**OLUWAROTIMI O. AKEREDOLU**

**V.**

1. **DR. RAHMAN OLUSEGUN MIMIKO**
2. **LABOUR PARTY (LP)**
3. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**

*SUPREME COURT OF NIGERIA*

SC.352/2013

**WALTER SAMUEL NKANU ONNOGHEN, J.S.C.** *(Presided)*
**IBRAHIM TANKO MUHAMMAD, J.S.C**
**CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C**
**JOHN AFOLABI FABIYI, J.S.C.**
**NWALI SYLVESTER NGWUTA, J.S.C.** *(Read the Leading Judgment)*
**MARY UKAEGO PETER-ODILI, J.S.C.**
**STANLEY SHENKO ALAGOA, J.S.C.**

**THURSDAY, 29th AUGUST 2013**

*ACTION - Case of party – Need for party to be consistent in his case.*

*APPEAL - Concurrent findings of fact by trial tribunal and Court of Appeal Attitude of Supreme Court thereto - When it can interfere therewith.*

*APPEAL - Ground of appeal - Comment, statement or argument of counsel whether can found ground of appeal.*

*APPEAL - Grounds of appeal – Formulation of - Need to relate to and arise from decision appealed against.*

*APPEAL - Grounds of appeal - Incompetent grounds - Whether can be argued along with competent grounds - How treated.*

*APPEAL - Issues for determination - Formulation of - Need to be based on grounds of appeal.*

*APPEAL - Issues for determination - Formulation of - Purpose of.*

*APPEAL - Preliminary objection to an appeal Purport of - Where raised - How treated.*

*ELECTION - Voters register Complaint in respect of - Whether can be raised after election has taken place.*

*ELECTION PETITION - Allegations in election petition, civil and criminal in nature - Standard of proof of.*

*ELECTION PETITION - Election tribunal - Allegation of manipulation of voters register - Jurisdiction of to entertain - Need to draw distinction between manipulation of voters register and use of manipulated voters register.*

*EIECTION PETITION - Election tribunal Need to have jurisdiction to entertain all matters connected with election.*

*ELECTION PETITION - Electoral Act, 2010(as amended) – Sections 138(1) and I39 (1 ) thereof Construction of.*

*ELECTION PETITION - Non-compliance in an election - Petitioner-alleging - Duty on to prove that same affected the outcome of election - Section 139(1) of the Electoral Act, 20l0(as amended).*

*ELECTION PETITION - Non-compliance in election matters- Provisions of sections 138(1) and 139(1) of the Electoral Act, 2010(as amended) - Need to read together in relation thereto.*

*ELECTION PETITION "Non-compliance" in sections l38 (1) (b) and I39 (1) of Electoral Act. 2010) (as amended) - Construction of.*

*ELECTION PETITION Non-compliance with provisions of Electoral Act - When will not invalidate election - Section 139(1) of the Electoral Act, 2010.*

*ELECTION PETITION - Voters register - Allegation of compilation of illegal voters register - Standard of proof of.*

*ELECTION PETITION - Voters register - Manipulation of voters register - Allegation of - Duty on petitioner alleging.*

*EVIDENCE - Expert witness - Evidence of - Whether court bound to accept - Duty on court.*

*EVIDENCE - Expert witness Report of - Where produced for fee - How treated.*

*EVIDENCE - Proof - Allegation of compilation of illegal voters register - Standard of proof of.*

*EVIDENCE - Proof - Allegations in election petition, civil and criminal in nature - Standard of proof of.*

*EVIDENCE - Proof - Manipulation of voters register - Allegation of Duty on petitioner alleging.*

*EVIDENCE - Proof - Non-compliance in an election - Petitioner alleging - Duty on to prove that same affected the outcome of election Section 139(1) of the Electoral Act, 2010 (as amended).*

*INTERPRETATION OF STATUTES - Electoral Act, 2010 (as amended) - Sections I38 (1) (b) and 139(1) thereof - Construction of.*

*INTERPRETATION OF STATUTES – "Non-compliance" in sections 138 (1) (b) and 139(1) of the Electoral Act, 2010 (as amended) - Construction of.*

*JURISDICTION - Election tribunal - Allegation of manipulation of voters register - Jurisdiction of to entertain - Need to draw distinction between manipulation of voters register and use of manipulated voters register.*

*JURISDICTION - Election tribunal - Need to have jurisdiction to entertain all matters connected with election.*

*PRACTICE AND PROCEDURE - Ground of appeal Comment, statement or argument of counsel - Whether can found ground of appeal.*

*PRACTICE AND PROCEDURE - Appeal Grounds of appeal Formulation of - Need to relate to and arise from decision appealed against.*

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*PRACTICE AND PROCEDURE - Appeal - Preliminary objection to an appeal - Purport of - Where raised - How treated.*

*PRACTICE AND PROCEDURE - Case of party – Need for party to be consistent in his case.*

*PRACTICE AND PROCEDURE - Concurrent findings of fact by trial tribunal and Court of Appeal - Attitude of Supreme Court thereto – When it can interfere therewith*

*STATUTE - Electoral Act, 2010 (as amended) Sections 138(1) and I39 (1) thereof - Construction of.*

*WORDS AND PHRASES - "Compliance" – "Non-compliance" -Meaning of.*

*WORDS AND PHRASES – "Non-compliance" in sections 138(1) (b) and 139(1) of the Electoral Act, 2010 (as amended) – Construction of.*

*WORDS AND PHRASES – "Non-compliance" – Meaning of.*

**Issues:**

1. Whether the Court of Appeal was right in upholding the decision of the trial tribunal to the effect that PW 34 and PW 35 did not render credible evidence to sustain the petition.
2. Whether the Court of Appeal was right in upholding the decision of the trial tribunal that the appellant failed to establish that the

alleged acts of non-compliance with the Electoral Act vitiated the election.

3. Whether the trial tribunal had the jurisdiction to entertain a matter relating to the alleged injection of names in the voters register used for the election.

**Facts:**

On 20th October 2012, the 3rd respondent conducted election for the office of the Governor of Ondo State. At the election, the appellant was sponsored by the Action Congress of Nigeria, while the 1st respondent was the candidate of the 2nd respondent. At the end of the election, the 3rd respondent declared the 1st respondent winner of the election with 260,195 votes.

The appellant challenged the declaration of the 1st respondent as winner by filing a petition at the Governorship Election Tribunal of Ondo State.

In the petition, the appellant pleaded that he had information from undisclosed source that the 1st and 2nd respondents, with the connivance of the 3rd respondent, secretly computed an illegal voter's register for use at the election; and that the 3rd respondent secretly manipulated the voters register with the active connivance of the 1st and 2"d respondents. The appellant claimed that the mode of manipulation of the voters register was a registration exercise called "Card Igbe Ayo", which was used as a cover for the alleged manipulation of the voters register by the injection of 100,000 names as voters for the election. The appellant also claimed that the unlawful injection of names into the voters registers included double and multiple registrations, and that there were other registrants whose finger prints were not captured.

At the trial, the appellant called 41 witnesses, including two expert witnesses, PW 34 and PW 35. The 1st respondent called 14 witnesses, while the 2nd and 3rd respondents called no witness. The appellant placed a great deal of reliance on the evidence of PW 34 and PW 35.

At the conclusion of trial, the trial tribunal dismissed the petition. The trial tribunal held that the appellant failed to prove his allegations of non-compliance with the provisions of the Electoral Act as well as the criminal allegations contained in the petition. It was held that the appellant failed to demonstrate how the alleged

injection of registrants into the voters registers substantially affected the result of the election.

The trial tribunal rejected the testimonies of PW 34 and PW 35 and found that their reports could not be accepted as the witnesses were thoroughly discredited during cross-examination. The evidence of PW 34 was discountenanced as not being credible as he had admitted under cross-examination that he was briefed upon a fee to look for evidence to sustain the petition. The trial tribunal found that PW 35 admitted that he gave repetition of entries of different numbers and that he admitted several errors in his report.

The appellant's appeal to the Court of Appeal was dismissed and the judgment of the trial tribunal was affirmed.

Dissatisfied, the appellant appealed to the Supreme Court, while the 1st respondent appealed against part of the decision of the Court of Appeal.

In determining the appeal, the Supreme Court considered the provision of sections 138(1) (b) and 139(1) of the Electoral Act, 2010 (as amended), which state thus:

"138(l) an election may be questioned on any of the following grounds:

(b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of (the) Act."

"139(1) an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."

**Held (***Unanimously dismissing the appeal and the cross-appeal):*

1. *On Standard of proof of allegation of compilation of illegal voters register -*
**A compilation of illegal voters register for use in any election is a criminal act and as such ought to be proved beyond reasonable doubt. This principle applies in an election case where allegation of crime is made. In the**

**instant case, it was claimed that the mode of manipulation of the voters register was a registration exercise which was used as a cover for the alleged manipulation of the voters register by injection of 100,000 names as voters for the election. However, the allegation of the criminal offence was not proved as required by law. [***Abubakar v. Yar 'adua* **(2008) 19 NWLR (Pt. 1120) 1 referred to.]** *(P. 439, paras. B-D)*

2. *On Duty on petitioner alleging manipulation of voters register -*
**In addition to pleading and proving an alleged manipulation of voters register, the petitioner in an election petition has a further duty to plead and prove the effect of the alleged manipulation on the result of the election. Even if it is proved that all the alleged voters injected into the voters register turned out and voted for the respondent, it will be necessary to deduct their votes as illegal votes from the respondent's total scores. In the instant case, the appellant failed to plead and prove the effect of the alleged manipulation on the result of the election.** *(P. 439, paras. E-G)*

3. *On Jurisdiction of election tribunal to entertain allegation of manipulation of voters register-*
**In determining the issue of the jurisdiction of an election tribunal to entertain matters relating to alleged manipulation of voters register, a distinction must be drawn between the occurrence of the facts amounting to injection of names in the voters register and the use of allegedly manipulated register in the election. While the former is an act done prior to the conduct of the election, the latter is an act contemporaneous with the conduct of the election. The former is a pre-election matter over which the tribunal has no jurisdiction, but the latter, the use of the register with the names injected therein for the election, is an election matter over which the tribunal has jurisdiction. In other words, it is the use of the manipulated voters register at the election, as distinct from the act of the alleged manipulation which is prior to the election that the election tribunal has the jurisdiction to entertain.** *(P. 441, paras. D-E)*

4. *On Jurisdiction of election tribunal to entertain allegation of manipulation of voters register -*

**Compilation of a voter's register and everything relating thereto predates an election, and as such it is a pre-election matter. However, it is not correct to contend that the voters register so produced and used in an election, if challenged, cannot be said to have affected the result of the election in question on ground of non-compliance with the provisions of the Electoral Act. In that respect, what is being challenged in effect is the effect of the use of a defective voters register on the result of the election. It is the use to which the alleged defective voters register is put to the disadvantage of the contestant(s) that constitutes the non-compliance which may substantially affect the result of the election in question, and consequently bring the issue within the jurisdiction of the election tribunal or court. In the instant case, the irregularities complained of in the petition as constituting a ground of non-compliance with the Electoral Act was the allegation of injection of names into the voters register, which was subsequently used in the election in issue. The appellant's case was that the voters register used in the election was injected compiled or not compiled in accordance with the provisions of the Electoral Act, 2010 (as amended) and that the omission or commission was done by the authority concerned to give undue advantage to one or some of the parties to the contest, which register was actually used in the election. Therefore, the question of non-compliance in the peculiar circumstances of the case came within the purview of the provisions of section 138(1)(b) of the Electoral Act, 2010 (as amended) and within the jurisdiction of the Election Tribunals or courts.** *(P. 443, paras. A-F)*

**Per ONNOGHEN, J.S.C. at pages 443 – 444, paras. G-C:**

> **"It should however not be understood that 1 am saying that the compilation of a voters register and/or anything relating thereto is not a pre-election matter for which provisions have been made in the Electoral Act, 2010, (as amended) for its challenge or redress. What I am saying is that there is much difference between the process of compilation of voters register and the use to which the compiled register is put in an election and the effect it has or may have on the result of the election. Whereas the process of compiling a voters register is a pre-election matter, the use to which an alleged fundamentally defective voters register so compiled is put to in an election which may substantially affect the result of the said election is**

**clearly an issue of non-compliance with the provisions of the Electoral Act, which constitutes a ground for challenging an election in a petition under section 138(1)(b) of the Electoral Act, 2010 as amended.**

**I am of the considered view that the position of the cross appellants, if accepted, will create injustice as the effect would preclude a petitioner with a genuine and substantial complaint against the use to which a fundamentally defective voters register is put to his disadvantage in an election from challenging same on the ground of non-compliance with the provisions of the Electoral Act. The Electoral Act is the foundation of the election process just as you cannot conduct a free and fair election without a voters register."**

5. *On Whether complaint in respect of voters register can be raised after election has taken place –*
**The matter of election goes beyond the casting of votes. Once the election has taken place, any concern over the voters register can only be addressed not in isolation, but within the purview of the fully completed electoral process in the given territory. And the form of adjudication is nowhere else at that point but the election tribunal where all the emanating issues, inclusive of the voters register and the voting, collation and declaration of result, are considered and a decision reached.** *[I.N.E.C. v. A.C.N.* **(2009) 9 NWLR (Pt. 1126) 524 referred to.]** *(Pp. 473-474, paras. G-B)*

6. *On Need for election tribunal to have jurisdiction to entertain all matters connected with election -*
**It is necessary that everything connected with the process leading to an election including the actual election and its aftermath comes within the jurisdiction of the election tribunal. That will stem the tide of parties trying to pursue election related matters in parallel courts which will only result in confusion. Where an action is in respect of an election conducted by the appropriate authority, whether inchoate or not, the proper court with jurisdiction to entertain any action arising there from or relating thereto is the relevant election tribunal established by the Constitution, as the matter is not a pre-election matter neither can it be accommodated under the procedure of judicial review.** *[Ohakim v. Agbaso* **(2010) 19 NWLR (Pt. 1226) 172 referred to.]** *(P. 473, paras. B-E)*.

7. *On When non-compliance with provisions of Electoral Act will not invalidate election –*
**By virtue of section 139(1) of the Electoral Act, 2010 (as amended), an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. Thus, it is not enough for the election tribunal or court to find that there was non-compliance with the provisions of the Electoral Act in the conduct of the election in issue for the non-compliance so found to vitiate the election. The petitioner in the circumstance of the case, must satisfy the tribunal or court that the non-compliance alleged and found to have occurred in the conduct of the election substantially affected the result of the election and that the election was not conducted substantially in accordance with the principles of the Electoral Act, 2010 (as amended). In the instant case, the non-compliance was said to be unlawful injection of names into the voters register, which was said to be double and multiple registrations; and that there were other registrants whose finger prints were not captured. The appellant had the duty to establish by evidence that the non-compliance complained of substantially affected the result of the election. The failure to do so was fatal to the case of the appellant.** *[Buhari v. I.N.E.C.* **(2008) 19 NWLR (Pt. 1120) 246;** *Buhari v.Obasanjo* **(2005) 13 NWLR (Pt. 941) I;** *Akinfosile v. Ijose* **(1960) SCNLR 447;** *Awolowo v. Shagari* **(1979) 6-9 SC 51;** *C.P.C. v. I.N.E.C.* **(2011) 18 NWLR (Pt. 1279) 493;** *Yusuf v. Obasanjo* **(2005) 18 NWLR (Pt. 956) 96;** *Ojukwu v. Yar'adtta* **(2009) 12 NWLR (Pt. 1154) 50 referred to.]** *(Pp. 445, paras. C-H; 455, paras. E H; 465-466, paras. F-B; 476-477, paras.H-F)*

8. *On Need to read the provisions of sections 138(1) and 139(1) together in relation to non-compliance in election matters -*
**Sections 138(1) and 139(1) of the Electoral Act, 2010(as amended) must be read together in construing the principle of non-compliance and its application to the complaints of non-compliance in election matters.** *(P. 451, paras. E-C)*
**Per CHUKWUMA-ENEH, J.S.C. at pages 451-452, paras. G-E:**

**"I hold the view that the two provisions have to be so construed together in order to arrive at the true intention of the law-maker and it couldn't be more so than here where the provisions of the said two sections are dealing with the same subject matter of non-compliance. The 3rd respondent has practically argued to the effect that section 138(1) (b) literarily has to be read subject to section 139(1) and 1 agree. Again, they must be read conjunctively to achieve the lawmaker's intention. In this regard an election cannot be vitiated for non-compliance unless and until the election sought to be so vitiated is also further showed conclusively where the standard proof so requires it, that the non-- compliance has also substantially affected the result of the election. In other words the appellants have to establish that but for the non-compliance they would otherwise have scored a majority of lawful votes over the number of votes cast for 1st respondent. Meaning in the context of this matter that going arithmetically that by subtracting the said over 100,000 illegal votes from the votes cast in favour of the 1st respondent here in the election that the votes cast in their favour would have come tops to that of the 1st respondent. In practical terms that is what the respondents' argument here has represented. The appellants' argument as per their above cited paragraph 8.07, with respect, is misconceived and unacceptable. It is wrong on the facts and circumstances of this matter or the applicable law to hold that the invalidity of the election automatically follows by operation of law under section 138(1) without adverting to the further duty on the appellants to show that the non-compliance having been proved has substantially affected the outcome of the election as per the said section 139(1)."**

