## CHAPTER 5

## CASES RELATED TO THE ACCEPTING DIGITAL DOCUMENT IN CIVIL AND SYARIAH COURT

### 5.1 Introduction

This This chapter will address the fourth research question. The gathered data was then evaluated using the document analysis method, which produced different results. The data were gathered from LexisNexis, CLJ Law, *Jurnal Hukum* and other sources. The researcher addresses the Malaysian Syariah court level of comprehension when admitting the digital document as evidence. Furthermore, the level of understanding, whereby Malaysian civil courts deal with the issue of digital document as evidence will be explored in the next section. In the final section, the researcher examines the differences between the Malaysian Syariah and civil courts in dealing with this issue. The next chapter suggests recommendations for improvement to the Syariah courts.

Several courts in various nations have rules on digital evidence cases. These situations arise with the advancement of technology and individuals start to use it to store information or data electronically. Computer printouts are also allowed as evidence under the Syariah or Islamic law; however, they are limited to civil trials because the burden of proof is less demanding. Islamic evidence law is a law of principles that regulates action and determines what evidence will be accepted in legal processes and trials. The acceptance of digital document should combine with Islamic evidence law to ensure that justice is served in the delivery of judgements.

According to Mohamad Khairudin and Ahmad (2019), the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561] or other Syariah Court Evidence Enactments, along with digital document, are inextricably linked to analysing and assessing the authenticity of digital evidence presented in a court of law.

## 5.2 Cases on Malaysian Civil Court regarding the Acceptance of Digital Document as Evidence

When it comes to digital evidence from the civil law perspective in Malaysia, it is important to note that the evidence statute was amended in 1993, which incorporated a section on electronic evidence. This updated law came rather later than those in fellow Commonwealth countries, such as Australia and the United Kingdom, whereby most additions to current law dealing with technology were incorporated in the 1970s and 1980s. Nevertheless, Section 90A, Section 90B and Section 90C of the Evidence Act 1950 [Act 56] are the provisions that governs Malaysia in terms of electronic or digital evidence and its admissibility. The issue now is what is a computer? Most people would think that a computer only constituted a desktop or laptop, but the legal definition in the Evidence Act 1950 [Act 56] is again very wide and not limited to the traditional understanding of the definition and types of computers. The Evidence Act 1950 [Act 56] defines a computer as a device that performs “logical, arithmetic, storage and display functions, and includes any data storage facility or communications facility”. Therefore, a computer can also include a ticket vending machine or a smartphone. Simple reference can be made to the case of *Hanafi Mat Hassan v PP* [2006] 3 CLJ 269 where tickets produced by a ticket machine in a bus were considered as part of computer-generated document or digital evidence. Once it was established that it was a document produced by a computer, it should be presented that the document was produced by the computer in the course of its ordinary use, and this could be done either through a certificate or by calling the maker to such document. According to Petters (2013), the term ‘computer-generated documents’ is ambiguous and even deceptive. Furthermore, according to the author, it might apply to any type of computer output or printout, including secure emails and contracts, regardless of whether the creator is identified. As a result, it is proposed that the court distinguish between a computer-generated document, whereby the output is just spitting out its input and one that is not.

First and foremost, in the case of *NR Management Sdn Bhd v CH-9 Media Sdn Bhd & Anor* [2021] 1 LNS 1036, the court believed that the document should be admissible even if no certificate under Section 90A of the Evidence Act 1950 [Act 56] was produced. In this case the Managing Director of NR Management and his lawyer who uploaded the screenshot. Evidence during the court trial with regard to the document was by the Managing Director of NR Management himself. Therefore, the exhibit was accepted as evidence, as it was in the Managing Director of NR Management’s own knowledge and the document was clearly related to Berita TV9 live broadcast on 23 August 2017 at 1.03 pm, which was posted on Facebook addressed to the plaintiff. The court also referred to Section 90A (2) of the Evidence Act 1950 and Section 3 of the Evidence Act 1950 on the definition of a ‘document’. The definition refers to any matters that are expressed, described, or described in any way on anything, including any matters included in a disc, tape, film, soundtrack, or other devices, by using letters, numerals, signs, symbols, gestures, emblems, or any other types of declaration, description, or description; any visual recording, whether static or moving;

any sound recording, or any electrical, magnetic, mechanical, or other recordings, or any sound, electronic pulse, or other data, regardless of how it was made.

Reference was made to the following illustrations for further clarification:

i. Writing is a document.

ii. The word printed, lithograph or photographed is a document.

iii. Things that are recorded, stored, processed, retrieved, or issued by a computer are documents.

