

COURT OF APPEAL  
IBADAN JUDICIAL DIVISION  
26TH NOVEMBER, 2010. CA/1/EPT/GOV/02/2010  
CORAM:- C. B. OGUNBIYI, M. L. GARBA, P. A. GALINJE,  
C. C. NWEZE, A. JAURO, JJCA

RAUF ADESOJI AREGBESOLA & 2 ORS. .... APPELLANTS/  
CROSS RESPONDENTS

AND

OLAGUNSOYE OYINLOLA & 2 ORS. .... RESPONDENTS/  
CROSS APPELLANTS

INDEPENDENT NATIONAL  
ELECTORAL COMMISSION

(INEC) & 1363 ORS. .... RESPONDENTS/  
CROSS RESPONDENTS

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PLEADINGS - Crime - Civil cases - Proof beyond reasonable doubt  
- Applicability - It is inapplicable where allegations of crime are severable - And their severance still leaves plaintiff with a cause of action (H1)

ELECTION PETITIONS - Pleadings - Averments - Civil nature of - Averments in many paragraphs are both civil - And severable from criminal averments in the petition - Contrary to the finding of the tribunal (H2)

STATUTES - Interpretation - S. 145(1)(b) of Electoral Act 2006 - "Or" - The use of "or" in the provision presupposes the dividing line - And the independent nature of distinguishing corrupt practices - From noncompliance (H3)

ELECTION PETITIONS - Evidence - Front loaded depositions - Status - Such statements of witnesses become their evidence in chief on adoption - The court is under a duty to evaluate same as such (H4)

JUDGMENTS - Mistakes - Amendments - Limit of "slip rule" - The rule only applies - Where the mistake is not of a fundamental nature - Transcending the entire proceedings - And going to the root of the

decision (H5)

ELECTION PETITIONS - Witnesses - Competence - Effect of s. 77 of Evidence Act - Unless Electoral Act otherwise provides - Officers of political parties are competent to testify - If qualified under the section (H6)

ELECTION PETITIONS - Evidence - Admissibility - Effect of s. 136 of Electoral Act 2006 - Evidence of witnesses is admissible - Though they may have obtained same in contravention of the section - By loitering after voting (H7)

ELECTION PETITIONS - Reports by polling agents - Admissibility - S. 91 of the Evidence Act - They are admissible under the section - Without calling their makers to testify - If calling them will cause undue delay or expense (H8)

STATUTES - Interpretation - Guiding principle - Interpretation should be for the purpose of giving the statute an effective result - Which is consistent with the intention of the legislature (H9)

ELECTION PETITIONS - Evidence - Reports by agents - Relation to their principal - Such reports qualify as reports by the principal - In line with the principle of agency - That he who acts through another acts by himself (H10)

EVIDENCE - Documents - Proof of authenticity - Whether maker must testify - Unless the authenticity of a document is challenged - The need to call the maker to testify does not arise - As authenticity will be presumed (H11)

EVIDENCE - Documents - Oral evidence of contents - Admissibility - Witness may give oral evidence of statements made by another person - About the contents of a document - If such statements are relevant (H12)

ELECTION PETITIONS - Judicial precedents - Distinguishing - *Akamode v. Dino* - The earlier case is distinguishable in that unlike in

that case - Respondents herein failed to effectively challenge appellants witnesses (H13)

PLEADINGS - Averments - Failure to lead evidence - Effect - Such averment is deemed abandoned and dead - With the result that issues are no longer joined with the opposite party (H14)

PRACTICE & PROCEDURE - Pleadings - Abandonment - Effect on party's case - The party cannot be heard to contradict by argument - What the other party has proved by evidence (H15)

EVIDENCE - Evaluation - Meaning - It involves a reasoned belief of the evidence of one party - And disbelief of the other - And an indication on record as to how the court arrived at its conclusion (H16)

ELECTION PETITIONS - Appeals - Limitation period - S. 149 of Electoral Act 2006 - Scope - It only applies where the decision appealed against - Has been given against the party who was returned as elected (H17)

APPEALS - Grounds - Competence - Effect of technical defect - Once a ground is succinctly couched - And the parties understand the meaning thereof - It is not incompetent by reason of mere technical defect (H18)

APPEALS - Grounds - Bases - Propriety - A ground of appeal must not only arise from the judgment appealed against - But must complain against the ratio decidendi of the case - Not an obiter dictum (H19)

ELECTION PETITIONS - Witnesses - Evidence not pleaded - But admitted by witness under cross examination - Election petitions not being like normal cases - Certain evidence may be acted upon - Though not pleaded (H20)

EVIDENCE - Words & phrases - Expert witness - Meaning - An expert witness is any person - Who in the opinion of the judge - Is specifically skilled - In the field he is giving evidence (H21)

**FACTS**

Following the general elections of 14 April 2007, the Independent National Electoral Commission (INEC) declared and returned the 1st respondent as the winner of the Gubernatorial seat in Osun State. Dissatisfied by the result as declared, the appellants/cross-respondents filed a petition before the Governorship and Legislative Houses Election Petitions Tribunal in the State challenging the return of the 1st respondent. The first tribunal dismissed the petition but on appeal a rehearing by a second tribunal was ordered. It is the decision of the second tribunal that is now being appealed against. It was appellants' case that no election was conducted in several polling stations and wards in ten local governments and that in few areas where elections were held, they were marred by violence. Appellants also alleged non-counting of votes in most polling stations and wards, as well as multiple thumb printing in other polling stations.

The respondents/cross-appellants filed a joint reply to the petition. The respondents/cross-respondents also filed a joint reply and so the 1366th and 1367th respondents. All the respondents essentially denied the allegations contained in the petition and contended that the election was conducted in substantial compliance with the provisions of the Electoral Act 2006. However, at the hearing, only the appellants and the cross-appellants led evidence. At the end of hearing, the tribunal dismissed the petition as it held that appellants did not make out their case though it cancelled the result of two units. It was the view of the tribunal that in view of the various criminal allegations in the petition, the applicable standard of proof was beyond all reasonable doubt. Moreover, it held the further view that the front loaded depositions of most of the appellants' witnesses, though adopted by the witnesses on oath, were "mere allegations" that still required other evidence in proof thereof. Aggrieved, appellants have brought this appeal against the judgment of the tribunal. Respondents have also cross-appealed in respect of the cancellation of the results of two units.

**ISSUES FOR DETERMINATION****APPEAL:**

(1) Whether the tribunal was right in its decision by concluding that all the allegations by the petitioners/appellants related to crimi-

nal offences and that the proof which must be beyond reasonable doubt.

(2) Whether the tribunal was correct in treating the evidence of petitioners' witnesses that is to say PW1-PW65 and PW71-PW79 as mere allegation.

