1. **MOHAMMED DELE BELGORE, SAN**
2. **ENGR. JOSHUA BABATUNDE ADEYINKA**
3. **ACTION CONGRESS OF NIGERIA (ACN)**

V

1. **ABDULFATAH AHMED**
2. **PETER KISHIKA**
3. **PEOPLES DEMOCRATIC PARTY (PDP)**
4. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (1NEC)**

COURT OF APPEAL (ILORIN DIVISION)

A.JEGA ABDULKADIR JC A *(Presided and Read the Lead Judgment)*
SIDIDAUDA BAGE JCA
CHIM A CENTUS NWEZE JCA
ISAIAH OLUFEMIAKEJU JCA
MOORE A. A. ADUMEIN JCA

EPT/CA/IL/GOV/1/2011

SATURDAY, 7 JANUARY 2012

APPEAL - Further or better particulars - Respondent - Whether mandated to ask for

APPEAL - Evaluation of evidence and making findings of fact based on - Trial court - Primary ditty of therefor - Appellate court - Attitude of thereto - Finding of fact not appealed against - Subsistence of

ELECTION - Political party - Member of - Designation of as member of/NEC to collate election result - Impropriety of - Electoral Act, 2010 (amended), section 29(1) considered ELECTION PETITION - Doctrine of severance thereunder - Onus to sever allegations of crime from civil averments - Who bears -Petitioner - Duty on to establish competence of petition so severed

ELECTION PETITION - Election result declared by INEC - Correctness of and regularity of conduct of election - Rebuttable presumption thereof

ELECTION PETITION - Filing fees - Improper assessment of by court registry - Petition - Dismissal of on ground of - Impropriety of

EVIDENCE - Admitted facts - Proof of - Needlessness of

EVIDENCE - Burden of proof - Who asserts - Onus on to prove -Evidence Act, sections 131 - 134 considered

EVIDENCE - Admissibility of evidence - Wrongly admitted document Court - Onus on not to attach weight to - Party who tenders document - Duty on to establish relevancy of

STATUTE Electoral Act No. 608, 2018, 1st schedule thereto, paragraph 12(5) - Purport of - Objection of jurisdictional nature – Where raised in the final address before an Election Tribunal - Whether competent

STATUTE - Electoral Act, 2010 (amended), section 29(1) - Political party - Member of - Designation of as member of INEC to collate election result - Impropriety of

STATUTE - Evidence Act, 2011, sections 131 - 134 - Who asserts -Onus on to prove

Issues:

1. Whether the tribunal was not correct to entertain and uphold the preliminary objections of the respondents to the competence *of* the petition on the various grounds canvassed and to ignore the offensive paragraphs of tire petition that were generic, general and vague.
2. Whether the tribunal was not correct in upholding the objection to the admissibility of documents on grounds of improper certification and right in holding that the appellants had a duty to tie the mass of documents tendered by them to the relevant areas of their case.
3. Whether the tribunal was not right in holding that the testimonies and reports of the PW63, PW64 and PW65 are unreliable and cannot be treated as expert evidence and the untendered reports attached to the statement on oath of the witnesses had no probative value.
4. Whether the appellants proved the alleged discrepancy of 21,192 ballot papers having regard to their pleadings and evidence.
5. Whether the various allegations of violence, chasing away of agents of the petitioners, multiple voting, inducement of voters, disruptions of election at various polling units made in the petition did not amount to commission of crime which must be proved beyond reasonable doubt.
6. Whether the tribunal was not right in its decision that the allegation of non-accreditation made in the petition was not proved.
7. Whether the tribunal was not right to refuse the reliefs sought by the appellants on the face of their palpable failure to establish their entitlements to same by credible oral and documentary evidence and

not right to have refused to allow the appellants' written address to take the place of evidence which they failed to lead at the trial.

8. Whether the tribunal was not in error in refusing to strike out the petition after having found that the requisite filing fees were not paid in respect thereof and when there was no prayer by the petitioners/cross-respondents for extension of time to pay same.

9. Whether the tribunal was not in error in nullifying the results of the election in Somasun polling unit, Adigbongbo/ Awe/Orimaro ward and Shinawu/Tunbuya ward, respectively, despite its earlier findings that the petitioners had not proved their case in respect of the aforementioned places, moreover, when the pleadings of the petitioners did not cover this point and the holding of the tribunal amounted to imposing the burden of proof on the cross-appellants

Facts:

The petitioners, who were candidates in the gubernatorial elections in Kwara State were aggrieved with the emergence of the 1st and 2nd respondents as winners of the election. They commenced a petition at the Governorship and Legislative Election Tribunal, sitting in Kwara State challenging die electoral result on grounds of non-compliance with electoral provisions. They prayed for a declaration that the 1st and 2nd respondents were not duly elected by the majority of lawful votes cast and in the alternative, that the election was invalid by reason of corrupt practices and non-compliance with electoral provisions. The respondents filed a preliminary objection challenging the competence of the petition. The tribunal dismissed the petition, and the petitioners, yet aggrieved, and appealed to the Court of Appeal, while the respondents, also aggrieved by part of the decision of the tribunal filed two separate notices of cross-appeal.

In determination of the appeal, the Court of Appeal considered the following statute-

1st Schedule to the Electoral Act, paragraph 12(5) -

"A respondent who has an objection to the hearing of the petition shall file his reply and state the objection therein and the objection shall be heard along with the substantive petition."

Held: *(Dismissing the appeal and cross-appeals)*

1. *Primary duty of trial court to evaluate evidence and make findings of fact based on, attitude of appellate court to and subsistence of finding of fact not appealed against –*

   A trial court has the power to ascribe credibility to the evidence of witnesses who testified before it. Due to the initial advantage which trial court has of actually seeing and assessing the witnesses, issues relating to demeanour of such witness which the court saw and assessed and ascription of weight to their evidence are the exclusive prerogatives of the trial court, prerogatives which no appellate court can interfere with. It is the primary responsibility of a trial court to make findings of fact based on the evidence presented before it. Unless those findings are shown to be perverse, an appellate court will seldom interfere with them. A *fortiori,* **where there is no appeal against a finding of fact, such a finding will be deemed to have been accepted. In the instant case, where the petitioners were unable to establish that the findings of the tribunal were perverse, the appellate court did not interfere therewith. [Ebba v. Ogodo (1984) 1 SCNLR 372, (2000) FWLR (Pt. 27) 2094; Owie v. Ighiwi (2005) All FWLR (Pt. 248) 1762, (2005) 5 NWLR (Pt. 917) 184; Ajao v. Ademola (2005) All FWLR (Pt. 256) 1239, (2005) 3 NWLR (Pt. 913) 636; Umanah v. Atlah (2006) All FWLR (Pt. 301) 1951, (2006) 9 KLR (Pt: 226) 3393; Nteogwuile v. Otuo (2001) 16 NWLR (Pt. 738) 58, (2001) FWLR (Pt. 68) 1076; Oyadare v. Keji (2005) All FWLR (Pt. 247) 1583, (2005) 7 NWLR (Pt. 925) 571 referred to]** [Pp. 278 - 279, paras. E - A]

2. *Whether a respondent is mandated to ask for further or better particulars -*

A respondent is not under a duty or obligation to ask for further or better particulars. [Olawepo v. Saraki (2009) **All FWLR (Pt. 498) 256 referred to]** [P. 275, para. H]

3. *Onus on who asserts to prove, Evidence Act, sections 131 - 134 considered -*

By the provisions of section 131 -134, Evidence Act, he who asserts must prove his assertion. In the instant case, the petitioners failed to discharge the burden on them, therefore, the petition was rightly dismissed by the tribunal. [Agagu v. Mimiko (2009) All FWLR (Pt. 462) 1122 (2009) 7 NWLR (Pt. 1140) 342; Igbeke v. Emordi (2010) 11 NWLR (Pt. 1204) 1 referred to] [P. 281, paras. A - B]

4. *Onus on court not to attach weight to wrongly admitted document and duty on party tendering documents to establish relevancy of-*

Where a court or tribunal, wrongly admitted a document in the course of its proceedings, it would be perfectly entitled not to attach any weight to it in its decision. Admitted documents useful as they could be, would not be of much use to the court in the absence of admissible oral evidence by persons who can explain their purport. [Jekpe v. Alokwe (2001) FWLR (Pt. 47) 1013, (2001) 4 SCNJ 67; Alao v. Akano 22 NSCQR (Pt. 11) 867, (1988) 1 NWLR (Pt. 71) 431; Terab v. Lawan (1992) 3 NWLR (Pt. 231) 569; Nwole v. Iwangwu (2006) All FWLR (Pt. 316) 325 referred to] [P. 276, para. F, P. 277, para. B]

5. *Rebuttable presumption of correctness of election result declared by INEC and regularity of conduct of the election -*

A result declared by an electoral body enjoys a presumption of regularity, correctness and authenticity. There is a presumption that an election which produced the said result was conducted in substantial compliance with the provisions of Electoral Act. The onus is therefore on the person alleging the contrary to prove otherwise. In the instant case, the petitioners challenged the correctness of the election results declared and the regularity of the election, but failed to establish same, their petition was therefore rightly dismissed by the tribunal. [Iniama v. Akpabio (2008) 17 NWLR (Pt. 1116) 225; Justice Party v. I.N.E.C. (2006) All FWLR (Pt. 339) 907; Chime v. Onyia (2009) All FWLR (Pt. 480) 673, (2009) 2 NWLR (Pt. 1124) 1; Mufutau v. Kayode (2008) 4 LRECN 227; Adun v Osunde (2003) 1 LRECN 160; Kalu v. Uzor (2005) 2 LRECN 281 (2005) All F WLR (Pt.287)978: Omoboriowo v. Ajasin (1981-1990) 332, (1984) 1 SCNLR 108; Jalingo v. Nyame (1992) 2 LRECN 532, (1992) 3 NWLR (Pt. 231) 538; Atikpekpe v. Joe (1999) 2 LRECN 302, (1999) 6 NWLR (Pt. 607) 428; Agoda v. Enamuotor (1999) 1 LRECN 205; Onye v. Ikema (1999) 3 LRECN 655, (1999) 4 NWLR (Pt. 598) 198 referred to] [P. 281, paras. C - F]

6. *Impropriety of dismissal of petition on grounds of improper assessment of filing fees by court registry –*

Once the petitioner pays the fees which was adjudged payable or assessed as payable by the registry of the tribunal, he should be absolved of any blame. His petition should not be thrown away or struck out because of the mistake of the registry. The mistake or ignorance of the registry should not be the misfortune of the petitioner. Election matters are usually very sensitive, a situation where a petition is struck out on the ground that the appropriate fees were not paid by the petitioner portends great danger. In the instant case, where the registry under-assessed the fees to be paid

by the petitioner, the tribunal therefore rightly refused to strike the petition out on ground of. [Idris v. A.N.P.P. (2008) 8 NWLR (Pt. 1088) 1 referred to] [Pp. 286 - 287, paras. H -C]

7. *Impropriety of designation of member of political party as officer of INEC to collate election results, Electoral Act, 2010 (as amended), section 29(1) considered* -

By the provision of section 29(1), Electoral Act, 2010. a member of a political party is prohibited or forbidden from being appointed and designated as an officer of INEC for the purposes of an election. A collation of ward results carried out by a member of a beneficial political party cannot be a collation in compliance with the Electoral Act. [P. 289, paras. B - C]

8. *Needlessness of proof of admitted facts* -

A fact which is admitted needs no further proof. [P. 274, para. C]

9. *Purport of paragraph 12(5) of the 1st Schedule to the Electoral Act and whether objection of jurisdictional nature raised in the final address before an election tribunal is competent* -

Per JEGA JCA:[Pp. 273, paras. E - F, Pp. 274 - 275, paras. C - G]

> **"Paragraph 12(5) of the 1st Schedule is an innovation in the Electoral Act, that is designed for the actualization of the purport of section 285(6) of the 1999 Constitution (as amended). That section prescribes a period of 180 days from the date of filing of an election petition for its disposal. To accede to the submission that the respondents' objection must be taken first will defeat the essence of that section. The third respondent's argument is clearly in tandem with the arguments proffered by the first and second respondents that it was proper for the third respondent to have raised its objection at its final address in**

consonance with the provision of paragraph 12(5) of the First Schedule to the Electoral Act, 2010 (as amended)....

This court is satisfied that the objection raised by the 1st, 2nd and 3rd respondents before the tribunal was jurisdictional in nature. Since it is settled now that it is jurisdictional in nature, was it appropriate to have raised the objection at the stage of final address by the 1st, 2nd and 3rd respondents?