9. *On Duty of petitioner alleging non-compliance to show that same affected outcome of election -*
**The burden is squarely on a petitioner who asserts acts of non-compliance to further show how the noncompliance has affected the outcome of the election, and who otherwise would fail if no evidence at all is supplied in**

**that regard. It is therefore not the duty of the trial tribunal to scout around the record to see if there is such evidence as that would mean prosecuting the petitioner's case by the tribunal. In that regard, the two limbs of section 139 of the Electoral Act, 2010 (as amended) must be satisfied to warrant nullifying an election which otherwise in law has also to be presumed to be regular. (***P. 452, paras. E-G)*

10. *On Construction of sections 138(1) (b) and 139(1) of the Electoral Act, 2010 (as amended) -*
**The wordings of sections 138(l) (b) and 139(1) of the Electoral Act, 2010 (as amended) are plain and do not admit of any ambiguity. They therefore have to be construed literally by giving the words used therein their natural simple meaning. Thus, there is no scope for having recourse to the rules of construction.** *(P. 453, paras. B-C)*

11. *On Construction of "non-compliance" in sections I38(l)(h) and 139(1) of the Electoral Act, 2010 (as amended) –*
**Construing the word "non-compliance" in the provisions of sections 138(1) and 139(1) of the Electoral Act, 2010(as amended) with regard to an election, has created a situation where an election has been conducted in a manner not in accordance with the provisions of the Act and or the guidelines prescribed therein.** *(P. 453, paras. C D)*
**Per CHUKWUMA-ENEH, J.S.C. at page 453, paras. D-G:**

> **"The instant Electoral Act has made Rules for the conduct of elections under the heading "procedure at election" and they cover a wide range of activities or exercises which taken together will ground a wholesome election process that would culminate into a transparent and open election process that is fair and free. In this regard the two limbs of the provisions of section 139(1) must be construed as a whole, each limb, as it were, throws some light on the other. And so, upon the meaning of non-compliance with the Act and for the plea to avail a petitioner in an election petition as the instant one it goes without more that the petitioner has to further prove that he would otherwise have won the election fair and square, but for the illegitimate acts or omissions tantamounting to non-**

**compliance as in this case by INEC i.e. the 3rd respondent (INEC) in the said election process."**

12. *On Burden of proof of non-compliance with provisions of Electoral Act –*

**The burden of proof arising from the provisions of section 139(1) of the Electoral Act, 2010 (as amended) is squarely on a petitioner, in the instant case, the appellant.** *(P. 454, para. B)*

**Per CHUKWUMA-ENEH, J.S.C. at pages 453 – 454, paras. G-B:**

**"I think the appellants have also missed the point in their submissions that the respondents have failed to supply any evidence in discharge of the *onus* of proof on them that is to show that the election has been conducted in substantial compliance with the principles of the Electoral Act and that the non-compliance as alleged in the petition by the appellants has not affected substantially the result of the election. This will tantamount to standing the *onus* of proof based on the instant pleadings and the Electoral Act on its head. As I have showed herein to place such burden on the respondents will thus render the instant non-compliance as an exception under section 139(1) and clearly it is based on a misconception of the provisions of the Act and is without any doubt misplaced and it is accordingly unacceptable. The second limb of section 139(1) is as much a part of the said section as the first limb that the two limbs of the section must therefore be construed conjunctively and as 1 have said herein as each limb throws some light on the other."**

13. *On Meaning of "compliance" and "non-compliance" –*

**Ordinarily, compliance is an act of complying or acting in accordance with wishes, request, commands, requirement, conditions or orders. It is an act of yielding or of conformity with the requirement or order. It is also an act of submission, obedience or conformance. On the other hand, where there is non-compliance, it postulates a reversal of all such definitions.** *[Ojukwu v. Yar'adua* **(2009) 12 NWER (Pt. 1154) 50 referred to.]** *(P. 472, paras. A-C)*

14. *On Whether court bound to accept evidence of expert witness –*

**The court is not bound to accept the evidence of any expert, even one who has no disclosed incentive or motive other than helping the court in the quest for justice. Therefore, when an expert witness, by his own** *ipse dixit,* **portrays himself as one hawking his evidence or a mercenary who would fight any man's battle for a fee and gives evidence in court, the court has as a duty to treat his evidence with the disdain it deserves.** *(Pp. 434-440, paras. H-A)*

15. *On Treatment of report of expert witness produced for fee –*

**It is unsafe to rely on the report put in by an expert for a fee. Such an expert witness can be declared unreliable and his evidence declared as one which cannot enhance the case of the party on whose behalf he gave evidence.** *[P.D.P. v. I.N.E.C.* **(2012) 7 NWLR (Pt. 1300) 538 referred to.]** *(P.* 465, *paras. C-F)*

**Per ALAGOA, J.S.C. at pages 477-478, paras. E-B:**

> **"Thus the heavy weather made by the appellant that the lower court held that there was non-compliance with the provisions of the Electoral Act 2010 as amended in the compilation of the voters register used in the election is not enough. If the intention of the appellant as learned senior counsel Chief Akin Olujimi has strenuously tried to portray is to rely on the evidence and documents tendered by PW34 and PW35 to show such substantial non-compliance, the appellant only succeeded in running into a brick wall. Appellant had portrayed PW35 as an expert and yet the court below dismissed his evidence as "preposterous, outlandish and perverse."**
>
> **See page 2040 Vol. IV of the records. Why was the court below so unsparing in its tongue lash? It is on record and the court below found as of fact that the total number of voters in the 2011 voters register was put at 1,553,580 while the total registered voters in the 2012 voters register was put at 1,654,205. By simple arithmetical calculation, the difference between the 2011 and 2012 figures is 100,725 and yet, PW35 as his exhibits P56 and P57 show, gave a figure of 164,072 as having been unlawfully injected into the 2012 voters register. PW35 was seriously discredited during cross examination by counsel to the 3rd**

**respondent. The lower court's conclusion was that the report of PW35 should be taken with a pinch of salt. The lower court in so asserting was only acceding and rightly too in my view to the finding of the trial tribunal before it. If the evidence of PW35 was found to be "'preposterous, outlandish and perverse", that of PW34 was outright dishonest and shameful as he admitted under cross-examination to have been briefed upon a fee "to look for evidence to sustain the petition that was already filed."**

**16.** *On Purport of preliminary objection to on appeal –*
**A preliminary objection is a pre-emptive strike aimed at scuttling the entire appeal** *in limine.* **If the objection is raised against particular grounds of appeal, the intention is to prevent the court from considering the issues raised from the grounds objected to in the determination of the appeal. Because of its nature and intendment, a preliminary objection, whether it is directed on the entire appeal or some grounds of appeal, is determined before any further action is taken on the appeal.** *(Pp. 432-433, paras. G-A)*

**17.** *On Standard of proof of allegations in election petition which are civil and criminal in nature –*
**In an election petition, where allegations are civil in character as well as criminal and they are so intertwined or interwoven as to make severance of one genre from the other impossible, the standard of proof must be of the higher standard, which is beyond reasonable doubt. It is when the petitioner has discharged the** *onus* **that the burden can shift to the respondent to see how far he can go to impugn the evidence put forward by the appellant.** *[Awolowo v. Shagari* **(1979) 1 All NLR 120;** *Buhari v. Obasanjo* **(2005) 13 NWLR (Pt. 941) 1 referred to.]***(Pp. 465-466, H-B)*

**18.** *On Need for party to be consistent in his case –*
**A change of the case of a party in an action midstream is not allowed.** *[Adeogun v. Fashogbon* **(2011) 8 NWLR (Pt. 1250) 427 referred to.]** *(P. 464, para. E)*

**Per PETER-ODILI, J.S.C. at page 464, paras. B-E:**

**"In evidence the appellant took the position through their witnesses that it was not the 1st and 2nd respondents who injected the names into the voters register but the 3rd respondent (INEC). This assertion has produced two facts, one the fact that in paragraph 30 the plaintiffs averred that it was the 1st and 2nd respondents that compiled the register with the injected names, albeit secretly with the connivance of the 3rd respondent. In paragraph 32 the same plaintiffs pleaded that it was the 3rd respondent that compiled the voters register with the unlawfully incorporated or injected names, with the support of the 1st and 2nd respondents, thus producing two different inconsistent scenarios as to how the alleged anomalies in the register came about.**

**The evidence in relation thereto is that it was the 1st and 2nd respondents who arranged the register in dispute. This situation brings into focus an attempt to change the case of the parties' mid-stream which is not allowed."**

**19.** *On Attitude of Supreme court to concurrent findings of facts by trial tribunal and court of Appeal –*
**Where a trial tribunal and the Court of Appeal arrived at concurrent findings of facts, the attitude of the Supreme Court is that except there is an established miscarriage of justice or violation of some principle of law or procedure, or the findings are perverse, the Supreme Court will not disturb such findings. In the instant case, the concurrent findings of the trial tribunal and the Court of Appeal did not suffer any of these lapses.** *[Seven-up Bottling Co. v. Adewale* **(2004) 4 NWLR (Pt. 862) 183;** *Dogo v. State* **(2001) 3 NWLR (Pt. 609) 192;** *Dakolo v. Rewane-Dakolo* **(2011) 16 NWLR (Pt. 1272) 22;** *Amadi v. Nwosu* **(1992) 5 NWLR (Pt. 241) 273;** *Onwujuba v. Obienu* **(1991) 4 NWLR (Pt. 183) 16;** *Ogundiyan v. State* **(1991) 3 NWLR (Pt. 181)519;** *lyaro v. State* **(1988) 1 NWLR (Pt. 69) 256 referred to.]** *(Pp. 456, paras. A-B; 466, paras. B-D; 478, paras. D-E)*

**20.** *On Whether comment, statement or argument of counsel can found ground of appeal –*

**A comment, a statement or an argument of counsel, as distinct from a finding of the court that the comment, statement or argument is correct, cannot found a valid ground of appeal.** *(P. 435, para. D-E).*

**21.** *On Need for grounds of appeal to relate to and arise from decision appealed against –*
**The grounds of appeal against a decision must relate to the decision and should constitute a challenge to the** *ratio* **of the decision. Grounds of appeal are not formulated** *in nubibus.* **They must be in** *firma terra,* **namely arise from a judgment. Otherwise, it is baseless and liable to be struck out as being incompetent. In the instant case, in ground 2 of the grounds of appeal, the appellant complained that the Court of Appeal erred in law when it confirmed the holding of the tribunal that evidence of PW 34 was not reliable simply because he was hired for a fee. However, from the records, the trial tribunal did not find that evidence of PW 34 was not reliable simply because he was hired for a fee. Therefore, the ground 2 was incompetent as the Court of Appeal could not and did not affirm a decision not contained in the judgment appealed against.** *[Saraki v. Kotoye* **(1992) 9 NWLR (Pt. 264) 156;** *Garuba v. Omokhodion* **(2011) 15 NWLR (Pt. 1269) 145 referred to.]** *(Pp. 434, paras. G-H; 476, paras. A-D)*

**22.** *On Treatment of incompetent grounds of appeal*
**Incompetent grounds of appeal cannot be argued along with competent grounds of appeal, and so are liable to be struck out. (***P. 476, paras. D-E)*

**23.** *On Purpose of formulation of issues for determination*
**The main purpose of the formulation of issues for determination is to enable the parties to narrow the issues in controversy in the grounds of appeal filed, in the interest of accuracy, clarity and brevity. [***Sha v. Kwan* **(2000)** 8 NWLR (Pt. 670) 685; *Ogbuanyinya v. Okudo* **(1990) 4 NWLR (Pt. 146) 551 referred to.]** *(P. 435, paras. E-F)*

**24.** *On Need for issues for determination to be based on grounds of appeal –*
**Issues for determination as well as argument in the appeal should be based on the grounds of appeal duly filed. [***Oje v. Babalola* **(1991) 4 NWLR (Pt. 185) 267;** *Osinupebi v. Saibu* **(1982) 7 SC 104;** *Western Steel Works v. Iron and Steel Workers Union of Nigeria* **(1987) 1 NWLR (Pt. 49) 284 referred to.]** *(P. 476, paras. E-F)*

**Nigerian Cases Referred to in the Judgment:**

*Abdullahi v. Oba* (1998) 6 NWLR (Pt. 554) 420
*Abiodun v. State* (2013) 9 NWLR (Pt. 1358) 138
*Abubakar v. Yar'Adua* (2008) 19 NWLR (Pt. 1120) 1
*Adeogun v. Fashogbon* (2008) 17 NWLR (Pt. 1115) 149
*Adeogun v. Fashogbon* (2011) 8 NWLR (Pt. 1250) 427
*Agbakoba v I.N.E.C.* (2008) 18 NWLR (Pt. 1119) 489
*Ajagbe v. Idowu* (2011) 17 NWLR (Pt. 1276) 422
*Akinfosile v. Ijose* (1960) SCNLR 447
*Akpunonu v. Beakart Overseas* (2000) 12 NWLR (Pt. 682) 553
*Amadi v. N.N.P.C.* (2000) 10 NWLR (Pt. 674) 76
*Amadi v. Nwosu* (1992) 3 NWLR (Pt. 241) 273
*Amuda v. Adelodun (*1994) 8 NWLR (Pt. 360) 23
*Anyaduba v. N.R.T.C. Ltd.* (1992) 5 NWLR (Rt. 243) 535
*Ariolu v. Ariolu* (2011) 11 NWLR (Pt. 1258) 288
*Awolowo v. Shagari* (1979) 6-9 SC 51
*Ayogu v. Nnamani* (2006) 8 NWLR (Pt. 981) 160
*B. Manfag. (Nig.) Ltd. v. M.S.O.I. Ltd.* (2007) 14 NWLR (Pt.1053)109
*Balonwu v. Ikpeazu* (2005) 13 NWLR (Pt. 942) 479
*Bank of the North v. Bello* (2000) 7 NWLR (Pt. 664) 244
*Briggs v. C.L.O.R.S.N* (2005) 12 NWLR (Pt. 938) 59
*Buhari v. I.N.E.*C. (2008) 19 NWLR (Pt. 1120) 246
*Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1
*C.P.C v. I.N.E.C* (2011) 18 NWLR (Pt. 1279) 493
*C.P.C v. Umar* (2012) 12 NWLR (Pt. 1315) 605
*Dakolo v. Rewane-Dakolo* (2011) 16 NWLR (Pt. 1272) 22
*Dogo v. State* (2001) 3 NWLR (Pt. 699) 192
*Doma v. I.N.E.C.* (2012) 13 NWLR (Pt. 1317) *297*
*Egemasi v. Onyekwere* (1983) 9 SC 7

*Fayemi v. Oni* (2009) 7 NWLR (Pt. 1140) 223
*Garuba v. Omokhodion* (2011) 15 NWLR (Pt. 1269) 145
*Globe Fishing Industries Ltd. v. Coker* (1990) 7 NWLR (Pt. 162) 265
*Honika Sawmill (Nig.) Ltd. v. Hoff* (1994) 2 NWLR (Pt. 326) 252
*Ibrahim v. I.N.E.C. (*1999) 8 NWLR (Pt. 614) 334
*I.N.E.C. v. A.C.N.* (2009) 2 NWLR (Pt. 1126) 524
*Iyaro v. State (1988)* 1 NWLR (Pt. 69) 256
*Ladoja v. I.N.E.C.* (2007) 12 NWLR (Pt. 1047) 119
*Madukolu v. Nkemdilim* (1962) 2 SCNLR 341
*Mafimisebi v. Ehuwa* (2007) 2 NWLR (Pt. 1018) 385
*Mba v. Agu* (1999) 12 NWLR (Pt. 629) 1
*Ndulue v. Orjiakor* (2013) 8 NWLR (Pt. 1356) 311
*Nwobodo v. Onoh* (1984) 1 SCNLR 1
*Oforlete v. State* (2000) 12 NWLR (Pt. 681) 415
*Ogbuanyinya v. Okudo* (1990) 4 NWLR (Pt. 146) 551
*Ogundiyan* v. Slate (1991) 3 NWLR (Pt. 181) 519
*Ohakim v. Agbaso* (2010) 19 NWLR (Pt. 1226) 172
*Oje v. Babalola* (1991) 4 NWLR (Pt. 185) 267
*Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50
*Okafor v. I.N.E.C.* (2010) 3 NWLR (Pt. 1180) 1
*Olaniyan v. University of Lagos* (No. 2) (1985) 2 NWLR (Pt. 9) 599
*Omoboriowo v. Ajasin* (1984) 1 SCNLR 108
*Onwujuba v. Obienu* (1991) 4 NWLR (Pt. 183) 16
*Onyia v. Ozougwu* (1999) 10 - 12 SC 24
*Osinupebi v. Saibu* (1982) 7 SC 104
*Osolu v. Osolu* (2003) 11 NWLR (Pt. 832) 608
*P.D.P. v. I.N.E.C.* (2012) 7 NWLR (Pt. 1300) 538
*Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156
*Seven-Up Bottling Co. v. Adewale* (2004) 4 NWLR (Pt. 862) 183
*Sha v. Kwan* (2000) 8 NWLR (Pt. 670) 685
*Western Steel Works Ltd. v. Iron & Steel Workers Union o*
*Nigeria & Ors* (No. 2) (1987) 1 NWLR (Pt. 49) 284
*Yusuf v. Obasanjo* (2005) 18 NWLR (Pt. 956) 96

**Nigerian Statutes Referred to in the Judgment:**

Electoral Act, 2010 (as amended), Ss. 19(1), 20, 138(1) (b), 139(1), 151(1)
Evidence Act, 2011, Ss. 67, 68(1), 83(3), 135(1), I68 (1)

**Nigerian Rules of Court Referred to in the Judgment:**

Supreme Court Rules (as amended) 2009, O. 8 r. 2(1)

**Appeal:**

These were an appeal and a cross appeal against the decision of the Court of Appeal dismissing the appellant's appeal against the judgment of the Governorship Election Tribunal, which dismissed the appellant's petition. The Supreme Court, in a unanimous decision, dismissed the appeal and the cross-appeal.