It was clear that the documents were a part of the plaintiff's day-to-day business affairs and were in the possession and custody of the plaintiff and provided the defendant did not argue the authenticity of the documents, they were admissible by the court as evidence under Section 73A (2) of the Evidence Act 1950.

In the case of *Gnanasegaran Pararajasingam v Public Prosecutor* [1997] 4 CLJ 6, the appellant, while acting as the complainant's solicitor, was entrusted with the ownership of two sums of money owned by the complainant, namely RM6,576.16 and RM133,000. The appellant kept the money in his office account and his client's account, respectively. The bank officer, Zainal, who was in-charge of the two accounts, testified that as of 27 May 1988 the bank decided to close the accounts, whereby the credit balance in each account remained at RM401.02 and RM39.69. At that time, the appellant did not make any payment to the complainant, and the court found that a criminal breach of trust in such circumstances had been proven against the appellant.

The appellant appealed and argued that the learned judge was wrong in admitting Zainal's evidence and relying on him. It was undeniable that in giving his evidence, Zainal relied heavily on computer printouts, which revealed the transactions made by the appellant with regard to the two sums of money. It was also undeniable according to subsection (1) Section 90A of the Evidence Act 1950 [Act 56]. The section provided that there was evidence that the document was published by a computer and that the computer published it 'in the ordinary course of its business'. The computer-generated papers in question were the firm's bank statements kept at the bank, and the case featured a criminal breach of trust by a firm of solicitors to their client. Nonetheless, Section 90A (2) of the Evidence Act 1950 [Act 56] stated:

> "(2) For the purposes of this section it may be proven that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person, who either before or after the production of the document by the computer is responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used."

The court ruled that the testimony from one of the witnesses, who was the bank officer in-charge of the account was sufficient to prove the components of Section 90A, namely the statements were generated by a computer in the ordinary course of business. As a result, the court disregarded the certificate requirement because the creator of the claims was present during the case's hearing. It is interesting to note that no certificate was ever presented in this case. On the other hand, the witness who testified was able to say whether the document was produced in the normal course of business. Although the document is no longer required in this case, it can still be seen in the original acceptance of the digital document as evidence previously.

Next, in the case of *Mohamad Fauzi Che Rus v Jr Joint Resources Holdings Sdn Bhd* [2016] 6 CLJ 266, the plaintiff was a human resource consultant, who assisted in the recruitment of foreign personnel. The defendant was a corporation that the Ministry of Home Affairs had permitted to recruit, manage and employ foreign workers. The plaintiff was required to procure and win contracts from clients for the recruitment, supply and management of foreign workers under the provisions of an agreement (the original agreement) signed on 25 October 2005. The plaintiff was to be paid 30% of the company's profits for hiring and managing foreign workers under the terms of this agreement. The plaintiff was granted exclusivity to procure business from several companies, including Advanced Micro Devices Export Sdn Bhd (AMD), Texas Instruments Malaysia Sdn Bhd (Texas Instruments) and STATS ChipPAC Malaysia Sdn Bhd (STATS ChipPAC), under the terms of two supplemental agreements signed by the parties on 7 December 2005. The supplemental agreements also stated that if the plaintiff is successful in obtaining business from the specified companies, the defendant would pay the plaintiff 30% of the profits for as long as the client's company remained a client of the defendant, as stated in Clause 2 of the original agreement.

Within the exclusivity period, the plaintiff claimed to have successfully negotiated contracts for AMD, Texas Instruments and STATS ChipPAC, and he recognised that the defendant had paid him RM153,016.20. On 23 July 2007, the defendant made the plaintiff an offer of employment as the chief operating officer of the JR Group of Companies based in JR Joint Resources Holdings Sdn Bhd, which meant that while the plaintiff would be employed by the defendant, his responsibilities would extend to all of the group's companies. The plaintiff started working on 1 September 2007 and by July 2008, he was the chief operating officer of the company. During his employment, the plaintiff discovered that the defendant had failed to pay his portion of the earnings, as stipulated in the initial contract. The plaintiff claimed that he was entitled to:

i. RM1,027,302 in compensation from Texas Instruments;

ii. RM186,462 in compensation from STATS ChipPAC; and

iii. RM304,435 in compensation from AMD.

The plaintiff attempted to adduce, amongst other things, invoices issued by the defendant to the clients and internal records of the defendant purporting to illustrate the defendant's costs and expenses in the supply of foreign workers to the clients. The issues for determination were:

a) whether the plaintiff's appointment as the defendant's chief operating officer had the effect of terminating the original agreement; and
b) whether (i) there were any amount owed by the defendant to the plaintiff under the original agreement, and (ii) whether the computer-generated documents sought to be adduced by the plaintiff had the effect of terminating the original agreement.