The appellant argued that the 1st and 2nd respondents raised the objection under paragraph 12(5) instead of paragraph 53(2) of the First Schedule to the Act which should govern same. Paragraph 53(2) prescribes the specific time the objection must be raised or it would be considered waived, if it is an issue of jurisdiction that is waive-able. It is clear therefore, that the application of paragraph 53(2) of the 1st Schedule is restrictive. It does not apply to all jurisdictional matters except those ones that are waiveable. From the nature of the objection as stated above, are they waiveable to bring them within the ambit of the provisions of paragraph 53(2) of the 1st Schedule? Without difficulty, this court will agree with the submissions of respondents and the decision of the tribunal, that the objections raised are not waiveable.

Having settled on the issue of waiver and non-applicability of paragraph 53(2) of the First Schedule, the next question is whether the objections were properly raised under paragraph 12(5) *(supra). ...*

It is stated that the respondents raised their objection at the final address stage of the petition. The appellants had argued in respect of the first

and second respondents' objection that since no oral arguments were proffered thereto, the objection in the address could be considered abandoned. The first and second respondents argued *per contra.* **Their position is that since their address was adopted** *in toto* **the objection**

therein is deemed argued. The same argument is applicable to the objection of the third respondent.

According to the tenor of paragraph 12(5), the objection shall be heard along with substantive petition. The question now is whether the word "heard" employed in the said paragraph is restricted to oral advocacy and does not contemplate written addresses. The paragraph is to the effect that the objection *"shall be heard along with the substantive petition".*

This court is of the view that the expression "shall be heard along with the substantive petition" simply means that the objection should be taken together with the substantive petition. By way of analogy, a party who has adopted his final written address before a tribunal is *ipso facto* **deemed to have argued that address. If the Electoral Act had wanted to adopt the approach of the other rules of procedure, it would have provided clearly that objections incorporated in the process before the court must be accompanied with an oral address. The provision of paragraph 12(5)** *(supra)* must be given its natural and ordinary meaning, Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3, (2007) 4 NWLR (Pt. 1025) 423; Awolowo v. Shagari (1979) 6 - 9 SC 51, (2001) FWLR (Pt. 73) 53 and Dabup v. Kolo (1993) 9 NWLR (Pt. 317) 35.

In all, we hold that the objections of the first, second and third respondents were properly argued upon the adoption of their final addresses. In other words, their adoption of their final addresses was tantamount to proffering oral arguments of their content including the objections therein. Finally, we also hold that the objections of first, second and third respondents were proper before the tribunal and it was correct in its decision that, jurisdiction being a threshold issue, can be raised at any stage of the proceedings. On this score, the arguments of the appellants fail and are hereby vacated."

10. *Who bears onus to sever allegations of crime from civil averments under the doctrine of severance under election petition and duty on petitioner to establish competence of petition so severed -*

Under the doctrine of severance of allegations of crime from civil averments, the duty rests squarely on the petitioner to sift and winnow those allegations of crime contained in the petition from the civil averments. It is also the duly of the petitioner to demonstrate to the tribunal that his outstanding averments could still sustain the petition. In the instant case, where the petitioners failed to discharge the duty on them, the tribunal therefore rightly dismissed the petition when the allegations in the petition were not proved. [Onwboriowo v. Ajasin (1981-1990) LRECN 332, (1984) 1 SCNLR 108; Fayemi v. Oni (2010) NWLR (Pt. 1222) 326 referred to] [P. 280. paras. E – F]

Nigerian Cases Referred to in the Judgment:

A.C.B. Ltd v. Henshaw *(1990) 1 NWLR (PT. 129) 646. (2009)* All FWLR (Pt.463) 1292

A.N.P.P. *V.* Usman *(2008) 12 NWLR (PT. 1100) 17*

Abidoye v. Alawode *(2001) FWLR (PT. 43) 322*

Abubakar v. Yar Adua *(2008) ALL FWLR (PI. 404) 1409, (2008) 4 NWLR (PT. 1078)465*

Abubakar v. Yar'Adua *(2009) ALL FWLR (PT. 457) 1*

Adefarasin v. Dayekh II *(2007) ALL FWLR (PT. 348) 911*

Ademeso v. Okoro *(2005) 6 SCNJ 71, (2005) ALL FWLR (PI. 277) 844*

Adeniyi *V.* Governing Council of Yaba College of Technologv *(1993) 6 NWLR (PI. 300) 426*

Adighije v.Nwaogu (20\0) *12 NWLR (PT. 1209)419*

Adun v. Osimde *(2003) I LRECN 160*

Agagu v. Mimiko (2009) ALL FWLR (PT. 462) 1122. (2009) ***7*** NWLR (Pt. 1140)342

Agoda v. Enamuotor (1999) 1 LRECN 205

Aiki v. Idowu (2006) All FWLR (Pt. 293) 361, (2006) 9 NWLR (Pt. 984) 47

Ajadi v. Ajibola (2004) All FWLR (Pt. 220) 1273, (2004) 16 NWLR (Pt. 898)91

Ajao v. Ademola (2005) All FWLR (Pt. 256) 1239. (2005) 3 NWLR (Pt. 913) 636

Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248

Alao v. Akano 22 NSCQR (Pt. 11) 867, (1988) 1 NWLR (Pt. 71) 431

Alfortin Ltd v. Attorney-General, Federation (1996) 9 NWLR (Pt. 475)634

Arabambi v. Advance Beverages Nig Ltd (2005) 5 NWLR (Pt. 959) 1, (2006) All FWLR (Pt. 295) 581

Aregbesola v. Oyinlola (2011) 9 NWLR (Pt. 1253) 458 Atone v. Amu (1974) 10 SC 237

Atikpekpe v. Joe (1999) 2 LRECN 302, (1999) 6 NWLR (Pt. 607) 428

Attorney-General, Anambra State v. Onuselogu Enterprises Ltd (1987) 4 NWLR (Pt. 66) 547

Awolowo v. Shagari (1979) 6 - 9 SC 51, (2001) FWLR (Pt. 73) 53

Awuse v. Odili (2004) All FWLR (Pt. 212) 1611, (2004) 18 NWLR (Pt. 876) 481

Aya v. Adasu (1992) 3 NWLR (Pt. 231) 598

Azudibia v. Ogunewe (2004) All FWLR (Pt. 205) 289

Balogun v. Akanji (1988) 1 NWLR (Pt. 70) 301

Bill Construction Co. Ltd v. Imani & Sons Ltd/Shell ***Trustees*** Ltd (2006) 19 NWLR (f t . 1013) 1

C.P.C. v. I.N.E.C. (unreported) decision of the Supreme Court Delivered on 28 December 2011, page 17

Chime v. Onyia (2009) All FWLR (Pt. 480) 673. (2009) 2 NWLR (Pt. 1124) 1

Dabupv. Kolo (1993) 9 NWLR (Pt. 317)35

Duriminiya v. C. O.P (1961) NNLR 70

Ebba v. Ogodo (1984) 1 SCNLR 372, (2000) FWLR (Pt. 27) 2094

Ebebe v. Ezenduka (1998) 7 NWLR (Pt. 556) 74

Elemo v. Omolade (1968) NMLR 359

Ezeanuma v. Onyema (2011) 13 NWLR (Pt. 1124) 1

Ezeonwu v. Onyechi (1996) 5 NWLR (Pt. 438) 499

Fashanu v. Adekoya (1974) 6 SC 83

Fayemi v. Oni (2010) NWLR (Pt. 1222) 326

Gaji v. Paye (2003) FWLR (Pt. 163) 1, (2003) 5 SC 53

Hydro-Quest Nigeria Ltd v. Bank of the North Ltd (1994) 1 NWLR (Pt. 318)41

l.N.E.C. v. Oshiomole (2009) 4 NWLR (Pt. 1132) 607

I.N.E.C. v.Ray (2004) 14 NWLR (Pt. 892)92, (2005) All FWLR (Pt. 265)1047

Idris v. A.N.P.P. (2008) 8 NWLR (Pt. 1088) 1

Ifeanyichukwu Osondu Co. Ltd v. Akhigbe (1999) 11 NWLR (Pt. 625) 1

Igbeke v. Emordi (2010) 11 NWLR (Pt. 1204) 1

Igodo v. Owulo (1999) 5 NWLR (Pt. 601) 70

Ilukwe v. Anah (1999) 5 NWLR (Pt. 603) 476

Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3, (2007) 4 NWLR (Pt. 1025) 423

Iniama v. Akpabio (2008) 17 NWLR (Pt. 1116) 225

Jalingo v. Nyame (1992) 2 LRECN 532, (1992) 3 NWLR (Pt. 231) 538

Jekpe v. Alokwe (2001) FWLR (Pt. 47) 1013, (2001) 4 SCNJ 67

John Paul Ltd v. Afribank (Nig.) Ltd (2003) 8 NWLR (Pt. 822) 290

Justice Party v. I.N.E.C. (2006) All FWLR (Pt. 339) 907

Kalu v. Uzor (2005) 2 LRECN 281, (2005) All FWLR (Pt. 287) 978 Kate Enterprises Ltd v. Daewoo (Nig.) Ltd (1985) 2 NWLR (Pt. 5) 116

Kingibe v. Maina (2004) FWLR (Pt. 191) 1555

Kossen Nis Ltd v. Savannah Bank (1995) 9 NWLR (Pt. 470) 439

Kotoye v. Saraki (1994) 7 NWLR (Pt. 357) 414

Lawal v. Dawodu (1972) 7 NSCC 515

M. I. A. & Sons Ltd v. F.H.A. (1991) 8 NWLR (Pt. 209) 295

Maduabum v. Nwosu (2010) All FWLR (Pt. 547) 678, (2010) 13 •
NWLR (Pt. 1213)623
Monier Construction Co. Ltd v. Azubuike (1990) 3 NWLR (Pt. 136)74
Mufutau v. Kay ode (2008) 4 LRECN 227
N.N.P. C. v. Ahamba (2009) 10 NWLR (Pt. 1149) 226, (2010) All
FWLR (Pt. 508) 365
Naruwal & Sons Ltd v. N. S. T. C. Ltd (1989) 2 NWLR (Pt. 166) 730
Noibi v. Fikolati (1987) 1 NWLR (Pt. 52) 619
Nteogwuile v. Onto (2001) 16 NWLR (Pt. 738) 58, (2001) FWLR (Pt. 68) 1076
Nwankwo v. Yar'Adua (2010) All FWLR (Pt. 534) 1, (2010) 12 NWLR (Pt. 1209)578
Nweke v. Ejims (1999) 11 NWLR (Pi. 625) 39
Nwole v. Iwangwi, (2006) All FWLR (Pt. 316) 325
Obekpolorv. State (\99\) 1 NWLR (Pt. 165) 113
Ogboru v. Uduaghun (2011) 2 NWLR (Pt. 1232) 538
Ola v. Union Bank (2005) 2 SCNJ 191
Olaniyonu v. Emeawa (1989) 5 NWLR (Pt. 122) 493
Olawepo v. Saraki (2009) All FWLR (Pt. 498) 256
Olukoga v. Fatunde (1996) 7 NWLR (Pt. 462) 516
Omoboriowo v. Ajasin (1981-1990) LRECN 332. (1984) 1 SCNLR 108
Onye v. Ikema (1999)3 LRECN655,(1999) 4NWLR(Pt. 598) 198
Owie v. Ighiwi (2005) All FWLR (Pt. 248) 1762. (2005) 5 NWLR (Pt. 917) 184
Oyadare v. Keji (2005) All FWLR (Pt. 247) 1583, (2005) 7 NWLR (Pt. 925) 571
Oyakhire v. Obaseki (1986) 1 NWLR (Pt. 19) 735
Oyegun v. Igbmediun (1992) 2 NWLR (Pt. 226)747
P.A.C. v. I.N.E.C. (2009) All FWLR (Pt. 478) 269
Queen v. Wilcok (1961) 2 NSCC 274

Sanusi v. Amoyegun (1992) 4 NWLR (Pt. 237) 527

Schroder & Co. v. Major & Co. (Nig.) Ltd (1989) 2 NWLR (Pt. 101) 1

Sonuga v. Anadem (1967) NMLR 77. (1967) 1 All NLR 91

Swan v. Dzungwe (1966) NWLR 297

Tabik Investment Ltd v. G.T.B. (2011) 17 NWLR (Pt. 1276) 240

Terab v. Lawan (1992) 3 NWLR (Pt. 231) 5fiQ

Euduuwa v. Habiba (1991) 2 NWLR (Pt. 174) 161

U.B.N. Ltd v Ozigi (1994)

U.B.N, v. Borini Prono (1998) 4 NWLR (Pt. 547) 640

Ukiri v. F.C.S.C. (2011) All FWLR (Pt. 577) 783

Umanah v. Attah (2006) All FWLR (Pt. 301) 1951, (2006) 9 KLR (Pt: 226) 3393

University of Lagos v. Olaniyun (1985) 1 NWLR (Pt. 1) 156

Walukoni v. Arueze (2013) All FWLR (Pt. 564) 72

West African Portland Cement Plc v. Adeyeri (2003) 12 NWLR (Pt. 835)517

Foreign Cases Referred to in the Judgment:

