1. **PASTOR IZE-IYAMU OSAGIE ANDREW**
2. **PEOPLES DEMOCRATIC PARTY (PDP)**

**V.**

1. **INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
2. **GODWIN NOGHEGHASE OBASEKI**
3. **ALL PROGRESSIVES CONGRESS (APC)**

*SUPREME COURT OF NIGERIA*

SC.466/2017

WALTER SAMUEL NKANU ONNOGHEN, C.J.N. (Presided)

OLABODE RHODES-VIVOUR, J.S.C.

MUSA DATT1.IO MUHAMMAD, J.S.C.

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

KUD1RAT MOTONMORI OLATOKUNBO KEKERE-EKUN. J.S.C.

JOHN IN YANG OKORO, J.S.C. (Read the Leading Judgment)

SIDI DAUDA BAGE, J.S.C.

MONDAY, 24TH JULY 2017

APPEAL - *Brief of argument - Reply brief - Purpose of - Objection to respondent s brief- Whether can be raised in reply brief.*

APPEAL - *Concurrent findings of foci by lower court - When Supreme Conn can interfere therewith*.

APPEAL - *Exercise of discretion by lower court - Appellant challenging - Onus thereon*.

APPEAL - *Issues for determination - Formulation of - Power of court to reformulate issues - Principle guiding*.

CONSTITUTIONAL LAW - *Election tribunal - Quorum of - Whether can be properly constituted without chairman - Section 285(4). 1999 Constitution.*

COURT - *Election tribunal - Quorum of - Whether can be properly constituted without chairman - Section 285(4). 1999 Constitution*.

COURT - *Election tribunal - Record of proceedings of- Authentic record - What is - Notes of members of tribunal - Status of*.

COURT - *Presumptions - Record of proceedings of court - Presumption in respect of-Section 147, Evidence Act. 2011*.

COURT - *Record of court - Where party seeks to challenge - Procedure therefor*.

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COURT - *Writing of judgment - Whether there is set style therefor*.

COURT - *Writing of judgment - Writing of judgment by trial court - Guide thereto*.

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DOCUMENT - *Documentary evidence - Document not tendered and admitted in evidence before court - Whether court can act thereon.*

DOCUMENT- *Documentary evidence - Document tendered from Bar • Probative value of.*

DOCUMENT - *Documentary evidence - How to adduce*.

DOCUMENT - *Documentary evidence - Public document - Tendering of - When will not amount to hearsay - When it will*.

DOCUMENT - *Documentary evidence - Tendering of documents in hulk in election petition - Object of - Need for partly tendering to link documents to his case*.

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ELECTION - *Conduct of election - Manuals, guidelines and regulations made for conduct of election - Need for electoral officers to observe. - Whether substitute for Electoral Act*.

ELECTION - *Polling agent - Functions of - Whether can act as polling agent in several units - Whether can give evidence on happening in unit lie was not physically present*.

ELECTION PETITION - *Conduct of election - Accreditation at election -Procedure therefor - Section 49(1) and (2), Electoral Act, 2010 - Whether presiding officer must double tick voters' register.*

ELECTION PETITION - *Documentary evidence - Tendering of documents in bulk in election petition - Object of - Need for party tendering, to link documents to his case*.

ELECTION PETITION - *Election tribunal – (Quorum of- Whether can he properly constituted without chairman - Section 2(15(4), 1999) Constitution.*

ELECTION PETITION - *Election tribunal - Record of proceedings of - Authentic record - What is - Notes of members of tribunal - Status of.*

ELECTION PETITION - *Ground for questioning election - Failure to double tick voters 'register - Whether ground for questioning election - Section 1.19(2). Electoral Act. 2010(as amended*).

ELECTION PETITION - *Hearing of citation petition - Witnesses - Evidence-in-chief of witness - What constitutes - Paragraph 41(3). first Schedule Electoral Act. 2010 (as amended).*

ELECTION PETITION - *Polling agent - Functions of - Whether can act as polling agent in several units - Whether can give evidence on happening in unit he was not physically present.*

ELECTION PETITION - *Proof -allegation of non-compliance with provisions of Electoral Act - Standard of proof of*.

ELECTION PETITION - *Proof - Allegations of lack of accreditation, improper accreditation, over-voting and inaccurate ballot paper accounting – Proof of.*

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EVIDENCE - *Documentary evidence - Document not tendered and admitted in evidence before court - Whether court can act thereon.*

EVIDENCE - *Documentary evidence - Document tendered from Bar - Probative value of.*

EVIDENCE - *Documentary evidence - How to adduce*.

EVIDENCE - *Documentary evidence - Public document - Tendering of - When will not amount to hearsay - When it will.*

EVIDENCE - *Documentary evidence - Tendering of documents in bulk in election petition - Object of - Need for party tendering to link documents to his case*.

EVIDENCE - *Hearsay evidence - How treated*.

EVIDENCE - *Hearsay evidence - What amounts to - Section 317 Evidence Act -How treated*.

EVIDENCE - *Presumptions - Record of proceedings of court - Presumption in respect of - Section 147. Evidence Act, 2011.*

EVIDENCE - *Proof - Allegation of non-compliance with provisions of Electoral Act - Standard of proof of*.

EVIDENCE - *Proof- Allegations of lack of accreditation, improper accreditation, over-voting and inaccurate ballot paper accounting - Proof of.*

EVIDENCE - *Proof - Burden and onus of proof on plaintiff in civil case - Need to succeed on strength of his own case and not on weakness of defence*.

EVIDENCE - *Proof - Burden and standard of proof in civil cases - How discharged - Sections 131, 132. 133, and 134, Evidence Act, 2011.*

EVIDENCE - *Proof- Burden of proof in civil cases - Shifting nature of*.

EVIDENCE - *Proof - Evidence required in election petition - Nature of*.

EVIDENCE - *Proof - Party seeking nullification of election - Onus thereon*.

EVIDENCE - *Proof - Petitioner alleging non-compliance with provisions of Electoral Act - Onus thereon - Need to present credible evidence from eyewitnesses- Need to prove non-compliance substantially affected result of election.*

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PRACTICE AND PROCEDURE - *Appeal - Brief of argument - Reply brief-Purpose of - Objection to respondent's brief - Whether can be raised in reply brief.*

PRACTICE AND PROCEDURE - *Appeal - Concurrent findings of fact by lower courts - When Supreme Court can interfere therewith*.

PRACTICE AND PROCEDURE - *Appeal - Exercise of discretion by lower court -Appellant challenging - Onus thereon*.

PRACTICE AND PROCEDURE-Appeal- *Issues for determination-formulation of - Power of court to reformulate issues - Principle guiding.*

PRACTICE AND PROCEDURE - Cross-examination - *Evidence elicited there under - Whether can constitute evidence in support of case of party who did not call any witness.*

PRACTICE AND PROCEDURE - *Presumptions - Record of proceedings of court - Presumption in respect of - Section 147, Evidence Act, 2011.*

PRACTICE AND PROCEDURE - *Proof - Burden and onus of proof on plaintiff in civil case - Need to succeed on strength of his own ease and not on weakness of defence*.

PRACTICE AND PROCEDURE - *Proof - Burden and standard of proof in civil cases - How discharged - Sections 131, 132, 133, and 134, Evidence Act, 2011.*

PRACTICE AND PROCEDURE - *Proof- Burden of proof in civil cases - Shifting nature of.*

PRACTICE AND PROCEDURE - *Record of court - Where party seeks to challenge - Procedure therefor*.

PRACTICE AND PROCEDURE - *Technicality - Altitude of court thereto*.

PRACTICE AND PROCEDURE - *Writing of judgment- Whether there is set style therefor.*

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STATUTE - *Construction of statutes - clear and unambiguous words of a statute – How construed*.

WORDS AND PHRASES - "*Technicality" - Meaning of.*

WORDS AND PHRASES - *Hearsay evidence - What amounts to.*

***Issues*:**

1. Whether the Court of Appeal was right in dismissing the appellants' application seeking to correct and/or amend the record of the trial tribunal with respect to the evidence-in-chief of the 1st appellant.
2. Whether the Court of Appeal was right in affirming the decision of the trial tribunal which dismissed the appellants' case before the respondents' defence.
3. Whether the Court of Appeal was right in holding that the testimonies of the appellants' witnesses were hearsay evidence and unreliable and that the appellants dumped documents tendered by them by failure to link all the documents tendered by them to their case.
4. Whether the Court of Appeal was right m its view that the appellants needed to call polling agents from all the polling units challenged in order to prove lack of improper accreditation, over voting, improper

accounting of ballot papers and in holding that the Is" respondent did not abandon its pleadings by failure to call or elicit any evidence in support of same.

**Facts:**

On 28th September 2016, election into the office of Governor of Edo State was conducted by the 1st respondent. The 1st appellant contested the election on the platform of the 2nd appellant whilst the 2nd respondent was sponsored by the 3rd respondent. At the end of the election, the 1st respondent declared the 2nd respondent as the winner of the election and consequently returned him as the duly elected Governor of Edo State.

Dissatisfied with the declaration and return of the 2nd respondent as the Governor of Edo State, the appellants filed a petition at the Governorship Election Tribunal, Benin City challenging that the 2nd respondent was not duly elected by majority of lawful votes cast at the election: that the election of the 2nd respondent was invalid by reason of noncompliance With the provisions of the Electoral Act. 2010 (as amended); and that the election of the 2nd respondent was invalid by reason of corrupt practices.

The appellants sought that it may be determined that the 2nd respondent was not duly elected or returned by the majority of lawful votes east at the. Election that it may be determined that the 1st appellant scored the highest number of lawful voles cast at the election and satisfied the requirements of the Constitution of the Federal Republic of Nigeria. 1999 (as amended) and the Electoral Act, 2010 (as amended); that the 1st appellant be declared validly elected or returned, having scored the highest number of lawful votes cast at the governorship election. In the alternative, that it

may be determined that the election be nullified for substantial non-compliance with the provisions of the Electoral Act which noncompliance substantially affected die result of the election and in its place, make an order for a fresh election to be conducted.

At the conclusion of bearing, the trial tribunal in its judgment dismissed the petition.

The appellants were aggrieved by the judgment of the trial tribunal and they appealed to the Court of Appeal.

At the Court of Appeal, after parties had settled briefs of argument but before hearing of the appeal, the appellants filed a motion seeking to correct and' or amend the 1st appellant's evidence-in-chief contained in the record of appeal. The Court of Appeal heard the application and in its ruling thereon dismissed it. The Court of Appeal also dismissed the appellants' appeal and affirmed the election of the 2nd respondent.

Dissatisfied, the appellants appealed to the Supreme Court against the dismissal of their application to amend the record of appeal and against the dismissal of their appeal.

In determining the appeals, the Supreme Court considered the provision of sections 37, 131, 132 and 133 of the Evidence Act. 2011 and sections 49 and 138(2) of and paragraph 41 (3) of the First Schedule to the Electoral Act. 2010 (as amended), which respectively state thus: Sections 37, 131, I 32 and 133 of the evidence Act, 2011:

"37. Hearsay means a statement -

(a) oral or written made otherwise than by a witness in a proceeding;

(b) contained or recorded in a book, document or any record whatever; proof of which is not admissible under any provision of this Act,

which is tendered in evidence for the purpose of proving the truth of the matter stated in it."

" 131 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

"132. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

“133(1) In civil cases, the burden of first proving existence or nonexistence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

(2) If the party referred to in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

(3) Where there are conflicting presumptions the case is the same as if there were conflicting evidence."

Sections 49 and 138(2) of and paragraph 41(3) of the First Schedule to the Electoral Act. 2010 (as amended):

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

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

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

"41(3) There shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in his deposition."

**Held** (*Unanimously dismissing the appeals*):

1. *On Quorum of election tribunal* -

**By virtue of section 285(4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the quorum of an election tribunal established under the section shall be the chairman and one other member. The provision clearly sets the chairman of an election tribunal as playing a very prominent role. Without him, the panel is not properly constituted. His position is a** *sine qua non* **to the validity of the proceedings of an election tribunal.** (*P. 541, paras. E-F*)

2. *On Record of proceedings of election tribunal* -

**The record of proceedings kept by the chairman of an election tribunal is the authentic record of the court. It cannot be otherwise since a record of appeal only takes cognizance of the record as kepi by the chairman. The notes kept by other members of the tribunal are just personal to them. It will lead to confusion at the hearing of the appeal and be cumbersome if all the notes of all the members are made part of the record**. **[***Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1 referred to. (Pp. 541, paras. F-G; 569, paras. F-G)

3. *On What constitutes evidence-in-chief of witness in election petition* -

**By virtue of paragraph 41(3) of the First Schedule to the Electoral Act, 2010 (as amended), relating to the taking of evidence-in-chief in an election petition proceeding, there shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all dispute documents or other exhibits referred to in his deposition. In an election petition proceeding, the provision makes it clear that evidence-in-chief of a witness is his witness statement on oath which he is only permitted to adopt and nothing more. After adoption, the witness statement on oath becomes his evidence-in-chief. The only other aspect of what will constitute part of the record and/or evidence is his answers to questions during cross-examination. In the instant case, the notes jotted by a member of the trial tribunal when PW1 was being led to adopt his written deposition which the appellants were seeking introducing into the record of**

**proceedings, was mere surplussage. Such oral evidence in addition to his written deposition is not permitted by the Electoral Act**. (*Pp. 542. paras A-C: 580. paras. E-F*)

4. *On Presumption in respect of record of proceedings of court –*

**By section 147 of the Evidence Act, 2011, the record of proceedings of a court is presumed by law to be correct until the contrary is proved. By virtue of section 168(1) of the Act, the record enjoys a rebuttable presumption of regularity**. (*Pp. 569. para. G: 560, para. C*)

5. *On Procedure where party seeks to challenge record of court* **-Where a party seeks to impugn the record of a court, such a party must first file an affidavit challenging the record and serve same on the judge or chairman of the tribunal. The affidavit must be independent of the motion to be filed to amend the record which motion shall be between the parties to the action only. After filing the affidavit, it will be followed by a motion on notice setting out the prayers and particulars thereof. The court will then exercise its discretion whether to grant the application or not**. [*Garuba v. Omokhodion* **(2011) 15 NWLR (PL 1269) 145 referred to**.] (P. 542. paras. E-F)

6. *On Procedure where party seeks to challenge record of court* -

**A party seeking to impugn (lie record of a court or tribunal must do the following**:

**(a) file an affidavit challenging the record in question which must be filed and served on the presiding officer of the court or tribunal for his reaction;**

**(b) file a formal application, a motion on notice, to the court supported by an affidavit seeking leave to amend the record.**

**The later affidavit cannot be the same as the affidavit challenging the record. The affidavit in support must disclose the following particulars:**

**(a) that an affidavit challenging the record was duly filed;**

**(b) that the affidavit was duly served on the affected parties with the particulars of service disclosed;**

**(c) that the affected parties either:**

**(i) filed affidavit in response to the affidavit challenging the record: or**

**(ii) failed to file such affidavit.**

**The affidavit challenging the record has the effect and intention of putting the court concerned on notice that its record is being impugned. Where service of the affidavit challenging the record is made on the registrar of the court concerned, rather than or in addition to the presiding judicial officer thereof, such service is sufficient for the purpose. It is after the steps above have been complied with that the court to which the application is made can exercise discretion one way or other. A record of appeal cannot be amended without the court's approval in exercise of its discretionary power to grant or refuse to sanction an amendment of the record of appeal. In the instant case, the appellants failed to follow the steps. Therefore, the Court of Appeal was right in deciding that the appellants' application**

**was incompetent. The appellants did not file an affidavit challenging the record intended to be impugned or serve one on the requisite authority. What they did was lo file a motion on notice for an order impugning the record which they served on the judicial officers concerned**. [*Garuba v. Omokhodion* **(2011) 15 NWLR (Pt. 1269) 145**; *Adegbuyi v. A.P.C.* **(2015) 2 NWLR (Pt. 1442) 1**; *Gonzee (Nig.) Ltd v. NERDC* **(2005) 13 NWLR (Pt. 943) 634**; *Ehikioya v. C.O.P.* **(1992) 4 NWLR (Pt. 233) 57**; *Agwarangbo v. Nakande* **(2000) 9 NWLR (Pt. 672) 341 referred to.** (*Pp. 542-543, paras. G-A; 565-566. paras. H-C; 570, paras. B-D; 579-580, paras. H-C*)

**Per OKORO, J.S.C. at page 542, paras. C-E:**

> **"Finally, on this, the appellants were clearly oblivious of the procedure to be adopted when challenging the record of a court. The appellants said that they only filed a motion on notice and served same on the chairman of the Tribunal. This is wrong. As was clearly stated by the learned senior counsel for the 1st respondent in his brief of argument, the chairman and members of the tribunal were not parties to the motion. That being the case, they had no locus of any kind to file any documents in respect thereof. It would be absurd for the chairman and members to react to the motion by filing, maybe, a counter-affidavit in a matter they are arbitrators and ought to be neutral. Will this not amount to descending into the arena? Certainly, it will.**

**" Per AKA'AHS, J.S.C. at pages 569-570, paras. H-B**:

**"In this case, it is noted that the appellants relied on two (2) documents in an attempt to impugn the record of the Tribunal, namely:-**

**(i) Exhibit B - the notes made by Hon. Justice Gilbert A Ngele, a member of the Tribunal;**

**(ii) Exhibit C - the notes kept by A. O. Obayomi Esq said to be counsel to the appellants.**

**There was no affidavit annexed to the appellants' application served on the members of the Tribunal alleging an error in the record of the Tribunal. What appears to have been served on the Chairman and members of the Tribunal was a motion on notice in which their names appeared as persons to be served. But the Chairman and members of the Tribunal were not parties to the motion. It would therefore be absurd for the Chairman and Members of the Tribunal to react to the motion in a proceeding in which they were arbiters."**

7. *On Whether there is set style for writing of judgment* -

**There is no dogmatic style in writing judgments. Indeed, every court is entitled to its own style of writing its judgment. Every Judge brings to bear his style of judgment writing, his exposure, level and quality of training he obtains over the years. As a result, Judges differ in the procedure and style of writing their judgments. Thus, the sequence of evaluation of evidence before a court is essentially a matter of style and has nothing to do with the substance of the case**. [*Jekpe v.*

*Alokwe* **(2001) 8 NWLR (Pt. 715) 252**; *Yalaju-Amaye v. A.R.EC Ltd* **(1990) 4 NWLR (Pt. 145) 422 referred to**.] (*P. 550, paras. E-F)*

8. *On Guide to writing of judgment by trial court* -

**While a trial court has uninhibited discretion in the style of writing its judgment, there are some steps it must follow in reaching a fair judgment which include the following:**

**(a) It should start by first considering the evidence led by the plaintiff to see whether he has led evidence on ail the material issues he needs to prove. At this point, there is no question of proof or belief or non-belief of the witnesses. If the plaintiff failed to lead evidence or if the evidence led by him is so patently unsatisfactory, then he has not made out a prima facie case in which the trial court does not need to consider the defendant's case.**

**(b) The next step is for the trial court to evaluate the evidence and in so doing, it has to bear in mind the following:**

**(i) on whom the onus of proof lies; and**

**(ii) whether the particular type of evidence called requires any special approach.**

**(c) After evaluating the evidence, the trial court should then make its findings which, having regard to the party on whom the burden of proof lies, then determine its ultimate effect.**

**Any other approach by the trial court different from the methods stated above will give an unfair advantage to the defendants and create an unfair trial with the**

**implication that the court was unfair in trial to one of the parties to the dispute**. [*Mbanefo v. Molokwu* **(2014) 6 NWLR (Pt. 1403) 377 referred to.)** *(P. 551, paras. A-E*)

9. *On Guide to writing of judgment by trial court* -

**There is no particular format for writing a judgment. Every Judge has his own style. However, a well written judgment must contain certain essential elements, viz:**

**(a) a statement of the claim or relief sought by the plaintiff;**
**(b) the relevant facts and counter facts leading to the claim or the relief;**
**(c) a review of the oral and/or documentary evidence adduced on either side;**
**(d) arguments of counsel;**
**(e) application of the law to the facts;**
**(f) the final order.**

**At the end of the day, a judgment must reflect a clear understanding of the issues raised by the pleadings and evidence. It must be a dispassionate appraisal of the evidence led and a proper consideration of the submissions made with due regard to the onus of proof. In the instant case, the judgment of the trial tribunal which was affirmed by the Court of Appeal fully met the requirements of a good judgment with due regard to the onus of proof.** [*Usiobaifo v. Usiobaifo* **(2005) 3 NWLR (Pt. 913) 665;** *Mogaji v. Odofin* **(1978) 4 SC 91**; *Samisi v. Ameyogun* **(1992) 4 NWLR (Pt. 237) 527 referred to.**) (*P. 582, paras. A-D)*

10. *On Burden of proof on plaintiff in civil case* -

**By virtue of sections 131(1), 132, 133(1), 134 and 136(1) of the Evidence Act 2011, generally the burden of**

**establishing a case lies on the plaintiff w ho asserts the existence of certain facts. He must discharge the burden by adducing cogent and credible evidence to prove same. His case crumbles and remains unproven where he fails to do so. A plaintiff is expected to succeed on the strength of his own case and not on the weakness of the case of the defence. In the instant case, the Court of Appeal rightly endorsed the decision of the trial tribunal which considered the appellants' case first and found it to be incredible before considering the respondents' defence which was done out of abundance of caution**. [*C.P.C v. INEC* **(2011) 18 NWLR (Pt. 1279) 493***; Igwe v. ACB Ltd* **(1999) 6 NWLR (Pt. 605) 1 referred to.**) (*Pp. 551-552, paras. H*-A)

**Per OKORO, J.S.C. at page 559, paras.E-F:**

> **"The above is the state of the law on the issue. In view of the above, one wonders why this aspect of the issue is of any significance to the appellants. After they failed to prove their case, the respondents could have walked away without any blink. But they nonetheless put in their defence. There is therefore nothing legally wrong for the trial tribunal to accept and believe their evidence far above that of the appellants. In fact the case of the respondents further weakened the already weak and unreliable evidence of the appellants. This aspect of their issue, to say the least, refuse to fly."**

11. *On Onus of proof on plaintiff in civil case* -

**By section 136 of the Evidence Act 2011, the onus is on the plaintiff to establish first his case by credible, cogent**

**and admissible evidence or persuasive arguments. It is after the plaintiff may have established or proved his case that the onus would shift to the defendant to rebut the case of the plaintiff already established. Thus, a petitioner who has not led credible evidence in support of his case is not entitled to have his case placed on the imaginary scale of justice since it would be illogical to place nothing on something. Where a petition fails to discharge the onus placed on him by law, there will be nothing for the respondent to rebut not to talk of calling witnesses. In the instant case, the appellants did not discharge onus on them and the tribunal could at that stage conclude, on the ultimate effect of the appellants' case, that there was no need for the respondents to enter a defence. Having not discharged the initial burden placed on them in accordance with section 136 of the Evidence Act, 2011, the onus did not shift to the respondents to enter their defence though in** *ex abundate cautella***, the respondents actually entered their defence.** [*Buhari v. Obasanjo* (**2005) 13 NWLR (Pt. 941) 1;** *Mbanefo v. Molokwu* **(2014) 6 NWLR (Pt. 1403) 377**; *Omisore v. Aregbesola* **(2015) 15 NWLR (Pt. 1482) 205 referred to.)** {*Pp. 551, paras. E-G; 559. para. E)*

