

1. ALHAJI MUHAMMED INUWA YAHAYA
2. ALL PROGRESSIVE CONGRESS (APC)

V.

1. ALHAJI IBRAHIM HASSAN DANKWANBO
2. PEOPLES DEMOCRATIC PARTY (PDP)
3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)

SUPREME COURT OF NIGERIA

SC.979/2015

WALTER SAMUEL NKANU ONNOGHEN. J.S.C. (*Presided and read Leading Judgment*)

OLABODE RHODES-VIVOUR, J.S.C

MARY UKAEGO PETER-ODILI, J.S.C

MUSA DATTIJO MUHAMMAD, J.S.C

CLARA BATA OGUNBIYI, J.S.C

CHIMA CENTUS NWEZE, J.S.C

AMIRU SANUSI, J.S.C

MONDAY, 25TH JANUARY 2016

ACTION - Case of party - Need for party to be consistent in the presentation of his case.

APPEAL - Decision appealed against - Where some issues resolved in favour of appellant - When appellant can appeal against the whole decision.

APPEAL - Finding of fact - Concurrent findings of trial court and Court of Appeal - Attitude of the Supreme Court thereto - When will interfere with - When will not

APPEAL - Fresh issue on appeal - Raising of - Need to obtain

*leave of court - Where raised and argued without leave -
Effect -How treated*

*DOCUMENT – Admissibility – Documentary evidence –
Admissibility of and weight to be attached thereto –
Distinction between – Relevance of distinction*

*ELECTION - Accreditation - Non- accreditation in an
election -Effect of.*

*ELECTION PETITION - Allegation of over-voting in an
election -how proved - Voters' register and ballot papers
- Relevance of.*

*ELECTION PETITION - Allegation of over-voting in an
election -When becomes a non-issue.*

*ELECTION PETITION - Allegation of over-voting in an
election -What petitioner must plead and prove.*

*ELECTION PETITION - Corrupt practices at election - Non-
compliance with Electoral Act - Allegations of - What
petitioner must establish*

*EVIDENCE - Admissibility - Statement made in foreign
language - Where translated into English Language -
Tendering of -Need for original statement and English
translation thereof to be tendered together - Effect of not
tendering both together.*

*EVIDENCE - Proof- Allegation - Onus of proof of - On whom
lies.*

*EVIDENCE - Proof - Allegation of over-voting in an election
-Proof of - What a petitioner must plead and prove.*

*EVIDENCE-Proof-Corrupt practices at election - Non-
compliance with Electoral Act - Allegations of - Proof of
- What petitioner must establish.*

*EVIDENCE - Proof - Evidence led on facts not pleaded
or at variance with pleadings - How treated.*

EVIDENCE - Proof - Pleadings - Evidence on issue not pleaded - Effect.

EVIDENCE - Witness statement on oath - Admissibility - Statement made in foreign language - Where translated into English Language - Tendering of - Need for original statement and English translation thereof to be tendered together - Effect of not tendering both together.

PRACTICE AND PROCEDURE - Witness statement on oath - Statement on oath - Statement made in a foreign language - Where translated into English Language - Tendering of - Need for original statement and the English translation thereof to be tendered together - Effect of not tendering both together.

PRACTICE AND PROCEDURE - Appeal - Decision appealed against - Where some issues resolved in favour of appellant - When appellant can appeal against the whole decision.

PRACTICE AND PROCEDURE - Appeal - Fresh issue on appeal - Raising of - Need to obtain leave of court - Where raised and argued without leave - Effect.

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

PRACTICE AND PROCEDURE - Pleadings - Evidence led on facts not pleaded or at variance with pleadings - How treated.

PRACTICE AND PROCEDURE - Pleadings - Importance of.

PRACTICE AND PROCEDURE - Statement on oath - Statement made in a foreign language - Where translated into English Language - Tendering of -

Need for original statement and the English translation thereof to be Om

Issues:

1. Whether the Court of Appeal, after ruling that exhibits 'AN' and 'AL' were admissible in law failed to evaluate same before arriving at the conclusion it reached in the judgment on the appeal
2. Whether the Court of Appeal was right when it affirmed the judgment of the election tribunal which struck out the witness depositions of PW2, PA3, P\7, PW8, PW10, PWM, PW12, PA 14, & PW17 on ground of being incompetent.

Facts:

Governorship election was conducted by the 3rd respondent. Independent National Electoral Commission (INEC) on the 11th April 2015 in Gombe State. The 1st respondent who was the candidate of the 2nd respondent was returned as the winner of the Gombe State Gubernatorial election held on the 11th April 2015.

The appellants who participated at the election were dissatisfied with the result of the election and they filed a petition at the Gombe State Governorship Election Petition Tribunal challenging same.

At the trial, the appellants called twenty – two (22) witnesses, PW1 - PW22, while 2nd respondent called nine to wit: RW1-RW9. On the other hand, RW10 was the only witness called by the 1st respondent while the 3rd respondent called no witness. PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14, and gave their testimonies in Hausa language but that version was not annexed to the English version before front-loading same It was only the English version of the statements 'depositions that were adopted at the trial.

At the trial, the appellants tendered from the Bar the certified true copy of the following documents used in the conduct of the election in question, by the 3rd respondent, namely: Forms EC8A, EC8B and EC8C series used in the polling units, the ward collation centres and the Local Government Council collation centres in the 11 Local Government Areas of Gombe State. AI so tendered from the Bar were exhibit AN which was the Card Reader Report for

Gombe State; exhibit AL - the summary of accredited votes from the Local Government Areas of the State: exhibit AP- the press statement by the 3rd respondent on the use of card readers for the Governorship election; exhibit AS the approved Guidelines and Regulations for the conduct of the General Election 2015 while exhibit AR was the manual for election officials 2015. In its judgment, the tribunal, after evaluating the evidence adduced, resolved the two main issues presented to the tribunal for the determination of the petition against the appellants and consequently dismissed the petition.

Aggrieved, the appellants appealed to the Court of Appeal. Though the Court of Appeal resolved some of the issues presented before it in favour of the appellants, it ended up dismissing the appeal as lacking in merit. Still dissatisfied, the appellants appealed to the Supreme Court. At the hearing of the appeal, the 1st respondent raised a preliminary objection against grounds 1, 3 and 5 of the grounds of appeal and the issues formulated therefrom. It was argued that since some of the issues were resolved in favour of the appellants at the Court of Appeal, it was incompetent for the appellants to complain against the whole decision and that the appellants needed leave to argue the issue of weight of evidence which was an issue coming before the court for the first time.

Held (*unanimously upholding the preliminary objection in part and dismissing the appeal*):

1. *On What a petitioner who alleges over-voting must plead and prove*

To prove over-voting, a petitioner must plead and tender in evidence the Register of Voters relevant to the election in issue. It is not enough for a petitioner in an election petition to allege over-voting. He has the duty to prove same. To discharge that responsibility, the law requires the petitioner to do the following:

- (a) tender the voters' register;**
- (b) tender the statement of result in the appropriate Forms which would show the number of registered accredited voters and number of actual votes;**

(c) relate each of the document to the specific area of his case in respect of which the documents are tendered

(d) show that the figure representing the over-voting if removed would result in victory for the petitioner.

Over-voting can only be demonstrated clearly where the number of accredited voters is less than the number of voters or votes cast. It is not enough for the petitioner to allege and prove over-voting. In addition to the above the petitioner must show that the said over-voting inured to the winner of the election in particular as the over-voting can be for any of the candidates in the election, respondent or any of the other contestants in the election in question. The court must also be satisfied that it was due to the over-voting traceable to the respondent that the respondent won the election. In the instant case, the appellants did not satisfy any of the requirements. In fact the case of the appellants was that there was no accreditation, polling unit by polling unit, and that any data produced by the 3rd respondent to show accreditation was falsified. However there was evidence of accreditation as contained in exhibit "AN" [*Haruna v. Modibo* (2004) (2004) 16 NWLR (Pt. 900) 487; *Kalgo v. Kalgo* (1999) 6 NWLR (Pt. 606) 639; *Audu v. I.N.E.C.* (No2) (2010) 13 NWLR (Pt.1212) 456; *Ininame v. Akpabio* (2008) 17 NWLR (Pt.116) 416; *Awuse v. Odili* (2005) 16 NWLR (Pt.952) 416; *Ivienagbor v. Bazuaye* (1999) 9 NWLR (Pt. 747) 33; *Owe v. Oshinhanjo* (1965) 1 All NLR 72; *Bornu Holding Co. Ltd. v. Bogoco* (1971) 1 ALL NLR 324; *Onibudo v. Akibu* (1982) 7 SC 60; *Nwaga v. Registered Trustee Recreation Club* (2004) FWLR (Pt. 190) 1360; *Jalingo v. Nyame* (1992; 3 NWLR (Pt. 231) 538; *Ugochukwu v. C.C.B. (Nig.) Ltd.* (1996) 6 NWLR (Pt. 456) 524 referred to.] (*Pp. 313, paras A-E; 313-314, paras H-B; 337, paras. B-E*)

2. *On When allegation of over-voting becomes a non-issue* – Once the number of people that voted is less than the number of persons accredited as was the case in the Governorship election in Gombe State, over-voting becomes a non-issue. (*P. SIS, paras. A-B*)

3. *On Relevance of voters register and ballot papers in proof of over-voting –*

Section 49 of the Electoral Act 2010, as amended, has prescribed the relevance of the voters' register as well as ballot papers when the petitioner is contesting the dispute based on over-voting. In this case, the appellant did not tender the voters register, the significance of which could not be underrated when an allegation of over-voting in an election is raised. The determination as to whether (here was over-voting is a matter which could have been detected and resolved from the voters register, which was not placed before the tribunal. Although the appellants did apply through the tribunal to access the register and they were obliged, they did not deem it necessary to place the register before the trial tribunal, and it was too late and out of tune for them to lay a complaint at the Supreme Court stage. This was more so especially where the appellants failed to elicit confirmation of over-voting in any of the polling units from either the PW21 or PW22, when they testified before the Election Petition Tribunal. (Pp. 313. paras. A-B; 326-327 paras. H-A 335. paras. B-E)

4. *On Duty on petitioner who challenges return of a candidate on ground of corrupt practices or non-compliance with Electoral Act –*

By virtue of sections 138(l)(b) and 139(1) of the Electoral Act, 2010 (as amended), when the ground for challenging the return of a candidate in an election petition is by reason of corrupt practices or non-compliance with the provisions of the Electoral Act, the petitioner has the duty to 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**

A complaint of non-compliance with the provisions of the Electoral Act 2010 (as amended), lays the *onus* on the petitioner to prove same systematically, polling unit by

polling unit and ward by ward, on the balance of probabilities. [*Ucha v. Elechi* (2012) 13 NWLR (Pt.1317) 330; *Awolowo v. Shagari* (1979) ALL NLR 120; *Ibrahim v. Shagari* (1983) 2 SCNLR 176; *Buhari v. Obasanjo* (2005)2 NWLR (Pt.910) 241 referred to] (P.313, paras. E-G)

5. *On Whom lies onus of proof of allegation of non-compliance with Electoral Act-*

He who alleges must prove. He has the burden of proof which he must discharge else he has to fail in the action, it means that a petitioner in an election petition whose ground(s) for challenging the election of his opponent is non-compliance with the provisions of the Electoral Act, by virtue of which he seeks nullification of the said election, must succeed on the strength of his case as pleaded. The non-compliance envisaged in the Act is such that substantially affects the result of the election and it is the duty of the petitioner who alleges same to not only prove the non-compliance but also show how it substantially affected the result of the election. It is in his own interest to do so since if he does not go the extra mile, the tribunal or court may properly come to the conclusion that the alleged non-compliance did not affect substantially the result of the election under section 139(1) of the Electoral Act, 2010 (as amended); In the instant case, the discrepancies in exhibits "AN" and "AL", assuming that they were relevant or material, did not amount to non-compliance with the provisions of the Electoral Act, 2010 as amended even if they related to the accreditation exercise. (P. 315.paras. C-G)

6. *On Effect of absence of accreditation in an election-*

Where there is no accreditation at all, there is substantial non-compliance with the provisions of the Electoral Act which substantially affects the result of the election or election simpliciter. Non-compliance arising from non-accreditation of voters

is fatal to the election because an election that proceeded without accreditation of voters is void *ab initio*. In the instant case, there was accreditation as evidenced in exhibits "AN" and 'AL'. [*Fayemi v. Oni* (2009) 7 NWLR (Ft. 1140; 223; *Ojukwu v. Yar'adua* (2009) 12 NWLR (Ft. 11541 50; *Oke v. Mimiko (No.2)* (2014.) 1 NWLR (Pt. 1388) 332 referred to.] (Pp 314. paras. F-H: 335. paras. B-F)

