

IN THE FEDERAL COURT OF APPEAL
BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
14TH JULY, 1978. FCA/B/77/77

BEFORE THEIR LORDSHIPS

JEMONU OMOIGBERAIEBOH, ABDUL GANIYU OLATUNJI AGBAJE,
PHILIP NNAEMEKA-AGU, JJCA

CHRISTOPHER D. ENYE APPELLANT

AND

1. JOHN O. EKOH

2. MICHAEL DIBIA

(The Electoral Officer RESPONDENTS
Agbazilo Local Government)

COURTS - Findings of fact - Need for trial court to make specific finding - Based on the evidence before it.

ELECTION PETITIONS - Pleadings - Facts which were not pleaded - May be received in evidence under certain conditions - In election petition proceedings.

ELECTION PETITIONS - Secrecy of voting - Evidence of allegation of breach of secrecy during voting - Was erroneously construed by the trial court.

ELECTION PETITIONS - Closure of poll - Earlier than the prescribed time - Establishment of other acts of non compliance with the Regulations - Trial court's dismissal of the petition was wrong.

ELECTION PETITIONS - Irregularities and non compliance with the Regulations - Where they affected the result of the election - The election will be declared null and void.

EVIDENCE - Witnesses - Available evidence by a witness on an issue - Could be believed without waiting for a host of other witnesses.

EVIDENCE - Witnesses - Disbelieving a particular witness - Was proper in this matter - Where the only available evidence was the word of that witness - Which was denied by the 1st respondent.

EVIDENCE - Witnesses - Acceptance of evidence of a witness - Where the evidence was admitted under cross examination - Trial Court should have accepted the evidence.

EVIDENCE - Documents - Admissibility - Affidavit evidence - Where a witness had given viva voce evidence - Trial court rightly refused to admit affidavit containing the same facts.

PLEADINGS - Fact in issue - Where pleaded - Evidence on that issue need not be pleaded.

STATUTES - Interpretation - Where narrow and erroneous - Proper interpretation now supplied by appellate court.

FACTS

The petitioner/appellant and the 1st respondent were among 4 candidates who contested the election in Ward 6 of the Agbazilo Local Government Area of the defunct Bendel State held on 28th December, 1976. In accordance with the results of the election, the 2nd respondent who was the electoral/returning officer for the area, returned the 1st respondent as the duly elected candidate for Ward 6 with a majority of 253 votes. The petitioner being dissatisfied with the conduct of the election filed a petition before the high court Ubiaja against the respondents on the following grounds:-

1. That the election was voided by corrupt practices or offences against Local Government Electoral Regulations 1976
2. That the 1st Respondent John O. Ekoh was not duly elected by

a majority of lawful votes at the election.

In the petition, the petitioner made allegations of corrupt practices against the 1st respondent and of non-compliance with the Electoral Regulations in the conduct of the elections. In support thereof, he gave evidence and called five witness to testify. The 1st respondent gave evidence in his defence in which he denied the allegations of corrupt practices and called one witness. The 2nd respondent also gave evidence and called two witnesses to show that there was compliance with the Bendel State Local Government Electoral Regulations (1976) hereinafter referred to as "the Regulations" in the conduct of the election in issue. The learned trial Judge considered the entire evidence and the submissions made by the counsel to each of the parties to the dispute and he held. ... "that this election petition cannot succeed and it is hereby dismissed."

The petitioner being dissatisfied with the decision has appealed to the Court of Appeal on six grounds of appeal.

ISSUE FOR DETERMINATION

Whether the alleged irregularities and non compliance with the Bendel State Local Government Electoral Regulations 1976 were established and whether they affected the results of the election.

HELD (Unanimously allowing the appeal per judgment delivered by **OMO EBOH JCA**)

Courts - Findings of fact

1. It is our considered view that the learned trial Judge was in the circumstance bound to find as a fact that voting at that polling station was not secret and then proceed to deal with the election petition on that basis rather than hold thus: ".... it may well be that voting was not entirely secret there" We therefore agree with the submission of the learned counsel for the appellant that the learned trial Judge neither accepted nor rejected the evidence of lack of secrecy tendered by the appellant, and that this affected his consideration of the appellant's case as will be shown later. (p. 112 D)

Available evidence by a witness on an issue

2. We have to mention that it was not necessary to call a host of witnesses to come forward to testify on how each of them was precluded from voting by the premature closure of the poll on that day before the available evidence by the p.w.2 could be believed. Also the reference made by the learned trial Judge to Ifeku, Oria 1, Oria 2 polling stations and to Exhibits B.F. to F11 was inapt and the analogy he drew therefrom was misleading for the appellant did not say that the incident which occurred at Urho also happened in the places that the Judge referred to. In the circumstances of this case, we hold that the learned trial Judge erred in rejecting the evidence on this point and in holding:

"It is true that a good number did not vote at Urho as per Exhibit C, but so was the position for instance in Ifeku 1, Oria 2 and Oria 1 as Exhibits F, F1 - F11 clearly show. Registration cards like Exhibits E to E14 can be collected from misguided sympathisers. Why did the owners not come to say how it all happened? These matters as they are, are not sufficient indicators of what happened. I do not think there is proper basis here again for accepting the story, and I reject the evidence in that regard.." (p. 113 B)

Interpretation - Where narrow

3. In our considered view, the interpretation given by the learned trial Judge to the provisions of Regulation 103(2) was extremely narrow and was therefore erroneous and this error arose from the exaggerated and unduly wide effect he seemed to have ascribed to the phrase which, to our mind, means no more than what it says but which the learned trial Judge erroneously interpreted as governing and overriding all the provisions of the said Regulation 103. We accordingly hold that the proper and correct interpretation to be placed on Regulations 103(2) of the Electoral Regulation is that the court is empowered "to inquire into any matter otherwise raised or apparent or any matter otherwise appearing in or from the election petition case, as to the court may seem necessary for the purpose of the full and proper determination of the petition." (p. 117 A)

