

IN THE FEDERAL COURT OF APPEAL
 BENIN JUDICIAL DIVISION
 HOLDEN IN BENIN CITY
 14TH DAY OF JULY, 1978. FCA/B/12/78
 CORAM:- J. O. EBOH, A. G. O. AGBAJE, P. NNAEMEKA-AGU, JJCA.

ALHAJI SUFUYANU JIMAH APPELLANT
 AND
 SALIU OGUN ALASAN RESPONDENT

ELECTION PETITIONS - Register of electors - Right to vote - May only be exercised by one whose name appears on the register.

ELECTION PETITIONS - Ballot papers cast by voters - That ought to be cancelled - But was shared equally by the Officer between the candidates - The wrong step did not have any effect on the election result.

ELECTION PETITIONS - Voting and being voted for - One may qualify to vote or be voted for in more than one ward - But such a person is not entitled to register or vote in more than one ward.

ELECTION PETITIONS - Personation by some voters- Renders those votes invalid and void - Court is to inquire on how the voters involved voted - Without which it cannot hold that the votes were cast for the appellant.

ELECTION PETITIONS - Personation found proved - Where of a nature that did not make the election unfair - Non compliance by reason of the personation is not proved.

ELECTION PETITIONS - Irregularities found proved - Where not sufficient to void the election - The single irregularity of personation upon deduction of the personated votes - Still gives appellant a slim majority

of one vote.

EVIDENCE - *Proof in an election petition - Of an allegation not involving crime - Is as in civil Cases on a balance of probabilities.*

FACTS

The respondent and appellant contested the post of councillor for Ward 5 to serve in Estako Local Government Council, Auchi. The appellant was returned by the electoral officer as having been duly elected by a majority of lawful votes. Appellant scored 3,369 votes as against 3,354 scored by his opponent, the respondent. The respondent being dissatisfied with the result of the election filed an election petition before the Auchi High Court. He complained that the election was void by reason of corrupt practices or other offences against the Local Government Electoral Regulations, 1976.

The learned trial judge found only some of the allegations proved and rejected the others. He declared the election of the appellant void. The appellant appealed to the Court of Appeal against the findings of the learned trial judge. There was no cross appeal against the trial court's finding that taken singly, all the irregularities he found proved would not be sufficient to void the election.

ISSUE FOR DETERMINATION

Whether the election of the appellant was rightly declared void by the learned trial judge.

HELD (Unanimously allowing the appeal per lead judgment of the Court delivered by **AGBAJE JCA**)

Register of electors

1. We are of the view that the provisions of Regulation 19(2) which are clear and mandatory make a register of electors conclusive for the purpose of determining whether any person is or is not an elector. It does not admit of any exceptions. So it is our view that a presiding officer has no discretion whatsoever to allow anyone whose name does not appear on the register of voters to vote. A quick look at the provisions of Regu-

lation 37(1) (b) will convince one that the provisions of Regulation 37(1) (a) (iv) cannot be construed as giving a presiding officer a discretion to allow someone whose name does not appear on the register of voters to vote. Regulation 37(1) (b) enjoins inter alia the polling officer immediately before delivering a ballot paper to a voter:

(a) to call out the name, number, address and occupation of the voter as stated in the copy of the register of electors or part thereof;

(b) to mark on the counterfoil the number of the voter in the register of electors, and

(c) to place a mark against the number of the voter and copy of the register of electors or part thereof.

If the name and number of a prospective voter were not on a register of voters we fail to see how these mandatory injunctions cast on a polling officer can be carried out. We are therefore satisfied that the learned trial judge was in error in holding that the 11th p.w. should have been allowed vote. (p. 530 H)

Ballot papers cast by voters

2. We are in agreement with the learned trial judge that by virtue of the provision of Regulation 44(2) of the Local Government Electoral Regulations the presiding officer should have cancelled the 12 ballot papers and that he acted wrongly by sharing them equally or at all between the appellant and the respondent. We are however satisfied that the wrong step taken by the presiding officer could not have had any effect whatsoever on the result of the election because the end result that would have been the same whether he cancelled the 12 ballot papers as envisaged by the regulation or whether, as in fact as he did, he distributed them equally between the two candidates at the election. (p. 531 G)

