1. PEOPLES DEMOCRATIC PARTY (PDP)
2. OLUSOLA KOLAPO OLUBUNMI

V.

1. INDEPENDENT NATIONAL ELECTORALCOMMISSION
2. ALL PROGRESSIVES CONGRESS (APC)
3. JOHN OLUKAYODE FAYEMI

SUPREME COURT OF NIGERIA

SC.409/2019

IBRAHIM TANKO MUHAMMAD, Ag. C.J.N. (*Presided*)
OLUKAYODE ARIWOOLA, J.S.C.
JOHN INYANG OKORO, J.S.C. (*Read the Leading Judgment*)
PAUL ADAMU GALUMJE, J.S.C.
UWANI MUSA ABBA AJI, J.S.C.

FRIDAY, 24TH MAY 2019

ACTION - Parties to an action - Allegation made against person not party to an action or election petition - How treated.

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

COURT - Judgment of court - Entry of judgment - What it presupposes.

DOCUMENT- Documentary evidence -Document tendered-Duty on party to relate to specific area of his case - Need for witness to give admissible evidence thereon -Need for party to be explicit in relating document.

DOCUMENT - Documentary evidence - Where tendered from the Bar – Probative value of – Whether court can embark on inquisitorial examination of documents outside court room.

ELECTION-Proof-Burden of proof on petitioner in election petition.

ELECTION-Proof-Standard of proof in election petition.

ELECTION PETITION-Conduct of election - Incidents at polling units – Evidence of - Who can give.

ELECTION PETITION - Conduct of election - Infractions at election-Evidence of-Who can give.

ELECTION PETITION - Conduct of election - Presumption in respect of - Section 168, Evidence Act, 2011 - Burden on petitioner to rebut regularity of -Nature of evidence he must adduce.
ELECTION PETITION - Disenfranchisement of voters-Allegation of-Proof of-How established.

ELECTION PETITION - Election result - Polling unit results-Evidence thereon -Who can give.

ELECTION PETITION - Nullification of election – Petitioner seeking-Onus thereon.
ELECTION PETITION -Parties to an election petition – Allegation made against person not party to an action or election petition- How treated.

ELECTION PETITION-Parties to an election petition-Where allegation not made against party-Course open to court.

ELECTION PETITION - Petitioner's reply - Right of petitioner to file-Time within which to file-Whether can bring new facts, grounds and prayers tending to amend or add to contents of petition - Paragraph 16(1)(a), First Schedule, Electoral Act,2010.

ELECTION PETITION-ON - Proof-Allegation of crime in election petition - Standard of proof of - Whether proof beyond reasonable doubt.

ELECTION PETITION-Proof-Petitioner alleging non-compliance with provisions of Electoral Act - Burden of proof thereon -What he must show and establish - Standard of proof required-Section 139(1) and (2), Electoral Act, 2010.

EVIDENCE - Documentary evidence - Document tendered-Duty on party to relate to specific area of his case - Need for witness to give admissible evidence thereon - Need for party to be explicit in relating document.

EVIDENCE- Documentary evidence- Where tendered from the Bar- Probative value of - Whether court can embark on inquisitorial examination of documents outside court room.

EVIDENCE - Presumptions - Conduct of election – Presumption in respect of - Section 168, Evidence Act, 2011 - Burden on petitioner to rebut regularity of -Nature of evidence he must adduce.

EVIDENCE - Proof-Allegation of crime in election petition -Standard of proof of-Whether proof beyond reasonable doubt.

EVIDENCE- Proof-Burden of proof in civil cases-On whom lies- Section 131(1) and (2), Evidence Act, 2011 - Shifting nature of.

EVIDENCE- Proof-Burden of proof on petitioner in election petition.

EVIDENCE-Proof-Conduct of election -Incidents at polling units-Evidence of-Who can give.

EVIDENCE-Proof-Conduct of election-Infractions at election-Evidence of-Who can give.

EVIDENCE - Proof-Disenfranchisement of voters - Allegation of- Proof of-How established.

EVIDENCE-Proof-Nullification of election-Petitioner seeking- Onus thereon.

EVIDENCE - Proof- Petitioner alleging non-compliance with provisions of Electoral Act - Burden of proof thereon—What they must show and establish - Standard of proof required - Section 139(1) and (2), Electoral Act, 2010.

EVIDENCE - Proof- Standard of proof in election petition.

EVIDENCE-Witnesses-Believing or disbelieving of witness by trial court-Basis of.

EVIDENCE - Witnesses - Credibility of witness -Importance of -Hearsay witness-Whether can testify to existence, truth and veracity of fact.

EVIDENCE- Witnesses - Proof of case - Whether depends on number of witnesses called.
JUDGMENT AND ORDER-Judgment of court-Entry of judgment-What it presupposes.

PRACTICE AND PROCEDURE - Appeal -Concurrent findings off act by trial court and Court of Appeal-Attitude of Supreme Court thereto - When it can interfere therewith.

PRACTICE AND PROCEDURE - Judgment of court - Entry of judgment-What it presupposes.

PRACTICE AND PROCEDURE - Statement on oath-Where not supported by pleadings-Effect.

Issues:

1. Whether the Court of Appeal was right in affirming the decision of the trial tribunal which failed to ascribe probative value to the testimonies of PW31 and PW32.
2. Whether the Court of Appeal was right in affirming the decision of the trial tribunal striking out the replies filed by the appellants to the respondents' replies.
3. Whether the Court of Appeal was right in affirming the decision of the trial tribunal that the appellants

Failed to prove the sundry allegations made against the return of the 3rd respondent in some local government areas where the appellants challenged the return.

4. Whether the Court of Appeal was right in affirming the trial tribunal's disregard as hearsay evidence the evidence of the collation agents called by the appellants in proof of their case.
5. Whether in the circumstances, the Court of Appeal was right in affirming the finding of the trial tribunal that the appellants dumped all the documents they tendered before the tribunal.
6. Whether the Court of Appeal was

right in affirming the decision of the trial tribunal that the appellants failed to discharge the burden of proof on the allegations of non-compliance, over-voting, incorrect ballot account, infractions and other allegations contained in their petition.

Facts:

The 1st appellant sponsored the 2nd appellant as its candidate at the governorship election held in Nigeria on 14th July 2018. The 3rd respondent was sponsored by the 2nd respondent as its candidate for the election. At the end of the exercise, the 1st respondent declared 3rd respondent as the winner of the election, having polled majority of lawful votes cast at the election. The appellants polled 78,121 votes while the 2nd and 3rd respondents polled 197,459 votes.

The appellants were dissatisfied with the result of the elections announced and consequently filed a petition at the Governorship Election Tribunal of Ekiti State on allegations bordering on non-compliance, irregularities, malpractices, and non-qualification and at the 2nd and 3rd respondents did not win majority of lawful votes cast at the election. The units challenged by the appellants in the petition were 1,458 polling units where the appellants alleged acts of non-compliance and other electoral malpractices that vitiated the election occurred.

The respondents, upon being served, filed their replies to the petition denying all the allegations by the appellants. On their part, the appellants filed replies to the respondents' replies. The appellants for the first time in their reply to the reply of the 2nd and 3rd respondents raised the fact of the existence of a Judgment of High Court of Ekiti State delivered on 30th May 2017. The appellants made allegations against persons who were not made parties to the petition. The reply was accompanied by statements on oath of PW31 and PW32.

At the hearing, the appellants called 71 witnesses and tendered 2,952 exhibits. The 1st respondent called 16 witnesses, 2nd respondent called 43 witnesses and the 3rd despondent called 4 witnesses. The2nd appellant testified as PW31 while PW32 was the appellants' State collation agent. Out of the appellants' 69 other witnesses, 41 were polling agents and the other witnesses were either local government or ward collation agents who gave evidence in respect of polling units where they did not operate in some of the local government areas.

PW31 and PW32 gave general account of what transpired across Ekiti State on the day of the governorship election of 14thJuly 2018, based on the reports received from their respective agents. They gave evidence covering the entire 2,195 polling units in 177 wards of the 16 Local Government Areas of Ekiti State. The 2,954 exhibits tendered by the appellants were tendered from the bar through their counsel at various stages of hearing.

At the conclusion of hearing, the trial tribunal in its judgment struck out the appellants' replies to the respondents' replies on ground of being contrary to paragraph 16(1) of the First Schedule to the Electoral Act, 2010 (as amended). The tribunal struck out the accompanying additional statements on oath of PW31 and PW32.It also struck out paragraphs containing names of persons against whom allegations were made but were not parties to the petition.

The trial tribunal held that the evidence of PW31 and PW32and the evidence of some of the unit collation agents amounted to hear say with no probative value. It finally held that the appellants failed to establish the allegations of non-compliances, over-voting, irregularities, malpractices and other allegations in the petition. It then dismissed the petition.

Aggrieved, the appellants appealed to the Court of Appeal. The Court of Appeal, in its judgment, dismissed the appeal. It held inter alia that the appellants as petitioners did not succeed in calling credible and acceptable witnesses before the trial tribunal and that the trial tribunal was right in its conclusion that the appellants did not discharge burden of proof cast on them.

Still aggrieved, the appellants appealed to the Supreme Court.

In determining the appeal, the Supreme Court considered the provisions of paragraph 16(1) of the First Schedule to the Electoral Act, 2010 (as amended) which states thus:

> "16(1) If a person in his reply to the, election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the Registry within five (5) days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues off acts, save however that:

(a)The petitioner shall not at this stage been titled to bring in new facts, grounds or prayers tendering to amend or add to the contents of the petition filed by him; and

(b) The petitioner's reply does not run counter to the provisions of sub-paragraph (1) of paragraph 14 of this Schedule.

(c)The petitioner in proving his case shall have14 days to do so and the respondent shall have 14 days to reply."