Election petitions - Pleadings

4. In other words, a proper and correct interpretation of Regulation 103(2) postulates that the courts in election petition cases have wider powers than they have in the ordinary civil cases and can thereby receive in evidence facts which are not pleaded in election petitions provided they are apparent thereon or they are matters or relate to matters otherwise appearing from the proceedings in the petition as may appear to the court necessary for a complete adjudication of the petition. We therefore hold that the fact which is ... said not to be expressly pleaded in this election petition (as we earlier underlined above) is clearly and certainly a matter apparent on the petition and which is necessary for a proper determination of the petition (see paragraph 3(3), (4), (5) & (8) and as such, that fact, having been led or given in evidence already in support or proof of the allegation of bribery (which was definitely pleaded in the petition) ought not to have been disregarded by the learned trial Judge as he did. (p. 117 E)

Fact in issue - Where pleaded

5. As there can be no doubt that corrupt practices were alleged and pleaded as a ground in the petition, that evidence

"..... that the 1st respondent was present when Jacob Achima (p.w.3) was sharing money and gifts to electors as his agents."

could be said to be merely evidence required to prove a fact in issue or to be matter relevant to the proof of a fact in issue which, strictly according to the rules of pleading, does not require to be expressly pleaded. For only material facts need be pleaded and not the evidence or facts in support or proof of same. So the learned trial Judge in our view, in the circumstances of this case, was not correct to disregard that fact on the ordinary rules of pleadings and what is more, the decided cases he referred to would not avail him because by leading or giving that fact in the proceeding as evidence in proof of the averment in his petition, the appellant was not thereby setting up in court a case which was at variance with his pleading nor was he introducing a fact which went to no issue or a matter which took the other party by surprise. (p. 118 G)

Disbelieving a particular witness

6. Notwithstanding all that the learned Judge said about Mr. Jacob Achima (p.w.3) vis-a-vis the 1st respondent, he finally said", I do not believe that the 1st respondent employed 3rd p.w. as a canvassing agent"

B In view of what the learned Judge said about Jacob Achima (p.w.3), we are satisfied that he (the Judge) was correct in disbelieving him (p.w.3) that the 1st respondent went with him to share money and goods as gifts to electors during the campaigns because on this point the only available evidence was the word of the p.w.3 as against that of the 1st respondent and in the circumstance, it cannot be said that the high standard of proof required in proof of allegations of corrupt practices at elections was attained in this case. (p. 119 F)

D Acceptance of evidence of a witness

7. Since p.w. 3 gave evidence in support of the appellant's averment in his petition and the 1st respondent in evidence-in-chief admitted that he appointed p.w.3 as his polling agent and under cross-examination admitted that he addressed groups of persons in various places including Urho, the learned trial Judge ought to have accepted the legal and credible evidence of both the p.w.3 and the 1st respondent as full proof that the 1st respondent acted contrary to the provisions of Regulation 80 of the Electoral Regulations. (p. 120 D)

Documents - Admissibility

8. We are satisfied that the learned trial Judge was right in rejecting the said documents. Since Mrs. Christiana Nnemeke was called as a witness and she gave viva voce evidence of what happened at Urho polling station on that day, we can hardly see the need for her to tender, in evidence, an affidavit containing the same facts. It is not the law that an affidavit, by its nature, vouchsafes the truth of its contents. We should mention that s. 90 of the Evidence Act to which learned counsel called our attention did not support his submission on this point. So this ground of appeal cannot succeed. (p. 121 G)

Secrecy of voting

9. With respect, we have to say that the above is not the right approach to the evidence on the point. Such an approach was erroneous as it was based on a restricted and subjective view of the evidence which focuses attention on the number of persons or voters concerned who openly B objected rather than a wide and objective view which contemplates the effect of non-secrecy upon the system of secret ballot and the adverse effects which non-secrecy could have had on the prospective voters as well as those who had actually voted on that day. In our view, what the learned trial Judge should have considered was the effect the breach of C secrecy could or would have upon the voting rather than think of proof of the allegation in terms of the number of persons shown to have reached or to have been angered away by the lack of secrecy. On a correct and proper approach, the question the learned trial Judge would have asked D and considered was:

"with the breach of the secrecy of the ballot. Could it be said that the voters at Onogholo, Ward 6(C), who cast their votes on that day did so with their free will and conscience?" The answer to this question, on E the state of the evidence before the court should be in the negative - which means that non-secrecy of the ballot affected the result of the election in that ward. This was therefore an irregularity. (p. 124 B)

Election petitions - Closure of poll F

10. To our mind, the learned trial Judge's approach, as shown in the portion of the judgment just quoted was erroneous for what he was entitled to consider on this point was whether or not the premature closure of the poll at Urho could or would have affected the result of the G voting at that station. On the available evidence, that more than 100 voters were prevented from voting as a result of the premature closure of the poll at the material time, the only reasonable answer or conclusion was that voting at Urho, Ward 6(i), could and would be adversely affected thereby - which is another irregularity. We are therefore satisfied H that had the learned trial Judge adopted the right and proper approach, he would not have come to the conclusions he reached in this case in con-

sequence of which he dismissed the petition. In our view, the appellant by legal and credible evidence had established against the 1st respondent acts of non-compliance with the Regulations which were substantial in the circumstances of this case. (p. 125 E)

B

Irregularities and non compliance with the Regulations

11. In the instant case, we have looked in vain for any evidence in the record on the part of the 1st respondent that such irregularities and non-compliance with the Regulations could not and did not affect the results of the election. In other words, the 1st respondent failed to discharge the onus on him. Since the 1st respondent was returned as the successful candidate at the election by the 2nd respondent with a majority of 253 votes and as there was evidence that those who did not vote at Onogholo were over 100 persons and at Urho were well over 100 persons according to the official figures contained in the exhibits tendered for those two polling stations, and since there was evidence that the 1st respondent himself and through his agent campaigned for votes in a manner contrary to the regulation, it cannot be said that the irregularities and non-compliance could not and did not affect the result of the election. On the facts of this case, we are satisfied that there was sufficient evidence and proof of the appellant's case to justify judgment being entered in his favour and that the learned trial Judge erred by dismissing the petition. The election of the 1st respondent is hereby declared null and void on the ground of non-compliance with the provisions of the Local Government Electoral Regulations, 1976. (p. 126 E)