12. *On Burden and standard of proof in civil cases* -

**The general burden of proof in civil cases is as provided for in sections 131, 132 and 133 of the Evidence Act, 2011 while the standard of proof, as provided in section 134 of the Act, is on the balance of probabilities. By virtue of sections 131,132 and 133 of the Act, whoever desires any court to give judgment as to any legal right**

**or liability dependent on the existence of facts which he asserts shall prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In civil cases, the burden of first proving existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. If the party adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with. Where there are conflicting presumptions the case is the same as if there were conflicting evidence**. (*P. 581. paras. B*-F)

13. *On Shifting nature of burden of proof in civil cases* -

**In discharging the burden of proof in a civil case, the plaintiff must first prove the existence or non-existence of what he asserts by relevant, admissible and credible evidence. Once the burden is discharged, the onus of proof shifts to the adverse party. The burden of proof of particular facts continues to shift between the parties until all the issues in the pleading have been dealt with. The onus is on the party against whom judgment would have been given if no further evidence were adduced.** [*Agbakoba v. I*NEC **(2008) 18 NWLR (Pt. 1119) 489;**

*Itauma v. Akpe-Ime* **(2000) 12 NWLR (Pt. 680) 156;** *Egbunike v. A.C.B. Ltd.* **(1995) 2 NWLR (Pt. 375) 34;** *Egharevba v. Osagie* **(2009) 18 NWLR (Pt. 1173) 299 referred to.**) (P. 551. paras. F-H)

14. *On Whether evidence elicited tinder cross-examination can constitute evidence in support of party who did not call any witness* -

**Evidence elicited from a party or his witness under cross-examination which goes to support the case of the party cross-examining constitutes evidence in support of the case or defence of the party. If at the end of the day, the party cross-examining decides not to call any witness, he can rely on the evidence elicited from cross-examination in establishing his case or defence. It may be said that the party called no witness in support of his case, but not evidence, as the evidence elicited from his opponent under cross-examination which are in support of his case or defence constitute his evidence in the case. The exception is that the evidence so elicited under cross-examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question or issue in controversy between the parties. In the instant case, the 1st respondent, having tendered documents in evidence, albeit from the Bar, and having thoroughly cross-examined and discredited the appellants' witnesses, it could not be said that the 1st respondent had abandoned its pleadings**. [*Akomolafe v. Guardian Press Ltd*. **(2010) 3 NWLR (Pt. 1181) 338 referred to.**) (*P. 584. paras. D-F*)

15. *On Onus on party seeking nullification of election* -

**A person seeking to nullity an election must succeed on the strength of his case as pleaded and not on the weakness of the case of the respondent, or on the failure of the respondent to adduce any evidence. In a claim for declaratory relief, the plaintiff or the petitioner must succeed on the strength of his own case and not the weakness of the defence. He would not be entitled to judgment even on admission**. [*C.P.C v. INEC* **(2011) 18 NWLR (Pt. 1279) 493**; *Emenike v. P.D.P*. **(2012) 12 NWLR (Pt. 1315) 556;** *C.P.C. v. INEC* **(2012) 1 NWLR (Pt. 1280) 106:** *Dumez Nig Ltd. v. Nwakhoba* (**2008) 18 NWLR (Pt. 1119) 361 referred to.**] (Pp. 552, para. B; 576. para. E; 580-581. paras. H-A)

**Per AKA'AHS, J.S.C. at page 576, paras. E-H:**

> **"A person who seeks to nullify an election must succeed on the strength of his case as pleaded and not on the weakness of the case of the respondents since the main reliefs being sought were declaratory reliefs**. See C.*P.C. v. INEC supra* **at 555, Musdapher CJN where he reiterated the law as follows:-**
>
> > **It is elementary law that a person seeking to nullify an election must succeed on the strength of his case as pleaded and not on the weakness of the case of the respondents, or on the failure of the respondents to adduce any evidence. In the instant ease, the trial Court of Appeal found that the appellant has failed to discharge the burden**

**placed upon him and I agree with the Court of Appeal when in its judgment, it stated :-**

> **"From whatever angle this petition is looked at it is clear that the burden of proof of the allegations contained in the petition be they criminal or substantial non-compliance, rested with the petitioner. The petitioner did not discharge this burden to warrant the rebuttal of the evidence to be adduced by the 1st set of respondents.""**

16. *On Standard of proof of allegation of non-compliance with provisions of Electoral Act* -

**The same standard of proof on non-compliance in an election applies whatever the consequences of such compliance, whether the non-compliance affects the return of a candidate or invalidates the entire election. In either of the scenarios, the quality and quantum of evidence does not change**. (*P. 553, paras. B-C)*

17. *On Onus of proof on petitioner alleging non-compliance with provisions of Electoral Act* -

**Where a petitioner in an election petition alleges non-compliance with the provisions of the Electoral Act, he has the onus of presenting credible evidence from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance for him to succeed on that ground, particularly where the allegation relates to non-accreditation or improper**

**accreditation, inflation or reduction of scores, alteration of results, over-voting, etc. In the instant case, the trial tribunal found, after the evaluation of the evidence, that the appellants failed to discharge the burden of proof placed on them by law** [*Buhari v. Obasanjo* **(2005) 13 NWLR (Pt. 941) 1**; *Buhari v. INEC* **(2008) 18 NWLR (Pt. 1120) 246**; *Okereke v. Umahi* **(2016) 11 NWLR (Pt. (Pt. 1524) 438**; *Nyesom v. Peterside* (**2016) 7 NWLR (Pt. 1512) 452**; *Amosun v. INEC* **(2010) LPELR 49431**; *Ucha v. Elechi* **(2012) 13 NWLR (Pt. 1317) 330 referred to**.(*Pp. 566, paras. F-G; 582, paras. D-F*)

18. *On Onus of proof on petitioner alleging non-compliance with provisions of Electoral Act* -

**Before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act, the petitioners must not only that there was non-compliance but that the non-compliance substantially affected the result of the election. Under section 139(1) of the Electoral Act, 2010 (as amended), if is presumed that the election was conducted substantially in accordance with the principles of the Electoral Act and any non-compliance did not affect substantially the result of the election and the burden of proof lies with the petitioner. It is only when the petitioner succeeds in adducing evidence to prove the pleaded facts that such burden shifts to the adversary**. [*C.P.C. v. INEC* (**2011) 18 NWLR (Pt. 1279) 493;** *Buhari v. Obasanjo* **(2005) 2 NWLR (Pt. 910) 241**: *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91; *Haruna v. Modibo* **(2004) 16 NWLR (Pt. 900) 487*;*** *Oke v.*

*Mimiko* (No. 2) **(2014) 1 NWLR (Pt. 1388) 332 referred to**.] (P 574. paras. EPF)

19 *On Proof of allegations of lack of accreditation, improper accreditation, over-voting and inaccurate ballot paper accounting* -

In an election petition, the allegations of lack of accreditation, improper accreditation, over-voting, inaccurate ballot papers account can be established by documentary evidence. This can be done by examination of voters' registers and Form EC8As used for the conduct of the relevant election. (P. 560, para. A)

20. *On Nature of evidence required in election petition* -

**The requirement of the law is that a petitioner must call eye witnesses who were present when entries in electoral forms were being made and can testify to how the entries in the documents were arrived at. In an election matter, the evidence required is not the one which was picked up from perusing documents made by others. In the instant case, the appellants' witnesses were not the makers of the documents in respect of which they testified, and were not present when the documents were made. Therefore they were not competent and/or capable of giving testimonies and explaining the circumstances surrounding how the entries in the electoral documents were made**. [*Oke v. Mimiko* (No. 2) (**2014) 1 NWLR (Pt. 1388) 332 referred to**.] (*P. 557, paras. E-F*)

21. *On Who can give evidence of inaccurate ballot paper accounting* -

**It is only persons who were physically present at polling units who can give evidence as to what transpired there. It is only the agents who were present at the polling units that can give testimony of ballot paper inaccurate accounting. The reason is that it is at the polling units that accreditation and distribution of ballot papers to voters take place. Any ballot papers not used at the election, together with the used ones, whether valid or invalid, are usually accounted for at the polling units**. [Oke v. Mimiko (No. 2) (2014) 1 NWLR (Ft. 1388) 332 referred to. (P. 563. paras. G-H)

22. *On Functions of polling agents* -

**The functions of polling agents are defined in section 45 of the Electoral Act, 2010 (as amended). Foiling agents represent the respective political parties at the numerous polling units in obvious recognition of the enormity of the task of those monitoring the election in all the polling units of a State. A polling agent, being human, can only be physically present at only one polling unit at a given time and so cannot perform the task with the same title as polling agent in any or all the other polling units. Therefore, when evidence is to be provided as to what happened in disputed units other than (he one he is physically available at, then he is not qualified to testify thereto. This is because section 45(2) of the Electoral Act expects evidence directly from the relevant field officer at the required polling unit.** [*Oke v. Mimiko* (No. 2) **(2014) 1 NWLR (Pt. 1388) 332;** *Buhari v*

*Obasanjo* (2005) 13 NWLR (Ft. 941) 1; *A.C.N, v.* ***Lamido*** **(2012) 8 NWLR (Pt. 1303) 560 referred to**.) [Pp. 575-576. paras. E-A)

23. *On Procedure for accreditation at election* -

**By virtue of section 49(1) and (2) of the Electoral Act, 2010 (as amended), any person intending to vote with his voter's card shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter's card. The presiding officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the register that the person has voted. The provision requires a presiding officer, on being presented with a voter's card by an intending voter, to be satisfied that the name of the person is on the register of voters, issue him a ballot paper and indicate on the register that the person has voted. There is no provision for double tick to the right and left, as was contended by the appellants in the instant case. Also, the supplement to the 2015 Guidelines and Regulations on the Conduct of Election which modified the portions of the Guidelines relating to accreditation states that accreditation at the election is to be by authentication and verification of voters using the card reader, checking of the register of voters and inking the cuticle of the specified finger. It is evident from the provision that from the steps outlined therein, there is no mention of ticking of voters' register on any side.** (*P. 562, paras. D-H*)

24. *On Need for electoral officers to observe manuals, guidelines and regulations made for conduct of election* -
**Manuals, guidelines and regulations made by the electoral body in aid of smooth conduct of election are to be observed by both ad hoc and permanent staff of the Independent National Electoral Commission. But such directions cannot take the place of the Electoral Act**. (*P. 563, para D*)

25. *On Whether failure to double lick the voters ' register ground for questioning, election* -
**By virtue of section 138(2) of the Electoral Act. 2010 (as amended), an act or omission which may be contrary to an instruction or direction of the Commission or an officer appointed for the purpose of an election but which is not contrary to the provisions of the Act shall not of itself be a ground for questioning the election. Thus, failure to double tick the voters register cannot be a ground for challenging an election. It is improper for parties who have no serious issues to challenge the outcome of an election to resort to a trivial issue of ticking to the right and to the left. Election petition should be more serious than that**. [*C.P.C. v. INEC* **(2011) 18 NWLR (Pt. 1279) 493:** *Agbaje v Fashola* **(2008) 6 NWLR (Pt. 1082) 90 referred to.)** (*P. 563. paras D-E*)

26. *On What amounts to hearsay evidence* -
**By virtue of section 37 of (he Evidence Act, 2011 hearsay means a statement:**

**(a) oral or written made otherwise than by a witness to a proceeding; or**

**(b) contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of the Act, which is tendered in evidence for the purpose of proving the truth of the matter stated in it.**

**It is a statement made by a person who is not a witness in a proceeding or contained or recorded in a book which by the provision of the Evidence Act is rendered inadmissible. It is also hearsay if it is offered in proof of the truth of the statement. However, where a piece of evidence, being a statement, whether oral or written, made by a person who is not called as a witness in a proceeding is offered in proof of the fact that the statement was made and not in proof of the fact that the statement is true, the piece of evidence cannot be classified as hearsay. In the instant case, the trial court and the Court of Appeal were both right that the evidence of PW1 and all the ward collation officers who testified in the ease were hearsay.** (*P. 556, paras. B-F)*

**Per OKORO, J.S.C. at page 557, paras. A D:**

**"The appellants have admitted in their brief that the evidence of their witnesses did not arise from what they witnessed on election day when the entries in the electoral forms were being made, but (as contained in para. 6.09 page 28 of their brief), from '***findings***" which they** *'came up with'* **after observing and drawing inferences from the electoral forms. If the appellants' witnesses' evidence were not to prove the truth in those documents, why was it necessary for them to give evidence on them after 'studying', 'making findings' and 'coming up with' their evidence. I do not agree with the learned senior counsel for the appellants. Again, if their evidence was not to prove the truth on those documents tendered through**

**the Bar, how was the trial tribunal to believe those figures and numbers which were the fulcrum of the petition without subjecting them to cross examination of the actual makers of the documents? It has to be noted that those witnesses did not take part or participate in the conduct of the election nor were they present at any of the stages at which the electoral forms, documents or materials which formed the basis of their evidence were recorded, prepared or entries thereon made**."

27. *On When tendering of public document will not amount to hoarsen*:

**Where a public document is tendered just to show the existence of such document only, though not tendered by the maker, it would not ordinarily be termed hearsay. But where a witness who did not participate in the making of the document ventures to give evidence on the contents of the document and tries to persuade the court on the truth of its content, as w as done in the instant case, it becomes hearsay and shorn of the exception granted by section 52 of the Evidence Act, 2011**. (*Pp. 557-558. paras. H-A)*

28. *On Treatment of hearsay evidence* -

**A court or tribunal has no business to entertain, consider or rely on the evidence of persons who did not have a first hand, direct, actual and positive interaction with the facts in issue, and in the unlikely event that the testimony of such person is received in evidence, the court is under a bounden duty to expunge the testimony of such witness from its judgment**. *(P. 558, para. B)*

29. *On How to adduce documentary evidence* -

**What the law requires is that, first of all, the maker of a must tender it and testily to its contents. Then, the document must be subjected to the test of veracity and credibility. Where it involves mathematical calculations, how the figures were arrived at must be demonstrated in the open court. The correctness of the final figure must also be shown in the open court. It is not the duty of the court to sort out the exhibits, the figures and do calculations in chambers to arrive at a figure to be given in judgment particularly in an election petition which is challenging the number of valid votes scored by a candidate declared and returned as the winner of the election. In the instant case, the trial tribunal and the Court of Appeal stated in their judgments that the stated exhibits were not demonstrated in the open court by the appellants and their witnesses. There was nothing in the record which showed a contrary state of affairs at the trial. Consequently, the trial tribunal and the Court of Appeal were right**. *(P. 558, paras. C-F)*

30. *On Object of tendering documents in bulk in election petition and need for party tendering to link documents to his case* -**Tendering documents in bulk in election petition is to ensure speedy trial and bearing of election petitions within the time limited by statute. But that does not exclude or stop proper evidence to prop such dormant documents. It is not the duty of a court or tribunal to embark on cloistered justice by making enquiry into the case outside the open court, not even by**

**examination of documents which w ere in evidence but not examined in the open court. A judge is an adjudicator and not an investigator. Demonstration in open court is not achieved where a witnesses simply touches a bundle of documents with numerous pages. The frontloading of evidence and tendering documents in bulk from the Bar do no alter the requirement, which is an element of proof. The duty of a party tendering the documents is to ensure that such documents qua exhibits are linked to the relevant aspects of his case to which they relate. In the instant ease, almost all the documents tendered by the appellants were tendered by their counsel from the Bar. The serious lacuna in the appellants' case was their failure to link the documents to the relevant aspects of their case by calling the appropriate witnesses to speak to them and demonstrate their applicability to appellant's case in open court. Therefore, the decisions of the tribunal and the Court of Appeal could not be faulted.** [*ACN v. Lamido* **(2012) 8 NWLR (ft. 1303) 560**; *Ogboru v. Okowa* **(2016) II NWLR (Pt. 1522) 84**; *Omisore v. Aregbesola* **(2015) 15 NWLR (Pt. 1482) 205**; *Ladoja v. Ajimobi* **(2010) 10 NWLR (Pt. 1519) 87;** *Audit v. INEC* (No.2) **(2010) 13 NWLR (Pt. 1212) 456**; *Ucha v. Elechi* **(2012) 13 NWLR (Pt. 1317) 330 referred to.)** (*Pp. 558-559. paras. G-C)*

Per OKORO, J.S.C. at page 560, paras. C-H:

> **"May I state for the umpteenth time that tendering of documents without adducing evidence, which link the document with the particular complaint of the party is fatal. This is because, it is not the duty of the court/ tribunal**

**to examine the documents outside the tribunal and tie them with the complaints of the appellants. In *Belgore v. Ahmed (supra*), this court emphasized the fact that where the maker of a document is not called to testify, the document would not be accorded probative value, notwithstanding its status as a certified public document. May be if I further reproduce the position of this court in an earlier ease, the appellants would be satisfied. In** *Omisore v. Aregbesola (supra*) at 324-325

**paras H-A, this court held as follows:**

> **"In other words, documentary evidence, no matter its relevance, cannot on its own speak for itself without the aid of an explanation relating its existence. The validity and relevance of documents to admit facts or evidence is when it is done in the open court and not a matter for counsel's address. It is not also the duty of a court to speculate or work out either mathematically or scientifically a method of arriving at an answer on an issue which could only be elicited by credible and tested evidence at the trial.'**

**In view of all I have said above, it is my well considered view and I so hold that the lower court was right to hold that the appellants ought to call polling unit agents in all the polling units challenged in order to prove lack of improper accreditation, over voting**

**and improper accounting of ballot papers. I agree with Prince Lateef O. Fagbemi, SAN, counsel for the 3rd respondent that the appellants seem to have the impression that the need to call polling unit agents in proof of their case is dispensed with simply because in their view and as stated in this issue in their brief of argument, 'the proof of the allegation is documentary'. As it turns out, this does not represent the position of the law."**

**Per AKA'AHS, J.S.C. at pages 576-578, paras. H-A:**

**"As regards dumping of documents, the law is trite that it is not the duty of the court to proceed through documents tendered by parties which were not demonstrated in open court. The court below stated in volume 14 pages 13018-13019 referring to the presentation of the appellants before the Tribunal:-**

**'What the appellants did here was to dump the documents on the court by tendering it from the bar, got a few witnesses to identify or recognize some of the documents and left the Tribunal to figure out the rest in its chambers…..It is not the duty of the court to sort out the various exhibits, the figures and do the calculation in chambers to arrive al a figure to be given in judgment particularly in an election which is**

**challenging the number of valid votes scored by a candidate declared and returned as the winner of the election.'**

**Going through the records, it is to be observed that almost all the documents tendered by the appellants were tendered by appellants' counsel from the Bar and one gaping failure on the part of the appellants is that they did not link the said documents to the relevant aspects of their case by calling the appropriate witnesses to speak to them and demonstrate their applicability to appellants' ease in open court. A party tendering documents has the duty to ensure that such documents qua exhibits are linked to the relevant aspects of his case to which they relate. The point was poignantly made in this court by my learned brother, Ogunbiyi JSC in** *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 at 144-145 thus:-

**'I seek to say that the law is settled on documents tendered in court which purpose and worth must he demonstrated through a witness, it is settled also that the duty lies on a party who wants to rely on a document in support of his case to produce/tender and link or demonstrate the documents tendered to specific parts of his case. The fact that a document was tendered in the course of proceedings does not relieve a party from satisfying the legal duty placed on hint to link his document to his case.... The appellant at the lower tribunal apart from tendering exhibits 1-192 through PW1 did not bother to**

**demonstrate the exhibits through any witness. The witness PW1, merely dumped the exhibits on the tribunal and expecting it to go on a voyage of discovery. It is not the court's lot to be saddled with or can it *suo motu* assume a partisan responsibility of tying each bundle of such documentary evidence to the appellant's case which would occasion injustice to the other party. The court as an arbiter must not go into the arena and engage itself in doing a case for one party to the disadvantage of another party. The petitioner has a duty to tie the documentary evidence to the facts he pleaded through a witness. Anything short of that will be taken as dumping the exhibits (documents) on the tribunal**. See: *Audu v. INEC* (No.2) **(2010) 13 NWLR (Pt. 1212) 456 at 520 and** (*Ucha v. Elechi* **(2012) 12 NWLR (Pt.1313)330 at 360**.'

**Apart from identifying the documents, none of the appellants' witnesses demonstrated the documents before them. Such identification cannot by any stretch be taken to mean that the documents were properly linked to the aspects of the case of the appellants. There is a world of difference between mere identification of a document and demonstration qua linking same to the appellants' case. None of the appellants' witnesses specifically related the exhibits to the specific complaints in their depositions. The blanket identification by the witnesses cannot meet the requirement of the law in this regard**."