**History of the Case:**

*Supreme Court:*

*Names of Justices that sat on the appeal:* Walter Samuel Nkanu Onnoghen, J.S.C. *(Presided):* Ibrahim Tanko Muhammad, J.S.C.; Christopher Mitchell Chukwuma Eneh, J.S.C; John Afolabi Fabiyi, J.S.C.; Nwali Sylvester Ngwuta, J.S.C. *(Read the Leading Judgment);* Mary Ukaego Peter-Odili, J.S.C; Stanley Shenko Alagoa J.S.C.

*Appeal No.: SC.* 352/2013

*Date of Judgment:* Thursday, 29th August 2013

*Names of Counsel:* S.A. Orkumah, Esq. *{with him,* Wole Aina, Michael F. Lana; Folashade Aladeniyi [Mrs.]; Benson Aderosin; Olujinmi Olumide; Olujinmi Akinyemi; Sodeinde Taiwo; Victor Olatoyegun; Charles Tililoye; Bola Alabi; Akinola Fasanmi; Adegbemile H. Kayode; Bode Famakin; Ifeanyi Egwuasi; Bada M. Matthew; Dare Oketade; Kayode Adegbola; Balogun Omoyemi; Adaeze Oguchienti [Miss] and Nnaemeka Nwankwo) - *for the Appellant*

Chief Wole Olanipekun, SAN (*with him,* I.A. Adedipe, SAN; Adebayo Adenipekun, SAN; Abayomi Akinmode; Kayode Ajulo; O. Adeyemi; Kunle lyalana; Dr. Dapo Olanipekun; Bode Olanipekun; Olumide Ogunje; Kehinde Ogunwumiju; B. Aduloju; Ademola Adesina; Adebayo Adesina; Ademola Abimbola; Thompson Akinyemi; P.C. Ezegamba; I. Wakama; Vessessa Onyemauwa and Ibiso E. Briggs) - *for the 1st Respondent*

Yusuf Ali, SAN *(with him,* A.O. Adelodun, SAN; Prof. Wahab Egbewole; K.K. Eleja; A.O. Abdulkadir; S.O. Akangbe [Mrs.]; S.A. Abdullahi; Taofiq Alubarika; T.E. Akintunde [Mrs.]; C.O. Mbam; E.I. Umunnakwe and T.U. Ekomaru) *for the 2nd Respondent*
Dr. Onyechi Ikpeazu, SAN *(with him,* Abdul Mohammad, Wale Balogun, Sandy Tadaferua [Mrs.] and Eyitayo Fatogun) - *for the 3rd Respondent*

*Court of Appeal:*

*Division of the Court of Appeal from which the appeal was brought:* Court of Appeal, Akure
*Names of Justices that sat on the appeal:* Mohammed Lawal Garba, J.C.A. (Presided); Adzira Gana Mshelia, J.C.A.; Ejembi Eko , J.C.A.; Obietonbara Daniel Kalio, J.C.A.(Read the Leading Judgment); Emmanuel Akomaye Agim, J.C.A.
*Appeal No.:* CA/AK/EPT/GOV/08/13
*Date of Judgment:* Tuesday, 1st July 2013
*Names of Counsel:* N. O. Oke, SAN; Yinka Orokoto, Esq.; Yomi Akinfemiwa, Esq.; Olusola Dare, Esq.; Olusola Oke, Esq.; Mafimisebi Idowu, Esq.; Prince John Ola Mafo, Esq.; Ijabadeniyi Supo, Esq.; Olumide Ogunleye, Esq.; A. O. Oladele, Esq.; Oluwaseyi Bamigboye, Esq.; Akintunde Adewumi, Esq.; Timilehin Oguntuase, Esq.; O. O. Odumosu [Miss]; M. E. Ejims [Miss] - *for the Appellants*
Chief Wole Olanipekun, OFR, SAN; Ricky Tarfa, SAN; Adebayo Adenipekun, SAN; John Baiyeshea, SAN; Abayomi Akamode, Esq.; Kunle Ijalana, Esq.; Abimbola Ajileye-George; Sesan Dada; Olumide Ogunje; Akeem Olaniyan; Thompson Akinyemi; Y. A. Dikko; Olabode Olanipekun; Wole Okenile; Adedayo Adesina; Kingsley Jephter; Oyebanji Oluwatobi; Duduyemi Ajewole; Stella C. Uda - *for 1st Respondent*
Yusuf O. Ali, Esq., SAN; A.O. Adelodun, SAN; Prof Wahab Egbewole; Ayo Olarenwaju, Esq.; K. K. Eleja, Esq.; R. O. Balogun, Esq.; A. O.

Abdulkadir, Esq.; A. S. Addullahi Esq.; Taofiq Alubarika, Esq.; Hammad Muhammad, Esq.; ldris Suleiman, Esq. *for 2nd Respondent*
Dr. Onyechi Ikpeazu, SAN; Onyinye Anumonye, Esq.; Wale Balogun; Chioma Wokeocha [Mrs.]; Ayotunde Ogunleye, Esq.; Peter Nwatu, Esq. *3rd – 5th Respondent*

*Tribunal:*
*Name of the Election Tribunal:* Governorship Election Tribunal, Akure
*Date of Judgment:* Friday, 3rd May 2013

**Counsel:**
S.A. Orkumah, Esq. *{with him,* Wole Aina, Michael F. Lana; Folashade Aladeniyi |Mrs.|; Benson Aderosin; Olujinmi Olumide; Olujinmi Akinyemi; Sodeinde Taiwo; Victor Olatoyegun; Charles Titiloye; Bola Alabi; Akinola Fasanmi; Adegbemile H. Kayode; Bode Famakin; Ifeanyi Egwuasi; Bada M. Matthew; Dare Oketade; Kayode Adegbola; Balogun Omoyemi; Adaeze Oguchienti [Miss] and Nnaemeka Nwankwo) - *for the Appellant*
Chief Wole Olanipekun, SAN *(with him,* l.A. Adedipe, SAN; Adebayo Adenipekun, SAN; Abayomi Akinmode; Kayode Ajulo; O. Adeyemi; Kunle iyalana; Dr. Dapo Olanipekun; Bode Olanipekun; Olumide Ogunje; Kehinde Ogunwumiju; B. Aduloju; Ademola Adesina; Adebayo Adesina; Ademola Abimbola; Thompson Akinyemi; P.C. Ezegamba; I. Wakama; Vessessa Onyemauwa and Ibiso E Briggs) - *for the 1st Respondent*
Yusuf Ali, SAN *(with him,* A.O. Adelodun, SAN; Prof. Wahab Egbewole; K.K. Eleja; A.O. Abdulkadir; S.O. Akangbe [Mrs.]; S.A. Abdullahi; Taofiq Alubarika; T.E. Akintunde [Mrs.l; CO. Mbam; E.l. Umunnakwe and T. U. Ekomaru) - *for the 2nd Respondent*
Dr. Onyechi lkpeazu, SAN *(with him,* Abdul Mohammad, Wale Balogun, Sandy Tadaferua [Mrs.] and Eyitayo Fatogun) – *for the 3rd Respondent*

**NGWUTA, J.S.C. (Delivering the Leading .Judgment):** On the 20th day of October, 2012, the 3rd respondent herein (1NEC), conducted election for the office of the Governor of Ondo State. In the election, appellant flew the flag of the Action Congress of Nigeria, a registered Political Party.

The 1st respondent was the candidate of the 2nd respondent, the Labour Party (LP), also a registered political party, at the election. The 3rd respondent, INEC, is the nation's Electoral Umpire. Candidates of other registered political parties, including the PDP, contested the election with the appellant and the l st respondent.

At the close of the election, the following results were recorded and announced by the 3rd respondent:

Oluwarotimi Akeredolu, ACN – 143,512 votes

Chief Alex Olusola Oke, PDP – 155,196 votes

Dr. Rahman Mimiko, LP – 260,199 votes.

In the light of the above scores, the 1st respondent, Rahman Mimiko of the Labour Party (LP), was declared winner of the election by the 3rd respondent (INEC).

Appellant challenged the declaration of the 1st respondent as the duly elected Governor of Ondo State by a petition filed in the Election Petition Tribunal constituted for Ondo State, on 9th November, 2012. In its judgment of 3rd May, 2013, the trial tribunal dismissed the appellant's petition and affirmed the election and return of the 1st respondent as the duly elected Governor of Ondo State.

Aggrieved by the decision of the tribunal, the appellant appealed to the Court of Appeal, Ondo Judicial Division. On the 1st July 2013, the court below, in its judgment, dismissed the appeal and affirmed the decision of the trial tribunal.

Dissatisfied with the judgment of the court below, the appellant, by their notice of appeal filed on 11/7/2013, appealed to this court on 13 grounds, which are hereunder reproduced, shorn of their particulars:

*''Grounds of Appeal:*

1. The learned appellate Justices erred in law when after correctly finding that the only reason the tribunal discountenanced the evidence of PW34 and PW35 propelled on exhibits P52 (A & B) and P55, P56 and P57 was because of the

perverse finding of the tribunal that the petitioners had knowledge of the contents of the voters register at least one month before the election but later in their judgment held the tribunal properly evaluated the evidence of the two witnesses and other witnesses, and was right in rejecting their evidence on the ground that they were not credible object expert witnesses whose evidence would be of any assistance to the tribunal.

2. The learned appellate Justices erred in law when they confirmed the holding of the tribunal that evidence of PW34 was not reliable simply because he was hired for a fee.
3. The learned appellate Justices erred in law when they held that the finding of the tribunal that the evidence of PW34 is unreliable because PW34 testified that he was briefed to look for evidence to sustain the petition that was already filed cannot be interfered with.
4. The learned appellate Justices erred in law when they held thus –

   'The findings of tact by the tribunal that the PW34 and PW35 and their reports are unreliable are findings that the appellate court does not readily interfere with, unless they are perverse. In the instant case the findings are not perverse as the printed evidence show.'
5. The learned appellate Justices erred in law when they held that the appellants have not proved how the various acts of non-compliance with the Electoral Act alleged in the petition affected the outcome of the election and that the presumption of regularity in section 168(1) of the Evidence Act enured in favour of the judgment of the tribunal dismissing the petition.
6. The learned appellate Justices erred in law when having found that the voters

register used for the election did not comply with statutory requirements of the Electoral Act still proceeded to hold that the presumption of regularity in section 168(1) of the Evidence Act 2011 enured in favour of the judgment of the tribunal.

7. The learned appellate Justices erred in law when they held that the petitioners/appellants; failed to prove how the non-compliance of the voters register used for the election with the Electoral Act substantially affected the result of the election.
8. The learned appellate Justices erred in law when they held that the appellants did not show how the judgment appealed had occasioned substantial injustice or miscarriage of justice to them in the light of the facts and prevailing circumstances of the extant provision of the Electoral Act, 2010.
9. The learned Justices erred in law when they held the tribunal had adroitly evaluated the evidence of the two experts when the same evidence of PW34 and PW35 and their reports were discountenanced by the tribunal.
10. The learned appellate Justices erred in law when they held that the 1st appellant was in *pari delicto* with the 3rd respondent (INEC) in respect of illegal injection of names into the voters register for the election.
11. The lower court erred in law when it held thus:

    "The appellants submit that the POW35 through his exhibits P56 and P57 established that over 164,072 were unlawfully injected into the 2012 voters register. If the balance of 10,725 arithmetically, the difference between 1,654,205 and 1,553,580 figures in 2012 and 2011 voters registers respectively then the calculation of PW35 the expert

appears preposterous, outlandish and perverse."

12. The lower court erred in law when it held thus:

'All the findings of fact on non-accreditation, over-voting and the sundry acts of electoral malpractices pleaded by the appellants as petitioners were made upon painstaking and scrupulous evaluation of the evidential materials on them. Upon these proper evaluation of facts, as done by the tribunal, the findings of the tribunal on the issues of non-accreditation, corrupt practices and the sundry acts of electoral malpractices cannot be faulted.'

13. The judgment is against the weight of evidence."

From their 13 grounds of appeal, appellant distilled the following five issues for determination:

"1. Whether the learned appellate Justices were not wrong in affirming the holding of the tribunal that the evidence of PW34 was unreliable simply because the witness was briefed upon a fee to look for evidence to sustain the petition already filed. This issue relates to grounds 2 and 3.

2. Whether the learned appellate Justices were right in holding that the tribunal properly evaluated the evidence of PW34, PW35, their reports and exhibits P52 (A & B) P55 and P57 and the evidence of other witnesses before dismissing same as unreliable. This issue relates to grounds 1, 4, 9, 12 and 13.

3. Whether the appellate Justices having found that the voters register used for the conduct of the 2012 election did not comply with mandatory provisions of the Electoral Act, it was necessary for the appellants to prove how the non-compliance affected the result of the

election and if so whether there was not sufficient evidence on the record in proof of how the sundry acts of non-compliance affected the result of the election. This issue relates to grounds 5, 6, 7 and 8.

4. Whether the appellate Justices were right when they raised, considered *suo mom* and held that the 1st appellant was in *pari delicto* with the 3rd respondent in respect of illegal injection of names into the voters register in spite of the pleadings and uncontroverted evidence before the court to the contrary. This issue relates to ground 10.

5. Whether it was open to the lower court to substitute or rely on its own views outside the records and use same ot discredit the evidence of PW35 which was not challenged or controverted by the respondents. This issue relates to ground 11."

In response, learned counsel for the 1st respondent. Dr. Oladapo Olanipekun, in his brief of argument, formulated the following two issues for determination.

"1. Having regard to the admissible evidence led by the appellants in support of their position, *vis-a-vis* the state of the law on the burden and standard of proof as well as the reliefs sought in the appellants' petition, whether the lower court was right in affirming the decision of the trial tribunal, dismissing the appellants' petition (grounds 5, 6, 7, 8, 10 and 13).

2. Whether the lower court was not right when it affirmed the decision of the trial tribunal discountenancing the commissioned evidence of PW34 and PW35 (grounds 2, 3, 4, 9, 11 and 12)."

In his brief of argument filed on 29/7/2017, the learned Silk for the 2nd respondent, Yusuf O. Alli, SAN, presented these three issues for determination:

"1. Whether the court below was not right in endorsing the findings and conclusions of

the trial tribunal on the testimonies and documentary evidence proffered by the PW34 and PW35 at the trial.

2. Whether considering the totality of the oral and documentary evidence canvassed at the trial the court below was not right in its conclusion that the appellants failed totally to proof (sic) any of the allegations made in the petition at the trial.
3. Whether on a calm view of the case, the court below was not right in its view that the appellants were unable to demonstrate the effect of the alleged injection of names into the voters register on the outcome of election."

Learned senior counsel for the 2nd respondent indicated that issue I covered grounds 1, 2, 3, 4, 9 and 11; issue 2 covered grounds 5, 8, 12 and 13 and issue 3 covered grounds 6, 7 and 10 of the grounds of appeal.

In the 3rd respondent's brief, settled by Chief Adegboyega Awomolo, SAN, as lead counsel, the following two issues were set down for determination:

"1. Was the Court of Appeal correct in upholding the decision of the tribunal to the effect that PW34 and PW35 did not render credible evidence capable of sustaining the petition, (Grounds 1, 2, 3, 4, 9 and 11).
2. Was the Court of Appeal correct in upholding the decision of the tribunal to the effect that the appellants failed to establish that the acts of non-compliance with the electoral Act alleged by them vitiated the Governorship election of Ondo State. (Grounds 5, 6, 7, 8, 10 and 13)"

Before presenting his two issues for determination, learned senior counsel for the 3rd respondent objected to the competence of grounds 2, 3, 6 and 10 of the grounds of appeal. His argument on the preliminary objection was incorporated in the 3rd respondent's brief.

In ground 2 of the grounds of appeal, appellant complained that:

"The learned appellate Justices erred in law when they confirmed the holding of

> the tribunal that evidence of PW34 was not reliable simply because he was hired for a fee."

Ground 3: The learned appellate Justices erred in law when they held that the finding of the trial tribunal that the evidence of PW34 is unreliable because PW34 testified that he was briefed to look for evidence to sustain the petition that was already filed cannot be interfered with,

Ground 6: The learned appellate Justices erred in law when having found that the voters register used for the election did not comply with statutory requirement of the Electoral Act still proceeded to hold that the presumption of regularity in section 168(1) of the Evidence Act 2011 enured in favour of the judgment of the tribunal.

Ground 10: The learned appellate Justices erred in law when they held that the appellant was in *pari-delicto* with the 3rd respondent (INEC) in respect of illegal injection of names into the voters register used for the election.

A preliminary objection is a pre-emptive strike aimed at scuttling the entire appeal *in limine.* If the objection is raised against particular grounds of appeal as is the case before us, the intention is to prevent the court from considering the issues raised from the grounds objected to in the determination of the appeal.