G

NOTABLE POINT OF INTEREST
OMO EBOH JCA

1. Duty of the court to ensure that a witness is not unduly pressurized

In this connection we have to observe that it was not for the court to give reason as to why a witness (like the 1st respondent) testified the way he did under pressure of cross-examination although it is part of the duty of the court during the proceedings to ensure that a witness is not unduly pressurized by the opposing Counsel or that undue advantage is not taken

of his limited intelligence or inadequate educational background in appropriate cases. (See Aderemi v. Adedire (1966) N.M.L.R. 398 at 402) .(p.120B)

REPRESENTATION

DR. Peter Ijewere counsel for the Appellant

Suru Akele Esqr. Counsel for the 1st Respondent

J. O. Gwam: Legal Adviser Counsel for the 2nd Respondent

CASES REFERRED TO

Benson v. Onitiri (1959) 5 F.S.C. 69

Aderemi v. Adedire (1966) N.W.L.R. 398 at 402

Akinfosile v. Ijose (1960) 5 F.S.C. 192

Dzungwe v. Swem (1966) N.M.L.R 297 at 303

STATUTES REFERRED TO

Bendel State Local Government Electoral Regulations 1976, Regulations 103, 90, 80

Federal Legislative Houses (Disputed Seats) Regulations 1959, Reg. 30(2)

Evidence Act s. 90

JUDGMENT OF THE COURT (DELIVERED BY

J. OMO EBOH JCA)

This is an appeal against the decision of the High Court, Ubiaja, delivered on 14th July, 1977 in an election petition case instituted by Mr. Chirstopher D. Enye as the petitioner. The said Mr. Chirstopher D. Enye and one Mr. John O. Ekoh were two of the four candidates who contested the election in Ward 6 of the Agbazilo Local Government Area held on 28th December, 1976. At the election, Mr. Chirstopher D. Enye scored 1, 011 votes, Mr. John O. Ekoh 1, 264, and the other two candidates 683 and 666 votes respectively. In accordance with these result, Mr. M. H Dibia, the Electoral/Returning Officer for the Area returned Mr. John O. Ekoh as the duly elected candidate for Ward 6 with a majority of 253 votes. The petitioner (Mr. C. D. Enye) being dissatisfied with the con-

duct of the election filed a petition on 18th January, 1978 against Mr. John Ekoh as the 1st respondent and Mr. M. Dibia as the 2nd respondent on the following grounds:-

1. That the election was voided by corrupt practices or offences against Local Government Electoral Regulations 1976
2. That the 1st Respondent John O. Ekoh was not duly elected by a majority of lawful votes at the election.

In the petition, the petitioner made allegation of corrupt practices against the 1st respondent and of non-compliance with the Electoral Regulations in the conduct of the elections. In support thereof, he gave evidence and called five witness to testify. The 1st respondent gave evidence in his defence in which he denied the allegations of corrupt practices and called one witness. The 2nd respondent also gave evidence and called two witnesses to show that there was compliance with the Bendel State Local Government Electoral Regulations (1976) herein-after referred to as "the Regulations" in the conduct of the election in issue. The learned trial Judge considered the entire evidence and the submissions made by the counsel to each of the parties to the dispute and he held as follows:-

"The petitioner's case looks attractive on the surface but it is not so sustained from a critical view after all. I have taken into account that the standard of proof in respect of Urho and Onogholo incidents is on the balance of probabilities but I hold that that standard has not been quite achieved on a proper assessment. On the whole I am satisfied that this election petition cannot succeed and it is hereby dismissed."

The petitioner (hereinafter referred to as "the appellant") being dissatisfied with the decision of the learned trial Judge has appealed to this court in his Notice and Grounds of Appeal filed on 10th August, 1977, and through his counsel, sought for an obtained leave to argue additional grounds of appeal all of which are reproduced hereunder for ease of reference:-

- (1) That the decision is against the weight of evidence.
- (2) The learned trial Judge erred in law in his interpretation of Regulations 103 and 90 of the Local Government Electoral Regulation

1976 when he said *inter alia*: "Although under sub-regulation 2, of the said Regulation the Court is empowered to rely on any fact relevant to the issue raised in the petition, such a fact cannot be used if at the time it is given in evidence or comes to light the time limited by Regulation 90 has elapsed."

(3) The learned trial Judge erred and misdirected himself in law when he said that he would disregard (or reject) the evidence of the 3rd p.w. "which suggests that he went together with the first respondent to campaign" as inadmissible because in his view, the evidence of 3rd p.w. is at variance with the pleadings in paragraphs 3, 4 and 5 of the Petition; when in fact the said paragraphs could properly accommodate the said evidence which was never objected to during the trial. By so doing, the court has also belatedly and improperly raised the issue of admissibility of the evidence of a vital witness without giving the parties the opportunity to address it on the point.

(4) The learned trial Judge erred in law and on facts when he held that "Although the standard of proof required in respect of Urho and Onogholo incidents is that of balance of probabilities, the standard has not been quite achieved on proper assessment" when (i) he did not properly assess the said evidence relating thereto and (ii) there was sufficient evidence on record (much uncontroverted) to justify the Petitioner's case on the balance of probabilities.

(5) The learned trial Judge erred in law and/or misdirected himself on the facts when he failed to assess or to properly assess evidence on:-

(a) the absence of secrecy in the voting at ward 6C of the Constituency (Onogholo);

(b) the evidence of the opening of the polls at 9 a.m. instead of 7.30 a.m. and its being closed at 3 p.m. instead of 4.30 p.m. at Ward 6-1 (Urho) and

The combined effects of these on the results of the election in that constituency.

(6) The learned trial Judge erred in law and/or misdirected himself on the facts when by wrongly rejecting Identification 5 as inadmis-

sible, he by implication rejected as inadmissible Identification I which was pleaded in paragraph 8 of the Election Petition and in consequence of the rejection of the said Identification 1, rejected as inadmissible the whole of the evidence of the 3rd p.w."