7. *On Effect of not tendering statement on oath in a foreign language and the English translation thereof together –*

The language of the court is English Language. Where a statement or deposition is made in another language and later translated to the language of the court, the English Language version must be tendered in evidence along with the version in the other language. In other words, where a witness as an illiterate has made his statement in a foreign language as in this case in Hausa language. both the statement in the foreign language and the English translation thereof have to be tendered together, In the instant case, the depositions made in Hausa Language were never before the tribunal nor identified In the witnesses. Only the alleged English Language versions of the original depositions were tendered without a jurat. That apart, despite the fact that the tribunal expunged the evidence of the said witnesses from the record, it still went ahead to evaluate them in the alternative before arriving at the conclusion that they had no weight at all. The finding was duly affirmed by the Court of Appeal. In the circumstance, the Court of Appeal was right in affirming the decision of the tribunal in respect of the deposition of the witnesses in question and resolving the issue against the appellants. The two courts were right in rejecting those statements and evidence of the said witnesses. [*Gundiri v. Nyako* (2014) 2 NWLR (Pt. 1391) 211 referred to.] (Pp. 317, paras. A D; 328-329. paras. D-C)

8. *On Distinction between admissibility of document and weight to be attached thereto -*

Admissibility of a document does not necessarily convey the weight to be attached to the document admitted (P. 331, para. H)

9. On Treatment of evidence led on fact not pleaded

- Evidence which is at variance either with a party's pleadings or which is not covered by pleadings goes to no issue. The court will not go outside the pleadings to determine the rights of parties. In the instant case, the contention that there was a discrepancy between the figures recorded or captured by the card reader and the figures on exhibit 'AL', summary of results forms showing the number of persons accredited, was not an issue on the pleadings. The appellants' case as per their petition was that there was no accreditation, and that if there was any purported one at all, it was false or cooked up. At the Court of Appeal, however, they alleged a discrepancy between the documents, exhibits 'AN' and 'AL', the Card Reader report and the summary of resale Form EC8C as to the number of voters accredited respectively. As rightly submitted by the 2nd respondent's counsel, the question of discrepancy was not the appellants' case on their pleadings. [Buhari v. Obasanja (2005) 13 NWLR (Pt. 941) 1 referred to.] (Pp. 333-334, paras. H-D)

10. On Important of pleadings and need for party to be consistent in the presentation of his case -

A party's pleading is the most important requirement of his case before the court. It must be explicit, clear and specific to the point. It must also be consistent bearing in mind that the outcome of an appeal is a product of the original pleading as set out at the trial court. It is one and the same case from its inception right through the various stages of the appeal and does not change, in this case, the case the appellants set out to pursue before the tribunal was not proved, in other words, they failed to prove that the election was invalid by reason of substantial non-compliance with the provisions of the Electoral Act, 2010 as amended and the election guidelines. Following the frond of events of

i be ease presented by the appellants, it was obvious that they were not consistent on what they sought to claim from the court. This was so having regard to their pleading, the presentation at the trial tribunal, the reliefs sought before the Court of Appeal and also their ease before the Supreme Court. The appellants engaged in an attitude of trial and error in the presentation of their ease. This is not acceptable by any standard of adjudication. (P.336. paras. A-F)

11. *On Treatment of fresh issue raised on appeal without leave of court –*

An appellant needs leave to raise and argue a fresh issue coming before an appellate court for the first time. In the instant case, the appellants needed leave to raise and argue the issue of weight of evidence which was an issue coming before the Supreme Court for the first time, same not having been raised and argued before the Court of Appeal. To that extent, the objection in relation to the competence of ground 5 was valid and the ground consequently struck out for being incompetent, together with issue 3 formulated therefrom. (P. 305. paras. F- G)

12. *On When whole decision can be subject of appeal even when some issues were resolved in favour of appellant*

Per ONNOGHEN , J.S.C. at page 305. paras. A-E:

"It is true that the part of the decision of the lower court which is said to be the subject of the instant appeal is stated to be "the whole decision". Also not in dispute is the fact that in the consideration of the twelve issues formulated by learned senior counsel for appellants, the lower court resolved some of the issues in favour of appellants. Under normal circumstance, the appeal ought to be directed at some parts of the judgment the appellants disagree with.

In the instant case, however. I have looked carefully at the grounds of appeal complained of particularly grounds 1 and 4 thereof together with their particulars and it is clear that the substance of the complaints of appellants in those grounds centre on

the refusal of the lower court, after resolving some of the issues in favour of appellants, to reflect the effect of that resolution on any of the main reliefs sought in the petition but proceeded to dismiss the appeal for lack of merit, thereby making the whole decision subject to appeal.

I am therefore in agreement with the learned senior counsel on that issue. In situations like this, the court has to look at and consider the substance of the grounds of appeal and their particulars. In the circumstance. I hold that grounds 1 and 4 of the grounds of appeal are competent and overrule the objection relating to them."

13. On Attitude of the Supreme Court to concurrent findings of trial court and Court of Appeal -

Where concurrent findings of the trial court and the Court of Appeal are not perverse, the Supreme Court would not interfere with those findings as there would have been no miscarriage of justice. [Gbileve : Addingi (2014) 16 NWLR (Pt. 1433) 394; Saliu v. State (2014) 12 NWLR (Pt. 1420) 65; Kubor v. Dickson (2013) 4 NWLR (Pt. 1345) 534 referred to.] (P. 327. paras. A - B)

Nigerian Cases Referred to in the Judgment:

Agbaka v. Amadi (1998) II NWLR (Pt 572, 16
Amadi v. Orisakwe (2005) 7 NWLR (Pt. 924) 385
Anyabunsi v. Ugwunze (1995) 6 NWLR (Pt. 401) 225
Audi v. INEC (2010) 13 NWLR (Pt. 1212) 456
Awe v. Oshinbanjo (1965) 1 ALL NLR 72
Awolowo v. Shagari (1979) 6-9 SC 51
Awuse v. Odili (2005) 16 NWLR 44. 952) 416
B.H.C. Ltd v. Bogoco (1971) 1 All NLR 324
Baridam v. State (1994) 1 NWLR (Pt. 320) 250
Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1
Buhari v. Obasanjo (2009) 2 NWLR (Pt. 910)
Edokpolo & Co. Ltd. v. Ohenhen (1994) 7 NWLR (Pt. 358) 511
Egharevba v. Osagie (2009) 18 NWLR (Pt.1173) 299
Erik Emborg Expor A/S v. Jos Int'l Brew Plc (2003) 5 NWLR (Pt.814) 505
Fayemi v. Oni (2009) 7 NWLR (Pt.1140) 223

Gbileve v. Addingi (2014) 16 NWLR (Pt.1433) 394
Gundiri v. Nyako (2014) 2 NWLR (Pt. 1391)211
Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 48 4
Ibrahim v. Shagari (1983) 2 SCNLR 176
Ininame v. Akpabio (2008) W NWLR 44. 1116(22
Ivienagbor v. Bazuaye (1999) 9 NWLR (Pt. ~47 t 33
Jalingo v. Nyame (1992) 3 NWLR (Pt. 231) 538
Jev v. Iyortyom (2014) 14 NWLR (Pt. 1428)575
Kalgo v. Kalgo (1999) 6 NWLR (Pt. 608) 639
Kubor v. Dickson (2013) 4 NWLR (Pt. 1345) 534
Niger Construction Ltd. v. Okugbeni (1987)4 NWLR
(Pt.67) 787
Nnorodim v. Ezeani (1995) 2 NWLR (Pt. 378) 448
Nwaga v. Registered Trustees, Recitation Club (2014)
FWLR (Pt.190) 1360
Odom v. PDP (2015) 6 NWLR (Pt. 1456) 527
Ojukwu v. Yar 'Adua (2009) 12 NWLR (Pt.1154.) 50
Oke v. Mimiko (No.2) (2014) 1 NWLR (Pt. 1388 I 332
Onibudo v. Akibu (1982) 7 SC 60
PDP v. INEC (2012) 7 NWLR (Pt. 1300) 538
Saliu v. State (2014) 12 NWLR (Pt. 1420) 65
Sale. v. State (2016) 3 NWLR (Pt. 1499.) 392
Seven-up Bottling Co. v. Adewale (2004) 4 NWLR (Pt.
862) 183
Shurumo v. State (2010) 19 NWLR (Pt. 226) 73
Ucha v. Elechi (2012) 13 NWLR (Pt. 1317)330
Ugochukwu v. C.C.B. (Nig.) Ltd (1996) 6 NWLR (Pt.
456) 524

Nigerian Statutes Referred to in the Judgment

Electoral Act, 2010 (as amended); Ss.49, 138(1) (b). 139(10)

Evidence Act, 2011; S.84

Illiterates Protection Act

Appeal:

This was an appeal against the judgment of the Court of Appeal which dismissed the appeal of the appellants from the judgment of the Gombe State Governorship Election Tribunal dismissing the petition of the appellants herein against the election / return of the 1st respondent as Governor of Gombe State. The

Supreme Court, in a unanimous decision, upheld the 1st respondent's preliminary objection in part and dismissed the appeal

History of the Case:

Supreme Court

Names of Justices that sat on the appeal: Walter Samuel Nkanu Onnoghen.J.S.C. (*Presided and Read the Judgment*) Olabode Rhodes-Vivour. J.S.C.; Mary Ukaego Peter-Odili, J.S.C, Musa Dattijo Muhammad, J.S.C.: Clara Bata Ogunbiyi J.S.C; Chima Centus Nweze, J.S.C; C:Amiru Sanusi J.S.C .
Appeal No.: SC/979/2015

Date of Judgment: Monday 25th January 2016

Names of Counsel: Yusuf Ali SAN: (*with him, Adebayo*

O. Adelodun. SAN and K.K. Eleja. SAN. Professor Wahab Egbewole: Yakubu Maikasuwa, Esq; Ayo Olanrewaju. Esq.: John Lawrence, Esq.. S. A. Okc. Esq.: G. A. Idiagbonya. Esq.: Isaac Adebayo. Esq; R. O. Balogun. Esq.: Dr B. A. Omipidan: Dr L T. Adekilekun: Abass Ajiya. Esq.: A. O. Abdulkadir, ESQ.: Dr. R. O. Abdulkadir. Esq.; Oladeie Oyelami. Esq.; I. F. Yusuf. Esq.; A. O. Usman. Esq.: K.T Sulyman; S.A. Osuolale. Esq.: Adaobi Ike (Miss) and Tejumola Opejin [Miss)) - *for the Appellants*

Ibrahim Isiaku. SAN (*with him* Solomon H. Umoh. SAN: Z. M. Umar: Habu Abdu. Esq.; B. A. Oyefeso: N. D. Gwaison. Esq.: J. E. Okonkwo. Esq.: C. M. Dioji: F.S. Abiodun, Esq and A.Z Abdullahi, Esq- *for the 1st Respondent*

Olajide Ayodele, SAN, (*with him, A.G Yaro; J.J Adamu; C. Ubale; A.O Ayodele amd M.D Ayodele*) - *for the 2nd Respondent*

Hassan. M. Liman. SAN (*with him* M.B Usman. Esq. Aisha I Abbas (Mrs) I. M. Dikko. Esq.: Bello Shehu. Esq. (Legal Officer. INEC: Y. D. Dangana, Esq.; Fatima Bukar (Miss): Mahmud Usman. Esq.: Emecyene line Henry (Mrs): Azeez Taiwo Hassan. Esq.: Amanzi E Amanzi. I -a.: David Nguntsu Mesbi. Esq.; Sani Rabi. Esq.: Ismail idns Aseku Esq.: Abdullah! Sliuaibu Gayam, Esq.; Edoaka Ignatius Oduko: Earida Emar (Miss): Amayo Peace

Osadebamwen (Miss): Nkechi K. Edeze: Emeka
Greassias Asbara: Ismail Bala .Malami and Musa
Danladi -for the 3rd Respondent

Court of Appeal.