Bruce v. Odhams Press Ltd (1936) 1 All ER. 287

Goodman v. J. Eban Ltd (1954) 1 QBD 550

West Rand Co. v. Rex (1905) 2 KB 199

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, **1**999, sections 36(1), 179(2) and 285(6)

Electoral Act (No. 6) of 2010 (as amended), paragraphs 4(l)(d), 12(5), 17(1)(2), and 53(2),(5) of the First Schedule, sections 29(1) and 117 to 131

Evidence Act, 2011, sections 104 and 131-134

Nigerian Rules of Court Referred to in the Judgment:

Federal High Court (Civil Procedure) Rules, 2009, Order 13, rule 4(1)

Books Referred to in the Judgment:

Strouds' Judicial Dictionary;

T. Nwamara (ed) the Encyclopedia of Evidence Law and Practice, 1st Edition, 1966

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A. O. Adelodun SAN (with him, Saka A. Isau SAN; Dr. Abdulwahab Egbewole; S.U Solagberu, Esq.; A. G. F. Salaudeen, Esq.; Tunde Laaro, Esq.; Muritaia Adio, Esq.; A Abdulkareem, Esq.; B. B. Eleja (Mrs.); M.A. Abdulmalik (Miss); L.A. Ahmed, Esq.; A.O. Orire, Esq.; A. A. Olatunji, Esq.; Tolu Mokuolu, Esq.; Olagunju Olanrewaju Jamal, Esq.; Y. Y. Ajibade, Esq. and Ahmed Muhammed) - *for the 3rd Respondent.*

Olajide Ayodele SAN (with him, T.O. Durojaiye, Esq.; Abdulwahab Bamide!e, Esq.; Tayo Douglas, Esq.; Nureni Jimch, Esq.; Tunde Salako, Esq.; Tunji Ojuokaiye, Esq.; Oluscgun Balogun, Esq. and Lawrence Ola, Esq.) - *for the 4th Respondent.*

ABDULKADIR JCA (Delivering the Lead Judgment): The instant appeal is a fallout of the judgment of the Governorship Election Petition Tribunal, Kwara State, which was delivered on 11 November 2011. By the judgment in question, the tribunal dismissed the appellants' election petition filed on 17 May 2011, challenging the conduct and result of the said election in five Local Government Areas (out of sixteen Local Government Areas and twenty-eight wards in parts of some other Local Government Areas making up a total of eight hundred and ninety-five polling units). The areas challenged are as follows: Patigi, Baruten, Edu, Ifelodun and Moro Local Government Areas. The following wards in some Local Government Areas were also challenged: Isapa Ward, Koro Ward, Obbo Aiyegunle 1 and ObboAiyegunle II Ward in Ekiti Local Government Area, Agbeyangi Ward, Oke Oyi/oke Esa/Alalubosa Ward, Akpado Ward and Marafa/Pepete Wards in florin East Local Government Area, Akanbi I Ward and Akanbi II Ward in Ilorin South Local Government Area, Ajikobi Ward, Ubandawaki Ward and Ojuekun Zarumi Ward in Ilorin West Local Government, Ajase Ipo I Ward, Ajase Ipo II Ward and Arandum Ward in Irepodun Local Government, Adena Ward and Bani Ward in Kaima Local Government, Igbona Ward and Ojoku Ward in Oyun Local Government, and Adingbongbo/Awe/Orirnaro Ward. Elebue/ Agbona/Fata Ward, Onire/ Ode-Giwa/Alapa Ward, Ejue/Berikodo Ward, Ogbondoro/RekeWard, Ajon Ward, Ila Ofa Watu ana Ukesho Ward in Asa Local Government (collectively referred to hereafter as the “Areas being challenged").

The facts and circumstances leading to die instant appeal are discernible from the tribunal's judgment, particularly, on pages 2918 -2951 of the record. Although, the appellants called 65 witnesses, their case was predicated largely upon the electoral documents obtained from the fourth respondent. It was through these documents that they sought to establish acts of non compliance with the provisions of the Electoral Act. such as non-accreditation, misuse and misapplication of ballot papers, wrongful entry of results etc., in the conduct of the said election.

They contended that by reason of these acts of non-compliance spread across all the areas being challenged, the election results in those areas ought to be cancelled and the votes recorded for all candidates in those areas should be deducted from their total votes. Once this is done, the first appellant would emerge as the candidate who scored the highest lawful votes of 112.327 votes as against the first respondent's 111,369 votes. The A first appellant would also have met the requirement of section 179(2) of the Constitution of the Federal Republic of Nigeria, 1999, by scoring not less than 25% of the total votes cast in two-third of the Local Governments in the State.

The respondents on their part, challenged the competence of the petition by way of a preliminary objection in their pleadings. The objection was based upon a number of grounds which include nonpayment of the appropriate filing fees by the petitioners, that certain parts of the petition were lacking in particulars and that certain parties ought to have been joined. Beyond this, the respondents' case was that the first respondent was duly elected and that the election was conducted in substantial C compliance with tire Electoral Act. Alternatively, the respondents contended that if there were any acts of non-compliance, they were not substantial enough to have affected the out-come of the election.

In a considered judgment delivered on 11 November 2011, the tribunal dismissed the appellants' election petition. By their amended notice of appeal D dated and filed 15 December 2011, but deemed properly filed on 20 December 2011, containing 18 grounds of appeal, they distilled the following issues for the determination of this appeal to wit:

(1) Whether the preliminary objections ought to have been entertained.

(2) Whether the tribunal was correct to have held that certain paragraphs of the petition were too vague and general and thereby failing to give probative value to the evidence reiating thereto.

(3) Whether the tribunal was correct to have struck out paragraphs 18.15 to 18.17 of the petition for non-joinder.

(4) Whether the tribunal was correct to have held that the public documents tendered in evidence were not certified in accordance with the law.

(5) Whether the tribunal was correct in holding that the reports of PW's 63,64 and 65 annexed to their witness statement on oath and adopted, not having been separately tendered in evidence, was not evidence upon which the tribunal was obliged to act.

(6) Whether the tribunal was right not to have acted on the documents tendered on the ground that they were not spoken to after being tendered.

(7) Whether the tribunal was correct to have held that the demonstration made by the counsel in address, found no support from the evidence led

(8) Whether the tribunal ought to have given effect to the excess of 21,192 ballot papers recorded as having been used on the forms ECBA tendered in evidence by cancelling the results in the affected areas.

(9) Whether the tribunal was correct in rejecting the evidence of PW 63, 64 and 65 and in failing to give true and proper effect to them.

(10) Whether on the state of the evidence, the tribunal ought to have used the evidence of non-accreditation found in the documents tendered in evidence to cancel the results in the affected polling units.

(11) Whether the tribunal was correct to have treated the various allegations of violence, chasing away of agents, multiple voting, inducements with money, disruption of election and such other allegations alleged as raising issues of

crime and rejecting the evidence in respect of same without any considerations to the fact that they could and did constitute acts of non-compliance which is civil in nature.

(12) Whether the tribunal properly evaluated and put to use the documentary and oral evidence before it.

(13) Whether based on the totality of the evidence before the tribunal, judgment ought to have been entered in favour of the appellants as prayed.

Arguments/submissions of the parties

The appeal was heard on 20 December 2011. Learned counsel for the appellants, E. C. Sofunde, SAN, leading other lawyers, informed the court that the appellants' brief of argument was dated and filed on 6 December 2011. He, equally, explained that the appellants' reply brief was dated and filed on 12 December 2011. He adopted the two briefs and urged the court to allow the appeal**.**

Mallam Yusuf Ali, SAN, for the first and second respondents also informed the court that the first and second respondents' brief of argument was dated and filed on 12 December 2011. He adopted the brief and urged the court to dismiss the appeal. Alhaji A. O. Adelodun, SAN, for the third respondent, stated that the third respondents' brief was dated and filed on 12 December 2011. He adopted the said brief and urged the court to dismiss the appeal.

Chief O. Ayodele, SAN, for the fourth respondent, informed the court that the fourth respondents' brief of argument was dated and filed on 12 December 2011. He also, adopted the said brief and urged the court to dismiss the appeal.

In a nutshell, the submission of the learned counsel on the first issue was that the preliminary objections of the respondents ought to have been brought under sub-paragraphs 2 and 5 of paragraph 53 of the First Schedule, to the Electoral Act (No. 6) of 2010 and not sub-paragraph 5 of paragraph 12 under which it was brought. Consequently, the respondents had waived the

irregularities by taking fresh steps. It was contended that by their failure to argue them orally, they must be taken to have abandoned them.

Learned counsel submitted further that the sub-paragraphs 2 and 5 of paragraph 53 of the First Schedule to the Electoral Act, 2010 (as amended) mandates the tribunal not to allow an objection to the hearing of the petition for irregularity or for being a nullity which is not raised within a reasonable time and when the party making the application has taken a fresh step. Sub-paragraph 5 states that objection shall be heard and determined after the close of pleadings

It was further submitted that the two sets of provisions appear to contradict each other because one permits the objection to be taken at the end of the case whilst the other mandates that it must be taken timeously. To this extent, therefore, if a party may elect to object under any of the two sets of provisions, no matter the nature of the objection, the tribunal was wrong to have held that there was no contradiction. The law is that general legislation must give way to specific legislation in respect of those specific matters dealt with therein, Schroder & Co. v. Major & Co. (Nig.) Ltd (1989)2 NWLR (Pt. 101) 1 and Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3, (2007) 4 NWLR (Pt.1025) 423.

With respect to issue No. 2. counsel placed reliance on the provisions of paragraph 4(1)(d) of the First Schedule to the Electoral Act. The paragraph prescribes that a petition shall state clearly the facts of the election petition and the grounds on which it is based and the relief sought by the petitioner.

According to counsel, in so far as there had been compliance with the said paragraph, by the statement of the facts of the election petition, G the grounds on which it was brought and the reliefs sought, the tribunal was wrong to say that the appellants did not comply with it. Further, the vagueness or otherwise of those facts was a matter to be dealt with under paragraph 17 of the First Schedule.

The appellants also argued that they had complied with the provisions of Order 13, rule 4(1) of the Federal High Court (Civil Procedure) Rules, 2009,

by pleading only material facts**,** Bruce v. Odhams Press Ltd (1936) 1 All ER 287; West Rand Co v. Rex (1905) 2 KB 199; and West African Portland Cement Plc v. Adeyeri (2003) 12 NWLR (Pt. 835) 517.

It was further submitted that under paragraph 17(1)(2) of the 1 st Schedule to the Electoral Act, 2010, in the circumstance of this issue, the respondent was under a duty to ask for further and better particulars, Nwankwo & Ors. v. Yar'Aihia & Ors. (2010) All FWLR (Pt. 534) 1, (2010) 12 NWLR (Pt. 1209) 578; Ifeanyichukwu Osondit Co. Ltd & Anor. v. Akhigbe (1999) 11 NWLR (Pt. 625) 1; Abubakar v. Yar'Adua (2009) All FWLR (Pt. 457) 1; Olawepo v. Saraki & Ors. (2009) All FWLR (Pt. 498) 256; and Abubakar & Ors. v. Yar'Adua & Ors. (2008) All FWLR (Pt. 404) 1409, (2008) 4 NWLR (Pt. 1078)465.

The third issue was predicated on the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999. The appellants contended that the law is trite that the application of the section is limited to the determination of a citizen's civil rights and obligations and therefore, if they are not in issue, observance of fair hearing is not obligatory, Bill Cons/ruction Co. Ltd v. linani & Sons Ltd/Shell Trustees Ltd (2006) 19 NWLR (Pt. 1013) 1 and Adeniyi v. Governing Council of Yaba College of Technology (1993) 6 NWLR (Pt. 300) 426.

Issue No. 4 was distilled from ground 5 of the appellants amended notice of appeal in relation to Forms EC8A, EC8Bs etc which were certified true copies. The appellants submitted that they had met all the requirements of certification as required by section 104 of the Evidence Act, 2011, Tsalibawa v. Habiba (1991) 2 NWLR (Pt. 174) 161; also, Strouds' Judicial Dictionary; Goodman v. J. Eban Ltd (1954) 1 QBD 550; T. Nwamara (ed) The Encyclopedia of Evidence Law and Practice, 1st Edition, 1966; Kotoye v. Saraki & Anor. (1994) 7 NWLR (Pt. 357) 414; Edward Kunde Swetn v. Benjamin Ako Dzungwe (1966) NMLR 297; Ezeonwu v. Onyechi (1996) 3 NWLR (Pt. 438) 499 and Tabik Investment Ltd G.T.B. (2CT I, 17 NWLR (Pt. 1276) 240 at 259.