B Arguing the appeal before us, the learned counsel for the appel-
lant, first dealt with grounds 4 and 5. He submitted that the appellant led
evidence to show that there was breach of secrecy during voting in the
polling station at Onogholo within Ward 6 at the material time and that
there were 370 registered voters there out of whom 50 persons voted for
C the appellant and 198 for the 1st respondent. The appellant's 1st P.W.
(Andrew Omoijuanfo) said that when he came to that polling station and
entered into the booth to cast his vote, he was prevented from shutting
the door by some people including one Chief Robert Ikuenobe who was
D the polling agent of the 1st respondent; that he made a report to the
polling officer there and as he did not want to cast his vote with the door
open and in the view of the people, he returned the ballot paper earlier
issued to him to the polling officer and went away. This witness' evi-
E dence was supported by the testimony of the appellant's 4th witness
(Sunday Otuomajie). The 1st respondent at a stage admitted that when
he visited the polling station that day, he could see the ballot boxes from
outside and the 2nd respondent's 2nd witness who was the presiding
F officer at Onogholo Ward 6(C) said that the ballot boxes were placed in
an open church hall and that they were not screened from the view of
persons outside. Counsel then submitted that non-secrecy at this station
was thus established and that it was therefore the duty of the learned trial
Judge to make a definite finding on this point which he failed to do. He
G further submitted that the learned trial Judge neither accepted nor re-
jected the evidence tendered on non-secrecy of the ballot but merely said
in his judgment:

*"It may well be that voting was not entirely secret there because of
H what the 1st respondent himself said"*

He said it was also wrong for the learned trial Judge to limit himself to the
single witness who gave evidence of non-secrecy instead of considering
the adverse effect that non-secrecy would have on the voters who were

thus made to vote in full view of other persons in view of the fact that the figures showed that more than 100 persons out of the 370 registered voters did not vote there on that day. On the voting at Urho polling station, Ward 6(i), the appellant's 2nd witness (Christiana Nnemeka) who was duly appointed a female searcher for the election said as follows:- B

"I arrived at the polling station at 7 a.m. on 28th December, 1976, voting stated at 9. a.m. and closed at 3 p.m. We were supposed to close at 4.30 p.m. The polling officer decided to close at 3 p.m. but I told him that closing time was 4.30 p.m. The petitioner came to the station around 2.30 p.m. and told us that we are supposed to close at 4.30 p.m. Later at about 2.45 p.m. the 1st respondent came and spoke to the polling officer Mr. Sadoh. I do not know what they discussed. After they discussed, Mr. Sadoh closed at 3. p.m. and began to pack the boxes. I challenged that closing time was 4.30 p.m. as the petitioner earlier told us. But Mr. Sadoh refused. We closed at 3 p.m. At the time we closed there were more than 100 people waiting to cast their votes. Mr. Sadoh refused them to vote. Some got annoyed and left. Some 15 people who remained behind gave their registration cards to one Sunday Ofor. The boxes were later taken to Illushi. I parted company on the way to Illushi because I sustained an injury. At the time we closed 307 persons had voted in that station." C D E

Appellant's counsel submitted that the above testimony disclosed a serious irregularity since there was evidence that 470 persons were registered as voters in that station, that bout 150 did not vote and that more than 100 persons were waiting to cast their votes when the polling officer (Mr. Sadoh) closed polling at 3 p.m. instead of 4.30 p.m. that day as stipulated in the Regulations, He said that the learned trial Judge was wrong in rejecting the evidence in that regard as he did. In reply, the learned counsel to the 1st respondent submitted that the learned trial Judge properly and correctly assessed and evaluated the evidence about the incident at Onogholo and the facts about Urho polling stations. He said that although the learned trial Judge did not specifically decide whether the voting at Onogholo was secret or not, he came to a correct conclusion that the appellant did not show that the result of the election was F G H

substantially affected thereby and that the evidence given by the single witness to prove that voting at Onogholo was not secret was totally insufficient to prove the point.

We think that it is necessary to deal first with the duty of the court to make definite findings of fact on matters in which issues are joined by both parties to a dispute. This is so because the decision of the court must, invariably, be based on such findings as well as the facts established in the case. As can be seen from the printed record of proceedings in this case, there was evidence from the appellant's witnesses that the ballot used during polling at Onogholo, Ward 6(C), on the election day were placed in a church hall and were not screened from public view and as such could be seen through the opposite door which was kept open. This was, as it were, supported in a way by part of the 1st respondent's evidence. **It is our considered view that the learned trial Judge was in the circumstance bound to find as a fact that voting at that polling station was not secret and then proceed to deal with the election petition on that basis rather than hold thus: ".... it may well be that voting was not entirely secret there"** We therefore agree with the submission of the learned counsel for the appellant that the learned trial Judge neither accepted nor rejected the evidence of lack of secrecy tendered by the appellant, and that this affected his consideration of the appellant's case as will be shown later.

In respect of the voting at Urho, the evidence of Christiana Nnaemeka (p.w.2) part of which was quoted above showed clearly a serious irregularity and non-compliance with the Electoral Regulations. This resulted in more than 100 voters who were present and willing to cast their votes being prevented from doing so as a result of the polling officer prematurely closing the polls at 3. p.m. instead of 4.30 p.m. on that day against the advice of the said Christiana Nnemeka (p.w.2) the female searcher officially appointed for that polling station. The petitioner never alleged or suggested that the 1st respondent directly prevented the voters from voting at Urho or that he influenced the pooling officer to close the poll prematurely and so, it was wrong for the learned trial Judge to have dealt with this matter from that point of view. Like-

wise, it appears to us that the two basic facts which the learned trial Judge set out as making the evidence on this point "less credit-worthy" did not arise because in any event no one at that point in time would know how the voting was going on at Urho and furthermore, the appellant ought not to be prejudiced in his petition merely because he did not complain of the irregularity initially to the 2nd respondent, who obviously was incapable of doing anything to redress any irregularity already committed by one of his polling officers at that late hour. **We have to mention that it was not necessary to call a host of witnesses to come forward to testify on how each of them was precluded from voting by the premature closure of the poll on that day before the available evidence by the p.w.2 could be believed. Also the reference made by the learned trial Judge to Ifeku, Oria 1, Oria 2 polling stations and to Exhibits B.F. to F11 was inapt and the analogy he drew therefrom was misleading for the appellant did not say that the incident which occurred at Urho also happened in the places that the Judge referred to. In the circumstances of this case, we hold that the learned trial Judge erred in rejecting the evidence on this point and in holding:**

"It is true that a good number did not vote at Urho as per Exhibit C, but so was the position for instance in Ifeku 1, Oria 2 and Oria 1 as Exhibits F, F1 - F11 clearly show. Registration cards like Exhibits E to E14 can be collected from misguided sympathisers. Why did the owners not come to say how it all happened? These matters as they are, are not sufficient indicators of what happened. I do not think there is proper basis here again for accepting the story, and I reject the evidence in that regard.."