Proof in an election petition

3. Or if we may put it in another way the coincidence which counsel for the appellant urged upon the learned trial judge was beyond the bounds of reasonable probabilities and this case being essentially a civil case, the contention can, with legal justification be ignored. For our part we think

that the learned trial judge was right in the conclusion he reached on this point and for the reasons he gave for arriving at the conclusion. Proof in an election petition of an allegation not involving an allegation of a crime against party to the petition is as in a civil case on a balance of probabilities. See Swem v. Dzungwe (1966) N.M.L.R. 297 at 303. There is only at the highest the very remote possibility that counsel for the appellant could be right in his submission in this regard. (p. 533 H)

C Voting and being voted for

4. It is possible that some one by reason of his place of birth on the one hand and on his residence on the other may qualify to vote or be voted for in more than one ward. But upon a fair and true construction of the provisions of Regulations 11 and 37 of the regulations, we are satisfied that such a one is not entitled to register or vote in more than one ward. We are therefore satisfied that the learned trial judge was right in taking cognisance of what happened in Ihievbe Ward 2A in his consideration of the allegation of personation in Etsako Ward F/H Auchì. (p. 535 B)

E

Personation by some voters - Renders those votes invalid

5. The learned trial judge having held that L. Idonogie and 9 others were guilty of personation at Etsako Ward F, it follows that the vote that each of them cast in that Ward was invalid and void and should not have been counted. So, at that stage relying on the authority of Stepney & ors. v. Durant (1886) as reported in 4 O'M & H 34 at 36 the court should have taken all necessary steps to discover how each of the voters involved voted. Without doing this the lower court could not on the authorities hold that the votes were cast for the appellant and in consequence, further hold that they affected the votes that the appellant scored. (p. 536 D)

H Personation found proved

6. The personation said to be proved must always be borne in mind: it is not that the 10 persons voted more than once at a polling station in the Ward for which the appellant was returned at its duly elected councillor (Etsako Ward). The personation consisted in the fact found by the lower

court that the persons voted both at Ihievbe Ward 2A and at Etsako Ward. The fact that the 10 persons were on the Register of electors for Etsako Ward shows prima facie that they were qualified to vote in that Ward. There was no evidence that they were not eligible for registration as electors in that ward. Because of the foregoing, the personation found B proved by the court was of such a nature that we cannot say in the words of Lord Colebridge, C. J., in Woodward v. Sarsons (1875) L.R. 10 C.P. 733 quoted with approval in Swem v. Dzungwe (supra) at 303:

".... that the constituency had not in fact had a fair and free C opportunity of electing the candidate which the majority might prefer." And again following the guidance of Lord Colebridge, C.J., in the same case, we cannot say that the lower court without being satisfied that the personation did in fact affect the result of the election, had before it D material which should have satisfied it that there was reasonable ground to be believe that the personation he found proved might have prevented a majority of the electors from electing the candidate they preferred. So in the circumstances of this case, it is not apposite to hold that once the respondent had proved non-compliance by reason of the personation E established, the onus shifts to the appellant to show that the personation did not affect the results of the election. So in our view the learned trial judge was wrong in treating, as he did, the votes cast by L. Idonogie and others as if they were necessarily cast for the appellant. (p. 537 G) F

Irregularities found proved

7. On the finding of the learned trial judge before us to the effect that taken singly all the irregularities he found proved would not be sufficient G to void the election against which finding there was no cross-appeal, we must perforce hold that finding (i) was not sufficient to void the election. Even if this finding is taken along with the finding as to personation, the result of the election will be the same since it will only mean deducting 14 H votes from the votes cast for the appellant. Since all the 14 votes were invalid and void there is no basis for holding that they should be added to the votes cast for the respondent. So the appellant still has a majority of one vote, a very slim majority no doubt but none the less a majority. In

the result the appellant's appeal succeeds, the judgment of the learned trial judge is hereby set aside and in its place an order dismissing the election petition is hereby entered. (p. 539 A)

B REPRESENTATION

Mr. J.A. Ojeme for the Appellant

Mr. C. I. Akere for the Respondent

C CASES REFERRED TO

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

Stepney Division Tower Hamlets, case, Isaacson v. Durant (1886)