(3) Whether the tribunal was right in its conclusion relating the probative value and insufficiency of the evidence of ward supervisors and petitioners/appellants polling agents. B

(4) Whether the failure by the 4<sup>th</sup>-1365<sup>th</sup> Respondents also the 1366<sup>th</sup>-1367<sup>th</sup> Respondents to call evidence amounted to abandonment of their pleadings and consequently an admission of allegations in the petition as regards those parties. C

(5) Whether the tribunal properly evaluated the evidence of the witnesses inclusive of documentary evidence and arrived at the findings that the petitioners/appellants failed to prove their petition. D  
CROSS-APPEAL:

1. Whether having regard to the pleadings and evidence called the trial tribunal was not in error in nullifying the results of the election in unit 1 ward 9 of Atakumosa West Local Government and unit 1 in ward 9 of Ifedayo Local Government. E

2. Whether the tribunal was right in refusing to strike out the petition when same was presented out of the statutory prescribed period for presenting same and when same is vitiated by the joinder of unknown Respondents, the ground is unknown to law couple with the fact of the pleadings in the petition not supporting the grounds. F

3. Whether the tribunal was not wrong in refusing to attach probative value to the evidence of RW 61 and RW 62 when the testimonies of the said witnesses were credible and covered by the pleadings of the 1st - 3<sup>rd</sup> Respondents/Cross Appellants. G

**HELD** (Unanimously allowing the appeal and dismissing the cross-appeal per **OGUNBIYI JCA**)

***Civil cases - Proof beyond reasonable doubt - Applicability***

1. The interpretation of the foregoing authority presupposes that application of section 137(1) of the Evidence Act to a civil case depends on the contents of the pleadings of each case. In other words, if the averments alleging the commission of a crime are severable and if following such act of severance the petitioners pleadings still H

contains sufficient averments which suffices and discloses a cause of action devoid of criminal imputation against any of the parties to the proceedings, then the burden of proof laying on the petitioner is not of a criminal nature beyond reasonable doubt but that which requires proof on preponderance of evidence. The principle of severance in cases of this nature is of great significance and has been emphasized by their Lordships as seen in the case of *Omoboriowo v Ajasin* supra. In other words the determining factor is whether the allegations if severed and put into two separate compartments can be sustained as an entity. If the answer is positive, then proof of one is not dependent on the other but side by side. The crucial determinant factor certainly is dependant on the pleadings of the parties. (p. 2722 A)

**D *Pleadings - Averments - Civil nature of***

2. Taking into consideration the averments of the petitioners/appellants at paragraphs 18, 23, 24, 27.2 and 27.3 of the petition which have all been reproduced somewhere in this judgment, paragraph 18 for instance alleges that the purported elections in the contested Local Governments were vitiated by substantial non-compliance with the mandatory statutory requirements of the electoral Act 2006 which non-compliance substantially affected the validity of the said election such that none of the candidates in the said elections can be validly returned as having validly won the elections in the affected Local Governments. It is also significant to clearly restate again and as earlier pointed out that there are ten Local Governments which are in contention and subject of this appeal. The averments in the said paragraphs are clearly civil in natures which are distinct claims separable from the criminal allegations also in the same petition as it was the case in the authorities of *Omoboriowo v Ajasin* and also the recent decision in *Fayemi v Oni*. It is not, in other words correct therefore but erroneously found by the learned tribunal judges that all the allegations by the petitioners/appellants related to criminal offences. (p. 2723 D)

***Interpretation - S. 145(1)(b) of Electoral Act 2006 - "Or"***

3. More over and just for further emphasis, by the provision of section 145 of the Electoral Act 2006, the two allegations are sever-

able and serve sufficient to ground a petition. Specifically subsections (1)(b) and (c) states the grounds upon which such petition could be brought.

“145(1).....

(b) that the election was invalid by reason of corrupt practices or non-compliance with the provisions of this Act; B

(c) that the respondent was not duly elected by majority of lawful votes cast at the election;”

By the use of the word or in subsection (b), it presupposes the dividing line and Independent nature of and distinguishing corrupt practices from non-compliance. It will only amount to surplusage as earlier stated therefore to allege both the corrupt practices or non-compliance. (p. 2724 E) C

#### ***Election petitions - Evidence - Front-loaded depositions - Status*** D

4. Perhaps and on a more serious note, the tribunal had not adverted its mind for purpose of appreciating the front loading procedure of witnesses provided for in the Practice Direction. In other words that the statement of a witness once adopted becomes his evidence in chief and the court is under a duty to evaluate same and not to be treated as mere allegation requiring additional proof as deemed needed by the tribunal. Paragraph 1(1)(b), 4(1) and (3) of the Practice Direction for instance provides as follows:- E

“(1) All petitions to be presented before the Tribunal or Court shall be accompanied by:- F

(a).....

(b) Written statements on oath of the witness;.....

4(1) Subject to any statutory provision or any provision of these Paragraphs relating evidence, any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses in open court. G

(2) .....

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

The use of the word shall in the foregoing provisions, make the compliance compulsory. (p. 2728 C)

**JUDGMENTS - Mistakes - Amendments - Limit of "slip rule"**

5. It is glaring that the 1<sup>st</sup> - 3<sup>rd</sup> respondents senior counsel conceded that the tribunal strayed by the use of the word "mere allegations" to describe the evidence of the appellants' witnesses and thus the use of  
 B a "mere slip" committed by the tribunal. Whether or not the act amounted to a mere slip is dependant on the consequential effect arising there from and its outcome on the appellants' case.

The concept of a 'Slip Rule' presupposes that, it is occasioned  
 C by accident or mistake and therefore not deliberate. Another significant feature is that it is amenable to amendment which must not be of a fundamental nature. In other words, it must not transcend the entire proceedings as to have a devastating effect going into the root of the decision. This cannot be said of the situation with the case at  
 D hand and under consideration, wherein the tribunal, from the judgment in question, and on appeal, the tribunal, as rightly submitted by the learned senior counsel for the appellants treated the evidence of virtually all the appellants' witnesses as mere allegations.  
 (p. 2729 A/E )

E

**Witnesses - Competence - Effect of s. 77 of Evidence Act**

6. Having regard to the findings of the tribunal at page 164 of the record under reference supra, it is clear that in reliance on section 77  
 F of the Evidence Act the tribunal conceded that ward supervisors are competent witnesses "to give account of what they saw, heard or perceived of which the tribunal so held;" Not too far distant space and time, the same tribunal also at page 165 seriously veered off and branded the evidence of the ward supervisors as mere allegations.  
 G Rather and in other words, it held also that evidence of non-counting of votes, non announcement of results and what happened at various polling units ought to have come only from polling agents. This is a glaring inconsistency as it amounts to blowing hot and cold either from the same mouth or at one and the same time. In the absence of  
 H any provision in the Electoral Act 2006 which precludes officers of a political party who are not polling agents from testifying on behalf of a party the only guiding principle ought and should be section 77 of the Evidence Act. In other words, the pre-occupation and concern of the tribunal should be whether the witnesses sought to testify "are

competent to give account of what they saw, heard or perceived,” in their bid to give first hand evidence. The said section 77 of the Evidence Act is a substantive law which enshrines the direct evidence rule. (p. 2735 F)

### ***Evidence - Admissibility - Effect of s. 136 of Electoral Act 2006*** <sup>B</sup>

7. Significant to say that the said section of the Electoral Act, however creates an offence for loitering “without lawful excuse after voting or after being refused to vote.

