

WIKE EZENYVO NYESOM

V.

- 1. HON. (DR.) DAKUKU ADOL PETERSIDE**
- 2. ARE PROGRESSIVES CONGRESS (APC)**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
- 4. PEOPLES DEMOCRATIC PARTY (PDP)**

SUPREME COURT OF NIGERIA

SC. 1002/2015

MAHMUD MOHAMMED, C.J.N.

(Presided)

IBRAHIM TANKO MUHAMMAD, J.S.C.

NWALI SYLVESTER NGWUTA, J.S.C.

KUMAI BAYANG AKA' AHS, J.S.C.

KUDIRAT MOTONMORI OLATOKUNBO KEKERE-EKUN,
J.S.C. *(Read the Leading Judgment)*

JOHN INYANG OKORO. J.S.C.

AMIRU SANUSI, J.S.C.

FRIDAY, 12TH FEBRUARY 2016

ADMINISTRATIVE LAW - Independent National Electoral Commission - Stains of - Powers and functions of.

APPEAL - Concurrent findings of fact by trial court and Court of Appeal - Altitude of Supreme Court thereto - When will interfere with.

APPEAL - Decision of Supreme Court or Court of Appeal - Judgment and opinions of Justices of Supreme Court and Court of Appeal

-How delivered - Who can deliver - Justice who did not participate in hearing of case - Whether can deliver judgment or give opinion on same

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CONSTITUTIONAL LAW - Right to fair hearing - Denial of - Effect of.

CONSTITUTIONAL LAW Right to fair hearing Scope of.

COURT - Competence of court - When a court is competent - Determinants of.

COURT - Decision of court - Court consisting of panel of Judges - Decision of - How delivered - Who can deliver - Judicial officer who did not participate in hearing of case - Whether can write or deliver a decision on same.

COURT-Decision of Supreme Court or Court of Appeal - Judgment and opinions of Justices of Supreme Court and Court of Appeal - How delivered - Who can deliver - Justice who did not participate in hearing of case - Whether can deliver judgment or give opinion on same.

COURT - Jurisdiction of court - Issue of - Fundamental nature of - When can be raised - Whether can be raised first time at Supreme Court.

DOCUMENT- Documentary evidence - Admissibility of - Probative value of - What determines each - Difference between both.

DOCUMENT - Documentary evidence - Where maker of not called as witness and was tendered by witness having limited knowledge of its contents - Whether court will give probative value thereto.

ELECTION - Accreditation of voters - Identity of voter - Authentication of - Power of Independent National Electoral Commission to under take - Source of - Section 57, Electoral Act, 2010 (as amended).

ELECTION - Accreditation of voters - Procedure therefor - Manual accreditation by reference to voters' register - Whether extant or replaced with use of Smart Card Reader machines.

ELECTION - Conduct of election - Electronic voting machine Use of - Prohibition of - Scope of - Whether includes Smart Card Reader machines - Section 52(I)(b), Electoral Ad, 2010 (as amended).

ELECTION - Conduct of election - Non-compliance with Electoral Act - When will not invalidate election - Section 139(1). Electoral Act (as amended).

ELECTION - Conduct of election - Regulations and guidelines therefor - Power of Independent National Electoral Commission to make - Source of - Regulations and guidelines so made - Act or omission contrary thereto - When not a ground for election petition - Sections 138 (2) and 153, Electoral Act, 2010 (as amended).

ELECTION - Conduct of election - Smart Card Reader machines - Introduction and use of by Independent National Electoral Commission - Need for commendation of.

ELECTION - Conduct of election - Smart Card Reader machines
- *Use of in election by Independent National Electoral Commission*
- *Function and purpose of - Whether use replaces voters' register or statement of election result in appropriate forms.*

ELECTION - Election petition - Appearance of respondent thereto
- *Time limit for - Rule applicable thereto - Whether paragraph 10(2), first Schedule, Electoral Act, 2010 (as amended) or section 99, Sheriffs and Civil Process Act.*

ELECTION - Election petition - Issuance and service of - Rules governing
- *Adequacy of paragraphs 6 - 8, first Schedule, Electoral Act, 2010 (as amended) - Whether sections 97 - 99, Sheriffs and Civil Process Act applicable.*

ELECTION - Election petition - Over-voting in an election - Allegation of - Proof of - What petitioner must do.

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ELECTION - Election petitions - Practice and procedure of – Rules therefor - Sources of - Federal High Court (Civil Procedure) Rules - When and how applicable.

ELECTION - Election results declared by Independent National Electoral Commission - Presumption of regularity of – Petitioner challenging same - Onus on.

ELECTION - Election tribunals - Governorship Election Tribunal

- Composition and quorum of - What are.

ELECTION - Electoral Act, 2010 (as amended) - Amendment of to provide for use of Smart Card Reader machines in an election - Need for.

ELECTION - Electoral Act, 2010 (as amended) - Provisions of

- Whether superior to directives of Independent National Electoral Commission.

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ELECTION - Independent National Electoral Commission - Notice required to be given to commission under Electoral Act -Where given but inadequate - Who can complain about same.

ELECTION - Independent National Electoral Commission - Status of - Powers and functions of.

ELECTION - Notice required to be given to Independent National Electoral Commission under Electoral Act - Where given but inadequate - Who can complain about same.

ELECTION - Return of candidate - Challenge of - Where on ground of corrupt practices or non-compliance with Electoral Act -What petitioner must prove to succeed.

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ELECTION - Smart Card Reader machines - Use of in conduct of election - Whether in conflict with provisions of Electoral Act, 2010 (as amended).

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ELECTION - Voters - Non-accreditation of Allegation of - Proof of - Duty on petitioner to rely on voters' register.

ELECTION PETITION - Conduct of election - Non-compliance with Electoral Act - When will not invalidate election - Section 139(1), Electoral Act (as amended).

ELECTION PETITION - Conduct of election - Regulations and guidelines therefor - Power of Independent National Electoral Commission to make - Source of- Regulations and guidelines so made - Act or omission contrary thereto - When not a ground for election petition - Sections 138 (2) and 153, Electoral Act, 2010 (as amended).

ELECTION PETITION - Corrupt practices - Where a ground for challenging return of candidate in an election - What petitioner must prove to succeed.

ELECTION PETITION - Election petition - Appearance of respondent thereto - Time limit for - Rule applicable thereto -Whether paragraph 10(2), First Schedule, Electoral Act, 2010 (as amended) or section 99, Sheriffs and Civil Process Act.

ELECTION PETITION - Election petition - Issuance and service of - Rules governing - Adequacy of paragraphs 6 - 8, First Schedule, Electoral Act, 2010 (as amended) - Whether sections 97 - 99, Sheriffs and Civil Process Act applicable ELECTION PETITION - Election petitions - Nature of- Whether time bound.

ELECTION PETITION - Election petitions - Practice and procedure of - Rules therefor - Sources of - Federal High Court (Civil Procedure) Rules - When and how applicable.

ELECTION PETITION - Election tribunals - Governorship Election Tribunal - Composition and quorum of - What are.

ELECTION PETITION - Irregularity in election petition or proceedings arising therefrom - Application to set aside - When should be filed - When will not be granted - Paragraph 53(2), First Schedule, Electoral Act.

ELECTION PETITION - Non-compliance with Electoral Act -Where a ground for challenging return of candidate in an election - What petitioner must prove to succeed.

ELECTION PETITION - Notice required to be given to Independent National Electoral Commission under Electoral Act - Where given but inadequate - Who can complain about same.

ELECTION PETITION - Over-voting - Allegation of - Proof of-What petitioner must do.

ELECTION PETITION - Return of candidate - Challenge of -Where on ground of corrupt practices or non-compliance with Electoral Act - What petitioner must prove to succeed.

ELECTION PETITION - Voters - Non-accreditation of- Allegation of - Proof of - Duty on petitioner to rely on voters' register.

ELECTION PETITION - Election Petition - Who can present.

*EVIDENCE - Admissibility - Admissibility of document - What determines
EVIDENCE - Concurrent findings of fact by trial court and Court of
Appeal - Attitude of Supreme Court thereto - When will interfere with.*

*EVIDENCE - Documentary evidence - Admissibility of - Probative value
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witness and was tendered by witness having limited knowledge of its
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*EVIDENCE - Presumptions - Election results declared by Independent
National Electoral Commission - Presumption of regularity of -
Petitioner challenging same - Onus on.*

*EVIDENCE - Proof- Non-accreditation of voters during election -
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*EVIDENCE - Proof - Over-voting in an election - Allegation of-Proof of -
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*EVIDENCE - Proof of crime - Burden of proof of - On whom lies -Standard
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PAIR HEARING - Right to fair hearing - Scope of.

INTERPRETATION OF STATUTES - Clear and unambiguous words in statutes - How interpreted.

JUDGMENT AND ORDER - Decision of court - Where a nullity -Effect of.

JUDGMENT AND ORDER - Decision of Supreme Court or Court of Appeal - Judgment and opinions of Justices of Supreme Court and Court of Appeal - How delivered - Who can deliver - Justice who did not participate in hearing of case - Whether can deliver judgment or give opinion on same.

JUDGMENT AND ORDER - Declaratory relief - Claim therefor -Need for claimant to succeed on strength of own case and not on weakness of defendant's case.

JURISDICTION - Jurisdiction of court - Issue of - Fundamental nature of - When can be raised - Whether can be raised first time at Supreme Court.

LEGAL PRACTITIONER - Seal and stamp approved by Nigerian Bar Association - Failure of legal practitioner to affix on court process - Effect of - Whether process is null and void - How process can be regularised.

LOCUS STANDI - Locus standi - Issue of - How determined -Document court looks at - What plaintiff must establish.

LOCUS STANDI - Locus standi - Meaning of - Issue of - Nature of

- Where plaintiff lacks locus standi - Effect of.

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NOTABLE PRONOUNCEMENT - On nature of Smart Card Reader machines and functions of in conduct of election.

NOTABLE PRONOUNCEMENT-On need to amend Electoral Act, 2010 to incorporate the use of Smart Card Reader machines in elections.

NOTABLE PRONOUNCEMENT - On need to commend IN EC for introducing Smart Card Reader machines in the conduct of elections in Nigeria

PRACTICE AND PROCEDURE - Concurrent findings of fact by trial court and Court of Appeal - Attitude of Supreme Court thereto - When will interfere with.

PRACTICE AND PROCEDURE - Decision of court - Court consisting of panel of Judges - Decision of - I low delivered -Who can deliver - Judicial officer who did not participate in hearing of case - Whether can write or deliver a decision on same.

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*PRACTICE AND PROCEDURE - Locus standi - Issue of - How
determined - Document court looks at - What plaintiff must establish.*

*PRACTICE AND PROCEDURE - Process filed in court by counsel
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*PRINCIPLES OF INTERPRETATION - Interpretation of statutes -Clear
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*STATUTE - Electoral Act, 2010 (as amended) - Provisions of - Whether
superior to directives of Independent National Electoral Commission.*

*STA'TUTE - Interpretation of statutes - Clear and unambiguous
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*TRIBUNAL - Decision of tribunal - 'Tribunal consisting of panel of
members - How delivered - Who can deliver - Member who did not
fully participate in a proceeding of tribunal - Whether can write or
deliver opinion or decision on same.*

Issues:

1. Was the Court of Appeal right when it failed to hold that the ruling of the re-constituted tribunal given on 9th September 2015 and relied on by the Court of Appeal to arrive at the conclusion that the tribunal considered and resolved all the issues raised in the appellant's motions not competent and valid?
2. Was the Court of Appeal right when it came to the conclusion that the appellant's constitutional right to fair hearing was not breached by the tribunal?
3. Was the Court of Appeal right when it came to the conclusion that the election petition meant for service out of jurisdiction - subject matter of the appeal, was competently issued and served such as to clothe the tribunal with the necessary jurisdiction to entertain the same?
4. Did the Court of Appeal come to the right conclusion when it held that the petition to which no Nigerian Bar Association approved seal and stamp was affixed was cognizable and capable of being entertained and determined.
5. Was the Court of Appeal right when it came to the conclusion that the 1st and 2nd respondents had the *locus standi* to present their petition-subject matter of the appeal?

Was the Court of Appeal right when it sustained the reliance placed by the tribunal on the Smart Card Reader machines report tendered in evidence by the petitioners and admitted as exhibit 'A9'?

7. Was the Court of Appeal right when it came to the conclusion that the documents tendered by the petitioners were not documentary hearsay and documents that were merely dumped on the tribunal and were capable of being relied on for the purpose of proving the petition?

8. Was the Court of Appeal right when it came to the conclusion that the 1st and 2nd respondents' ground for the petition which included non-compliance with the Manual for election Officials 2015 and General elections approved Guidelines and Regulations was within the purview of section 138(1)(b) of the electoral Act 2010 (as amended).
9. Was the Court of Appeal right when it came to the conclusion that there was no conflict between the provisions of sections 49 and 52(1)(b) of the electoral Act, 2010 (as amended), on the one hand and the Manual for election Officials 2015 and the Approved Guidelines and Regulations made by INFC for the election and accordingly that failure to follow the Manual or Guidelines had the effect of rendering the election void?
10. Was the Court of Appeal right when it failed to apply to the facts of the present case, the decisions of the Supreme Court in the cases of *Kakih v. P.D.P.* (2014) 5 NWLR (Pt. 1430) 377 and *Ucha v. Elechi* (2012) 13 NWLR (Pt. 1317) 339 among others regarding the onus, method and standard of proof in election cases involving allegations of non-compliance with the provisions of the electoral Act?
11. Was the Court of Appeal right when it came to the conclusion that the evidence in the petition was properly evaluated by the tribunal and that the petitioners were entitled to judgment?

Facts:

On 11th and 12th April 2015, the Independent National electoral Commission (the 3rd respondent) conducted an election for the office of Governor of Rivers State. The appellant contested in the election as the 4th respondent's candidate. And the 1st respondent contested as the 2nd respondent's candidate. At the end of the election, the 3rd respondent declared that the appellant scored 1,029,102 votes and majority of lawful votes cast. So the 3rd respondent returned the appellant as the elected Governor of Rivers State.

The 1st and 2nd respondents were dissatisfied with the 3rd respondent's declaration and return of the appellant as Governor of Rivers State. So they filed a petition at the Governorship Election Tribunal on the grounds that:

- (a) (he appellant was not duly elected by majority or highest number of lawful votes cast at the election;
- (b) the election of the appellant was invalid and unlawful because of substantial non-compliance with the provisions of the electoral Act, 2010 (as amended), the Manual for Election Officials 2015 and the 3rd respondent's election guidelines and regulations, particularly, its directives on the use of Smart Card Reader machines for the accreditation of voters in the election; and
- (c) the election was invalid because of corrupt practices.

A major aspect of the 1st and 2nd respondents' case was that only

292,878 voters were accredited for the election by the use of Smart Card Reader machines and that majority of the accredited

voters were unable to vote due to widespread violence but the 3rd

respondent stated 1,228,614 voters were accredited and declared that the appellant scored 1,029,102 votes.

Essentially, the 1st and 2nd respondents sought a declaration that the appellant was not duly elected or returned by the majority of lawful votes cast at the election, and an order for the conduct of fresh election in Rivers State by the 3rd respondent.

The appellant raised a preliminary objection to the competence of the petition and the jurisdiction of the tribunal over it. He also filed three applications in which he repeated his preliminary objection and challenged the competence of the petitioners' reply and witness statements on oath. The tribunal heard the appellant's applications and ruled that it would consider the issues in them together with the substantive case. The appellant appealed against that ruling to the Court of Appeal.

While the appellant's appeal was pending, the Chairman of the tribunal was removed and replaced by a new Chairman. The tribunal then began hearing evidence on the substantive *case*. Subsequently, the Court of Appeal delivered its ruling on the appellant's appeal. It directed the tribunal to resolve the issues of the 1st and 2nd respondents' *locus standi* and service of the originating processes which the appellant raised in his application but were not decided by the tribunal. The re constituted panel of the tribunal complied with the directive of the Court of Appeal and delivered a ruling on 9th September 2015. The tribunal also complied with another directive of the appellate court and delivered a ruling under which it struck out several paragraphs of the petition, particularly, paragraphs where the 1st and 2nd respondents made allegations against persons and security agencies who were not parties to

the petition. Further, the tribunal made a consequential order barring the calling of evidence on such allegations in the case.

At the hearing of the petition, the 1st and 2nd respondents called witnesses and tendered electoral and other documents in evidence. One of their witnesses, PW49 (the 3rd respondent's employee and its Assistant Director, I.C.T.) tendered the Smart Card Reader machines report as exhibit A9. She, however, admitted that the exhibit was made by a member of staff in her unit. She admitted under cross-examination that she was not in Rivers State for the election, did not participate in any stage of accreditation of voters during the election and did not examine any of the Smart Card Reader machines after the election. She stated that the machines were in Port Harcourt, Rivers State, that the data in the Smart Card Reader machines was uploaded to the 3rd respondent's server and that the server was shut 6 weeks after the election.

Significantly, the number of accredited voters in exhibit A9 was higher than the number pleaded by the 1st and 2nd respondents in their petition. And some of their other witnesses explained that the 1st and 2nd respondents pleaded the number which had been uploaded to the 3rd respondent's server at the time the petition was prepared.

The appellant called witnesses and tendered documents; while the 3rd respondent called only witnesses. The 4th respondent did not call any witness but tendered documents in evidence from the bar.

The tribunal delivered its judgment after hearing evidence and considering the written address of the parties' counsel. The tribunal relied heavily on the 3rd respondent's written directives on the use of Smart Card Reader machines, the evidence of PW49 and exhibit A9, and concluded that the 3rd respondent's officials' failed to follow the 3rd respondent's directives. The tribunal held further that their failure to do so substantially affected the conduct of the election.

Consequently, the tribunal allowed the petition. It also nullified the election and return of the appellant on grounds of substantial non-

compliance with the electoral Act.

The appellant appealed to the Court of Appeal which dismissed the appeal and affirmed the tribunal's judgment. The appellant appealed further to the Supreme Court, he argued that exhibit A9 was a documentary hearsay which contradicted the 1st and 2nd respondents' case and, at best, was only proof of the number of voters whose accreditation had been uploaded to the 3rd respondent's server before it was shut. He also argued that the data from the Smart Card Reader machines, without details of the voters' register, could not provide proof of accreditation of voters or over-voting at the election. He further argued that though some voters' register were tendered in evidence, no attempt was made to link them with the results tendered or with exhibit A9.

In determining the appeal, the Supreme Court construed some statutory provisions. They include sections 49, 52(1)(b), 137(1) (a) & (b), 138(1)(b) & (2), 139(1) and 153 of the electoral Act, 2010 (as amended) which provide as follows:

"49(1) Any person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card.

(2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate on the Register that the person has voted.

52(1)(b) The use of electronic voting machine for the time being is prohibited.

137(1) An election petition may be presented by one or more of the following persons -

- (a) a candidate in an election;
- (b) a political party which participated in the election.

138(1) An election may be questioned on any of the following grounds, that is to say

- (a) that a person whose election is questioned was, at the time of the election, not qualified to contest the election;
- (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

(2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.

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

(2) An election shall not be liable to be questioned by reason of a defect in the title, or want of title of the person conducting the election or acting in the office provided such a person has the right or authority of the Commission to conduct the election.

153. The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof."

Held (*Unanimously allowing the appeal*):

1. *On Meaning of locus standi and effect where plaintiff lacks locus standi –*

Locus standi is the legal capacity to institute an action in a court of law. Where a plaintiff lacks locus standi to maintain an action, the court lacks the competence to entertain his complaint. It is therefore a threshold issue which affects the jurisdiction of court. [*Daniel v. I.N.E.C.* (2015) 9 NWLR (Pt. 1463) 113;

Thomas v. Olufosoye (1989) 1 NWLR (Pt.18) 669; *Opobiyi v. Muniru* (2011) 18 NWLR (Pt.1278) 387 referred to.] (P. 514, paras. A-B)

2. *On Determination of issue of locus standi -*

In determining whether a plaintiff has the necessary locus standi to institute an action, it is his pleadings that would be considered by the court. The plaintiff must show sufficient interest in the subject matter of the dispute. [Emezi v. Osuagwu (2005) 12 NWLR (Pt. 939) 340; Momoh v. Olotu (1970) 1 All NLR 117; A-G Anambra State v. A.-G., Fed. (2005) 9 NWLR (Pt. 931) 572 referred to.] (P. 514, paras. C-D)

3. *On Who can present election petition –*

By virtue of section 137(1)(a) and (b) of the Electoral Act, an election petition may be presented by one or

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more of the following persons: -

- (a) a candidate in an election;
- (b) a political party which participated in the election.

In this case, the 1st and 2nd respondents who were the candidate in the election and the political party that sponsored him respectively, have an interest in the subject matter of the petition. So, the finding by the Court of Appeal that the 1st and 2nd respondents have locus standi is unassailable. (Pp. 514-515, paras. D-B; D)

4. *On Who can complain about inadequacy of notice given to Independent National Electoral Commission -*

Only the Independent National Electoral Commission (INEC) or a member of a political party concerned, who is adversely affected as a result of inadequate notice to INEC, is competent to complain of the inadequacy of the notice. [Shinkafi v. Yah (2016) 7 NWLR (Pt. 1511) 340; Tarzoor v. Ioraer (2016) 2 NWLR (Pt. 1500) 463 referred to.] (P. 515, paras. C-D)

5. *On Nature of election petitions –*

Election matters are sui generis with a special character of their own, quite different from ordinary civil or criminal proceedings. They are governed by their own statutory provisions which regulate their practice and procedure. Further, by virtue of section 285(6) and (7) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), election matters are time bound, [Hasson v. Aliyu (2010) 17 NWER (Pt. 1223) 547; Ehuwa v. O.S.I.E.G. (2006) 10 NWLR (Pt. 1012) 544 referred to.] (Pp. 505. paras. E-F; 509, paras. B C; 559, paras. B-F)

6. *On Rules of practice and procedure applicable in election petitions*

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Section 145 of the Electoral Act provides that the rules of procedure to be adopted for election petitions and appeals arising therefrom shall be as set out in the First Schedule to the Act, and that the President of the Court of Appeal may issue practice directions to election tribunals. Paragraph 54 of the First Schedule, in turn, provides that subject to the express provision of (he Act, the practice and procedure of the tribunal

or the court in election petition shall be as nearly as possible, similar to the civil practice and procedure of the Federal High Court and that its civil procedure rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of the Act as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action. Accordingly, any recourse to the Federal High Court (Civil Procedure) Rules must be subject to the express provisions of the Electoral Act. Thus, it is only where the Electoral Act or its First Schedule does not provide for a particular situation that reference would be made to the Federal High Court (Civil Procedure) Rules with necessary modification. (P. 500 paras C- G)

7. *On Whether provisions of Sheriffs and Civil Process Act applies to issuance and service of election petition –*

Paragraphs 6-8 of the First Schedule of the Electoral Act, adequately provide for the issuance and service of election petitions. Consequently, it is not necessary to resort to the Federal High Court (Civil Procedure) Rules or the provisions of sections 97, 98 and 99 of the Sheriffs and Civil Process Act. (Pp. 509-51E paras. H - F)

8. *On lime limit for entering appearance to election petition –*

The provisions of section 99 of the Sheriffs and Civil Process Act, which gives a defendant not less than thirty days to respond to a writ of summons is clearly in conflict with paragraph 10(2) of the First Schedule to the Electoral Act, which gives a respondent no more than twenty-one days to file a reply to a petition. Further, if it was the intention of the legislature to make specific rules governing service outside

jurisdiction, it would have incorporated same in paragraphs 6 and 7 of the First Schedule to the Electoral Act. (P. 511, paras. F-H)

9. *On When application to set aside election petition proceedings will not be granted –*

Paragraph 53(2) of the First Schedule to the Electoral Act provides that an application to set aside an election petition or a proceeding resulting therefrom for irregularity or for being a nullity shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceeding after knowledge of the defect. In this case, the appellant raised the issue of lack of Nigerian Bar Association (NBA) approved seal and stamp on the petition for the first time at the hearing of the appeal. In the circumstance, the appellant raised the issue too late in the proceedings and the issue did not vitiate the petition because that would have amounted to enthrone technicality at the expense of substantial justice. [*Abubakar v. Yar 'Adua (2008) 18 NWLR (Pt. 1120) 1* referred to.] (P. 512, paras. B-E)

10. *On When non-compliance with Electoral Act will not invalidate an election -*

By section 139(1) of the Electoral Act, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the election tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not substantially affect the result of the election. (P. 553, paras. A-C)

11. On When breach of INEC's regulations and guidelines for conduct of election not a ground for election petition -

Section 153 of the Electoral Act empowers the Independent National Electoral Commission (INEC) to issue regulations, guidelines or manuals ' for the smooth conduct of elections. However, by virtue of section 138(2) of the Act, where an act or omission regarding such regulations or guidelines is not contrary to the provisions of the Act, it shall not of itself be a ground for questioning an election.