Because of its nature and intendment, a preliminary objection, whether it is directed at the entire appeal or some grounds of appeal, is determined before any further action is taken on the appeal, and I will now determine the objection on the argument offered by counsel for the parties.

In brief, 3rd appellant's grouse with ground 2 in the appellants' ground of appeal is that the allegation that the tribunal treated the evidence of PW34 as unreliable "simply because he was hired for a fee" is not contained in the printed records of the trial tribunal and the lower court could not have affirmed a finding that was not made in the judgment appealed against.

In ground 3, it was also argued for the 3rd respondent that the record of the trial tribunal does not contain the assertion that the tribunal discredited the witness for stating that he was briefed upon a fee to look for evidence to sustain the petition that was already filed.

In ground 6, it was argued that the lower court, contrary to the appellants' contention, only held that the tribunal, having acted in an official capacity, its judgment was *ex facie* valid until the contrary is established by the appellants.

In ground 10, reference was made to the judgment of the court below at pages 2045 to 2046 of the record wherein the court reproduced the argument of Chief Olanipekun, SAN. It was argued that the said reproduction of the argument/comment of the learned Silk without more cannot qualify as a finding made by the court over which a ground of appeal can be validly raised.

Learned senior counsel for the 3rd respondent urged the court, based on his argument, to strike out grounds 2, 3, 6 and 10 of the appellant's grounds of appeal for being incompetent.

Appellant's reply brief to the 3rd respondent's brief filed on 3/8/2013 incorporated appellant's reply to the 3rd respondent's argument on preliminary objection.

In answer to ground 2, it was argued for the appellant that the objection is misconceived. A portion of the judgment of the court below at page 21 of the record was reproduced. The lower court had said that "PW34 who was also under cross-examination had admitted that he was briefed upon a fee" to look for evidence to sustain the petition that was already filed, was rightly dismissed as not being credible objective expert witness whose evidence would be of any assistance to the tribunal".

In the appellant's view, the above finding of the court below justified ground 2 of the grounds of appeal. In ground 3, the appellant described the objection as misconceived, frivolous and mischievous. In support of this contention, reliance was put on the portion of the judgment of the court below at page 2041 of the record which reads:

> "The findings of fact by the tribunal that PWs 34 and 35 and their reports are unreliable and findings that the appellate court does not readily interfere with unless they are perverse. In the instant case, the findings are not perverse as the printed records show."

Ground 6 was described as frivolous and vexatious and that the said ground was based on the judgment of the lower court. In ground 10, it was argued for the

appellant that learned counsel for the 3rd respondent did not appreciate "the full stop mark placed after the word 'election' which allegedly indicated the end of the statement made by Chief Olanipekun, SAN.

In other words, the entire paragraph relied on by the 3rd respondent was not the statement of the learned senior counsel. The court was urged to dismiss all the grounds of objection.

In answer to ground 2, the learned counsel for the appellant relied on a paragraph at p.21 of the record to the effect that:

> "PW34 who was also under cross examination had admitted that he was briefed upon a fee to look for evidence to sustain the petition that was already filed was rightly dismissed as not being credible objective expert witness whose evidence would be of any assistance to the tribunal" as the basis for the complaint that the court below affirmed the holding that "the evidence of PW34 was not reliable simply because he was hired for a fee."

From the record, the trial tribunal did not find that the evidence of PW34 was not reliable "simply because he was hired for a fee".

Ground 2 of the grounds of appeal is therefore incompetent as the Court of Appeal could not and did not affirm a decision not contained in the judgment appealed against.

In ground 3, the court below did not make the finding complained of by the appellant. The Court of Appeal said that:

> "The findings of fact by the tribunal that the PWs 34 and 35 and their reports were unreliable (which are) findings of fact that the appellate court does not readily interfere with unless they are perverse."

Contrary to ground 3 of the grounds of appeal, the lower court did not make the finding attributed to it by the appellant. The court simply stated the findings of fact made by the trial tribunal and declined to disturb same in absence of a showing that the finding was perverse.

In ground 6, I agree with the learned senior counsel for the 3rd respondent that if the ground is read with its particulars of error, the complaint is not borne out by the

decision of the court below. In ground 10, the appellant sought to save the ground, by attempting to split the statement credited to Chief Olanipekun, SAN, at pages 2045 to 2046 of the record. However, the portions credited to the lower court are to the effect that: "according to the senior counsel for the 1st respondent this is a case of pot calling a kettle black."

In my view the entire paragraph is a reproduction of the statement of Chief Olanipekun, SAN as reproduced by the lower court in its judgment. Comment, statement or argument of counsel, as distinct from a finding of the court that the said statement, comment or argument is correct, cannot found a valid ground of appeal.

In conclusion, 1 sustain the 3rd respondent's preliminary objection to grounds 2, 3, 6 and 10 of the appellant's grounds of appeal as incompetent and they are hereby struck out and so are issues 1, 3 and 4 derived from them. The main purpose of the formulation of issues for determination is to enable the parties to narrow the issues in controversy in the grounds of appeal filed in the interest of accuracy, clarity and brevity. See *Sha v. Kwan* (2000) 78 LRCN 1645 at 1664, (2000) 8 NWLR (Pt. 670) 685; *Ogbuanyinya & Ors v. Obi Okudo & Ors* (1990) 4 NWLR (Pt. 146) 55 1 at 568.

It therefore follows that an incompetent or invalid ground of appeal cannot give rise to a valid issue for determination of an appeal.

Issue No. 3 deserves special mention. It was derived from grounds 5, 6, 7 and 8 of the four grounds, only ground 6 is incompetent. Be that as it may, the vitiating factor in ground 6 has tainted the product of a combination of these valid grounds of appeal and one invalid ground of appeal. Of the five issues presented by the appellant, only issues 2 and 5 are valid and will be considered in the determination of the appeal.

The two issues are:

"(2) Whether the learned appellate Justices were right in holding that the tribunal properly evaluated the evidence of PW34, PW35, their reports and exhibits P52 (A & B), P55 and P57 and the evidence of other witnesses before dismissing same as unreliable.

(5) Whether it was open to the lower court to substitute or rely on its own views outside the records and use same to discredit the evidence

of PW35 which was not challenged or controverted by the respondents."

Arguing issues 2 and 5 together, learned counsel for the appellant made specific reference to page 2041 of the record of the lower court to the effect that:

"The evidence and reports of these two witnesses, PW34 and PW35 were intended to prove that the non-compliance of INEC with the Electoral Act."

It therefore follows that an incompetent or invalid ground of appeal cannot give rise to a valid issue for determination as an appeal.

Issue No. 3 deserves special mention. It was derived from grounds 5, 6, 7 and 8. Of the four, grounds, only ground 6 is incompetent. Be that as it may, the vitiating factor in ground 6 has tainted the product of a combination of these valid grounds of appeal and one invalid ground of appeal. Of the live issues presented by the appellant, only issues 2 and 5 are valid and will be considered in the determination of the appeal.

The two issues are:

"(2). Whether the learned appellate Justices were right in holding that the tribunal properly evaluated the evidence of PW34, PW35, their reports and exhibits P52 (A & B), P55 and P57 and the evidence of other witnesses before dismissing same as unreliable.

(5) Whether it was open to the lower court to substitute or rely on its own views outside the records and use same to discredit the evidence of PW35 which was not challenged or controverted by the respondents."

Arguing issues 2 and 5 together, learned counsel for the appellant made specific reference to page 2041 of the record of the lower court to the effect that:

"The evidence and reports of these two witnesses, PW34 and PW35 were to prove that the non-compliance of INEC with the Electoral Act in the computation and use of the 2012 Voters Register had substantially affected the outcome or the result of the election conducted on 20th October, 2012."

It was argued for the appellant that since the lower court held that the tribunal had jurisdiction to make use of the evidence of PW34 and PW35 and exhibits they tendered, the court ought to have evaluated or properly

evaluated the evidence. The appellant's counsel impugned the finding of the court below that "the tribunal had adroitly evaluated the evidence of those two expert witnesses as perverse, as according to him, the tribunal did not evaluate the evidence of PW34 and PW35. He urged the court to resolve the issues in favour of the appellant.

In dealing with the issue in his brief, learned counsel for the 1st respondent, said that the appellant's case is founded in various and serious allegations of crime, criminal negligence and criminal dereliction of duty. He referred to section 83 (3) of the Evidence Act and submitted that the fact that PW34 and PW35 admitted that they were commissioned by the appellant for financial reward formed part of the basis of the tribunal's rejection of their evidence.

He referred particularly to the admission of PW34 that "he was contracted to look for evidence to sustain the petition that was already filed." As contained at pages 1570-1571 of the record. He relied on *Fayemi v. Oni* (2009) 7 NWLR (Pt. 1140) 223 at 276-277 on the need for caution in admitting a report of expert not called at the instance of the court. He concluded that the evidence of PW34 and PW35 was rightly rejected by the tribunal and that the rejection was affirmed by the lower court and urged the court to dismiss the appeal.

In his own argument, learned senior counsel for the 2nd respondent, argued that the evidence of PW34 and PW35 on the examination of voters register and Electoral Forms does not fall within the purview of section 68(1) of the Evidence Act 2011 and *ipso facto* PW34 and PW35 are not experts. He relied on the finding to that effect by the tribunal at page 1726 of the record based on the evidence of the said witnesses.

He referred to pages 1727-1728 of the record where the "P34 admitted that he lifted information wrongly from primary sources and he even attempted an amendment of the document he is not the maker of when he answered that "the number of ballot papers issued is 277 but when you add up you arrive at 283".

Learned senior counsel referred to page 39 of the record where PW35 admitted several errors on his report and using a wrong data on the 2011 voters register to arrive at figures in his report. He impugned the evidence of the rest of the appellant's witnesses as hearsay which cannot advance the appellant's case. He relied on *Doma*

*v. INEC* (2012) All FWLR (Pt. 628) 815 at 829, (2012) 13 NWLR (Pt. 1317) 297 among others and urged the court to decide in favour of the respondents and against the appellant.

In his own argument, learned senior counsel for the 3rd respondent referred to pages 1726-1727 of the record where the tribunal ended its finding by saying that "even if we were to accept the report of PW35, it will certainly be lacking in probative value" a finding which he said was sustained by the court below. He said it was not true that the evidence of PW34 and PW35 was rejected simply because they were hired to give evidence in support of the petition.

The tribunal found and the court below confirmed that the evidence of the PW34 and PW35 was unreliable on grounds other than their being hired by the appellant.

From the record, it is clear that even though the tribunal declined to use the evidence relating to injection of names in the Voters Register, in the alternative, it critically examined the said evidence of the PW34 and PW35 and found same unreliable, not only because they were hired to find evidence to support appellant's petition, but also because of errors and deliberate attempt to distort facts contained in the evidence of the said witnesses. The tribunal examined the evidence of PW34 and PW35 and the reports they prepared and made a finding of fact that the evidence was not reliable. This finding of fact was endorsed by the court below.

From the petition, the case of the appellant on the injection of names into the Voters Register appears incapable of proof. In paragraph 30 of the petition, at pages 11-12 of Vol. II of the record, it was asserted that the petitioners had information from undisclosed source that the 1st and 2nd respondents with the connivance of the electoral umpire, INEC, the 3rd respondent, secretly computed illegal voters register for use at the election.

In paragraph 32, it was claimed that the 3rd respondent secretly manipulated the Voters Register with active connivance of the 1st and 2nd respondents. In view of the irreconcilable conflict in paragraphs 30 and 32 of the petition, it cannot be proved who, among the 1st and 2nd respondents on one hand, and the 3rd respondent, on the other hand injected the alleged 100,000 names into the Voters Register connived at the alleged injection.

It was claimed that the mode of manipulation of the voters register was the registration exercise called "Card

Igbe Ayo", was used as a cover for the alleged manipulation of the voters' register by injection of 100,000 names as voters for the election. In the circumstances, the "Card Igbe Ayo" register is the bedrock of the appellants but it was not produced at the trial.

Further compilation of illegal Voters' Register for use in any election is a criminal act and as such ought to be proved beyond reasonable doubt. See section 135 (1) of the Evidence Act, 2011. This principle applies in an election case where allegation of crime is made. See *Abubakar v. Yar'Adua* (2009) All FWLR (Pt. 457) I SC, (2008) 19 NWLR (Pt. 1120) 1. The allegation of criminal offence was not proved as required by law.

But assuming without conceding that proof beyond reasonable doubt was attained, the appellant had to prove the effect of the injection of 100,000 names in the voters' register on the outcome of the election. Even if it is proved that all the alleged 100,000 voters injected into the voters' register turned out and voted for the 1st respondent, it will be necessary to deduct the 100,000 votes as illegal votes for the 1st respondent's total scores.

The simple arithmetic will be 1st respondent's total votes of 260,199 less the alleged 100,000 illegal votes. The result is 160,199 votes which is 16,687 votes in excess of appellant's 143, 512 votes.

In addition to pleading and proving the alleged manipulation of the voters' register, the appellant had a further duty to plead and prove the effect of the alleged manipulation on the result of the election and this was not done.

Appellant's case rests largely on the evidence of PW34 and PW35, the alleged experts who were found by the trial tribunal and affirmed by court below to be bereft of expertise on the issue on which they gave evidence.

The court is not bound to accept the evidence of any expert, even one who has no disclosed incentive or motive other than helping the court in the quest for justice. Therefore, when an expert witness, by his own *ipse dixit*, portrays himself as one hawking his evidence or a mercenary who would fight any man's battle for a fee as it were, gives evidence in court, the court has a duty to treat his evidence with the disdain it deserves. After all, as the saying goes, "he who pays the piper dictates the tune of the music".

It is my considered view that each of the two surviving issues 2 and 5 in the appellant's brief of argument lacks merit. The two issues are resolved against the appellant and in favour of the respondents.

Consequently, I hereby dismiss the appeal and affirm the judgment appealed against.

Parties are to bear their respective costs.

*Cross-Appeal:*

There is a cross-appeal filed by the 1st respondent and another one by the 3rd respondent in the main appeal. I will determine both cross-appeals together.

The single issue in the 1st respondent's cross-appeal is whether the lower court was not in error when it came to the conclusion that the trial tribunal was wrong in holding that it lacked jurisdiction to entertain the pre-election matter of alleged injection of names in the voters register.

In the cross-appeal filed by the 3rd respondent, two issues were formulated for resolution by the court. The issues are:

"1. Whether the Court of Appeal was correct in setting aside the finding of the tribunal that the irregularities relied on in the petition were pre-election matters brought to the knowledge of the 1st and 2nd cross-respondents before the election over which the tribunal had no jurisdiction. Grounds i, ii, iv and v.

2. Did the Court of Appeal properly construe section 19( 1) of the Electoral Act 2010 (as amended) in holding that there was no evidence that the cross-appellant complied with "statutory commandment" with respect to the voters register used for the election ."

The cross-respondents gave notices of preliminary objection to each cross-appeal, and argued same in the briefs. I have carefully considered the three issues in the cross-appeals and the arguments in the briefs filed by both sides.

I think the crucial issue in the cross-appeals is whether or not the tribunal had jurisdiction to entertain matters relating to alleged injection of names in the voters register used for the election? I find that the preliminary objections are not sustainable and are hereby dismissed.

In determining the issue of jurisdiction of the tribunal to entertain matters relating to alleged manipulation of

the voters register, it is pertinent to draw a distinction between the occurrence of the facts amounting to injection of names in the voters register and the use of the allegedly manipulated register in the election.

While the former is clearly an act done prior to the conduct of the election as disclosed in the evidence before the tribunal, the latter is an act contemporaneous with the conduct of the election. The former is a pre-election matter, over which the tribunal had no jurisdiction but the latter, the use of the register with the names injected therein for the election, is an election matter over which the tribunal has jurisdiction. It is the use of the allegedly manipulated voters register at the election as distinct from the act of the alleged manipulation which is prior to the election that the lower court said the tribunal had jurisdiction to entertain.

I resolve the issue in each cross-appeal against the cross appellants and in favour of the cross-respondents.

The cross-appeal filed by the 1st respondent as well as the one filed by the 3rd respondent in the main appeal, lack merit and are hereby dismissed.

Parties shall bear their respective costs.

**ONNOGHEN, J.S.C.:** I have had the benefit of reading in draft the lead judgment of my learned brother, Ngwuta, J .S.C. just delivered. I agree with his reasoning and conclusion that the appeals lack merit and should be dismissed.

The facts of the case have been stated in detail in the lead judgment as a result of which I do not intend to repeat them herein except as may be needed to emphasize the point being made.

The instant appeal is a further appeal against the decision of the trial tribunal delivered on the 3rd day of May, 2013 dismissing the election petition of the appellants, then petitioners, against the return of the 1st respondent as the duly elected Governor of Ondo State following the gubernatorial election conducted in the State on the 20th day of October, 2012.

It is pertinent to state that apart from the appeal, there are some preliminary objections and two cross appeals; one each by the 1st and 3rd respondents.

When one takes a close look at the appeals - that is the main appeal and cross appeals - it is clear that there are three main issues that call for determination. These are:

a) Whether the lower court is right in holding that the tribunal was in error in its conclusion that the issues relating to voters register are pre-election matters over which the tribunal had no jurisdiction - arising from the cross appeals.
b) Whether the lower court is right in upholding the decision of the tribunal to the effect that PW 34 and PW 35 did not render credible evidence to sustain the petition.
c) Whether the lower court is right in upholding the decision of the tribunal that the appellants failed to establish that the acts of non-compliance with the Electoral Act alleged vitiated the election in question.