(Dismissing the appeal):

1. *On Who can give evidence of infractions at election –*

***By section* 45 of the Electoral Act, 2010 (as amended), political parties are at liberty to appoint polling agents whose functions are defined therein. They represent their respective political parties at the numerous polling units as, by law, political leaders and all citizens of Nigeria are restricted to their respective polling units. Therefore, evidence on any infraction of the electoral process must be given by the polling agent present at the unit and who also witnessed it. Where polling agents relate any infraction of the electoral process to their leaders, and the leaders take it upon themselves to testify to the infractions or happenings in court, the evidence will amount to hearsay evidence which the court does not accord probative value. In the instant case, the testimonies of PW31 and PW32, with evidence of what occurred throughout 2,195 polling units, amounted to an effort in futility.PW31 expressly admitted that the information to which he testified were obtained from his party agents and that some of the information got to him two days after the conclusion of elections. The trial tribunal was right in holding his testimony to be hearsay and the Court of Appeal rightly affirmed same. The appellants should have called polling agents to show how the figures could have affected the outcome of the election. The use of witnesses who did not witness the infraction was the bane of their petition.** [*Buhari v. Obasanjo* **(2005) 13 NWLR(Pt. 941) 1**; *ACN v. Lamido*

(2012) 8 NWLR(Pt.1303) 560;*Gundiri v. Nyako* **(2014) 2 NWLR (Pt.1391)211;** *Oke v. Mimiko* **(2014) 1 NWLR (Pt. 1388)332**; *Andrew v. INEC* **(2018)9 NWLR (Pt.1625)507**;*Audu v. INEC* (No. 2) **(2010) 13 NWLR (Pt.1212)** 456;*Ojukwu v. Onwudiwe* (1984) 1 SCNLR 237; *Ucha v.Elechi* **(2012) 13 NWLR (Pt. 1317)** 330 referred to.]*(Pp. 682 683,paras.E-B;696,paras.B-C)*Per OKORO, J.S.C. at pages 681-682,paras.H-E; 695-696, paras. G-A:

"A careful consideration of the arguments of all the senior counsel for both parties in this issue shows clearly that it deals with the proprietary or otherwise of the lower court's decision affirming the conclusion or decision of the trial Tribunal on the testimonies of the PW31 and PW32 who gave general account of what transpired across Ekiti State on the day of the governorship election of 14th July,2018, based on the reports received from the irrespective agents. Now who are the PW31 and PW32? The record shows that the PW31 was the candidate of the 1s' appellant and himself the 2nd appellant in this case. The PW32 was the State collation agent of the appellants. The two courts below in their concurrence have held that the evidence of these two witnesses is too general and clearly devoid of any credibility or evidential value. The reasons are that apart from their evidence being a reproduction of the entire petition, they gave evidence covering the entire 2,195 polling units in 177 wards of the 16 Local Government Areas of Ekiti State. Are these two witnesses supermen or oracles of Ife in view of the fact that they were only limited to their polling units only on the day of the election? How were they able to know what transpired in all the 2,195 polling units? There is no evidence on the record that any of the two witnesses is a spirit. They are therefore limited as to time and space. Each of them could only have given evidence as to what transpired in his polling unit alone. All attempts to give evidence as to what happened in other polling units are hearsay having been told by their supporters

from those other voting venues.... My Lords, the facts of this case show that of the1,458 polling units that the appellants alleged acts that vitiated the election, to wit, non-compliance and other electoral malpractices, the appellants called a paltry 71 witnesses and of that number, 41 were polling agents and the others were either local government or ward collation agents inclusive of PW31,the appellant himself, who was neither a polling or collation agent. By the status of these witnesses, who were not polling agents, their testimonies, as I agreed before, are deemed hearsay and inadequate to ground the allegations in reference to incidents that took place at the polling units."

2. *On Who can give evidence of incidents at polling units –*

The only witnesses acceptable in election matters in proof of incidents at polling units are unit agents and no other. In the instant case, in order to prove the allegations in respect of the units they challenged, the appellants had a duty to call the polling unit agents in respect of each of the 1,458units to speak to the documents in respect of their units. *[Gundiri v. Nyako* (**2014) 2 NWLR (Pt.1391) 211;** *Oke v. Mimiko* **(2014) 1 NWLR (Pt. 1388) 332;** *Udom v. Umana* (No: 1) **(2016) 12 NWLR(Pt.1526)179** referred to.](*Pp..692,paras.F-G; 693,paras.B-C)*

3. *On Who can give evidence on polling unit results –*

In giving evidence about polling unit results, it must be shown that the witnesses witnessed the making of the results or were signatories to them. *(P.684, paras. D-E)*

4. *On Probative value of documentary evidence tendered from bar-*

An exhibit tendered from the bar without calling the maker, as done in the instant case, attracts no probative value, because there is no opportunity given to the other party to cross-examine the maker for the purpose of testing its veracity. A court is not

allowed to embark on an inquisitorial examination of documents outside the court room. [*Omisore v.Aregbesola* **(2015) 15 NWLR (Pt.1482) 205** referred to.] (*P.683, paras. C-D*)

5. On Duty on party to relate document tendered to specific area of his case –

Where a party decides to rely on documents to prove his case, there must be a link between the document and the specific areas of the case. He must relate each document to the specific areas of his case for which the document was tendered. On no account must counsel dump documents on the trial court. This is because no court would spend precious judicial time linking documents to specific areas of a party's case. And it is not enough for witnesses to refer to exhibits tendered through the bar and identify them in their testimonies. The witnesses should be able to give admissible evidence on them. In the instant case, the appellants, apart from their failure to call the requisite polling unit agents in respect of each of the polling units complained of also failed to link and/or demonstrate the bundles exhibits tendered from the bar through the witnesses. Out of thousands of documents tendered through the bar, a few witnesses who did not make those documents were used just to identify them as they could not speak on those documents. The documents were merely dumped on the tribunal. *[ANPP v. INEC* **(2010) 13 NWLR (Pt. 1212) 549;** *Ucha v. Elechi* **(2012) 13 NWLR (Pt. 1317)330;** *Iniama v Akpabio* **(2008) 17 NWLR (Pt. 1116)225;** *Udom v. Umana* (No. 1) **(2016) 12 NWLR (Pt.1526)179** referred to.](*Pp..684,paras.. B-E; 690, paras.C-D)*

6. On Duty on party to relate document tendered to specific area of his case –

When a document is tendered in evidence and it is intended in proof of a specific point, the duty on the party who wants to relate the document/exhibit to an aspect of his case is to say so explicitly and not leave the court to investigate the contents of the

documents. This is because admitted documents, useful as they may be, could not be of much assistance to the court in the absence of admissible oral evidence by persons who can explain their importance. In the instant case, exhibits "PVR1"-"PVR16" did not serve any purpose because the Appellants did not call any evidence in the respect of the polling units or call the makers to testify.*[Abi v C.B.N.* ***(*****2012) 3 NWLR (Pt.1286) 1;*** *Udom v. Umana (No. 1)* **(2016) 12 NWLR (Pt. 1526) 179;** *Alao v.Aregbesola* **(2015)15 NWLR (P. 1482)** 205 referred to.] *(Pp.693-694, paras. F-A)*

7. On Right of petitioner to file petitioner's reply-

By virtue of paragraph 16(1) of the First Schedule to the Electoral Act 2010 (as amended), if a person in his Reply to the election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the registry within five days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of facts. However, the petitioner shall not at that stage be entitled to bring in new facts, grounds or prayers tendering to amend or add to the contents of the petition filed by him; and his reply must not run counter to the provisions of paragraph 14 (1) of the Schedule. The petitioner in proving his case shall have fourteen days to do so and the respondent shall have fourteen days to reply. Thus, a petitioner's reply to a respondent's reply to a petition should contain only a response to new issues of facts or law raised in the respondents' reply to the petition. It is not an opportunity to bring in new facts, grounds or prayers tending to amend or add to the contents of the petition filed by the petitioner. In the instant case, the trial tribunal was right in striking out the appellants' reply as it offended paragraph 16(1) of the First Schedule to the Electoral Act,2010 *(as amended). [Akinsanya v.Soyemi* **(1998) 8,NWLR (Pt. 560) 49;** *Olubodun v.*

Lawal（2008） **17 NWLR （Pt. 1115 1** ; *Akeredolu》 Akinremi* **(1989) 3 NWLR (PL. 108) 164;** *Oke v.Mimiko* **(2014) 1 NWLR (Pt.1388) 332** referred to.](*Pp:686-687.paras B-E;687 paras.G-A)*

8. *On Effect where statement on oath not supported by pleadings-*

A statement on oath has no legal value where no pleadings anchor or support it. In the instant case, upon the striking out of the appellants' reply, the statements on oath of the PW31 and PW32 accompanying the reply were of no legal value. (*P.687, para.B.).*

9. *On Treatment of allegation against person not party to an action or election petition-*

Where allegations are made against a person or persons who is or are not a party or parties to an action/petition, such allegations go to no issue and the trial court/tribunal will be on *firma terra* to strike out such paragraphs. (P.687,paras.B-C)

10. *On Course open to court where allegation not made against party to election petition* **- *Where a party is listed in a petition,* and there is no allegation made against such a party, the court can strike out his name in order to prune the issues for determination to manageable size. There is no procedural requirement under the electoral laws, not to talk of the usability, viability or otherwise, of putting names of people that the petitioner has no reliefs against in the petition. A petition must focus on the essentials of its complaint.** [*Yusuf v. Obasanjo* **(2004) 9 NWLR (Pt.877) 144;** *APC v.PDP* **(2015)15 NWLR (Pt. 1481) 1;** *Kalu v. Chukwumerije* **(2012)12 NWLR (Pt.1315) 425** referred to.] *(P. 687, paras.C-F)*

11. *On Proof of allegation of disenfranchisement of voters-*

A voter is disenfranchised when his right to vote is denied him. The court would be satisfied on the proof of disenfranchisement of voters when such Voters give clear evidence that they were

duly registered for the election but were not given the necessary for such voters to tender in evidence their respective voters' cards and registers of voters from each affected polling unit to confirm the allegation of non-voting. Most important is the need for such disenfranchised voters to give evidence to show that if they had been given the opportunity to vote, the candidate of the political party of their choice would have won the election. In the instant case, the appellants failed to lead such evidence. The omission was fatal to the appellants' petition. [*Udom v. Umana (No. 1)* **(2016) 12 NWLR (Pt.1526) 179** referred to.](*P.690,paras.E-H)*

12. *On Onus on petitioner seeking nullification of election –*

A person seeking to nullify an election must succeed on the strength of his case as pleaded and proved by credible witnesses and not on the weakness of the case of the respondent or on the failure of the respondents to adduce any evidence. Therefore, an election tribunal has the bounden duty to consider the petition vis-à-vis the pleadings and witnesses called by the petitioner and where the petitioner fails to satisfy the requirements of proof as the law prescribes, the tribunal is bound to dismiss same. *[CPC v. INEC* **(2011) 18 NWLR (Pt. 1279) 493** referred to.] (*P.691,paras.E-G*).