Therefore, the judgement said that even if the conditions under Section 90A of the Evidence Act 1950 [Act 56] are not met, 'documents created by a computer may still be admitted if it is acceptable under another exception to the rule against the hearsay.

Additionally, according to Mohamed and Ramlee (2014), the case related to the acceptance of digital evidence in civil court is the case of *RHB Bank Berhad v Lee Kai Shin & Anor* (High Court of Sabah & Sarawak at Kuching, July 2008). The plaintiff (RHB) claimed against the outstanding balance under the Hire Purchase agreement, which was RM162,186.06, plus interest at 8% per annually from 13 January 2006 until full repayment and expenses. The learned Session Court Judge determined that the account statement of the plaintiff was documented evidence and that it satisfied with

Section 90A (2) of the Evidence Act 1950 [Act 56], as the admissibility of documents produced by computers and of statements contained therein Section 90 (2).

During the trial, the defendants disputed on admissibility of the plaintiff's evidence. The defendant argued that the bank statement constituted digital evidence that should adhere to Section 90A (2) of the Evidence Act 1950 [Act 56]. According to the argument the digital evidence was inadmissible because the plaintiff failed to submit a certificate. The learned Session Court Judge determined that RHB Bank Berhad's account statement constituted documentary evidence and that it had conformed with Section 90A (2) of the Evidence Act 1950 [Act 56].

The judge also found that, notwithstanding the lack of a certificate from RHB Bank Berhad, the oral testimony of the RHB witness was adequate to determine the digital evidence's reliability and admissibility. In other words, the digital evidence in this case was accepted. As a result, the sum claimed by RHB Bank Berhad was correct. Lee Kai Shin and Anor were then required to pay the remaining debt until the case was fully settled and costs were paid (Nurainolmardhiah et.al, 2015). It specified that a statement considered admissible as evidence should not be considered as confirmation of evidence given by the maker of the statement for the purposes of any rule of law, or practise requiring authentication of evidence, or regulating the way unverified material is served (Mohan, 1992).

Furthermore, in the case of *PP v Hanafi Mat Hassan* [2003] 6 CLJ 459, it was also related to Section 90A (2) of the Evidence Act 1950 [Act 56]. The defence argued that because the ticket was generated by a computer, which was the bus ticket system, it could not be admitted unless it was shown by the offering of a certificate under Section 90A (2) of the Evidence Act 1950 [Act 56]. The accused also rejected the



UNIVERSITI SAINS ISLAM MALAYSIA
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA

charges, claiming that he had offered a friend a lift on the bus during the alleged incident. The digital evidence produced in this case, namely the bus ticket and the DNA report, was received to establish the accused guilty of the counts of rape and murder of the victim (Mohamad Azhan et al., 2017). The accused, a bus driver, was charged with the murder and rape of Noor Suzaily, the victim. On the day of the claimed incident, the victim allegedly boarded the bus driven by the accused. A bus ticket recovered in the deceased's bag was one of the key pieces of evidence presented. According to the information on the ticket, it was issued by the accused from a ticketing system on board the bus on the day in question. Therefore, the DNA report and the bus ticket were the evidence according to Section 90A of the Evidence Act 1950 [Act 56] to prove the accused with the crime.

These cases showed the relevant legal rules controlling the acceptance of digital evidence and also the court decisions involving those rules on civil court process. If there is a debate or challenge about the authenticity of digital evidence in the future, the Civil Procedure Act and Enactments could be used as references to the Syariah and civil courts. The Civil Procedure Act and Enactments should implement the rules in admitting digital document as evidence in the civil Court, which may improve the way Syariah legal practitioners deal with this type of evidence in a courtroom. Moreover, this will ultimately benefit the legal Syariah measuring standard accurate results by adopting an implementation technique that is required from the provision of the civil court in dealing with digital evidence for achieving an effective digital document as evidence in court.

## 5.3 Cases on Malaysian Syariah Court regarding the Acceptance of Digital Document as Evidence

Digital evidence, often known as digital documents, can be used as evidence in court. Furthermore, according to Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561], digital documents can be used as evidence in the category of documents. However, the admissibility of a digital document as a form of proof in a Syariah court should be deeply analysed (Wan Abdul Fattah et al., 2020). Therefore, in this section, the researcher will discuss a number of incidents involving document falsification in marriage cases under Syariah courts. Furthermore, the researcher will investigate such issues and draw broad conclusions about how Syariah courts manage them.