In this case, the 1st and 2nd respondents complained that there was deliberate non-use of the Smart Card Reader machines during the election. But the use of the Smart Card Reader machines has not done away with the need for manual accreditation of voters provided for in section 49 of the Act. So the inclusion of non-compliance with the Manual for Election Officials 2015 General Election Officials 2015 and INEC's 2015 General Election approved Guidelines amongst the grounds for the 1st and 2nd respondents' petition is improper.

(Pp. 528, paras. A-F; 546, paras. G hi; 547, paras. A-C)

Per AKA'AHS, J.S.C. at pages 548-549, paras. H-A:

"Section 138(2) of the Electoral Act envisages a situation where the Electoral Commission issues instructions or guidelines which are not carried out. The failure of the card reader machine or failure to use it for the accreditation of voters cannot invalidate the election."

12. On Proof of over-voting in an election –

A petitioner who seeks to prove over-voting at an election must tender in evidence, the voters' register among other documents. In this case, the 1st and 2nd respondents' argument that it was no longer necessary to tender the voters' register to prove over-voting is untenable notwithstanding the introduction of the

Smart Card Reader machines in the conduct of elections, [Haruna v. Modibbu (2004) 16 NWLR (Pt. 900) 487; Kalgo v. Kalgo (1999) 6 NWLR (Pt. 606) 639 referred to.] (P. 551, paras. E-F)

Per OKORO, J.S.C. at page 551, paras. C-E:

"Let me comment briefly on the issue of the use of Card Reader Machine in elections. There is no doubt that the introduction of this device in electioneering processes in this country is a commendable effort. It was, no doubt meant to sanitize accreditation and reduce, if not eradicate incidents of over-voting and/ or multiple voting. As I said elsewhere, this device was not meant to replace the voters register nor was it designed to take the position of electoral forms lor declaration of results. See Mahmud Aliyit Shinkafi & Anor v. Abdulazeez Abubakar Yari & 2 Ors. (Unreported) Appeal No. SC.907/2015 delivered on 8th January, 2016; (2016) 7 NWLR (Pt. 1511) 340."

13. On Proof of over-voting in an election –

To prove over-voting in an election, a petitioner must do the following

- (a) tender the voters register;**
- (b) tender the statement of results in appropriate forms which would show the number of registered accredited voters and number of actual votes;**
- (c) relate each of (he documents to the specific area of his case in respect of which the documents arc tendered; and**
- (d) show that the figure representing the over-voting if removed would result in victory for the petitioner.**

Haruna v. Modibo (2004) 16 NWLR (Pt. 900) 487; *Kalgo v. Kalgo* (1999) 6 NWLR (Pt. 606) 639; *Audu v. I.N.E.C. (No.2)* (2010) 13 NWLR (Pt.1212) 456; *Shinkafi v. Yari* (2016) 7 NWLR (Pt. 1511) 340; *Yahaya v. Dankwambo* (2016) 7 NWLR (Pt. 1511) 284 referred to.] (P. 520, paras. C-F)

14. *On Proof of non-accreditation of voters and over-voting in an election –*

In order to prove non-accreditation and or over-voting during an election, a petitioner must rely on the voters' register. In this case, in order to prove (heir allegations of non-accreditation and or over-voting, the 1st and 2nd respondents were bound to rely on the voters registers of all the affected local government areas. However, voter's registers were tendered in evidence for only 11 out of 23 local government areas in the State. Further, the registers were tendered from the bar and no attempt was made to link them with exhibit AG, the smart card reader machines report. Notably, forms 15C8A were tendered in evidence for only 15 out of 23 Local Government areas in the State. Some of the defences were cross-examined on the basis of the form EC8A to show that the number of accredited voters stated therein was in conflict with the number of accredited voters stated in exhibit A9. But the evidence presented by the 1st and 2nd respondents did not meet the required standard of proving over-voting polling unit by polling unit. Moreover, the voters' register cannot be jettisoned in the exercise of proving over voting. (P. 526, paras. A-C)

15. *On Proof of corrupt practice or non-compliance with Fleet oral Act in an election -*

Where the ground for challenging the return of a candidate in an election is an allegation of corrupt practices or non-compliance with the provisions of Electoral Act, the petitioner must prove that:

- (a) the corrupt practice or non-compliance took place; and**
- (b) the corrupt practice or non-compliance substantially affected the result of the election.**

[Yahaya v. Dankwambo (2016) 7 NWLR (Pt. 1511) 284; Awolowo v. Shagari (1979) 6-9 SC 51; Buhari v. Obasanjo (2005) 2 NWLR (Pt.910) 241 referred to.] (Pp. 520-521, paras. G-A)

16. On Proof of non-compliance with Electoral Act in an election -

Where a petitioner complains of non-compliance with the provisions of the Electoral Act, he has an onerous task because he must prove his assertion polling unit by polling unit, ward by ward, and the standard of proof is on the balance of probabilities. Further, he must show figures that the adverse party was credited with as a result of the noncompliance; for example, Forms EC8A, election materials not signed and stamped by presiding officers. It is only then that the respondent is to lead evidence in rebuttal. In this case, the 1st and 2nd respondents did not prove their allegation of non-compliance with the Electoral Act. *[Ucha v. Elechi (2012) 13 NWLR (Pt.1317) 330 referred to.] (Pp. 533, paras. C-E; 534-535, paras. B-E; 536, paras. F-H)*

17. On Power of IN EC 1o authenticate identity of voter –

Section 57 of the Electoral Act provides the Independent National Electoral Commission (INEC) with authority to authenticate the identity of a voter when he presents himself to cast his vote. (P. 530, para. B)

18. *On Prohibition of use of electronic voting machine in election -*

Section 52(l) (b) of the Electoral Act prohibits the use of electronic voting machine for the time being. The Smart Card Reader machines are used, meanwhile, for accreditation of voters, and not for voting. (Pp. 529-530, paras. IP A)

19. *On Function and purpose of Smart Card Reader machines in elections -*

The function of the Smart Card Reader machines in elections conducted by the Independent National Electoral Commission is solely to authenticate the owner of a voter's card and to prevent multi-voting by a voter, and it cannot replace the voters register or statement of results in appropriate forms. [*Shinkafi v. Yari* (2016) 7 NWLR (Pt. 1511) 340; *Okereke v. Umahi* (Unreported) SC.1004/2015 delivered on 5/2/2016 referred to.] (P. 522, paras. B-C)

20. *On Whether use of Smart Card Reader machines a breach of Electoral Act, 2010 (as amended) –*

Though the failure to follow the manual and guidelines made by the Independent National Electoral Commission (INEC) in exercise of its powers under the Electoral Act did not, in and of itself, render the election void in this case, INCE's introduction of smart card reader machines in the conduct of the election is not in conflict with the relevant sections of the Electoral Act. (Pp. 530, paras. B-C; 547, paras. B-C)

21. *On Whether use of voters' register for manual accreditation of voters superseded by use of smart card reader machine –*

The use of Smart Card Reader machines bolsters the transparency and accuracy of the accreditation process during an election. Nevertheless, section 49(1) and (2) of the Electoral Act which provide for manual accreditation of voters by reference to the voters' register is extant and remains a vital part of Nigerian Electoral law. In this case, the tribunal and the Court of Appeal were unduly swayed by INEC's Directives on the use of the Smart Card Reader machines in the accreditation of voters. But INEC's directives, guidelines and manuals cannot supersede the provisions of the Electoral Act so as to eliminate manual accreditation of voters. [Shinkafi v. Yari (2016) 7 NWER (Pt. 1511) 340; Okereke v. Umahi (Unreported) Appeal No. SC.1004/2015 delivered on 5/2/2016 referred to.] (Pp. 525-526, paras. A-A; 526, paras. E-F)

22. *On Presumption of regularity of election results declared by INEC - Election results declared by the Independent National Electoral Commission (INEC) enjoy a presumption of regularity. In other words, they are prima facie correct, and the onus is on the petitioner to prove the contrary. [Buhari v. Obasanjo (2005) 13 NWER (Pt.941) 1; Awolowo v. Shagari (1979) 6 - 9 SC 51; Akinfosile v. Ajose (1960) SCNUR 447 referred to.] (Pp. 532-533, paras. H-A)*

23. *On Whether provisions of Electoral Act is superior to INEC's directives –*

The provisions of the Electoral Act are superior to any letter or directive of the Independent National Electoral Commission

(INEC). That superiority is clearly stated in section 138(2) of the Act. In this case, the use of manual accreditation procedure during the election contrary to INEC's directives on use of Smart Card Reader machines, does not amount to a ground for questioning the election of the appellant. (Pp. 551-552, paras. F-A)

24. *On Distinction between effect of breach of statute and breach of procedural rules -*

A distinction must always be drawn between the effect of a law (the Electoral Act, the Constitution, etc.) made by the legislature (National Assembly) and a rule of procedure (by whatever name called) made by any other authority with a view to facilitating the smooth running or operation of a given institution. A breach of the former can be more severe and fatal than a breach of the latter. In this case, the provisions of section 138(2) of the Electoral Act decisively settles the issue of effect of failure to follow the directives of the Independent National Electoral Commission on the use of Smart Card Reader machines during the election. (P. 547, paras. D-E)

25. *On Interpretation of clear and unambiguous words in statute -*

The golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statute. In this case, the provisions of sections 138 and 153 of the Electoral Act are clear and unambiguous. [*Ibrahim v. Barde* (1996) 9 NWLR (Pt.474) 513; *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377; *Adisa v. Oyinwola* (2000) 10 NWLR (Pt. 674) 116; *Uwazurike v. A. G Fed.* (2007) 8 NWLR (Pt. 1035) 1 referred to.] (P. 527, paras. F-H)

26. On Status, powers and functions of INEC -

The Independent National Electoral Commission (INEC) is one of the Federal Executive bodies established by section 153(l)(f) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and paragraph 15(a) of Part 1 of the Third Schedule to the Constitution empowers INEC to, amongst other things, do the following:

- (a) organise, undertake and supervise all elections to the offices of (he President and Vice-President, a Governor and his deputy and to the membership of the National Assembly and House of Assembly of each State;**
- (b) register and supervise political parties;**
- (c) arrange and conduct registration of persons qualified to vote;**
- (d) maintain and revise the voters register for the purpose of any election under the Constitution; and**
 - (c) carry out such other functions as may be conferred upon it by an Act of the National Assembly.**

(P. 541, paras. F-H)

27. On When issue of jurisdiction of court can be raised –

The issue of jurisdiction of court is so fundamental to adjudication that it can be raised at any stage of the proceedings and even for the first time on appeal to the Supreme Court. In this case, the appellant's issues 1 and 2, on the validity of the tribunal's ruling delivered on 9th September 2015, raised the issue of jurisdiction of court. In the circumstance, the issues can be raised at the Supreme Court. [U.D.U. v. Kraus Thompson Ltd. (2001) 15 NWLR (Pt. 736) 305; Elabanjo v. Dawodu (2006) 15

NWLR (Pt. 1001) 115; *P.D.P. v. Okorochoa* (2012) 15
NWLR (Pt. 1323) 205 referred to.] (P. 503, paras. C-F)

28. *On When a court is competent -*

A court is competent to adjudicate when:

- (a) **it is properly constituted with respect to the number and qualification of its members;**
- (b) **the subject-matter of the action is within its jurisdiction;**
- (c) **the action is initiated by due process of law;**
- (d) **any condition precedent to the exercise of its jurisdiction has been fulfilled.**

In this case, since the chairman of the tribunal did not participate in the hearing of the appellant's application from its beginning to its end, the tribunal, as constituted when it delivered its ruling, on the application, was not competent to deliver the ruling. So the ruling is a nullity. [Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Okpanum v. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (Pt. 559) 537; Dangana v. Usman (2013) 6 NWLR (Pt. 1349) 50; N.U.R.T.W. v. R.T.EA.N. (2012) 10 NWLR (Pt. 1307) 170 referred to.] (Pp. 550, paras. A C; 553, paras. D-H)

29. *On Composition and quorum of Governorship Election Tribunal –*

By section 285(3) of the Constitution of the Federal Republic of Nigeria, 1999 and paragraph 2(1) of the Sixth Schedule to the Constitution, a Governorship Election Tribunal shall consist of a Chairman and two other members, while by section 285(4) of the Constitution, the quorum of an election tribunal established under the section shall be the chairman and one other member. In this case, (he two members of the tribunal who participated in the hearing of the appellant's application and delivered their opinion on it could not form a quorum in the absence of the

chairman who also participated in the hearing of the application. In the circumstance, the tribunal was not properly constituted for the delivery of its ruling on 9th September 2015, and therefore lacked the competence to do so. [*Madukolu v. Nkemdilim* (1962) 2 SCNLR 341 referred to.] (P. 503, paras. F-H)

30. On Quorum of Governorship Election Tribunal –

Section 285(4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) states that the quorum of a Governorship Election Tribunal comprises of the chairman and one other member. In other words, the position of a chairman of an election tribunal is very important because no legally valid quorum can be formed without him. In this case, the chairman of the tribunal was removed and a new one was appointed while the appellant's application was part-heard. In the circumstance, the composition of the tribunal changed and that made the tribunal's ruling on the appellant's application a nullity. (Pp. 552-553, paras. F-D)

31. On Whether judicial officer or member of tribunal who did not participate in hearing of a case or matter can write or deliver a decision on same –

The effect of the provision of section 294(1) and (2) of the Constitution of the Federal Republic of ' Nigeria, 1999 is that where a panel of Justices hears a cause or matter, each of the them must express and ' deliver his opinion in writing. Such written opinion ^ may, however, be delivered by any other Justice of the court on behalf of a Justice who participated in the hearing but is unavoidably absent. The opinion delivered must be the opinion of the Justices who participated in the hearing. Though the provision ji of section 294(1) and (2) of the

Constitution refers specifically to Justice of the Supreme Court and ' of the Court of Appeal, the principle is applicable to any court or tribunal that sits in a panel of two or more members. In this case, the panel of the tribunal that signed and delivered the tribunal's ruling on 9th September 2015 is different from the panel of the tribunal that heard the appellant's applications. In the circumstance, the ruling is # invalid and a nullity. [*Sokoto State Govt. v. Kamdex (Nig.) Ltd. (2007) 7 NWLR (Pt. 1034) 466; Ubwa v. Tiv Area Traditional Council (2004) 11 NWLR (Pt. 884) 427 referred to.*] (Pp. 504-505, paras. B-B; D-E)

Per KEKERE-EKUN, J.S.C. at pages 504-505, paras. H-B:

"In the instant case, Pindiga, J as chairman with, Leha, J and Taiwo, J heard the application. The ruling delivered on 9/9/2015 signed by Ambursa, J as Chairman and Leha and Taiwo, JJ as members, reviewed the submissions of learned counsel made at the hearing of the application before dismissing same. There is no do ubt that Ambursa,,J could not have formed an opinion on the submissions of learned counsel, which he did not hear. In the eyes of the law only Leha, J and Taiwo, J delivered the ruling.

The signature of Ambursa, J on the ruling was invalid. In the ease of " *Sokoto State Govt v. Kamdex Nig. Lid. (2007) 7 NWLR (PL 1034) 466* a similar situation arose where a Justice of the Court of Appeal who did not participate in the hearing of the appeal wrote and delivered a judgment therein. The judgment so delivered was declared a nullity. See also: *Ubwa v. Tiv Traditional Council (2004) 11 NWLR (Pt. 884) 427.*"

32. *On Whether judicial officer or member of tribunal who did not participate in hearing of a case or mailer can write or deliver a decision on same –*

Only the Judge or Judges who took part in the hearing of a case or application can take part in the writing and signing of the judgment or ruling of the court. In other words, a judicial officer of whatever jurisdiction who did not participate in court proceedings in respect of a case has no legal right or capacity to write a judgment or opinion to determine the dispute between the parties to the case. If the judicial officer does so, the decision is a nullity because the court is not properly constituted. In this case, the member of the tribunal who did not take part in hearing the appellant's applications lacked the capacity to write, sign and deliver the tribunal's ruling of 9th September 2015. [Madukolu *v.* Nkemdilim (1962) 2 SCNLR 341; Adeigbe *v.* Kusimo (1965) All NLR 248; Sokoto State Govt. *v.* Kamdex (Nig.) Ltd. (2007) 7 NWLR (Pt.1034) 466; Ubwa *v.* Tiv Traditional Council (2004) 11 NWLR (PL 884) 427 referred to.] (Pp. 539, paras. B-D; 550, paras. C-F)

33. *On Effect of null decision of court –*

If a decision is a nullity, it cannot confer jurisdiction on same court or tribunal or any other court or tribunal. In this case, the tribunal's ruling of 9th September 2015 was a nullity. That alone could have deprived the Court of Appeal of jurisdiction over any appeal against the judgment of the tribunal if the election petition was not time bound under the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the time to remit the case to the tribunal had lapsed. (P. 539, paras. D-G)

34. *On Scope of right to fair hearing –*

A proper interpretation or construction of the provision of section 36(1) of the Constitution of the Federal Republic of

Nigeria, 1999 (as amended) shows that the right to fair hearing extends beyond merely affording the parties a hearing but also includes a proper consideration and determination of the issues canvassed by the parties before the court. But the court cannot consider the issues canvassed, without hearing parties. So, where a court of law, without hearing parties, proceeds to consider the issues in a matter and delivers judgment, it is clear that the parties were denied fair hearing. (P. 550, paras. F-H)

35. *On Effect of denial of fair hearing -*

Once there is a denial of fair hearing as guaranteed under section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the whole proceedings becomes vitiated, null and void. [*Ojengbede v. Esan* (2001) 18 NWLR (PL 746) 771; *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 58) 587; *Wilson v. A.-G., Bendel State* (1985) 1 NWLR (Pt. 4) 572 referred to.] (P. 551, paras. A-C)

36. *On Duty on claimant for declaratory relief to succeed on strength of own case –*

Where a party seeks declaratory reliefs, the burden is on him to succeed on the strength of his own case and not on the weakness of the defence (if any). Such relief will not be granted, even on admission made by the adverse party. But in this case, the tribunal and the Court of Appeal made much of the fact that the witnesses called by the appellant were discredited under cross-examination and therefore found their evidence unreliable, which gave further impetus to the 1st and 2nd respondents' case. [*Emenike v. P.O.P.* (2012) 12 NWLR (Pt. 1315) 556; *Dumez Ltd. v. Nwakhoba* (2008) 18 NWLR (Pt.1119)

361; Ucha v. Elechi (2012) 13 NWLR (Pt.1317) 330 referred to.]
(/'. 535, paras. F-H)

37. On Proof of crime -

Where the commission of a crime by a party to a proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt and the burden of proof is on the person who asserts the commission of crime. In this case, the 1st and 2nd respondents made serious allegations of crime in their petition but they failed to prove their allegations. Further, they did not join the alleged perpetrators of the alleged crimes as parties to their petition. [Abubakar v. Yar 'Adua (2008) 19 NWLR (Pt.1120) 1; Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1; Omoboriowo v. Ajasin (1984) 1 SCNLR 108; Kakih v. P.D.P. (2014) 15 NWLR (Pt.1430) 374 referred to.] (Pp. 533, paras. E G; 536, paras. B-C)

38. On When Supreme Court will interfere with concurrent findings of fact by lower courts –

The evaluation of evidence and ascription of probative value thereto are the primary duties of the trial court, which had the singular opportunity of seeing and hearing the witnesses testify and an appellate court would ordinarily not interfere. Also, the Supreme Court would not interfere with concurrent findings of fact by two lower courts unless it is shown that the findings are perverse, or not based on a proper and dispassionate appraisal of the evidence, or that there is an error either of law or fact, which has occasioned a miscarriage of justice. In this case, the tribunal and the Court of Appeal were unduly influenced by the alleged failure of officials of the

Independent National Electoral Commission (INEC) to adhere to INRC's manual, guidelines and directives on the exclusive use of the Smart Card Reader machines for accreditation of voters and on hearsay evidence, and thereby made wrong conclusions. In the circumstance, the Supreme Court ought to interfere with the concurrent findings of the tribunal and the Court of Appeal. [Ogoala v. State (1991) 2 NWLR (Pt. 175) 509; Saleh v. B.O.N. Ltd. (2006) 6 NWLR (Pt.976) 316; Agbaje v. Fashola (2008) 6 NWLR (Pt.1082) 90 referred to.] (Pp. 533-534, paras. G-A; 537, paras. A-C)

39. On Difference between admissibility and probative value of document and considerations for determining either-
There is a difference between the admissibility of a document and its probative value. Admissibility is based on relevance, while probative value depends on relevance and proof. In effect, a piece of evidence has probative value if it tends to prove an issue. Furthermore, estimating the value to be attached to a statement rendered admissible by the Evidence Act, regard must be had, *inter alia*, to all the circumstances from which any inference can reasonably be drawn to the accuracy or otherwise of the statement. [A.C.N. v. Lamido (2012) 8 NWLR (1303) 560; Buhari v. I.N.E.C. (2008) 19 NWLR (Pt.1120) 246; Belgore v. Ahmed (2013) 8 NWLR (Pt.1355) 60 referred to.] (Pp. 522-523, paras. F-F)

Per KEKERE-EKUN, J.S.C. at pages 523-524, paras. G-A:

"What is evident from the excerpts of the testimony of PW49 above is that exhibit A9 cannot be conclusive proof

of the number of accredited voters at the election. The witness acknowledged that there are circumstances when the Card Reader may not read a voter's PVC, in which, case incident forms are used. No incident forms were tendered by the 1st and 2nd respondents. Secondly (hat there was an arbitrary 6-week cut-off date set by INEC for the upload of data to the INEC database. Thirdly, as observed by learned senior counsel for the appellant, there was nothing to show that at the time the 1st and 2nd respondents applied for exhibit A9, all the data from the Card Readers used in the election had been fully uploaded. It is equally interesting to note that exhibit A9 contains a figure of 293,072 accredited voters, which is contrary to the pleading in paragraph 20 of the petition that "not more than 292,878 voters were accredited"."