It is also trite law that regardless of the source of the evidence by PW1-PW66 and PW71-PW79, or even in the face of contravening the provisions of section 136(i)(ii), the illegality, if any, will attach to the persons of the witnesses and not the evidence given by him. In other words, even where a witness is branded as illegal, the same will not apply to the evidence given by such a witness no matter the source of the evidence which is immaterial. In the case of Sadau & Anor. V State where the apex court relied on the case of Kuruma, Son of Kamau v the Queen, at page 203 the Privy Council described the position of the law as follows:-

*“In their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is admissible the court is not concerned with how the evidence was obtained.”* (pp. 2736 H/2737 C) <sup>E</sup>

### ***Reports by polling agents - Admissibility - S. 91 Evidence Act*** <sup>F</sup>

8. However and for the determinant relevance or not of the reports by the petitioners/appellants polling agents, recourse can be had to section 91 of the evidence Act.

It is significant to restate that the application and invocation of the foregoing provision of the Evidence Act, which could be at any stage of a proceeding, is subject to the fulfillment of certain conditions serving as pre-requisite to the making of the order there under. In other words, the court must in the first place take all the circumstances into account and if satisfied that either undue delay or expense would otherwise be caused, proceed to admit such statement as evidence regardless to whether or not an order is made to the effect. By the use of the phrase “notwithstanding that the maker of the statement is available but is not called as a witness”, serves <sup>H</sup>

relevant for the justification of the entire provision. The determinant factor is squarely centred on the necessity to take into account all the circumstances of the case which should be, to the satisfaction of the court. The application and relevance of this section to the case at hand would only be appreciated in the light of the subject matter of  
B appeal which is by nature an election petition appeal.  
(pp. 2745 D/2746 A)

***STATUTES - Interpretation - Guiding principle***

C 9. The direction of the line of reasoning by the tribunal cannot be accommodated within the context of the provision of section 91 of the Evidence Act. Specifically and for instance, the legislature cannot be said to enact a law that would serve a defeatist function by rendering section 91(2) of the Act of non effect.  
D The Supreme Court has reaffirmed the guiding principle governing the interpretation of statutes for instance in the case of *Abdulkarim v Incar (Nig.) Ltd. (1992) 7 NWLR (Pt.251) page 1 at 17* the court held the principle as resting on the maxim *ut res magis valeat quam pereat* which in other words is for the purpose of giving  
E such statute an effective result which is consistent and not divergent with the intention of the legislature. (p. 2748 E)

***Evidence - Reports by agents - Relation to their principal***

F 10. It is in order to say that the reports prepared by the polling agents, appointed in accordance to section 46(1) under the 2006 Electoral Act were indeed, the reports of the 3<sup>rd</sup> petitioner as their principal. The authorities of *Buhari v Obasanjo* should be read in conjunction with that of *James v Mid-Motors* both under reference *supra*. This is  
G in line with the well established principle of law of agency of *Qui Facit per alium facit per se*. That is to say that he who does an act through another does it himself. The said exhibits 1-78,143-146 and 148-153 are therefore the Acts of the 3<sup>rd</sup> petitioner who in law and being the principal is the maker or author of the said documents. The case  
H of *Nasir v Berini* under reference *supra* is relevant and in point wherein Coker, JSC at pages 293 had this to say:-

The letter, exhibit 23, was put in evidence by Mr. Nasir himself. He had given evidence that he instructed his solicitors to write the letter and he thereafter testified as follows:-

*“Exhibit 23 speaks of a tacit arrangement between me and the bank ..... the main terms of the tacit arrangement are contained in Exhibit 23.”*

*“In the circumstances in which Exhibit 23 was put in evidence, therefore, the maker of it, i.e. the plaintiff, even though he acted through his agent, his solicitor, gave oral evidence indicating that he was the author of the contents of Exhibit 23. We think therefore that on that basis the judge was right to deal with the contents of Exhibit 23 as if the document was evidence of its contents.”*  
(pp. 2749 E/2750 A)

***Documents - Proof of authenticity - Maker must not testify***

11. The respondents did not also challenge the authenticity of the said Exhibits 1-78,143-146 and 148-153 hence, the reason for the calling of the makers of the reports did not therefore arise. In other words the admission of the exhibits without objection presupposed that they were authentic in the absence of any challenge. In the case of G. Chitex Ind. Ltd. v O. B. I. (Nig.) Ltd. (2005) 14 NWLR (Pt.945) 392 at 411, the apex court per Musdapher, JSC had this to say on the foregoing subject:-

*“Exhibit H which was offered as proof of the loss of N3.5 million is not an authentic document to entitle the appellant to claim such damages. Where a document is challenged and impugned as unauthentic, the maker of the document should be called to support the document, otherwise no weight should be attached to it.”*

The submission by the learned senior counsel for the 1<sup>st</sup>-3<sup>rd</sup> respondents on the distinction between admissibility of a document and the weight to be attached to it amounts to a misconception of the documents in question and at hand, especially having regard to the pronouncement by His Lordship of the apex court in the case of G. Chitex Ind. Ltd. v O. B. I. Nig. Ltd. supra. In other words while it is not in dispute that there is a distinction between admissibility of a document and the weight to be attached thereto, the situation at hand does not come within that argument and circumstance wherein the reports admitted are worthy of weight. (p. 2751 F)

***Documents - Oral evidence of contents - Admissibility***

12. For further confirmation on the weight to be attached to the reports in question, the provision of section 198(2) of the Evidence Act is also relevant and in support wherein the reproduction says:-

B *“A witness may however give oral evidence of statements made by another persons about the contents of a document if such statements are in themselves relevant facts.”*

C The question to pose and following the foregoing authority is, how relevant are the polling agents reports? It is pertinent to restate that the said exhibits as the report by the polling agents are the accounts of what they witnessed at the conduct of the various elections. On the authority of the provision of section 198(2) of the Evidence Act therefore, there is no doubt that the statement about the content of such report are in themselves relevant facts as it would serve to D confirm or not the allegation of the transgressions complained of by the petitioners. The contents of the report being relevant facts are therefore admissible in evidence and to be accorded the due weight of recognition. (p. 2752 C)

E ***Judicial precedents - Distinguishing - Akamode v. Dino***

13. The petitioners/appellants, it was resolved earlier in this judgment led evidence (both oral and documentary) in proof of the said allegations in the paragraphs and the effect which was to shift the onus of proof to INEC and which same was not discharged. The case of F Ukpo v Imoke supra is in support.