31. *On Whether court can act on document not tendered and admitted in evidence before it* -

**A court is not allowed to act on any document not tendered and admitted in evidence before the court. It is not the habit of courts to go outside the gamut of evidence before it to shop for evidence and materials upon which to use to decide a case before it. Thus, parties must endeavour to produce and properly place their evidence before the court. In the instant case, the appellants failed in this sacred duty hence the trial tribunal refused to act on the appellants' exercise of recount of ballot papers. The ballot papers not having been tendered and admitted in evidence by the trial tribunal, it was not available and was not evidence which the trial tribunal or parties could rely on**. [*Wassah v. Kara* **(2015) 4 NWLR (Pt. 1449) 374;** *Skye Bank Plc v. Akinpelu* **(2010) 9 NWLR (Pt. 1198) 179 referred to.**] (P. 564. paras. F-G)

32. *On Probative value of document tendered from Bar* -

**Credence cannot be given to a document tendered by a witness who cannot be rightly cross-examined as to its contents. A person who did not make a document is not in a position to give evidence on it because the veracity and credibility of the document cannot be tested through a person who has no nexus with the document. Only a maker of a document can tender and be cross-examined on same. Any exhibit tendered from the Bar without calling maker thereof will not attract any probative value.** [*Omisore v. Aregbesola* **(2015) 15**

**NWLR (Pt. 1482) 205**; *Udom v. Umana* **(2016) 12 NWLR (Pt. 1526) 179 referred to.**] (*Pp. 576, paras. B-C; 578, paras. A-B)*

33. *On difference between admissibility of document and probative value of document –*

**The admissibility of a document and the evidential value ascribed to it are two different things. The fact that a document is necessary to prove accreditation, over-voting, e.t.c. and has been admitted in evidence from the bar or however does not necessarily mean that it must be automatically attached or accorded probative value or weight**. [Agballah v. Chime (2009) 1 NWLR (Pt. 1122) 373; Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452 referred to.] (Pp. 558, para. A; 560, paras. B-C)

34. *On Construction of clear and unambiguous words of statute* **-Where the wordings of a statute or an enactment are clear and unambiguous, the same should be given its direct and ordinary meaning by the courts without employing any rule of interpretation. In the instant ease, since the statute has not provided for ticking to the right and the left, no rule of interpretation could be employed to stretch the law beyond what it provides**. [*Calabar Central Co-operative Thrift of Credit Society v. Ekpo* **(2008) 6 NWLR (Pt. 1083) 362**; *Atungwu v. Ochekwu* **(2013) 14 NWLR (Pt. 1375) 605**: *Amudi v. INEC* **(2013) 4 NWLR (Pt. 1345) 595**; *Ugwuanyi v.*

*NICON Plc*. **(2013) 11 NWLR (Pt. 1366) 546 referred to.**]
(Pp. 562-563. paras G-A)

35. On Whether address of counsel substitute for evidence -
**The address of counsel, no matter how brilliant and erudite, cannot take the place of the evidence on record. An issue merely raised by counsel in his address cannot be part of the evidence before the court and ought to be discountenanced. In tin instant case, the summation table unilaterally drawn up by the appellants in their final address was liable to be discountenanced because it was done in their final written address without the parties joining issues on same**. [*Dodo v Salanke* **(2006) 9 NWLR (Pt. 986) 447**; *Omisore v. Aregbesola* **(2015) 15 NWLR (Pt. 1482) 205 referred to.]** (P. 565, paras. C-D)

36. *On Onus on appellant challenging exercise of discretion by lower court* -
**Where an appeal is against the exercise of discretion by a lower court, it is important for the appellant to satisfy the appellate court that the lower court failed to exercise its discretion judicially and judiciously**. (P. 566. paras. C-D)

37. *On Attitude of Supreme Court to concurrent findings of fact by lower courts* -
**Where an appeal is against the concurrent findings of fact by lower courts, the success of the appeal demands that the appellant must satisfy the Supreme Court that the findings of fact are perverse or cannot be supported having regard to the evidence on record or are in**

**violation of established principles of substantive law or procedure, etc. etc. Where the appellant fails to establish any of these, the position of the Supreme Court is that the court does not make a practice of interfering with the concurrent findings by the lower courts. In the instant case, the appellants' appeal was against the concurrent findings of fact by the trial tribunal and the Court of Appeal. However, the appellants failed to bring the appeal within the purview of the recognised exceptions to the general rule thereby rendering the appeal liable to be dismissed.** [Olowu v. Nigerian Army (2011) 18 NWLR (Pt. 1279) 659; lbodo v. Enarofia (\9Hl) S -1 SC 42: Wuluckem v. GW; (1980)5 SC 291 referred to.] (Pp. 566, paras. D-F; 580, paras. G-H)

38. On Power of court to reformulate issues for determination -

**Every tribunal or court can validly reformulate issues for determination which may be different from what was submitted to it by the parties. However, there is a precondition to the valid exercise of the power. The issues so formulated by the tribunal or court must be with the view to bringing out the real question in controversy in the matter. Put differently, any modified or reformulated issue must be for the purpose only of determining the real grievances of the parties to the case. No court should take the liberty of reformulating issues as to change the nature and character of the case submitted by the parties or indirectly raise a completely new issue**. [*INEC v. Abubakar* **(2009) 8 NWLR (PL 1143) 259;** *Daniel v. INEC* **(2015) 9 NWLR (Pt. 1463) 113**:

*Ekunola v. C.B.N.* **(2013) 15 NWLR (Pt.1377) 224 referred to.**] (Pp. 552-553, paras. G-B)

39. *On Purpose of reply brief* -

**A reply brief is to respond to new issues raised by the respondent in his brief. It is not an opportunity to re-argue appellant's case or even improve on it. Where a reply brief goes outside the parameters set for it, the court should ignore and discountenance it. In the instant case, in the appellants' reply brief, the appellants contended that the 1st respondent's brief of argument was incompetent because the arguments were against the decision of the election tribunal and not the Court of Appeal. That part of the appellants' reply brief was discountenanced**. [*Umeji v. A.-G., Imo State* **(1995) 4 NWLR (Pt. 391) 552 referred to.**] (P. 549, paras. F-G)

40. *On whether objection to respondent's brief can be raised in reply brief –*

**The function of a reply brief does not include the raising of objection to the usage of a respondent's brief duly adopted and relied upon by the respondent. This is because the respondent at that stage is not procedurally enamoured to file a reply to the appellant's reply brief. Such an objection would be raised without giving the respondent an opportunity to be heard on it.** (*P. 549, paras. D-E*)

41. *On Altitude of court to technicality* -

**The era of technicality has gone for good in judicial proceedings. The courts have since departed from its**

**shore. All courts have now embraced with love the need to deliver substantial justice to parties who come to seek justice in court**. [*Olley v. Tunji* **(2013) 10 NWLR (Pt. 1362) 275 referred to.]** *(Pp. 540-541. paras. H-.4)*

42. On Meaning of "technicality " -

**Technicality means a harmless error.** [Olley v. Tunji **(2013) 10 NWLR (Pt. 1362) 275 referred to.**] (P. 540. para. H)

Nigerian Cases Referred to in the Judgment:

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

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

Adegbuvi v. A.PC. (201 5) 2 NWLR (Pt. 1442) 1

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

Agbakoha v. I.N.E.C. (2008) 18 NWLR (Pt. 1119) 489

Agballahv. Chime (2009) 1 NWLR (Pt. 1122) 373

Agbareh v. Mimra (2008) 2 NWLR (Pt. 1071) 378

Agwarangbo v. Nakande (2000) 9 NWLR (Pt. 672) 34 1

Ajadi v. Ajibola (2004) I 6 NWLR (Pt. 898) 91

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

Akinyedc r Opere (1967) SC NLR 523

Akomolafev. Guardian Press Ltd. (2010)3 NWLR (Pt. 1181) 338

Amadi v. I.N.E.C. (2013) 4 NWLR (Pt. 1345) 595

Amosun v. I.N.E.C. (2010) LPELR - 49431

Amusa v. State (2003) 4 NWLR (Pt. 811)595

Anuforo v. Obilor (1997) 11 NWLR (Pt. 530) 661

Anyanwu v. Uzowuaka (2009) 13 NWLR (Pt. 1159) 445

Atungwuv. Ochekwu (2013) 14 NWLR (Pt. 1375)605

Audit v. INEC (No. 2) (2010) 13 NWLR (Pt. 1212) 456

Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416
Bassil v. Fajebe (2001) 11 NWLR (Pt. 725) 592
Belgore v. Ahmed (2013) 8 NWLR (Pt. 1355) 60
Buhari v. [NEC (2008) 18 NWLR (Pt. 1120) 246
Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1
Buhari v. Obasanjo (2005) 2 NWLR (Pt. 910) 241
C.C.T. & C.S. Ltd v. Ekpo (2008) 6 NWLR (Pt. 1083)362
C.P.C. v. I.N.E.C. (2011) 18 NWLR (Pt. 1279)493
C.P.C. v. I.N.E.C. (2012) 1 NWLR (Pt.J280) 106
Daniel v. I.N.E.C. (2015)9 NWLR (Pt. 1463) 113
Dodo v. Salanke (2006) 9 NWLR (Pt. 986) 447
Dumez Nig. Ltd. v. Nwakhoba (2008) 18 NWLR (Pt. 1119) 361 Egbunike v.A.C.B. Ltd. (1995) 2 NWLR (Pt.375) 34
Egharevba v. Osagie (2009) 18 NWLR (Pt.1173) 299
Ehikioya v. C.O.P. (1992) 4 NWLR (Pt. 233) 57
Ekunola v. C.B.N. (2013) 15 NWLR (Pt. 1377) 224
Emeka v. State (2014) 13 NWLR (Pt. 1425) 614
Emenike v. P.D.P (2012) 12 NWLR (Pt. 1315) 556
F.R.N. v. Nwosu (2016) 17 NWLR (Pi. 1541)226
Gambia v. Omokhodion (2011) 15 NWLR (Pt. 1269) 145
Gonzee (Nig.) Ltd. v. N.E.R.D.C. (2005) 13 NWLR (Pt. 943) 634 Haruna v. Modibbo (2004) 16 NWLR (Pt. 900) 487
Hope v. Elleh (2009) LPELR 8520
I.N.E.C. v. Abubakar (2009) 8 NWLR (Pt. 1143) 259
lbodo v. Enarofia (1980) 5-7 SC 42
Igwe v. A.C.B. Ltd. (1999) 6 NWLR (Pt. 605) 1
Itauma v. Akpe-Ime (2000) 12 NWLR (Pt. 680) 156
Jekpe v. Alokwe (2001) 8 NWLR (Pt. 715) 252
Kakih v. P.D.P. (2014) 15 NWLR (Pt. 1430)374
Kola v. Potiskum (1998) 3 NWLR (Pt. 540) 1

Kanbo v. Grend 0992) 3 NWLR (Pt. 230) 426
Ladoja v. Ajimobi (20)6) 10 NWLR (Pt. 1519) 87
Mbanefo v. Molokwu (2014) 6 NWLR (Pt. 1403) 377
Mobil Prod. Nig. Unltd. v. LASEPA (2002) 18 NWLR (Pt. 798) 1 Mogaji v. Odofin (1978) 4 SC 91
Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1
Nwankwo v. Abazie (2003) 12 NWLR (Pt. 834) 381
Nwaora v. Nwabueze (2011) 17 NWLR (Pt. 1277) 699
Nwokidu v. Okanu (2010) 3 NWLR (Pt. 1181) 362
Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452
Ogborn v. Okmva (2016) 11 NWLR (Pt. 1522) 84
Ojukwu v. Yar' Adua (2009) 12 NWLR (Pt. 1154) 50
Oke v. Mimiko (No. 2) (2014) 1 NWLR (Pt. 1388) 332
Okereke v. Umahi (2016) 11 NWLR (Pt. 1524) 438
Okubre v. Ibanga (1990) 6 NWLR (Pt. 154) 1
Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530
Olly v. Tunji (2013) 10 NWLR (Pt. 1362) 275
Olokunlade v. Samuel (2011) 17 NWLR (Pt. 1276) 290
Olowu v. Nigerian Army (2011) 18 NWLR (Pt. 1279) 659
Olufosoye v. Fakorede (1993) 1 NWLR (Pt. 272) 747
Omisore v. Aregbesola (2015) 15 NWLR (Pt. 1482) 205
Onobrucherev. Esegine (1986) 1 NWLR (Pt. 19) 799
Ordia v. Piedmont (Nig.) Ltd. (1995) 2 NWLR (Pt. 379 516
Orji v. Anyaso (2000) 2 NWLR (Pt. 643) 1
Oshiomhole v. Airhiavbere (2013) 7 NWLR (Pt. 1353) 376
Ovunwo v. Woko (2011) 17 NWLR (Pt. 1279) 522
Salami v. Ajadi (2007) LPELR 8622
Sanusi v. Ameyogun (1992) 4 NWLR (Pt.237) 527
Skye Bank Plc v. Akinpelu (2010) 9 NWLR (Pt. 1198) 179
Uchav. Elechi (2012) 13 NWLR (Pt. 1317)330
Udeze v. Chidebc (1990) 1 NWLR (Pt. 125) 141

Udom v. Umana (2016) 12 NWLR (Pt. 1526) 179

Ugwuanyi v. NICON Ins. Plc (2013) 11 NWLR (Pt. 1366) 546 Umeji v. A.-G., Imo State (1995) 4 NWLR (Pt. 391) 552 Usiobaifov. Usiobaifo (2005) 3 NWLR (Pt.913) 665

Uwazurike v. Nwachukwu (2013) 3 NWLR (Pt. 1342) 503

Wassah v. Kara (2015) 4 NWLR (Pt. 1449) 374

Woluchem v. Gudi (1981) 5 SC 291

Yaki v. Bagudu (2015) 18 NWLR (Pt. 1491) 288

Yalaju-Amaye v. A.R.E.C. Ltd. (1990) 4 NWLR (Pt. 145) 422

Yar'Adua. v. Barda (1992) 2 NWLR (Pt. 231) 638

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

*Subramariam v. Public Prosecutor* (1 956) 1 WLR 965

*Thynne v. Thynne* (1955) 3 WLR 466

*Wallersteiner v. Moir*(1974) 3 All ER 217

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

Constitution of the Federal Republic of Nigeria. 1999 (as amended). S. 285(4)

Electoral Act, 2010 (as amended), Ss. 45, 49, 138(1)(a), (2). 1st Sch.. para. 41(3)

Evidence Act, 2011. Ss. 37, 39 - 76, 126, 131, 132. 133(1), 134, 136. 13S(1)(a)(b), 139(1), 140(2), 147 and 168(1)

**Appeals:**

These were appeals against the ruling of the Court of Appeal dismissing the appellants' application seeking the correction and/or amendment of the record of the Election Tribunal

with respect to the L' appellant's evidence-in-chief and an appeal against the decision of the Court of Appeal dismissing the appeal against the judgment of the Election Tribunal which dismissed the appellant's petition. The Supreme Court, sitting as a full court, in a unanimous decision, dismissed the appeals.

**History of the Case**:

*Supreme Court*:

*Names of Justices that sat on the appeal*: Walter Samuel Nkanu Onnoghen, C.J.N. (Presided); Olabode Rhodes-Vivour, J.S.C.; Musa Dattijo Muhammad, J.S.C; Kumai Bayang Aka'ahs, J.S.C.: Kudirat Motonmori Olatokunbo Kekere-Ekun, J.S.C.; John Inyang Okoro, J.S.C. (Read the Leading Judgment); Sidi Dauda Bage, J.S.C.

*Appeal No*.: SC.466/2017

*Date of Judgment*: Monday, 24th July 2017

*Names of Counsel*: Yusuf Ali, SAN, Emmanuel C. Ukala, SAN. Kemi Pinheiro, SAN, Adebayo O. Adelodun, SAN, Roland I. Otaru. SAN, D.C. DeNwigwe SAN, Chief Ferdinand O. Orbih, SAN, Chief H.O. Ogbodu, SAN FCIArb, Akinolu T. Kehinde, SAN. Kehinde K. Eleja SAN, Dr. V.J.O. Azinge SAN (with them, Kingsley O. B Obamogie Esq., Prof. Wahab Egbewole, Efosa Urhoghide Esq., L.G., Edewi Esq., Omoniyi Idowu Esq., Ikhide Ehighelua Esq., Pascal Ugbome Esq., B.R. Gold Esq., Chief Rafiu O. Balogun, Kehinde Ogunwumiju Esq., Alex Akoja Esq., Dike Udenna Esq. FCIArb, A.M. Abdulkareem Esq., Patrica Ikpegbu [Mrs], Bamikole Aduloju Esq., Ibrahim M. Adedo Esq., Thaddeus Idenyi Esq., A.O. Obayomi (-Esq., Felix Imosili Esq., T.N. Alatise Esq., A.O.

Usman Esq., A.B. Eleburuike Esq., C.C. lbezim (Miss), Desmond Orbili Esq., Dr. G. Oni Edigin Esq., Patrick Isiekwene Esq., Jibrin lsmaila Esq., Friday O. Itulah Esq., Tunde Ahmed Adejumo Esq., Osasu Ize-Iyamu Esq., Bola Okiji Esq., Abdulbasit Agbaje Esq., G.O. Onoabhagbe Esq., F.E. Ubuane Esq.. J.E. Airiohuodion Esq., Osaro Osarenkhoe Esq., B Imafidon Agbaayere, Esq., S.U. Obazee Esq.. L.E. Eseigbe Esq., Nosa Adams Esq., Reginald Nnwoka Esq., Osikhena-Boih-Donald, K.T. Sulyman-Hassan [Mrs] - *for the Appellants*

Asiwaju Adegboyega Awomolo, SAN, Dr. Onyechi Ikeazu SAN, Chief [Mrs] Victoria O. Awomolo SAN, (*with them*, T.M. Inuwa Esq., Onyinye Anumonye Esq., Eyitayo Fatogun Esq., Chioma Ohakim E (Mrs.), Ismail Ajibade Esq., Alhassan A. Umar Esq., Tobechukwu Nweke Esq., Akinyosoye Arosanym Esq., Obinna Onya Esq., Olajide Olaleye-Kumuyi Esq., Jude Daniel Odi Esq.. Adeoluwa Adekunle [Miss], Chidimma Nweke [Miss]) -*for the 1st Respondent*

Chief Wole Olanipekun, SAN, Adetunji Oyeyipo SAN, A.J. Owonikoko SAN, Chief N. Ekanem SAN (*with them*, Kelvin Aigbe Esq., Kabir Momoh Esq., Santos Owootori Esq., Vote Ugberaese Esq., Bolarinwa Awujoola Esq., Tolu Adetomiwa Esq., Segun Jimoh Esq., C.S. Imoko Esq., S.M. Kudus Esq., M.K. Fidelis Esq., Ugochukwu Nwosu-lheme Esq., Opemipo Olorunfemi Stephen Esq., Tajudeen Alade Esq. - *for the 2nd Respondent*

Prince Lateef O. Fagbemi SAN, Rickey M. Tarfa SAN, Chief Adeniyi Akintola SAN, Rotimi Oguneso SAN, Dr. J.O. Olatoke SAN, H.O. Afolabi SAN (with them, Collins A.R. Aimuan Esq., Victor Ohiosumua Esq., Folasade

Aofolaju Esq., Olusola A. Dare Esq., George Ohioma Esq., Sikiru O. Adewoye Esq., Aikhunegbe Malik Esq., Stephen Okoror Esq., Omosanya A. Popoola Esq., G.A. Oladejo Esq., Rashidi Isamotu Esq., B.A. Oyun Esq., Oladele Oyelami Esq., Akeem Umoru Esq., J.O. Andreson Achilike Esq., George Onaho Esq., C.I. Aiguobarueghian Esq., Chuka Iguh Esq., Adokutu Jafaru Esq., Oladipo Osinowo Esq., Israel Matesun Esq., Thomas Ojo Esq., Oluwaseye Adeboye Esq., Oghogho A. Osagie

Esq., B.E Salako Esq., Tersagh linande Esq., O.T. Olujide Poko Esq., E.A. Uwa Esq., Esther Akugue, Esq., K.O. Ajana Esq., R.G

Igwe Esq., T.K. Salawu Esq., Gideon Ejemai Esq., Sharon Anyaduba Esq., S.A. Lawa] Esq.. Rilwan Idris, Esq. - *for the 3rd Respondent*

*Court of Appeal:*

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

*Names of Justices that sat on the appeal*: Monica Boln'an Dongban-Mensem. J.C.A. (Presided); Tom Shaibu Yakubu, J.C.A.; Misitura Omodere Bolaji-Yusuff, J.C.A. (*Read the Leading Judgment*): Ugochukwu Anthony Ogakwu, J.C.A.; Mohammed Mustapha, J.C.A.

*Appeal No.*: CA/B/EPT/EDS/GOV/20/2017

*Date of Judgment*: Friday, 9th June 2017

*Tribunal:*

*Name of the Tribunal*: Edo State Governorship Election Tribunal, Benin

*Members of the Tribunal*: A.T. Badamasi, J. - Chairman; Gilbert A.

Ngele, J. - Member; Khadi Adamu Usman, J. - Member

*Suit No*.: EPT/EDS/GOV/2/2016

*Date of Judgment*: Friday, 14th April 20) 7

**OKORO, J.S.C. (Delivering the Leading Judgment):** On the 10th day of July, 2017 when this interlocutory appeal was taken, I delivered judgment immediately thereafter holding that the appeal lacks merit and same was dismissed. Reasons for the judgment were to be given today, 24th July, 2017. I hereby proceeds to give those reasons.

This interlocutory appeal is against the ruling of the Court of Appeal, Benin Division delivered on 30th May, 2017 wherein the lower court refused the appellants' application dated and filed on 22nd May, 2017 seeking an order correcting and/or amending the 1st appellant's evidence-in-chief contained in Volume 13, pages 11742 - 11743 of the record of appeal and to rely on the record of the 1st appellant's evidence-in-chief taken by one of the members of the Tribunal's panel Hon. Justice Gilbert A. Ngele (member 1), as well as a deeming order. A synopsis of the facts will suffice.

On 28th September, 2016, election into the office of Governor of Edo State was conducted by the 1st respondent. The 1st appellant contested the said election on the platform of the 2nd appellant, whilst the 2nd respondent was sponsored by the 3rd respondent.

At the end of the election, the 1st respondent declared the 2nd respondent as the winner of the election and consequently returned him as the duly elected Governor of Edo State.

Dissatisfied with the declaration and return of the 2nd respondent as the A Governor of Edo State, the appellants, on 19th October, 2016 filed a petition at the Governorship Election Tribunal, holden at Benin City challenging the aforesaid return. After due consideration of the evidence adduced by the parties, the tribunal on 14th April, 2017 delivered judgment and dismissed the petition. Not satisfied with the decision of the Tribunal, the appellants appealed to the lower court vide notice of appeal filed on the 28th of April, 2017.

After parties had exchanged briefs of argument, but before the hearing of the appeal, the appellants filed a motion on 22nd May, 2017, seeking to correct and/or amend 1st appellant's evidence-in-chief aforesaid. The said motion was argued on 30th, May, 2017 and ruling given the same date. The application was refused and dismissed.

Aggrieved by the said ruling, the appellants filed notice of appeal on 12th June, 2017. The said notice contains five (5) grounds of appeal out of which the appellants have distilled two issues for determination as follows:

"(1) Whether the appellants' application before the lower court dated and filed on 22nd May, 2017 seeking an order correcting and/or amending the record of appeal was competent?

(2) Did the appellants satisfy the requirements for correction and/or amendment of the record of appeal in the lower court?

Learned Senior Counsel for the 1st respondent has however distilled one issue for determination. It states:

> "Whether the Court of Appeal was correct when it held that the appellants failed to present exceptional circumstances to warrant the exercise of the court's discretion to jettison the record of proceedings of the Chairman of the Tribunal in favour of that kept by one of the members of the Tribunal on the subject matter of the application?"

Chief Wole Olanipekun, SAN, learned senior counsel for the 2nd respondent also formulated one issue in the following words:

> "Juxtaposing the facts and circumstances of this case against the F clear statutory provisions and binding decisions/precedents, whether the lower court was not right in dismissing appellants' motion dated 22nd May, 2017?"

The learned Senior Counsel for the 3rd respondent. Prince Lateef O. Fagbemi. SAN also decoded one issue for determination. It is couched as follows:

> "Whether the Court of Appeal was not right in dismissing the G appellants' application seeking to correct and/or amend the record of the trial Tribunal with respect to the evidence-in-chief of the 1st appellant as contained in Volume 13, pages 11742 - 11743 of the record, same being incompetent, having not satisfied a condition precedent and also lacking in merit?"

At the hearing of this appeal on 10th July, 2017, the 1st and 3rd respondents H indicated that they had preliminary objections. The Is1 respondent filed her notice of preliminary objection on 27th June, 2017 whereas the 3rd respondent filed his on 30th June, 2017.

Basically the objection of the 1st respondent is that ground 1 of the grounds of appeal did not arise from the decision of the Court of Appeal. Arguments on the preliminary objection are contained on pp. 1 - 4 of her brief of argument. The said ground of appeal, without the particulars states:

> "The learned Justices of the Court of Appeal erred in law by holding that the appellants' application dated and filed on 22nd May, 2017 seeking an order of the court to con-eel and/or amend the record of the trial Tribunal with respect of the evidence-in-chief of the 1st appellant contained in Volume 13, page 11742 - 11743 was incompetent."

Learned counsel for the 1st respondent submitted that although the lower court pointed out the inadequacy of the application, nevertheless went ahead to hear the application on the merit and dismissed same. That the lower court did not thus hold the application to be incompetent. It is his view that the said ground does not arise from the ruling appealed against.