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

Court of Appeal. Yola

Names of Justices that sat on the appeal: Helen Moronkeji

Ogunwumiju. J.C.A (*Presided and Read the Leading Judgment*):

Ibrahim Mohammed Musa Satilawa. J.C.A. Joseph Eino Tins J.C.A

: Frederick Oziakpono Oho. J.C.A.: Ugochuchkwwo Anthony

Ogakwu. J.C.A.

Appeal No.: CA/YL/EPT/GMB/GOV/103/2015

Date of Judgment: Wednesday, 3rd December 2015

Names of Counsel: Chief Adeniyi Akintola. SAN (*with him.* Yakubu

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Hassan M. Liman. SAN (*with him.* Halita, Esq.. I.M Dikko. Esq.

Bello Shehu, Esq.. Y D, Dangana. Esq.: Mahmud Usman Esq.. and

A.S. Gayam. Esq.) *for the 3rd Respondent*

Tribunal:

Name the Tribunal: Governorship Election Petition Tribunal,

Gombe

Petition No: EPT/GMB/GOV/01/2015

Date of Judgment: Wednesday, 14th October 2015

Counsel:

Yusuf Ali. SAN: (*with him.* Adebayo O. Adelodun. SAN and

K.K. Eleja. SAN, Professor Wahab Egbewole. Yakubu

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S. A. Oke. Esq.; G. A. Idiagbonya. Esq.: Isaac Adebayo. Esq.:

R. O. Balogun. Esq.: Dr B. A Omipidan: Dr M. T. Adekilekun:

Abass Ajiya. Esq.: A.O Abdulkadir. Esq.; Dr. R. O Abdulkadir.

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Esq.: K.T.Sulyman: S.A.Osuolale Esq : Adaobi
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Umar: Habu Abdu. Esq.: B. A. Oyefeso; N. D. Gwaison, Esq’;
J. E Okonkwo. Esq.: C. M. Dioji: F.S Abiodun. Esq and A. Z.
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Olajide Ayodele. SAN. (*with him*. A G. Yaro J. J. Adamu: C.
Ubale: A. O. Ayodele and M. A. Ayodele) - *for the 2nd
Respondent*

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Abbas (Mrs): I. M. Dikko. Esq.; Bello Shehu. Esq. (Legal
Officer. INEC): Y. D. Dangana. Esq.: Eatima Bukar (Miss);
Mahmud Usman. Esq.: Emeeycne Ime Henry (Mrs); Azecz
Taiwo Hassan. Esq.; Amanzi F. Amanzi. Esq.: David Nguntsu
Meshi, Esq.; Sani Rabi. Esq.; Ismail Idris Aseku Esq.:
Abdullahi Shuaibu Gayam. Esq.; Udoka Ignatius Oduko:
Farida Umar (Miss); Amayo Peace Osadebamwen (Miss);
Nkechi K. Udeze; Emeka Gregsilas Agbara: Ismail Bala
Malami and Musa Danladi - *for the 3rd Respondent*

ONNOGHEN, J.S.C. (Delivering the heading Judgment):

On Wednesday, the 20th day of January. 2016, this Court heard and delivered judgment in this appeal. The court upheld the preliminary objection in part and dismissed the appeal for lack of merit. The reasons for the judgment so delivered was adjourned to today which I now proceed to give.

This appeal is against the judgment of the Court of Appeal, holden in Yola in appeal No. CA/YL/EPT/GMB/GOV/103/2015 delivered on 3/12/15 in which the court dismissed the appeal of the present appellants against the judgment of the Gombe State Governorship Election Petition Tribunal delivered on the 14th day of October. 2015 dismissing the petition of the appellants herein against the election/return of the 1st respondent as the winner of the Gombe State Gubernatorial election held on the 1 day of April. 2015.

In the petition in question, appellants, as petitioners claimed the following reliefs:

"WHEREFORE your petitioners pray as follows:

(a) It be determined that the Governorship election of the 11th day of April) 2015 in Gombe State conducted by the 3rd respondent was marred by corrupt practices, fraud and outright rigging.

(b) it be determined that the 1st and 2nd respondents herein were not duly elected, and did not score the lawful majority votes cast at the 11th April. 2015 Governorship Election in Gombe State and ought not to have been returned by the 3rd respondent.

(c) It be determined that the total highest number of lawful votes cast at the 11th April. 2015 Governorship Election in Gombe State were for the petitioner and the 1st and 2nd petitioners ought to have been returned by the 3rd respondent as winners of the said election.

(d) It be determined that the votes allegedly scored or credited to the 1st and 2nd respondents in the polling units and wards of Gombe State are invalid on the ground of corrupt practices, fraud, multiple voting, ballot snatching, ballot stuffing and outright rigging.

(e) It be determined that the Governorship Election of 11th April, 2015 in Gombe State suffered from non-compliance with the Electoral Act. 2010 (as amended).

(f) An order declaring the 1st and 2nd petitioners as the winners of the Governorship Election of 11th April, 2015 in Gombe State, having scored the highest number of lawful votes of the total votes cast in the said Election.

(g) An order compelling the 3rd respondent to withdraw from the 1st and 2nd respondents the certificate of return as the validly elected Governor of Gombe State in the Governorship Election held on 11th April. 2015.

(h) An order compelling the 3rd respondent to present to the A petitioner the certificate of return as the validly elected Governor of Gombe State in the Governorship Election held on 11th April. 2015.

Alternatively:

An order nullifying the entire Governorship Election conducted in Gombe State on 11th April, 2015 on the grounds of corrupt practices and non-compliance with the Electoral Act, 2010."

At the trial, appellants called twenty two (22) witnesses. PWE PW22 while 2nd respondent called nine to wit: RW1-RW9. On the other hand, RW10 was the only witness called by 1st respondent while 3rd respondent called no witness.

Two main issues were presented to the tribunal for the determination of the petition, namely:

- (i) Who won the majority of lawful votes cast at the election? and
- (ii) Were the issues of corrupt practices and non-compliance with the provisions of the Electoral Act proved at the trial?

At the trial, appellants tendered from the Bar, the certified true copy of the following documents used in the conduct of the election in question, by the 3rd respondent, namely

Forms EC8A, EC8B and EC8C series used in the polling units, the ward collation centres and Local Government Council collation centres in the 11 Local Government Areas of Gombe State. Also tendered from the Bar are: exhibits AN – which is the Card Reader Report for Gombe State; exhibit AL – the summary of accredited votes from Local Government Areas of the State; exhibits AP the press statement by 3rd respondent on the use of Card Headers for the Governorship election; exhibit 'AS' - the approved Guidelines and Regulations for the conduct of the General Election 2015 while exhibit AR is the manual for election officials 2015.

As stated earlier in this judgment, the tribunal, after evaluation of the evidence adduced resolved the two main issues against the appellants and consequently dismissed the petition resulting in an appeal to the Court of Appeal. Though the lower court resolved some of the issues presented before it in favour of appellants, it ended up in dismissing the appeal as lacking in merit. The instant appeal is against that decision.

In the appellants' brief filed on 31/12/2015, Yusuf Ali, SAN leading other Senior Advocates of Nigeria and legal practitioners formulated three issues for the determination of the appeal. These are as follows:

1. Whether the court below was right having rightly found that exhibit 'AN ' was wrongly rejected by the trial tribunal and that the testimony of PW21 was wrench discountenanced but still failed to accord exhibit 'AN' and the testimony of PW21 the necessary weight and resultant consequence they have on the appellants} case especially when the PW21 linked the documents tendered with the case of the appellants'. (Grounds 1, 3)
2. Whether the court below was right in affirming the decision of the trial tribunal on the testimonies of PWs' 2, 3, 7, 8, 10, 11, 12, 14 and 17 by holding that the testimonies of the witnesses are inadmissible and that there was failure to adhere to the provisions of Illiterate Protection Act on the ground of alleged absence of Illiterate jurat? (Ground 2)
3. Whether the court below was right in affirming the dismissal of appellants' petition when from the totality of the case made by the appellants especially the oral and documentary evidence tendered show that they have discharged the burden of proof on the various allegation made to entitle them to succeed, {Ground 5)

Learned leading senior counsel for 1st respondent. Ibrahim Isiyaku. SAN wised a preliminary objection against grounds 1, 3 and 5 of the grounds of appeal and the issues formulated therefrom by suitor counsel for appellants in the 1st respondent brief filed on 7/1/16 and in the alternative adopted appellants' issues 1 and 2 but formulated his issue 3 as follows:

"3. Whether the decision oi the lower court was against the weight of evidence."

I have to note that the three issues formulated by learned senior the 2nd and 3rd respondents Messrs Olajide Ayooele, SAN and Hassan M. Liman. SAN in their respective briefs of argument tiled on 8/1/2016 and 4/1/2016 respectively, are substantially the same with the issues identified by learned senior counsel tor appellant though differently couched. *Preliminary Objection*

In arguing the objection to appellant's grounds 1, 4 and 5 of the grounds of appeal, learned senior counsel for the 1st respondent

referred this Court to the statement contained in paragraph 2 of the notice of appeal at pages 6212 – 6217 of Vol.8 of the record to wit:

"2 *Part of the decision of the Court of Appeal complained of:*

“The whole decision”.

Whereas out of the twelve (12) issues submitted to the lower court some were resolved in favour of appellants viz issues 10, 5, 6 (in part) and 7 thereby but the said grounds of appeal and the statement as to which part of the judgment of the lower court complained of in the appeal supra, mean, in effect, that the complaints include even the parts of the judgment in favour of appellants, which should not have been the case, relying on *Niger Construction Ltd. v. Okugeni* (1987) 4 NWLR (Pt. 67) 787 at 795 and *Erik Embord Exput A/S v. Jos international Breweries Plc* (2003) 5 NWLR (Pt. 814) 505 at 512; that grounds 1 and 4 of the grounds of appeal are in conflict with the earlier quoted statement in paragraph 2 of the notice of appeal particularly as the lower court has overruled the decisions of the tribunal that:

(a) exhibit 'AN' was inadmissible and expunged from the record, and that

(b) PW21 was not a competent and compellable witness for lite appellants and urged the court to strike out the said grounds 1 and 4.

It is also the contention of learned senior counsel that since appellants' issue 3 is distilled from grounds 1, 3 and 4 of the grounds of appeal when grounds 1 and 4 are incompetent, the issue in question is consequently incompetent and liable to be struck out - relying on *Jev v. Iyortyom* (2014) 14 NWLR (Pt. 1428) 575 at 608 - 609 and *Agbaka v. Amadi* (1998) 11 NWLR (Pt. 512) 16 at 24.

On ground 5, it is the submission of senior counsel that none of the 24 grounds of appeal filed in the lower court which gave rise to the 12 issues formulated for determination challenged the totality of the evidence adduced at the trial; that all the issues formulated by senior counsel and decided by the lower court were on specific finding/holding by the tribunal that no leave was sought nor granted to raise and argue ground 5 as a fresh issue and urged the court to strike out issue 3 distilled therefrom.

Finally, senior counsel urged the court to sustain the objection -and consequently strike out grounds 1, 4 and 5 and issues 1 and 3 formulated therefrom.

In the reply brief filed on 9/1/16, learned senior counsel for appellants submitted that the right of appeal is constitutional and "*cannot be taken away from appellant under any guise*": that all the appellants need to do is to ensure that their complaints flow from the decision appealed against: that any examination of the grounds of appeal reveals, that appellants are not attacking the issues resolved in their favour but the refusal of the lower court, after correcting the omissions to effect same on the end result of their findings resulting in the lower court dismissing the appeal for lack of merit thereby affecting the whole decision.

It is also the contention of learned counsel that the grounds complained of are competent as they flow from the decision on appeal and that L1 respondent has failed to establish the incompetence of the grounds attacked as lumping up competent and incompetent grounds. Finally learned counsel urged the court to overrule the objection.

It is true that the part of the decision of the lower court which is said to be the subject of the instant appeal is stated to be "*the whole decision*". Also not in dispute is the fact that in the consideration of the twelve issues formulated by learned senior counsel for appellants, the lower court resolved some of the issues in favour of appellants. Under normal circumstance, the appeal ought to be directed at some parts of the judgement the appellants disagree with. In the instant case, however, I have looked carefully at the grounds of appeal complained of particularly grounds 1 and 4 thereof together with their particulars and it is clear that the substance of the complaints of appellants in those grounds center on the refusal of the lower court, after resolving some of the issues in favour of appellants, to reflect the effect of that resolution on any of the main reliefs sought in the petition but proceeded to dismiss the appeal.