G It is relevant to further restate that for purpose of grounding the respondents arguments, in rendering worthless the evidence by the appellants’ witnesses, same cannot be brought within the case of Akanmode v Dino supra. This is in the absence of effectively challenging the appellants witness so as to render their evidence as naught. It is also clear on record and as earlier stated that most of the appellants witnesses were not cross examined and even those who were, H their credibility was never challenged. The cross examination did not also in anyway elicit any evidence in support of the averments in the said respondents’ briefs. A mere cross examination is not enough to satisfy the Arguments by the learned respondents counsel, contrary to the submission by their learned counsel. (p. 2760 F)

***PLEADINGS - Averments - Failure to lead evidence - Effect***

14. In the circumstance of this case, the resultant outcome of the 4<sup>th</sup> to 1365<sup>th</sup> and 1366<sup>th</sup> to 1367<sup>th</sup> respondents' pleadings is that same in the absence of calling any evidence are hereby abandoned. The pronouncement made in the case of *Ojoh v Kamalu* at page 565 supra B is evident wherein Tobi JSC had this to say:-

*"Pleadings, not being human beings have no mouth to speak in court. And so they speak through witnesses. If witnesses do not narrate them in court, they remain moribund, if not dead at all times and for all times, to the procedural disadvantage of the owner."* C

Also relevant is *Alao v Akano* (2005) 11 NWLR (Pt.935) at 180, where Akintan, JSC amongst others stated this and said:-

*".....The law is settled that where issues are joined on any averment in the pleadings but no evidence is led to support such averment, the result is that such averment in the pleadings is either to be struck out or be dismissed. In other words, such averment could be treated as having been abandoned."* D

Further still and in addition to its being dead, the effectual pre-supposition is that issues are no longer joined because the being nature of the pleadings can no longer speak through the language of a witness. The consequential outcome is that there would be no reply at all on record in which case issues are no longer denied because there is no denial. (p. 2761 G) E

***Pleadings - Abandonment - Effect on party's case***

15. The 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup>-1367<sup>th</sup> respondents have both abandoned their pleadings, they cannot in the circumstance be heard to contradict by their arguments what the petitioner have proved by evidence. There cannot therefore be an issue for consideration and which has been formulated by a party that has abandoned his pleadings. This is as laid down by this court again in the case of *Alhaji Muhammed Maigari Dingyadi & Anor v Aliyu Magatakarda Wamako & Ors.* supra wherein Belgore JCA said:- H

*"There is no doubt that the tribunal was clearly in error. There cannot be an issue for consideration formulated by a party that has abandoned his pleadings. The issue so formulated has nothing to hang on. Where a defendant abandons his pleadings, he is taken and as*

*having admitted the allegations against him in the statement of claim.”*  
(p. 2763 C)

***EVIDENCE - Evaluation - Meaning***

16. However, as shown above, the tribunal only concerned itself with  
B a summary or re-statement of the testimonies of the witnesses. This  
was where it erred. A summary or restatement of evidence is not the  
same thing as evaluation of evidence.

While the summation of the evidence simply means what it says,  
C namely, making a summary of the evidence, the evaluation or ap-  
praisal of evidence is a much more rigorous process which entails the  
assessment or estimation of the evidence with a view to ascribing  
credit or value to it.

Unlike a mere review of evidence, its actual evaluation in-  
D volves a reasoned belief of the evidence of one of the contending  
parties and disbelief of the other or a reasoned preference of one  
version to the other. Above all, there must be an indication on record  
as to how the court arrived at its conclusion of preferring one piece of  
evidence to the other. (p. 2769 H)

E

***Appeals - Limitation period - S. 149 of Electoral Act - Scope***

17. Pursuant to paragraph 1 of the Election Petition Practice Direc-  
tions, No.2 of 2007, an Appellant is required to file his Notice and  
F Grounds of appeal at the registry of the election petition tribunal  
within 21 days from the date of the decision appealed against. This  
provision is consistent with the provisions of Section 149 of the Elec-  
toral Act 2006.

In BUHARI VS OBASANJO (2005) 13 NWLR (PT.941) 1 the Su-  
G preme Court was faced with a similar situation as in this case. In that  
case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised a preliminary objection on  
the ground that the cross appeal was filed outside the 21 days pro-  
vided under Section 138(1) and (2) of the Electoral Act, 2002. Hav-  
ing examined the Section aforesaid which is the same as Section 149(1)  
H and (2) of the Electoral Act, 2006, the Supreme Court held at page  
179 paragraphs G-H as follows:-

*“It could be seen that section 138 of the Electoral Act is con-  
cerned 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Cross Appellants validly elected. Therefore the provisions of the section have no application here."*

I feel bound by the decision of the Supreme Court in BUHARI B VS OBASANJO (supra). (pp. 2789 F/2791 B)

### ***Grounds - Competence - Effect of technical defect***

18. A ground of appeal is a statement by a party aggrieved with the decision of a Court, complaining that the Court from which the appeal is brought made a mistake in the finding of facts or application of law to certain sets of facts. In other words, a ground of appeal is the complaint of the Appellant against the judgment of the Court. Such a complaint must be based on the live issue or issues in controversy in the suit. D

A ground of appeal is no doubt a pillar upon which the appeal rests. Once it is succinctly couched and the parties understand and appreciate the meaning of the contents thereof, such a ground of appeal will not be incompetent merely because it is technically defective. E

I agree that the Cross Respondents have not shown that they have either been misled or that a miscarriage of justice has been occasioned as a result of the manner grounds 4 and 5 of the cross appeal have been couched. I therefore find no reasonable cause to declare grounds 4 and 5 incompetent. (p. 2792 D) F

### ***APPEALS - Grounds - Bases - Propriety***

19. I also read through the judgment of the tribunal at pages 9-210 of volume 7 of the record of appeal, I found no passage where the tribunal commented on the question of whether or not the petition was filed out of time and whether the 17<sup>th</sup> - 157<sup>th</sup> Respondents were wrongly or rightly fused in the petition. In COOPERATIVE & COMMERCE BANK PLC & ANOR. VS JONAH DAN OKORO EKPERI (2007) 1 SC (PT.11) 130 at 147 lines 9-22, Tobi JSC said:- H

*"It is elementary law that a ground of appeal must arise from or relate to the judgment of the court. It must directly emanate from the judgment of the Court. It must complain against the ratio decidendi of the case, not the obiter dictum. An Appellate Court should*

not be placed in a position of speculation or conjecture whether a ground of appeal arises from or relates to the judgment of the Court. And that is why our adjectival law requires that the grounds of appeal must be drafted with concision, precision or exactness. There is no room for vague and rigmarole language in the drafting of grounds of appeal.”