13. *On Presumption in respect of conduct of election –*

Section 168 of the Evidence Act, 2011 confers presumption of regularity on every official act of the government including the conduct of the governorship election. The burden of rebutting the regularity of the conduct of the election lies with the petitioner who questions same. In rebutting the correctness or regularity of such an official act, credible and cogent evidence must be adduced by such a party seeking such a vitiating relief, and testimonies geared towards that effect should not be at large. Such evidence should be directed to specific vitiating acts as alleged from one polling unit to another, by no other than polling

unit agents who had first-hand observation of what took place at the various polling units. In the instant case, the Court of Appeal was right to agree with the trial tribunal that the appellants failed to prove the petition with credible evidence. [*CPC v. INEC* **(2011) 18 NWLR (Pt.1279)493;** *Wike v. Peterside* **(2016) 7 NWLR (Pt.1512) 452** referred to.] (*P.695, paras.C-G)*

14. On Burden of proof on petitioner in election petition –

In an election petition, the burden of proof lies on the petitioner whose duty it is to adduce evidence for purpose of tilting the scale of justice in his favour. In other words, where the petitioner alleges, and fails to satisfy the burden of proof, he would not be entitled to judgment in his favour. (P. 698,paras. C-D)

15. On Burden of proof in civil cases –

By virtue of section 131(1) and (2) of the Evidence Act 2011, it is the party who desires the court to give judgment in his favour based on a set of facts which he believes entitles him to judgment that must first prove to the satisfaction of the court that those facts exist. By the same token, he who is bound to prove the existence of facts which he alleges bears the burden of proof in that respect. In the instant case, it was the appellants at whose instance the petition was filed with the allegations raised and the ultimate prayers sought that had the duty first by credible evidence to prove to the trial tribunal that indeed they were entitled to the prayers sought. (P.692,paras.B-D)

16. On Burden of proof in civil cases –

Generally, in a civil case, the party that asserts in his pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, his case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, he is said to have discharged the burden of proof and the burden is then said to have shifted to

the party's adversary to prove that the fact established by the evidence adduced could not, on the preponderance of the evidence, result in the court giving judgment in favour of the party. [*Buhari v Obasanjo* **(2005)13NWLR (Pt.941) 1** referred to.](*P.698,paras.F-H)*

17. *On Standard of proof in election petition-*

The general standard of proof in election petition cases, like in civil claims, is on the balance of probability. (P.698,paras.B-C)

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

Where a petitioner complains of non-compliance with the provisions of the Electoral Act, 2010 (as amended), he has a duty to prove it polling unit by polling unit, ward by ward and the standard required is proof on the balance of probabilities and not on minimal proof. He must show figures that the adverse party was credited with as a result of the non-compliance and Forms EC8A and election materials not stamped/signed by presiding officers. He must establish that the non-compliance was substantial and that it affected the result of the election. It is only then that the respondents are to lead exidence in rebuttal. [*Ucha v. Elechi* **(2012)13NWLR (PL. 1317)330** referred to.] (*P.693, paras.C-E)*

19. *On Burden of proof on petitioner alleging non-compliance with provisions of Electoral Act-*

The doctrine of substantial compliance consecrated in section 139(1) of the Electoral Act, 2010 will only arise where the petitioner has succeeded in establishing substantial non-compliance with the principles of the Electoral Act or, in the alternative, substantial effect on the election result of any infraction of the Act, no matter how minuscule the transgression may be. In the instant case, the appellants in all the issues raised

and the allegations made against the respondents were not able to prove cogently that there was substantial non-compliance with the Electoral Act and all the guidelines for the governorship election conducted on 14th July 2018. [*Omisore v. Aregbesola* **(2015) 15 NWLR (Pt. 1482)205** referred to.](*Pp.699-700, paras.G-B)*

20. On Burden of proof on petitioner alleging non-compliance with provisions of Electoral Act –

By virtue of section 137(1) and (2) of the Electoral Act 2010, the standard of proof is on preponderance of evidence. That is to say, one side's position outweighs the other. The petitioner is to prove that there was non-compliance with the provisions of the Electoral Act. He must also prove that the non-compliance was substantial, that it affected the results of the election. It is then the burden shifts to the respondent to rebut that fact. Evidence led by a petitioner outweighs that of the respondent when the petitioner is able to establish substantial non-compliance and there is only a feeble response or nothing much forthcoming from the respondent in rebuttal. [*Aliucha v. Elechi* **(2012) 13 NWLR (Pt.1317) 330** referred to.](*P.699, paras.E-G)*

21. On Standard of proof of allegation of crime in election petition-

Allegations questioning the propriety of elections verged on criminal acts must be proved beyond reasonable doubt. Therefore, in the election petition, the standard of proof is proof beyond reasonable criminal nature. [*Aliucha v. Elechi* **(2012) 13 NWLR (Pt.1317) 330** referred to.(*Pp.698-699, paras.H-A*)

22. On Basis of believing or disbelieving of witness by trial court –

Issue of believing or disbelieving witnesses by a trial court is usually based on evidence before the court and also on the demeanour of those witnesses which the trial court has the opportunity of assessing. In the instant case, the issue was not on which witness to believe. The issue rested on the fact that the

appellants failed to field the core witnesses to prove the grave allegations made in the petition. In declaring the testimonies of all the collation agents who the appellants called in proof of their case as hearsay, the tribunal acted on sound legal principles

23. *On Importance of credibility of witness –*

Credibility of a witness ensures reliability without which no cognisance would be taken thereof. A witness who testifies by his senses of the existence of fact is worthy of recognition and proof. However, a hearsay witness cannot testify to the existence, truth and veracity of a fact. (*P.698,paras.D-E)*

24. *On Whether proof of case depends on number of witnesses called-*

For the just determination of a case, the proof is not dependent upon the number of witnesses called, but rather the credibility thereof. The evidence of one credible witness will stand tall and weighty as against multiple witnesses whose evidence is to the contrary. (P.698, paras.E-F)

25. *On What entry of judgment presupposes –*

Securing judgment presupposes that the justice of the case is given to the party in whose favour it is declared. (*P.698, para. D*)

26. *On Attitude of Supreme Court to concurrent findings of fact by trial court and Court of Appeal and when it can interfere therewith-*

The Supreme Court can hardly interfere with the concurrent findings of a trial court and the Court of Appeal except such findings are perverse or lead to a miscarriage of justice. In the instant case, the findings of the trial tribunal and the Court of Appeal that the appellants' replies to the respondents' replies to the petition were contrary to paragraph16(1) of the First Schedule to the Electoral Act, 2010(as amended) were concurrent. [*Obasuyi v.BusinessVentures Ltd.* **(2000) 5 NWLR (Pt.658) 668;**

Dairo v. UBN Plc **(2007) 16 NWLR (Pt. 1059) 99** referred to.] (*P.685, paras.F-H*)

Nigerian Cases Referred to in the Judgment:

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

A.N.P.P. v. I.N.E.C. (2010) 13 NWLR (Pt. 1212) 549

A.P.C. v. P.D.P. (2015) 15 NWLR (Pt. 1482)1

Abi v. C.B.N. (2012)3 NWLR (Pt. 1286)1

Akeredolu v Akinremi (1989) 3 NWLR (Pt. 108)164

Akinsanya v. Soyemi (1998) 8 NWLR (Pt.560) 49

Alao v. Akano (2005) 11 NWLR (Pt. 1437) 160

Andrew v. I.N.E.C. (2018) 9 NWLR (Pt.1625) 507

Aregbesola v. Oyinlola (2011) 9 NWLR (Pt. 1253)458

Audu v. I.N.E.C. (2010) 13 NWLR (Pt. 1212) 456

Buhari v. Obasanjo (2001) 13 NWLR (Pt.941)1

Buhari v. Obasanjo (2014) 1 NWLR (Pt. 1388) 332

C.P.C. v. I.N.E.C. (2011) 18 NWLR (Pt. 1279) 493

Dairo v. U.B.N. Plc (2007) 16 NWLR (Pt. 1059) 99

Gundiri v. Nyako (2014) 2 NWLR (Pt. 1391) 211

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

Kalu v. Chukwumerije (2012) 12 NWLR (Pt. 1315) 425

Ladoja v. Ajimobi (2016) 10 NWLR (Pt. 1519) 87

Mmaduabu v. Nwaosu (2010) 13 NWLR (Pt. 1212) 623

Obasuyi v. Business Ventures Ltd. (2000) 5 NWLR (Pt. 658) 668

Oke v. Mimiko (2014) 1 NWLR (Pt. 1388) 332

Olubodun v. Lawal (2008) 17 NWLR (Pt. 1115)1

Omisore v. Aregbesola (2015) 15 NWLR (Pt.1482) 205

P.D.P.v.I.N.E.C. (2014) 17 NWLR (Pt.1625) 525

Ucha v. Elechi (2012) 13 NWLR (Pt.1317)330

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

United Nigeria Insurance Co. Ltd. v. Universal Commercial & Industrial Co. Ltd. (1999) 3 NWLR (Pt. 593) 17

Wike v. Peterside (2016) 7 NWLR (Pt. 1512) 452

Yusuf v. Obasanjo (2004) 9 NWLR (Pt. 877) 144

Nigerian Statutes Referred to in the Judgment:

Electoral Act, 2010 (as amended), Ss. 45, 137(1), (2), 139(1);

Para. 16(1) of the 1st Schedule

Evidence Act, 2011, Ss. 131(1)(2),168

Appeal:

This was an appeal against the decision of the Court of Appeal dismissing the appeal against the judgment of the Governorship Election Tribunal which dismissed the appellants' petition. The Supreme Court dismissed the appeal.