The above issues (b) and (c) arise from the main appeal.

I have decided to put the issue arising from the cross appeal first because it is in the nature of a peripheral matter bordering on the jurisdiction of the tribunal/court.

It is the submission of learned senior counsel for the 3rd respondent/cross appellant, Chief A.S. Awomolo, SAN in the cross appellant brief filed on 26/7/2013 that the lower court was in error when it held that the tribunal was wrong in coming to the conclusion that it had no jurisdiction to entertain issues bordering on non-compliance of the voters register with the Electoral Act.

It is the further contention of learned senior counsel that though the provisions of section 138(b) of the Electoral Act, 2010 (as amended) grants a right to question an election on the ground of non compliance with the provisions of the said Electoral Act, the ground does not include a situation where the facts of the alleged non-compliance occurred at the time of compilation of the register used for the election, which are clearly pre-election matters and cannot therefore be a ground for challenging the result of the election.

I must confess that the above argument is beautiful and straight forward. It is based on the fact that compilation of a voters register and everything relating thereto predates an election and as such it is a pre-election matter. The submission cannot be faulted.

However, though the above view is correct to an extent, it is not correct to contend that the voters register so produced and used in an election, if challenged, cannot be said to have affected the result of the election

in question on grounds of non-compliance with the provisions of the Electoral Act. What is being challenged in effect is the effect of the use of a defective voters register on the result of the election.

In the instant case, the irregularities complained of in the petition as constituting a ground of non-compliance with the Electoral Act is the allegation of injection of names into the voters register, which register was subsequently used in the election in issue. In effect, it is the case of the petitioners/appellants that the voters register used in the said election was improperly compiled or not compiled in accordance with the provisions of the Electoral Act; 2010, as amended, and that the omission or commission was done by the authority concerned to give undue advantage to one or some of the parties to the contest, which register was actually used in the election in question.

Having regards to the above facts I agree with the lower court that the question of non-compliance in the peculiar circumstances of the facts of this case comes within the purview of the provisions of section 138 (1) (b) of the Electoral Act, 2010, as amended, and consequently within the jurisdiction of the Election tribunals/courts. It is the use to which the alleged fundamentally defective voters register is put to the disadvantage of the contestant(s) that constitute the non-compliance which may substantially affect the result of the election in question, and consequently bring the issue within the jurisdiction of the Election tribunal/court.

It should however not be understood that 1 am saying that the compilation of a voters register and/or anything relating thereto is not a pre-election matter for which provisions have been made in the Electoral Act, 2010, as amended for its challenge or redress. What I am saying is that there is much difference between the process of compilation of voters register and the use to which the compiled register is put in an election and the effect it has or may have on the result of the election. Whereas the process of compiling a voters register is a pre-election matter, the use to which an alleged fundamentally detective voters register so compiled is put to in an election which may substantially affect the result of the said election is clearly an issue of non-compliance with the provisions of the Electoral Act, which constitutes a ground for challenging an election in

a petition under section 138 (1) (b) of the Electoral Act, 2010 (as amended).

I am of the considered view that the position of the cross appellants, if accepted, will create injustice as the effect would preclude a petitioner with a genuine and substantial complaint against the use to which a fundamentally defective voters register is put to his disadvantage in an election from challenging same on the ground of non-compliance with the provisions of the Electoral Act. The Electoral Act is the foundation of the election process just as you cannot conduct a free and fair election without a voters register.

The next issue I want to comment on is my 3rd issue, having regards to the resolution of my first issue. Haven agreed with the lower court that the Election tribunal has the jurisdiction to hear and determine the issue of non-compliance in that it is not a pre-election matter, the question that follows, naturally is, whether the lower court is right in upholding the decision of the tribunal that appellants failed to establish the fact that the non-compliance complained of substantially affected the result of the election, so as to vitiate the election. The two issues are therefore closely related.

It is the case of appellants that having established the fact of non-compliance with the Electoral Act, 2010, (as amended) in the process of compilation of the voters register, appellants have discharged the burden placed on them by law as the non-compliance in this case is of the nature, without more, to vitiate the result of the election.

It is also the contention of the appellants in the alternative, that there are sufficient evidence on record in proof of how the sundry acts of non-compliance affected the result of the election.

Learned senior counsel for appellants, Chief Olujinmi, SAN in the appellant's brief filed on 26/7/2013, submitted that the effect of the finding by the lower court that the voters register did not comply with the mandatory provisions of the Electoral Act is that the voters register was invalid and that the court was therefore in error in proceeding to require appellant to show how the non-compliance affected the result of the election; that an election which is based on a voters register “which had been surreptitiously altered, should not be allowed to stand.”

Learned senior counsel relied on the evidence of PW34 and PW35 in contending in the alternative that

there is evidence on record to establish how the non-compliance substantially affected the result of the election.

It is not in doubt that the lower courts did find/hold that there was non-compliance with the provisions of the Electoral Act, 2010, (as amended) in the compilation of the Voters Register used in the election in question. Also not in dispute is the fact that the lower courts, after making the above concurrent findings, went further to hold that appellant did not prove that the non-compliance substantially affected the result of the election and consequently resolved the issue against the appellant.

Section 139(1) of the Electoral Act, 2010, (as amended) provides as follows:-

> "An election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."

From the above provision, it is clear that it is not enough for the election tribunal/court to find that there was non-compliance with the provisions of the Electoral Act in the conduct of the election in issue for the non-compliance so found to vitiate the election. The petitioner, in the circumstance of the case must satisfy the tribunal/court that the non-compliance alleged and found to have occurred in the conduct of the election, substantially affected the result of the election and that the election was not conducted substantially in accordance with the principles of the Electoral Act, 2010 (as amended).

In the instant case, the non-compliance is said to be unlawful injection of names into the voters register, which is said to include double and multiple registrations and that there were other registrants whose finger prints were not captured.

However, I hold the considered view that the existence of those facts, without more, is not sufficient having regards to the provisions of section 139(1) of the Electoral Act 2010 (as amended) and reproduced *supra*. For the non-compliance complained of to be relevant and/or weighty enough to vitiate the election, it must be proved by evidence that those people who were so

wrongfully included in the voters register actually voted in the election in issue and that if their number is deducted from the total votes cast for the winner, the petitioner would have won by majority of lawful votes. None of these has been done in this case.

I therefore agree with the lower courts that appellant had the duty to establish by evidence that the non-compliance complained of substantially affected the result of the election in issue and that the failure to do so is fatal to the case of the appellant.

With regards to issue (b) *supra,* I agree with the lower courts that the evidence of PW **34** and PW **35** is hearsay and consequently irrelevant in the determination of the issues in the case. The above being the case, the appellant's case has no evidence in support of the relevant issues raised therein and consequently deserved to be dismissed.

In conclusion, I too find no merit whatsoever in the appeals which are consequently dismissed by me.

I abide by the consequential orders made in the lead judgment of my learned brother, Ngwuta, J.S.C. including the order as to costs.

Appeal and cross appeals dismissed.

**I.T MUHAMMAD, J.S.C:** My noble learned brother, Ngwuta, J.S.C. permitted me to read in advance his judgment just delivered. I am contented with his reasoning and conclusions on all the matters raised including the objections, the cross-appeal etc. I do not intend to add anything. I am in complete agreement with him. The preliminary objection by the 3rd respondent is potent enough and it is hereby sustained.

The main appeal lacks merit I dismiss it. The cross-appeals are also unmeritorious I dismiss them. Parties to bear own costs.

**CHUKWUMA-ENEH, J.S.C.;** In the lead judgment prepared and delivered in this appeal before this court the facts and the statements of the cases of the parties have been set out in sufficient detail. For the purpose of this short contribution I adopt them as mine.

It is to be noted that the tribunal in this petition in its judgment has dismissed the petition even although it has also reached the conclusion that more than 100,000 unlawful registrants have been injected into the 2012 register of voters without there having been conducted

by INEC of any exercises in review or revision or new registration as per the said register of voters. The tribunal has in reaching this conclusion said that the petitioners' main complaint of non-compliance has been hinged on challenging the content of the register of voters and not as to the use to which the register has been put during the actual conduct of the election process and so, that its jurisdiction as Election Tribunal has been ousted as the complaint tantamounts to a pre-election matter over which an Election Tribunal has no power to deal with. Clearly, there is a misconception of the applicable election law, procedure and practice *vis-a-vis* the said finding as I will establish anon. Even then, and more importantly that the effect of the injection of names of these illegal voters upon the result of the instant election has not been proved by the petitioners, i.e. that the petitioners have failed to show how the injection of over 100,000 registrants has affected the outcome of the election.

Against the foregoing background, the lower court has rightly set aside the tribunal's finding declining jurisdiction. It has itself nonetheless come to hold that the injection of over 100,000 unlawful registrants even although not as per any legitimate exercise by INEC's Act under the Electoral Act as to suffice as what might suffice as a review or revision or new registration as per the register of voters. All the same, that much of what properly has been in issue in this matter is as regards to the use to which the register of voters has been put in the conduct of the instant election process and so that the instant petition is absolutely within the tribunal's jurisdiction as the complaint of its use is not by any stretch of the construction of the Electoral Act a pre-election issue. It has also held that the petitioners have not even then as a matter of discharging the onus on them showed how it has impacted the outcome of the instant election. In other words, that the injection has not substantially affected the outcome of the election. It has therefore come to hold the due return of the 1st respondent in the said election. It is on such sound grounds that the court below has based its decision in this matter.

Let me pause here to interpose that there are occasions arising from the peculiar facts and circumstances of an election petition when some pre-election causes may in fact and in law arise in the

conduct of actual elections as in this regard. There are causes such as questioning in most cases even the nominations, or its validity, screening and clearing of candidates for elections may so arise. Such complaints are known to have reared their heads thus spilling over into the conduct of elections proper. And so a tribunal as the instant one faced with the questions as in the instant circumstances as aforesaid has to examine absolutely the facts and circumstances, in order words the subject matter of the petition before it closely to ascertain whether the court/tribunal has jurisdiction over the subject matter of the petition and so also against the Act creating the court/tribunal. Thus an election petition itself has to be closely examined as regards to the subject matter of the claim/petition as in this case before the court/tribunal declines jurisdiction on the ground simply that the complaint does not arise out of the conduct of an election process proper or as not having happened within the actual period of the conduct of elections. The ground upon which the instant petition is premised is clearly within the provisions of sections 138(1) (b) and 139(1) of the Electoral Act. It is settled law that the plaintiff's claim as a petitioner's petition here has to be looked at to ascertain whether or not the claim/petition falls within the jurisdiction of the court/tribunal. See: *Madukolu & Ors. v. Nkemdilim* (1962) 1 ANLR 587; (1962) 2 SCNLR 341. In the above cited case, this court has attempted to set out the pre-conditions now trite that have to exist before a court could assume jurisdiction over a matter placed before it for adjudication. I see no need replicating them here. And this principle applies here with every vigor.

The appellants' case in this appeal put briefly has questioned the instant voting without accreditation *vis-a-vis* the instant alleged disorderly register of voters with all its obvious discrepancies. Thus it has questioned the number of lawful voters so ticked therein as having voted according to the said register in the instant election as being totally different from the actual number as recorded to have so voted as per FORM EC8A. In other words, these infractions have brought out clearly to the fore the use of an inappropriate register of voters in the conduct of the said election process. Again, let me pause here to observe that the importance of an authentic register of voters for an open and transparent election process cannot be underestimated. Not only that the

candidate who intends to contest in a particular election is required to be a registered voter as per the register of voters, also a person who is minded to cast his vote in an election must be a registered voter as per the register of voters to be enabled to cast his vote in an election.

It is clear that the gravamen of the appellants' case in this matter is on the non use of an appropriate register of voters and strictly speaking not on the contents of the said register of voters *per se.* 1 have to expatiate upon this point as it touches on the issue of jurisdiction and to show that the tribunal here has completely, with respect, misapprehended the petitioners' case before it; even although it ultimately has come to the correct decision by dismissing the petition. The court below is therefore right to have overruled the tribunal on the issue of want jurisdiction, and consequently to have set aside that finding to the effect that the petitioners' complaints are otherwise hinged on pre-election infractions and so outside its jurisdiction.

The other crucial point upon which the appeal again hinges has included the propriety of the tribunal's finding as affirmed by the court below that the impact of the invalid number of registrants on the overall election has not been proved in the instant case nor has the evidence proffered attained the standard of proof required according to the law and also that the various questions of non-compliance alleged by the appellants in the petition have not again been proved.

On the backdrop of the above premises the crucial question on whom lies the burden of proof and the propriety of the tribunal's finding on that issue as affirmed by the court below and so also the finding that in law the burden of proof lies on the petitioners/appellants, that is, as a matter of law. The appellants utter failure so to appreciate these points upon the backdrop of a proper construction of section 138 (1) (b) and section 139(1) of the Electoral Act as amended is obvious as per paragraphs 8.06, 8.07 and 8.08 of the appellants' joint brief of argument. I will expatiate anon. As a corollary to the foregoing premise, again this has raised in this case the pertinent question of standard of proof beyond reasonable doubt as the categories of the complaints alleged by the appellants *prima facie* amounting to non-compliance with the Electoral Act are of criminal in nature. The appellants have proffered in that regard the testimonies of their experts as per PW34

and PW35 *vis-à-vis* exhibits P52 (A & B) and P55, P56 and P57 (Al - A20) received in evidence in this matter, all of which have been rejected and discountenanced by the court below for reasons ably stated in the lead judgment The said exhibits tendered before the tribunal have been castigated based on sections 131(1) &. (2), 132, 133(13) and 134 of the Evidence Act 2011 which I also find applicable. However, this aspect of the appellants' case has been so satisfactorily dealt with in the lead judgment of my Noble Lord Ngwuta, JSC, that I do not see any grounds for duplicating the same here. He has given an in-depth assessment of their evidential value and weight to be attached to the evidence of PW34 and PW35 in the context of this case. I need not delve into the same here as I have nothing to add thereto.

However, on the complaints that the appellants have failed to prove the acts of non-compliance with the Electoral Act and its guidelines that is to say by showing that they substantially have affected the result of the election, the appellants' stance in this regard is captured by their paragraphs 8.06, 8.07 and 8.08 of their joint brief of argument in this appeal and they read as follows:

"8.06- The Court of Appeal acted in contravention of S.139(1) of the Electoral Act by requiring the appellants who had already proved non-compliance with the Electoral Act to further proof that non-compliance substantially affected the outcome of the election.

8.07- The lower court was wrong by falling to hold that invalidity of the election automatically followed by the operation of law under S.158 (1) (b), is (sic) holding that the election was afflicted by non-compliance with the Electoral Act.

8.08- Even if the lower court was correct in holding that the .appellants had a further duty to prove how the non-compliance proved, substantially affected the outcome of the election, the lower court was still wrong not to have itself, examined the evidence on record to see whether it was so proved.

The respondents particularly the 3rd respondent in response therefore have contended that the court below has acted correctly in holding to the findings that the appellants have totally failed to establish the acts of non-compliance with the Electoral Act and the guidelines as

alleged so as to vitiate the election. And also that they have misconceived their case as per the combined reading of the provisions of sections 138(l)(b) and 139(1) of the Electoral Act as amended in projecting their position that the Register of voters on having been vitiated that the invalidity of the election automatically followed by operation of the law under section I38(l)(b), and so that the instant election must be nullified. Again, that to hold to the foregoing views negates the clear provisions of section 138(1) (b) construed together with section 139 (1) of Electoral Act 2010 as amended. In this regard they have argued that even where non-compliance with the provisions of the Electoral Act have been found proved, all the same, that the election is stilt sustainable provided it has been conducted in substantial compliance with the other provisions of the Electoral Act to such a degree that the election cannot be vitiated. As can be seen the questions raised for determination in this appeal the construction of these provisions.

At this stage I refer to the instant provisions of section 138 (1) (b) and 139(l) by setting them out as follows:-

> "138(l) An election may be questioned on on ... the grounds:
>
> a) (not applicable)
>
> b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of (the) Act.
>
> 139(1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Electoral Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."