40. *On Probative value of document tendered by person who has limited knowledge of its contents and was not its maker -*

Where the maker of a document is not called to testify, the document would not be accorded probative value, notwithstanding its status as a certified public document. In this case, though exhibit A9 was admissible, it was not prepared by PW49 who tendered it in evidence. Further, PW49 was not in a position to testify on how the Smart Card Reader machines functioned during the election in Rivers State. (Pp. 522-523, paras. G-A)

41. *On Effect of failure to affix seal and stamp on court process filed by counsel -*

The failure to affix the Nigerian Bar Association (NBA) approved seal and stamp on a process does not render it nullity and void. Such act of omission is an irregularity that

can be cured by an application for extension of time and a deeming order. In this case, when the issue of lack of NBA approved seal and stamp on the petition was raised, the respondent's counsel made an oral application to affix his seal and stamp on the petition. [*Yaki v. Bagudu (2015) 18 NWLR (Pt. 1491) 288 referred to.*] (*P. 512, paras. A-B*)

42. NOTABLE PRONOUNCEMENT:

- (a) *On Need to commend the Independent National Electoral Commission for introducing Smart Card Reader machines in the conduct of elections in Nigeria*

Per KEKERE-EKUN, J.S.C. at page 525, para. A:

"I had stated earlier in this judgment that INEC is to be commended for the innovation of the Card Reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of "one man one vote" by preventing multi-voting by a voter."

- (b) *On Nature of Smart Card Reader machines and functions of in conduct of election -*

Per I. T. MUHAMMAD, J.S.C. at page 540, paras. D-H:

"My Lords, let it be appreciated from the outset that Smart Card Reader Machine or simply Card Reader (SCRM for short), is an innovation in our electoral process. It was not known, or rather, it was never put in practice before in our political development. From my general reading and my comprehension of the literature surrounding the Smart Card Reader Machine, it

appears to me and, put in a concise form, that the Smart Card Reader Machine is a technological device set up to authenticate and verify, on election day, a Permanent Voter's Card (PVC) issued by INEC. Smart Card Reader Machine is designed to read information contained in the embedded chip of the Permanent Voter's Card (PVC) issued by INEC to verify the authenticity of the PVC and also carry out a verification of the intending voter by matching the biometrics contained from the voter on the spot with the ones stored on the PVC.

INEC's motive, which became public in introducing the technologically-based device, barring any technical mishap, breakdown or malfunction, was to ensure a credible, transparent, free and fair election for the country."

(c) *On Need to amend Electoral Act, 2010 to incorporate the use of smart card reader machines in elections –*

Per E T. MUHAMMAD, J.S.C. at page 547, paras. E-H:

"In conclusion, I must commend INEC for its introduction of the Smart Card Reader Machine. I must, at the same time, draw attention of the authorities that be, that there is dire need, because of the importance and relevance of the Smart Card Reader Machine, in this our 21st Century of technological development, to recognise the indispensability of the use of the Smart Card Reader Machine in our electioneering processes. But, till today, voting through the voters Register, supersedes any other technology that may be introduced, through Guidelines or Manuals. To this effect, it is my humble suggestion that the earlier the better, INEC/any other relevant authority takes steps to recommend to the National Assembly, further

amendment to the Electoral Act 2010 (as amended) by incorporating in the Act, the use of the Smart Card Reader Machine in future elections."

Nigerian Cases Referred to in the Judgment:

A.-G., Anamhira State v. A.G., Fed. (2005) 9 NWLR (Pt.931) 572

A.C.N. v. Lanudo (2012) 8 NWLR (Pt. 1303) 560

A.C.N, v. Nyako (2015) 18 NWLR (Pt. 1491) 352

Abuhakar v. Yar'Adua (2008) 19 NWLR (Pt. 1120) 1

Adeigbe v. Kusimo (1965) All NLR 248

Adisa v. Oyinwola (2000) 10 NWLR (Pt. 674) 116

Agbaje v. Eashola (2008) 6 NWLR (Pt.1082) 90

Akinfosile v. Ajose (1960) SCNLR 447

Alalade v. Awodovin (1999) 5 NWLR (Pt. 604) 529

Amaechi v. I.N.E.C. (2008) 5 NWLR (Pt. 1080) 227

Ambode v. I.N.E.C. (Unreported) Appeal No. CA/L/LP/ GOV/762A/2015 of 26/8/2015

Anyanwu v. Uzonuaka (2009) 13 NWLR (Pt.1 159) '145

Audi, v. I.N.E.C. (No. 2) (2010) 13 NWLR (Pt.1212) 456

Awolowo v. Shagari (1979) 6-9 SC 51

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416

Bamaïyi v. State (2001) 8 NWLR (Pt. 715) 270

Belgore v. Ahmed (2013) 8 NWLR (Pt. 1 355) 60

Buhari v. E.N.E.C. (2008) 19 NWLR (Pt. 1 120) 246

Buhari v. Obasanjo (2005) 13 NWLR (Pt.941) 1

Buhari v. Obasanjo (2005) 2 NWLR (14.910) 241

Buhari v. Yusitf (2003) 14 NWLR (Pt. 841) 446

Daggash v. Bulama (2004) 14 NWLR (Pt. 892) 144

Dangana v. Usman (2013) 6 NWLR (Pt. 1349) 50

Daniel v. EN.E.C. (2015) 9 NWLR (Pt. 1463) 113
Dumez Ltd. r. Nwakhoba (2008) 18 NWLR (Pt. 1 119) 361
Egwu v. Obasanjo (1999) 7 NWLR (Pt.611) 355
Ehuwa v. O.S.E.E.C. (2006) 10 NWLR (Pt. 1012) 544
Ejiogu v. Irona (2009) 4 NWLR (Pt. 1132) 513
Elabanjo v. Dawodu (2006) 15 NWLR (Pt. 1001) 115
Emeje v. Positive (2010) 1 NWLR (Pt. 1174) 48
Emenike v. P.D.P. (2012) 12 NWLR (Pt. 1315) 556
Emezi v. Osuagwu (2005) 12 NWLR (Pt.939) 340
Fayemi v. Oni (2010) 17 NWLR (Pt. 1222) 326
H.D.P v. EN.E.C. (2009) 8 NWLR (Pt.1 143) 297
Eluruna v. Modibbo (2004) 16 NWLR (Pt.900) 487
Hassan v. Aliyu (2010) 17 NWLR (14.1223) 547
Ibrahim v. Barde (1996) 9 NWLR (Pt.474) 513
Igbeke v. Emordi (2010) 11 NWLR (It. 1204) 1
Kakih v. P.D.P. (2014) 5 NWLR (Pt.1430) 374
Kalgo v. Kalgo (1999) 6 NWLR (Pl.606) 639
Kayili v. Yilbuk (2015) 7 NWLR (Pt. 1457) 26
Kolawole v. Folusho (2009) 8 NWLR (Pt. 1143) 338
Kubor v. Dickson (2013) 4 NWLR (Pl.1345) 534
Labour Party v. Wike (Unreported) Appeal No. CA/A/ LP 17492/2015 of 21/9/2015
M.P.P.P. v. I.N.E. C. (No.1) (2015) 18 NWLR (Pt. 1491)207
Madukolu v. Nkemdilim (1962) 2 SCNLR 341
Momoh v. Olutu (1970) 1 All NLR 117
N.U.R.T.W. v. R.T.E.A.N. (2012) 10 NWLR (Pt. 1307) 170
Ngige v. Aktmyili (2012) 15 NWLR (Pt. 1323) 343
Nobis-Elendu v. I.N.E. C. (2015) 16 NWLR (Pi. 1485) 197
Nwankwo v. Yar'Adua (2010) 12 NWLR (Pt. 1209) 518
Nwobodo v. Onoh (1984) 1 SCNLR 1
Ogbuanyinya v. Okudo (No.2) (1990) 4 NWLR (Pt.146) 551

Ogbuinya v. Okudo (2001) FWLR (Pt.72) 1987
Ogoala v. State (1991) 2 NWLR (Pl.I75)509
Ojengbede v. Esau (2001) 18 NWLR (Pt. 746) 771
Ojogbue v. Nnubia (1972) 6 SC 127
Ojokolobo v. Alamu (1987) 3 NWLR (Pt.61) 377
Ojukwu v. Yar'Adua (2009) 12 NWLR (Pt .1154) 50
Okereke v. Umahi (Unreported) SC.1004/2015 delivered on
5/2/2016
Okpanum v. S.G.E. (Nig.) Ltd. (1998) 7 NWLR (Pt. 559) 537
Oloruntoba-Ojo v. Abdulraheem (2009) 13 NWLR (Pt. 1157) 83
Omisore v. Aregbesola (2015) 15 NWLR (14.1482) 205
Omoboriowo v. Ajasin (1984) 1 SCNLR 108
Opobiye v. Muniru (2011) 18 NWLR (Pt.1278) 387
Olapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587
Ovunwo v. Woko (2011) 17 NWLR (Pt. 1277) 522 *P.D.P. v. I.N.E.C.*
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Sokoto State Govt v. Kamdex (Nig.) Ltd. (2007) 7 NWLR (Pt.1034)466
Taiwo v. Adegboro (2011) 11 NWLR (Pt.1259) 562
Tarzoor v. ioraer (2016) 2 NWLR (Pt. 1500) 463
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U.B.A. v. Ozigi (1994) 3 NWLR (Pt.333) 385
Ubwa v. Tiv Area Traditional Council (2004) 1 1 NWLR (Pt. 884) 427
Ucha v. Elechi (2012) 13 NWLR (Pt.13 17) 330
Usman Dan Fodio University v. Kraus Thompson Ltd. (2001) 15 NWLR
(Pt. 736) 305

Utteh v. Slate (1992) 2 NWLR (Pt.223) 257
Uwazurike v.A.-G., Fed. (2007) 8 NWLR (Pt. 1035) 1
Uzuda v. Ebigah (2009) 15 NWLR (Pt. 1163) 1
Wilson v. A.-G., Bendel State (1985) 1 NWLR (Pt. 4) 572
Woluchem v. Gudi (1981) 5 SC 291
Yabatech v. M.C. & D. Ltd. (2014) 3 NWLR (Pt.1395) 616
Yahaya v. Dankwambo (2016) 7 NWLR (Pt. 1511) 284
Yaki v. Bagudu (2015) 18 NWLR (Pt. 1491) 288

Foreign Cases Referred to in the Judgment:

Subramaniam v. Public Prosecutor (1956) 1 W.L.R. 965
Macfoy v. United African Company (1961) 3 WLR 1405

Nigerian Statutes Referred to in the Judgment:

Constitution of the Federal Republic of Nigeria, 1999 (as amended),
Ss. 36(1), 285(3)(4)(6)(7) and 294(1)(2); Sixth Schedule para. 2(1)
Electoral Act, 2010 (as amended) Ss. 10(2), 12(1) 21,49(1)(2),
52(1)(b), 85(1). 95, 133(10(a)(b), 137(1), 138(1)(b), 145(2); First
Schedule paras. 6,7, 8(3), 9,25(2), 27(1), 54 Electoral Act, Ss. 138(1)(b)
& (2) and 153 Evidence Act, 201 1,S. 135(1) Evidence Act, Ss.
84(2)(5), 104, 111
Legal Practitioners Act. Cap. L11, Laws of the Federation of Nigeria,
2004, S. 12
Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation
of Nigeria, 2004. Ss. 96, 97, 98 and 99

Nigerian Rules of Court Referred to in the Judgment:

Federal High Court (Civil Procedure) Rules, O. 6, rr. 12, 13,
14, 15 and 16

Books Referred to in the Judgment:

Manual for Election Officials 2015

The Approved Guidelines and Regulations made by INEC
Appeal:

This was an appeal against the decision of the Court of Appeal which affirmed the judgment of the Rivers State Governorship Election Tribunal and dismissed the appellant's appeal. The Supreme Court, in a unanimous decision, allowed the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: Mahmud Mohammed, C.J.N. (*Presided*); Ibrahim Tanko Muhammad, J.S.C.; Nwali Sylvester Ngwuta, J.S.C.; Kumai Bayang Aka'ahs, J.S.C; Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C. (*Read the Leading Judgment*); John Inyang Okoro, J.S.C; Amiru Sanusi, J.S.C.

Appeal No.: SC.1002/2015 *Dale of Judgment:* Friday, 12th February 2016 *Names of Counsel:* Emmanuel C. Ukala SAN; Okey Wali, SAN; Prof, Epiphany C. Azinge SAN; D.C DeNwigwe SAN and Eberechi Adele, SAN (*with them*, Dr. Z. Adango, Esq.; Emeka Ichokwu, Esq.; Nelson Worgu, Esq.; Edmund Mark, Esq.; Mark S. Agwu, Esq.; Erastus Awortu, Esq.; Vitalis Ajoku, Esq.; Osima Ginah, Esq.; O.J. Iheko [Miss]; Dike Udenna, Esq.; Yunusa Akanbi, Esq.; William Atanbi, Esq.; Somoni Daopu, Esq.; Afam Okeke Esq. and Emmanuel Mark, Esq.) - *for the Appellant*

Chief Akin Olujinmi, SAN; Chief Adeniyi Akintola, SAN; Alhaji Lasun Sanusi, SAN; Funke Aboyade, SAN (*with them*, Ifcanyi Egwasi, Esq.; Olumide Olujinmi,

Esq.; Akinsola Olujinmi, Esq.; Akinyemi Olujinmi, Esq.; Olufemi Atetedaiye, Esq.; Anne Achu [Mrs.]; Ayodcle Akisanya Esq.; Yusuf Anikulapo, Esq.; Kcemi OdegbamF Fatogbe [Mrs.]; Oluwole Ilori, Esq.; Oluseyi Adetanmi, Esq.; Olajide Loye Esq., Abayomi Abdulwahab Esq.; Olukayode Ariwoola Jnr. Esq.; Christian Okoh, Esq.; Antonia Omoyemi Balogun [Mrs.]; Ricardo Ebikade, Esq.; Ifcoluwa Ajani [Miss]; Ifcdolapo Yejide Esan [Ms]; Ademola O. Owolabi, Esq.; Tolulope Adebayo [Miss]; Oladcle Oyelami, Esq.; Levi Nwoye, Esq.; Henry Odili; H.A. Bello; E.N. Ebete and Sahecd Smart Akingbade) - *for the 1st Respondent*

Yusuf Ali, SAN; Emeka Ngige, SAN; K.K. Eleja, SAN (*with them*, Alh. A.K. Adey, Esq; Prof. Wahab Egbcwole; Ayo Olanrewaju, Esq.; M.I. Hanafi, Esq.; Mas'ud Alabelewe, Esq.; Lawrence John, Esq.; S.A. Oke, Esq.; Alex Akoja, Esq; Onyeka Obiajulu, Esq.; P.I. Ipkegbu [Mrs.]; K.O. Lawal, Esq.; H.O. Sulaiman [Miss]; Emeka Okeakpu, Esq.; A.O. Usman, Esq.; A.B. Eleburuike, Esq.; Tejumola Opejin (Miss) and Musa Ahmed, Esq.) - *for the 2nd Respondent*

Dr. Onyechi Ikpeazu, SAN; Ighodalo Imadegbelo SAN; Ken Njemanze, SAN (*with them*, Alex Ejiesieme, Esq.; Obumneme Ezconu, Esq.; Onyinye Anumonye, Esq.; Emeka Nri-Ezedi, Esq.; Nkiru Frank Mmegwa; Tobechukwu Nweke, Esq.; Martin Nwokocha, Esq.; Nwachukwu Ibegbu Esq.; Obinna Onya Esq.; Obiora Aduba Esq.; Nwamaka Ofoegbu [Miss] and Ogechi Ogbonna, Esq.) - *for the 3rd Respondent* Chief Wole Olanipekun, SAN; Chief Chris Uche, SAN; Chief Ifedayo Adedipe, SAN; Joe Agi, SAN, Gordy Uche, SAN

(with them, Usman O. Sule, Esq.; Raymond Anyawata, Esq.; Aderemi A. Abimbola, Esq.; Olabode Olanipekun, Esq.; Kanayo Okafor, Esq.; Aisha Aliyu [Mrs.]; Uchenna Ugonabo [Miss]; Bolarinwa Awujoola, Esq.; I.E. Briggs [Miss]; Vanessa Onyemauwa [Miss]; Adebayo Majekolagbe, Esq.; Olakunle Lawal, Esq.; Blessing Akinsehinwa, Esq.; James Ebbe, Esq.; Chukwudifu Mbnmali, Esq.; Francis Nsiegbonam, Esq.; Naeemah Goji, Esq.; Emmanuel Rukari, Esq.; Uzoma Nwosu-Ihcme, Esq.; Ibisio Elimira Briggs, Esq.; and J. Oblac, Esq.) - for the Appellant in respect of all the process.

Court of Appeal:

Division of the Court of Appeal from which the appeal was brought: Court of Appeal, Abuja

Names of Justices that sat on the appeal: Abubakar D. Yahaya, J.C.A. (Read the Leading Judgment); Tani Y. Hassan, J.C.A.; M. Mustapha, J.C.A.

Appeal No.: CA/A/EIT/413^c/2015

Date of Judgment: Saturday, 5th September 2015

Names of Counsel: Chief Wole Olanipckun SAN, Ifedayo Adcdipe SAN, Ibisio Briggs (Mrs.), A. Majekolagbe and J. Siyirdon - for the Appellant

*Chief A. Olujimi SAN - for the 1st and 2nd Respondents
Chief A. Akintola, SAN and Emeka Ngige, SAN (with them, Prof. Wahab Egbewolc, S. A. Okc, O. Olujimi, A. Olujimi, O. M. Etedaye, A. Abdulwahab, E. Sam Ibrahim [Miss], O. Obiajulu.A. O. Usman.Awo O. Oyelami.Alex Ejesieme - for the 3rd Respondent*

E. C. Ukala SAN, D. Udonna and D. Samoru - for the 4th Respondent

Tribunal:

Name of the Tribunal: Governorship Election Tribunal,
Rivers State

Names of Members: Ambursa, J. (*Chairman*); Leha, J.
(*Member*) and Taiwo, J. (*Member*)

Petition No: EPT/RV/GOV/04/15

Date of Judgment: Friday, 31st July 2015

Counsel:

Emmanuel C. Ukala SAN; Okey Wali, SAN; Prof. Epiphany C. Azinge
SAN; D.C. DeNwigwe SAN and Eberechi Adele, -v. SAN (*with them*,
Dr. Z. Adango, Esq.; Emcka Iehokwu, Esq Nelson Worgu, Esq.; Edmund
Mark, Esq.; Mark S. Agwu, Esq.; Erastus Awortu, Esq.; Vital is Ajoku,
Esq.; Osima Ginah, Esq.; O.J. Ihcko J Miss J; Dike Udenna, Esq.; Yunusa
Akanbi, Esq.; William Alanbi, Esq.; Somoni Daopu, Esq.; Afam Okeke
Esq. and Emmanuel Mark, Esq.) - *for the Appellant*

Chief Akin Olujinmi, CON, SAN; Chief Adeniyi Akintola, SAN; Alhaji
Easun Sanusi.SAN; Eunkc Aboyade, SAN (*with them*, Ifeanyi Egwasi,
Esq.; Olumide Olujinmi, Esq.; Akinsola Olujinmi, Esq.; Akinyemi
Olujinmi Esq.; Olufemi Atetedaiye, Esq.; Anne Achu [Mrs.]; Ayodele
Akisanya Esq.; Yusuf Anikulapo, Esq.; Kemi Odcgbami-Eatogbe [Mrs.];
Oluwole Ilori. Esq.; Oluseyi Adetanmi, Esq.; Olajide Eoye Esq., Abayomi
Abdulwahab Esq.; Olukayodc Ariwoola Jnr. Esq.; Christian Okoh, Esq.;
Antonia Omoycmi Balogun (Mrs.); Ricardo Ebikade, Esq.; Ifcoluwa Ajani
[Miss]; Ifedolapo Yejide Esan [Ms]; Ademola O. Owolabi. Esq.; Tolulope
Adebayo [Miss]; Oladele Oyelami, Esq.; Levi Nwoye, Esq.; Henry Odili;
H.A. Bello; E.N. Ebete and Saheed Smart Akingbade) - *for the 1st
Respondent*

Yusuf Ali, SAN; Emeka Ngige, SAN; K.K. Eleja, SAN (*with them*, Alh. A.K. Adey, Esq; Prof. Wahab Egbcwole; Ayo Olanrewaju, Esq.; M.I. Hanati, Esq.; Mas'ud Alabelewe, Esq.; Lawrence John, Esq.; S.A. Okc, Esq.; Alex Akoja, Esq; Onyeka Obiajulu, Esq.; P.I. Ipkegbu [Mrs.]; K.O. Lawal, Esq.; H.O. Sulaiman [Miss]; Emeka Okeakpu, Esq.; A.O. Usman, Esq.; A.B. Eleburuiké, Esq.; Tcjumola Opcjin [Miss] and Musa Ahmed, Esq.) - *for the 2nd Respondent* Dr. Onyechi Ikpeazu, SAN; Ighodalo Imadegbelo SAN; Ken Njemanze, SAN (*with them*, Alex Ejiesieme, Esq.; Obumnemc Ezeonu, Esq.; Onyinye Anumonye. Esq.; Emeka Nri-Ezedi, Esq.; Nkiru Frank Mmegwa; Tobechukwu Nweke, Esq.; Martin Nwokeocha, Esq.; Nwachukwu Ibegbu Esq.; Obinzna Onya Esq.; Obiora Aduba Esq.; Nwamaka Ofoegbu [Miss] and Ogechi Ogbonna, Esq.) - *for the 3rd Respondent* Chief Wole Olanipckun, SAN; Chief Chris Uche. SAN; Chief Ifedayo Adedipe, SAN; Joe Agi, SAN, Gordy Uche, SAN (*with them*, Usman O. Sule, Esq.; Raymond Anyawata, Esq.; Aderemi A. Abimbola, Esq.; Olabode Olanipekun, Esq.; Kanayo Okafor, Esq.; Aisha Aliyu [Mrs.]; Uclienna Ugonabo A j A [Miss]; Bolarinwa Awujoola, Esq.; I.E. Briggs [Miss]; Vanessa Onyemauwa [Miss]; Adebayo Majekolagbe, Esq.; Olakunle Eawal, Esq.; Blessing Akinschinwa, Esq.; James Ebbe, Esq.; Chukwudifu Mbamali, Esq.; Francis Nsiegbunam, Esq.; Naeemah Goji, Esq.; Emmanuel Rukari, Esq.; Uzoma Nwosu-Iheme, Esq.; Ibiso Elimira Briggs, Esq.; and J. Oblae, Esq.) - *for lire Appellant in respect of all the process.*

KEKERE-EKUN, J.S.C. (Delivering the Leading Judgment):

This appeal was heard on 27th January, 2016 after hearing submissions from learned counsel. I pronounced my judgment allowing the appeal and adjourned till today to give my reasons for allowing the appeal. I now proceed to do so.

