

SUPREME COURT OF NIGERIA
1ST JULY, 2005 SC. 3/2004
CORAM:- M. L. UWAIS CJN, S. M. A. BELGORE,
I. L. KUTIGI, A. O. EJIWUNMI, D. O. EDOZIE,
I. C. PATS-ACHOLONU, S. A. AKINTAN, JJSC

- | | |
|-------------------------------|-------------------------|
| 1. MUHAMMADU BUHARI | APPELLANTS/CROSS- |
| 2. ALL NIGERIAN PEOPLES | APPELLANTS |
| PARTY (ANPP) | |
| AND | |
| 1. CHIEF OLUSEGUN A. OBASANJO | RESPONDENTS/ |
| 2. ALHAJI ATIKU ABUBAKAR | CROSS-APPELLANTS |
| | |
| 3. INDEPENDENT NATIONAL | RESPONDENT/ |
| ELECTORAL COMMISSION (INEC) | RESPONDENT |
| | |
| 4. CHIEF ELECTORAL OFFICER | |
| AT THE PRESIDENTIAL ELECTION | RESPONDENTS/ |
| 5. CHIEF RETURNING OFFICER | CROSS-APPELLANTS |
| OF THE PRESIDENTIAL ELECTION | |
| | |
| 6. RESIDENT ELECTORAL | |
| COMMISSIONER ABIA STATE | RESPONDENTS/ |
| & 259 ORS. | RESPONDENTS |
-

EVIDENCE - Election petitions - Pleadings - Averments - Where denied by the respondents - Burden of proving the facts - Will be placed on the appellants (H1)

ELECTION PETITIONS - Election materials - Certification of - Is to take place - At both office and polling station - Vide s. 67(3) of the Electoral Act (H2)

ELECTION PETITIONS - Polling agents - Functions of - Office and polling booth - Definitions - In the light of s. 36(1) of the Electoral Act

- A polling agent should not be interpreted to mean a party agent (H3)

ELECTIONS - Validity - Evidence - Proof - Validity of the 2003 presidential election - Where a party asserts noncompliance with the Electoral Act in his pleadings - He is required to prove such fact - By adducing credible evidence (H4)

EVIDENCE - Proof - Election petitions - Allegations made - Where some of them were not proved by the appellants - Burden of proof will not shift to the respondents (H5)

PRACTICE & PROCEDURE - Election petitions - Obiter dictum - Documents - Production of - Where a party fails to produce a document - The party that needs that document - Should adduce secondary evidence thereof - Or pursue committal of the defaulting party to prison (H6)

ELECTION PETITIONS - Election materials certification - Evidence - Witnesses - Where a witness is not a polling agent - He cannot legally testify - That there was no certification of the election materials (H7)

ELECTION PETITIONS - Irregularity - Oath taking - By electoral officers - Lower court's finding that electoral officers' failure to take oath - Is cured by s. 4(1) of the Oaths Act - Is erroneous (H8)

ELECTION PETITIONS - Irregularities - Evidence - Bias - Where some Resident Electoral Commissioners were shown to be members of PDP - That alone does not prove bias - Party who asserts bias - Will have to go further by adducing evidence (H9)

ELECTION PETITIONS - Violence - Undue influence - As criminal offence under s. 129 Electoral Act - Where the petitioners mean to prosecute the respondents - It has to be by criminal proceedings (H10)

PRACTICE & PROCEDURE - Pleadings - Election petitions - Particulars

of pleadings must be given - O. 26 rr. 5 & 6(1) Federal High Court Rules - To avoid surprise to the adversary (H11)

APPEALS - Election petitions - Objection - Grounds of appeal - Entering of an appearance - When an irregular procedure is adopted - With the acquiescence of a party - Such adoption cannot be a ground of appeal (H12)

ELECTION PETITIONS - Stare decisis - Jurisdiction - Qualification of Obasanjo to contest - Ojukwu's case is in all fours with this issue - And the holding in that case applies here - Ss. 239(1) & 233(3) 1999 Constitution - Is where the court derives jurisdiction - And not s. 6(6)(c) (H13)

EVIDENCE - Admissibility - Hearsay - Election petitions - Where trial court acted - On inadmissible hearsay evidence - The appellate court will expunge it (H14)

ELECTION PETITIONS - Evidence - Cross appeal - Nullification of presidential election results in Ogun State - By trial Court of Appeal - Being based on inadmissible hearsay evidence - Was wrong (H15)

APPEALS - Election petitions - Evidence - Notice of cross appeal - Was given within the three months limitation period - And the cross appeal succeeds - As the petitioners failed to prove manipulation - In Ogun State election results (H16)

ELECTION PETITIONS - Invalidation - Oaths - Non Compliance with the provisions of the Act s. 135(1) - As the presidential election - Was conducted substantially - Within the provisions of the Electoral Act - It shall not be invalidated for failure of the electoral officers - To take oath of loyalty (H17)

Before the Court of Appeal, the petitioners/appellants/cross respondents, brought a petition challenging the declaration of the 1st and 2nd respondents/cross appellants as President and Vice President, respectively on the 20th of May, 2003. The Presidential Election was held on the 19th of April, 2003, for the office of the President and Vice President of the Federal Republic of Nigeria. After the compilation of election results nationwide, the 1st and 2nd respondents/cross appellants were returned by the 5th respondent/cross appellant as duly elected President and Vice President of the Federal Republic of Nigeria.

In this petition, the petitioners sought inter alia, an order of the court that the election is invalid for noncompliance with substantial sections of the Electoral Act, 2002, and for reason of corrupt practices. The Court of Appeal dismissed the petition (Nsofor JCA dissenting) on the ground that the respondents had satisfied the provisions of section 134(2) of the 1999 Constitution, notwithstanding the nullification of the election in Ogun State, some Local Government areas, wards and other units. Being dissatisfied, the appellants/cross respondents have further appealed to the Supreme Court.

ISSUES FOR DETERMINATION

ISSUE NO. 1

Whether the Court of Appeal properly interpreted Section 135 (1) and 67(3) of the Electoral Act, 2002 (Grounds 5, 7, and 25).

ISSUE NO. 2

Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150 (1) of the Evidence Act in the judgment (Grounds 3, 13 and 30).

ISSUE NO. 3

Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law (Ground 1).

ISSUE NO. 4

Whether the Court of Appeal's conclusion that non-compliance with Section 67(3) of the Electoral Act was not proved is sustainable considering the express provisions of the section, the pleadings of the parties

and the totality of evidence on record on the point (Grounds 8 and 9).

ISSUE NO. 5

Whether the Court of Appeal's failure to invalidate the Presidential election after holding that Section 18 of the Electoral Act 2002, was not complied with was proper (Ground 4). Etc. see p. 1878

CROSS APPEAL

Whether the learned trial Justices of the Court of Appeal were right in nullifying the presidential election results in Ogun State in the light of the evidence and materials placed before them? (Grounds 2, 2, 4, 5 & 6).

HELD (Unanimously dismissing the appeal per UWAIS CJN)

Averments - Where denied by the respondents

1. In their amended petition at the court below, the 1st and 2nd appellants/ cross respondent pleaded in paragraphs 13 and 13A thus:-

"13. In accordance with the provisions of Section 67(3) of the Electoral Act, 2002, the Polling Agents of contesting political parties were expected to certify all the election materials to be used at the election from the office to the polling station. But the 3rd respondent and its representatives failed or neglected to apply this very important provision, which was enacted to ensure credibility of the electoral process.

These averments were denied by the respondents. Consequently, by the rules of procedure and evidence this places the burden of proving the facts on 1st and 2nd appellants/cross-respondents. (p. 1887 B)

Election materials - Certification of

2. The Court of Appeal, per Tabai, JCA., in interpreting Section 67(3) held that it was a polling agent that was to certify the election materials from the office to the polling booth. And that the certification was to take place at either the Ward Collection Centre or the Ward Distribution Centre.

It seems to me that the certification of the election materials is intended by Section 67(3) to take place at both the office and polling station. It is not difficult to know the office or the polling booth. If this is correct, then there cannot be a certification when the materials leave

the office on its way to but has not reached the polling booth. It is not practically possible or convenient for the certification to take place after leaving the office but before reaching the polling booth. (p. 1887 G)

B *Polling agents - Functions of*

3. According to Section 36(1) of the Electoral Act, 2002, the polling agents are to carry out their function at a polling booth. In my view, the Act simply mentions “office” and “polling booth.” It certainly does not mention “ward collection centre” or “ward distribution centre” as surmised by Tabai, JCA. However, the word “office” has been defined by The Concise Oxford Dictionary, 7th Edition, to mean place for transacting business, room, etc., in which the clerks of an establishment work, counting-house, room in which any kind of administrative or clerical work is done. It therefore appears to me by the definition that a “ward distribution centre” and a “ward collection centre” could pass for an “office”. In that case, I do not think that it will be right to say, as argued by learned counsel for the 1st and 2nd appellants/cross-respondents, that the Court of Appeal misdirected itself in determining where the materials were to be certified.

E In the light of the provisions of Section 36(1), I do not think that a “polling agent,” even if appointed by a political party, should be interpreted to mean a “party agent,” as submitted by Chief Ahamba, learned counsel for the 1st and 2nd appellants/cross-respondents. The words “polling agents,” in Section 67(3), even if not explained by Section 36(1), cannot in their ordinary meaning be the same as “party agents”. In any event, the words must be given their ordinary grammatical meaning since they are not ambiguous or vague. (p. 1888 B)

G

Validity of the 2003 presidential election

4. In general, in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact,

H

it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduced could not, on the preponderance of the evidence, result in the court giving judgment in favour of the party.

It is clear from the foregoing provisions of the Act that the burden of proving the non-compliance with the provisions of the Electoral Act, 2002, the invalidity of the election by reason of corrupt practices and the disqualification of the 1st respondent/ cross-appellant from contesting the election were matters to be proved by the 1st and 2nd appellants/cross-respondents at the trial in the Court of Appeal. (pp. 1893 C & 1894 D)

Election petitions - Allegations made

5. It follows from the foregoing that the 1st and 2nd appellants/cross-respondents were, by the finding of the Court of Appeal, unable to prove some of the allegations made in their amended petition. The evidence led did not show what took place in 22 States, according to the finding of the court. This led the Court of Appeal to presume that there were no irregularities in the 22 States pursuant to Section 150(1) of the Evidence Act, which provides:-

“150 (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for validity were complied with.”

On the basis of the findings by the Court of Appeal, which is not disturbed, I am satisfied that the 1st and 2nd appellants/cross-respondents did not fully discharge the burden of proof on them and therefore the burden did not shift to the respondents. (p. 1897 B)

Election petitions - Obiter dictum

6. I quite agree with the submissions by Chief Afe Babalola and Mr. Sofunde, learned Senior Advocates of Nigeria. The incident, which the 1st and 2nd appellants/cross-respondents raised, occurred in the course of the proceedings in the Court of Appeal in 2004. It did not occur on or before the 19th April, 2003, when the presidential election was conducted. It

therefore should not have been the subject of comment during but before the judgment of the Court of Appeal. At any rate, the proper procedure to be followed as a result of the failure to produce the documents is for the party that needed the documents to adduce secondary evidence of them in accordance with Sections 97(1)(a) and 98 of the Evidence Act or ask the court to compel the defaulter to produce the documents by committal to prison. This did not happen. Rather, the court decided to comment on the default in the course of its delivery of judgment. Surely, whatever the court said in that regard could not have been part of the question for determination by it as presented in the parties' pleadings where issues were joined. It is, therefore, obiter and cannot be the subject of complaint to or decision by us. Accordingly, the Issue No. 3 fails.

(p. 1899 D)

D ***Election materials certification - Evidence***

7. In proof of paragraph 13, the 1st and 2nd appellants/cross-respondents called numerous witnesses, who variously described themselves as agent, party agent, presiding officer, supervisor, supervisor/agent, polling agent, coordinator presidential election, agent to ANPP, supervisor ANPP at Local Government level, Supervisor-INEC, Independent observer (domestic), an agent for ANPP, Unit agent for ANPP, ANPP party agent, ANPP party supervisory agent, ANPP supervisory agent/collation agent and supervisory/collation agent.

Of all these only 2 witnesses, namely petitioners' witnesses Nos. 16 and 62 specifically described themselves as "polling agents." With this state of affairs, it is easy to see why the Court of Appeal held that there was no proof of the allegation in paragraph 13 and that the testimonies of the over 60 witnesses called by the petitioners was at variance with the pleadings. I accept this because I do not see how any person who was not polling agent can legally testify that there was no certification of the election materials as required by Section 67(3) which provides that it is polling agents and no one else that were to certify the materials.

(p. 1902 G)

H

Irregularity - Oath taking - By electoral officers

8. There is no dispute that with regard to Section 18 of the Electoral Act, 2002, the Court of Appeal found as a fact that the oath prescribed by the section had not been sworn to by the officials that were supposed to do so. This finding of fact is not being challenged. The section reads-

"18. All Electoral Officers, Presiding Officers and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interests of the Federal Republic of Nigeria without fear or favour."

The form of the oath has not been prescribed by the Electoral Act, 2002, though Section 18 thereof provides what the oath should pertain to. Section 1 of the Oaths Act, Cap. 333 of the Laws of the Federation of Nigeria, 1990, provides:-

"1. The oath to be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act."

None of the oaths so prescribed is titled - "Oath of Loyalty and Neutrality." Again Section 2 of the Oaths Act, Cap. 333, states:-

"2. A person appointed to the office set out in the second column of the Second Schedule to this Act shall take the oath specified in the first column of the said Schedule which shall be administered by the authority specified in the third column of the said Schedule."

I have carefully examined the Second Schedule of the Oaths Act, I am, unable to find "Electoral Officers, Presiding Officers and Returning Officers" mentioned therein, nor is it indicated therein what oath they are to take. Therefore, there is a lacuna in the Electoral Act. In my view, the provisions of the Oaths Act, Cap. 333 have no application to the election officials specified by Section 18 of the Electoral Act. It follows that the provisions of Section 4(1) of the Oaths Act, on the consequence of an omission by a public officer to take any oath, must be read in the context of the Oaths Act, Cap. 333 alone and cannot be extended to any other legislation in general, as was done by the Court of Appeal in this case. Therefore, Tabai, JCA., acted in error when he held that the omission by the Electoral officials to take the Oath of Loyalty and Neutrality had

been cured by Section 4(1) of the Oaths Act, Cap. 333. Consequently, the failure to take the oath prescribed by Section 18 of the Electoral Act is another irregularity, the effect of which, on the validity of the election, I will consider later in this judgment. (p. 1909 E)

B Irregularities - Evidence - Bias

9. With regard to the evidence of irregularities given State by State covering 14 States, the Court of Appeal, per Tabai, JCA., considered such evidence State by State as adduced and gave cogent reasons as to why the evidence was accepted or rejected. It is true that evidence was adduced to show that some Resident Electoral Commissioners were members of the PDP. This is sufficient to prove non-compliance with Sections 17(2) and 19 of the Electoral Act, 2002, but is not sufficient to lead to the conclusion that they were biased. The party that asserts that they were biased will have to go further by adducing evidence to show the manner in which they were biased against the petitioner or in favour of the respondent to the petition to enable the tribunal or court come to that conclusion. That has not been the case here. It is not enough merely to show that the officials were members of the PDP. The evidence adduced by the petitioners is therefore inconclusive in that regard and I so hold. (p. 1920 B)

F ELECTION PETITIONS - Violence - Undue influence

10. Mr. Sofunde argues that the issue here does not apply to his clients but the 1st and 2nd respondents/cross-respondents. He submits that by way of assistance to the court, though the Court of Appeal made the finding that there was violence in the election, it did not find that the violence was at the instance of the 1st and 2nd respondents/cross-appellants. Therefore, the provisions of Section 129 of the Electoral Act ought not to apply.

Now, it is clear to me that Section 129 of the Electoral Act, creates a criminal offence which it terms “undue influence” and prescribes punishment for the offence. I do not therefore see how such an offence can be the subject of an election petition or civil proceeding. If the petitioners mean to prosecute the 1st and 2nd respondents/cross-appellants of the offence under Section 129 then there must be a charge to which

they must plead in a normal criminal proceedings. However, that is not the situation here. I am strengthened in holding this view by the heading given to Part VI of the Electoral Act, which is “Electoral Offences” and the part covers Sections 114 to 130 inclusive of the Act. Section 134 of the Electoral Act, 2002, provides the grounds on which an election may be questioned by way of petition., none of which mentions “undue influence.” Consequently, I see no substance in this issue and it fails. (p. 1921 H)

C Election petitions - Particulars of pleadings must be given

11. Now the aspect of the Court of Appeal’s judgment which Chief Ahamba attacks reads thus:-

“The ruling of this court on the 9/2/04 was to the effect that although Rivers State is specifically pleaded, evidence of what happened in Eleme LGA of Rivers State was inadmissible since facts in respect thereto were not, in addition, specifically pleaded. In other words, even where a State of the Federation is specifically pleaded, a Local Government within that State must in addition be specifically pleaded to enable evidence in respect thereof to be admitted. This court is bound by that decision.

This decision cannot, however, be read in isolation it must be read side by side with this court’s earlier ruling on the 4/11/03 by which evidence in respect of Benue State was admitted.

Chief Afe Babalola, SAN., objected to the admissibility of evidence in respect of Benue State, his ground being that the State had not been specifically pleaded. In the ruling, this court per Oguntade, JCA., (as he then was), reacted thus:

“With respect to the respondents’ counsel, I do not think that the import of the averment in paragraph 14(c) and 14(g) ought to be limited in scope. It seems to me that rather than confine the act of violence alleged to Ebonyi State, paragraph 14(c) only makes Ebonyi State an example of the widespread violence during the elections. That this was the intention of the petitioners was put beyond dispute by the last sentence of paragraph 14(c) where the petitioners served notice that they would be leading evidence of similar acts of violence in at least twenty-one States of the Federation.”

The purport of this ruling is that the petitioners were at liberty

to adduce evidence in support of their allegations of the 3rd respondent's condonation and or connivance at 1st respondent's deployment of armed military and police personnel and their alleged perpetration of violence against members of the ANPP and other political parties. This court is equally bound by this decision of the 4/11/03. It must be emphasized that every inch of this country falls within the boundaries of one Local Government Area or another. The combined effect of the two decisions is that whereas evidence of corrupt practices such as stuffing of ballot boxes with ballot papers, diversion of election materials to private homes, entries of false results into result sheets, etc., in a Local Government Area are inadmissible unless facts relating thereto have been specifically pleaded, evidence of alleged perpetration of violence and intimidation by military and police personnel and PDP thugs in the Local Government Areas are admissible even though facts relating thereto have not been specifically pleaded. I shall therefore examine, in due course, the evidence in respect of these Local Government Areas to see which one to discountenance."

I see nothing wrong with this stand which the Court of Appeal took. It is elementary, as contained in Order 26 rules 5 and 6(1) of the Federal High Court (Civil Procedure) Rules, that in pleadings, particulars must be given and the adversary must not be taken by surprise. (p. 1924 E)

Election petitions - Objection - Grounds of appeal

12. Mr. Sofunde submits that entering of appearance within the meaning of paragraph 12(1) of the Procedure for Election Petitions does not amount to appearing in court physically by the 1st and 2nd respondents. That it is the delivery in the registry of the court of the memorandum of appearance that amounts to entering an appearance.

First of all, this point ought to have been raised in the Court of Appeal by the 1st and 2nd appellants/cross-respondents by way of objection. It does not appear that this was done. It is settled law that where an irregular procedure is adopted with the acquiescence of a party to a civil action, such adoption cannot be a ground of appeal. Also, where a wrong procedure has been followed in filing a process and no objection

was raised by the party that should have objected, the court is entitled to proceed with the hearing despite the wrong procedure followed - *Obajinmi v. A-G of Western Nigeria* (1967) All NLR 31.

Secondly, paragraph 10(2) of Procedure for Election Petitions provides:-

"(2) The non-filing of a memorandum of appearance shall not bar the respondent from defending the election petition if the respondent files his reply to the election petition in the Registry within a reasonable time, but, in any case, not later than twenty one (21) days from the receipt of the election petition."

It follows that even if the 1st and 2nd respondents entered appearance out of time that could not have affected the filing of the reply, which as submitted by Chief Afe Babalola, was filed within the 21 days provided by paragraph 10(2).

Consequently, I see no substance in this issue and it fails. (p. 1934 H)

Jurisdiction - Qualification of Obasanjo to contest

13. As can be seen, the claim in both this case and that case are the same. The argument is also the same in respect of Section 137(1)(b) of the Constitution. Reference to Section 318 of the Constitution on the definition of "office" has been made in both cases as well. The only new argument in the present case, which was not advanced in *Ojukwu's* case, is that the facts of this case are different from the facts in that case. It is argued also as a new point that this court lacked the jurisdiction in view of the provisions of Section 6(6)(c) and (d) to hear the case. With respect, the question whether the 1st respondent/cross-appellant was disqualified from contesting the election is a question of law and not fact. It is the Constitution in Section 137 thereof that provides the grounds for disqualification. The evidence that he was appointed by the Supreme Military Council as Head of State is common to this and *Ojukwu's* case. Therefore this case is on all fours with that case. I need only to repeat and adopt what I held in *Ojukwu's* case at p. 202 thereof, which is as follows:-

The keyword here is "appointment" which does not have the same meaning as "election" which the appellant canvassed that took place in

the Supreme Military Council to appoint the 1st respondent in 1976 as Head of the Federal Military Government.

B Surely, the office of Head of the Federal Military Government is not the same as the office of the President of the Federal Republic of Nigeria as envisaged by the 1999 Constitution which relates to a general election, while Decree No. 32 of 1975 talks of appointment and not election.”

C I now need to advert to the question of jurisdiction in Ojukwu’s case.

D It is significant to allude to the exception made to the application of Section 6(6)(c) of the Constitution. The provisions of the subsection have no application where the Constitution provides that a superior court can exercise jurisdiction on any issue or question as to whether any act or omission is in conformity with chapter II of the constitution. I do not, with respect, see any relevance of the submission by learned counsel for the 1st and 2nd appellants/respondents to the question of jurisdiction of this court being tied up to the provisions of Section 6(6)(c) and (d). The provisions of the Constitution which gave this court jurisdiction in Ojukwu’s case, are Sections 239(1)(a) and 233(1) thereof.

E And not the provisions of Chapter II of the Constitution. Also that the subject before us is election and not the Fundamental Objectives and Directive Principles of State Policy in the Chapter II.

F I therefore hold that this court had jurisdiction to hear and determine all the questions raised in Ojukwu’s case. Consequently, this issue fails. (pp. 1939 A / 1940 A)

Admissibility - Hearsay - Election petitions

G 14. Chief Afe Babalola has shown, from the cross-examination of P.W.1, that his evidence was substantially hearsay and therefore inadmissible, as it was based on reports made to him by the ANPP agents that he sent to the polling units in Ogun State. The polling agents were not called to collaborate the evidence of P.W.1. Its being hearsay is confirmed by the judgment of Tabai, JCA.

H It follows that the report received by P.W.1, Mr. Bisi Lawal is hearsay and therefore inadmissible. A court can only act upon evidence

which is admissible. Where a trial court has admitted and acted upon a legally inadmissible evidence, it is the duty of the appellate court to ensure that such legally inadmissible evidence is expunged.
(p. 1950 D)

Nullification of presidential election results in Ogun State

15. I am mindful of the provisions of Section 227(1) of the Evidence Act, Cap. 112 which provides:-

“227 (1) *The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.*”

D But the evidence of P.W.1 is all that the Court of Appeal (per Tabai, JCA.), relied upon to hold “that the documents tendered by P.W.1 are authentic INEC results for the 142 polling units” in Ogun State and to nullify the election. The makers of the documents did not testify to tender them in evidence as exhibits. Chief Ahamba has of course referred to the evidence of P.W.26, Kehinde Adebayo Delano, who was a Senatorial candidate for the ANPP. I am afraid his evidence is not mentioned anywhere in the judgment of the Court of Appeal, nor is it to the point here and so cannot support the decision by the Court of Appeal.

F Therefore the cross-appeal succeeds and it is hereby allowed.
(pp. 1951 B / 1952 F)

Election petitions - Evidence - Notice of cross appeal

G 16. I find support for this view in the provisions of paragraph 51 of the Procedure for Election Petitions, which reads:-

“51. *Subject to the provisions of this Act, an appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with the practice and procedure relating to appeals in the Court of Appeal or of the Supreme Court as the case may be regard being had to the need for urgency on electoral matters.*”

By the provisions of Section 27(2)(a) of the Supreme Court Act, Cap. 424, the period prescribed for the giving of notice to appeal from

a decision of the Court of Appeal to the Supreme Court in a civil case is three months. In the absence of any specific provision in the Electoral Act, 2002, as to the time forgiving notice of appeal as such and in the light of paragraph 51 of the Procedure for Election Petitions, I hold that the provisions of Section 27(2)(a) of the Supreme Court Act applies to this case.

The judgment of the Court of Appeal in the petition was delivered on 20th December, 2004. Three months from thence ended on 20th March, 2005, but the cross-appeal herein was filed on 15th February, 2005, after obtaining leave from this court on 9th February, 2005 to do so. That is well within three months. The preliminary objection, therefore, fails and it is dismissed. I hold that the cross-appeal was brought within time.

In arguing against the cross-appeal. Chief Ahamba adopted the issue for determination raised by the 4th-5th respondents/cross-appellants and presents his argument. In view of the decision I have reached above in the cross-appeal by the 1st and 2nd respondents/cross-appellants, with the rejection of the evidence of P.W. 1 as hearsay and the failure of the 1st and 2nd appellants/cross-respondents to call the ANPP agents from whom P.W.1 received report of substantial non-conformity with the Electoral Act. I have no alternative than to hold that the 1st and 2nd appellants/cross-respondents have failed to prove, beyond reasonable doubt, the manipulation alleged to have taken place in Ogun State. Accordingly, the cross-appeal by the 4th-5th respondents/cross-appellants succeeds and it is hereby allowed. (p. 1954 C)

Invalidation - Non Compliance with the provisions of the Act s. 135(1)

17. Section 135(1) of the Electoral Act provides that an election shall not be invalidated by reason of non-compliance with the provisions of the Electoral Act, if it appears that the election was conducted substantially in accordance with the principles of the Electoral Act and that the non-compliance did not affect substantially the result of the election.

The evidence adduced at the trial in the Court of Appeal by the 1st and 2nd appellants/cross - respondents was not sufficient to enable the Court of Appeal hold that the election was not held substantially in accordance with the principles of the Electoral Act. This was so despite the

Court of Appeal nullifying the election in Ogun State. In this court, we are satisfied that the testimony of Chief Bisi Lawal, P.W.1, which the Court of Appeal relied heavily upon to nullify the election in Ogun State, was based on hearsay, which is unreliable and by Evidence Act, inadmissible. The documents the witnesses tendered were not, in the absence of evidence of the makers, reliable. Again the failure of the Electoral Officers, Presiding Officers and Returning Officers to take Oath of Loyalty and Neutrality is of no moment since the form of the oath is omitted in the Electoral Act and cannot be found in the Oaths Act. All these have further weakened the petitioners' case for non-compliance with the provisions of the Electoral Act.

In sum, the case made by the 1st and 2nd appellants/cross-respondents before the Court of Appeal which did not entitle them to the judgment of the court in their favour is even weaker before this court. I therefore, come to the conclusion that the election was conducted substantially in accordance with the principles of the Electoral Act. (p. 1956 F)

NOTABLE POINTS OF INTEREST

BELGORE JSC

1. Election result is presumed correct and authentic unless the contrary is proved

It is the duty of the petitioners not only indicate clearly the evidence of violence, where it occurred and how it affected the election to bring the election within the scope of non-substantiality in compliance with law as to render it invalid. General allegations, without more is to my mind insufficient proof of irregularity or violence or fraud or corrupt practice. When the Electoral Commission declares a result, there is a presumption the result is correct. But this presumption is not water tight, it is rebuttable and the onus is on the petitioner to prove and rebut the presumption. Omoboriowo v. Ajasin (1984) 1 SCNLR 108; Nwobodo v. Onoh (1984) 7 SCNLR 1. Once the Electoral Commission announces the result of an election, it is presumed correct and authentic and the petitioner who alleges the opposite must offer clear and positive proof that the result is incorrect

and not authentic. If the allegation is of fraud, it must be proved beyond reasonable doubt, because fraud is a crime. If it is of violence, the violence, its location, its effect on the election, its spread whereby substantially it affects the result must be clearly pleaded and given in evidence. (p. 1968 A)

B
2. *Pleadings - Evidence should not be given on a fact that is not pleaded*

In all civil matters in superior courts of record, all facts a party relies upon must be pleaded clearly in numbered paragraphs. The same applies to election petitions so that the paragraphs set out seriatim will indicate the facts the petitioner relies for his petition. All rules of High Courts provide for this practice. The reason for this principle of practice is that no party should take advantage of lurking away facts in his pleadings and unleashing surprise in court by evidence on a matter not pleaded, it has been with us since colonial days and it is not unreasonable. The attainment of justice is that all parties to a suit must in their pleadings make full disclosure of facts they intend to rely for their case. In that case, each party will readily prepare for the case he is to meet. By not pleading a fact and coming to court to offer evidence on it, is wrong in principles of jurisprudence. Thus, pleadings are matters of full disclosure, not the Trojan Horse! (p. 1976 C)

EDOZIE JSC

F
3. *Not every breach of the Electoral Act, 2002 - Will ground invalidation of election*

Let me say straightaway that it is not disputed that in the conduct of the election, the 3rd respondent was in breach of the provisions of Sections 18 and 40(1) of the Electoral Act, 2002. What is in dispute is the legal consequences of the breach; does it without more lead inexonerably to the invalidation of the election? Section 134(1) of the Act sets out the grounds upon which an election may be questioned, one of which is that election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act. But the makers of the law realizing that non-compliance with the provisions of the Act could occur in the conduct of an election then enacted in Section 135(1) of the Act, that an election

shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. I had expressed my views on the interpretation of this section while considering the first issue for determination. It is my view that proof of non-compliance with Sections 18 and 40(1) of the Electoral Act, 2002, without more is insufficient to lead to the invalidation of the election. I am in complete agreement with the court in this regard. I will resolve the issues under consideration against the appellants. (p. 2038 F)

PAST-ACHOLONU JSC

4. *Duty of court to give meaning to shrouded words of a State*

Section 135(1) of the Electoral Act, 2002, states as follows:

“An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election.”

In respect of Section 135(1), what really is the import of the expression “*substantially in accordance with the principles of the Act*”? In order not to arrive at a construction that may be pejorative of the expression or which might do violence to what it denotes having regard to the context in which that phrase appears in the statute, a holistic approach to the interpretation is important. Indeed, a careful and methodical analysis and scrutiny of the expression in reference to acts whether by way of omission or commission in the course of election connotes practices which when viewed objectively, having regard to the provision, are in consonance in great detail in application and performance with, and appear to satisfy the requirements of the dictates of the statute to show proper accommodation of the tenor and intendments of the provision. That is to say that too much should not be made of certain seeming violations or irregularities that do

not fundamentally and materially affect due effectiveness and actualization of the spirit of the Act. There is no doubt that this provision is inelegantly drafted but the court must make a meaning out of it to give it sense, proper understanding and relevance. It seems to me that the construction given to that section by the lower court accords with rationality. The aim of justice is to discover truth and apply same so as to give meaning to the life of the society.

I would go even further to postulate that where the words of the statute appear shrouded in a cloak of cloudiness, making it difficult to ascertain on the surface what it has in mind, it is the duty of the court to attempt to give a meaning that will resonate with sense, order and system so as to make it workable and real. In the circumstances the Court of Appeal found itself, I believe that its construction is the best in its quest to mete out justice and not render the provision barren, impotent or worthless. In jurisprudence such might be described as a Judge made law but indeed it is the Judge's effort to administer justice and in this effort to seek for truth, he would dig in to explore ways to give an interpretation that is ennobling and fertile. (pp. 2059 G / 2060 G)

AKINTAN JSC

5. Cancellation of election - Purpose of s.135(1) of the Act

As I have stated earlier above, the purpose of the inclusion of Section 135(1) in the Act is to prevent an election from being invalidated on mere failure to comply with minor provisions of the Electoral Act which have no effect or substantially affect the outcome of the election. Presidential election, according to our Constitution, is a nation-wide exercise. The preparations involve a lot of planning, logistics and enormous cost of money from public fund. The courts are required to take judicial notice of all these points stated above. An order of cancellation or nullification of such an election is therefore not expected to be made by a tribunal or court without clear, positive, credible and overwhelming evidence led to the effect that the entire election was totally flawed nation-wide and the conduct was in breach of major and very fundamental provisions of the Act. (p. 2090 D)

6. Burden of proof in civil matters

But from the facts in the instant case, it was not in doubt that a result was declared. A result was in fact declared in which the 1st respondent was declared as the winner at the election. The onus was on the appellants who challenged the election of the 1st respondent to lead credible evidence in support of their contention that the 3rd respondent failed to carry out the duties assigned to it by law. It is after the appellants have led credible evidence in support of their claim as pleaded that the onus would shift on the 3rd respondent to rebut the claim of the appellants. Election petitions are civil matters. The burden of proof in civil matters is not static or rigidly on one side as in criminal cases. It shifts from one side to the other, depending on the state of the pleadings and evidence led in support of each of the parties' case. (p. 2091 F)

REPRESENTATION

Chief M. I. Ahamha, SAN., (with him, J. Dozie, B. A. Adamu, V. I. Ikeonu, A. A. Gulak, C. H. Nwuke, E. Etteh, J. Nunieh-Yowika, M. Shuaihu, A. K. Usman, M. Asibe and A. K. Iroha), for the 1st and 2nd Appellants/Cross-Respondents.

Chief Afe Babalola, SAN., (with him, Chief A. S. Awomolo, SAN., O. Okunloye, SAN., O. Dada, Wole Aladedoye, O. Sowemimo and N. Okonkwo), for the 1st and 2nd Respondents/Cross-Appellants.

A. O. Eghobamien, SAN., (with him, M. I. Damisa (Mrs.)), for the 4th and 5th Respondents/Cross-Appellants.

E.O. Sofunde, SAN., (with him, J. K. Gadzama, SAN., R. O. Yusuf, A. O Eghobamien, Jnr., M. I. Hanafi, C. I. Nwako, K. C. Ndukuba, P. A. Obim (Miss), S. I. Kalio and R. A. Nnaji), for the 3rd and 6th - 265th Respondents.

CASES REFERRED TO

Kale v. Coker (1982) 12 S.C. (Reprint) 118; (1982) 12 S.C. 252 at pp. 257-25

Aqua Ltd. v. Ondo Sports Council, (1988) 10-11 S.C. 31; (1988) 4 NWLR

(Pt. 91) 622 at p. 641

Ahmed v. Kassim, 3 FSC 51

Oviawe v. I.R.P. (Nig.) Ltd. (1999) 3 NWLR (Pt. 492) 126 at p. 139.

Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 519 at pp. 532 F-G and 543D

B Pan Asian African Co. Ltd. v. National Insurance Co. (Nig.) Ltd. (1982) 9 S.C. (Reprint) 1; (1982) 9 S.C. 1

Ugochukwu v. Cooperative & Commercial Bank Ltd. (1996) 6 NWLR (Pt. 456) 524 at p. 537F-G

Lion of Africa Insurance v. Fisayo (1986) 4 NWLR (Pt. 37) 674

C A-G Anambra State v. Onuselogu Enterprises Ltd. (1987) 4 NWLR (Pt. 66) 547 at p. 560

Akhigbe Olise v. Richard Ofen-Imu, NEPLR Vol. 3 p. 42 at p. 45; Morgan v. Simpson (1975) QB 151

STATUTES & RULES REFERRED TO

D Constitution of the Federal Republic of Nigeria 1999, ss. 6(6)(b)-(d), 233(3), 239(1), 134(2), 137(1)(b) & 318

Electoral Act, 1963, s. 93(1)

Electoral Act, 2002 ss. 17, 18, 19, 36(1), 40 67(3), 93(1), 122, 129, 133,

E 134, 135(1) & 149

Evidence Act ss 77(a)-(c), 97(1)(a), 98, 112, 132, 135-139, 150, 227(1)

Oaths Act Cap. 333 LFN 1990 SS. 2, 4(1)

Constitution (Basic Provisions) Decree No. 32 of ss. 8, 20

F Supreme Court Act s. 27(2)

Federal High Court (Civil Procedure) Rules 2000 O. 26 rr. 5 & 6(1)

Procedure for Election Petition First Schedule of Electoral Act, 2002 Paragraphs 10(2), 12(1), 43(1) & 51

LEAD JUDGMENT BY UWAIJS CJN

G The Presidential Election was held on the 19th day of April, 2003, to fill the offices of the President and the Vice-President of the Federal Republic of Nigeria. The election, which was conducted nation-wide by the 3rd respondent/respondent, was contested by candidates from 20 political parties. The 1st appellant/cross-respondent together with another candidate
H (now deceased) contested the election as candidates of the 2nd appellant/

cross-respondent - All Nigeria Peoples Party (ANPP) - while the 1st and 2nd respondents/cross-appellants contested as candidates of the Peoples Democratic Party (PDP). The 1st and 2nd respondents/cross-appellants were returned by the 5th respondent/cross-appellant as duly elected President and Vice-President of the Federal Republic of Nigeria respectively. B

The 1st and 2nd appellants/cross-respondents felt aggrieved and, therefore, as petitioners brought a petition before the Court of Appeal on the 20th day of May, 2003, challenging the declaration of the 1st and 2nd respondents/cross-appellants as President and Vice-President respectively C and joining the 4th and 5th respondents/cross-appellants as well as the 3rd and 6th to 265th respondents/respondents as provided by Section 133(2) of the Electoral Act, 2002.

In their petition, which was amended twice, the 1st and 2nd appellants/cross-respondents, pleaded in paragraphs 4 and 5 thereof, as D follows:-

“4. “And your petitioners state that the candidates and their scores as arbitrarily assigned to each candidate and declared by the National Returning Officer for the Presidential election are as follows: E

PARTY	CANDIDATES	TOTAL VOTES SCORED	
ANPP	Pres: Buhari Muhammadu		F
		12,710,022	
	Vice: Okadigbo Chuba Williams Malachy		
APGA	Pres: Ojukwu Chukwuemeka Odumegwu	1,297,445	
	Vice: Hajia Sani Ibrahim		
APLP	Pres: Okereke Osita Emmanuel	26,921	G
	Vice: Abdullahi Tukur Alhaji		
ARP	Pres: Yahaya G. K. Ezemue Ndu	11,565	
	Vice: Hajia Asmau Aliyu Mohammed		
BNPP	Pres: Nanji Ifeanyi Chukwu Goodwill		H
		5,987	
	Vice: Suleiman Mohammed Awwal		
DA	Pres: Ferreria Antonia Abayomi Jorge		
		6,727	

		Vice: Eboigbe Ehi	
JP		Pres: Christopher Ogenebrorie Okotie	
119,547			
		Vice: Habib Mairo Baturiya (Mrs.)	
B	LDPN	Pres: Chief Christopher Pere Ajuwa	4,473
		Vice: Mohammed Nasir	
	MDJ	Pres: Yusuf Mohammad Dikko	21,403
		Vice: Chief Melford Obiene Okilo	
C	MMN	Pres: Major Mojisola Adekunle Obasanjo (rtd)	3,757
		Vice: Mohammed Ibrahim	
	NAC	Pres: Agoro (Dr.) Olapade (Ronald Aremo)	5,756
		Vice: Aminu Garbati Abubakar	
	NAP	Pres: Tunji Braithwaite	6,932
		Vice: Hajia Maimunatu Lata Tombai (MON)	
D	NCP	Pres: Gani Fawehinmi	161,333
		Vice: Jerome (Jerry) Tala Gopye	
	NDP	Pres: Sen. Ike Omar Sanda Nwachukwu	132,997
		Vice: Habu Fari Aliyu	
E	NNPP	Pres: Dr. Kalu Idika Kalu	23,830
		Vice: Jawi Abdulrahman Paga	
	PAC	Pres: Mrs. Sarah N. Jibril	157,560
		Vice: Chief Elemosho Babatunde Tajudeen	
F	PDP	Pres: Chief Olusegun Obasanjo	24,456,140
		Vice: Alhaji Atiku Abubakar	
	PMP	Pres: Nwankwo Agwucha Arthur	57,720
		Vice: Batubo Benett Raymond	
	PRP	Pres: Musa Abdulkadir Balarabe	100,765
		Vice: Okafor Ernest Ngozi	
G	UNPP	Pres: Chief Nwobodo Jim Ifeanyichukwu	169,609
		Vice: Goni Mohammed	

The 1st respondent who together with the 2nd respondent were sponsored by the Peoples Democratic Party were returned as elected.

H 5. The petitioners shall contend that the figures ascribed to each of the candidates in the result above pleaded were the product of deliber-

ate wrong entries made by the 3rd respondent's agents or representatives at the wards, Local Government Areas and State collation centers. The declared result of the Presidential election held on the 19th April, 2003, is hereby pleaded."

The reliefs sought in the last Amended Petition are:-

"(a) An order of the court that the election is invalid for reasons of non-compliance with substantial sections of the Electoral Act, 2002.

(b) An order of the court that the election is invalid for reason of corrupt practices.

(c) An order of the court that at the time of the election the 1st respondent was not qualified to contest."

The trial of the petition, which lasted about 15 months, began before the Court of Appeal, (Abdullahi, PCA., Mahmud Mohammed, JCA., (as he then was), Nsofor and Tabai, JJCA.), on the 25th day of September, 2003, and ended on the 20th day of December, 2004. The court having heard the 139 witnesses called by the 1st and 2nd petitioners (1st and 2nd appellants/cross-respondents), the 100 witnesses called by the 1st and 2nd respondents (1st and 2nd respondents/cross-appellants) and the 116 witnesses called by the 3rd and 6th to 268th respondents (3rd and 6th to 265th respondents/cross-respondents), being altogether 355 witnesses.

In the leading judgment of the Court of Appeal, delivered by Tabai, JCA., (with Nsofor, JCA., dissenting) the court held as follows:-

"I have considered the evidence in support of the allegations in each of the 14 States which elections (sic) were questioned. And in the exercise I have cancelled the election in Ogun State, some Local Government Areas, Wards and Units. The question is the effect (sic) of this annulment on the election in the country. For the determinations (sic) of this question I refer to the provisions of Section 134(2) of the 1999 Constitution of the Federal Republic of Nigeria.

Section 134(2) of the Constitution provides:-

'A candidate for an election to the office of President shall be deemed to have been elected where, there being more than two candidates for the election -

(a) he has the highest number of votes cast at the election; and

(b) he has not less than one-quarter of the votes cast at the election

in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.”

This provision appears clear to me. Where a candidate wins the highest number of votes cast in at least two-thirds of the 36 States in the Federation and the Federal Capital Territory Abuja, he is deemed to be elected..... I do not appreciate any ambiguity in the provision and even if there was one, this court is bound to adopt a construction which is just, reasonable and sensible. (See Maxwell on the Interpretation of Statutes, 12th Edition, Chapter 10). In my view, it would lead to absurdity and manifest injustice to nullify the election for the entire nation because of the nullification of the election of one State, some Local Government Areas, Wards and Units. Such a devastating result could hardly have been contemplated by the framers of the Constitution.

It is my conclusion therefore that the cancellation of the election in Ogun State and the other smaller components does not substantially affect the election of the 1st and 2nd respondents.

In the event, this petition fails and same is dismissed with costs which I assess at N5,000 in favour of each set of respondents.”

The notice of appeal to this court, filed by the 1st and 2nd appellants/cross-respondents, contains 41 grounds of appeal and the following 7 reliefs which are being sought:-

“(a) To allow the appeal.

(b) to set aside the majority judgment of the lower court (sic) dismissing the petition.

(c) To uphold the dissenting judgment of Nsofor, JCA.

(d) To allow the petition on all the grounds and consequentially disqualify the 1st and 2nd respondents under Section 129 of the Electoral Act 2002.

(e) To order the 3rd respondent to conduct a fresh election within one month from the date of judgment in this appeal.

(f) In the event of disqualifying the 1st and 2nd respondents either under Ground 9(c) of the petition and/or consequentially under Section 129 of the Electoral Act, to order the 3rd respondent to conduct a fresh election between the remaining candidates in the election.”

(g) In the event that the appeal succeeds, with or without the dis-

qualification of the 1st and 2nd respondents, to order that the President of the Senate act as the President of the Federal Republic of Nigeria during the period between the judgment and the fresh period of election.”

The 1st and 2nd respondent/cross-appellants and the 4th and 5th respondent/cross appellants, with our leave, have both cross appealed. However, I shall delay consideration of the cross-appeals till I determine the appeal by the 1st and 2nd appellants/cross-respondents.

Learned counsel for the 1st and 2nd appellants/cross-respondents, Chief Mike Ahamba, Senior Advocate of Nigeria, in the Amended Brief of Argument filed on their behalf, has formulated 18 issues for determination to cover 41 grounds of appeal filed. They read as follows :-

ISSUE NO. 1

Whether the Court of Appeal properly interpreted Section 135 (1) and 67(3) of the Electoral Act, 2002 (Grounds 5, 7, and 25).

ISSUE NO. 2

Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150 (1) of the Evidence Act in the judgment (Grounds 3. 13 and 30).

ISSUE NO. 3

Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law (Ground 1).

ISSUE NO. 4

Whether the Court of Appeal’s conclusion that non-compliance with Section 67(3) of the Electoral Act was not proved is sustainable considering the express provisions of the section, the pleadings of the parties and the totality of evidence on record on the point (Grounds 8 and 9).

ISSUE NO. 5

Whether the Court of Appeal’s failure to invalidate the Presidential election after holding that Section 18 of the Electoral Act 2002, was not complied with was proper (Ground 4).

ISSUE NO. 6

Whether the Court of Appeal’s failure to invalidate the Presidential election after finding that Section 40(1) of the Electoral Act, 2002 was

breached in the conduct of the election was proper (Ground 10).

ISSUE NO. 7

Whether the Court of Appeal was not in error by failing to invalidate the Presidential election considering the specific and uncontroverted evidence of bias or likelihood of it in INEC Resident Electoral Commissioners in twelve states of the federation (Grounds 11, 12 and 17).

ISSUE NO. 8

Whether the failure of the Court of Appeal to apply Section 149(d) Evidence Act against 3rd respondent for failing to produce letter of protest in Cross River State for which notice to produce had been given was proper in law (Ground 14).

ISSUE NO. 9

Whether the Court of Appeal's non-application of the provision of the provisions of Section 129 of Electoral Act 2002, against the 1st and 2nd respondents was proper after the pleadings, evidence on record and the findings of the court on intimidation and violence. (Grounds 23 and 34).

ISSUE NO. 10

Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas on the ground that such Local Government Areas were not specifically pleaded was proper in law (Grounds 2 and 37).

ISSUE NO. 11

Whether, on the balance of probability, the Presidential election should not have been invalidated (Grounds 24, 31, 32 and 33)

ISSUE NO. 12

Whether there was no evidence proffered on Imo State that can substantially affect the election (Ground 36).

ISSUE NO. 13

Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived non-joinder of necessary parties (Grounds 18 and 28).

ISSUE NO. 14

Whether on the balance of probability the election in each of Ad-

amawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross River, Edo, Rivers, Bayelsa and Imo States should not have been severally invalidated (Grounds 15, 16, 19, 20, 21, 22, 27, 29, 35, 40 and 41).

ISSUE NO. 15

Whether the Court of Appeal was not in error by upholding the Presidential election of 19/4/03 after invalidating the election of one State (Ogun) considering the provisions of Section 134(1) of the Constitution of the Federal Republic of Nigeria (Ground 6)

ISSUE NO. 16

Whether the 1st and 2nd respondents' Reply is a competent process in the proceeding (Ground 39).

ISSUE NO. 17

Whether the 1st respondent was qualified to contest the Presidential election under the Constitution of the Federal Republic of Nigeria (Ground 38).

ISSUE NO. 18

Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioners proffered evidence and, if it did, whether the misdirection did not occasion a miscarriage of justice (Ground 26)."

For his part, Chief Afe Babalola, Senior Advocate of Nigeria, learned counsel for the 1st and 2nd respondents/cross-appellants, puts forward in their Amended Brief of Argument 11 issues for determination, thus:-

"1. Whether or not the statement of the court below, "that INEC's failure to produce the Presidential Election Results which it was summoned to produce amounts to a negation of INEC's claim to neutrality" is of any moment and capable of denying the election the presumption of regularity to lead to nullifying the Presidential election herein? Grounds 1, 13 (Appellants' Issues 2 & 3).

2. Whether or not the court below was right in its decision to H discountenance and or expunge from record all evidence lead by the petitioners in that case that were not pleaded? Ground 2 (Appellants' Issue 10)

3. Whether or not the Presidential Election of 19/4/03 was not conducted in substantial compliance with the provisions of Electoral Act, 2002, particularly Sections 18, 40(1), 17(2), 19, required for the validation of the election? Grounds 3, 4, 5, 6, 10, 11, 12, 30, 31, 32, 33 (Appellants' Issues 1, 2, 5, 6, 7, 11 & 15).

4. Whether or not the appellants proved their allegation of failure to certify the election materials as required by Section 67(3) of the Electoral Act, 2002 and if so whether any such failure is capable of rendering the election void? Grounds 7, 8, 9 & 25 (Appellants' Issues No. 1 & 4).

5. Whether or not the appellants pleaded and proved their allegations of malpractices, irregularities in the conduct of the election in Cross-River, Akwa Ibom, Anambra, Adamawa, Lagos, Rivers, Bayelsa, Taraba, Enugu, Ebonyi, Benue, Imo, Edo, Kogi States to substantially affect the election in those States? Grounds 5, 14, 15, 16, 17, 19, 20, 21, 22, 27, 29, 35, 36, 37, 40 and 41 (Appellants' Issues 8, 12 & 14).

6. Whether or not the court below was not right in discountenancing evidence adduced against Presiding Officers that were not joined as parties to the petition? Grounds 18, 28 (Appellants' Issue 13).

7. Whether or not the findings of the court below that violence and destruction of properties attended the election in some places were substantial and sufficiently linked to the 1st and 2nd respondents to invalidate their election? Grounds 23, 34 (Appellants' Issue 9).

8. Whether or not the nullification of the Presidential Election in Ogun State and few other Local Governments, Wards and Polling units in the Federation was right and, if so, whether the said nullifications were substantial to warrant the nullification of the entire election? Ground 24 (Appellants' Issue 11).

9. Whether or not the petitioners pleaded and proved any malpractice in any number of States to substantially affect the result of the election? Ground 26 (Appellants' Issue 18).

10. Whether or not the 1st respondent was disqualified from contesting the election on the false allegation that he had been elected twice into present office? Ground 38 (Appellants' Issue 17).

11. Whether or not the reply filed by the respondents in this case

was not competent having regard to the provisions of Electoral Act? Ground 39 (Appellants' Issue 16)."

"The 4th and 5th respondents/cross-appellants have postulated, in their Amended Brief of Argument prepared by their counsel. Mr. Alfred Eghobamien, learned Senior Advocate of Nigeria, 2 issues for determination which raise the following questions:-

"1. Whether having regard to the evidence before the court below, their Lordships were wrong in not nullifying the results of the Presidential Election of 19/4/2003 by reasons of non-compliance with the provisions of the Electoral Act, 2002, irregularities and corrupt practices.

2. Whether the court below was right in holding that the 1st respondent was qualified to contest for the post of the office of the President of the Federal Republic of Nigeria on the 19/4/2003."

Mr. E. O. Sofunde, learned Senior Advocate of Nigeria, counsel for the 3rd and 6th to 265th respondents/respondents, did not consider it necessary to amend the joint brief of argument, which he filed on behalf of all his clients, after the 1st and 2nd appellants/cross-respondents amended their brief of argument. He adopted, instead of raising issues of his own, the issues for determination formulated by the 1st and 2nd appellants/respondents in their original brief of argument. Happily, those issues are the same as those contained in the Amended Brief of Argument later filed by the 1st and 2nd appellants/cross-respondents as stated earlier above.

For the sake of clarity, I propose to consider as argued therein the issue formulated in the Amended Brief of Argument of the 1st and 2nd appellants/cross-respondents as I find them more comprehensive than the issues in the other Briefs of Argument.

Issue no. 1

Learned counsel for the 1st and 2nd appellants/cross-respondents argued, in the Amended Brief, that the Court of Appeal misinterpreted Sections 67 subsection (3) and 135 subsection (1) of the Electoral Act, 2002, and that by the misconstruction of the provisions of the Act, the Court of Appeal placed on the 1st and 2nd appellants/cross-respondents the burden of proving a non-existent onus. This, he contends, affected the resolution of the issues that arose before the Court of Appeal. It is

submitted that the court could expound the provisions of a statute but it could not in so doing expand them because it lacks the competence to do so on the authority of *Tukur v. Government of Gongola State* (1989) 9 S.C. 1; (1989) 4 NWLR (Pt. 117) 517 at p. 547C. It is further canvassed that the duty of the Court of Appeal in interpreting a statutory provision is to give the unambiguous words of the statute effect in their natural and grammatical meaning, save where to do so would lead to absurdity. The cases of *Aqua Ltd. v. Ondo Sports Council*, (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91) 622 at p. 641E and *Oviawe v. I.R.P. (Nig.) Ltd.* (1999) 3 NWLR (Pt. 492) 126 at p. 139F were cited in support. It is submitted that when *Tabai, JCA.*, found as follows:-

"It is clear both from Section 67(3) of the Electoral Act (2002) and paragraph 13 of the petition that it was the Polling Agent who has the authority to certificate (sic) document. And although it is not categorically so stated in the provision, it appears to me that certifications were to be done either at Ward Collection/Distribution Centre where materials were supposed to be handed over to the Presiding Officers. I came to that conclusion because from the evidence before the court the Polling Agent carried out his functions only within the operational bases or areas of a Presiding Officer,"

The interpretation he gave to Section 67(3) was speculative and that he failed to give effect to the words of the section. It is being urged that we should hold that the court below was in error and that we should reverse its finding by holding that the words "Polling Agent" in Section 67(3) mean "Party Agent".