Having found that the 6<sup>th</sup> and 7<sup>th</sup> grounds of cross appeal do not arise from the decision against which the cross appeal lies, they are liable to be struck out. I accordingly strike them out.  
(pp. 2793 G/2794 D)

**Witnesses - Evidence not pleaded - But admitted by witness**

20. The finding of the tribunal with respect to the cancellation of the results of the two units is at pages 79 and its back. It is aptly produced in the briefs of both parties. It is therefore sufficient to state here that the cancellation of the results was attributable to irregularity in the conduct of the election in the two units. RW22 and RW9 were witnesses called by the Respondents/Cross Appellants and they made admission against the Cross Appellants interest. This is evidence that carries sufficient weight. The admission of these witnesses under cross examination that the election in these two units was not conducted in substantial compliance with the Electoral Act 2006 cannot be ignored because same did not form part of the pleadings. Election Petitions are sui generis, and unlike the normal cases, certain evidence though not pleaded are capable of being acted upon. For example, where there is a proven case that a ballot box in a polling unit was snatched and taken away, it will be preposterous for a tribunal to accept a result from that polling unit because it was not pleaded that the ballot box in that unit was snatched and taken to an unknown destination.  
(p. 2795 G)

**Words & phrases - Expert witness - Meaning**

21. The law is settled that whether or not a witness can be regarded as an expert is a question for the judge who heard the witness to decide. In ATTORNEY GENERAL OF THE FEDERATION & 2 ORS. VS ABUBAKAR & ORS. (2007) 4 SC (PT.11) 62 at 247 LINES 9-10, the Supreme Court per Aderemi JSC had this to say:-

*“In legal parlance, an expert is any person who is specifically*

*skilled in the field he is giving evidence. But I hasten to add that whether or not such a witness can be regarded as an expert is a question for the judge to decide.” See AZU VS THE STATE (1993) 6 NWLR (PT.299) 303.*

The learned trial judges of the tribunal gave the reasons why they did not accord much reliance on the evidence of RW61 at page 200 paragraph 5 of their judgment.

As far as I am concerned, the learned trial judges of the tribunal have competently handled the evidence of RW61 and RW62. I do not think I have any justification to interfere with that exercise.

### **REPRESENTATION**

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1. Egun .O. Sofunde SAN
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4. Kola Awodein SAN
5. Charles Edosomwan SAN
6. Prof. Yemi Osinbajo SAN
7. Deji Sasegbon SAN
8. J. O. Fakayode SAN
9. Femi Ifaturoti SAN
10. Adewale Afolabi SAN
11. Nath Agunbiade SAN
12. Funso Olukoga SAN
13. T. A. Abdul-Wahab SAN
14. Dapo Akinosun SAN
15. Adetunji Ajagbe SAN
16. Olatunji Ibrahim SAN
17. Mutiu Ganiyu SAN
18. Lanre Ayanwale SAN
19. Gbenga Akano SAN
20. W. A. Salman SAN
21. Olusegun Olatoye SAN
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23. Olayinka Okedara SAN
24. Ajibola Basiru SAN
25. Kunle Adegoke SAN
26. T. S. Adegboyega SAN
27. Kolapo Alimi SAN
28. Ibrahim Lawal SAN
29. B. A. Ramoni SAN
30. Daud’ Akinloye SAN
31. Omojola Odunaya SAN
32. Mutiu Olaoye SAN
33. M. A. Adebisi SAN
34. Adedoyin Taiwo SAN
35. Yewande Omotayo SAN
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7. ADEBAYO ADELODUN SAN 8. OTUNBA KUNLE KALEJAYE SAN  
9. N. O. O. OKE SAN 10. R. A. LAWAL-RABANA SAN  
11. A. A. ABIMBOLA ESQ. SAN 12. DEGBILE MORONKEJI ESQ.  
B SAN  
13. DR. WAHAB EGBEWOLE SAN 14. HASSAN TAIWO FAJIMITE  
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15. WOLE OLUKANNI ESQ. SAN 16. TEWO LAMUYE ESQ. SAN  
C 17. BOYE SOBANJO ESQ. SAN 18. ADEBISI RAIMI ESQ. SAN  
19. K. K. ELEJA ESQ. SAN 20. ADESOJI OLAOBA-EFUNTAYO ESQ.  
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21. OLUWOLE KUPOLUYI ESQ. SAN 22. YEMI GIWA ESQ. SAN  
23. M. T. ADEKILEKUN ESQ. SAN 24. ADETUNJI MURAINA ESQ.  
D SAN  
25. A. O. OYELEKE ESQ. SAN 26. ABIMBOLA AROWOSEBE  
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27. AKEEM OLANIYAN ESQ. SAN 28. A. O. OLADELE ESQ. SAN  
29. N. N. ADEGBOYE SAN 30. OLUMIDE ALIU ESQ. SAN  
E 31. CHUKWUDI MADUKA ESQ. 32. T. B. OLURODE (MISS)  
33. T. E. AKINTADE (MISS) 34. CHUWUDI ENEBELI ESQ.  
35. MUYIWA ADEGUN 36. I. A. SAKA ESQ.  
37. GBOYEGA OYEWOLE (former A-G) 38. TUNJI LAWAL  
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1. MRS. AYODEJI BOBADERIN WITH DAYO FAMAKIN-JOHNSON.  
COUNSEL FOR 1366<sup>th</sup> AND 1367<sup>th</sup> RESPONDENTS:

- G 1. HON. ATTORNEY GENERAL AND COMMISSIONER FOR JUSTICE - HON. NIYI OWOLADE  
2. MRS. K. M. AKANO - SOLICITOR GENERAL AND PERMANENT  
AND PERMANENT SECRETARY, MINISTRY OF JUSTICE.  
3. MR. JIDE OBISAKIN - CHIEF STATE COUNSEL  
H 4. MR. O. F. AKINTAYO - STATE COUNSEL

### **CASES REFERRED TO**

Ajadi v Ajibola (2004) 16 NWLR (Pt.898) 91 at 195

- Ojo v Gharoro (2006) 10 NWLR (Pt.987) 173 at 203  
ANPP v INEC (2010) 13 NWLR (Pt.1212) 549 at 614  
Michael v Yuosuo (2004) 15 NWLR (Pt.895) 90 at 105  
Ukpo v Imoke (2009) 1 NWLR (Pt.1121) 90 at 143-44  
Yusuf v Obasanjo (2005) 18 NWLR (Pt.956) 96 at 210  
INEC v Abubakar (2009) 8 NWLR (Pt.1143) 259 at 295 B  
Gambari v. Saraki (2009) All FWLR (Pt.469) 445 at 474  
Kowa v Musa (2006) 5 NWLR (Pt.972) pages 1 at 34-35  
Lasun v Awoyemi (2009) 16 NWLR (Pt.1168) 513 at 553  
Ogun v Ekwere-madu (2006) 1 NWLR (Pt.961) 255 at 281 C  
Agagu v Mimiko (2009) 7 NWLR (Pt.1140) 342 at 424-425  
Maduabum v Nwosu (2010) 13 NWLR (Pt.1212) 623 at 656  
Maduekwe v Okoroafor (1992) 9 NWLR (Pt.263) p.69 at 82  
Military Governor of Ondo State v Adewunmi (1983) 3 NWLR (Pt.82) 280 D