The appellants filed a reply brief on 30/6/17 wherein they responded to the preliminary objection. Learned Senior Counsel for the appellants submitted that the court below had taken a decision about the incompetence of the application before asking the question "is this application competent?" It is his submission that the lower court had answered the question before asking it. The aspect of the ruling of the lower court which ground 1 is challenging is as follows:

> "The filing of the affidavit is therefore a condition precedent to the exercise of the court's jurisdiction to consider the application for an amendment of the records. This fundamental procedure not having been complied with, is this application competent""

My understanding of the above decision of the lower court is that the appellants did not file an affidavit challenging the record before filing the motion and that by the decision of this court in Gonzee Nig. Ltd. v. N.E.R.D.C. (2005) 13 NWLR (Pt. 943) 634 and Nwankwo v. Abazie (2003) 12 NWLR (Pt. 834) 381. the said affidavit is a condition precedent to the filing of the motion. Indeed, the lower court was actually saying that the application was incompetent but that notwithstanding, the lower court heard the application on the merit and dismissed same. For me, I hold the view that the ground of appeal is competent. The 1st respondent's preliminary objection is accordingly overruled.

I shall now consider the preliminary objection raised by the 3rd respondent. The 3rd respondent's main reason for the preliminary objection is that since final judgment in the appeal has been delivered since 9th June, 2017, the interlocutors' appeal has become academic and would serve no utilitarian purpose or value. Secondly, that ground 3 is not a ground against the findings of the lower court.

In his argument, the learned Silk for the 3rd respondent submitted that H based on the case of *Nwora v. Nwabueze* (2011) 17 NWLR (Pt. 1277) 699 at 725, this appeal has become spent and academic since the appeal at the lower court has been decided. As regards ground 3 of the grounds of appeal, he opined the use of the words impliedly holding cannot be deciphered from the judgment of the court below.

In response, the learned Silk for the appellants submitted that the facts A in *Nwora v. Nwabuezc*e(supra) are utterly different from the present case. That there are live issues to be determined in the instant appeal. Referring to the ruling of the court below, particularly on page 12937, he submitted that ground 3 of the

grounds of appeal derives from and challenges of the ruling of the Court of Appeal.

The application for amendment of the record of appeal particularly evidence-in-chief of the PW1 was to assist the appellants conduct their appeal with the proper facts in the record. If it was granted, the said amendment could have been used at the lower court and in this court as there is an appeal before us. Therefore there is still a life issue to be determined.

The case of *Nwora v. Nwabueze* (supra) relied upon by the 3rd respondent in which this court held that an interlocutory appeal cannot be entertained in this court where the main appeal at the lower court has been struck out is not applicable to the facts of this case. Every case is authority for what it decides. In Nwora's case (supra), there was no record of appeal from the trial High Court to the Court of Appeal which necessitated the stinking out of the appeal for noncompliance with conditions of appeal. In the instant appeal, although the appeal has been decided at the court below, the record of appeal sought to be amended is still relevant to the appellant's case before this court. Therefore, it cannot be said to be academic and/or spent as argued by Senior Counsel for the 3rd respondent.

With regards to ground 3 of the grounds of appeal, I wish to reproduce the portion of the ruling and the said ground of appeal. At page 12937 of the record is part of the ruling of the court below as follows:

> "Further, the general principle of law regarding the correctness of the record where more than one Judge sits as in the panel in this case under consideration, the record of the Chairman taken at the proceedings is the record of the Tribunal. The notes taken by other members of the Tribunal do not

> form part of the records. See *Ngige v. Obi (supra*) and *Dantiye v. Kanya & Ors."*

Ground 3 in the notice of appeal alleged to be incompetent by the 3rd respondent states:

> "The learned Justices of the Court of Appeal erred in law by impliedly holding that the record of the Chairman of the trial Tribunal could not be assailed by recourse to the official record of a member of the tribunal."

From the portion of the ruling of the lower court reproduced above vis-a-vis the 3rd ground of appeal, it is crystal clear that the ground of appeal is attacking the decision of the lower court in the said ruling, the use of the word "impliedly" notwithstanding. The court below in its ruling actually decided that it is only the record of the Chairman that is the official record of the Tribunal and that the record of the other members are mere notes. Honestly, I do not know why the word "impliedly" was used but let me say that the era of technicality has gone for good in judicial proceedings. The courts have since departed from its shore. All courts have now embraced with love the need to deliver substantial justice to parties who come to seek justice in our courts. The word technicality has been defined by this court to mean a harmless error and I think this is what the use of the word "impliedly" connotes. See *Mrs. Simian Olapeju Sinmisola Olley v. Hon. Olukolu Ganiyu Tunji & Ors*(2013) 10 NWLR(Pt. 1362)275

It is my view from all I have said above that this second preliminary objection is unmeritorious and is accordingly overruled. Having overruled the two preliminary objections, the coast is now clear to determine the interlocutory appeal on the merit.

Although the appellants distilled two issues for determination. I think the version of the lone issue formulated by the 3rd respondent is more encapsulating of all the complaints of the appellants in the notice of appeal I shall accordingly determine this appeal based on the said sole issue already set out in this judgment.

Learned Senior Counsel for the appellants submitted that the appellants impeached the record of the trial Tribunal by filing a motion on notice at the court below, setting out in details the part of the record of appeal sought to be corrected and/or amended. It is his view that having served the motion on the Tribunal, the appellants had satisfied the conditions for the grant of the application. He concluded that the lower court was wrong to rely on the case of *Garuba v. Omokhodion* (2011) 15 NWLR (Pt. 1269) 145, to hold that appellant's application was incompetent. He urged the court to resolve this issue against the appellants.

In response, the three senior counsel for the respondents agree that appellants' motion of 22nd May. 2017 before the court below was contrary to established statutory and judicial authorities and that the lower court was right to have dismissed same. That, apart from the fact that the appellants did not file an affidavit to impeach the record of the Chairman of the Tribunal as decided by this court in *Garuba v. Omokhodion (supra)*, it was not possible to substitute the record of the Chairman with that of member of the Tribunal, relying on the cased of *Ngige v. Obi* (2006) 14 NWLR (Pt. 999) 1. They all urged the court to resolve the issue against the appellants.

By Section 285 (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), "the quorum of an election tribunal established under this section shall be the Chairman and one other member:"This provision clearly sets the

chairman of an Election Tribunal as playing a very prominent role. Without him, the panel is not properly constituted. His position, as was pointed out by the learned' senior counsel for the 2nd respondent of the proceedings of an Election Tribunal. It follows without much ado that the record of proceeding kept by the said chairman is the authentic record of the court.lt cannot be otherwise since the record of appeal only takes cognizance of the record as kept by the Chairman. The notes kept by other members are just personal to them. As was pointed out by the court of Appeal in Ngige v. Obi (2006) 14 NWLR (Pt. 999) 1, should all the notes of all the member be made part of the record, apart from being cumbersome, it will lead to confusion at the hearing of an appeal.

On page 12937, Vol. 14 of the record of appeal, the court below followed their earlier decision in *Ngige's case (supra)* and held that "*where more than one judge sits as in a panel in this case under consideration, the record of the Chairman taken at the proceedings is the record of the Tribunal*". Thus, an attempt by the appellants to move the lower court to substitute the record of the Chairman of the Tribunal with that of member I of the panel was an exercise in A futility. No wonder the lower court refused the application.

More so, by paragraph 41 (3) of the First Schedule to the Electoral Act 2010 (as amended), relating to the taking of evidence-in-chief in an election petition proceedings, "*there shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in his deposition*." In an election petition proceedings, the above provision makes it crystal clear that evidence-in-chief of a witness is his witness statement on oath which he is only permitted to adopt and nothing more. After adoption, the said

witness statement on oath becomes his evidence-in-chief. The only other aspect of what will constitute part of the record and/or evidence is his answers to questions during cross-examination. It follows that anything other than the adoption of his witness statement on oath during examination in chief, the notes taken by member 1 or any other member sought to replace the Chairman's record, cannot by any stretch of imagination qualify as his evidence-in-chief and the court below was perfectly right to refuse the application.

Finally, on this, the appellants were clearly oblivious of the procedure to be adopted when challenging the record of a court. The appellants said that they only filed a motion on notice and served same on the Chairman of the Tribunal. This is wrong. As was clearly stated by the learned Senior Counsel for the 1st respondent in his brief of argument, the Chairman and members of the I Tribunal were not parties to the motion. That being the case, they had no locus 1 of any kind lo file any documents in respect thereof. It would be absurd for the Chairman and members to react to the motion by filling, maybe, a counter- affidavit in a matter they are arbitrators and ought to be neutral. Will this not amount to descending inio the arena? Certainly, it will.

This court has laid down the procedure to be followed where a party seeks to impugn the record of a court. Such a party must first file an affidavit challenging the record and serve same on the chairman of the tribunal. The said affidavit must be independent of the motion to be filed to amend the record which motion shall be between the parties to the action only.

After filing the said affidavit, it will be followed by a motion on notice setting out the prayers and particulars thereof. The court will then exercise its discretion whether to grant the

application or not. See *Garuba v. Omokhodion* (2011) 15 NWLR (Pt. 1269) 145.

For the avoidance of any doubt whatsoever, a party seeking to impugn the G record of a court or Tribunal must do the following:

1. File an affidavit challenging the record
2. File a formal application (motion on notice) to the court supported by an affidavit.

Note that the later affidavit can't be the same as an affidavit challenging the record. The affidavit in support must disclose the following particulars:

1. That affidavit challenging the record was duly filed.
2. That the said affidavit was duly served on the affected parties with the particulars of service disclosed.
3. That the affected parties either:
   (a) Filed affidavit in response lo the affidavit challenging the record; or
   (b) Failed to file such affidavit.

It is after the above steps have been complied with that the court to which the application is made can exercise its discretion one way or the other. The appellants herein failed to follow these steps. I hold that the court below was right to decide that the application was incompetent though it nonetheless determined the motion on the merit due largely, in my opinion, to the public interest and perception in election matters.

The sole issue for the determination of this appeal is hereby resolved against tire appellants. The interlocutory appeal lacks merit and is hereby dismissed. I make no other as to costs.

*MAIN APPEAL:*

It will be recalled that when this appeal was heard on Monday, the 10th day of July, 2017, 1 gave judgment immediately dismissing the appeal and promised to give reasons for taking that

position today 24th July, 2017. The following are therefore the reasons for the judgment.

This is an appeal against the judgment of the Court of Appeal, Benin Division delivered on the 9th day of June. 2017 wherein the lower court affirmed the judgment of the Governorship Election Tribunal, Benin, upholding the election and return of the 2nd respondent as the duly elected Governor of Edo State in an election conducted by the 1st respondent. A summary of the facts will suffice.

On 28th September, 2016, the Independent National Electoral Commission (1NEC) i.e. 1st respondent herein, conducted election into the office of Governor of Edo State. Nineteen (19) political parties sponsored their various candidates in the election.

The 1st appellant herein. Pastor Ize-Iyamu Osagie Andrew was the candidate of the 2nd appellant, the Peoples Democratic Party (PDP) while the 2nd respondent, Godwin N. Obaseki was sponsored by the 3rd respondent. All Progressives Congress (APC).

At the conclusion of the election, the 2nd respondent was declared as the winner of the election and returned duly elected by the respondent. The 1st and 2nd appellants were aggrieved by the declaration of the 2nd respondent as the duly elected Governor of Edo StaTe.

The two appellants, as plaintiffs, presented a petition before the Governorship Election Tribunal, Edo State on the following grounds:-

1. That the 2nd respondent was not duly elected by majority of lawful votes cast at the election.

2. That the election of the 2nd respondent was invalid by reason of non-compliance with the provisions of the Electoral Act, 2010 (as amended).
3. That the election of the 2nd respondent was invalid by reason of corrupt practices.

The appellants sought the following reliefs:

1. That it may be determined that the 2nd respondent Godwin Nogheghase Obaseki was not duly elected or returned by the majority of lawful votes cast at the Edo State Governorship Election held on the 28th day of September, 2016.
2. That it may be determined that the 1st petitioner who was the candidate of the 2nd petitioner, scored the highest number of lawful votes cast at the election and satisfied the requirements of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and the Electoral Act. 2010 (as amended).
3. That the 1st petitioner be declared validly elected or returned, having scored the highest number of lawful votes cast at the Governorship election held on the 28th day of September, 2016.

IN THE ALTERNATIVE

4. That it may be determined that the Edo State Governorship Election held on the 28th day of September, 2016 be nullified for substantial non-compliance with the provisions of the Electoral Act which non-compliance substantially affected the result of the A, election and in its place, make an order for a fresh election to be conducted.

Parties filed and exchanged pleadings, called their witnesses and filed final addresses. In a considered judgment

delivered on the 14th day of April 2017, the Tribunal dismissed the appellants' petition.

Dissatisfied with the stance of the trial Tribunal in dismissing their petition, D the appellants filed notice of appeal containing 41 grounds on 28th April, 2017. Parties filed and exchanged briefs. At the end of hearing the appeal, the lower court dismissed the appeal and affirmed the judgment of the Trial Tribunal

Aggrieved by the decision of the Court of Appeal, the appellants have further appealed to this court. Notice of appeal was filed on 15th June, 2017 and has 21 grounds of appeal. Front the said grounds of appeal the learned senior E counsel for the appellants, Yusuf Ali, SAN, leading other counsel, distilled three issues for the determination of this appeal. In the appellants' brief of argument settled by the learned Silk aforenamed and filed on the 23rd day of June, 2017, the said three issues are identified:

"1. Whether the court below was right in affirming the decision of the Tribunal which dismissed the appellants' case before the F respondents' defence, misplaced the burden of proof on the appellants, misdirected itself regarding the nature of appellants' 2nd issue for determination before the Tribunal and thereby caused a grave miscarriage of justice on the appellants.

2. Whether the court below was right by holding that the testimonies of all the witnesses called by the appellants were hearsay evidence and unreliable while preferring and relying on the non-cogent, unbelievable and wooly testimonies of the 2nd and 3rd respondents' witnesses and in further holding that the appellants dumped documents tendered by

them by failure to link all the documents tendered by them to their case when this was not so.

3. Whether the court below was not wrong in its view that the h appellants needed to call polling agents from all the polling units challenged in order to prove lack of improper accreditation, over voting, improper accounting of ballot papers when the proof of the allegations is documentary and in further holding that the 1st respondent did not abandon its pleadings by failure to call or elicit any evidence in support of same.

In the brief settled by Dr Onyechi Ikpeazu, SAN, being led by Asiwaju A. S. Awomolo, SAN, for the 1st respondent, only one issue is formulated for the determination of this appeal. The said issue states:

> "Whether the Court of Appeal was correct in sustaining the decision of the Tribunal to the effect that the appellants did not prove that the Governorship election which took place in Edo State on 28th September, 2016 was vitiated by non-compliance with the provisions of the Electoral Act, 2010 and that the appellants failed to prove that they were entitled to the rebel's sought in the Election petition."

For the 2nd respondent, three issues are decoded from the 21 grounds of appeal. In the brief filed by Chief Wole Olanipekun, SAN, leading other counsel the three issues are couched thus:

1. Considering the stale of the pleadings, the relevant sections of the Electoral Act on grounds for challenging an election petition, vis-a-vis binding decisions of appellate courts, including the Supreme

Court decision on *C.P.C. v. I.N.E.C.* (2012) 2 - 3 SC 1; (2011) 18 NWLR (pt. 1279) 493. Whether the lower court did come to the right decision when it affirmed the decision of the lower Tribunal that the orchestrated complaints mounted against the return of the 2nd respondent by the appellants relating to how the voters' registers were ticked were of no moment.

2. Considering extant statutory and judicial authorities on election jurisprudence and juxtaposing the admissible evidence led against the pleadings, whether the lower court was not right in affirming the conclusions/findings of the trial Tribunal.
3. Having regard to appellants' pleading in the petition, the reliefs sought at the Tribunal through to the Court of Appeal and at the Supreme Court, vis-a-vis the evidence on record, whether this Honourable Court would not affirm the decision of the lower court, which also rightly affirmed the impeccable decision of the trial Tribunal.

Prince Lateef O. Fagbemi, SAN, leading other counsel for the 3rd respondent, formulated five (5) issues for determination as contained in the brief of argument they filed on 30th June, 2017. The five issues are as follows:

1. Whether the Court of Appeal was not right when it held that the trial tribunal properly evaluated evidence placed before it and rightly ascribed proper probative value to same?
2. Whether the Court of Appeal was not right when it held that the appellants have not proved the allegation of non-compliance with Electoral Act and over voting in all the affected polling units being

challenged by tire appellants having failed to call eye witnesses in those polling units?

3. Whether the Court of Appeal was not right when it held that failure to tick right and tick left on the voters register does not amount to non-compliance with Electoral Act in the peculiar circumstance of this appeal.
4. Whether the Court of Appeal was not right when it held that the appellants dumped their documents on the tribunal having failed to link them to their case?
5. Whether the Court of Appeal was not right when it held that the 1st respondent need not call witnesses and that weakness of the defence (if any) will not avail the petitioner where petitioners/ appellants have failed to discharge the onus of proof placed on them by the law?

May I note here that the learned Senior Counsel for the appellants has filed three reply briefs to the 1st, 2nd and 3rd respondents' briefs on 30/6/17 and 5/7/17 respectively. I shall make reference to them in the course of this judgment as appropriate.

After a careful perusal of the judgment of the lower court; vis-a-vis the complaint of the appellants against the said decision, I find it most appropriate to adopt the three issues formulated by the appellants for the determination of this appeal, after all, it is their appeal. That is not to say that the issues formulated by the respondents are not plausible. All shall be taken along with those of the appellants. I shall start from the first issue.

On issue 1, the learned Senior Counsel for the appellants, submitted that the decision of the trial Tribunal ought to be set aside because the said tribunal breached the appellants' right to fair hearing by failing to place their case side by side with the case of the respondents before reaching its decision. He argued that the

lower court in holding that "…..*evidence in civil cases aye assessed and evaluated by holding the evidence called by both parties in the case on either side of the imaginary scale of justice balancing and weighing them together*", this holding is binding and subsisting having not been challenged, relying on *Uwazurike v. Nwachukwu* (2013) 3 NWLR (Pi. 1342) 503.

Learned Senior Counsel drew the attention of the court to pp. 12339 -12373 of the record on the fact that it was after dismissing the appellants' case that the Tribunal commenced a review and consideration of the evidence of the respondents. He opined that although every judge or court is entitled to adopt a distinctive style of writing judgments such that a judgment would not be upturned on appeal simply because it is not written in a certain manner or style, it must display a dispassionate consideration of all the evidence led by both sides to a dispute, weigh same on an imaginary scale and decide in whose favour the evidence preponderates before dismissing the case or granting the reliefs sought by the plaintiff, relying on *Anyanwu v. Uzowuaka* (2009) 13 NWLR (Pt. 1159) 445 at 471 - 472 paras. C - D. On the effect of failure to rightly approach or consider evidence, learned Silk referred to the cases of *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426 at 441 Paras. A - E, *Ovunwo & Anor. v. Woko & Ors* (2011) 6 - 7 SC (Pt. 1) 22; (2011) 17 NWLR (Pt. 1279) 522. H

It was a further contention of the learned Senior Counsel that the court below misapplied the case of *Mbanefo v. Molokwu* (2014) 6 NWLR (Pt. 1403) 377, for whereas the ease talked about prima facie case, the court below understood it to mean burden of proof. According to him, the court below was wrong to rely on *Mbanefo's case (supra*). Referring to the case of *F.R.N. v. Nwosu* (2016) 17 NWLR (Pt. 1541) 226 at 285 - 286 paras. D - F, learned Senior Counsel submitted that a lower court must refrain from

misconstruing and misapplying the ratio in an earlier judgment as it not only leads to injustice but also confusion in the state of the law. In concluding this aspect, the learned Silk submitted that the trial Tribunal should have weighed the evidence adduced by the appellants side by side that of the respondents on the imaginary scale of justice and the lower court was wrong to have relied on the decision in *Mbanefo's case (supra)* to justify the trial Tribunal's fatal omission.

Appellant's, further contention in this issue is that in re-couching appellants' issue two in the court's issue five and its holding thereof, the lower court demonstrates that just like the trial Tribunal, the lower court felt that the case of the appellants was not materially different from a contention that the election was characterized by substantial non-compliance which would lead to a nullification of the election and the conduct of a fresh election when in actual fact the appellants' case was that the election was characterized by substantial non-compliance which would affect the return of the 2nd respondent. It is their view that the burden of proof on a petitioner who just wants to knock off enough invalid votes from his opponent's score so that he can be in the lead is substantially different and much less than the burden of proof on a petitioner who intends to show that the election in the whole state was marred by substantial non-compliance with the Electoral Act such that no candidate could validly be declared winner of the election. Learned Counsel relies on the cases of *Okubre v. Ibanga* (1990) 6 NWLR (Pt. 154) 1 at 13 paras A - B and *Onobruchere v. Esegine* (1986) 1 NWLR (Pt. 19) 799 at 807 para. G. 26

Learned Senior Counsel submitted .that where a court formulates issues which is at variance with the case of the appellant, it robs the appellant of his right to fair hearing, relying

on Ekunola v. C.B.N. (2013) 15 NWLR (Pt. 1377) 224, Udeze v. Chidebe (1990) 1 NWLR (Pt. 125) 141 at 161 - 162 paras. H-D.

In conclusion, learned Senior Counsel submitted that the lower court should not have accepted the Tribunal's consideration of the appellants' case as painstaking, thorough and detailed since the said consideration was based on the Tribunal's misdirection as to the nature of the petition and misplacement of the burden of proof in the petition.

In response to issue 1 the learned Senior Counsel for the 1st respondent. Dr. Onyechi Ikpeazu, SAN submitted in paragraph 5.14 of their brief that all that the appellants can establish is that the evidence offered by them was so adequate as to tilt the scale and to warrant cogent evidence on the part of the respondents. According to him, without showing that their evidence tilted the scale in their favour, the Tribunal cannot by the mere act of deciding the case based on the inadequacy of the appellants' case be found in any reversible error. It is his contention that indeed, the Tribunal had no business evaluating the evidence of the respondents unless it has found that the imaginary scale demanded such venture, relying on the case *of Mbanefo v. Molokwu (supra*). Relying on the case of *Emeka v. State* (2014) 13 NWLR (Pt. 1425) 614 at 636 - 637 paras. H - A, learned Silk urged this court to hold that there was nothing wrong with the style adopted by the Tribunal in the judgment and in any case, that appellants did not show any miscarriage of justice.

On the appellants complaint that their Issue two was not properly captured, learned Senior Counsel submitted that the Tribunal in streamlining the issues took the appellants' issue 2 into contemplation in formulating issue 5 which he set out in the brief.

In his own response, the learned Senior Counsel for the 2nd respondent submitted that the lower court was perfectly right when

it held that the judgment of the trial Tribunal meets the fundamental requirements of a good judgment as outlined in the case of *Okulate v. Awosanya* (7000) 2 NWLR (Pt. 646) 530 at 546. As to the sequence by which a trial court should resolve the claims before it, the learned Silk referred to the case of Yaleju-Amaye v. AREC Ltd. (1990) 4 NWLR (Pt. 145) 422 at 445.