With regard to Section 135(1) of the Act, learned Senior Advocate refers to the following excerpt from the judgment of *Tabai, JCA*:

"It is my view from above provision therefore that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to be invalidated,"

And submitted that the Court of Appeal did not interpret the express words of the provision but instead imported extra words upon which the court based its interpretation of the section. It is also submitted

that the Court of Appeal in its interpretation of Section 135(1) had omitted the words "did not" and thereby changed the meaning of the section by giving it a different construction. Reference is made to Section 93(1) of the Electoral Act, 1963, which had similar wording as Section 135(1) of the 2002 Act, and the case of *Swem v. Dzungwe* (1966) NMLR 297 at p. 303, which was cited to the Court of Appeal, is referred to. It is argued that the court refused to follow the decision in that case, which being a decision of this court is binding on it and followed *Amadi v. Eke* (2004) 14 NWLR (Pt. 891) 1, which is a decision of the Court of Appeal, thus misdirecting itself.

In reply, Chief Afe Babalola argued, under his issue No. 4. that the interpretation given to Section 67(3) of the Electoral Act, 2002, was correct, since it is settled law that where the wordings of a statute are clear and unambiguous, the court must give such wordings their natural meaning. He refers in support to the case of *A-G Bendel State v. A-G Federation* (1981) 10 S.C. (Reprint) 1; (1981) 2 NCLR 1. He draws our attention to Exhibit O, which is page V of the Manual for Election Officials prepared by the 3rd respondent/respondent pursuant to Section 149 of the Electoral Act, 2002, where the phrase "Polling Agent" is defined to mean "Any person(s) appointed by a political party to attend at a polling station to observe the conduct of the elections, may become party agent(s) at a collation centre." He urged upon us to uphold the decision of the Court of Appeal that any reference to a polling agent cannot be extended beyond a person appointed by a political party to attend at a polling station.

Mr. Eghobamien, learned Senior Advocate of Nigeria for the 4th and 5th respondents/cross-appellants argues that the provisions of Section 67(3) must be read together with those of Section 36(1) of the Electoral Act, 2002, which states "polling agents are to carry out their assignments at each of the polling stations in the Local Government Area for which they have candidates)." When this is done, he says, it will be appreciated that what Section 67(3) envisages is that the certification of election materials is to take place at polling station and not in the office of the 3rd respondent/cross-appellant. He refers to the finding by the Court of Appeal to the failure of the 1st and 2nd appellants/cross-respondents to produce

evidence to prove that the necessary documents were not certified as pleaded in paragraph 13 of their petition. He then submitted that there is no ground for this court to interfere with it, because it has not been shown that the finding is perverse for it to warrant any interference. He cited the cases of Ozokpo v. Paul (1990) 2 NWLR (Pt. 133) 494 at p. 5 13A - B; Woluchem v. Gudi (1981) 5 S.C. (.Reprint) 178; (1981) 5 S.C. 31 and Fatoyinbo v. Williams (1956) SCNLR 294, (1956) 1 FSC 87. He submitted on the authority of Amadi v. Eke at p. 10E-H that the non-certification is not fatal to the election results unless it can be shown that it substantially affected the result of the election.

In his reply, Mr. Sofunde, learned counsel for the 3rd and 6th-265th respondents/respondents, states in their Brief of Argument, that the thrust of the submissions of the 1st and 2nd appellants/cross-respondents is that certification of election materials ought to have started from the office of the 3rd respondent/respondent. He submits that the Court of Appeal was right when it stated, per Tabai, JCA., that “certification (sic) were to be done either at the polling unit or at the ward collation/distribution centre where materials were supposed to be handed over to the Presiding Officers.” Learned counsel argues that this decision is supported by the provisions of Section 67(3) of the Electoral Act, 2002, which prescribes for certification by polling agents and no other person. That the polling agents are persons whose political parties have, by notice in writing signed and addressed to the Electoral Officer of the Local Government Area, appointed them to attend at each polling station in the Local Government Area for which they have candidates. That Section 36(1) of the Electoral Act, 2002, requires that the notice sets out the names and addresses of the polling agents and that the notice must be given to the Electoral Officers before the date fixed for the election. He submits that it is only such persons that have the right to certify electoral materials under Section 67(3) of the Act; and argues that by the combined reading of Sections 67(3) and 36(1) of the Act, certification of the materials could have been done only at the polling booths. He submits that the phrase “shall certify the election materials from the office to the polling booths” in Section 67(3) merely means that the materials coming from the office to the polling booth shall

be certified. It does not state the place where the certification should be made, he contends; and submits that since polling agents are restricted to the polling booths, they can only certify the materials at the polling booths. Learned counsel refers to the argument by learned counsel for the 1st and 2nd appellants, the words that “Polling Agents” mean “Party Agent” and argues that the words “Polling Agent” have been defined in Section 36(1) of the Electoral Act, 2002 and cannot mean a “Party Agent.”

Learned counsel, arguing on the provisions of Section 135(1) of the Act, refers to the decision of this court in the case of Swem v. Dzungwe, (supra) which he submits had been superseded by the later decisions of the court in Awolowo v. Shagari (1979) 6-9 S.C. (Reprint) 37; (1979) All NLR (Reprint) 120 at pp. 167-170 and Ojukwu v. Onwudinwe (1984) 1 SCNLR 247 at pp. 305D-306D which support the findings made by the Court of Appeal. He canvassed that the alien expression imported into Section 135(1), complained about by the 1st and 2nd appellants/ cross- respondents, cannot be sustained in the light of the later authorities of this court cited above. Learned Senior Advocate submits that once non-compliance is established, the onus lies on the respondent in an election petition to establish that the non-compliance did not affect the results of the election. He said that the onus lies on the 1st and 2nd appellants to establish that there was non-compliance and that such non-compliance did or could have affected the result of the election. It is submitted that it is only when this happens that the burden of proof would shift from the petitioners to the respondents to prove that the result was not affected.

Now the Electoral Act, 2002, provides in Sections 36(1) and (3), 67(3) and 135(1) thereof, as follows:-

“36 (1) All political parties may by notice in writing signed and addressed to the Electoral Officer of the Local Government Area appoint persons (in this Act referred to as “Polling Agents”) to attend at each polling station in the Local Government Area for which they have candidate(s), and the notice shall set out the names and addresses of the polling agents and be given to the Electoral Officer before the date fixed for the election.....

(3) Where in this Act, an act or thing is required or to be done by

or in the presence of a Polling Agent, the non-attendance of the Polling Agent at the time and place appointed for the act or thing or refusal by the Polling Agent to do the act or thing shall not, if the act or thing is otherwise done properly, invalidate the act or thing.”

B “67 (3) The Polling agents shall certify the election materials from the office to the polling booth.”

C 155 (1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”

In their amended petition at the court below, the 1st and 2nd appellants/cross respondent pleaded in paragraphs 13 and 13A thus:-

D “13. In accordance with the provisions of Section 67(3) of the Electoral Act, 2002, the Polling Agents of contesting political parties were expected to certify all the election materials to be used at the election from the office to the polling station. But the 3rd respondent and its representatives failed or neglected to apply this very important provision, E which was enacted to ensure credibility of the electoral process. As a result of this failure, the petitioners shall contend, it became impossible to monitor what materials actually and officially emanated from the offices of 3rd respondent at the National, State or Local Government points F of distribution of election materials such as the ballot boxes, the ballot papers and result sheets for the polling stations (booths), Wards, Local Government Area, State and National Collation Centers.

G 13A. The petitioners hereby plead and shall contend at the hearing that all such uncertified election materials were invalid for the election, and, by extension, the election itself was invalid, the same having been conducted with invalid materials.”

H These averments were denied by the respondents. Consequently, by the rules of procedure and evidence this places the burden of proving the facts on 1st and 2nd appellants/cross-respondents. **The Court of Appeal, per Tabai, JCA., in interpreting Section 67(3) held that it was a polling agent that was to certify the election materials**

from the office to the polling booth. And that the certification was to take place at either the Ward Collection Centre or the Ward Distribution Centre.

It seems to me that the certification of the election materials is intended by Section 67(3) to take place at both the office and polling B station. It is not difficult to know the office or the polling booth. If this is correct, then there cannot be a certification when the materials leave the office on its way to but has not reached the polling booth. It is not practically possible or convenient for the certification to take place after leaving the office but before reaching the polling booth. C **According to** Section 36(1) of the Electoral Act, 2002, the polling agents are to carry out their function at a polling booth. In my view, the Act simply mentions “office” and “polling booth.” It certainly does not mention “ward collection centre” or “ward distribution centre” as D surmised by Tabai, JCA. However, the word “office” has been defined by The Concise Oxford Dictionary, 7th Edition, to mean place for transacting business, room, etc., in which the clerks of an establishment work, counting-house, room in which any kind of administrative E or clerical work is done. It therefore appears to me by the definition that a “ward distribution centre” and a “ward collection centre” could pass for an “office”. In that case, I do not think that it will be right to say, as argued by learned counsel for the 1st and 2nd appellants/ F cross-respondents, that the Court of Appeal misdirected itself in determining where the materials were to be certified.

In the light of the provisions of Section 36(1), I do not think that a “polling agent,” even if appointed by a political party, should be G interpreted to mean a “party agent,” as submitted by Chief Ahamba, learned counsel for the 1st and 2nd appellants/cross-respondents. The words “polling agents,” in Section 67(3), even if not explained by Section 36(1), cannot in their ordinary meaning be the same as H “party agents”. In any event, the words must be given their ordinary grammatical meaning since they are not ambiguous or vague - See Aqua Ltd. v. Ondo Sports Council, (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt. 91) 622 at p. 641; Ahmed v. Kassim, 3 FSC 51 and Oviawe v. I.R.P.

(Nig.) Ltd. (1999) 3 NWLR (Pt. 492) 126 at p. 139.

With regard to Section 135(1) of the Electoral Act, 2002, an election will not be invalidated by reason of non-compliance with the provisions of the Act if it appears that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. Here we are concerned with the application of the provisions of Section 67(3) of the Act by the Court of Appeal. As there are other non-compliances being alleged in this case, I am of the opinion that the cumulative effect of all the non-compliances are to be considered vis-a-vis the provisions of Section 135(1). I therefore, propose to defer further consideration of the argument proffered here until I reach that state.

Issues No. 2 and 18

The Court of Appeal, while considering the submission made to it by Chief Ahamba, learned Senior Advocate, that once the election in any State of the Federation is nullified, there can be no basis for the calculation of the result to ascertain if the requirement of scoring one quarter of the votes in two-thirds of the total States of the Federation and the Federal Capital Territory had been satisfied; and that once it has been established by evidence that there was violence in a number of States, then, the court may safely hold, on the preponderance of evidence, that there was widespread violence in the election which entitled the court to nullify the election held throughout the country, as a whole, stated thus:-

"My reaction is first to refer to the principle of presumption of regularity in Section 150(1) of the Evidence Act, 1990, and Swem v. Dzungwe, (supra). A petitioner must first allege and adduce some evidence of the existence of violence and other corrupt practices in a particular State to subject that State to the scrutiny of the court. Where allegation is made and no evidence (is) adduced on the conduct of the election in a State, the presumption of regularity enures in its favour. In this case there was no specific allegation of any wrong doing in the conduct of the 19/4/04 election in 22 States and my view is that the election in these States was regularly conducted and the ensuing results authentic."

1st and 2nd appellants/cross-respondents' complaint is that the

Court of Appeal finding does not accord with the provisions of Section 150 (1) of the Evidence Act. That this led the Court of Appeal to uphold the election in some States thereby holding that the election throughout the Federation was substantially regular. It is argued that the provisions of Section 150(1) of the Evidence Act are in two parts. First, there must be evidence that the official act carried out is substantially regular and, secondly, that when such evidence is adduced, then the presumption of regularity will apply. It is then posed on whom lies the duty to lead evidence of substantial regularity? It is submitted in answer that the onus is on the person who claims the regularity of the official act. In this case, it is argued that the burden rests with the 3rd respondent/respondent. The case of INEC v. Ray (2004) 14 NWLR (Pt. 892) 92 at p. 135 E-G is cited in support, being a decision of the Court of Appeal and therefore of binding effect on the majority of that court in this case. Learned counsel for the 1st and 2nd appellants/cross-respondents refers to the averments in paragraphs 4 - 20A of the Amended Petition, which he says apply to the whole country as one presidential constituency, and reference is made to the evidence adduced in proof of the averments. It is referred to as evidence adduced on the non-compliance with Section 18 of the Electoral Act, 2002, - voting without voting card, non-certification of election materials, changing of voting method from thumb printing to finger printing, undue influence, employment of party members as Resident Electoral Commissioners and ad-hoc officers, unconstitutional deployment of armed soldiers and policemen, all of which were nation-wide. In view of all these, it is submitted that there was no basis for the Court of Appeal to apply the principle of presumption of regularity to 22 States.

In reply, Chief Afe Babalola, argues that based on decided cases, where an allegation of substantial non-compliance with the provisions of the Electoral Act or Regulations is made, the onus is on the petitioner to show that such allegation has substantially affected the result of the election. He cited the following cases in support - Akinfosile v. Ijose H (1960) SCNLR 447; Gbe v. Esewe (1986) 4 NWLR (Pt. 89) 435; Abibo v. Tamuno (1999) 4 NWLR (Pt. 559) 334; Anazodo v. Audu (1999) 4 NWLR (Pt. 600) 530 and Kudu v. Aliyu (1999) 3 NWLR (Pt. 231) 615 at p. 634.

He also refers to his book Election Law and Practice by Afe Babalola, p. 252. On the authority of the case of Awolowo v. Shagari (1979) 12 NSCC 87 at p. 123, he submits that before an election petition can succeed on ground of non-compliance with the provisions of the Electoral Act, the petitioner will have to prove not only that there was non-compliance with the provisions of the Act, but also that the non-compliance substantially affected the result of the election. He refers to Section 135(1) of the Electoral Act and contends that the 1st and 2nd appellants/cross-respondents wrongly rely on the case of Swem v. Dzungwe (supra) to contend that the onus is on the 1st and 2nd respondents/cross-appellants to establish that the election was conducted in substantial compliance with the Electoral Act. He submits that the principle established in the case is in line with the principle of law that the petitioner who alleges non-compliance in an election petition has the onus of proving such non-compliance and that the onus does not shift to the respondent to the petition until the court or tribunal hearing the petition finds it impossible after the petitioner must have established any non-compliance to say whether or not the results were affected by the non-compliance established.

After citing a number of cases, learned counsel submits that there was no burden of proof on the respondents/cross-appellants because the 1st and 2nd appellants/cross-respondents had failed to discharge the burden placed on them. He contends that the 1st and 2nd appellants/cross-respondents failed to establish any case of non-compliance with the provisions of Sections 17(2) and 19 of the Electoral Act, 2002.

Mr. Eghobamien, learned counsel, argues that although Section 18 of the Electoral Act requires that all Electoral Officers, Presiding Officers and Returning Officers shall swear or affirm to an oath of loyalty and neutrality, the absence of proof of non-compliance with its provisions cannot result in the nullification of the election. He submits that under Section 18, it is the trial court or tribunal that determines whether any non-compliance affects the result of an election. This, he argues, involves the exercise of discretion by the court or tribunal. Unless there is cogent evidence to show that the non-compliance substantially affects the result of the election the discretion will not be exercised. He refers to Section

4(1) of the Oaths Act, Cap. 333 and canvasses that the omission or default of the officials of the 3rd respondent/cross-appellant to take oath did not affect the validity of the election. On non-compliance with Section 40(1) of the Electoral Act, he refers to the finding by the Court of Appeal that there was no doubt that some people voted without voters' cards, and argues that since the exact number of such voters was not ascertained, as found by the Court of Appeal, this is a finding of fact, that this court cannot interfere with that finding. The onus to show that there were unlawful votes in the election fell on the 1st and 2nd appellants/cross-respondents but they failed to discharge the burden.

On non-compliance with Section 17(2) and 19 of the Act, learned counsel contends that the 1st and 2nd appellants/cross-respondents failed to show that the Resident Electoral Commissioner for Gombe State was still a member of the PDP when the election took place on 19th April, 2003. Furthermore, they failed to show what act of bias the Resident Electoral Commissioner played. Therefore, in the circumstances, the Court of Appeal was right to invoke the provisions of Section 150(1) of the Evidence Act to apply the presumption of regularity to the election in Gombe State.

Mr. Sofunde argues that since the 1st and 2nd appellants/cross-respondents conceded that there was an election but alleged that the results were false, the burden, on the state of their pleadings, is on them to prove the falsity. That this is in accord with the decision of this court in Nwobodo v. Unoh (1984) 1 SCNLR 108 at p. 122. It follows, learned counsel argues, that the decision in INEC v. Ray (2004) 14 NWLR (Pt. 892) 92, which places the burden on INEC to produce the results of the election before any presumption may apply to it, cannot be right. On the issue of the Court of Appeal relying on Section 150 of the Evidence Act with regard to the presumption of regularity, it is argued that in Omoboriowo's case (supra) this court applied the presumption just as the Court of Appeal did in the present case.

The 1st and 2nd appellants/cross-respondents no doubt pleaded in paragraph 9 of their amended petition that there were wide-spread irregularities in the election throughout the country. The alleged irregularities include the arbitrary assignment of votes to the candidates in paragraph 4

thereof and that the result of the election was deliberate wrong entries of votes, in paragraph 5 thereof. In addition, paragraph 9 reads as follows:-

“The grounds on which this petition relies are:

(a) That the election is invalid by reason of non-compliance with the provisions of the Electoral Act, 2002.

(b) That the election is invalid by reason of corrupt practices.

(c) That the 1st respondent was at the time of the election not qualified to contest the election.

In the alternative:

That the respondent was not duly elected by a majority of lawful votes cast at the election and did not score one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja, in accordance with the provisions of the Constitution and the Electoral Act, 2002.

In general, in a civil case, the party that asserts in its pleadings the existence of a particular fact is required to prove such fact by adducing credible evidence. If the party fails to do so, its case will fail. On the other hand, if the party succeeds in adducing evidence to prove the pleaded fact, it is said to have discharged the burden of proof that rests on it. The burden is then said to have shifted to the party’s adversary to prove that the fact established by the evidence adduced could not, on the preponderance of the evidence, result in the court giving judgment in favour of the party.

These propositions are the product of Sections 135 to 139 of the Evidence Act, Cap. 112 of the Laws of the Federation of Nigeria, 1990. The sections minus Section 138 provide as follows:

“135 (1) Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

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

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

137 (1) In civil cases the burden off first proving the existence or

non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had of any presumption that may arise on the pleadings.

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

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

“139. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person, but the burden may in course of a case be shifted from one side to the other; in considering the amount of evidence necessary to shift the burden of proof regard shall be had by the court to the opportunity of knowledge with respect to the to be proved which may be possessed by the parties respectively.”

It is clear from the foregoing provisions of the Act that the burden of proving the non-compliance with the provisions of the Electoral Act, 2002, the invalidity of the election by reason of corrupt practices and the disqualification of the 1st respondent/ cross-appellant from contesting the election were matters to be proved by the 1st and 2nd appellants/cross-respondents at the trial in the Court of Appeal.

The 1st and 2nd appellants/cross-respondents had adduced evidence at the trial in order to prove the allegations made in their petition and the Court of Appeal made specific findings on them. In paragraph 11 of the amended petition, they alleged that the 3rd respondent/respondent failed, neglected or omitted to subject the officials required by the Electoral Act to take oath or affirm to their loyalty to the Federal Republic of Nigeria and neutrality in the conduct of the election as provided by Section 18 of the Act. The court of Appeal found as a fact that the 3rd respondent/respondent did not comply with the provisions of the section. In paragraphs 13 and 13A of the said petition, quoted above, they allege that the election

materials were not certified by the polling agents. They called over sixty witnesses to testify on the allegations. However, the Court of Appeal rejected their evidence because the totality of their testimony was "focused on the non-certification at the office of the Electoral Officer at the Local Government Headquarters. Almost all the witnesses complained that they were denied the opportunities of certifying the election materials by the Electoral Officer." All the over 60 witnesses except 6 were supervisory agents to the ANPP. The Court of Appeal therefore made the finding that:-

"The petitioners were therefore at pains to prove a case different from that which they pleaded in paragraph 13 of the petition. The evidence of these over fifty witnesses as to the point of certification is therefore at variance with the pleadings. The legal effect is that the totality of the voluminous evidence goes to no issue and has to be discountenanced."

The Court of Appeal then held:-

"On the whole therefore there was not the slightest evidence of non-compliance relevant to the matters pleaded in paragraph 13 of the petition. I hold that the petitioners failed to prove the allegation of non-certification as pleaded."

On the issue of persons voting without a voting card, as allowed by Exhibit 10, the Court of Appeal found on the evidence adduced by the 1st and 2nd appellants/cross-respondents -

"There is no doubt, some evidence before this court of people who voted without voter's cards. There was however no evidence of the number of such vote by people without voter's cards and the units in which such votes were cast. In the absence of such evidence, the effect of such votes on the election in a Unit, Ward, Local Government or State cannot be ascertained. This court cannot, by mere speculation as to the probable effect of such unlawful votes, cancel the election. In the event, I hold that there is no proof of the ascertainable number of votes recorded in violation of Section 40(1) of the Electoral Act, 2002 substantial enough to warrant a nullification of the election."

In paragraph 15 of the amended petition, the issue of non-compliance with Sections 17(2) and 19 of the Electoral Act, 2002, was pleaded. It was averred that the 3rd respondent/respondent was biased because

the appointment of its major members and Resident National Electoral Commissioners was made by the 1st respondent/cross-appellant who made sure that only those who owed allegiance to the PDP as opposed to the nation were appointed. The 1st and 2nd appellants/cross-respondents called evidence in support of the averment in the paragraph. The Court of Appeal stated "Suffices (sic) to say that the petitioners' oral evidence in support of paragraph 15(a) and (b), (i), (iii), (iv) and (v) were sufficiently countered." With regard to paragraph 15(b)(ii) of the amended petition which averred that the Resident Electoral Commissioner for Gombe State - Alhaji Gidado Abubakar was "a full-fledged well-known member of the PDP," oral evidence was adduced and Exhibits Nos. 234 and 235 were tendered. Tabai, JCA., held thus:-

"There is in my view, sufficient proof that as at January, 1999, Alhaji Gidado Abubakar was a member of the PDP."

The controverted evidence is that he was the Resident Electoral Commissioner for Gombe State on the 19/4/03 and thus the 19th respondent. Apart from the allegation of his membership of the PDP there is no complaint against his conduct of the election in Gombe (sic). And there was no evidence of his conduct of the election in that State....."

In paragraph 19 of the amended petition, the 1st and 2nd appellants/cross-respondents pleaded "that the election was marred by widespread violence, executive intimidation and electoral malpractices such as entry of fictitious figures into result sheets at different stages of the elections (sic), barring of agents of political parties and candidates other than PDP from collation centres (where such centres were allowed to exist), pre-voting time finger printing of ballot papers, snatching of election materials by thugs for stuffing outside polling stations, and other pronounced irregularities". Evidence was called by the 1st and 2nd appellants in respect of 14 States to prove corrupt malpractices in them. The States are - Cross River State, Akwa Ibom State, Rivers State, Bayelsa State, Taraba State, Adamawa State, Kaduna State, Ogun State, Ebonyi State, Benue State, Imo State, Enugu State, Kogi State, Edo State. Various findings were made by the Court of Appeal confirming in the States evident of varied malpractices covering some areas of the States,

except in the case of the election in Ogun State, which it held -

“The result of my finding in that case is that the Presidential election of 19/4/03 in Ogun State was not conducted in substantial conformity with the Electoral Act, 2002, and the same is accordingly nullified.”

It follows from the foregoing that the 1st and 2nd appellants/cross-respondents were, by the finding of the Court of Appeal, unable to prove some of the allegations made in their amended petition. The evidence led did not show what took place in 22 States, according to the finding of the court. This led the Court of Appeal to presume that there were no irregularities in the 22 States pursuant to Section 150(1) of the Evidence Act, which provides:-

“150 (1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for validity were complied with.”

On the basis of the findings by the Court of Appeal, which is not disturbed, I am satisfied that the 1st and 2nd appellants/cross-respondents did not fully discharge the burden of proof on them and therefore the burden did not shift to the respondents. The issue fails.

Issue No. 3 -

The complaint here is that in the course of the trial of the case in the Court of Appeal, the 1st and 2nd appellants/cross-respondents issued notice to the 3rd respondent/respondent to produce the result of the election and other documents. These were not produced and their counsel applied to the Court of Appeal for the result and documents to be produced. The court issued to the 3rd respondent/respondent a subpoena to do so. Again, the result and documents were not produced by the 30th March, 2004, when the 1st and 2nd appellants/cross-respondents closed their case. The Court of Appeal in its judgment observed that the conduct of the 3rd respondent/respondent was damnable and went on to state that-

“The brazen refusal to produce the result and the other documents specified in the subpoena is a negation of INEC’s claim to neutrality and impartiality.”

Chief Ahamba complains that the Court of Appeal failed to invalidate the election after holding that the 3rd respondent/respondent’s

claim for neutrality had been negated. He argued that by the finding, the court had not only found that the 3rd respondent/respondent was biased but had also rejected 3rd respondent’s defence of being unbiased in conducting the election. He submitted that since it is against the principle of natural justice for an umpire to be biased, the natural consequence is the invalidation of the resultant act.

Chief Afe Babalola, learned counsel for the 1st and 2nd respondents/cross-appellants replies that there is a difference between the conduct of election and the conduct of the proceedings of election petition. He argues that the holding by the Court of Appeal is limited to the conduct of the case before it and does not extend to the conduct of the election. He states further that it was not the petitioners’ case that the Court of Appeal should find that the 3rd respondent/respondent was biased in the conduct of the election because it failed to produce the result of the election as this was not pleaded in the petition before the court. Since the failure to produce the result and document was not pleaded, the Court of Appeal was not competent to determine the failure - *Awojugbagbe Light Industry Ltd. v. Chinukwe* (1995) 4 NWLR (Pt. 390) 379 at p. 427. He canvasses that where a subpoena was issued to produce a document, the failure to do so is not the subject of adverse finding by the court. The proper step to be taken by the court in accordance with the law was for it to issue a committal warrant for the disobedience of the subpoena or allow the party that needs the document to adduce secondary evidence on the document. He argues further that the election result was at any rate pleaded in paragraph 4 of the amended petition and was admitted by all the respondents. Therefore, what was admitted needed no proof - *Ojukwu v. Onwudiwe* (1984) 1 SCNLR 247 at p. 248.

Mr. Sofunde argues that the finding by the Court of Appeal relates to the conduct of the trial of the case because it arose in the course of considering the fact that documents needed to prove the petitioners’ case were not produced. He submits that any decision by the court ascribing lack of neutrality and impartiality by the 3rd respondent/respondent related to its role post-election and during the conduct of the trial. Therefore, the submissions by Chief Ahamba are misconceived in so far as his argument

is premised on the basis that there was any finding of bias and partiality by the 3rd respondent/respondent during the conduct of the election, which was the case put forward by Chief Ahamba. It is submitted by Mr. Sofunde that any bias at the trial of the case cannot be the basis for vitiating the election. Therefore, the decision of the Court of Appeal regarding the lack of neutrality or bias is obiter. He cited in support the cases of Bucknor-Macleans & Anor v. Inlaks Ltd. (1980) 8-11 S.C. (Reprint) 1; (1980) All NLR (Reprint) 184 at p. 193 and Adesokan & Ors. v. Adetunji & Ors. (1994) 5 NWLR (Pt. 346) 540 at p. 564A-B. He concluded that in so far as the decision of the Court of Appeal is obiter we should not entertain the complaint by the 1st and 2nd appellants/cross-respondents.

I quite agree with the submissions by Chief Afe Babalola and Mr. Sofunde, learned Senior Advocates of Nigeria. The incident, which the 1st and 2nd appellants/cross-respondents raised, occurred in the course of the proceedings in the Court of Appeal in 2004. It did not occur on or before the 19th April, 2003, when the presidential election was conducted. It therefore should not have been the subject of comment during but before the judgment of the Court of Appeal. At any rate, the proper procedure to be followed as a result of the failure to produce the documents is for the party that needed the documents to adduce secondary evidence of them in accordance with Sections 97(1)(a) and 98 of the Evidence Act or ask the court to compel the defaulter to produce the documents by committal to prison. This did not happen. Rather, the court decided to comment on the default in the course of its delivery of judgment. Surely, whatever the court said in that regard could not have been part of the question for determination by it as presented in the parties' pleadings where issues were joined. It is, therefore, obiter and cannot be the subject of complaint to or decision by us. Accordingly, the Issue No. 3 fails.

Issue No. 4.

The Court of Appeal concluded that there was no proof of the allegation in paragraph 13 of the petition (quoted above) that there was no certification of election materials by polling agents before they were used, as required by Section 67(3) of the Electoral Act, 2002. And that

the testimonies of over 60 witnesses called by the 1st and 2nd appellants/cross-respondents to prove the non-certification of the election materials were at variance with the pleadings. That on the whole, there was no evidence of non-certification and that the petitioners had failed to establish the non-certification as pleaded.

Chief Ahamba complains that this finding by the court was not right as the pleading in paragraph 13 of the petition was supported by overwhelming evidence adduced by both the petitioners and the respondents. He contends that the Court of Appeal went out of the issue presented by the pleadings to hold that there was no evidence of non-certification proffered by the petitioners; and submitted that there was no dispute between the parties to the petition as to whether there was certification of the election materials or not, as both the petitioners and the respondents agreed that there was none by virtue of the fact that none of the parties pleaded that there was certification. With this state of the pleadings, he argued that what was left for the Court of Appeal to decide was whether the 3rd respondent/respondent had provided the opportunity for certification or not, and if not, the legal consequence of the non-certification.

Learned counsel points out that evidence was led to show that the effort made by their polling agents to certify documents was rebuffed by the Resident Electoral Commissioners and the Electoral Officers at the offices in Local Government Areas. That no less than 60 witnesses were called in this regard. Similarly, evidence confirming the petitioners' allegations were solicited through cross-examination of the witnesses called by the 1st and 2nd respondents/cross-appellants and the 3rd and 6th-265th respondents/respondents to the effect that there was no certification. Furthermore, none of the Electoral Officers called by the 3rd and 6th-265th respondents/respondents proffered evidence of certification or opportunity for the polling agents to certify the materials. It is, therefore, submitted that the conclusion reached by the Court of Appeal was perverse in the extreme since it was speculative, not based on the pleadings of the parties and the evidence adduced.

In reply, Chief Afe Babalola argued that the averment in paragraph 13 of the petition was traversed by the 1st and 2nd respondents/cross-appel-

lants in paragraphs 2 and 16 of their reply. That the 1st and 2nd appellants/cross-respondents did not call a single polling agent to testify in support of the averment in paragraph 13 of their petition. That the testimonies of the more than 60 witnesses called by the petitioners, who were “supervisory agents” were never pleaded by petitioners. He therefore contends that where a trial is conducted on the basis of pleadings, the judgment of the trial court shall be based on issues raised and joined by the pleadings. That evidence given which is not referable to the pleadings should not be admitted since it goes to no issue; and where admitted inadvertently, should be ignored and expunged from the record for the purpose of making a finding of fact. He cites the following cases in support - Oke-Bola v. Molake (1975) 12 S.C. 61 at p. 63; George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117; Emegokwue v. Okadigbo (1973) 4 S.C. (Reprint) 78; (1973) S.C. 13; Ogbodu v. Adelugba (1971) 1 All NLR 68; Williams v. Williams (1974) 3 S.C. 83 and Adepoju v. Awoduyilemi (1999) 5 NWLR (Pt. 603) 364. Learned counsel draws attention to the averment by the 1st and 2nd appellants/cross-respondents in their petition that the polling agents of all the contesting political parties to the election were not allowed to certify the election materials.

Mr. Sofunde submitted that all the submissions made by Chief Ahamba ought to be rejected because there was no single evidence called at the trial of the petition of a polling agent within the meaning of Section 36(1) of the Electoral Act, 2002.

Now, the averment in paragraph 13 of the petition is that Section 67(3) of the Electoral Act, 2002, was not complied with in that the polling agents were not permitted or given the opportunity to certify the election materials as enjoined by the subsection. To prove the averment, it becomes necessary for the petitioners to invite the polling agents to confirm that they did not or they were denied the opportunity to certify the materials. This is so because according to Chief Afe Babalola, the averment in paragraph 13 was denied in paragraphs 2 and 16 of the reply to the petition by the 1st and 2nd respondents/cross-appellants. These read thus:-

“2. The respondents deny paragraphs 3, 5, 9 to 288 of the petition and all allegations of illegality, irregular conduct, malpractices and vio-

lation of the Constitution. Electoral Act, 2002, and Electoral Regulations and all other laws contained therein and put the petitioners to strict proof of all the averments contained therein.”

“16. With reference to paragraph 13 of the petition, the respondents aver that facilities and opportunities were afforded the Polling Agents who were present from the offices of the 3rd respondent to the Polling Booths to certify the materials used for the election to be authentic and hence no invalidity could result from some of the polling agents (if any) not availing themselves of the opportunity afforded them by the 3rd respondent to do so.”

Again, the 3rd and 6th to 26th respondents/respondents deny paragraph 13 of the amended petition in paragraph 10 of their amended reply which reads :-

“10. Paragraphs 13 and 13(a) of the petition are hereby denied. The 4th-41st respondents aver that it is the duty of the polling agents to reach the 3rd-26th respondents' various offices across the country to certify the election materials to be used at the polling station. However, the polling agents (where available) chose not to reach the 3rd-26th respondents' offices but proceeded straight to the various polling stations to witness the voting exercise and subsequently certify the results of the voting exercise.”

In proof of paragraph 13, the 1st and 2nd appellants/cross-respondents called numerous witnesses, who variously described themselves as agent, party agent, presiding officer, supervisor, supervisor/agent, polling agent, coordinator presidential election, agent to ANPP, supervisor ANPP at Local Government level, Supervisor-INEC, Independent observer (domestic), an agent for ANPP, Unit agent for ANPP, ANPP party agent, ANPP party supervisory agent, ANPP supervisory agent/collation agent and supervisory/collation agent.

Of all these only 2 witnesses, namely petitioners' witnesses Nos. 16 and 62 specifically described themselves as “polling agents.” With this state of affairs, it is easy to see why the Court of Appeal held that there was no proof of the allegation in paragraph 13 and that the testimonies of the over 60 witnesses called by the petitioners was

at variance with the pleadings. I accept this because I do not see how any person who was not polling agent can legally testify that there was no certification of the election materials as required by Section 67(3) which provides that it is polling agents and no one else that were to certify the materials.

Accordingly, issue No. 4 fails.

Issues Nos. 5 and 6:

These issues are argued together. They concern the non-compliance with the provisions of Sections 18 and 40(1) of the Electoral Act, 2002. The Court of Appeal found as follows, per Tabai, JCA:-

"In my assessment, the evidence clearly preponderates in favour of the petitioners' assertion in paragraph of the petition that not every Electoral Officer, Presiding Officer and Returning Officer who participated in the conduct of the election was subjected to the affirmation and oath of loyalty and neutrality. I find as a fact that the 3rd respondent did not comply with Section 18 of the Electoral Act, 2002..... I do not see the rationale in the argument that the result of the omission of an Electoral Officer, Presiding Officer and Returning Officer to subscribe to the affirmation or swear the oath (of loyalty) should be the prevention of the innocent Nigerian voter from exercising his constitutional right to vote. Such a result could hardly have been contemplated by the law-makers.

I am not unmindful of the fact that the duty imposed on the officers by Section 18 of the Electoral Act is mandatory. But the said section falls short of spelling out the consequences of a breach."

After quoting Section 135(1) of the Electoral Act, the learned Justice said:-

"It is my view from the above provision therefore that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to invalidation. I am, with respect, not persuaded by the argument of learned senior counsel for the petitioners that the non-compliance without more is sufficient to invalidate the election."

With regard to Section 40(1) of the Electoral Act, learned Justice held:-

"Pursuant to the enabling provisions of Section 149(1) (of the Electoral Act, 2002), the INEC made the regulation and guideline manuals which were admitted in evidence as Exhibits 'O' and 'P'. There is (a) provision in Exhibit 'O', chapter 5 (thereof) under 'Voting Procedure Step 2' at page 18, to the effect that a person who does not have a voter's card but whose name is in the voter's register can be issued ballot paper to vote

With respect to the issue of inconsistency, I am persuaded by the submission of Chief Ahamba. SAN, that the plain meaning of Section 40(1) is that only a person with his voter's card has authority to vote. The provision in Exhibit "O" which granted authority to a person without a voter's card to vote appears ultra vires the provisions of Section 40(1) of the Act.

There is, no doubt, some evidence before this court of people who voted without voter's card. There was however no evidence of the number of such votes by people without voter's cards and the units in which such votes were cast. In the absence of such evidence the effect of such votes on the election in a Unit, Ward, Local Government or State cannot be ascertained. This court cannot by mere speculation as to the probable effect of such unlawful votes cancel the election. In the event, I hold that there is no proof of the ascertainable number of votes recorded in violation of Section 40(1) of the Electoral Act, 2002, substantial enough to warrant a nullification of the election."

Chief Ahamba complains that the reasoning upon which the Court of Appeal anchored its inability to invalidate the election owing to non-compliance with Sections 18 and 40(1) of the Act, is untenable. He argues that the findings that although Section 18 is mandatory it does not provide any consequences for non-compliance with it is contrary to the decision of this court the case of Aqua Ltd. v. Ondo Sports Council (supra) that a statute or any written document consisting of many parts or clauses should be construed by looking at the whole of the statute or document to ascertain and carry out the intention of the legislature or author. He submits that had Court of Appeal been guided by this, it would not have read Sections 18 and 40(1) in isolation by limiting its search for

consequences of non-compliance in the sections, but would have read the sections together with Section 134(1)(b) of the Act, which provides that an election may be invalidated for non-compliance with the provisions of the Electoral Act, 2002.

B In dealing with the non-compliance with Section 18, the Court of Appeal adverted to the provisions of Section 4 subsection (1) of the Oaths Act, Cap. 333 of the Laws of the Federation of Nigeria, 1990, which provides:-

C *"4 (1) Nothing in this Act shall render, or be deemed to render or be deemed to have rendered invalid any act done or which hereafter may be done by a public officer in the execution of intended execution of his official duties, by reason only of the omission by the public officer to take any oath or to take any affirmation which the officer should take or should have taken or should make or should have made.*

D *Provided that any person who declines, neglects, or omits to take the required oath or make the required affirmation under this Act shall:-*

(a) if he had already entered on his office, be deemed to have vacated that office from the date of refusal; and

E *(b) if he had not already entered on his office, be disqualified from entering on the same."*

Chief Ahamba submits that the provision of Section 4(12) are not applicable to non-compliance under Section 18 of the Electoral Act for the following four reasons. First of all, the officers that participated in the conduct of the election were not public officers as defined under Section 318 of the 1999 Constitution because they are ad-hoc officers. A Returning Officer belongs to that class. Therefore, not being public officers, under the Constitution, the provisions of Section 4 subsection (1) of the Oaths Act does not apply to them. Secondly, the Electoral Act, 2002, having been passed much later than the Oaths Act, is sui generis and has provided that non-compliance with its (Electoral Act) provisions is liable to have the election being invalidated by virtue of the provisions of Section 134(1)(b) of the Electoral Act. Thirdly, by the principles of interpretation of statutes, a specific provision supersedes a general provision. Therefore, Section 18 of the Electoral Act overrides Section 4(1) of the Oaths Act

which is general in nature. Fourthly, non-compliance with mandatory provisions of a statute generally leads to illegality or invalidity. Learned counsel submits that the Court of Appeal acted in error when it subjected the provisions of Section 18 of the Electoral Act to those of Section 4(1) of the Oaths Act.

B Furthermore, Chief Ahamba, argues that the Court of Appeal in refusing to apply the principle of invalidity to the non-compliance with Sections 18 and 40(1) gave the same reason with respect to each section, which is that from the evidence on record it could not be determined whether either of the non-compliances affected the result of the election or not. He submitted that in such a situation the only course open to the court was to allow the petition and invalidate the election. Citing the decision of this court in *Swem v. Dzungwe* (supra), he contends that the onus was on the respondents in the petition, to adduce evidence to establish that the non-compliances proved by the petitioners did not affect the result of the election as provided by Section 135(1) of the Electoral Act, 2002.

In reply, Chief Afe Babalola argues that before a petition can succeed on ground of non-compliance, with the provisions of the Electoral Act, the petitioner must prove not only that there was non-compliance but that it substantially affected the result of the election. He cited in support the case of *Awolowo v. Shagari* (1979) 6-9 S.C. (Reprint) 37; (1979) 12 NSCC 87 at p. 123. Learned Senior Advocate refers to Section 135(1) of the Electoral Act, 2002, which provides:-

"135 (1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election."

and submits that it is clear from the provisions of Section 135(1) that for a petitioner to succeed on ground of non-compliance, such petition must satisfy two conditions, namely:-

- (i) the non-compliance is substantial; and
- (ii) the non-compliance affects substantially the result of the election.

He cited the following authorities to buttress the submission - Abibo v. Tamuno (1999) 4 NWLR (Pt. 599) 334 at p. 340 B-C; Ogunderu v. Adebayo (1999) 6 NWLR (Pt. 608) 684 at p. 698 D-E and G-H; Kudu v. Aliyu (1999) 3 NWLR (Pt. 231) 615 at p. 634; Agoda v. Emanuoto (1999) 8 NWLR (Pt. 615) 407 at p. 417 B-C; Na'Bature v. Mahuta (1992) 9 NWLR (Pt. 263) 85 at 108 E-H and Haruna v. Modibbo, (2004) 16 NWLR (Pt. 900) 487 at p. 541. He argues that Chief Ahamba wrongly placed reliance on Swem's case (supra) to contend that the onus is on the respondent to an election petition to establish that the election was conducted in substantial compliance with the Electoral Act. He refers to what the Supreme Court held on p. 303 thereof and submits that the principle established in the case is in line with the age long principle of law that the petitioner who alleges non-compliance in an election petition has the burden of proving such non-compliance. That the onus does not shift to the respondent until the tribunal or court finds it impossible after the petitioner must have established any non-compliance to say whether or not the results were affected by the non-compliance established. He contends that where the tribunal or court is certain that the non-compliance established by the petitioner does not affect the result of the election, the petition must fail. He submits that the practice over the years is that it is the petitioner who should lead evidence to show that the non-compliance has affected the result of the election in order to get the relief he is seeking. He cited in addition to the above cases, those of Maska v. Ibrahim (1999) 4 NWLR (Pt. 599) 415 at p. 422 E-F; Aondoakaa v. Ajo (1999) 5 NWLR (Pt. 602) 206 and Abba v. Jumare (1999) 5 NWLR (Pt. 602) 270 at p. 278 B-D. Finally, he argues that the 1st and 2nd appellants/cross-respondents failed to prove, by evidence, the effect of non-compliance with Section 18 of the Electoral Act. Instead, the witnesses they called conceded during cross-examination that although the oath of neutrality was not administered on them, they performed their functions without fear or favour.

Learned counsel relies on the foregoing argument and submissions in respect of allegation of non-compliance with Section 40(1) of the Act.

In reply to Chief Ahamba's contention, Mr. Sofunde, argues that an election may be challenged on one or more of the grounds pro-

vided by Section 134 of the Electoral Act, 2002 and that any question of non-compliance with the provisions of the Act, falls under Section 134(1) (b) thereof. However the effect of such non-compliance may not invalidate the election by virtue of the provisions of Section 135(1) of the Electoral Act. In other words, for an election questioned under Section 134(1)(b) to be invalidated, the non-compliance complained of must be substantial and must have substantially affected the result of the election. He cites in support, once more, the cases of Awolowo v. Shagari (supra) and Ojukwu v. Onwudiwe (supra).

With regard to the breach under Section 40(1) of the Act, learned Senior Advocate submits that in the light of Section 135(1), there must be substantial non-compliance that did affect or may have affected the result of the election. That the purport of the decision of the Court of Appeal is that there was no sufficient evidence before it to determine whether the non-compliance might or might not affect the election. He submits that the decision in Swen v. Dzungwe (supra) established that two situations must co-exist before the dictum thereat applies. The first situation being that the court must be in a position, from sufficient evidence before it, to determine whether the non-compliance may or may not have affected the election. The second situation is to consider whether in fact it did affect the election. That if it was established that all the affected votes were cast for the respondent, the court would have been able to say that the election was affected. But if, on the other hand, it was not established how many such affected votes were cast in favour of each party, then it would be impossible for the tribunal or court to say whether the results were actually affected. Learned counsel stressed that in Swem's case, it was proved that not only were there irregularities affecting the votes in four polling stations, but also that there was a relatively small difference between the overall majority of the appellant in that case, in the constituency as a whole of sixty-six stations and the number of registered voters in the offending stations were sufficient to affect the result.

Mr. Eghobamien submits that in the absence of proof of the effect of the non-compliance on the result of the election, the election cannot be nullified under Section 135(1). He cites in support the case of Basheer v.

Same (1992) 4 NWLR (Pt. 236) 491 at p. 509A-C which interpreted Section 92(1) of the State Government (Basic Constitutional and Transitional Provision) Decree, 1991, which he says is in pari materia with Section 135(1) of the Electoral Act, 2002.

There is no dispute that with regard to Section 18 of the Electoral Act, 2002, the Court of Appeal found as a fact that the oath prescribed by the section had not been sworn to by the officials that were supposed to do so. This finding of fact is not being challenged.

The section reads-

“18. All Electoral Officers, Presiding Officers and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interests of the Federal Republic of Nigeria without fear or favour.”

The form of the oath has not been prescribed by the Electoral Act, 2002, though Section 18 thereof provides what the oath should pertain to. Section 1 of the Oaths Act, Cap. 333 of the Laws of the Federation of Nigeria, 1990, provides:-

“1. The oath to be taken as occasion shall demand shall be the oaths set out in the First Schedule to this Act.”

None of the oaths so prescribed is titled - “*Oath of Loyalty and Neutrality*.” Again Section 2 of the Oaths Act, Cap. 333, states:-

“2. A person appointed to the office set out in the second column of the Second Schedule to this Act shall take the oath specified in the first column of the said Schedule which shall be administered by the authority specified in the third column of the said Schedule.”

I have carefully examined the Second Schedule of the Oaths Act, I am, unable to find “*Electoral Officers, Presiding Officers and Returning Officers*” mentioned therein, nor is it indicated therein what oath they are to take. Therefore, there is a lacuna in the Electoral Act. In my view, the provisions of the Oaths Act, Cap. 333 have no application to the election officials specified by Section 18 of the Electoral Act. It follows that the provisions of Section 4(1) of the Oaths Act, on the consequence of an omission by a public officer to take any oath,

must be read in the context of the Oaths Act, Cap. 333 alone and cannot be extended to any other legislation in general, as was done by the Court of Appeal in this case. Therefore, Tabai, JCA., acted in error when he held that the omission by the Electoral officials to take the Oath of Loyalty and Neutrality had been cured by Section 4(1) of the Oaths Act, Cap. 333. Consequently, the failure to take the oath prescribed by Section 18 of the Electoral Act is another irregularity, the effect of which, on the validity of the election, I will consider later in this judgment

On Section 40(1) of the Electoral Act, 2002, which provides:-

“40(1) Every person intending to vote shall present himself to a presiding officer at the polling unit in the constituency in which his name is registered with his voter’s card.”

Learned Justice of the Court of Appeal, (Tabai, JCA.), found that some voters cast votes without a voter’s card and therefore held that the provisions of Exhibit O, which gave the voters the opportunity to vote with their registration cards and not voters’ card, was ultra vires Section 40(1). This finding has not been challenged by any of the parties to this case, it therefore stands as evidence of another non-compliance with the provisions of the Electoral Act.

As in the case of Section 18, I will defer consideration of the effect of the non-compliance to later in the course of this judgment.

Issue No.7 -

The complaint here is that the Court of Appeal after making a finding of bias against the 3rd respondents it failed to hold that the entire election was a nullity. Chief Ahamba contends that the 1st and 2nd appellants/cross-respondents pleaded the bias in paragraphs 14 and 15 of the amended petition. He argues that the averment in paragraph 14(a)-(h) of the petition was not exhaustive because it was pleaded earlier in paragraph 14(a) and (b) that evidence would be led to show further incidence of bias by the 3rd respondent/respondent throughout the country. He pointed out that the averment in paragraph 15 of the petition pertained to bias or likelihood of bias by the appointees of the 1st respondent/cross-appellant, particularly the Resident Electoral Commissioners. Learned Senior Advocate argues

that the averment in paragraph 18 of the reply to the petition by the 1st and 2nd appellants/cross-respondents did not quite meet the petitioners' pleading because the averment falls short of the requirement in paragraph 2(1) of Schedule 1 to the Electoral Act, 2002. He therefore, urges on us to hold that paragraph 18 of the reply did not put in issue the allegation that the 1st respondent/cross-appellant appointed his party members of Resident Electoral Commissioners.

He submits that the question of bias by the 3rd respondent/respondent is not in issue because the Court of Appeal had already found that by the failure of the 3rd respondent/respondent to produce on notice the election result and other documents requested by learned Senior Advocate on behalf of the 1st and 2nd appellants/cross-respondents in the course of the trial, was confirmation of its being biased. The second aspect of bias, pleaded in paragraph 15(b)(i)-(v) of the petition, relates to the disqualification of some of the Resident Electoral Commissioners on account of their being political party members. Chief Ahamba submits that the petitioners had called sufficient evidence to show that some Resident Electoral Commissioners were members of the PDP. He complains against the finding by the Court of Appeal that at the trial, the petitioners adduced some evidence in support of the allegations in paragraphs 14 and 15 of the petition and the respondents tendered some evidence in denial. Also that the court stated that owing to lack of time and space it would not dwell in detailed deliberation on the issue. He submits that by that, the Court of Appeal was in error for failing to evaluate the evidence before it. He argues that the excuse given by the court that there was lack of time and space could not be sufficient reason for its failure to evaluate the evidence adduced. He contends that the failure had occasioned miscarriage of justice. He urges us to evaluate the evidence, which the Court of Appeal failed to weigh, as we are competent to do so. And when we do this, to hold that the allegations in paragraphs 14 and 15 of the petition had been proved by the petitioners. Following this he urges us to also hold that there has been non-compliance with Sections 17(1) and 19 of the Electoral Act, 2002.

In reply, Chief Afe Babalola contends that before a court can reach a decision that there is an admission to certain facts by the pleadings of a

defendant, which could entitle a plaintiff for judgment without the need to prove such facts, the pleadings of the parties, as a whole, must be considered and not each paragraph thereof in isolation. He cited the following cases in support, namely, *Titiloye v. Olupo* (1991) 7 NWLR (Pt. 205) 519 at pp. 532 F-G and 543D; *Pan Asian African Co. Ltd. v. National Insurance Co. (Nig.) Ltd.* (1982) 9 S.C. (Reprint) 1; (1982) 9 S.C. 1; *Ugochukwu v. Cooperative & Commercial Bank Ltd.* (1996) 6 NWLR (Pt. 456) 524 at p. 537F-G; *Lion of Africa Insurance v. Fisayo* (1986) 4 NWLR (Pt. 37) 674 and *A-G Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 NWLR (Pt. 66) 547 at p. 560. He submits that the evidence given by the petitioners' witnesses as to the political membership of the PDP by the Resident Electoral Commissioners was discredited in cross-examination, and neither their party membership cards nor extracts from the membership register of the party to confirm their membership were tendered in evidence by the petitioners. Again no iota of evidence was adduced by the petitioners to show that the Resident Electoral Commissioners were biased in their action and no allegation of misdeed was averred in the petition against any of them. He contends that as no real bias was demonstrated against the Resident Electoral Commissioners, no case of non-compliance with Sections 17(2) and 19 had been established.

Mr. Sofunde argues that the evidence of petitioners' witnesses Nos. 94, 97, 110, 117, 136 and 139 relied upon by the petitioners had either been hearsay or was discredited in cross-examination. He adopted his argument in respect of issue No. 1 above.

Mr. Eghobamien argues that although the petitioners produced evidence to show that the Resident Electoral Commissioner for Gombe State. Alhaji Gidado Abubakar, was a member of the PDP in 1999, they failed to call evidence to establish that he was still a member of the party by 19th April, 2003, when the election took place and he functioned as the Resident Electoral Commissioner. That in addition, the petitioners failed to show the role played by him which affected the result of the election to their detriment. Therefore, it is submitted that the Court of Appeal was right to invoke the provisions of Section 150(1) of the Evidence Act to hold that the presumption of regularity applied.

The Court of Appeal in considering the alleged non-compliance with Sections 17(2) and 19 of the Electoral Act, observed as follows:-

“The next is the alleged non-compliance with Sections 17(2) and 19 of the Electoral Act, 2002, this issue is raised in paragraph 156 of the petitionI hold that the averment in paragraph 18 of the 1st and 2nd respondent’s reply that they deny the allegations contained in the particulars of paragraph 15 of the petition is, in my consideration, a sufficient traverse. The result is that the petitioners were not relieved of the burden of proving the allegations in their paragraph 15.