### **STATUTES & RULES REFERRED TO**

- Evidence Act, ss. 91, 138, 137 & 198  
Electoral Act, 2006, ss. 145, 155 & 158  
Election Petition Tribunals and Court Practice Directions 2007 E

### **LEAD JUDGMENT BY OGUNBIYI JCA**

This appeal is against the judgment of the Governorship and Legislative House Election Petition (Retrial) Tribunal holden at Osogbo, Osun State (Coram: Justices Ali Garba, Benedict E. Agbattah, Ismaila H. Bashir, Muhammad T. M. Aliyu and Abimbola O Obaseki) delivered on 28<sup>th</sup> day of May, 2010. The Notice of Appeal is contained at pages 546 to 601 of Volume 7 of the Record of Appeal. F

The brief facts of this case are that on the 14<sup>th</sup> April, 2007, the 4<sup>th</sup> Respondent conducted an election for the office of the Governor of Osun State. The 3<sup>rd</sup> Petitioner/Appellant sponsored the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners/Appellants as its Governorship and Deputy Governorship Candidates, respectively, in the said election while the 3<sup>rd</sup> Respondent sponsored the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as its governorship and deputy governorship candidates also respectively. At the end of the exercise, the 4<sup>th</sup> Respondent announced that the 1<sup>st</sup> Respondent scored a total of 426,666 votes as against the 1<sup>st</sup> petitioner's 240,722 and consequently declared the 1<sup>st</sup> Respondent duly elected and returned H

as the Governor of Osun State.

Dissatisfied with the conduct and result of the election, the Petitioners/Appellants on 11<sup>th</sup> May, 2007, filed the petition at the Governorship and Legislative Houses Election Petition Tribunal holden at Osogbo, Osun State claiming the following reliefs against the Respondents at paragraphs 158 and 159 at pages 211-213 of the record as follows:

“158.1 That votes recorded and/or returned in the following Local Government namely Atakumosa West Local Government, Ayedaade Local Government, Boluwaduro Local Government, Boriipe Local Government, Ede North Local Government, Ife Central Local Government, Ifedayo Local Government, Isokan Local Government, Odo-Otin Local Government and Ola Oluwa Local Government, do not represent lawful votes cast in the said Local Government areas in the Osun State Governorship Election held on the 14<sup>th</sup> April, 2007 and as having been obtained in vitiating circumstances of substantial non-compliance with mandatory provisions of Electoral Act, 2006, violence and malpractices which substantially affected the validity of the said elections that none of the candidates in the said elections can be validly returned as having validly won in the said affected Local Government Areas.

158.2. That the said Prince Olagunsoye Oyinlola was not duly elected By the majority of lawful votes cast in the Osun State Governorship Election held on April 14, 2007 and that his election is void.

158.3 That Rauf Aregbesola was elected and ought to have been returned having scored the highest number of votes cast in the Osun State Governorship Election held on April 14, 2007, and satisfied the requirements of the section 179 of the Constitution of the Federal Republic of Nigeria, 1999 and the Electoral Act, 2006.

158.4 .That the 1<sup>st</sup> petitioner be declared validly elected or returned. 159. The Petitioners pray **ALTERNATIVELY AND ONLY IN THE ALTERNATIVE-**

159.1. That the Osun State Governorship Election held on April 14, 2007 is void on the ground that the election was not conducted substantially in accordance with the provisions of Part IV of the Electoral Act, 2006.

159.2. That the said election was vitiated by substantial non compliance with the mandatory statutory requirements which sub-

*stantially affected the validity of the said elections that none of the candidates in the said election can be validly returned as having validly won the said election.*

*153.7. That the Osun State Governorship Election held on the 14th of April 2007 be nullified or cancelled and the 4<sup>th</sup> Respondent is to conduct fresh elections for the office of the Governor of Osun State.”*

It is the Appellants’ case that the 1<sup>st</sup> Respondent was not duly elected by majority of lawful votes cast at the election; that the results announced by the 4<sup>th</sup> Respondent for the ten Local Governments namely: Atakunmosa West, Ayedaade, Boluwaduro, Boripe, Ife Central, Ife East, Ife South, Ifedayo, Isokan and Odo-Otin Local Governments are not and do not represent results of the lawful and valid votes cast thereat and that the purported elections were vitiated by substantial non-compliance with the mandatory requirements of the Electoral Act, 2006.

It was also the petitioners case that no election was conducted in several polling stations and wards in the said Local Governments and that in few areas where elections were held, the elections were marred by violence. The petitioners also made the case that the elections were inconclusive, wherein votes were not counted and results were not recorded in forms EC8A and were not also announced in most polling stations and wards.

Furthermore that, already multiple thumb printed ballot papers were forcefully deposited at collation centres and counted as valid votes but were illegally recorded on Form EC8A and eventually announced in favour of the 1<sup>st</sup> Respondent. The petitioners also alleged that there were general cases of multiple thumb printing of ballot papers, and ballot snatching by agents of the 1<sup>st</sup> to 3<sup>rd</sup> Respondents, and that all the widespread disruptions, irregularities and/or malpractices referred to in the petition were done with the express and/or implied consent, authority or instruction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents acting severally or in concert.

The three sets of Respondents in the petition filed their respective joint replies to the petition with each denying the allegations contained therein. In other words, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents settled a joint reply which was filed on the 8th of June, 2007. The reply in essence, denied all the allegations contained in the petition. The Re-

spondents also contended that the return of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was lawful and proper and that the elections in the alleged contested Local Governments were conducted in compliance and/or in substantial compliance with the provisions and spirit of the Electoral Act 2006.

B The 4<sup>th</sup> to the 1365<sup>th</sup> Respondents also settled a joint brief. Similarly, that of the 1366<sup>th</sup> and 1367<sup>th</sup> Respondents also a joint reply, was filed on the 20<sup>th</sup> of May, 2007.

C It is pertinent to restate at this juncture that while the petitioners contended at paragraph 17 of the petition that the returns in 12 Local Governments were unlawful and invalid, the pursuit was dropped in respect of Ede North and Ola Oluwa Local Governments. It is not in dispute by all parties therefore that there are ten local governments in contention.

D At the trial therefore, the petitioners called a total of 82 witnesses and tendered documentary evidence in respect of only ten of the twelve Local Governments pleaded in the petition as reproduced supra and thereby abandoned its pleadings in respect of Ede North Local Government and Ola- Oluwa Local Government.