On issue No. 5, it was submitted that a document annexed to an affidavit is part of the affidavit. By the same token, the documents annexed to the witness statements were part of the statement, P.A C. v. I.N.E.C. (2009) All FWLR (Pt. 478) 269. It was further submitted that even if it was correct to say that the appellants had breached the provisions of toe said paragraph 41 (2) of the First Schedule to the Electoral Act, 2010, that breach was at best an irregularity. Since the respondents had cross-examined the said witnesses upon the said reports, they had waived the irregularity. The courts do not make it a habit of allowing a party who had waived an irregularity to turn around to complain about such an irregularity, Noibi v. Fikolati & Anor. (1987)) 1 NWLR (Pt. 52) 619; Hydro-Quest Nigeria Ltd v. Bank of the North Ltd & Anor. (1994) 1 NWLR (Pt. 318) 41; Kossen Nig Ltd & Anor. v. Savannah Bank (1995) 9 NWLR (Pi. 420) 439 mdObekpolor v. The State (1991) 1 NWLR (Pt. 165) 113

On issue No. 6, it was submitted that where a document was properly put before the Tribunal by tendering them, the appellant had in effect, adduced evidence on what happened at the election. The tribunal was therefore right to have examined them, I.N.E.C. v. Oshiomole (2009) 4NWLR (Pt. 1132) 607; Fayemi v. Out (2010) NWLR (Pt. 1222) 326 and Kingibe v. Maina (2004) FWLR (Pt. 191) 1555.

On issue 7, it was submitted that the address stage was the stage at which the effect of documentary evidence as it related to the case could be raised. Thus, even if the said documents were not spoken to, in so far as they were before the tribunal, it was the duty of the tribunal to examine and give effect to them, Arabambi & Anor. v. Advance Beverages Nig Ltd (2005) 5 NWLR (Pt. 959) 1, (2006) All FWLR (Pt. 295) 581 ;Aiki v. Idowu (2006) All FWLR (Pt. 293) 361. (2006) 9 NWLR (Pt. 984) 47 and Queen v. Wilcok (1961)2 NSCC274, 276.

On issue No. 8. counsel submitted that where evidence before the tribunal was one which it could not ignore, it must act on it. In the instant appeal, the tribunal was wrong to have shut its eyes to the glaring discrepancy

regardless of what it makes of the evidence of PW64 and PW65. The confirmation of the said discrepancy by the secretary was sufficient for the tribunal to act and to hold that the integrity of the election in the affected areas had been impugned. Consequently, the votes recorded for all the candidates in the affected areas ought to have been cancelled. Aregbesola v. Oyinlola (2011) 9 NWLR (Pt. 1253) 458 and Omoboriowo v. Ajasin (1984) 1 SCNLR 108.

On issue No. 9, learned senior counsel took the view that the tribunal did not properly evaluate the evidence of PW63, PW64 and PW65. Worse still, it took into account irrelevant considerations with which to discredit the said witnesses and failed to take into consideration matters which support credibility of the said witnesses. It was further submitted that since there was no contrary evidence before the tribunal to rebut or discredit the evidence of the witnesses, which thus remained unchallenged, the law as to unchallenged expert evidence should apply, Oyakhire v. Obaseki & Ors. (1986) 1 NWLR (Pt. 19) 735 and M. I. A. & Sons Ltd v. EH.A. & Anor (1991)8 NWLR (Pt. 209) 295. Counsel opined that the tribunal applied the wrong principles and thereby erred when it refused to accord any probative value to the evidence of PW63, PW64 and PW65.

On issue No. 10, the appellants submitted that the tribunal did not rely or did not properly rely on the documentary evidence before it on accreditation. It failed to consider at all any documentary evidence (particularly the voters' registers) to determine the issue of lack of accreditation in the whole of Moro and Ifelodun Local Governments, the wards being challenged in Ekiti, Oyun, Kaima, Asa, Irepodun, florin West, Ilorin East and Ilorin South Local Governments. Even where it did consider the documentary evidence, it did so partially with regard to only certain areas in the Local governments being challenged.

They further pointed out that the law is settled that a person cannot vote until he has been accredited and it is the stamp on the voter's card and marking of the electoral register that prove that accreditation did take place. Where the

electoral Register was not so marked but votes were returned for a particular voting unit, it would be safe to conclude that such votes were not obtained through due electoral process, Nweke v. Ejims & Ors. (1999) 11 NWLR (Pt. 625) 39; Ajadi v. Ajibola & Ors. (2004) All FWLR (Pt. 220) 1273. (2004) 16 NWLR (Pt. 898) 91; Igodo v. Owido & Ors. (1999) 5 NWLR (Pt. 601) 70 and l.N.E.C. & Ors. v. Ray&Anor. (2004) 14 NWLR (Pt. 892)92, (2005) All FWLR (Pt. 265) 1047.

On issue No. 11, learned senior counsel explained that the standard of proof in election cases is proof on the balance of probabilities. Where allegations which border on the commission of crimes are pleaded, such allegations require proof beyond reasonable doubt. However, as long as the allegations of crime are severable and if severed, the appellants' pleadings would still contain sufficient averments which disclose, a cause of action with regard to irregularities and acts of non-compliance devoid of criminal imputation, the burden of proof on the petitioner is not proof beyond reasonable doubt but proof on the balance of probabilities, Aregbesola v. Oyinlola; Omoboriowo v. Ajasm and Fayemi v. Oni.

On issue No. 12, it was submitted that the complaint of the appellant is that, amongst other things, the tribunal did not evaluate the evidence before it properly. If it had done so, it would have found that the appellants had clearly proved their case on the balance of probabilities. Consequently, the tribunal's decision went against the weight of evidence, U.B.N, v. Borini Prono (1998) 4 NWLR (Pt. 547) 640; Balogim v. Akanji (1988) I NWLR (Pt. 70) 301; Lawal v. Dawodu (1972) 7 NSCC 515; Nantwal & Sons Ltd v. N.S. T.C. Ltd (1989) 2 NWLR (Pt. 166) 730 and Ebb a v. Ogodo (1984) 1 SCNLR 372, (2000) FWLR (Pt. 27) 2094.

On issue No. 13, it was submitted that on the totality of die evidence before the tribunal, judgment ought to have been entered in favour of the appellants. They maintained that they had shown that there were substantial irregularities and/or non-compliance with the provisions of the Electoral Act in a majority of the polling units of the constituency. They provided

A charts showing the complete non-compliance and argued that the irregularities and non-compliance with the provisions of the Electoral Act, which gave rise to the deduction of unlawful votes in the five Local Government Areas and twenty-eight wards of other Local government Areas challenged by the appellants substantially and adversely affected the outcome of the election, Oyegun v. Igbinedion (1992) 2 NWLR (Pt. 226) 747; Ebebe v. Ezenduka (1998) 7 NWLR (Pt. 556) 74; Aya v. Adasu (1992) 3 NWLR (Pt. 231) 598 and Aziidibia v. Ogunewe (2004) All FWLR (Pt. 205)289.

Counsel submitted finally that, by reason of the foregoing, the appellants had fulfilled the requirements of section 179(2) of the Constitution. Accordingly, the first appellant is by virtue of section 140(3) of the Electoral Act, 2010 (as amended), entitled to be returned as the elected winner of the said election. Alternatively, where the court finds that there was non-compliance and that unlawful votes were ascribed, neither the first appellant nor the first respondent would have met the requirements of the law to be declared duly elected. It is only then that a fresh election in the areas being challenged ought to be ordered.

On the other hand, the first and second respondents raised the following seven (7) issues for determination in their brief:

1. Whether the tribunal was not correct to entertain and uphold the preliminary objections of the respondents to the competence of the petition on the various grounds canvassed and to ignore the offensive paragraphs of the petition that were generic, genera] and vague.
2. Whether the tribunal was not correct in upholding the objection to the admissibility of documents on grounds of improper certification and right in holding that the appellants had a duty to tie the mass of documents tendered by them to the relevant areas of their case.

3. Whether the tribunal was not right in holding that the testimonies and reports of the PW63, PW64 and PW65 are unreliable, and cannot be treated as expert evidence and the untendered reports attached to the statement on oath of the witnesses had no probative value.
4. Whether the appellants proved the alleged discrepancy of 21,192 ballot papers having regard to their pleadings and evidence.
5. Whether the various allegations of violence, chasing away of agents of the petitioners, multiple voting, inducement of voters, disruptions of election at various polling units made in the petition did not amount to commission of crime which must be proved beyond reasonable doubt.
6. Whether the tribunal was not right in its decision that the allegation of non-accreditation made in the petition was not proved.
7. Whether the Tribunal was not right to refuse the reliefs sought by the appellants on the face of their palpable failure to establish their entitlements to same by credible oral and documentary evidence and not right to have refused to allow the appellants' written address to take the place of evidence which they failed to lead at the trial.

Learned counsel submitted that the first issue is dual-faceted. The first limb deals with the correctness or otherwise of the decision of the tribunal to entertain and uphold the preliminary objections of the first, second and third respondents to the competence of the petition on the various grounds canvassed. The other aspect of the issue relates to the proprietary or otherwise of the approach of the tribunal which discountenanced the paragraphs of the petition that were found offensive on the grounds that they were generic, general and vague.

It was further argued that the tribunal considered all relevant arguments canvassed in relation to the objections. It held in relation to the petitioners'

contention that the first and second respondents had waived p their right to raise the objection, that they did not waive their right. The tribunal was also of tire opinion that the objection was jurisdictional in nature and was therefore validly raised. The tribunal found glaring defects in the petitioners' pleadings which were replete with general and unspecific averments that were devoid of relevant particulars.

The point was further taken that the finding; and conclusion of the tribunal on this issue are unassailable and cannot be faulted. Further, that the contention of the appellants that the respondents were under obligation to ask for further and better particulars was highly misplaced as it was not mandatory for them under paragraph 17(1) of the First Schedule to the Electoral Act, 2010 to apply for further and better particulars. The case of Nwankwo v. Yar 'Adua (2010) All FWLR (Pt. 534) 1 (2010) 12 NWLR (Pt. 1209) 583 at 589 which the appellants relied on was unhelpful because there was no defect of pleadings in that case as we have in this case.

It was further observed that the tribunal correctly stated the position of the law on the consequence of lack of specificity in the petitioner’s pleadings. The first and second respondents entreated this court to rely on Olawepo v Saraki (2009) All FWLR (Pt. 498) 256 at 294 and other recent but unreported decisions. They prayed this court to uphold the decision of the tribunal, a decision which not only upheld the respondents' objection to the competence of the petition but which also discountenanced the offensive paragraphs of the petition.

Issue No. 2 deals with the correctness or otherwise of the decision of the tribunal relating to the inadmissibility [on the ground of improper certification of documents which the appellants tendered. It equally addresses the view of the tribunal that the appellant had a duty to tie their mass of documents to the relevant aspect of their case. This issue corresponds with the appellants' issues 4, 6 and 12.

The respondents canvassed the view that in the absence of a signature and date in longhand, the question of compliance with section 104 of the Evidence Act,

2011, would not even be remotely mooted Tsalibawa v. Habiba (1991) 2 NWLR (Pt. 174, 161 and Adefamsin v. Dayekh II (2007) All FWLR (Pt. 348) 911.

In support of the position of the tribunal on the duty on a party to tie his documents to the relevant aspects of his case, they prayed in aid D the fol lowing cases: Duriminiya v. C.O.P (1996) NNLR 70; Terab v. Lawan (1992) 3 NWLR (Pt. 231) 569 and Nwole v. Iwangwu (2006) All FWLR (Pt. 316) 325.

Issue No. 3 corresponds with the appellant's issues 5 and 9. It deals with the rejection of the evidence of PW 63, PW64 and PW65 and the reports which were annexed to their respective written statements on oath. The respondents contended that, as weighty as the findings of the tribunal on the testimonies of these witnesses and their reports were, the appellants never challenged them on appeal. As such, both the findings and the reasons on which they were predicated are deemed correct and binding on them and indeed this court Olukoga v. Fatunde (1996) 9 NWLR (Pt. 462) and Alfortin Ltd v. Attorney-General, Federation (1996) 9 NWI ,R

Issue 4 tallies with the appellants' issue No. 8 on the effect of the discrepancy of 21,192 ballot papers. The respondents took the view that die question of the discrepancy of 21.192 ballot papers or any quantity of ballot papers at all did not arise from the pleadings of the petitioners. In other words, it was not the case of the petitioners on the pleadings that there was any discrepancy on the ballot papers anywhere. They further contended that to that extent, neither the tribunal nor this court could legitimately inquire into that insinuation on the principle that parties are bound by their pleadings.