Woodward v. Sarsons (1875) L.R. 10 C.P. 733

D JUDGMENT DELIVERED BY AGBAJE JCA

The election, the subject matter of this appeal, was held on the 28th day of December, 1976. The two candidates at the election were Saliu Ogun Alasan the petitioner in the election petition (hereinafter referred to as the respondent) and Alhaji Sufuyan Jimah the first respondent to the election petition (hereinafter referred to as the appellant). The election was held in order to elect a councillor for ward 5 to serve in the Etsako Local Government Council, Auchi. The Electoral/Returning Officer was one Solomon I. Ebomwonyi. He was made the second respondent to the election petition. The appellant was returned by the electoral officer as having been duly elected by a majority of lawful votes. The votes recorded for the appellant were 3,369 as against 3,354 scored by his opponent, the respondent. The respondent being dissatisfied with the result of the election filed in an Auchi High Court the election petition with which we are concerned in this appeal. The respondent complained in his petition thus:

"That the election was void by reason of corrupt practices or other offences against the Local Government Electoral Regulations, 1976 committed by the appellant, his servants, agents or privies and or all other persons acting under his control or influence and with his knowledge, consent and authority."

The respondent gave in numbered paragraphs, particulars of the acts which, according to him, amounted to corrupt practices or other offences under the Local Government Electoral Regulations 1976, on the part of the appellant and/or his servants and/or agents. The learned trial judge, Omosun, J., who tried the election petition found only some of the allegations in the respondent's election petition proved, he rejected the others. There is no cross-appeal in respect of the findings of the learned trial judge adverse to the respondent. So this appeal is concerned with the following findings of the learned trial judge in his judgment dated 21st July, 1977: C

"In the sum total, I have found the following transgressions committed, namely:

- (i) Excess of 4 ballot papers in polling station 5S.*
- (ii) A voter was not allowed to vote in polling station 5Q.* D
- (iii) 12 ballot papers found on the floor in the compartment of polling station 5G were shared equally to the petitioner and 1st Respondent by the presiding officer*
- (iv) Personation by L. O. Idonogie and 9 members of his household."* E

Because of these findings, the learned trial Judge ultimately declared the election of the appellant void. The appellant being dissatisfied with his decision has now appealed from it to this court. F

In respect of findings (i), (ii) and (iii) namely excess of 4 ballot papers in polling station 5S, a voter was not allowed to vote in polling station 5Q; 12 ballot papers found on the floor in the compartment of polling station 5G were shared equally to the petitioner and 1st Respondent by the presiding officer respectively, made by the learned trial judge, the appellant did not dispute the primary facts upon which they were based. So the appellant did not dispute that in polling station 5S there was an excess of 4 ballot papers. In fact in respect of this finding the submission of counsel for the appellant Mr. Ojeme was to the effect that this transgression found proved, by the learned trial judge could not have affected the result of the election. We shall say more about this latter on in this judgment. Again counsel for the appellant did not dispute it that G H

one Michael Igono, the 11th p.w. was not allowed by the presiding officer to vote at the polling station 5Q. This is the basis for finding (ii) referred to above. The contention of counsel for the appellant in this regard was that the presiding officer was right in not allowing the 11th p.w. to vote and that the learned trial judge was in error in holding to the contrary. In respect of Michael Igono the 11th p.w. who was not allowed to vote the learned trial judge held as follows:

"It is true that his name and number were omitted from the register of voters - Exh. 'M'

The point that calls for a determination by us is whether, as the learned trial judge said in his judgment, the presiding officer had a discretion in the circumstances to allow the 11th p.w. Mr. Igono to vote, the latter having presented his registration card Exh. 'L' to the presiding officer as evidence of his (11th p.w.'s) having been registered as an elector in the election. It was the submission of counsel for the appellant that the failure of the name and registration number of the 11th p.w. to appear on the register of voters was conclusive on the point and that the presiding officer had no discretion on the matter. On the latter submission namely that the presiding officer had no discretion on the matter, counsel for the appellant referred us to Regulation 19(2) of the Local Government Electoral Regulations. It says:

"A register of electors prepared in accordance with the provisions of this part shall be conclusive for the purpose of determining whether any person is or is not an elector in respect of local government elections until revised or superseded, in the registration area for which it was prepared."