E On their own behalf the 1<sup>st</sup> to 3<sup>rd</sup> Respondents called 62 witnesses while the 4<sup>th</sup> -1365<sup>th</sup> Respondents (INEC) and the 1366<sup>th</sup> - 1367<sup>th</sup> Respondents did not call any witness at all. On the 28<sup>th</sup> May, 2010, the Honourable Tribunal at pages 9-210 Volume 7 of the record delivered the judgment in the petition and dismissed same on the ground that the petitioners had not made out their case.

F At this juncture, I would wish to briefly resolve the controversy as to which of the two judgments at pages 9-210 and 219-423 of Volume 7 of the record of appeal is authentic. While the appellants submitted in favour of the former, the 1st to 3rd respondents relied on the latter.

G It is on record that the judgment of the tribunal delivered in the open court on the 28<sup>th</sup> May, 2010 and signed by four members of the Panel is contained on page 9 to 210 of Volume 7 of the record. H The reference made by the 1<sup>st</sup> to 3<sup>rd</sup> respondents at paragraph 1.01 and where ever else it appeared and relying on pages 219-423 supra, cannot possibly be the judgment currently appealed against but a strange document. This is apt because the said document sought to be relied upon was supposed to have been a clean copy of the judg-

ment in the petition and which same at page 211 of the record was admittedly typed and served by the Secretary of the Tribunal “with the tacit consent and authority of the Chairman”, and which was neither delivered, signed nor authenticated by any of the Justices. Page 423 of Volume 7 of the record is evidence. By section 294(1) of the 1999 Constitution, the said document which has not been B duly authenticated cannot in the circumstance be the judgment of the tribunal appealed against or to which reference could be made. The authenticated judgment of the tribunal and which is the subject of this appeal is contained at pages 9 to 210 of Volume 7 of C the record.

Dissatisfied with the said judgment the petitioners appealed to this Court by the Notice of Appeal dated 14<sup>th</sup> June, 2010 and filed on the 16<sup>th</sup> June, 2010. It is contained at pages 546 to 601 of Volume 7 of the Record of Appeal wherein 69 grounds of appeal were D raised. The notice of appeal at pages 602-656 was also withdrawn by the learned senior counsel Mr. E. O. Sofunde and same is hereby struck out.

In compliance with the Practice Direction, all parties filed their respective briefs of arguments, with that of the appellants dated and E filed 6<sup>th</sup> July, 2010. The reply to the 1<sup>st</sup> - 3<sup>rd</sup> respondents is also dated and filed the 29<sup>th</sup> July, 2010 and that to the 1366<sup>th</sup> - 1367<sup>th</sup> respondents dated and filed 25<sup>th</sup> October, 2010.

On behalf of the 1<sup>st</sup> - 3<sup>rd</sup> respondents their learned senior counsel F also filed respondents brief of argument dated and filed 19<sup>th</sup> July, 2010 also a cross appellants’ brief on the 8<sup>th</sup> July, 2010.

In response to the appellants’ brief, the 4<sup>th</sup> - 1365<sup>th</sup> respondents G filed a brief also dated 12<sup>th</sup> August 2010 but deemed properly filed pursuant to an order of court made on the 4<sup>th</sup> October, 2010. A further brief on behalf of the 1366<sup>th</sup> and 1367 respondents was also filed 14<sup>th</sup> July, 2010 but properly deemed filed on the 19<sup>th</sup> October, 2010.

On the 1<sup>st</sup> day of November, 2010 at the hearing of the appeal, Mr. E. O. Sofunde SAN represented the appellants cross/re- H spondents and appeared in company of his brothers silk inclusive of Chief Akin Olujinmi SAN as well as several other counsel. The senior counsel Chief Olujinmi who was assigned to prosecute the appellant’s appeal adopted and relied on their said brief under reference supra

and the replies to the sets of respondents briefs also under reference.

The learned senior counsel drew the court's attention to the brief filed by the 4<sup>th</sup> - 1365<sup>th</sup> respondents. He argued, that although the submissions therein amounted to a denial, they however did not call evidence at all to challenge any aspect of the evidence adduced by the petitioners at the trial. That the said respondents in the circumstance are therefore deemed to have abandoned their case and thus resulting in the petitioners' case being unchallenged.

The learned senior counsel in expatiating further on issues 1, 4, 6, 7 and 8 submitted at great length that they all relate to the pleadings of the petitioners on non counting of the votes by INEC Officials and their failure to produce the voters registers used in the conduct of the election. That the tribunal was therefore wrong in concluding that the complaints were mere allegations and which were not supported by any evidence. That it was wrong to say that the appellants did not call any evidence in support of the allegations especially where their seventy-five witnesses who were ward supervisors went from one polling station to the other. Reference in support was made to the case of *Lasun v Awoyemi* (2009) 16 NWLR (Pt.1168) 513 at 553. The learned counsel also submitted that the tribunal was in error in holding that non counting of votes and failure to produce register amounted to criminal allegations. The said counsel also argued that the criminal allegations are severable from the civil allegations and cited the recent decision by this court in the case of *Fayemi & Other v Oni & Others* in CA/IL/EPT/GOV/1/10 delivered on the 15<sup>th</sup> October, 2010; See also the case of *Agagu v Mimiko* (2009) 7 NWLR (Pt.1140) 342 at 401.

Submitting further on issue 17, the learned senior counsel faulted the tribunal in failing to take certain documents into account. An example was given of Exhibit 92 where registered voters were less than the votes counted. That a further discrepancy was where ballot papers did not tally with form EC8A. The learned senior counsel further re-emphasized the fundamental significance of voters register to a credible election in the absence of which there would be no election. Further reference was made to exhibit 196 and he argued that the tribunal failed to consider all the irregularities. That the tendering of Exhibits 217 by the appellants and R18 by the respondents which are certified true copies by INEC with same being blank and

unsigned, is contrary to the election manual and therefore fatal on the case of *Amabare v Sylva* (2009) 1 NWLR (Pt.1121) 1. That the lower court ought to have voided the election in the ten local governments and affirmed the 1<sup>st</sup> appellant as the elected Governor of Osun State having fielded the majority votes. The senior counsel so urged the court as submitted. B

On behalf of the 1<sup>st</sup> -3<sup>rd</sup> respondents Mr. Yusuf Ali SAN also in company of his senior colleagues and other counsel adopted the 1<sup>st</sup> - 3<sup>rd</sup> respondents' brief of arguments as referenced supra and prayed the court to dismiss the appeal. That the latter decision of *Amosun v Daniel* has settled the status of roving supervisors by five man panel of this court and that it was decided later than the case of *Lasun v Awoyemi* referred to by the appellants' counsel. That supervisors are unknown to section 62. That from paragraphs 62-71 of the appellants' petition, the issue of over voting was never pleaded as such D issue were therefore never joined. That the appellants should not be allowed to change the rules of the game at this stage. That with reference to paragraphs 19, 21, 22 and 27 of the petition, the appellants did not only make the commission of crime as the bone of their petition but the totality of it, hence, the principle of severance cannot E therefore be applied to this case. Learned senior counsel thereafter submitted the inapplicability of *Fayemi v Oni & Others* (supra). That the summary of the tribunals holding was that the totality of the petitioners' evidence did not prove their case to entitle them to judgment. The senior counsel questioned the uniformity in the testimony F of the petitioners' witnesses which he submitted is suggestive that they should not be believed as witnesses of truth. The case of *Maduabum v Nwosu* (2010) 13 NWLR (Pt.1212) 623 at 656 was cited as reference. That the tribunal was correct in rejecting the evidence G therefore.