At the trial, the petitioners adduced some evidence in support of all the material allegations in the aforesaid paragraph. The respondents also tendered some evidence in denial of the assertions. For lack of time and space I would not dwell in any detailed deliberation on the issue. Suffices (sic) to say that the petitioners’ oral evidence in support of paragraph 15(a) and (b)(i),(iii),(iv) and (v) were sufficiently countered. As respects paragraph 15(b)(ii) the story is different There is, in my view, sufficient proof that as at January, 1999, Alhaji Gidado Abubakar was a member of the PDP.

The uncontroverted evidence is that he was the Resident Electoral Commissioner for Gombe State on the 19/4/03 and thus, the 19th respondent. Apart from the allegations of his membership of the PDP there is no complaint against his conduct of the election in Gombe (sic). And there was no evidence of his conduct in that State. There is the presumption of irregularity of his official conduct at the election and a further presumption that the result of that election in Gombe State is correct by virtue of Section 150(1) of the Evidence Act There is no evidence of who scored a majority of votes in Gombe State. In the absence of any evidence in rebuttal to the presumption of validity of the election and correctness of whatever result in Gombe State it remained unassailable. On this state of the pleadings and available evidence, can proof of Alhaji Gidado Abubakar’s membership of the PDP in 1999 without more, sufficient non-compliance to invalidate the election in Gombe State? I shall answer this question in the negative.”

It is clear from the foregoing that the trial court found that although

the Resident Electoral Commissioner was a member of the PDP in January, 1999, there was no evidence that he remained such a member by the time the election took place in April, 2003. This is a sound finding of fact by Tabai, JCA. Furthermore, there was no evidence as to what act of bias he committed in favour of the 1st and 2nd respondents/cross-appellants or against the 1st and 2nd appellants/cross-respondents. In the light of this, the Court of Appeal was right to come to the conclusion that the presumption of validity under Section 150(1) of the Evidence Act applied.

With regard to the other Resident Electoral Commissioners it is clear from the quotation above of the judgment of the Court of Appeal, as to why it is being contended that the petitioners’ case was not properly considered when the court stated that for lack of time and space it would not dwell on details. There is no doubt that the court considered in general, the evidence adduced by both the petitioners and the respondents and it held that the evidence adduced by the petitioners had been countered by the respondents and that the burden of proof was on the petitioners. If the evidence adduced by the petitioners had been countered by the respondents does it then mean that the petitioners had been relieved of the burden of proof? My understanding of this is that by the evidence adduced in respect of paragraph 15(a) and (b)(i), (iii), (iv) and (v) the 1st and 2nd appellants/respondents had not discharged the burden of proof on them. In that event, there was no proof that the Resident Electoral Commissioners were biased either against the 1st and 2nd appellants/cross-respondents or in favour of the 1st and 2nd respondents/cross-appellants. In which case, I am only able to say that there was non-compliance with the provisions of Sections 17(2) and 19 of the Electoral Act simpliciter but not biased by the Resident Electoral Commissioners, just as found by the Court of Appeal.

The evidence adduced by the petitioners at the trial concerned Section 17(2) only. No evidence on the appointment of other Electoral Officers under Section 19 by the 3rd respondent was adduced.

Issue Nos. 8, 11 and 14

These issues have been argued together by Chief Ahamba on the basis that they deal with the question whether on the balance of probability the election could not have been invalidated in respect of some States

and by extension the whole of the country (constituency). Also akin to this question is whether substantial non-compliance in the conduct of the election had been proved and that the respondents to the petition had succeeded in proving that such established non-compliance could not or B did not in fact affect the election.

As I mentioned earlier, I prefer to defer till later, consideration of the totality of the effect of non-compliance with the provisions of the Electoral Act than dealing with it piecemeal. I will therefore deal here C only with the first question.

Chief Ahamba argues that on the authority of *Basheer v. Seme* (1999) 4 NWLR (Pt. 236) 419 at p. 509 A-C; *Imiere v. Salami* (1989) 2 NEPLR 131 at pp. 161-162; *Na' Bature v. Mahuta* (1992) 9 NWLR (Pt. 263) 85 at p. 104; *Akhigbe Olise v. Richard Ofen-Imu*, NEPLR Vol. 3 p. 42 at p. 45; *Morgan v. Simpson* (1975) QB 151 and *Halsbury's Laws of* D *England* 4th Edition. Vol. 15 paragraph 581, the Court of Appeal ought to have allowed the petition since the respondent failed to produce the final result of the election. Also that the petition ought to have been allowed because the elections in 20 out of the 36 States were vitiated as a result E of the irregularities and incidents of non-compliance that occurred in the States. Learned counsel then referred to the evidence adduced by the petitioners to the effect that the Resident Electoral Commissioners for Delta State, Ondo State, Gombe State and Kwara State were members of the PDP. F While the Court of Appeal found that such evidence had been adduced, it failed, with the exception of Gombe State, to hold that the petitioners had proved that the Resident Electoral Commissioners were such members simply because only oral and not documentary evidence was adduced in that respect. It is submitted that the Court of Appeal erred in so holding G as the oral evidence in respect of each of the three States was not rebutted or controverted and as such it should have served as proof - *A-G of Oyo State v. Fairlakes Hotels Ltd.* (No. 2) (1989) 12 S.C. 1; (1989) 5 NWLR (Pt. 121) 255 at p. 283 A-B.

Learned counsel states that he adopts the foregoing argument H in respect of the Resident Electoral Commissioners for Kaduna State, Imo State, Edo State and Kogi State in respect of whom the petitioners

adduced oral evidence that were members of the PDP. He submits that in all the cases about the 8 States the 1st appellant/cross-respondent denied the assertion that they were PDP members but proffered no evidence in rebuttal. He therefore urges that on the balance of probability, based on the preponderance of the petitioners' evidence, this court should reverse the B decision of the Court of Appeal and hold that the 1st appellant/cross-respondent appointed PDP members for all the States in the Federation and for that reason the election could not have been free and fair or substantially in compliance with the Electoral Act. 2002.

With regard to the Resident Electoral Commissioners for Ad- C amawa, Lagos and Anambra States, learned Senior Advocate contends that evidence of bias was led to show that they committed acts of bias in the gubernatorial elections which were held simultaneously with the Presidential election, in favour of PDP gubernatorial candidates in the D respective States.

Learned counsel refers to the various findings of fact made by Tabai. JCA., in respect of Akwa Ibom State, Cross-River State, Rivers State, Bayelsa State, Edo State, Ebonyi and Benue States, Enugu State, E Kaduna State, Adamawa State and Kogi State, on the evidence adduced by the petitioners to show non-compliance throughout the country, with specific evidence in 20 States, malpractices and non-compliance in 14 States, violence in all the States, withholding of results and other documents by F the 3rd respondent/respondent. He invites us to take into consideration the totality of the evidence and come to the conclusion, which he says is inevitable, that on the preponderance of the evidence the Presidential Election conducted on the 19th April, 2003, was not conducted in substan- G tial compliance with the provisions and principles of the Act, consequent upon which the election is invalid.

Chief Afe Babalola, in reply, refers to the 14 States complained about by the petitioners to contend that the basis of the Court of Appeal's conclusions is that the testimonies of the petitioners' witnesses related to H insignificant number of polling units within a few Local Governments in the specific States which could not substantially affect the result of the Presidential election. That another ground for the conclusion by the court

is that the pieces of evidence given by the petitioners' witnesses were not borne out by the petitioners' pleadings as the witnesses testified in respect of Local Government Areas that were not pleaded. The third factor was that the Electoral Officials against whose conduct serious allegations were made by the petitioners' witnesses were not joined as respondents to the petition. He submits that in the light of all these shortcomings in the petitioners' case, the findings made by the Court of Appeal were unassailable, since it is settled law that party cannot urge a case different from that which he pleaded, as the court is bound to decide only the case pleaded by the parties - *Lipede v. Sonekan* (1995) 1 NWLR (Pt. 374) 668 and *Overseas Construction Ltd. v. Creek Enterprises Ltd.* (1985) 3 NWLR (Pt. 13) 407 at p.414 C-E.

Learned counsel submits that all evidence adduced by the petitioners which went to no issue were properly rejected by the Court of Appeal. Nowhere in the petition were Local Government Areas and States, in respect of which evidence was discountenanced were pleaded. Therefore, the petitioners had failed to discharge the burden on them and the court below was right to have concluded that there was no evidence from the States concerned that could have substantially affected the election. Learned counsel went further to illustrate the pattern of the evidence adduced State by State, as follows:-

“(a) In Cross River (sic) there are 18 Local Governments the appellants pleaded irregularities in two Local Governments but led evidence in only one Local Government.

(b) In Akwa Ibom State, there are 33 Local Governments, the appellants pleaded irregularities in 12 Local Governments but led evidence in only 9 Local Governments.

(c) In Rivers State there are 22 Local Governments. The appellants pleaded irregularities in 14 Local Governments but led evidence in only 8 Local Governments.

(d) In Bayelsa State there are 8 Local Governments. The appellants pleaded irregularities in 5 Local Governments but led evidence in only 3 Local Governments.

(e) In Taraba State there are 16 Local Governments. The appellants

pleaded irregularities in Local Governments but led evidence in only 4 Local Governments.

(f) In Kaduna State there are 21 Local Governments; the appellants pleaded irregularities in 4 Local Governments but led evidence in only one Local Government.

(g) In Imo State, petitioner pleaded 14 out of 27 Local Governments but led evidence in only one.

(h) The appellants want this court to rely on evidence of P. W.136 that REC had posted a false result on the INEC website in the Governorship election to nullify the Presidential election, in Lagos State.

(i) The appellants also want this court to use the evidence of P.W.136 that REC for Anambra State announced results in the senatorial election in favour of PDP who purportedly had no candidate, to nullify the Presidential election in Anambra State.

(j) The appellants also want this court to use Exhibit 238 which was an error in recording of votes in a Unit and Local Government in Adamawa State to nullify the Presidential election in Adamawa State.

(k) The appellants relied on Exhibit 299 and evidence of 29th RW to ask this court to nullify the election in Ibesikpo Asutan LGA of Akwa Ibom. The appellants quoted a part of the answers of the witness under cross-examination out of context and applied meaning that was suitable to the appellants to an otherwise clear and unambiguous evidence of this witness.”

Chief Afe Babalola then submits that in respect of all the Local Governments where the petitioners led evidence, the 1st and 2nd respondents called witnesses to rebut the allegations made by the witnesses.

On issue No. 8, Mr. Sofunde argues that the Court of Appeal stated the position of the law correctly when it held that a party on whom notice to produce is served is under no obligation to produce the document named in the notice to produce but that such service plus the failure to produce the document merely enables the party that issued the notice to produce to give secondary evidence of the document - *Nnamdi Azikiwe University & Ors v. Nwafor* (1999) 1 NWLR (Pt. 585) 116 at p. 141 E-H. In reply to the 1st and 2nd appellants/cross-respondents' argument

on Issue No. 14, learned counsel draws attention to the decision of this court in the cases of Awolowo v. Shagari (1979) 6-9 S.C. (Reprint) 37; (1979) All NLR (Reprint) 120 at pp. 143-144 and 167-170- and Ojukwu v. Onwudiwe (1984) 1 SCNLR 247 at pp. 305D-306D and submits that the decision in the case of Morgan v. Simpson (supra) principally relied upon by Chief Ahamba, was declared in Awolowo's case (supra) as not applicable in Nigeria.

On the submission by Chief Ahamba that because the 3rd respondent/respondent had failed to produce the result of the election, the Court of Appeal ought to have upheld the petition, I am of the view that this cannot be right. As I have stated earlier in this judgment, the incident of the 3rd respondent/respondent's failure to produce on notice the result of the election occurred in the course of the proceedings in the petition. That is long after the election, which constitutes the cause of action, took place, so that the failure has nothing to do with the conduct of the election. I agree with Mr. Sofunde that as the result was not produced on notice it was open to the 1st and 2nd appellants/cross-respondents to adduce secondary evidence of the result. This they did not do even though they had already pleaded the result in detail in paragraph 4 of the petition, as quoted above, which shows that they were in possession of the result throughout the trial of the petition.

With regard to the evidence of irregularities given State by State covering 14 States, the Court of Appeal, per Tabai, JCA., considered such evidence State by State as adduced and gave cogent reasons as to why the evidence was accepted or rejected. It is true that evidence was adduced to show that some Resident Electoral Commissioners were members of the PDP. This is sufficient to prove non-compliance with Sections 17(2) and 19 of the Electoral Act, 2002, but is not sufficient to lead to the conclusion that they were biased. The party that asserts that they were biased will have to go further by adducing evidence to show the manner in which they were biased against the petitioner or in favour of the respondent to the petition to enable the tribunal or court come to that conclusion. That has not been the case here. It is not enough merely to show that the officials

were members of the PDP. The evidence adduced by the petitioners is therefore inconclusive in that regard and I so hold. This issues fails.

The question here is based on the failure of the Court of Appeal to apply the provisions of Section 129 of the Electoral Act, 2002, on undue influence, despite its making a finding of extreme violence and the evidence before it as to who deployed the perpetrators of the violence.

Chief Ahamba refers to the provisions of Section 129(a) of the Electoral Act, which provides:-

"129. A person who-

(a) directly or indirectly, by himself or by another person on his behalf makes use of or threatens to make use of any force, violence or restrain;

.....
commits the offence of undue influence and is liable on conviction to a fine of N100,000 or imprisonment for twelve months, and shall in addition be guilty of corrupt practice under Section 133 of this Act (sic Section 122) and the incumbent be disqualified as a candidate in the election"

and argues that by virtue of the decisions in the cases of Bua v. Dauda (2003) 6 S.C. (Pt. II) 120; (2003) 13 NWLR (Pt. 838) 657 at p. 680 and Yusuf v. Obasanjo (2003) 9-10 S.C. 53; (2003) 16 NWLR (Pt. 847) 554 at pp. 641H-642A, what constitutes undue influence and the definition to corrupt practice as mentioned under Section 129, does not put the commission of crime directly in issue. He states that though the petitioners pleaded undue influence by the 1st and 2nd respondents/cross-appellants and adduced evidence to prove this, the Court of Appeal only made findings extensively of violence and intimidation but failed to mention those who carried out the acts or those who directed the acts. He refers specifically to the pieces of evidence adduced by the petitioners in respect of use of military personnel and the Nigeria Police Force in the conduct of the election. He urges that on the balance of probabilities we should hold that the 1st and 2nd respondents/cross-appellants were liable for the electoral offence of undue influence and by implication of corrupt practices under Section 129 of the Electoral Act, 2002.

Chief Afe Babalola replies that it is a principle of our law that no person shall be found guilty of a criminal offence without being given the opportunity to defend himself. Therefore any person against whom an allegation is made must be given the opportunity to defend himself - Obasanjo v. Buhari (2003) 11 S.C. 1; (2003) 17 NWLR (Pt. 850) 510 at p. 578 D-E. He contends that neither the PDP, nor the military personnel nor the Nigeria Police Force had been joined as parties to the case to give them the opportunity to defend themselves, and no evidence was adduced to connect their activities with the 1st and 2nd respondents/cross-appellants. He therefore submits that the evidence went to no issue and it should be discountenanced.

Mr. Sofunde argues that the issue here does not apply to his clients but the 1st and 2nd respondents/cross-respondents. He submits that by way of assistance to the court, though the Court of Appeal made the finding that there was violence in the election, it did not find that the violence was at the instance of the 1st and 2nd respondents/cross-appellants. Therefore, the provisions of Section 129 of the Electoral Act ought not to apply.

Now, it is clear to me that Section 129 of the Electoral Act, creates a criminal offence which it terms “undue influence” and prescribes punishment for the offence. I do not therefore see how such an offence can be the subject of an election petition or civil proceeding. If the petitioners mean to prosecute the 1st and 2nd respondents/cross-appellants of the offence under Section 129 then there must be a charge to which they must plead in a normal criminal proceedings. However, that is not the situation here. I am strengthened in holding this view by the heading given to Part VI of the Electoral Act, which is “Electoral Offences” and the part covers Sections 114 to 130 inclusive of the Act. Section 134 of the Electoral Act, 2002, provides the grounds on which an election may be questioned by way of petition., none of which mentions “undue influence.” Consequently, I see no substance in this issue and it fails.

Issue No. 10

The petitioners pleaded in general in paragraph 19 of their

amended petition as follows:-

“19. In addition to the vitiating status, conduct and acts of 3rd respondent, your petitioners plead that the election was marred by wide-spread violence, executive intimidation, and electoral malpractices such as entry of fictitious figures into result sheets at the different stages of the elections, barring of agents of political parties and candidates other than those of the PDP from collation centres (where such centres were allowed to exist), pre-voting time finger printing of ballot papers, snatching of election materials by thugs for stuffing outside polling stations and other pronounced irregularities details of some of which are hereunder pleaded.

And then went on to plead specifically in subsequent paragraphs of the amended petition the general allegations contained in paragraph 19, State by State and under each State incidences per Local Government Areas, Wards, Units etc. from paragraph 31 up to paragraph 288 of the amended petition. On the 9th February, 2004, the petitioners’ witness No. 59, Mr. Nelson Ogbuje, of Ekporo Town in Eleme Local Government Area Rivers State, while testifying, stated that he went to the polling station in Aluse ward to vote but there were neither election materials nor election officials at the polling station up to 1.00 p.m when he returned to his house without having the opportunity to vote. Counsel for the 1st and 2nd respondents to the petition raised objection that the evidence of the witness with regard to Eleme Local Government Area was not pleaded in the amended petition. The Court of Appeal upheld the objection ruling that the general pleading in paragraph 19 could not sustain the evidence since irregularities in Rivers State were pleaded and places in the State where the irregularities took place were specifically pleaded. In the words of Abdullahi, PCA.,

“The general averments in paragraphs 19 and 75 of the Petitioners’ pleaded (sic) in my view cannot serve as an open ended situation to enable the petitioners to call evidence in (sic) any part of Rivers State that was not specifically pleaded as in this case, other Local Governments have been specifically pleaded, then why not Eleme Local Government, if it is important to the petitioners.

It is my view that this witness cannot be lead (sic) to give evidence

on Eleme Local Government. The objection is accordingly sustained.”

The 1st and 2nd appellants/cross-respondents complain that this ruling led the Court of Appeal to discountenance evidence properly admitted in the course of the trial in respect of several States including Rivers State, Akwa Ibom State, Taraba State, Imo State, Ebonyi State and Bayelsa State. Chief Ahamba submits that the ruling by the Court of Appeal was erroneous and had occasioned miscarriage of justice except in the case of evidence of violence.

Chief Afe Babalola has listed in his brief of argument 19 Local Government Areas of Cross River State, Akwa Ibom State, Rivers State, Kaduna State, Enugu State, Edo State, Bayelsa State and Ebonyi State that were not specifically pleaded by the petitioners. He contends that it is not the case of the 1st and 2nd appellants /cross-respondents that they pleaded these Local Government Areas in respect of which the Court of Appeal discountenanced all evidence of malpractice but rather the contention is that the general averments permit them to call evidence in respect of every Local Government Area in Nigeria even where not pleaded. He submits that this cannot be correct having regard to the position of the law that parties and the court are bound by their pleadings. That any evidence which is not based on the pleadings goes to no issue. He cites in support of the submission, the case of Adefemi v. Abegunde (2004) 15 NWLR (Pt. 895) 1 and Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 NWLR (Pt. 13) 407 at p. 414C, E.

Mr. Sofunde contends that given the ruling of 9th February, 2004, where the Court of Appeal limited the scope of which evidence of malpractice could be given, the court was right to have discountenanced evidence of malpractice not pleaded by the petitioners because the court was bound by its decision of 9th February, 2004, on the authority of Lawal v. Dawodu (1972) 8-9 S.C. (Reprint) 55; (1972) All NLR (Reprint) 707 at pp. 718-719. Learned counsel also refers to Order 26 rules 5 and 6 of the Federal High Court (Civil Procedure) Rules, 2000, applicable to the proceedings, in the Court of Appeal and the case of Omoboriowo v. Ajasin (supra) at pp. 143G-144A, per Obaseki, JSC.

Now the aspect of the Court of Appeal’s judgment which Chief

Ahamba attacks reads thus:-

“The ruling of this court on the 9/2/04 was to the effect that although Rivers State is specifically pleaded, evidence of what happened in Eleme LGA of Rivers State was inadmissible since facts in respect thereto were not, in addition, specifically pleaded. In other words, even where a State of the Federation is specifically pleaded, a Local Government within that State must in addition be specifically pleaded to enable evidence in respect thereof to be admitted. This court is bound by that decision.

This decision cannot, however, be read in isolation it must be read side by side with this court’s earlier ruling on the 4/11/03 by which evidence in respect of Benue State was admitted.

Chief Afe Babalola, SAN., objected to the admissibility of evidence in respect of Benue State, his ground being that the State had not been specifically pleaded. In the ruling, this court per Oguntade, JCA., (as he then was), reacted thus:

“With respect to the respondents’ counsel, I do not think that the import of the averment in paragraph 14(c) and 14(g) ought to be limited in scope. It seems to me that rather than confine the act of violence alleged to Ebonyi State, paragraph 14(c) only makes Ebonyi State an example of the widespread violence during the elections. That this was the intention of the petitioners was put beyond dispute by the last sentence of paragraph 14(c) where the petitioners served notice that they would be leading evidence of similar acts of violence in at least twenty-one States of the Federation.”

The purport of this ruling is that the petitioners were at liberty to adduce evidence in support of their allegations of the 3rd respondent’s condonation and or connivance at 1st respondent’s deployment of armed military and police personnel and their alleged perpetration of violence against members of the ANPP and other political parties. This court is equally bound by this decision of the 4/11/03. It must be emphasized that every inch of this country falls within the boundaries of one Local Government Area or another. The combined effect of the two decisions is that whereas evidence of corrupt practices such

as stuffing of ballot boxes with ballot papers, diversion of election materials to private homes, entries of false results into result sheets, etc., in a Local Government Area are inadmissible unless facts relating thereto have been specifically pleaded, evidence of alleged perpetration of violence and intimidation by military and police personnel and PDP thugs in the Local Government Areas are admissible even though facts relating thereto have not been specifically pleaded. I shall therefore examine, in due course, the evidence in respect of these Local Government Areas to see which one to discountenance.”

I see nothing wrong with this stand which the Court of Appeal took. It is elementary, as contained in Order 26 rules 5 and 6(1) of the Federal High Court (Civil Procedure) Rules, that in pleadings, particulars must be given and the adversary must not be taken by surprise. The rules read:-

“5. (1) In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence and in all other cases in which particulars may be necessary, particulars (with dates and items if necessary) shall be stated in the pleadings.

(2) In an action for libel or slander, if the plaintiff alleges that the words or matter complained of were used in a defamatory sense other than their ordinary meaning, he shall give particulars of the facts and matters on which he relied in support of his allegation.

6. (1) A party shall plead specifically any matter (for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality) which, if not specifically pleaded might take the opposite party by surprise.”

Accordingly the issue fails.

Issue No. 12

Chief Ahamba’s grouse here is that the Court of Appeal held that there was no evidence on the election in Imo State which could substantially affect the election in the State. He argues that the petitioners had adduced evidence of intimidation, assault occasioning harm, arson, non-certification of election material, non-administration of oath on the election officials and similar other acts of non-compliance applicable to

other States, which applied to Imo State. That it was despite the evidence that the Court of Appeal came to the aforementioned conclusion. That nowhere in the judgment of the Court of Appeal was it stated that the pieces of evidence called by the petitioners were either rejected or not accorded probative value. That the testimonies of petitioners’ witnesses Nos. 23, 45, 49 had exposed serious malpractices each of which was capable of leading to invalidation of the election. Learned counsel cited the case of Oilfield Supply Centre v. Johnson (1987) 2 NWLR (Pt. 58) 625; Swem v. Dzungwe (supra) and Mogaji & Ors. v. Odofoin (1978) 4 S.C. (Reprint) 53, 65; (1978) 4 S.C. 94 in support. He submits that the Court of Appeal ought to have found the election in Imo State as not having been conducted in substantial compliance with the provisions of the Electoral Act, 2002.

Chief Afe Babalola replies that the Court of Appeal was right in holding that the evidence adduced by the petitioners in respect of Imo State, and led evidence of irregularities in only one of the 14 Local Government Areas that they pleaded. Therefore, the Court of Appeal could not have nullified the election in all the 27 Local Government Areas based on such evidence. He contends that the testimonies of the 3 petitioners’ witnesses called, viz P.W.23, P.W. 45 and P.W.97 did not prove the specific non-compliance with the provisions of the Electoral Act pleaded, in respect of the 12 out of the 14 Local Government Areas in respect of which the petitioners questioned the conduct of the election. Therefore, they failed to discharge the burden of proof which rested on them - Igodo v. Owulo (1999) 5 NWLR (Pt. 601) 70 and Remi v. Sunday (1999) 8 NWLR (Pt. 613) 93. He submits that since the burden was not discharged by the petitioners, the Court of Appeal was right to conclude that there was not enough evidence from which the election could be affected.

Mr. Sofunde argues that the 1st and 2nd appellants/cross-respondents’ complaint gives the impression that the Court of Appeal did not consider the evidence adduced before coming to the conclusion reached, which is being complained about. But it in fact considered the evidence adduced by the petitioners before holding that the evidence did not affect the election in Imo State.

I think the answer to the question being raised here is to quote

the finding made by Tabai, JCA., with regard to the evidence called by the petitioners in this respect. It reads:-

“IMO STATE

The pleadings relevant to Imo State are paragraphs 270-288 of the petition. Three witnesses gave evidence for the petitioners. The first was P.W.23, Dr. Edmund Ibekwe. He was the ANPP Chairman of Imo State Chapter. He gave evidence of the general security situation in Imo State. He said there was heavy military and police presence with armoured cars and sand bags with soldiers and policemen saying “CONTINUITY” when a person passed by them. According to him “CONTINUITY” was a PDP campaign slogan. He tendered Exhibits 26, 29, 30 and 31.

Next was the testimony of the P.W.45, Anthony Dimegwu. He gave account of how the Transition Chairman of Ahiazu/Mbaise LGA Mr. Chidi Ibe ran exchanging ballot box already stuffed with ballot papers from his car in his convoy for one of the boxes at the Central School Polling Station. According to this witness when he tried to query him for that action Mr. Ibe took up a gun and struck him on the frontal part of his head and he fell down unconscious and remained so for two weeks. He was admitted in two hospital (sic) in Imo State and later flown to Italy where he was treated. He regained his consciousness in the hospital in Italy.

The third witness was P.W.97, Ethelbert Okwaranya. He testified to the effect that the REC for Imo State, Alhaji Daura from Katsina State was a member of the PDP. He also gave evidence about Chief John Nwosu the REC for Delta State as at the 19/4/03 that he was a card carrying member of the PDP.

There is no evidence from Imo State that can substantially affect the election in Imo State.”

The question is: from the aforementioned, could it be said that there was evidence which substantially affected the election in Imo State? The testimony of P.W.23 related to the general security situation in the State. That there was heavy presence of the military and the police and that they should campaign slogan of the PDP, but did not state how this affected the voters. The testimony of P.W. 45 concerned an incident at the Central School Polling Station where he saw a stuffed ballot box being

exchanged with the one at the polling station. This is just one incident, the witness did not mention what happened elsewhere in the State. His evidence did not cover the whole of the State or the 14 Local Government Areas pleaded out of the 27 Local Government Areas in the State. Again, this is not sufficient to affect substantially the election in the State. P.W. 97 gave evidence of Resident Electoral Commissioner for Imo State being a member of the PDP but his evidence fell short of stating what act or acts of bias there was against the petitioners or the 1st and 2nd respondents, which the Resident Electoral Commissioner committed.

In my opinion, when all the pieces of testimonies of the 3 witnesses are put together it cannot correctly be held that the election in Imo State was substantially affected since the evidence did not cover the whole of the State but a small section of it. In my opinion, the Court of Appeal was right to hold that the evidence of the witnesses did not substantially affect the election in that State. Issue No. 12 therefore fails.

Issue No. 13.

The complaint here by the 1st and 2nd appellants/cross-respondents is against the holding by the Court of Appeal that Presiding Officers were not joined in the petition and that the failure to do so was fatal to the case of the petitioners. Chief Ahamba argues that all persons against whom the petitioners had complaint were joined as parties to the petition. He submits that where more than one person appear to have been involved in what is complained against, it is not mandatory on the petitioner to join all those involved - Buhari v. Obasanjo (2003) 11 S.C. 1;(2003) 17 NWLR (Pt.850) 587. Referring to the incidences in Kaduna State and Rivers State, learned counsel submitted that as the 3rd respondent/respondent is being accused of failing to conduct election, an official who can perform his function only if an election is actually conducted needs not be joined.

Chief Afe Babalola states that the complaint by the 1st and 2nd appellants/cross-respondents is that the allegations contained in their pleadings are against the 3rd respondent/respondent as a corporate body and because of this they could lead evidence concerning the staff of the 3rd respondent/respondent however described, whether joined or not because the 3rd respondent/respondent, as a corporate body, acts through natural

persons. He points out that the complaints of the 1st and 2nd appellants/cross-respondent, throughout their petition, had been over voting, inflation of votes, non-voting and other electoral malpractices directed at various polling stations. Therefore, he argues, these are not allegations against the 3rd respondent/respondent as a corporate body but against specific Electoral Officers who were not joined as respondents to the petition.

He submits that it is settled law that if a petition complains of the conduct of an electoral officer, a presiding officer, a returning officer, or any other person who took part in the conduct of the election, such officer or person is, for the purpose of the Electoral Act, 2002, deemed to be a respondent to the petition and should be joined in his or her official status as a necessary party. He supports the submission with the cases of *Obasanjo v. Yusuf* (2004) 5 S.C. (Pt. 1) 27; (2004) 9 NWLR (Pt. 877) 144; *Egolum v. Obasanjo* (1999) 5 S.C. (Pt. I) 1; (1999) 7 NWLR (Pt. 611) 355 and *Onojoin v. Egani* (1999) 5 NWLR (Pt. 603) 416.

Mr. Sofunde, submits that the type of non-joinder of party which is dealt with in this case is statutory and not based on the principle of common law and cites the case of *Obasanjo & Anor v. Buhari & Ors.* (2003) 11 S.C. 1; (2003) 17 NWLR (Pt. 850) 510 at p. 576 D-F in support.

Section 133 subsection (2) of the Electoral, Act, 2002, deals with the joinder of party in an election petition. It provides:-

“(2) The person whose election is complained of is, in this Act, referred to as the respondent, but if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party.”

The findings by the Court of Appeal which are the subject of the complaint by the 1st and 2nd appellants/cross-respondents are as follows:-

“Another general issue raised is the one described by Chief Afe Babalola as NON-JOINDER OF MANDATORY RESPONDENTS. The principle as to the proper parties to be joined in election petitions of this nature has been settled in quite a number of cases, one of the most recent

being *Obasanjo v. Yusuf* (2004) 5 S.C. (Pt. I) 27; (2004) 9 NWLR (Pt. 877) 144 at 185 where the Supreme Court restated the principle thus:-

“The law clearly is that if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall, for the purpose of the Act, be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party. (See Section 133(2) of the Electoral Act). Paragraphs 12 and 14 of the petition are clearly in my view complaints or allegations against the 1st respondent who is alleged to have continued to deploy police and army personnel not only to supervise the conduct of the election but to intimidate voters as well. The 1st respondent is already a respondent in the petition. I do not know how the unnamed, unidentified and unassigned police and army personnel as well as political party agents and or thugs can be made parties in the petition. I think the Court of Appeal was right to have refused to strike out the two paragraphs. Paragraphs 12 and 14 are therefore competent.

As regards paragraph 16 of the petition, I think the Tribunal (which is this court) rightly held that this paragraph is directed principally against the 1st and 41st respondents who are already parties to the petition. The paragraph is therefore competent “See at *Egolum v. Obasanjo* (1999) 5 S.C. (Pt. I) 1; (1999) 7 NWLR (Pt. 611) 423. The principle in *Obasanjo v. Yusuf* (supra) shall, in the course of this judgment, be applied in determining whether any paragraph of this petition is incompetent and liable to struck out for non-joinder or misjoinder.

In his written address Chief Ahamba, SAN., listed out the Form EC8A for Kachia, Jema’a, Makarfi, Kudan, Kagako, Jaba, Ikara, Zangon Kataf and Chukun LGAs. These are listed from pages 89-131 of the address. I took time to go through them and, no doubt, they disclose fundamental irregularities in the results entered in these documents. In most of them there was no accreditation. And this was the common feature in the several of them that were tested in court. However, each of these documents was prepared or supposed to be prepared by no other official than the Presiding Officer. By virtue of the provisions of Section 133(2)

of the Electoral Act, 2002, and the numerous case law authorities one of the most recent, being *Obasanjo v. Yusuf* (supra), each of them is deemed to be a respondent and who should therefore be joined. One can readily appreciate the grave difficulties posed by the provisions and the interpretation by the courts, that however remains the law and we are bound by it. In his address. Chief Ahamba, SAN., stated at page 89 thus,

“In most of these acts the ad-hoc officers were helpless victims rather than accomplices. Hence they are not joined in the petition, the accusation being against corporate “INEC”

The question is that of evidence. The evidence before us is that in most polling units there were no Presiding Officers and election materials. It was only in a few cases that we had the Presiding Officer without the materials. Since the complaint is against the results in the Form EC8As prepared by the Presiding Officers, their non-joinder is fatal to those paragraphs which are therefore struck out.”

I think these findings by the Court of Appeal are correct since they follow the provisions of Section 133(2) of the Electoral Act, 2002 and the decided cases of this court on the subject which are binding on it.

Accordingly, I see no substance in issue No. 13 and it fails.

Issue No. 15

This issue raises the question whether the Court of Appeal having nullified the whole of the election in Ogun State, it should not have, by reason of that, also nullified the Presidential election as a whole.

Chief Ahamba refers to the provisions of Section 134(2) of the Constitution which provides:-

“134(2) A candidate for an election to the office of President shall be deemed to have been duly elected where, there being more than two candidates for the election-

(a) he has the highest number of votes cast at the election; and

(b) he had not less than one quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.”

and argues that by the wordings of the subsection it is clear that Presidential election must be held simultaneously in all the States of the

Federation and the Federal Capital Territory. That where the election in a State is voided, then Section 134(2) of the Constitution has not been satisfied. He submits that the phrase “not less than one-quarter of the votes cast at the election” in Section 134(2) can only mean an election conducted simultaneously in the 36 States.

Although Chief Afe Babalola has indicated in the brief of argument filed by him that issue no. 3 therein covers inter alia 1st and 2nd appellants/cross-respondents’ issue no. 15, yet his brief of argument fails to contain any argument in that section (issue no. 3) of the brief.

Mr. Sofunde submits that the import of Section 134(2) of the Constitution is that a winning candidate should have the required majority and once he attains that majority, it cannot be argued that because there was no election in one State, the election then must be voided. He cites the case of *Awolowo v. Shagari* (supra) at p. 168 in support.

It is significant to point out that there was indeed an election in Ogun State at the same time as anywhere else, that is, on 19th April, 2001. So it is not that there was no election at all, which is the premise for the contention of Chief Ahamba. It is true that the Court of Appeal nullified the whole of the election in Ogun State on the basis that there was no substantial compliance with the Electoral Act, 2002. Its words, per Tabai, JCA., are:-

“The result of my finding in this case is that the Presidential Election of 19/4/03 in Ogun State was not conducted in substantial conformity with the Electoral Act, 2002 and same is accordingly nullified.”

which confirms that there was election in Ogun State on 19th April, 2003. Therefore, the fact that the election was nullified by the court does not mean or is not synonymous with the election not being held at all. Since this is the premise on which the 1st and 2nd appellants/cross-respondents’ argument is grounded it follows that the whole of the argument misses the point and is with respect irrelevant. The nullification of the election by the court is not the same as the election not taking place. For this reason Issue No. 15 fails.

Issue No. 16.

The complaint here deals with what is perceived as late filing

of reply by the 1st and 2nd respondents to the petitioners' petition in the court below. Chief Ahamba contends that the 1st and 2nd respondents were served with the petition on the 22nd and 23rd May, 2003, respectively. On the 25th May, 2003, all the parties to the petition participated in the hearing of an interlocutory application for injunction brought before the court below. The application was for an order to restrain the 1st and 2nd respondents. On 27th May, 2003, ruling was delivered by the court in favour of the 1st and 2nd respondents. On 30th May, 2003, the 1st and 2nd respondents filed memorandum of appearance and on the 13th June, 2003, they jointly filed their brief of argument.

By paragraph 12(1) of the Procedure for Election Petitions contained in the First Schedule to the Electoral Act, 2003, the respondent to a petition shall file his reply within 14 days of entering appearance.

Chief Ahamba argues that the 1st and 2nd respondents after appearing physically in the Court of Appeal on 25th May, 2003, should have filed their reply on 8th June, 2003, but failed to do so until the 13th June, 2003. He submits that they were out of time and therefore we should hold that the reply was incompetent.

Chief Afe Babalola, states that by paragraph 8(1)(b) of the Procedure for Election Petitions the 1st and 2nd respondents were to be served personally. That by the 23rd May, 2003, when the petition was fixed for hearing by the court below, he appeared, as a mark of respect to the court because a hearing notice was served on his chambers, and asked for adjournment to ensure that the 1st and 2nd respondents were personally served. He refers to paragraph 10(2) of the Procedure for Election Petitions, and argues that its provisions allowed the 1st and 2nd respondents 21 days within which to reply to the election petition from the date of the service of the petition on them irrespective of whether they filed the memorandum of appearances before appearing physically in court. He submits that the 1st and 2nd respondents were deemed to have been served on the 23rd May, 2003, when he undertook to accept service of the petition on their behalf. That by the date of the service, the 1st and 2nd respondents were entitled to 7 days to enter appearance and further 14 days to file reply to the petition and this was what the 1st and 2nd respondents did.

Mr. Sofunde submits that entering of appearance within the meaning of paragraph 12(1) of the Procedure for Election Petitions does not amount to appearing in court physically by the 1st and 2nd respondents. That it is the delivery in the registry of the court of the memorandum of appearance that amounts to entering an appearance.

First of all, this point ought to have been raised in the Court of Appeal by the 1st and 2nd appellants/cross-respondents by way of objection. It does not appear that this was done. It is settled law that where an irregular procedure is adopted with the acquiescence of a party to a civil action, such adoption cannot be a ground of appeal - *Ojiegbe v. Okwaranyi* (1962) All NLR 605; *Sonuga v. Anadein* (1967) All NLR 91. Also, where a wrong procedure has been followed in filing a process and no objection was raised by the party that should have objected, the court is entitled to proceed with the hearing despite the wrong procedure followed - *Obajinmi v. A-G of Western Nigeria* (1967) All NLR 31.

Secondly, paragraph 10(2) of Procedure for Election Petitions provides:-

“(2) The non-filing of a memorandum of appearance shall not bar the respondent from defending the election petition if the respondent files his reply to the election petition in the Registry within a reasonable time, but, in any case, not later than twenty one (21) days from the receipt of the election petition.”

It follows that even if the 1st and 2nd respondents entered appearance out of time that could not have affected the filing of the reply, which as submitted by Chief Afe Babalola, was filed within the 21 days provided by paragraph 10(2).

Consequently, I see no substance in this issue and it fails.

Issue No. 17.

The Court of Appeal, on this issue, observed as follows, per Tabai. JCA.,

“The first issue is whether the 1st respondent was qualified to contest the 19/4/03 election. In paragraph 293 of the second amended petition the petitioners pleaded.

“The petitioners furthers plead that the 1st respondent being a person who had been elected to the post of Head of State in two previous occasions namely 1976-79 and 1999-2003 is not qualified to contest the election.”

B The P.W.138, Mukhtar Mohammed, testified to the effect that he was a member of the Supreme Military Council in 1976 and that following the assassination of General M. Mohammed the 1st respondent was elected the Head of State. The D.W.96, Vice Admiral Michael Ayinde Adelanwa
C gave evidence to the contrary. Learned senior counsel for the respondents submitted that this same issue of the qualification of the 1st respondent to contest the election has been settled in *Ojukwu v. Obasanjo* (2004) 7 S.C. (Pt. 1) 117; (2004) 12 NWLR (Pt. 886) 169. Chief Afe Babalola, SAN., referred particularly to the statement of Mohammed, JSC., page 198 where he said:-

D *“On this point alone, assuming I accept that when the 1st respondent was appointed the Head of the Military Government he was elected, it is plain to say that he was not elected President of Nigeria but Head of the Federal Military Government. The offices of the President and that of*
E *Head of Federal Military Government are not the same designations. No amount of analogy and of 1999 Constitution and Section 6(2)(a) of the Constitution (Basic Provisions) Decree No. 32 of 1975. This alone has*
F *flawed the contention of the appellant in the petition that the 1st respondent has been elected President of Nigeria by the Supreme Military Council in 1976.”*

G Chief Ahamba. SAN., submitted that there was a distinction between *Ojukwu v. Obasanjo* (supra) and the present case and that the earlier decision is not binding in this case. In my consideration the issue of the 1st respondent’s qualification to contest the 19/4/03 election now
H canvassed before us was the self-same live issue in *Ojukwu v. Obasanjo* (supra). From whichever way one looks at it. I do not find any distinction between the two cases. If there is any distinction, it is not more than the distinction between LAGOS and EKO. I hold that the 1st respondent was qualified to contest the election. This issue is accordingly resolved in favour of the respondents.”

Chief Ahamba refers to Section 137(1)(b) of the 1999 Constitution, and submits that the words “elected to such office,” therein includes appointment into such office, in view of the definition of the word “office” in Section 318 of the Constitution that -

“When used with reference to the validity of an election means any office the appointment to which is by election under this Constitution.” B

He contends that the words “such office” in Section 137(1)(b) of the Constitution include the office of Head of State. Also, that it is not in dispute that the 1st respondent/respondent was Head of State, Chief Executive and Commander-in-Chief of the Armed Forces of the Federal
C Republic of Nigeria from 1976-1979. He submits that by virtue of the definition of “office” in Section 318 of the Constitution, the office of Head of State and Commander-in-Chief of the Armed Forces is in the same category with an elective office under the 1999 Constitution. In other D words, “appointment” includes “election”. Consequently, he argues, that “appointment” is not a word that is literarily severable from the word “election.”

E Learned counsel argues that the evidence of the procedure followed by the Supreme Military Council given by petitioners” witness No. 138, retired Air Vice-Marshal Mukhtar Mohammed, was that the 1st respondent’s appointment as Head of State was by unopposed election. He refers to the decision of this court in *Ojukwu v. Obasanjo* (2004) 7 S.C. (Pt. 1) 117; (2004) 12 NWLR (Pt. 886) 169 at 200 and urges us to distinguish
F it from the present case, because the facts in the former are different and the decision of this court in the former was given without jurisdiction in view of the provisions of Section 6(6)(c) and (d) of the 1999 Constitution.

G In reply, Chief Afe Babalola, argues that the request that we should depart from the decision in *Ojukwu’s* case is grossly misplaced, since the issues for determination in that case and the present case are the same. Also that the evidence adduced in both cases are the same. He submits that this court, as in *Ojukwu’s* case, has the jurisdiction to enquire into all
H matters between persons, etc, under Section 6(6)(b) of the Constitution and Section 137(1)(b) of the Constitution enjoins the court to enquire into any dispute as to whether anybody has been elected into the office of President at any two elections. Constitution which ousts the jurisdiction

of this court from making enquiry into an issue that had been submitted to it for determination by the 1st and 2nd appellants/cross-respondents. He cites the case of A-G Lagos State v. A-G Federation (2004) 11-12 S.C. 85; (2004) 18 NWLR (Pt. 904) 1 at 89H on the point that we should not readily deny ourselves the jurisdiction exercised in Ojukwu's case by departing from that decision. He submits that the conditions laid down in Adisa v. Oyinwola (2000) 6 S.C. (Pt. II) 47; (2000) 10 NWLR (Pt. 674) 116, for departing from our decision, have not been met in this case.

Mr. Sofunde contends that the words "appointment to which is by election under this Constitution," in Section 318 of the Constitution, can only mean that office which is in the category of officers that are elective under the 1999 Constitution. That this does not apply to the office of the Head of State which the 1st respondent/cross-appellants occupied in 1976 which was not elective under the 1999 Constitution.

On Section 6(6)(d) of the 1999 Constitution, learned counsel submits that it is irrelevant to this case, because its provisions bar an enquiry into the competence of an authority or person to make law. He argues that competence of the 1st respondent/cross-appellant to make laws between 1976 and 1979 is not being challenged here. The validity of his appointment in 1976 is not also being challenged. It is his qualification to contest election under the 1999 Constitution that is in issue, based on the fact that he had been validly appointed Head of State in 1976. On Section 6(6)(d) of the Constitution, he submits that if its provisions apply, then the whole of the enquiry into how 1st respondent/cross-appellant came into office as Head of State, in order to determine whether he was elected, cannot be conducted.

Now the claim by the 1st and 2nd appellants/cross-respondents in their amended petition is for -

"(c) An order of the court that at the time of the election the 1st respondent was not qualified to contest."

In Ojukwu's case (supra) the petitioners' claim reads:-

"(i) A declaration that as at the 19th April, 2003, when Presidential Election was held in Nigeria, Chief Olusegun Obasanjo, the 1st respondent, was not qualified to contest the election."

As can be seen, the claim in both this case and that case are the same. The argument is also the same in respect of Section 137(1)(b) of the Constitution. Reference to Section 318 of the Constitution on the definition of "office" has been made in both cases as well. The only new argument in the present case, which was not advanced in Ojukwu's case, is that the facts of this case are different from the facts in that case. It is argued also as a new point that this court lacked the jurisdiction in view of the provisions of Section 6(6)(c) and (d) to hear the case. With respect, the question whether the 1st respondent/cross-appellant was disqualified from contesting the election is a question of law and not fact. It is the Constitution in Section 137 thereof that provides the grounds for disqualification. The evidence that he was appointed by the Supreme Military Council as Head of State is common to this and Ojukwu's case. Therefore this case is on all fours with that case. I need only to repeat and adopt what I held in Ojukwu's case at p. 202 thereof, which is as follows:-

"Both the words "office" and "President" in Section 137 subsection (1)(b) of the 1999 Constitution have been defined in Section 318 thereof to mean as follows: "office" when used with reference to the validity of an election means any office the appointment to which is by election under this Constitution,"

"President" or "Vice-President" means the President or Vice-President of the Federal Republic of Nigeria."

In contrast, Section 20 of the Constitution (Basic Provisions) Decree No. 32 of 1975 defined the Head of the Federal Military Government as follows:

"The Head of the Federal Military Government" means the Head of the Federal Military Government, Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria."

Section 8 of Decree No. 32 of 1975, which provides for the functions of the Supreme Military Council, states in subsection (d) thereof as follows:

*"8. The functions of the Supreme Military Council include-
(d) the exclusive responsibility for the appointment of the Head*

of the Federal Military Government.....” (Underlining mine).

The keyword here is “appointment” which does not have the same meaning as “election” which the appellant canvassed that took place in the Supreme Military Council to appoint the 1st respondent B in 1976 as Head of the Federal Military Government.

Surely, the office of Head of the Federal Military Government is not the same as the office of the President of the Federal Republic of Nigeria as envisaged by the 1999 Constitution which relates to a C general election, while Decree No. 32 of 1975 talks of appointment and not election.”

I now need to advert to the question of jurisdiction in Ojukwu’s case. Section 6(6)(c) and (d) of the 1999 Constitution provides:-

D “6. The judicial powers vested in accordance with the foregoing provisions of this section-

(c) shall not, except as otherwise provided by this Constitution extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles E of State Policy set out in Chapter II of this Constitution; and

(d) shall not, as from the date when this section comes into force, extend to any action or proceedings relating to any existing law made on or after 15th January, 1966, for determining any issue or question as to F competence of any authority or person to make such law.”

It is significant to allude to the exception made to the application of Section 6(6)(c) of the Constitution. The provisions of the subsection have no application where the Constitution provides that a superior court can exercise jurisdiction on any issue or question as G to whether any act or omission is in conformity with chapter II of the constitution. I do not, with respect, see any relevance of the submission by learned counsel for the 1st and 2nd appellants/respondents to the question of jurisdiction of this court being tied up to the provisions of Section 6(6)(c) and (d). The provisions of the Constitution which H gave this court jurisdiction in Ojukwu’s case, are Sections 239(1)(a) and 233(1) thereof, which provide as follows-

“239 (1) Subject to the provisions of this Constitution, the Court of Appeal shall, to the exclusion of any other court of law in Nigeria, have original jurisdiction to hear and determine any question as to whether-

(a) any person has been validly elected to the office of President or Vice-President under this Constitution, or” B

“233 (3) The Supreme Court shall have jurisdiction, to the exclusion of any other court of law in Nigeria, to hear and determine appeals from the Court of Appeal.”

and not the provisions of Chapter II of the Constitution. Also that the subject before us is election and not the Fundamental Objectives and Directive Principles of State Policy in the Chapter II. C

I therefore hold that this court had jurisdiction to hear and determine all the questions raised in Ojukwu’s case. “Consequently, D this issue fails.

CROSS-APPEAL BY THE 1ST AND 2ND RESPONDENTS

The 1st and 2nd respondents/cross-appellants filed 12 grounds of cross-appeal and formulated 5 issues for determination in their brief of argument to cover the grounds. The issues read as follows:- E

“1. Whether the learned trial Justices of the Court of Appeal ought to have nullified the Presidential election results in Ogun State having regard to the non-joinder of the mandatory election officials against whom serious allegations were made by the petitioners/cross-respondents? F (Ground 1).

2. Whether the learned trial Justices of the Court of Appeal were right in nullifying the presidential election results in Ogun State in the light of the evidence and materials placed before them? (Grounds 2, 2, 4, G 5 & 6).

3. Whether the learned trial Justices of the Court of Appeal were right to have voided some provisions of the Manual of Election Officials (Exhibit ‘O’) for being inconsistent with the Electoral Act, 2002, in view of the pleadings of the parties and the evidence before the court? (Ground H 7).

4. Whether the learned trial Justices of the Court of Appeal were right to have nullified the presidential election results in some Local Gov-

ernment Areas, Wards and Polling Units in Akwa-Ibom State, Rivers State, Bayelsa State and Taraba State having regard to the totality of evidence before the court and the persons joined as respondents to the petition? (Grounds 8, 9, 10 & 12).

B 5. *Whether the learned trial Justices of the Court of Appeal were right to have held that Section 18 of the Electoral Act, 2002, was not complied with having regard to the totality of evidence before the court? (Ground 11)."*

C The 1st and 2nd appellants/cross-respondents filed a reply brief and formulated 6 issues herein. They read:-

D "(a) Whether the manipulation of results in Ogun State found by the trial court did not relate to any joined respondents in the petition. (Ground 1) of the findings of manipulation of result by the 3rd, 4th, 5th, 31st and 68th respondents in Ogun State. (Grounds 2, 3, 5 and 6 of cross-appeal).

E (c) Whether the provision in Exhibit "O" which granted authority to persons without voters cards to vote was not inconsistent with Section 40(1) of the Electoral Act, 2002, which expressly requires prospective voters to show their voter's card to the Presiding Officers before voting and thus void. (Ground 7 of the cross-appeal).

F (d) Whether the appellants did not attain the standard of proof required of them in law in the establishment of the non-compliances and malpractices found by the trial court to have occurred in Ogun State. (Ground 4).

G (e) Whether the learned Justices of the Court of Appeal were right to have nullified the Presidential election result in some Local Government Areas, Wards and Polling Units in Akwa-Ibom State, Rivers State, Bayelsa State and Taraba State having regard to the totality of evidence before the court and the persons joined as respondents. (Grounds 8, 9, 10 and 12 of the cross-appeal).

H (f) Whether the finding by the trial court of non-compliance with Section 18 of the Electoral Act was proper in law. (Ground 11 of the cross-appeal)."

I propose to adopt the issues as formulated by the 1st and 2nd re-

spondents/cross-appellants as they cover all the 12 grounds of cross-appeal and are more to the points in issue. First of all, let me point out that it is against public policy to have multiplicity of litigation. Some of the grounds of appeal and issues raised in this cross-appeal will also be found in the main appeal and have been considered above. It does not help to revisit B them in the cross-appeal. The argument advanced in the cross-appeal by the 1st and 2nd respondents/cross-appellants could have been raised in the main appeal and would have led to the same result that could be achieved in the cross-appeal, but this has not been done. Consequently, I feel that C only issue no. 2 is novel in the cross-appeal. I propose to treat it only.

The Court of Appeal observed thus in the judgment of Tabai, JCA.,-

"At the trial Chief Bisi Lawal was the star witness for the petitioners. He was the ANPP Governorship candidate for the elections of the D 19/4/03. He also served as the coordinator for the elections of that day. According to him, every voter was issued with 2 ballot papers, one for the Presidential Election and the other for the Governorship election. He sent E ANPP agents to each of the 3,210 polling units in Ogun State. He also sent some other ANPP Held officers. At the close of the polls he got reports from his agents and field officers that they were denied access to the unit results and that they were able to obtain the results from only 142 polling units out of the total 3,210. And the votes scored by the 1st petitioner from F these 142 units was 1,547. He tendered these INEC results (Forms EC8As) which were admitted in evidence as Exhibits A-A38; B-B14, C-C1, D-D21, E-E1, F-F24, G-G33, H, and K-K6. He also tendered Exhibit 'J' for the Governorship election.