The learned trial judge in coming to the decision that the presiding officer had a discretion to allow 11th p.w. to vote in the circumstances we have stated above relied on Regulation 37 (1) (a) (iv) of the Local Government Electoral Regulations, which enacts that:

"for the purpose of satisfying the polling officer as to his entitlement to vote an elector may produce to the polling officer a registration receipt issued to the elector in accordance with Regulation 13(3)."

We are of the view that the provisions of Regulation 19(2) which

are clear and mandatory make a register of electors conclusive for the purpose of determining whether any person is or is not an elector. It does not admit of any exceptions. So it is our view that a presiding officer has no discretion whatsoever to allow anyone whose name does not appear on the register of voters to vote. A quick B look at the provisions of Regulation 37(1) (b) will convince one that the provisions of Regulation 37(1) (a) (iv) cannot be construed as giving a presiding officer a discretion to allow someone whose name does not appear on the register of voters to vote. Regulation 37(1) C (b) enjoins inter alia the polling officer immediately before delivering a ballot paper to a voter:

(a) to call out the name, number, address and occupation of the voter as stated in the copy of the register of electors or part thereof; D

(b) to mark on the counterfoil the number of the voter in the register of electors, and

(c) to place a mark against the number of the voter and copy of the register of electors or part thereof. E

If the name and number of a prospective voter were not on a register of voters we fail to see how these mandatory injunctions cast on a polling officer can be carried out. We are therefore satisfied that the learned trial judge was in error in holding that the 11th p.w. F should have been allowed vote. Coming back again to finding (iii) referred to above by us, it appears to be common ground that 12 ballot papers were found on the floor in the compartment of polling station 5G and that they were shared equally between the appellant and the respondent. We are in agreement with the learned trial judge that by G virtue of the provision of Regulation 44(2) of the Local Government Electoral Regulations the presiding officer should have cancelled the 12 ballot papers and that he acted wrongly by sharing them equally or at all between the appellant and the respondent. H We are however satisfied that the wrong step taken by the presiding officer could not have had any effect whatsoever on the result of the election because the end result that would have been the

same whether he cancelled the 12 ballot papers as envisaged by the regulation or whether, as in fact as he did, he distributed them equally between the two candidates at the election.

It is finding (iv) which gave rise to some amount of weighty contentions in this appeal. In the first place counsel for the appellant contended that the learned trial judge was wrong in holding that the 10 persons to whom he referred in his judgment that is to say L. O. Idonogie and 9 members of his household voted more than once at the election. In other words counsel for the appellant submitted that the trial judge was wrong in holding that these persons voted both at Ihievbe Ward 2A and at Etsako Ward 5F on 28/12/76 at the local government elections held throughout Bendel State. In order to follow the arguments of counsel before us on the reasoning of the learned trial judge in this regard it is necessary to set down the names of the 10 persons: Idonogie Kate, Idonogie Lawrence, Idonogie Stella, Idonogie Edith, Idonogie Christiana, Idonogie Lucy, Idonogie Helen, Idonogie Simeon, Idonogie Uwagbae and Idonogie Esther. On the evidence before the learned trial judge which counsel for the appellant did not challenge these persons; names were ticked, in the register of voters involved as having voted both at Ihievbe Ward 2A and at Etsako Ward 5F Auchì. On the evidence of the 2nd p.w. Abel E. Oyakhilome and that of the 4th p.w. Justus Babatunde Ajayi it was established that Idonogie Lawrence who voted in Ihievbe Ward 2A and Idonogie Lawrence who voted at Etsako Ward 5F were one and the same person. In respect of the other persons who were said to have voted twice there was no direct evidence as in the case of Idonogie Lawrence establishing that each of them in fact voted twice. So the submission of counsel for the appellant before the learned trial judge and indeed before us was that all that had been established was only a coincidence of names and nothing more. This aspect of the matter received the consideration of the learned trial judge. We are obliged to quote at some length from his judgment in this regard:

"Mr. Ojeme for the 1st respondent has submitted that the petitioner must prove that those who voted at Sebe and Auchì are one and the same person and it could be a coincidence of names and there is no

evidence that they in fact voted at both places. The submission of the learned counsel is untenable. I believe 1st p.w., 2nd p.w. and 3rd p.w. that a tick or marking in the register of voters indicates that a voter has voted, or applied for a ballot paper. Section 37(b) (1) of the Local Government Electoral Regulations 1976 shows that a mark placed against a voter's name indicates that a ballot paper was received by the voter and 37(d) shows that after the issue of the ballot paper, the voter is to go immediately into the secret compartment in the polling station and secretly record his vote, and in the absence of evidence to the contrary, I can draw the inference that such a voter voted. I hold on the evidence before me that the people referred to above at page 28 voted at Sabe and Auchi. It has been urged that it could be a coincidence of names in both places. I think not. An examination of Exhibit "B" will show that the persons listed above all come from the same quarter in Sebe and their occupation is house wife. Similarly in Exhibit "C", they are all listed together, come from the same address in Auchi and are again of the same occupation. I believe 5th p.w. that he knows the Idonogie family well and that Kate, Stella, Edith, Esther, Christiana are wives to L. O. Idonogie and Lucy, Helen are daughters of L. O. Idonogie, while Simeon, Anthony are sons of L. O. Idonogie, Uwagbae Idonogie, a Nephew to L. O. Idonogie and stays with him. I am fortified in this regard by the evidence of 14th p.w. whom I regard a witness of truth. Mr. L. O. Idonogie, 3rd witness to 1st respondent is a blatant liar. It was most distressing to say the least to see this witness lying with all impertinence that he did not vote at both Sebe and Auchi. On the evidence before me, I hold and find as a fact that the following voted at Ihievbe Ward 2A and Etsako Ward 5F on 28/12/76 at the Local Government Elections held throughout Bendel State: Idonogie Lawrence, Idonogie Kate, Idonogie Stella, Idonogie Edith, Idonogie Christiana, Idonogie Lucy, Idonogie Helen, Idonogie Simeon, Idonogie Uwagbae, Idonogie Esther."

In short the reasoning of the learned trial judge was this: the chances of the coincidence of names upon which counsel for the appellant relied are so infinitesimally small that they can with safety be ignored in this case.

Or if we may put it in another way the coincidence which counsel

for the appellant urged upon the learned trial judge was beyond the bounds of reasonable probabilities and this case being essentially a civil case, the contention can, with legal justification be ignored. For our part we think that the learned trial judge was right in the conclusion he reached on this point and for the reasons he gave for arriving at the conclusion. Proof in an election petition of an allegation not involving an allegation of a crime against party to the petition is as in a civil case on a balance of probabilities. See Swem v. Dzungwe (1966) N.M.L.R. 297 at 303. There is only at the highest the very remote possibility that counsel for the appellant could be right in his submission in this regard. We are also of the view that this submission cannot create any reasonable doubt in the mind of any reasonable tribunal as to the correctness of the conclusion reached by the learned trial judge since as we have said counsel's submission was based on a very remote possibility. The next point taken by counsel for appellant was to the effect that since the personation found by the learned trial judge did not take place at the same election that is to say at the election with which this appeal is concerned it cannot be taken cognisance of in the determination of this election petition. He submitted that once it is established that the 10 persons involved each of them had a right to vote and did vote only once at the election the subject matter of this appeal, there was no irregularity. He submitted that this was what was proved. The offence of personation is provided for by Regulation 64(1) and (2):

"(1) Any person who at an election applies for a ballot paper in the name of some other persons whether that name be the name of a person living or dead, or of a fictitious person, or who having voted once at any such election, applies at the same election for a ballot paper in his own name, shall be guilty of the offence of personation.

(2) Any person who, at an election, votes in the name of some other person whether that name be the name of a person living or dead, or of a fictitious person or who, having voted once at any such election votes a second time in his own name, shall be guilty of the offence of personation."