History of the Case:

Supreme Court:

Names of Justices that sat on the appeal: IbrahimTanko Muhammad, Ag. C.J.N. (*Presided*); Olukayode Ariwoola,J.S.C.; John Inyang Okoro, J.S.C.(*Read the Leading Judgment*); Paul Adamu Galumje, J.S.C.; UwaniMusa Abba Aji, J.S.C.

Appeal No.: SC.409/2019

Date of Judgment: Friday, 24th May 2019

Names of Counsel: Yusuf Ali, SAN; Adebayo Adelodun,

SAN;Prof. Wahab Egbewole,SAN (with them, Alex

Okoga, Esq. and Adesina Agbede,Esq.)-*for the Appellants*

Charles Edosomwan, SAN (*with him*, Chris Onwugbonu,Esq.; Muyideen

Obans, Esq. and Dayo Ashonibare, Esq.)

-for the 1st Respondent

Olumide Olujinmi, Esq. (*with him*, Akinsole,Olujinmi,Esq.;Oluwole Ilori, Esq.; Abdulwahab Abayomi, Esq.and Chiazor Ngige, Esq.) - for the 2" Respondent

S.D. Ajayi,Esq. (*with him*, Thomas Ojo, Esq.; Ademola Adeleye, Esq.; Vicar Ogbuafor, Esq. and Sadiq Ahmed,Esq.)-for the 3rt Respondent

Court of Appeal:

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

Names of Justices that sat on the appeal: Stephen Jonah Adah,J.C.A.

(*Presided and Read the Leading Judgment*); Tinuade Akomolafe-Wilson, J.C.A.; Emmanuel Akomaye Agim,J.C.A.

Appeal No.: CA/A/EPT/139/2019

Date of Judgment: Thursday,28th March 2019

Names of Counsel: Yusuf Ali, SAN; Adebayo Adelodun,SAN; Roland I. Otaru, SAN; Ola Olanipekun, SAN; Kehinde K.Eleja, SAN; Prof. Wahab Egbewole, SAN; Olalekan Ojo, SAN (*with them*, Alex Akoja, Esq.; Patricia Ikpegbu, Esq.; O.I. Lawal, Esq. and K.T. Sulyman, Esq.)-*for the Appellants*

Uwensuyi - Edosomwan, SAN (*with him*, Chris Ewere Onwugbonu, Esq.; Osasu Isibor, Esq.; Seun Awolade,Esq.; Muyideen Obans, Esq.; Dayo Ashonibare,Esq.;and John Edjeba, Esq.) -*for the 1st Respondent*

Nathaniel Agunbiade, Esq.(*with him*, Ifeanyi Egwuasi, Esq.; Kazeem Gbadamosi, Esq.; Ojo Adebayo, Esq.;Oloyede Oyediran, Esq.; Olumide Olujinmi, Esq.;Akinsola Olujinmi, Esq.; Akinyemi Olujinmi, Esq.; AyoAkinsanya,Esq. and Abdulwahab Abayomi, Esq.) - *for the 2nd Respondent*

L. O. Fagbemi, SAN; John Olusola Baiyeshea, SAN;

J.O.Olatoke, SAN; H. O. Afolabi, SAN; Muiz Banire,

SAN (*with them*, Olusola A. Dare, Esq.; Seun Ajayi, Esq.;

Kazeem Adedeji,Esq.;Lateef A.Adedigba,Esq.;SikiruAdewioye, Esq.; R. O. Balogun, Esq.;I. K. Olanirewaju,Esq.;Kabir Akingbolu, Esq.;L.L.Akanbi, Esq.; TajudeenAkingbolu,Esq.; B. A. Oyun, Esq.; Rashidi Isamotu,Esq.; Thomas Ojo, Esq. and Oluwaseye T.Adeboye,Esq.)-*for the 3rd Respondent*

Tribunal:

Name of the Tribunal: Ekiti State Governorship Election

Petition Tribunal, Ekiti

Petition No.: EPT/EKS/GOV/01/2018

Date of Judgment: Monday, 28th January 2019

Counsel:

Yusuf Ali, SAN; Adebayo Adelodun, SAN; Prof. WahabEgbewole,SAN (with them, Alex Okoga, Esq. and Adesina Agbede,Esq.) - *for the Appellants* Charles Edosonwan,SAN (*with him*, Chris Onwugbonu,Esq.;Muyideen Obans, Esq. and Dayo Ashonibare, Esq.)-*for the1st Respondent*

Olumide Olujinmi, Esq.(*with him*, Akinsole Olujinmi, Esq.; Oluwole Ilori, Esq.; Abdulwahab Abayomi ,Esq. and Chiazor Ngige, Esq.)-*for the 2nd Respondent*

S.D. Ajayi, Esq. (*with him*, Thomas Ojo, Esq.; AdemolaAdeleye,Esq.; Vicar Ogbuafor, Esq. and Sadiq Ahmed, Esq.)- *for the 3rd Respondent*

OKORO, J.S.C. (Delivering the Leading Judgment): This is an appeal against the judgment of the Court of Appeal, Abuja Division delivered on 28th March, 2019, which dismissed the appeal of the appellants who had also lost at the trial Election Petition Tribunal.

The 1st appellant sponsored the 2nd appellant as its candidate at the Governorship Election held on the
14th of July, 2018. The third respondent was, on the other hand, sponsored by the 2nd respondent.

At the end of the exercise, the 1st respondent declared the 3rd have polled majority of lawful votes cast at the election. The appellants polled 178,121 votes while the 2nd and 3rd respondents polled 197,459 votes.

The appellants being dissatisfied with the result of the elections announced and declared by the 1st respondent, filed their petition on 3rd August, 2018. The grounds of their petition are as contained in paragraph 17 of the petition wherein allegations bordering on non-compliance, irregularities, malpractices, non-qualification were raised and that the 2nd and 3rd respondents did not win majority of lawful votes cast at the elections.

The respondents upon being served filed their replies to the petition denying all the allegations by the appellants.

At the close of pleadings, parties filed their pre-trial conference forms and pre-hearing sessions held. At the hearing, the appellants called 71 witnesses and tendered 2,952 exhibits. The 1st respondent called 16 witnesses, 2nd respondent called 43 witnesses and the 3rd respondent called 4 witnesses. Upon close of evidence, parties filed their written addresses and adopted same on 9th January, 2019.The Tribunal delivered its judgment on 28/1/19 and dismissed he petition. An appeal to the Court of Appeal was dismissed. Appellants have further appealed to the court.

Briefs of argument were filed and exchanged by all the parties. The appellants formulated 6 (six) issues for the determination of this appeal. 1st respondent distilled four issues.

The other respondents also distilled issues for the determination of this appeal. At the hearing of this appeal on 16th May, 2019, both senior and other counsel representing all the parties adopted their respective briefs. While the learned senior counsel for the appellants urged the court to allow the appeal, the senior counsel representing the three respondents urged the court separately to dismiss this appeal.

In the appellant's brief settled by

Yusuf Ali, SAN, leading other counsel which was filed on 25th April, 2019, the six issues are as follows:-

1. Whether the court below acted in accordance with the law by agreeing with the trial Tribunal in the way it failed to ascribe probative value to the testimonies of PW31 and PW32 who gave uncontroverted; cogent and believable testimonies and which also proved the contents of all the exhibits tendered at the trial.(Grounds 1 and 2)
2. Whether the court below acted rightly in endorsing the trial Tribunal's decision that struck out the replies filed by the appellants to the replies of the Respondents, filed against the petition and for striking out the names of certain persons in some of the paragraphs of the appellants' replies.(Grounds 3 and 4) Whether the Court of Appeal was correct in agreeing with the trial tribunal that the appellants failed to prove the sundry allegations they made against the return of the 2md and 3d respondents in Moba, Ise Oru, Oye, Efon, Ekiti East, Gbonyin, Ikole, Ileje Meje, Ido/Osi, Ado Ekiti and other Local Governments where the appellants challenged the return of the 3rd respondent. (Ground 5)
3. Whether the court below did not breach the right of the appellants to a fair hearing in agreeing with the trial tribunal in the unequal treatment of the testimonies of the witnesses called by the respondents on one hand and the appellants on the other, which held that collation agent called by the appellants gave hearsay evidence but that electoral officers called by the respondents did not, after it has been shown that the two sets of witnesses did not visit the polling stations on which they testified (Ground 6).
4. Whether the court below acted in accordance with the law, when it agreed with the trial Tribunal that the appellants dumped all the documents tendered before the Tribunal, notwithstanding the fact that PW31,PW32 and other witnesses called by the 1" Respondent gave evidence on, demonstrated and linked the exhibits to the case of the appellants.(Ground7)

5. Whether the court below was correct in upholding the decision of the trial Tribunal that the appellants failed to discharge the burden of proof on the sundry allegations of non-compliance, over-voting, incorrect ballot account, infractions and other allegations contained in the petition, when this was not so. (Grounds 8 and 9)

Charles Uwensuyi - Edosomwan, SAN, senior counsel for the 1st respondent distilled four issues for the determination of this appeal as contained in the brief of argument he filed on 30th April, 2019. The four issues are couched thus: -

1. Whether the lower appellate court was right inholding, thus agreeing with the Honourable Tribunal that no probative and credible value could be ascribed to the Evidence of PW31 and PW32; through whom the appellants claimed documents (rightly held to have been dumped) were identified and affixed to specific allegations of the appellants' petition. (Ground 1,2and 7)
2. Whether the lower appellate court was right in holding and thus agreeing with the Honourable Tribunal, that the appellants failed to prove their allegations in the contested local government areas. (Ground 5)
3. Whether any undue advantage was given to respondents (especially the 1st respondent) as against the appellants in the presentation/evaluation of the testimony of the irrespective witnesses, as to amount to a breach of the appellants' right to fair hearing. (Ground 6)
4. Whether on the whole the appellants proved their case (at the Tribunal) such as to entitle them to the favourable judgment of the lower appellate court, against the backdrop of the allegations of non-compliance, overvoting, incorrect ballot accounting among others. (Grounds 8 and 9)

The second respondent, represented by Chief Akin Olujinmi, SAN who settled its brief, leading other senior and other counsel formulated six issues same as the appellants,

The six issues may be stated as follows: -

1. Whether the Court of Appeal was not right in affirming the decision of the tribunal that the testimonies ofPW31 and PW32 lacked probative value and did not prove the contents of all the exhibits tendered at the trial. Covers grounds 1 and 2.