I am therefore in agreement with the learned senior counsel on that issue. In situations like this, the court has to look at and consider the substance of the grounds of appeal and their particulars. In the circumstance, I hold that grounds 1 and 4 of the grounds of appeal are competent and overrule the objection relating to them.

In respect of ground 5, which is the omnibus ground of end appeal I agree with learned senior counsel for 1st respondent that the ground of appeal before the lower court (24 of them in all) were directed at

specific findings/ holdings by the tribunal and none attacked the totality of evidence adduced before the tribunal. Learned senior counsel for appellants did not react to the objection relating to the need of leave before filing ground 5.

I agree with learned senior counsel for the 1st respondent that appellants needed leave to raise and argue the issue of weight of evidence which is an issue coming before this court for the first time, same not having been raised and argued before lower court. To that extent, the objection in relation to the competence of ground 5 is sustained and the ground is consequently struck out for being incompetent. Along with the said ground 5 goes issue 3 formulated by appellant thereon.

On issue 1, it is the view of learned senior counsel for appellants that the lower court rightly held that exhibit 'AN' is admissible in evidence and that evidence was properly led on same but submitted that the said exhibit 'AN' is the Card Reader report for the Governorship Election of the 11th April, 2015 and that the election was tainted with irregularities thereby rendering the results of the election fundamentally flawed: that exhibit "AN" is a fundamental acknowledgment of what transpired in the Governorship election in Gombe State on 11th April, 2015: that exhibit 'AN' shows that accreditation in the said election was fraught with irregularities and that any form of irregularity in accreditation is a substantial non-compliance and where a petitioner has proved same, as in the instant case, there is no duty on such a petitioner to show the effect of its substantiality: that the fundamentality of accreditation in an election has been stated in a number of cases including *Fayemi v. Oni* (2009) 7 NWLR (Pt. 1140) 223 at 287; *Ojukwu v. Yar'adua* (2009) 12 NWLR (Pt. 1154) 50 at 175; *Oke v. Mimiko* (No.2) (2014) 1 NWLR (Pt. 1388) 332 at 392.

Learned counsel then proceeded to state the law thus:

" To that extent, the appellants having shown that there is an infraction in the sanctity of the accreditation for the election of Gombe State Governorship election with respect to conflict in the figures of accreditation as confirmed by exhibit 'AN' and exhibit 'ALL there is no duty on the appellants to show the effect of the non-compliance "

It is also the contention of learned counsel that improper accreditation or where it is shown that the card reader result with respect to accreditation is different from the result of

accreditation in the summary of result, it is tantamount to non-accreditation because any improper accreditation cannot sustain an election: that it is the duty of the respondents to prove that the accreditation which was the basis of the result was proper which they woefully failed to do: that it is not within the competence of the lower court to explain away the discrepancies in the various figures in exhibits "AN" and 'AL' as they did in this case.

It is the further submission of learned senior counsel that exhibit 'AN' shows over-voting in four local governments in relation to the discrepancies between exhibits 'AN' and 'AL' with the following as the breakdown:

- (a) Balanga: Exhibit "AN" – 45,365 Exhibit " AL – 50,905
- (b) Gombe: Exhibit 'AN' – 61,430 Exhibit "AL" – 61,674.
- (c) Kaltungo: Exhibit' AN' – 43,285 Exhibit 'AL' - 45754, and
- (d) Nafada: Exhibit 'AN' – 21,832 Exhibit" AL-22,391

That the total number of votes affected thereby is 187,405 between the parties to the action and that (his. without more, constitutes a fundamental non-compliance: that the lower court failed to give consideration to these infractions.

With regard to the evidence of PW21 learned senior counsel stated that the lower court agreed that the said witness is credible and submitted that the court having so found the evidence of the said PW21 must be relied upon as held in *Egharevba v. Osagie* (2009) 18 N'WLR (Pt. 1173) 299 at 326 that the failure of the lower court to give value to the said evidence of PW21 has resulted in a miscarriage of justice because if the court had done so the result would have been different and urged the court to resolve the issue in favour of appellants.

On his part, learned senior counsel for 1st respondent submitted that some of the reliefs sought in the petition are declaratory in nature and that appellants have the duty to establish, by credible evidence, the allegations of non-compliance with the provisions of the Electoral Act; that it is erroneous to submit that once appellants alleged or prove irregularities; the onus is on respondents to disprove the

irregularities or non-compliance, relying on: *P.C. v. INEC* (2012) All FWER (Pt. 617) 605 at 647 - 648 reported as *P.D.P. v. INEC* (2012) 7 NWLR (Pt. 1300) 538; *Ucha v. Elechi* (2012) 1 All EWER (Pt.625) 237 at 257; (2012) 13 NWLR (Pt. 133) 330; *If Gundiri v. Nyako* (2013) All I-WLR (Pt. 698) 816 at 849; (2014) 2 NWLR (Pt. 1391) 211 Section 139(1) of the Electoral Act. 2010 (as amended).

Learned senior counsel then submitted, that it is trite law that admissibility of evidence is one thing while the weight to be attached thereto is another, referring to the submission in relation to exhibits 'AN" and 'AL; that despite the ruling of the tribunal expunging exhibit 'AN' from the record in its judgment, it went on to consider the weight to be attached thereto during evaluation of evidence at pages 5833 - 5836 of vol. viii and found that the number of accredited voters as shown in exhibit 'AN' is lower than that in exhibit 'AL' and that the total number of voters as per exhibit 'AL' is j 535,081. While as per exhibit 'AN', the total number of accredited voters was 510,530 and that both figures were not reconciled by any witness; that the tribunal found/held that the total number of votes cast was not proved to be more than the total number of accredited voters as per exhibits 'AN' and 'AL; that the fact that exhibit "AL shows the total number of voles east as 506,768. it means that not all those who were accredited vested in the election and that it was the duty of the petitioner to have proved that any non-compliance substantially affected the result of the election with regard to the discrepancies in exhibits 'AN' and 'AL'; that the above findings holdings by the tribunal upon evaluation of exhibits 'AN' and AL' were affirmed by the lower court at pages 6123 - 6124 of vol. viii of the record. Learned senior counsel then submitted that based on the above, due consideration was given lo exhibits "AN" and "AL' by the lower courts before coming to the conclusion that the conflict between exhibit 'AN' and 'AL' did not substantially affect the outcome of the election.

On the testimony of PW2i. learned senior counsel stated that it is not in dispute that the witness made no entries in any of the documents tendered and admitted in evidence neither was he present when the entries were made; that the lower courts evaluated the evidence of PW'21 in detail; that only the presiding officers, party agents or even voters from the affected polling units can give direct evidence on the allegations in respect of their polling units; that it was from the evidence of PW21 that the lower court found that a total of 2,011

votes were deducted from the total score of appellants and that appellants' final score should have been 207.143 votes not 205,132 votes: that it was also from the evidence of PW21 that the court found that a total of 7,759 votes was added to the total score of 1st and 2nd respondents and that their total score ought to have been 277.610 votes instead of 285.369 votes: that appellants did not prove that the 1st and 2nd respondents were credited with 114,610 invalid votes which appellants' alleged to be the unlawful votes.

On the question of non-compliance arising from non-accreditation of voters and conducting election without valid voters' register voiding elections *ab initio*, learned senior counsel agreed with senior counsel for appellants but disagrees that where the Card Reader data shows that the number of voters accredited is different from the number of accredited voters in the summary result it amounts to non-accreditation, as submitted by learned senior counsel for appellant; that appellants did not tender the voters register in respect of the issue of over-voting as alleged: that the lower courts found that the total number of votes cast (506,768) is less than the number of accredited voters in both exhibits 'AN' (510530) and exhibit 'AL' which is 535,081 voters. Finally, learned senior counsel urged the court to resolve the issue against appellants.

On his part, learned senior counsel for the 2nd respondent submitted that the allegation of appellants of discrepancies in the figures of accredited voters in four Local Government Areas, is not part of their case on the pleadings and that any evidence at variance with the pleadings ground to no issue: that the issue of accreditation is a matter to be established polling unit by polling unit not local government by local government as is the attempt in exhibit "AN": that the votes cast is less than the number of accredited voters either by the card reader - exhibit 'AN' or exhibit "AL" - summary of results: that appellants did not tender the voters register; that the courts found that in many of the polling units the number of votes cast was less than the number of voters accredited, and urged the court to resolve the issue against appellants.

Learned senior counsel for 3rd respondent submitted that submission of senior counsel for appellants and the cases cited and relied upon in relation to non-accreditation of voters do not apply to the facts of the instant case where there is evidence of accreditation of voters: that since appellant; did not establish that the total votes cast in the election in issue exceeded either the accreditation as per exhibit "AN" or 'AL' issue 1, in the opinion of learned senior counsel is lame. Like learned counsel for the 1st and 2nd respondent;

the evidence of PW21 and exhibits 'AN' and 'AL' were duly evaluated by the lower courts contrary to the submission of learned senior counsel for appellants and came to the same conclusion; that the findings on the exhibits is concurrent and appellants have not shown any reason why this court should set same aside, relying on: *Gbileve v. Addingi* (2014) 16 NWLR (Pt. 1433) 394 at 417 - 418; *Saliu v. State* (2014) 12 NWLR (Pt. 1420) 65; *Kubor v. Dickson* (2013) 4 NWLR (Pt. 1345) 5.34 at 585 etc.

I have gone through the reply briefs filed in relation to each of the respondents' briefs and noticed that learned senior counsel used the opportunity to re-emphasize the points earlier made in the main brief in relation to the 1st and 2nd respondents brief.

In respect of the issue of concurrent finding of fact by the lower courts raised by learned senior counsel for 3rd respondent, it is the submission of learned counsel for appellants that "to the extent that the decisions of the two courts were oblivious of the very fundamental contradiction between the contents of exhibits 'AN' and 'AL' by refusing to give due weight to the said contradiction, both decisions are perverse and have provided basis for intervention." Learned senior Counsel then cited and relied on *Baridam v. The State* (1994) 1 NWLR (Pt. 320) 250 at 260 and *Nnorodim v. Ezeani* (1995) 2 NWLR (Pt. 378) 448 at 467; *Odom v. P.D.P.* (2015) 6 NWLR (Pt. 1456) 527 at 559 - 560.

The question to be answered in this issue is simply whether the lower court, after ruling that exhibits "AN" and "AL" are admissible in law failed to evaluate same before arriving at the conclusion it reached in the judgment on appeal.

I have carefully gone through the record of proceedings and the judgments of the lower courts on the issue under consideration. It is correct from the record, that the lower courts evaluated the exhibits in question before making their findings thereon. Even though the tribunal initially held that the documents were inadmissible and consequently expunged same from the record, it proceeded, nonetheless to evaluate them in the alternative, as is the reasonable practice expected of the lower courts, not being the final court of the land. At pages 5828 - 5836 of the record, the tribunal stated thus:

"Assuming however that we are wrong in holdings we did, of what probative value, of any, of exhibit 'AN' When PW22 WAS SHOWN EXHIBIT "AN" she stated thus: "What I am now shown is exhibit "AN".

It is the computer generated output from the Card Reader used in Gombe State. From exhibit "AN" the total number of voters accredited are as follows:

1. Akko Local Government
78,812-page 11
2. Balanga Local Government 45,365 - page 17
3. Billiri Local Government
42,724- page 21
4. Dukku Local Government
39,205 - page 28
5. Funakaye Local Government
40,619-page 34
6. Gombe Local Government
61,430 page 40
7. Kaltungo Local Government
43,285 - page 46
8. Kwaimi Local Government
42,830 page 52
9. Nafada Local Government
21,832 - page 56
10. Shongom Local Government
25,487 - page 58
11. Yamaltu Ideba Local Government 68,941 - page 69

The total number of accredited voters for the Governorship election is 510,530. The number of accredited voters as shown in exhibit "AN" is lower than that in exhibit "AL" which is the summary of results from local government areas collation at the state level and the terminal form in collation of figures emanating from LC8A series. The total number of accredited voters as indicated in exhibit AL is 535,081. These two (2) figures were not reconciled by any witness. The total number of votes cast has not been proved to be more than the total number of accredited voters as per the said document. Learned senior counsel to the petitioners had stated in his final written address that the burden of resolving the discrepancies in the accreditation figures was that of the 3rd respondent. This is far from the truth. As earlier stated, the burden of proving non-compliance resides with the petitioners first and does not shift until they have discharged that burden.