This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 16th December 2015 affirming the judgment of the Rivers State Governorship Election Tribunal (hereinafter referred to as the tribunal) delivered on 24th October 2015, which nullified the election and return of the appellant as Governor of Rivers State and ordered the conduct of a fresh election.

Election into the office of Governor of Rivers State was conducted by the 3rd respondent (INEC) on 11th and 12th April 2015. The appellant, who was sponsored by the 4th respondent (PDP) was returned elected, having scored the majority of lawful votes cast. The 1st respondent also contested the election on the platform of the 2nd respondent (APC).

The 1st and 2nd respondents were dissatisfied with the return of the appellant and consequently filed a petition before the tribunal on the following grounds:

- "(i) That the 2nd respondent was not duly elected by majority or highest number of lawful votes cast at the election;
- (ii) That the election of the 2nd respondent was invalid and unlawful by reason of substantial non-compliance with the provisions of the Electoral Act, 2010 (as amended). Manual for Election Officials 2015 as well as the 1st respondent's 2015 General Elections Approved Guidelines and Regulations,
- (iii) The election was invalid by reason of corrupt practices."

They sought the following reliefs:

- "(i) That it may be determined and thus determined that the 2nd respondent, Wike Ezenwo Nyesom was not duly elected or returned by the majority of lawful

votes cast at the Governorship election in Rivers State held on 11th and 12th April, 2015.

- (ii) That it may be determined and thus determined that the said election and the return of the 2nd respondent, Wike Ezenwo Nyesom, are void by acts which clearly violate and breach various provisions of the Electoral Act (as amended), including but not limited to rigging and manipulation of election results, unprecedented acts of violence, thuggery, abduction, coercion of opponents, non-compliance with the provisions of the Electoral Act, manual for election and the guidelines etc. committed at the towns, villages, settlements, wards and polling stations aforementioned, as well as unlawful interference in the electoral process by political office holders.
- (iii) That it may be determined and thus determined that the results of the Governorship election for Rivers State held on 11th and 12th April, 2015 for the entire Rivers State *save Eleme Local Government Area, Wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt Local Government Area* as declared and announced by the 1st respondent be nullified.
- (iv) That a fresh election in all the polling Units and Wards of Rivers State be conducted by the 1st respondent.
- (v) Any other appropriate relief(s) that this Honourable Tribunal may deem fit to grant in the circumstances of this petition." (Italics mine).

Upon being served with the petition, the appellant (as 2nd respondent) filed and gave notice of preliminary objection along with his reply to the petition. By the preliminary

objection he challenged the competence of the petition and the jurisdiction of the tribunal to entertain it. The appellant filed a further three applications raising the earlier objection and in addition challenging the competence of the petitioners' reply and witness statements on oath. The 1st and 2nd respondents joined issues with the appellant in respect of all the processes. After hearing the applications, the tribunal ruled that it would consider the issues canvassed along with the substantive case. The appellant was aggrieved by this decision and appealed to the court below in respect of the ruling on the motion filed on 30/6/2015 only.

While the appeal was pending, the tribunal ordered and conducted pre-hearing and pre-trial conference and a pre-trial conference report was drawn up and signed by the tribunal as then constituted by Hon. Justice Mu'azu Abdulkadir Pindiga as Chairman. Before trial commenced, His Lordship Pindiga, J. was removed and the panel re-constituted by the lion. President of the Court of Appeal with Hon. Justice Suleiman M. Ambursa as the new Chairman.

The re-constituted panel began hearing evidence immediately on 5/9/2015. While hearing at the Tribunal was going on, the Court of Appeal delivered its ruling on the interlocutory appeal and directed the tribunal to "immediately resolve the issue of the *locus standi* of the petitioners and the service of the originating processes, raised before it but which were not decided upon as yet." (See pages 1993 - 1994 Vol. 3 of the record).

In compliance with this order, the newly constituted panel with Ambursa, J as Chairman delivered the ruling on 9/9/2015. In compliance with another order of the Court of Appeal in favour of the 4th respondent, the tribunal delivered another

ruling on the same 9/9/2015 striking out several paragraphs of the petition, particularly paragraphs wherein allegations of crime were made against known and unknown individuals and security agencies, who were not parties to the petition. The tribunal also made a consequential order barring or restricting the calling of evidence relating to such allegations in the case.

At the hearing, the 1st and 2nd respondents called 56 witnesses (including subpoenaed witnesses) and tendered electoral and other documents which were admitted in evidence. The appellant called 24 witnesses and tendered numerous documents while the 3rd respondent called 16 witnesses. The 4th respondent did not call any witness but tendered documents from the Bar. At the conclusion of the trial and after considering the written addresses of learned counsel on both sides, the tribunal delivered its judgment on 24/10/2015 wherein it allowed the petition and nullified the election and return of the appellant on grounds of substantial non-compliance with the Electoral Act. The appellant was dissatisfied with the decision and appealed to the court below, which on 16/12/2015 dismissed the appeal and affirmed the judgment of the tribunal.

Not surprisingly, the appellant is still dissatisfied and has filed the instant appeal. The notice of appeal filed on 29/12/2015 contains 20 grounds of appeal. The appellant and 1st and 2nd respondents duly exchanged briefs of argument.

In the appellant's brief settled by Emmanuel C. Ukala, SAN filed on 8/1/2016, the following issues were submitted for determination:

"i. Was the Court of Appeal right when it failed to appreciate that the "ruling" of the election Tribunal given on the 9th day of September 2015 signed by

Hon. Justice S.M. Ambursa relied on by the Court of Appeal to arrive at the conclusion that the election Tribunal considered and resolved all the issues raised in the appellant's motions filed on 30/06/2105, 01/08/2015 and 17/08/2015 respectively was not competent and valid?

(Distilled from ground 3 of the appellant's ground of appeal)

- ii. Was the Court of Appeal right when it came to the conclusion that the appellant's constitutional right to fair hearing was not breached by the Election Tribunal? (Distilled from grounds 1, 2 and 4 of the appellant's ground of appeal)
- iii. Was the Court of Appeal right when it came to the conclusion that the Election Petition meant for service out of jurisdiction, subject matter of the appeal, was competently issued and served such as to cloth the Election Tribunal with the necessary jurisdiction to entertain the same? (Distilled from grounds 5 and 6 of the appellant's grounds of appeal). Did the Court of Appeal come to the right conclusion when it held that the Election Petition to which no stamp and seal of the Nigerian Bar Association ^ was affixed was cognizable and capable of being entertained and determined? (Distilled from ground 7 of the appellant's grounds of appeal).
- v. Was the Court of Appeal right when it came to the conclusion that the 1st and 2nd respondents/petitioners had the *locus standi* to present the 1-lection Petition subject matter of the appeal? (Distilled from ground 8 of the appellant's grounds of appeal).

- vi Was the Court of Appeal right when it sustained the reliance placed by the election Tribunal on the Card ^ Reader Report tendered in evidence by the petitioners and admitted as exhibit 'A9'? (Distilled from grounds 13 and 15 of the appellant's grounds of appeal).
- vii. Was the Court of Appeal right when it came to the conclusion that the documents tendered by D the petitioners were not documentary hearsay and documents that were merely dumped on the Election Tribunal and were capable of being relied on for the purpose of proving the Election Petition? (Distilled from grounds 9 and 10 of the appellant's ground of appeal).
- viii. Was the Court of Appeal right when it came to the conclusion that the petitioners' ground for the petition which included non-compliance with Manual for Election Officials 2015 and General Elections Approved Guidelines and Regulations was within the purview of section 138(1)(b) of the electoral Act, 2010 (as amended)? (Distilled from ground 11 of the appellant's grounds of appeal).
- ix Was the Court of Appeal right when it came to the G conclusion that there was no conflict between the provisions of sections 49 and 52(1)(b) of the electoral Act 2010 (as amended), on the one hand and the J Manual for Election Officials, 2015 and the Approved Guidelines and Regulations made by INFC for the 11 election and accordingly that failure to follow the Manual or Guidelines have the effect of rendering the election void? (Distilled from grounds 12, 16 and 1 8 of the appellant's grounds of appeal)
- x. Was the Court of Appeal right when it failed to apply to the facts of the present case, the decisions of the Supreme Court in the case of *Kakih v. P.D.P.* (2014) 5 NWLR (Pi. 1430) 377 and *Ucha v. Elechi* (2012) 13 NWLR (Ft.1317) 330 among others

regarding the onus, method and standard of proof in election cases involving allegations of non-compliance with the provisions of the electoral Act? (Distilled from ground 19 of the appellant's grounds of appeal.

- xi. Was the Court of Appeal right when it came to the conclusion that the evidence in the election petition was properly evaluated by the Election Tribunal and that the petitioners were entitled to judgment? (Distilled from Grounds 14, 17 and 20 of the appellant's grounds of appeal),"

The 1st respondent's brief was settled by Chief Akin Olujinrni, CON, SAN. Therein he formulated 8 issues for determination while in the 2nd respondent's brief settled by Yusuf Ali, SAN live issues were distilled for determination.

The appellant filed replies to the 1st and 2nd briefs. The 3rd and 4th respondents did not file any briefs in this appeal as they have also filed separate appeals in SC. 1(101/2015 and SC. 1003/2015 wherein they also seek the reversal of the decision of the court below.

After a perusal of the notice and grounds of appeal and the issues formulated by the parties. I find the appellant's issues apt for the determination of the appeal. Some of the issues will be considered together where appropriate.

Arguments on the Issues

Issues 1 and 2

Issues 1 and 2 are concerned with the competence of the ruling of the Tribunal delivered on 9th September 2015 signed by Ambursa, J. who did not participate in the hearing of the application that gave rise to the said ruling.

Learned senior counsel for the appellant. E.C. Ukala. SAN, submitted that when the issue of the competence of the ruling delivered on 9/9/2015 was raised at the court below, that court failed to make any pronouncement on the issue and Failed to address the appellant's contention that since

Ambursa, J. was not competent to sign and deliver the ruling, it meant in effect that the issue relating to the issuance and service of the originating processes had not been resolved. He submitted that in the face of a clear breach of duty by the court below to consider and pronounce upon the competence of the ruling, this court ought not to allow the judgment of the court to stand. Reliance was placed on *Samba Pet Ltd v. U.B.A. Plc* (2010) 5-7 SC (Pt. II) 20 at 23; *Ojogbne v. Nnubia* (1972) 6 SC 127 at 132.

Learned senior counsel noted that the panel that heard the motion consisted of Hon. Justice Mu'azu Abdulkadir Pindiga as chairman and that on 29/7/2015 it delivered a ruling resolving issue 1 out of the 8 issues for determination and deferred issues 4-8 to be taken along with the petition. That upon the directive of the Court of Appeal, after a successful appeal to that court, that the ruling on issues 4-8 should be delivered, the tribunal, under the chairmanship of Amhursa. J who had assumed duty during the pendency of the appeal, proceeded to deliver a ruling which was signed by him as chairman. 17

Relying on the authority of *Sokoto State Govt v. Kamdex (Nig.) Ltd.* (2007) 7 NWLR (Pt. 1034) 466 at 492-493, learned counsel submitted that once a judicial official who did not participate in the hearing participates in the delivery of the judgment or ruling, the judgment or ruling becomes void *ab initio* notwithstanding the fact that the majority of the judges or judicial officers who delivered the judgment or ruling participated in the hearing. He also cited the cases of: *Ubwa v. Tiv Area Traditional Council* (2004) 11 NWLR (Pt. 884) 427 at 436 A & 437; *Runka v. Katsina Native Authority* (1950) 13 WACA 98; *Adeigbe v. Kusimo* (1965) 1 All NLR 248 at 263. F

With regard to the second issue learned senior counsel argued that the ruling delivered on 9/9/2015 is null and void and therefore no decision at all and remains non-existent as if it had never been given. Apart from contending that the ruling is a nullity he also argued that the ruling only dealt with the issue of *locus standi* and the service of the originating

processes as directed by the Court of Appeal and did not deal with issues 4-8 of the motion paper. He therefore contended that the court below could not properly rely on the said ruling as the tribunal's determination of all (he issues raised in the appellant's motion including issues 4 8 which were H never considered by (he tribunal. He submitted that the tribunal also failed to consider its motion filed on 1/8/2015 challenging the competence of the written statements on oath accompanying the petition as well as the motion filed on 17/8/2015 challenging the competence of the petitioner's reply to the appellant's reply to the petition which were also deferred to be taken along with the petition. He argued that the failure to consider and determine the applications and issues constitutes a violation of the appellant's right to fair hearing.

Learned senior counsel disagreed with the view of the court below that the mere moving and hearing of the motion satisfied the requirement of fair hearing. He submitted that the right to fair hearing goes beyond merely affording the parties a hearing but necessarily includes a proper consideration and determination of the issues canvassed by the parties. He relied on: *Ogee Ovunwo v. Woko* (2011) LPELR-2841 (SC); (2011) 17 NWLR (Pt. 1277) 522 and *Uzuda v. Ebigah* (2009) SC. 348/2002; (2009) 15 NWLR (Pt. 1163.) 1.

In reaction to the above submission, learned senior counsel for the 1st respondent Chief Akin Olujinmi, SAN noted that the ruling delivered by the tribunal on 9/9/2015 was delivered by Hon. Justice Leha who was one of the members of the tribunal headed by I Ion. Justice Pindiga, when the motion was heard. He noted that the appellant did not appeal against the ruling and continued the hearing of the petition by cross-examining the petitioner's witnesses and tendering documents.

On the competence of the tribunal under Ambursa, J, to have delivered the ruling he relied in paragraph 25(2) of the 1st Schedule to the (electoral Act, 2010 (as amended), which provides as follows:

""(2) If the Chairman of the tribunal or the Presiding Justice of the court who begins the hearing of an election petition is disabled by illness or otherwise, the hearing may be recommenced and concluded by another Chairman of the Tribunal or Presiding Justice of the court appointed by the appropriate authority."

He submitted that in this case hearing of the petition had not commenced. That the tribunal as previously constituted had only concluded (he pre hearing session. Relying on the decision of this court in *P.D.P. v. I.N.E.C.* (1999) 11 NWLR (It.626) 200 at 261. B-C, he submitted that where the literal construction of a statute will lead to absurdity the court should lean in favour of the purpose approach to avoid the absurdity. He submitted that the order of the Court of Appeal to deliver the ruling was directed at the tribunal and that the signing of the ruling by the chairman along with the 2 other members who actually participated in the hearing was only to fulfil the quorum of the tribunal.

He distinguished the authorities cited on the ground that no provision equivalent to paragraph 25(2) of the 1st Schedule of the Electoral Act was considered in any of the cases, He also noted that election petitions are *sui generis* and that the law ordinarily applicable to civil cases may not apply, He referred to the case of *Ngige v. Akunyili* (2012) 15 NWLK (Pt. 1325) 543 at 304. He argued that in the instant case there is no challenge to the power or authority of the President of the court of Appeal to constitute and reconstitute tribunals.

He maintained that there was no breach of the appellant's right to fair hearing as the lower court gave proper consideration to his complaint at pages 2943 to 2945 of Vol. 5 of the record and submitted that at the point the application was argued it is deemed that all issues relating to the application had been canvassed before the court. It is also contended that even if some issues were left out by the tribunal when delivering its ruling and the lower court did not advert its mind to those issues, the appellant has not shown that this has occasioned a miscarriage of justice, bearing in

mind that it is not every error that leads to a reversal of the judgment complained of. He cited the case of *Bamaiyi v. The State* (2001) 4 SC (Pt.1) 18 at 25; (2001) 8 NWLR (Pt. 715) 270.

Learned senior counsel for the 2nd respondent, Yusuf Ali, SAN, made submissions substantially similar to learned senior counsel for the 1st respondent. He argued in addition that the appellant, not having challenged the interlocutory ruling within 14 days as required by law could no longer raise the issue, He also maintained that the tribunal considered all the appellant's complaints in its Final judgment and that there was no breach of the appellant's right to fair hearing.

In reply on points of law to the submissions of learned counsel for the 1st respondent learned senior counsel argued that the delivery of the ruling in the circumstances of this case was in breach of section 27(1) of the 1st schedule to the Electoral Act and section 285(4) of the 1999 Constitution to effect that the two members who participated in the hearing could not form the necessary quorum to deliver the ruling and the chairman who did not participate in the hearing could not constitute a quorum with any other member since he did not participate in the hearing. On the time limit for appealing against an interlocutory decision, it was also argued that the objection taken to the grounds of appeal at the court below which was overruled on the ground that the ground touch on the issue of jurisdiction and that there is no appeal against that finding. Similar submissions were made in the reply to the 2nd respondent's brief.

Resolution of Issues 1 and 2

The crux of these two issues is the validity of the ruling of the tribunal delivered on 9/9/2015 by a panel constituted with Ambursa, J. as chairman when the said chairman did not participate in the hearing of the application.

I must state at the outset that the contention of learned senior counsel for the two respondents that the appellant failed to appeal against the interlocutory ruling within 14 days as required by law and thus cannot

now raise it in this court, is misconceived. As rightly pointed out by learned counsel for the appellant, the grounds of appeal touching on these issues were challenged before the court below by way of preliminary objection, which was overruled on the grounds that they raise the issue of jurisdiction. The law is well settled that the issue of jurisdiction is so fundamental to adjudication that it can be raised at any stage of the proceedings and even for the first time on appeal to this court. See: *Usman Dan Fodio University v. Kraus Thompson Ltd.* (2001) 15 NWLR (Pt. 736) 305; *Elabanjo v. Dawodu* (2006) 15 NWLR (Pt. 1001,) 115-116.G-A; *P.D.P. v. Okorochoa* (2012) 15 NWLR (Pt. 1323) 205. The issues are therefore competent before this court.

It is not in dispute that the panel of the tribunal that heard the application dated 30/6/2015 was different from the Panel that sat on 9/9/2015 when the ruling was delivered. By section 285(3) of the 1999 Constitution, the composition of the Governorship Election Tribunal shall be as set out in the Sixth Schedule to the Constitution. Paragraph 2(1) of the 6th Schedule provides that the Governorship Election Tribunal shall consist of a chairman and two other members, while section 285(4) of the Constitution provides that the quorum of an Election Tribunal established under the section shall be the Chairman and one other member.

It has been argued on behalf of the 1st and 2nd respondents that the delivery of the ruling by the tribunal headed by Ambursa J. was in compliance with the directive of the tribunal to deliver the ruling previously adjourned to be dealt with along with the main petition and that the signature of Ambursa, J was only appended to comply with the constitutional provision regarding quorum. That one of the tribunal members who participated in the hearing of the petition, Hon. Justice Leha, delivered the ruling. It is also contended that the provision of paragraph 25(1) of the 1st Schedule to the electoral Act was not applicable in the circumstances of this case, as the hearing had not commenced.

Section 294 (1) and (2) of the 1999 Constitution (as amended)

provides thus:

- "(i) Every court established under this Constitution shall deliver its decision in writing not later than Ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within Seven days of the delivery thereof.
- (2) Each Justice of the Supreme Court or of the Court of Appeal shall express and deliver his opinion in writing, or may State in writing that he adopts the opinion of any other Justices who delivers a written opinion: Provided that it shall not be necessary for all the Justices who heard a cause or matter to be present when judgment is to be delivered and the opinion of a Justice may be pronounced or read by any other Justice whether or not he was present at the hearing."

It is evident from this constitutional provision that the intention of the Framers of the Constitution is that where a panel of Justices hears a cause or matter, each of them must express and deliver his opinion in writing. Such written opinion may however be delivered by any other justice of the court on behalf of a Justice who participated in the hearing but is unavoidably absent. The opinion delivered must be the opinion of the Justices who participated in the hearing. Even though the provision of section 294(1) and (2) refers specifically to Justices of the Supreme Court and the Court of Appeal, it is my view that the principle is applicable to any court or tribunal that sits in a panel of two or more members.

In the instant case, Pindiga, J as Chairman with, Leha, J and Taiwo, J heard the application. The ruling delivered on 9/9/2015 signed by Ambursa, J as chairman and Leha and Taiwo, JJ as members, reviewed the submissions of learned counsel made at the hearing of the application before dismissing same. There is no doubt that Ambursa, J could not have

formed an opinion on the submissions of learned counsel, which he did not hear. In the eyes of the law only Leha, J and Taiwo, J delivered the ruling.

The signature of Ambursa, J on the ruling was invalid, in the case of *Sokoto State Govt v. Kamdex Nig. Ltd.* (2007) 7 NWLR (Pt. 1034) 466 a similar situation arose where a Justice of the Court of Appeal who did not participate in the hearing of the appeal wrote and delivered a judgment therein. The judgment so delivered was declared a nullity. See also: *Ubwa v. Tiv Traditional Council* (2004) 11 NWLR (Ft. 884) 427.

The remaining two members of the tribunal who participated in the hearing of the application and delivered opinion therein could not form a quorum in the absence of the chairman who participated in the hearing. The tribunal was not properly constituted for the delivery of the ruling and therefore lacked the competence to do so. See *Madukolu v. Nkemdilum* (1962) 2 SCNLR 341.

I therefore agree with learned counsel for the appellant that the ruling delivered on 9/9/2016 was without jurisdiction. It is a nullity. It follows that the appellant's right to fair hearing was breached as there is no resolution of the issues submitted for determination in the said application.

Having found that the ruling delivered on 9/9/2015 was a nullity, it constitutes a good ground for setting aside the entire proceeding before the tribunal. However, having regard to the fact that this is an election matter, which is *sui generis* and time bound and the fact that it would not be possible for the parties to return to the tribunal having regard to the provisions of section 285(6) & (7) of the 1999 Constitution, I deem it proper, in the interest of justice to consider the appeal on its merit.

I therefore resolve issues 1 and 2 in the appellant's favour.

Issues 3 and 4

Issues 3 and 4 concern the competence of the issuance and service of the Election Petition outside the jurisdiction of the tribunal in purported breach of sections 96, 97, 98 of the Sheriffs and Civil Process Act, Cap. S. 6 LFN. 2004 and the effect of noncompliance with the stamp and seal requirement

as prescribed by the Rules of Professional Conduct for Legal Practitioners made pursuant to section 12 of the Legal Practitioners Act, Cap. L11, LFN, 2004.