2. Whether the Court of Appeal was not right in affirming the decision of the Tribunal striking out the appellants' reply filed in reply to the respondants' striking out the paragraphs containing names of persons against whom allegations were made but are not parties to the petition. Covers grounds 3 and 4.
3. Whether the court of Appeal was not right in affirming the decision of the Tribunal that the appellant did not prove the sundry allegations on the conduct of the elections in Moba, Ise Orun, Oye, Efon, Ekiti East, Gbonyin Ikole, Ilejemele, Ido/Osi, Ado Ekiti and other Local Governments where the appellants challenged the return of the 3rd respondent (Ground 5)
4. Whether the Court of Appeal was not right when it affirmed the decision of the Tribunal that the tribunal did not abdicate its duty of impartiality in giving even consideration to the case of the parties. Covers ground 6.
5. Whether the Court of Appeal was not right in holding that the appellants merely dumped documents on the tribunal due to lack of oral evidence to tie the documents to relevant aspects of the appellants case through the witnesses called. Covers ground 7.
6. Whether the Court of Appeal was not right when it affirmed the decision of the tribunal that the Appellants failed to prove any of their alleged irregularities and non-compliance on the conduct of the election. Covers grounds 8 and 9.

Finally, on this aspect, the brief of the 3rd respondent was settled by Seun Ajayi, Esq and filed on 13th May, 2019. Six issues are distilled for determination. The six issues are: -

1. Whether the lower court was not right in agreeing with the decision of the trial Tribunal in its consideration of the evidence of PW31 and PW32 alongside other materials before it? (Grounds 1 and 2);
2. Whether the lower court was not right in affirming the decision of the trial Tribunal striking out the Replies filed by the appellants of the replies of the Respondents to the petition and in striking out the names of the persons in paragraphs of the petition and Replies? (Grounds 3 and 4)
3. Whether the lower court was not right in agreeing with the trial Tribunal's decision that the appellants did not prove their allegations in Moba, Ise Orun, Oye, Efon, Ekiti East, Gbonyin, Ikole, Ilemejele, Ido/Osi, Ado Ekiti and other Local

4. Government where the appellants challenged the return of the 3rd respondent? (Ground 5).
5. Whether having regard to the onus and burden of proof, the lower court was not right in refusing to interfere with the evidence properly evaluated by the trial tribunal in its consideration of the case of the parties? (Ground 6);
6. Whether the lower court was not correct in affirming the holding of the trial Tribunal that appellants' dumped documents on the tribunal and the dumped documents were not demonstrated by PW31 and PW32? (Ground7); and
7. Whether the lower court was wrong in upholding the trial Tribunal's holding that the appellants did not discharge the burden of proof cast on them, and prove the various heads of allegation of non-compliance, over voting, incorrect ballot account, infractions and other allegations? (Grounds 9 and 10).

On receipt of the briefs of argument of the 1st to 3rd respondents, he appellants filed reply briefs on 8th May, 2019, 2nd May 2019 and 6th May, 2019 to the 1st, 2nd and 3rd respondents' briefs respectively. I shall
determine this appeal based on the six issues distilled by the appellants.

Issue 1

This issue is whether the court below acted in accordance with the law by agreeing with the trial Tribunal in the way it failed to scribe probative value to the testimonies of PW31 and PW32 who gave uncontroverted, cogent and believable testimonies and which also proved the contents of all the exhibits at the trial.

In his opening statement, on this issue, the learned senior counsel for the appellants submitted that whereas the respective testimonies of the two witnesses were quite extensive and touched on virtually every allegation in the petition, neither of the two witnesses was challenged let alone contradicted under cross-examination. That the consequence of failure to cross-examine adversary’s witness is an admission of his testimony. It is his view that the lower court fell into the same error with the trial Tribunal which failed to review and ascribe probative value to the evidence of PW31 and PW32.

Learned senior counsel submitted further that by adopting the position of the trial Tribunal, the lower court was wrong and occasioned a grave miscarriage of justice to the appellants. That once a witness adopts his statement on oath, the content becomes evidence in

chief and the court is under an obligation to evaluate same and not to treat same as mere allegation requiring proof as done by the Tribunal in this case, relying on the case of *Aregbesola v. Oyinlola* (2011) 9 NWLR (Pt. 1253) 458 at 605-606 paragraphsH- B. According to learned Silk,the court below was wrong to rely on the case of *Omisore v. Aregbesola* (2015) LPELR-24803(SC), (2015) 15

NWLR(Pt.1482)205 because in the instant case against the decision in *Omisore's case*, the witnesses identified the documents and spoke to the documents. He concluded that the appellants succeeded in proving these allegations of non-compliance with the Electoral Act provisions not just by having the recent electoral documents admitted in evidence but also by having same identified by the witnesses before the Tribunal. He urged this court to resolve this issue in favour of the appellants.

In response, the learned senior counsel for the 1st respondent, Charles Uwensuyi - Edosomwan, SAN, apart from submitting that by section 168 of the Evidence Act, 2011 which confers presumption of regularity on every official act of the government including the act of INEC conducting the governorship election of 14th July,2018 in Ekiti State which the appellants failed to rebut, he opined that the PW31,having expressly admitted that not only were the information to which he testified obtained from some third parties, some of those information got to him days after the conclusion of the election. He submitted that the testimony of PW31 was hearsay, He stressed that the only

set of witnesses whose testimonies would be credible to establish the allegations concerning incidents at the polling units are polling agents for which neither the PW31 norPW32 met this requirement. He submitted that the court below was right to discountenance the evidence of both PW31 and PW32, relying on *Buhari v. Obasanjo* (2005) 13 NWLR (Pt.941) 1, *Oke v. Mimiko* (2014) 1 NWLR (Pt.1388)332.

Learned senior counsel further submitted that the position of PW32 is the same as that of PW3 because he also gave hearsay evidence. According to him, the lower court having found the testimonies of PW31 and PW32 to be vitiated by hearsay, the documents - EC 8 As, EC 8 Bs et al which were purportedly given life by the participation of PW31 and PW32 in the trials are equally deemed to be documentary hearsay, relying on *Udom v. Umana* (2016)2 SC (Pt.1) page 1, (2016) 12 NWLR (Pt. 1526) 179; *Ladoja v. Ajimobi* (2016) 10 NWLR (Pt. 1519) 87 at 144 - 145. He urged the court to resolve this issue against the appellants.

The learned senior counsel for the second respondent Chief Akin Olujinmi, SAN, leading other senior and other counsel submitted in the same vein as learned Silk for the 1st respondent. In the main, he submitted that the evidence of PW31 and PW32 did not prove the contents of all the exhibits tendered at the trial. That the two witnesses were not polling agents who could give evidence on what transpired at the polling units in support of the various allegations made in the petition. He added that the whole evidence of PW31 and PW32 amounts to hearsay.

In his submission in this issue, the learned counsel for the 3rd respondent who settled this brief, Seun Ajayi, Esq, submitted that the evidence of the PW31 and PW32 are legally inadmissible and devoid of any evidential value, thereby making the decision of the lower court upholding the decision of the trial Tribunal in not according probative value to same correct and unassailable. All the respondents' counsel urged this court to resolve this issue against the appellants.

Learned senior counsel for the appellants filed reply briefs to the arguments of the three respondents. His replies in the main is that apart from the PW31 and
PW32, the appellants called 69 other witnesses, 41 of which were polling agents but curiously, the two courts below did not ascribe them probative value. That the cases of *Ladoja v. Ajimobi* (supra) and *Omisore v. Aregbesola* (supra) relied upon by the court below are clearly misplaced because the facts inthis appeal are distinguishable from the two cases. He urged this court to so hold.

Resolution of Issue 1

A careful consideration of the arguments of all the senior counsel for both parties in this issue shows clearly that it deals with the proprietary or otherwise of the lower court's decision affirming the conclusion or decision of the trial Tribunal on the testimonies of the PW31 and PW32 who gave general account of what transpired across Ekiti State on the day of the governorship election of 14th July, 2018, based on the reports received from their respective agents. Now who are the PW31 and PW32? The record shows
that the PW31 was the candidate of the 1st appellant and himself the 2nd appellant in this case. The PW32 was the State collation agent of the appellants.

The two courts below in their concurrence have held that the evidence of these two witnesses is too general and clearly devoid of any credibility or evidential value. The reasons are that apart from their evidence being a reproduction of the entire petition, they gave evidence covering the entire 2,195 polling units in 177wards of the 16 Local Government Areas of Ekiti

State. Are these two witnesses' supermen or oracles of Ife in view of the fact that they were only limited to their polling units only on the day of the election? How were they able to know what transpired in all the 2,195 polling units? There is no evidence on the record that any of the two witnesses is a spirit. They are therefore limited as to time and space. Each of them could, only have given evidence as to what transpired in his polling unit alone. All attempts to give evidence as to what happened in other polling units are hearsay having been told by their supporters from those other voting venues.