Now back to the discrepancies, the question to ask is whether they are substantial enough to affect the result of the election. As earlier stated, the figures in exhibit "AN" is 510,530 while in exhibit "AL" is 535,081. The total number of votes cast as indicated in exhibit "AL" is 506,768. This means that it is not all those who were accredited that voted in the electionthis the petitioners have not done with regard to the discrepancies in exhibits "AN" and "AL".

If the above quoted passage from the judgment of the tribunal is not evaluation and ascription of probative value or weight to the documents - exhibits "AN" and "AL" in question I wonder what else it is in legal practice.

Did the lower court also evaluate the documents after ruling that the tribunal was in error in expunging from the record exhibits "AN" and "AL"? Did that court also ascribe any probative value or weight to the said exhibits? Learned senior counsel for appellants submitted that the court did not. Is he correct?

At page 6124 of the record, the lower court stated thus:

“However, exhibit “AN” on which PW22 was examined by both parties is an interesting document. PW22 was able to say that by exhibit “AN”, the number of accredited voters by Card Reader was 510,530. On the other hand, exhibit "AL", the summary of result of local government areas in Gombe State shows that the total number of people who were accredited is 535,081. From the evidence of PW21 on page 5293 of the record, exhibit ‘AL’ shows total votes cast to be 506,768. Valid votes cast was 493,611 and 13,157 votes were rejected. Thus the total number of votes cast is less than the number of accredited voters in either exhibit “AN” or exhibit “AL”...

Much ado was made to exhibit ‘AN’ and PW22 but neither the witness nor the exhibit had anything spectacular to show in proof of the appellants' claims Exhibit ‘AN’ would have been a sword of Damocles hanging over the head of the respondents, if the number of voters who voted actually exceeded the number accredited by Card Reader.”

From the above, it is very clear that the lower court re-evaluated the exhibits and came to the same conclusion reached by the tribunal which is that the exhibits have no probative value or

weight in respect of the case put forward by appellants.

I hold the considered view that whatever discrepancies in the figures in exhibits 'AN' and 'AL' it is not in dispute at all, as found by the lower courts, that the number of voters who voted in the Gombe State Gubernatorial Election of 11th April, 2015 did not exceed the accredited number of voters by Card Reader Data. The above being an indisputable fact where then is the over voting being talked about by appellants? Over voting can only be demonstrated clearly where the number of accredited voters is less than the number of voters or votes cast. To prove over voting, it is now settled law that you must plead and tender in evidence the Register of voters relevant to the election in issue. This was not done in the instant case.

It is not enough for a petitioner in an election petition to allege over voting. He has the duty to prove same. To discharge that responsibility the law requires the petitioner to do the following:

- (a) Tender the voters' register;
- (b) Tender the statement of result in the appropriate forms which would show the number of registered accredited voters and number of actual votes;
- (c) Relate each of the document to the specific area case in respect of which the documents are tendered;
- (d) Show that the figure representing the over-voting if removed would result in victory for the petitioner.
See: *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; *Iniamo v. AKpabio* (2008) NWLR (Pt. 1116) 225.

On the other hand, when the ground for challenging the return of a candidate in an election petition is by reason of corrupt practices or non-compliance with the provisions of the Electoral Act, the petitioner has the duty to 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 sections 138(1)(b) and 139(1) of the Electoral Act, 2010 (as amended); *Awolowo v. Shagari* (1979) All NLR 120; *Ibrahim v. Shagari* (1983) 2 SCNLR 176; *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241 etc.

It is not enough for the petitioner to allege and prove over-

voting, in addition to the above the petitioner must show that the said over-voting inured to the winner of the election in particular as the over-voting can be for any of the candidates in the election, respondent or any of the other contestants in the election in question. The court must also be satisfied that it was due to the over-voting traceable to the respondent that the respondent won the election.

In the instant case, appellants did not satisfy any of the requirements. In fact the case of the appellants is that there was no accreditation, polling unit by polling unit, and that any data produced by 3rd respondent to show accreditation is falsified. No wonder that at the trial no evidence of accreditation, polling unit by polling unit as required by law, was produced by appellants. Rather there is evidence of accreditation as contained in exhibit “AN” and now the case of appellants has changed from non- accreditation to discrepancies in the figures of accredited voters which alleged discrepancies failed to prove over-voting for it to have any legal effect on the result of the election. In any event, it is my considered view that evidence of discrepancies goes to no issue as the case of the appellants as pleaded in the petition was not founded on discrepancies and the effect(s) it they has have on the result of the election.

It is also the contention of learned senior counsel for appellants that once a ground of non-compliance with the Electoral Act is alleged or proved, the burden on a petitioner who alleges same is discharged as the petitioner does not need to go further to prove how the non-compliance substantially affected the result of the election. Is learned senior counsel correct in that submission. I do not think so.

To begin with it is not the case of appellants that there was no accreditation of voters during the conduct of the election in issue neither are they complaining that the election was conducted with an invalid voters register. The above being the case, I hold the view that the case of *Fayemi v Oni, supra; Ojukwu v. Yar'adua, supra; Oka v. Mimiko* also supra, are not relevant in the determination of this appeal, the facts being grossly not the same. The above decisions clearly state the true position of the law that where there is no accreditation at all, there is substantial non-compliance with the provisions of the Electoral Act which substantially affects the result of the election or election *simpliciter*. In the instant case, there was accreditation as evidenced in exhibits ‘AN’ and ‘AL’.

Learned senior counsel has also stated that what appellants need to do is to point to the discrepancies in exhibits ‘AN’ and ‘AL’

and that constitutes substantial non-compliance shifting the burden of proof to the respondents. I must say that I consider the above worrisome, particularly having regard to the provision of section 139(1) of the Electoral Act, 2010, as amended which provides as follows:

“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 noncompliance did not affect substantially the result of the election.”

Generally speaking it is settled law that he who alleges must prove, he has the burden of proof which he must discharge else he has to fail in the action. It means that a petitioner in an election petition whose ground(s) for challenging the election of his opponent is non-compliance with the provisions of the Electoral Act, 2010, as amended by virtue of which he seeks nullification of the said election must succeed on the strength of his case as pleaded, I hold the view that discrepancies in exhibits "AN" and "AL", granted that they are relevant or material, which I do not concede, do not amount to non-compliance with the provisions of the Electoral Act, 2010 as amended even if they relate to 'accreditation exercise. The non compliance envisaged in the Act is such that substantially affects the result of the election and it is the duty of the petitioner who alleges same to not only prove the non-compliance but also show how it substantially affected the result of the election. It is in his own interest to do so since if he does not go the extra mile, the tribunal or court may properly come to the conclusion that the alleged non-compliance did not affect substantially the result of the election under section 139(1) of the Electoral Act, 2010 (as amended).

In the circumstance, I resolve issue 1 against appellants.

On issue 2, learned senior counsel for appellants submitted that the lower court was in error in expunging or discountenancing the testimonies of PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14 and PW17 on the ground that they were illiterates whose English Language translations of their original statement in Hausa Language did not contain a signed jurat; that the witnesses were cross examined extensively on the statements; that they identified the statements as theirs; that the lower court was in error in affirming, the decision of the tribunal expunging the testimonies

from the record; that the provision of the Illiterates Protection Act/Law is to protect the illiterate who executes a document; that the provision is not to be used as a sworn against the illiterate - relying on: *Edokpolo and Co. v. Ohenhen* (1994) 7 NWLR (Pt. 358) 511 at 534; *Anyabunsi v. Ugwunze* (1995) 7 SCNJ 55 at 69; (1995) 6 NWLR (Pt.401) 225.

Finally learned senior counsel submitted that the testimonies of the witnesses were admissible and that the court should so admit them and ascribe probative value to them to enhance substantial justice.

On his part, learned counsel for 1st respondent stated that all the affected witnesses gave their statements in Hausa Language but that version was not annexed to the English version before front loading same; that only the English version of the statements/depositions were adopted at the trial; that the facts of this case are the same with those of *Gundiri v. Nyako* (2014) 2 NWLR (Pt. 1391) 211 at 241 - 242 and urged the court to resolve the issue against appellants.

I have to state that learned senior counsel for the 2nd and 3rd respondents made submissions on the issue similar to those of senior counsel for the 1st respondent which I do not intend to reproduce herein.

In resolving this issue, I need to state that learned senior counsel for appellants appear to join the issue of evidential value to be attached to a statement or deposition made by an illiterate in a language other than English Language without annexing the original statement of the deponent made in that foreign language to the English Language version.

It is not in doubt that the English Language version of the depositions of the witnesses concerned contained at pages 886 of Vol. 1; 4497, 4539 of Vol. 6; 4545 - 4560 and 45700 - 4618 of Vol. 6 of the records of appeal though containing the name of one A.G.M. Bello Esq. as one who read and interpreted the depositions to the deponents from the original Hausa Language in which they were made to English Language were not signed by him. The English versions therefore had no jurat.

The law is settled that the language of the court is English Language and that where a statement or deposition made in a foreign language and later translated to the language of the court, the English language version must be tendered in evidence, it must be tendered along with the version in the foreign language, in the instant case, the depositions made in Hausa Language were never

before the tribunal nor identified by the witnesses. Only the alleged English Language versions of the original depositions were tendered without a jurat. In the circumstance, I agree with the submissions of learned senior counsel for respondents that the present case is on all four with the ease of *Gundiri v. Nyako* (2014) 2 NWLR (Pt. 1391) 211 at 241 - 242. That apart, despite the fact that the tribunal expunged the evidence of the said witnesses from the record, it still went ahead to evaluate them in the alternative before arriving at the conclusion that they have no weight at all. The above finding was duly affirmed by the lower court and I find no fault in the decision of the lower courts on the matter. In the circumstance, I hold the view that the lower court is right in affirming the decision of the tribunal in respect of the deposition of the witnesses in question and resolve the issue against appellants.

The two surviving issues, haven resolved against appellants, it is obvious that the appeal has no merit and is consequently dismissed by me with N250,000 costs each to the 1st and 2nd respondents against appellants. The 3rd respondent is to bear its own costs.

Appeal dismissed.

RHODES-VIVOURE, J.S.C.: This appeal was heard on the 20th day of January, 2016, We dismissed it and informed counsel that reasons for dismissing the judgment would be given on Monday, the 25th day of January, 2016. My learned brother, Onnoghen, JSC obliged me with a draft on his reasons for dismissing the appeal. I agree with his Lordships reasoning and conclusions. I must observe that exhibit AN, is the card reader, the total number of accredited voters was 510,530. While exhibit AL, the total number of votes cast was 506,768. The petition was credited with 205,132 votes while, the first respondent was credited with 285,369 votes

A close look at these figures reveal that there was no substantial irregularity in the conduct of the elections. The reasoning is premised on the fact and the law that once the number of people that voted is less than the number of persons accredited as was the case in the Governorship election in Gombe State over-voting becomes a non-issue.

For this and the more detailed reasoning in the Reasons for Judgment prepared by my learned brother, Onnoghen, JSC the appeal is dismissed.

PETER-ODILI, J.S.C.: Reasons for the judgment delivered on the bench on 20th day of January 2016 which said reasons for the decision were articulated by my learned brother. W. S. N. Onnoghen, JSC explaining what brought about the dismissal of the appeal heard on the said 20th day of January, 2016.

This is an appeal from the decision of the Court of Appeal, Yola Division sitting in Yola, Adamawa State coram: H. M. Ogunwumiju; I. M. M. Saulawa; J.T. Tur; F.O. Oziakpono Oho; U. A. Ogakwu, JJCA which dismissed the appeal of the appellants and affirmed the dismissal of the petition in the Governorship Election Petition Tribunal Gombe as unproved and lacking in merit.

Appellants aggrieved In the judgment of the Court of Appeal or court below have come before the Supreme Court praying for the setting aside of the said judgment with reliefs set out in the notice of appeal filed on the 14th day of December, 2015. The facts leading to this appeal are well set out in the lead judgment and there is no need for a repeat herein even though I shall reproduce the reliefs as sought by the petitioner/appellant.

