TELECOMMUNICATIONS, MEDIA & TECHNOLOGY
Kenya

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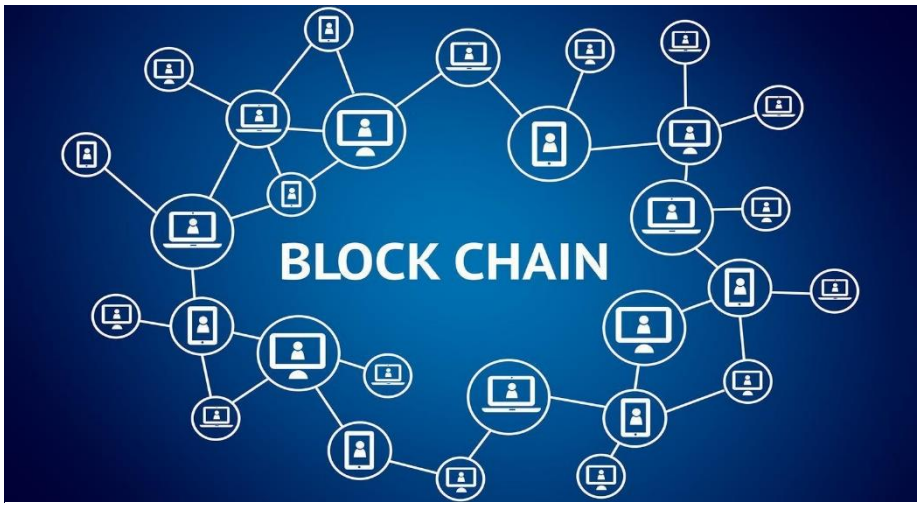
A CASE FOR BLOCKCHAIN EVIDENCE IN KENYA



Blockchains are an example of distributed ledger technology (DLT) which is an authoritative system of record where everyone who subscribes to it gets a permanent record of every transaction. Ideally, Blockchain does away with intermediaries. No alteration can be done on data once locked in a blockchain.

BLOCKCHAIN AND THE LAW; WHICH WAY TO GO?

Credibility of evidence given is critical in any tribunal adjudging a claim, hence the quick adoption of blockchain evidence worldwide.

China's Internet Court in Hangzhou City led the way in August 2018 when it ruled that evidence authenticated with blockchain technology can be presented in legal disputes. The case had been filed by a Hangzhou based media company against a technology company for copyright infringement. The plaintiff showed screen captured images and text that it considered unauthorized usage by the defendant which evidence had been encoded through a blockchain based evidence deposition platform.

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In the United States, the State of Vermont passed a law in 2017 which was later amended in November 2018 that creates a presumption of admissibility of blockchain records that meet certain minimum requirements.

The United Kingdom has also warmed up to this wave and on August 23rd, 2018, Balaji Anbil, the Head of Digital Architecture and Cyber Security at Her Majesty's Courts and Tribunals Service announced that the UK would be conducting a pilot project for storing digital evidence on a blockchain.

KENYA'S EVIDENCE LAW IN PERSPECTIVE.

Section 78A of the Evidence Act, Cap 80 (the Act) provides that electronic messages and digital material are admissible as evidence. The Act requires that the court look into the reliability of how the evidence was generated and maintained as well as how the originator was identified. Part VII of the Act goes on to detail how electronic records are admissible in court. This Part provides for aspects such as electronic agreements and electronic signatures. In light of innovative developments such as smart contracts, blockchain technology would enhance the reliability required under Section 78A of the Act.

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The Kenya Information and Communication Act No. of 2 of 1998 (KICA) gives legal recognition of electronic records at Section 83G. Section 83H provides for retention of electronic records and requires that such records remain accessible in the format it was originally generated. The law also requires that details facilitating the identification of the original destination, date and time of dispatch or receipt of such electronic record are available in the electronic record. Blockchain technology would improve the integrity of such information if there was need for it to be presented as evidence in court.

The Cabinet Secretary for ICT set up a taskforce on Blockchain and Artificial Intelligence in February 2018 to explore the use of Distributed Ledger Technology and AI for development in Kenya. This was a clear indication that the government appreciates these advancements and their impact on the Kenyan economy. It is expected that the report will lay a basis for a policy that will influence legislation on blockchain.

WHY BLOCKCHAIN?

Given that the Evidence Act is under review for amendment, it is the perfect opportunity for Kenya to streamline the digital evidence space for two reasons:

1. Technology is shaping the world

From the onset, a statute or regulatory guidelines governing use of blockchain would suffice. For instance, on January 10, 2019, the Cyberspace Administration of China (CAC) released Administrative Provisions on Blockchain Information Services (Blockchain Provisions), which came into effect beginning February 15, 2019. These provisions regulate the Blockchain industry in China and impose new regulatory requirements on Blockchain service providers. Kenya's technological space has seen blockchain service providers enter the market providing services albeit operating in a largely unregulated zone.

The proposed legislation or regulations should lay down the parameters or requirements that digital evidence stored and provided through blockchain should meet. International Best Practice considers at least:

a. Digital signatures;
b. Reliable timestamps;
c. Hash value verification; and
d. Authenticity of technology used for instance that the technology provider must be registered.

Blockchain is a reliable technology as it has features of decentralization and openness. Content stored on blockchain would be perpetual and hard to tamper with. Blockchain does away with intermediaries thus removing human interference as much as is possible. Blockchain has the capability to provide a framework for protecting the integrity of digital evidence by guaranteeing evidence chain

The Act must consider that there are now smart contracts and IP rights related to them. A smart contract is a pre-coded program or logic which is stored on a distributed ledger of a Blockchain system and can result in shared updates.

2. Need for transparency and authentic evidence.

For most public process functions, there are many participating parties and almost every space is most likely susceptible to corruption and inefficiency. Transparency and decentralization are not appreciated as values upon which our current societal make-up is constituted. This has also made its way into the digital space which would easily compromise evidence adduced in court.

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An inter-agency platform based on blockchain that allows government agencies to share evidence can be contemplated through the proposed regulation with the aid of necessary technocrats.

THE PROBLEM OF IMPLEMENTATION.

Whereas implementing blockchain evidence is recommended, we must anticipate and mitigate the problems that would be faced in implementing such law.

The judiciary has kicked off a digitization process which involves electronic filing systems, online assessment of court fees and a roll out of text to speech software to facilitate automatic transcription of proceedings. It has also over time established video conferencing to allow for speedy and timely access to justice. However, not all court stations are well endowed with requisite ICT infrastructure. Although the government has started the process of connecting all 640 court stations to broadband, there is much to be done yet. This would hamper adducing digital evidence through blockchain.

WAY FORWARD

The problems to implementation of blockchain technology should not hinder the development of the evidence law but rather challenge us to have well thought out amendments to the Evidence Act. Block chain evidence would be ideal if it guarantees greater transparency; enhanced security of evidence adduced; improved traceability of content in legal proceedings; and increased efficiency in delivering justice.