is no uniformity in terms of resolving matters that arise within the courts.

### **3. Statement of the problem**

Within the judiciary system in Zimbabwe, each judge is free to dismiss evidence on the basis of the court's independent evaluation of the authenticity of a given document (Ncube 2015). The court must believe that records admitted before it, are trustworthy, that is they must clearly and accurately relate the facts as originally presented in summary form. Digital records are much more volatile than textual print. Digital records are vulnerable to alteration, manipulation and tempering which may raise serious admissibility challenges, leading to proliferation of evidence. Without guidelines or specific standards in relation to the authentication of digital records, the judicial authorities at the Bulawayo High Court are left to apply their own judicial discretion to make decisions, thus there is no uniform standard or guideline with regard to reaching a verdict. This shows that there is no uniformity or consistency in the admissibility of digital records. It is necessary for laws and procedures to be instituted when using digital records as evidence in courts, as they are more volatile and differ from other evidence. The study therefore sought to investigate the admissibility of digital records as evidence in a court of law in Zimbabwe, in particular, the Bulawayo High Court. This was to ensure that cases involving digital records were guided by legislation in decision-making thus curbing cases where judicial authorities relied on their own discretion to make decisions.

### **4. Purpose and objectives of the study**

The purpose of the study was to explore the admissibility of digital records as evidence in Bulawayo High Court in Zimbabwe. The specific objectives of the study were to:

- i. analyse the policies that support the use of digital records as evidence in the high courts of Zimbabwe.
- ii. determine the acceptability of digital records as evidence in high court of Zimbabwe.
- iii. assess methods for authenticating digital records in the high courts of Zimbabwe.
- iv. determine the importance of digital records in administering justice.

## 5. Methodology

The study utilised the qualitative research approach which focused on understanding some aspect of social life as the court system addresses social issues and seeks to correct social ills. This enabled the researchers to gain an insight into how court officials view digital records as evidence when carrying out their mandate of administering justice. The researchers distributed questionnaires and conducted face-to-face interviews with some court officials, thereby obtaining information on what qualifies as evidence in the day-to-day activities of the courts. Content analysis on previous cases was also used. The population and samples included the judge, prosecutors and lawyers as they are custodians of the law with knowledge on the subject. The researchers purposively selected a pool of respondents which comprised 20 lawyers, one judge, one prosecutor and one member of the information communication and technology department. A total of 20 questionnaires were distributed to lawyers. Eleven were completed and returned. The researchers had targeted three interviewees but managed to interview two as the other was too busy with court cases. Qualitative data from interviews and content analysis was presented thematically.

## 6. Findings

The findings are presented and discussed under the headings that follow.

### *6.1 Policies and legal framework of digital records*

One of the objectives of the study was to examine policies that supported the use of digital records as evidence in high courts in Zimbabwe. The lawyers were asked regarding the policies in place, to support the use of digital records as evidence in courts. The identified legislative framework included the case law, the Civil Evidence Act and Criminal Procedures and Evidence Act as the policies that were used. During the interview the Judge said, “I think the only example I

can give you is the statute of the Judicial Law's Ease of Doing Business Act, which is already legalizing that procedure so, clearly there's a shift."

The stated pieces of legislation were examined and it mostly referred to virtual sittings and utilised technology in the delivery of legal services. The statute did not contain any steps alluding to how digital records were to be admitted as evidence in courts of law, implying that there were no set policies in place on how these digital records were to be treated. Without policies in place, there is no consistency, compliance, good practice or uniformity in the administration of justice, which infringes on citizens' rights as decision-making maybe prolonged. The high court of Bulawayo may be prone to risks if they do not follow stated procedures with regard to the handling of digital records as valuable evidence may be lost, which violates citizens' rights. In addition, digital records are susceptible to manipulation, alteration and deletion; thus, if no policies are in place to use them, evidence obtained may be subjective, resulting in offenders being set free whilst victims are denied justice. Inverclyde Council (2015) asserts that policies enable consistency as well as efficiency in the management of records. They further explain that the use of policies enables adequate procedures to meet desired requirements and as such, records need to be managed in the right manner by the right personnel. Records form a basis for legal evidence, hence, without policies in place it affects their use within the judicial sector.

It emerged from the participants that the Criminal Procedure and Evidence Act [Chapter 9:07] (2016) and the Civil Evidence Act [Chapter 8:01] (2011) recognised digital records as evidence in courts of law. However, the prosecutor felt that the legislation does not fully embrace digital records when stating that:

Most of our acts relating to the issue of evidence were enacted years back when technology was still far. I remember last time there was the cyber-crime security bill but as far as I know it is still a bill it hasn't been passed to law so as things stand it would appear that in our jurisdiction there is no law that relates to the admissibility of electronic evidence.



The judge was also of the same view as he stated, “The laws certainly do not cater for digital records because they were made at a time when this entire electronic thing was not in place, there is need to amend them”.