Arguments on the Issues

E.C. Ukala, SAN, for the appellant argued that paragraphs 6, 7, 8 and 10 of the 1st Schedule to the Electoral Act are concerned with the issuance and service of an election petition within the State or territorial jurisdiction of the tribunal. It is further contended that where the originating process is to be served outside the State or Territorial jurisdiction of the tribunal, the Sheriffs and Civil Process Act, is applicable. Learned senior counsel argued that there is nothing in the Electoral Act that excludes recourse to Sheriffs and Civil Process Act and that in law what is not expressly prohibited is permissible.

He submitted further that paragraph 54 of the 1st Schedule incorporates and adopts the provisions of the federal High Court Rules and makes them applicable to election petition cases subject only to the provisions of the Electoral Act itself. On this premise he posited that the provision of the federal High Court (Civil Procedure) Rules, including Order 6 rules 13, 14, 15, and 16 are applicable in this case. He submitted that paragraph 54 of the 1st Schedule permits the application of the federal High Court Rules "with such modification as may be necessary to render them applicable t having regard to the provisions of the Act, and therefore the alleged inconsistency as contended by the lower court between the 30 days stipulated by section 99 of the Sheriffs and Civil Process Act for entering appearance and the 21 days limited under paragraph 10(2) of the 1st Schedule, is misconceived. He distinguished the authority of *Oloruntoba-Ojo v. Abdulraheem* (2007) SCN 118: (2009) 13 NWLR (Pt. 1157) 83 relied on by the lower court in this regard. He also contended that section 19 of the Sheriffs and Civil Process Act, which defines "court" to "include" the High Court of the federal Capital Territory of Abuja or of the State, is a clear indication that the definition is not exhaustive and an

Election Tribunal falls within the definition. He submitted that the court below erred in holding that the originating processes were issued and served in compliance with due process and that the tribunal had jurisdiction to entertain the petition.

On the issue of non-compliance with the stamp and seal requirement, learned senior counsel submitted that at the court below, when the issue was raised, learned senior counsel for the 1st respondent, Chief Akin Olujinmi, SAN applied orally to affix his Legal Practitioner's stamp on the petition. That the oral application was opposed by learned counsel for the appellant. The issue was raised after learned counsel had adopted their briefs of argument

The court reserved judgment thereafter. It is the appellant's contention that in the judgment delivered on 16/12/2015, the court below did not grant the application to affix the stamp and did not make any pronouncement on the issue. Learned senior counsel argued that since the lower court did not cure the defect, the petition remained non-cognizable in law. He relied on the recent decision of this court in *Yaki v. Bagudu* (2015) LPELR- 25721 (SC); (2015) 18 NWER (Pt. 1491)288.

In reply on the issue of service, Chief Akin Olujinmi, SAN, for the 1st respondent submitted, relying on *Buhari v. Yusuf* (2003) 14 NWLR (Pt. 841) 446, that election petitions are *sui generis* and therefore considerations which may be applicable to an ordinary civil proceeding may not necessarily apply to an election petition proceeding. He submitted that the applicable law, to election proceedings is the Electoral Act, 2010 (as amended). He referred to Parts VIII and IX of the Act and the Schedule thereto which contain specific provisions relating to election petition proceedings. He also referred to section 145(2) of the Act which empowers the President of the Court of Appeal to issue Practice Directions to election Tribunals and Paragraph 54, of the first Schedule to the Act. He submitted that there is nothing in the provisions that makes any provisions of the Sheriffs and Civil Process Act applicable to election petitions. On the

definition of "courts" as contained in section 95 of the Act. He submitted that it is restricted to the High Court of the FCT, Abuja and states of Nigeria and that there is no reference to a tribunal. Reference was also made to section 133(1)(a) & (b) of the Electoral Act, which distinguishes between a "court" and an "election tribunal". He submitted further that the Federal High Court (Civil Procedure) Rules did not incorporate the Sheriffs and Civil Process Act. He relied on the maxim: "*Expressio unius est exclusio alterius*" and the case of *Buhari v. Yusuf* (2004) 1 LPR, at 25; (2003) 14 NWLR (Pt. 841) 446 per Uwaifo, JSC. He also argued that paragraph 45(sic:54) of the 1st schedule did not incorporate the federal High Court Rules wholesale but made them applicable subject to appropriate modification with regard to the Provisions of the Act. It was also argued that some provisions of the Sheriffs and Civil Process Act are at variance with the provisions of the Electoral Act, such as section 99 on time allowed a defendant to respond to a writ of summons *vis a vis* sections 12(1) & 10(2) of the Electoral Act.

It is also contended that election petition proceedings being *sui generis* with its own rules, any rule of procedure not specifically mentioned in the electoral Act cannot be brought in or used as obtains in ordinary civil matters. Relying on the case of *Nwankwo v. Yar'adua* (2010) 3 SC (Pt.III) 1; (2010) 12 NWLR (Pt. 1209) 518, he submitted that the Federal High Court Rules are subject to the provisions of the electoral Act and in the event of a conflict, the provisions of the electoral Act will prevail and that the Federal High Court Rules would only apply where there is a *lacuna* in the electoral Act.

He referred to paragraphs 7 and 8(3) of the First Schedule to the electoral Act and submitted that by virtue of paragraph 8(3) of the First Schedule, failure of or improper service shall not vitiate the proceedings of an election petition, He argued that since there is no *lacuna* in the electoral Act, there is no need for recourse to the Sheriffs and Civil Process Act or the Federal High Court Rules.

On the non-use of the seal and stamp seal of the NBA, learned senior counsel submitted that based on the decisions of this court in *Yarki v. Bagudu (supra)* and *M.P.P.P. v. INEC & Ors.* SC.665/2015: (No.1) (2015) 18 NWLR (Pt. 1491) 207, the requirement of the NBA stamp and seal is not a compulsory requirement for the filing of a process in court and that the stamp and seal Policy had not come into effect as of 3rd May 2015 when the petition was filed. He submitted that the non-compliance is a mere irregularity which the appellant had waived, having contested the petition on the merit. On when a party should raise objection based on procedural irregularity, he cited the case of: *Soude v. Abdullahi* (1989) 4 NWLR (Pt.116) 387 at 405, E. He also referred to paragraph 53 of the First Schedule on the effect of non-compliance. He submitted that the appellant has not suffered any miscarriage of justice by the non-compliance.

I need not repeat the submissions of learned senior counsel to the 2nd respondent, which are substantially the same as those of learned counsel for the 1st respondent.

In reply on points of law, learned senior counsel for the appellant contended that service of the petition was effected at the National Head Office of the 3rd and 4th respondents at Abuja as opposed to being served on agents of the two respondents within jurisdiction and therefore Order 6 rule 12 of the Federal High Court Rules which permits service on local agents of parties carrying on business within the jurisdiction did not apply.

He also submitted that the concept of waiver does not apply as the appellant had been consistent in challenging the competence of the issuance and service of the originating processes right from his reply to the petition up till this stage.

It is well settled that election matter are sui generis with a special character of their own quite different from ordinary civil or criminal proceedings. They are governed by their own statutory provisions regulating their practice and procedure. See: *Hassan v. Aliyu* (2010) 17 NWLR (Pt. 1223] 547; *Ehuwa v. O.S.I.E.C.* (2006) 10 NWLR (Pt.1012)

544.

Section 145 of the Electoral Act provides:

- "1. The rules of procedure to be adopted for election petitions and appeals arising therefrom shall be as set out in the First Schedule to this Act.
2. The President of the Court of Appeal may issue practice directions to election tribunals."

Paragraph 54 of the First Schedule also provides thus:

"Subject to the express provisions of this Act, the practice and procedure of the tribunal or the court in relation to an election petition shall be as nearly as possible, similar to the practice and procedure of the Federal High Court in the exercise of its civil jurisdiction and the Civil Procedure Rules shall apply with such modifications as may be necessary to render them applicable having regard to the provisions of this Act, as if the petitioner and the respondent were respectively the plaintiff and the defendant in an ordinary civil action." (Italics supplied)

Specifically, any recourse to the Federal High Court (Civil Procedure) Rules must be "subject to the express provisions" of the Act. It follows that it is only where the Electoral Act or First Schedule does not provide for a particular situation that reference would be made to the Federal High Court (Civil Procedure) Rules with necessary modification.

Paragraphs 6, 7 & 8 of the First Schedule provide as follows:

- "6. For the purpose of service of an election petition on the respondents, the petitioner shall furnish the Secretary with the address of the respondents' abode or the addresses of places where personal service can be effected on the respondent.
- 7(1) on the presentation of an election petition and payment of the requisite fees, the Secretary shall forthwith -

- (a) cause notice of the presentation of the election petition, to be served on each of the respondents;
 - (b) post on the tribunal notice board a certified copy of the election petition; and
 - (c) set aside a certified copy for onward transmission to the person or persons required by law to adjudicate and determine the election petition.
- (2) in the notice of presentation of the election petition, the Secretary shall state a time, not being less than five days but not more than seven days after the date of service of the notice, within which each of the respondents shall enter an appearance in respect of the election petition.
- (3) in fixing the time within which the respondents are to enter appearance, the secretary shall have regard to
- (a) the necessity for securing a speedy hearing of the election petition; and
 - (b) the distance from the Registry or the place of hearing to the address furnished under subparagraph (4) of paragraph 4 of this Schedule.
- 8(1) Subject to subparagraphs (2) and (3) of this paragraph, service on the respondents -
- (a) of the documents mentioned in subparagraph (1)(a) of paragraph 7 of this Schedule; and
 - (b) of any other documents required to be served on them before entering appearance, shall be personal.
- (2) Where the petitioner has furnished, under paragraph 6 of this Schedule, the addresses of the places where personal service can be effected on the respondents and the respondents or any of them cannot be found at the place or places, the tribunal or court on being satisfied, on an

application supported by an affidavit showing that all reasonable efforts have been made to effect personal service, may order that service of any document mentioned in subparagraph (1) of this paragraph be effected in any ways mentioned in the relevant provisions of the Civil Procedure Rules for effecting substituted service in civil cases and that service shall be deemed to be equivalent to personal service.

(3) The proceedings under the election petition shall not be vitiated notwithstanding the fact that -

(a) the respondents or any of them may not have been served personally or;

(b) A document of which substituted service has been effected pursuant to an order made under subparagraph (2) of this paragraph did not reach the respondent, and in either case, the proceedings may be heard and continued or determined as if the respondents or any of them had been served personally with the document and shall be valid and effective for all purposes."

These provisions, to my mind as well as paragraphs 9 & 10 of the First Schedule, speak to the special nature of ejection petitions where time is of the essence. I am of the view that paragraphs 6, 7 & 8 adequately provide for the issuance and service of election petitions and do not require further foray into the Federal High Court (Civil Procedure) Rules. I am inclined to agree with learned senior counsel for the respondents that the provisions of section 97, 98 & 99 of the Sheriffs and Civil Process Act are not applicable to an election petition and cannot be incorporated into the Federal High Court (Civil Procedure) Rules.

The provisions of section 99 of the Sheriffs and Civil Process Act, which gives a defendant not less than thirty days to respond to a writ of

summons is clearly in conflict with paragraph 10(2) of the First Schedule, which gives a respondent no more than twenty one days to file a reply to the petition. I am of the view that if it was the intention of the legislature to make specific rules governing service outside jurisdiction, it would have incorporated same in paragraphs 6 and/or 7 of the First Schedule.

I agree with the lower court that the issuance of the petition by the secretary of the tribunal in the circumstances of this case was competent.

With regard to the lack of NBA stamp and seal on the petition, refer to the recent decision of this court in: *Gen. Bello Sarkin Yarki v. Senator Abubakar Atiku Bagudu* in SC.722/2015 delivered on 13/11/2015; reported as *Yaki v. Bagudu* (2015) 18 NWLR (Pt. 1491) 288 when this court held that the failure to affix the approved seal and stamp of the NBA on a process does not render the process null and void. It is an irregularity that can be cured 'by an application' for extension of time and a deeming order. It is noteworthy that the issue was raised for the first time at the hearing of the appeal. Whereupon, learned senior counsel, Chief Akin Olujinmi, SAN made an oral application to affix his stamp and seal on the petition. Paragraph 53(2) of the first Schedule provides that an application to set aside an election petition or a proceeding resulting therefrom for irregularity or for being a nullity shall not be allowed unless made within a reasonable time and when the party making the application has not taken any fresh step in the proceeding after knowledge of the defect.

I am of the view that the issue was raised too late in the day and cannot, at this stage vitiate the petition. That would amount to enthrone technicality at the expense of substantial justice. See: *Abubakar v. Yar'Adua* (2008) 1 SC (Pt.II) 77 at 122 lines, 25 – 30; (2008) 18 NWLR (Pt. 1120) 1.

These issues are accordingly resolved against the appellant.

Issue 5

This issue concerns the *locus standi* of the 1st and 2nd respondents to present the petition, subject matter of the appeal on the ground of failure

to comply with section 21 of the Electoral Act which requires 21 days notice to be given to INEC before the conduct of primaries by a political party.

Argument on Issue 5

It is the appellant's contention that compliance with section 85(1) of the Electoral Act is fundamental and that non-compliance vitiates a candidacy.

E.C. Ukala, SAN for the appellant submitted that the candidate and political party which participated in an election as contemplated by section 137 of the Electoral Act must necessarily refer to and be limited to those who did so "*de jure*" in accordance with the law and not *mere de facto* candidacy on participation without lawful basis. On the distinction between "*de facto*" and "*de jure*" he relied on *Amaechi v. I.N.E.C.* (2008) 5 NWLR (Pt.1080) 227; *Labour Party v. Wike (Unreported)* Appeal No. CA/A/EPT/492/2015 delivered on 21/9/2015; *Ejiogu v. Irona* (2009) 4 NWLR (Pt. 1132) 513 at 561, B - D.

He urged the court to hold that the lower court erred in holding that the 1st and 2nd respondents had the necessary *locus standi* to constitute and maintain the petition before the tribunal.

In response, Chief Akin Olujinmi, SAN for the 1st respondent contended that (a) whether or not a person has *locus standi* is determined on the basis of the statement of claim (or petition as in the instant case). See: *Taiwo v. Adegboro & Anor.* (2011) 11 NWLR (Pt.1259) 562 at 579 - 580, A - B; (b) that the question of *locus standi* is only concerned with whether the plaintiff has sufficient interest in the subject matter of the dispute; (c) *locus standi* is never considered on the basis of the defence of a defendant; referring to section 137(1) of the Electoral Act which provides for the parties to an election petition, he submitted that both the 1st and 2nd respondents had the *locus standi* to present the petition being one of the candidates that participated in the election and the political party that sponsored him. He referred to the averments in the petition wherein the

votes credited to the candidates, including the 1st and 2nd respondents were pleaded. He relied on *Egwu v. Obasanjo* (1999) 7 NWLR (Pt.611) 355 at 384- 385 and *Kolawole v. Folusho* (2009) 8 NWLR (Pt.1143) 338 at 400, H.

Learned counsel submitted that even if the notice was short, the proper party to complain is INEC and not the candidate of a rival political party. He also contended that the issue, even if competently raised is a pre-election issue, which cannot qualify as a post election issue to be litigated before the tribunal. He submitted that the authorities of *Atai v. Dangana* (*supra*) and *Amaechi v. I.N.E.C.* (*supra*) are not, apposite in this case. He relied on the recent decision of this court in *Shinkafi v. Yari* in SC.907/2015 delivered on 8th January 2016, reported in (2016) 7 NWLR (Pt. 1511) 340 and submitted that even if there was non-compliance it is for INEC to apply the sanctions provided in section 86(4) of the Electoral Act and not for the appellant to complain.

Yusuf Ali, SAN, for the 2nd respondent made similar submissions. In addition, he submitted that the appellant cannot hide under section 85(1) of the Electoral Act to deny the 1st and 2nd respondents their right to bring the petition. He submitted that the appellant's complaint relates to the nomination of candidates and not qualification and therefore he ought to have filed a cross-petition rather than raising it in his defence.

Locus standi has been defined as the legal capacity to institute an action in a court of law. Where a plaintiff lacks *locus standi* to maintain an action, the court will lack the competence to entertain his complaint. It is therefore a threshold issue which affects the jurisdiction of the court. See: *Daniel v. I.N.E.C.* (2015) LPELR -SC.757/2013: (2015) 9 NWLR (Pt. 1463) 113; *Thomas v. Ulufosoye* (1989) 1 NWLR (Pt.18) 669; *Opobiyi & Anor. v. Layiwola Muniru* (2011) 18 NWLR (Pt.1278) 387 at 403. D - F.

It is also trite that in determining whether a plaintiff has the necessary locus to institute an action, it is his pleadings that would be considered by the court. The claimant must show sufficient interest in the

subject matter of the dispute. See: *Emezi v. Osuagwu* (2005) 12 NWLR (Pt.939) 340; *Momoh & Anor. v. Olotu* (1970) 1 All NLR 117; A.-G., *Anambra State v. A.-G., Federation & Ors.* (2005) 9 NWLR (Pt.931) 572.

As rightly submitted by learned senior counsel for the 1st respondent, section 137(1)(a) & (b) of the Electoral Act provides thus:

"(1) An election petition may be presented by one or more of the following persons-

(a) A candidate in an election;

(b) A political party which participated in the election."

Clearly, even at first glance, the 1st and 2nd respondents, being the candidate in the election and the political party that sponsored him respectively, have an interest in the subject matter of the petition.

Paragraphs 1, 2 & 3 of the petition bear this out:

- "1. Your 1st petitioner Hon. (Dr.) Dakuku Adol Peterside was the sponsored candidate of the 2nd petitioner, All Progressives Congress (hereinafter otherwise referred to as "APC") at the Rivers State Governorship election held on 11th and 12th April, 2015 in Rivers State and the 1st petitioner claims to have had a right to be returned at the election.
2. Your 1st petitioner was the candidate of APC at the aforementioned election of 11th and 12th April, 2015 and also participated fully in all the processes and stages leading to the election and has the legal right to be returned as the Governor of Rivers State.
3. The 2nd petitioner, All Progressives Congress (APC) is one of the registered political parties in Nigeria and the political party that sponsored the 1st petitioner in the election, subject matter of this action. Your petitioners state that the 2nd respondent was wrongfully declared the winner of the aforementioned election and unduly returned as the

Governor of Rivers State."

Beyond this, the issue has been fully settled by this court in its recent decision in: *Shinkafi v. Yari* SC.907/2015 delivered on 8/1/2016, reported in (2016) 7 NWLR (Pt. 1511) 340 and *Tarzoor v. Ioraer* SC.928/2015 delivered on 15/1/2016, reported in (2016) 3 NWLR (Pt. 1500) 463, that only INEC or a member of the political party concerned who is adversely affected as a result of the inadequate notice, is competent to complain of the inadequacy. The finding of the lower court affirming the *locus standi* of the 1st and 2nd respondents is unassailable. I find no reason to disturb it. This issue is resolved against the appellant.

Issues 6 & 7

These two issues are concerned with the evaluation of the documentary evidence by the tribunal and the affirmation of same by the court below.

Arguments on Issues 6 & 7

Learned senior counsel for the appellant, E.C. Ukala, SAN referred to the 'petitioners' pleadings in paragraphs 20, 788, 793 and 799 of their petition to the effect that only 292,878 voters were credited for the election, majority of whom were unable to vote due to unprecedented violence and exhibit A9, the Card Reader Report relied upon by them and the evidence of PW49 who testified on the operation of the Card Reader Machine. He argued that exhibit A9 which both lower courts heavily relied on amounts to documentary hearsay as it was not tendered by the maker; that being a computer printout and a public document, it was not duly certified in accordance with sections 104 and 111 of the Evidence Act; that having regard to the stages involved in the transfer and upload of data from the Card Reader to the INEC server, the certificate issued by Mrs. Essien in purported compliance with section 104 of the Evidence Act and the evidence of PW49 did not link exhibit A9 with the server thereby contravening section 84(2) & (5) of the Evidence Act. It is contended that exhibit A9 contradicts the case pleaded by the petitioners and contradicts

the evidence of PW53 and PW54. He noted that PW53 and PW54 testified to the effect that the figure relied on in stating the total number of accredited voters was the figure uploaded into the server and supplied by INEC at the time the petition was prepared, which in his view could not amount to proof that the data contained in till the card readers used in each of the polling stations was fully uploaded into the INEC server. He also argued that exhibit A9 is unknown to the electoral Act and Electoral Guidelines and the Manual.

Learned senior counsel contended that the two lower courts were wrong in holding that the "albatross" of INEC in Rivers State was the brazen disobedience in the use of Card Readers as, they failed to appreciate that exhibit A9 would at best provide evidence of electronic accreditation data, which was successfully uploaded before the server was shut down 6 weeks after the election and not evidence of the correct figure of voters who were successfully accredited by the Card Readers. He also submitted that the data from the Card Reader alone, without an examination of the voters Register cannot provide proof of accreditation or over voting at an election. He relied on: *Fayemi v. Oni* (2010) CA/IL/EPT/GOV/10 of 15/10/2010; (2010) 17 NWLR (Pt. 1222) 326 and *Awuse v. Odili* (2005) CA/PH/EPT/119/04 at 52; (2005) 16 NWLR (Pt. 952) 416-previous decisions of the lower court, which it ought to have been guided by. He argued further that although some voters' registers were tendered, no attempt was made to link them with the results tendered or with exhibit A9. Relying on several Court of Appeal decisions at page 23 of his brief, he submitted that the introduction of the Card Reader machine has not obviated the necessity to tender the Voters Register to establish accreditation, non-accreditation or over voting.

On the issue of dumping of exhibits on the tribunal and documentary hearsay, learned senior counsel submitted that exhibits A10, A282 – 300, A301, A303, A304, & A307 were tendered through witnesses who did not make them. Referring to section 37(a) & (b) of the Evidence

Act and the case of *Utteh v. The State* (1992) 2 NWLR (Pt.223) 257 at 273, F, he argued that the documents so tendered amounted to documentary hearsay and are therefore inadmissible. It maintained that notwithstanding the tendering of certified copies of the documents from the Bar, they are of no probative value in the absence of their makers being called as witnesses. He cited: *Belgore v. Ahmed* (2013) 8 NWLR (Pt.1355) 60 at 100; *Buhari v. I.N.E.C.* (2008) 19 NWLR (Pt. 1120) 246 at 391.