The existence of digital evidence in Syariah court can be demonstrated in several digital tools. The requirements of Section 49 of the Syariah Court Evidence (Federal Territories) 1997 [Act 561] strengthen the definition of a document based on Section 3 of the Syariah Court Evidence (Federal Territories) Act 1997 [Act 561].

First and foremost, the case related to acceptance of digital document as evidence in Syariah court can be seen in the case of *Zabariah Binti Mat Piah v Syed Abas Bin Syed Ibrahim,* file case no: (06100-041-0422 -2008) on 10 October 2008, whereby a *fasakh* claim was filed in the Kuantan Syariah High Court. On 11 June 1968, the plaintiff, Zabariah Binti Mat Piah, married the defendant, Syed Abas Bin Syed Ibrahim, and they had five children. Insufficient maintenance and the defendant assaulted the plaintiff’s body were two of the reasons given by the plaintiff in filing a *fasakh* claim in the Syariah High Court of Kuantan. On the other hand, the evidence that the plaintiff was assaulted was the burden that fell on the plaintiff's shoulders.

However, bringing witnesses for this proof was impossible because no one assaulted his wife and summoned witnesses to observe the incident. The plaintiff's claims should be substantiated by evidence or proof of evidence. The judge in this case, Yang Arif Dato'Haji Abdul Rahman bin Mohd Yunos, ordered that the claim of physical injuries should be backed up by a medical report or document description in visual form or photograph. The Syariah court accepts photos or visuals that are deemed as a digital document description, as evidence in court (Mohamad Azhan et al., 2020). A medical report from a medical institution or clinic as well as visuals or images, demonstrating having been severely battered or endangering the physical being, are examples of evidence that can be accepted in a Syariah court in the case of a *fasakh* claim connected to the issue of physical assault. Additionally, Syariah courts accept photographs or visuals that are deemed digital evidence, as evidence at trial.

During the trial, no medical reports from any medical institution or clinic corroborating the plaintiff's claims, nor documented evidence in the form of visuals or images, demonstrating that the plaintiff was badly battered or inflicting physical harm to the plaintiff, were shown to the court. The judge found that the strike was light and did not cause serious injuries in this case. However, bringing witnesses for this proof is impossible because no one assaulted his wife and summoned witnesses to observe the incident (Mohamad Azhan et al., 2017).

In the case of *Farah Wahida binti Jamaludin v Adam Kee bin Abdullah* [2003], file case no: (01001-014-0560-2017-JB), the case was based on Section 53 of the Johor Islamic Family Law Enactment, whereby the plaintiff Farah Wahida sought the dissolution of her marriage (*fasakh*) to the defendant Adam Kee bin Abdullah. The plaintiff claimed that the defendant had failed to pay maintenance for several years as well as other obligations, such as house rental costs and the child's nursery. Nonetheless, the plaintiff was abused and injured by the defendant, inflicting and causing harm. According to the plaintiff, the defendant was performing the Buddha's ritual in a temple. On that claim, the plaintiff displayed a picture of causing harm and also a picture of a Buddha rite. The plaintiff was successful in her claim for divorce (*fasakh*) (Mohamad Khairudid & Ahmad, 2019). It showed that the existence of digital evidence could be seen as using various digital devices in this case and could also be accepted as digital evidence in the Syariah court.

Other than that, in the case of *Ahmad Faozi Bin Mansor v Norhafizah Binti Ahmad*, file case no: (14002-058-0001-2004), the defendant had cheated on her husband and had an extra-marital affair with another man. In this issue, the plaintiff accused the defendant of deception by submitting a phone bill revealing that the defendant frequently communicated with other men. The claim from the husband was approved by the Syariah court based on proof of behaviour shown in the document descriptions, such as phone bills and SMS. Therefore, it showed that the Syariah Court Evidence section of laws contained the corresponding digital forensics technology with Islamic Evidence Law.

Additionally, a case related to sending an SMS and asking for divorce is also not a new issue to the Malaysian society. It became a topic of conversation in 2003 when the case of *Shamsudin Latif v Azida Fazlina Bt Latif* was referred to the Syariah court (Gombak). In this case, Syarie Judge Mohamad Fauzi Ismail ruled that the divorce *taklik* statement sent by Shamsudin via SMS, which read as *'If you don't leave your* *father's and mother's house, you got a triple divorce'*, was valid as well as a triple divorce was affective against Azida (Norazlina, 2006). According to the above evidence, the court decided that the utterance made was a *sarih* utterance (explicit). Therefore, the court did not consider the intention of the plaintiff when making a statement via SMS.