Turning to issue No. 5, which relates to appellants' issue No. 11, the respondents re-iterated the settled position that where allegations of the commission of crime are made, whether in civil or criminal proceedings but especially in an election petition, the standard of proof is beyond reasonable doubt and the strict burden of proof is on the petitioners, A.N. P.P. v. Usman

(2008) 12 NWLR (Pt. 1100)17; Chime v. Onyia (2009) All FWLR (Pt. 480) 673, (2009) 2 NWLR (Pt. 1124) 1 and Ezeanuma v. Onyema (2011) 13 NWLR (Pt. 1124) 1.

Issue No. 6 is on the allegation of non-accreditation. The respondents submitted that with respect to such allegations, the onus rests squarely on the plaintiff or defendant who substantial ly asserts the affirmative of the issue, Ogboru v. Uduaghan (2011) 2 NWLR (Pt. 1232) 538; Elemo v. Omoiade(1968) NMLR 359;Mane v. Amu (1974) 10 SC 237; Fashanu v. Adekoya (1974) 6 SC 83 and Kate Enterprises Ltd v. Daewoo (Nig.) Ltd (1985) 2 NWLR (Pt. 5)116.

It was further submitted that the state of pleadings determines a party's case. Accordingly, since the tribunal had held that the averments in the appellants' petition were generic, general, vague and devoid of particulars, they were no longer in a position to prove the allegation of non-accreditation and the various paragraphs which the tribunal had discountenanced.

Arguing issue No. 7, the respondents maintained that the tribunal, rightly refused the reliefs which the appellants sought. They took the view that none of the allegations had been proved. Worse still, one notable feature in the architecture of the appellants' petition was that apart from being woven around very weak and unreliable evidential structures, its foundations were not even rooted in the pleadings.

Learned senior counsel for the respondents concluded that it was only when the appellants had established a prima facie case that it would be necessary to consider the case of the respondents, Sanusi v. Amoyegun (1992) 4 NWLR (Pt, 237) 527 and Justice Party v. l.N.E. C. (2006) All FWLR (Pt. 339) 907. He prayed that all the issues should be resolved in favour of the first and second respondents.

The third respondents identified the issues for the determination of this appeal as follows:

1. Whether the tribunal was not right to entertain the preliminary objections of the respondents to the competence of the petition and in ignoring the offending paragraphs of the petition that were generic, general and vague.

2. Whether the tribunal was not correct in upholding the objection to the admissibility of documents tendered by the appellants on the ground of improper certification and in holding that the appellants had a duty to tie the mass of documents to the relevant areas of their case.

3. Whether the tribunal was not right in holding that the testimonies of PW63, PW64 and PW65 are unreliable, cannot be treated as expert evidence and that the untendered reports attached to the statement on oath of the witnesses had no probative value.

4. Whether the appellants proved the alleged discrepancy of 21,192 ballot papers having regard to their pleadings and evidence.

5. Whether the various allegations of violence, chasing away of agents of the petitioners, multiple voting, inducement of voters, and disruption of election at various polling units made in the petition did not amount to commission of crime which must be proved beyond reasonable doubt and whether they were so proved.

6. Whether the tribunal was not right in its decision that the allegation of non-accreditation made in the petition was proved.

7. Whether the trial tribunal was right to refuse the reliefs sought by the appellants in the face of their palpable failure to establish their entitlements to same by credible oral and documentary evidence and to have refused to allow the appellants' written address to take the place of evidence which they failed to lead at the trial.

We observe here that the issues which the third and fourth respondents formulated for the determination of this appeal are on all fours with tire seven (7) issues which the first and second respondents formulated both in content and wordings. Above all, the arguments which their learned counsel proffered in respect of each of the seven issues are largely similar to the arguments of the counsel for the first and

second respondents. This would obviate the need for the restatement or repetition of these issues and arguments *ad nauseam!*

This court has examined the thirteen issues which the appellants G set out for the determination of this appeal as against the seven issues which the first and second respondents concreted. The seven issues also raised by the third respondent and the six issues of the 4th respondent are largely similar.

The question common to all of them, is whether the election in question which was the subject of the petition at the tribunal and which resulted into this appeal was conducted in substantial compliance or substantial noncompliance with the Electoral Act, 2010 (as amended).

Against this background therefore, this court will be guided by the issues raised by the respondents. They are not only all- encompassing, they y\ capture the grouse of the appellants as expressed in the 18 grounds of appeal contained in the notice of appeal set out for the determination of this appeal.

Consideration of the issues

Issue one

Whether the tribunal was not correct to entertain and uphold the preliminary objection of respondents to the competence of the petition on the various grounds canvassed and in ignoring the offensive paragraphs of the petition that were generic, general and vague.

This issue covers the appellants' issues 1, 2 and 3. In their reaction to this issue, the appellants had argued that the preliminary objection of the respondents should not have been entertained as it was brought under sub-paragraphs 2 and 5 of paragraph 53 of the First Schedule to the Electoral Act No. 6 of 2010 and not sub-paragraph 5 of paragraph 12 under which it was supposed to be brought. Consequently, the respondents had waived tire irregularities by taking fresh steps. Additionally, with regard to the first and second respondents' objections, it was contended that in so far as they failed to argue them orally, they must be taken to have abandoned them.

The appellants had argued as to what amounts to taking fresh p steps by the respondents after filing their objections. The respondents had filed replies containing

their objections. This according to tire appellants, amounted to taking a fresh step in the proceeding after knowledge of the defect. The tribunal was thus precluded from entertaining the objections as prescribed in sub-paragraph 2 of paragraph 53.

It was also contended that by the provision of paragraph 53(2), it r was too late to entertain the objection at the stage of final address The appellants sought refuge in the case of Agagu v. Mimiko & Ors. (2009) All FWLR (Pt. 462) 1122, (2009) 7 NWLR (Pt. 1140) 342. It was further argued that the objections raised were jurisdictional but then the statement of the tribunal that an issue of jurisdiction may be raised at any stage of the G proceedings seemed to overlook the fact that even if it may be raised at any stage of the proceedings, whether or not it would succeed was another issue. If there is a statutory provision or rule of court that prescribes the specific time that an issue must be raised, and it is not raised at that prescribed time, the issue would have been waived if it is an issue of jurisdiction that is waiveable. If paragraph 53(2) is applicable therefore, the issue of waiver should defeat the objection giving the fact that it was not argued when it should have been argued as stated in Agagu v. Mimiko & Ors.

It was also contended that the tribunal would appear to have overlooked the fact that there is a distinction between procedural want of jurisdiction and subject matter want of jurisdiction and that the former may be waived, citing Kossen Nig Ltd & Anor. v. Savunnah Bank (1995) 9 NWLR (Pt. 420) 439 The first and second respondents maintained that the appellants' contention that the objection had been abandoned as same was raised in the final written address of the first and second respondents and that the objection was not moved orally during the final address are all misplaced. On the objection which was not formally moved during the final address, they argued that there is no provision in either the Federal High Court Rules, the First Schedule to the Electoral Act or indeed, the Practice Direction for the manner in which an objection may be moved. The argument on the objection was the fulcrum of issue No. 1 formulated and argued in the first and second respondents' final written address before the tribunal. The written address in which the objection was argued was adopted *in toto.* Indeed, there was no indication that any part of the address was being abandoned, waived or withdrawn. This being so, the objection was

properly argued, Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248. Also, the provision of paragraph 12(5) of the First Schedule to the Electoral Act is very clear. It provides that the kind of objection which the respondents raised should be heard together with the case itself.

Paragraph 12(5) of the 1 st Schedule is an innovation in the Electoral Act that is designed for the actualization of the purport of section 285(6) of the 1999 Constitution (as amended). That section prescribes a period of 180 days from the date of filing of an election petition for its disposal. To accede to the submission that the respondents' objection must be taken first will defeat the essence of that section. The third respondent's argument is clearly in tandem with the arguments proffered by the first and second respondents, that it was proper for the third respondent to have raised its objection at its final address in consonance with the provision of paragraph 12(5) of the First Schedule to the Electoral Act, 2010 (as amended). The fourth respondent did not file its own preliminary objection but aligned itself with the objections and arguments which the first, second and third respondents proffered.

It is pertinent to examine first, the nature of the objection of the first and second respondents contained on pages 2974 - 2975 of the record which in words and content are the same with that of the third respondent filed in her reply on 10 July 2011 to the petition vide paragraph 1 thereof. It is as follows:

(a) That the petition was filed in flagrant contravention of the clear provision of paragraph 4(1) of the First Schedule to the A Electoral Act, 2010 (as amended).

(b) Several paragraphs of the petition are devoid of the material facts upon which the petition can be hinged.

(c) The paragraphs contained very vague, nebulous, omnibus and general averments that are lacking in particulars g contrary to the express provisions of the 1st Schedule to the of Electoral Act, 2010 (as amended).

(d) Failure to state the date when the results were declared and the 1st respondent's return which are material facts is fatal to the petition.

From the records, the parties are at consensus *ad idem* on the C jurisdictional nature of the objections raised by the 1st, 2nd and 3rd respondents. The appellants conceded to the jurisdictional nature of respondents* objection on page 2703 paragraph 6 thereof. It is trite law that a fact which is admitted needs no further proof. This court is satisfied that the objection raised by the 1st, 2nd and 3rd respondents before the D tribunal was jurisdictional in nature. Since it is settled now that it is jurisdictional in nature, was it appropriate to have raised the objection at the stage of final address by the 1st, 2nd and 3rd respondents?

The appellant argued that the 1st and 2nd respondents raised the objection under paragraph 12(5) instead of paragraph 53(2) of the First g Schedule to the Act which should govern same. Paragraph 53(2) prescribes the specific time the objection must be raised or it would be considered waived, if it is an issue of jurisdiction that is waiveable. It is clear therefore, that the application of paragraph 53(2) of the 1st Schedule is restrictive. It does not apply to all jurisdictional matters except those ones that are waiveable. From nature of the objection as stated above, are they waiveable to bring them within the ambit of the provisions of paragraph 53(2) of the 1st Schedule? Without difficulty, this court will agree with the submissions of respondents and the decision of the tribunal, that the objections raised are not waiveable.

Having settled on the issue of waiver and non-applicability of G paragraph 53(2) of the First Schedule, the next question is whether the objections were properly raised under paragraph 12(5) *(supra).* The said paragraph provides:

> A respondent who has an objection to the hearing of the petition shall file his reply and state the objection therein and the objection shall be heard along with the substantive petition.

It is stated that the respondents raised their objection at the final address stage of the petition. The appellants had argued in respect of the first and second respondents' objection that since no oral arguments were proffered thereto, the objection in the address could be considered abandoned. The first and second respondents argued *per contra.* Their position is that since their address was

adopted *in toto,* the objection therein is deemed argued. The same argument is applicable to the objection of the third respondent.

According to the tenor of paragraph 12(5), the objection shall be heard along with the substantive petition. The question now is whether the word "heard" employed in the said paragraph is restricted to oral advocacy and does not contemplate written addresses. The paragraph is to the effect that the objection *"shall be heard along with the substantive petition"*.

This court is of the view that the expression "shall be heard along with the substantive petition" simply means that the objection should be taken together with the substantive petition. By way of analogy, a party who has adopted his final written address before a tribunal is *ipso facto* deemed to have argued that address. If the Electoral Act had wanted to adopt the approach of the other rules of procedure, it would have provided clearly that objections incorporated in the process before the court must be accompanied with an oral address. The provision of paragraph 12(5) *(supra)* must be given its natural and ordinary meaning, Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3, (2007) 4 NWLR (Pt. 1025) 423; Awolowo v. Shagari (1979) 6 - 9 SC 51, (2001) FWLR (Pt. 73) 53 and Dabup v. Kolo (1993) 9 NWLR (Pt. 317)35.

In all, we hold that the objections of the first, second and third respondents were properly argued upon the adoption of their final addresses. In other words, their adoption of their final addresses was tantamount to proffering oral arguments of their content including the objections therein. Finally, we also hold that the objections of first, second and third respondents were proper before the tribunal and it was correct in its decision that, jurisdiction being a threshold issue, can be raised at any stage of the proceedings. On this score, the arguments of the appellant fail and are hereby vacated.

The second facet of the issue deals with the offending paragraphs of the petition. The appellants' approach to the objection in this regard, was not that the paragraphs were not evasive, but that the respondents were under obligation to ask for further and better particulars. The tribunal rightly rejected this contention. The law is settled that a respondent is not under a duty or

obligation to ask for further or better particulars, Olawepo v Saraki. Emboldened by the position of the law, the tribunal discountenanced the offending paragraphs. We endorse its position. Based on the foregoing, we resolve this issue against the appellants.

Issue two

The respondents' second issue, which the appellants had argued as their fourth issue, is on the correctness or otherwise of the tribunal's ruling which upheld the objection to the admissibility of documents which the g appellants tendered. The documents were rejected on the ground of improper certification and the appellants' failure to tie them to the relevant aspects of their case. The appellants maintained that the tribunal wrongly rejected the said documents since they had complied with section 104 of the Evidence Act, 201.1 as to the mode of certification of documents. Reliance was placed on, Tsalibawa v. Habiba(1991) 2 NWLR (Pt. 174) 161.