It was argued that in coming to the conclusion that being public documents, they were properly tendered from the Bar, the court below failed to advert its mind to the exception in section 105 of the Evidence Act. He argued that proof of the contents of the public document is not the same as proof of the truth of its contents, which can only be done through its maker. He submitted that once the makers of exhibits A9, A10, A12 - A31, A32 – A270, A271 - A281, A282 - A300, A301, A303 - A307, B30 and B31, which were tendered to prove the truth of their contents, were called to testify, those documents constitute inadmissible hearsay. He cited the case of *Subramaniam v. Public Prosecutor* (1956) 1 W.L.R. 965 at 969. He also maintained that the documents were dumped on the Tribunal as they, were not demonstrated by linking them to particular aspects of the petitioners' case, He relied on. *A.C.N. v. Nyako* (2013) All FWLR (Pt .686) 424 at 463 - 464; (2015) 18 NWLR (Pt. 1491) 352; *A.C.N. v. Lamido* (2012) 8 NWLR (Pt.1303) 560 at 584; *Ucha v. Elechi* (2012) All FWLR (Pt.625) 237; (2012) 13 NWLR (Pt.1317) 330 and several other authorities in support

He contended further that exhibit A9 was inadmissible for being made by a party interested at a time when proceedings were pending, contrary to section 83(3) of the Evidence Act and also for the fact that the document was not certified in compliance with sections 104 and 111 of the Evidence Act. He referred to: *Kubor v. Dickson* (2013) 4 NWLR (Pt. 1345) 534 at 579; *Omisore v. Aregbesola* (2015) 15 NWLR (Pt.1482) 205 at 294. Based on the foregoing, he submitted that the tribunal was not entitled to

reply on them for any purpose whatsoever and that the lower court was wrong to have upheld such reliance.

Chief Akin Olujinmi, SAN for the 1st respondent addressed these issues under 5 of his brief. He submitted that contrary to the submissions of learned senior counsel, E.C. Ukala, SAN, both lower courts found the documents to have been properly certified, pleaded and linked to relevant aspects of the petitioner's case through relevant witnesses. Relying on the case of *Saleh v. B.O.N* (2006) 6 NWLR (Pt.9761 316 at 317, he submitted that any official of a corporate body such as INEC can give evidence in respect of a transaction concerning the corporate body even if he was not present when the transaction was made, He submitted further that by the authority of *Nwobodo v. Onoh* (19M)1 SC 1 at 91; (1984) 1 SCNLR 1 election result forms made in the course of the election are admissible against the electoral body as admissions in favour of the petitioners having been made in the ordinary course of business by the Electoral body by its officials. He referred to sections 24(a) & 41 of the Evidence Act, 2011. He submitted further that by section 105 of the Evidence Act. copies of documents certified in accordance with section 104 may be produced in proof of the contents of public documents or parts of public documents of which they purport to be copies, He referred to the recent decision of this court in *Kayili v. Yilbuk & Ors* (2015) 2 SCM 161; (2015) 7 NWER (Pt. 1457) 26 to contend that even where a document is admitted in the absence of its maker, the court will consider the weight to be attached to it. He submitted that exhibits A303 and A307 are reports issued by INEC conveying its official position on the election it conducted, while exhibit A305 was: a report issued by a private election monitoring organization that monitored the election.

He submitted that the contents of public documents are deemed proved upon mere production without the necessity of calling the makers. He relied on: *Ogbuinya v. Okudo* (2001) FWLR (Pt.72) 1987 at 2001. He submitted that the exhibits, which are public documents (A2, A9, A10,

A300, A301, A303, A307, 830 and 831) substantially complied with the requirement of the law on certification and were therefore properly admitted and relied upon by the tribunal. He referred to: *Daggash v. Bulama* (2004) All FWLR (Pt.212) 1666 at 1710, A-B; (2004) 14 NWER (Pt. 892) 144.

He submitted that all the exhibits enjoy the presumption of G correctness, authenticity and regularity accorded them under sections 104, 105, 146, 167, & 168 of the Evidence Act. He submitted that PW54 (1st respondent in this appeal) testified and linked the documents tendered by the petitioners to their case and that the allegation of dumping is unfounded.

Yusuf Ali, SAN for the 2nd respondent submitted that the authority of *Utteh v. The State* (supra) is not applicable to the facts of this case, as all the documents in contention are certified true copies of public documents, which are admissible through any witness. He submitted that the authority of *Belgore v. Ahmed* (supra) is distinguishable from the facts of this case while the cases of *Hashidu v. Goje* (supra) and *Shell Development Co. Ltd. v. Otuko* (1990) 6 NWLR (Pt.159) 693 at 713 are Court of Appeal decisions. He submitted that in the absence of fraud, the content of documents tendered and admitted by the Tribunal cannot be contradicted or discredited by oral evidence, He relied on *Emeje v. Positive* (2010) 1 NWLR (Pt. 1174) 48 at 69; *Igbeke v. Emordi* (2010) 11 NWER (Pt.1204) 1 at 35; *Anyanwu v. Uzonuaka* (2009) 13 NWLR (Pt.1159) 445; *U.B.A. v. Ozigi* (1994) 3 NWLR (Pt.333) 385.

On dumping of exhibits, He submitted that the witnesses who tendered the 9 exhibits were eye witnesses and their reports were based on what they saw on the field and the exhibits were properly tied to the 1st and 2nd respondents' case. That the appellant did not utilize the opportunity he had of impugning the weight of the documents. Other submissions are similar to those of Chief Akin Olujinmi, SAN for the 1st respondent.

I shall refer to the appellant's replies to the 1st and 2nd respondents' submissions if necessary in the course of resolving these issues.

The case of the 1st and 2nd respondents at the tribunal that the appellant was not duly elected by majority of lawful votes cast was hinged on substantial non-compliance with the provisions of the Electoral Act, 2010 (as amended), the Manual for Election Officials 2015 and the 3rd respondent's 2015 General Elections Approved Guidelines and Regulations and also by reason of corrupt practices, which included thuggery, intimidation, harassment of voters, snatching of electoral materials, lack of result sheets, deliberate resort to manual accreditation to manipulate results, non collation of results at ward collation centres, arbitrary allocation of figures in electoral forms, etc.

A major aspect of the 1st and 2nd respondent's case before the tribunal as pleaded in paragraph 20 of the petition was that only 292, 878 voters were accredited for the election by the use of card reader machines whereas the result declared by the 3rd respondent showed that votes recorded (allotted or allocated) for the candidates were more than the accredited voters. It is averred in paragraph 788 of the petition that the petitioners would rely on relevant documents of the 1st respondent (INEC) showing the total number of accreditation per polling units and wards as captured in the INEC data base otherwise known as 'query log', In paragraph 798, reliance is placed on certified true copies of the uploaded and/or downloaded data from the smart card readers and/or their databases used for the said elections, it is further averted in paragraph 799 that out of the 292, 878 voters who were accredited, a majority were unable to cast their vote due to unprecedented violence, which characterized the voting exercise in the state.

It is not in dispute that the appellant was returned as the winner of the election with 1,029,192 votes. The pleadings of the 1st and 2nd respondents show that there is a serious allegation of non-accreditation, over voting and disenfranchisement, which in their view constituted

substantial non-compliance with the Electoral Act. The law is well settled that in order to prove over voting the petitioner must do the following:

1. Tender the voters register;
2. Tender the statement of results in appropriate forms which would show the number of registered accredited voters and number of actual votes;
3. Relate each of the documents to the specific area of his case in respect of which the documents are tendered;
4. Show that the figure representing the over-voting if removed would result in victory for the petitioner.

See: *Haruna v. Modibbo* (2004) 16 NWLR (Pt.900) 487; *Kalgo v. Kalgo* (1999) 6 NWLR (Pt .606) 639; *Audu v. INEC* (No.2) (2010) 13 NWLR (Pt.1212) 456; *Shinkafi v. Yari* (Unreported) SC.907/2015 delivered on 8/1/2016; (now reported in (2016) 7 NWLR (Pt. 1511) 340); *Yahaya v. Dankwambo* (Unreported) SC.979/2015 delivered on 25/1/2016; (new reported in (2016) 7 NWLR (Pt. 1511) 284).

Furthermore, where the ground for challenging the return of a candidate in an election is by reason of corrupt practices or noncompliance with the provisions of the Electoral Act, the petitioner must prove:

- (a) that the corrupt practice or non-compliance took place: and
- (b) that the corrupt practice or non-compliance substantially affected the result of the election.

See: *Yahaya v. Dankwambo* (supra); *Awoluwo v. Shagari* (1979) All NER 120; *Buhari v. Obasanjo* (2005) 2 NWER (Pt.9IO) 241 and sections 138(1)(b) and 139(1) of the Evidence Act, 2011.

The tribunal devoted a considerable portion of its judgment at pages 2690 - 2695 of Volume 4 of the record to the testimonies of PW49, PW53 and DW37 and Exhibits A9, A301, B30 and B31 tendered through them. At page 2694, the tribunal opined thus:

"We therefore consider any subsequent act of non-compliance with the contents of exhibits A301, 830, 831

and A9 on the efficacy of the card reader for the election as an act which will render the election a nullity. The public funds sacrificed in the procurement of the card readers is not for fun but to enhance the credibility of elections in Nigeria. That ought be held with esteem by all officers of the 1st respondent in the conduct of elections,"

Thereafter, it came to the following conclusion at page 2695:

"The evidence adduced by the petitioner in the testimony of their witnesses, the contents of the exhibits tendered which were linked to their case and the clear discrepancy in the number of votes accredited as in exhibit A9 and those in exhibit A 10 proved that the petitioners have succeeded in adducing credible evidence in support of the pleaded facts in their petition to call on the tribunal to consider the case of the respondents."

In resolving issue 6 at the court below, that court also at page 3010 Vol. 5 held:

"It was by this enormous powers conferred on INEC that the body introduced the Card Reader to bring sanity and sanctity into the electoral body The albatross around the neck of the Rivers State INEC is that it totally failed, neglected and refused to follow the guidelines as set out by the controlling body. The blatant and brazen disobedience of the Rivers State INEC officials cannot render the use of the Card Reader unlawful. The INEC Card Reader usage is well entrenched in the Electoral Act and Regulations by the authority with which INEC has been well endowed."

It would not therefore be out of place to say that both lower A courts placed considerable reliance on the testimony of PW49 and the Card Reader report (Exhibit A9) and exhibits A301, 830,831 in reaching the conclusion that the 1st and 2nd respondents had successfully proved the

alleged discrepancy between the number of voters accredited in exhibit A9 and those reflected in exhibit A10 (Form EC8E series), this court in a number of recent decisions has commended the introduction of the Card Reader in the 2015 elections by INEC. The court has noted however, that its function is solely to authenticate the owner of a voter's card and to prevent multi-voting by a voter and cannot replace the voters' register or statement of results in appropriate forms. See: *Shinkafi v. Yari (supra)*; *Okereke v. Umahi* (unreported) SC.1004/2015 delivered on 5/2/2015 at pages 31- 34.

It is worthy of note that at the point of tendering exhibit A9, FW49 an Assistant Director ICT with INEC, acknowledged that the report was in fact prepared by one Mrs. Eneua (sic: Mrs. Nnenna Essien), a member of staff in her unit. She admitted under cross-examination that she was not in Rivers State for the election and did not examine any of the card readers after the election. She stated that the machines were in Port Harcourt. She did not participate in any stage of accreditation of voters. She was certainly not in a position to testify as to how the card readers functioned during the election in Rivers State. Learned senior counsel for the 1st and 2nd respondents have contended that being a certified true copy of a public document tendered by a public officer, it represents the truth of its contents. The position of the law is that there is a difference between the admissibility of a document and the, probative value to be attached to it. Admissibility is based on relevance, while probative value depends not only on relevance but also on proof. Evidence is said to have probative value if it tends to prove an issue. See: *A.C.N, v. Lamido* (2012) 8 NWLR (1303) 560; *Buhari v. I.N.E.C.* (2008) 19 NWLR (Pt.1120) 246; *Belgore v. Ahmed* (2013) 8 NWLR (Pt.1355) 60 at 100, E-F. In *Belgore v. Ahmed (supra)* this court emphasized the fact that where the maker of a document is not called to testify, the document would not be accorded probative value, notwithstanding its status as a certified public document. Furthermore, in *Buhari v. INEC (supra)* at 391, it was held that in

estimating the value to be attached to a statement rendered admissible by the Evidence Act, regard must be had, *inter alia* all the circumstances from which any inference can reasonably be drawn to the accuracy or otherwise of the statement.

Exhibit A9 was tendered as conclusive proof of the number of accredited voters at the election. As noted earlier, PW49 did not participate at any stage of the election process in Rivers State and did not author exhibit A9. Under cross examination at pages 2360-2364 of Volume 4 of the record, she stated *inter alia*:

"I see exhibit A9. At page 136, I see a total of 293,072 as total accredited voters for the election. I know an incident form is issued to a voter when the card reader cannot successfully accredited (sic) a voter. It should have relationship with the number of failed accredited voters in the card reader report. The server (sic: server) was available for card reader data offload (sic: upload) for a period of 6 weeks after the conduct of the election.

... I wouldn't say that the server (sic) download was a continuous process and INEC said 6 weeks will be enough for everybody to obtain the report if he likes. ... It is true when there is no network, the data in the card reader cannot be offloaded.... The card reader is designed only to capture electronic accreditation.

... The cut off date is on the presumption that all information in the card reader would have been offloaded. We do not have documentation from ICT Rivers State that all the information have (sic) been offloaded. There are some factors that can prevent the reader from identifying the PVC. The major factor is that if the PVC is damaged the card reader will not be able to read it. ... The particulars in the PVC are the same particulars in the manual register. I

was not in Rivers State for the election."

What is evident from the excerpts of the testimony of PW49 above is that exhibit A9 cannot be conclusive proof of the number of accredited voters at the election. The witness acknowledged that there are circumstances when the Card Reader may not read a voter's PVC, in which case incident forms are used. No incident forms were tendered by the 1st and 2nd respondents. Secondly, that there was an arbitrary 6-week cut-off date set by INEC for the upload of data to the INEC database. Thirdly, as observed by learned senior counsel for the appellant, there was nothing to show that at the time the 1st and 2nd respondents applied for exhibit A9, all the data from the card readers used in the election had been fully uploaded. It is equally interesting to note that exhibit A9 contains a figure of 293,072 accredited voters, which is contrary to the pleading in paragraph 20 of the petition that "not more than 292,878 voters were accredited."

In upholding the decision of the tribunal, the lower court, at pages 3005 to 3010 of Volume 5 of the record, referred to the assessment of the oral and documentary evidence given by PW49, PW53 and DW37. The findings of the tribunal referred to dealt extensively with the directive of INEC via exhibit A308 (Guidelines (for the conduct of the 2015 election), exhibit A301 (Press Statement dated 2/4/2015), and exhibit 831 (circular dated 8/4/2015) and the failure of INEC officials to comply therewith.

The lower court went further to hold as follows at page 3008 of the record:

"My understanding of the above provision of the Electoral Act 2010, as amended, is that the act or omission of any Electoral Official of INEC, which is contrary to the provisions of the Electoral Act committed after instruction or directive of INEC to its officials concerned can be a ground for questioning the election and it comes under section 138(1)(b) of the Electoral Act, which is one of the grounds upon which the petition was predicated. A failure

to follow INEC's Manual and Approved Guidelines and Regulations constitutes direct violation of sections 49, 57, 58, 73, and 74 of the Electoral Act. ... The Manual and Approved Guidelines form an integral part of law and regulations for the conduct of election and INEC Officials must scrupulously and dutifully comply with it."

And further apt page 3009:

"Thus INEC Guidelines and Manual cannot be obeyed in breach of its provisions. Even exhibits B30, B31 and A301 the Press Release, Directive and Instruction of INEC to its officials are enough warnings and pointers that INEC meant it and wanted Smart Reader Card (sic) to be used in accreditation of voters for Governorship election in Rivers State."

I had stated earlier in this judgment that INEC is to be commended for the innovation of the Card Reader machine to bolster the transparency and accuracy of the accreditation process and to maintain the democratic norm of "one man one vote" by preventing multi-voting by a voter. Nevertheless, section 49(1) and (2) of the Electoral Act, 2010 (as amended) which provide for manual accreditation of voters is extant and remains a vital part of our Electoral Law. The section provides thus:

- "49(1) Any person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card.
- (2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate on the Register that the person has voted.

In the recent decision of this court in *Shinkafi v. Yari* (2019) 7 NWLR (Pt. 1511) 340 Okoro, JSC stated thus:

"My understanding of the function of the Card Reader

Machine is to authenticate the owner of a voter's card and to prevent multi-voting by a voter, I am not aware that the Card Reader Machine has replaced the voter's register or has taken the place of statement of results in appropriate forms."

Again. Nweze, JSC in *Okereke v. Umahi & Ors.* (Unreported) SC.1004/2015 delivered on 5/2/2016 reiterated the position thus at pages 33 -34:

"Indeed, since the Guidelines and Manual (supra), which authorized the use and deployment of the electronic Card Reader Machine, were made in exercise of the powers conferred by the Electoral Act, the said Card Reader cannot, logically, depose or dethrone the Voters' Register whose juridical roots are. Firmly embedded or entrenched in the selfsame Electoral Act from which it (Voter's Register), directly derives its sustenance and currency.

Thus, any attempt to invest it (the Card Reader Machine procedure) with such overarching pre-eminence or superiority over the Voters' Register is like converting an auxiliary procedure into the dominant procedure - A of proof, that is proof of accreditation."

In order to prove non-accreditation and/or over voting, the 1st and 2nd respondents were bound to rely on the Voters' Registers in respect of all the affected Local Governments. The Voters' Registers tendered were in respect of only 11 out of 23 Local Governments. They were tendered from the Bar as exhibits A271 - A281. No attempt was made to link them with exhibit A9. It is also noteworthy that Forms EC8A were tendered in respect of only 15 out of 23 Local Government Areas. An attempt was made to confront some of the defence witnesses with Forms EC8A (Exhibits A282 -A300) c to show that the number of accredited voters stated therein was in conflict with the number of accredited voters as per

exhibit A9. This cannot meet the required standard of proving over voting polling unit by polling unit. Furthermore, the Voters Register could not be jettisoned in the exercise.

In any event, as rightly submitted by learned counsel for the appellant, the tendering of Exhibits A9, A10, A12 - A31, A32 -A270, A271 - A281, A282 - A300, A301, A303 - A307, B30 and B31, from the Bar, without their makers being called, amounted to documentary hearsay and the tribunal and the lower court were wrong in placing reliance on them. I am of the view and I do hold that the tribunal and the lower court were unduly swayed by the INEC directives on the use of the card readers. As held by this court, the INEC directives, Guidelines and Manual cannot be elevated above the provisions of the Electoral Act so as to eliminate manual F accreditation of voters. This will remain so until INEC takes steps to have the necessary amendments made to bring the usage of the Card Reader within the ambit of the substantive Electoral Act.

These issues are accordingly resolved in favour of the appellant.

Issue 8

Argument on Issue 8

It is contended by E.C. Ukala, SAN that the ground of the petition which included non compliance with the Manual for Election Officials 2015 and General Elections Approved Guidelines and Regulations was outside the purview of sections 138(1)(b) of the Electoral Act, 2010 (as amended). He relied on the decision of this court in: *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50 at 121 and submitted that having regard to section 138(2) of the Electoral Act; an act or omission which is contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of election, but which is not contrary to the provision of the Act, shall not of it self be a ground of questioning the election. He submitted that the Act draws a distinction between the Electoral Act and any subsidiary legislation by INEC.

In response, Chief Akin Olujinmi, SAN for the 1st respondent referred to some recent decisions of the court of Appeal to the effect that reference to the Manual, Guidelines and Regulations in the ground of a petition alleging non-compliance with the Electoral Act does not make the ground incompetent. He relied on *H.D.P. v. I.N.E.C.* (2009) 8 NWLR (Pt.1143) 297 at 316 – 317 and 333. He distinguished *Ojukwu's* case (supra) on the ground that it was predicated on provisions of the 1999 constitution, which clearly took it outside the purview of the Electoral Act. He also referred to: *Ambode v. I.N.E.C.* (Unreported) CA/L/EP/GOV/762A/2015 delivered on 26/8/2015 by a full panel of the court of Appeal. He submitted further that there is no conflict between sections 49 and 52(1)(b) of the Electoral Act on the one hand and the provisions of the Manual and guidelines made pursuant to the provisions of the Electoral Act on the other. On interpretation of statutes and the need to read the statute as a whole, he relied on: *Ozonma Chidi Nobis-Elendu v. I.N.E.C. & Ors.* (2015) 6 SCM 117 at 137; (2015) 16 NWLR (Pt. 1485) 197. The submissions of learned senior counsel for the 2nd respondent are to similar effect.

Resolution of Issue 8

The golden rule of interpretation of statutes is that where the words used in a statute are clear and unambiguous they must be given their natural and ordinary meaning unless to do so would lead to absurdity or inconsistency with the rest of the statute. It was held *inter alia* in: *Ibrahim v. Barde* (1996) 9 NWLR (Pt .474) 513 at 517 B - C per Uwais, CJN (as he then was) that if the words of the statute are precise and unambiguous, no more is required to expound them in their natural and ordinary sense. He held further that the words of the statute alone, in such circumstance, best declare the intention of the lawmaker. See also: *Ojokolobo v. Alamu* (1987) 3 NWLR (Pt.61) 377 at 402, F - H; *Adisa v. Oyinwola & Ors.* (2000) 6 SC (Pt.II) 47; (2000) 10 NWLR (Pt. 674) 116; *Uwazurike & Ors. v. A.-G., Federation* (2007) 2 SC 169; (2007) 8 NWLR (Pt. 1035) 1. Section

138(1)(b) and (2) and 153 Electoral Act provide:

138(1) An election may be questioned on any of the following grounds, that is to say:

- (b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act.
- (2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.

153. The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof."

The above provisions appear to be quite clear and unambiguous. While the Electoral Commission is duly conferred with powers to issue regulations, guidelines or manuals for the smooth conduct of elections, by section 138(2) of the Act, so long as an act or omission regarding such regulations or guidelines is not contrary to the provisions of the Act itself, it shall not of itself be a ground for questioning the election. In the instant case, one of the complaints of the 1st & 2nd respondents is that there was deliberate non-use of the Card Reader machines in the election. However, as this court has held, the use of the Card Reader has not done away with manual accreditation provided for in section 49 of the Act.

It follows therefore that the inclusion of non-compliance with the Manual for Election Officials 2015 as well as INEC's 2015 General Elections Approved Guidelines in the circumstances of this case is improper. This issue is accordingly resolved in the appellant's favour.

Issue 9: Argument on the Issue

This issue raises the question as to whether failure to follow the Manual or Guidelines have the effect of rendering the election void and whether there is a conflict between sections 49 and 52(1) (b) of the Electoral Act on the one hand and the Manual for Election Officials 2015 and the Approved Guidelines and Regulations made by INEC. It is contended on behalf of the appellant that the requirement for biometric verification of a voter vide the Card Reader is a requirement of the Guidelines and Manual outside what is statutorily provided for in sections 9, 10 and 12 of the Electoral Act, which expressly set out the qualification for registration as a voter. He therefore posited that the verification of the biometrics of voters cannot be imposed by INEC as a condition precedent to valid accreditation of voters. He noted that while section 49 of the Electoral Act mandates a voter to present himself to the Presiding Officer at a polling unit, paragraph 2.4.1 -26 at pages 32 - 35 of the Manual compels a voter to present himself to the "APO III" (queue controller) for the polling unit or voting point. He is of the opinion that in effect the power and procedure vested in the Presiding Officer has been removed and vested in the Queue Controller. He contended that the several steps enunciated for verification and statistics in the manual under the card leader procedure are far more detailed than the two step process provided for in section 49 of the Act. He set out the procedures to be followed after accreditation and submitted that the right of a voter to be issued with a ballot paper as soon as his name is verified on the Register of Voters has also been removed. He contended that certain aspects of the electronic accreditation procedure, such as storing and uploading of the information verified by the card reader disable the voters and party agents from scrutinizing same to verify its accuracy. He contrasts this procedure with the openness of the procedure prescribed by section 49 of the Electoral Act and contends that it lends itself to manipulation.