Further, the learned Silk submitted that both legally and logically it does not even lie with the appellants to complain that the Tribunal did not consider the case of the respondents before deciding the issues in the petition. That the appellants lost sight of the fact that the reliefs in the petition are declaratory in nature, requiring them to succeed on the strength of their own evidence and not on the case made out by the respondents. Moreover, he opined, that by section IT 136 of the Evidence Act, the appellants were required to discharge the initial burden placed on them before the respondents could be called to make a defence, relying on the cases of *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 222, *Mbanefo v. Molokwu* (supra). According to learned counsel, the appellants cannot be heard to enforce rights belonging to the respondents, placing reliance on *Mobil Prod. Nig. Unltd v. LASEPA* (2002) 18 NWLR (Pt. 798) 1 at 30.

In respect of appellants' complaint concerning their issue 2, the learned Senior Advocate urged the court to discountenance the contention as it amounts to approbation and reprobation, an act proscribed by law, referring to *Ajide v. Keiani* (1985) 3 NWLR (Pt. 12) 248 at 269. He contended that this very issue 5 as formulated by the Tribunal was acknowledged and accepted by this same appellants in paragraphs 4.07 - 4.08 on page 5 of their brief as the "hallmark" F and that they even went further to concede in para. 4.12 on page 7 of their brief that issue 5 as formulated by the Tribunal evinced the fundamental nature" of that issue.

Learned Senior Counsel concluded on this issue that the argument of the appellants on the difference between their issue 2 and issue 5 formulated by the Tribunal is strange and of no moment for the reason that the same standard of proof on the balance of probabilities is required whether the noncompliance affects the return of a candidate or invalidates the entire election.

The learned Senior Counsel for the 3rd respondent also made similar submission as his two learned senior friends above. In the main, he submitted that the position of the law is trite that in establishing a case of this nature wherein the appellants are seeking for declaratory reliefs from the court, the j-appellants can only succeed in their claim on the proof and strength of their own case and not on the weakness or otherwise of the defence, relying on *Nwokidu v. Okami* (2010) 3 NWLR (Pt. 1181) 362 at 390 - 391 paras. G - A. It is his further submission that the trial Tribunal is only obliged to consider the defence of the respondents after it had satisfied itself that the appellants had made out a case that is worth responding to, lest the tribunal would be engaging in an academic exercise 'which no court empowered to do.

Learned Senior Counsel also agreed that in this matter, the onus of proof vested squarely on the appellants. He cited these eases in support, i.e. Awuse v. Odili (2005) All FWLR (Pt. 261) 248; (2005) 10 NWLR (Ft. 952) 416. *Olufosoye v. Fakorede* (DOS) NWLR (Ft. 72) 747 and *Hope v. Elleh & Anor* (2009) LPELR 8520 (CA)

In respect of denial of fair hearing regard being made to appellants issue 2 before the Tribunal, learned Silk submitted that the tribunal did not deny the appellants their right to fair hearing following the reformulation of the issues for determination as all the issues submitted before the trial Tribunal by the appellants were considered before the Tribunal reached its final decision. All

counsel for the respondents urged this court to resolve issue 1 against the appellants.

In the appellants' reply brief of argument, the learned Senior Counsel for the appellants submitted that the respondent's brief of argument is incompetent because the arguments therein are against the decision of the Election Tribunal and not the court below. He urged this court to hold that the first respondent has no proper brief before this court.

Without much ado, may I state that the function of a reply brief does not include the raising of objection to the usage of a brief of the respondent duly adopted and relied upon by a respondent. The simple reason being that the respondent at that stage is not procedurally enamored to file a reply to the appellant's reply brief, it goes without saying that such objection would be raised without giving the respondent an opportunity to be heard on it. As it turn out in this case, only the complaint of the appellant regarding the brief of the 1st respondent is before this court without a proper avenue for the respondent to state his own side of the case for the court to take an informed and unbiased position.

A reply brief, I must say, is to respond to new issues raised by the respondent in his brief. It is not an opportunity to reargue appellant's case or even improve on it. Where a reply brief goes outside the parameters set for it, the court should ignore and discountenance it. See *Umeji A Ors v. A.-G.*, Imo State (1995) 4 NWLR (Pt. 391) 552. In the instant case, (hat part of the appellants' reply brief is hereby discountenanced

Apart from the above observation, 1 shall refer to the three reply briefs filed by the appellants as appropriate.

A careful perusal of the appellants' argument in the first issue which 1 have summarized earlier in this judgment shows that their major complaint against the judgment of the Court of Appeal

is that the court below ought not to have affirmed the decision of the trial Tribunal especially as the Tribunal failed to give the case presented by the appellants fair consideration by placing same side by side with the case of the respondents on an imaginary scale before reaching its decision. The aspect of the lower court's judgment which the appellants are contesting is contained on page 12995 of Vol. 14 of the record of appeal. It states as follows

> "The contention of the appellants that the Tribunal improperly and wrongly approached the evidence adduced by first considering the evidence adduced by the appellants and even before the consideration of the case presented by the respondents is totally misconceived and an affront to the settled principles of law. The law is clear that the Tribunal having found that the appellants failed to discharge the burden placed on them by Section 1 36 of the Evidence Act, it had no duty- to consider the evidence or the case of the respondents. In law, there was nothing for the respondents to respond to. II is *ex adundati cautella*, that the Tribunal went ahead and considered the evidence of the respondents.
>
> The complaint of the appellants' counsel that the tribunal failed to properly evaluate the evidence adduced by not putting same on the imaginary scale of justice has no support in law. For a piece of evidence to be put on the imaginary scale of justice, it must first pass the tests for cogency, credibility and admissibility. Where the evidence led by a party had been discredited during, cross-examination, there will be nothing left for purpose

> of weighing on an imaginary scale. See *Omisore v. Aregbesola (supra*). "

I have quoted the judgment of the lower court in extensive to bring to the fore the reason for the complaint of the appellants.

Basically, the complaint of the appellants in this issue borders on the sequence by which the Tribunal adopted in the evaluation of evidence before it, and, as was pointed out by the learned senior counsel for the 2nd respondent, and 1 agree completely, is essentially a matter of style and has nothing to do with the substance of the case. There is no dogmatic style in writing judgments. Indeed, every court is entitled to its own style of writing its judgment. Every Judge brings to bear in his style of judgment writing his exposure, level and quality of training he obtains over the years. And as a result, judges differ in the procedure and style of writing their judgments. See *Jekpe* v. *Alokwe* (2001) 8 NWLR (Pt. 71 5) 252 at 264, *Yalaju-Amaye v. AREC Ltd*. (1990) 4 NWLR (Pt. 145) 422 at 445.

The case of *Mbanefo v. Molokwu* (supra) was cited and relied upon by all the parties to this appeal. But the learned Senior Counsel for the appellants asked a question which I think has to be answered right here and now. The question is found on p. 8, para. 4.15 of the appellants' brief as follows:

> "…..did your Lordships actually hold in *Mbanefo v. Molokwu* (2014) 6 NWLR (Pt. 1403) 377 that once the plaintiff (or petitioner in this case) fails to discharge the burden of proof on him by adducing cogent, credible and satisfactory evidence, the court or Tribunal does not need to comply with the settled principle that the case presented by parties should be weighed on an imaginary scale before a fair decision can be arrived at?

To answer the above question and put the matter to rest, it is pertinent to visit the said judgment and bring it to life, in the very words used therein. On pages 415-416 paragraphs H - E of the law report (supra), this court held as follows

> "While a trial court has uninhibited discretion in the style of writing its judgment. There are some steps it must follow in reaching a fair judgment which include the following:
>
> *(a)* It should start by first considering the evidence led by the plaintiff to see whether he has led evidence on all the material issues he needs prove. At this point, there is no question of proof or belief or non-belief of the witness. *If the plaintiff failed to lead evidence or if the evidence led by him is so patently unsatisfactory, then he has not made out a prima facie case in 'which the trial court does not need to consider the case of the defendant.*
>
> *(b)* The next step is for the trial court to evaluate the evidence and in so doing, it has to bear in mind the following processes:
>
> (i) On whom the onus of proof lies: and
>
> (ii) Whether the particular type of evidence called requires any special approach;
>
> (c) After evaluating the evidence, the trial court should then make its findings which having regard to the party on whom the burden of proof lies, then determine its ultimate effect.
>
> It is to be said that any other approach by the trial court different from the methods above staled will

> give an unfair advantage to the defendants and create an unfair trial with the implication that the court was unfair in trial to one of the parties to the dispute. See *Anuforo v. Obilor* (19971 12 NWLR (Pt. 531) 661."
>
> (Italicized portion is mine for emphasis).

Clearly, the above decision of tins court is simple and at the risk of repetition, may I state that by Section 136 of the Evident c Act 20)1, the onus is on the plaintiffs or appellants to establish first their case by credible, cogent and admissible evidence or persuasive arguments. It is after the plaintiff's or appellants as the case may be have established or proved their case that the onus would shift to the respondents to rebut the case of the plaintiff" or appellant already established. See *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 222. Thus, the case of *Mbanefo v. Molokwu (supra)* supports the decision of the lower court that a petitioner who has not led credible evidence in support of his case is not entitled to have his case placed on the imaginary scale of justice since it would be illogical to place nothing on something.

As was rightly argued by the learned counsel for the 2nd respondent the appellants have not contended that the onus of proof did not lie on them and having not discharged same, the case of *Mbanefo (supra)* supports that the Tribunal can at that stage conclude on the ultimate effect of the appellants' case, that there was no need for the respondents to enter a defence which they nonetheless, out of abundance of caution, entered.

A calm reading of Sections 131(1), 132, 133(1), 134 and 136(1) of the Evidence Act, 2011 will disclose without doubt, that generally, the burden of establishing a case lies on the plaintiff who asserts the existence of certain facts lie must do so by adducing cogent and credible evidence to prove same. Should he fail to do

so, his case crumbles and remains unproven. A plaintiff is expected to succeed on the strength of his own case and not on the weakness of the case of the defence. See *C.P.C. v. INEC* (2011) 18 NWLR (Pt. 1279)493; *Igwe v. A.C.B.* Ltd. (1999) 6 NWLR (Pt. 605) 1.

One important issue which has to be noted in this case is that the reliefs sought by the appellants at the trial court are declaratory. It is trite that a party & who seeks declaratory reliefs is duty bound to succeed only on the strength of his case without making recourse to the respondent's case.

I am fully persuaded to hold that the court below rightly endorsed the decision of the trial Tribunal which considered the appellants" case first and found it to be incredible before considering the respondents' defence which was done out of abundance of caution. I do not agree with the appellants in their contention that the Tribunal dismissed their case before considering that of the respondents since what the Tribunal did was to evaluate the appellants" evidence and found them incredible with the ultimate effect and consequence that there was no need for the respondents to even enter a defence.

The other complaint of the appellants in this issue is that the court below was wrong to agree that the Tribunal considered the appellants' issue 2. What happened at the trial Tribunal is that the said Tribunal reformulated appellants' issue 2 and rendered it as issue 5. The Tribunal's issue 5 reads:

> "Whether on the state of the pleadings and evidence led the petitioners have established that there was substantial noncompliance with the provisions of the Electoral Act which has H substantially affected the Edo State Governorship election held on the 28th September, 2016 to warrant an order nullifying the election and for fresh election to be conducted .

Let me also reproduce appellants' issue 2 as follows:

> "Whether there was substantial non-compliance with the provisions of the Electoral Act. 2010 (as amended) in the condition of the election at the wards and the Polling Units being challenged in the Petition, and if so, whether the substantial non-compliance affected the return of the 2nd impendent as declared by the 1st respondent.

With due respect to the learned Senior Counsel for the appellants, the difference between the two issues may just be a difference between six and half a dozen. Issue 2 as formulated by the appellants and issue 5 as reformulated by the court rover basically the same area, such that a consideration and resolution of one ostensibly translates to the consideration and resolution of the other.

All the parties to this appeal agree and concede that every Tribunal/Court can validly reformulate issues for determination which may be different from what w as submitted to it by the parties. That notwithstanding, there is a pre-condition H to the valid exercise of this power. The issues so formulated by the Tribunal or court must be with the view to bringing the real question in controversy in the mailer to the front burner. Put differently, any modified or reformulated issue must be for the purpose only of determining the real grievances of the parties to the case. See *IN EC v. Abubakar* (2009) 8 NWLR (Pt. 1143) 259 at 277 - 278 paras. G - A, *Daniel v. INEC* (2015) 9 NWLR (Pt, 1463) 113 at 146.

May I add my voice to the position already established by this court that no court should take the liberty of reformulating issues as to change the nature and character of the case submitted by the parties or indirectly raise a completely new issue. See

*Ehmola v. C.B.N*. (2013) 15 NWLR (Pt. 1377) 224 at 265 - 266 paras. G - D. This, however, is not the case here.

The learned counsel for the appellants had argued that the burden and/or standard of proof required of his issue 2 is less than the one required of issue 5 formulated by the Tribunal. This argument, to my mind does not fly. It is of no moment, The reason is that the same standard of proof on non-compliance in an election, whatever the consequences of such compliance, whether the noncompliance affects the return of a candidate or invalidates the entire election, the same standard of proof applies.

As was pointed out by learned Senior Counsel for the 2nd respondent which I agree, in either scenario, the quality and quantum of evidence does not change-See Sections 138(1) (b), 139(1) and 140(2) of the Electoral Act.

The appellants' further contention that the failure of the Tribunal to consider their issue 2 constitutes a denial of fair hearing does not impress this court having held that their issue 2 is basically the same as the reformulated issue 5 by the Tribunal.

In view of all 1 have said above, it is my view that there was no miscarriage of justice against the appellants based on the complaints ventilated in issue 1 which 1 have last resolved. Accordingly, issue one is resolved against the appellants.

The second issue distilled by the appellants, like the first issue is quite loaded. It has four broad divisions as follows:

1. Whether appellants' witnesses gave hearsay evidence.
2. Whether appellants dumped documents on the trial Tribunal.
3. Wrongful accreditation.
4. The Tribunal's reliance on the testimonies of the 2nd and 3rd respondents' witnesses.

The learned Senior Counsel for the appellants argued this issue under three sub heads. I shall however resolve them together.

As regards the evidence of appellants' witnesses held as hearsay by the two courts below, after a brief definition of what hearsay evidence means, the learned Senior Counsel for the appellants submitted that the underlining factor is that for evidence of a witness who was not the maker of the statement to be hearsay, it must be offered or proposed to establish the truth of the statement made. That on the other hand, where a piece of evidence being a statement (whether oral or written) made by a person who is not called as a witness in a proceeding is offered in proof of the fact that the statement was made and not in proof of the fact that the statement is true, that piece of evidence cannot be classified as hearsay, citing and relying on the cases of *Kala v. Potiskum* (1998) 3 NWLR (Pt. 540) 1 and *Emmanuel v. Umana & Ors.* (2016) LPELR - 40037 (SC); reported as *Udom v. Umana* (No. 1) (2016) 12 NWLR (Pt. 1526) 179.

According to learned Senior Counsel, what was sought to be proved before the trial Tribunal was the existence of those facts on those electoral documents and the inference to be drawn from same and not whether the facts and figures in the electoral documents were true. In this regard, learned counsel opined that the case presented by the appellants in their evidence before the trial Tribunal is totally different from the case presented in the cases of *Buhari v. Obasanjo* (2005) 13 NWI.R (Pt. 941) 1, *A.C.N, v. Nyako* (2015) 18 NWLR (Pi. 1491)352 at 385 and *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 at 159.

Referring to Sections 39 - 76 of the Evidence Act, 2011, the learned Silk submitted that there are exceptions to the hearsay rule. Specifically referring to Section 52 thereof, he submitted that the facts, tickings and figures contained in the Voters Register and the Form EC8As for polling units challenged in the petition are public records kept by officers of the 1st respondent. Thai reliance placed

on the said records and evidence of die appellants based on same are therefore not hearsay evidence. He concluded that the lower court was wrong to have affirmed the decision of the trial Tribunal rejecting the testimony of the appellants' ward collation agents as being hearsay.

On the issue of dumping of documents on the tribunal, the learned Silk submitted that the lower court's affirmation of the decision of the Tribunal as regards probative value of the documentary exhibits before the trial Tribunal is wrong and not supported by the records before the court. According to him, all witnesses called by the appellants have their evidence anchored on the documentary exhibits before the Tribunal which exhibits they all identified under examination-in-chief as having made reference to and relied on them in their statements on oath.

Learned Senior Counsel opined that by the frontloading principle, a witness whose statement on oath had been filed along with the petition and in k that regard, has given notice of the evidence he is to proffer and the documents he would rely on, can only, at trial, identify particular exhibits as the documents he referred to in the statement on oath so as to tic those exhibits to his evidence. Thai he cannot make further reference to paragraphs of his oath as upon being sworn and after adopting the statement on oath, it has become elevated to his testimony for all intents and purposes. Learned counsel relies on the case F of *Yar'Adua v. Barda* (1992) 2 NWLR (Pt. 231) 638 at 642.

On the 3rd arm of this issue, learned Senior Advocate submitted that an obvious flaw in the lower court's decision is in its affirmation of the trial Tribunal's reliance on the 2nd and 3rd respondents' witnesses. That as much as they concede that a claimant or a petitioner would only succeed on the strength of his own case and not on the weakness of the defence, it is imperative

that. G where the claimant has discharged the onus of proof, weakness in the defence put up by the defendant may be taken advantage of by the claimant, relying on *Olokunlade v. Samuel* (2011) 17 NWLR (Pt. 1276)290.

It was his contention that rather than proffer cogent and credible evidence to rebut/controvert the evidence led by the appellants' witnesses, the 2nd and 3rd respondents called witnesses that testified to the effect that they never saw H the voters' register for the polling units challenged in the petition. He then asked if the evidence of the 2nd and 3rd respondents' witnesses can be used to controvert the evidence of the appellants which is backed up by documentary evidence i.e. voters register for all the polling units challenged in the petition. He submitted that the evidence of the appellants was to be preferred as respondents witnesses cannot give oral evidence to contradict documentary evidence, relying on *Bassil v. Fajebe* (2001) 11 NWLR (Pt. 725) 592, *Orji v. Anyaso* (2000) 2 NWLR (Pt. 643) 1. He then urged the court to resolve this issue in favour of the appellants.

In response to this issue, the learned Senior Counsel for the 1st respondent submitted that the appellants admit that the testimonies of PW1 and majority of witnesses for the appellants were plagiarized from the result sheets and was not entries either made or witnessed by the witnesses. I opined that there is no need for this court to depart from the rule that non compliance must be proved by direct evidence of persons who had sufficient nexus with the documents on which the allegations of non-compliance were made, relying on *Oke v. Mimiko* (No. 2) (2014) 1 NWLR (Pt, 1388) 332. He contended that having regard to the accurate state of the law, the evidence of the PW1 and other PWs carried no weight whatsoever,

In the same vein, the learned Senior Advocate for the 2nd respondent made similar submission and added that a court or tribunal has no jurisdiction to entertain, consider or rely on the evidence of persons who did not have a first hand, direct, actual and positive interaction with the facts in issue and in the unlikely event that the testimony of such persons is received in evidence, the court is under a bounden duty to expunge the testimony of such witnesses in its judgment, relying on *Buhari v. Obasanjo* (*supra*), *Kakih v. P.D.P*. (2014) 15 NWLR (Pt. 1430) 374 at 418-419. *Gundiri v. Nyako (Supra*).

Learned Silk submitted that in the instant appeal, the 1st appellant's evidence covers over 2000 polling units twice more than the number of polling units covered by the witness in *Oke v. Mimiko* (No.2) (supra).

On the argument of the appellants that those documents tendered were not sought to establish the truth of its contents, the learned Counsel submitted that such submission has grave consequences for the appeal as the appellant have effectively conceded that they did not seek to impeach the results of the election.

In the same vein, the learned Senior Counsel for the 3rd respondent added his voice on p. 16 para. 5.12 of their brief thus:

> "In the instant case, the appellants only tendered documents in bulk from the Bar and failed to call sufficient oral evidence lo link/tie their documents to the specific areas of their case. The documents themselves arc examples of hearsay, hence the imperative need for oral evidence to appraise same. See Belgore v. Ahmed (2013) 8 NWLR (Pt. 1355) 60 at 100 para D."

On the 2nd arm of the issue, the three learned Senior Counsel for the respondents are unanimous that those documents were indeed dumped on the tribunal as even the makers were not called to testify. Learned Silk for the 2nd respondent posited that almost all the documents tendered by the appellants were tendered by then-counsel from the Bar. Hence the decision of the Tribunal in this regard cannot be second guessed. That they never called first hand witnesses to link the documents to the specific areas of their complaints. According to him, the documents were thus dumped on the tribunal relying on *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 at 144- 145.

On the 3rd arm of this issue which has to do with reliance on the evidence A of 2nd and 3rd respondents' witnesses, it was the response of the learned counsel for the respondents that appellants' attack against the decision of the lower court in this regard is borne out of misapprehension of the position of the law on the standard, burden and quantum of proof in an election petition seeking for declaratory reliefs. It was further contended in conclusion that evidence of appellants was so bereft of critical evidence that it did not deserve any defence by the respondents in the first place. The respondents urged the court to resolve this issue against the appellants. I shall now proceed to resolve this issue. Section 37 of the Evidence Act, 2011 provides:

37. Hearsay means a statement-

(a) Oral or written made otherwise than by a witness in a proceeding: or

(b) Contained or recorded in a book, document or any record whatever, proof of which is not admissible under any provision of this Act, which is tendered in evidence for the purpose of proving the truth of the matter staled in it."

From the above statutory definition of hearsay evidence, it is gleaned that '2 it is a statement made by a person who is not a witness in a proceeding, or contained/recorded in a book which by the provision of the Evidence Act is rendered inadmissible. It is also hearsay if it is offered in proof of the truth of the statement. See *Subramarian v. Public Prosecutor* (1956) 1 WLR 965 at 969. As was contended by the learned counsel for the appellants, and I agree with him, where a piece of evidence being a statement (whether oral or written) made by a person who is not called as a witness in a proceeding is offered in proof of the fact that the statement was made and not in proof of the fact that the statement is true, that piece of evidence cannot be classified as hearsay. The learned Senior Counsel for the appellants stated emphatically in para. 5.06 and 5.08 at page 17 of their brief that the appellants were not proving the truth of those facts and figures in the electoral documents but the fact that those figures are contained in those documents.

In affirming the findings of the Tribunal on the hearsay nature of the evidence led by the appellants, the Court of Appeal made the following pronouncement at page 12997 (Vol. 14) of the record:

> "From the entire case of the appellants as presented in their pleadings and the evidence adduced, it is the polling agents of G the 2nd appellant in each of the polling units being contested that saw what happened. The ward collation agents would also have seen what happened at the polling units where they voted and can testify only in respect of those polling units. The evidence of PW1 and ward collation agents in respect of the polling units other than where they voted based only on their purported

> examination of the result sheets and reports received from polling agents are hearsay and are clearly inadmissible and were rightly rejected by the Tribunal. See *ACN v. Nyako* (2015) 18NWLR (Pt. 1491) 352 at 385 - 386 (H - H),"

I agree entirely with the two courts below that in the instant case, the evidence of PW1 and all the ward collation officers who testified in this case are hearsay. I wall explain.