G The witness testified that from the final result announced by the 3rd respondent, the 1st respondent scored 1,360,170 votes while the 1st petitioner was credited with only 680 votes. The same result showed that all the Governorship candidates together scored 747,296 votes, with the PDP candidate scoring 449,335 votes. In his further analysis of the result H he said the 1st respondent scored over and above all the votes scored by the Governorship candidates and more than 900,000 votes over the PDP Governorship candidate. He said he disagreed with these results because

the 1st petitioner who had scored 1,547 votes from only 142 unit results could not possibly have scored 680 votes from the 3,210 units in the State. The P.W. 1 concluded his evidence in the following terms:

‘The result that came out of the Presidential Election in Ogun B State was massively manipulated in favour of the 1st respondent, and substantially reduced for the 1st petitioner. The result from Ogun State is untenable and should be rejected by the court.’

The two INEC witnesses, R.W. 10 and R.W. 11 never made any attempt to justify the 1st and 2nd respondents’ score of 618,071 votes over and above the scores of all the Governorship candidates at the election. In my view the difference represents 618,071 voters who were issued with two ballot papers each but who decided to vote for the Presidential candidate of their choice and not to vote any candidate for Governor. The figure also represents the total number of unused, rejected and destroyed ballot papers. There is no record of this before the court. This, in my consideration, puts the authenticity of the figures in some doubt.

The two INEC witnesses who were Electoral Officers at the election tried to discredit the results in the 142 polling units and contended that they were not genuine. They therefore tendered another set of results emanating from the same units covered by the 142 polling units and these were admitted in evidence as Exhibits 276, 277-277(4), 278-278(9), 279-279(4), 280-280(6), 281-281(1), and 288.

I must say that I am not impressed with the credibility of these two INEC witnesses. The 142 unit results in Exhibits A-A38, D-B14, C-C1, D-D21, E-E1, F-F24, G-G33, H, ‘J’ and K-K(6) are INEC documents and the witnesses cannot impugn the authenticity of these documents by producing alternative INEC documents. Besides, each of the witnesses admitted under cross-examination that it is not indicated on their purportedly genuine results that the ANPP was also one of the contestant political parties in the election. What is indicated in all the result sheets produced is that only AD and PDP contested the elections. The documents produced by the respondents are on their faces, manifestly defective and unreliable. And the two witnesses are as unreliable as the documents they produced. Under cross-examination they admitted that they, in addition

to their normal duties as Electoral Officers, also functioned as the Local Government Area Collation Officers and agreed that their performance of the duties as such collation officers was contrary to the provisions of the Electoral Act, 2002 and the regulations and guidelines made thereunder. I reject their evidence. I believe the evidence of the P.W.1 and find as a fact that the documents tendered by him are the authentic INEC results for the 142 polling units.

On the scores in these documents, if the 1st petitioner scored 1,547 votes from 142 polling units there can be no circumstance by which he would score less in the overall result from 3,210 units of the State. And there is no way anybody can justify the 1st petitioner’s score of only 680 votes in the final result. I am satisfied that the petitioners have substantiated their assertion that the 3rd respondent and its agents manipulated the result of the Presidential Election in Ogun State in favour of the 1st and 2nd respondents against the 1st petitioner.

In any election, the electoral officials have a duty to produce only the hard scores of the candidates. Any manipulation of the result by the arbitrary addition or subtraction to the scores of candidates produces a result different from that expressed by the electorate and such a manipulated result is liable to cancellation. The result of my finding in this case is that the Presidential election of 19/4/03 in Ogun State was not conducted in substantial conformity with the Electoral Act, 2002 and same is accordingly nullified.”

Chief Afe Babalola complains that the election materials with which the Court of Appeal would have arrived at a just decision, to wit - the Presidential Election result, the Governorship election result and the voters’ register, were not tendered as exhibits before the Court of Appeal. With these inadequacies, the court nullified the whole of the election in Ogun State. Worse still, he submits, the court relied on the hearsay evidence of petitioners’ witness No. 1, Chief Bisi Lawal, as to what transpired in various polling stations which he never visited on the election day. He argues that the summary of evidence (quoted above) which the Court of Appeal relied upon is that at the end of the voting exercise. P.W.1 received results from only 142 polling units from 7 Local Government Areas on

Forms EC8A, out of 20 Local Government Areas in the State and the rest were not accounted for. That he checked the Forms and he disagreed with the 680 votes credited to the 1st appellant/cross-respondent. He also disagreed with the 1,360,170 votes credited to the 1st respondent/ cross-appellant. That Forms EC8A and EC8C in respect of the 7 Local Government Areas mentioned were admitted in evidence but when it was sought to tender the Presidential election results through P.W.1. whilst under cross-examination by him, this was disallowed by the court on the objection raised by counsel for the 1st and 2nd respondents thereat. This accounted for the result of the election not being before the Court of Appeal as well as the register of the voters in Ogun State. Nor was the summary of the Governorship election result in Ogun State before the court too. Chief Afe Babalola submits that by the provisions of Section 132 of the Evidence Act, when any official proceedings have been reduced to the form of a document or series of documents, no evidence may be given orally of such proceedings except the documents itself or series of document. That the petitioners failed to avail the Court of Appeal of the Presidential election result Form. He submits that the court was wrong to have acted on the oral evidence of P.W.1 as to the votes scored by the candidates in the Presidential Election in Ogun State. Learned counsel further argues that the testimony of P.W.1 on the manipulation of election result in Ogun State is an allegation of crime, which by the Evidence Act, must be proved beyond reasonable doubt - Hashidu v. Goje (2003) 15 NWLR (Pt. 843) 352 at p. 386E-F; Nwobodo v. Onoh (1981) 1 SCNLR 1; Eboh v. Ogujiofor (1999) 2 NWLR (Pt. 595) 419; Adamu v. Gwadabawa (1999) 3 NWLR (Pt. 594) 256 and Oni v. Adeyinka (1998) 8 NWLR (Pt. 562) 425 are cited in support of the argument.

In further support of his argument that the testimony of P.W.1 was unreliable as to proof of falsification of the election result, he draws attention to what the witness stated under cross-examination, viz-

“There should be at least one party agent or two at each polling station. The duty of a party agent is to do things in accordance with the laid down rules the documents I tendered were given to me by our party agents. E & E1; F-F24; G-G34; H & J. I do not know the makers of

these Exhibits, but my agents knew them. The agents are alive and well.”

He submits that the admissible evidence ought to have come from the polling agents who received the Forms from the polling officials of the 3rd respondent/respondent, in whose presence the officials prepared and signed the Forms on which the disputed figures were written.

On the nullification of the Presidential election result in Ogun State, which was based on the disparity between the votes won by the 1st respondent/cross-appellant and those of the Governorship candidates in the State, he refers to the finding by the Court of Appeal that in the opinion of the court the difference was 618,071 votes and argues that since neither the result of the Governorship election nor Presidential election was before the court, there was therefore, no record from which the court could justify its finding. He refers further to the evidence of the P.W.1 under cross-examination, where he said:-

“Ogun State was AD controlled State. Other political parties fielded candidates at gubernatorial election in Ogun State. At Presidential election AD did not field a candidate. AD came second in the gubernatorial election.”

and submits that this answer explains the disparity, if any, between the results of Presidential election and the gubernatorial election in Ogun State and casts doubt on the evidence of P.W.1 that the disparity was as a result of electoral malpractice.

Finally, learned counsel asks that we set aside the finding by the Court of Appeal based on the evidence of P.W.1 and draw the appropriate inferences and conclusions.

In reply, Chief Ahamba draws our attention to the brief of argument filed by the 1st and 2nd respondents/cross-appellants in the main appeal, where they state in paragraph 4.12 thereof as follows:-

“4.12 In the first place, the final result complained of was pleaded by the petitioners and admitted by the respondents. It was unnecessary to tender the election result having regard to the state of the pleadings in this case. The appellants pleaded the results in paragraph 4 of their petition and the respondents admitted them.”

and submits that the 1st and 2nd respondents/cross-appellants

cannot now change their position to contend that the figures pleaded in paragraph 257 of the petition, which were admitted by them in paragraph 8 of their reply, is still in issue in the cross-appeal.

Learned counsel refers to paragraph 257 of the petition and paragraph 88 of the reply by the 1st and 2nd respondents, which both read thus:-

"257. The petitioners aver that the INEC officials in the State were biased and the result released shows that the figures were wrongly or intentionally manipulated in favour of the 1st and 2nd respondents.

Particulars of Bias And Wrong Entry

(a) Total registered voters in Ogun State stand at

(b) Total votes cast at Gubernatorial election only was 747,296 which represented 46.7% of registered voters in Ogun State.

(c) Declared winner at the Gubernatorial election was PDP candidate who scored 449,335 votes, that is 60% of total votes cast at the poll.

(d) Total votes scored by the 1st respondent in the Presidential election was 1,360,170, that is 99.92% of the total votes cast at the poll.

(e) In absolute terms the 1st respondent received over 632,000 votes, more than the votes cast at the Gubernatorial election held same day, same time, same polling units simultaneously.

(f) Also the 1st respondent received about 930,000 votes more than his Gubernatorial counterpart who was declared the winner in same election held same day, same time, at the same polling units simultaneously."

"88. The respondents further state that there was nothing unusual in the disparity in the votes scored by the PDP Gubernatorial candidate and the Presidential candidate because the party in control in Ogun State, even though had Governorship candidate did not have a Presidential candidate.

He submits that the 1st and 2nd respondents did not put the figures in issue but only responded to the disparity of votes between PDP Gubernatorial candidate and the 1st and 2nd respondents. Thus they failed to respond to the real complaint in paragraph 257 of the petition. Therefore what remained in the circumstances to be decided by the Court of Appeal,

was whether the undisputed figures warranted any explanation by the respondents, and the Court of Appeal so held. He contends that the figure which exceeded 600,000 votes over and above the total number of the ballot papers issued at the election booths in Ogun State was unexplained, presented as prima facie case of manipulation, which was not controverted, and therefore warranted acceptance by the Court of Appeal.

On the point that allegation of manipulation of result is allegation of crime which must be proved beyond reasonable doubt. Chief Ahamba submits that the witnesses called by both the petitioners and the respondents conclusively proved that there was manipulation of votes in Ogun State. He placed support in the case of *Nwobodo v. Onoh* (1984) 1 S.C. 1 at p. 42 and refers to Section 138(1) of the Evidence Act, Cap. 112. Learned counsel refers to the testimony of petitioners' witness, P.W.26 who gave evidence that there was no collation or announcement of results at Ogun State collation centre. Under cross-examination, this point was further confirmed. Therefore, he argues on the authority of *Amadi v. Nwosu* (1992) 23 NSCC 93 at p. 103, the fact that there was no collation of the presidential election results in Ogun State at the collation centre stood proved. That the question may be asked as to how and where did the concerned officials arrive at 1.3 million votes for the 1st and 2nd respondents/cross-appellants and 680 votes for the 1st appellant/cross-respondent. No explanation was offered. It is submitted that this is a non-compliance that was capable of vitiating the election. The cases of *INEC v. Ray* (2004) 14 NWLR (Pt. 892) 92 at p. 123G and *Aondoakaa v. Ajo* (1999) 5 NWLR (Pt. 602) at p. 255A are cited to buttress the argument. It is contended further that with the respondents failing to call any evidence to counter that given by P.W.26, the Court of Appeal was right to annul the election on that evidence alone as the election in Ogun State was inconclusive. Learned counsel concluded by submitting that from the evidence and pleading before the Court of Appeal, the petitioners not only cast a doubt on the regularity of the election in Ogun State but conclusively proved that the Presidential election in the State was not conducted in substantial compliance with the principles and provisions of the Electoral Act, 2002.

Now, there is no doubt from the quotation above, that the Court

of Appeal relied heavily on the testimony of P.W.1, Mr. Bisi Lawal, the Governorship candidate for the ANPP, to come to the conclusion that the Presidential election in Ogun State was not conducted in substantial conformity with the Electoral Act, to nullify the election. It referred to the witness as “the star witness for the petitioners.” It rejected in its totality the evidence of the two witnesses called by the 3rd respondent - INEC, R.W.10 and R.W.11 and accepted the evidence of P.W.1. **Chief Afe Babalola has shown, from the cross-examination of P.W.1, that his evidence was substantially hearsay and therefore inadmissible, as it was based on reports made to him by the ANPP agents that he sent to the polling units in Ogun State. The polling agents were not called to collaborate the evidence of P.W.1. Its being hearsay is confirmed by the judgment of Tabai, JCA., where he observed -**

“..... He sent ANPP agents to each of the 3,210 polling units in Ogun State. He also sent some other ANPP field officers. At the close of the polls he got report from his agents and field officers that they were denied access to the units out of the total 3,210.” (Underlining mine)

Section 77(a), (b) and (c) of the Evidence Act provides:-

“77. Oral evidence must, in all cases whatever, be direct -

(a) If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw that fact;

(b) If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard that fact;

(c) If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived that fact by that sense or in that manner.”

It follows that the report received by P.W.1, Mr. Bisi Lawal is hearsay and therefore inadmissible. A court can only act upon evidence which is admissible. Where a trial court has admitted and acted upon a legally inadmissible evidence, it is the duty of the appellate court to ensure that such legally inadmissible evidence is expunged - See Kale v. Coker (1982) 12 S.C. (Reprint) 118; (1982) 12 S.C. 252 at pp. 257-258 and Olukade v. Alade (1976) 1 S.C (Reprint) 83; (1976) 2 S.C. 183.

I am mindful of the provisions of Section 227(1) of the Evi-

dence Act, Cap. 112 which provides:-

“227 (1) The wrongful admission of evidence shall not of itself be a ground for the reversal of any decision in any case where it shall appear to the court on appeal that the evidence so admitted cannot reasonably be held to have affected the decision and that such decision would have been the same if such evidence had not been admitted.”

but the evidence of P.W.1 is all that the Court of Appeal (per Tabai, JCA.), relied upon to hold “that the documents tendered by P.W.1 are authentic INEC results for the 142 polling units” in Ogun State and to nullify the election. The makers of the documents did not testify to tender them in evidence as exhibits. Chief Ahamba has of course referred to the evidence of P.W.26, Kehinde Adebayo Delano, who was a Senatorial candidate for the ANPP. I am afraid his evidence is not mentioned anywhere in the judgment of the Court of Appeal, nor is it to the point here and so cannot support the decision by the Court of Appeal. This is what he stated in his evidence:-

“My names are Kehinde Adebayo Delano sworn on Bible S, English. I live in Ogun State. Ejire-Emulu Villa. I am a Chattered Accountant.

In April, 2003, I was in Ogun State. On 19/4/03, Presidential and Gubernatorial Elections were conducted. I was a Senatorial Candidate for ANPP and I was the co-ordinator of Presidential election in Ogun State. I was particularly given the duty of collating agent in Ogun State for the ANPP at the State H/Qs. It was at INEC H/Qs Abeokuta. I tried, I went to the State H/Qs on Sunday 20/4/03 of INEC to do the collations of election results. When I got into the premises, I met our governorship candidate - Bisi Lawal (P.W.1). I saw him having serious argument with some police officers. They were insisting that he could not go into the building where collation is taking place. I informed the armed personnel who I was and P.W.1 was gubernatorial candidate and were there to do the collation of results for the Presidential and the Governorship elections.

The Police Officer informed me that he had instructions that no one should enter the premises.

Looking across, I could see many party stalwarts of the PDP chatting in the place. One INEC official went to have a chat with us. I

introduced myself as to who I was and what I was there to do. He informed me that Presidential collation would be done in Abuja. The Police Officers marched us out of the premises.

CHIEF AWOMOLO, SAN cross-examines

B I was aware that INEC required political parties to send names of their agents to INEC H/Qs days before the election. The collation centre is a sensitive security area. ANPP agents for all collation centres were all accredited by INEC. I know all the results of Presidential election for 36
C States and Abuja were collated in Abuja. That is all.” J. K. GADZAMA, SAN., cross-examines

I do not know that Bisi Lawal was not supposed to be at the collation centre as a candidate. I know that I saw some people inside the premises. I was coordinating agent for the Senatorial District. That is all.”

D **Therefore the cross-appeal succeeds and it is hereby allowed.**
CROSS-APPEAL BY 4TH - 5TH RESPONDENTS

The singular issue formulated by the 4th-5th respondents/cross-appellants from the lone ground of appeal filed by them, is:-

E *“Having regard to the evidence before the learned Justices of the Court of Appeal whether the petitioners proved beyond reasonable doubt, act of manipulation in respect of Ogun State by cross-appellants as required by Section 138(1) of the Evidence Act.”*

F The 1st and 2nd appellants/cross-respondents have not formulated any issue but raise a preliminary objection on the ground that the cross-appeal has been filed out of time and that this court has no power to extend the time for filing it.

G Chief Ahamba refers to Section 138(1) and (2) of the Electoral Act, 2002 and submits that the cross-appeal having been filed on 15th February, 2005, was brought outside the 21 days allowed after the delivery of the judgment of the Court of Appeal. He contends that this court has no power under the Electoral Act to enlarge the time for the filing of the cross-appeal notwithstanding the provisions of paragraph 43(1) of the Procedure for Election Petitions in the First Schedule to the Electoral Act,
H 2002.

The 4th to 5th respondents/cross-appellants have not filed a reply

to the preliminary objection, as they ought to have done, in order to counter or concede to the objection. Be that as it may, Section 128 of the Electoral Act, under which the preliminary objection is brought, provides:

“138 (1) If the Election Tribunal or the court, as the case may be, determines that a candidate returned as elected was not validly elected, and if notice of appeal against that decision is given within 21 days from the date of the decision, the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the court, remain in office pending the determination of the appeal.”

(2) If the Election Tribunal or the court, as the case may be, determines that a candidate returned as elected was not validly elected the candidate returned as elected shall, notwithstanding the contrary decision of the Election Tribunal or the court, remain in office pending the expiration of the period of 21 days within which an appeal may be brought.”

And paragraph 43(1) of the Procedure for Election Petitions states:-

“43. (1) The Tribunal or court shall have power, subject to the provisions of Section 154 of this Act and paragraph 14 of this Schedule, to enlarge time for doing any act or taking any proceedings on such terms (if any) as the justice of the case may require except otherwise provided by any other provision of this Schedule.”

F It could be seen that Section 138 of the Act is concerned with a situation where the decision of a tribunal or court has been given against a candidate who has been returned as elected, declaring that such a candidate has not been validly elected. With respect, the opposite is the case in this appeal because the Court of Appeal had declared the 1st and 2nd
G respondents/cross-appellants validly elected. Therefore the provisions of the section have no application here. Paragraph 43(1) of the Procedure for Election Petitions is concerned with the enlargement and abridgement of time for doing any act or taking any proceedings before a tribunal or a
H court. When read together with paragraph 14 of the Procedure for Election Petitions, which deals with the amendment of election petition and reply, it is clear that paragraph 43(1) applies to the tribunal or court hearing,

at first instance, an election petition. **I find support for this view in the provisions of paragraph 51 of the Procedure for Election Petitions, which reads:-**

“51. Subject to the provisions of this Act, an appeal to the Court of Appeal or to the Supreme Court shall be determined in accordance with the practice and procedure relating to appeals in the Court of Appeal or of the Supreme Court as the case may be regard being had to the need for urgency on electoral matters.”

By the provisions of Section 27(2)(a) of the Supreme Court Act, Cap. 424, the period prescribed for the giving of notice to appeal from a decision of the Court of Appeal to the Supreme Court in a civil case is three months. In the absence of any specific provision in the Electoral Act, 2002, as to the time forgiving notice of appeal as such and in the light of paragraph 51 of the Procedure for Election Petitions, I hold that the provisions of Section 27(2)(a) of the Supreme Court Act applies to this case.

The judgment of the Court of Appeal in the petition was delivered on 20th December, 2004. Three months from thence ended on 20th March, 2005, but the cross-appeal herein was filed on 15th February, 2005, after obtaining leave from this court on 9th February, 2005 to do so. That is well within three months. The preliminary objection, therefore, fails and it is dismissed. I hold that the cross-appeal was brought within time.

In arguing against the cross-appeal. Chief Ahamba adopted the issue for determination raised by the 4th-5th respondents/cross-appellants and presents his argument. In view of the decision I have reached above in the cross-appeal by the 1st and 2nd respondents/cross-appellants, with the rejection of the evidence of P.W. 1 as hearsay and the failure of the 1st and 2nd appellants/cross-respondents to call the ANPP agents from whom P.W.1 received report of substantial non-conformity with the Electoral Act. I have no alternative than to hold that the 1st and 2nd appellants/cross-respondents have failed to prove, beyond reasonable doubt, the manipulation alleged to have taken place in Ogun State. Accordingly, the cross-appeal by the 4th-

5th respondents/cross-appellants succeeds and it is hereby allowed.

CONCLUSION

In summary, the non-compliances with the provisions of the Electoral Act, 2002, which I found in the foregoing, are as follows:-

“1. That by Section 17(2) of the Electoral Act, 2002, no person who is a member of a political party or who openly expresses support for any candidate shall be appointed into any office for the purposes of election. There is evidence that some of the Resident Electoral Officers were members of the PDP including the Resident Electoral Commissioner for Gombe State. But there was no evidence as to what acts of bias they performed.

2. That there was no compliance with Section 18 of the Electoral Act, 2002, which directs that all the Electoral Officers. Presiding Officers and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality. However, neither the Electoral Act nor the Oaths Act prescribes the Oath of Loyalty and neutrality, so that it is not known exactly what this oath is. If the form of the oath is not known, the question is could it have been taken? Would the failure to take an unknown oath have any effect? I do not think so.

3. That Section 19 of the Electoral Act, 2002, directs the 3rd respondent/respondent not to appoint other officers than Electoral Officers, Presiding Officers and Returning Officers who are registered members of any political party as election officers. However, no evidence of the violation of the provisions of the section was adduced as such by the petitioners or accepted by the Court of Appeal. This too has no effect on the election.

4. That Section 40(1) of the Electoral Act, which provides that persons intending to vote should produce their voters' card at the polling station to enable the Presiding Officer issue ballot paper cards to them. This provision was not complied with, when on the authority of Exhibit O, voting was allowed on production of registration cards instead except that there was no evidence as to how many voters so voted in the election. It was not possible, therefore, to quantify how such votes affected the result of the election.

5. That by Section 67(3) of the Electoral Act, election materials should be certified by polling agents. Only 2 ANPP polling agents testified that the certification did not take place. Considering the number of polling agents all over the country in Polling Units, Wards, Local Government Areas and the States, such evidence was too scanty to prove that there was no certification of the documents throughout the country.

These are the non-compliances with the Electoral Act raised in the 1st and 2nd appellants/cross -respondents' issues for determination. As can be seen not all of them have been fully proved. **Section 135(1) of the Electoral Act provides that an election shall not be invalidated by reason of non-compliance with the provisions of the Electoral Act, if it appears that the election was conducted substantially in accordance with the principles of the Electoral Act and that the non-compliance did not affect substantially the result of the election.**

The evidence adduced at the trial in the Court of Appeal by the 1st and 2nd appellants/cross - respondents was not sufficient to enable the Court of Appeal hold that the election was not held substantially in accordance with the principles of the Electoral Act. This was so despite the Court of Appeal nullifying the election in Ogun State. In this court, we are satisfied that the testimony of Chief Bisi Lawal, P.W.1, which the Court of Appeal relied heavily upon to nullify the election in Ogun State, was based on hearsay, which is unreliable and by Evidence Act, inadmissible. The documents the witnesses tendered were not, in the absence of evidence of the makers, reliable. Again the failure of the Electoral Officers, Presiding Officers and Returning Officers to take Oath of Loyalty and Neutrality is of no moment since the form of the oath is omitted in the Electoral Act and cannot be found in the Oaths Act. All these have further weakened the petitioners' case for non-compliance with the provisions of the Electoral Act.

In sum, the case made by the 1st and 2nd appellants/cross-respondents before the Court of Appeal which did not entitle them to the judgment of the court in their favour is even weaker before this court. I therefore, come to the conclusion that the election was conducted substantially in accordance with the principles of the Electoral Act.

I need not go further to consider the second limb Section 135(1) which is whether the non-compliance, so far proved, has affected substantially the result of the election, since, as I hold, that on the evidence adduced before the Court of Appeal, the election was conducted substantially in conformity with the principles of the Electoral Act.

Accordingly, the appeal fails and it is hereby dismissed with no order as to costs. I have also mentioned earlier that both the cross-appeals by the 1st and 2nd respondents/cross-appellants and the 4th-5th respondents/cross-appellants respectively, succeed and that they are allowed. I make no order as to costs.

Finally, I wish to commend the Honourable President and the Honourable Justices of the Court of Appeal and the counsel for the parties, before the Court of Appeal, for their industry throughout the proceedings which has lasted for 15 months, resulting in hearing a total of 355 witnesses called by all the parties in the petition.

BELGORE JSC

This is an appeal 1st and 2nd appellants against 265 (two hundred and sixty-five) defendants. The appeal is in respect of first instance trial of presidential election petition brought before Court of Appeal by virtue of Section 239(1)(a) of the Constitution of the Federal Republic of Nigeria 1999. Court of Appeal in the main dismissed the petition and found the election of the first and second respondents, i.e., Chief Olusegun A. Obasanjo and Alhaji Atiku Abubakar as President and Vice President respectively was valid and in substantial compliance with the Electoral Act. That was the majority judgment of Court of Appeal as there was one dissenting judgment by Justice Nsofor, JCA. I will later in this judgment advert to that judgment.

The election to the office of the President of the Federal Republic of Nigeria was held all over the Federation on 19th day of April, 2003. The 3rd respondent. Independent National Electoral Commission, conducted

the election contested by twenty political parties. The Governorship elections to all States of the Federation were concurrently held on that same day, but this is not relevant to this appeal. The 1st appellant/cross respondent stood on the platform of All Nigeria Peoples Party (ANPP) while the 1st and 2nd respondents/cross appellants stood on the platform of Peoples Democratic Party (PDP). The running mate for the appellant/cross respondent. Dr. Chuba Okadigbo died. The Chief Returning Officer of 3rd respondent/ cross appellant returned 1st and 2nd respondents/cross appellants as duly elected as President and Vice President of the Federal Republic of Nigeria.

As a result of the aforesaid return, the 1st and 2nd appellants/cross respondents filed petition at the trial Court of Appeal on several grounds, challenging the return. The petition was filed on 20th day of May, 2003. Joined in the petition as respondents were 1st and 2nd respondents, 4th and 5th respondents as well as 3rd and 6th - 268th respondents. This is in accordance with Section 133(2) of the Electoral Act which provides:

“133(2) The person whose election is complained of is, in this Act, referred to as the respondent, but if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary party.”

The petition was amended twice and the petitioners pleaded as follows:

“4. And your petitioners state that the candidates and their scores as arbitrarily assigned to each candidate and declared by the National Returning Officer for the Presidential election are as follows:-

PARTY	CANDIDATES	TOTAL VOTES SCORED
ANPP	Pres: Buhari Muhammadu	12,710,022
	Vice: Okadigbo Chuba Williams Malachy	
APGA	Pres: Ojukwu Chukwuemeka Odumegwu	1,297,445
	Vice: Hajia Sani Ibrahim	

APLP	Pres: Okereke Osita Emmanuel	26,921	
	Vice: Abdullahi Tukur Alhaji		
ARP	Pres: Yahaya G. K. Ezemue Ndu	11,565	
	Vice: Hajia Asmau Aliyu Mohammed		
BNPP	Pres: Nanji Ifeanyi Chukwu Goodwill		B
5,987			
	Vice: Suleiman Mohammed Awwal		
DA	Pres: Ferreria Antonia Abayomi Jorge		C
6,727			
	Vice: Eboigbe Ehi		
JP	Pres: Christopher Ogenebrorie Okotie		
119,547			
	Vice: Habib Mairo Baturiya (Mrs.)		
LDPN	Pres: Chief Christopher Pere Ajuwa	4,473	D
	Vice: Mohammed Nasir		
MDJ	Pres: Yusuf Mohammadu Dikko	21,403	
	Vice: Chief Melford Obiene Okilo		
MMN	Pres: Major Mojisola Adekunle Obasanjo (rtd)	3,757	E
	Vice: Mohammed Ibrahim		
NAC	Pres: Agoro (Dr.) Olapade (Ronald Aremo)	5,756	
	Vice: Aminu Garbati Abubakar		
NAP	Pres: Tunji Braithwaite	6,932	F
	Vice: Hajia Maimunatu Lata Tombai (MON)		
NCP	Pres: Gani Fawehinmi	161,333	
	Vice: Jerome (Jerry) Tala Gopye		
NDP	Pres: Sen. Ike Omar Sanda Nwachukwu	132,997	G
	Vice: Habu Fari Aliyu		
NNPP	Pres: Dr. Kalu Idika Kalu	23,830	
	Vice: Jawi Abdulrahman Paga		
PAC	Pres: Mrs. Sarah N. Jibril	157,560	H
	Vice: Chief Elemosho Babatunde Tajudeen		
PDP	Pres: Chief Olusegun Obasanjo	24,456,140	
	Vice: Alhaji Atiku Abubakar		
PMP	Pres: Nwankwo Agwucha Arthur	57,720	

Vice: Batubo Benett Raymond

PRP Pres: Musa Abdulkadir Balarabe 100,765

Vice: Okafor Ernest Ngozi

UNPP Pres: Chief Nwobodo Jim Ifeanyichukwu 169,609

B Vice: Goni Mohammed

"The 1st respondent who together with second respondent were sponsored by the Peoples Democratic Party were returned as elected."

C "5. The petitioners shall contend that the figures ascribed to each of the candidates in the result above pleaded were the product of deliberate wrong entries made by 3rd respondent's Agents or representatives at the Wards, Local Government Areas and State Collation Centres. The declared result of the Presidential election held on the 19th day of April, 2003, is hereby pleaded".

D The petition therefore sought the following reliefs:

(a) An order of the court that the election is invalid for reasons of non-compliance with substantial sections of the Electoral Act, 2002.

(b) An order of the court that the election is invalid for reasons of corrupt practices.

E (c) An order of the court that at the time of the election, the 1st respondent was not qualified to contest."

At the inception of the petition, five Justices of the Court of Appeal were to hear it (Abdullahi, PCA., Oguntade, JCA., M. Mahmud, JCA., Nsofor, F JCA and Tabai JCA). Oguntade, JCA., (as he then was) was appointed to Supreme Court and only four of the Justices heard the petition to conclusion. Mahmud, JCA., (as he then was), is now a Justice of Supreme Court some months after the decision of Court of Appeal. Justice Nsofor, JCA., recently retired on attaining the age of seventy years as demanded G by the Constitution. The petition perhaps holds record for its number of respondents, witnesses exhibits and length of time taken to hear and determine it. I think this is due mainly to the Electoral Act, 2002, riddles with absurdities and anomalies, and several inconsistencies making it the clumsiest Electoral Act ever in the history of this country. But that H was the only statute to work with apart from aid from the supreme law, the Constitution. The election tribunals were no doubt confronted with

very difficult task; they had little room for abridging time or number of parties and witnesses. However, it may be mentioned for posterity that the trial took fifteen months with one hundred and thirty-nine witnesses by petitioners, one hundred for 1st and 2nd respondents and one hundred and sixteen for 5th and 6th to 268th respondents. B

It can therefore be seen that the Court of Appeal faced a gargantuan task in shifting through all the evidence and exhibits to arrive at their majority decision, led by judgment of Tabai, JCA. The learned Justice concluded as follows:

C "I have considered all the evidence in support of the allegations in each of the 14th States in which elections were questioned. And in the exercise I have cancelled the election in Ogun State, some Local Government Areas, Wards and Units. The question is the effect of this annulment on the election in the country. For the determination of this question I refer to D the provisions of Section 134(2) of the 1999 Constitution of the Federal Republic of Nigeria:

Section 134(2) of the Constitution provides:

"(2) A candidate for an election to the office of President shall be deemed E to have been duly elected where, there being more than two candidates for the election-

(a) he has the highest number of votes cast at the election, and

(b) he has not less than one-quarter of the votes cast at the election in each F of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja."

"This provision appears clear to me. Where a candidate wins the highest number of votes cast in at least two-thirds of the 36 States in the Federation G and the Federal Capital Territory, Abuja, he is deemed to be elected.....

I do not appreciate any ambiguity in the provision and even if there was one, this court is bound to adopt a construction which is just, reasonable and sensible. (See Maxwell on the Interpretation of Statutes, 12th Edition, Chapter 10). In my view, it would lead to absurdity and manifest injustice H to nullify the election for the entire nation because of the nullification of the election of one State, some Local Government Areas, Wards and Units. Such a devastating result could hardly have been contemplated by

the framers of the Constitution.

It is my conclusion therefore that the cancellation of the election in Ogun State and the other smaller components does not substantially affect the election of the 1st and 2nd respondents.

B *In the event, this petition fails and same is dismissed with costs which I assess at N5,000.00k in favour of each set of respondents."*

Justice Nsofor's judgment is long and not easy to paraphrase here, but his conclusion is that the election was fraught with anomalies and irregularities and the only conclusion he draws was that the entire election ought to be declared null and void. Against the majority judgment, this appeal has been filed, appellants with cross appeal against those areas where elections were nullified and against the dissenting judgment of Nsofor, JCA., by 1st and 2nd respondents/cross respondents filed 41 grounds of appeal and sought the following reliefs:

D *"(i) To allow the appeal.*

(ii) To set aside the majority judgment of the lower court dismissing the petition.

(iii) To uphold the dissenting judgment of Nsofor, JCA.

E *(iv) To allow the petition on all the ground and consequentially disqualify the 1st and 2nd respondents under Section 129 of Electoral Act.*

(v) To order 3rd respondent to conduct a fresh election within one month from the date of judgment in this appeal.

F *(vi) In the event of disqualifying 1st and 2nd respondents either under Ground 9(c) of the petition and/or consequentially under Section 129 of the Electoral Act, to order the 3rd respondent to conduct a fresh election between the remaining candidates in the election.*

G *(vii) In the event, the appeal succeeds with or without the disqualification of the 1st and 2nd respondents, to order that the President of the Senate acts as the President of the Federal Republic of Nigeria during the period between judgment and the fresh election."*

(The Roman numbering i - vii are mine for ease of perusal).

H The 1st, 2nd, 4th and 5th respondents also cross-appealed, whose merit will follow the decision in the main appeal. Suffice to consider the main appeal first. The appellant formulated eighteen issues for determination

whilst 1st and 2nd respondents formulated eleven issues. The appellants joined some of the issues but I think the justice of this all important appeal will best be served if each issue is considered separately with the relevant 1st, 2nd and other respondents' issues. Also instead of first setting out the issues. I will enumerate under each issue my considered decision to save space and aid understanding of the issues.

However, before delving into the issues, it must be pointed out that the majority judgment found some irregularities and nullified election as a result of them in some parts of the country including the entire Ogun State. The other areas nullified are some Local Government Areas, Wards, Polling Units in Akwa Ibom State, Rivers State, Bayelsa State and Taraba State. There was also finding of non-compliance with Section 18 of Electoral Act reading:

"S. 18. All Electoral Officers, Presiding Officers, and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in interest of the Federal Republic of Nigeria without fear or favour".

This led also to the nullification of certain provisions of Exhibit O, "Manual of Election Officers". Against these nullifications, the 1st and 2nd respondents cross-appealed. The 4th and 5th respondents also cross-appealed against the finding on Ogun State leading to the entire nullification of the election there. The 3rd, 6th - 268th respondents never cross-appealed.

I now go to the issues.

ISSUE 1

Whether the Court of Appeal properly interpreted Sections 135(1) and 67(3) of the Electoral Act (This is based on Grounds 5, 7 and 25 of the appeal).

The majority judgment clearly interpreted Section 67(3) (supra) when it held us follows:

"It is clear both from Section, 67(3) of the Electoral Act and paragraph 13 of the petition that it was the polling agent who has authority to certify document. And although it is not categorically so stated in the provision, it appears to me that certification were to be done either at the Polling

Unit or at the Ward Collation/Distribution Centre where materials were supposed to be handed over to the Presiding Officers. I came to that conclusion because from the evidence before the court, the Polling Agent carried out his functions only within the operational bases or areas of a Polling Officer and the operational base of a Presiding Officer is either the Polling Unit or the Ward Collation/ Distribution Centre where the election materials were to be delivered to him”.

The appellants contend the above interpretation was an error or wrong. Their own submission is that certification of election materials must start from the office of the 3rd respondent and concluded at the Polling Booths. Which then of the two contending interpretations is practicable and feasible in view of the size - length and breath - of the country. The reason for the exercise of certification is to satisfy all the political parties and their candidates that the election materials were distributed, that they are genuine, and that they are the ones used for the election. Certainly, the certification is to obviate fraud and lack of confidence in the electoral process. To say that certification by polling agents will start from the office headquarters of Independent National Electoral Commission through to States, Local Government, Ward, Polling Units and Booths by political polling agents is a task that will by mere administrative process take weeks if not months for an election that must be held in a day. The appellants’ interpretation will not only cause mischief and delay to electoral process but will cause chaos and uncertainty and will open the process to suspicion and mistrust. Section 67(3) (supra) for its brevity has not spelt out where the certification must take place, but common sense and convenience dictates that it should be at the stations or collation centres. This is borne out of the simple fact that the party agents are always at the operational bases where the polling and collation stations are located. The purport of Section 135(1) of Electoral Act is very clear as to burden of proof in invalidating an election. Section 135(1) says:

“135(1) An election shall not be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Tribunal or court that the election was concluded substantially in accordance with the principles of the Act and that non-compliance did not affect substantially the result of

the elections.”

The senior counsel to the appellants contends that what the petitioners had to do was to establish non-compliance with a provision of Electoral Act. Once this is done, without more the election must be invalidated; unless the respondents then offer evidence that the non-compliance has not substantially affected the election result. He relied on *Basheer v. Sawe* (1992) 4 NWLR (Pt. 236) 491, 509; *Na Bature v. Mahuta* (1992) 9 NWLR (Pt. 263) 85, 104. Chief Afe Babalola, SAN., for 1st and 2nd respondents contends that non-compliance with the Act will only invalidate if it is substantial and is such to have affected the election result in a substantial manner. With great respect, the decision in *Basheer v. Sawe* (supra) was per incuriam so is that of *Na Bature v. Mahuta* (supra) limited in its scope of applicability.

Basheer v. Sawe (supra) was in interpretation of Section 42(1) of Decree 18 of 1992 which is in pari materia with Section 135(1) (supra). It is manifest that an election by virtue of Section 135(1) of the Act shall not be invalidated by mere reason it was not conducted substantially in accordance with the provisions of the Act, it must be shown clearly by evidence that the non-substantiality has affected the result of the election. Election and its victory, is like soccer and goals scored. The petitioner must not only show substantial non-compliance but also the figures i.e. votes, that the compliance attracted or omitted. The elementary evidential burden of “The person asserting must prove” has not been derogated from by Section 135(1). The petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify nullification (*Awolowo v. Shagari* (1979) 6-9 S.C. (Reprint) 37; (1979) All NLR (Reprint) 120, 161; *Akinfosile v. Ijose* 5 FSC 182, 199).

The appellants’ reliance on the English case (Court of Appeal of England), *Morgan v. Sampson* (1975) QB 151 merely emphasizes that once it is clearly proved that the election was so badly conducted and substantially not in accordance with the law as to election that election would be vitiated. In that case, two out of nineteen polling stations were closed all the day of the election and five thousand voters were unable to vote, but this is not all, it affected other stations that were open when people heard

that all stations were actually closed, even though from rumours. Such substantial non-compliance rightly affected the result of the election. At any rate, Denning, MR's proposition is far from the case in Nigeria (See Bello, JSC., as he then was, in *Awolowo v. Shagari*). This court in 1984 considered this state of the law in the case of *Ojukwu v. Onwudiwe* (1984) 1 SCNLR 247, 305-306

"..... *In Sorunke v. Odebunmi 5 FSC Federal Supreme Court considered when an election could be invalidated for non-compliance with the provisions of the regulations governing the election*

"*In the present case the fact that the election as conducted in 86 of the 138 polling booths of the constituency in question was not found wanting prima facie shows that there was substantial compliance with the provisions of Part II of Electoral Act in the majority of the polling booths where the election took place in the constituency. The burden was therefore on the appellant to show that the non-compliance which applied to 52 polling booths, as found by the learned trial Judge actually vitiated the election in the constituency as a whole. That he failed to do.*"

The onus has not by any means shifted from the time honoured law on evidence that the person who asserts a situation must prove. The burden on petitioners to prove that non-compliance has not only taken place but has also substantially affected the result fulfilled, there must be clear evidence of non-compliance, then that the non-compliance has substantially affected the election. Failure to affirm or take oath of allegiance has not in any way diminished the fact that the election was valid."

ISSUE 2

Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150(1) of the Evidence Act in the judgment (This is distilled from Grounds of Appeal 3, 13 and 30).

Evidence Act in Section 150(1) provides:

"*When any judicial official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with*".

Counsel to the appellants, Chief M. Ahamba, SAN., submits that once evidence of violence is shown in a number of States, the court must hold

that violence is preponderant in all the States, indeed all over the country which is the constituency for Presidential Election. This hypothesis, to my mind, is strange to our corpus juris. Does it mean that once it is shown, there was violence in say, Ojuelegba in Lagos State, the presumption is that violence must be presumed to cover the entire Mainland, Lagos, as to render the election on the Mainland invalid? The majority judgment of Court of Appeal adequately adverted to this:

"A petitioner must first allege and adduce some evidence of the existence of violence and other corrupt practices in a particular State to subject that State to the scrutiny of the court. When allegation is made and no evidence adduced on the conduct of the election in a State, the presumption of regularity enures in its favour. In this case, there was no specific allegation of any wrong doing in the conduct of the election in 22 States and my view is that the election in these States was regularly conducted and ensuing result authentic". *Swem v. Ako Diungwe* (1966) NMLR 297, 303.

With great respect this position is clearly not available. It is the duty of the petitioners not only indicate clearly the evidence of violence, where it occurred and how it affected the election to bring the election within the scope of non-substantiality in compliance with law as to render it invalid. General allegations, without more is to my mind insufficient proof of irregularity or violence or fraud or corrupt practice. When the Electoral Commission declares a result, there is a presumption the result is correct. But this presumption is not water tight, it is rebuttable and the onus is on the petitioner to prove and rebut the presumption. *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; *Nwobodo v. Onoh* (1984) 7 SCNLR 1. Once the Electoral Commission announces the result of an election, it is presumed correct and authentic and the petitioner who alleges the opposite must offer clear and positive proof that the result is incorrect and not authentic. If the allegation is of fraud, it must be proved beyond reasonable doubt, because fraud is a crime. If it is of violence, the violence, its location, its effect on the election, its spread whereby substantially it affects the result must be clearly pleaded and given in evidence. The appellants adverted to 14 States of the Federation where electoral malpractices took place but hardly offered evidence on them but went on to adduce evidence on

States not pleaded and thus evidence on those unpleaded States went to no issue. Purpose of pleading is to afford the opponent the opportunity of knowing the case he faces, a matter not pleaded and offered only in evidence is an embarrassment to the opponent who was unprepared for it. The Court of Appeal finding on this aspect cannot be disturbed (Swem v. Ako Dzungwe) (1966) NMLR 297, 303.

ISSUE 3

“Whether the failure of Court of Appeal to nullify the Presidential Election of 19th April, 2003 after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law?”

This issue seems to stem from the comment of the Court of Appeal in lead judgment about the failure of the 3rd respondent to produce results and other documents specified in the subpoena to produce. By the comments the appellants contend the entire Presidential Election ought to be invalidated because, partiality is a negation of natural justice and the decision of Court of Appeal in upholding the election is null and void. It must be pointed out that bias and lack of neutrality was not an issue at the trial on the part of 3rd respondent. The statement of the court, though unfortunately looks weighty, was not the result of what formed part of the case as it was not pleaded, but was the reaction of the court to failure to produce documents ordered to be produced. All courts of law must be wary of commenting on what is strictly not part of the parties’ case in pleadings, but such comments must by no means be a ground to nullify the entire case. It is merely a way of a tribunal exposing its anger at a failure of a party to obey simple order. Out that apart, it has not been shown how it affects the election. What is pleaded in clear paragraphs 10, 14 and 15 of the amended petition is lack of neutrality and bias prior to and during the election; the statement of results involve events after the election. The court is to confine itself to issue in pleadings before it, not those matters unpleaded. To invalidate the election, even a part of the election, on unpleaded fact would have been a grave injustice. There were options open to petitioners for failure to obey subpoena; if they had copies, they could offer secondary evidence of the documents and or initiate committal proceedings for contempt. This was

not to be the case. The statement was unfortunately made by Court of Appeal, this might be due to unusual enormity of evidence, time it took, exhibits, the record of proceedings in four bulky volumes and the stress and strain on their Lordships, but it is of no legal or evidential offence against all the evidence before them.

ISSUE 4

Whether the Court of Appeal’s conclusion that non-compliance with Section 57(3) of Electoral Act 2002, was not proved is sustainable considering the express provisions of the section, the pleadings of the parties and the totality of evidence on record on the point (this is discerned from the Grounds 8 and 9 of Appeal).

This issue concerns the certification of election materials. This matter has been dealt with by me in issue 1. It is alleged in paragraph 13 of the amended petition that election materials were not certified by party agents contrary to Section 67(3) of the Electoral Act, 2003. What I have to add to issue 1 on this point is that the respondents pleaded that facilities were offered to all polling agents to carry out the certification and opportunities were there to use them. There were more than sixty witnesses called by appellants to show that their polling agents were frustrated by Resident Electoral Commissioners and Electoral Officers at Local Government Area Offices. The evidence as they were, never convinced the Court of Appeal in the lead judgment which is the majority judgment. It is, however, not the business of Electoral Officers on election day to start looking for polling agents, the polling agents must come to them. Once the facilities were available and not utilized the fault certainly is not that of the Electoral Officers or 3rd respondent. As I have held under issue 1, the only reasonable place to certify the election materials in accordance with Section 67(3) of Electoral Act, 2002, is either the Polling Unit, Collation Centre, Ward and Distribution Centre. It was for the polling agents to get to these places and to be directed to do so by their parties. It is not the business of the electoral officers at these centres to start looking for polling agents. What was pleaded by petitioners in paragraph 13 says:

“13A The petitioners hereby plead and shall contend at the hearing that all such uncertified election materials were invalid for the election, and, by

extension, the election itself was invalid, the same having been conducted with invalid materials”.

It is clear therefore, that by ordinary rule of pleadings the appellants could not stray out of the facts they relied upon. The majority judgment clearly so stated and found no substance in the issue now before this court. The golden rule has always been to leave undisturbed, the findings of trial court on facts before it unless the finding can be vitiated by inadmissible evidence, or is perverse or there is no evidence to those facts before it. This stand of an appellate court is justified by deep principle of fairness and justice whereby no facts legally admitted by trial court should lightly be disturbed by an appellate court. Our Law Reports for almost a century are replete with this principle. Just like issues 1, 2 and 3, I resolve issue 4 against the appellants.

Issues 5 and 6 can best be treated together. They are based on Section 18 and Section 40(1) of Electoral Act, 2002. I set out the issues:

ISSUE 5

“Whether the Court of Appeal’s failure to invalidate the Presidential Election after holding that Section 18 of the Electoral Act, 2002, was not complied with was proper”.

ISSUE 6

“Whether the Court of Appeal’s failure to invalidate the Presidential Election after finding that Section 40(1) of the Electoral Act, 2002, was breached in the conduct of the election was proper”.

The two sections for purpose of clarity are in-seriatim set out:

“S. 18. All Electoral Officers, Presiding Officers, Returning Officers shall affirm or swear to Oath of Loyalty and Neutrality indicating they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria without fear or favour”.

S.40(1) Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voters’ card.

(2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register that the person has voted.”

At the hearing in the Court of Appeal, the petitioners led evidence and the court found as a fact that the provisions set out above were not complied with. The Electoral Officers were not sworn and were not affirmed as requested by Section 18 (supra). It was also shown that some voters voted without showing their voters’ card. Court of Appeal held that it would not invalidate the vote just because Section 18 (supra) was not complied with. Their reason for this is that the Justices believed that failure of the election officers to subscribe to oath to indicate their loyalty and impartiality did not affect the election. The section is a request and failure to carry out its request would not invalidate act of public officers once it is shown there was no mala fide. It relied on Section 135(1) of the Electoral Act. As for violation of Section 40(1) (supra), Court of Appeal held there was no evidence of number of votes cast where voters never showed their voters’ card. Therefore, there was no conclusive proof that the election was not substantially in compliance with the Electoral Act. Counsel for appellants, Chief Ahamba, SAN., submitted that failure to comply with the two sections of the Act was fatal and trial court erred in not invalidating the election.

It is true the 3rd respondent was remiss or negligent in not complying with Section 18 and Section 40(1) and (2) of Electoral Act. In an election, the question always is whether there has been substantial compliance with the voting process. Non-compliance with the provisions of the Act, once it is not shown to affect the election is not a strong reason to invalidate the voting or the election itself. Section 135(1) of the Electoral Act, quoted earlier, is apposite. The grounds upon which an election may be questioned are clearly set out in Section 134(1) of Electoral Act but also realizing that the non-compliance may not substantially affect the election, provided Section 135(1). It appears that Swem v. Dzungwe (supra) has been over-flogged, the court must have a thorough recourse to the provisions of Section 134(1) and Section 135(1) (supra). I find no substance in these issues 5 and 6 and I resolve them against the appellants.

ISSUE 7

“Whether the Court of Appeal was not in error by failing to invalidate the Presidential Election considering specific and uncontroverted evidence of

bias or likelihood of it in the INEC, and Resident Electoral Commissioners in twelve States of the Federation”.

This issue came up in issue 3 that I have already deliberated upon earlier in this judgment. Chief Ahamba contended that once the trial court found some evidence of bias and lack of neutrality in INEC (3rd respondent) the election ought out-rightly to be invalidated. I have already dealt with this in issue 3. The evidence of bias and failure of neutrality by 3rd respondent must be so widespread and all-embracing in order to merit invalidating the election. Unfortunately, what was before Court of Appeal were mainly allegations without concrete proof to satisfy the above requirements. We are here in this dealing not with the substantial evidence but invitation for obiter dicta (Wilson v. Oshin (1983) 4 NWLR (Pt. 88) 329.

Counsel for appellants also raised issue of bias with reference to paragraph 15 of the petition wherein it was alleged that card carrying members of 1st and 2nd respondents’ party were appointed Resident Electoral Commissioners. The chairman of INEC, (3rd respondent) Dr. Abel Guobadia was at one time Assistant Secretary, National Universities Commission and the fact of his removal from that post was not disclosed during his confirmation by the Senate. Because of this there must be presumption of bias and partiality against him. I believe this is a wide allegation and it was not seriously a good issue. Other persons were listed as either blood relations of members of 1st and 2nd respondents’ party or even members who during party primaries vied as candidates. Six such persons were listed, but how far has their conduct infringed the Act or the votes and how widespread? In matters like these, the entire evidence in the proceedings must be visited to know how the conduct of the election has been so adversely affected to justify invalidating the election. The parties’ pleadings and evidence in support are crucial (Lion of Africa Insurance Company v. Fisayo (1986) 4 NWLR (Pt. 37) 674; Attorney-General Anambra State v. Onuselugo Enterprises Limited (1987) 4 NWLR (Pt. 66) 547, 560; Titiloye v. Olupo (1991) 7 NWLR (Pt. 205) 518, 532; Ugochukwu v. Cooperative and Commerce Bank Limited (1996) 6 NWLR (Pt. 456), 524, 527. The appellants adverted only to 1st and 2nd respondents’ averment in response to paragraph 15 of the petition, but a look at the entire averment of these

respondents will show that the contention of the appellants had been well met by respondents.

As for whether some Resident Electoral Commissioners were members of Peoples Democratic Party (party of 1st and 2nd respondents) the Court of Appeal found the allegation to be mere hearsay without evidence to substantiate it. There was no evidence led to show that 19th respondent remained a member of any political party or that even the election was affected by his officiating in a manner not in substantial compliance with the Electoral Act. I see no merit in this issue 7 and I resolve it against the appellants.

ISSUE 8

“Whether the failure of the Court of Appeal to apply Section 149(d) Evidence Act against 3rd respondent for failure to produce the letter of protest in Cross River State for which Notice to Produce has been given was proper in law?”

There was allegation in paragraph 32 of the petition that a radio broadcast mentioned that there was disqualification of Chief John Ukpa of ANPP as gubernatorial candidate and that a Notice to Produce letter by the said Chief John Ukpa was not produced. I do not know the relevance of gubernatorial election to this matter before us. But suffice to say that Section 149(d) Evidence Act is a two-edged sword. It used to be Section 148(d) of 1958 Laws of the Federation of Nigeria before the Laws of the Federal Republic of Nigeria, 1990, changed the section to 149(d). The purport of that subsection is this:

“In any trial, where one party withholds the evidence which he ought to bring before court, the presumption is that evidence if made available would be against that person”.

In Notice to Produce procedure, it is supposed that the person asking for the document knows of the contents, perhaps has a copy of it. If the person to produce fails to produce it, the secondary evidence of it can be admitted in evidence. Chief John Ukpa of the ANPP, if he actually wrote the letter of protest in question, he could bring the copy of it for admission. Either the letter did not exist or it existed but Chief John Ukpa refused to bring its copy. If he brought the copy the presumption can as well be that the

contents would not have supported the case of the appellants. Allegation of the radio broadcast was, according to Court of Appeal not proved. See also Section 98 Evidence Act, 1990 and recent cases of Union Bank of Nigeria Plc. & Anor v. Alhaji Muhammadu Idrisu (1999) 7 NWLR (Pt. 609) 105, 118-9; Gbadamosi v. Kabo Travels (2000) 8 NWLR (pt. 668) 243, 273, the provision of Section 149(d) Evidence Act is of no use to the appellants. Issue 8 is therefore resolved against the appellants.