In reaction, Chief Akin Olujinmi, SAN for the 1st respondent argued that there is no conflict as the powers vested on INEC cannot be

questioned and do not detract from the provisions of the Electoral Act. He submitted that the finding of the court below that the provisions of the Guidelines and Manual are complementary to one another should be accepted as the correct position.

Yusuf Ali. SAN made similar submissions and referred to the findings of the lower court on this issue, which he contended cannot be faulted. He rejected the submission that the card reader has introduced electronic voting and submitted that there is nothing in the card reader that diminishes voters from exercising their rights or from the provisions of section 49 of the Evidence Act.

Resolution of Issue 9

I must say that I am not in agreement with learned senior counsel for the appellant on this issue. Section 52(1)(b) of the Electoral Act prohibits the use of electronic' voting machine for the time being. It is pertinent to note that the Card Reader is used in the accreditation process, and not for voting. Furthermore, it has been acknowledged throughout this judgment that the innovation of the use of the card reader was to aid 'in the transparent conduct of elections. As noted by the court below at pages 2999 - 3000 of Volume 5 of the record, reproduced in paragraph 9.24 of the 2nd respondent's brief, section 57 of the Electoral Act provides INEC with authority to authenticate the identity of a voter when he presents himself to cast his vote. In the course of resolving issues 6, 7 and 8 I held that that failure to follow the Manual and Guidelines, which were made in exercise of the powers conferred by the Electoral Act cannot, in and of itself, render the election void. However, this should not be understood to mean that the innovation of the card reader is in conflict with relevant sections of the Electoral Act. This issue is accordingly resolved against the appellant.

Issues 10 & 11

Argument on the Issues

In respect of Issues 10 and 11 learned senior counsel for the appellant submitted that the lower court erred in failing to apply the

decisions of this court in *Kakih v. P.D.P.* (2014) 5 NWLR (Pt.1430) 374 and *Ucha v. Elechi* (2012) 13 NWLR (Pt.1317) 330 on the burden of proof of non-compliance with the Electoral Act, non-voting, misconduct and non-conduct of the election. He submitted further that where there is an allegation that a voter was unable to cast his vote because there was no election or because the election was misconduct he must tender his voters card in evidence, which must in turn be linked to the voters register and further it must be proved that if the disenfranchised voters were allowed to vote the petitioner would have won the election. He noted that the petition in this case was founded wholly on the allegation that there was no complete process of election in any of the polling units (except for a few wards in Eleme Local Government Area), that election was not held or where it held it was marred by irregularities, violence, chaos and other malpractices. He submitted that in the circumstances the lower court ought to have relied on the authorities referred to and dismissed the appeal.

He noted that out of 56 witnesses, only two (PW9 and PW10) claimed to be voters and they did not tender their voters cards. He referred to the evidence of PW9 in his witness statement wherein he averred that voting went smoothly and that results were announced and entered in form EC8A, and contended that he was not a disenfranchised voter and did not fit the category of witness required to prove the allegations of non voting, misconduct, etc. He noted that PW10 who claimed to have been disenfranchised did not tender his voters card, while PW54 (the 1st respondent herein) gave conflicting evidence. He submitted that the evidence of PW10, even if accepted as having the required probative value, would relate only to his polling unit (Unit 2 Ward 12) out of 4442 polling units and an additional 1350 voting points in 23 Local Governments, in paragraph 4.80 of his brief he listed the witnesses whose evidence amounted to hearsay or whose evidence was laced with hearsay in cases involving allegations of crime against persons who were not parties to the petition.

In addition to a general submission that the court below wrongly held that the tribunal properly evaluated the evidence before it, he submitted that as the 1st and 2nd respondents had no complaint against the results in Eleme LGA and Wards 1, 2, 3, 8, 9, 11 and 19 of Port Harcourt LGA, the tribunal was wrong to have nullified elections in those wards, and the lower court was wrong to have affirmed the decision.

In response, learned senior counsel for the 1st respondent noted that there is a difference of 935,542 between the number of accredited voters as contained in Form EC8D (exhibit 11), which is 1,228,614 and the number of accredited voters as contained in exhibit A9, which is 293,072. He noted further that the total votes declared by INEC in exhibit All is 1,187,295. He observed that the appellant was recorded in exhibit A10 to have scored 1,029,102 votes, far in excess of the total accreditation in exhibit A9. He submitted that the appellant had the burden of justifying the excess and that the number of votes cast having exceeded the number of accredited voters, the result was rightly declared null and void. He referred to: *Alalade v. Awodoyin* (1999) LRECN 613 at 623, E - G; (1999) 5 NWLR (Pt. 604) 529; *N.E.C. v. Suleiman* (1992) 129 at 143. He submitted that even though, the appellant tendered incident forms they were not demonstrated before the court. He submitted that exhibit A9 tendered by PW49 is an admission against interest. He relied on: *Nwobodo v. Onoh* (1984) 1 SC 1 at 91; (1984) 1 SCNLR 1. He reiterated his position on the use of the card reader machine.

Learned senior counsel placed particular reliance on the evidence of PW40 with regard to the allegations of thuggery, violence and disruption. He noted that the said witness testified that he and his monitoring learn covered 19 LGAs and that he personally with three National Commissioners covered 8 LGAs. He referred to exhibit A2, the report tendered in support of his account of what transpired. He submitted that the evidence of this witness was not controverted notwithstanding the calling of DW37, a member of PW40's team to discredit him. He submitted

further that exhibit A2 constitutes an admission against interest. In paragraphs 10.16 - 10.17 of his brief he referred to the in-house reports tendered as exhibits A303, A304, A307 and A309 and contended that they also constitute admission against interest.

On the evaluation of evidence, he referred to various aspects of the record and the evidence of witnesses considered by the tribunal and submitted that the evidence was properly evaluated. Moreover, he relied on several authorities to the effect that the evaluation of evidence and ascription of probative value thereto is the prerogative of the trial court as the advantage of seeing and observing the witnesses is not available to an appellate court. He referred to: *Yabatech v. M.C. & D. Ltd.* (2014) 3 NWLR (Pt.1395) 616 at 664; *Woluchem v. Gudi* (1981) 5 SC 291, among others.

Learned senior counsel submitted that for an election known to law to have taken place, all the constituent elements of an E election must be shown to have taken place. In paragraphs 11.16 - 11.21 he considered the procedure for accreditation prescribed by INEC in exhibit A309, the evidence of PW49 and exhibit A9 tendered through her and contended that in view of the prescription by INEC of the use of the card reader for accreditation there was no justification for resort to any other form of accreditation. He submitted that according to the Guidelines, if the card reader failed and could not be replaced or repaired by 1pm, the election was to be postponed to the following day.

Yusuf Ali, SAN for the 2nd respondent, reiterated the principles of law governing the altitude of this court to concurrent findings of fact by two lower courts and urged the court not to accept the invitation by the appellant to re-evaluate the evidence. He considered the evaluation of evidence as done by the two lower courts in paragraphs 8.09 - 8.22 of his brief and urged the court to hold that the two courts below properly evaluated the evidence before them and came to the correct conclusion.

Resolution of Issues 10 & 11

The law is trite that the results declared by INEC enjoy a

presumption of regularity. In other words, they are *prima facie* correct. The onus is on the petitioner to prove the contrary. See: *Buhari v. Obasanjo* (2005) 13 NWLR (Ft.941) 1; *Awolowo v. Shagari* (1979) 6-9 SC 51; *Akinfosile v. Ajose* (1960) SCNLR 447.

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

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

Where a petitioner complains of non-compliance with the provisions of the Act, he has an onerous task, for, he must prove it polling unit by polling unit, ward by ward and the standard of proof is on the balance of probabilities. He must show figures that the adverse party was credited with as a result of the non-compliance e.g. Forms EC8A, election materials not signed/stamped by Presiding Officers. It is only then that the respondents are to lead evidence in rebuttal. See: *Ucha v. Elechi* (2012) 13 NWLR (Pt.1317) 330 at 359. E- G.

It is also the law that where the commission of a crime by a party to a proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. See: section 135(1) of the Evidence Act, 2011. The burden of proof is on the person who asserts it. See: section 135(1) of the Evidence Act 2011. See also: *Abubakar v. Yar'Adua* (2008) 19 NWLR (Pt.1120) 1 at 143, D; 144, B; *Buhari v. Obasanjo* (supra) *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; *Kakih v. P.D.P.* (2014) 15 NWLR (Pt.1430) 374 at 422 - 423, B-C.

There is no doubt that the evaluation of evidence and ascription of probative value thereto are the primary duties of the trial court, which had the singular opportunity of seeing and hearing the witnesses testify and an appellate court would ordinarily not interfere. It is also trite that this court

will not interfere with concurrent findings of fact by two lower courts unless it is shown that the find re perverse, or not based on a proper and dispassionate appraisal of the evidence or that there is an error either of law or fact, which has occasioned a miscarriage of justice. See: *Ogoala v. The State* (1991) 2 NWLR (Pt.175) 509; *Saleh v. B.O.N. Ltd.* (2006) 6 NWLR (Pt.976) 316 at 329 - 330 11 – C; *Agbaje v. Fashola* (2008) 6 NWLR (Pt.1082) 90 at 153. B - E.

The purport of the appellant's submission in respect of the evaluation of evidence by the tribunal, which was affirmed by the lower court is that had the tribunal and the lower court applied the decisions of this court in *Kakih v. P.D.P.* and *Ucha v. Elechi (supra)*, they would have reached a different conclusion.

It is significant to note that there are 23 Local Government Areas in Rivers State. According to PW53, a State collation agent, there are 4442 polling units and 1350 voting points in the State making a total of over 5,000 voting points. Some of the allegations made by the 1st and 2nd respondents include:

- (i) Non-voting due to violence, thuggery and intimidation of voters;
- (ii) Snatching of election materials; Non-use of card Readers';
- (iii) Non-collation of results at ward collation centres;
- (v) Arbitrary allocation of figures;
- (vi) Non-provision of Forms EC8A;
- (vii) Result sheets not showing results of all the political parties that contested the election.

In order to prove the alleged acts of non-compliance, it was necessary for the petitioners to call witnesses from all the affected polling units to give first hand testimony of what transpired. Out of the 56 witnesses called by the 1st and 2nd respondents, 18 were ward collation agents who received information from polling agents in the various units. Their evidence was, not tied to any of the exhibits tendered.

Some of the witnesses (PWs' 19, 20, 24 and 35) who were Local Government Collation agents for the 2nd respondent gave sweeping testimony covering four Local Government Areas (Obio Akpor, Asari Toro, Tai & Ikwerre) on non-use of card readers, hijacking of materials, illegal thumb-printing of ballot papers, etc. The polling agents from the affected wards were not called to testify.

The trial tribunal made special reference to the testimonies of PWs' 40, 49, 53 & 54. The evidence of PW49 has been dealt with extensively earlier. PW40 was the Head of Election and Party Monitoring Department, INEC, Rivers State. He described the election as a sham, warfare, a mockery of democracy. His evidence was that his team monitored elections in 19 Local Government Areas but he later stated that he visited 8 Focal Government Areas with three National Commissioners of INEC. The report of the team was admitted as exhibit A2. He however admitted under cross-examination that he did not personally visit all the Local Government Areas. He also admitted that Election Officers reported the hijacking of materials to the team when they visited but he did not witness hijacking of materials himself (page 23 of Vol.4).

I am inclined to agree with learned senior counsel for the appellant that the evidence of PW40 cannot take the place of polling agents or voters who were disenfranchised.

PW53, a State collation agent for the 2nd respondent admitted under cross-examination that he did not witness the hijacking of materials but was so informed by his agents. He also stated that he was in only one Local Government Collation Centre (Ikwerre) and did not visit any other polling unit apart from Ward 1 unit 6 (page 2401 Vol.5).

Likewise, PW54 (the 1st respondent) whose evidence was said to span the entire petition testified that he never left his Local Government during the election. He received information through his agents and other sources (page 2408 Vol.5). Through him exhibits A303, A304, A305, A306 and A307 were tendered. These are various election observer reports

on the conduct of the election in the State. Not being the maker of these documents, he was not competent to testify in respect thereof.

Both the tribunal and the court below made much of fact that witnesses called by the appellant were discredited under cross-examination and therefore their evidence was unreliable, which therefore gave further impetus to the case of the 1st and 2nd respondents. It will be recalled that the 1st and 2nd respondents sought declaratory reliefs before the tribunal. The law is that where a party seeks declaratory reliefs, the burden is on him to succeed on the strength of his own case and not on the weakness of the defence (if any). Such reliefs will not be granted, even on admission. See: *Emenike v. P.D.P.* (2012) LPELR-SC.443/2011 at 27, D - G; (2012) 12 NWLR (Pt. 1315) 556; *Dumez Ltd. v. Nwakhoba* (2008) 18 NWLR (Pt. 1119) 361 at 373 - 374; *Ucha v. Elechi* (2012) 13 NWLR (Pt.1317) 330.

The 1st and 2nd respondents herein failed to establish the allegation of non-compliance with the provisions of the Electoral Act in the manner enjoined by this court in *Ucha v. Elechi* (supra) polling unit by polling unit. Voters registers were tendered in respect of only 11 out of 23 Local Government Areas and were not demonstrated before the tribunal. Confronting a few of the defence witnesses with one or two entries does not meet the standard inquired in this regard. Disenfranchised voters from all the affected polling units ought to have been called to testify.

Furthermore, serious allegations of crime were made throughout the length and breadth of the petition, such as hijacking and diversion of election materials, illegal thumb-printing of ballot papers, falsification of results, violent attacks on voters, kidnapping, etc. The 1st and 2nd respondents had the burden of proving the allegations beyond reasonable doubt. Where crimes are alleged, the ingredients of the offences must be proved. This they failed to do. None of the alleged perpetrators was joined in the petition.

Interestingly, the tribunal in its judgment at page 2682 Vol. 4 of the record, made the following observation:

"Before we proceed into the issue distilled for determination, we wish to state that in our ruling delivered on 9/9/2015, certain paragraphs were struck out from the petition while a consequential order was made against the calling of evidence of some individuals, Police, other security agencies and unknown persons mentioned in some paragraphs of the petition."

Indeed, over 100 paragraphs of the petition were struck out in the circumstance. In the course of its judgment, the tribunal did not revisit the issue to ensure that no evidence of criminal allegations concerning unidentified individuals, security agents, etc was led.

The generalized evidence led by mobile policemen, officers of the Department of State Security and Military Officers were against unidentified individuals and unidentified P.D.P. thugs.

For the evidence of disruption, violence and corrupt practices to warrant the nullification of the entire election in Rivers State, the 1st and 2nd respondents had to first prove the non-compliance: polling unit by polling unit, ward by ward. They must also establish that the non-compliance was substantial and affected the result of the election. It is only when this is done, that the respondents are to lead evidence in rebuttal. See: *Ucha v. Elechi (supra)*. The 1st and 2nd respondents herein failed to bring their case within these parameters.

Issues 10 & 11 are accordingly resolved in the appellant's favour.

It is my view that the tribunal and the court below were unduly influenced by the alleged failure of INEC officials to adhere to INEC's Manual, Guidelines and directives on the exclusive use of the Card Readers for accreditation and hearsay evidence and thereby, with due respect, came to the wrong conclusions. The tribunal ought to have been guided by the decisions of this court in *Kakih v. P.D.P.* and *Ucha v. Elechi* in evaluating the evidence before it and the court below should also have been so guided in affirming the decision.

Notwithstanding the resolution of issues 3, 4, 5 & 9 against the appellant, I hold that the appellant has shown sufficient reason for this court to interfere with the concurrent findings of the tribunal and the court below.

It is for those reasons that I allowed this appeal on 27th January, 2016. The judgment of the Court of Appeal, Abuja Division delivered on 16/12/2015 which affirmed the judgment of the Rivers State Governorship Election Tribunal delivered on 24/10/2015 was accordingly set aside. The petition of the 1st and 2nd respondents was hereby dismissed and the return of the appellant as the duly elected Governor of Rivers State by the 3rd respondent (INEC) restored. Parties shall bear their costs.

MOHAMMED, C.J.N.: On Wednesday, the 27th day of January 2016, I delivered my Judgment in this appeal allowing the appellant's appeal in line with the lead Judgment of my learned brother, Kekere-Ekun, JSC with which I entirely agreed on that day and I promised to give my own reasons for allowing the appeal today Friday 12th February, 2016. I now proceed to give my own reasons for allowing the appeal, setting aside the judgment of the Court of Appeal of 16th December 2015 which affirmed the judgment of the Governorship Election Petition Tribunal delivered in favour of the 1st and 2nd respondents and substitution therefore, a Judgment dismissing the 1st and 2nd respondents' petition.

I have had the opportunity before today of reading in draft, reasons for judgment allowing the appeal by my learned brother, Kekere- Ekun, JSC. I am in full agreement with my learned brother in the full reasons carefully prepared and the conclusion reached therein for allowing the appeal. I accordingly adopt the reasons for judgment comprehensively prepared by my learned brother, Kekere-Ekun, JSC as mine for allowing the appeal.

I. T. MUHAMMAD, J.S.C: On Wednesday, 27th day of January, 2016, I indicated my agreement with my learned brother, Eekere-Ekun, JSC, in his conclusion in allowing this appeal and the consequential orders that followed. I adjourned giving my reasons for so doing to today. Herein below are my reasons.

This is an appeal from the decision of the Court of Appeal, Abuja (the court below), wherein that court affirmed the decision of the Rivers State Governorship election Petition Tribunal (the tribunal), delivered on the 24th of October, 2015, in which the tribunal found that the appellant was not validly elected to the office of Governor of Rivers State. The tribunal nullified appellant's return as Governor and ordered for a fresh election. The appellant appealed to this court. More vivid facts and the issues for the determination of the appeal have been ably set out by my learned brother in his judgment, which I need not repeat here, except where exigency demands.

My Lord, my perusal of the record of appeal placed before this court; learned senior counsel for the various parties' respective submissions and the prevailing laws governing the conduct of elections in this country, and more particularly, the issues formulated, primarily, by the appellant and as set out in the leading reasoning, the following salient points appear to be the bane of the appeal:

- (a) Improper Constitution of the tribunal that delivered a ruling on 9/9/2015 prior to the hearing of the petition
- (b) Another ruling on the same 9/9/2015 by the tribunal which struck out several paragraphs of the petition particularly those featuring allegations of crime against known and unknown individuals and security agencies who were not parties to the case and entering a consequential order barring or restricting the calling of evidence relating to such allegations in the case.
- (c) Affirmation by the court below of the reliance by the

tribunal on the Card Reader Report admitted in evidence as exhibit A9.

- (d) Breach of fundamental Right to Fair Hearing
- (e) Improper issuance and service of the originating process.
- (f) Dumping of documents on the tribunal by the petitioners.

The genesis of what brought about the improper constitution of the Tribunal when it sat and delivered a ruling on the 9th September, 2015, has been clearly set out in the lead reasoning. I only re-iterate the position of the law that a judicial officer of whatever jurisdiction who did not participate in court in taking proceedings in respect of the suit/case in question, has no legal right or capacity to express an opinion in determining dispute between parties in that suit/case he did not participate at the hearing level of the suit/case. If he does so, the decision delivered in which such a judicial officer participated is a nullity as the court/tribunal was not properly constituted. See: *Mudukolu v. Nkemdilim* (1962) 2 SCNLR 341; *Adeigbe v. Kusimo* (1965) All NLR 248 at 263; *Sokoto State Govt. v. Kamdex (Nig.) Ltd.* (2007) 7 NWLR (Pt.1034) 492 at 497; *Ubwa v. Tiv Area Traditional Council* (2004) 11 NWLR (Pt.884) at 436.

If a decision is a nullity, it cannot confer jurisdiction on same court/tribunal or any other court or tribunal. One cannot put something on nothing and expect it to stand. It will collapse. See: *Macfoy v. United African Company* (1961) 3 WLR 1405 at 1409. This, alone could have deprived the Court of Appeal from entertaining any further appeal. Be that as it may, considering the nature of election matters which are a class of their own, or, generally referred to as *sui generis*, and more importantly, that such matters are to be decided within a given time (time bound) and in view of the fact that the tribunal and the court below went ahead to decide, the petition as filed, it only dawned on me to consider the justice of the whole case and treat this appeal on its merit. This is for the simple reason that I have lost the opportunity to remit the matter for a fair trial by the tribunal in view of the provision of section 285(6) and (7) of the

Constitution of the Federal Republic of Nigeria, 1999 (as amended).

On the issue of Card Reader Report which was tendered and admitted as exhibit "A9", at the tribunal, the learned SAN for the appellant urged this court to hold that the court below was in grave error when it sustained the reliance placed by the Election Tribunal on the Card Reader report tendered as Exh. "A9". The learned SAN made copious submissions on the issue, that, *inter alia*, the concurrent reliance placed on exhibit "A9" and the evidence of PW49 by the two lower courts is patently perverse and wrong in law, PW49 tendered exhibit "A9" as a computer print out. It is a public document and was not certified in accordance with the provisions of sections 104 and 114 of the Evidence Act, 2011. It contradicted the case pleaded by the petitioners and the evidence of PWs' 53 and 54. Exhibit "A9" is unknown to the Electoral Act and Electoral Guidelines and the manual.

The first respondent argued that the Card Reader is not a mere matter of guideline. It has statutory force as the Act itself. Non-compliance thereof, qualifies as non-compliance with the Act.

The second respondent submitted that there is no conflict in the provisions of sections 49 and 52(1)(b) of the Electoral Act and the Manual and Approved Guidelines especially with regard to the introduction of the Card Reader in the general elections in 2015. That there is nothing in the Card Reader that diminishes voters from exercising their rights and nothing detracts from the provisions of section 49 of the Electoral Act.

My Lords, let it be appreciated from the outset that Smart Card Reader Machine or simply Card Reader (SCRM for short), is an innovation in our Electoral Process. It was not known, or rather, it was never put in practice before in our political development. From my general reading and my comprehension of the literature surrounding the Smart Card Reader Machine, it appears to me and, put in a concise form, that the Smart Card Reader Machine is a technological device set up to authenticate and verify, on election day, a permanent voter's card (PVC) issued by INEC. Smart

Card Reader Machine is designed to read information contained in the embedded chip of the Permanent Voter's Card (PVC) issued by INEC to verify the authenticity of the PVC and also carry out a verification of the intending voter by matching the biometrics contained from the voter on the spot with the ones stored on the PVC.