There is no doubt because of the provisions of Regulations 37(1) (c) and 37(1) (e) (1) of the Local Government Electoral Regulations that a voter had only one vote at the Local Government Elections 1976 and that such a vote could only be cast at one polling station. The provisions of Regulations 11(1) and (2) to which counsel for the appellant referred us deal only with the eligibility of persons to vote and to be voted for. **It is possible that some one by reason of his place of birth on the one hand and on his residence on the other may qualify to vote or be voted for in more than one ward. But upon a fair and true construction of the provisions of Regulations 11 and 37 of the regulations, we are satisfied that such a one is not entitled to register or vote in more than one ward. We are therefore satisfied that the learned trial judge was right in taking cognisance of what happened in Ihievbe Ward 2A in his consideration of the allegation of personation in Etsako Ward F/H Auch.** The next submission of counsel for the appellant in respect of the allegations of personation found proved by the learned trial judge is this. It is to the effect that there was nothing before the learned trial judge to show that what happened could have affected the result of the election one way or other. It is to be noted that the learned trial judge said specifically that he did not attribute the personation to the appellant. The submission of counsel for the appellant runs along the following lines. It is only after it was established that the persons guilty of personation voted for the appellant that it could be said that what they did could have affected the votes scored by the appellant at the election. Since the learned trial judge found that he could not attribute the personation to the appellant the fact of the personation alone would not be evidence enough for holding that the persons involved did vote for him. It appears to us because of the provisions Regulations 39(1) and (2) of the Local Government Electoral Regulations that a vote cast by any person guilty of personation would be invalid and void and liable to be subtracted or disallowed from the votes of any one for whom it was cast. However Regulation 140 of the Local Government Electoral Regulations to which counsel for the appellant referred us provides:

"... no person who has voted at an election held under these Regu-

lations shall, in any legal proceedings arising out of the election, be required to state for whom he voted."

It appears on the face of these provisions that the discovery of how a voter voted cannot be obtained in any court proceedings arising out of the election. This regulation is identical with Parliamentary Election Rules, Rule 21 and Local Elections Principal Areas Rules 1973, S. I. No. 79, Sch. 2, r.17 of the United Kingdom. Halsbury's Laws of England vol. 15 4th edition para. 909 at 494 says in regard to the latter provisions:

"Secrecy of Vote: A witness may not be required to disclose for whom he has voted, and it is only in those cases where he has publicly held himself out as belonging to some political party that he may be asked to which party he belongs. The court may not discover how a person has voted until it has been proved that he voted and his vote has been proved that he voted and his vote has been declared to be void."

For the latter proposition, Halsbury's Laws of England relied on the case of Stepney Division, Tower Hamlets, case, Isaacson v. Durant (1886) as reported in 4 o'M & H 34 at 36. **The learned trial judge having held that L. Idonogie and 9 others were guilty of personation at Etsako Ward F, it follows that the vote that each of them cast in that Ward was invalid and void and should not have been counted. So, at that stage relying on the authority of Stepney & ors. v. Durant (1886) as reported in 4 o'M & H 34 at 36 the court should have taken all necessary steps to discover how each of the voters involved voted. Without doing this the lower court could not on the authorities hold that the votes were cast for the appellant and in consequence, further hold that they affected the votes that the appellant scored.**

We are conscious of it that in Swem v. Dzungwe & Anor. (1966) N.M.L.R. (supra) at 303 the Supreme Court held:

"It is clear therefore that where from the facts found the Court was unable to say whether or not the non-compliance affected the result once it is satisfied that there was non-compliance which might affect the result, an election petition will be allowed. In such a petition the petition postulates that the petitioner lost the election on account of non-compliance with the Electoral Rules or Regulations or Statutes which was sub-

stantial enough to affect the result of the election. The reply of the respondent postulates, apart from technical bars of procedure and/or jurisdiction, that there was no non-compliance or that even if there was the non-compliance did not affect the majority secured by the appellant. It follows clearly, therefore, that if at the end of the case of the petitioner, a case of non-compliance is established which may or may not affect the result of the election and it is impossible for the tribunal to say whether or not the results were affected by the non-compliance established, unless there be evidence on behalf of the respondent that such non-compliance as found could not and did not in fact affect the results of the election, then the petition is entitled to succeed on the simple ground that civil cases are proved by a preponderance of accepted evidence."