By section 45 of the Electoral Act, 2010 (as amended) political parties are at liberty to appoint polling agents whose functions are defined therein. They represent their respective political parties at the numerous polling units as by law, political leaders and indeed all citizens of Nigeria are restricted to their respective polling units. Therefore, evidence on any infraction of the electoral process must be given by the agent who was present at the unit and who also witnessed it. Where they relate these happenings to their leaders who take it upon themselves to testify to these infractions or happenings in court, definitely, this will amount to hearsay evidence which the court does not accord probative value. Therefore, when the PW31 and PW32 set out to testify, armed with all the evidence of what occurred throughout the 2,195 polling units in the State in relation to each polling unit it was an effort in futility. See *Buhari v. Obasanjo* (2005) 13 NWLR (Pt. 941) 1 at315, *ACN v. Lamido* (2012) 8 NWLR (Pt.1303) 560, *Gundiri v. Nyako* (2014) 2 NWLR (Pt.1391)211, *Oke v. Mimiko* (2014) NWLR(Pt.1388)332.

In a situation where the PW31 expressly admitted that not only were the information to which he testified obtained from his party agents, some of those informations got to him two days after the conclusion of elections, his testimony was rightly held to be hearsay as held by the Tribunal and affirmed by the lower court. See pages 9740 - 974 (Vol. 16) of the record of proceedings and page 9742 of same. Even where the PW31 was able to link the documents tendered through the Bar with his testimony, such exercise will still make his testimony hearsay as the documents were not made by him and he cannot answer questions on them. I must state categorically that exhibits tendered from the Bar, as, done in the instant case, without calling the makers thereof attract no probative value because there was no opportunity given to the respondents to cross-examine the makers for the purpose of testing its veracity. See *Omisore v. Aregbesola* (*supra).* The law is well settled that a court is not allowed to embark on an inquisitorial examination of documents outside the court room. What the PW31and PW32 did was to report to the court what their agents told them even on the documents tendered through the Bar. This is what the lower court said on page 11142 - 11146 of Vol. 18 of the record: -

> "When cross examined on these depositions, he confirmed that he became aware of the facts related to him by "our agents and informants from our representatives." The agent's informants and representatives were not mentioned or named. He did not say anywhere that after casting his own

vote, he went around other polling units. Under cross-examination he asserted that after casting his vote he went back to his house. That he got the results of the election two days after from the polling unit agents. It is very clear and it is without controversy here that the evidence of the PW31 is purely hearsay.....from his deposition the account he has given was relayed to him by a collation agent or agents. The evidence is therefore hearsay. Hearsay evidence, oral or documentary is in admissible and lacks probative value. (See page 37 of Evidence Act and *Okereke v. Umalu* (2016) 11

> NWLR (Pt.1524)438. It is settled position of our law that as a petitioner, the appellant who alleged non-compliance with the Electoral Act has the burden to prove his petition by calling witnesses to prove to the satisfaction of the court/tribunal not only on the conduct of the elections but also that the non-compliance has affected the result of the election".

The law is trite that where a party decides to rely on documents to prove his case, there must be a link between the document and the specific areas of the petition. He must relate each document to the specific areas of his case for which the document was tendered. On no account must counsel dump documents on the trial court. No court would spend precious judicial time linking documents to specific areas of a party's case. See *ANPP v. INEC* (2010) 13NWLR (Pt. 1212)549, *Ucha v. Elechi* (2012)13 NWLR (Pt.1317)330, *Iniama v Akpabio* (2008) 17 NWLR (Pt. 1116) 225, *Udom v.Umana* (2016) 12 NWLR (Pt. 1526)179.

Let me say emphatically that it is not enough to argue thatPW31 and PW32 and other witnesses referred to those 2,952exhibits tendered through the Bar and even identified them in their testimonies without showing that these witnesses can give admissible evidence on them. In the case of polling unit results, it must be shown that the witnesses witnessed the making of the result or were signatories to them.

I agree that the lower court was right when it held in their judgment that the trial tribunal was right to hold that the evidence of PW31 and PW32 were hearsay and lacked probative value. Accordingly, I resolve the first issue against the appellants.

Issue Two:

The complaint of the appellants in this issue is that the lower court was wrong to agree with the trial Tribunal which struck out their reply to the 2nd and 3rd respondents' reply to the petition. Learned senior counsel for the appellants submitted that by paragraph 16(1) of the 1st Schedule to the Electoral Act, 2010 (as amended), a petitioner in an election petition proceeding is eminently qualified to file a reply to the reply of any of the respondents to the petition where such respondents raise new issues of law or facts in their defence to the petition and which the petition has not deal with. That contrary to the decision of the lower court, the replies did not raise any new issue. On the need to file such reply, learned Silk referred to the case of *Mmaduabu v. Nwaosu* (2010) 13 NWLR
(Pt. 1212) 623.Learned counsel also faulted the striking out of additional statement on Oath of the PW31 and PW32. Also, that the lower court was wrong to agree with the trial Tribunal striking out names of some persons as there was no prayer to that effect. He urged the court to resolve this issue in favour of the appellants.

Chief Akin Olujinmi, SAN, learned senior counsel for the second respondent submitted that throughout the submission of the appellants contained in paragraphs 5.02 to 5.07 of their brief they failed to highlight, show and demonstrate before this court what new issues of fact or law is contained in the respondents' reply which justified the Petitioners replies filed. Secondly, the petitioner's reply having been struck but by the Tribunal the accompanying processes like PW31 and PW32's statements on Oath had no place in the petition anymore. Thirdly, that where a person has not been made a party to the petition, all criminal allegations made specifically against him go to no issue and such paragraphs ought to be struck out.
Learned counsel for the 3rd respondent joined the 2nd respondent in similar submissions but added that the trial tribunal was on sound legal footing to have struck out the names of the persons against whom many allegations were made by the appellants without having found them as parties to the petition. That the 2nd and 3rd respondents clearly prayed that the names be

struck out. All counsel for the respondents urged this court to resolve this issue against the appellants.

Resolution: -

Both the trial tribunal and the court below have found that the appellants' replies to the replies of the respondents to the petition were contrary to paragraph 16(1) of the First Schedule

to the Electoral Act, 2010 (as amended). These are concurrent findings of the two lower courts. The law is trite that this court can hardly interfere with the, concurrent findings of the two courts below except such findings are perverse or leads to a miscarriage of justice. See *Obasuyi & Anor v. Business Ventures Ltd.* (2000) 5 NWLR(Pt.658) 668, *Dairo v. U.B.N. Plc & Anor* (2007) 16 NWLR (Pt.1059) 99.

In circumstance of this case, the appellants had a duty to interrogate the respondents' replies to their petition and come out with the new points of law or facts which necessitated the issues they raised in their appellants' reply. However, throughout the submissions of the appellants in their brief, they failed to highlight, show and/or demonstrate before this court what new issues of factor law are contained in the respondents' replies which justify the petitioner's replies filed.

Paragraph 16(1) of the First Schedule to the Electoral Act, 2010 (as amended) provides:-

"16(1) If a person in his reply to the, election petition raises new issues of facts in defence of his case which the petition has not dealt with, the petitioner shall be entitled to file in the Registry within five (5) days from the receipt of the respondent's reply, a petitioner's reply in answer to the new issues of facts, save however that: -

(a) The petitioner shall not at this stage be entitled to bring in new facts, grounds or prayers tendering to amend or add to the contents of the petition filed by him; and

(b) The petitioner's reply does not run counter to the provisions of sub-paragraph (1) of paragraph 14 of this Schedule.

(c) The petitioner in proving his case shall have 14days to do so and the respondent shall have 14days to reply."

As pointed out in his brief, the learned counsel for the 3rd respondent in paragraph 4.41 thereof, the appellants raised the issue of facts for the first time in his reply regarding the existence of the judgment of Ekiti High Court in suit No. HAD/57/2017: *Dr. John Kayode Fayemi v. Governor of Ekiti State & 11 ors* delivered on 30th May, 2017. At that stage, the 3rd respondent had no opportunity to controvert the averments because the provision of the First Schedule to the Electoral Act reproduced above has foreclosed him from filing further pleadings.

I need not over flog the issues. The law is very clear that appellants' reply to respondents reply to a petition should contain only a response to new issues of facts or law raised; in the respondents' reply to the petition. It is not an opportunity to bring in new facts, grounds or

prayers tending to amend or add to the contents of the petition filed by the petitioner. See *Akinsanya v.Soyemi* (1998) 8 NWLR (Pt.560) 49, *Olubodun v. Lawal* (2008) All FWLR (Pt. 434) 1468, (2008) 17 NWLR (Pt.1115)1, *Akeredolu v. Akinremi* (1989) 3 NWLR (Pt. 108) 164, *Oke v. Mimiko* (supra). I agree with the court below that the trial Tribunal was right in striking out the appellant's reply same having offended paragraph16(1) of the First Schedule to the Electoral Act, 2010 (as amended).

Secondly, having struck out the appellants' reply, the statements on oath of the PW31 and PW32 accompanying the reply were of no legal value as there was no pleadings to anchor or support same.

Again, the law is trite that where allegations are made against a person or persons who are not parties to the petition, such allegations go to no issue and the trial Tribunal will be on *firma terra* to strike out such paragraphs. Also where there is a party listed in the petition where no single allegation is made against such a party, I do not see anything wrong if his name is struck out in order to prune the issues for determination to manageable size. See *Yusuf v. Obasanjo* (2004) All FWLR (Pt. 213) 1384 at 1920, (2004)9 NWLR (Pt. 877) 144. I agree with the court below when it held that there is no procedural requirement under the Electoral Laws not to talk of the usability, viability or otherwise of putting names of people that the petitioner has no reliefs against in the petition. Apetition must focus on the essentials of its complaint. See. *APC v.PDP* (2015) 15 NWLR (Pt. 1481) 1, *Kalu v. Chukwumerije* (2012) 12 NWLR (Pt. 1315) 425. The outcome of all I have said above is that the appellants have failed to show why the concurrent findings of the two, courts below on this issue should be disturbed. I resolve this issue against the appellants also.

Issue Three: -

This issue challenges the decision of the lower court which agreed with the trial Tribunal that the appellants failed to prove the sundry allegations they made against the return of the 2nd and 3rd respondents in Moba, Ise Orun, Oye, Efon, Ekiti East Gbonyin,Ikole,Ileye Meje, Ido/Osi, Ado Ekiti and other Local Governmentswhere the appellants challenged the return of the 3rd respondent.