On grounds 2 and 3, the learned counsel for the appellant submitted that the interpretation put to Regulation 103 of the Electoral Regulations by the learned trial Judge was not correct and that the facts concerned were, in fact, pleaded in paragraphs 3(3), (4), (5) and (8) of the petition. He referred to the evidence of Jacob Achima (p.w.3) that the 1st respondent employed and paid him as his agent and that he campaigned for votes for him in different places including Urho and argued

that even if the fact "that 1st respondent was present with the p.w.3 during the campaigns" (underlining is ours) was not pleaded in the petition and if such fact is said not to be comprehended in paragraph 3(8) thereof, the learned trial Judge, on a proper and correct interpretation of S. 103(2) of the Electoral Regulations, ought to have received such evidence. He submitted that Regulation 103(2) empowers the court to entertain facts and issues not raised in the petition provided they relate to the election in dispute. He further argued that even if the learned trial Judge was correct in rejecting that evidence on that ground that that fact was not pleaded, only that piece of evidence should be discarded and that the remaining evidence of Mr. Jacob Achima (p.w.3) ought to have been assessed properly. Counsel for the 1st respondent submitted, in reply, that Regulation 103(2) merely permits the learned trial Judge to look into any issue not pleaded and not facts; that since facts not pleaded in civil case, go to no issue, the Judge cannot look into any fact in the case which is not pleaded. He said that the Judge was therefore right in rejecting the evidence of p.w.3 "... that the 1st respondent was present during some of the campaigns when he (p.w.3) distributed the money and goods to some of the electors at Urho to vote for the 1st respondent". He maintained that the learned Judge's interpretation of s.103(2) of the Electoral Regulation was therefore correct.

In dealing with the trial Judge's interpretation of s.103 of the Local Government Electoral Regulation, 1976, it is only but helpful that the relevant provisions thereof be set out as hereunder:

"103(1)(a) after the expiry of the time limited by regulation 90 for presenting the petition no amendment shall be made introducing any fresh prayer in the petition, or affecting any alteration of substance in the prayer; or (saving anything which may be done under the provisions of sub regulation (2) of this regulation) affecting any substantial alteration in or addition to the statement of facts and grounds relied upon to sustain the prayer; and

(2) In the trial and determination of the petition the Court shall not be obliged to confine its inquiry or findings to the issues raised by the petition and the reply, if any, and may, with or without ordering or allow-

ing the amendment of any statement of the facts and grounds relied upon in support of the petition or the amendment of any admission or denial contained, or facts or grounds set out in the reply (but subject always and having due regard to the time limited by regulation 90 for presenting an election petition), inquire into any other issue otherwise raised or appar- B
ent or any matter otherwise appearing, as to the court may seem neces- sary for the purpose of the full and proper determination of the petition." On the pertinent portion of the evidence of Jacob Achima (p.w.3) which reads:-

"He (1st respondent) then asked me what I thought should be given C
to the people in the area in which I had been campaigning for him. I told him anything would be all right. He then suggested money, salt and drinks. He gave me N360. Both of us went together to share out the money to people I have spoken to. I gave out N40 to each of the nine D
quarters wards we were sharing out the money. The purpose of giving out this money together with salt and drinks was that the people vote for the 1st respondent. I went also with the 1st respondent to other places where he said he was expecting some votes such as Okokpo. Odegume and E
Ifekun. We campaigned in those places as well and we handed posters to the 1st respondent's agents."

the learned trial Judge said as follows:-

"The pleadings set out above do not suggest that the 1st respondent was F
accompanied by the 3rd p.w. either to campaign or to share out gifts at any given time or indeed that the 1st respondent carried out campaigns himself. But what is pleaded in paragraphs 3, 4 and 5 is that the 3rd p.w. carried out campaign on behalf of the 1st respondent and influenced G
people to vote for him as an assignment. Paragraph 8 is that the 1st respondent himself or through his agents corruptly treated voters with gifts to vote for him."

From the above, it is clear that what the learned trial Judge said the H
appellant did not plead in his petition was the fact that "..... 1st respon- dent campaigned by himself or was present when Jacob Achima shared out the alleged money and goods to the electors during his campaigns at different places including Urho". The learned trial Judge then held that

since this fact was not expressly pleaded in the petition, any evidence led or given to that effect should be disregarded by the court as it goes to no issue and because, according to him, of the wording of Regulation 103(1)(a) of the Regulations. The learned trial Judge further held:

B *"Although under sub-regulation 2 of the said Regulation the court is empowered to rely on any fact relevant to the issues raised in the petition (with or without allowing amendment), such a fact cannot be used if at the time it is given in evidence or comes to light, the time limited by Regulation 90 has elapsed. In other words, a fact or evidence may be*
 C *available to support, add to or amend a petition, but it will serve no useful purpose as far as the petition goes, if it is not utilized within 30 days after the date of election." (Underlining is ours)*

D The question posed by the above interpretation generally is: "Did the legislators contemplate that the presentation and hearing of an election petition will or must all take place within 30 days from the day the election complained of was held? The answer to this is easily in the negative because:

E (1) the legislators neither expressly nor impliedly said so in the wording of Regulation 103;

(2) experience shows that it is practically impossible to initiate, hear and conclude proceedings in an election petition case within 30 days
 F because Regulation 90 itself stipulates that an election petition shall be presented or filed within 30 days from the date of the election, complained against;

(3) such interpretation will lead to absurdity because if the legislators by Regulation 90 allow an aggrieved candidate or person 30 days
 G within which to present an election petition by filing it in court, it is inconceivable that the same legislators would expect that the filing of a reply by the other party or parties to the petition, and the hearing of the proceedings will all take place within the same period of 30 days from the
 H date of the same election, especially if the petitioners files the petition only a day or two before the expiry of the period of 30 days stipulated of the purpose;

(4) such an interpretation will render Regulation 103(2) nugatory

and will completely castrate its provisions for the same reasons just given in (3) above; in other words the provisions of Regulation will have no meaning or effect and will serve no purpose whatsoever.