On their part, the respondents contended that, though the tribunal had rejected the said documents, it still made copious use of them in its judgment.

The documents in question were from the fourth respondent (INEC). They were the result sheets (forms EC8As, EC8Bs ere/voters register and ballot papers) from the polling units/wards of the Local Government of the areas being challenged. The documents were tendered from the Bar without any objections from the respondents and admitted in evidence.

In their final addresses, the first, second and third respondents raised g the issue of improper certification of the documents, contending that they fell short of the requirements of section 104 of the Evidence Act, 2011. It was specifically contended that the documents bore a "stamp impression bearing engraved characters that are being offered as the signature of the officer certifying the documents" and that "affixing of a stamp impression on these documents does not satisfy the requirement of signature as authenticating gesture”.

The law is settled that where a court or tribunal wrongly admitted a document in the course of its proceedings, it would be perfectly entitled not to

attach any weight to it in its decision. The documents in controversy were those of the fourth respondent, INEC, which by law, are public documents. The fourth respondent itself was present in court when the documents were being tendered but did not raise any objection to their admissibility.

What is more, this argument is even academic for notwithstanding its rejection of the said documents, the tribunal still made copious use ,, of them in its judgement, see, pages 3009 - 3010; 3017; 3019 and 3020, of the record. [See, also, pages 476 -481; 524 and 664, amongst others, of the record). It was this volte face that gave it the impetus to nullify the A elections in the affected wards. The result is that the appellants suffered no miscarriage of justice since the documents were still made use of as shown above. On the authority of Jekpe v. Alokwe **(**2001) EWLR (Pt. 47) 1013, (2001) 4 SCNJ 67, we uphold the decision of the tribunal that the appellants, had the duty to tie those INEC documents to their case. As Ejiwunmi JSC, *Alao v. Akano* 22 NSCQR (Pt. 11) 867,884, (1988) 1 NWLR (Pt. 71) 431.

> ... it must be borne in mind that admitted documents useful as they could be, would not be of much use to the court in the absence of admissible oral evidence by persons who can explain their purport.

Also, Terab v. Lawan (1992) 3 NWLR (Pt. 231) 569, 592 and Nwole v. C Iwangwu (2006) All FWLR (Pt. 316) 325, 344.

On the whole therefore, we agree with the respondents that the appellants had not suffered any miscarriage of justice from the shifting attitude of the tribunal to those documents. We also resolve this issue in favour of the respondents.

Issue three

This issue covers the appellants issue's No. 5,6, and 7. It deals with the rejection of evidence of PW 63, PW64 and PW65 and the non-reliance on the reports which were which to their respective written statements on oath. The documents annexed to the written statements of those witnesses which were in form of depositions on oath by law were part and parcel of those statements. The record shows that those witnesses were cross-examined on their respective

statements and the annexures. The tribunal went ahead to make its findings on their testimonies and reports. It gave its reasons why it found that those testimonies were unreliable. This can be gleaned from pages 2250 – 2253, 2255 and 2258 of the records. We find considerable merit in the respondents' contention that since the appellants did not challenge the findings and reasons on which they were predicated in this appeal, they are deemed to be correct and binding on the appellants.

The tribunal saw and heard the said witnesses. It watched their demeanour in the witness box. It made insightful, albeit, damaging findings on their credibility and the probative value of their testimonies. For their bearing on this issue, we shall implore the tribunal to restate its impressions of these witnesses. On page 175, the tribunal found thus:

> The PW63 did not know the number of Forms EC8As that he got from INEC nor the number of the electoral materials he got from INEC. For the PW65, his report is afflicted with errors glaringly shown during the cross examination. If he could make an error in lifting what is in Form EC8As into his report what will happen about adding up or his summation as he puts it. It is obvious that he made his own conclusions when he indicated no ticking in the voters' register because the ticking were outside the box yet he never put any column to show that yes there were ticking or ticking but outside the box. When he did not talk about the percentage of lawful votes cast for the parties nor show the number of votes scored by the individual how can one *appreciate the overall effect of his findings on the votes of the contestants* … [page 176 italics supplied for emphasis]

The tribunal's unfavourable findings on the PW64 are no less crucial. Hear this:

> For the PW64, Dr. Tunde Adegbola, one cannot say that he is not qualified to be called an expert even though on electoral matters he had handled them in 2007 and 2011 unlike in information systems and Data analysis where for the past

> twenty five years he has been in practice, *but has he really shown expertise when he has no log book or document showing what documents and what number he was given to work on. He agreed that the serial numbers of ballot papers are very crucial to the exercise he performed yet he did not include them in his report …* [page 176 italics supplied for emphasis] Now, it is no longer in dispute that it is the primary responsibility of a trial court to make findings of fact based on the evidence presented before it. Unless where those findings are shown to be perverse, an appellate court will seldom interfere with them. *A fortiori,* where them ;£ r.e appeal against a finding of fact, such a finding will be deemed to have been accepted, per Onnoghen JSC in Ime Umanah v. Victor Attah All FWLR(Pt. 301) 1951 (2006) 9 KLR (Pp. 226) 3393,3417.

Due to the initial advantage which the trial court had of actually seeing and assessing the witnesses, Nteogwuile v. Onto (2001)16 NWLR (Pt. 738) 58, (2001) FWLR (Pt. 68) 1076 and Oyadare v. Keji (2005) All FWLR (Pt. 247) 1583, (2005) 7 NWLR (Pt. 925) 571, issues relating to the demeanour of such witnesses which the court saw and assessed and ascription of weight to their evidence are the exclusive prerogatives of the trial court, prerogatives which no appellate court can interfere with Ebba v. Ogodo(m4) 1 SCNLR 372, (2000) FWLR (Pt. 27) 2094 and Owie v. Ighiwi (2005) All FWLR (Pt. 248) 1762, (2005) 5 NWLR (Pt. 917) 184, 208. This foundation dictated the rule that a trial court has the power to ascribe credibility to the evidence of witnesses who testified before it, Ajao v. Ademola (2005) All FWLR (Pt. 256) 1239, (2005) 3 NWLR (Pt. 913) 636,656

Against this background, we take the view that since the appellants have not shown that the above findings are perverse, we cannot interfere with them. This issue is also resolved against the appellants.

Issue four

The respondents' fourth issue corresponds with the appellants' issue number 8. The appellants' contention was that they established a discrepancy of 21,192 ballot papers. They therefore prayed this court that the said votes be deducted from the votes of the parties. They observed that 213,011 (two hundred and thirteen thousand and eleven) ballot papers used for the election in challenged areas were tendered and admitted in evidence.

They further pointed out that from the evidence before the tribunal, 234, 203 total valid votes were recorded in form ECSAs in all the areas being challenged as against those certified by the fourth respondent, thus, indicating a discrepancy of N21,192(twenty one thousand, one hundred and ninety-two) ballot papers between what was recorded and what was actually used. The tribunal refused to act on this discrepancy relying on the fact that since the reports of PW64 and PW65 were rejected, the argument cannot hold. In the view of the appellants, this act of non-compliance had seriously impugned the integrity of the election. The tribunal was therefore wrong to have shut its eyes to the glaring discrepancy.

The respondents argued that the discrepancy of 21.192 ballot papers or any quantity of ballot papers at all did not arise from the pleadings of the petitioners. In consequence, neither the tribunal nor this court can inquire into that observation which emerged from petitioners' final address. The appellants, in their reply brief insisted they complained about mis-use and mis-allocation of ballot papers and wrongful entry of results. They referred to paragraphs 18.2, 18.3, 18, 4 at page 9 of the record and 18.6 at page l0 of the said record. For them, that constituted enough pleading of this fact.

The main question here is whether the issue of the discrepancy of 21,192 votes had impugned on the integrity of the election. The burden of proving that it did was on the petitioners/appellants. They were required to provide facts and figures of the effect of the discrepancy on the election, sections 131 - 134 of the Evidence Act, 2011**;** *Agagu v.Mimiko* (2009) All FWLR (Pt. 462) 1122, (2009) 7 NWLR (Pt. 1140) 342 and *Igbeke v. Emordi* (2010)11 NWLR (Pt. 1204)! at 48. We therefore agree with the decision of the tribunal that the

appellants failed to prove that assertion. This issue is equally resolved in favour of the respondents.

Issue five

This issue relates to the appellants' issue No. 11 which is to the effect that all averments in the petition constitute various offences under sections 117 to 131 of the Electoral Act, 2010 (as amended). The appellants maintained that the standard of proof in election cases is on the balance of probabilities. Where however, the commission of a crime is alleged, the standard of proof is beyond reasonable doubt. However, as long as the allegations of crime are severable and if severed, the appellants' pleading would still contain sufficient averments which disclose a cause of action with regard to irregularities and non compliance devoid of criminal imputation, the burden of proof on the petitioner is not proof beyond reasonable doubt but proof on balance of probabilities, *Omoboriowo v. Ajasin; Aregbesola* ***v.*** *Oyinlola* and *Fayemi v. Oni.* In conclusion, they maintained that the tribunal wrongly evaluated the evidence before it**.**

The respondents contended that tire tribunal was correct in its findings and in subsequently dismissing the petition on the ground that the appellants did not prove the allegation of crime beyond reasonable doubt as required by law. Even then, this court can only interfere with such findings where they are found to be perverse. We are in agreement with the submission that ordinarily, an appellate court will not interfere with findings of facts by a lower court, except if such findings are proved to be perverse, *Abidoye v.* Alawode (2001) FWLR (Pt. 43) 322 and *University: of Lagos* ***v.*** *Olaniyan* (1985) 1 NWLR (Pt. 1) 156. In the instant appeal, the appellants did not show that the said findings of the tribunal were perverse findings.

True indeed, in *Omoboriowo v. Ajasin,* the Supreme Court endorsed and adopted the doctrine of severance of allegations of crime from civil averments. However, the court explained that the duty rests squarely on the petitioner to sift and winnow those allegations of crime contained in the petition from the civil averments. The apex court further explained that it was equally the duty

of the petitioner to demonstrate to the tribunal that his outstanding averments could still sustain the petition. Also, *Fayemi v. Oni.* The petitioners in the present appeal did not discharge that duty. The tribunal could not do that for them. Since the tribunal found that those criminal allegations were not proved beyond reasonable doubt and were left as integral parts of toe petition at the time of its decision, this court will not interfere with those findings of fact. This issue also fails. It is resolved against the appellants.

Issue six

This issue corresponds with the appellants' issue No. 12. It centres on the question whether the tribunal properly evaluated and put to use, the documentary and oral evidence before it. According to the appellants, toe decision was against the weight of evidence. The respondents on the contrary maintained that the *onus* of proof rested squarely on the appellants as petitioners since they substantially asserted the affirmative of this issue. This issue is akin to issue No. 4. We agree that he who asserts must prove his assertion. Sections 131-134 of the Evidence Act, 2011 (as amended): also, per Adekeye JSC in C.F.C. v. I.N.E.G. & Ors. (Unreported decision of the Supreme Court delivered on 28 December 2011, pages 17 et seq); *Agagu* ***v.*** *Mimiko* and *Igbeke* ***v.*** *Emordi.* The appellants have not discharged this burden. Accordingly, we resolve this issue against them.

Issue seven

This issue is the same as the appellants' issue 13. The appellants submitted that from the totality of toe evidence before the tribunal, judgment ought to have been entered in their favour. The respondents maintained that the tribunal was right in refusing the reliefs which the appellants sought.

Our understanding of the law on this issue is that a result declared by an electoral body (in this case, the fourth respondent] enjoys a presumption of regularity, correctness and authenticity. *Omoboriowo* ***v.*** *Ajasin* (1981- 1990) *LRECN* 332. 353; *Jaliugo v. Nyame* (1992) 2 *LRECN* 532, (1992) 3 *NWLR* (Pt. 231) 538; *Atikpekpe v. Joe* (1999) 2 LRECN 302, (1999) 6 NWLR (Pl 601)428; *Agoda v. Enamuotor* (1999) 1 *LRECN* 205; *Onye v. lkema* (1999; 3

LRECN 655. (1999) 4 NWLR (Pt. 598) 198; *Mufutau v. Kayode & Ors.* (2008) 4 *LRECN* 227; *Adun v. Osunde* (2003) 1 LRECN 160 and *Kalit v. Uzor* (2005) 2 LRECN 281, (2005) All EWER (Pt. 287)

We equally understand the law to be that there is a presumption that an election which produced the said result was conducted in substantial compliance with the provisions of Electoral Act. The onus is therefore on the person alleging the contrary to prove otherwise Iniama v. Akpabio (2008) 17 NWLR (Pt. 1116) 225 at 303; Justice Party v. I.N.E. C. (2006) All FWLR (Pt. 339) 907 and Chime v. Onyia (2009) All FWLR (Pt. 480) 673, (2009) All FWLR (Pt. 480) 673.