Clearly, a combined reading of the provisions of section 138(1) (b) and section 139(1) has showed that section 138 ( 1 ) (b) has to be resorted to on the backdrop of the provisions of section 139(1). The two sections must be read together in construing the principle of non-compliance and its application to the complaints of non-compliance in election matters. I hold the view that the two provisions have to be so construed together in order to arrive at the true intention of the law-maker and it couldn't be more so than here where the provisions of the

said two sections are dealing with the same subject matter of non-compliance. The 3rd respondent has practically agued to the effect that section 138 (1) (b) literarily has to be read subject to section 139(1) and I agree. Again, they must be read conjunctively to achieve the lawmaker's intention. In this regard an election cannot be vitiated for non-compliance unless and until the election sought to be so vitiated is also further showed conclusively where the standard proof so requires it, that the non-compliance has also substantially affected the result of the election. In other words, the appellants have to establish that but for the non-compliance they would otherwise have scored a majority of lawful votes over the number of votes cast for 1st respondent. Meaning in the context of this matter that going arithmetically that by subtracting the said over 100,000 illegal voles from the votes cast in favour of the 1st respondent here in the election that the votes cast in their favour would have come tops to that of the 1st respondent. In practical terms that is what the respondents' argument here has represented. The appellants' argument as per their above cited paragraph 8.07, with respect, is misconceived and unacceptable. It is wrong on the facts and circumstances of this matter or the applicable law to hold that the invalidity of the election automatically follows by operation of law under section 138(1) without adverting to the further duty on the appellants to show that the non-compliance having been proved has substantially affected the outcome of the election as per the said section 139(1). And so it is not the duty of the lower court to scout around the record to see if there is such evidence as that would mean prosecuting the appellant's case by the tribunal. In this regard, the two limbs of the provisions of section 139(1) must therefore be satisfied to warrant nullifying an election which otherwise in law has also to be presumed to be regular. Clearly, from the provisions of section 139(1) the burden is squarely on the appellants who assert the acts of non-compliance to further show how the non-compliance has affected the outcome of the election and who otherwise would fail if no evidence at all is supplied in that regard. I am quite aware of the proposition by Lord Denning construing similar provision as here (as I have observed in many cases before now) to the effect that an election could be so marred that it is substantially conducted in non-

compliance with the law and thus vitiating the entire election. See: *Morgan v. Simpson* (1975) QB. 151. In such a case, I must add that such an election must have lost all character of an election arising out of the alleged non-compliance with the law. In other words, it must be such a fundamental breach in law to vitiate an election. Upon that construction the observation of my learned brother, Onnoghen, JSC in *Ojukwu v. Yur'Adua* (2009) 12 NWLR (Pt.1154) 50 on non-compliance with regard to non serialization of ballot papers used in that election, though obiter in a dissenting opinion has to be seen in that light. However, this court's opinion on this issue is as clearly settled in *Awolowo v. Shagari* (1979) 2 NSSC 87 at p.3 per Obaseki, JSC. Wherefore his Lordship has applied the principle as per the case of *Woodward v. Sarsons* (10 CP.733 at 751 in preference to the principle in *Morgan v. Simpson (supra).*

The wordings of these provisions i.e. sections 138(1) (b) and 139(1) I must emphasize are plain and clearly do not admit of any ambiguity. They therefore have to be construed literarily by giving the words used therein their natural simple meaning – thus there is no scope for having recourse to the rules of construction.

Construing the word "non-compliance" in both provisions with regard to an election has created a situation where an election has been conducted in a manner not in accordance with the provisions of the Act and/or the guidelines prescribed therefrom. The instant Electoral Act has made Rules for the conduct of elections under the heading "procedure at election" and they cover a wide range of activities or exercises which taken together will ground a wholesome election process that would culminate into a transparent and open election process that is fair and free. In this regard, the two limbs of the provisions of section 139 (1) must be construed as a whole, each limb, as it were, throws some light on the other. And so, upon the meaning of non-compliance with the Act and for the plea to avail a petitioner in an Election Petition as the instant one it goes without more that the petitioner has to further prove that he would otherwise have won the election fair and square, but for the illegitimate acts or omissions tantamounting to non-compliance as in this case by INEC i.e. the 3rd respondent (INEC) in the said election process.

I think the appellants have also missed the point in their submissions that the respondents have failed to

supply any evidence in discharge of the *onus* of proof on them that is to show that the election has been conducted in substantial compliance with the principles of the Electoral Act and that the non-compliance as alleged in the petition by the appellants has not affected substantially the result of the election. This will tantamount to standing the *onus* of proof based on the instant pleadings and the Electoral Act on its head. As I have showed herein to place such burden on the respondents will thus render the instant non-compliance as an exception under section 139(1) and clearly it is based on a misconception of the provisions of the Act and is without any doubt misplaced and it is accordingly unacceptable .The second limb of section 139(1) is as much a part of the said section as the first limb that the two limbs of the section must therefore be construed conjunctively and as I have said herein as each limb throws some light on the other. The burden of proof arising from the provisions of section 139(1) is squarely placed on the appellants in this matter.

In sum, the appellants' case in these appeals lack merits. I too dismiss the same and I endorse the orders contained in lead judgment of my noble Lord Ngwuta, JSC including the order on costs.

Appeal and cross appeals dismissed.

**FABIYI, J.S.C.:** I had a preview of the judgment just delivered by my learned brother, Ngwuta, JSC. I agree entirely with the reasons advanced therein to arrive at the conclusions that the main appeal as well as the cross-appeals should be dismissed.

I desire to chip in a few words of my own in support. The relevant facts of the matter have been clearly set out in the lead judgment. I wish to touch briefly two salient issues for determination in the main appeal. The appellant and his party at the time of filing the petition before the trial tribunal tried to rest the petition on allegation of corrupt practices and/or non-compliance with the Electoral Act.

The trial tribunal and the lower court concurrently found that the appellant failed to prove allegations of non-compliance with the provisions of the Electoral Act as well as criminal allegations contained in the petition. The appellant failed to demonstrate how alleged injection of registrants into the voter’s register of 2012 substantially affected the result of the election. It was

further found that PW34 and PW35 were thoroughly discredited under cross-examination and that they are not experts who could be relied upon having been paid to do the bidding of the petitioners. It was equally found that the appellant failed to show how alleged non-compliance with the Electoral Act substantially affected the result of the election.

The two salient issues which seriously deserve my consideration in this appeal are:-

(a) Was the lower court right in endorsing the findings and conclusions of the trial tribunal on the testimonies and documentary evidence proffered by PW34 and PW35 at the trial?

(b) Was the court below right in its view that the appellant was unable to demonstrate the effect of alleged injection of names into the voters register on the outcome of the election?

It is extant in the judgment of the lower court at page 2041 of the record that PW34 under cross-examination admitted that he was briefed, upon a fee, ‘to look for evidence to sustain the petition that was already filed’. Same was discountenanced as not being credible. The lower court also confirmed that P.W.35 wrongly lifted figures and did wrong calculation described as 'preposterous, outlandish and perverse'. Without any doubt, these witnesses are not objective experts; having been employed for a fee. Their reports were designed to steal the show; as it were the lower court, rightly in my view, found that it was not safe to rely on their evidence. See: the case of *P.D.P. v. INEC* (2012) 7 NWLR (Pt. 1300) 538 at 365.

It is basic that for a petition to succeed on non-compliance with the provision of the Electoral Act, the petitioner must prove not only that there was non-compliance with the provisions of the Act, but also that the non-compliance substantially affected the result of the election. See: section 139 of the Electoral Act 2010, as amended. Put in other words, the petitioner has to prove:

1. That there was non-compliance.
2. That the non-compliance substantially affected the result of the election.

The above have been variously pronounced in the cases of *Buhari v. INEC* (2008) 19 NWLR (Pt. 1 120) 246

at 435; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 at 80; *Akinfosile v. Ijose* (1960) SCNLR 447; *Awolowo v. Shagari* (1979) 6 – 9 SC 51; *C.P.C. v. I.N.E.C. & Ors.* (2011) 12 SCNJ 644 at 710, (2011) 18 NWLR (Pt. 1279) 493.

The lower court affirmed the finding of the trial tribunal that the appellant failed to prove substantial non-compliance. In the same vein, the appellant failed to establish in any material particular how any alleged non-compliance substantially impacted on the final result of the election.

Finally, it is glaring that the trial tribunal and the lower court rightly made concurrent findings that the appellant failed to prove the petition in accordance with laid down procedure, standard of proof and duly settled principles of law. Such findings have not been shown to be perverse. This court will not interfere with same in the prevailing circumstance. See: *Seven-Up Bottling Co. v. Adewale* (2004) 4 N WLR (Ft. 862) 183.

For the above reasons and those carefully set out in the lead judgment, which I hereby adopt, I too feel that the main appeal as well as the cross-appeals should be dismissed. I order accordingly and abide by all consequential orders therein contained; that relating to costs inclusive.

**PETER-ODILI, J.S.C.:** This is an appeal from the judgment of the Court of Appeal sitting at Akure, Ondo State delivered on the 1st of July, 2013. The said appeal was from the judgment of the Ondo State Governorship Election Petition Tribunal sitting at Akure delivered on 3rd of May, 2013.

Briefly stated, the facts are that on the 20th October 2012, the 3rd respondent conducted the Governorship Election in Ondo State. The 1st appellant being the Governorship candidate of the 2nd appellant contested the election with other candidates from other political parties one of whom is the 1st respondent who was a candidate for the 2nd respondent. By the result announced on the 21st October, 2012 the 1st respondent was declared winner of that election.

The appellants being dissatisfied with the result so declared filed a petition on the 9th day of November 2012 before the tribunal. The respondents filed their respective replies and the appellants then filed their replies to what the respondents put forward.

At the close of pleadings, the petition went into trial with the appellants calling 41 witnesses including two expert witnesses and the 1st respondent called 14 witnesses while the 2nd and 3rd respondents called no witness.

At the end of evidence and addresses of counsel, the tribunal delivered its judgment dismissing the petition hence the appeal to the Court of Appeal which in turn dismissed the appeal on the ground that the tribunal was right in discountenancing the evidence of the expert witnesses. Also that though the voters register used for the election did not comply with the mandatory provisions of the Electoral Act as complained of by the petitioners/appellants, but they did not prove the substantiality of the non-compliance and how it affected the result of the election.

Again dissatisfied, the appellants came before the Supreme Court. At the hearing on 27th August 2013, learned counsel for the 1st respondent raised the issue of the demise of the 2nd appellant, Action Congress of Nigeria (ACN) as it has been subsumed by the larger political party, All Progressive Congress (APC) and so the name of the second appellant ACN should be struck out of the processes. That the situation is such as the court can take judicial notice of it being a matter already in the public domain. The other counsel for the other respondents, Yusuf Ali SAN and Dr. Onyechi lkpeazu SAN towed the line of Chief Wole Olanipekun, learned senior counsel of the 1st respondent.

Initially learned counsel for the appellants, Mr. Aina resisted the position taken by the respondents' counsel stating that there was not enough material on which the court can take judicial notice of the merger that brought about the extinction of the 2nd appellant and the emergence of APC.

In changing his stance, Mr. Aina asked the court to substitute APC for the name of 2nd appellant. This change of position was vehemently resisted by the respondents. This court ruled per Onnoghen, JSC that there is no *vires* in this court to effect the change or substitution sought by the appellant's counsel and so the application was refused and the name of 2nd appellant struck out even though the appeal survived.

Hearing the appeal, Mr. Aina now for the sole appellant adopted their brief of argument filed on 26/7/13 and replies to the briefs of the respondents filed on 7/8/13, 1/8/13 and 3/8/13 respectively. Equally,

adopted were the briefs of cross-respondents filed on 2/8/13, 7/8/13 and 2/8/13 respectively including the arguments on the preliminary objection to the cross-appeal.

Learned counsel for the appellant crafted five issues for determination which are stated as follows:

*Issues for determination:*

1. Whether the learned appellate Justices were not wrong in affirming the holding of the tribunal that the evidence of PW34 was unreliable simply because the witness was briefed upon a fee to look for evidence to sustain the petition already filed. This issue relates to grounds 2 & 3.
2. Whether the learned appellate Justices were right in holding that the tribunal properly evaluated the evidence of PW34, PW35, their reports and exhibits P52 (A & 8), P55, P56 and P57 and the evidence of other witnesses before dismissing same as unreliable. This issue relates to grounds 1,4, 9, 12 and 13.
3. Whether the appellate Justices having found that the voters registers used for the conduct of the 2012 election did not comply with mandatory provisions of the electoral Act, it was necessary for the appellant to prove how the non-compliance affected the result of the election and if so whether there was not sufficient evidence on the record in proof of how the sundry acts of non-compliance affected the result of the election. This issue relates to grounds 5, 6, 7 and 8.
4. Whether appellate Justices were right when they raised, considered *suo motu* and held that the 1st appellant was in *pari delicto* with the 3rd respondent in respect of illegal injection of names into the voters registers in spite of the pleadings and uncontroverted evidence before the court to the contrary. This issue relates to ground 10.
5. Whether it was open to the lower court to substitute or rely on its own views outside the records and use same to discredit the evidence of PW35 which was not challenged or controverted by the respondents. This issue relates to ground 11.

Learned counsel for the 1st respondent, Chief Wole Olanipekun SAN adopted their brief of argument filed on 1/8/13 in which was couched two issues for determination, viz:

1. Having regard to the admissible evidence led by the appellants in support of their petition *vis a vis* the state of the law on the burden and standard of proof as well as the reliefs sought in the appellant's petition, whether the lower court was not right in affirming the decision of the trial tribunal, dismissing the appellant's petition. (Grounds 5, 6, 7, 8, 10 and 13).
2. Whether the lower court was not right when it affirmed the decision of the trial tribunal discountenancing the commissioned evidence of PW34 and PW35 (grounds 1, 2, 3, 4, 5, 9, 11 and 12).

Yusuf Ali SAN, learned counsel for the 2nd respondent adopted their brief filed on 29/7/13. In it were formulated three issues for determination which are thus:

1. Whether the court below was not right in endorsing the findings and conclusions of the trial tribunal on the testimonies and documentary evidence proffered by the PW34 and PW35 at the trial.
2. Whether considering the totality of the oral and documentary evidence canvassed at the trial, the court below was not right in its conclusion that the appellants failed totality to proof (sic) any of the allegations made in the petition at the trial.
3. Whether on a calm view of the case, the court below was not right in its view that the appellants were unable to demonstrate the effect of the alleged injection of names into the voters register on the outcome of election.

Dr. Onyechi Ikpeazu SAN, learned counsel for the 3rd respondent) adopted their brief settled by Chief Awomolo SAN and filed on 1/8/13 in which were raised two questions, viz:

1. Was the Court of Appeal correct in upholding the decision of the tribunal to the effect that PW4 34 and PW35 did not render credible evidence capable of sustaining the petition.

2. Was the Court of Appeal correct in upholding the decision of the tribunal to the effect that the appellants failed to establish that the acts of non-compliance with the Electoral Act alleged by them, vitiated the Governorship election of Ondo State.

It has to be brought forth that the 3rd respondent raised a preliminary objection which was argued in their brief on the ground that the grounds 2, 3, 6, and 10 of the grounds of appeal lacked competence being outside the decision of the Court of Appeal.

The objection has merit and those grounds cannot stand along with the issues derived thereform. Grounds 2 and 5 however survive. This objective was fully considered in the lead judgment delivered by my learned brother, N. S. Ngwuta, J.S.C. which reasoning I adopt as mine.

*Appeal*

The two issues couched by the 1st respondent seem easy to utilize to settle the questions in controversy and I shall use them together. For further references they are:

1. Having regard to the admissible evidence led by the appellants in support of their petition vis-a-vis the state of the law on the burden and standard of proof as well as the reliefs sought in the appellant's petition, whether the lower court was not right in affirming the decision of the trial tribunal, dismissing the appellant's petition.
2. Whether the lower court was right when it affirmed the decision of the trial tribunal discountenancing the commission agents' evidence of PW34 and PW35.

Mr. Aina of counsel for the appellant submitted that the refusal of the trial court and agreed upon by the Court of Appeal not to act upon the evidence of PW34 based on unreliability merely because PW34 had admitted being briefed upon a fee to look for evidence to sustain the petition already filed. That the two courts below acted erroneously since it was not shown that PW34 was involved in the events leading to the petition nor interested in the outcome thereof in any way and also not shown to have any reason to conceal the truth, He cited several judicial authorities in support and section 151(1) of the Electoral Act.

Also submitted for the appellant is that the lower court did not show how or where in the records the trial

tribunal evaluated the evidence of PW34 and 35 and so the Court of Appeal failed to evaluate the evidence of PW34 and 35 which the tribunal equally failed to do, and so reached a wrong decision, He cited *Abiodun v. State* (2013) 9 NWLR (Pt. 1358) 138 at 157; *Ajagbe v. Idowu*, (2011) 17 NWLR (Pt. 1276) 422 at 448; *Ndulue v. Orjiakor* (2013) 8 NWLR (Pt. 1356) 311 at 338.

For the appellant was further stated that PW34 analyzed 1,896 Units of the 13 Local Government Areas complained of in the petition and the respondents did nothing in rebuttal of the irregularities and malpractices found in those units. That the respondents failing to challenge those assertions are deemed to have accepted them as the correct state of affairs. He cited *Oforlete v. State* (2000) 12 NWLR (Pt. 681) 415 at 439; *Ndulue v. Ojiakor* (2013) 8 NWLR (Pt 1356) 311 at 338.

That the effect of the finding by the lower court that the voters register did not comply with the mandatory provisions of the Electoral Act is that the voters registers was invalid in keeping with section 139(1) (b) of the Electoral Act and so an election based on it would naturally be invalid or void. He referred to *Egemasi v. Onyekwere* (1983) 14 NSCC 409.

Mr. Aina of counsel said the allegations of electoral malpractices like the non-accreditation or improper accreditation, over voting, failure or improper account for ballot papers having been established were acts of non-compliance which substantially affected the result of the election.

Responding, learned counsel for the 1st respondent, chief Wole Olanipekun, SAN said there was a glaring mismatch between the pleaded facts of the appellant and the grounds of the petition as appellant abandoned their pleading and alleged that it was no longer the 1st and 2nd respondents that compiled the illegal voters' register but the 3rd respondent, INEC that was responsible for the alleged compilation and failure to display a copy of the voters' register/ additional voters' register. That it is settled law that parties must be consistent between pleadings and evidence adduced. He referred to *Adeogun v. Fashogbon* (2011) 8 NWLR (Pt. 1250) 427 at 453 544) etc.