It appears to us that the above proposition will not apply here where specific allegations of personation were made and it is not impossible for the tribunal, from what we have said above to discover how the personation could have affected the result of the election. Again because of the provision of Regulation 140 to which we have referred above it will be like asking the appellant to do what the Electoral Regulations do not permit him to do if the burden were cast on him to prove that those who personated did not vote for him. Again the personation which the court found was not wide spread. In fact only 10 cases of it were established and in the judgment of the lower court itself they could not by themselves alone have affected the result of the election. So the transgression in this regard was not substantial. So we are of the view that because of the smallness of the cases of personation proved the court should, relying on the passage we have quoted above from Halsbury's Laws of England, have discovered how the 10 persons who personated voted. **The personation said to be proved must always be borne in mind: it is not that the 10 persons voted more than once at a polling station in the Ward for which the appellant was returned as its duly elected councillor (Etsako Ward). The personation consisted in the fact found by the lower court that the persons voted both at Ihievbe Ward 2A and at Etsako Ward. The fact that the 10 persons were on the Register of electors for Etsako Ward shows prima facie that**

they were qualified to vote in that Ward. There was no evidence that they were not eligible for registration as electors in that ward. Because of the foregoing, the personation found proved by the court was of such a nature that we cannot say in the words of Lord Colebridge, C. J., in Woodward v. Sarsons (1875) L.R. 10 C.P. 733 quoted with approval in Swem v. Dzungwe (supra) at 303:

"... that the constituency had not in fact had a fair and free opportunity of electing the candidate which the majority might prefer."

And again following the guidance of Lord Colebridge, C.J., in the same case, we cannot say that the lower court without being satisfied that the personation did in fact affect the result of the election, had before it material which should have satisfied it that there was reasonable ground to believe that the personation he found proved might have prevented a majority of the electors from electing the candidate they preferred. So in the circumstances of this case, it is not apposite to hold that once the respondent had proved non-compliance by reason of the personation established, the onus shifts to the appellant to show that the personation did not affect the results of the election. The fact that the majority of the appellant was only 15 would not in our view affect the conclusion we have just reached. In fact as we have said earlier on the learned trial judge himself recognised it that this transgression only could not have affected the result of the election. What we are saying is that there is even no basis for adding it to any other transgression proved.

So in our view the learned trial judge was wrong in treating, as he did, the votes cast by. L. Idonogie and others as if they were necessarily cast for the appellant. The learned trial judge in his judgment held that all the transgressions he found proved would not each taken by itself be sufficient to void the election. From what we have been saying above, namely (1) the fact that 11th p.w. was not allowed to vote was not a transgression against the regulation, (2) the 12 ballot papers which were shared between the appellant and the respondent could not have affected the result of the election, and (3) the personation of

which L. Idonogie and 9 others were guilty, was, on the material before the learned trial judge, not evidence enough for holding that their votes should be discounted from the votes cast for the appellant, we are only now left with the consideration of finding (1) as to the excess of 4 ballot papers in the Polling Station 5. **On the finding of the learned trial judge before us to the effect that taken singly all the irregularities he found proved would not be sufficient to void the election against which finding there was no cross-appeal, we must perforce hold that finding (i) was not sufficient to void the election.**

Even if this finding is taken along with the finding as to personation, the result of the election will be the same since it will only mean deducting 14 votes from the votes cast for the appellant. Since all the 14 votes were invalid and void there is no basis for holding that they should be added to the votes cast for the respondent. So the appellant still has a majority of one vote, a very slim majority no doubt but none the less a majority.

In the result the appellant's appeal succeeds, the judgment of the learned trial judge is hereby set aside and in its place an order dismissing the election petition is hereby entered. The appellant is entitled to his costs in this court and in the court below which we assess at N600.00 and N75.00 respectively against the respondent.

POST SCRIPT:

I must put this post script to this judgment in view of the dissenting judgment I gave in FCA/B/20/77 E. A. Lamai V. M. C. Orbih given on 18/5/78 where I held that Regulation 103(2) does not permit the use of evidence not pleaded in the trial and the determination of an election petition. I am still of this view which agrees with the view of the learned trial Judge in this regard. So I do not think he was wrong in so holding. In this case the fate of this appeal does not inevitably depend on the interpretation given to Regulation 103(2) as was the case in FCA/B/20/77. Since the other reasons given for saying that the appeal should be allowed, to which I agree, are by themselves sufficient to arrive at that conclusion, I cannot possibly dissent here as I did in FCA/B/20/77.

Sgd. A. G. O. ABAJE JUSTICE, COURT OF APPEAL

B

C

D

E

F

G

H