The appellants have admitted in their brief that the evidence of their witnesses did not arise from what they witnessed on election day when the entries in the electoral forms were being made, but (as contained in para. 6.09 page 28 of their brief), from "findings" which they "came up with" after observing and drawing inferences from the electoral forms. If the appellants' witnesses evidence were not to prove the truth in those documents, why was it necessary for them to give evidence on them after "studying", "making findings" and "coming up with" their evidence. I do not agree with the learned Senior Counsel for the appellants. Again, if their evidence was not to prove the truth on those documents tendered through the Bar, how was the trial Tribunal to believe those figures and numbers which were the fulcrum of the petition without subjecting them to cross examination of the actual makers of the documents? It has to be noted that those witnesses did not take part or participate in the conduct of the election nor were they present at any of the stages at which the electoral forms, documents or materials which formed the basis of their evidence were recorded, prepared or entries thereon made. See *Amosun v. INEC* (2010) LPELR - 49431 at 120- 121; *Okereke v. Umahi* (2016) 1 NWLR (Pt. 1524) 438 at 473.

As was rightly in my opinion submitted by Chief Wole Olanipekun, SAN, in an election matter such as the instant case,

the evidence required is not the one which was picked up from perusing documents made by others. Otherwise, anyone with basic comprehension arithmetic skills would be able to testify anywhere in Nigeria. The requirement of die law is that a petitioner must call eye witnesses who were present when the entries in the forms were being made and can testify to how the entries in the documents were arrived at. It is to he noted that the appellants' witnesses were not the makers of the documents in respect of which they testified and were not present when the documents were made. They were thus, not competent and/or capable of giving testimonies and explain the circumstances surrounding how the entries in the electoral document were made. See *Oke v. Mimiko (supra)*.

Learned Senior Counsel for the appellants argued in paras. 5.11 and 5.12 of their brief that by Section 52 of the Evidence Act. 20II, where a statement relied upon in a proceeding constitutes statement of official records kept by a public officer, the reliance placed on such statement and offered by a witness other than the officer who recorded the statement cannot be classified as hearsay evidence. Titus, that the facts, ticking and figures contained in Voters Register and the Forms EC 8A's for the polling units challenged in the petition are public records kept by officers of the 1st respondent. That, reliance placed on the said records and evidence of the appellants based on same are therefore not hearsay evidence.

On the above submission and I think I had put the facts and the law in proper perspective earlier in this judgment that where a public document is tendered just to show the existence of such document only, though not tendered by the maker, it would not ordinarily be termed hearsay. But where a witness who did not participate in the making of the document ventures to give evidence on the contents of the document and tries to persuade the

court on the truth of its content was done in this case. It becomes hearsay and torn of exceptions granted by Section 52 of the Evidence Act, 20 It. In the circumstance, there is a big gulf between admissibility of a document and probative value to be placed on it by the court.

Finally on This, I do agree with the court below that the trial Tribunal was right to refer to the testimonies of PW1 and other prosecution witnesses as hearsay because a court or tribunal has no business to entertain, consider or rely on the evidence of persons who did not have a first hand, direct actual and positive interaction with the facts in issue, and in the unlikely event that the testimony of such person is received in evidence, the court is under a bounden duty to expunge the testimony of such witness from its judgment, I shall leave this aspect now.

On issue of dumping documents on the Tribunal, both the Tribunal and the court below are in concurrence that the appellants dumped their documents (Exhibits) on the tribunal. The court below said this much on page 13018 of the record of appeal (Vol. 14) as follows:

> "What the law requires is that first of all, the maker of the document must tender it and testify to its contents. Then, the documents must be subjected to the test of veracity and credibility and where it involves mathematical calculations, how the figures were arrived at must be demonstrated in the open court and finally, the correctness of the final figure must also be shown in the open court. What the appellants did here was to dump the documents on the court by tendering it from the Bar, got a few witnesses to identify or recognize some of the documents and left the Tribunal to figure out the

> rest in its chambers "….. It is not the duty of the court to sort out the various exhibits, the figures and do calculations in chambers to arrive at a figure to be given in judgment particularly in an election petition which is challenging the number of valid votes scored by a candidate declared and returned as the winner of the election."

Without much ado, I agree with the view expressed by the court below in this matter. Both the trial tribunal and the lower court have stated clearly in their judgments that the slated exhibits were not demonstrated in the open court by the appellants and their witnesses. My attention has not been drawn to any part of the record showing the contrary state of affairs at the trial. So, believe the views of the two courts below to be the true position.

Let me lend my voice to the trite position of the law which has been expounded in this court severally that tendering documents in bulk in election petition is to ensure speedy trial and hearing of election petitions within the time limited by statute. But that does not exclude or stop proper evidence to prop such dormant documents. As this court stated in *A.C.N v. Lamido* (2012) 8 NWLR (Pt. 1305) 560 at 592, paras. C - F, it is not the duty of a court or Tribunal to embarks on cloistered justice by making enquiry into the case outside the open court not even by examination of documents which were in evidence but not examined in the open court. A judge is an adjudicator, not an investigator. I need to stale clearly that demonstration in open court is not achieved where a witness simply touches a bundle of numerous documents with numerous pages.

The frontloading evidence and tendering documents in bulk from the bar do not alter this requirement which is an element of

proof. See *Ogboru v. Okowa* (2016) 11 NWLR (Pt. 1522) 84. *Omisore v. Aregbesola* (2015) 15 NWLR (Pt. 1182)205.

From the record of appeal, almost all the documents tendered by the appellants were tendered, by their counsel from the Bar.

Hence the decision of the Tribunal as upheld by the court below in this reg.aid cannot be faulted.

The serious *lacuna* the appellants' case is their failure link the said documents to the relevant aspects or weir case by calling the appropriate witnesses to speak to them and demonstrate their applicability to appellants' case in open court. The law is clear on duty of a party tendering documents to ensure what such document *qua* exhibits are linked to the relevant aspects of his case to which they relate. See *Ladoja v. Ajimobi* (*supra*), Audu v. INEC (No. 2) (2010) 5 NWLR (Pt 1212) 456. Uclw v. £7vcW (2.012) 15 NWLR (Pt. 1317) 330 at 360.

As can be seen above, this aspect of the appellants' issue does not avail them at all.

The last leg of this issue has to do with appellants' attack on the court below for upholding the Tribunal's believe and reliance on the 2nd and 3rd respondents' evidence. Earlier in this judgment 1 agreed with the two courts below that the appellants, having not discharged the initial burden placed on them in accordance with Section 136 of the Evidence Act, 2011, the onus did not shift to the respondents to enter their defence though in *ex abundant cautela* the respondents actually entered their defence. I need to reiterate the point that where a petitioner fails to discharge the onus placed on him by law as in this case, there will be nothing for the respondents to rebut not to talk of calling witnesses. See Omisore v Aregbesola (2015) 15 NWLR (Pt.1482) 205 at 322.

The above is the state of the law on the issue. In view of the above, one wonders why this aspect of the issue is of an) significance to the appellants. After they failed to prove their case, the respondents could have walked aw ay without any blink. But they nonetheless put in their defence. There is therefore nothing legally wrong for the trial Tribunal to accept and believe their evidence fat-above that of the appellants. In fact the case of the respondents further weakened the already weak and unreliable evidence of the appellants. This aspect of their second issue, to say the least, refused to fly.

On the whole, issue two as distilled by the appellants, is hereby resolved against them.

I shall now consider issue 3 which is the last issue in this appeal. There are nine sub-issues making up issue 3. I shall take the first three together as they are argued in the appellants' brief.

1. The importance of documentary evidence in proving the noncompliance alleged
2. The mere production and tendering of certified true copy of public documents obviates the need for oral evidence on same.
3. The concept of demonstration of document is alien to the frontloading procedure.

A careful perusal of the argument of the learned counsel for the appellants in respect of the above three sub-issues, will disclose that they are mere repetition of aspects of issues 1 and 2 already treated in this judgment. There is no double that allegations of lack of accreditation/improper accreditation, over voting, inaccurate ballot papers account can be established by documentary evidence. This can be done by examination of voter’s registers and Form EC 8As used for the conduct of the relevant election. The grouse of the appellants is however the holding of the lower court that "*both documents and the witness who saw, heard, perceived or did what*

*amounts to non-compliance are vital for contesting the lawfulness of the votes cast at the election*, " relying on the cases *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1. L*adoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 at 159.

I wish to state at the risk of repetition that the fact that a document is necessary to prove accreditation, over voting etc and has been admitted in evidence from the bar or however, does not necessarily mean that it must be automatically attached or accorded probative value or weight. The admissibility of a document and the evidential value ascribed to it are two different things. See Agballah v. Chime (2009) 1 NWLR. (Pt. 1 122) 373, Nyesom v. Peterside (2016) 7 NWLR (Pt. 1512) 452 at 522 - 523. May I state for the umpteenth time that tendering of documents without adducing evidence, which link the document with the particular complaint of the party is fatal. This is because, it is not the duty of the court/Tribunal to examine the documents outside the Tribunal and tie them with the complaints of the appellants. In Belgore v Ahmed (supra), this court emphasized the fact that where the maker of a document is not called to testify, the document would not be accorded probative value, notwithstanding its status as a certified public document.

May be if I further reproduce the position of this court in an earlier case, the appellants would be satisfied In *Omisore v. Aregbesola* (supra) at 324 - 325 paras. H - A, this court held as follows:

> "In other words, documentary evidence, no matter its relevance, cannot on its own speak for itself without the aid of an explanation relating its existence. The validity and relevance of documents to admit facts or evidence is when it is done in the open court and not a matter for counsel's address. It

> is not also the duty of a court to speculate or work out either mathematically or scientifically a method of arriving at an answer on an issue which could only be elicited by credible and tested evidence at the trial."

In view of all I have said above, it is my well considered view and I so hold that the lower court was right to hold that the appellants ought to call polling unit agents in all the polling units challenged in order to prove lack of improper accreditation, over voting and improper accounting of ballot papers. I agree with Prince Lateef O. Fagbemi, SAN, counsel for the 3rd respondent that the appellants seem to have the impression that the need to call polling unit agents n proof of their case is dispensed with simply because in their view and as stated in this issue in their brief of argument, "the proof of the allegations is documentary", As it turns out, this does not represent the position of the law.

May I now proceed to determine issues relating to the Manual for election officials and ticking of voters' register for accreditation. Appellants' contention here is that the Manual, being a subsidiary legislation has a force of law and that the procedural steps set out in the manual for election officials for the conduct of accreditation must be complied with, referring to Yaki & Anor. v. Bagudu & Ors (2015) 1 LPELR - 25721 (SC); (2.015) 18 NWLR (Pt. 1491 , 288 and Amusa v. State (2003) 4 NWLR (Pt. 811) 595.

Furthermore, learned Senior Advocate for appellants submitted that if there is no provision for ticking of Voters Register in the Electoral Act, Exhibit P03 91 has filled in the gap by providing for how accreditation and or licking or marking of the Register of Voters should be done. It is bis contention that the court below fell into error by jettisoning the provision of Exhibit P0391 on the modality for ticking rather than restrict itself to the

provisions of Section 49 of the Evidence Act which is not specific and thereby came to the wrong conclusion that failure to comply with the Manual as regards the mode of accreditation is not a ground for questioning election.

Furthermore, it was the learned Silk's submission that the decision *in INEC v. Peterside (supra)* quoted and heavily relied upon by the court below at page 13009 of the record does not support the position taken by the court below' that the mode of ticking or modus of performing accreditation stated in the Manual for election is not mandatory.

In response, the learned counsel for INEC, the 1st respondent in this appeal, submitted that by virtue of the provisions of Section 138(1 )(a) of the Electoral Act, 2010 (as amended), a complaint or ground of non-compliance in an election petition must be non-compliance with the Electoral Act and nothing more. That though the appellants cleverly avoided the incorporation ol the Manual for Training of Election Official 2016 as part of the grounds for the petition as set out in paragraph 16 of the Petition, yet they have alleged that failure to tick the picture of a voter on the voters' register to the left and right in accordance with the Manual invalidates the vote of that voter and consequently the election in the polling unit where such voter voted.

Learned Senior Counsel opined that the appellants have surreptitiously tied their case on non-compliance to the said Manual for Training of Election Officials 2016 and the alleged failure to tick the picture of a voter on the voter Register to the left and right, when they by law are not allowed to do so, referring to the cases of Ojukwu v. Yar'adua (2009) 12 NWLR (Pi 1154) 50 at 121; Oshiomhole v. Airhiavbere (2013) 7 NWLR (Pt. 1353) 376 and Section 138(1) (a) of the Electoral Act, 2010 (as amended).

In conclusion, the learned Silk urged that the appellants have not shown that the ticking of the name of a voter only once on the voter register is contrary to any provision of the Electoral Act. 2010 (as amended). It is his further conclusion that instruction in the Manual for Election Officials, 2016 cannot take the place of the statutory provisions in the Electoral Act, otherwise the National Assembly ought to amend the law and incorporate the Manual into the Act. According to him, it is also not the duty of the judge to alter the express provisions of the statute.

May I say that the learned senior counsel for both the 2nd and 3rd respondents made similar submissions as done by the 1st respondent's counsel I do not intend to repeat the exercise but their submission shall be referred to as appropriate.

The portion of the judgment of the trial Tribunal which the lower court upheld to which the appellants are challenging is as captured at page 12329 (Vol.13) of the record. It states:

> "It is worthy of note that in the entire petition, there is no single specific averment on the issue of ticking either to the left or to the right in respect of any polling unit being challenged. All that we have arc averments from paragraphs 22-36 which apart front being generic, they are merely reproduction of provisions of Manual of electoral Officials, 2016 which cannot in any way serve as specific pleadings. Having not specifically pleaded the issue of ticking in the pleading, all evidence given in that wise go to no issue as the law is evidence (sic) on facts not pleaded goes to no issue….."

A careful perusal of the appellants' brief will show clearly that they have not challenged the above findings which were upheld by the lower court. In order words the issue of ticking to the right or left

did not form part of the appellants' case in their petition as stated by the courts below. Therefore, appellants' reliance on the Manual as a subsidiary legislation to prove the issue of ticking to the right or left is of no moment since the issue of ticking did not form part of the appellants' case in the petition.

Section 49 of the Electoral Act, 2010 (as amended) which provides for accreditation and voting in an election provides:

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

The above provision of the Electoral Act requires a Presiding Officer, on being presented with a voter's card by an intending voter, to be satisfied that the name of the person is on the Register of Voters, issue him a ballot paper and indicate F on the Register that the person has voted. There is no provision for double tick to the right and left as argued by the appellants.

Again, the supplement to the 2015 Guidelines and Regulations for the Conduct of the Flection (tendered as Exhibit 1R022) which modified the portions of the Guidelines refilling to accreditation states that accreditation at the election was to be by "authentication and verification of voters using the card reader, checking or the Register of Voters and inking of the cuticle of the specified finger.

From the above provision it is evident that from the steps outlined therein, there is no mention of licking of voter's register on any side. Where the statute has mo provided for ticking to the

right and to the left, no rule of interpretation should be employed to stretch the law beyond what it provides just to meet the h selfish interest of either the appellant or respondent. The law is well settled that where the wordings of a statute or an enactment are clear and unambiguous, the same should be given its direct and ordinary meaning by the courts without employing any rule of interpretation. See *Calabar Central Co-Operative Thrift & Credit Society Ltd & 20 Ors v. Bassey Ebong Ekpo* (2008) 6 NWLR (Pt, 1083) 362. Atungwu v. Ochekwu (2013) 14 NWLR (Pt. 1375) 605, *Amodi v. INEC* (2013) 4 NWLR(Pt. 1345) 595, *Ugwianyi v. NICON Ins. Plc.* (2013) 11 NWLR (Pt. 1366) 546.

The witnesses of both the appellants and respondents testified that they were, on presentation of their PVCs. authenticated and verified by the card readers employed and that the Presiding Officers further checked the voters' register to confirm their details as the voters whose names appear on the voters' register. This indicates due accreditation after which they cast their votes and the cuticle of their fingers were then inked. In most of these cases the Presiding Officers ticked only once to show that the voter has voted since both accreditation and voting took place at the same time.

Indeed, as was ably shown by Chief Olanipekun, SAN the learned Senior Counsel for the 2nd respondent, the PW 27 told the trial Tribunal that PDF won in his unit even though there is only one tick against his name. In spite of the said one tick he said he was satisfied with the election. PW31 also asserted that any tick which is clone once would be "ok," It would appear that if the appellants did not win those units where only one tick appeared, they would have challenged those units.

Let me state that Manuals, Guidelines and Regulations made by the Electoral Body in aid of smooth conduct of election

are to be observed by both ad-hoc and permanent staff of INEC for the good of the electoral process. But can such directions take the place of the Electoral Act? The answer is No. Section ' 138(2) of the Electoral Act. 2010 (as amended) states:

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

The above provision is clear simple. It is improper for parties who have no serious issues to challenge the outcome of an election to resort to trivial issues of ticking to the right and to the left, Election Petition should be more serious than that. See *C.P.C. v. I.N.EC* (2011) 18 NWLR (Pt. 1279) 493 at 559. Failure to double tick the voters register cannot be a ground for challenging an election. See also *Agbaje v. Fashola* (2008) ATTTWLR (Pt. 443) 1302 at 1334: (2008) 6 NWLR (Pt. 1082) 90.

In the circumstance of this case, I have no difficulty in holding that appellants' arguments in this issue have suffered a shipwreck.

On the issue of inaccurate accounting of ballot papers at the polling units, I state emphatically that only the agents who were present at the polling units where the appellants allege the non-compliance took place, that can give testimony of such ballot Inaccurate accounting. The reason is that it is at the polling units that accreditation and distribution of ballot papers to voters take place any ballot papers not used at the election, together with used ones, whether valid or invalid are usually accounted for at the polling units. It stands to reason that only persons who were physically present at the polling units who could give evidence as

to what transpired there. They apparently failed to bring such category of witnesses to testify as I have held before, this is the bane of appellants' case. See *Oke v. Mimiko (supra*).

With regard to ballot paper recount which the appellants complain that the trial Tribunal refused to reckon with and to which the lower court upheld, the court below made the following findings on page 13021 of the record (Vol. 14):

> "The appellants counsel did not contest the fact that the ballot papers and the report of the counting of the ballot papers were not tendered and admitted as exhibits. He did not contest the fact that the recount was partially done due to time frame. His argument is that since the ballot papers were produced pursuant to the order of the court it was incumbent on the court to give value to the outcome of recount exercise so that the court will not take away with one hand what it had earlier given with another hand."

Apart from the above view expressed by the court below, the appellants in their Petition averred in paragraph 753 as follows:

> "753. The Petitioners will, before or at the trial of this petition apply and pray this Honourable Tribunal for an order or direction that the ballot papers used and votes cast in each or some of the polling units for the Governorship election in Edo State be produced in court by the 1st respondent and recounted in open court and the figures obtained be *admitted in evidence*. Your Petitioners aver that when the votes are recounted, the figures will clearly show' that the result credited to the 2nd and 3rd respondents is wrongful and not in compliance with the Electoral

> Act, 2010 (as amended) and the Manual for Election Officials, 2016 and Guidelines. (Italics mine).

The appellants had intended in the averment in the petition that after the recount, the figures shall be *admitted into evidence*. But both the trial Tribunal and the court below have found that those figures were never tendered and/ or admitted into evidence. This is quite apart from the fact that the exercise was inconclusive. There was, as it were, no evidence properly so called before the trial Tribunal. court is not allowed to act on any document not tendered and admitted in evidence before the court. It is not the habit of courts to go outside the gamut of evidence before it to shop for evidence and materials upon which to use to decide a case before it. Parties must endeavour to produce and properly place their evidence before the court. The appellants herein failed in this sacred duty and no wonder the trial Tribunal refused to act on the said recount exercise. See *Lawan Abdullahi Buba Wassah & Ors v. Tukhashe Kara & Ors* (2014) LPELR - 24212 (SC); (2015) 4 NWLR (Pt. 1449) 374, *Skye Bank Plc v. Akinpelu* (2010) 9 NWLR (Pt. 1198) 179.

As was held by the two courts below, the ballot papers not having been tender and admitted in evidence by the trial tribunal, it was therefore not available and was not evidence with the trial tribunal or parties could rely on. The appellants as, it turns out, could not persuade this court in this aspect of their argument.

The final aspect of issue 3 has to do with the summation of the votes allegedly affected by non-compliance as contained on page 37 of appellants' brief, particularly paragraph 6.52 thereof Now listen to the learned Senior Counsel for the appellants in his argument:

> "6.52 We most humbly invite the attention of the Honourable court to the table/summation of the votes of the - parties affected by 1. Lack of/improper accreditation 2. Over voting 3. Inaccurate Ballot Account and 4. Inadequacies revealed by the recounting exercise ordered by the Tribunal which have been graphically captured on pages 11312 - 11343 of the Record (as demonstrated by the Petitioners in their final address in response to the 1st respondent's final written address before the Tribunal)"

By their own admission, the appellants have stated that the summation was done in their final written address by their counsel. I am inclined to agree with the position of the three Senior Counsel for the respondents that the said table unilaterally drawn up by the appellants in their final address, is liable to be discountenanced by this court as was done by the two courts below because it was done in their final written addresses, without the parties joining issues on same.

Secondly, an issue merely raised by counsel in his final address as done by the appellants in this case cannot be part of the evidence before the court and ought to be discountenanced. The law is trite that the address of Counsel no matter how brilliant and erudite cannot take the place of the evidence on record See *Dodo v. Salanke* (2006) 9 NWLR (Pt. 986) 447 at 471 B - C. *Omisore v. Aregbesola* (supra) at 300 – 301 paras. H - A.

As I usually say, this aspect of the 3rd issue did not fly at all. Thus, the 3rd issue is also resolved against the appellants

Having resolved the three issues against the appellants, what remains to be said is that this appeal is devoid of any scintilla of merit and is accordingly dismissed. Parties shall bear their

respective costs. The above are the reasons why I dismissed this appeal on Monday, the 10th day of July, 2017.

**ONNOGHEN, C.J.N.:** On the 10th day of July 2017, this Court, heard the appeals in this matter and dismissed them.

The reasons for the judgment were adjourned to today, 24th July 2017 which I now proceed to give.

I have had the benefit of reading in draft the lead reasons for Judgment delivered by my learned brother, Okoro, JSC just delivered.

I agree with his reasons and conclusion that the appeals lack merit and should be dismissed.

The facts relevant for the determination of the appeals have been stated in detail in the lead reasons for judgment making it unnecessary for me to repeat them herein except as may be needed for the point being made.

In respect of the interlocutory appeal arising from the refusal of the lower court to grant an application to impugn the record of the tribunal, it is now settled law that to enable a court of law to exercise its discretion in granting an application to impugn the record of the court two processes are necessary, to wit:

(a) an affidavit challenging the record in question which must be filed and served on the presiding officer of the court in question or tribunal for his reaction, and,
(b) a formal application seeking leave to amend the said record.

The affidavit challenging the record in question has the effect and intention of putting the court concerned on notice that its record is being impugned. Where service of the affidavit challenging the record is made on the Registrar of the Court ^

concerned, rather than or in addition to the presiding judicial officer thereof, such service is sufficient for the purpose. However, see *Ganiba v. Omokhodion* (2011) 15 NWLR (Pt. 1260) 145 at 179-180; Adegbuyi v A.P.C (2015) 2 NWLR (Pt. 1442) 1 at 24; *Gonzee (Nig.) Ltd v. NERDC* (2005) 13 NWLR (Pt. 945) 634 at 646.

From the available facts on record appellants did not file an affidavit challenging the record intended to be impugned let alone serving one on the requisite authority. What they did was to file a motion on notice for an order impugning the record which they served on the judicial officers concerned.