Learned senior counsel for the 1st respondent said the complaint of the appellant against the election and return of the 1st respondent border on allegations of non-compliance with the provisions of the Electoral Act which are predicated on other factors and allegations of a

criminal nature which are interwoven with and embedded in most of the paragraphs of the petition and so those criminal allegations must be proved beyond reasonable doubt by the petitioner. He cited *Akpunonu v. Beakart Overseas* (2000) 12 NWLR (Pt. 682) 553 at 561; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108 at 156; *Nwobodo v. Onoh* (1984) 1 SCNLR 1 at 32.

For the 1st respondent was submitted further that the court below did not need to re-evaluate the evidence of PW34 and PW35 since evaluation was properly made and a finding reached by the trial tribunal. He cited *Osolu v. Osolu* (2003) 14 NSCQLR 750 at 768, (2003) 11 NWLR (Pt. 832) 608; *Onyia v. Ozougwu* (1999) 10 - 12 SC24.

Also that the appellant was unable to rebut the presumption of regularity in favour of the results of the Ondo State Governorship Election declared by INEC and so the concurrent findings and decision of the two lower courts should be upheld.

For the 2nd respondent, Yusuf Ali SAN submitted that since PWs 34 and 35 were not experts and did not give evidence of being present nor witnessing any part of the election to which their evidence related, their evidence especially as reflected in the exhibits tendered through them are inadmissible and should be discountenanced as they border on opinion evidence. He cited section 67 of the Evidence Act 201 1; *P.D.P. v. I.N.E.C.* (2012) 7 NWLR (Pt. 1300) 538 at 565 per Fabiyi, JSC.

Learned senior advocate for the 2nd respondent submitted that the appellant failed to adduce credible evidence in support of the results at the various units or at the collation centres at ward level and so the evidence in proof of irregular results cannot stand. He cited *Ayogu v. Nnamani* (2006) 8 NWLR (Pt. 981) 160; *Oka for v. I.N.E.C.* (2010) 3 NWLR (Pt. 1180) 1 at 49 etc.

For the 3rd respondent, Dr. Ikpeazu SAN said from a calm view, the appellant's case was propelled on the reports of PW34 and PW35 which was founded on mere technicality and conjecture.

Furthermore, he submitted that the entire allegation as alleged by the appellant of the alleged abhorrent state of the register of voters could not stand the pre-hearing as the tribunal had those paragraphs struck out since there was no explanation for the alleged wrongful inflation of the registers of voters and so appellant's case was bound to collapse. Also the parties including the appellant were made aware of the contents of the register at least one month before the election and there was no complaint

under a pre-election process and so cannot now be heard of a defective voters registers. That appellant's pleadings in paragraphs 36 and 37 bear that fact out.

Dr. Ikpeazu SAN contended that both the tribunal and the Court of Appeal concurred that there were no irregularities which substantially affected the result of the election and this court is urged to sustain those concurrent findings in the absence of a miscarriage of justice arising from the decisions of the two courts below. He cited *Amadi v. NNPC* (2000) 10 NWLR (Pt. 674) 76 at 112.

Having stated the summary of the submissions of counsel on either side what has emerged on the part of the appellant as shown by the counsel on their behalf are basically that the court below was wrong to hold that the evidence of PW34 was unreliable simply because he was hired for a fee to look for evidence to sustain the petition that was already filed. Also that the Court of Appeal was wrong contrary to section 139(1) of the Electoral Act by requiring the appellant who had already proved non-compliance with the Electoral Act to further prove that the non-compliance substantially affected the outcome of the election. Again the grouse of the appellant that the Court of Appeal raised for the parties *sua motu* and decided the issue that the 1st appellant was in *pari delicto* with the 3rd respondent in the unlawful injection of names into the voters register, contrary to the pleadings and evidence of the parties.

For the respondents, the learned counsel on their respective behalf took the position that the appeal involves concurrent findings of fact on the vital issues of credibility of witnesses as well as the skewed reports produced by the tainted witnesses. Again that the concurrent findings also rested on the fundamental requirement that a petitioner who seeks to impugn the result of an election on the grounds of non-compliance must establish beyond any peradventure that the infractions substantially affected the result of the election.

I would first tackle the issue raised by learned counsel for the appellant that the Court of Appeal raised by itself or *suo motu* without regard to the pleadings and evidence the issue of the unlawful injection of name into the voters register. This assertion is difficult to comprehend in view of the pleadings of the appellant as shown by the record in paragraphs 30, 31 and 32 thereof and which are thus:

"30. Prior to the election, your petitioners had information that illegal voters' register was being secretly compiled by the 1st and 2nd respondents with the connivance of the 3rd respondent for use in the election.

31. In response to the public outcry generated by this fact, in addition to other allegations of impropriety against the respondents, the 3rd respondent (through the Ondo State Resident Electoral Commissioner) summoned a stakeholders meeting at the Police Officers' Mess Akure on the 8th day of August, 2012. There the 3rd respondent gave an assurance that there would be no continuous voter' registration exercise before the October 21, 2012 governorship election. He affirmed that the 2011 voters' register will be used except for an addendum of 7,539 names of voters who registered but their names were missing from 2011 register and those of transfers. The list given to the 2nd petitioner by the 3rd respondent containing the addendum and the local government distribution of the 7,539 voters is hereby pleaded. The speech read by the resident Electoral Commissioner along with Newspapers publications on the said meeting are hereby pleaded. 3rd respondent is hereby given notice to produce the said speech.

32. Contrary to this assurance, the 3rd respondent with the active connivance of the 1st and 2nd respondent engaged in secret manipulation of the voters' register by massive voters registration and re-registration exercise under varied stratagems (such as "Card Igbe Ayo" etc) for Labour Party members thereby overloading the 2011 voters' register by about 100,000 names. This anomaly occurred in all the local governments of Ondo State and also affected numerous polling units and the overall outcome of the election.

In evidence the appellant took the position through their witnesses that it was not the 1st and 2nd respondents who injected the names into the voters register but the 3rd respondent (INEC). This assertion has produced two facts, one, the fact that in paragraph 30 the plaintiffs

averred that it was 1st and 2nd respondents that compiled the register with the injected names, albeit secretly with the connivance of the 3ld respondent. In paragraph 32 the same plaintiffs pleaded that it was the 3rd respondent that compiled the voters register with the unlawfully incorporated or injected names, with the support of the 1st and 2nd respondents, thus producing two different inconsistent scenarios as to how the alleged anomalies in the register came about.

The evidence in relation thereto is that it was the 1st and 2nd respondents who arranged the register in dispute. This situation brings into focus an attempt to change the case of the parties' mid-stream which is not allowed. See *Adeogun v. Fashogbon* (2011) 8 NWLR (Pt. 1250)427.

Again must be stated that the issue had been brought in by the plaintiffs/appellant and when the court below made reference to it, it cannot be properly said that court raised the issue *suo motu* and decided on it. I place reliance on *BMNL v. Ola llemobola Ltd.* (2007) All FWLR (Pt. 379) 1340 at 1369, (2007) 14 NWLR (Pt. 1053) 109.

In respect of the evidence of PW34 and PW35 upon which great reliance was placed by the appellant, the trial tribunal rejected their testimonies within the court's findings that their reports could not be accepted as the witnesses were discredited in cross-examination of PW34 who had admitted lifting the information he presented wrongly from primary sources and then attempted to amend the document he was not the maker of. He admitted making several errors which he termed human error in his addition of ballot papers used for the election. The same happened with PW35 who admitted several errors in his report and used missing data on 2011 voters register to arrive at the figure in his report and so that missing data cannot be used to compare with the 2012 voters' register which became the main focus of PW35's report. Again found by the tribunal is that the witness admitted that he gave repetition of entries of different numbers, clearly operating from uncertain premises and so the tribunal found it easy to reject his testimony. The tribunal also made a finding that PW34 showed himself a liar when he swore that he was at INEC office and together with members of his team inspected INEC documents a situation which the relevant tendered and admitted exhibit showed as untrue since his name did not appear in that document along those who took part in the inspection.

Those findings above the court below went along with since nothing held back their hand from so doing. It is evident that PW34 and PW35 were not experts as they each put out and did not give evidence of being present or witnessing any part of the election to which their evidence related. All these coupled with their inaccurate reports and calculations taken on the foundation of having been contracted for a fee. They clearly wanted to justify their fee with falsehoods intended to deceive. The two courts below were right to have declared the witnesses as unreliable and their evidence not such as could enhance the case of the appellant and akin to what propelled Fabiyi, JSC in *P.D.P. v. INEC* (2012) 7 NWLR (Pt. 1300) 538 at 565 to describe a similar situation to be reports put by an expert for a fee as designed to steal the show and It was therefore unsafe to rely on such evidence.

On the matter of non-compliance with the Electoral Act, while the appellant through counsel posit that what they brought out in evidence was enough the respondents disagree on the basis that the appellant's evidence fell short of what is required for the nullification of the election. I take the of thought of the respondents in that it is not enough to allege, non-compliance with the Electoral Act, the petitioner now appellant ought to establish by concrete evidence not only the non-compliance but that it was substantial to vitiate the election. Nothing other than that would suffice. Also the petitioner cannot run away from his responsibility on the burden of proof and on whom it lies. In the present circumstances, the allegations are civil in character as well as criminal and so intertwined or interwoven as to make severance of one genre from the other which is impossible. Therefore the standard of proof must be of the higher standard which is beyond reasonable doubt. It is when the petitioner has discharged the onus on this that the burden can shift to the respondents to see how far he can go to impugn such a rock solid evidence put forward by the appellant. That is the prescription of law in practice and there is no running away from it. See *Awolowo v. Shagari* (1979) 1 All NLR 120 at 126; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1.

Indeed the trial tribunal was on firm ground in making its findings and reaching its decision that the appellant had not established substantial non-compliance with the Electoral Act. The lower court definitely considered what the tribunal did and had no difficulty on

making similar findings and conclusion. On my part, seeing nothing perverse or not supported by credible evidence on those concurrent findings or a miscarriage of justice it is only logical to go along those earlier findings and conclusion of the two courts below. See *Dogo* v. *State* (2001) 1 SCNJ 315 at 331, (2001) 3 NWLR (Pt. 699) 192; *Dakolo v: Rewane-Dakolo* (2011) 16 NWLR (Pt. 1272) 22 at 49.

From the above and the fuller reasoning in the lead judgment of my brother, N.S. Ngwuta, J.S.C., I am of the view that this appeal lacks merit and is dismissed.

Parties are to bear their costs.

*Cross-Appeal*

Chief Wole Olanipekun, SAN learned counsel for the 1st respondent cross-appellant adopted their brief filed on 26/7/13 and also adopted was the reply to the cross- respondent's brief and a response to cross-respondent's notice of preliminary objection. In the cross-appellant's brief were formulated two issues for determinations as follows:

1. Whether the Court of Appeal was correct in setting aside the finding of the tribunal that the irregularities relied on in the petition were pre-election matters brought to the knowledge of the 1st and 2nd cross-respondents before the election, over which the tribunal had no jurisdiction. (Grounds I, iii, iv and v)
2. Did the Court of Appeal properly construe section 19(1) of the Electoral Act, 2010 (as amended) in holding that there was no evidence that the cross-appellant complied with "statutory commandment" with respect to the voters registers used for the election. (Ground II).

Mallam Yusuf Ali SAN for the 2nd respondent/cross-appellants adopted their brief of argument filed on 29/7/13 and in it was crafted a single issue thus:

> Whether the court below was right in setting aside the finding of the trial tribunal that declined jurisdiction to entertain the allegations of injection of names into the vote

is register when, factually and legally, it was a pre-election matter.

For the 3rd respondent/cross-appellant's brief, Dr. Onyechi Ikpeazu, SAN adopted their brief settled by Chief Awomolo SAN filed on 26/7/13 and also reply brief filed on 5/8/13. In the 3rd respondent/cross-appellant's brief were crafted two issues for determination as follows:

1. Whether the Court of Appeal was correct in setting aside the finding of the tribunal that the irregularities relied on in the petition were pre-election matters brought to the knowledge of the 1st and 2nd cross-respondents before the election over which the tribunal had no jurisdiction. (Grounds i, iii, iv, and v).
2. Did the Court of Appeal properly construe section 19 (1) of the Electoral Act, 2010 (as amended) in holding that there was no evidence that the cross-appellant complied with "statutory commandment" with respect to the voters register used for the election. Ground 2

Mr. Aina learned counsel for the cross-respondent adopted their brief filed on 2/8/13 and in it was argued the preliminary objection. Cross-respondent had adopted crafted a sole issue of cross-appellant.

Whether the 3rd respondent complied with the mandatory requirements of the Electoral Act 2010 as amended) in respect of the voters register used for the Governorship election held in Ondo State on 20th October, 2012.

However the preliminary objection must be tackled before anything can be done. The grouse of the cross-respondent in this preliminary objection are centred on the relief in the notice of cross appeal not being available to the 3rd respondent/cross-appellant and that the particulars of error of law in support of grounds 1, 2, and 3 are not related to the grounds of appeal. Therefore that the grounds being incompetent should be struck out along with issue 2 formulated on ground 2. Also those grounds 4 and 5 are incompetent for having no relevance to the part of the decision complained against and having argued the two grounds together with grounds 1 and 3 and so the grounds and issue 1 formulated therefrom should be struck out.

Mr. Aina of counsel arguing for the cross-respondent stated that the finding being attacked by the 3rd cross-appellant is that of the trial tribunal on unlawful injection of names into the voters' register used for the conduct of the election in issue which was the only finding of irregularity on the voters register used for the conduct of the election in issue which was the only finding of irregularity on the voters' register affirmed by the lower court. That it is trite law that in an appeal to the Supreme Court a party can only appeal against a finding made by Court of Appeal and not the finding of the trial tribunal. He cited *Anyaduba v. N.R.T.C. Ltd.* (1992) 5 NWLR (Pt. 243) 535 at 553; *Mafimisebi v. Ehuwa* (2007) 2 NWLR (Pt. 1018)385 at 411.

Mr. Aina further stated that the only relief contained in the notice of cross-appeal is not available to the 3rd respondent/cross-appellant, as the 3rd respondent did not appeal to the lower court against the finding of irregularities in the voters' register made by the tribunal. The cross-appellant, he said is bound by that finding. He referred to *Olaniyan v. University of Lagos* (No. 2) (1985) 2 NWLR (Pt. 9) 599 at 607; *Ariolu v. Ariolu* (2011) All FWLR (Pt. 599) 1152 at 1168, (2011) II NWLR (Pt. 1258) 288.

Those particulars 1 to 7 of ground 1 are not elucidation of the ground complained of. He said the particulars have no relevance to the ground of appeal and in act at variance with ground 1 of the notice of appeal and so the ground should be struck out. He cited *Abdullahi v. Oba* (1998) 6 NWLR (Pt. 554) 420 at 428; *Honika Sawmill {Nig.) Ltd. v. Hoff* (1994) 2 NWLR (Pt. 326) 252; *Amuda v. Adelodun* (1994) 8 NWLR (Pt. 360) 23 at 31.

Mr. Aina of counsel submitted that particulars 1, 2, 3 and 4 under ground 2 of the notice of cross-appeal is an argument which is only fit for a brief of argument and particulars of grounds of appeal. That particular (1) should constitute an independent complaint on which evidence is superior or weaker. He cited *Globe fishing Industries Ltd. v. Coker* (1990) 7 NWLR (Pt. 162) 265 at 300.

On particular (4) of ground 2, learned counsel for the objector said that the particular amounts to an independent complaint as it does not relate to the ground, the same situation in regard to particulars 2, 3, and 4 of ground 3 of 3rd respondent/cross appellant's notice of

appeal. He relied on *Briggs v. C.L.O.R.S.N.* (2005) 12 NWLR (Pt. 938) 59 at 90.

It was again submitted for the objector that 3rd respondent/cross appellant has no *locus standi* to bring the cross-appeal since the cross-appeal is for the benefit of 2nd – 3rd respondents. He cited *Balonwu v. Ikpeazu* (2005) 13 NWLR (Pt. 942) 479 at 513 - 514.

Those grounds 4 and 5 are incompetent having no relevance to the part of the decision complained against and having been argued together with grounds 1 and 3 are all incompetent and should be struck out along with the issues derived therefrom. He cited Order 8 rule 2(1) Rules of the Supreme Court (as amended) in 2008).

Chief Wole Olanipekun responding for the cross-appellant/ 1st respondent said the scope of a ground of appeal is not limited to specific portions of the text of the judgment appealed against. That the cross-appellant did not need to quote the entire judgment of the lower court in order to competently bring in the particulars under the 3 grounds. He cited Bellow *Bank of the North v. Bello* (2000) 7 NWLR (Pt. 664) 244 at 253; *Mba v. Agu* (1999) 12 NWLR (Pt. 629) 1 at 12.

That the objection is hanging on technicalities which would not do.

For the 3rd respondent/cross appellant, Dr. lkpeazu said the ground of this objection is based on a misconception and lacking in merit. That the particulars of grounds 1, 2 and 3 support and explain the grounds of appeal, flowing naturally therefrom. I am at one with the submission of the cross-appellant's counsel as the objection has not merit, the particulars properly capturing the grievance embedded in the appeal.

*Cross-Appeal Arguments*

The sole issue as crafted by the 1st respondent/cross-appellant Dr. Rahman Mimiko seems sufficient in handling this cross-appeal.

*Sole Issue*

> Whether the lower court was not in error when it came to the conclusion that the trial tribunal was wrong in holding that it lacked jurisdiction to entertain the pre-election matter of alleged injection of names in the voters' register.