In our considered view, the interpretation given by the learned trial Judge to the provisions of Regulation 103(2) was extremely narrow B and was therefore erroneous and this error arose from the exaggerated and unduly wide effect he seemed to have ascribed to the phrase which, to our mind, means no more than what it says but which the learned trial Judge erroneously interpreted as governing C and overriding all the provisions of the said Regulation 103. We accordingly hold that the proper and correct interpretation to be place on Regulations 103(2) of the Electoral Regulation is that the court is empowered "to inquire into any matter otherwise raised or D apparent or any matter otherwise appearing in or from the election petition case, as to the court may seem necessary for the purpose of the full and proper determination of the petition."

In other words, a proper and correct interpretation of Regulation 103(2) postulates that the courts in election petition cases E have wider powers than they have in the ordinary civil cases and can thereby receive in evidence facts which are not pleaded in election petitions provided they are apparent thereon or they are matters or relate to matters otherwise appearing from the proceedings F in the petition as may appear to the court necessary for a complete adjudication of the petition. We therefore hold that the fact which is ... said not to be expressly pleaded in this election petition (as we earlier underlined above) is clearly and certainly a matter apparent G on the petition and which is necessary for a proper determination of the petition (see paragraph 3(3), (4), (5) & (8) and as such, that fact, having been led or given in evidence already in support or proof of the allegation of bribery (which was definitely pleaded in H the petition) ought not to have been disregarded by the learned trial Judge as he did. See the majority judgment of this court (yet unreported) delivered in Benin City on the 18th day of May, 1978 in Suit No. FCA/B/20/77: Chief E. A. Lamai vs. Chief M.C.K. Orbih. There we

followed the decision of the Federal Supreme Court in Benson v. Onitiri (1959) 5 F.S.C. 69 in which Regulation 30(2) of the Federal Legislative Houses (Disputed Seats) Regulations 1959, was considered and interpreted. We may add that Regulation 30(2) of the 1959 Regulation is "in pari materia" with Regulation 103(2) which is under consideration on this case.

Their Lordships, through Ademola, C.J.F., at page 79 of the report, said as follows:-

"The Court refused to hear arguments on the point as it was not pleaded. xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

With great respect to the learned trial Judge, I think he was wrong to have shut out arguments or submissions on this point. The purpose of Regulation 30(2) of the Federal Legislative Houses (Disputed Seats) Regulation, 1959, already referred to is, to my mind, analogous to taking up a point not raised in the pleadings of an ordinary civil suit and, in my view, it would have been competency for the Court itself to take up the point if even parties did not."

Of course, this court is bound by the interpretation placed on the above-mentioned Regulation 30(2) by the Federal Supreme Court. In view of the above, we cannot but say that the learned trial Judge erred in his interpretation of the Regulation 103(2) and also when he held as follows:-

"A fortiori, when the rules of pleadings are confounded with the restrictions placed on a petition under regulation 103, a situation where a petitioner's pleadings were inadequate becomes insurmountable after 30 days from the date of the election complained about."

As there can be no doubt that corrupt practices were alleged and pleaded as a ground in the petition, that evidence

"..... that the 1st respondent was present when Jacob Achima (p.w.3) was sharing money and gifts to electors as his agents."

could be said to be merely evidence required to prove a fact in issue or to be matter relevant to the proof of a fact in issue which, strictly according to the rules of pleading, does not require to be expressly pleaded. For only material facts need be pleaded and not the evidence or facts in support or proof of same. See Rules of the Supreme

court of England, 1976, Volume I at page 265, Order 18/7/3, under the caption "Material Facts, not Evidence." **So the learned trial Judge in our view, in the circumstances of this case, was not correct to disregard that fact on the ordinary rules of pleadings and what is more, the decided cases he referred to would not avail him because by leading or giving that fact in the proceeding as evidence in proof of the averment in his petition, the appellant was not thereby setting up in court a case which was at variance with his pleading nor was he introducing a fact which went to no issue or a matter which took the other party by surprise.**

After holding, as we have done above what the proper interpretation to be put to Regulation 103(2) should be, we will now proceed to consider whether if that fact was not disregarded by the learned trial judge, he would have come to the same conclusion that he reached and whether the conclusion he reached in the instant case was right and proper or not on the available evidence. In this connection, it is desirable to not that there are two separate issues involved viz:-

(1) the ground in the petition based on the allegation of corrupt practices and (2) the ground based on the allegation that the 1st respondent by himself and through Mr. Jacob Achima (p.w. 3) as his agent campaigned for votes in a manner contrary to the regulations. On (1), we note that the learned trial Judge directed himself rightly as to the standard of proof required in respect of allegations of corrupt practices at elections as one "beyond reasonable doubt". **Notwithstanding all that the learned Judge said about Mr. Jacob Achima (p.w.3) vis-a-vis the 1st respondent, he finally said", I do not believe that the 1st respondent employed 3rd p.w. as a canvassing agent"** In view of what the learned Judge said about Jacob Achima (p.w.3), we are satisfied that he (the Judge) was correct in disbelieving him (p.w.3) that the 1st respondent went with him to share money and goods as gifts to elector during the campaigns because on this point the only available evidence was the word of the p.w.3 as against that of the 1st respondent and in the circumstance, it cannot be said that the high standard of proof required in proof of allegations of corrupt

practices at elections was attained in this case. On (2) above, there is nothing on record to impugn the credit-worthiness of p.w.3; his evidence that the 1st respondent appointed him to campaign for him and that he did so was not demolished in cross-examination and even appeared to have been supported by a portion of the 1st respondent's evidence under cross-examination. In this connection we have to observe that it was not for the court to give reason as to why a witness (like the 1st respondent) testified the way he did under pressure of cross-examination although it is part of the duty of the court during the proceedings to ensure that a witness is not unduly pressurized by the opposing Counsel or that undue advantage is not taken of his limited intelligence or inadequate educational background in appropriate cases. (See Aderemi v. Adedire (1966) N.M.L.R. 398 at 402). **Since p.w. 3 gave evidence in support of the appellant's averment in his petition and the 1st respondent in evidence-in-chief admitted that he appointed p.w.3 as his polling agent and under cross-examination admitted that he addressed groups of persons in various places including Urho, the learned trial Judge ought to have accepted the legal and credible evidence of both the p.w.3 and the 1st respondent as full proof that the 1st respondent acted contrary to the provisions of Regulation 80 of the Electoral Regulations.** Therefore, the case of Akinfosile v. Ijose (1960) 5 F.S.C. 192 relied upon by the learned trial Judge does not apply because the petitioner in the instant case was not relying only upon the emergence of evidence from the opposite party for he had already led evidence, through the p.w.3, in proof of his averment. So we hold that the learned trial Judge was wrong when he held as follows:-