“ISSUE 9

C “Whether the Court of Appeal’s non-application of the provisions of Section 129 of Electoral Act, 2002, against 1st and 2nd respondents was proper having regard to the pleadings, evidence on record and findings of the court on intimidation and violence”.

Section 129 Electoral Act, 2002, provides:

D Section “129. A person who:

(a) directly or indirectly, by himself or by another person on his behalf, makes use or threatens to make use of any force, violence or restraint.

E (b) inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss on or against a person in order to induce or compel that person to vote or refrain from voting, or on account of such person having voted or refrained from voting

(c)

(d)

F Commits an offence of undue influence and is liable on conviction to a fine of N100,000.00 or imprisonment for twelve months and shall in addition be guilty of corrupt practice under Section 132 of this Act and the incumbent disqualified as a candidate in the election”

G These serious allegations of violence and even murder in some parts of Ebonyi, Imo, Kogi and Enugu States which the Court of Appeal believed occurred. But who was responsible for these acts? Certainly, the allegation never said 1st and 2nd respondents were responsible for the unfortunate acts of thuggery and deliberate violence. If, in election, there are acts of violence and those acts could not be linked directly or indirectly with a candidate for the election, the candidate cannot be held responsible for those acts. It is only where the evidence in court directly connect the can-

didate with the act of undue influence will the election of the candidate be nullified. Any other person found guilty of such act, apart from the candidate, will face the penalty imposed by Section 129 (supra) Oyegun v. Igbiniedion (1992) 2 NWLR (Pt. 226) 747, 759; Agomo v. Iroakeji (1998) 19 NWLR (Pt. 568) 133. The mere deployment of police and members B of the Armed Forces without more does not make 1st respondent a party to violence or undue influence. In all elections all over democratic world, members of the security forces help maintain law and order. In Nigeria, without them, there can be chaos and anarchy. There can be one or two C incidents of misconduct by members of these forces unless it is proved by overwhelming evidence that the misconduct was countrywide, the election of the incumbent cannot be nullified. Incidents in four or five States of the Federation cannot be said to be country-wide in a country of thirty six states. This issue is only begging for excuse and I resolve it against the D appellants.

“ISSUE 10

“Whether the exclusion of in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas E on the ground that such Local Government Areas were not specifically pleaded was proper in law”.

In all civil matters in superior courts of record, all facts a party relies upon must be pleaded clearly in numbered paragraphs. The same applies F to election petitions so that the paragraphs set out seriatim will indicate the facts the petitioner relies for his petition. All rules of High Courts provide for this practice. The reason for this principle of practice is that no party should take advantage of lurking away facts in his pleadings and unleashing surprise in court by evidence on a matter not pleaded, it has G been with us since colonial days and it is not unreasonable. The attainment of justice is that all parties to a suit must in their pleadings make full disclosure of facts they intend to rely for their case. In that case, each party will readily prepare for the case he is to meet. By not pleading a H fact and coming to court to offer evidence on it, is wrong in principles of jurisprudence. Thus, pleadings are matters of full disclosure, not the Trojan Horse! Emegokwue v. Okadigbo (1973) 4 S.C 113; Pascutto v.

Adecentro (Nigeria) Ltd. (1997) 11 NWLR (Pt. 529) 467. Assuming the facts unpleaded and received in evidence were not excluded by Court of Appeal majority judgment, would it have altered the judgment? It would not in the least looking at the whole pleadings and evidence in court. I

B resolve this issue against the appellants.

ISSUE 11

“Whether on balance of probability, the Presidential Election should not have been invalidated.”

C This is an issue I fail to find any argument from the appellants. I am of the firm view that the brevity of the issue and without any argument on, it is abandoned. See Ikputu v. Ikputu (1991) 5 NWLR (Pt. 193) 521; Ajibade v. Pedro (1992) 5 NWLR (Pt. 241) 529.

ISSUE 12

D “Whether there was no evidence proffered on Imo State that can substantially affect the election?”

The submission of the appellants is that there was overwhelming evidence in Imo State that ought to substantially affect the election to justify its nullification. The evidence relied upon were in the testimonies of P.W. 23, E P.W. 45, and P.W. 97 concerning destruction of INEC Office on election day, burning of the house of PDP chieftain in Ideato North, burning of Ahiazu Mbaise Local Government Headquarters and a letter indicating various acts of election malpractices sufficient to invalidate the election; F the letter is Exhibit 30. The Court of Appeal that heard all these story held that the acts complained of were not substantial as to nullify the election in the whole Imo State, not even in the area where they occurred. I have considered this type of straw in a haystack in issue 1 by adverting therein to Section 135(1) Electoral Act, 2002. I am satisfied the Court of Appeal G has ably thrashed the point that the evidence of these three witnesses were not substantial as to render the election a nullity. The letter, Exhibit 30, was not specific as to the alleged irregularities, where they existed and what effect they had. I find no merit in this issue 12.

“ISSUE 13

H “Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of perceived

non-joinder of necessary parties”.

All courts of trial must rely on evidence in court based on the pleadings. The appellants alleged malpractices pervaded the election all over the country. But where is the evidence, or are mere rumours enough as evidence. Secondly, the discountenanced evidence are not indicated. The trial court B as well as the appellate court should not be sent on mere speculation and wild goose chase for evidence that is not there. In the written address by Ahamba SAN., for the appellants, he listed some Form EC 81 for Kaduna, Jamaa, Makarfi, Kudan, Kagarko, Jabi, Ikara, Zango Kataf and Chukun C Local Governments. In most of them, there were no accreditation and they were prepared or supposed to be prepared by Presiding Officer. All these areas are in Kaduna State, most of them Kaduna South. There is no evidence how they substantially affected the election result. The officers who prepared them were not joined as parties as required by Section 132(2) D Electoral Act 2002. What is most important in matters where electoral officers are accused of malfeasance, it is not right not to hear from them; they can be heard only if they are joined as parties. Further, there is no evidence of facts and figures of how the irregularities affected the election. E The allegations weighty as they are presented have not in the slightest way affected the election result. I resolve this issue 13 against the appellants.

ISSUE 14

Whether on the balance of probability the election in each of Adamawa, F Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross-River, Edo, Rivers, Bayelsa, and Imo States should not have been severally invalidated.”

Chief Ahamba, SAN., for the appellants posited that the election in those States mentioned ought to be invalidated. He enumerated the areas of his aversion to trial court’s finding by adverting to each State mentioned. I G shall deal with the submission on that basis too.

ADAMAWA STATE

It was submitted that the Resident Electoral Commissioner altered the result in Exhibit 238 to favour PDP in governorship election. We are H here dealing not with governorship election. This appeal is on decision of Court of Appeal on Presidential Election. There is no relevance in the allegation of alteration of result to Presidential Election result. As the

PDP was not a party to the proceedings because trial court struck out 1st and 2nd respondents' pleading on that party, Chief Ahamba posited that all the appellants' allegations were admitted even by implication. But then where plaintiff leads evidence in support of defendant's pleading, the evidence is admissible. That is the rule of pleadings and the trend of decided cases. (*Sketch Newspapers v. Ajagbemokeferi* (1989) 2 S.C. (Pt. II) 73; (1989) 1 NWLR (Pt. 100) 678; *Bamgbose and Ors. v. Olanrewaju* (1991) 4 NWLR (Pt. 184) 132, 155, therefore, the evidence elucidated in cross-examination on issues joined is not inadmissible simply because the party elucidating that evidence never pleaded it, it is sufficient if it is in a party's pleading. Above all, the trial Court of Appeal, rightly held that there was insufficient evidence of violence to prove allegations pleaded.

KADUNA STATE

The allegation is the same as in issue 13 not substantiated. I hold the same view on this point.

ENUGU STATE

The petition of the appellants never relied on the question whether or not collation was done or was an irregularity. It just came up in this appeal just as it surfaced in trial court. Trial court clearly held, and relied on evidence before it, that the alleged irregularities were not substantial enough as to affect the result of the election.

KOGI STATE

The petition alleged violence in the whole State. But established violence in only four Local Governments out of twenty-one. It found no substantial reason to nullify the election on the mere fringe violence.

TARABA STATE

There was no argument advanced in regard to allegation of violence in this State and it is deemed abandoned.

EBONYI STATE

The contention is that the evidence regarding this State was not evaluated. The lower court held that the local government to which the evidence proffered related was not pleaded in the petition.

BENUE STATE

The same as Ebonyi State. An unpleaded fact given in evidence goes to

no issue.

CROSS RIVER STATE

The complaints concerned the consideration by trial court of evidence of malpractices in Akankpa Local Government Area and Calabar Municipal only. As the other Local Governments were not pleaded, I find no substance in this complaint. This matter of pleadings has been adequately addressed by me in issue 10. Failure to invoke Section 149(d) Evidence Act has been clearly adumbrated upon in my treatment of issue 8, the alleged radio broadcast that a governorship candidate had been disqualified certainly has no bearing on this matter of Presidential Election before us; it is irrelevant to this appeal. The arson or fire outbreak at St. John's Primary School Akankpa, at best affects only the election in that school and has not be shown by evidence that affected the result of the election.

EDO STATE

The contention is that the Court of Appeal in majority judgment failed to evaluate the evidence given on Edo State. This is contrary to the written record of proceedings. All the eight witnesses called by appellants and those of respondents had their evidence clearly evaluated. The majority judgment held that no election took place in nine units of Essigie Primary School Voting Centre and this never affected the overall election in the State.

RIVERS STATE

The complaint is that in ten out of twenty-three Local Government Areas election in the State ought to be nullified and those in the ten Local Government Areas ought at least to be nullified first. The trial court cancelled the election in Asari/Tori Local Government Area, one ward and four units in Andoni Local Government Area, two units in Obia/Akpo Local Government Area and one unit in Ogu/Bolo Local Government Area. The appellants tendered several exhibits of places where election was not held but result falsified. The officers who falsified the results were not joined and the court never regarded the evidence as of any value.

BAYELSA STATE

The appellants as petitioners were able to offer credible evidence in 5 units of Emekalakala in Ogbea Local Government Area where no election

results were tendered and the election in those units was cancelled. The other complaint was with regard to Nemba Local Government Area and the evidence on it went to no issue. Had the evidence been admitted and evaluated I cannot fathom how it could have affected the result substantially enough to render the entire election a nullity.

IMO STATE

I have addressed this issue in issue 12 and I have no reason to depart from conclusion I reached thereat.

C ISSUE 15

“Whether the Court of Appeal was not in error by upholding the Presidential Election of 19th April, 2003, after invalidating the election of one State, Ogun State. considering the provisions of Section 134(1) of the Constitution of the Federal Republic of Nigeria 1999.”

D Section 134(1) of the Constitution aforesaid says:

“(1) A candidate for an election to the office of President shall be deemed to have been duly elected, where, there being only two candidates for the election:

- (a) he has the majority of votes cast at the election; and
- E (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.”

F “S.134(2) A candidate for an election to the office of President shall be deemed to have been duly elected where, there being more than two candidates for the election:

- (b) he has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States in the Federation and the Federal Capital Territory, Abuja.”

G By the submission of the learned senior advocate, Chief Ahamba, because the election in entire Ogun State was nullified in the majority judgment of Court of Appeal, there no longer existed the basis for calculating the percentage and the election of 1st and 2nd respondents was a violation of the Constitution. I have read time and again without number the provisions of Section 134(1), (2), (3), (4) and (5) carefully. I cannot pinpoint H any ambiguity in that long section. In interpretation of a statute, once the

words used are clear, ordinary meaning the words in it are given to them. There is no need to seek extraneous aid in interpreting the section. What Chief Ahamba has submitted is not only novel to statutory interpretation. I cannot find any solace in my surprise by the submission. Our decisions on interpretation of statutes are numerous and clear as to sections of law B written in plain, ordinary and unambiguous words. (See Attorney-General of Bendel State v. Attorney-General of the Federation (1981) 10 S.C. (Reprint) 1; (1981) 3 NCLR 1. The invalidation of election in any State without facts and figures will not overwhelm the result countrywide unless C clear evidence is led to justify such question. There is none in this case. This contention by the learned counsel cannot be supported by authorities very extant in our law reports and I reject it outright.

“ISSUE 16

Whether the 1st and 2nd respondents’ Reply is a competent process in the D proceedings.”

The 1st and 2nd respondents were served with appellants’ petition on 22nd and 23rd day of May, 2003. On 25th May, 2003, all the parties to the petition were at the Court of Appeal in respect of an application for injunction to restrain the respondents 1 & 2 from being sworn in as President E and Vice President respectively. The petitioners who filed the application were unsuccessful as the lower court ruled against them by dismissing the application. It was on 30th May, 2003, that 1st and 2nd respondents filed F their memorandum of appearance. The counsel for appellants. Chief Ahamba, SAN., submitted the Memorandum of Appearance filed by 1st & 2nd respondents should be reckoned for days to file their Reply from 23rd May, 2003 and when they filed the Reply on 13th June, 2003, they G were fourteen (14) days out of time. He relied on the case of Adegoke Motors v. Adesanya (1989) 5 S.C. 113; (1989) 3 NWLR (Pt. 109) 250. There is a world of difference procedurally between “appearing” and “entering an appearance”. When the 1st and 2nd respondents appeared to answer to injunction physically they appeared on 25th May, 2003. But H when by virtue of paragraph 9(1) of First Schedule to the Electoral Act, 2002, the 1st and 2nd respondents filed their memorandum of appearance in Court of Appeal on 30th May, 2003, they entered appearance. Thus, a

little under fourteen days provided by the Act i.e., 13th June, 2003, when they (1st & 2nd respondents) filed their Reply, they were well within the 14 days calculating from 30th May, 2003. There is no substance in this issue 16 and I resolve it against the appellants.

B ISSUE 17

“Whether the 1st respondent was qualified to contest the Presidential Election under the Constitution of the Federal Republic of Nigeria”.

The Constitution of the Federal Republic of Nigeria on Section 137(1)

C (b) provides:

“A person shall not be qualified for election to the office of the President if he has been elected to such office at any two previous elections.”

D The appellants postulated that the 1st respondent was in 1976 appointed President of the Republic by the then Supreme Military Government. He referred to Section 5(d) of the Constitution (Basic Provision) Decree No. 32 of 1975 and secondly, his election in 1999 under the Constitution of the Federal Republic of Nigeria, 1999. To my mind, basically, this is a funny issue. The situations whereby 1st respondent became Head of Federal Military Government and Commander-In-Chief of the Armed Forces of the
E Federal Republic of Nigeria in February, 1976 and has become President in 1999 are entirely different. In 1976, 1st respondent was not elected at any election but was appointed by his brother officers in the Supreme Military Council. That was an event entirely under a military regime that had no
F colouration of democratic process. In 1999, he was elected in a country-wide election by popular majority votes of all Nigerians eligible to vote who voted. His first election was therefore in 1999 under the Constitution of the Federal Republic of Nigeria and the relevant Electoral Act. This issue seems to me a voyage of discovery and has no substance. I resolve
G issue 17 against the appellants.

ISSUE 18

*“Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioners proffered evidence and, if it did, whether the misdirection did not occasion a miscarriage of
H justice.”*

I believe the grouse of the appellants is in the finding of majority judgment

of Court of Appeal where inter alia it held as follows:

“Where no allegation is made and no evidence adduced on the conduct of the election in a State, the presumption of regularity ensures in its favour. In this case (Petition, bracket being mine for emphasis) there was no specific allegation of any wrong-doing in the conduct of 19th April. B 2003 Election in 22 States and my view that the elections in these States were regularly conducted and the ensuing results authentic.”

This statement is not as all embracing as the learned counsel for the appellants opined. If the entire pleadings and all evidence before Court of Appeal are put into focus, it is easy to discern what the trial court was referring to. There were some specific States referred to in the petition. e.g. Kaduna, Akwa Ibom, Kogi, Enugu, Ebonyi, Bayelsa. etc., to which I adverted to in the earlier issues in this judgment, where specific allegations of irregularity were pleaded. Those allegations referred to Units, Wards, D Collation Centres and Local Government Areas and not to the country in general. Copious findings were made on those places, but in 22 States either nothing is complained about them or some of the complaints had no evidence to back them. I find no substance in this issue 18. E

From the foregoing on issues 1 to 18, I find no merit in this appeal and I dismiss it.

For the dissenting judgment of Nsofor, JCA., I would have skipped it entirely in view of what I have written on issues 1-18 above. But looking F at that judgment, it seems to me more of emotional response than the facts and the law before Court of Appeal. Facts unpleaded were alluded to as if they were of issues in the matter, little errors and irregularities in some little Polling Units, Local Government Areas and Collating Centres, in G most cases unpleaded, and with little or no substantial evidence in support were relied upon. I do not in my respectful view, think that judgment has done any jurisprudential damage to majority judgment which has been product of thoroughly considered assessment.

CROSS-APPEAL

H There are twelve grounds of cross-appeal with five issues for determination formulated around them. The sole cross-appellants are the 1st and 2nd respondents. They also filed a Reply brief. The Chief Justice of Nigeria

painstakingly set out the whole issues in the brief in his judgment. The Court of Appeal was certainly not happy with INEC attitude to some exhibits required to be brought to court. The exhibits required were Forms EC8A. The irons in this complaint by the appellants is that when P.W.1, Chief Bisi Lawal was being cross-examined, effort was made by counsel for 1st and 2nd respondents to lender the election results but counsel for appellants objected. The objection was upheld by Court of Appeal. Later as a result, the result for Ogun State was not before the court. But is that enough reason to nullify the entire election? In view of the little over one third of the State's, Local Government Areas' results, it seems the Court of Appeal was in error on this point. The court apparently failed to draw its attention to the cross-examination of P.W.1, Bisi Lawal. It is for petitioners to prove their case and by objecting at earliest opportunity to have the results in court, the appellants are not entitled to the benefit of the results in 14 Local Government Areas not in court. It simply means they never intended the results to be seen by the court, that is what actually took place. The appellants also alleged manipulation of election results in the same 142 Polling Units from 7 Local Government Areas. Manipulation or alteration of election result is a criminal offence and the proof required is high, that is beyond reasonable doubt. The sin of parts of 7 Local Governments in Ogun State in having some doubt on the returns should not have been visited on the other 13 Local Government Area. But that precisely is what Court of Appeal did by relying heavily on the evidence of Chief Bisi Lawal which covers only 7 Local Government Areas. The failure to bring other results for the rest of the States was due entirely to the appellants who earlier in the trial objected to their being brought to court. Unfortunately, Chief Lawal as P.W.1 gave evidence of what he never saw but what he was told by polling agents. That is hearsay. I therefore, agree with the lead judgment of Honourable Chief Justice of Nigeria, which I had the privilege of reading in advance that the cross-appeal has merit. I also allow it.

I also abide by the reasons and conclusions reached in the judgment of Chief Justice of Nigeria on the cross-appeal by 4th and 5th respondents on the alleged acts of manipulation of the results in certain parts of Ogun

State. I allow the cross-appeal of 4th-5th respondents. I abide by the summary made by Chief Justice at the conclusion of his lead judgment.

The task undertaken by Court of Appeal in the face of length of time of sitting, listening to over two hundred witnesses, receiving several exhibits, listening and ruling on several objections and motions is highly commendable. It is to their credit that they never wavered throughout in their patience and sobriety. I wish next elections will have a better, more civilized and considerably less cumbersome Electoral Act to deal with.

KUTIGI JSC

I have had the privilege of reading before now the judgment just rendered by my learned brother, the Honourable Chief Justice of Nigeria. I agree with his reasoning and conclusion, arrived at in the said judgment. I do not wish to add anything because he has in the judgment sufficiently and meticulously covered all the vital issues canvassed before us in the appeal and cross-appeals. Consequently, I endorse the conclusions and orders made therein.

EJIWUNMI JSC

The Independent National Electoral Commission (INEC) established by an Act of the National Assembly is the body charged with the duty of conducting elections for the Office of the President, Vice President of the Federal Republic of Nigeria and other elective offices. On the 19th of April, 2003, INEC conducted a general election, which included dial of the President and Vice President of the Federal Republic of Nigeria, throughout the 36 States of the country. The contestants in respect of the Office of the President and Vice President in the said election, included Chief Olusegun Obasanjo with his running mate, Alhaji Atiku Abubakar who contested the election on the platform of the Peoples Democratic Party (PDP), and Alhaji Muhammadu Buhari with his running mate, Chief Chuba Okadigbo, who stood for the election on the platform of the All Nigeria People Party (ANPP).

At the end of the elections and following the counting of the votes cast in the elections. Chief Olusegun Obasanjo on the platform of the Peoples Democratic Party was declared the winner and was accordingly returned as the President with his running mate, Alhaji Atiku Abubakar, Vice President of the Federal Republic of Nigeria. As the candidate of the All Nigeria Peoples Party, Muhammadu Buhari, and the Party were dissatisfied with the outcome of the election, they went to the Court of Appeal to challenge the result of the election. They filed an election petition against the declared winners of the election, the Independent National Electoral Commission (INEC) and 265 others before the Court of Appeal. The petition was so filed because that court is vested with the jurisdiction to hear the petition by virtue of the provisions of Section 239 of the Constitution of the Federal Republic of Nigeria 1999 which reads:-

“239 (1) Subject to the provisions of the Constitution, the Court of Appeal shall have jurisdiction to the exclusion of any other court of law in Nigeria, original jurisdiction to hear and determine any question as to whether -

(a) Any person has been validly elected to the Office of the President or Vice President under this Constitution...

(2) In the hearing and determination of an election petition under paragraph (a) of subsection (1) of this section, the Court of Appeal shall be duly constituted if it consists of at least three Justices of the Court of Appeal.”

For the hearing of the petition, the petitioners amended their petition twice and the of the petition was heard on basis of the 2nd amended petition of the petitioners. The 1st and 2nd respondents filed their reply.

Following the exchange of pleadings, the trial commenced. In support of their case, the petitioners called 139 witnesses, the 1st and 2nd respondents called 100 witnesses, while the 3rd-265th respondents called 114 witnesses.

At the close of the hearing of oral evidence, the Court of Appeal sitting as the Presidential Election Tribunal ordered that written briefs be filed by the parties. By its judgment delivered on 20th December, 2004, the petition was dismissed by the majority judgment of Tabai, JCA., Abdullahi P JCA., and Muhammed, JCA., while Nsofor JCA., dissented.

The appellants, not being satisfied with that judgment of the court have appealed to this court. Pursuant thereto, they filed 41 grounds of appeal.

The two sets of respondents also filed separate Notices of cross-appeal against the judgment of the tribunal.

Now, the parties duly filed and exchanged their respective Briefs of Argument and some of which were amended with leave. The appellants by their amended brief distilled 18 issues for the determination of the appeal. They read thus:-

“1. Whether the Court of Appeal properly interpreted Sections 135(1) and 67(3) of the Electoral Act, 2002. (Grounds 5, 7 and 25).

2. Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150(1) of the Evidence Act in the judgment. (Grounds 3, 13 and 30)

3. Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law. (Ground 1)

4. Whether the Court of Appeal’s conclusion that non-compliance with Section 67 (3) of the Electoral Act was not proved is sustainable considering the express provision of the section, the pleadings of the parties and the totality of evidence on record on the point. (Grounds 8 and 9)

5. Whether the Court of Appeal’s failure to invalidate the Presidential election after holding that Section 18 of the Electoral Act, 2002, was not complied with was proper (Ground 4).

6. Whether the Court of Appeal’s failure to invalidate the Presidential election after finding that Section 40(1) of the Electoral Act, 2002, was breached in the conduct of the election was proper (Ground 10).

7. Whether the Court of Appeal was not in error by failing to invalidate the presidential election considering the specific and uncontroverted evidence of bias or likelihood of it in the INEC, and Resident Electoral Commissioners in twelve States of the Federation. (Grounds 11, 12 and 1?)

8. Whether the failure of the Court of Appeal to apply Section 149 (d) of the Evidence Act against 3rd respondent for failing to produce the letter of protest in Cross River State for which notice to produce had been given was proper in law (Ground 14).

9. *Whether the Court of Appeal's non-application of the provisions of Section 129 of Electoral Act, 2002, against the 1st and 2nd respondents was proper after the pleadings, evidence on record and the findings of the court on intimidation and violence (Grounds 23 and 34)*

B 10. *Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas on the ground that such Local Government Areas were not specifically pleaded was proper in law. (Grounds 2 and 37).*

C 11. *Whether on the balance of probability, the presidential election should not have been invalidated (Grounds 24, 31, 32 and 33).*

12. *Whether there was no evidence proffered on Imo State that can substantially affect the election. (Ground 36).*

D 13. *Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived non-joinder of necessary parties (Grounds 18 and 28).*

E 14. *Whether on the balance of probability the election in each of Adamawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross River, Edo, Rivers, Bayelsa and Imo States should not have been severally invalidated (Grounds 15, 16, 19, 20, 21, 22, 27, 29, 35, 40 and 41).*

F 15. *Whether the Court of Appeal was not in error by upholding the Presidential election of 19/4/03 after invalidating, the election of one State (Ogun) considering the provisions of Section 134 (1) of the Constitution of the Federal Republic of Nigeria (Ground 6)*

16. *Whether the 1st and 2nd respondents' reply is a competent process in the proceeding (Ground 39).*

G 17. *Whether the 1st respondent was qualified to contest the presidential election under the Constitution of the Federal Republic of Nigeria (Ground 38).*

18. *Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioners proffered evidence and, if it did, whether the misdirection did not occasion a miscarriage of justice (Ground 26)."*

H In the brief filed for the 1st and 2nd respondents, the court was first asked to consider that the 18 issues formulated for the appellants

were generally repetitive and some of them academic. It was then argued that Issue 1&2 of the issues formulated by the appellants be struck out as the issues are mere academic questions. It is the contention of the respondents that the issues were not related to the facts in the appeal. It is the further submission of learned counsel, Chief Afe Babalola, SAN., that a determination of any of them in favour of the appellants will not result in a verdict in their favour. In support of this submission, reference was made to the following cases: *Ibori v. Agbi* (2004) 2 S. C. (Pt.1) 51; (2004) 6 NWLR (Pt. 868) 78 at 111; *African Petroleum Ltd. v. Owodunni* (1991) 8 NWLR (Pt. 210) 391, 410 and *Ugo v. Obiekwe* (1989) 2 S.C. (Pt.II) 41; (1989) 1 NWLR (Pt. 99) 566. And for the 1st and 2nd respondents, their learned senior counsel formulated the following issues:-

"1. Whether or not the statement of the court below, "that INEC's failure to produce the Presidential Election Results which it was summoned to produce amounts to a negation of INEC's claim to neutrality" is of any moment and capable of denying the election the presumption of regularity to lead to nullifying the Presidential Election herein? Grounds 1, 13.

2. Whether or not the court below was right in its decision to E discountenance and/or expunge from record all evidence led by the petitioners in the case that were not pleaded? Ground 2.

3. Whether or not the Presidential election of 19/4/03 was not conducted in substantial compliance with the provisions of the Electoral Act, 2002, particularly Sections 18, 40(1), 17(2), 19, required for the validation of the election? Grounds 3, 4, 5, 6, 10, 11, 12, 30, 31, 32, 33.

4. Whether or not the appellants proved their allegation of failure to certify the election materials as required by Section 67 (3) of the Electoral Act, 2002, and if so, whether any such failure is capable of rendering G the election void? Grounds 7, 8, 9, 25.

5. Whether or not the appellants pleaded and proved their allegations of malpractice, irregularities in the conduct of the election in Cross River, Akwa Ibom, Anambra, Lagos, Rivers, Bayelsa, Taraba, Enugu, H Ebonyi, Benue, Imo, Edo, Kogi States to substantially affect the election in those States? Grounds 5,14, 15, 16, 17, 19, 20, 21, 22, 27, 29, 35, 36, 37, 40 and 41.

6. Whether or not the court below was not right in discountenancing evidence adduced against presiding officers that were not joined as parties to the petition? Grounds 18, 28.

7. Whether or not the findings of the court below that violence B and destruction of properties attended the election in some places were substantial and sufficiently linked to the 1st and 2nd respondents to invalidate their election? Grounds 23, 24.

8. Whether or not the nullification of the presidential election in C Ogun State and few other Local Governments, Wards and Polling units in the Federation was right and , if so, whether the said nullifications were substantial to warrant the nullification of the entire election? Ground 24.

9. Whether or not the petitioners pleaded and proved any malpractice in any number of States to substantially affect the result of the election? Ground 26. D

10. Whether or not the 1st respondent was disqualified from contesting on the false allegation that he had been elected twice into the present office? Ground 38.

11. Whether or not the reply filed by the respondents in this case E was not competent having regard to the provisions of Electoral Act, Ground 39.”

For the 3rd & 6th-256th respondents, their learned counsel. E. O. Sofunde. SAN., who settled their brief of argument adopted in that brief, F the 18 issues raised in the appellants’ brief for the determination of the brief.

In the brief filed on their behalf by their counsel. A. O. Eghobamien, SAN, two issues were identified for the 4th and 5th respondents.

Before I consider the arguments of learned counsel for the parties. G I wish to state the substance of the reliefs claimed by the petitioners. The substance of which was captured in paragraph 294 of the petitioners’ 2nd Amended Petition, which reads thus:-

“Wherefore your petitioners pray as follows:-

H (a) An order of the court that the election is invalid for reasons of non-compliance with substantial sections of the Electoral Act, 2002.

(b) An order of the court that the election is invalid for reasons

of corrupt practices.

(c) An order of the court that at the time of the election 1st respondent was not qualified to contest.

In the alternative:

That the 1st respondent was not validly elected by a majority of B lawful votes cast in the election and did not receive 25% of votes cast in two-thirds of the States of the Federation and the Federal Capital Territory as required by the 1999 Constitution of the Federal Republic of Nigeria.”

Earlier in this judgment, I have stated that by the majority decision of the Presidential Election Tribunal, the reliefs sought by the appellants C to invalidate the election were rejected. Also, earlier in this judgment, the issues raised in this appeal against the judgment of the Tribunal have been set down. I will now proceed with the consideration of the reliefs D predicated upon the issues raised.

Issue 1

Whether the Court of Appeal properly interpreted Sections 135 (1) and 67(3) of the Electoral Act.

On this complaint of the appellants is that the Presidential misinterpreted the provisions of Sections 67 (3) and 135 (1) of the Electoral Act, E 2002. And that by virtue of its erroneous interpretation of the sections, the court created a non-existent onus which it then imposed in support of this contention, learned counsel referred to as Tukur v. Governor of Gongola F State (1989) 9 S. C. 1; (1989) 4 NWLR (Pt. 117) 517 at 547; Aqua Ltd. v. Ondo Sports Council (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt.91) 622 at 614; Oviawe v. I.R.P (Nig.) Ltd. (1999) 3 NWLR (Pt.492) 126 at 139; Ahmed v. Kassim (1958) 3 FSC 1; Lawal v. G. B. Ollivant (Nig) Ltd. G (1972) 3 S.C. (Reprint) 120; (1972) 3 S C 124. With regard to Section 67 (3) of the Electoral Act, the learned counsel then submitted plainly that the Tribunal was wrong to interpret it. The learned counsel for the appellants has also argued that Section 135(1) was similarly misconstrued when Tabai JCA., said:- H

“It is my view from the above provision therefore that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not

be liable to be invalidated.”

Learned counsel then submitted that by the interpretation given to the provisions of Section 135 (1), the Tribunal shifted the onus on the petitioners to lead evidence that an established non-compliance actually affected the result of the election. That interpretation by the Tribunal by implication amounted to a judicial amendment by excluding the words “did not”, which exclusion completely changed the text of the provision and gave it a different meaning. In support of his contention, appellants referred to the following cases: - Swen v. Dzungwe (1966) NMLR 297 at 303; Woodward v. Sarsons (1875) LRIOCP 733; Amadi v. Eke (2004) 14 NWLR (Pt. 891) 1. On the basis of the above submissions, learned counsel urged the court to resolve Issue 1 in favour of the appellants.

In their response to the contention of the appellants reviewed above, learned counsel for the 1st and 2nd respondents has argued to the contrary in their brief. Their submissions in respect of whether the Tribunal wrongly construed the provisions of Section 67 (3) and Section 135 (1) of the Electoral Act were argued in the respondents’ brief under the respondents’ Issues 3 and 4 respectively. The arguments developed in respect of these questions would be considered later in this judgment along with the other submissions by counsel.

In respect of the 3rd and 6th to 265th respondents, their learned counsel, E. O. Sofunde, SAN., who prepared their brief opened his argument in support of the view of the Tribunal with regard to the interpretation of Section 67 (3) of the Electoral Act, 2002, when he said thus and I quote:-

“With the utmost respect to the appellants, however, it is submitted that the learned trial Judge who delivered the majority judgment got it right when he said that “certification was to be done either at the polling unit or at the ward collation/distribution centre where materials were supposed to be handed over to the Presiding officers.”

The further argument of the learned counsel in support of his position will also be considered later along with the submissions made on the point. Suffice it to say at this stage to refer to some of the authorities that were cited in support of the above submission of learned counsel: Re Vandervells Trusts (No.2) (1984) 3 All ER 205 at 213; Chinwedu v.

Mbamali & Anor. (1980) 3-4 S.C. 21; Vol.12 (1980) NSCC 127 at 147, 150-151; Peenok Investments Ltd. v. Hotel Presidential Ltd. Ezeani v. Onwordi (1986) 4 NWLR (Pt. 33) 27 at 46; Anyanwu v. Mbara & Anor (1992) 5 NWLR (Pt. 242) 386 at 398.

The first question to be considered is, whether Section 67 (3) was wrongly misconstrued by the Tribunal. Earlier in this judgment. I have set out howbeit briefly, the contention of the appellants that Section 67(3) of the Electoral Act, 2002 was wrongly misconstrued. In order to appreciate the argument of counsel, it is desirable to reproduce the provisions of Section 67(3) which simply states that:

“The Polling Agents shall certify the election materials from the office to the polling booth.”

In the course of his judgment, Talabi, JCA., who delivered the majority judgment interpreted the above provisions thus:-

“It is clear both from Section 67 (3) of the Electoral Act and paragraph 13 of the petition that it was the Polling Agent who has the authority to certify documents. And although it is not categorically so stated in the provision, it appears to me that certification was to be done either at Ward/ Collation/Distribution Centre where materials were supposed to be handed over to the Presiding Officers. I came to that conclusion because from the evidence before the court, the Polling Agent carried out his functions only within the operational basis or areas of a Presiding Officer.”

The learned counsel has faulted the interpretation given by the learned Justice of the Tribunal to Section 67(3), as it was based on a rather unfortunate and erroneous presumption that those who made the law did not appreciate or even know the difference between “Office” and “Polling Station”. This, argued learned counsel, would be a presumption that is alien to our law of jurisprudence. He then went on to argue that from the above provision, it is clear that “Polling Agent” means “Party Agent”, and urged the court to hold that the tribunal was in error in its interpretation of the Act and that the interpretation be given to hold that in the section “Polling Agent” means “Party Agent”.

The learned counsel for the 1st and 2nd respondents in the respondents’ brief concedes it that the interpretation of Section 67 (3) of the

Electoral Act, 2002, is not free from difficulty, but submits that the Tribunal cannot be faulted for holding that the “certification” must be done at the polling stations or collation centers having regard to the fact that it is the party agents that must carry out the certification and who are to be found at the polling and collation stations, not at the Office of the Independent National Electoral commission.

While I agree that the provisions of Section 67(3) of the Electoral Act, could have been better drafted to reflect what the law makers wanted to guide the conduction of the elections, that fact should not by itself nullify interpretation given to it by the Presidential Election Tribunal. The decision of the Tribunal can easily be supported, as argued by learned counsel for the 3rd, 6th - 265th respondents, E. O. Sofunde, SAN. It is not in doubt that Section 67 (3) of the Electoral Act, 2002, prescribes for certification by polling agents and no other person. That position is made clear by virtue of Section 36 (1) of the Electoral Act which stipulates that :-

“All political parties may by notice in writing signed and addressed to the Electoral Officer of the Local Government Area appoint persons (in this Act referred to as “Polling Agents”) to attend at each polling station in the Local Government Area for which they have candidates, and the notice shall set out the names and addresses of the polling agents and be given to the Electoral Officer before the date of the election.”

It is therefore clear that by the provisions of Section 36 (1) supra, the focus of the Electoral Act is that polling agents who are indeed nominees of political parties are required to present themselves to the Electoral Officer of the Local Government Area for the purposes of the duties imposed upon them by Section 67 (3) of the Electoral Law. It is in that context that the expression “shall certify the election materials from the office to the polling booths” be understood and which would give meaning to the position of the polling officers as designated by Section 36 (1) of the Electoral Law. It must also be borne in mind that in construing the provisions of a section of a statute, the whole of the statute must be read in order to determine the meaning and effect of the words being interpreted. See *Garba v. Federal Civil Service Commission* (1988) 1 NSCC

306; *Awolowo v. Shagari & 2 Ors.* (1979) 6-9 S.C. (Reprint) 37; (1979) 6-9 S.C. 51; *Bronik Motors v. Wema Bank* (1983) 1 SCNLR 296.

It follows from what I have said above that though the provisions of Section 67 (3) could have been better framed. I do not deem it necessary to accede to the submission of learned counsel that the Tribunal was in error in its interpretation of Section 67 (3) of the Electoral Act, 2002. And I so hold.

I now turn to consider whether the Presidential Election Tribunal misconstrued Section 135 (1) of the Electoral Act. It reads:-

“An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”

The learned Justice of the Presidential Tribunal, Tabai JCA., upon the due consideration of the above quoted provisions of Section 135 (1), then formed this view of the purport of the said section, which reads:-

“It is my view from the above provision therefore that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to be invalidated.”

On Section 135 (1), learned counsel for the 1st and 2nd respondents, argues that the appellants wrongly placed reliance on the case of *Swem v. Dzungwe* (1966) NMLR 297 to contend that onus is on the respondent to an election petition to establish that the election was conducted in substantial compliance with the Electoral Act. Having so argued, learned counsel for the 1st and 2nd respondents then submits that the principle established in the case of *Swem v. Dzungwe* (supra) is in line with the age long principle of law that the petitioner who alleges non-compliance in the election petition has the onus of proving such non-compliance. The onus does not shift on the respondent until the Court or Tribunal finds it impossible after the petitioners must have established any non-compliance to say whether or not the results were affected by the non-compliance established. In support of this submission, he cited several cases including

the following: Agoda v. Emanuoto (1999) 8 NWLR (Pt. 615) 407 at 419; Maska v. Ibrahim (1999) 4 NWLR (Pt. 599) 415 at 422; Aondoakaa v. Ajo (1999) 6 NWLR (Pt. 602) 206; Abba v. Jumare (1999) 5 NWLR (Pt. 602) 220 at 278. Finally, learned counsel for the 1st and 2nd respondents submitted that the learned Justice of the Tribunal did not misinterpret the provisions of Section 35(1) of the Act.

E. O. Sofunde, SAN., learned counsel for the 3rd, 6th-265th respondents, premised his reaction to the argument of the appellants that learned Justice of the Tribunal wrongly interpreted the provisions of Section 135 (1) of the Electoral Act, was to submit that the learned Justice of the Tribunal interpreted its provisions rightly when he says:-

“Both learned senior counsel rely on this statement of the Supreme Court. On the principle of the decision, it is a common ground that the petitioner must first established (sic) ‘the non-compliance’. The controversy is only as to the point at which the onus shifts to the respondents to prove that the non-compliance, though established, did not substantially affect that election and the result. In my considered opinion, whether or not at the end of the case of the petitioner, the onus shifts to the respondents to prove that the non-compliance did not substantially affect the election and the result depends on the court’s own perception to the effect of the non-compliance. Where the court is of the opinion that the non-compliance did not and could not have had any impact whatsoever on the election, then the petitioner has failed to shift the onus of proof and the petition thus fails. But where, in the opinion of the court, the effect of non-compliance is fundamental and has created in the court’s mind a doubt on the regularity of the election and authenticity of the ensuing result, then the onus shifts on the respondents, in such a situation, unless the respondents leads (sic) “evidence to establish that the non-compliance did not affect the election and the results, the petition succeeds. It is my respectful view that in such a situation, proof is not beyond reasonable doubt but on preponderance of evidence.”

He then concedes it that in the interpretation of Section 135 (1), the learned Justice of the Presidential Tribunal placed reliance on the Swem v. Dzungwe (1966) NMLR 297. However, learned counsel submits that

the argument set up by the learned counsel for the appellants as to whether Swem v. Dzungwe (supra) was properly applied by the learned Justice of the Presidential Tribunal. This is because the later decisions of this court, namely Awolowo v. Shagari (1979) 6-9 S.C. (Reprint) 37; (1979) All NLR (Reprint) 120 and Ojukwu v. Onwudiwe (1984) 1 SCNLR 247 are the cases that should be considered as to whether Section 135 (1) was properly interpreted or not. It seems clear that after a careful analysis of the cases referred to above that learned counsel submitted that the learned Justice of the Tribunal was right as to the interpretation given to the provisions of Section 135 (1) of the Act. I think it is right to refer to the decision of this court in respect of this question in Awolowo v. Shagari (supra). I will later in this judgment refer again to it when I come to discuss other issues raised in this appeal. See also Ojukwu v. Onwudiwe (supra).

After due consideration of the cases referred to above. I have no doubt that the learned Justice of the Tribunal rightly interpreted the provisions of Section 135(1) of the Electoral Act. This in effect means that the onus lies on the appellants to establish first, substantial non-compliance and secondly, that it did or could have affected the result of the election. It is alter the appellants established the foregoing that the onus would have shifted to the respondents to establish that the result was not affected. It follows from what I have said above that Issue 1 must be resolved against the appellant and I so hold.

Issues (2) & (18)

This issue queries the Presidential Tribunal’s application of presumption of regularity which affected the Tribunal’s decision on the complaints in the three grounds argued under this issue and the general determination of the petition against the petitioners particularly as it concerns the number of States.

The learned counsel for the appellants/cross-respondents argued this issue mainly on the premise that the approach of the learned Justice of the Presidential Tribunal for the determination of the complaints of the appellants/cross-respondents was erroneous as the Tribunal wrongly appraised the meaning and effect of Section 150 of the Evidence Act, particularly as the Tribunal failed to follow the decision of the Court of

Appeal in INEC v. Ray (2004) 14 NWLR (Pt. 892) 92 at 135. It is argued for the appellants/cross-appellants that the Tribunal ought to have followed that decision unless there is clear reason before the tribunal to depart from its previous judgment. See *Uttih v. Onoyinwe* (1991) 1 NWLR (Pt.66) 166 B at 205. It is apt to deal first with this submission. While there can be no doubt that a court of co-ordinate jurisdiction is bound to follow the decision of a court of co-ordinate jurisdiction but surely, it is a misconceived argument for learned counsel to submit as if when a matter is on appeal C to this court, this court cannot refuse to follow the erroneous decision of a lower court. It is no doubt that an appellate court would certainly not uphold an erroneous decision of any lower court. If however, a lower court arrives at a decision that is adjudged right by an appellate court, then that decision would be upheld by the appellate court. See *Lebile v. The Registered Trustees of Cherubim and Seraphim Church of Zion of Nigeria, Ugbonia & Ors* (2003) 1 S.C. (Pt. 1) 25; (2003) 2 NWLR (Pt. 804) 399 at 422-423. D

After due consideration of the reasoning that led to the decision in INEC v. Ray (supra). I agree entirely with the submission of learned E counsel for the 3rd, 6th -265th respondents. E. O. Sofunde, SAN., that that decision in INEC v. Ray (supra) is neither binding on this court nor does it represent the correct state of the law. In holding the view held above. I have found useful the decision of the court in *Nwobodo v. Onoh* (1984) F 1 SCNLR 12, this court at page 32, said as follows:-

"I think, at this stage I may say that I accept the submission of Chief Williams that there is in law a rebuttable presumption that the result of any election declared by FEDECO is correct and authentic and the onus is on the person who denies the correctness and authenticity to rebut the presumption." G

In *Omoboriowo v. Ajasin* (1984) 1 SCNLR 1, this court again said at page 122 as follows:-

"Now as I stated in Nwobodo v. Onoh (supra), there is in law a rebuttable presumption that the result of any election declared by the Returning Officer is correct and authentic by virtue of Sections 115, 148 H (c) and 149 (1) of the Evidence Act and the burden is on the person who

denies the correctness and authenticity of the return to rebut the presumption. Where such denial is based on a mere complaint that the petitioner scored a majority of lawful votes the rebuttal needs only to be proved within the balance of probability."

As the appellants had mentioned specifically in their petition B that 14 States were affected by electoral malpractices and as it is a well-known principle that parties are bound by their pleadings, and evidence not supported by the pleadings goes to no issue, the appellants are obliged to plead such facts as would support their case. It follows that where C there are no pleadings upon which evidence was led, such evidence must be discountenanced. See *Oke-Bola v. Molake* (1975) 12 S.C. 61 at 63; *George v. Dominion Flour Mills Ltd.* (1963) 1 All NLR 71; *Emegokwue v. Okadigbo* (1973) 4 S.C. (Reprint) 146; (1973) 4 S.C. 113; *Orizu v. Anyaegbunam* (1978) 5 S.C. 21 at 33-34; *Williams v. Williams* (1974) 3 D S.C. 83; *Adepoju v. Awoduyilemi* (1999) 5 NWLR (Pt. 603) 364.

It is therefore my view that upon the premise of what I have said above in respect of the pleadings of the appellants, this issue must be resolved against the appellants. E

Issue 3

Whether the failure of the Court of Appeal to nullify the Presidential election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and partiality for failing to produce F election results was proper in law.

The arrowhead of the complaint of the appellants/cross-respondents in respect of this issue is the following statement made by Tabai, JCA., who delivered the majority judgment of the Tribunal. It reads:-

"The brazen refusal to produce the result and other documents specified in the subpoena is a negation of INEC's claim to neutrality and impartiality. It is settled law that a party should not be allowed to derive G benefits from his own wrongs, lest the law becomes an instrument of injustice. See African Petroleum Ltd. v. Owodunni (1991) 8 NWLR (Pt. 210) H 391 at 421."

Therefore, having regard to the above quoted dictum, learned counsel then submitted that the Tribunal had not only found that the 3rd

respondent was biased but had rejected the case, however presented, of non-bias by INEC. It is the further submission of learned counsel that upon the basis of that dictum, the Tribunal should have invalidated the entire Presidential election. In the view of learned counsel for the appellants, the tribunal by that holding had shown that the 3rd respondent was in breach of one of the twin pillars of justice namely, *nemo iudex in causa sua*. In support of this submission, he referred to a number of cases which included *Adigun v. Attorney-General Oyo State* (1987) 1 NWLR (Pt. 53) 678 at 709; *Hart v. Governor of Rivers State* (1976) 11 S.C. (Reprint) 109; (1976) 11 S.C. 211.

It is therefore the submission of learned counsel for the appellants/cross-respondents that in the circumstances of the finding that the 3rd respondent had negated its claim to neutrality and impartiality; the only option to the Tribunal was to invalidate the election. And he further argued that as the election had not been conducted in accordance with the principles of the Act, urged this court to resolve this issue in the negative, grounds 1 & 14 of the grounds of appeal and allow the entire appeal.

The 1st and 2nd respondents in their brief answered the complaints under their issue (1). It is the submission of their learned counsel that the holding of the tribunal leaves none in doubt that it is limited to the conduct of the case but does not extend the conduct of the election. Learned counsel then argued that it is not available to the appellants to construe the holding as covering the conduct of the whole election. It was not the case of the appellants to find that the 3rd respondent was biased in the conduct of the election because the 3rd respondent did not produce the result of the election to them. Learned counsel furthermore argued that the appellants cannot seek to take advantage of that holding as helpful to their case beyond the scope of the decision of the court. And cited in support of his submission *Awojugbagbe Light Industries Ltd. v. Chinukwe* (1995) 4 NWLR (Pt. 390) 379 at 427.

It is also the submission of Chief Afe Babalola, SAN., learned counsel for the 1st and 2nd respondents/cross-appellants that the failure of the 3rd respondent to produce a document which it was subpoenaed to produce cannot rightly, lawfully and procedurally lead to a finding

of partiality and non-neutrality. Subpoena, argues learned counsel, is a court process commanding any person to attend the court and produce a document or evidence before the court. The effect of failure to answer the subpoena does not lead to an adverse finding against the party.

Finally, in order to show that the appellants were making a mountain out of molehill, it is submitted by learned counsel for the 1st and 2nd respondents that by their petition, the 1st and 2nd appellants had specifically pleaded the votes cast in favour of each of those who took part in the election and included the votes cast for the 1st and 2nd appellants. The 1st and 2nd appellants/cross-respondents therefore did not need the result from the 3rd respondent to prove their case.

Finally, it is submitted for the 1st and 2nd appellants/cross-respondents that the holding of the Tribunal does not amount to adverse findings with regard to the conduct of the election by the 3rd respondent. And it does not also fall within the precinct of issues raised by the 1st and 2nd appellants. He therefore, urged the court to resolve the issue against the appellants/cross-respondents.

E. O. Sofunde, SAN., learned counsel for the 3rd, 6th-256th respondents, for his part, argued that the holding of the Tribunal is an obiter dicta and being an obiter dicta, it is not appealable and it should not be entertained. In support of this submission, we were referred to the following authorities, *Buknor- Macleans & Anor v. Inlaks Ltd.* (1980) 8-11 S. C. (Reprint 1); (1980) All NLR (Reprint) 184 at 193 and *Adesokan & Ors v. Adetunji* (1994) 5 NWLR (Pt. 346) 540 at 564.

It would be recalled the contention of Chief Afe Babalola, SAN., learned counsel for the 1st and 2nd respondents, when he made the point that the holding of the Tribunal was in respect of the case and not in respect of the conduct of the election. Hence, he argued that it was not the focus or the prayer of the appellants to fault the election result on the ground that the 3rd respondent was unfair for its failure to produce the results of the election. The holding can properly be described as an obiter dicta as per the observation of Ogundare JSC., in *Adesokan & Ors. v. Adetunji & Ors* (supra) where at page 564, he said:-

“.... one point to be observed is that the above passage was not

one of the reasonings for the decision of the court to strike out the reference for incompetence, that is, it was not a ratio decidendi in the case. It was an observation made by the court, going beyond what was necessary to the decision and laying down a rule not necessary for the purpose of the case. Statements like the above passage which are men passing remarks are known as 'obiter dicta' and they have no binding authority....."

With the above principles in mind, it is clear that the holding in dispute in the instant case has not been shown to be part of the case of the 1st and 2nd appellants. The holding was an observation made by learned Justice of the Tribunal. As nothing turns on the observation, it is my view that nothing turns on it and should be regarded as an 'obiter dicta'. For the above reasons. I must resolve the issue against the appellants.

Issue 4

Whether the Court of Appeal's conclusion that non-compliance with Section 67 (3) of the Electoral Act was not proved is sustainable considering the express provisions of the section, the pleadings of the parties and the totality of evidence on record on the point. (Grounds 8 & 9)

Earlier in this judgment, I have had the opportunity of considering extensively the provision of Section 67 (3) of the Electoral Act. I do not therefore deem it necessary to repeat here what I have earlier said. It is sufficient to say here that this issue fails for the reasons already given.

Issues Nos. 5 & 6

The question for consideration under these issues are:

Whether the failure of the Tribunal to invalidate the Presidential election after holding that Sections 18 and 40 (1) of the Electoral Act, 2002, were breached in the conduct of the election was proper.

For the determination of the question raised above. I will begin with the consideration of Section 18 of the Electoral Act, 2002, and which reads thus:

"All Electoral Officers, Presiding Officers and Returning Officers shall affirm or swear an oath of Loyalty and Neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interest of the

Federal Republic of Nigeria without fear or favour."

Now, bearing in mind the above quoted provisions of Section 18 of the Electoral Act, and the hard evidence of what transpired in the course of the trial concerning the election, the learned Justice of the Tribunal said as follows at page 2417 of the printed record:-

"In my assessment, the evidence clearly preponderates in favour of the petitioners' assertion in paragraph 11 of the petition that not every Electoral Officer, Presiding Officer and Returning Officer who participated in the conduct of the election was subjected to the affirmation and oath of loyalty and neutrality. I find as a fact that the 3rd respondent did not comply with Section 18 of the Electoral Act, 2002."

Further in the said judgment, the learned Justice of the Tribunal then said:-

"I am not unmindful of the fact that the duty imposed on the officers by Section 18 of the Electoral Act is mandatory. But the said section falls short of spelling out the consequences of a breach. And so the section should be construed in the spirit and necessary intendment of the entire Electoral Act."

The learned Justice of the Tribunal, after further consideration of the questions raised before him then referred to Section 135 (1) before holding as follows:-

"It is my view from the above provisions therefore that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to be invalidated."

Learned counsel for the 1st and 2nd appellants then distilled from the above quoted portions the judgment of the learned Justice of the Tribunal the following:-

- (a) That there was non-compliance with Section 18 of the Act.
- (b) That the provision not complied with is mandatory.
- (c) That the Act did not provide consequence for its breach.
- (d) That Section 4 (1) of the Oaths Act applied to save the acts of the officers, and
- (e) That there was need for petitioners to lead evidence that the

non-compliance affected the result of the election.”

And further submitted that while points (a) and (b) of the points distilled above are correct in fact and in law, points (c), (d) and (e) are legally erroneous.

B In respect of Section 40 (1) of the Electoral Act, which reads, thus:-

C *“Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the constituent in which his name is registered with his voter’s card.”*

The learned Justice of the Tribunal held as follows:-

D “There was however no evidence of the number of such votes by people without voter’s cards and the units in which such votes were cast. In the absence of such evidence, the effect of such votes on the election in a Unit, Ward, Local Government (sic) or State cannot be ascertained. This court cannot, by mere speculation as to the probable effect of such unlawful votes, cancel the election. In the event, I hold that there is no proof of the ascertainable number of votes recorded in violation of Section 40 (1) of the Electoral Act, 2002 substantial enough to warrant a nullification E of the election.”