Chief Wole Olanipekun SAN for the 1st respondent/cross appellant submitted that the complaint of the petitioner was clearly pre-election matter which was outside the jurisdiction of the election tribunal. This is so because the cross-respondent failed to prove that

there was a nexus between the allegations of the injection of names in the register and the holding of the election. Also that it is not every instance of non-compliance with the provisions of the Electoral Act that translates automatically to the filing of an election petition. He cited *Ibrahim v. INEC* (1999) 8 NWLR (Pt. 614) 334 at 351, *Adeogun v. Fashogbon* (2008) 17 NWLR (Pt. 1115) 149 at 181; *Agbakoba v INEC* (2008) 18 NWLR (Pt. 1119) 489 at 544.

Mallam Yusuf Ali SAN for the 2nd respondent/cross appellant stated that the Election tribunal lacked the requisite *vires* to adjudicate on a pre-election matter as issues of this nature are within the adjudicatory powers of the State High Court. That the issues at stake in relation to the voters register are a pre-election matter which ought to have been raised before the conduct of the election. He cited *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Ladoja v. INEC* (2007) 12 NWLR (Pt. 1047) 119 at 181; *C.P.C. v. Umar* (2012) 12 NWLR (Pt. 1315) 605 at 624.

DR. lkpeazu SAN for the 3rd respondent/cross-appellant said that the Court of Appeal was not correct when it held that the tribunal was wrong in holding that it had no jurisdiction to entertain issues bordering on non compliance of the voters' register with the Electoral Act. That the facts of the alleged non compliance are matters which occurred at the time of the compilation of the register used for the election and were pre-election in nature and cannot form the basis for challenge of the results of the election.

Responding, learned counsel for the cross-respondent, Mr. Aina said that the decision of the Court of Appeal that the 4th cross respondent did not comply with the mandatory provision of the Electoral Act or "'statutory commandment" of the Electoral Act is unassailable. He cited sections 19 and 20 of the Electoral Act 2010 (as amended).That the issue of the voters' register used in the conduct of the election is not a pre-election matter and so within the jurisdiction of the Election Tribunal. He cited *Ohakim v. Agbaso* (2011) All FWLR (Pt. 553) 1806 at 1846, (2010) 19 NWLR (Pt. 1226) 172; *INEC v. ACN* (2009) 2 NWLR (Pt. 1126) 524 at 588.

This cross-appeal is in the main a clarification as to whether the issues bordering on the use of the 2012 voters' register by the 4th cross-respondent (INEC) for the conduct of 20/10/12 election is not a pre-election matter and that it was wrong of the tribunal to have

declined jurisdiction to entertain and consider the complaint of 1st cross-respondent on the use of the voters' register which allegedly contained unlawfully injected names for the conduct of the October 20th 2012 governorship election on the basis that it was a pre-election matter.

The cross-appellants stance is that the matter on ground concerning the voters' register irregularly added names or injected as described fall outside the adjudicatory powers of the Election tribunal and that court ought not to have entered into it as it was a pre-election matter squarely within the domain of either the State High Court or the Federal High Court. That the Court of Appeal should have redressed that wrong position taken by the tribunal. This position is vehemently contested by the cross-respondent who contend that even though an irregularity within the voters register existing before the election can be taken as pre-election but when not addressed and the election takes place with the use of that voters' register with or without disputed contents then the only logical thing is that when the election is disputed at the Election tribunal that dispute cannot be fully considered without bringing in the concerns that arose in respect of its contents since a surgical operation of the pre-election content of part of the dispute cannot be done to separate it from what transpired at the contest ground being the election which is the battle on ground.

I would as a follow up quote what the Court of Appeal did when faced with the decision of whether or not there was jurisdiction in the tribunal over the matter of the voters' register taken alongside the election that had fully taken place and a winner declared. That court held thus:

> "The grounds for questioning an election are eloquently stated in section I38 (l) (b) of the Electoral Act 2010 (as amended). It includes "'non-compliance with the provisions" of the Electoral Act. The Electoral Act is the only enabling statute for compilation and use of the voters' register. By dint of section I38 (l) (b) of the Electoral Act, where it is alleged that the voters register, used in the election the subject of the petition, was improperly compiled or not properly compiled in compliance with the Electoral Act, and that it was done to give undue

> advantage to one of the parties, and that the voters' register was used to conduct the election; then I think, in my humble view that section 138 (1) (b) of the Electoral Act, 2010 has been invoked. By the said section 138 (1) (b) of the Act, therefore, the Election Tribunal, including the instant tribunal, has jurisdiction to entertain such a compliant. After all, compliance, as stated by I. T. Muhammad J.S.C. in *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50 at page 140 B-C is ordinarily "an act of complying or acting in accordance with wishes, request, commands requirement, conditions or order".
>
> It is an act of yielding or conformity with the requirement or order". The learned jurist then concludes that where there is non-compliance, it postulates reversal of such definitions.
>
> In tandem of this simple definition of compliance or non-compliance, it is my view that an election conducted using voters register not compiled in accordance with or in compliance with the provisions of the Electoral Act will, in the circumstance fall within the jurisdiction of the Election tribunal order Section I38(1) (b) of the Electoral Act 2010 as amended".

That section 138(l) (b) of the Electoral Act prescribes as follows:

> "That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act".

Central to the dispute at hand is the word "non-compliance" and I would go to the simple definition given by this court in *Ojukwu v. Yar'adua* (2009) 12 NWLR (Pt. 1154) 50 at 140 per Tanka Muhammad J.S.C. as follows:

> "Compliance ordinarily, is an act of complying or acting in accordance with wishes, request, commands ' requirement, conditions or orders. It is an act of yielding or conformity with the requirement or order. Henry Campbell Black puts it simply as an act of submission, obedience conformance"

> thus: where there is non-compliance, it postulates reversal of all such definitions"

The simple definition easy to understand above referred to having been stated the next question to deal with is the matter which court would have jurisdiction to handle these issues thrown up on account of the vexed scenario of allegation and denial that the voters register was not tampered with. It seems to me that this court has settled the matter in an earlier case where the definition of what an "election" is would be dealt with. A case in point is that of *Ohakim v. Agbaso* (2011) All FWLR (Pt. 553) 1806 at 1846, (2010) 19 NWLR (Pt. 1226) 172 at 232-233, paras. G – B per Onnoghen, JSC where he state as follows:

> "It is necessary that everything connected with the process leading to the election including the actual election and its aftermath come within the jurisdiction of election tribunal. That will stem the tide of parties trying to pursue election related matters in parallel courts which will only result in confusion, a glimpse of which can be seen in the Sokoto State Gubernatorial election petition saga. In any event, it is my considered view that since the action concerned an election conducted on 14th April 2007 by the appropriate authority whether inchoate or not, the proper court with jurisdiction to entertain any action arising therefrom or relating thereto is the relevant election tribunal established by the Constitution of this country as the matter is not a pre-election matter neither can it be accommodated under the procedure of judicial review. Section 164 of the Electoral Act 2006 defines election as meaning "... any election held under this Act and includes a *referendum"*, It is therefore beyond doubt that what took place on 14th April 2007 in Imo State in particular was an election and as such any action relating to the processes leading thereto including the actual conduct of the event or its cancellation fall within the jurisdiction of the election tribunal by operation of law and no other court or tribunal is clothed with jurisdiction to entertain it in any guise."

I cannot but go along with that *dictum* as the matter of election certainly goes beyond the casting of votes. Since before the vote casting, accreditation with nothing else than the voters' register which had been produced before the casting of the votes along with whatever concerns that may have arisen on account of how it was produced or amended, then it follows that once the election has taken place, the concerns over the voters register can only be addressed not in isolation but within the purview of the fully completed electoral process in the given territory and the forming of adjudication is nowhere else at that point but the election tribunal where all the issues emanating, inclusive of the voters' register and the voting, collation and declaration of result are considered and a decision reached. See *I.N.E.C. v. A.C.N.* (2009) 9 NWLR (Pt. 1126) 524.

It is therefore in the light of the foregoing and the better articulated reasoning of my learned brother, N. S. Ngwuta, JSC that I do not hesitate in going along with what the Court of Appeal said and did in its holding that an election conducted using the voters register whether properly or improperly compiled in compliance with the provisions of the Electoral Act fell within the jurisdiction of the Electoral tribunal under section 138(1) (b) of the Electoral Act, 2010 (as amended). That being the case I too dismiss this cross-appeal as lacking in merit. I abide by the order made as to costs.

**ALAGOA, J.S.C.:** This is an appeal against the judgment of the Court of Appeal Akure Division (hereinafter simply referred to as the lower court or the court below) which affirmed the judgment of the Governorship Election Tribunal sitting in Akure dismissing the petition filed by the petitioners Oluwarotimi Akeredolu and the Action Congress of Nigeria (ACN) which party sponsored him. In contention at the said election which was conducted by the 3rd respondent, the Independent National Electoral Commission ((NEC) on the 20th October, 2012 in Ondo State was the Governorship seat for Ondo State which was keenly contested not only by the present parties to this appeal but by other candidates sponsored by their various political parties. The 1st respondent Rahman O. Mimiko of the Labour Party (2nd respondent) was declared duly elected having been adjudged by the 3rd respondent (INEC) as having scored a majority of lawful votes cast at the election. Aggrieved by the judgment of

the court below, the petitioners as appellants further appealed to the Supreme Court by their notice of appeal filed on the 11th July, 2013 consisting of thirteen grounds from which the appellant distilled five issues in paragraph 3 at page 3 of the appellants' brief of argument dated 26th July, 2013 and filed same day. The said issues are as follows:-

1. Whether the learned appellate Justices were not wrong in affirming the holding of the tribunal that the evidence of PW34 was unreliable simply because witness was briefed upon a fee to look for evidence to sustain the petition already filed. This issue relates to grounds 2 & 3.
2. Whether the learned appellate Justices were right in holding that the tribunal properly evaluated the evidence of PW34, PW35, their reports and exhibits P52 (A&B), P55, P56 and P57 and the evidence of other witnesses before dismissing same as unreliable. This issue relates to grounds 1, 4, 9, 12 and 13.
3. Whether the appellate Justices having found that the voters register used for the conduct of the 2012 election did not comply with mandatory provisions of the Electoral Act, it was necessary for the appellant to prove how the non-compliance affected the result of the election and if so 'whether there was not sufficient evidence on the record in proof of how the sundry acts of non-compliance affected the result of the election. This issue relates to grounds 5, 6, 7 and 8.
4. Whether the appellate Justices were right when they raised, considered *suo motu* and held that the 1st appellant was in *pari delicto* with the 3rd respondent in respect of illegal injection of names into the voters register in spite of the pleadings and uncontroverted evidence before the court to the contrary. This issue relates to ground 10.
5. Whether it was open to the lower court to substitute or rely on its own views outside the records and use same to discredit the evidence of PW35 which was not challenged or controverted by the respondents. This issue relates to ground 11.

The respondents cross appealed and also raised objection to the competence of the appeal on some grounds in the notice of appeal. The appellants also raised objection to the cross appeal of the respondents. Of particular note is the objection of the 3rd respondent (INEC) to grounds 2, 3, 6 and 10 of the appellants grounds of appeal, which grounds, it is contended by the respondents do not arise from the decision of the court below. It was further contended by the respondents that those grounds be struck out as well as issues 1, 3 and 4 distilled from those grounds. Having meticulously read through the said grounds 2, 3, 6 and 10 of the appellants grounds of appeal, I find and therefore inclined to agree with the appeal that the said grounds did not arise front the judgment of the court below. This court, per Karibi Whyte, J.S.C., in *Saraki v. Kotoye* (1992) 11/12 SCNJ. 26, (1992) 9 NWLR (Pt. 264) 156 at 184, paras. E - F put the position succinctly thus,

> "It is well settled propositions of law in respect of which there can hardly be a departure, that the grounds of appeal against a decision must relate to the decision and should constitute a challenge to the *ratio* of the decision ... Grounds of appeal are not formulated in *nubibus.* They must be in f*irma terra,* namely arise from a judgment."

Much more recently in *Hon. Zakawanu Garuba & Ors v. Hon. Ehi Bright Omokhodion* (2011) 15 NWLR (Pt. 1269) 145 at 177, paras. B-C this court in similar vein held as follows:

> "It is equally settled that a ground of appeal must correlate with as well as arise from the decision appealed against and should frontally attack the *ratio* of the decision otherwise it is baseless and liable to be struck out being incompetent."

The rationale is that incompetent grounds of appeal cannot be argued along with competent grounds of appeal and so are liable to be struck out. The said grounds 2, 3, 6 and 10 are accordingly struck out. In *Chief Kafaru Oje & Anor v. Chief Ganiyu Babalola & Ors* (1991) 4 NWLR (Pt. 185) 267, this court per Nnaemeka Agu, JSC, held that issues for determination as well as argument in the appeal should be based on the grounds of appeal duly filed. See *also Osinupebi v. Saibu & Ors* (1982) 7 SC 104, pages 110-111; *Western Steel Works & Ors* v. *Iron and Steel*

*Workers Union of Nigeria & Ors* (No. 2) (1987) 1 NWLR (Pt. 49) 284 at 304.

Issues 1, 3 and 4 cannot therefore stand on their own having being distilled from the struck out grounds 2, 3,6 and 10.The said issues are also accordingly struck out. This done, the arguable part of this appeal is hinged upon what can be made out of the evidence of PW34 and PW35 which evidence had been discredited by the trial tribunal which view had found support with the court below.

The petition had been based on allegations of corruption and non compliance with the provisions of the Electoral Act. Both the trial tribunal and the court below however thought and held otherwise. Section 139(1) of the Electoral Act 2010 (as amended) which is very germane to this discourse provide that,

> "An election shall not be invalidated by reason of non-compliance with the provisions of the Act if it appears to the election tribunal or court that the election *was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."* (Italics mine for emphasis).

This provision is clear and admits of no ambiguity whatsoever. There is no dearth of authorities on this important legal principle. See for example *Yusuf v. Obasanjo* (2005) 18 NWLR (Pt. 956) 96; *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50 at page 140; *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 80; *Buhari v. l.N.E.C.* (2008) 19 NWLR (PL 1120) 246 at 435. The *onus* is on the appellants who are asserting to prove this substantial non-compliance. A breakdown of section 139(1) of the Electoral Act 2010 as amended is as follows:-

i. Appellant must prove non-compliance with the provisions of the Electoral Act 2010 as amended.
ii. The non-compliance must be substantial.
iii. The substantial non compliance must affect the result of the election.

Thus the heavy weather made by the appellant that the lower court held that there was non-compliance with the provisions of the Electoral Act 2010 as amended in the compilation of the voters register used in the election is not enough. If the intention of the appellant as learned senior counsel Chief Akin Olujimi has strenuously tried

to portray is to rely on the evidence and documents tendered by PW34 and PW35 to show such substantial non-compliance, the appellant only succeeded in running into a brick wall. Appellant had portrayed PW35 as an expert and yet the court below dismissed his evidence as "preposterous, outlandish and perverse."

See page 2040 Vol. IV of the records. Why was the court below so unsparing in its tongue lash? It is on record and the court below found as of fact that the total number of voters in the 2011 voters register was put at 1,553,580 while the total registered voters in the 2012 voters register was put at 1,654,205. By simple arithmetical calculation, the difference between the 201 I and 2012 figures is 100,725 and yet, PW35 as his exhibits P56 and P57 show, gave a figure of 164,072 as having been unlawfully injected into the 2012 voters register. PW35 was seriously discredited during cross examination by counsel to the 3rd respondent. The lower court's conclusion was that the report of PW35 should be taken with a pinch of salt. The lower court in so asserting was only acceding and rightly too in my view to the finding of the trial tribunal before it. If the evidence of PW35 was found to be "preposterous, outlandish and perverse", that of PW34 was outright dishonest and shameful as he admitted under cross-examination to have been briefed upon a fee "to look for evidence to sustain the petition that was already filed."

In this the court below agreed with the finding of the trial tribunal that such evidence could not be relied upon. In my view there is nothing in evidence to show that the non compliance which is alleged to be the injection of names into the voters register and a few other sundry allegations substantially affected the result of the election as to cause the election to be vitiated. The evidence of PW 34 and PW 35 were such as to amount only to hearsay.

The trial tribunal and the court below have arrived at concurrent findings of fact and the attitude of the Supreme Court is replete in a number of judicial authorities which is that except there is established miscarriage of justice or violation of some principle of law or procedure or the findings are perverse, the Supreme Court will not disturb such findings. See *Adaku Amadi* v. *Edward Nwosu* (1992) 6 SCNJ 59, (1992) 5 NWLR (Pt. 241) 273; *Onwujuba v. Obienu* (1991) 4 NWLR (Pt. 183) 16; *Ogundiyan v. State* (1991) 3 NWLR (Pt. 181) 519; *lyaro v. The State* (1988) 1 NWLR (Pt. 69) 256. The

list is indeed inexhaustive. I do not find the findings of fact bedeviled by any of these lapses.

It is for these reasons and the fuller reasons contained in the lead judgment of my learned brother, Nwali Sylvester Ngwuta, J.S.C., which I had the privilege to read in advance and which I completely agree with that I too find no merit in the appeal and cross appeal.

I also dismiss same while abiding by all other order or orders contained in the said lead judgment including the order on costs.

*Appeal and Cross-appeal dismissed*