- (a) It be determined that the Governorship election of the 11th day of April 2015 in Gombe State conducted by the 3rd Respondent was marred by corrupt practices, fraud and outright rigging.
- (b) It be determined that the 1st and 2nd Respondents herein were not duly elected, and did not score the lawful majority votes cast at the 11th April 2015 Governorship Election in Gombe State and ought not to have been returned by the 3rd respondent.
- (c) It be determined that the total highest number of lawful votes cast at the 11th April 2015 Governorship Election in Gombe State were for the petitioner and the 1st and 2nd petitioners ought to have been returned by the 3rd respondents as winners of the said election.
- (d) It be determined that the votes allegedly stored or credited to the 1st and 2nd respondents in the polling units and wards of Gombe State are invalid on the ground of corrupt practice, fraud, multiple voting, ballot snatching, ballot shilling and outright rigging.
- (e) It be determined that the Governorship Election of 11th April 2015 in Gombe State suffered from non-compliance with the Electoral Act 2010 (as

amended).

- (f) An order declaring the 1st and 2nd petitioners as the winners of the Governorship Election of 11th April 2015 in Gombe State, having scored the highest number of lawful votes of the total cast in the said election.
- (g) An order compelling the 3rd respondent to withdraw from the 1st and 2nd respondent the certificate of return as the validly elected Governor of Gombe State in the Governorship Election held on 11th April 2015.
- (h) An order compelling the 3rd respondent to present to the 1st petitioner the certificate of return as the validly elected Governor of Gombe State in the Governorship Election held on 11th April, 2015

ALTERNATIVELY:

- (i) An order nullifying the entire governorship election conducted in Gombe State on the 1st April 2015 on the grounds of corrupt practices or non compliance with the Electoral Act, 2010.

Learned counsel for the appellants, Yusuf Ali, SAN adopted the brief filed on 31/12/2015 and in it formulated three issues for determination, viz:

1. Whether the court below was right having rightly found that exhibit AN was wrongfully rejected by the trial tribunal and that the testimony of PW21 was wrongly discountenanced but still failed to accord exhibit AN and the testimony of PW21 the necessary weight and resultant consequence they have on the appellants case especially when the PW21 linked the documents tendered with the ease of the appellants (Grounds I, 3,&4)
2. Whether the court below was right in affirming the decision of the trial Tribunal on the testimonies of PWs' 2, 3, 7, 8, 10, 11, 12, 14 & 17 by holding that the testimonies of the witnesses are inadmissible and that there was failure to adhere to the provisions of the Illiterate Protection Act on the ground of alleged absence of illiterate jurat? (Ground 2)
3. Whether the court below was right in affirming the dismissal of the appellants' petition, when from the totality of the case made by the appellants especially

the oral and documentary evidence tendered show that they have discharged the burden of proof on the various allegations made to entitle them to succeed.
(Ground 5)

Learned Senior Advocate also adopted the Reply Briefs of the appellants filed on the 9/1/2016 and 7/1/2016, 13/1/2016 respectively in response to 1st respondent, 3rd respondent and 2nd respondent.

For the 1st respondent, Ibrahim Isiyaku SAN adopted its brief of argument filed on the 7/4/2016 He crafted three issues for determination which are as follows:

1. Whether the court below was right having rightly found a that exhibit AN was wrongfully rejected by the trial Tribunal and that the testimony of PW21 was wrongly discountenanced out still failed to accord exhibit AN and the testimony of PW21 the necessary weight and resultant consequence they hare on the appellants' l case especially when the PW21 linked the documents tendered with the case of the appellants? (Ground 1, 3 & 4)
2. Whether the court below was right in affirming the decision of the trial tribunal on the testimonies of PWs' 2, 3, 7, 8, 10, 11, 12, 14 & 17 by holding that the testimonies of the witnesses are inadmissible and that there was failure to adhere to the provisions of the Illiterate Protection Act on the ground of alleged absence of illiterate jurat? (Ground 2)

The 1st respondent formulated the following as issue No. 3 from ground 3.

“3. Whether the decision of the Lower Court was against the weight of evidence”.

Mr. Olajide Ayodele SAN of counsel for the 2nd respondent adopted its Brief argument filed on 8/1/2016 and identified three issues for determination which are thus:

- (a) Whether Court of Appeal was not trials; when after overruling the trial tribunal on the admissibility of exhibit AN, the card reader report it held that there was no evidence led on the Card Reader Report by the appellants to show substantial non-compliance with the provisions of the Electoral Act, 2010 (as amended) by the officials of the 3o:respondent.
(Ground 1)

- (b) Whether the Court of Appeal was not right when it held that the evidence of the following witnesses: PW2, PW3, PW7, PW10, PW11, PW12, PW14 and PW17 was incompetent and defective because the witnesses admitted making their statement in Hausa language and tendering a statement English language Without attaching the Hausa version of the statement and having the said statement translated into English language by an interpreter who did not sign the illiterate jurat on the witness statement on oath. (Ground 2)
- (c) Whether the court of Appeal was not right when it held that it is only the document which PW21 tried to link with the complains of the appellant, that have probative value and that the other document notwithstanding the fact that they are certified true copies of public documents cannot be given evidential value and whether the Court of Appeal was not right in stating that in spite of the competence of PW21 to testify before the tribunal, he cannot testify in respect of the actions of presiding officers, collation officers and documents which were made by other person when he was not there and whether the failure to give evidential value to such documents caused a miscarriage of justice. (Grounds 3, 4 & 5)

For the 3rd respondent, Hassan M. Liman, SAN adopted its brief of argument filed on the 4th January 2016 in which he drafted three issues for determination which are thus:

1. Whether Mom the facts and circumstances of this appeal, the Court of Appeal was right in affirming the decision of the trial tribunal when it re-evaluated Exhibit "AN" and ascribed to it the proper probative value in arriving at its judgment.
2. Whether the Court of Appeal was right when it affirmed the judgment of the trial tribunal which struck out the witness depositions of PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14 & PW17 which were found to be incompetent.
3. Whether the Court of Appeal was right when it affirmed the decision of the trial tribunal in rejecting the evidence of PW21 on the ground that the

evidence was inadmissible and that the PW21 was not a competent witness to testify on the documentary evidence already tendered from the Bar. (Distilled from grounds 3, 4 & 5 of the notice of appeal).

For an ease flow, I shall utilize the issues as crafted by the 3rd respondent since they seem simply drafted and all questions raised by each of the parties are in substance the same though differently crafted.

Issue No.1:

Whether from the facts and circumstances of this appeal, the Court of Appeal was right in affirming the decision of the trial Tribunal when it re-evaluated exhibit 'AN' and ascribed to it the proper probative value in arriving at its judgment.

Canvassing the position of the appellants, learned counsel said that exhibit 'AN', the card reader report for the Governorship election of the 11th April, 2015 showed that the election was tainted with irregularities and so the result of the election was fundamentally compromised and so a substantial non-compliance had ensued. He cited *Fayemi v. Oni* (2009) 7 NWLR (Pt.1140) 223 at 287; *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50 at 175.

He stated further for the appellant's that there was improper accreditation or where it is shown as in this case that the card reader result with respect to accreditation is different from the result of accreditation in the summary of the result is tantamount to non-accreditation and so cannot sustain an election.

Learned counsel for the 1st respondent contended that there is a world of difference between non-accreditation and the use of invalid Voters Registers on the one hand, and what transpired in the case on the other. That the appellant in this case did not tender the voters register or ballot papers in the election, let alone call for the evaluation of same in respect of the over voting claim raised by them. That the relevance of the voters' register as well as ballot papers in respect of over voting claim cannot be over emphasized.

For the 2nd respondent, it was submitted that since the dispute is about accreditation of voters, polling unit by polling unit, the principle is that accreditation is taken polling unit by polling unit and so the determining factor on the question, whether or not there has been accreditation is the polling unit and not on local Government Area basis.

It was submitted for the 3rd respondent that the disputed

exhibit 'AN' was properly evaluated first by the trial tribunal and affirmed by the Court of Appeal and such a concurrent finding ought not to be interfered with by the Supreme Court since there is no perversity leading to a miscarriage of justice having been established. He cited *Gbileve v. Addingi* (2014) 16 NWLR (Pt. 433) 393 at 417 – 418.

In brief, appellants contend that the Court of Appeal ruled that exhibit 'AN' was admissible evidence and admitted same still fell into manifest error in refusing to give the said exhibit its full weight.

The respondents countering that position, posit that exhibits 'AN' and 'AC' did not establish that the total votes cast were more than the number of voters accredited. That the Court of re-evaluated exhibit 'AN' and ascribed to it the proper probative value in arriving at its judgment.

The trial tribunal had in considering the admissibility of exhibit 'AN' which is the card reader accreditation report generated and tendered before the trial tribunal stated as follows:

“Before proceeding to determine the value of exhibit 'AN', we shall first of all consider whether or not it was admitted wrongly and what the Tribunal should do in the circumstance. From the record of this Tribunal, exhibit 'AN' was tendered with other documents by the petitioners from Bar without objection. However, when PW22 was about to answer question on it, the issue of whether or not proper foundation had been laid arose.... In the instant case the issue before us is whether the pre-conditions required before a computer generated documents can be admitted in evidence have been satisfied as provided in section 84(1) & (2) of the Evidence Act 2011

It is the contention of the respondents that the petitioners did not comply with the provisions of this section as the conditions precedent to the tendering of exhibit 'AN' were not fulfilled. The document therefore is inadmissible in law notwithstanding the fact that it had been admitted earlier from the bar. They urged the Tribunal to expunge exhibit 'AN' at this stage of the judgment.

It must be stated the respondents' counsel had earlier vigorously objected to the petitioner's counsel

laying any foundation after the document had been admitted in evidence. Consequent upon this tribunal on 10th August, 2015.

What the above means is that the foundation must first be laid through evidence before the document generated from computer can be admissible. We will add on our own that where the e-document is admitted from the Bar as in instant petition, the starting point for an evidence with respect to such a document shall be the foundation as to how it is generated and produced and the devices used in the generation and production. It is when that is done that further evidence with respect to e-document can be elicited. It amounts to an afterthought for learned senior counsel for the petitioners to ask the witness to state the model of the computer used in generating this document after the witness has given evidence. In our view the objection at this is well taken and is hereby sustained.

We still stand by the above ruling except to finally nail the ruling on the head figuratively by expunging exhibit AN from the records of the Tribunal as it is an inadmissible piece of document not minding the fact that a certificate was issued and placed on the document... Exhibit "AN" at this stage is hereby expunged from the record of this Tribunal."

See pages 5828 – 5833 of the volume 8 of the record of appeal.

The Tribunal went on to state, thus at pages 5828 – 5836 of the Record, volume 8 as follows:

"The total number of accredited voter for the Governorship Election is 510,530. The number of accredited voters as shown in exhibit "AN" is lower than that in exhibit "AL" which is the summary of result from Local Government Areas collation of figures emanating from EC8A series. The total number of accredited voters as indicated in Exhibit AL is 535,081. These two (2) figures were not reconciled by any witness. The total number of votes cast has not been proved to be more than the total number of accredited voters as per the said document. Learned senior counsel to the petitioners had stated in his final written address that the burden

of resolving the discrepancies in the accreditation figures was that of the 3rd respondent. This is far from the truth. As earlier stated, the burden of proving non-compliance resides with the petitioners first and does not shift until they have discharged that burden.

Now back to the discrepancies, the question to ask is whether they are substantial enough to affect the result of the election. As earlier stated, the figures in exhibit “AN” is 510,530 while in exhibit "AL" it is 535,081. The total number of votes cast is indicated in exhibit AL is 506,768. This means that it is not all those who were accredited that voted in the election... this the petitioners have not done with regard to the discrepancies in exhibits “AN” and “AL”.

See pages 5828 - 5836 of Volume 8 of the record of appeal.

In considering exhibit “AN” the court of Appeal affirmed that the decision of the trial tribunal when held thus:

“However, exhibit “AN” on which PW22 was examined by both parties is an interesting document PW22 was able to say that by exhibit “AN” the number of accredited voters by card reader was 510,530. On the other hand, exhibit “AL” the summary of result of Local Government Areas in Gombe State show that the total number of people who were accredited is 535,081. From the evidence of PW21 on page 529 of the record, exhibit AL shows total votes cast to be 506,768. Valid votes cast was 493,611 and 13,157 votes were rejected. Thus the total number of vote cast is less than the number of accredited voters in either exhibit “AN” or exhibit “AL”.

Much ado was made of exhibit “AN” and PW22 but neither the witness nor the exhibit had anything spectacular to show in proof of the appellants’ claims Exhibit “AN” would have been a sword of Damocles hanging over the head of the respondents, if the number of voters who voted actually exceeded the number accredited by card reader.”