F It is the contention of learned counsel for the 1st and 2nd appellants/cross-respondents that the tribunal fell into error in its application of Section 40(1) of the Electoral Act, by holding that there is no proof of the ascertainable number of votes recorded in violation of Section 40(1) and that are substantial enough to warrant a nullification of the election. That holding, submits learned counsel, is the direct opposite of what the position of the law is on the subject. It is therefore, submitted for the appellants that this court should reverse that holding of the Residential G Electoral Tribunal, citing in support, the case of Uor v. Loko (1988) 2 NWLR (Pt. 77) 430 at 441.

H It is also the submission of learned counsel for the appellants that the provisions of Section 18 are mandatory, yet it did not provide any consequences for non-compliance, though the Tribunal went on to state that the section should then be construed in the spirit and intendment of the entire Electoral Act. But though that was the proper approach, argues learned

counsel, yet the Tribunal failed to construe the section accordingly. He therefore, argued that the Tribunal failed to decide the section as envisaged by the Electoral Act. So also, argued the appellants, the Tribunal applied wrongly Section 134 (1) to come to its decision and also the provisions of Section 4(1) of the Oaths Act. B

After referring to Swen v. Dzungwe (supra), learned counsel for the appellants then argued that the Tribunal after hearing evidence from both sides found itself unable to determine whether or not Sections 18 and 40 (1) of the Electoral Act affected the result of the election; the C Tribunal should have allowed the petition. He therefore, urged this court to so hold, and resolve both issues in favour of the appellants and also allow the appeal.

D Chief Afe Babalola, SAN., for the 1st and 2nd respondents argued the issues under consideration under Issue 3 in the 1st and 2nd respondents’ brief. The short point made in that brief is that, where an allegation of substantial non-compliance with the Electoral Laws or Regulations is made, the onus is on the petitioners to show that such allegation of non-compliance has substantially affected the result of the election. In E support of this submission, reference was made to the following authorities: Ibrahim v. Shagari (1983) 2 SCNLR 176; Akinfosile v. Ijose (1966) SCNLR 447; Gbe v. Esewe (1986) 4 NWLR (Pt. 89) 435; Abibo v. Tamuno (1999) 4 NWLR (Pt. 559) 334; Anazodo v. Audu (1999) 4 NWLR (Pt. F 600) 530; Election Law and Practise by Afe Babalola. Learned counsel also submits on the authority of the decision of this court in Awolowo v. Shagari (1979) 6-9 S.C. (Reprint) 37; (1979) 12 NSCC 87, 123 that before a petition can succeed on the ground of non-compliance with the G provisions of the Electoral Act, the petitioners must prove not only that there was non-compliance with the provisions of the Electoral Act, but that the non-compliance substantially affected the result. Reference was also made to Section 135 (1) of the Electoral Act, 2002. And upon these H arguments, learned counsel urged that the issue be resolved against the appellants.

As the arguments offered for the 4th and 5th respondents in their brief are in accordance with that reviewed for the 1st and 2nd respondents

which I have reviewed above. I therefore, do not need to state again the argument of A. O. Eghobamien, SAN., for the 4th and 5th respondents. The submissions will of course be considered in determining the questions raised.

B Mr. E. O. Sofunde, SAN., learned senior counsel for the 3rd, 6th-265th respondents, submitted in their brief that Sections 18 and 40 (1) of the Electoral Act, cannot be construed without considering the provisions of Section 134 (1) (b) and Section 135 (1). In other words, argues learned counsel, for an election questioned under Section 134 (1) (b) to be invalidated, the onus lies on the appellants to have established:

“(a) *The substantial non-compliance; and*

(b) that it did or could have affected the result of the election.”

D He further submitted that it is only if the appellants established the foregoing that the onus would have shifted to the respondents to establish that the result was not affected.

Earlier in this judgment, I have set down the provisions of Sections 18 and 40(1) of the Electoral Act. If carefully read, it should be clear that they only prescribe in respect of Section 18, that all Electoral Officers, E Presiding Officer and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality indicating they would not accept bribe or gratification in the discharge of the duties of their office. And Section 40(1) states simply that every person intending to vote shall present himself to F a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter’s card. It is only necessary to observe that these are rules enacted into the Electoral Act and others of the same kind for the purpose of conducting an election. These provisions do not by themselves invalidate an election if breached, as a complainant in G respect of the conduct of an election would have to question the election in accordance with the provisions of Section 134 (1) of the Electoral Act. Its provisions read thus:

“An election may be questioned on any of the following grounds, that is to say:

H (a) *That a person whose election is questioned was at the time of the election, not qualified to contest the election;*

(b) That the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act;

(c) That the respondent was not duly elected by majority of lawful votes cast at the election; or

(d) That the petitioner or its candidate was validly nominated but B was unlawfully excluded from the election.”

And it is only under the provisions of Section 135 (1) that the Act stipulates when an election may be invalidated. It reads:

“S. 135(1) *An election shall not be liable to be invalidated by C reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.*”

To begin with, I think that the learned counsel for the appellants D cannot be right in his submission that the learned Justice of the Tribunal was wrong to have considered the provisions of Section 134 (1) in the course of determining whether the breaches of Sections 18 and 40 (1) alleged in the petition should have compelled the Tribunal to invalidate the election. E This is because Sections 18 and 40 (1) as already stated were designed to stipulate what must be done by those charged with duties connected with the conduct of an election, and what the voters should do pursuant to their intention to vote. And if a petitioner believes that there have been F breaches in the conduct of the election, then the breaches would have to be questioned under any or all of the relevant grounds set out in Section 134 (1). It is also clear that it is to the provisions of Section 135 (1) that the Tribunal or court would turn if the questions raised in the election G petition had to do with whether the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act.

Its provisions is similar to Section 135 (1) that fell for consideration in the following cases: Swen v. Dzungwe (supra); Ibrahim v. Shagari (1983) 2 SCNLR 176; Akinfosile v. Ijose (supra); Awolowo v. H Shagari (supra). However, it is sufficient to state that it is clear from all the relevant authorities that before a petition can succeed on the ground of non-compliance with the provisions of the Electoral Act, the petitioners

must prove not only that there was non-compliance with the provisions of the Electoral Act but that the non-compliance substantially affected the result of the election. In *Awolowo v. Shagari* (supra), Obaseki, JSC., quoted with approval the dictum of Lord Coleridge in *Woodward v. Sarsons*

B (1875) LR 10 at p. 733 as follows:-

“If this proposition be closely examined it will be found to be equivalent to this, that the non-observance of the rules or forms which is to render the election invalid, must be so great as to amount to a conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters, or in other words, the result of the election.”

D And it is also elucidating to refer to the observation made by Obaseki, JSC, on the above dictum of Lord Coleridge:

His Lordship, Obaseki, JSC, said:-

“When Lord Coleridge refers to a majority of voters, he cannot mean to say that non-compliance may be overlooked unless it affects over half of the votes cast. He referred to a non-compliance which “affected the majority of voters or in other words, the result of the election.” It cannot be doubted that here Lord Coleridge means that those electors wishing to vote who formed a majority in favour of a particular candidate - must have been prevented from casting a majority of votes in his favour with effect. This does not require that all their votes must have been disallowed; it will be sufficient if enough of their votes are disallowed to give another candidate a majority of valid votes.”

G *From the above observation of Obaseki, JSC., it can be deduced that it is not only evident that the provisions of Sections 18 and 40(1), and indeed other rules enacted into the Electoral Act were breached, but it must also be proved by the petitioners that as a result, the electors which formed a majority wishing to vote for them have been prevented from casting a majority of votes in their favour. And as was said above, “This does not require that all their votes must have been disallowed; it will be sufficient if enough of their votes are disallowed to give another candidate a majority of valid votes.”*

It follows from what I have said above that it is simply not enough to prove that breaches of the rules enacted into the Electoral Act, and other rules made for the conduct of the election were breached, the appellants as in this case must go further to prove that such breaches prevented the majority voters from casting their votes in their favour. B

On the issues raised, the appellants have failed to satisfy the Tribunal that the election be invalidated for the alleged breaches of Sections 18 and 40 (1) and this court that the non-compliance has affected the result of the election or has prevented a majority of votes in their favour with effect. C

Issue No. 7

Whether the Court of Appeal was not in error by failing to invalidate the Presidential election considering the specific and uncontroverted evidence of bias or likelihood of it in the INEC and Resident Electoral Commissioners in the twelve States of the Federation. D

On this issue the first contention made for the appellants is that as the 3rd respondent was biased and lacking in neutrality and therefore lacking in impartiality, the Presidential election should have been invalidated. This aspect of the complaint had earlier been considered and resolved against the appellants. I do not therefore need to revisit it here. E

The second question raised under this issue relates to allegation of bias or likelihood of it by reason of the fact that the 1st respondent F appointed as Resident Electoral Commissioners (REC) members of the PDP the political party to which he belongs so as to guarantee for himself their bias and loyalty in the conduct of the election. These allegations were pleaded in paragraphs 14 and 15 of the petition. Furthermore, they G pleaded in sub-paragraph 14(1) that:

“The petitioners shall lead evidence to show further elements of bias in the Independent National Electoral Commission all over the country whether herein pleaded or not.”

H In support of the allegation pleaded in the aforesaid paragraphs of the petition, the appellants gave evidence through P.W.s 94, 97, 110, 117, 136 and 139. With regard to P.W.94, the evidence given by this witness may be classified thus:-

(a) Almost all the officials who were to be engaged during the election were not those on the original list displayed but they were PDP members.

(b) The REC of Kogi State was a card carrying member of the B PDP.

Obviously, the appellants to succeed ought to have led direct evidence and not hearsay evidence. They couldn't also tender the original list, which they pleaded and alluded to in their pleadings. It is in my C view manifest that a careful perusal of the evidence of the other witnesses called on this point by the appellants show that they consist mainly of hearsay evidence. See *Management Enterprises Ltd. v. Otusanya* (1987) 18 NSCC (Pt. 65) 577 and *Okpara v. Federal Republic of Nigeria* (1977) 4 S.C. (Reprint) 31; (Vol.II) 1977 NSCC 166. It is of course settled law D that hearsay evidence is not admissible to prove a fact or matter. "It is not also of assistance to the appellants to contend that the allegations in paragraph 15 of the petition was not traversed by paragraph 18 of the 1st and 2nd respondents' reply. This is because the legal position is that before E a court can decide whether or not there is an admission in the Statement of Defence or reply to a petition in respect of an averment in a Statement of Claim, the entire pleadings of the parties as a whole must be considered. See *Lion of Africa Insurance v. Fisayo* (1986) 4 NWLR (Pt. 37) 674; *Attorney-General of Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 F NWLR (Pt. 66) 547 at 560. If the appellants had considered the pleadings in the light of the above observation upon the state of the law, they would have refrained from making complaints on this point.

With regard to the complaint that some Resident Electoral Commissioners were members of the PDP, it is necessary to refer to Sections G 17(2) and 19 of the Electoral Act. It is manifest that Section 17 (2) provides that no person who is a member of a political party or who has openly expressed support for any candidate shall be appointed into any position for the purposes of registration of voters or election under this Act. And in Section 19, the provision is to the effect that "the Commission shall H for the purpose of an election under this Act, appoint such other officers as may be required provided that they shall not be registered members of

any political party."

It is my humble view that in the determination of this question, the Tribunal has to consider whether the appellants established the onus placed on them to prove the allegations they have made. As I have already observed in my consideration of "Issue 6", the appellants needed not only B prove these allegations but ought to also show how the conduct of these persons prevented majority votes cast by their voters who wanted to cast their votes for them.

In the case in hand, the Tribunal rightly found that the evidence tendered by the appellants to establish that some Resident Electoral Officers were members of the PDP was not credible enough being for the most C part hearsay evidence. One should have expected that their membership card of the political party in question would have been tendered. The poster and minutes of meeting tendered as Exhibits 234 and 235 respectively in respect of the 19th respondent relate to the events of 1999. And D more directly to the point is the absence of any evidence of bias on the part of the Resident Electoral Officers. This situation brings to mind the saying that there is no way in which the mind of a person can be discerned E from his face. It is therefore necessary to have evidence that shows that his conduct in every ramification of the word betrayed that he showed or had been showing preference for the respondents. Having regard to all I have said above, this issue lacks merit and I so hold. F

Issue No. 8

Whether the failure of the Tribunal to apply Section 149 (d) of the Evidence Act against the 3rd respondent for failing to produce the letter of protest in Cross River State for which notice to produce had been given G was proper in law?"

Now, I must, and with due respect, ask how far the answer to this question, even if given in the affirmative would assist the appellants in the resolution of their main aim which is to advance such argument as would lead the court to overturn the judgment against which they are appealing. H I should have thought that the principle long established is that an appellant should concentrate on and advance argument upon clear breaches of the law that would advance the merit of his appeal. Be that as it may,

this issue arose from the consideration of the conduct of the election in Cross River State. In the course of his evidence before the Presidential Election Tribunal, P.W. 134 spoke about the broadcast on Cross River State radio concerning the alleged disqualification of the ANPP gubernatorial candidate. Chief John Okpa the evidence which was admitted but later in the judgment the Tribunal ruled that in the absence of a letter of protest written by Chief John Okpa dated 19/4/03, the assertion about the radio broadcast is not sufficient proof of the allegation. This was sequel to the “Notice to Produce” served by the appellants. The complaint of the appellants is against the ruling of the Tribunal that the alleged broadcast is not sufficient proof of the allegation made by the appellants.

The tribunal in my humble view correctly stated the law when it said that a party on whom notice to produce is served is under no obligation to produce the document named therein. Such notice plus the failure to produce the document named therein merely enables secondary evidence of the document to be given. It therefore cannot be correct that the provision of Section 149 (d) of the Evidence Act can be brought in aid. That section does not relieve a plaintiff of the burden of producing the document or probing its contents. See *Union Bank of Nigeria v. Alhaji Muhammadu Idirise* (1999) 7 NWLR (Pt. 609) 105 at 118-119; *Gbadamosi v. Kabo Travels Ltd.* (2000) 8 NWLR (Pt. 668) 243 at 273. “In any event, the letter was merely one of protest. And as I have observed, I cannot see its relevance to the case being presented to the Tribunal. It follows that as I see no merit in this issue, it is refused.

Issue No. 9

Whether the Tribunal’s non-application of the provisions of Section 129 of the Electoral Act, 2002, against the 1st and 2nd respondents was proper having regard to the pleadings, evidence on record and the findings of the court on intimidation and violence.

The starting point for the determination of this question is of course the provisions of Section 129 of the Electoral Act, it reads:-

“S. 129. A person who-

(a) directly or indirectly, by himself or by another person on his behalf, makes use of or threatens to make use of any force, violence or

restraint;

(b) inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm or loss on or against a person in order to induce or compel that person to vote or refrain from voting, or on account of such person having voted or refrained from voting; or

(c) by abduction, duress, or a fraudulent device or contrivance, impedes or prevents the free use of the vote by a voter or thereby compels, induces or prevails on a voter to give or refrain from giving his vote:

(d) by preventing any political aspirants from free use of the media, designated vehicles, mobilization of political support and campaign at an election,

commits the offence of undue influence and is liable on conviction to a fine of N100,000 or imprisonment for twelve months, and shall in addition be guilty of corrupt practice under Section 133 of this Act and the incumbent disqualified as a candidate in the election.”

The appellants’ case on this issue is that by their pleadings and evidence they established numerous acts of undue influence by the 1st and 2nd respondents. But the Tribunal, though it accepted the evidence led by appellants, declined to nullify the election. In this regard, let me quote the relevant portion of the judgment of the tribunal at pages 2480-2481 of the record. It reads:-

“Let me comment on the allegations of perpetration of violence either by PDP thugs in the presence of military and police personnel or by the military and police personnel themselves. These are pleaded in paragraphs 14(c) and (g), 19 and 20 of the petition. And I have already referred to some instances in this judgment. There were instances of some violence in all the 14 States which elections were questioned in this petition. I have already referred to the alleged incident where the Tribunal Chairman of Ahiazu/Mbaise LGA of Imo State, Mr. Chidi Ibe, struck the head of Mr. Anthony Dimugwu with the butt of the gun and which sent him critically injured and unconscious. He regained his consciousness only after about two weeks in a hospital in Italy. From Ebonyi we heard the story of how one Anthony Nwudo, the secretary to ANPP in Ezza North LGA of Ebonyi State was killed by PDP youths and his body taken to the residence of

one Idoh to deter him from his bid for councillorship under the platform of the ANPP. From Kogi State we also heard the evidence of how youths wearing PDP “T” shirts and face caps went into the Olokoba polling station firing gun shots leaving in their trailed (sic) 3 young persons dead, B and from Enugu State we heard the case of how police Sgt. Anthony Abba, one of the six policemen attached to the ANPP Gubernatorial candidate was killed at the premises of the ANPP Chairman of Igbo Eze North LGA by some men amongst whom was Mike Onu, a PDP stalwart, instances C of such brutal killings either immediately before or on the 19/4/03 are numerous. These allegations were in most cases not controverted. The victims were almost invariably members or supporters of ANPP or some innocent passers by (sic). And the most tragic and disturbing aspect of the incidents is that these incidents either happened in the presence of D policemen and solders or immediately reported to them. No arrests were made and no investigations. In the case of alleged killing of police Sgt. Anthony Abba, 14 PDP thugs and the transition Chairman of the LGA were arrested, but were released the following day.”

There can be no doubt that the above quoted excerpt reveals E various acts of violence, but it did not prove that the 1st and 2nd respondents directed the nefarious activities disclosed in it. However, it must be noted that the argument of the appellants is that the 1st respondent had the constitutional authority to give directives to the army and the police. F That fact cannot however be used to infer that once the army or police act, they must have acted under the authority of the 1st respondent. It is my view that for the 1st respondent to be held responsible for such activities, there must be evidence to prove under whose authority they acted. Moreso because the presumption of regularity under Section 150 of the G Evidence Act applies only to acts shown to have been done in a manner substantially regular.

While there can be doubt that the acts found by the Tribunal are grim and despicable with the perpetrators of these act of violence. I accept the submission of learned counsel for the 1st and 2nd respondents that H irregularities at an election which are neither the act of a candidate nor linked to him cannot affect his election. Therefore, an elected candidate

cannot have his election nullified on the ground of corrupt practices or any other irregularity committed in the process of the election unless it can be proved that the candidate expressly authorized the illegality. See Oyegun v. Igbinedon (1992) 2 NWLR (Pt. 226) 747 at 759-760; Agomo v. Iroakeji (1998) 19 NWLR (Pt. 568) 173; Egbe v. Etchie (1955-1956) B WRNLR 134; Keiti v. Isa (1965) NNLR 17; Obasanjo v. Buhari (2003) 11 S.C. 1;(2003) 17 NWLR (Pt. 850) 510 at 578.

As there is no scintilla of evidence to connect the 1st and 2nd respondents with the findings of the Tribunal, I must hold that there is no C merit in this issue. It is accordingly refused.

Issue No. 10

Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas on the ground that such Local Government Areas were not specif- D ically pleaded was proper in law.”

The substance of the complaint of the appellants in respect of this issue is that the Tribunal was wrong to have excluded evidence on matters E not pleaded. It must first be noted that a trial court may receive evidence during the course of the trial. But when the court in the consideration of its judgment found that some of the pieces of evidence earlier admitted were not pleaded, then the court has the duty to strike out such evidence F and such evidence would therefore not be considered in the determination of the dispute between the parties. See George v. Dominion Flour Mills (1963) 1 All NLR 70. In this regard, it is manifest that this petition was G tried on the pleadings filed by the parties. The relevant paragraphs of the petition are paragraphs 3, 4, 5, 10, 12, 12(a), 13, 14, 15, 16, 17, 18, 19, 20 and 20(a). A careful perusal of those paragraphs reveal that they contained H general pleas and since no particulars were given, the appellants could only give general evidence. This is because of the rule of pleading requiring particulars of misrepresentation, fraud, wilful default, breach of trust or any fact showing illegality and all other cases in which particulars may be necessary. Under the rules of pleading, it is settled law that where the facts are not specifically pleaded, the opposite party might be taken by surprise.

By virtue of paragraph 50 of the 1st Schedule which incorporates the provision of the Federal High Court (Civil Procedure) Rules 2000, its Order 26 Rules 5 and 6 thereof are apposite. In *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108 at pp. 143 to 144, Obaseki, JSC., said as follows:

B “....The allegations of falsification and inflation were made in such general terms that the court should not take notice of it. In *Wallingford v. Mutual Society* (1897-1880) 5 App. Cas 687 Lord Selbourne said at p. 697

C ‘With regard to fraud, if there be any principle which is perfectly well settled, it is that general allegations however strong may be the words in which they are slated are insufficient even to amount to an averment of fraud of which any court ought to take notice.’”

D In the case in hand, it is very clear that the appellants in the several averments that are germane to the questions raised in this issue made general pleas in paragraphs 3-20 of their petition. It is therefore my view that the Tribunal was right to have refused to consider matters which were not specifically pleaded.

E Though they have now on appeal raised rulings of the Tribunal which gave contrary directions, I do not in my humble view consider that that aspect of the trial can be used to override the general and well settled principles of pleading that parties must specifically plead matters on which they intend to lead evidence to prove their claim. Finally, on the authority F of the decision of this court in *Obasanjo & Anor. v. Buhari & Ors* (2003) 11 S.C. 1: (2003) 17 NWLR (Pt. 850) 510 at 576 that non-joinder of necessary parties to an action is fatal to the success of the case of plaintiff against such parties. In this appeal, the appellants clearly failed to join as G parties those against whom they made several allegations of malpractices, etc., in the conduct of the election. Having not joined them in the action. I do not see how the judgment of the Tribunal can be faulted in all the circumstances of the case.

This issue fails and it is refused. Issue No.11

H Whether the Presidential Election should have been invalidated on a balance of probability.

The appellants have not proffered any argument on this issue and

accordingly it is deemed abandoned. *Are v. Ipaye* (1986) 5 NWLR (Pt. 29) 416 at 418; *Ajibade v. Pedro* (1992) 5 NWLR (Pt. 241) 259.

Issue No. 12

Whether there was no evidence proffered on Imo State that can substantially affect the election.

Here the appellants contend that contrary to the finding by the Tribunal at p. 2473 of the record that “there is no evidence from Imo State that can substantially affect the election in Imo State, there was indeed overwhelming evidence to that effect. In support of this contention, appellants referred to the testimony of P.W. 23, P.W.45 and P.W.97, C destruction of INEC Office on election, burning of Ahiazu Mbaise L.G. headquarters, the burning of the house of PDP chieftain in Ideato North and letter Exhibit 30 as establishing various acts of election malpractices sufficient to invalidate the election. In the judgment, Tabai, JCA., who D read the majority judgment, declined to invalidate the election upon the evidence led by the appellants. There can be no question that malpractices were established as claimed but the real question is whether they were such as to invalidate the election. I have earlier in this judgment considered the provisions of Section 135 (1) of the Electoral Act, 2002, and had reached the conclusion that the mere occurrence of acts of malpractices without more cannot lead to the invalidation of the election. As I do not intend to revisit my earlier decision on this point, I say no more. The letter F Exhibit 30 dated 28th day of April, 2003, written by the Resident Electoral Commissioner admitting some irregularities in the conduct of elections in Imo State Presidential and Governorship elections may properly well be true, but it is of no assistance without the real evidence in support of the G confessional letter.

The issue lacks merit.

Issue No. 13

Whether the Tribunal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived H non-joinder of necessary parties.

The question under this issue must be considered in the light of the provisions of Section 133 (2) of the Electoral Act, 2002, which reads:-

“The person whose election is, complained of is, in this Act, referred to as the respondent, but if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as is necessary.”

The above provision came up for consideration in this court in *Obasanjo & Anor v. Buhari & Ors* (2003) 11 S.C. 1 ;(2003) 17 NWLR (Pt. 850) 510 at 576. This court affirmatively held that such persons described in the said Section 132(2) of the Electoral Act must be joined as necessary parties where allegations are made against them in respect of the performance of the duties of the office held by them. It is therefore the duty of any one who wanted to establish any allegation to serve them directly and in personam. By so doing, such persons are given the chance to defend their conduct. It follows that as such persons against whom allegations were made by the appellants having not been joined in the action, the tribunal was right to have jettisoned whenever evidence were led against them.

This issue accordingly lacks merit.

Issue No. 14

Whether on the balance of probability the election in each of Adamawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross River, Edo, Rivers, Bayelsa and Imo States should not have been invalidated.

Adamawa State

In respect of this State, appellants argued that the Resident Electoral Commissioner was proved beyond reasonable doubt to have altered the results in Exhibit 238 in favour of PDP in the Governorship Election. That may well be. But that fact is only relevant to the governorship election and irrelevant in the presidential election under consideration.

Next, it is argued for the appellants that the Tribunal struck out the pleadings of the 1st and 2nd respondents. It is therefore further argued that the appellants needed only minimal evidence to establish their claim. This submission is in my humble view strange. I thought that the duty of the appellants remains the same and that is, to establish their claim before

the court. This is because the court has a duty to evaluate the evidence adduced to see if it is credible enough to sustain the claim. See *Ogundipe v. Attorney-General Kwara State* (1993) 2 NWLR (Pt. 313) 558.

After due consideration of the analysis of the situations of the other States namely, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross River, Edo, Rivers, Bayelsa and Imo, it is my considered view that there is no merit in the argument of the appellants in respect of this issue. The relief sought thereon is therefore refused.

Issue No. 15

Whether the Presidential Election ought not to have been invalidated having invalidated the election in Ogun State.

The purport of Section 134 (2) (b) of the Constitution of the Federal Republic of Nigeria, 1999, that stipulates that where there are more than two candidates a candidate shall be deemed to have been elected where he had not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States and the Federal Capital Territory, is that a winning candidate should have the required majority. Therefore, once he has attained that majority it cannot be argued that because there was no election in one State, the election must be voided unless the result in that State, had there been an election there, may have affected the election. It is submitted that the same reasoning must apply where there was election which was voided. The non-compliance was in Ogun State alone. In *Awolowo v. Shagari* (supra) where it was argued that the majority required under Section 34A of the Electoral Decree No. 73 of 1977 was not attained because of non-compliance in Kano State, at page 168, this Honourable Court held as follows:-

“I think that when the Decree speaks of “affecting the result” it means tilting the result in favour of the petitioner. In the presidential election, where the whole country constitutes the constituency, the onus on the petitioner is enormous and in the absence of any amendment to this provision of Section 111 of the Electoral Decree, no tribunal in any petition by a weak presidential opponent, can justifiably invalidate any election for non-compliance on a minimal scale.

There is no evidence that the non-compliance with Section 34A(1) (c) (ii) one of the provisions of Part II has affected the result i.e., but for the non-compliance, the petitioner would have won, to enable the tribunal declare the result invalid. The petitioner pleaded a substantial non-compliance i.e. failure to obtain one-quarter of the votes cast in each of at least two-thirds of all the States in the Federation. But the evidence established this non-compliance in only one State. In other words, the evidence established that the 1st respondent obtained in each of the 12 States one-quarter or more of the votes cast but did not in the 13th State-Kano State. The 3rd respondent claimed that 1st respondent received 25% of the votes in two-thirds of Kano State. There is no evidence of counting in two-thirds Kano State."

Issue No. 16

Whether the 1st and 2nd respondents' reply is a competent process.

The appellants here are seeking to persuade this court that the answer filed by the 1st and 2nd respondents was filed out of time because it was filed fourteen days after they physically appeared in court. This contention is predicated on their construction of the expression "entering an appearance" used in paragraph 12 (1) of Schedule 1 to the Electoral Act. This is apparently based on *Adegoke Motors v. Adesanya* (1989) 5 S.C. 113; (1989) 3 NWLR (Pt.109) 250. This case when read carefully recognizes two modes of appearing, not of entering appearance. With due respect, it was erroneous to suggest as did learned counsel for the appellants that the case recognized two modes of entering an appearance and physically appearing in court when the case is to be heard.

It is therefore clear that appearing in court as the 1st and 2nd respondents did, did not amount to "entering an appearance" within the meaning of the provisions of paragraph 12 (1). It is the delivery of the memorandum of appearance that amounts to entering an appearance. By so doing, on 30th May, 2003 and counting 14 days period from that day, the 1st and 2nd respondents' reply was duly filed on 13th June, 2003 and within time.

Clearly, this issue lacks merit.

Issue No. 17

Was the 1st respondent qualified to contest the election.

The question raised under this issue by the appellants is premised on the view held by the appellants that the 1st respondent had already been elected twice. This question had been considered and settled in *Ojukwu v. Obasanjo* (2004) 7 S.C. (Pt.1) 117; (2004) 12 NWLR (Pt. 886) 169. The unanimous decision of this court was that the 1st respondent was not disqualified by reason of Section 137 (1) of the 1999 Constitution from contesting the presidential election, 2003. Nothing in the argument of learned senior counsel is sufficiently persuasive for me to depart from the earlier decision of this court.

Issue No. 18

Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioner proffered evidence, and if it did, whether the misdirection did not occasion a miscarriage of justice.

The complaint of the appellants in respect of this issue stems from the words of the Tribunal at the conclusion of the trial. But before doing so it is necessary to point out that it is very misleading indeed for it to be stated in the appellants' brief that the tribunal held that there was no evidence adduced in respect of twenty two States. What the Tribunal said, reads thus:-

"Where no allegation is made and no evidence adduced on the conduct of the election in a State, the presumption of irregularity enures in its favour. In this case there was no specific allegation in the conduct of the 19/4/03 election in 22 States and my view is that the election in these States was regularly conducted and the ensuing results authentic."

This statement was made after the conclusion of evidence on specific allegations made State by State starting from page 2437. Prior to this, the court had considered specific irregularities that were alleged to have taken place nationwide. Therefore, the statement quoted above must be construed within the context of the review of all that transpired during the trial. It is therefore my considered view that the question raised is misconceived and there is no premise for considering whether a miscarriage of justice had occurred.

Cross Appeal

The 1st and 2nd respondents filed a cross-appeal against that part of the decision of the Presidential Election Tribunal delivered on the 20/12/04 in the presidential petition heard on appeal where their Lordships B invalidated the Presidential election held in Ogun State on 19/4/03. The star witness who appeared to have influenced the decision of the tribunal is one Chief Bisi Lawal. His evidence summarized by the Tribunal is at page 2469 of the record where the tribunal said as follows:-

C “At the trial, Chief Bisi Lawal was the star witness for the petitioners. He was the ANPP Governorship candidate for the elections of the 19/4/03. He also served as the coordinator for the elections of that day. According to him, every voter was issued with 2 ballot papers, one for the Presidential election and the other for the Governorship election. He D sent ANPP agents to each of the 3,210 polling units in Ogun State. He also sent some other ANPP field officers. At the close of the polls he got report from his agents and field officers that they were denied access to the unit results and that they were able to obtain the result from only 142 E polling units out of the total 3,210. And the votes scored by the 1st petitioner from these 142 units was 1,547. He tendered INEC results (Forms ECSAs) which were admitted in evidence as Exhibits A-A38, B-B14, C-C1, D-D21, E-E1, F-F24, G-G33, H and K-K6. He also tendered Exhibit ‘J’ for the Governorship election. The witness testified that from the F final result announced by the 3rd respondent, the 1st respondent scored 1,360,170 votes while the 1st petitioner was credited with only 680 votes. The same result showed that all the Governorship candidates together scored 747,296 votes with the PDP candidate scoring 449,335 votes. In his further analysis of the result he said the 1st respondent scored 618,071 G votes over and above all the votes scored by the Governorship candidates and more than 900,000 votes over the PDP Governorship candidate. He said he disagreed with these results because the 1st petitioner who had scored 1,547 votes from only 142 units results could not possibly have scored 680 votes from the 3210 units in the State. The P.W.1 concluded his evidences in the following terms:

H *‘The result that came out of the Presidential election in Ogun*

State was massively manipulated in favour of the 1st respondent, and substantially reduced for the 1st petitioner. The result from Ogun State is untenable and should be rejected by the court’.”

The other evidence material for consideration by the Tribunal in respect of this State are 2 INEC witnesses whose evidence were reviewed B on pp. 2470-2471. Then the tribunal, per Tabai JCA., then gave views on these 2 witnesses as follows:

C *“I must say that I am not impressed with the credibility of these two INEC witnesses. The 142 unit results in Exhibits A-A38, B-B14, C-C1-D-D21, E-E1, F-F24, G-G33, H, J and K-K6 are INEC documents and the witnesses cannot impugn the authenticity of these documents by producing alternative INEC documents.*

D *Besides each of the witnesses admitted under cross-examination that it is not indicated on their purportedly genuine results that the ANPP was also one of the contestant political parties in the election. What is indicated in all the result sheets produced is that only AD and PDP contested the election. The documents produced by the respondents are on their faces, manifestly defective and unreliable. And the two witnesses are E as unreliable as the documents they produced. Under cross-examination they admitted that they, in addition to their normal duties as Electoral Officers, also functioned as the Local Government Area Collation Officers and agreed that their performance of the duties as such collation officers F was contrary to the provisions of the Electoral Act, 2002, and the Regulations and Guidelines made thereunder. I reject their evidence. I believe the evidence of the P.W.1 and find as a fact that the documents tendered by him are the authentic INEC results for the 142 polling units.”*

G The learned Justice of the Tribunal then concluded his views which were shared by the other members of the tribunal who delivered the Tribunal judgment when he said thus:

H *“On the scores in these documents, if the 1st petitioner scored 1,547 votes from 142 polling units there can be no circumstance by which he would score less in the overall result from 3210 units of the State, and there is no way anybody can justify the 1st petitioner’s score of only 680 votes in the final result. I am satisfied that the petitioners have substan-*

tiated their assertion that the 3rd respondent and its agents manipulated the result of the presidential election in Ogun State in favour of the 1st and 2nd respondents against the 1st petitioner. In any election, the electoral officials have a duty to produce only the hard scores of the candidates.

B Any manipulation of the result by the arbitrary addition or subtraction to the scores of candidates produces a result different from that expressed by the electorate and such a manipulated result is liable to cancellation. The result of my finding in this case is that the Presidential election of 19/4/03 in Ogun State was not conducted in substantial conformity with the Electoral Act 2002, and same is accordingly nullified".

D It is manifest from the extracts of the judgment which I have re-produced above that the judgment that led to the decision of the Tribunal was clearly dependent upon evidence of Chief Bisi Lawal. But it is my humble view that if the Tribunal had examined more closely the evidence of this witness, even from his oral testimony, it should have been manifest that the witness was not speaking of what he saw and what he did on that day which he testified about. Clearly, his evidence was that of a person giving evidence about what he was told about the events of the day. This E was brought more clearly to the fore under cross-examination where he admitted quite clearly that he was never at any of the places where the elections were taking place. He was stationed where he was collating the events of the day. The evidence required to establish a crime must be evi- F dence of a witness who saw or heard or took part in the transactions upon which he was giving evidence. It is written law that hearsay evidence is not admissible for the purpose of establishing a crime. See Section 77 of the Evidence Act. If such evidence was admitted unwittingly, that evidence should not be acted upon by the trial court but if it did, an appellate court can overturn that judgment based on the finding that the finding of the G trial court was based upon inadequate evidence. See Rabi v. State (1980) 8-11 S.C. (Reprint) 85; (1980) 8/11 S.C. 130 and Ebba v. Ogodu (1984) 1 SCNLR 372.

H In the instant case, it is manifest that the judgment of the Tribunal per Tabai, JCA., preceded their evidence of Chief Bisi Lawal. His evidence for the most part as I have identified above was hearsay. It follows

therefore that the resolution of the Tribunal that the presidential election held on 19/4/03 in Ogun State was not conducted in substantial conformity with the Electoral Act, 2002 was based on inadmissible evidence. For that reason, it is my view that the judgment of the Tribunal ought not to stand. It is therefore set aside accordingly.

I also ought to refer to the appeal of the 4th and 5th respondents who also appealed against the judgment invalidating the election held in Ogun State in 19/4/03. I also will for the reasons given above uphold their appeal. In the result, the appeals of the 1st and 2nd respondents succeed and also that of the 4th and 5th respondents. I have also had the opportunity of reading the leading judgment just read by the Honourable. The Chief Justice of Nigeria, where he reviewed the arguments in respect of their appeals and I agree for the reasons given that their appeals be allowed. Similarly, I agree with him for allowing the cross-appeals. I also abide with him that the main appeal be dismissed for the fuller reasons given in the said judgment.

I abide with the orders made with regard to costs in the said judgment of the Honourable. The Chief Justice of Nigeria.

EDOZIE JSC

On 19th April, 2003, the 3rd respondent herein, that is, the Independent National Electoral Commission conducted throughout the country an election into the offices of the President and Vice President of the Federal Republic of Nigeria. The 1st and 2nd respondents who contested as President and Vice President respectively under the platform of the Peoples Democratic Party (PDP) were on 22/5/2003 declared to have won the election. In consequence, the 1st appellant who was one of the contestants for the office of President and the All Nigeria Peoples Party (ANPP) that sponsored him filed before the Court of Appeal an election petition challenging the results of the election. Pleadings were duly filed, exchanged and subsequently amended by the parties. In the 2nd and last petition with 294 paragraphs filed by the appellants as petitioners on 8/10/2004, the reliefs claimed as spelt out in paragraph 294 are the following:-

"Wherefore, your petitioners pray as follows:-

(a) *An Order of the court that the election is invalid for reasons of non-compliance with substantial sections of the Electoral Act, 2002.*

(b) *An Order of the court that the election is invalid for reason of corrupt practices.*

B (c) *An Order of the court that at the time of the election the 1st respondent was not qualified to contest.”*

IN THE ALTERNATIVE

C *“That the 1st respondent was not validly elected by a majority of lawful votes cast in the election and did not receive 25% of votes cast in two-thirds of the States of the Federation and the Federal Capital Territory, Abuja as required by the 1999 Constitution of the Federal Republic of Nigeria.”*

D At the trial, the petitioners called a total of 139 witnesses, the 1st and 2nd respondents called 100 witnesses while the 3rd - 268th respondents relied on 114 witnesses.

E After due trial, the parties by their counsel submitted written addresses and on 20/12/2004, the Court of Appeal dismissed the petition in a majority judgment (Nsofor, JCA., dissenting). By the majority judgment delivered by Tabai, JCA., the Court of Appeal held that although certain irregularities were found to have been established and certain results were cancelled for various reasons the irregularities and the cancellation of some results were not substantial to affect the overall election result. The court F upheld the qualification of the 1st respondent to contest the election and dismissed the petition.

G Against the judgment, the petitioners filed 41 grounds of appeal from which 18 issues were identified for determination. The 1st set of respondents, that is, 1st and 2nd respondents cross-appealed against, inter alia, the nullification of the presidential results in Ogun State and in some Local Government Areas, wards, polling units in Akwa-Ibom State, Rivers State, Bayelsa and Taraba States as well as the finding of non-compliance with Section 18 of the Electoral Act and the nullification of some provisions of the ‘Manual of Election Officials’ Exhibit “0”.

H In the same vein, the 3rd set of respondents, that is, the 4th and 5th respondents cross-appealed on the finding that the election in Ogun

State was manipulated. The 2nd set of respondents, to wit, 3rd and 6th to 268th respondents did not cross-appeal.

Pursuant to the main appeal and the cross-appeals, learned counsel for the parties filed and exchanged briefs of argument. It will be convenient to dispose of the main appeal by the petitioners before, if necessary, B a consideration of the cross-appeals.

As noted, the petitioners, herein appellants, filed 41 grounds of appeal on the basis of which 18 issues for determination were formulated. The 1st and 2nd sets of respondents in their respective briefs formulated C issues for determination. For brevity, I will adopt the 18 issues as formulated in the appellants’ brief for the consideration of the appeal. The issues will be treated seriatim and in sequence commencing with issue 1.

Issue No.1

D Whether the Court of Appeal properly interpreted Sections 135(1) and 67(3) of the Electoral Act, 2002 (Grounds 5, 7 and 25.)

I propose to discuss Section 67(3) first. It provides:-

“The Polling Agents shall certify the election materials from the office to the polling booth.” E

At p. 2422 of Vol.4 of the record of appeal, the section was interpreted in the majority judgment thus:-

“It is clear both from Section 67(3) of the Electoral Act and paragraph 13 of the petition that it was the Polling Agent who has authority F to certify document. And although it is not categorically so stated in the provision, it appears to me that certification was to be done either at the polling unit or at Ward Collation/Distribution Centre where materials were supposed to be handed over to the Presiding Offices. I came to that conclusion because from the evidence before the court the Polling Agent G carried out his functions only within the operational bases or areas of a Presiding Officer. And the operational base of the Presiding Office is either the polling unit or the ward collation/distribution centre where the election materials were to be delivered to him.” H

The contention of the learned senior counsel for the appellants, Chief M. I. Ahamba, SAN., is that the above interpretation is wrong and that it is very clear and unambiguous from the words of the section that

certification of election materials ought to start from the office of the 3rd respondent and to be concluded at the polling booths. The learned senior counsel for the 1st set of respondents. Chief Afe Babalola, SAN., and the learned senior counsel for the 2nd set of respondents (3rd and 6th to 268th respondents) E. O. Sofunde. SAN., disagree with that interpretation. I am in agreement with them. The expression “shall certify the election materials from the office to the polling booths” merely means that the materials coming from the office to the polling booths shall be certified. It does not spell out where the certification is to take place. The court below cannot be faulted in its reasoning that certification should be done at the polling stations or collation centres in view of the fact that it is the party agents that have the duty to carry out the certification and their operational bases were at the polling and collation stations.

Section 135(1) of the Electoral Act, 2002.

The section provides:-

“135 (1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election.”

The contention of Chief Ahamba, SAN., on the proper interpretation of the above section is that once non-compliance is established in an election, such an election would be invalidated without more. It is his view that if the petitioners allege and prove non-compliance, the burden shifts to the respondent to prove that the non-compliance did not substantially affect the result of the election failing which the petition must succeed. For this proposition, he relied on the following cases:- Basheer v. Same (1992) 4 NWLR (Pt.236) 491 at 509; Na’ Bature v. Mahuta (1992) 9 NWLR (Pt.263) 85 at 104, and the English case of Morgan v. Simpson (1975) QB 151, among others. Both Chief Afe Babalola, SAN., and Mr. Sofunde, SAN., maintained that for a petitioner to succeed on a ground of non-compliance, such petitioner must satisfy the court that:

- (i) the non-compliance is substantial;
- (ii) the non-compliance affects substantially the result of the

election.

No doubt, the case of Basheer v. Same supra, supports the appellants’ contention but in the case of Na’ Bature v. Mohuta, Tobi, JCA., (as he then was), observed that his decision in Basheer v. Same supra, was given per incuriam and stated that the correct interpretation of Section 42(1) of Decree No.18 of 1992 (in pari materia with Section 135(1) of the Electoral Act 2002) is that -

“An election shall not be invalidated by the sole reason that it was not conducted substantially in accordance with the principle of Decree No. 18 of 1992, unless such non-compliance has affected substantially the result of the election. In other words, the first limb of the subsection is parasitic on the second limb. Both limbs must be satisfied in their negative content before an election could be invalidated.”

In the case of Awolowo v. Shagari (1979) 6-9 S.C. (Reprint) 37; (1979) All NLR (Reprint) 120 this court at page 167 et seq held as follows:-

“Once a petitioner alleges a particular non-compliance and avers in his prayer that it was substantial, it is his duty to satisfy the court or tribunal having cognizance of the question. See Akinfosile v. Ijose 5 FSC 182 at 199 (a case dealing with Regulations 1958 which is in pari materia with Section 111 of the Electoral Decree, 1977 as amended).”

Referring to a dictum of Denning, MR., in the case of Morgan v. Simpson (supra) where he said:

“If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. That is shown by the case, Hackney case to 0’MRH 77 where two out of 19 polling stations were closed all day and 5,000 voters were unable to vote.”

Commenting on that dictum in Awolowo v. Shagari supra, Bello, JSC., as he then was, said:-

“It is doubtful whether the 1st proposition represents the State of the law in Nigeria.”

The case of Ojukwu v. Onwudiwe (1984) 1 SCNLR 247 is also apposite. At pp. 305 to 306 this court stated, inter alia.

“Part 11 of the Electoral Act 1962 deals with the procedure at

elections. In *Sorunke v. Odebunmi* 5 FSC 175 the Federal Supreme Court considered when an election could be invalidated for non-compliance with provisions of the regulations governing the election. It cited with approval the following observations of Lord Coleridge in *Woodward v. Garsons* 10 RACP 733 at 751:-

"If this proposition be closely examined, it will be found to be equivalent to this, that the non-observation of the rules or forms which is to render the election invalid, must be so great as to amount to conducting of the election in a manner contrary to the principle of an election by ballot, and must be so great as to satisfy the tribunal that it did affect or might have affected the majority of the voters or in other words the result of the election."

In the present case, the fact that the election as conducted in 86 of the 138 polling booths of the constituency in question was not found wanting, *prima facie* shows that there was substantial compliance with the provisions of Part 11 of the Electoral Act in the majority of the polling booths where the election took place in the constituency. The burden was therefore on the appellant to show that the non-compliance which applied to the 52 polling booths, as found by the learned trial Judge, actually vitiated the election in the constituency as a whole. That he failed to do."

In the light of the foregoing authorities, the position of the law appears to be that for an allegation of non-compliance with electoral provisions to sustain an election petition, the onus lies on the petitioner first to establish the existence of substantial non-compliance and secondly, to show that it did or could have affected the result of the election. In the instant appeal, the court at p.2420 of the record concluded thus:-

"It is my view from the above provision, therefore, that unless there is some proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to invalidation. I am, with respect, not persuaded by the argument of learned senior counsel for the petitioners that the non-compliance without more is sufficient to invalidate the election....."

That interpretation cannot be faulted.

Issue No.2

"Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150(1) of the Evidence Act in the judgment (Grounds 3, 13 and 30)

The section of the Evidence Act in issue provides:-

"150(1) When any judicial or official act is shown to have been done in a manner substantially regular; it is presumed that formal requisites for its validity were complied with."

The court below had cause to refer to and apply the above provision in reaction to the submission of Chief Ahamba, SAN., to the effect that once it is established by evidence that there was violence in a number of States, then the court may safely hold on the preponderance of evidence that there was wide spread violence in the election to justify the nullification of the whole election in the country. In response to that submission, the court below at p.3482 of the report commented thus:-

"My reaction is first to refer to the principle of presumption of regularity in Section 150(1) of the Evidence Act, 1990 and Swen v. Dzungwe (Supra). A petitioner must first allege and adduce some evidence of the existence of violence and other corrupt practices in a particular state to subject that state to the scrutiny of the court. Where no allegation is made and no evidence adduced on the conduct of the election in a State, the presumption of regularity enures in its favour. In this case there was no specific allegation of any wrong doing in the conduct of the 18/4/03 election in 22 States and my view is that the election in these States was regularly conducted and the ensuing results authentic."

The appellants contend firstly, that for presumption of regularity to be invoked, evidence of substantial regularity in the conduct of the election must be given and secondly, that the pleadings in paragraphs 4-20A of the petition and evidence led covered the 36 States and the Federal Capital Territory. In my view, the above reasoning and conclusion of the court below are unassailable. It is trite law that there is a rebuttable presumption that the result of any election declared by the electoral commission is correct and authentic and the burden lies on the party that disputes the correctness and authenticity of the result to lead rebuttal evidence. See *Nwobodo v. Onoh* (1984) 7 SCNLR 1. In *Omoboriowo v. Ajasin* (1984)

1 SCNLR 108, this court restated the correct position of the law thus:-

“Now as I stated in *Nwobodo v. Onoh* (supra), there is in law a rebuttable presumption that the result of any election declared by the Returning Officer is correct and authentic by virtue of Sections 115, 148(b) and 149(1) of the Evidence Act and the burden is on the person who denies the correctness and authenticity of the result to rebut the presumption. Where such denial is based on a mere complaint that the petitioner scored a majority of lawful votes the rebuttal needs only to be proved within the balance of probability.

In respect of the second contention about the number of States affected by electoral malpractices, the appellants mentioned specifically 14 States. It is an elementary principle that parties are bound by their pleadings and evidence not supported by the pleadings goes to no issue and must be discountenanced. *African Continental Bank Ltd. v. Attorney-General Northern Nigeria* (1967) NMLR 231 at 233.

The appellants having specifically mentioned 14 States as the areas where electoral malpractices occurred, evidence adduced in respect of States not pleaded went to no issue. The court below was therefore justified in invoking the presumption of regularity of the election in respect of the 22 States not specifically mentioned in the petition.

Issue 3

“Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law?”

This issue is predicated on a passage in the judgment of the court below where at page 2409 of the record it stated thus:-

“The brazen refusal to produce the result and other documents specified in the subpoena is a negation of INEC’s claim to neutrality and impartiality. It is settled law that a party should not be allowed to derive benefits from his own wrongs, lest the law becomes an instrument of injustice. See African Petroleum Ltd. v. Owodunni (1991) 8 NWLR (Pt.210) 391 at 421. However the issue pertains to burden of proof and shall be visited as and whenever necessary in the course of this judgment.”

The contention of the appellants is that the court below having by the above statement found the 3rd respondent biased and not neutral in the conduct of the election ought to have invalidated the election. Learned counsel for the appellants submitted that the consequence of the violation of the principle of natural justice in a decision is to render such a decision null and void citing in support the following authorities:-*The State v. Chief Magistrate, Ex parte Onukwue* (1978) 1 LRN; *Adigun v. A-G Oyo State* (1987) 1 NWLR (Pt.53) 678 at 709.

With respect, I see no merit in the appellants’ contention. This is because the statement of the court below quoted above relates to the conduct of the 3rd respondent in the course of trial for failing to produce documents used for the election in disobedience of the order of the court. But bias and lack of neutrality on the part of the 3rd respondent in the course of trial was not what the appellants pleaded and relied upon to void the election. In paragraphs 10, 14 and 15 of the amended petition, the appellants pleaded the bias and lack of neutrality of the 3rd respondent prior to and during the election of the 19th April, 2003. A court is bound to confine its decision within the limits of the scope of inquiry before it. In other words, a court has no competence to determine an issue beyond the scope of what was put in issue by the parties in their pleadings: see *Awojugbagbe Light Ind. Ltd. v. Chinukwe* (1995) 4 NWLR (Pt.390) 378, 427. It would, therefore, have been a grave error for the court below to have invalidated the election on the basis of allegations on which parties did not join issues. Furthermore, the finding of bias and lack of neutrality against the 3rd respondent for failure to produce election materials pursuant to a subpoena is not justified. Subpoena is a court process commanding any person to attend the court and produce a document or evidence before the court. The effect of failure to answer the subpoena does not lead to an adverse finding against the defaulting party. The appellant was entitled to issue committal processes or lead secondary evidence on the matter. It is, therefore, my view that quite apart from the fact that the statement of the court below under consideration cannot form the basis for voiding the election, the statement was uncalled for.

Issue 4

“Whether the Court of Appeal’s conclusion that non-compliance with Section 67(3) of the Electoral Act was not proved is sustainable considering the express provisions of the section, the pleadings of the parties and the totality of evidence on record on the point (Grounds 8 and 9)

B This issue derives from the complaint of the appellants as pleaded in paragraph 13 of their amended petition to the effect that election materials were not certified by party agents contrary to the provision of Section 67(3) of the Electoral Act, 2002. In their replies, the respondents pleaded C that facilities and opportunities were offered to the polling agents to carry out the certification of the election materials. The appellants called more than 60 witnesses to show that efforts by their agents to certify the materials was rebuffed beginning with the Resident Electoral Commissioners to the Electoral Officers at the Local Government Area Offices. In the D leading judgment of the court below, it held that appellants’ allegation of non-certification of the election materials was not established. Citing the cases of *Kate Enterprises v. Daewoo Motors* (1985) 2 NWLR (Pt.5) 116 at 129 and *Nnajofofor v. Ukonu* (1985) 2 NWLR (Pt.9) 686 as authorities that an appellate court save in matters of credibility of witnesses can E re-evaluate evidence on record if the trial court fails to do so, learned senior counsel for the appellants urged on us to hold that the allegation of non-certification of election materials was conclusively proved and that the respondents failed to prove that the opportunity for certification was F provided by the 3rd respondent.

In my view, what is crucial in the resolution of the issue is the proper interpretation of Section 67(3) of the Electoral Act, 2002. That has been dealt with under the first issue for determination in which I endorsed the interpretation of the court below to the effect that certification was G to be done by polling agents either at the polling unit or at the ward collation/distribution centres where election materials were supposed to be handed over to the Presiding Officers. It was therefore incumbent upon the appellants to call on their polling agents to testify that they were denied certification at the polling units or ward collation/distribution centres. This H they failed to do. At p.2423 of the record, the court below held:-

“At the trial, the petitioners called over sixty witnesses on this

allegation of non-certification of election materials. And the totality of the evidence was focused on the non-certification at the office of the Electoral Officer at the Local Government Headquarters. Almost all the witnesses complained that they were denied the opportunity of certifying the election materials, by the Electoral Officer. It is to be noted also that B all the witnesses, except six, were supervisory agents of the A.N.P.P. The petitioners were, therefore, at pains to prove a case different from that which they pleaded in paragraph 13 of the petition.”

I see no reason to fault that finding which to me is unassailable. C I reject the appellants’ contention that the finding is perverse and resolve issue 4 against the appellants.

Issues 5 and 6

Issue 5: Whether the Court of Appeal’s failure to invalidate the Presidential election after holding that Section 18 of the Electoral Act, D 2002 was not complied with was proper.