This claim was also based on the case of *Moriazi bin Muhammad v Ajmawati binti Atan* [2005] 1 CLJ (SYA) 415, in which the judge agreed with the plaintiff who had successfully filed the *qarinah* that could be accepted by the Syariah court of Selangor, namely receipts and cheques as papers as well as money reimbursements. The plaintiff submitted a claim against her former husband for a specified amount of money and the admission of digital documents was discussed indirectly. The purported loan of SGD46,000 was included in the ancillary claims. The defendant denied the loan existed, but claimed it was intended as a gift. Both sides were unable to substantiate their claims, but the plaintiff was able to establish that the defendant had paid her SGD20,000 using various cheques credited to her bank account. The digital evidence should also be supported by supporting information, such as an expert's testimony, according to Section 33 of the Syariah Court Evidence (Federal Territories) 1997 [Act 561]. This type of testimony is used to confirm the authenticity of digital documents (Wan Abdul Fattah et al., 2021b). Section 33 of the Syariah Court Evidence (Federal Territories) 1997 [Act 561] stated:

> "(1) When the Court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, or relating to determination of *nasab*, the opinions upon that point of persons specifically skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, or relating to determination of *nasab*, are *qarinah*.
>
> (2) Such persons are called experts.

> (3) Two or more experts shall be called to give evidence where possible, but if two experts are not available, the evidence of one expert is sufficient. If two experts give different opinions, a third expert shall be called to give evidence.
>
> It is illustrated as follows:
>
> The question is whether a certain document was written by A. Another document is produced, which is proven or admitted to have been written by A.
>
> The opinions of experts on the question whether the two documents were written by the same person, or by different persons are *qarinah*."

According to Wan Abdul Fattah et al. (2018), in this case, the appellate judge also overlooked or had a lack of understanding on the concept and implementation of digital documents. All the data were recorded in the system or identified as a digital document throughout the process of storing, withdrawing and transmitting money either online or via cheques, as in this example. When compared to evidence, information from digital documents is stronger and more constant since it does not alter, even after time passes and the owner has been deceased for ten years. When the time passes and the witness forgets or dies, the testimony of witness may change.

Therefore, there is a clear provision under Syariah law, for admittance of digital document as evidence in Syariah court issues under the Syariah Court Evidence (Federal Territories) 1997 [Act 561]. However, the cases in Syariah court have limited judgement, which is only related to marriage rather than in the civil court that is wider. Even though Syariah courts hear many cases involving digital document as evidence, the rules related to this issue is still minimal and is usually applied at the discretion of the court.

## 5.4 Comparison between Cases in Syariah and Civil Court

Digital documents can be used to support a divorce case, a marriage declaration and *nafkah* suits in Syariah courts. These technological and digital evidence are utilised in the prosecution of Syariah crime cases to back up the charges against the accused, such as illicit intercourse and *khalwat* (Wan Abdul Fattah et al., 2021a).

The exclusive section on admissibility of digital evidence as well as the need for the enforcement officer to access computerised data, as established in the Malaysian Criminal Procedure Code, have yet to be altered. As a result, the amendment is necessary. Furthermore, even though no cases involving digital forensics in civil or criminal proceedings existed, the existence of digital evidence can be seen using various digital devices. Nonetheless, the decisions of the Malaysian civil courts in matters involving digital evidence can be used as precedent by the Syariah courts when dealing with digital evidence situations. The party should meet the standards set forth in Section 90A of the Malaysian Evidence Act 1950 [Act 56] in order for the digital evidence to be accepted (Mohamad Khairudid & Ahmad, 2019).

As a result, the court will consider all of the requirements before deciding whether digital evidence is admissible or inadmissible in certain instances. In evaluating the authenticity of digital evidence, digital forensics science can be used in conjunction with the Syariah and Civil Procedure Act 1998 and Enactments.

## 5.5 Conclusion

In summary, this chapter discussed how Civil and Syariah laws deal with the issue relating to the admissibility of digital document as evidence through cases from both courts. The researcher analysed several cases, involving the digital document as evidence in Syariah and civil courts to make a general conclusion on how both courts deal with this issue. As a result, in the following chapter, the researcher will propose amendments to the present Malaysian Syariah legislation on the admittance of digital document as evidence. The researcher will offer some future improvements that the Syariah court could make in terms of admitting the digital document as evidence.

UNIVERSITI SAINS ISLAM MALAYSIA
ISLAMIC SCIENCE UNIVERSITY OF MALAYSIA