This, the appellants have failed to do. In other words, the appellants have not shown any justification why this court should not clothe the election and return in question with the presumption as rightly decided by the tribunal. In the circumstance, we have no option than to accord that veil of presumption its deserved sacrosanctity. This issue is also resolved against the appellants.

It finally resolves this appeal which is hereby dismissed in its entirety. No order as to costs.

Cross-Appeal

(First and Second Respondents/Cross-Appellants)

The cross-appellants were the first and second respondents in the election petition filed against their return by the fourth respondent before the Governorship Election Petitions Tribunal of Kwara State (hereinafter called 'tribunal'). The 1st, 2nd and 3rd cross-respondents/appellants had sought before the tribunal, a declaration that the first and second respondents/cross-appellants were not duly elected by the majority of lawful votes cast at the election and in the alternative, that the election was invalid by reason of corrupt practices and non-compliance with the provisions of the Electoral Act.

The cross-appellants/first and second respondents before the tribunal filed a reply in which they joined issues with the averments contained in the petition, denied the entitlement of the petitioners/1 st to 3rd respondents to any of the

reliefs endorsed on the petition and supplicated the tribunal for the dismissal of the petitioners' case in its entirety.

The tribunal delivered its considered judgment on 11 November 2011, dismissing the petitioners/1st, 2nd and 3rd cross-respondents' petition before it. The cross-appellants/first and second respondents were dissatisfied with certain aspects of the judgment dismissing tire petition. Their grouse is against the aspect of the decision of tribunal which after having held that the second cross respondent/second appellant qualified as a candidate within the meaning of the law that filing fees ought to be paid but were not paid in respect of tire challenge to his election that the petition should not be struck out on that ground, rather, that filing fees should be paid in respect of the said party within a period of seven days of the judgment of the tribunal.

The tribunal also ordered the nullification of the results in Somasun Unit, Adigbongbo/ Awe/Orirnaro Ward and Shinawu/Tumbuya wards. In so concluding, it relied on the testimonies of witnesses called by the respondents/cross-appellants. This was in spite of its earlier finding that the documents relied upon were inadmissible on both grounds of pleadings and non-certification and the other important finding that the petitioners on their own, had not proved their case in respect of the three concerned places.

The cross-appellants filed an amended notice of cross-appeal dated and filed 19 December 2011, but deemed properly filed on 20 December 2011. From the seven (7) grounds of appeal contained in the amended notice of cross-appeal, the following issues have been distilled for the determination of this appeal:

1. Whether the tribunal was not in error in refusing to strike out the petition after having found that the requisite filing fees were not paid in respect thereof and when there was no prayer by the petitioners/cross-respondents for extension of time to pay same.
2. Whether the tribunal was not in error in nullifying the results of the election in Somasun polling unit, Adigbongbo/ Awe/Orimaro ward and Shinawu/Tunbuya ward, respectively, despite its earlier

findings that the petitioners had not proved their case in respect of the aforementioned places, moreover, when the pleadings of the petitioners did not cover this paint and the holding of the tribunal amounted to imposing the burden of proof on the cross-appellants.

In arguing the issue No. 1, learned counsel to the first and second cross-appellants submitted that the tribunal had earlier agreed with its submission that the requisite filing fees were not paid by the 1st, 2nd and 3rd cross-respondents. But rather than strike out the petition for incompetence as urged on it by the cross-appellants the tribunal chose to order the payment of the requisite filing fees thereby saving the petition. The grouse of the cross-appellant therefore, is the refusal of the tribunal to strike out the petition. The tribunal, in reaching its decision, relied on paragraph D 53(1) of the First Schedule to the Electoral Act, 2010 (as Amended) which deals with non-compliance with rules.

It was submitted further that the issue of lack of payment of fees was not a matter of non-compliance with the rules that could be waived as it went to the root of the case. The tribunal was therefore, wrong to have E treated it as such, llukwe v. Chucks Anah & Ors. (1999) 5 NWI.R (Pt. 603) 476; Olaniyonu v. Professor Emeawa (1989) 5 NWLR (Pt. 122) 493;Idris v.A.N.P.P. (2008) 8 NWLR (Pt. 1088) I; Maduabum v. Nwosu (2010) All FWLR (Pt. 547) 678, (2010) 13 NWLR (Pt. 1213) 623; Sonuga & Ors v. Anadein (1967) NMLR 77, (1967) 1 All NLR 9land Awuse v. Odili (2004) All FWLR (Pt. 212) 1611, (2004) 18 NWLR (Pt.876) 481 at 509.

Issue No. 2 centres on the propriety or otherwise of the decision of the tribunal to nullify the results of election in Somasun Polling Unit of Edu Local Government Area, Adigbongbo/Awe/Orirnaro ward of Asa Local Government Area and Shinawu/Tumbuya ward of Baruteen Local G Government. Reference was made to the presumption of regularity which insures in favour of the result of election. Exhibit '209' which could only be rebutted by credible evidence was not in fact rebutted on account of want of evidence. The tribunal was therefore in error to have nullified the election in the circumstances,

Chime v Onyia (2009) All FWLR (Pi. H 480) 673 and Adighije v. Nwaogu (2010) 12 NWLR (Pt. 1209) 419.

It was submitted further that in the determination of this issue, the cross-appellants will adopt their submission concerning lack of pleadings and improper certification of electoral forms tendered by the petitioners cross-respondents. Counsel urged this court to resolve this issue in favour *A* of the 1st, 2nd and 3rd respondents/cross-appellants.

The cross-respondents' brief was dated and filed on 14 December 2011. Two issues were formulated for the determination of the cross-appeal to wit:

1. Whether the tribunal was right in ordering the cross- g respondent to pay the appropriate filing fees having found that the Secretary of the tribunal under-assessed the fees payable at the time of filing the petition.
2. Having regard to the pleadings and evidence led, whether the tribunal was right in nullifying the results of election in Somasun Polling unit; Adigbongbo/Awe/Orimaro ward and C Shinawa/Tumbuya ward.

In arguing issue No. 1, learned counsel for the cross-respondents submitted that the law is settled on the fact that non-payment of fees does not render a case incompetent but makes it an irregularity which can be corrected by the payment of the correct fees. In the instant case, D it was not the case of non-payment of filing fees at all but the case of under-assessment of fees to be paid by the petitioners by the Secretary of the tribunal, wherein they were assessed to pay half instead of double.

It is further argued that the tribunal was correct in its decision on this issue wherein it relied on the recent decision in Idris v. A.N.P.P. & Ors. (2008) 8 NWLR (Pt. 1088) 1 and held that though, there had been an under- assessment of filing fees by the Secretary of the tribunal that amounted to an irregularity and would not lead to the petition being struck out. Having held that the respondents should not be penalized for the underassessment done

by the said Secretary, the tribunal ordered the respondents to pay the outstanding sum of N15,000.00 (fifteen thousand naira) within seven clays from the date the judgment was delivered.

It was further submitted that all cases cited by the learned senior counsel for the first and second respondents were decided in 1995, 1999, 2005, and 2006, which clearly were earlier in time than the decision in Idris v. A.N.P.P. & Ors. on non-payment of filing fees only amounting to irregularity. G A.C.B. Ltd v.Henshaw(1990) 1 NWLR (Pt. 129) 646, (2009) All FWLR (Pt. 463) 1292; John Paul Ltd v. Afribank (Nig.) Ltd (2003) 8 NWLR (Pt. 822) 290 and N.N.P.C. v. Ahamha (2009) 10 NWLR (Pt. 1149) 226, (2010) All FWLR (Pt. 508) 365.

On issue No. 2, it was submitted that the contention of the cross-appellant that the tribunal having held that the testimonies of PW46, PW47 and PW49 went to no issue for making what amounted to criminal allegations against persons who were not joined in the action could not proceed to nullify the election in the affected areas was a misconception. It-is pertinent to note that the cross-respondents had challenged the tribunal's findings as regards the evidence of PW46, PW47 and PW49 as going to no issue.

It was further submitted that the misconception on the part of the cross-appellant was that to the extent that the tribunal found that the evidence of PW46, 47 and 49 went to no issue, under no circumstance whatsoever should the election be nullified. However, there were other issues like the tribunal was in doubt about the authenticity of exhibit' ‘1081’ Lb, where it has been demonstrated that the agent who claimed that he appended his signature had been substantially discredited. First, he was unable to confirm that tire signature on exhibit' 1081 Lb' was his signature. Second, the name upon which he swore his statement on oath was radically different from the name to which he claimed ownership by virtue of his alleged signature on the said exhibit. Also, the fourth cross-respondent never called any evidence to explain these various discrepancies.

This in itself was sufficient to annul the election in the affected areas.

In the absence of such evidence, the tribunal was left with no option but to rely on the evidence of DW54 that the elections were conducted in noncompliance with the Electoral Act.

Finally, it was submitted that the cross-appeal lacked merit and should be dismissed.

The cross-appellants, in reply to issue No. 1 of the cross respondents' brief of argument on the inadequate payment of filing fee by a party which was remedied by an order for payment of the short fall relied on the case of A.C.B. Ltd v Afribank (Nig.) Ltd and NNPC v. Ahamba were unhelpful. The two cases are not on election petition which has been recognized as *sui generis* and therefore, governed by its own peculiar rules and practice and in none of the two cases was their complaint against the originating process, rather they had to o with filing of statement of defence and counterclaim. Idris v. A.N.P.P. relied upon by the cross-respondent was a *2008* decision. The recent decision on this is Maduabum v. Nwosu *(2010)* All FWLR (Pt. 547) 678, *(2010) 13* NWLR (Pt. *1212) 623* where the necessity of paying appropriate fil ing fee was re-echoed and re-affirmed by this court. This court was urged to reject the submissions on the issue in favour of tire cross-appellants.

On issue No. *2*, it was submitted that at paragraphs 70, 71 and *72* of their brief, the cross-respondents submitted that the tribunal was right to have used and relied upon documents which it had earlier held inadmissible and rejected. Counsel contended that this was wrong as rejected documents cannot be used by the tribunal that rejected them, U.B.N. Ltd v. Ozigi (1994) *3* NWLR (Pt. 333) 385.

Finally, it was submitted that this court should reject the submissions advanced by the cross-respondent under their issue 2 and resolve the said issue in favour of the cross-appellants. The court was also urged to discountenance the submissions of the cross-respondents as contained in their brief and allow the cross-appeal in its entirety.

The tribunal gave due consideration to the arguments of counsel on both sides and found that, by virtue of paragraph 49 of the First

Schedule to the Electoral Act, 2010 (as amended), the first and second respondents/cross-appellants were two candidates who were made respondents in the same petition. The tribunal found also that the petitioners/cross-respondents paid the filing fees that covered only one petition but did not strike out the petition as prayed by the first and second C respondents/cross-appellants.

In its decision on page 2970 of the record, the tribunal, placing reliance on paragraph 53(1) of the First Schedule to the Electoral Act, 2010 (as amended), ordered that the shortfall of N 15,000.00 (fifteen thousand naira) in the filing fees should be paid by the petitioners within D seven days of the judgment. It reasoned that the amount of N 15,000.00 (fifteen thousand naira) paid as filing and other sundry fees by the petitioners/ cross-respondents was the amount assessed by the Secretary of the tribunal and the petitioners could not be penalized for any under-assessment done by the said Secretary.

In the argument of this cross appeal on this issue, the two learned senior counsel for the cross appellants and the first, second and third cross-respondents had referred the court to various decisions of this court on the implication of failure of a party to pay filing fees, the details of which arguments are contained in their respective briefs of argument already stated in this judgment.

It is worthy of note in the instant case that the petition had been heard to its conclusion and the argument of the objection of the cross-appellants was at the final address stage when what remained for the tribunal was to deliver its judgment. It is also to be noted that the tribunal in its judgment dismissed the petition.

In the above circumstances, we believe that the decision of the tribunal refusing to strike out the petition and its order for payment of the shortfall in filing and other sundry fees within seven days of the judgment met the justice of the case since it had not been disputed that the petitioners/cross-respondents paid the amount of

money as assessed by the Secretary of the tribunal who was responsible for any under assessment done by him. In Idris ***v.*** A.N.P.P. (2008) 8 NWLR (Pt. 1088) 1, 110-111, Omokri JCA (of blessed memory) stared thus

> Now, if a petitioner pays the fees as assessed by the registry of the tribunal, why should he bear the brunt of non-payment of the correct or appropriate fees. In my view, once the petitioner pays the fees which was adjudged payable or assessed as payable by the registry of the tribunal, he should be absolved of any blame. His petition should not be thrown away or struck out because of the mistake of the registry. The mistake or ignorance of the registry should not be the misfortune of the petitioner. Election matters are usually very sensitive, a situation where a petition is struck out on the ground that the appropriate fees were not paid by the petitioner portends great danger.