I have to again emphasis that where an appeal is against the exercise of discretion by the lower court it is important for the appellant(s) to satisfy the appellate court that the lower court failed to exercise it discretion judicially and judiciously. In the instant interlocutory appeal, appellants have not even considered that principle as an issue for determination. Granted, however, that they did, the appeal will still fail as no affidavit challenging the record sought to be impugned was filed and served on the appropriate authority.

On the main appeal, it is worthy of note that it is against the concurrent findings of facts by the lower courts, the success of which demands that E appellants must satisfy this court that the said findings of fact are perverse or cannot be supported having regard to the evidence on record or are in violation of established principles of substantive law for procedure etc, etc. Where an appellant fails to establish any of the above, the position of this court, which has become trite, is that the court does not make a practice of interfering with the concurrent findings of facts by the lower courts.

The appellants have, however, failed to bring their appeal within the purview of the recognized exceptions to the above general rule thereby rendering the appeal liable to be dismissed.

Secondly, one of the main planks on which the petition is based is noncompliance with the provisions of the Electoral Act, 2010 (as amended). For one to succeed on that ground, it is now settled law that where a petitioner alleges non-compliance with the provisions of the Electoral Act, he has the onus of presenting credible evidence from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance - See *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at 315 - 316; *Buhari v. INEC* (2008) 18 NWLR (Pt. 1120) 246 at 391 - 392: *Okereke v. Umahi* (2016) 11 NWLR (Pt. 1524) 438 at 473. Nyesom v. Peterside (2016) 7 NWLR (Pt, 1512) 452 etc. etc.

In the instant case the trial tribunal found, after evaluation of the evidence, that appellants failed to discharge the burden of proof placed on them by law and dismissed the petition which decision was affirmed by the lower court in the Judgment now on appeal - See pages 12997- 12998 of Vol. 14 of the record and pages 13017 and 13020 also of the record.

It is for the above reasons and the more detailed reasons contained in the said lead reasons for Judgment of my learned brother, Okoro JSC that I too find no merit m the appeals and consequently dismissed same.

I abide by the consequential orders made in the lead reasons for judgment including the order as to costs.

Appeal dismissed.

**RHODES-VIVOUR, J.S.C.:** On 10 July 2017, this court dismissed both the interlocutory appeal and the main appeal of the

appellants and adjourned to 24 July for reasons for the judgment to be given.

I read in draft the reasons for the judgments given by my learned brother. Okoro, JSC. I am in complete agreement with the reasoning and conclusions of his Lordship.

Both appeals are dismissed.

**M. D. MUHAMMAD, J.S.C.:** On Monday 10th July, 2017, I dismissed the interlocutory appeals and promise to give reasons for my dismissal of same today 24th July 2017.

My learned brother, John Inyang Okoro. J.S C. who delivered the lead judgment had obliged me before now his reasons for dismissing the two appeals as contained in the judgment just delivered. I imbibe these reasons as mine for my earlier dismissal of the two appeals. I also abide by the consequential orders reflected in his Lordship's judgment.

**AKA'AHS, J.S.C.:** These appeals (Interlocutory and Substantive) were heard on Monday, 10 July 2017.1 dismissed them and adjourned to today, 24 July 2017 to give the reasons for so doing.

I had a preview of the reasons for dismissing the appeals by my learned brother. Okoro JSC, in the lead judgments, I agree with him that the said appeals lack merit and should be dismissed.

The facts giving rise to the interlocutory and substantive appeals are as follows:-

The gubernatorial election for Edo State was conducted by the Independent National Electoral Commission (hereinafter called the 1st respondent) on 28 September, 2016. Pastor lze-lyamu Osagie Andrew was the candidate of the Peoples Democratic Party.

They are 1st and 2nd appellants respectively in this appeal. Godwin Nogheghase Obaseki was sponsored by the All Progressives Congress (APC). They shall be referred to as the 2nd and 3rd respondents respectively in this appeal. At the conclusion of the election, the 1st respondent declared the 2nd respondent winner of the election and returned him as the duly elected governor of Edo State. The appellants being aggrieved filed the petition and stated in paragraph 16 the grounds of the petition as follows:

(i) That the 2nd respondent was NOT duly elected by majority of lawful votes cast at the election.
(ii) That the election of the 2nd respondent was invalid by reason of non-compliance with the provision of the Electoral Act, 2010 as amended.
(iii) That the election of the 2nd respondent was invalid by reason of corrupt practices.

In paragraph 754 of the petition, the petitioners (now appellants) sought the following reliefs:-

(i) That it may be determined that the 2nd respondent, Godwin Nogheghase Obaseki, was not duly elected or returned by majority of lawful votes cast at the Edo State Governorship election held on the 28 day of September, 2016.
(ii) That it may be determined that the 1st petitioner, who was the candidate of the 2nd petitioner, scored the highest number of lawful votes cast at the election and satisfied the requirement of the Constitution of the Federal Republic of Nigeria 1999 as amended and the Electoral Act, 2010 as amended.
(iii) That the petitioner be declared validly elected or returned, D basing scored the highest number of

lawful votes cast at the Governorship election held on the 28 day of September, 2016. IN THE ALTERNATIVE

(iv) That it may be determined that the Edo State Governorship election held on the 28 day of September, 2016 be nullified for substantial non-compliance with the provisions of the Electoral Act which non-compliance substantially affected the result of the election and in its place, make an order for a fresh election to be conducted.

The respondents joined issues with the petitioners and the matter proceeded to trial. The petitioner called 91 witnesses out of which 29 of them were polling agents who testified and tendered some exhibits. The 1st respondent tendered from the Bar Forms EC8B and EC8C from the 18 Local Governments in Edo State and the supplement to the 2015 Guidelines and Regulations for the conduct of the election. The 2nd respondent called 70 witnesses while the 3rd respondent called 15 witnesses. At the end of the trial the Tribunal dismissed the petition and upheld the election of the 2nd respondent as the Governor of Edo State. The appellants were dissatisfied and appealed against it to the Court of Appeal, Benin City.

They subsequently filed an application on 22 May 2017 seeking an order directing a correction and/or amendment of the 1st appellant/applicant's evidence-in-chief contained in volume 13, pages 11742-11743 of the record of appeal in this appeal i.e. Appeal No. CA/B/EPT/EDS/GOV/201/17: *Pastor Ize-lyamu v. Osagie Andrew & Anor v. Independent National Electoral Commission (INEC) & Ors*……..". The motion was dismissed on 30 May, 2017 and this led to the filing of the interlocutory appeal by the appellants. The appellants also lost the main appeal and

consequently appealed against it to this court. This forms the substantive appeal No. SC. 466/2017.

The two issues formulated by the appellants in the interlocutory appeal are: -

1. Whether the appellants application before the lower court dated and filed on 22 May, 2017 seeking an order correcting and/or amending the record of appeal was competent. (Distilled from Ground 1)
2. Did the appellants satisfy the requirements for correction and/or amendment of the record of appeal in the lower court? (Distilled from Grounds 2. 3, 4 and 5)

In the brief filed by Dr. Ikpeazu SAN on behalf of 1st respondent where the preliminary objection to the competence of the appellant's brief was questioned, learned senior counsel raised one issue for determination to wit:

> Whether the Court of Appeal was correct when it held that the appellants failed to present exceptional circumstances to warrant the exercise of the court's discretion to jettison the record of proceedings of the Chairman of the Tribunal in favour of that kept by one of the members of the Tribunal on the subject matter of the application.

Chief Olanipekun SAN who led other senior counsel on behalf of the 2nd respondent also presented a single issue for determination in the Interlocutory appeal while Prince Lateef Fagbemi SAN who also had a coterie of senior counsel appearing with him for the 3rd respondent, apart from filing a preliminary objection stating that the Interlocutory appeal has become academic and would serve no utilitarian purpose since final judgment was delivered on 9 June 2017 submitted one issue for determination.

Learned senior counsel filed reply briefs in answer to the briefs filed by ail the counsel to the respondents.

I agree with the objection raised by learned senior counsel for the 3rd respondent that the Interlocutory appeal has become academic since judgment in the main appeal was delivered on June 2017 and whatever grievance that learned counsel is entertaining about the refusal to allow the appellants to correct or amend the evidence-in-chief of the 1st appellant can be accommodated in the substantive appeal. Furthermore the application before the Court of Appeal sought to amend the record of the Chairman of the Tribunal as was kepi by Hon. Justice A. T. Badamosi. It has been judicially noticed that where a Tribunal consists of more than one member, it is the record maintained and signed by the Chairman that is the authentic record. See: *Ngige v. Obi* (2006) 14 NWLR (Ft. 999) 1 at 182 and 231. The record of proceedings of a court is presumed by law to be correct until the contrary is proved. See: Section 147 Evidence Act. And a patty who seeks to challenge the correctness of the record must swear to an affidavit setting out the facts or parts of the proceedings wrongly stated in the record. Such affidavit must be served on the trial Judge and/or the Registrar of the court who would then, if he desires to contest the affidavit, swear to and file a counter-affidavit. See: *Ehikioya v. C.O.P. (1992) 4 NWLR (Pt. 233) 57 at 70; Agwarangbo v. Nakande* (2000) 9 NWLR (Pt. 672) 341 at 360.

In this case, it is noted that the appellants relied on two (2) documents in an attempt to impugn the record of the Tribunal namely:-

(i) Exhibit B - the notes made by Hon. Justice Gilbert A. Ngele, a member of the Tribunal;
(ii) Exhibit C - the notes kept by A. O. Obayomi Esq said to be counsel to the appellants.

There was no affidavit annexed to the appellants' application served on the members of the Tribunal alleging an error in the record of the Tribunal. What appears to have been served on the Chairman and members of the Tribunal was a motion on notice in which their names appeared as persons to be served. But the Chairman and members of the Tribunal were not parties to the motion. would therefore be absurd for the Chairman and Members of the Tribunal to react to the motion in a proceeding in which they were arbiters.

A record of appeal cannot be amended without the court's approval in exercise of its discretionary power to grant or refuse to sanction an amendment of the record of appeal. See: *Thynne v. Thynne* (1955) 3 WLR 466 which was approved in *Akinyede v. Opere* (1967) 5 NSCC 299 at 301; (1967) SCNLR 523. So the proper procedure of challenging the records would be:-

(i) The affidavit challenging the record: and
(ii) motion on notice supported by affidavit seeking the court's discretion to amend the records.

The appellants failed to follow the procedure outlined above and so the lower court reached the right decision when it refused to accede to the request made by the appellants to amend and/or correct the record of the Tribunal. I there fore find no merit in the Interlocutory appeal and it is accordingly dismissed.

In the main appeal, Yusuf Ali, SAN formulated three issues for determination. The issues are:-

1. Whether the Court below was right in affirming the decision of the Tribunal which dismissed the appellants' case before considering the respondents' defence, misplaced the burden of proof on the appellant, misdirected itself regarding the nature of appellants' 2nd issue for determination before the Tribunal and

thereby caused a grave miscarriage of justice on the F appellants. (Grounds 1, 2, 3,20 and 21)

2. Whether the Court below was right by holding that the testimonies of all the witnesses called by the appellants were hearsay evidence and unreliable while preferring and relying on the non-cogent, unbelievable and wooly testimonies of the 2nd and 3rd respondents' witnesses and in further holding that the appellants dumped documents tendered by them by failure to link all the documents tendered by them to their case when this was not so.
3. Whether the court below was not wrong in its view that the

   appellants needed to call polling agents from all the polling units challenged in order to prove lack of/improper accounting of ballot papers when the proof of the allegations is documentary and in further holding that the 1st respondent did not abandon its pleadings by failure to call or elicit any evidence in support of same. (Grounds 5, 8, 9, 10, 11, 12, 13, 16, 16, 17 and 18)

Dr. Ikpeazu SAN identified a sole issue for determination on behalf of the 1st respondent. The issue is:-

> Whether the Court of Appeal was correct in sustaining the decision of the Tribunal to the effect that the appellants did not prove that the Governorship election which took place in Edo State on 28 September, 2016 was vitiated by non-compliance with the provisions of the Electoral Act, 2010 and that the appellants failed to prove that they were entitled to the reliefs sought in the election petition. (Grounds 1, 2, 3, 4, 5, 6. 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 21)

Chief Olanipekun SAN. submitted three issues; for determination on behalf of the 2nd respondent which are:

(i) Considering the state of the pleadings, the relevant sections of the Electoral Act on grounds for challenging an election petition, vis-a-vis binding decisions of appellate courts, including the Supreme Court decision in CPC v /NEC (2012) 2-3 SC 1: (2011) I 8 NWLR (Pt. 1279) 493, whether the lower court did not come to the right decision when it affirmed the decision of the lower Tribunal that the orchestrated complaints mounted against the return of the 2nd respondent by the appellants relating to how the voters' registers were ticked were of no moment - Grounds 9, 10, 11 and 12 of the notice of appeal.

(ii) Considering extant statutory and judicial authorities on election jurisprudence and juxtaposing the admissible evidence led against the pleadings, whether the lower court was not right in affirming the conclusions/findings of the trial Tribunal - Grounds 1, 2, 7. 18. 19 and 20 of the notice of appeal.

(iii) Having regard to the appellants pleadings in the petition, the reliefs sought at the Tribunal through to the Court, of Appeal and at the Supreme Court, vis-a- vis the evidence on record, whether this Honourable Court would not affirm the decision of the lower court, which also rightly affirmed the impeccable decision of the trial Tribunal - Grounds 3. 4. 5, 6. 8. 13, 14, 15, 16, 17 and 21 of the notice of appeal.

Prince Lateef Fagbemi SAN appearing for the 3rd respondent distilled five issues for determination as follows:-

1. Whether the Court of Appeal was not right when it held that the trial tribunal properly evaluated evidence placed before it and rightly ascribed proper probative value to same? (Grounds 1, 2, 3, 4, 6, 7, 16, 17 and 21).
2. Whether the Court of Appeal was not right when it held that the appellant (sic) have not proved the allegation of non-compliance with Electoral Act and over voting in all the affected polling units being challenged by the appellants having failed to call eye witnesses in those polling units? (Grounds 5, 8, and 13).
3. Whether the Court of Appeal was not right when it held that failure to tick right and tick left on the voters register does not amount to non-compliance with Electoral Act in the peculiar circumstance of this appeal? (Grounds 9, 10, 11, 12).
4. Whether the Court of Appeal was not right when it held that the appellants dumped their documents on the tribunal having failed to link them to their case? (Grounds 14 and 15).
5. Whether the Court of Appeal was not right when it held that the 1st respondent need not call witnesses and that weaknesses of the defence (if any) will not avail the petitioner where petitioners/ appellants have failed to discharge the onus of prove (sic) placed on them by the law? (Grounds 18, 19 and 20).

The appellants filed reply briefs to the briefs of learned counsel for the respondents. Learned senior counsel urged this court to strike out 1st respondent's brief as being incompetent on the ground that all die submissions made by learned counsel are in support of the decision of the trial Tribunal.

In arguing the appeal, learned senior counsel for the appellants submitted that the concurrent decisions of both the trial Tribunal and that of the Court of Appeal are perverse and had thereby occasioned a grave miscarriage of justice against the appellants and this court should interfere with the said concurrent decisions as decided in *Okulate v. Awosanya* (2000) 2 NWLR (Pi 646) 530 B at 537. Learned senior counsel argued that the lower court ought not to have affirmed the decision of the Tribunal since it failed to give the case presented by the appellants fair consideration by placing same side by side with the case of the respondents on an imaginary scale before reaching its decision.

It is the contention of appellants' counsel that the trial Tribunal correctly identified the hallmark of the petition to revolve around the issue of substantial non-compliance with the provisions of the Electoral Act but the Tribunal considered only the evidence adduced by the appellants as petitioners from pages 12269-12339 and practically dismissed the case of the appellants even before a consideration of the case presented by the respondents. He maintained that regardless of the style a court chooses in writing its judgment, it must display a dispassionate consideration of all the evidence led by both sides F to a dispute, weigh same on the imaginary scale and decide in whose favour the evidence preponderates before dismissing the case or entering judgment in favour of the plaintiffs. He submitted that where a court fails to make findings on material and important issues of fact or approaches the evidence called by the parties wrongly, the appellate court has no alternative but to allow the appeal. Reliance was placed on these cases: *Anyanwu v. Uzowuaka* (2009) 13 NWLR G (Pt. 1159) 445 at 471 - 472; *Karibo v. Grend* (1992) 3 NWLR (Pt. 230) 426 at 441 and *Ovunwo & Anor v. Woko & Ors* (2011) 6-7 SC (Pt. 1) 1 at 22; (2011) 17 NWLR (Pt. 1277) 522.

Learned counsel addressed the finding of the tribunal that the testimonies of all the witnesses called by the appellants were hearsay evidence and unreliable. He submitted that the decision and reasoning of the lower court which upheld the decision of the trial tribunal refusing to accord probative value to the evidence of the 1st appellant and other witnesses as being hearsay is erroneous and constitutes a gross misconception of the nature of the case presented by the appellants because their evidence at the trial tribunal is totally different from the case presented in the cases of Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1; A.C.N. v. Nyako (2015) 18 NWLR (Pt. 1491) 352 and *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 which were relied on by the lower court. He said in the case of *Buhari v. Obasanjo*, the evidence castigated as hearsay was offered in proof of the veracity of the statement received from other people who were not called as witnesses and not as proof that those facts were actually relayed to the witness who offered the evidence. He drew the court's attention to the fact that several exceptions to the hearsay rule have been provided for in sections 39 - 76 of the Evidence Act, 2011 and one of those exceptions which is applicable to the evidence of the appellants' witnesses is contained in section 52 of the Evidence Act which provides:-

> "An entry in any public or other official books, register or record, including electronic record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any oilier person in the performance of a duty specially enjoined by the law of the country in which such book or register or record is kept, is itself admissible ".

He interpreted the section to mean that where the statement relied upon in a proceeding constitutes statement of official records kept by a public officer the reliance placed on such statement and offered by a witness other than the officer who recorded the statement cannot be classified as hearsay evidence. He then argued that in the instant case, the facts, ticking and figures contained in the voters' register and the forms EC8As for the polling units challenged in the petition are public documents kept by officers of the 1st respondent and the reliance placed on the said records and evidence of the appellants based on same are therefore not hearsay evidence. He said the various acts of non-compliance pleaded are:

(i) improper/absence of accreditation,

(iij) over voting and inaccurate ballot paper accounting.

He said these acts of non-compliance are such that they can only be proved by recourse to documentary evidence (i.e. the voters register, Forms EC8As and Forms ECSBs for the affected units He submitted that in proof of allegation of non-compliance in the conduct of the election, the best evidence with which such non-compliance can be established is documentary evidence which when tendered must be given due regard and cited the case of: Agbareh v. Mimra (2008) 2 NWLR (Pt. 1071) 378. He went on to submit that since the acts of non-compliance can only be proved by documentary evidence, anyone in custody of such documentary evidence such as the appellants' ward collation agents who received the documents from the polling agents and the 1st appellant (PW 1) who duly obtained certified copies of the voter register. Forms EC8A and Forms

EC8B for the affected polling units are by law competent and compellable witnesses to testify as to what they observed after a perusal of the documents and this will not amount to hearsay. The case of *Salam*i *v. Ajadi* (2007) LPELR 8622 which cited the decision in *Paul Ordia v. Piedmont (Nig.) Ltd*. (1995) 2 SCNJ; (1995) 2 NWLR (Pt. 379 516 was relied upon. Section 126 Evidence Act A was also cited in support.

It is therefore the contention of learned counsel that having not given any evidence as to receiving any information from other persons but rather anchoring his evidence on what he directly observed after a careful perusal of the documents tendered as exhibits, the lower court was wrong to have agreed with the tribunal that PW1's evidence was incredible and hearsay. The same thing goes with PW5, PW10, PW24, PW30, PW31, PW32, PW33, PW34, PW41, PW56 and PW63 as well as other appellants' ward collation agents.

On the issue of the dumping of documents learned counsel argued that all the witnesses called by the appellants anchored their evidence on documentary exhibits which they identified during examination in chief which led to their being cross-examined on the documents. There were a total of 46 witnesses.

The petition against the declaration and return of the 2nd respondent as the winner of the Edo State Governorship election conducted on 28 September 2016 is based on the ground that he did not score the highest number of lawful votes cast at the election and did not satisfy the requirement of the Constitution of the Federal Republic of Nigeria 1999, and Electoral Act 2010 as amended. The alternative prayer is to nullify' the election for substantial non-compliance with the provisions of the Electoral Act

which non-compliance substantially affected the result of the election. Consequently the petitioner prays for a nullification of the result and ordering of a fresh poll by the 1st respondent.

Before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act, the petitioners must prove not only that there was non-compliance but that the non-compliance substantially affected the result of the election. See: *C.P.C. v. INEC* (2011) 18 NWLR (Pt. 1279) 493 at 539.Under section 139 (1) Electoral Act it is presumed that the election was conducted substantially in accordance with the principles of the Electoral Act and any non-compliance did not affect substantially the result of the election and the burden of proof lies with the petitioner. It is only when the petitioner succeeds in adducing evidence to prove the pleaded facts that such burden shifts F to the adversary. See: *Buhari v. Obasanjo* (2005) 2 NWLR (Pt. 910) 241; *Ajadi v. Ajibola* (2004) 16 NWLR (Pt. 898) 91 and *Haruna* v. *Modibbo* (2004) 16 NWLR (Pt. 900) 487.

This same argument was advanced in *Oke v. Mimiko* (2014) 1 NWLR (Part 13 88) 332 where the allegations of non-compliance which are not dissimilar with those in the present case were stated at page 365 as follows:-

> "The appellants' counsel gave a litany of the infractions of the Electoral Act, the respondents perpetrated in his brief of argument. They include among others:-
>
> 1. That people were allowed to vote without accreditation;
> 2. That there was multiple accreditation and voting;
> 3. That the number of voters recorded is not the same as h the number ticked to have voted;
> 4. That the number of voters ticked to have been accredited in the voters register differs from the

number of accredited voters entered on Form EC8A(1);

5. That the number of used and unused ballot papers entered in Form EC8A( 1) exceeded the number of ballot papers used in the affected polling units;
6. That alterations were made on Form EC8A(1) without same being authenticated;
7. That there, were swapping of result sheets;
8. That Forms EC8A(1) were not signed, stamped and dated and did not have the name of the presiding officer;
9. That unidentified persons and objects were accredited and voted;
10. That unknown Forms EC8A(1) having no serial numbers were used in the election;
11. That Form EC8( 1) did not reflect the vote of some of the political parties that participated in the election and;
12. Failure to use the appropriate register of voters to conduct the election".