Issue 6: Whether the Court of Appeal’s failure to invalidate the Presidential election after finding that Section 40(1) of the Electoral Act, E 2002 was breached in the conduct of the election was proper.

For better appreciation of these issues let me begin by setting out the relevant provisions on which they are based.

(1) Section 18 of the Electoral Act provides:-

“All Electoral Officers, Presiding Officers, and Returning Officers F shall affirm or swear an oath of loyalty and neutrality indicating that they would not accept bribe or gratification from any person and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria without fear or favour.”

(2) Section 4(1) is in the following terms:- G

“Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is H registered with his voter’s card.”

The appellants led evidence to show and the trial court found as H of fact that the above provisions had not been complied with in that the electoral officials were not subjected to the affirmation and oath of loyalty and neutrality and that some voters voted without registration cards. In

declining to invalidate the election for the violation of Section 18 the court below held that by virtue of Section 4(1) of the Oaths Act the omission to subscribe to the oath did not affect the act of the electoral officers who are public officers, the section did not spell out the consequences of the breach of the section and that there was no proof that the non-compliance thereof substantially affected the result of the election relying on Section 135(1) of the Act. With respect to the non-compliance with Section 40(1) the court below held that there is no proof of the ascertainable number of votes recorded in violation of the provision substantial enough to warrant a nullification of the election.

In this appeal, the learned senior counsel for the appellants has submitted that all the reasons given by the court below in not invalidating the election for non-compliance with the provisions in question are not tenable in law. He referred to Section 134(1) of the Act which provides that an election may be invalidated as a result of non-compliance with the provisions of the Act including the provision of Section 18 of the Act. Reference was also made to Section 4(i) of the Oaths Act which learned counsel submitted did not apply to electoral staff who are merely ad-hoc officers and not public officers as defined by Section 318 of the 1999 Constitution.

Finally, learned counsel referred to Section 135(1) of the Electoral Act, 2002, and the case of *Swem v. Dzungwe* (supra) and submitted that once the non-compliance with Sections 18 and 40(1) of the Electoral Act, 2002, was established the appellants were entitled to have the election nullified.

Let me say straightaway that it is not disputed that in the conduct of the election, the 3rd respondent was in breach of the provisions of Sections 18 and 40(1) of the Electoral Act, 2002. What is in dispute is the legal consequences of the breach; does it without more lead inexonerably to the invalidation of the election? Section 134(1) of the Act sets out the grounds upon which an election may be questioned, one of which is that election was invalid by reason of corrupt practices or non-compliance with the provisions of the Act. But the makers of the law realizing that non-compliance with the provisions of the Act could occur in the conduct

of an election then enacted in Section 135(1) of the Act, that an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election. I had expressed my views on the interpretation of this section while considering the first issue for determination. It is my view that proof of non-compliance with Sections 18 and 40(1) of the Electoral Act, 2002, without more is insufficient to lead to the invalidation of the election. I am in complete agreement with the court in this regard. I will resolve the issues under consideration against the appellants.

Issue No. 7

“Whether the Court of Appeal was not in error by failing to invalidate the presidential election considering the specific and uncontroverted evidence of bias or likelihood of it in the INEC, and Resident Electoral Commissioners in twelve States of the Federation.”

Under this issue, the appellants’ complaints are two pronged. Firstly, it is contended that based on the finding by the court below that the 3rd respondent was biased and lacking in neutrality and impartiality, the Presidential election ought to have been invalidated. This aspect of the complaint had earlier been considered and treated under Issue No.3 supra and the conclusion reached and herein reaffirmed is that in so far as the remark by the court below referred to the conduct of the 3rd respondent in relation to the trial of the election petition as opposed to its role in the conduct of the election, the finding or remark was baseless and a mere obiter dicta which is not appealable. It is not every pronouncement made by a Judge that can be made the subject of an appeal: See *Wilson v. Oshin* (1988) 4 NWLR (Pt.88) 329; *Shuaibu v. Nigeria-Arab Bank Ltd.* (1998) 4 S.C. 170; (1998) 5 NWLR (Pt.551) 582 at 597.

The second prong of the appellants’ complaint relates to allegation of bias or likelihood of it by reason of the fact that the 1st respondent appointed as Resident Electoral Commissioners (REC) members of the PDP, the political party to which he belongs, with the aim to guarantee for himself their bias and loyalty in the conduct of the election.

The learned senior counsel for the appellants has submitted that the traverse in paragraph 18 of the 1st and 2nd respondents' reply did not put in issue the allegation of bias pleaded in paragraph 15 of the petition with the consequence that the allegations were deemed to be admitted.

B The following cases were alluded to: *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718 at 741; *Oguma v. I.B.W.A* (1988) 1 NWLR (Pt.73) 658. It was further submitted that the evidence adduced by the appellants to substantiate their allegations was not evaluated or properly evaluated.

C On the question that appellants' allegation in paragraph 15 of the petition was not traversed by paragraph 18 of the 1st and 2nd respondents' reply, the position of the law is that before a court can decide whether or not there is an admission in the statement of defence or reply to a petition in respect to an averment in a Statement of Claim or petition, the entire pleadings of the parties as a whole must be considered: See *Titiloye v. Olupo* (1991) 7 NWLR (Pt.205) 518 at 532; *Pan Asian African Co. Ltd. v. National Insurance Co. (Nig.) Ltd.* (1982) 9 S.C. (Reprint) 1; (1982) 8 S.C. 1; *Ugochukwu v. Coop and Commerce Bank Ltd.* (1996) 6 NWLR (Pt.456) 524 at 537; *Lion of Africa Insurance v. Fisayo* (1986) 4 NWLR D (Pt.37) 674; *A-G Anambra State v. Onuselogu Enterprises Ltd.* (1987) 4 NWLR (Pt.66) 547 at 560.

Had the appellants taken into account the whole of the averments in the 1st and 2nd respondents' reply rather than paragraph 18 thereof only, F their contention would have been different.

G With respect to the complaint that some Residential Electoral Commissioners were members of the PDP, it is necessary to refer to Sections 17(2) and 19 of the Electoral Act. Section 17(2) provides that no person who is a member of a political party or who has openly expressed support for any candidate shall be appointed into any position for the purposes of registration of voters or election under this Act. In Section 19 the provision is to the effect that "the commission shall for the purpose of an election under this Act, appoint such other officers as may be required provided that they shall not be registered members of any political party."

H The Court of Appeal found, and rightly in my view, that the evidence tendered by the appellants to establish that some Resident Electoral

Officers were members of the PDP was not credible enough, being largely hearsay evidence. Their membership card of a political party was not tendered in evidence nor extract from the register of the party produced. The poster and minutes of meeting tendered as Exhibits 234 and 235 respectively in respect of the 19th respondent relate to the events of 1999. B No evidence was led to show that the 19th respondent was still a member of PDP at the time of the Presidential election of 19th April, 2003. There was no evidence of bias on the part of the Resident Electoral Officers. In the light of the foregoing, I see no merit in the issue just canvassed. C

Issue No.8

"Whether the failure of the Court of Appeal to apply Section 149(d) of the Evidence Act against 3rd respondent for failing to produce the letter of protest in Cross-River State for which Notice to Produce had been given was proper in law?" D

The issue derives from the consideration of the conduct of the election in Cross-River State particularly the evidence of P.W. 134 about the broadcast on Cross River State radio concerning the alleged disqualification of the A.N.P.P. Gubernatorial candidate, Chief John Okpa, which E the court below in its leading judgment held was properly admitted. At p.2439 of the record, it went on to comment thus:-

"The petitioners had through the pleadings in para.32 of the petition served a notice to produce a letter of protest by the said Chief F John Okpa dated 19/4/03 addressed to the Resident Electoral Commissioner. The said letter was however not produced. In the absence of the letter, the assertion about the radio broadcast is not sufficient proof of the allegation."

G The pith of the appellants' complaint is that the court below was in grave error by failing to apply Section 149(d) of the Evidence Act against all those who failed to produce the document by holding that if the document had been produced it would have been unfavourable to them to justify the cancellation of the election in Cross River State. It is H settled law that a party on whom "notice to produce" a document is given is not under any obligation to produce the document. The service of the 'notice to produce' only entitles the party serving the notice to adduce

secondary evidence of the document in question by virtue of Section 98 of the Evidence Act, 1990: vide *Union Bank of Nigeria Plc & Anor. v. Alhaji Muhammadu Idrisu* (1999) 7 NWLR (Pt.609) 105 at 118-119; *Gbadamosi v. Kabo Travels Ltd.* (2000) 8 NWLR (Pt.668) 243 at 273. Since the law is that service of notice to produce merely enables the party who does so to lead secondary evidence of the document in question, it cannot be correct that the provision of Section 149(d) of the Evidence Act, 1990, can be applied as that section does not relieve the person serving the notice of the burden of producing the document if he can or proving its contents. I will, therefore, resolve this issue against the appellants.

Issue No.9

“Whether the Court of Appeal’s non-application of the provisions of Section 129 of the Electoral Act, 2002 against the 1st and 2nd respondents was proper having regard to the pleadings, evidence on record and the findings of the court on intimidation and violence.”

Section 129 of the Electoral Act creates the offence of undue influence at election with severe punishment for the offence. It enacts:-

“129. A person who:-

(a) directly or indirectly, by himself or by another person on his behalf, makes use or threatens to make use of any force, violence or restrain

(b) inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm or loss on or against a person in order to induce or compel that person to vote or refrain from voting, or on account of such person having voted or refrained from voting.

(c)

(d)

commits the offence of undue influence is liable on conviction to a fine of N100,000 or imprisonment for twelve months and shall in addition be guilty of corrupt practice under Section 132 of this Act and the incumbent be disqualified as a candidate in the election.”

The appellants are complaining that by their pleadings and evidence they established numerous acts of undue influence by the 1st and 2nd respondents and yet the court below notwithstanding that it found there were such acts of undue influence declined to nullify the election.

Admittedly, the court below made elaborate findings on acts of violence which characterized the conduct of the election. At pages 2480 - 2481 it observed, inter alia, thus:-

“Let me comment on the allegations of perpetration of violence either by PDP thugs in the presence of military and police personnel or by military and police personnel themselves I have already referred to the alleged incident where the Transition Chairman of Abia State, Mr. Chidi Ibe, struck the head of Mr. Anthony Dimegwu with the butt of his gun and which sent him critically injured and unconscious From Ebonyi we heard the story of how one Anthony Nwudo, the Secretary of ANPP in Ezza North LGA of Ebonyi State, was killed by PDP youths and his body taken to the residence of one Idah to deter him from his bid for councillorship under the platform of ANPP. From Kogi State, we heard the evidence of how youths wearing PDP “T” shirts and face caps went into Olokobe Filling Station firing gun shots leaving in their trail 3 young persons dead. And from Enugu State we heard the case of how police Sgt. Anthony Abba, one of the six police men attached to the ANPP gubernatorial candidate was killed at the premises of the ANPP Chairman of Igbo-Eze North LGA by some men amongst who was Mike Onu a PDP stalwart. Instances of such brutal killings either immediately before or on the 19/4/03 are numerous. These allegations were in most cases not controverted. The victims were almost invariably members or supporters of ANPP or some innocent passers-by. And the most tragic and disturbing aspect of the incident is that these incidents either happened in the presence of policemen or soldiers or immediately reported to them In the case of the alleged killing of police Sgt. Anthony Abba, 14 PDP thugs and the Transition Chairman of the L.G. A. were arrested, but were released the following day”

It is evident from the above excerpt that, though the court below accepted that instances of use of violence were galore it did not find the 1st and 2nd respondents to be responsible directly or indirectly in respect of those acts of violence and brutality. The position of the law is that irregularities at an election which are neither the act of a candidate nor linked to him cannot affect his election. An elected candidate cannot have

his election nullified on the ground of corrupt practices or any other illegality committed in an election unless it be established that the candidate expressly authorized the illegality. See *Oyegun v. Igbiniedion* (1992) 2 NWLR (Pt.226) 747 at 759; *Agomo v. Iroakeji* (1998) 19 NWLR (Pt.568) 133. Learned senior counsel for the appellants has contended in his brief that the averments in paragraphs 19 to 20 A of the petition implicating the 1st and 2nd respondents with responsibility for unconstitutional deployment of members of the armed forces for the conduct of the election was not traversed by the respondents and as such the allegation was deemed to have been admitted. With respect to counsel, the submission is misconceived. In paragraphs 2 and 20 of the 1st and 2nd respondents' Reply, they denied the averments in paragraphs 19 to 20A of the petition and put the appellants to strict proof thereof. That, in my view, was a sufficient traverse implying that the allegations in question were not admitted. I, therefore, find no merit in the issue under consideration.

Issue No. 10

"Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas on the ground that such Local Government Areas were not specifically pleaded was proper in law."

The substance of the appellants' complaint is the wrongful exclusion of evidence by the court below in the consideration of the case before it.

The evidence excluded relates to the malpractices in the conduct of the election in several named Local Government Areas on the ground that those Local Government Areas and States were not specifically pleaded in the election petition. It is an elementary principle of law that parties are bound by their pleadings and that evidence which is not supported by the pleadings goes to no issue and should be disregarded: see *Emegokwue v. Okadigbo* (1973) 4 S.C. (Reprint) 78;(1973) 4 S.C. 113; *Pescutto v. Adecentro (Nig.) Ltd.* (1997) 11 NWLR (Pt.529) 467. Since there were no facts pleaded in the appellants' petition in respect of the Local Government Areas and States for which evidence of act of malpractices was adduced at the trial, I think the court below was justified in discountenancing the

evidence. That apart, the law provides that the wrongful exclusion of evidence shall not of itself be a ground for the reversal of any decision in any case if it shall appear to the court on appeal that had the evidence so excluded been admitted, it may reasonably be held that the decision would have been the same: see Section 227(2) of the Evidence Act, 1990; *B Wahabi Alao Lawal v. The State* (1966) 1 All NLR 107, 166; *Ibrahim Khalil Yossin v. Barclays Bank D.C.O.* (1968) NMLR 380. It is my view that even if the evidence complained of has not been excluded, the decision of the court below would not have been different having regard to the non-joinder of necessary parties who ought to have been joined in the petition on the authority of *Obasanjo & Anor. v. Buhari and Ors.* (2003) 11 S.C. 1; (2003) 17 NWLR (Pt.856) 510 at 576. I will equally resolve this issue against the appellants.

Issue No. 11

"Whether, on the balance of probability, the Presidential election should not have been invalidated."

The appellants did not proffer any argument on this issue and accordingly it is deemed abandoned. See *Are v. Ipaye* (1986) 5 NWLR E (Pt.29) 416 at 418; *Ikpuku v. Ikputu* (1991) 5 NWLR (Pt. 193) 521; *Ajibade v. Pedro* (1992) 5 NWLR (Pt.241) 259.

Issue No. 12

"Whether there was no evidence proffered on Imo State that can substantially affect the election?"

The gravamen of the appellants' complaint on this issue is that contrary to the finding by the lower court at p.2473 of the record that "there is no evidence from Imo State that can substantially affect the election in Imo State," there was indeed overwhelming and uncontroverted evidence to that effect. The appellants referred to the testimony of P.W.23, P.W.45, P.W.97, destruction of INEC office on election day burning of Ahiazu Mbaise L.G. Headquarters, the burning of the house of PDP chieftain in Ideato North and a letter. Exhibit 30, as establishing various acts of election malpractices sufficient to invalidate the election. The court below in the leading judgment of Tabai, JCA., reviewed the evidence of the three witnesses mentioned and came to the conclusion that

it did not substantially affect the election in Imo State. It is not doubted that election malpractices occurred. But as pointed out while considering Issue No. 1 on the interpretation of Section 135(1) of the Electoral Act, 2002 the mere occurrence of acts of malpractices without more cannot lead to the invalidation of the election. As this point has been dealt with under issue No.1, I say no more on it, except to say that the observation of the court below on the evidence of election malpractices in Imo State is well founded. Exhibit 30 is a letter dated 28th day of April, 2003, written by the Resident Electoral Commissioner of Imo State admitting some irregularities in Imo State in the conduct of the National Assembly, Presidential and Governorship elections and promising to make amends in the election of May 3, 2003. The letter did not specify the particular election to which any particular irregularity is related to, the nature of the irregularities and where they occurred. The admission of the irregularities by the REC Imo State, therefore, is of no moment. I see no merit in the issue under consideration.

Issue No. 13

“Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived non-joinder of necessary parties.”

By this issue, the appellants postulate that a substantial part of the evidence of malpractices they led was discountenanced by the court below on the ground of what it perceived to be non-joinder of necessary parties. Expectedly, the submission of learned counsel on this issue should have identified the evidence so discountenanced but this was not done. It is not for this court to attempt to speculate on which evidence the appellants have in mind. The provision of the Electoral Act, 2002 governing the joinder of parties is Section 133(2) thereof which stipulates:-

“The person whose election is complained of is, in this Act referred to as the respondent, but if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in the election petition in his or her official status as a necessary

party.”

In the application of the provision, the court below at pp.2465-2466 had this to say:-

“In his written address, Chief Ahamba, SAN., listed out the Form EC 8A for Kachia, Jema’a, Makarfi, Kudan Kogarto, Jabe, Ikara, Zangon Katay and Chukum LGA.s. These are listed from pages 89-131 of the address. I took time to go through them and no doubt, they disclose fundamental irregularities in the results entered in these documents. In most of them there was no accreditation. And this was the common feature in the several of them that were tested in court. However, each of these documents was prepared or supposed to be prepared by no other official than the Presiding Officer. By virtue of the provisions of Section 133(2) of the Electoral Act, 2002, and the numerous case law authorities, one of the most recent, being Obasanjo v. Yusuf (supra), each of them is deemed to be a respondent and who should, therefore, be joined. But they are not joined. One can readily appreciate the grave difficulties posed by the provisions and the interpretation by the courts. That, however, remains the law and we are bound by it. In his address, Chief Ahamba, SAN., stated at page 80, thus:-

“In most of these acts the ad hoc officers were helpless victims rather than accomplices. Hence, they are not joined in the petition. The accusation being against corporate INEC.

The question is that of evidence. The evidence before us is that in most polling units there were no Presiding Officers and election materials. It was only in a few cases that we had the Presiding Officer without materials. Since the complaint is against the results in the Form EC 8As prepared by the Presiding Officers, their non-joinder is fatal to those paragraphs which are therefore struck out.”

It is manifest from the above excerpt that the evidence that was jettisoned related to falsification of election results in form EC 8As prepared by Presiding Officers. Since the allegations were made against the Presiding Officers in respect of the affected election results and the said Presiding Officers were not joined as parties in the petition, the court below was quite justified to discountenance the evidence in proof of the

allegation. That is in consonance with the provision of Section 133(2) of the Electoral Act supra.

This ground of the appeal fails.

Issue No. 14

B “Whether on the balance of probability the election in each of Adamawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross-River, Edo, Rivers, Bayelsa and Imo States should have been severally invalidated.”

C The learned senior counsel for the appellants. Chief Ahamba, SAN., has contended that based on the evidence adduced by the appellants in the conduct of election in the States mentioned, the election in those States ought to have been nullified. The grounds of this submission will now be examined in relation to each of the States mentioned:-

Adamawa State

D It was contended, firstly, that it was proved beyond reasonable doubt that the Resident Electoral Commissioner for Adamawa State altered the result in Exhibit 238 in favour of PDP in the governorship election. Quite apart from the fact that the alleged finding to that effect did not
E relate to the Presidential election with which this appeal is concerned, I have not seen nor has my attention been referred to the alleged finding of the court below.

F Secondly, it was contended that the lower court struck out the 1st and 2nd respondents’ pleadings (paragraphs 103-150) on the ground that the pleader in those paragraphs, the PDP, was not a party to the proceedings. Learned counsel then reasoned that the implication of the striking out of those paragraphs was that the averments they purported to have traversed in the appellants’ pleadings were not traversed such that only minimal
G evidence was required to establish the truth of such averments. These submissions in my view are not entirely correct. There are decided cases in support of the proposition that a plaintiff is entitled to lead evidence on a point in the defendant’s pleading. See Agu v. Ikewibe (1991) 3 NWLR (Pt.180) 385 at 410; Adenuga v. Lagos Town Council 13 WACA 125; Onyekonwu v. Ekwubiri’s (1966) 1 All NLR 32; Sketch v. Ajagbemokeferi
H (1989) 2 S.C. (Pt.II) 73; (1989) 1 NWLR (Pt.100) 678; Bamgboye & Ors.

v. Olanrewaju (1991) 4 NWLR (Pt. 184) 132 at 155. Consistent with this principle, the evidence led during cross-examination on issues joined is not inadmissible merely because such evidence is not supported by the pleadings of the party eliciting the evidence. More importantly, even where the evidence adduced by the plaintiff is unchallenged, the court still has B the duty to evaluate the evidence adduced to see if it is credible enough to sustain the claim: See Ogundipe v. A-G Kwara State (1993) 2 NWLR (Pt.313) 558. In the instant case, the court below held that the quality of the evidence led on violence was insufficient to prove specific allegations C pleaded.

Kaduna State

The complaint against the judgment of the court below as it relates to Kaduna State is that paragraphs of the petition were struck out and evidence therein discountenanced on the ground that the Presiding Officers D alleged to have falsified election results were not joined as parties in the petition. A similar complaint has been examined under Issue No. 13 and a repetition is not necessary. Based on the views expressed on Issue No. 13, the complaint is not sustained. E

Enugu State

The appellants had submitted that the failure of the court below to invalidate the election in Enugu State was as a result of a misplacement of the onus of proving that there was no collation of election results F which onus that court placed on the appellants. With respect, the question whether or not there was any collation of election results was not one of the irregularities relied upon by the appellants to question the election in Enugu State and any statement to that effect by the court below was a mere obiter which is not appealable. The court below carefully considered G complaints about violence, and intimidation and failure to distribute election materials and held that the irregularities affected only very few polling units in some LGAs concerned and that it could not be said that such irregularities affected substantially the election in Enugu State. H

Kogi State

Allegation of violence was made in the whole State but established only in 4 out of 21 LGAs and as a result, the court below held that that

was not enough to warrant the cancellation of the election in that State. That reasoning cannot be faulted. Another objection to the judgment of the court below is that it failed to nullify the election in Kogi State on the ground that the Resident Electoral Commissioner there was a member of the PDP in apparent violation of Sections 17(2) and 19 of the Electoral Act, 2002. This aspect of the complaint has been treated under Issue No.7 wherein I concluded that the complaint could not justify the invalidation of the election.

Taraba State:

No argument advanced.

Ebonyi and Benue States

The appellants' complaints regarding these two States is that the evidence relating to them was not evaluated. At page 2472 of the report the lower court stated its reason for discountenancing the evidence to be that the Local Governments 10 which the evidence related were not pleaded. As that finding has not been challenged in this appeal, it cannot be reversed.

Cross River

The criticism of the judgment of the court below with respect to Cross River may be considered under four broad compartments as follows:-

Firstly, it is stated that the court below limited itself to the consideration of electoral malpractices to Akamkpa LGA and Calabar Municipality because other LGAs were not pleaded. This matter has been considered under Issue No. 10. Secondly, there is the complaint that the court below failed to invoke the provisions of Section 149(d) of the Evidence Act, when the 3rd respondent failed to produce election results pursuant to a notice to produce the said documents. This has also been dealt with under Issue No.8. Thirdly, is the complaint that there was unchallenged or uncontroverted evidence by P.W. 134, John Ochella that heard on Cross River State Radio in the morning of the election that the ANPP governorship candidate. Chief John Okpa had been disqualified which evidence was properly admitted under Section 77(2) of the Evidence Act but was not acted upon by the court below. While that evidence was capable of affecting the gubernatorial election, its effect on the presidential

election with which the appeal is concerned is debatable. It was not safe for the presidential election to be invalidated on that score. Fourthly, is the complaint about the shooting and arson alleged to have taken place at Akamkpa. The court below reviewed the evidence and held, quite rightly in my view, that even if the evidence is accepted, the result should be confined to that St. John's Primary School unit or at best Akamkpa Urban ward and therefore, that the corrupt practices established in one polling station cannot justify the cancellation of the election in Akamkpa LGA.

Edo State

The contention of the learned senior counsel for the appellants is that the court below did not arrive at any conclusion in respect of the conduct of election in Edo State. I do not share this view. The court below in its leading judgment evaluated the evidence of all the eight witnesses called by the appellants and the rebuttal evidence of the respondents' witnesses and at the end declared that there was no election in 9 units of Esigie Primary School voting centre.

Rivers State

The appellants' submission with respect to Rivers State is that the election was so badly conducted in the State that the election in 10 out of 23 LGAs of the State ought to have been cancelled instead of the nullification of the election in Asari/Tori LGA., one ward and four units in Andoni LGA, two units of Obia/Akpo LGA and one unit of Ogu/Bolo LGA. In support of their contention, the appellants referred to 26 Exhibits - Exhibits 145-166 tendered by their witnesses which they maintained were not evaluated in the leading judgment.

Referring to the evidence of P.W.32, at p.2445 of the record, the court below observed:-

"According to him there was no election and yet there were results. They tendered Exhibits 145, 146, 147, 148, 148A, 149, 149A, 150, 150A, 151, 151A, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165 and 166."

It is evident from the above excerpts that what the appellants were complaining about was the falsification of election results by presiding officers who were not joined as parties in the petition. That being the case

the court below was quite justified to disregard the exhibits.

Bayelsa State

The criticism of the judgment of the court below is in respect of Ogbea and Nembe LGAs. With respect to Ogbea LGA the argument was that since the P.W. 113, the Electoral Officer for Ogbea LGA failed to tender the result of the LGA, the whole election for the LGA ought to have been cancelled. The contention overlooks the state of the law on the burden of proof and the evidence on record. The burden was on the appellants to lead credible evidence that there was no election; the evidential burden then shifts to the respondents to prove that there was an election. In the instant case, the evidence of no election was confined to 5 Units of Emekalakala in Ogbea LGA in respect of which no election results were tendered hence the cancellation is limited to those 5 units.

With respect to Nembe LGA the complaint is that the lower court was wrong to have discountenanced the evidence of PW.38 on the ground that the LGA to which the evidence related was not pleaded. As this point has been covered under Issue No. 10, further discussion will be repetitive. Suffice it to say that the court below was justified to have discountenanced the evidence.

Imo State

Arguments were not advanced in the appellants' brief apparently because the conduct of election in Imo State was discussed under issue No. 12.

Issue No. 15

"Whether the Court of Appeal was not in error by upholding the Presidential election of 19/4/03 after invalidating the election of one State (Ogun) considering the provisions of Section 134(1) of the Constitution of the Federal Republic of Nigeria?"

'Chief Ahamba, SAN., referred to Section 134(2)(b) of the Constitution, 1999, which stipulates that where there are more than two candidates, a candidate shall be deemed to have been elected if he has the majority of the votes cast and has not less than one-quarter of the votes cast at the election in each of at least two-thirds of all the States and the Federal Capital Territory. He then submitted that with the nullification of

the election in Ogun State, the basis for the calculation no longer existed and, therefore, the election of the 1st and 2nd respondents was in violation of the Constitution. This, with respect, is a strained interpretation of the provision of Section 134(1) of the Constitution of the Federal Republic of Nigeria, 1999. It is settled law that where the wordings of a statute are clear and unambiguous the court must give them their plain and ordinary meaning: see *Dominic Onuorah Ifezue v. Livinus Mbadugha & Anor.* (1984) 5 S.C. 79; *A-G Bendel State v. A-G Federation* (1982) 3 NCLR 1. In my view, the words of Section 134(2)(b) of the 1999 Constitution are clear, precise and unambiguous. The invalidation of election in any number of States does not affect the basis of the calculation of 2/3 of all the States in the Federation and the Federal Capital Territory, Abuja. The contention of the learned senior counsel for the appellants to the contrary is with respect, erroneous.

Issue No. 16

Whether the 1st and 2nd respondents' reply is a competent process in the proceeding.

The background facts to this issue may be narrated briefly thus:- The 1st and 2nd respondents were served the appellants' petition on the 22nd and 23rd May, 2003 respectively. On 25th May 2003 all the parties to the petition argued an application for interlocutory injunction against the 1st and 2nd respondents which was ruled in their favour on 27th May, 2003. On 30th May, 2003 the 1st and 2nd respondents filed their memorandum of appearance and subsequently filed their joint reply on 13th June, 2003. Learned senior counsel for the appellants then posed the question whether the time for the computation of 14 days allowed for the filing of a reply under paragraph 12(1) of Schedule 1 of the Electoral Act, 2002 is to be reckoned from the 25th May, 2003, when the respondents by their counsel physically appeared in court to argue the application for injunction or the 30th May, 2003 when their memorandum of appearance was filed. In answering the question and relying on the case of *Adegoke Motors v. Adesanya* (1989) 5 S.C. 113; (1989) 3 NWLR (Pt. 109) 250, Chief Ahamba, SAN., submitted that time should be reckoned from 23rd May, 2003 and that the reply filed on 13th June, 2003, was outside the 14

days period limited under the schedule and as such, the reply was incompetent. The case of Adegoke Motors v. Adesanya (supra) recognizes two modes of appearing, not of entering appearance. The two modes recognized are entering an appearance and physically appearing in court when the case is to be heard. When, therefore, the 1st and 2nd respondents on 25th May, 2003 appeared in court to contest the application for interlocutory injunction, that did not amount to entering an appearance. By paragraph 9(1) of 1st Schedule to the Electoral Act appearance is entered by filing in the Registry of the Court of Appeal a memorandum of appearance. That was what the 1st and 2nd respondents did on 30th May, 2003 and calculating from that date the 14 days' period of filing reply, the 1st and 2nd respondents reply filed on 13th June 2003 was filed within time. There is, therefore, no substance in the appellants' contention that the 1st and 2nd respondents' reply is incompetent.

Issue No. 17

"Whether the 1st respondent was qualified to contest the Presidential election under the Constitution of the Federal Republic of Nigeria."

This issue is predicated on the provision of Section 137(1)(b) of the 1999 Constitution to the following effect:

"A person shall not be qualified for election to the office of President if he has been elected to such office at any two previous elections."

In canvassing the disqualification of the 1st respondent on the basis of the above provision, the appellants rely on, first, the appointment in 1976 of the 1st respondent by the Supreme Military Council as Head of State and Commander-in-Chief of the Armed Forces of the Federal Republic of Nigeria pursuant to Section 8(d) of the Constitution (Basic Provisions) Decree No.32 of 1975 and secondly, the election in 1999 of the 1st respondent as the President of the Federal Republic of Nigeria under the 1999 Constitution. Whether these two previous offices held by the 1st respondent disqualified him from contesting the election the subject matter of this appeal has been judicially considered by this court in the case of Ojukwu v. Obasanjo (2004)7 S.C. (Pt.1) 117; (2004) 12 NWLR (Pt.886) 169 in which the unanimous decision of this court was that the 1st respondent was not disqualified by reason of Section 137(1)

(b) of the 1999 Constitution from contesting the presidential election in the year 2003. I am not persuaded from the arguments of the appellants to depart from this decision. Accordingly, there is no merit in the issue under consideration.

Issue No. 18

"Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the Petitioners proffered evidence and, if it did whether the misdirection did not occasion a miscarriage of justice."

This issue derives from the statement of the leading judgment of the court below at p.2482 of the record where in dealing with the presumption of regularity it observed thus:-

"Where no allegation is made and no evidence adduced on the conduct of the election in a State the presumption of regularity enures in its favour. In this case there was no specific allegation of any wrong doing in the conduct of the 19/4/03 election in 22 States and my view is that the elections in these States were regularly conducted and the ensuing results authentic."

The statement was made sequel to the consideration and conclusion of evidence led with respect to specific allegations of malpractices made in respect of each State specifically pleaded in the petition. Prior to that, the court below had considered and dealt with specific irregularities that were alleged to have characterized the election nationwide. Therefore, in the context of the statement quoted above, the court was referring to specific allegations made with regard to particular States as opposed to the general allegations of malpractices in the conduct of the election nationwide. I am of the opinion that the contention by the appellants that the court below misdirected itself by the statement in question is, with respect, misconceived. The appeal on this ground also fails.

The outcome of my consideration of the appellants' appeal is that it is unmeritorious. The foregoing is by way of emphasis supportive of the leading judgment just delivered by my learned and noble brother, Uwais CJN. I agree with him that the appeal lacks substance and is accordingly dismissed. I also agree with his reasoning and conclusion in allowing the

two cross-appeals.

PATS-ACHOLONU JSC

I have carefully read in draft the judgment of the learned Chief Justice of Nigeria, Uwais, CJN., and I agree with him. He has graphically set out clearly in a beautiful prose the case of the parties and in my view has come to a right conclusion. Let me however add a bit of my own.

This is an appeal from the judgment of the Court of Appeal in respect of the Presidential Election conducted in 2003. The appellant complained of serious irregularities which he alleged were readily manifest in the conduct of the election. In the pleadings and evidence given, it was alleged that there were cases of abandoning the tenets of the Electoral Act by a resort to the breaking of all known prescriptions of the Act. There were complaints of rampant violence, intimidation, carrying away of voting materials and manifest ineptitude on the part of the 3rd respondent responsible for conducting the election. More than 300 witnesses testified for all the parties. The Court of Appeal in its judgment dismissed the petition but nullified the election conducted in Ogun State.

Obviously piqued by the judgment of the court below and expressing dire dissatisfaction as demonstrated in the language of the appellants in the appeal, they appealed to this court and framed many issues some of which were argued together. I hereby set them down as follows:-

1. Whether the Court of Appeal properly interpreted Sections 135(1) and 67(3) of the Electoral Act, 2002. (Grounds 5, 7 and 25).

2. Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150(1) of the Evidence Act in the judgment (Grounds 3, 13 and 30).

3. Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality and impartiality for failing to produce election results was proper in law. (Ground 1).

4. Whether the Court of Appeal's conclusion that non-compliance with Section 67(3) of the Electoral Act was not proved is sustainable considering the express provisions of the section, the pleadings of the parties

and the totality of evidence on record on the point (Grounds 8 and 9).

5. Whether the Court of Appeal's failure to invalidate the Presidential election after holding that Section 18 of the Electoral Act, 2002, was not complied with was proper (Ground 4).

6. Whether the Court of Appeal's failure to invalidate the Presidential election after finding that Section 40(1) of the Electoral Act, 2002, was breached in the conduct of the election was proper (Ground 10).

7. Whether the Court of Appeal was not in error by failing to invalidate the Presidential election considering the specific and uncontroverted evidence of bias or likelihood of it in the INEC and Resident Electoral Commissioners in twelve States of the Federation (Grounds 11, 12 and 17).

8. Whether the failure of the Court of Appeal to apply Section 149(d) of the Evidence Act against 3rd respondent for failing to produce the letter of protest in Cross-River State for which notice to produce had been given was proper in law (Ground 14).

9. Whether the Court of Appeal's non-application of the provision of Section 129 of the Electoral Act, 2002, against the 1st and 2nd respondents was proper after the pleadings, evidence on record and the findings of the court on intimidation and violence. (Grounds 23 and 34)

10. Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in several Local Government Areas on the ground that such Local Government Areas were not specifically pleaded was proper in law (Grounds 2 and 37).

11. Whether, on the balance of probability, the Presidential election should not have been invalidated (Grounds 24, 31 and 33).

12. Whether there was no evidence proffered on Imo State that can substantially affect the election (Ground 36).

13. Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived non-joinder of necessary parties (Grounds 18 and 28).

14. Whether on the balance of probability, the election in each of Adamawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross-River, Edo, Rivers, Bayelsa and Imo States should have been severally invalidated

(Grounds 15, 16, 19, 20, 21, 22, 27, 29, 35, 40 and 41).

15. Whether the Court of Appeal was not in error by upholding the Presidential election of 19th April 2003 after invalidating the election of one State (Ogun) considering the provisions of Section 134(1) of the Constitution of the Federal Republic of Nigeria (Ground 6).

16. Whether the 1st and 2nd respondents' Reply is a competent process in the proceeding (Ground 39).

17. Whether the 1st respondent was qualified to contest the Presidential election under the Constitution of the Federal Republic of Nigeria. (Ground 38).

18. Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioners proffered evidence and, if it did, whether the misdirection did not occasion a miscarriage of justice (Ground 26).

The 1st and 2nd respondents filed their brief and framed 12 issues which they conceive represent the questions to be determined. There were also briefs filed by the other respondents. I need not go into them as the plenitude of the questions to be determined by the court are more or less well covered in the appellants' issues. The 1st and 2nd respondents cross-appealed. I will thereafter analyze the cross-appeal filed in the matter after fully discussing the appeal of the appellants. I have observed that in arguing the appeal as reflected on the issues, the arguments on the questions framed by the leading learned counsel for the appellants. Chief Ahamba, (SAN.), were not made serially. I shall therefore attempt to follow as conveniently as possible and within reason his methodology of approach that will lead to comprehension and order id est, the manner as was settled by the counsel for the appellants.

On issue No. 1, the contention of the appellants is as to whether the interpretation given to Sections 67(3) and 135(1) accords with the intention of the statute in relation to the overall evidence and the applicable law in this case. On the surface of issue No. 1, one is tempted to wonder whether the question this court is being asked to resolve does not appear academic as the way it is framed does not seem to show any nexus to the issues in controversy that the appellants are asking the court to determine.

However, having regard to the sensitiveness of the case, I have decided to dwell on it forensically to ensure due diligence.

The argument on issue No. 1 on the true interpretation to be placed in respect of Sections 135 and 67(3) of the Electoral Act, 2002 is two-fold.

Section 67(3) states:

"The Polling Agents shall certify the election materials from the office to the polling booth."

My view is that the intendment of the section is that the polling agents shall certify themselves as to the authenticity and genuineness and I dare say the credibility of the materials before an election is held to satisfy themselves of the reliability of the materials, in other words, to ensure that the materials to be used for the election are correct. This certification is conceivably to be done from where it was carried to the polling booth where their use would be made.

Section 135(1) of the Electoral Act, 2002, states as follows:

"An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act and that the non-compliance did not affect substantially the result of the election."

In respect of Section 135(1), what really is the import of the expression "substantially in accordance with the principles of the Act"? In order not to arrive at a construction that may be pejorative of the expression or which might do violence to what it denotes having regard to the context in which that phrase appears in the statute, a holistic approach to the interpretation is important. Indeed, a careful and methodical analysis and scrutiny of the expression in reference to acts whether by way of omission or commission in the course of election connotes practices which when viewed objectively, having regard to the provision, are in consonance in great detail in application and performance with, and appear to satisfy the requirements of the dictates of the statute to show proper accommodation of the tenor and intendments of the provision. That is to say that too much should not be made of certain seeming violations or irregularities that do

not fundamentally and materially affect due effectiveness and actualization of the spirit of the Act. There is no doubt that this provision is inelegantly drafted but the court must make a meaning out of it to give it sense, proper understanding and relevance. It seems to me that the construction given to that section by the lower court accords with rationality. The aim of justice is to discover truth and apply same so as to give meaning to the life of the society.

The learned counsel for the appellants had cited the observation of Wali, JSC., in *Aqua Ltd. v. Ondo State Sports Council* (1988) 10-11 S.C. 31; (1988) 4 NWLR (Pt.91) 622 at 641. In that case this court said:

“In construing a statute, it is the duty of the court to ascertain the meaning of words actually used by reading them in their ordinary grammatical sense and to give effect unless such construction would lead to some absurdity or would be plainly repugnant to the intention to be collected from other parts of the statute.”

I would go even further to postulate that where the words of the statute appear shrouded in a cloak of cloudiness, making it difficult to ascertain on the surface what it has in mind, it is the duty of the court to attempt to give a meaning that will resonate with sense, order and system so as to make it workable and real. In the circumstances the Court of Appeal found itself, I believe that its construction is the best in its quest to mete out justice and not render the provision barren, impotent or worthless. In jurisprudence such might be described as a Judge made law but indeed it is the Judge’s effort to administer justice and in this effort to seek for truth, he would dig in to explore ways to give an interpretation that is ennobling and fertile.

Too much, I believe, has been made out in the case of *Swen v. Dzungwe* (1966) NMLR 297 at 303. Reliance was much placed on this particular sentence by the appellants, to wit. *“..... 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 and it is impossible for the tribunal to say whether or not the results were affected by non-compliance established unless there is evidence on behalf of the respondent that such non-compliance as found could not and did*

not affect the results of the election, then the petitioner is entitled to succeed on the simple ground that civil cases are proved by preponderance of evidence.”

This statement of the court, given nearly 40 years ago with greatest respect, tends to put a heavy burden on the respondents. The conclusion appears to my mind feckless, jejune and debatable. It started with the expression “non-compliance is established”. Non-compliance here to me would relate only to material acts whether by omission or commission that would adversely affect the good and decent operationality of the conduct of the election. I do not subscribe to his interpretation.

Issue No.2 which was argued together with issue No. 18, is on the presumption of irregularity. Let me set out the provision of Section 150(1) of the Evidence Act.

“When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

In a situation as envisaged by this section, it is important to stress that the complainants’ duty should entail marshaling out the detailed facts that would raise the presumption of irregularity. They are the petitioners, therefore they are expected to adduce sufficient evidence to warrant the respondents to be put on the defence to show regularity. This is the intent of the provision of Section 150(1) which should not be read in isolation to the beginning of that section. This court was referred to *Ogbuanyinya v. Okudo* (No.2) 1990 NWLR (Pt. 146) 551 at 570. I wonder whether this case is really in appellants’ favour. The learned counsel submitted that in fact evidence was given in 14 States. Let me examine the nature of evidence proffered in respect of some of the 20 States he mentioned in his brief to wit: Adamawa, Gombe, Taraba, Kaduna, Anambra, Benue, Kogi, Cross River, Akwa Ibom, Rivers, Bayelsa, Imo, Enugu, Ebonyi, Delta, Edo, Ondo, Ogun, Kwara and Lagos States.

I have striven to read the evidence of the appellants’ witnesses in respect of the contents of the petition as refers to certain incongruous acts of some thugs or security people who threatened the voters with violence and succeeded in good measure to put the fear of God in many responsible

citizens who wished to exercise their franchise. The problem attendant to this case is that although there are many accounts of irregularities, violence and so on to which witnesses testified, it is not easy to secure enough witnesses who may be able to testify satisfactorily what happened in all the polling stations or polling booths which numbered in hundreds of thousands in the whole country. Though given that election matters have peculiar characteristics of their own they are still species of civil cases. What I wish to be understood to be saying is that there might have been horrendous acts of brigandage, violence and meanness committed based on the primitive and primordial concept and understanding of what election is all about, to get the required testimony that would preponderate over the respondents' case, the appellants would literally have to put hundreds of thousands of witnesses in the box. Though what I have read so far is chilling and indeed might have made what took place in Nigeria in 1964 a child's play, that notwithstanding, it behoves of the appellants to put all available facts on the table. It is a daunting task. In Edo State there is evidence that no election took place in some of the wards or booths in some of the Local Governments, but certainly not in the majority of the Local Governments. This is the same in Ebonyi State where even some people were said to have been killed; some others frightened to death and driven away. There is evidence that much violence and irregularities took place in few localized areas of Akwa Ibom, Imo and Cross River States. There was no evidence that the wrong doings took place in the majority of the Local Governments in these States. The point I am striving to make is whether unlawful acts that took place in few Local Governments in few States would be enough to cancel the elections in these States if the proven acts of brigandage which have reduced what ought to be a proper exercise of democratic right were witnessed. It is essential that a proponent of an action must not rest on his oars in the rendition of evidence to show that there was substantial non-conformity. He must perforce bring evidence of the totality of the States he complained about. The court does not award judgments by percentage and doubtful presumption.

Let me illustrate graphically what I am saying. A witness, one Dr. Robert Idemudia testified as to what took place in his Uhen ward which

is one of the 13 wards in Ovia North East Local Government Area in Edo State. What happened in the other 12 wards in that Local Government nobody can say. Would the court therefore presume that because of some irregular practices in one ward in Ovia North East Local Government, the same would apply to the other wards in those Local Governments not mentioned. Still in Edo State, one Sunday Unabor a pensioner, complained of what happened when he went to vote. He was not only prevented from voting, he was stopped, and when he complained to the police nearby, he was turned away. There was no other evidence from that Local Government. Again, what happened there took place in one ward only. Still in Edo State, consider also the evidence of one Barrister Hassan Kadiri a collation agent for ANPP at Auchì. According to him, there were no elections in ward 5 and no election officers because the soldiers said to be supposedly on guard, "*sternly warned them against interfering*" (whatever that means). Instead, he found people running away from the school where they were supposed to vote. He was later seized by a group of people, put in a vehicle, taken into a farm land but was later released after his car was vandalized. The point I am making is that though unbridled acts of vagabondage and indescribable acts were obviously perpetrated by elements whose understanding of democracy is the type that would make the Hitler's Storm Troopers and Comrades of Stalin blush, unless evidence is given as to what happened in all the wards or polling booths in Auchì it is difficult to conclude that such evil practices might have taken place in those other wards not mentioned. Indeed, these activities which reduced the election into a charade and infamy in few areas mentioned, might have conceivably taken place in other areas, but we need hard core evidence of such ignoble activities having taken place there. I must now hasten to warn that in a situation as to what took place during the 2003 Presidential election, it is difficult to proffer enough evidence to sustain the assertion one makes. It is not enough to give evidence in what happened in one or two wards in a Local Government which may have 13 wards and the court being urged to conclude or draw the inference that the other wards, nay other Local Governments in that State must have suffered such inscrutable malaise. These issues are resolved against the appellants.

Issues No.3 and 8 were taken together. The appellants queried why the court below did not invalidate the result of the election after it lampooned INEC for failing to be neutral or impartial. The learned counsel for the appellants referred to *African Petroleum Ltd. v. Owodunni* (1991) 8 NWLR (Pt.210) 391. Reference was made to such cases as *Adigun v. Attorney-General Oyo State* (1987) 1 NWLR (Pt.53) 678, and 709; *Iyere v. Duru* (1986) 5 NWLR (Pt.44) 683, and *Hart v. Governor of Rivers State* (1976) 1 1 S.C. (Reprint) 109; (1976) 11 S.C. 211-238 at 239 - which impose duty to act fairly and impartially. See also *Imiere v. Salami* (1989) 2 NEPLR 131 at 59. The learned counsel for the 3rd and other respondents are of the view that the remark on non-neutrality and impartiality referred to the case in hand that is before the Court of Appeal and not to the conduct of the election. A careful examination of the comment by the Court of Appeal shows that the non-impartiality or bias was not referable to the conduct of the elections as it appeared to be connected with failure to produce the documents which were subpoenaed. The further comment that a party should not be allowed to derive benefits from its own wrong doing tends to strengthen the belief. If it is to the election, then the court would in my view have said so. It should not be forgotten that the persons principally affected by the petition are 1st and 2nd respondents. They were not required to produce any document which they failed to produce. INEC might be mischievous but it is not its own election that is being questioned although its conduct of the election as it relates to or affects the 1st and 2nd respondents constitutes the points to be determined. It is only tangentially affected. The expression by the court to this effect that "however, the issue pertains to burden of proof and shall be visited as and whenever necessary in the course of this judgment" seems to me to demonstrate that the claim of avowal of being a neutral person in the case does not impress the lower court. I do not agree that the statement that INEC was biased was obiter. In fact, it does not relate to the conduct of the elections for the court below stated as follows:-

"Let me at this juncture restate the legal effect of the service of notice to produce. It is settled law that a party on whom notice to produce a document is served is not under any obligation to produce the docu-

ment. The service of the notice to produce only entitles the party serving the notice to adduce secondary evidence of the document in question by virtue of Section 98 of the Evidence Act, 1990. See *Union Bank of Nigeria Plc. & Anor. v. Alhaji Muhammadu Idris* (1999) 7 NWLR (Pt.609) 105 at 118-119; *Gbadamosi v. Kobo Travels Ltd.* (2000) 8 NWLR (Pt.668) 243 at 273".

Besides, it is a truism that it is not one of the grounds of the petition that the 3rd respondent was biased in favour of the 1st and 2nd respondents. Essentially, the petition questioned the competence of the 3rd respondent and it strove to show that no professional skill was displayed, but rather there was manifest a horrid and inept conduct which tended to make the whole election a mockery and a laughing stock in the country. This issue fails.

An issue that arose is on the interpretation of Oaths Act in reference to the oath that should be taken by the election officers. Counsel for the appellants submitted that the court below having found out that not all electoral officers, presiding officers or returning officers who participated took the oath, that the election should have been invalidated. The question is how many of the electoral officers, presiding officers and returning officers who did not subscribe to the oath testified. There is abundance of evidence that many officers did not take the oath but certainly not all and it will be a Herculean task, indeed gargantuan, for the petitioners or even the 1st and 2nd respondents to assemble all the officers to know with any degree of certainty who did not take the oath. As I said before, this case shall like all civil matters be determined on the preponderance of evidence. I have much sympathy with the problem the appellants had in persuading the lower court to accede to the request. They had to establish that from the testimony given they were able to prove within the bounds of human capability, that the election was marred in most of the places with ineptitude, glossing over of some statutory requirements, lack of proper understanding of the exercise of franchise by the citizenry by the people who took part or ought to take part in the conduct of the election. The question is whether what they had been able to produce could satisfy that court, to wit, that taking the country as a whole without any form of

surmise, they have conclusively proved the case on the balance of probability in respect of the particular issue of oath taking. My answer is of course not. I would though praise them for having gone as much as they did. What they have succeeded in doing was merely to show that not well tutored electoral officers, presiding officers and returning officers behaved well in our society - a 3rd world and underdeveloped country. As much as I sympathize with them. I am afraid that I do not subscribe to the view espoused by the appellants' counsel.

Issue No.4. On this point the learned counsel for the appellants took exception to the conclusion of the Court of Appeal that the evidence of non-certification was at variance with the pleading. Both the counsel for the 1st, 2nd and 3rd respondents and 6th-268th respondents stated that there was not a single polling agent called to give evidence of non-certification. Section 67(3) applies only to polling agents. To find out whether any certification whatsoever took place it was imperative that a good and substantial number of polling agents be called to give evidence. Having pleaded that the 3rd respondent failed to comply with the statutory requirement as stated in Section 67(3), it is the responsibility of the petitioners to prove that point by satisfactory evidence. I fail to see how this can be done without a deluge of evidence from the majority of the polling agents that took part in the election all over the country. Addresses of counsel are not evidence. It was possible that perhaps some Resident Electoral Commissioners might conceivably be biased in favour of the 1st and 2nd respondents because some of them were hitherto card carrying members of PDP, but the appellants must prove that at the time of the election, they still were members of PDP and that the lower court failed to evaluate the evidence elicited and carefully appraise them in order to determine bias or otherwise.

They made mention of Resident Officers who witnesses said were card carrying members of PDP. There was no documentary evidence. The Resident Electoral Officers whose impartiality was called into question were 20th, 14th, 22nd, 19th, 16th, 27th, 32nd, 26th and 235th respondents. Now the weakness manifest in this proof is that there was no documentary evidence such as the party cards or register of party members showing in

an uncanny way that these were true card carrying members. It is the duty of the party who asserts to prove. This has not happened. In his submission, the learned counsel for the appellants stated as follows "..... on the balance of probability, the established bias probably occurred as alleged and was capable of affecting the result." The submission did not ask the court to make a deduction or draw the necessary inference in the established facts. The appellants' counsel used the expression "probably occurred". This denotes that it might or might not have taken place. It further connotes that one may not necessarily draw any inference and there is obviously no certainty, and perhaps there was even lack of sureness on the matter having taken place. Bias is a primitive phenomenon which affects and dulls the mind of one so affected. Even if there is a likelihood of bias on their part which is possible given the state of evidence, will this court draw the inference that because the Resident Electoral Officers were proved to be members of the PDP, that the 279 Resident Electoral Officers are PDP members. Such conclusion will not stand the test of objective analysis. It will be illusory to come to such an assumption.

Section 17(10) of the Electoral Act has provided that a party member cannot be appointed an electoral officer. When in actual fact it is proved in any place that an Electoral Officer is a member of PDP party, that should to my mind invalidate any election result from that area because there is definitely a likelihood of bias, for when can a roaring lion turn into a mewling cat. To my mind, the standard of proof in establishing substantial compliance becomes a desideratum, to wit, having been proved. But as I said, has there really been convincing proof? Where there is doubt as to proof the court should lean against the party who ought to prove it. Another point is that even if about 100 Resident officers were tainted, (which is not the case) the non-tainted majority could still sustain the election result to affirm the overall result to conclude that there has been a substantial compliance. This issue does not favour the appellants.

On issues No.5 and 6, the learned counsel for the appellants expressed his disappointment on the failure of the court below to invalidate the election after, according to him, making findings of non-compliance with Sections 18 and 40(1) of the Electoral Act. He took umbrage on the

reasoning or views of the majority judgment of the court below which he submitted runs contrary to the conclusion reached at the end, and which runs thus:-

“In my assessment the evidence clearly preponderates in favour of the petitioners’ assertion in paragraph 11 of the petition that not every Electoral Officer, Presiding Officer and Returning Officer who participated in the conduct of the election was subject to the affirmation and oath of loyalty and neutrality.”

I find as a fact that the 3rd respondent did not quite comply with Section 18 of the Electoral Act, 2002. This section states thus:-

“All Electoral Officers, Presiding Officers, and Returning Officers shall affirm or swear an Oath of Loyalty and Neutrality indicating that they would not accept bribe or accept gratification from any person and shall perform their functions and duties impartially and in the interest of the Federal Republic of Nigeria without fear or favour”.