I have quoted both the trial tribunal and the Court of Appeal for what those two courts did in their findings and decisions. It is not in dispute that the tribunal at first admitted in evidence the card

Reader Report (exhibit AN) which was tendered by the petitioners counsel from the Bar along with other certified true copies of election related documents and at the point of writing its judgment, the Tribunal expunged exhibit AN on the ground that it did not satisfy the conditions set out under section 84 of the Evidence Act, 2011 for admissibility of computer-generated documents. Also not in dispute is that the Court of Appeal found the said conditions complied with and over ruling the tribunal reinstated the said exhibit. AN. What the court below did as had earlier been done by the Trial tribunal was to make the finding the appellant never tendered the voters' register or ballot papers in the election and it is crucial to state in this case that section 49 of the Electoral Act, has prescribed the relevance of the voters' register as well as ballot papers when the appellant is contesting the dispute based on over voting. In line therefore with the compliance of the Electoral Act in these concurrent findings of the two courts which show no perversity, that this court cannot interfere with those findings as there is no miscarriage of justice. See *Gbileve v. Addingi* (2014) 16 NWLR (Pt. 1433) 394; *Saliu v. State* (2014) 4 NWLR (Pt.1420) 65 at 85; *kubor v. Dickson* (2013) 4 NWLR (Pt.1345) 534 at 585.

I see nothing on which what the court of Appeal did in its re-evaluation of the exhibit AN and the probative value it ascribed to and holding that the appellant had not met the requirement expected of a petitioner in proof of his grievance.

I have no difficulty in resolving the issue against the appellant.

Issue No.2

Whether the Court of Appeal was right when it affirmed the judgment of the Trial tribunal which struck out the witness depositions of PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14, & PW17 which were found to be incompetent.

Yusuf Ali, SAN for the appellants submitted that the court of Appeal was in manifest error in agreeing with the respondents and upholding the expunging of the testimonies of the identified witnesses in that there was non-compliance with the provisions of the Illiterate protection Act regarding the jurat and interpretation. He referred to *Edokpolo & Co. v Ohenhen* (1994) 7 NWLR (Pt. 358) 511 at 534.

That it was not open to a stranger or a third party to raise the issue of Illiterate Protection law to impair or jeopardize the interest of an illiterate.

That this is a concurrent finding that the Supreme Court should interfere with. He relied on *Amadi v. Orisakwe* (2005) All FWLR (PT. 247) 1529 at 1538; (2005) 7 NWLR (Pt. 924) 385.

Ibrahim Isiyaku, SAN for the 1st respondent contended that the witnesses adopt depositions which were not made by them since English language was not language in which they made their statements. He cited *Gundiri v. Nyako* (2014) 2 NWLR (Pt. 391) 211.

That the affected witnesses did not adopt depositions made by them since the Hausa versions were not adopted while the English versions which they adopted were not their statements.

For the 2nd respondent, Mr. Ayodele, SAN submitted along the same lines as 1st respondent as well as Mr. Liman, SAN for the 3rd respondent on the ground that the concurrent findings by the trial tribunal and the Court of Appeal on the issue of incompetence of the witnesses of PW2, PW3, PW7, PW10, PW11, PW12, PW14 and PW17 and so this court should not upset those findings.

The appellant's standpoint is that the Court of Appeal erroneously upheld the expunging of the testimonies of PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14 and PW17 In the tribunal which resulted into a miscarriage of justice on the appellants.

The respondents disagree contending that witnesses who had made statements on oath in Hausa language cannot adopt statements purported to be theirs in English language and that the Court of Appeal was right in agreeing with what the tribunal did when it expunged those statements.

What is in contention here is the probative value of the translated English version of the statements on oath adopted by the PW2, PW3, PW7, PW8, PW10, PW11, PW12, PW14 and PW17 at the trial in the absence of the Hausa version in which the statements were originally made by the said witnesses. The problem on ground seems to have been settled by this court and the case of *Gundiri v. Nyako* (2014) 2 NWLR (Pt. 1391) 211 at 241 - 242 per Ogunbiyi seems to have had the present scenario in mind. I shall quote my learned brother who captured the position effectively and that is thus:

“From the foregoing findings by the trial tribunal, the law desires that witness depositions are to be individually identified with the maker. It is not enough an identity that none of the witnesses in question disowned the statement. They could not in other words have claimed rightly a deposition which

was made in English language since they spoke in Hausa. The mentioning of the name of one Sunday Mathew, an interpreter was not enough an identity. The learned appellants' counsel cited the case of Udeagha v. Omegara (2010) 11 NWLR (Pt. 1204) page 168 wherein it was held that a witness can adopt an irregular written disposition. With all respect the situation at hand is remarkably distinguishable from the case under reference because it has nothing to do with adopting in irregular deposition. It is rather to do with a different deposition made in a distinct and alien language and which is being sought for adoption.”

Chukwuma-Eneh, JSC in the same Gundiri tersely stated the situation as it is and thus at page 856:

“It is the law that where a witness as an illiterate has made his statement in a foreign language as in this case in Hausa language, both the statement in a foreign language and the English translation thereof have to be tendered together.”

Clearly the issue is resolved against the appellant as the two courts below were right in rejecting those statements and evidence of the said witnesses.

From the foregoing and the better articulated reasoning in the lead judgment I had no difficulty in dismissing the appeal.

M.D. MUHAMMAD, J.S.C.: I had a preview of the reasons proffered by my learned brother. Onnoghen JSC, for his dismissal of this appeal on 20th January. I adopt them as mine and abide by all the orders made therein including the order on costs.

OGUNBIYI, J.S.C.: The appeal herein was heard on the 20th day of January, 2016. The court dismissed same as lacking in merit and deferred the reasons for Monday, the 25th day of January, 2016. I have been privileged to be given the draft reasons for the judgment of my learned brother, Onnoghen, JSC, I agree totally with his Lordship on the reasons and conclusion arrived thereat.

This is an appeal which emanated from the decision of the Court of Appeal Yola Division sitting in Yola wherein the appeal of the appellants herein was dismissed and thereby affirmed the dismissal of the petition by the Governorship Election Petition Tribunal

Gombe as unproved and without any merit, on the 14th day of October, 2015. The judgment of the lower court was delivered on the 3rd day of December, 2015.

The appellants were dissatisfied with the said judgment and proceeded to file this appeal and prayed for the setting aside of the lower court decision and consequently sought for the orders and or relief as contained in the notice of appeal, which was filed on the 14th day of December, 2015 and is contained on pages 6212 - 6217 of volume 8 of the record of appeal before this court. The three issues raised by the appellants in this appeal are as follows:

1. Whether Court of Appeal was right having rightly found that exhibit 'AN' was wrongfully rejected by the trial tribunal and that the testimony of PW21 was wrongly discountenanced but still fail to accord exhibit "AN" and the testimony of PW21 the necessary weight and resultant consequence they have on the appellants' case especially when the PW21 linked the documents tendered with the case of the appellants?
2. Whether the Court below was light in affirming the decision of the tribunal on the testimonies of PWs' 2, 3, 7, 8, 10, 11, 12, 14 & 17 by holding that the testimonies of the 'witnesses are inadmissible and that there was failure to adhere to the provisions of Illiterate Protection Act on the ground of alleged absence of Illiterate Jurat?
3. Whether the court below was right in affirming the dismissal of the appellants' petition, when from the totality of the case made by the appellants especially the oral and documentary evidence tendered show that they has discharged the burden of proof on the various allegations made to entitle them to succeed.

Briefly on the preliminary objection raised by the 1st respondent in his brief of argument. I wish to state that on a thorough perusal and consideration of same. I have come to the conclusion that the objection raised against the competence of grounds 1 and 4 of the grounds of appeal is overruled and I hold in the circumstance that the grounds are competent.

However and on account of ground 5, I seek to say that same is incompetent. The reason grounding the conclusion is obvious, that is to say, because the complaint against the weight of evidence was not taken or made an issue at the lower court, it cannot be raised for

the first time in this court without leave first sought and obtained. The said ground 5 is therefore struck out. Consequently, issue 3 which was formulated there from the said ground is also struck out. This is predicated on the consideration that the issue which was formulated from a combination of competent and incompetent grounds has also been contaminated and rendered incompetent.

With the striking out of issue 3, the living issues are 1 and 2.

I will now proceed to consider the 1st issue raised by the appellant:

The appellants' complaint which originated into this appeal is not far-fetched. It relates to the document Exhibit 'AN' (the Card Reader Report for the Governorship Election of the 11th April, 2015); the lower court overruled the tribunal and reinstated exhibit 'AN' which was initially admitted by the tribunal but subsequently expunged, it is the appellants' case also that exhibit 'AN' on its face value, shows substantial non-compliance with the provision? of the electoral Act as evidenced by conflict in the total number of accredited voters stated in exhibits "AN" and 'AL'. Further still that the lower court "declined to give effect and due weight" to exhibit 'AN' and that the conflict between exhibits 'AN' and 'AL' should have inextricably led to the nullification of the election that the lower court having held that PW21 was a competent compellable witness, should have also held that his testimony provided necessary linkage for all the documents tendered in evidence. The counsel questions vehemently therefore the refusal by the lower court to overturn the trial tribunal's judgment.

On the documents Exhibits "AN" And 'AL'

The fact is well settled that the tribunal did admit in evidence the card reader report (marked exhibit 'AN') which was tendered by the petitioners' counsel from the Bar along with other certified true copies of election related documents. At the point of writing the judgment however, the tribunal expunged the said exhibit 'AN' on the ground that it did not satisfy the conditions set out under section 84 of the Evidence Act, 2011 for admissibility of computer-generated documents. It is also on the record that the lower court, contrary to the contention held by the tribunal, found that the said conditions were in fact satisfied and it proceeded to overrule the tribunal and reinstated the said exhibit 'AN'. Be that as it may and to the dismay of the appellants, the lower court in its judgment ruled against them and endorsed the trial tribunal in attaching no weight to exhibit 'AN'. The principle of law is well settled that admissibility of a document does not necessarily convey the weight

to be attached to the document admitted.

The tribunal at pages 5533 – 5836 of the record of appeal held comprehensively thus on the evidence of PW22 and the document exhibits ‘AN’ and ‘AL’:

“When PW22 was shown exhibit ‘AN’ she stated thus:

‘what I am now shown is exhibit AN. It is the computer-generated output from the card readers used in Gombe State..... The total number of accredited voters for the Governorship Election is 510,530.’

The number of accredited voters as shown in exhibit , 'AN' is lower than that in exhibit 'AL' which is the summary of results from Local Government Areas collated at state level and the terminal form in the collation of figures emanating from form EC8A series. The total number of accredited voters as indicated in exhibit ‘AL’ is 535,081.

These two figures were not reconciled by any witness. *The total number of votes cast has not been proved to be more than the total number of accredited voters as per the said document.*

Now back to the discrepancies the question to ask is whether they are substantial enough to affect substantially the result of the election.”

From the document, exhibit ‘AL’, the total number of votes cast was 506,768. Also by exhibit 'AN', the figure of accreditation is put at 510,530 compared to 535,081 as shown on exhibit 'AL' where the total number of votes cast is put at 506,768. Suffice it to say therefore that, the fact of accreditation does not necessarily result in voting.

In further reiteration, the tribunal held emphatically and said thus at pages 5833 - 5836:

“As earlier stated, the figures in exhibit ‘AN’ is 510,530 while in exhibit ‘AL’ it is 535,081. The total number of votes cast as indicated in exhibit ‘AL’ is 506,768. This means that it is not all those who were accredited that voted in the election. The petitioners do not only have to prove that there was non-compliance with the provisions of the Electoral Act; they also have the burden of proving that the non-compliance substantially affected the result of the

election. This the petitioners have not done with regard to the discrepancies in exhibits ‘AN’ and ‘AL’. (Italics mine).

In affirming the above finding, the lower tribunal held and said thus at pages 6123 – 6124 in vol. VIII of the record:

“However, exhibit ‘AN’ on which PW22 was examined by both parties is an interesting document. PW22 was able to say that by exhibit ‘AN’, the number of accredited voters by the Card Reader was 510,530. On the other hand, exhibit ‘AL’ the summary of result of Local Government Areas in Gombe state show that the total number of people who were accredited is 535,081. From the evidence of PW21 on page 5292 of the record, exhibit ‘AL’ shows total votes cast to be 506,768. Valid votes cast was 493,611 and 13,157 votes were rejected. Thus the total number of votes cast is less than the number of accredited voters in either exhibit ‘AN’ or exhibit ‘AL’.”