(1) *"The reason why I cannot use this evidence to support the petitioner's case is that it differs from the case presented by him and I cannot use it in any way to amend or add to his own case, as his counsel urged me to do, as that will be contrary to sub-regulations (1) (a) of Regulation 103."*

(2) *"Once the fact that he went in company of 1st respondent to do this is inadmissible because it was not pleaded, the whole evidence breaks down."*

and (3) "I mention this because from what the 1st respondent himself said in evidence, one might feel that there had been corrupt practices on his part. That is not the point; the point is even if it has been shown that there had been some corrupt practices or election offences, has the petitioner based his petition on that aspect of corrupt practices or election offences which the 1st respondent himself has somehow admitted? He has not, and Regulation 103(1)(a) will preclude him from making it part of his case just as 103(2) will preclude me from making any effective use of it in the circumstances."

In the result, we hold that (1) the interpretation put to regulation 103(1) and (2) by the learned Judge was in error; (2) the petitioner's allegations of corrupt practices at election were not proved beyond reasonable doubt as required in law by the evidence of the p.w. 3 along; (3) the allegation that 1st respondent appointed p.w. 3 as his agent and that he by himself and through p.w. campaigned in a manner contrary to Regulation 80 of the Electoral Regulations was proved.

In ground 6, the learned counsel for the appellant complained about the rejection of certain documents which were produced in evidence during the proceedings by the learned trial Judge. He submitted that the trial Judge was wrong in so doing especially in respect of Identification 5, an affidavit sworn by the p.w. 2 (Mrs. Christiana Nnemeka), which he said was admissible in law to show what she did as a result of her experience at Urho polling station on that day. We have gone through the relevant portions of the proceedings and considered the submissions of the appellant's counsel on these points and we find ourselves unable to agree with his views. **We are satisfied that the learned trial Judge was right in rejecting the said documents. Since Mrs. Christiana Nnemeka was called as a witness and she gave viva voce evidence of what happened at Urho polling station on that day, we can hardly see the need for her to tender, in evidence, an affidavit containing the same facts. It is not the law that an affidavit, by its nature, vouchsafes the truth of its contents. We should mention that s. 90 of the Evidence Act to which learned counsel called our attention did not support his submission on this point. So this ground of**

appeal cannot succeed.

In view of all we have said above, what we finally have to consider is whether the election for Agbazilo Local Government Area, Ward 6, was conducted substantially in accordance with the provisions of the Electoral Regulations, or whether the acts of non-compliance with the provisions of the Regulations proved by evidence were such as could and did affect the results of the election. We agree with learned trial Judge that the onus was on the appellant to aver and prove the above. Counsel for the appellant said that this was averred in the petition and was proved by evidence led at the trial. He submitted that the learned trial Judge erred in the assessment of the evidence tendered by the petitioner. Counsel for the 1st respondent, in reply, argued that the evidence tendered on this point was totally inadequate and that the learned trial Judge was correct in his conclusion which we quoted at the beginning of this judgment. We, have carefully considered the submissions made by counsel for the parties to this suit and have also carefully scrutinized the record of proceedings. We are satisfied that the combined effects of paragraphs 3(10) to 3(14) inclusive of the petition show that the appellant averred non-compliance with the provisions of the Regulations and that by the combined effects of paragraphs 3(15) to 3(17) inclusive of the petition, he averred that non-compliance with the provisions of the Regulations substantially affected the results of the election to his detriment. There was, in our view, sufficient legal and credible evidence in the printed record of proceedings which substantiated the averments in this respect in the appellant's election petition. Furthermore, we are satisfied that the learned trial Judge did not assess the evidence tendered by and for the appellant in this suit properly as we will proceed to show. In the judgment, the learned trial Judge, in respect of the voting at Onogholo said:

"The complaint is in respect of one polling station out of thirteen: " "As far as the evidence goes, only one person, the 1st p.w., was said to have refused to vote because, according to him he was not allowed to shut the door in order to vote." "But even then the evidence that he did not vote is inconclusive. Exhibit B shows

his name ticked, indicating that he had voted, although as properly pointed out by learned counsel for the petitioner, the tick against a name may only really prove he got ballot paper. The presumption that he voted is there. I do not think that presumption has been rebutted by the unreliable evidence tendered."

Firstly, we have to point out that 1st p.w.'s evidence of lack of secrecy at Onogholo polling station was corroborated by the evidence of p.w. 4 and to some extent by the admission of the 1st respondent himself as we pointed out earlier. In the circumstance, we can find no proper basis on which the learned trial Judge regarded the evidence of p.w.1 as unreliable. Further, while we agree that there was a presumption that p.w. 1 voted because there was a tick mark against his name which was made by the polling officer, we cannot agree that that presumption was not rebutted by the legal and credible evidence of p.w. 1 that he returned his ballot paper which the polling officer issued to him to the same polling officer when he was prevented from shutting the door of the polling both to ensure that he cast his vote in secrecy that day. It is our view that on a proper assessment, the learned trial Judge would not have come to the conclusion he reached on this point. In view of all we said above about the voting at Urho polling station, Ward 6(i), we are clearly of the view that a proper and correct assessment of the evidence of p.w. 2 (Mrs. Christiana Nnemeke) and p.w. 5 (Sunday Ofor) would not have led the learned trial Judge to the conclusion he reached on their evidence. Their evidence was direct and straight forward and was neither shaken nor weakened by cross-examination.