The findings of the court below by the use of expression that “not every Electoral Officer, Presiding and Returning Officer” cannot be construed to mean all Electoral, Presiding and Returning Officers. The point I am striving to make is this, that the finding does not state that the majority of the participating officers did not subscribe to the oath or affirmation. It did not state what percentage of these officers relative to their numerical strength in the country - wide, did or did not subscribe to the oath or affirmation. It must be made abundantly clear that the intendment of some of the saving positions in this rather inelegantly drafted Act, with its sometimes obtuse and equivocal language, is to try to save any election as most reasonably as possible. In effect, some latitude of non-abidance is anticipated, that is if in the opinion of the officers concerned, the non-compliance does not destroy the fundamental tenets ingrained in the Act, then such irregularities could conveniently be overlooked. In a situation such as this court is faced. I believe it is safe to give a liberal construction to the section. Moreover, where it is not certain the percentage of non-oath takers it is not safe to cancel or void such an election. The learned counsel for the appellants was piqued with the conclusion of the lower court in respect of the dictates of section 40(1). This section states thus:-

“1. Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voters card”.

There was testimony to the effect that not all voters over the country had their voters cards, but yet some of these were allowed to cast their votes nonetheless as long as their names were on the register. The court below had this to say in respect of that:

“There was however no evidence of the number of such votes by people without voters cards and the units in which such votes were cast. In the absence of such evidence, the effect of such votes on the election in a unit, ward, Local Government (sic) or State cannot be ascertained. This court cannot by mere speculation as to the probable effect of such unlawful voters cancel election”.

I could not agree more with this conclusion, based, in my opinion, on a very sound reasoning. In arriving at any decision a court has great freedom and latitude to choose between conflicting versions and divergent inferences; its sole aim being to find out which party’s case has been preponderated; in other words, whether the evidence is sufficient to establish the facts in issue. A fortiori where an issue is left in serious doubt as to make the court speculate, the party on whom the burden of proof ultimately rests must lose as the party has the onus of establishing the full facts that would persuade the court to find in its favour. I believe that it can be said that the evidence of facts and circumstances on which a plaintiff relies and depends for his action and the necessary inference that can be so deduced must manifest such superiority, predominance or prepolency in favour of the basic proposition or assertion he is seeking to establish as to exclude any equally well supported belief in any inconsistent proposition or hypothesis. The appellants have failed to establish their case. These issues fail.

On issue No. 10, the appellants questioned what they described as the exclusion of a substantial volume of evidence proffered in several Local Government Areas in several States for non-specific pleading of the Local Government Areas in the petition. The appellants’ angst was the exclusion of the evidence described by them as “properly admitted” in

the course of the proceedings in respect of - in particular - Rivers, Akwa Ibom, Taraba, Imo, Edo, Cross River, Enugu, Ebonyi and Bayelsa. The appellants' counsel referred to some rulings made by the lower court like the one of 16th February, 2004, where the Court of Appeal had held inter alia in respect of which evidence was admissible relative to the nature of pleadings thus:

“Although in paragraph 14 of the petition they pleaded that Ebonyi State was an example where bias was on display, they did not attempt to limit in the said paragraph the areas in which malpractices occurred in Ebonyi State. It therefore could not be said that the petitioners had as it were conveyed to the respondents that there was (sic) no practices in other areas of Ebonyi State as pleaded in paragraph 19 of the petition”.

They questioned the rationale for excluding the wisdom of some rulings. They made such bones as the one above while relying on the ones not favourable to the respondents. The stand of the appellants is that there are several averments covering the many States and the evidence of what happened in one State is a good measure of what might have probably taken place in other States not referred to in the pleadings or mentioned. There might have been some inconsistent rulings by the Court of Appeal which procedure adopted led to improper application of the law relating to the evidence proffered in respect of the facts pleaded. Regardless of whatever inconsistency was latent in some rulings of the lower court, it is an elementary law that material facts not pleaded go to no issue. To submit that the proof of commission of electoral offences in one State should be used or can be relied upon as a proof of systematic violations of electoral acts in other States sounds quizzical and strange to me. Such argument flies against the grain of what operates in our legal system. Parties are at all times bound by their pleadings regardless of whatever unacceptable ruling is made or where a mistake of law is patently manifest. This court cannot be persuaded to apply an inchoate law that offends procedural and substantive law. I cannot accept a submission to the effect that whatever evidence has been used in one State should equally be used in another. See *Lipede v. Sonekan* (1995) 1 NWLR (Ft.374) 668; *Overseas Construction Ltd. v. Creek Ent. Ltd.* (1985) 3 NWLR (Pt. 13) 407 at 414, see also *Igodo*

v. Owulo (1999) 5 NWLR (Pt.601) 70; *Remi v. Sunday* (1999) 8 NWLR (Pt.613) 93. Where the lower court in a ruling made a mistake of law, the appellants cannot be heard to rely on it to ask this court to affirm the mistake of law. That would lead to the decadence and slow death of our jurisprudence. This issue obviously fails.

On issue No. 12, the appellants' complaint is at the manner that the Court of Appeal dismissed as non-evidence the unrebutted testimony of intimidation, assault occasioning harm, arson, non-certification of election materials, and non-administration of oath etc. Counsel in particular referred to the evidence of P.W.23, P.W.45, P.W.49 and P.W.97. The learned counsel for the 3rd and 6th-268 respondents replicando submitted that there are no material particulars pleaded and the evidence is general in content and therefore could not buttress what has been asserted by the appellants. He referred to the observation of Obaseki, JSC., in *Omoboriowo v. Ajasin* who relied on the comment of Lord Selbourne, LC., in *Wallington v. Mutual Society* (1897) 805 AC 687 at 697.

P.W.23, E. Onyebuchi, who described himself as a doctor said in his evidence:

“On the 17th and 18th April (he did not state the year) Military Police and soldiers took over the streets in Owerri and all roads leading to Local Governments. They will stop people and search them and inform them to remember continuity.”

(The word “continuity” is said to be a political campaign jargon of PDP) I have carefully read the evidence of the witness. He made references to the killing of a senatorial candidate. There is nothing in his evidence that is remotely connected to what the appeal sought to prove in Imo State. Consider also the evidence of P.W.45 from Ahiazu Mbaise also in Imo State. He referred to an incident that took place when he went to vote:

“They placed the Nissan bus on the way and blocked my car. He ordered them to beat me up. I was beaten up. At a point I saw him pull up the boot of the bus and pull out a very heavy gun and shoot in the air two times. There was a lot of panic. He moved towards me with the gun. I was afraid he was going to shoot me. He turned the gun and hit me with

bottom of the gun. At this point, I lost conscious (sic). I was taken to Italy after being taken to two hospitals in Owerri.”

After examining the portion of evidence of P.W.45, there was obviously a clear evidence of intimidation and I dare say terrorization B by which I mean putting the fear of God in this witness. He appeared to be the Chairman of the interim Local Government or a party. He did not mention the name of the person who did the intimidation. Moreover, this incident was confined to his ward Olu/Lude ward in Mbaize, Imo State. C There is no evidence that this incident was replicated in all the wards in his local government. I had all along stated that I do sympathize with the appellants as they indeed face an enormous task of proving that these sort of allegations took place nation-wide. The 97th P.W., Ethelbert Okwaranya, an interim Chairman and secretary of ANPP of Umuobom in Ideato D South Local Government of Imo State said he heard gun shots released by Mobile Police men, who came to arrest him. The incident took place on the 10th of April, 2003. He equally narrated the incidents that took place on the 11th of April, 2003, 12th April, 2003 and 18th April, 2003. There was nothing significant or of substance he said that took place on E the election day itself. Under cross-examination, he said:

“We have 27 Local Governments in Imo State. I was in only one Local Government. I did not see what happened in the other 26 Local Governments”.

F It is manifestly clear that it would be invidious to use his evidence as reference point to what happened in all the Local Governments in Imo State. Then, there was the evidence of the 49th witness. Solomon Egmdigh, from Anejundual LGA in Rivers State whose testimony was confined to what took place in his booth. I do not see the relevance of his evidence. G On the whole this issue fails irredeemably.

Issue No.9 questions the failure of the Court of Appeal to apply the unambiguous provision of Section 129 of the Electoral Act which states as follows:-

A person who -

H (a) directly or indirectly, by himself or by another person on his behalf, makes use of or threatens to make use of any force, violence or

restrain;

(b) inflicts or threatens to inflict by himself or by any other person, any temporal or spiritual injury, damage, harm or loss on or against a person in order to induce or compel that person to vote or refrain from voting, or on account of such person having voted or refrained from voting; or B

(c) by abduction, duress, or a fraudulent device or contrivance, impedes or prevents the free use of the vote by a voter or thereby compels, induces, or prevails on a voter to give or refrain from giving his vote.

(d) by preventing any political aspirants from free use of the media, designated vehicles, mobilization of political support and campaign C at an election, commits the offence of undue influence and is liable on conviction to a fine of N100,000.00 or imprisonment for twelve months and shall in addition be guilty of corrupt practice under Section 133 of this Act and the incumbent be disqualified as a candidate in the election. D

Now, there was evidence of violence and intimidation, but was there any evidence linking the 1st and 2nd respondents with the perfidious acts perpetrated by some people, whether directly, circumstantially and or inferentially? I see none. Indeed, one Dr. Edmund Onyemere testified that it E is the responsibility of the President who happened to be the 1st respondent to ensure peace and order during the election. He stated further that he (the President) would do this by ensuring adequate policing of the whole nation through the appropriate agency. Where the agencies either in their F ignorance of their loyalty to the Constitution or were not fully briefed as to the right thing to do help to preserve the organic nature of our society, but rather resorted to ignoble, insidious, trothless or unconscionable acts outside the purview of their job or assignment, such unprincipled acts G cannot be attributed to be the acts of the 1st and 2nd respondents. Therefore, from the submission made by the 1st and 2nd respondents' counsel, they cannot be found liable. Further to these, the appellants submitted that notwithstanding the evidence of intimidation and the testimony of H violence on the part of the Military and the Police, this evidence was not challenged. The military person or police they have in mind was not mentioned. With greatest respect. I am not aware that the Inspector-General of Police, the Army Chief, the Police Council or Police Service Commission

are parties to the case. The evidence was over-generalized. Such evidence would be challenged by those bodies or those persons who caused them if they were parties in the case. It is certainly no business of the 1st and 2nd respondents. I do not share this rather skewed and awkward reasoning.

B Issues 8, 11 and 14 are whether on the balance of probability the election should not have been invalidated in the named States. I take these named States to be those States that were mentioned in the amended petition. I have fully considered the import of the nature of evidence adduced and I find it difficult to rationalize that the evidence which has been fully
C analyzed in these areas are enough to invalidate the Presidential election in those States. The learned counsel for the appellants has referred to the pronouncement of the Court of Appeal in *Bashea v. Same* (1999) 4 NWLR (Pt.236) 419 at 509 and *Imiere v. Saami* (1989) 3 NEPLR 131 at 161 on the questions of substantial non-compliance. It is important to stress that
D non-compliance must be proved on a wide scale in an election such as the presidential election. We may have to evolve any methodology in framing future Electoral Acts to make trials very short otherwise we risk having the present state of affairs coming up all the time. This would of
E course necessitate an amendment of the Constitution. A situation where an election petition lasted more than 2 years for a 4 year Presidential term leaves very much to be desired. It is an affront to the rule of law seen from an activist and progressive view point or mind. You simply cannot
F invalidate an election because you proved electoral malpractices in few wards in a few local governments in few States.

At this juncture for the avoidance of doubt the word “few” means in Oxford Advance Dictionary “not many”. One word that is easily abused is ‘several’. In fact, it does not denote or mean “many” contrary to our
G usual usage here, far from it. It means not more than two but not many. See Oxford Advanced Dictionary, Oxford Learners Dictionary, Webster, and all full volumes of Oxford Dictionary.

In his submission, the learned counsel for the appellants. Chief
H Ahamba, SAN., referred to the statement of the President of the Court of Appeal, Abdullahi, to the effect that he would have readily nullified the election in Obaniliku Obudu, Yakur and Yola but for lack of proof beyond

all reasonable doubt. It must be stressed that even if the elections in these local governments are nullified, they do not constitute the majority of the local governments in Cross River State. Moreover, it is essential to know that most of the allegations questioning the propriety of the elections verged on criminal acts and other unethical acts. On the authority of *B Jim Nwobodo v. Onoh & 2 Ors.* (1984) 1 SCNLR, they must be proved “beyond all reasonable doubt”. What really does that expression mean? It is proof that precludes every reasonable hypothesis except that which it tends to support and verily it is a proof that is consistent with the guilt
C of the accused person or against whom the allegation has been made. Therefore, it can be said that for evidence to attain the height that could bring about a conviction it must exclude beyond reasonable doubt every other hypothesis or conjecture or proposition or presumption except that
D of the guilt of the accused. If the evidence is wobbly, thermative or vague or is compatible with both innocence or guilt, then it cannot be described as being beyond all reasonable doubt.

In the case before us, who would face the criminal prosecution, the 1st and 2nd respondents who it has not been proved knew what hap-
E pened in the field, or the perpetrators who largely appear unknown? I have carefully gone through the gamut of the appellants’ stand in so far as it concerns the case, and I do not for the life of me see how I could fault the judgment of the Court of Appeal.
F

Issue No. 13. This point is on the matter of non-joinder of essential parties which as reasoned by the court below made the appellants’ case weak, from its own point of view. The appellants’ counsel does not find favour with this view of the Court of Appeal. To buttress his case he said in his brief “where an official of INEC is put in a state of helplessness
G by the rampaging Military and Police personnel, PDP thugs or some overzealous party men or by INEC’s corporate policy, it is submitted that such officials would have no complaint made against them”. Is INEC as a mere corporate body capable of inflicting assaults on people by shooting
H at people or flogging them or generally doing the type of things human beings as homosapiens can do? I am well aware that a court had in *Kate Ent. Ltd. v. Daewoo Ltd.* (1985) 2 NWLR (Pt.5) 166 at 135 stated that:

“Companies have no flesh and blood. Their existence is a mere legal abstraction (sic). They must therefore of necessity act through their Directors, Managers, and officials”.

Did INEC act through any of the misguided miscreants who caused havoc in some places? Counsel submitted that, for example, where “INEC is being accused of failing to conduct election, an official who can only really participate if an election is actually conducted needs not be joined”. I believe that where a criminal act is committed or alleged to have been committed prudence and expedience demand that such a person be made a party, *id est*, to be joined. He argued further that where a presiding officer fails to show up, it is INEC that is to be indicted and not the officials, and he argued that no *ad hoc* staff can be held responsible for materials withheld or diverted by INEC. It is important to prove by substantial evidence that INEC as a corporate body committed a criminal act for which it should stand condemned. The question is this: Did INEC instruct some of its officers to behave in a criminal and in a repugnant way. Because INEC works through human beings as in this case, if the Presiding Officers or Polling Officers who committed certain criminal acts are known, they ought to be joined. Simply stating that if INEC as a corporate entity is accused of a wrong, it does not mean that an official who might have been responsible for perpetrating the wrong should be joined does not hold water. It would amount to an oversimplification of a complex and not easily explicable problem. In such a case as here where officers should be personally responsible for any criminal acts, to show that there was violence which destroyed the spirit of the statutory provision and therefore should be squarely laid at the “feet” of INEC, boggles the mind. There must be proof that INEC gave a directive or effectively abdicated its responsibilities because of its bias to ensure the victory of the 1st and 2nd respondents and therefore aided and abetted the commission of criminal conduct or offence. I do not share the view expressed by the appellants’ counsel in its area.

Issue No. 15 - This issue appears academic and an attempt to expatiate on earlier issues which I have held not proved due to dearth of weighty facts.

Issue No. 16 - appears nebulous. It does not advance the case of the appellants. The matter was fiercely fought in the Court of Appeal. To talk of the nature of memorandum of appearance at this stage is to be overly technical. Nowadays, courts tend to move away from discussing technical matters when the substantive matter is the issue. In the case of *Broad Bank of Nig. Ltd. v. Olayiwola (2005) 125 LRCN 657*, one of the important issues raised was on the validity of a writ. The question of reliance on mere technicality was assiduously canvassed in this court. This court held as follow :-

*“I believe that where the prescription of the law is mandatory even if only on a procedural level, a court in its quest to do justice ought generally to be imbued with the dictates of reason and the nature of the particular case to seek to accommodate a party that appears to have run foul of the dictates of a procedural law. The contention in this case is that the appellant had unwittingly not done what it was supposed to do, *id est*, the course which the law has insisted in this type of matter has not been followed.....*

However, in this case the respondents have known and were very much aware of the case against them and ought not seek protection under the veil of technicality There is nothing to show beyond latching on the abstract issue of technicality that the respondents would be adversely affected by the irregularity committed. In this connection, much as I may sympathize with the respondents. I do not share their point which does not go to the meat of the case but on mere form.”

It cannot be over-emphasized that counsel should avoid too much reliance on mere form or technicalities. It does not advance the cause of justice. This issue fails.

Issue No. 17 is on whether Chief Obasanjo should have been allowed to contest the election. In other words, was Chief Olusegun Obasanjo qualified to contest the election of 2003. The matter of whether Chief Olusegun can or could contest the election of 2003 has been settled by the Supreme Court in *Ojukwu v. Obasanjo (2004) 7 S.C. (Pt.I) 117; (2004) 12 NWLR (Pt.886) 169 at 200*. This court does not intend to re-visit the issue again. This point needs not be canvassed or agitated upon again.

Let me now switch over to the cross-appeal of the 1st and 2nd respondents. The complaint of the cross-appellants is the non-joinder of the people against whom serious allegations were made and yet the lower court could find fault in the election in Ogun State relying on the mere ipse dixit of the appellants' 1st witness whose testimony bordered on hearsay. Chief Afe Babalola could not reconcile himself with the conclusion of the court below that there was a manipulation. The argument of the learned counsel for the 1st and 2nd respondents/cross-appellants is that since the allegation of manipulation has the insidious and sinister connotation which ordinarily would characterize it as a criminal offence, those officers if known should have been joined so that they would be in the court to answer the charges of rigging or manipulation. Counsel then cited the case of *Egolum v. Obasanjo* (1999) 5 S.C. (Pt.I) 1; (1999) 7 NWLR (Pt.611) 355 at 397. It is elementary that where an allegation is made against someone more particularly in the conduct of an election and the action of the person is called into question, to wit, that the offender engaged in such an intrepid act which has done violence to the spirit of the Act, the offender should be a necessary party otherwise how else could one establish his culpability.

What really gave rise to this allegation of manipulation, and the way and manner the lower court treated this issue? The 1st witness to testify for the petitioners in the lower court was Chief Bisi Lawal, who is of ANPP and a gubernatorial candidate but not an electoral officer. Part of his testimony reads thus:

"They brought very few election results, form EC8A 142 out of 3210 were returned to me. The presidential candidate for ANPP scored 680. The 1st respondent scored 1,360,170 votes in Ogun State. I cross-checked the 147 form EC8A received. I disagree with the 680 votes credited to the ANPP Presidential candidate. I also disagree with the 1,360,170 votes credited to 1st respondent.

The difference between the votes scored by all governorship candidates for all the parties in Ogun State and that scored by 1st respondent is 618,071 more than the total votes cast for all the gubernatorial candidates put together. The same procedure followed in Ogun State by

INEC is the same thing all over the country. Same time, same day using the same voters register."

How does he know all those facts in the whole country unless he is capable of being in so many places one and at the same time? Continuing, he said:

"The result that came out of the Presidential election in Ogun State was massively manipulated in favour of the first respondent, and substantially reduced for the 1st petitioner. The result from Ogun State is untenable".

The weakness easily manifest in P.W.1's testimony, using his expression, is a dose of "massive" hearsay and full of conjectures, assumptions not based on hard facts. I have carefully read the evidence of the other witnesses in Ogun State and there is nothing they said that warranted the conclusion drawn by the lower court. No doubt that court might have been profoundly affected, disgusted by some untoward and offensive acts committed in selected areas by people most of whom were unknown. However, with greatest respect, at all times the court should not allow sentiment to obscure its vision in relation to what is before it. P.W.1 was not and cannot possibly be at all the places in Nigeria at the same time.

Chief Ahamba replicando submitted that the mere joining of the Resident Electoral Officer was enough as he was in charge and that the onus was on him to clear "how the result from a very minute fraction of the units became larger than the result from the whole". This charge may not be salutary from ethical point of view and it stands to reason in the eye of a neutral person that something odious took place. And, even if working in proportion to what was realized in other districts or wards could that have affected the overall results or the victory? I doubt it. In the circumstance, this issue succeeds.

The 2nd issue somehow is tangentially related to the first issue. As I stated earlier the evidence of manipulation is not clear in that no one is clearly shown to have been responsible for the nature of the rigging. The very big obstacle that anyone who seeks to have the election of the President or Governor upturned is the very large number of witnesses he

must call due to the size of the respective constituencies. In a country like our own, he may have to call about 250,000 - 300,000 witnesses. By the time the court would have heard from all of them with the way our present law is couched, the incumbent would have long finished and left his office and even if the petitioner finally wins, it will be an empty victory bereft of any substance. Once again, I agree that this issue is successful.

Having so stated, the remaining issues canvassed in this cross-appeal and the other cross-appeals have been subsumed in the judgment of this court. In the final analysis the cross-appeal succeeds.

While though the main appeal has failed due to what I ascribe as to the impossibility of satisfactorily proving nation-wide spread of ineptitude, violence, intimidation and other acts of terrorization as well as other barefaced acts that literally chill the bones and would as William Shakespeare said in Macbeth (*"make the sitteth heart knock at my ribs against the use of nature"*) some of the revelations that is, where the few evidence was led and proved, are blood curdling. That in this day and age in this country that has been independent for 45 years we can still witness horrendous acts by security officers who ought to dutifully ensure peace and tranquility in the election process suddenly turning themselves into agents of destruction, and introduced mayhem to what ordinarily would have been a civilized way of exercising franchise by the people who are sovereign, is regrettable. I ascribe the nefarious activities of thugs and the few security officers and party men to lack of understanding of the philosophy and ethics behind election in a democratic state and lack of understanding of the dynamics of election processes. It is scary to send policemen to election places when they have not been properly tutored that in the exercise of their duty to maintain law and order in election areas, their allegiance is to the Constitution. Some of the evidence elicited is so disquieting that one would wonder whether we have learnt or in fact can learn a lesson. Such inordinate and impetuous acts are despicable. Such mania to traduce all known civilized practices by the supporters of the parties is reprehensible, and condemnable. Some of the things that happened in 2003 election can be likened to what Macduff, the Thane of Cowdar said when he saw the bloodied murdered King Duncan in Macbeth

by William E. Shakespeare:

"O horror, horror, horror! Tongue nor heart cannot conceive nor name

Thee.....

Confusion hath made his masterpiece

Most sacrilegious murder hath broken open

The Lord's anointed temple and stole thence

The life of the building"

And when Lennox asked, "Mean you his Majesty"? Macduff answered:

"Approach the chamber and destroy your sight

With a new Gorgon do not bid me

See, and then speak yourself. This country would not like to witness another Gorgon in an election.

To ensure the non-repeal of what happened in some parts of the country in 2003, there must be massive education of the electoral officers who will take part in future elections. There must be statewide enlightenment, programmes educating the masses as to their rights as to how the citizens who are sovereign can exercise their franchise freely, unmolested and undisturbed. There must be de-emphasis on money. It is important to demonstrate to the citizenry what incalculable harm corruption has done in this country so that at election time they should learn to shun people who try to buy their votes. More importantly, our security men should have a series of workshops to learn that their allegiance is to the Constitution and should learn to practice what police in developed nations do. Politics in Nigeria should not be a do or die affair. Anyone without a profession except politics must have nothing to do with politics in whatever form. Above all let budding politicians leave jobless people who now turn into thugs as supporters alone, so that more harm will not be done to electoral processes.

I wish to congratulate the counsel on all the sides for work well done as they waded through the forest or should I say labyrinth of evidence adduced, and were able to demonstrate uncanny understanding of their case which they have been able to show in their well forensically researched,

articulated and admirable briefs.

On the whole, the main appeal is dismissed. I affirm the judgment of the court below. The cross-appeals however succeed. I abide by the orders contained in the leading judgment.

B

AKINTAN JSC

C I had the privilege of a preview of the leading judgment just delivered by my learned brother, Uwais, CJN. He has set out the full facts of the case, discussed and reviewed all the issues formulated and canvassed in all the briefs filed by the parties in the appeal. I therefore do not intend to repeat then. I agree with his reasoning and the conclusions he reached therein. All I intend to do therefore is by way of emphasizing some aspects of the case and complementing some of the views expressed in the leading judgment.

D

The 1st appellant contested the Presidential Election held throughout the country on 19th April, 2003, on the platform of the 2nd appellant political party, the All Nigeria Peoples Party. The 1st and 2nd respondents also contested the same election. They were candidates for the office of president and vice president respectively. The 3rd respondent, the INEC, is the statutory body charged with conducting elections in the country and in fact conducted the said election. The 4th to the 265th respondents are officials of the 3rd respondent that participated in conducting the election. Apart from the 1st appellant and 1st and 2nd respondents, there were other candidates that contested the election along with them for the offices of President and Vice President.

G

At the end of the election, the 3rd respondent published the results. In the results published, the 1st respondent scored 24,456,140 votes. The scores of other contestants were also published. The 1st respondent, having scored the highest votes, was declared as the winner of the election. The appellants were dissatisfied with the results declared by the 3rd respondents. They therefore filed a petition at the Court of Appeal (hereinafter referred to as the court below) which under Section 239 of

H

the 1999 Constitution, is conferred with the exclusive original jurisdiction to hear and determine petitions relating to the election into the office of President or Vice President under the Constitution.

The appellants amended their petition twice at the court below.

In their second and final amended petition, they prayed that court for the following reliefs: B

“(a) An order declaring the election invalid for reasons of non-compliance with substantial sections of the Electoral Act 2002;

(b) An order of the court that the election is invalid for reason of corrupt practices; C

(c) An order of court that at the time of the election, the 1st respondent was not qualified to contest; and

(d) An alternative claim that the 1st respondent was not validly elected by a majority of lawful votes cast in the election and did not receive 25% of votes cast in two-thirds of the States of the Federation and the Federal Capital Territory.” D

At the trial in the court below, the petitioners called 139 witnesses, the 1st and 2nd respondents called 100 witnesses, while the 3rd to 268th respondents called 114 witnesses. At the close of the case for the respondents, counsel in the case submitted written addresses. The court below thereafter delivered its reserved judgment in the case on 20/12/04. The court, in its said judgment, dismissed me petition in a majority judgment (Nsofor, JCA., dissenting). The present appeal is against the majority judgment of the court dismissing the petition. F

The appellants filed 41 grounds of appeal against the judgment.

The 1st and 2nd respondents, as well as the 4th and 5th respondents, filed notices of cross-appeal. The parties filed their briefs of argument in this court. The appellants formulated the following 18 issues as arising for determination in the appeal: G

(1) Whether the Court of Appeal properly interpreted Sections 135(1) and 67(3) of the Electoral Act, 2002. H

(2) Whether the Court of Appeal properly interpreted and applied the presumption of regularity under Section 150(1) of the Evidence Act in the judgment.

(3) Whether the failure of the Court of Appeal to nullify the Presidential Election of 19th April, 2003, after holding the 3rd respondent damnable and lacking in neutrality for failing to produce election results was proper in law.

B (4) Whether the Court of Appeal's conclusion that non-compliance with Section 67(3) of the Electoral Act was not proved is sustainable considering the express provisions of the Section, the pleadings of the parties and the totality of evidence on record on the point.

C (5) Whether the Court of Appeal's failure to invalidate the Presidential Election after holding that Section 18 of the Electoral Act, 2002, was not complied with was proper.

(6) Whether the Court of Appeal's failure to invalidate the Presidential Election after finding that Section 40(1) of the Electoral Act, 2003, was breached in the conduct of the election was proper.

D (7) Whether the Court of Appeal was not in error by failing to invalidate the Presidential Election considering the specific and uncontroverted evidence of bias or likelihood of it in the INEC, and Resident Electoral Commissioners in twelve States of the Federation.

E (8) Whether the failure of the Court of Appeal to apply to Section 149(d) of the Evidence Act against 3rd respondent for failing to produce the letter of protest in Cross River State for which notice to produce had been given was proper in law.

F (9) Whether the Court of Appeal's non-application of the provisions of Section 129 of the Electoral Act, 2002, against the 1st and 2nd respondents was proper after the pleadings, evidence on record and the findings of the court on intimidation and violence.

G (10) Whether the exclusion in the majority judgment of the properly admitted evidence of malpractices proffered in Local Government Areas on the ground that such Local Government Areas were not specifically pleaded was proper in law.

(11) Whether, on the balance of probability, the Presidential Election should not have been invalidated.

H (12) Whether there was no evidence proffered on Imo State that can substantially affect the election.

(13) Whether the Court of Appeal was not in error by discountenancing a substantial volume of evidence in some States on the ground of a perceived non-joinder of necessary parties.

(14) Whether on the balance of probability the election in each of Adamawa, Kaduna, Enugu, Kogi, Taraba, Ebonyi, Benue, Cross-River, Edo, Rivers, Bayelsa and Imo States should not have been severally invalidated.

(15) Whether the Court of Appeal was not in error by upholding the Presidential Election of 19/4/03 after invalidating the election of one State (Ogun) considering the provisions of Section 134(1) of the Constitution of the Federal Republic of Nigeria.

(16) Whether the 1st and 2nd respondents' reply is a competent process in the proceeding.

(17) Whether the 1st respondent was qualified to contest the Presidential election under the Constitution of the Federal Republic of Nigeria.

(18) Whether the Court of Appeal did not misdirect itself on the number of States of the Federation upon which the petitioner preferred evidence and, if it did, whether the misdirection did not occasion a miscarriage of justice.

The 1st and 2nd respondents complained in their brief that many of the issues formulated are repetitive in nature while some are academic. Issues 1 and 2, in particular, are regarded as mere academic questions, the resolution of which are said not to have any effect on the outcome of the case. The 1st and 2nd respondents thereafter reduced the issues to eleven. The 3rd and 6th to 268th respondents adopted the 18 issues formulated by the appellants in their brief of argument. The 4th and 5th respondents, on the other hand, reduced the issues to only two in their brief. I will, however, consider the issues as raised in the appellants' brief.

The main complaint of the appellants in issue 1 is that the court below mis-interpreted the provisions of Sections 67(3) and 135(1) of the Electoral Act, 2002. (hereinafter referred to in this judgment as the Act). As a result of the misinterpretation of the provisions of the two

sections of the Act, it is alleged that a non-existent onus of proof was wrongly placed on the appellants. Specifically, it is alleged that the court below misinterpreted the specific provisions of Section 67(3) of the Act which provides, inter alia, “that the polling agents shall certify the election materials from the office to the polling booth”. In the leading judgment of the court below written by Tabai. JCA., the learned Justice said thus:

“It is clear both from Section 67(3) of the Electoral Act and paragraph 13 of the petition that it is the polling agents who have the authority to certify documents. And although it is not categorically so stated in the provision, it appears to me that the certification was to be done either at Ward Collation/Distribution centre where materials were supposed to be handed over to the presiding officers. I came to that conclusion because from the evidence before the court, the polling agent carried out his function only within the operational bases or areas of a presiding officer.”

It is submitted that the above interpretation was speculative in nature and fails to give effect to the clear words of the provision.

Section 67 of the Act makes provision for the forms for use at the elections conducted under the Act. The section provides thus:

“67(1) The forms to be used for the conduct of elections to the offices mentioned in Section 15 of this Act, election petitions arising therefrom shall be substantially set out in Second Schedule to this Act or as may be otherwise determined by the Commission from time to time.

(2) Notwithstanding the provisions of sub-section (1) of this section, the commission shall have power to design any forms it deems necessary for the discharge of its functions under this Act.

(3) The Polling Agents shall certify the election materials from the office to the polling booth.”

The grievance of the appellants is that the court below failed to hold that the certification of the election materials “from the office to the polling booth” should have been interpreted to mean certification from the office of the 3rd respondent, INEC. Instead, the court inter-

preted that provision to mean “the certification was to be done either at ward collation/distribution centre where materials were supposed to be handed over to the presiding officers.”

It may be mentioned that Polling Agents are people appointed by political parties under Section 36(1) of the Act and their appointments are to be “by notice in writing signed and addressed to the Electoral Officer of the Local Government Area for which they (political parties) have candidates and the notice shall set out the names and addresses of the polling agents and be given to the Electoral Officer before the date fixed for the election.” The main role of the polling agents as prescribed in Section 36(1) is mainly to be the representative of the political party at every polling station. A polling agent is usually posted to a particular polling station as the agent of the political party that appointed him. It is therefore out of place to hold that every polling agent, say in a State, would first all assemble at the 3rd respondent’s State office or in 3rd respondent’s local government office in the case of those appointed to polling stations in a particular local government area, merely to perform or witness certification of election materials before moving to the various polling stations where they are attached by the political parties that appointed them. Such interpretation could create unenviable logistic problems and will also be contrary to the provisions of the section.

The interpretation given to the provision by the court below is therefore correct, very appropriate and in line with the provisions of the Act.

The other complaint raised in issue 1 is against Section 135(1) of the Act. The Section 135(1) provides as follows:

“135(1) An election shall not be liable to be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of this Act and that the non-compliance did not affect substantially the result of the election.”

The main objective of the above provision is to ensure that not every minor non-compliance or minor breach of the provisions of the

Act should vitiate an election.

An Election Tribunal or a court entertaining an election petition is to decide from the evidence tendered before it in each case whether an alleged non-compliance is substantial enough to warrant nullification of an election. In the instant case, the appellants' complaint was that the court below did not give the provision a proper interpretation in the leading judgment. Reference is made to a passage from the judgment where Tabai. JCA., said:

"It is my view from the above provision therefore that unless there is more proof that the non-compliance with the provisions of Section 18 of the Electoral Act substantially affected the result, the election shall not be liable to be invalidated."

Section 18 of the Act mentioned in the above passage quoted from the judgment provides that "all electoral officers, presiding officers and returning officers shall affirm or swear an oath of loyalty and neutrality indicating that they would not accept bribe or gratification from any person, and shall perform their functions and duties impartially and in the interests of the Federal Republic of Nigeria."

It is submitted in the appellants' amended brief that the court below did not interpret the expressed words of the provision, but instead, imported an alien expression upon which the court's interpretation was based. The court's act is said to amount to a judicial amendment of the provision by excluding the words "did not" by which a different meaning was given to the provision.

The complaint of the appellants in this respect emanated from an allegation that some of the electoral officers, presiding officers and returning officers were not administered with the oath as required in Section 18 of the Act. The stand of the court below was that such omission alone was not enough to justify nullification of an election in the absence of any proof of any malpractice on the part of the officials.

I entirely agree with that stand. This is because, if such a stand is not taken, it would be totally impossible to conduct any election, let alone a presidential election in which the entire country is involved. It would mean a minor non-compliance at, for example, a polling station in a

village, would result in cancelling the entire election nation-wide. Such a situation is what Section 135(1) of the Act is aimed at preventing.

Reference is made in the appellants' amended brief to the provision of Section 93(1) of the Electoral Act, 1963, which is said to be similar Section 135(1) of the Act and the interpretation given to that provision by this court in *Swem v. Dzungwe* (1996) 297 at 303 where this court said, *inter alia*:

"It is clear therefore that where from the facts found, the court was unable to say whether or not non-compliance affected the result, once it is satisfied that there was non-compliance which might affect the result, an election will be allowed"

The court below is accused of not following the interpretation as postulated in that case by not nullifying the Presidential Election held throughout the country after finding that some electoral officials failed to take the oath prescribed in Section 18 of the Act. I totally disagree with the view that the interpretation given by the court below is in conflict with the stand taken in the *Swem v. Dzungwe* case (*supra*). This is because it is clear from the passage quoted from the judgment in the *Swem v. Dzungwe* case that the trial court in the case was unable to make specific finding of fact on whether or not non-compliance affected the result of the election in that case. That was not the position in the instant case because the court below was not in doubt in holding that the evidence was led to show that the non-compliance with the provision of the said Section 18 of the Act influenced the performance of the officials who were alleged to have failed to take the required oath or that the results of the election was affected by the failure to take the oath by the officials.

As I have stated earlier above, the purpose of the inclusion of Section 135(1) in the Act is to prevent an election from being invalidated on mere failure to comply with minor provisions of the Electoral Act which have no effect or substantially affect the outcome of the election.

Presidential election, according to our Constitution, is a nation-wide exercise. The preparations involve a lot of planning, logistics and enormous cost of money from public fund. The courts are required to take

judicial notice of all these points stated above. An order of cancellation or nullification of such an election is therefore not expected to be made by a tribunal or court without clear, positive, credible and overwhelming evidence led to the effect that the entire election was totally flawed nation-wide and the conduct was in breach of major and very fundamental provisions of the Act.

In the instant case, the 1st appellant was just one of the numerous candidates that contested for the office of President of Nigeria at the election. The 2nd appellant was also one of many political parties that fielded candidates for the same office. The 1st appellant, according to the result declared at the end of the election, scored just about half of the votes credited to the 1st respondent. But the 1st appellant did not challenge the scores credited to the 1st respondent nor prayed the court below to declare him a winner and to that end, leading credible evidence to show that he scored more votes than the 1st respondent at the election. But he prayed the court below to set aside the entire election on the grounds, inter alia, that certain breaches of the provisions of the Act were committed without showing how the alleged breaches affected the entire outcome of the election, including the results credited to the other contestants and himself. The court below was therefore right in rejecting the request and the interpretation given to the provision of the Act is, in my view, quite appropriate.

In the appellants Issue 2, it is alleged that the court below misapplied the provisions of Section 150(1) of the Evidence Act relating to presumption of regularity of official acts. The section provides thus:

“150(1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with.”

It is alleged that the court below misinterpreted the above provision by holding that the onus of proving irregularity was on the appellants. A dictum of Ogunbiyi, JCA., in INEC v. Ray (2004) 14 NWLR (Pt.892) 92 at 135 was cited in support of the view that the onus should be on the defence. In the dictum, the learned JCA is reported as saying that the presumption could only be available to INEC if it produced a

result of the election at the tribunal.

But from the facts in the instant case, it was not in doubt that a result was declared. A result was in fact declared in which the 1st respondent was declared as the winner at the election. The onus was on the appellants who challenged the election of the 1st respondent to lead credible evidence in support of their contention that the 3rd respondent failed to carry out the duties assigned to it by law. It is after the appellants have led credible evidence in support of their claim as pleaded that the onus would shift on the 3rd respondent to rebut the claim of the appellants. Election petitions are civil matters. The burden of proof in civil matters is not static or rigidly on one side as in criminal cases. It shifts from one side to the other, depending on the state of the pleadings and evidence led in support of each of the parties' case. See Adegoke v. Adibi (1992) 5 NWLR (Pt. 242) 410 at 423; and Osawaru v. Ezeiruka (1978) 6-7 S.C. (Reprint) 91; (1978) 6-7 S.C. 135 at 145. There is therefore no merit in the appellants' contention in issue 2.

The same result is also applicable to the contention of the appellants in Issue 3 where they are blaming the court below for not nullifying the election on the ground that the 3rd respondent failed to produce the results of the election as demanded in a subpoena. Again, the law is settled that where a party fails to produce a document required in a subpoena, the party making the demand would be entitled to lead secondary evidence of the documents so demanded. The omission to produce the document can never be visited with dismissal of the case of the party who failed to produce such document. There is therefore also no merit in the appellants' case on that issue.

The complaint of the appellants in issue 6 is that the election ought to have been nullified on the ground that some voters were allowed to cast their votes without producing their voters cards. This is said to be contrary to specific provisions of Section 40(1) of the Act.

The said Section 40(1) of the Act provides as follows:

“40(1) Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the Constituency in which his name is registered with his voter's card.”

The complaint of the appellants is that some people who did not produce their voter's cards were allowed to vote and that even though Tabai, JCA., found as a fact and held that there was no evidence of the number of such votes cast by people without voter's cards and the units in which such votes were cast, the learned Justice still came to the conclusion that in the absence of such evidence the effect of such votes on the election could not be ascertained.

The court below is therefore being accused of failure to nullify the election in the whole country on the allegation that an unspecified number of people voted without presenting their voter's cards. I believe that the court below was right in not yielding to the appellants' request.

Yielding to such a request would have amounted to an act of gross irresponsibility and perverted the course of justice. The same is the position in all the allegations of breaches of similar provisions of the Act made by the appellants in this appeal. They are all instances where they failed to prove that the alleged breaches had any substantial effect on the outcome of the entire election. These are in the appellants' Issues 5, 6, 7, 10 and 11. In the absence of any credible evidence led to show that any of the alleged breach of the provisions of the Act substantially affected the outcome of the election, no court could grant a request for nullification. The appellants totally failed to realize that the aim of the provisions of Section 135(1) of the Act is to save an election from being nullified on frivolous grounds premised on allegations of minor breaches of the provisions of the Act. The issues raised in the appeal are mainly querying instances of alleged breaches of the provisions of the Act. They failed to prove the effect of such breaches on the outcome of the election. They are therefore bound to fail.

The other point I will like to discuss is the allegation of intimidation and violence during the election raised in the appellants' issue 9; and the exclusion or discountenance of evidence led on ground of non-joinder of necessary parties raised in issue 13.

In the appellants' issue 9, reference is made to the provisions of Section 129 of the Act relating to use of undue influence during an election. It is alleged that although the court below made findings of

fact that incidents of acts of use of violence existed in many parts of the country, the court is however said to have refused to cancel the election for that reason. Again, mere allegations of incidents of use of force or existence of violent acts made by one of the candidates at an election are insufficient to warrant cancellation of a nation-wide election without showing who was responsible for the violence. Section 129 of the Act prescribes adequate sanction for anyone found guilty of committing any of the acts listed in the section. It is therefore inappropriate to infer that a particular candidate was responsible for the violent acts committed without any evidence led to prove the allegations beyond reasonable doubt as required in proving criminal cases.

The point raised in issue 13 is that certain evidence were rejected on the ground that the necessary parties were not joined. I have no doubt in hold in holding that the step taken by the court below is in line with the mandatory provision of Section 133(2) of the Act which require that such people should be joined as necessary parties.

For the reasons I have set out above, and the fuller reasons given in the said leading judgment written by my learned brother, Uwais, CJN., I also hold that there is totally no merit in the appellants' appeal, I accordingly dismiss the appeal. I will now consider the cross-appeals.

CROSS-APPEAL

The 1st and 2nd respondents as well as the 4th and 5th respondents were not satisfied with some aspects of the judgment. They therefore filed notices of cross-appeal and filed their respective cross-appellants' briefs in this court. The appellants/cross-respondents also filed a cross-respondents' brief. The 1st and 2nd respondents/cross-appellants formulated the following five issues as arising for determination in their cross-appeal.

1. Whether the learned trial Justices of the Court of Appeal ought to have nullified the presidential election results in Ogun State having regard to the non-joinder of the mandatory election officials against whom serious allegations were made by the petitioners/cross-respondents.

2. Whether the learned trial Justices of the Court of Appeal

were right in nullifying the presidential election results in Ogun State in the light of the evidence and materials placed before them.

3. Whether the learned trial Justices of the Court of Appeal were right to have voided some provisions of the Manual of Election Officials for being inconsistent with the Electoral Act, 2002, in view of the pleadings of the parties and the evidence before the court.

4. Whether the learned trial Justices of the Court of Appeal were right to have nullified the presidential election results in some local government areas, wards and polling units in Akwa-Ibom State, Rivers State, Bayelsa State and Taraba State having regard to the totality of evidence before the court and the persons joined as respondents to the petition.

5. Whether the learned trial Justices of the Court of Appeal were right to have held that Section 18 of the Electoral Act, 2002, was not complied with having regard to the totality of evidence before the court.”

The cross-respondents, on the other hand, formulated six issues in their cross-respondents brief. However, I believe that the six issues are covered by the five issues formulated in the cross-appellants’ brief. I therefore consider it unnecessary to reproduce the six issues formulated by the cross-respondents. I will accordingly treat the questions raised in the appeal based on the issues formulated in the cross-appellants’ brief.

The cross-appellants are querying the nullification of the presidential election in Ogun State in their issues 1 and 2. It is submitted that the court below was wrong in nullifying the election in that State because the necessary parties against whom the allegations of malpractices were made were not joined as parties as required in Section 133(2) of the Act. They also queried the evidence relied on by the court below in arriving at the decision to nullify the election.

On failure to join the necessary parties, it is submitted in the cross-appellants’ brief that the only officers of INEC from Ogun State that were joined as respondents in the petition are the 31st and 68th respondents, that is, the Resident Electoral Commissioner for Ogun State, as the 31st respondent; and the State Returning Officer at the Presi-

dential Election in Ogun State, as the 68th respondent. It is argued that having regard to the allegations and findings made by the court below, those two officers were not answerable at all for the allegations. It is argued that the allegations of malpractices were in fact made against the Local Government collation officers who were joined as necessary parties. This is said to be contrary to the mandatory provisions of Section 133(2) of the Act.

The evidence relied on in the instant case is also said to be faulty in that it is hearsay, and that since allegations of falsification were made, such allegations ought to be proved beyond reasonable doubt since they are criminal in nature.

The evidence tendered by the petitioners in support of the case for the cancellation of the Presidential Election results in Ogun State came from one Bisi Lawal. (P.W.1), the 2nd appellant/cross-respondent’s party agent in Ogun State. His role was to receive the results brought by his party’s polling agents, collate them and arrive at the total figure credited to his political party. He was definitely not present at the various polling stations where the results brought to him by his party’s agents were prepared.

On the necessary parties to be joined. Section 133(2) of the Act provides that:

“133(2) The person whose election is complained of is, in this Act, referred to as the respondent, but if the petition complains of the conduct of an Electoral Officer, a Presiding Officer, a Returning Officer or any other person who took part in the conduct of an election, such officer or person shall for the purpose of this Act be deemed to be a respondent and shall be joined in election petition in his or her official status as a necessary party.”

The officials who are required to be joined as necessary parties under the sub-section quoted above, are those whose conduct at the election the petition is complaining about in the petition. It -s therefore necessary that the complaints of a petitioner must have to be examined before a decision whether the appropriate official who took part in the conduct of the election and whose conduct is subject of complaint in

the petition was joined. In the instant case, the appellants/cross-respondents were complaining about the figures brought to their party agent in Ogun State (P.W.1). The officials joined in this respect are the Resident Electoral Commissioner, Ogun State (as 31st respondent) and the State Returning Officer at Presidential Election, Ogun State (as 31st respondent).

The complaint of the appellants/cross-respondents in this respect is premised on the finding of fact made by Tabai, JCA., in the leading judgment where the learned Justice said:

“On the scores in these documents, if the 1st petitioner scored 1,547 votes from 142 polling units there can be no circumstances by which he would score less in the overall result from 3,210 units in the State.”

It is clear from the above complaint that the allegation could not be said to have been caused by any particular electoral officer, presiding officer, or returning officer. The details of the person responsible could only come in the evidence presented by the appellants at the trial. But this was not done. Also, there is nothing in the complaint upon which the appellants could infer that the allegation was criminal in nature because the complaint could arise as a result of mistake in the calculation or failure to retrieve all the necessary returns from the party’s polling agents or any other cause. It is therefore not right to infer that the errors complained of were as a result of criminal acts on the part of the officials of the 3rd respondent, INEC.

In the instant case, the only evidence relied on came from Bisi Lawal (P.W.1). The question therefore is whether the evidence presented by the appellants/cross-respondents was sufficient to justify the conclusion reached by the court below on the issue. The parties joined, therefore, are in my view, quite appropriate and the required proof cannot be one beyond reasonable doubt as required in proving criminal cases.

On the question whether the evidence led in support is sufficient to warrant the decision reached on the point by the court below, it is necessary to examine the said evidence led. The position of the few regarding the type of evidence which must be led in support of allega-

tions in which figures or scores of candidates at an election are being challenged is that it should come direct from the officers who were on the field where the votes were counted and/or collated. The State party agents, such as Bisi Lawal (P.W.1), received the figures he gave in his evidence in court in this case from his party’s agents, who were not called as witnesses. Such evidence is therefore inadmissible as it is hearsay. See Omoboriowo v. Ajasin (1984) 1 SCNLR 108; and Hashidu v. Goje (2003) 15 NWLR (Pt.843) 352 at 386.

In the Hashidu v. Goje case, (supra), I stated the position of the law on the point on page 393 of the report as follows:

“The main contention in the appeal is whether the appellants led sufficient credible evidence at the trial to warrant turning around the results of the election declared in favour of the 1st respondent by INEC. The result as declared by INEC gave the 1st respondent 494,562 votes as against 468,273 votes credited to the 1st appellants. The margin was therefore 26,289 votes. All that the appellants needed to prove was to ensure that 26,289 votes plus one vote are subtracted from the votes credited to the 1st respondent. But in their efforts to prove this, they relied principally on the evidence led by P.W.1 and P.W.2, their two principal witnesses. They overlooked the point that these two witnesses were not in the field where the results being challenged were counted and entered on the forms brought to the P.W. 1 and later passed on to P.W.2. The evidence relied on by PWs. 1 and 2 are therefore what they were told by witnesses (their agents) who were not called to give evidence. The correct evidence in this respect ought to come from the polling agents who received the form from INEC polling officials and in whose presence the INEC officials prepared and signed the forms on which the disputed figures were written.”

As I have stated earlier above, Bisi Lawal (P.W.1) was the Ogun State party agent of the 2nd appellant/respondent political party. The figures he gave the court below in his evidence were brought to him by his party’s polling agents sent to the various polling stations. None of these party agents was called to testify. Similarly, none of the INEC polling agents was called to testify and confirm the figures since

they should be the makers of the Forms on which the figures given were written. It follows therefore that the evidence given by the said P.W.I on the figures and relied on by the lower court was totally inadmissible because it is hearsay evidence. The court below was therefore wrong in relying on the figures. The cancellation of the election based on the inadmissible evidence is accordingly improper. I therefore allow the cross-appeal on the issue of cancellation of the Presidential Election result in Ogun State. I accordingly set aside the order of the court below cancelling the said result in Ogun State.

The point raised in the cross-appellants' issue 3 is whether the court below was right to have voided some provisions of the Manual of Election Officials admitted in evidence at the hearing as Exhibit O. The Manual was prepared by INEC under the powers conferred on INEC in Section 149 of the Act. That section provides as follows:

"149. The Commission may, subject to the provisions of this Act, issue regulations, guidelines or manuals for the purpose of giving effect to the provisions of this Act and for the due administration thereof."

The powers conferred on INEC in the section enable the Commission to make what is sometimes called by-laws or subsidiary legislation. The Manual (Exhibit O) in the instant case, was issued as a working guide to the INEC officials. The section does not or is not expected to confer on the Commission or any of its officials any power beyond what the principal Act conferred on the Commission or any of its officials. Similarly, the powers conferred on the Commission in the said Section 149 do not authorize the Commission to amend any of the provisions of the principal Act. It follows, therefore, that if any of the provisions contained in the Manual (Exhibit O) is in conflict with the mandatory provisions of the Electoral Act, such provisions will be ultra vires, null and void and may be so declared by the court since such provisions would be outside the powers conferred on the Commission. See *Psychiatric Hospital Management Board v. Ejitaga* (2000) 11 NWLR (Pt.677) 154; and *Mayor of Westminster v. London & North-Western Railway Co.* (1905) AC 426 at 430.

In the instant case, the specific provision in the Manual (Exhibit O) which was the subject of the appellants/cross-respondents' complaint is the one which authorized those whose names appear on the register of voters but had no voter's cards to vote during the election.

That directive is said to be contrary to the mandatory provisions of Section 40(1) of the Act. That section reads thus:

"40(1) Every person intending to vote shall present himself to a Presiding Officer at the polling unit in the Constituency in which his name is registered with his voter's card.

(2) The presiding officer shall, on being satisfied that the name of the person is on the register of voters, issue him a ballot paper; and indicate on the register that the person had voted."

The section authorized every Presiding Officer power and duty to ensure and be satisfied with the identity of every person who presents himself to him as a registered voter intending to vote before issuing him with a ballot paper. This is required to be done by the Presiding Officer comparing the names on the voter's card presented to him with the names on the register of voters in his possession. That is what is required of him in Section 40 of the Act. Any regulation or directive made by INEC which precludes the Presiding Officer from cross-checking the names on the voter's card with that on the register of voters or which permits either someone with a voter's card alone to vote or, as alleged in the instant case, which permits anyone without voter's card but whose names appear on the register of voters to vote, will be acting contrary to the mandatory provisions of Section 40 of the Act. The relevant provision of the Manual (Exhibit O) is therefore in conflict with the mandatory provision of the Act and it is accordingly ultra vires, null and void. The court below was therefore quite right in declaring the said provision in the Manual (Exhibit O) as ultra vires, null and void.

But as I have said earlier above in my judgment in the main appeal, merely establishing that some people who were not entitled to vote, such as those who were allowed to vote without presenting their voter's cards as in the instant case, will not per se be enough to cancel an election unless it is clearly shown that the number of those involved

in such voting illegally when deducted from the total votes cast at the election would change the outcome of the said election. As that was not shown in the instant case, there is no justification in tampering with the results declared by the INEC.

B *As a result of the conclusions I have reached above in the three*
issues I have considered so far in the 1st and 2nd respondents/cross-ap-
pellants' issues formulated in their brief. I believe that it is fruitless tak-
C *ing up the other issues raised in the 1st and 2nd respondents/cross-ap-*
pellants' brief as well as those raised in the 4th and 5th respondents'
brief. My final conclusion therefore is that for the reasons I have given
above and the fuller reasons given in the leading judgment written by
my learned brother. Uwais. CJN. I hold that the main appeal fails and I
accordingly dismiss it. I allow the cross appeal and I make no order on
D *costs.*

B

C

D

E

F

G

H

E

F

G

H

B

C

D

E

F

G

H

B

C

D

E

F

G

H

B

C

D

E

F

G

H