In the main, the learned senior counsel for the appellants submitted that having not frontally traversed the allegations of non-compliance, corrupt practices, irreconcilable entries, discrepancies between the print copy and certified true copies, electoral

EC 8 B, non-holding of election in a number of polling units across the State, large number of rejected votes/deliberate voiding of votes card reader, the 1st respondent has thus admitted the averments and they need no further proof. That the overall effect of non-compliance therefore is that a total number of 10,059 registered voters were unjustifiably disenfranchised. He contended that the failure to conduct elections in the affected polling units have, substantially affected the election which has deprived 10,059 registered voters, covering seven local government areas the opportunity to elect a candidate of their choice.

Furthermore, the learned Silk opined that the election leading to this appeal is largely based on documents and thus, that the appellants have clearly shown that the documents had something to hang on through the witnesses that were called, as well as the cross-examination of the respondents' witnesses. He relies on the cases of *United Nigeria Insurance Co. Ltd. v. Universal Commercial &Industrial Co. Ltd.* **(1999) 3 NWLR (Pt. 593) 17,** *Diamond Bank v. PAMOB West Africa Ltd.* (2014) LPELR - 24337 (CA) –that where there is oral evidence as well as documentary evidence, the documentary evidence should be used as a hanger by which the oral evidence will be assessed.

He urged the court to resolve this issue in favour of the appellants.

In response, the senior counsel for the 2nd respondent and counsel for the 3rd respondent, as if they sat together to write their respective briefs, submitted contrary to the arguments of the appellants. They referred to pages 10753- 10842, volume 17of the printed record of appeal which contains the extensive and comprehensive review of the evidence of the appellants by the trial tribunal and this extensive review was also confirmed by the lower court particularly at pages 11158 - 11161, volume 18 of the record of appeal. It was submitted that a close perusal of same will reveal that the appellants endeavoured to prove the alleged infraction and irregularities in the 1458 polling units by calling only 41 polling unit agents leaving a total of 1417 polling units with no eyewitnesses' testimony to attest to, or confirm or give evidence to all the allegations alleged to have occurred in them during the election. According to them, the appellants also called ward collation agents whose evidence in respect of only 15 wards out of 177 wards being challenged by them. They contended that those collation agents were pertainly not at the locus or units or other wards where the alleged non-compliance took place but were merely told what happened. It was concluded that their testimonies were hearsay thereby making the trial tribunals decision in not taking them serious, quite correct citing the case of *Gundiri v. Nyako* (2014)2 NWLR (Pt.1391)211. They urged this court to resolve this issue against the appellants.

The first respondent's senior counsel did not have this issue, as part of his four issues. What could resemble this issue 3 is their issue 2 which he argued together with his issue 4. It is really and herculean task in view of available time to sort out the arguments.

I shall leave it at that since the 2nd and 3rd respondents have given this court the benefit of their opinion on the said issue 3.

Resolution: -

This issue has been decided upon by both the trial Tribunal and the court below. So, it is not new. At least I have the benefit of position of the two lower courts on the issue. For instance, the court below addressed this issue in the following words on page 159 of the record thus: -

> "In the instant appeal, the appellants called PW1, PW3, PW31 and PW32 to prove the allegations of malpractices in Moba. None of these witnesses was a registered voter in the place. They were all collation agents at various levels. Their testimonies were all hearsay as found by the tribunal. Where particularly as in Moba an allegation of non-voting was raised, a registered voter for that place is a credible witness in proof of the allegation of non-voting. When the issues have to do with over voting and lack of proper accreditation, Voter Register and complete Card Reader report are required along with the testimonies of polling unit agents who were directly present at the place of the election.These were not proved before the lower tribunal and the tribunal was right to say so.This same scenario played out in the cases of Ise-Orun, Oye, Irepodun, Ifelodun, Ekiti South West, Ekiti East, Gbonyun, Ikole, Uejemeje, Ido/Osi, Efon, Ado Ekiti and other Local Government Areas in the State.
>
> ……The tribunal made findings of the unavailability of credible witness to prove all the allegations. Some of the allegations such as voiding of votes and violent harassment of the appellants' agents with other electoral malpractices are criminal in nature. The law as in section 35(1) of the Evidence Act, 2011 that if the commission of crime by a party to any proceedings is directly in issue in any proceedings, it must be proved beyond reasonable doubt. See *Nwobodo v. Onoh* (1984) 1SCNLR 1, *Ogah v. Ikpeazu* (2017) 5-6 SC (Pt.1)1."

> ……The tribunal made findings of the unavailability of credible witness to prove all the allegations. Some of the allegations such as voiding of votes and violent harassment of the appellants' agents with other electoral malpractices are criminal in nature. The law as in section 35(1) of the Evidence Act, 2011 that if the commission of crime by a party to any proceedings is directly in issue in any proceedings, it must be proved beyond reasonable doubt. See *Nwobodo v. Onoh* (1984) 1SCNLR 1, *Ogah v. Ikpeazu* (2017) 5-6 SC (Pt.1)1."

The above conclusion of the court below clearly shows that the appellants, apart from their failure to call the requisite polling unit agents in respect of each of the polling units complained of also failed to link and/or demonstrate the bundles exhibits tendered from the bar through the witnesses. Out of thousands of documents tendered through the bar, a few witnesses who did not make those documents were used just to identify them as they could not speak on those documents. That is why I agree with the respondents that those documents were merely dumped on the tribunal.

Talking about disenfranchisement, the law is trite that a voter is disenfranchised when his right to vote is denied him. This court in *Udom v. Umana* (No. 1) (2016) 12 NWLR (Pt. 1526) 179 at 247 made it clear that the court would be satisfied on the proof of disenfranchisement of voters when such voters give clear evidence that they were duly registered for the election but were not given the opportunity to cast their votes. In this regard, it is necessary for such voters to tender in evidence their respective voters cards and registers of voters from each affected polling unit to confirm the allegation of non-voting. Most important of all is the need for such disenfranchised voters to give evidence to show that if they had been given the opportunity to vote, the candidate of the political party of their choice would have won the election. The appellants herein led no such evidence. I agree with counsel for the respondents that the omission was fatal to the petition of the appellants. In the circumstance, I resolve this issue against the appellants.

Issue Four: -

In this issue, it is the contention of the learned senior counsel for the appellants that the lower court failed to appreciate the error perpetrated by the learned Judges of the trial Tribunal in failing to discharge their judicial task by the uneven way and manner they treated the testimonies and evidence of the appellants' witnesses *vis-à-vis* the testimonies and evidence of

the respondents, especially the1st respondent. That the position of the lower court does not address the concern of the appellants in the sense that the major issue raised before the lower court is the impartiality of the trial Tribunal in the assessment of the witnesses by the parties and not about the strength of the case of the parties but rather that the trial Tribunal failed to be even handed with the cases presented by the parties.

In response, the learned Silk for the 1st respondent submitted that the appellants failed to convince the Tribunal by compelling credible and cogent evidence of the allegations which they had urged on the Tribunal as the basis for tempering with the return of the 3rd respondent as the winner of the election of July, 14th 2018. That it is against this backdrop that the lower court upheldhe decision of the said Tribunal. Both the counsel for the 2nd and 3rd respondents also argue in the same vein and added that even without the evidence of the respondents, the appellants could not have won the case because they did not lead credible evidence to prove their case.

Resolution: -

The law is trite that a person seeking to nullify an election must succeed on the strength of his case as pleaded ad proved by credible witnesses and not on the weakness of the case of the respondent or on the failure of the respondents to adduce any evidence. See *CPC v. INEC* (2011) 18 NWLR (Pt. 1279) 493 at 555 paragraphs C- D. Therefore, an election Tribunal has the bounden duty to consider the petition *vis-à-vis* the pleadings and witnesses called by the appellants and where they have failed to satisfy the requirements of proof as the law prescribes, the tribunal is bound dismiss same. For instance in Moba Local Government Area, the lower court while affirming the decision of the trial Tribunal in Its findings found that PW1 and PW3 who were ward collation agents could not competently give evidence in respect of polling units there they did not operate. I had earlier in this judgment agreed with the two courts below that their decision not to ascribe probative value to the evidence of PW1 and PW3 in Moba Local Government their importance. See *Abi v. C.B.N.* (2012) 3 NWLR (Pt. 1286) 1at 28, *Udom v. Umana (*No. 1) (*supra),* Alao v. Akano (2005) 11NWLR (Pt. 935) 160 at 178,*Omisore v. Aregbesola* (*supra*).

In circumstance of this case, having held that the witnesses called by the appellants gave largely hearsay evidence of things they did not have personal knowledge, does it make any difference that the same set of witnesses who identified some of the exhibits they did not make, did so in vain? Will it also be wrong to say that those documents not identified by appropriate persons were merely dumped on the Tribunal? I think the lower court was right in affirming the

decision of the Tribunal that the appellants merely dumped those documents on the Tribunal. I resolve this issue against the appellants also.

Issue Six: -

The appellants' complaint in this issue deals with the proprietary or otherwise of the decision of the lower court affirming the findings of the trial tribunal that appellants did not discharge the burden of proof on the allegation of non-compliance, over voting, incorrect ballot papers counting, infraction and other allegations. It is the contention of the appellants that the lower court was wrong in refusing to hold that the trial tribunal must go further to deduct the votes from the total result having agreed that there were infractions, over voting and non-compliance in some units.

It was the contention of the respondents that apart from the fact that the appellants' witnesses gave hearsay evidence, the paucity of witnesses was fatal to their case, relying on *PDP v. INEC*(2014) 17NWLR (Pt. 1437) 525, *Buhari v. Obasanjo* (*supra*).

This issue is anchored on the findings of the Tribunal which was upheld by the lower court. The Tribunal's view to this effect can be found on page 10859 of volume 17 of the record of Appeal as follows:-

> "Albeit in a few instances, we found some infractions and irregularities in some units as shown in exhibits P6B2,P10G3,P17A6,P17A7,P12C2,P14C1,P14C6,P13 A6,P13 K13,P13 K15,P13 L5,P19 A1,P19 B1,P19 B8 and P19 D24 where incidence of alterations were not initialed or over-voting occurred but in our humble conclusion, they did not amount to so much as the law requires to come to the conclusion that they substantially flawed the election in issue."