On these allegations, this court stated at pages 365-366 thus:-

> "It was for the appellants to prove these very serious acts of infraction of the Electoral Act before the Tribunal. Clearly, majority if not all the acts of infraction of the Electoral Act enumerated above were criminal in nature and therefore required a higher standard of proof that is proof beyond reasonable doubt.
>
> Learned senior counsel for the 1st respondent observed and I agree with him that PW1 in the present appeal like PW45 (Olusola Oke Esq) in *Oke v. Mimiko* supra, gave a global evidence affecting multiple polling units. Like PW1 herein, he purported to state in his witness statement, infractions which he claimed he observed from the result sheets, the register of voters etc. And

dealing with same type of evidence this court held in *Oke v. Mimiko* supra at pages 376-377 as follows:-

> "On a revisit of the evidence of PW4 who testified on what transpired in over 1000 polling units, that witness assumed the role of a polling agent whose functions are defined by section 45 of the Electoral Act. Polling agents represent the respective political parties at the numerous polling units in obvious recognition of the enormity of the task of those monitoring the election in all the polling units of the State. Even though the 1st appellant was at liberty to perform the duty of polling agent for himself and his party, being human he can only be physically present at only one polling unit at a given time and so cannot perform the task with the same title as polling agent in any or all the other polling units and so when the evidence is to be provided as to what happened in disputed units other than the one he is physically available at then he is not qualified to testify thereto. This is because section 45(2) Electoral Act expects evidence directly from the relevant field officer at the required polling unit. Therefore when PW45 set out to testify as a State Agent armed with all the evidence of what occurred throughout the State to each polling unit, he did so under a misguided understanding of what the Electoral Act had prescribed",

See: *Buhari v. Obasanjo* (2005) 13 NWLR (Pt, 941) 1; *A.C.N. v. Lamido* (2012) 8NWLR(R 1303) 560.

The appellants have admitted that the testimonies of PW1 and majority of the witnesses were based on the result sheets. They

were not entries either made or witnessed by the witnesses and credence can hardly be given to a document tendered by a witness who could not be rightly cross-examined as to its contents. The court rightly described the statement on oath of PW45 in *Oke v. Mimiko* (supra), as "a bundle of primary and secondary hearsay".

The appellants called 91 witnesses from the 2,627 polling units in the State which they challenged in the petition. Only 29 of the said witnesses were polling agents at the polling units. What this means is that 62 of the witnesses gave hearsay evidence and no primary evidence was forth coming in respect of 2,598 polling units. Based on this it is inconceivable that the appellants would have discharged the burden that there was substantial non-compliance with the conduct of the election which should lead to a nullification of the results of the election.

Learned senior counsel for the appellants complained that the Tribunal did D not put the evidence called by the parties on the imaginary scale and weigh same to see where the evidence tilted. Although it is the quality and not the number of witnesses that matter, but in a situation where the evidence of the main witnesses for the petitioners was rightly treated as hearsay, the omission to put that evidence on an imaginary scale in order to determine where the evidence preponderates pales into insignificance in view of the fact that the onus of proof E lies with the petitioner who stands to lose if no evidence is called on either side. It did not matter whether the 1st respondent called any witnesses to testify or not. A person who seeks to nullify an election must succeed on the strength of his case as pleaded and not on the weakness of the case of the respondents since the main reliefs being sought were declaratory reliefs. See: *C.P.C v. INEC* supra at 555, paras. C-E per Musdapher, CJN where he reiterated the law as follows:-

"It is elementary law that a person seeking to nullify' an election must succeed on the strength of his case as pleaded and not on the weakness of the case of the respondents, or on the failure of the respondents to adduce any evidence. In the instant case, the trial Court of Appeal found that the appellant has failed to discharge the burden placed upon him and I agree with the Court of Appeal when in its judgment, it stated:-

"From whatever angle this petition is looked at, it is clear that the burden of proof of the allegations contained in the petition be they criminal or substantial noncompliance, rested with the petitioner. The petitioner did not discharge this burden to warrant the rebuttal of the p; evidence to be adduced by the 1st set of respondents",

As regards dumping of documents, the law is trite that it is not the duty of the court to proceed through documents tendered by parties which were not demonstrated in open court. The court below stated in volume 14 pages 13018-13019 referring to the presentation of the appellants before the Tribunal:-

"What the appellants did here was to dump the documents on the court by tendering it from the bar, got a few witnesses to identify or recognise some of the documents and left the Tribunal to figure out the rest in its chambers….It is not the duty of the court to sort out the various exhibits, the figures and do the calculation in chambers to arrive al a figure to be given in judgment particularly in an election which is challenging the number of valid votes scored by a candidate declared and returned as /he winner of the election ".

Going through the records, it is to be observed that almost all the documents tendered by the appellants were tendered by appellants' counsel from the Bar and one gaping failure on the part of the appellants is that they did not link the said documents to the relevant aspects of their case by calling the appropriate witnesses to speak to them and demonstrate their applicability to appellants' case in open court. A party tendering documents has the duty to ensure that such documents qua exhibits are linked to the relevant aspects of his case to which they relate. The point was poignantly made in this court by my learned brother, Ogunbiyi. JSC in *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 15 19) 87 at 145-146, paras. H-E thus:-

> "I seek to say that the law is settled on documents tendered in court which purpose and worth must be demonstrated through a witness. It is settled also that the duty lies on a party who wants to rely on a document in support of his case to produce, tender and link or demonstrate the documents tendered to specific parts of his case. The fact that a document was tendered in the course of proceedings does not relieve a party from satisfying the legal duty placed on him to link his document with his case.... The appellant al the lower tribunal apart from tendering Exhibits 1-192 through PW1 did not bother to demonstrate the exhibits through any witness. The witness PW1, merely dumped the Exhibits on the Tribunal and expecting it to go on a voyage of discovery. It is not the court's lot to be not saddled with nor can it *suo motu* assume a partisant responsibility of tying each bundle of such documentary evidence to the appellant's case to prove the malpractice alleged. It would amount to the court

doing a party's case which would occasion injustice to the other party. The court as an arbiter must not get into the arena and engage itself in doing a case for one patty to the disadvantage of the other party. The petitioner has a duty' to tie the documentary evidence to the facts he pleaded through a witness. Anything short of that will be taken as dumping the evidence (documents) on the Tribunal. See: *Audu v. INEC* (No. 2) (2010) 13 NWLR (Pt. 1212) 456 at 520 and *Ucha v. Elechi* (2012) 13 NWLR (Pt. 1317) 330 at 360".

Apart from identifying the documents; none of the appellants' witnesses demonstrated the documents before them. Such identification cannot by any stretch be taken to mean that the documents were properly linked to the aspects of the case of the appellants. There is a world of difference between mere identification of a document and demonstration qua linking same to the appellants'

case. None of the appellants' witnesses specifically related the exhibits to the specific complaints in their depositions. The blanket identification by the witnesses cannot meet the requirement of the law in this regard. PWs 34, 37, 38, 40, 43, 44, 45, 47 and 49 amongst others admitted they were not the makers of those documents which they identified. It is settled law that a person who did not make a document is not in a position to give evidence on it because the veracity and credibility of that document cannot he tested through a person who has no nexus with the document. Only a maker of a document can tender and be cross-examined on same. Any exhibits tendered from the Bar without calling the maker thereof will not attract any probative value. See: *Omisore v. Aregbesola* 15 NWLR (Pt 1482) 205; *Udom Gabriel Emmanuel v.*

*Umana & Ors* (2016) 2 SC (Pt. 1)1, (2016) 12 NWLR (Pt. 1526) 179.

It is based on the fact that the appellants did not discharge the burden of proof as provided by law that led me to dismiss the appeal when it was heard on Monday, 10 July, 2017 and it is for this and the elaborate reasons contained in the judgment of my learned brother, Okoro JSC that I found the appeal to be unmeritorious and accordingly dismissed same. I make no order on costs.

**KEKERE-EKUN, J.S.C.:** On Monday 10th July, 2017, I dismissed both the interlocutory and substantive appeals of the appellants and promised to give my reasons for so doing today, 24th July 20)7.

I have had a preview of the reasons for judgment given by my learned brother, John Inyang Okoro, JSC. I agree entirely with the reasoning and E conclusions reached therein. I shall add a few words of my own in further support.

This appeal is against the concurrent findings of the two lower courts. The appellant who contested alongside the 2nd respondent and other candidates in the election conducted by the 1st respondent (INEC) on 28th September, 2016 into the office of Governor of Edo State, was aggrieved by the return F of the 2nd respondent as the winner of the election and filed a petition before the Governorship Election Petition Tribunal of Edo State sitting at Benin. The appellant contested on the platform of the PDP (2nd appellant) while the 2nd respondent contested on the platform of the All Progressives Congress (A PC), which is the 3rd respondent in the appeal.

The grounds of the petition were:

1. That the 2nd respondent was not duly elected by a majority of lawful votes cast at the election.
2. That the election of the 2nd respondent was invalid by reason of non-compliance with the provisions of the Electoral Act, 2010 (as amended).
3. That the election of the 2nd respondent was invalid by reason of corrupt practices.

Consequently, they sought the following reliefs:

(i) That it may be determined that the 2nd respondent, Godwin Nogheghase Obaseki was not duly elected or returned by the majority of lawful votes cast at the Edo State Governorship Election held on the 2nd day of September 2016.

(ii) That it may be determined that the 1st petitioner, who was the candidate of the 2nd petitioner, scored the highest number of lawful votes cast at the election and satisfied the requirements of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the Electoral Act, 20 10 (as amended).

(iii) That the 111 petitioner be declared validly elected or returned having scored the highest number of lawful votes cast at the Governorship election held on the 28nd day of September 2016.

IN THE ALTERNATIVE

(iv) That it may be determined that the Edo State Governorship election held on the 28th day of September 2016 be nullified for substantial non-compliance with the provisions of the Electoral Act which non-compliance substantially affected the result of the election and in its place, make an order for a fresh election to be conducted.

The appellant and 2nd and 3rd respondents called witnesses and tendered documentary evidence in support of their respective positions. The 1st respondent did not call any witnesses but tendered documents and cross-examined the appellants' witnesses.

At the conclusion of tire trial, the Tribunal, in a considered judgment delivered on 14/4/2017 dismissed the petition and affirmed the return of the 2nd respondent. The appellants' appeal to the court below was unsuccessful as it dismissed same and affirmed the judgment of the trial Tribunal. The judgment of the Court of Appeal was delivered on 9/6/2017. The appellants are still dissatisfied, hence the instant appeal.

*INTERLOCUTORY APPEAL*

They have also appealed against the interlocutory ruling of the court below delivered on 30/5/2017 refusing their application to amend the record of proceedings transmitted from the trial Tribunal to the Court of Appeal. They had sought for an order correcting and/or amending the 1st appellant's evidence-in-chief by relying on the record of a member of the Tribunal, Hon. Justice Gilbert A. Ngele made on 30th January 2017 in place of the record of proceedings taken by the Chairman on the ground that the Chairman's record is not an accurate depiction of the evidence-in-chief of the 1st appellant, In refusing the application, the lower court held, *inter alia*, that the proper procedure was not adopted in seeking to impugn the court's record and further that the appellants had not shown sufficient cause to warrant the exercise of the court's discretion in their favour.

My learned brother, John Inyang Okoro, JSC has dealt extensively with this issue in his reasons for judgment. In agreeing with his reasoning I wish to emphasize the following:

(a) The procedure for impugning the record of a court has been settled in the case of *Garuba v. Omokhodion*

(2011) 15 NWLR (Pt. 1269) 145 @ 179-180 H-C, where it was held that two processes are required to impugn the court's record. An affidavit challenging the record must first be filed and served on the Presiding officer A of the court or tribunal for his reaction. It is then followed by a formal application seeking to amend the record. The affidavit in support of an application to amend the record cannot take the place of the required affidavit challenging the record. Unlike the motion to amend, which is between the parties on record, an affidavit challenging the record is a notice to the court itself that its record is being impugned. As rightly submitted by learned senior counsel for the 2nd respondent. Chief Wole Olanipekun, SAN, the affidavit challenging the record is the proper mode for impeaching the record of the court. If the challenge is well founded, the formal application that follows is the means to have the impugned record amended. See also: *Adegbuyi v. APC* (2015) 2 NWLR (Pt. 1442) 1 @ 24; *Gonzee Nig. Ltd. v. NERDC* (2005) 13 NWLR (Pt.943) 634 @ 646 B-C.

(b) Secondly, the record of the chairman is the record of the Tribunal. By virtue of Section 168(1) of the Evidence Act, 2011, it enjoys a presumption of regularity. It is a rebuttable presumption. However the correct procedure for challenging the record, as D stated in Garuba v. Omokhodiom(supra) must be followed.

(c) Thirdly, by paragraph 41(3) of the First Schedule to the Electoral Act, 2010 as amended, the written

statement of a witness on oath serves as his evidence-in-chief. It provides:

> "There shall be no oral examination of a witness during his evidence-in-chief except to lead the witness to adopt E his written deposition and tender in evidence all disputed documents or other exhibits referred to in his deposition.'"

It follows therefore, that the notes jotted by a member of the Tribunal when PWI was being led to adopt his written deposition, which the appellants were seeking to introduce into the record of proceedings, is mere surplussage. Such oral evidence in addition to his written deposition is not permitted by F the Electoral Act. Therefore, even if the appellants had adopted the correct procedure for impugning the record of proceedings, the court would still not have been in a position to exercise its discretion in their favour.

It is for these and the more detailed reasons stated in the lead judgment that 1 dismissed the interlocutory appeal.

*MAIN APPEAL*

With regard to the main appeal, my comments in respect of the 3 issues formulated by the appellants shall be taken together.

It is pertinent to note that this appeal is against concurrent findings of fact by the two lower courts. This court would not usually interfere with concurrent findings of fact unless it is shown that the findings are perverse, not based on the evidence before the court or where there is a substantial error of law or procedure on the face of the record resulting in a miscarriage of justice. See: *Olowu v. Nigerian Army* (2011) 18 NWLR (Pt.1279) 659: *Ibodo v. Enarofia* (1980) 5-7 SC 42; *Woluchem v. Gudi* (1981) 5 SC 291. Equally important is the fact that the reliefs sought by the

appellants before the Tribunal are declaratory in nature. The significance of this is that in a claim for declaratory reliefs the plaintiff (or petitioner in this case) must succeed on the strength of his own case and not on the weakness of the defence (if any). He would not be entitled to judgment even on admission. See: *Wallersteiner v. Moir* (1974) 3 All ER 217 @ 251*; Emenike v. PDP* (2012) 12 NWLR (Pt. 1315) 556; *C.P.C. v INEC* (2012) I NWLR (Pt. 1280) 106 @ 13 1; *Dumez Nig. Ltd. v. Nwakhoba* (2008) 18 NWLR (Pt.1119)361.

Some of the appellants' complaints are that the trial Tribunal dismissed their case before considering the defence of the respondents and that it misdirected itself on the burden of proof.

The general burden of proof in civil cases is as provided for in sections 131, 132 & 133 of the Evidence Act, 2011 while the standard of proof, as provided in section 134 of the Act, is on the balance of probabilities.

Sections 131, 132 & 133 of the Act provide:

"131(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

132. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

133(1) In civil cases, the burden of first proving existence or nonexistence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard

being had to any presumption that may arise on the pleadings.

(2) If the party referred to, in subsection (1) of this section adduces evidence which ought reasonably to satisfy the court that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced, and so on successively, until all the issues in the pleadings have been dealt with.

(3) Where there are conflicting presumptions the case is the same as if there were conflicting evidence."

In discharging the burden of proof, the plaintiff must first prove the existence or non-existence of what be asserts by relevant, admissible and credible evidence. Once the burden is discharged, the onus of proof shifts to the adverse party. The burden of proof of particular facts continues to shift between the parties until all the issues in the pleading have been dealt with. The onus is on the party against whom judgment would have been given if no further evidence were adduced. See: *Agbakoba v. I.N.E.C*. (2008) 1 8 NWLR (Pt. 1119) 489; *Itauma v. Akpe-lme* (2000) 7 SC (Pt. 11) 87; (2000) 12 NWLR (Pt. 680) 156; Egbunike v. ACS Ltd. (1995) 2 NWLR (Pt.375) 34; *Egharevba v. Osagie* (2009) 18 3NWLR (Pt. 1173) 299.

In the instant appeal, it was argued strongly on behalf of the appellants that the method adopted by the trial Tribunal in writing its judgment breached their right to fair hearing, as the appellants' case was reviewed and evaluated and a conclusion reached before a consideration of the case put up by the respondents.

It has been held severally by this court that there is no particular format for A writing a judgment. Every Judge has his own style.

However a well-written judgment must contain certain essential elements

viz:

(i) A statement of the claim or relief sought by the plaintiff;

(iii) The relevant facts and counter facts leading to the claim or the relief:

(iv) A review of the oral and/or documentary evidence adduced on either side;

(v) Arguments of counsel;

(vi) Application of the law to the facts;

(vii) The final order.

See: *Usiobaifo v. Usiobaifo* (2005) 3 NWLR (Pt.913) 665: *Mogaji v. Udofin* (1978)4 SC 65 @ 67.

At the end of the day the judgment must reflect a clear understanding of the issues raised by the pleadings and evidence. It must be a dispassionate appraisal of the evidence led, and a proper consideration of the submissions made with due regard to the onus of proof. See: *Sanusi v. Ameyogun* (1992) 4 NWLR (Pt.237) 527 @ 552 F-G.

Applying these principles to the present case, I am of the considered view that the judgment of the lower Tribunal, which was affirmed by the court below, fully met the requirements of a good judgment with due regard to the onus of proof. The appellants' reliefs were founded on non-compliance with the provisions of the Electoral Act. The settled position of the law is that where a petitioner alleges non-compliance, he has the onus of presenting evidence E from eye witnesses at the various polling units who can testify directly in proof of the alleged non-compliance, particularly where the allegations relate to non-

accreditation/improper accreditation, inflation or reduction of scores, alteration of results, over voting, etc. See: *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1 @ 315-316 B-C; *Buhari v. I.N.E.C*. (2008) 19 NWLR (Pt. 120) 246 @ 391-392 H-A; *Amosun v. I.N.E.C*. (2010) LPELR - 49431 @ 120-121, *Okereke v. Umahi* (2016) 11 NWLR (Pt.524) 438 @ 473*: Nyesom v. Peterside* (2016) 7 NWLR (Pt.1512) 452; *Ucha v. Elechi* (2012) All FWLR (Pt.625) 237; (2012) 13 NWLR (Pt. 1317) 330.

In the instant case, the trial court painstakingly considered the evidence of each and every witness who testified on behalf of the appellants and further considered the evidence adduced on Local Government basis to determine whether they had discharged the burden of making out their case. After this thorough exercise the court held, rightly in my view, that the burden of proof was not discharged and queried whether in the circumstances the burden had shifted to the defence.

Notwithstanding its finding that the appellants had not discharged the burden placed on them, the court still went ahead to consider the evidence h of the respondents' witnesses in the same manner as it had done with the appellants' witnesses and ascribed or did not ascribe probative value to their evidence accordingly before reaching its final conclusion that the petition lacked merit. In other words the same treatment was given to the testimony of the respondents' witnesses

In affirming the judgment of the Tribunal, the lower court held al page 12997-12998 of Vol.14 of the record as follows.

> "From the entire case of the appellants as presented in their pleadings and the evidence adduced, it is the polling agents of the 2nd appellant in each of the polling units being contested that saw what happened. The ward collation agents would also

have seen what happened at the polling units where they voted and can testify only in respect of those polling, units. The evidence of PW1 and ward collation agents in respect of the polling units other than where, they voted based only on their purported examination of result sheets and reports received [from] polling agents are hearsay and arc inadmissible and were rightly rejected by the Tribunal.'"

The court held further at pages 13017 & 13020 of the record:

"The petitioner challenged the results in 16 out of the 18 local Government Areas. Out of 92 witnesses: that testified for the petitioner, only 27 were polling agents. This was in an attempt to prove improper/lack of accreditation and over-voting, in hundreds of the polling units spread across 16 Local Govenment Areas. About 55 or more of the witnesses were ward collation agents. 2 of the witnesses were Local Government collation agents. Many of the witnesses admitted the fact that they were not present in any other polling unit apart from the one where they voted. Their testimonies were based on the documents and reports of the periling agents who w ere not called to testify' as to how the over-voting occurred. PW1 was the star witness. His evidence was based on interaction/analysis of INEC documents. The documents relied on by the appellants were tendered from the bar The Tribunal rightly held that the documents were dumped on it particularly 2531 form EC8As' (Exhibits P05-P0195) which were polling unit result sheets. The

polling agents who signed them ought to have been called to explain the circumstances that led to over-voting if any. The law is settled that a person who did not make a document is not in a position to give evidence on it because the veracity and credibility of a document cannot be tested through a person who has no nexus with the documents. The same principle applies to the evidence of PW1. The Tribunal was on a firm ground in law when it refused to ascribe probative value to the evidence of PW1 and the other witnesses.

……..

It is not the duty of the court to sort out the various exhibits, the figures and do calculations in chambers to arrive at a figure to be given in judgment particularly in an election petition which is challenging the number of valid votes scored by a candidate declared and returned as the winner of an election. The necessity of the evidence of polling agents who were present at the polling units comes to the fore considering the fact the polling agents signed the result sheets confirming the results as correct on the day of the election which results are now being disputed. In that circumstance, the only person who can explain why he signed the result as being correct and authentic on the day of the election when he had the earliest opportunity to contest the figures entered on the result sheets in his presence and why the result is now being challenged or contested is the party's polling agent."

This finding, in my considered view is unassailable. The Tribunal not only did a thorough and painstaking analysis of all the evidence before it, it demonstrated a clear understanding of the issues in contention and correctly applied the law to the facts before it.

The court below also conducted a thorough scrutiny of the judgment of the Tribunal and rightly affirmed same.

With regard to the contention that the court below was wrong to affirm the finding of the Tribunal that the 1st respondent did not abandon its pleadings by failure to call evidence in support thereof, I hold the considered view that both lower courts were correct in their finding. Having tendered documents in evidence, albeit from the Bar, and having thoroughly cross-examined and discredited the appellants' witnesses, it could not be said that the 1st respondent had abandoned its pleadings. In *Akomolafe v. Guardian Press Ltd*. (2010) 3 NWLR (Pt. 1181) 338 @ 351 F-H and 353-354 H-B, this court held:

> "Evidence elicited from a party or his witness under cross-examination, which goes to support the case of the party cross-examining, constitutes evidence in support of the case or defence of the party, If at the end of the day the party cross- examining decides not to call any witness, he can rely on the evidence elicited from cross-examination in establishing his case or defence. One may however say that the party called no witness in support of his case, not evidence, as the evidence elicited from his opponent under cross- examination which are in support of his case or defence constitute his evidence in the case.
>
> ……

> The exception is that the evidence so elicited under cross-examination must be on facts pleaded by the party concerned for it to be relevant to the determination of the question/issue in controversy between the parties.
>
> ……... having regard to the fact that the relevant evidence elicited from the appellants relate to the facts pleaded by way of defence to the action, they form part of the respondent's case and can be relied upon by the respondents in establishing their defence to the action without calling witnesses to further establish the said defence."

It is my considered view that the appellants have not suffered any miscarriage of justice in this case. Both the lower court and the trial Tribunal must be commended for a job well done. The appellants have not shown any special circumstance to warrant interference by this court with their concurrent findings.

It was for these and the more elaborate reasons well articulated by my learned brother, John Inyang Okoro, JSC in the lead judgment, that I found this appeal to be devoid of merit and dismissed it on Monday 10th July 2017. I abide by the order on costs.

Interlocutory and substantive appeals dismissed.

**BAGE, J.S.C.:** I have had the preview of the reasons for judgment given by my learned brother, John Inyang Okoro, JSC. I agree with him entirely with the reasoning and conclusion reached. I do not have anything useful to add. The appeal is without merit and should be dismissed.

*Appeal dismissed.*