There is no doubt that the above view correctly reflects the need for the courts to do substantial justice between the parties and to avoid technical justice which is no longer in vogue within our courts system.

The decision of the tribunal on this issue is unassailable and ought not to be disturbed or set aside. Issue No. 1 is accordingly resolved against the first and second cross-appellants.

Resolution of issue No. 2

We have read the arguments of learned senior counsel for the cross-appellants and the first - third cross-respondents on this issue. In g. addition, we have perused the legal authorities cited by the opposing parties and the part of the judgment or decision complained of by the cross-appellants. The cross-appellants' complaint was that the tribune! was wrong in cancelling the results of the election in Somasun Polling Unit in Lafiagi 1 ward of Edu Local Government Area- Adiohonohn/ Awe/Orimaro ward in Asa Local Government Area and Shinawu Tumbuya

ward of Baruten Local Government Area. In paragraph 16 of the petition, at pages 5-7 of the record, the appellants/first - third cross-respondents pleaded the fact that "unlawful and invalid votes" were credited to the first - third respondents/cross-appellants in some Local Government Areas, including Edu and Asa Local Government Areas. G From pages 3062 - 3075, the tribunal painstakingly analyzed the evidence adduced by the contending parties and made specific findings. In particular, the tribunal found that no gubernatorial election was held on 2 April 2011, in Kwara State, yet exhibit '209' - Form EC8A for Somasun Polling unit was identified by one Mohammed Ladan - DW28, a witness called by the cross- appellants. In the said Form EC8A (Polling Unit Result Sheet) for Somasun, votes were credited to the political parties in respect of a gubernatorial election purportedly held on 2 April 2011. The votes in exhibit '209'cannot be lawful or valid votes since no gubernatorial election was held on 7 April 2011. The tribunal was therefore right in excluding the purported votes credited to the parties in exhibit '209'.

In similar veins, the tribunal thoroughly examined the evidence adduced in respect of Asa Local Government Area at pages 3083 - 3084 of the record of appeal and correctly arrived at the conclusion that the votes credited to the parties in Adigbongbo/Awe/Orimaro ward II could not be valid or lawful votes. The cross-appellants had no legal burden to prove that the results of the disputed election were normal, correct and regular because of the presumption of regularity of an election result under the Electoral Act. However, where respondents to an election petition as the cross-appellants, undertake to call witnesses with a view to showing that only valid and lawful votes were credited to the political parties and/or candidates, the tribunal ought not to shut its judicial eyes to evidence of witnesses which openly or publicly demonstrated that indeed, some 'unlawful' or 'invalid' votes were in fact credited to the political parties which participated in the election.

In this case, the cancellation of the result of Adigbongbo/Awe/ Orimaro ward II in Asa Local Government Area by the Tribunal was justified. The third respondent in the main appeal - Peoples Democratic Party (P.D.P.) - claimed

through its witness - DW54, (Shehu Abubakar), that it was represented in the said ward by DW54 who indeed signed the result sheet for the affected areas. The valid votes, if any, in respect of the said ward could only be those authenticated by DW54 as the third respondent's party agent for the ward. The votes in exhibit' 108/L6 signed by one Sulaiman Issa Bolanle, as the agent or representative of PDP for the ward in issue cannot be honestly held by a reasonable tribunal under the facts and circumstances of this case as the “lawful” or 'valid' vines in AdigDongbo/ Awe. Orimaro ward. The piece of evidence adduced by the cross-appellants was clearly in favour of the first-third cross respondents' case and the said cross-respondents were entitled to take advantage of it.

The decision of the tribunal to cancel the result of the election in Shinawu/Tumbuya ward of Baruten Local Government Area cannot also be impeached. The first- third cross-respondents pleaded in paragraphs 22 to 25 of their election petition at pages 14 to 16 of the record of appeal that no valid election was conducted in compliance with the provisions of the Electoral Act in respect of Baruten Local Government Area. The parties' pleadings, shorn of the paragraphs of the first - third cross-respondents' petition struck out by the tribunal show that the parties joined issues on whether or not there was collation of results at the Ward Collation Centres in the said Local Government Area. The tribunal, after examining the evidence before it found that a member of P.D.P. - one Oni Adesola Oduayo acted as Collation Officer for INEC - the fourth respondent in this cross appeal and that the said Oni Adesola Oduayo signed the result sheet (Form EC8B) for Shinawu Tumbuya ward. The Fonn EC8B for the said ward was admitted in evidence as exhibit '779' (wrongly stated in the record as exhibit 449). Section 29(1) of the Electoral Act, 2010 (as amended) is apposite here.

As can be seen from the clear and unambiguous provisions of section 29(1) of the Electoral Act, 2010 (as amended), a member of a political party is prohibited or forbidden from being appointed and designated as an officer of the Independent National Electoral Commission for the purposes of an

election. A collation of ward results carried out by a member of a beneficial political party as in the instant case cannot be a collation in compliance with the Electoral Act. This issue is hereby resolved against the cross-appellants.

The cross-appeal of the first and second respondents/cross-appellants lacks merit and it is hereby dismissed.

No order as to costs.

Cross-appeal

(3rd Respondent/Cross-Appellant)

The 3rd respondent/cross-appellant upon service of the appellants' notice of appeal on her on 30 November 2011, filed a notice of cross-appeal g on 2 December 2011. The notice of cross-appeal contained five grounds of appeal wherein the 3rd respondent/cross-appellant challenged part of the decision of the trial tribunal which nullified election and results credited to the parties in Somasun Polling Unit. Shinawu/Tumbuya Ward.

The substratum of the cross-appeal in the main is that the tribunal was in grave error to have nullified the election in the aforementioned polling unit and wards in the sense that the reasons adduced for the nullification of the election by the tribunal were not pleaded by the petitioners/cross-respondents.

The decision of the tribunal is also wrong because it held that the oral evidence it relied upon had no probative value and the INEC Forms were rejected and expunged on account of improper certification as required by law. This court should restore the results of the election into the polling units and wards affected.

The sole issue that arises for determination from the grounds of appeal is:

Whether the honourable tribunal was not wrong by

nullifying the election in Somasun Polling Units, Adigbongbo/Awe/Orimaro Wards and Shinawu/Tumbuya Wards wlren the tribunal found that the petitioners had no credible evidence to prove their case, when the documentary A evidence relied upon by the trial tribunal were rejected on account of lack

of proper certification as required by law and when the reasons adduced by the tribunal are not pleaded.

The sole issue covers all the grounds of cross-appeal. In arguing the g sole issue of the cross appeal, learned counsel for the cross-appellant submitted that the tribunal nullified the result of Somasun Polling Unit in Edu Local Government Area for the singular reason that the date on exhibit '209' shown to DW29 and confirmed by the witness bears 2 April 2011 instead of 26 April 2011 which appears in other exhibits '210-218' which are also Forms ECSAs for the ward.

It was further submitted that the decision of the tribunal cannot stand having regard to the fact that nowhere in the petition was the issue of wrong date in any form ECSA pleaded in respect of Edu Local Government or any Local Government Area at all. It is settled that evidence led on facts not pleaded goes to no issue. And it is also D elementary that the court or tribunal lacks the requisite powers to make a case for the party which is different from that put forth by the party in the pleadings.

It was submitted further, for Adigbongbo/Awe/Orlmaro ward of Asa Local Government, that the tribunal also nullified.the results on ^ account of disparity in signatures and names as appeared on the form ECSB for the ward, exhibit' 1061L6 and the statement on oath of DE54, exhibit 54 A.

Counsel took the further view that the decision of the tribunal to nullify the result of the entire ward on the singular reason that PDP member acted as INEC Collation Officer and endorsed the Form EC8B f cannot be justified without recourse to Form EC8As which is the result of the polling units, the pyramid upon which the results in Form EC8B are premised without any pleadings in this respect by the petitioners/ cross-respondents. He re-iterated a cardinal principle of our jurisprudence that where a trial is by pleadings, the judgment of the G court must be based on the pleadings, Ukiri v. ECS. C. (2011) All FWLR (Pt. 577) 783; Walukoni v. Arueze (2011) All FWLR (Pt. 564) 72; Ola v. Union Bank (2005) 2 SCNJ 191 and Ademeso v. Okoro (2005) 6 SCNJ 71, (2005) All FWLR (P2t. 277) 844.

Finally, counsel prayed this court to resolve the sole issue in favour ^ of the cross-appellant and allow the cross-appeal. In reply to these submissions,

learned counsel for the cross- respondents submitted that as against the sole issue formulatpd by the learned counsel io the crossappellant, the issue which calls for determination in this cross appeal is as follows:

Having regard to the pleadings and the evidence led, whether the tribunal was right in nullifying the results of the election in Somasun Polling Unit, Adigbongbo/Awe/ Orimaro Ward and Shinawo/Tunbuya Ward. He submitted that the grounds upon which the tribunal was alleged to have nullified those results by the cross-appellant were that there were no pleadings on the part of the 1st, 2nd and 3rd cross-respondents to support the evidence that had been led, and that the tribunal placed reliance on inadmissible evidence**.**

Senior counsel canvassed the view that the 1st, 2nd and 3rd cross-respondents needed only to plead material facts and not evidence. Such material facts were pleaded in this case. The parties had joined issues as to whether there was substantial compliance with the Electoral Act. In paragraph 17 to 17.3 of the petition, the 1st, 2nd and 3rd cross-respondents had alleged that the votes credited to the 5th and 6th cross-respondents in 5 Local Government Areas, including Edu Local Government Area were vitiated by substantial non-compliance with the Electoral Act which non-compliance substantially affected the validity of the said election such that the votes credited to the 5th and 6th cross-respondents ought to be nullified as unlawful votes and discountenanced in determining the result of the election.

On the evidence of DW28, he contended that evidence elicited under cross-examination was not inadmissible merely because it was not supported by the pleadings of the party eliciting the evidence. A party may rely on evidence that was elicited under cross-examination controverting facts that were pleaded by the opposing party, *Gaji & Ors. v. Paye* (2003) FWLR (Pt. 163) 1, (2003) 5 SC 53.

Counsel further submitted that this piece of evidence which goes to show non-compliance with the Electoral Act need not be pleaded. The cross-appellant lost sight of the settled position of the law that the cross-respondents

were required to plead only material facts and not the evidence by which those facts are to be proved, *Attorney-General, Anambra Slate v. Onuselogu Enterprises Ltd* (1987) 4 NWLR (Pt. 66) 547 and *Monier Construction Co. Ltd* v *Azubuike* (1990) 3 NWLR (Pt. 136)74 On the second part of this issue, that is the propriety of the tribunal placing reliance on inadmissible evidence, the cross-appellant maintained that the tribunal erred in placing reliance on evidence that it had earlier held to be inadmissible. The 1st, 2nd and 3rd cross - respondents had taken up this issue in their cross-appeal that the tribunal erred to have rejected the evidence on the grounds of improper certification. If as it is likely this court finds that the tribunal erred, the subsequent contention to the cross-appellant becomes academic.

It was further submitted that on the analysis of signature, particularly in Adigbongbo/Awe/Orimaro Wards, that whether the exhibits were rejected or not, the tribunal was in order, to proceed with signature analysis. The witness had identified the signature on tire certified true copy that identification was for (he purposes of the signature analysis and had nothing to do with the authenticity of the document or its content. Consequently, the signature analysis showed that this witness was an untruthful witness and all the evidence he gave as to his presence at the electoral unit were in doubt and not in compliance with the Electoral Act. The court is entitled to use that evidence as the tribunal had done. There were two comparisons: one, comparing his signature under cross-examination with that reflected on exhibit '1081L6.

This signature was admitted and marked exhibit 'DW54A' whilst the other compared signature of the witness under cross-examination with that contained on his witness statement on oath and that specimen was admitted as exhibit 'DW54B'. The tribunal in that regard was in order to have set aside the election in the affected areas.

The sole issue that calls for determination in this cross-appeal is the same as the second issue distilled in the cross-appeal of the 1st and 2nd respondents/cross-appellants. This issue had been resolved in favour of the

appellants/1st - 3rd cross-respondents earlier in this judgment. We adopt the reasoning and conclusion in respect of issue No.2 framed in the cross-appeal of the 1st and 2nd respondents/cross-appellants and hold that this cross-appeal, filed by the 3rd respondent/cross-appellant lacks merit and it is hereby dismissed.

The conclusion from the foregoing is that the judgment of the tribunal is upheld and the declaration and return of the 1st and 2nd respondents as the Governor and Deputy Governor respectively of Kwara State is affirmed by this Court. No order as to costs.

BAGE JCA: I agree.

NWEZE JCA: I agree.

AKEJU JCA: I agree.

ADUMEIN JCA: I agree.

Appeal and Cross-Appeal dismissed