On quite a more serious note was the approach of the learned trial Judge to the case made by the appellant. From the record of proceedings, it is obvious from the judgment in this case that the learned trial Judge viewed the issue of lack of secrecy at Onogholo polling station from the angle that it was only one person, that is the p.w.1, who refused to vote on the ground that it was unlawful and irregular to make people cast their votes in full view of the public; that since there was no proof that more people than one did protest their objection to the breach of the rule of secrecy of the ballot by refusal to cast their votes, the allegation of

non-compliance with the Regulation was not proved. That since there was no proof that many of the persons who did not cast their votes at that polling station refused to do so because voting there was not secret, then there was no proof that non-secrecy of the ballot there affected the voting in that station - Onogholo, Ward 6(C). **With respect, we have to say that the above is not the right approach to the evidence on the point. Such an approach was erroneous as it was based on a restricted and subjective view of the evidence which focuses attention on the number of persons or voters concerned who openly objected rather than a wide and objective view which contemplates the affect of non-secrecy upon the system of secret ballot and the adverse effects which non-secrecy could have had on the prospective voters as well as those who had actually voted on that day. In our view, what the learned trial Judge should have considered was the effect the breach of secrecy could or would have upon the voting rather than think of proof of the allegation in terms of the number of persons shown to have reached or to have been angered away by the lack of secrecy. On a correct and proper approach, the question the learned trial Judge would have asked and considered was:**

"with the breach of the secrecy of the ballot. Could it be said that the voters at Onogholo, Ward 6(C), who cast their votes on that day did so with their free will and conscience?" The answer to this question, on the state of the evidence before the court should be in the negative - which means that non-secrecy of the ballot affected the result of the election in that ward. This was therefore an irregularity.

Also in the case of the voting at Urho, Ward 6(i) where the polling officer stopped the poll at 3 p.m. instead of 4.30 p.m. as stipulated by the Regulation, we held earlier in this judgment that the learned trial Judge erred in rejecting that evidence. We now have to add that the reasoning adopted by the learned trial Judge in coming to the conclusion whereby he rejected that evidence was another instance of his wrong approach to the case of the appellant as can be gleaned from the relevant excerpt from the judgment which we quoted earlier. Added to the excerpt is also

what the learned Judge said in the same judgment on the point:

"First, there was no suggestion that voting there was not secret or that anybody knew, not least the 1st respondent, how it was going. The 1st respondent having allegedly spent to much money at Urho how did it happen that he suddenly lost faith in the electors there, rushed to that polling station and within a couple of minutes decided and contrived to stop voting? What made it appear to him at that time that he was not winning there or that those who were alleged to be waiting still to vote, would not vote for him? There is absolutely nothing in support of this type of attitude. Secondly, if these irregularities occurred, why did the petitioner not complain to the 2nd respondent as soon as practicable or at all? He was the person who had authority over the running of the election in that area. Exhibit C was tendered to show that many people did not vote at Urho and from this I have been asked to accept that they were prevented from voting. Of course this might be considered along with the oral evidence in support. But other voters' lists (Exhibits B.F., to F11) also show that some people did not vote. Were they prevented as well?"

To our mind, the learned trial Judge's approach, as shown in the portion of the judgment just quoted was erroneous for what he was entitled to consider on this point was whether or not the premature closure of the poll at Urho could or would have affected the result of the voting at that station. On the available evidence, that more than 100 voters were prevented from voting as a result of the premature closure of the poll at the material time, the only reasonable answer or conclusion was that voting at Urho, Ward 6(i), could and would be adversely affected thereby - which is another irregularity. We are therefore satisfied that had the learned trial Judge adopted the right and proper approach, he would not have come to the conclusions he reached in this case in consequence of which he dismissed the petition. In our view, the appellant by legal and credible evidence had established against the 1st respondent acts of non-compliance with the Regulations which were substantial in the circumstances of this case.

Having held that non-secrecy of the ballot at Onogholo, Ward 6(C), and premature closure of the poll at Urho, Ward 6(1) were irregularities, and that canvassing for votes among groups of persons by the 1st respondent himself and through his agent Jacob Achima (p.w.3) was contrary to the Regulation, we are satisfied that the appellant had discharged the onus that rested on him to prove his case and that consequently, the onus then shifted to the 1st respondent to show that the said irregularities and non-compliance with the provisions of the Regulations could not or did not affect the result of the election. See Dzungwe & Anor. v. Swem (1966) N.M.L.R. 297 at 303 in which the Supreme Court, through Coker, J.S.C., held as follows:-

"4. Once a petitioner establishes non-compliance, and the Court or other tribunal cannot say whether or not the result of the election could have been affected by such non-compliance, the election will be avoided on the ground that civil cases are proved by a preponderance of accepted evidence. At that stage, the onus shifts to the respondent to show that the non-compliance did not affect the results of the election (The Akinfosile case (1) was decided on its own facts and the pleadings delivered therein.)"

In the instant case, we have looked in vain for any evidence in the record on the part of the 1st respondent that such irregularities and non-compliance with the Regulations could not and did not affect the results of the election. In other words, the 1st respondent failed to discharge the onus on him. Since the 1st respondent was returned as the successful candidate at the election by the 2nd respondent with a majority of 253 votes and as there was evidence that those who did not vote at Onogholo were over 100 persons and at urho were well over 100 persons according to the official figures contained in the exhibits tendered for those two polling stations, and since there was evidence that the 1st respondent himself and through his agent campaigned for votes in a manner contrary to the regulation, it cannot be said that the irregularities and non-compliance could not and did not affect the result of the election. On the facts of this case, we are satisfied that there was sufficient

evidence and proof of the appellant's case to justify judgment being entered in his favour and that the learned trial Judge erred by dismissing the petition. We should add that even if the learned trial Judge was right (but we have held that he was not) in his interpretation of Regulation 103(1) and (2), we still would have come to the same B conclusion that he ought not to have dismissed the petition for the reasons stated above.

In view of all we have said above, this appeal succeeds and is allowed. The judgment of the High Court, Ubiaja in Suit No. U/4/77 C delivered on 14th July, 1977 is set aside and annulled. In its place, there shall be judgment in favour of the appellant who was the petitioner in the court below. **The election of the 1st respondent is hereby declared null and void on the ground of non-compliance with the provisions D of the Local Government Electoral Regulations, 1976.** It is further ordered that the seat of the 1st respondent in Agbazilo Local Government Council is hereby declared vacant and that a fresh election shall be held to fill same. The Registrar of this court shall certify this determination and order to the Electoral Officer and the Secretary of the Agbazilo Local E Government Area. The appellant is entitled to the costs of this appeal which are assessed at N200 against the 1st respondent.

F

G

H