In its conclusion on this issue, the lower court at page 11164 of the record held as follows:-

> "appellants as petitioners did not succeed in calling credible and acceptable witnesses before the lower tribunal, the tribunal was right in its conclusion that the appellants did not discharge burden of proof cast on them."

My Lords, by the allegations made by the appellants at the Election tribunal and the reliefs flowing therefrom, the appellants seek to challenge or question the official conduct of the 1st respondent (INEC), which is the conduct of the Ekiti State Gubernatorial election of 14th July, 218. As was observed by the learned senior counsel for the 1st respondent, this venture in

itself is no mean task against the backdrop of statutory bulwarks meant to safe guard the official acts of government from all manner of meddlesomeness. See section 168 of the Evidence Act, 2011 which confers presumption of regularity on every official act of the government including, as I said, the conduct of the governorship election under review. See CPC v. INEC (2011) 18 NWLR (Pt.1279)493.

The law is trite that the burden of rebutting the regularity of the conduct of the election lies with the appellants who are questioning same. In rebutting the correctness or regularity of such an official act, the law demands that credible and cogent evidence be adduced by such a party seeking such a vitiating relief, and testimonies geared towards that effect should not be at large as It is with the appellants, especially with the testimonies of PW31 and PW32. Such evidence should be directed to specific vitiating acts as alleged from one polling unit to another, by no other than polling unit agents who had first hand observation of what took place at the various polling units. This is the position of the law so far. See *Nyesome Wike v. Peterside* (2016) 7 NWLR (Pt. 1512) 452. My Lords, the facts of this case show that of the 1,458 polling units that the appellants alleged acts that vitiated the election, to wit, non-compliance and other electoral malpractices, the appellants called a paltry 71 witnesses and of that number, 41 were polling agents and the others were either local government or ward collation agents inclusive of PW31, the appellant himself, who was neither a polling or collation agent. By the status of these witnesses, who were not polling agents. their testimonies, as I agreed before.

are deemed hearsay and inadequate to ground the allegations in reference to incidents that took place at the polling units. See *Andrew v. INEC* (2018) 9 NWLR (Pt.1625) 507 at 566 paragraph C, *Buhari & Anor v. Obasanjo & Ors.* (2005) 13 NWLR (Pt. 941)1.

The position of the two lower courts is that the alleged irregularities are too infinitesimal and not substantial to affect the outcome of the election. I think the appellants should have spent more time, assembling credible evidence i.e. polling unit agents to show how the figures could have affected the outcome of the election. The use of witnesses who did not witness the infraction in the various polling units, in my view was the bane of this petition. That is why the two courts below tagged the evidence of those witnesses as hearsay which lacked probative value. See *Audu v.INEC* (2010) 13 NWLR (Pt. 1212) 456, *Ojukwu v. Onwudiwe* (1984)1 SCNLR 237 at 306, *Ucha v. Elechi (supra).*

I, hold the view that the Court of Appeal was right to agree with the trial tribunal that the appellants failed to prove the petition with credible evidence. This issue is accordingly resolved against the appellants.

Having resolved the six issues against the appellants, I conclude that this appeal lacks merit and is hereby dismissed I affirm the decision of the lower court delivered on 28th March, 2019. Appeal dismissed, Parties to bear their respective costs.

ARIWOOLA, J.S.C.: I had the privilege of reading in draft the lead judgment of my learned brother, Okoro, JSC just delivered. I agree entirely with the reasoning and conclusion that the appeal is lacking in merit and should be dismissed. I too will dismiss the appeal.

Appeal dismissed.

ABBA AJI, J.S.C.: I have had a preview of the judgment of my learned brother, John Inyang Okoro, JSC and I agree with his reasoning and conclusions arrived thereat.

At the end of the Governorship election of Ekiti State, which held on 14/7/2018, the 1s respondent declared the 3rd respondent as the winner, adjudged to have polled majority of lawful votes cast with 197,459 votes while the appellants polled 178,121 votes. Dissatisfied with the result, the appellants filed their petition on 3/8/2018 before the Election Petition Tribunal but lost the petition in the judgment of the Tribunal delivered on 28/1/2019. At the lower court, the appeal was dismissed also, hence the present appeal.

The appellants' 6 issues for determination are:

1. Whether the court below acted in accordance with the law by agreeing with the trial Tribunal in the way it failed to ascribe probative value to the testimonies of PW31 and PW32 who gave uncontroverted, cogent and believable testimonies and which also proved the contents of all the exhibits tendered at the trial.

2. Whether the court below acted rightly in endorsing the trial Tribunals decision that struck out the replies filed by the appellants to the replies of the respondents, filed against the petition and for striking out the names of certain persons in some of the paragraphs of the appellants' replies.

3. Whether the Court of Appeal was correct in agreeing with the trial Tribunal that the appellants failed toprove the sundry allegations they made against the return of the 2nd and 3rd respondents in Moba, Ise,Oru,Oye, Efon, Ekiti East; Gbonyin, Ikole, Ileje Meje, Ido/Osi, Ado Ekiti and other Local Governments where the appellants challenged the return of the 3rd respondent.

4. Whether the court below did not breach the right of the appellants to fair hearing in agreeing with the trial Tribunal in the unequal treatment of the testimonies of the witnesses called by the respondents on one hand and the appellants on the other, which held that collation
agent called by the appellants gave hearsay evidence but that Electoral Officers called by the respondents did not after it has been shown that the two sets of witnesses did not visit the polling stations on which they testified.

5. Whether the court below acted in accordance with the law, when it agreed with the trial tribunal that the appellants dumped all the documents tendered before the Tribunal notwithstanding the fact that PW31,
PW32 and other witnesses called by the 1st respondent gave evidence on demonstrated and linked the exhibits to the case of the appellants.

6. Whether the court below was correct in upholding the decision of the trial Tribunal that the appellants failed to discharge the burden of proof on sundry allegations of non-compliance, over-voting, incorrect ballot account infractions and the allegations contained in the petition when this was not so.

It is trite law that the general standard of proof in election petition cases like in civil claims is on the balance of probability. It is also elementary to state that the burden of proof lies on the petitioners whose duty it is to adduce evidence for purpose of tilting the scale of justice in their favour. In other words, where the petitioner alleges, and fails to satisfy the burden of proof, he would not be entitled to judgment in his favour. Securing judgment pre-supposes that the justice of the case is given to the party in whose favour it is declared. Credibility therefore ensures reliability without which no cognizance would be taken thereof. A witness who testifies by his senses of the existence of fact is worthy of recognition and proof. A hearsay witness however cannot testify to the existence, truth and veracity of a fact. For the just determination of a case therefore, the proof is not dependent upon the number of witnesses but rather the credibility there of. The evidence of such one witness will stand toll and weighty as against multiple witnesses whose evidence is to the contrary. The apex court for instance in the case of Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) page1 at pages 122 and 193 held that in general, in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, it is said to have discharged the burden and is then said to have shifted to the party's adversary to prove that

the fact established by the evidence adduced, could not on the preponderance of the evidence, result in the court giving judgment in favour of the party.

Allegations questioning the propriety of elections verged on criminal acts must be proved beyond reasonable doubt. Per Rhodes-Vivour, JSC in Aliucha &

Anor v. Elechi & Ors (2012)

PELR-7823(SC), (2012) 13 NWLR (Pt.1317) 330 restated this hat in Election Petition trials, the standard of proof is proof beyond reasonable doubt where the petition is brought on grounds of criminal nature, "...the fact that the election was conducted in 86 of the 138 polling booths of the constituency in question was not found wanting prima facie shows that there was substantial compliance in the majority of the polling booths where the election took place the constituency. The burden was therefore on the appellant to how that the non-compliance which applied to 52 polling booths, is found by the learned trial Judge actually vitiated the election in the constituency as a whole that he failed to do."

This attracted the attention of the lower court which observed at page 10859 of Vol.17 that:

> "Albeit in a few instances, we found some infractions and irregularities in some units as shown ...where incidence of alterations were not initialed or over-
>
> voting occurred but in our humble conclusion, they did not amount to so much as the law requires to come to the conclusion that they substantially flawed the election in issue."

By virtue of section 137(1) and (2) of the Evidence Act, 2010, standard is on preponderance of evidence. That is to say, one de position outweighs the other. The petitioner is to prove that were was non-compliance with provisions of the Electoral Act. He then has an added burden to prove that the non-compliance was substantial, that it affected the results of the election. It is then, the burden shifts to the respondent to rebut that fact. Evidence led by petitioner outweighs that of the respondent when the petitioner is able to establish substantial non-compliance and there is only treble response or nothing much forthcoming from the respondent rebuttal. See per Rhodes-*Vivour, JSC in Aliucha & Anor v. Elechi Ors* (2012) LPELR-7823(SC), (2012) 13 NWLR (Pt.1317)330.

The sacred principles consecrated in section 139(1) of the electoral Act, 2010, that is, the doctrine of substantial compliance that its consideration will only arise where the petitioners

(such, the appellants who were the petitioners at first instance) have exceeded in establishing substantial non-compliance with the principles of the Electoral Act, etc. or, in the alternative, substantial effect on the election result of any infraction of the said Act, etc. no minuscule the transgression may be. See Per Nweze, JSC in *Omisore & Anor v. Aregbesola & Ors* (2015) LPELR-24803(SC), (2015) 15 NWLR (Pt.1482) 205. In the whole, the appellants in all the issues raised and the allegations made against the respondents must be able to prove cogently that there was substantial non - compliance with the Electoral Act and all the Guidelines for the Governorship election conducted on 14/7/2018.This they have not done even though there were some molecules of infractions which did not amount to substantial non-compliance to overturn the tables.

On the totality, the Tribunal's judgment which is affirmed by the lower court is also affirmed by me. In other words, the 3rd respondent's victory as the duly elected Governor of Ekiti State is also hereby confirmed and affirmed.

Appeal dismissed.