From these findings, the researchers identified that there was a gap in the laws of evidence regarding digital records in the courts of Zimbabwe. Hence, there is a need for more elaborative rules on the admissibility and presentation of digital records as the current laws focus on paper records. The introduction of technology has reshaped how people communicate and do business, which has a significant impact on the practice of law. Therefore, for the laws of evidence to stay relevant and purposeful in administering justice, it is of great value that they be reviewed as they can also be used as evidence in a court of law. Ncube (2015) is of the opinion that there is a need to improve the legislation regarding the admissibility of digital records as evidence in a court of law. In Ncube’s (2015) view the improvements will work to avoid evidence obtained from digital records being classified as “improperly obtained evidence”. This implies that for evidence to be admitted in court there is a need for legal statutes to be in place to support it as evidence in a court of law.

Content analysis of the National Archives of Zimbabwe Act (NAZ) [Chapter 25:06] (1986) revealed that it is silent on the management of digital records. This is also confirmed by Ngoepe and Saurombe (2016). Many industries have undergone various changes due to the introduction of technology. Thus it is of great value that the legislation statutes contain information on digital records, their management, use and disposal to avoid information of value from going obsolete or being disposed of without the mandatory steps being followed. Mutsagondo and Chaterera (2016) state that the NAZ Act was crafted solely to cater for the management of paper-based records and this explains why NAZ records surveys in public departments do not cover electronic records. They further state that due to the unavailability of legislation with regard to the management of electronic records, records management practitioners have resorted to a hit-or-miss approach when managing electronic records, thereby compromising service delivery as well as infringing the rights of citizens.

From the above information, it may be concluded that there is no uniformity in how records are kept, which may have a negative impact on the organisation’s operations. For example, in the case of the judicial sector, if there are no clear guidelines on how digital records are managed, court officials may fail to track records, which would delay court processes. Hence, for digital records to be

admissible as evidence in courts, there should be clearly spelt out laws on the responsibilities and duties with regard to the storage and disposal of digital records to curb delays in court proceedings as well as injustice.

## ***6.2 Acceptability of digital records as evidence***

The study sought to determine acceptability of digital records as evidence in court. It was noted that most social media platforms such as Facebook and WhatsApp were not readily acceptable as evidence in court. Participants were asked about the admissibility of digital records taking into consideration the susceptibility to manipulation. It was noted that digital records were not acceptable as evidence because it was difficult to authenticate them. During the interview, the judge acknowledged the use of digital records and stated, “It is just like any other evidence; the courts also move with times. People are now able to sue on the basis of online platforms. We cannot ignore that as evidence because that is a new thing. We know online things can also be hacked so we will approach it with caution.” In a separate interview, the prosecutor revealed that “digital records are admissible as evidence, the focus at the moment is on audio and visual records”.

It emerged that some social media platforms like Facebook were still a challenge in being considered as evidence as it was difficult to confirm the original creator of a post. A typical example is the case of Edmund Kudzayi who was charged for attempting to commit an act of insurgency, banditry, sabotage or terrorism as “Baba Jukwa”, a Facebook character who committed cybercrimes via the social network (New Zimbabwe 2017). The case has not been solved due to the absence of laws on how to deal with digital records. In addition, there are no laws with regard to how these social media platforms are to be dealt with. It is of great importance for the judicial sector to act faster in embracing technological changes, particularly with regard to social media records, which have taken centre stage in people’s lives. It is equally important to raise awareness through various training programmes such as seminars, workshops and symposiums for all court personnel. This is in a bid to help them become acquainted with digital records, their admissibility as evidence in courts of law, despite their vulnerability. It is imperative to teach them so that they may have an appreciation of the records used in a court of law and they may help in the administration of justice.

### ***6.3 Authentication of digital records***

The focus of this section was twofold, with the first part paying particular attention to steps in authenticating digital records, while the second part sought to establish the challenges of authenticating digital records. Questions were asked about the guidelines of authenticating records as evidence as well as the challenges faced in authenticating records. From the questionnaires, the general feeling was that there were no guidelines in place to help authenticate digital records. The interview with the judge revealed that “there are absolutely no laws in place to authenticate digital records”; a sentiment echoed by the prosecutor who revealed that, “there are no guidelines in place as evidenced by lack of legislation to that effect”.

Resources and skills were identified by the participants as lacking to authenticate digital records in courts. The judge mentioned that “there are training programmes that are being established, having started in the capital Harare in a bid to equip judges with the necessary skills and aptitude in authenticating digital records”.