Also in continuation, the lower court further said more at page 6124:

“In fact while the appellant did not elicit over-voting in each polling unit from PW21 or PW22, the cross examination of PW21 by 1st respondent’s counsel revealed that in some polling units, the number of voters were less than the number of accredited voters. Much Ado was made of exhibit ‘AN’ and PW22 but neither the witness nor the exhibit had anything spectacular to show in proof of the appellant’ claims. Exhibits “AN” would have been a sword of Democles hanging over the head of the respondents, if the number of voters who voted actually exceeded the number accredited by the card reader. Then the argument of the appellants, though not proved by any witness that the card reader was not used might have been possible.”

It is evident on record that the appellants did not produce any evidence as to what happened at the polling units with respect to accreditation.

The appellants' case as per their petition is that there was no accreditation, and if there was any purported one at all, it was false or cooked up. At the lower however, the case they appeared to make on appeal alleged a discrepancy between the documents exhibits ‘AN’ and ‘AL’. the Card Reader report and the summary of results Form EC8C as to the number of voters accredited respectively.

As rightly submitted by the 2nd respondent's counsel, the point must be made that the question of discrepancy was not the appellants' case on their pleadings. See *Buhari v. Obansanjo* (2005) 13 NWLR (Pt. 941) 1 at 255. The law is well settled that evidence which is at variance either with a party's pleadings or which is not covered by pleading goes to no issue. The court will not go outside the pleadings filed to determine the right of parties. The contention that there was discrepancy between the figures recorded or captured by the card reader and the figures on exhibit 'AL'. Summary of results forms showing the number of persons accredited, was not an issue on the pleadings.

The law is well pronounced by this court in the case of *Senator Julius Ali Ucha and Anor. v. Martin Elechi & 2 Ors.* (2012) 13 NWLR (Pt. 1317) 330 per Rhodes-Vivour, JSC that a complaint of non-compliance with the provisions of the Electoral Act 2010 (as amended), lays the onus on the petitioner to prove same systematically, polling unit by polling unit and ward by ward, on the balance of probability.

The learned counsel for the appellants relied auspiciously on the authorities of *fare mi r. On*, (2009) 7 NWLR (Pt.1140) 223 at 287; *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50 at 175 and *Oke v. Mimiko* (No.2) (2014) 1 NWLR (Pt.1388) 332 at 392. As rightly submitted by the learned counsel for the 3rd respondent, all the authorities are inapplicable and not relevant in aid of the appellant's case. The trial tribunal found that the appellants did not establish that the total votes cast in the said election, were in excess of exhibits "AN" and 'AL'

This decision was affirmed by the lower court and I have no reason to depart therefrom. This is because unlike the cases of *Fayemi v. Oni* and *Ojukwu v. Yar'Adua* (supra) where there was no accreditation of voters, the evidence of accreditation is overwhelming in the instant appeal where the total number of accredited voters for each Local Government Area in the state was read out by PW22.

I have perused with inmost care the record of appeal relations evaluation of evidence by the trial court which was reviewed and affirmed by the lower court, in my view. the submission made by me appellants' counsel and challenging same thereof cannot be correct particularly on exhibits 'AN' and 'AL' which I hold were properly evaluated or else the court would not have arrived at the conclusion it did.

It is pertinent to state that the appellant did not tender voters

register, which us significance cannot be underrated when an allegation of over voting in an election is raised. Section 49 of the Electoral Act is in support. The determination as to whether there was over voting is a matter which could have been detected and resolved from the voters register, which was not placed before the tribunal. It is worthy of note that the appellants did apply through the tribunal to access the register and they were obliged, it is intriguing how ever that the same appellants did not deem it necessary to place the register before their Lordships of the trial tribunal. I must say it is now too late and out of tune for them to lay a complaint at this stage. This is more so especially where the appellants failed to elicit confirmation of over voting in any of the polling units from either the PW21 or PW22, when they testified before the election petition Tribunal.

As rightly submitted by both parties, non-compliance arising from non-accreditation of voters in fatal to the electin because an election that proceeded without accreditation of voters is void *ab initio*.

It is pertinent to state further that the deep seated grouse nursed by the appellant is the allegation of press over voting at the election. I must say with approval that the two lower courts have provided for the answer when reference is made to their findings on the record. In other words, at pages 5835 & 5836 and also at page 6124, the judgments of the two lower courts, it was held respectively that the total number of votes cast (i.e. 506,768 votes) is less than the number of accredited voters in both exhibits 'AN' (510,530 voters) and 'AL' (535,081 voters). As rightly submitted by the learned senior counsel for the 1st respondent, the appellants did not deem it necessary to appeal against the specific finding (*supra*).

With reference to the cross examination of PW21 by 1st respondent's counsel, it is obvious that in many polling units the number of votes cast was less than the number of voters accredited Again exhibit 'AL' is a master piece of evidence which had not been dislodged or discredited by the appellants.

Having followed the trend of events of the case presented by the appellants, it is obvious that they have not been consistent on what they seek to claim from the court. This I say when regard is had to the petition on their pleadings, the presentation at the trial tribunal, the reliefs sought before the Court of Appeal and also their case before this court. The appellants, with all respect, have engaged in an attitude of trial and error in the presentation of their case, This is not acceptable to any standard of adjudication. I will akin the

attitude to a sick person, who incapable of presenting his symptoms before the doctor yet expects a perfect, outcome of the treatment.

The party's pleading is the most important requirement of his case before the court. It must be clear, explicit, clear and specific to the point. It must also be consistent bearing in mind that the outcome of an appeal is a product of the original pleading as set out at the trial court, It is one and the same case from its inception right through the various stages of the appeal and does not change. A farmer reaps the proceeds of his original seed. So it is with the appellants. The case the appellants set out to pursue before the tribunal was not proved, in other words, they have failed to prove that the election was invalid by reason of substantial non-compliance with the provisions of the Electoral Act, 2010 as amended and the election guidelines.

The two lower courts were concurrent in their findings. On the appeal before us therefore, the appellants have not also shown any special circumstance to provoke this court to depart from the concurrent findings of the two lower courts.

My learned brother, Hon. Justice Walter Samuel Nkanu Onnoghen, JSC has exhaustively and brilliantly determined the two live issues in this appeal. With the few words of mine and more particularly on the fuller reasons of my learned brother which I adopt as mine. I also dismiss the appeal as lacking in merit and abide by all orders made therein the lead judgment inclusive of costs.

Appeal is dismissed.

NWEZE, J.S.C.: This appeal was heard and dismissed on Wednesday, January 20, 2016. In so doing, the court promised to proffer its reasons today. I had the advantage of reading the draft of the reasons which my lord, Onnoghen, JSC, advanced in this regard. I, entirely, agree with His Lordship's reasons and conclusion.

Like my lord has stated most admirably, a petitioner who alleges over voting has the obligation to tender the voters' register; the statement of results in the appropriate forms: forms which would show the number of registered accredited voters' and the number of actual voters. *Awuse v. Odili* (2005) 16 NWLR (Pt. 952) 416; *Iniaya v. Akpabio* (2008) 17 NWLR (Pt.1116) 225.

What is more, he must relate each of the documents to the specific area of his case in respect of which the documents are tendered, *ivieagbor v. Bazuaye* (1999) 9 NLWR (Pt.620) 552; (1999) 6 SCNJ 235, 243; *Awe v. Oshinbanjo* (1965) 1 All NLR 72

at 75; *Bornu Holding Co. Ltd. V. Alhaji Hassan Bogoco (1971) 1 All NWLR 324 at 333; Alhaji Onibudo & Ors. v. Alhaji Akibu & Ors. (1982) 7 SC 60, 62; Nwaga v. Registered Trustees Recreation Club (2004) FWLR (Pt. 190) 1360, 1380-1381; Jalingo v. Nyame (1992) 3 NWLR (Pt.231) 538; Ugochukwu v. Co-operative Bank (1996) 7 SCNJ 22; (1996) 6 NWLR (Pt.456) 524.*

These, the appellant failed to do at the trial tribunal. The lower court was, therefore, right in affirming the approach of the said tribunal. It is for these, and the more detailed reasons proffered by my lord, Onnoghen, JSC, this morning that I too entered an order dismissing the appeal as indicated above. I abide by the consequential orders of his Lordship.

SANUSI J.S.C.: This court on Wednesday, 20th day of January took this appeal and delivered its judgment dismissing the appeal on that same day. The court also partly sustained the preliminary objection file by the 1st reason but overruled part of it for want of substance. We however adjourned the appeal to today for delivery of reasons for judgment. In this judgment I must say that I have considered the reasons advanced in the lead judgment just delivered by my learned brother Onnoghen, JSC, I am in entire agreement with such reasons ably and admirably marshalled by my learned brother. I adopt them as mine. I shall however add few comments on one of the few points canvassed by learned senior counsel to the parties in the appeal just for purpose of emphasis.

It is note worthy that one of the grouses of the appellant is that there was over voting at the governorship election held in Gombe State. A look at exhibit AN which is the Card Reader, it could be seen that the total number of accepted voters number of accredited voters was 510,530 But the total number of votes cast during the election in question, was 506,768 My understanding of the meaning of over voting is, where the number of cast exceeds the number of accredited voters in the area or State. From the evidence shown vide Exhibit AN, the number of votes cast was 506,768 which, is less than the number of accredited voters vide Exhibit AN. the Card Reader, that can therefore not be regarded as over voting There was therefore no evidence of substantial irregularity in the conduct of the election complained by the appellant the petitioner at the tribunal. In the instant case the petitioner now appellant merely complained that there was over voting without substantiating how the alleged over voting occurred since lie did not show that the

accreditation was abnormally done neither the voters register produced by him. In the instant case there was accreditation hence the allegation of substantial non-compliance with the provisions of Electoral Act would not have arisen at all. See *Fayomi v. Oni* (2009) 7 NWLR (Pt. 1140) 223 at 287; *Ojukwu v. Yar'Adua* (2009) 12 NWLR (Pt. 1154) 50; *Oke v. Mimiko* (No.2) (2014) 1 NWLR (Pt. 1388) 332 at 392.

Another crucial point worth being mentioned here is that in an allegation of over voting, the complainant is duty bound not only to plead the over voting, but also must tender the voter's register in evidence in relation to the election he questions. This is one of the methods he should adopt to prove such over voting. Other documents he must tender to prove over voting are:

- (a) The statement of result in the appropriate forms showing the number of registered accredited voters and the number of votes cast at the election; and
- (b) He must also relate each of these documents to specific areas relating to each of the documents he tendered, and also
- (c) He must show that the figures of over voting and that of such figures are removed from the result declared, he (the complaint) will be the winner of the election. See *Audu v. I.N.E.C.* (No.2) (2010) 13 NWLR (Pt.1212) 456; *Ininame v. Akpabio* (2008) 17 (Pt.1116) 225; *Haruna v. Modibbo* (2204) 16 NWLR (Pt.900) 487.

In the present case, no such documents were tendered to establish the allegation of over voting and also none of the above listed process was adopted or used to buttress the allegation of over voting and this is fatal to the petitioner's case.

Finally, it is worthy of note, that the two lower courts in the instant case gave concurring judgments to the effect that the petition and appeal lacked merit, after duly evaluating the evidence and considering the surrounding circumstance of this case the findings of facts made by the tribunal and affirmed by the lower court, can not be assailed in any respect. It is not the practice of the court to interfere with or disturb the concurring finding of facts made by the two lower courts except in exceptional circumstance such as where it is shown that such finding(s) is/was perverse or not supported by evidence in the record. That has not been so demonstrated by the appellant in this instant case. See *Shurumo v. State* (2010) 12 SC (Pt. 1) 73; (2010) 19 NWLR (Pt.1226) 73; *Seven Up Bottling Company*

Adewale (2004) 4 NWLR (Pt.862) 183; *Salien v. State* (2015) EJSC 39 reported as *Sale v. State* (2016) 3 NWLR (Pt.1449) 392.

Thus, for these few comments and the detailed reasons for judgment ably advanced by my learned brother, Onnoghen, JSC winch I agree with and adopt them as mine. I also hold that this appeal lacks merit and deserves to be dismissed as I did earlier. I abide by the consequential order made in the lead judgment including one on costs.

Appeal dismissed