INEC's motive, which became public in introducing the technologically-based device, barring any technical mishap, breakdown or malfunction, was to ensure a credible, transparent, free and fair election for the country.

Now, the main issue under consideration in this appeal vis-a-vis the Smart Card Reader Machine is whether it has acquired the force of law either under the Constitution of the Federal Republic of Nigeria, 1999 (as amended), or, under the Electoral Act, 2010 (as amended).

In his submission in reply to the points raised by the 1st respondent on the Smart Card Reader Machine, learned SAN for the appellant, stated, *inter alia*, that the directives or guidelines issued by the INEC on the use of the Card Reader for accreditation has no root or foundation in the Electoral Act and cannot be employed to subvert the express provisions of the Act especially as the Electoral Act expressly excludes any form of electronic voting. In his main brief, the learned SAN, earlier stated that contrary to the conclusion of the court below, the introduction of card readers is a complete departure from the spirit and essence of section 49 of the Electoral Act and it totally removes transparency from permits the occurrence of electronic manipulation of the electoral process contrary to sections 49 and 52(1)(b) of the Electoral Act, 2010 (as amended).

Both learned SANs for the 1st and 2nd respondents are agreed in their respective submissions that the appellant pleaded at the tribunal that card reader was used for accreditation and that there is no conflict between the Electoral Act and Manual neither are the Guidelines and Manual *ultra vires* the powers of INEC, they rather complement and supplement each other positively to enable INEC conduct transparent, free and fair, credible

election.

My Lords, INEC is one of the Federal Executive bodies established by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) (Section 153(1)(f) thereof). Paragraph 15(a) of Part 1 of the Third Schedule, empowers INEC, to, among other things, organize, undertake and supervise all elections to the offices of the President and Vice President, a Governor and his deputy; membership of the National Assembly and State Assemblies. It registers and supervises political parties. It is also obligated to arrange and conduct registration of persons qualified to vote; it maintains and revises the Voters Register for the purpose of any election under the Constitution. It is also under duty to carry out such other functions as may be conferred upon it by an Act of the National Assembly.

While evaluating the evidence placed before it, the tribunal, on the use of the card reader, made the following finding:

"It was the evidence of PW49 and DW37 (under cross-examination) that the 1st respondent (INEC) *took a decision to strictly comply with the use of the card reader in the conduct of the election.* The PW49 fully explained the working of the card reader examined exhibit "A9", and concluded that only 293,072 voters were accredited to vote in the election. We have equally perused the contents of exhibits A9, A301, B30 and B31 and *confirmed that the 1st respondent certainly resolved to as in the Guidelines for the election (Exhibit A308) employ the use of card readers only in the accreditation of voters in the election.*"

(Italics for emphasis)

The tribunal went on to cite a press statement admitted as exhibit A301, in which INEC informed Nigerians of its wishes that card readers will be used for the April, 11, 2015 elections, and related matters. Further

directives as to the use of the card reader were issued out by the 3rd respondent. The tribunal then held, *inter alia*:

"All these exhibits in our view proved conclusively that the 1st respondent had taken a decision that the provisions of the Guidelines for the Conduct of the 2015 general elections as in exhibit A308 which outlined the usage of the card reader machine, introduced for the purpose of giving effect to the provisions of the Electoral Act, 2010, as amended to ensure credible election, must be complied with in the conduct of the election in issue. In other words the commission did not at any moment relax the Guidelines whatsoever as rightly asserted by PW49, PW53 and DW37 through whom exhibits A9, A301, B30 and B31 were tendered." (Italics for emphasis)

The tribunal rejected the submissions by the 1st and 3rd respondents (before the tribunal) on the resort to manual accreditation H by the use of voters registers in accordance with section 49 of the Electoral Act, 2010 (as amended) as a result of the failure of the card readers/Idle tribunal held:

"We with due respect do not subscribe to those submissions in view of the fact that the 1st respondent (INEC) set out a procedure for the election in accordance with the powers vested on it under section 153 of the Electoral Act, 2010, as amended."

In what appears to be its final observation/findings on the card reader, the tribunal stated:

"It will therefore be seen that the sum total of the usage of the card reader is complimentary to the usage of the voters register. In other words the two work hand to hand in ensuring a credible election. The voters' registers properly come to play where a prospective voter has been screened by the card reader. In effect the card reader was injected by

INEC to ensure transparency and creditability in the electoral process with a view to cure the mischief of the past when only the voters registers were used in accreditation of voters. To suggest that the use of the card reader no matter how beneficial is against the provisions of the Electoral Act and therefore not be sustained as we earlier found. The INEC in its guidelines as in exhibit A308 properly prescribed the procedure in the applicability of the card reader in accordance with the provisions of section 57 and 153 to enhance and enforce the provisions of section 49 of the same Act. The law is trite that in interpreting a statute the whole of its provisions shall be read in order to arrive at the correct interpretation. The reading of paragraph 49 in isolation of other relevant sections of Act is likely to misrepresent the intention of the law makers, towards producing credible, fair and free elections in Nigeria.

In the circumstances we do not see any conflict in the election (sic) of card readers in the electoral process with the provisions of the Electoral Act, 2010 (as amended). We therefore consider any subsequent act of non compliance with the contents of exhibits A301, B30, B31 and A9 on the efficacy of the card reader for the election as an act which will render the election a nullity .The public funds sacrificed in the procurement of the card readers is not for fun but to enhance the credibility of elections in Nigeria. That ought be held with esteem by all officers of the 1st respondent in the conduct of elections.

A simple glance at exhibit A10, the declaration of result which the PW54 referred to as a mere allocation of figures when confronted with during cross-examination by the 7th respondent shows that the 2nd respondent was returned

elected with 1,092,102 votes while the 1st petitioner scored 124,896 votes among other contestants with different number of votes. The fact with respect to the number of voters accredited for the election and the total votes recorded at the election supported the ease of the petitioners that the election was not conducted in substantial compliance with the provisions of the Electoral Act, 2010 (as amended) and non compliance substantially affected the result of the election as rightly submitted by Chief Olujinmi, SAN for the petitioners. We are of the considered opinion that the issue of accreditation in an election cannot be compromised as it forms the backbone of the success or failure of the process. It is only where a voter is successfully accredited that he can be said to have the right to cast his vote."

(Italics for emphasis)

The court below made several positive comments although arriving at contrary conclusions on the Smart Card Reader Machine. It held, *inter-alia*:

"Where Smart Card Reader fails in the process of accreditation, alternative method or procedure of identifying the voter or enabling the voter to vote have been put in place and that is where filing of incident forms comes into play

Both Smart Card Reader and Voters Registers are to be used by election officials in all polling units for proper and valid accreditation of voters. They are interdependent as both are indispensable in accreditation process before actual casting of ballot by an eligible voter."

Again, on page 3010 of Vol. 5 of the records of appeal, the court below commented:

It was by this enormous powers conferred on INEC that the body introduced the Card Reader to bring sanity and sanctity into the electoral body.. The albatros around the neck of the Rivers State INEC is *that it totally failed, neglected and refused to follow the guidelines as set out by the controlling body. The blatant and brazen disobedience of the Rivers State INEC officials cannot render the use of the card Reader unlawful. The INEC Card Reader usage is well entrenched in the Electoral Act and regulations by the authority with which INEC has been well endowed.*"

(Italics for emphasis)

Further, on the directives given by INEC in Exhibits A301 (press statement issued on 2/4/2015); Exhibit 831 (circular issued on 8/4/2015) and the refusal or failure of INEC officials to implement those directives, the court below held;

"Thus, INEC Guidelines and Manual cannot be obeyed in breach of its provisions Even exhibits A30, B31 and A301 the Press Release, Directive and Instruction of INEC to its officials are enough warnings and pointers that INEC meant it and wanted Smart Card Reader to be used in accreditation of voters for Governorship election in Rivers State."

(Italics for emphasis)

The court below, then, to my understanding, raised the status of the Smart Card Reader Machine which came into play in the 2015 election through Manuals/Guidelines made by INEC to that of an Act (i.e. the Electoral Act). This is what the court below said:

"My understanding of the above provision of the Electoral Act, 2010 as amended, is that the Act (sic: act) or omission of any Electoral official of INEC, which is contrary to the provisions of the Electoral Act committed after instruction or directive of INEC to its officials concerned can be a

ground for questioning the election and it comes under Section 138(1)(b) of the Electoral Act. which is one of the grounds upon which the petition was predicated. *A failure to INEC's Manual and Approved Guidelines and Regulations constitutes direct violation of sections 49, 57, 58, 73 and 74 of the Electoral Act. The Manual and Approved Guidelines form an integral part of law and regulations fur the conduct of election and INEC officials must scrupulously and dutifully comply with it.*"(see page 3008 of Vol.5 of record of appeal) (All Italics for emphasis)

Thus, from the excerpts set out above from the decisions of the tribunal and the court below, it is dear to me, beyond any doubt, that the tribunal relied very heavily on the Card Reader Report (esp. Exh. A9 tendered by PW49) and exhibits A301, B30 and B31 to nullify the election of the appellant as the Governor of Rivers State.

But, permit me my Lords, to consider relevant provisions of the Principal Law, i.e. the Electoral Act, 2010, (as amended):

"49(1) A person intending to vote with his voter's card, shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter's card.

49(2) The Presiding Officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the Register that the person has voted.

138(1) An election may be questioned on any of the following grounds: That is to say:

- (a) That a person whose election is questioned was at the time of the election, not qualified to contest the election;
- (b) That the election was invalid by reason of b corrupt practices or non-compliance with the provisions of

this Act;

- (c) That the respondent was not duly elected by majority of lawful votes cast at the election; or
- (d) That the petitioner or its candidate was validly G nominated but was unlawfully excluded from the election.

138(2) An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election.

153. The Commission may, subject to the provisions of this Act, issue regulations, guidelines, or manuals for the purpose of giving effect to the provisions of this Act and for its administration thereof.”

In section 138(2) of the Act as above, it is clear that as long as an act (commission) or omission in relation to the Guidelines and or, Regulations is not contrary to the provisions of the Act, it shall not of itself be a ground for questioning the election. One of the complaints of the petitioners at the tribunal, is that of the non-user of the Smart Card Reader Machine in the election.

I agree with my learned brother, Kekere-Ekun, JSC, that the failure to follow the Manual and Guidelines which were made in exercise of the powers conferred by the Electoral Act, cannot in itself render the election void. And, this should not be understood to mean that the innovation of the Card Reader is in conflict with the relevant sections of the Electoral Act.

Permit me, again, Your noble Lordships, to state, with emphasis, that the Card Reader was introduced by INEC with good intentions. However, a distinction must always be drawn between the effect of a law made by the legislature (National Assembly: i.e. the Electoral Act; the Constitution, etc) and a rule of procedure (by whatever name called) by

any other authority with a view to facilitating the smooth running or operation of a given institution. Breach of the former can be severe and fatal than breach in case of the latter. In this appeal, section 138(2) decisively' settles the issue.

In conclusion, I must commend INEC for its introduction of the Smart Card Reader Machine. I must, at the same time, draw attention of the authorities that be, that there is dire need because of the importance and relevance of the Smart Card Reader Machine, in this our 21st Century of technological development, to recognize the indispensability of the use of the Smart Card Reader Machine in our electioneering processes. But, till today, voting through the voters Register, supersedes any other technology that may be introduced, through Guidelines or Manuals. To this effect, it is my humble suggestion that the earlier the better, INEC/any other relevant authority takes steps to recommend to the National Assembly, further amendment to the Electoral Act, 2010 (as amended) by incorporating in the Act, the use of the Smart Card Reader Machine in future elections.

For these and the more detailed reasons advanced in the leading reasons of my learned brother, Kekere-Ekun, JSC, in allowing the appeal, I too, affirm my allowing the appeal. I abide by all consequential orders made in the leading reasoning including order on costs.

NGWUTA, J.S.C.: This appeal was heard, and judgment delivered, on Wednesday, the 27th day of January, 2016. I delivered my judgment concurring with the lead judgment of my learned brother, Kekere-Ekun, JSC.

I indicated that I would give my reasons for allowing the appeal, setting aside the judgment of the court of appeal which affirmed the judgment of the Governorship Election Petition Tribunal today, 12th February, 2016.

I read in draft the reasons given by my learned brother, Kekere-Ekun, JSC for allowing the appeal and I entirely agree with, and adopt as mine, the reasons leading to the conclusion that the appeal has merit.

AKA'AHS, J.S.C.: We heard this appeal and other sister appeals namely SC.1001/2015 and SC.1003/2015 on 27th January, 2016. The leading judgment was delivered by my lord, Kekere-Ekun, JSC. In my concurring judgment, I allowed the appeal and reserved my reasons for the judgment till today, Friday, 12th February, 2016.

I was privileged to read in draft the comprehensive reasons for allowing the appeal given by my lord, Kekere-Ekun, JSC. I entirely agree with the said reasons that have been advanced in the leading judgment. I wish to observe that since the Peoples Democratic Party (PDP) which sponsored the appellant for the Gubernatorial election in River State had the same interests to protect, it was unnecessary for it to have filed a separate appeal which was given appeal no. SC.1001/2015.

The introduction of the card reader is certainly a welcome development in the electoral process. Although it is meant to improve on the integrity of those accredited to vote so as to check the incidence of rigging, it is yet to be made part of the Electoral Act. Section 138(2) of the Electoral Act envisages a situation where the electoral Commission issues instructions or guidelines which are not carried out. The failure of the card reader machine or failure to use it for the accreditation of voters cannot invalidate the election. The section stipulates as follows:

“138(2) An act or omission which may be contrary to an instruction or directive of the commission or of an officer appointed for the purpose of election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election”.

It is for this reason and the more articulated reasons contained in

the judgment of my Lord, Kekere-Ekun, JSC that I allowed the appeal on 27th January, 2016. I make no order on costs.

OKORO, J.S.C.: After the hearing of this appeal on the 27th January, 2016, I on the same date delivered my judgment allowing the appeal which agreed with the lead judgment of my learned brother, Kekere-Ekun, JSC.

I also promised to give reasons for allowing the appeal. I shall now offer those reasons. Just before I do that, let me state that I was obliged in advance a draft of the reasons for judgment just delivered by my learned brother, Kekere-Ekun, JSC. The learned jurist has meticulously and quite efficiently resolved all the salient issues submitted for the determination of this appeal. I shall adopt the reasons in the lead judgment as mine and make a few comments in support thereof.

The facts giving birth to this appeal, having been succinctly stated in the lead judgment, I need not repeat the exercise. I shall comment on issues one and two together. The issues are as follows:

- “1. Was the court of Appeal right when it failed to appreciate that the “ruling” of the Election Tribunal given on the 9th of September, 2015 signed by the Hon. Justice S.M. Ambursa, relied on by the court of Appeal to arrive at the conclusion that Election Tribunal considered and resolved all the issues raised in the appellant’s motions filed on 30/06/2015, 01/08/2015 and 17/08/2015 respectively was not competent and valid?
2. Was the Court of Appeal right when it came to the conclusion that the appellant’s constitutional right of fair hearing was not breached by the election Tribunal?

It is now trite that a court is competent to adjudicate when:

1. It is properly constituted with respect to the number and

qualification of its members;

2. The subject-matter of the action is within its jurisdiction;
3. The action is initiated by due process of law;
4. Any condition precedent to the exercise of its jurisdiction has been fulfilled.

See *Gabriel Madukolu & Ors v. Johnson Nkemdilim* (1962) 2 SCNLR 341; *Okpanum v. S.G.E. (Nig.) Ltd.* (1998) 7 NWLR (Pt. 559) 537.

It follows that only a court which heard the complaint of the parties is competent to write and deliver judgment in respect of the matter. Put differently, only the judge or judges who took part in the hearing of a case or application can take part in the writing and signing of the judgment or ruling. As was held, by this court in *Sokoto State Government v. Kamdex Nig. Ltd.* (2007) 7 NWLR (Pt. 1034) 492, a judicial officer who did not sit in court in that capacity to exercise jurisdiction of the court in hearing the case or matter cannot have the capacity in law to sit in court and write a judgment or opinion to determine a dispute which he did not participate in the hearing.

The end result of the above principle vis-a-vis the issue at hand is that Hon. Justice S. M. Ambursa, who did not take part in hearing the appellant's motions, was incompetent and lacked the capacity to write, sign and deliver the ruling of 9th September, 2015. The reason is that he did not hear the parties before making up his mind on how to resolve their conflict. See also *Ubwa v. Tiv Traditional Council* (2004) 11 NWLR (Pt. 884) 427 at 436 - 437.

As a corollary, a proper interpretation or construction of the provisions of section 36(1) of the 1999 Constitution (as amended) will show that the right of fair hearing extends beyond merely affording the parties a hearing but also includes a proper consideration and determination of the issues canvassed by the parties before the court. But can a court consider the issues without hearing from the parties? Where a

court of law, without hearing the parties, proceeds to consider the issues in the matter and delivers a judgment, it is clear that the parties were denied fair hearing.

There is no doubt that fair hearing is in most cases synonymous with natural justice, an issue which clearly is at the threshold of our legal system. Once there is a denial of fair hearing as guaranteed under section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended), the whole proceedings automatically become vitiated with a basic and fundamental irregularity which renders them null and void. See *Ojengbede v. Esan* (2001) 18 NWLR (Pt. 746) 771; *Otapo v. Summonu* (1987) 2 NWLR (Pt. 58) 587; *Wilson v. Attorney General of Bendel State* (1985) 1 NWLR (Pt.4) 572.

Let me comment briefly on the issue of the use of Card Reader Machine in elections. There is no doubt that the introduction of this device in electioneering processes in this country is a commendable effort. It was, no doubt meant to sanitize accreditation and reduce, if not eradicate incidents of over-voting and/or multiple voting. As I said elsewhere, this device was not meant to replace the water's register nor was it designed to take the position of electoral forms for declaration of results. See *Mahmud Aliyu Shinkafi & Anor v. Abdulazeez Abubakar Yari & 2 Ors.* (Unreported) Appeal No. SC.907/2015 delivered on 8th January, 2016; reported in (2016) 7 NWLR (Pt. 1511) 340. Thus, whenever a petitioner seeks to prove over-voting, the voters register is *sine qua non* amongst other documents. The argument that the voters register was no longer necessary did not fly at all. This has been the position of this court in a long line of cases. See *Haruna v. Modibbo* (2004) 16 NWLR (Pt. 900) 487 *Kalgo v. Kalgo* (1999) 6 NWLR (Pt. 606) 639. The 1st and 2nd respondents herein goofed when they gave pre-eminence to the Card Readers over and above the voters register. But, how can one prove over-voting without tendering the voters register?

Lastly, let me make it clear that the provisions of the Electoral Act

are superior to any letter or directive of the Independent National electoral Commission. That superiority is clearly stated in section 138(2) of the Electoral Act, 2010 (as amended) as follows:

"An act or omission which may be contrary to an instruction or directive of the Commission or of an officer appointed for the purpose of the election but which is not contrary to the provisions of this Act shall not of itself be a ground for questioning the election."

Thus, when the Independent national Electoral Commission directed that only card reader machine shall be used for accreditation and when it failed, its staff resorted to manual accreditation, that infraction did not for any reason amount to a ground for questioning the election of the appellant.

Based on the above reasons and the fuller ones in the lead reasons for judgment, I agree that this appeal is meritorious and I accordingly allow same. I abide by all consequential orders made in the lead reasons for judgment. I make no order as to costs.

SANUSI, J.S.C.: On the 27th of January 2016 this appeal was heard by this court along with related appeals. The court immediately after hearing the appeal, delivered its judgment allowing this appeal. I, on that day, undertook to advance my reasons for my judgment allowing this appeal on Friday 12th of February 2016 that is today.

Before today, I was obliged with a copy of the lead reasons for judgment just delivered by my learned brother, Kudirat Motonmori Olatokunbo Kekere-Ekun, JSC. Having perused same, I am in entire agreement with the reasons for judgment given therein and the conclusions arrived at in allowing this appeal. I comment my lord, for the industry she put in advancing the reasons for judgment as she painstakingly dealt with all the issues canvassed by learned counsel to the parties who argued the

appeal before us. I adopt the reasons for judgment as mine even though I would like to chip in few comments of mine just to compliment the reasons given in the said reasons for judgment.

On perusing the records of appeal, it is noted by me, that when the trial tribunal as constituted from inception commenced the hearing of the petition an application was filed by the 1st respondent challenging the competence of the petition. But before it completed the hearing and determined the said application, the original chairman of the tribunal was removed apparently by the constituting authority. A new Chairman in person of His Lordship Hon. Justice Ambursa, was appointed as the new chairman of the tribunal who continued with the hearing of the motions filed on 30/6/2015, 1/8/2015 and 17/8/15 and he finally delivered and signed the ruling dismissing the motion. To my mind, when Ambursa, J, came in as the new chairman of the tribunal, the ideal thing for him to do was to start fresh hearing of the motion since the composition of the tribunal had then changed. He did not do so. The position of a chairman of an election tribunal is very important, in that no legally valid quorum could be formed without him. By the provisions of Section 258(4) of the 1999 Constitution (as amended), a quorum of Governorship election Tribunal comprises a chairman and one other member. In view of the appointment of Ambursa, J as new chairman of the tribunal, the composition of the tribunal has therefore changed, hence he cannot continue the hearing of the motion mid-way and ultimately determine it or rule on it and sign the ruling as he did. The ruling delivered by him in the motion is therefore a nullity because the change in composition renders whatever decision the tribunal delivered on the application not heard by him right from the beginning, a nullity. The ruling was therefore delivered by the tribunal without jurisdiction. For a court of law to have jurisdiction to competently hear and determine a matter (motion), it must fulfill the under-listed four conditions:

- (a) It must be properly constituted with respect to the number and qualification of its members.

- (b) The subject matter of the action must be within its jurisdiction.
- (c) The action is initiated by due process of law, and
- (d) Any condition precedent to the exercise of its jurisdiction must have been fulfilled. See *Madukolu v. Nkemdilim* (1962) 1 All NLR 587; (1962) 2 SCNLR 341; *Dangana & Anor v. Usman & 4 Ors* (2012) 2 SC (Pt.III) 103; (2013) 6 NWLR (Pt. 1349) 50; *NURTW & Anor v. RTEAN & 5 Ors* (2012) 1 SC (Pt. II) 119; (2012) 10 NWLR (Pt. 1307) 170.

Since Ambursa, J, did not participate in the hearing of the application from the beginning to the end of the hearing of the motion, the tribunal as constituted then, had no jurisdiction to deliver the ruling determining the application and let alone signing it, as Ambursa, J did not hear part of the arguments proffered by learned counsel to the parties who argued the application. The ruling so delivered and signed by Ambursa, J as the new chairman of the trial tribunal is therefore a nullity and void.

On the whole, with these few comments and for the more detailed reasons for judgment advanced by my learned brother, Kekere-Okun, JSC, I also adjudge this appeal meritorious and I hereby accordingly allow it. I endorse the consequential orders made in the lead reasons for judgment. I however decline to make any order on costs, so each party should bear his/its own costs.

Appeal allowed.