These results leave the researchers with the impression that the court system is lagging behind in the field of technology. It thus becomes quite important for the court to embark on enacting guidelines and laws that deal with the authentication of digital records. Thomson (2013) affirms that court rules require that for evidence to be admissible, it must be authenticated. The Bulawayo High Court is left with the daunting task of admitting the evidence as there are no guidelines for authentication. *The State v Roy Leslie Bennet* (2010) HH 79 case is an example of where the state could not explain the software used to extract emails and consequently lost the case. Due to the fact that the attorney general failed to prove the authenticity of the emails he had presented as evidence before the court, Bennet was acquitted (Zimbabwe Legal Information Institute 2017). This case was dismissed as there were no specific guidelines for authenticating emails. Considering the nature of digital records, the need for laws governing such records in the judicial system can never be overemphasised.

### ***6.4 Importance of digital records in administering justice***

The other objective of this study was to determine the importance of digital records with regard to implementing decisions in courts. One participant was of the view that digital records are susceptible to manipulation which renders them inadmissible in implementing decisions in court proceedings. However, the

prosecutor acknowledged that digital records would expedite dispensation of cases as information can be obtained and verified timeously. During the interview, the prosecutor stated that “Digital records are more like real-time communication, as compared to oral evidence. In oral evidence, the witness can change what they said in previous statements”. Regarding the importance of digital records, the judge stated that, “They are very useful because it quickens the administration of justice. One does not have to fly to London to issue a summons. All that is needed is the other person’s email address and the summons will be emailed.”

From the responses, it was revealed that digital records are important in the administration of justice as they capture the activity as it occurs. An example is a closed circuit television; it captures information as it is as compared to oral testimonies where people change their statements. Hence, they are as important as physical records in administering justice. Motsaathebe and Mnjama (2009) are of the opinion that there is a link between evidence and records and they state that records are fundamental to the efficient and effective operations of the legal system as they contribute in the administration of justice and protect the citizens’ rights. Thus, digital records play an important role in serving as evidence in courts of law.

Based on case reports, the researchers discovered that digital records do play a pivotal role in administering justice, as highlighted by the *State versus Morgan Tsvangirai* (2004) HH 169 case. Tsvangirai and others were charged with the crime of high treason as they requested that the President be assassinated as well as staging of a military coup. The charges were based on a grainy four-and-a-half-hour video, recorded by hidden cameras, of a meeting between Mr Tsvangirai and Ari Ben Menashe (Zimbabwe Legal Information Institute 2017). The case was dismissed as the defence lawyers said the tape had been doctored and that the video recording was of poor quality. This case highlights the importance of digital records as evidence in administering justice.

In an interview, the judge pointed out that, “At the time that they are before you, I think they carry the same weight. Once you have gotten rid of the issues of authenticity, then you are home and dry, the two are of the same evidentiary value.”

Digital records can be equated to paper records in that they qualify to be termed legal records and can serve as evidence in courts of law. Bearman (1994) asserts that records are physical or virtual in nature and are created in a certain context

with specific context and structure. Therefore, they act as evidence of actions and transactions; support accountability, which is connected to evidence; are related to processes; and are preserved to serve a certain purpose. Williams (2011) posits that computer-based electronic evidence is subject to the same rules and laws that apply to documentary evidence. This implies that both types of records are equal in administering justice as they possess content, context and structure.

## 7. Conclusion and recommendations

This study aimed to investigate the admissibility of digital records as evidence in a court of law in Zimbabwe. The findings revealed that digital records are more like real-time communication and as such they should be considered as admissible sources of evidence when passing judgments in court. While digital records are susceptible to manipulation, which distorts their original content, they have a pivotal role to play in administering justice in courts of law. The judicial sector is grappling with challenges brought about by digital records generated through technology, particularly social media, which has taken centre stage of people's lives. In addition, the findings revealed that there are no policies in place for the use of digital records as evidence. The legislation on evidence focuses on audio-visual records and excludes other types of digital records such as social media platforms, electronic financial statements and spreadsheets. The legal frameworks governing evidence need to be revisited and amended to accommodate digital records that are generated using a variety of technologies. The legal statutes were enacted before the advent of computer technology.

Having established that digital records play a pivotal role in the administration of justice, the study makes the following recommendations:

- 1) Considering the nature of digital records; where they are purported to be vulnerable and easy to manipulate, there is a need for guidelines to be in place for their authentication.
- 2) The study recommends the revision and updating of the National Archives Act of Zimbabwe (1982) so that it includes management of digital records to keep abreast with the technology.
- 3) The court system should have the appropriate infrastructure for handling digital evidence that is submitted as well as knowledge experts to decode it.

- 4) Court officials should undergo training and attend workshops/seminars on digital records to develop an appreciation of digital records, their management and technology as a whole. Training programmes should be established to ensure that court officials are taught how to deal with digital records as well as their authentication.
- 5) Court officials may venture into exchange programmes where they travel for benchmarking purposes and observe how other countries' judicial systems deal with digital records as evidence.
- 6) The study recommends further research on the admissibility of digital records as evidence in all courts of law in Zimbabwe.

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