Submitting further on issue 2, the learned senior counsel argued that a party requiring reliance on a document must link it to the case and not merely dumping same on the court. The following additional authorities were cited in support:- *Abubakar v Mark* (2010) H All FWLR (Pt.531) 1578 at 1602-1603; *ANPP v INEC* (2010) 13 NWLR (Pt.1212) 549 at 614; *Walter v Skyll* (Nig.) Ltd. (2000) FWLR (Pt.13) 2244 at 2277-2278, and *Audu v INEC* (No.2) (2010) 13 NWLR (Pt.1212) 456 at 521. That no voter was called by the appel-

lants since all the roving agents said they never voted. That the case of *Amaechi v INEC* relied upon by the appellant was cited out of context as it was not an election matter in the absence of voting being canvassed. That for the act of an agent to result into a nullification of an election, it must be linked to the respondent who was declared  
B elected.

Again and on the nature of the reliefs at paragraphs 158-159 of the petition, the learned senior counsel argued that they are declaratory and that the apex court had ruled that such cannot be granted  
C on admission without evidence being led in proof thereon. In other words, that even if the respondents had failed to lead evidence, the appellants still had the onus to prove their case. That a party who can prove his case by other means needs not call any evidence as it would amount to surplusage. That election petitions being sui generis in  
D nature, the issue of abandonment of pleadings is not applicable as it is the case in normal civil cases. The counsel re-iterated the authority cited at pages 138-140 of their brief in the case of *Olawepo v Saraki*; also the case of *Bello v Eweka II* (1981) 1 SC 1. The learned senior counsel prayed for the dismissal of the appeal in the final analysis.

E Mr. Ayodeji Bobaderin also in company of Dayo Famakin-Johnson represented the 4<sup>th</sup>-1365<sup>th</sup> respondents. The counsel Mr. Bobaderin in adopting the brief filed on behalf of their clients relied also on same as their arguments in response to the appellants' brief.

F The learned counsel referred to pages 8-22 paragraphs 16-52 where they resolved not to call witnesses because the appellants did not prove their case either in chief or under cross examination. That there is a distinction between the phrases "not calling witnesses" and "not adducing evidence." That where the evidence of a witness is  
G weak or totally discredited under cross examination, as it is in the case at hand, they needed not call witnesses. That it is a cardinal principle in both civil and criminal cases that the burden of proof will only shift to the 4<sup>th</sup> - 1365<sup>th</sup> respondents where the appellants have proved their case. That in the absence of the appellants failing to file  
H any reply to the said respondents brief, the learned counsel urged the court to deem all the arguments as admitted.

Mr. Niyi Owolade, the Attorney-General and Commissioner for Justice Osun State also led a team of lawyers and represented the 1366<sup>th</sup> and 1367<sup>th</sup> respondents. The said counsel associated himself

with the submissions of the learned silk and his brothers before him on behalf of the other respondents. Reliance was also made on their brief of arguments referenced earlier, which he also adopted and urged for the dismissal of the appeal. That no single witness was called to prove the allegation against their clients. That while the appellants alleged the presence of police report, same was however not tendered in evidence. That the cumulative effect was to abandon the pleadings and thus the failure of proving the case against 1366<sup>th</sup> and 1367<sup>th</sup> respondents'. That it is not the duty of the respondents to call witnesses where appellants have failed to call credible evidence. The case of *Akanmode v Dino* (2009) All FWLR (Pt.471) at page 929 at page 16 of the respondents brief was cited in support. That the court should dismiss this appeal in its entirety and uphold the judgment of the tribunal. B C

Chief Olujinmi SAN in reply further referred to the case of *Famurewa v. Onigbogi* (CA/I/NA/EPT/NA/91/08) delivered on 16<sup>th</sup> April 2010 by this court Ibadan Division sitting as a full court which was later in time to *Amosun v Daniel's* case. That the uniformity of witnesses was not a point raised by the tribunal and that the respondents did not file a respondent's notice. That the arguments by the 1366<sup>th</sup> and 1367<sup>th</sup> respondents on reliance on police report is not their case. That the need to file a reply to the 4<sup>th</sup> - 1365<sup>th</sup> respondents brief did not arise. Also that the case of *Fayemi v Oni* was quoted out of context. D E

From the 69 grounds of appeal raised by the appellants, the following 28 issues were distilled at pages 13-17 of the appellants brief as follows:- F

*"1. Whether the treatment of the evidence of the petitioners' witnesses, that is, PW1-PW65 and PW71-PW79, as mere allegations was not erroneous and did not occasion a miscarriage of justice. - Grounds 1, 14, 16, 18, 24, 26, 29, 30, 31, 34 and 39.*

*2. Whether the decision of the tribunal that the evidence of PW10 required corroboration was not erroneous and did not occasion a miscarriage of justice. - Ground 15.* H

*3. Whether the decision of the tribunal that the allegation that INEC building was burnt in Boripe Local Government Area was not established was not erroneous and did not occasion a miscarriage of justice. - Ground 20.*

4. *Whether the decision of the tribunal that all the allegations of the petitioners related to criminal offences the proof of which must be beyond reasonable doubt was not erroneous and did not occasion a miscarriage of justice. - Ground 28.*

B 5. *Whether the tribunal was right when it held that the issue of non-counting of votes, non-recording of votes are required to be proved beyond reasonable doubt rather than on the balance of probabilities. - Ground 27.*

C 6. *Whether the decision of the tribunal that the evidence of non-counting of votes, non-announcement of results and what happened at the various polling units could only have come from polling agents was not erroneous and did not occasion a miscarriage of justice. - Ground 2.*

D 7. *Whether the tribunal was right in holding that the petitioners failed to lead evidence on such issues as non-counting, non-recording of votes and non-announcement of results at the polling units. - Ground 43.*

E 8. *Whether the decision of the tribunal that the evidence given by the ward supervisors was not sufficient to establish the petition of the petitioners was not erroneous and did not occasion a miscarriage of justice. - Grounds 39, 41 and 42.*

F 9. *Whether the decision of the tribunal that the evidence challenging the figures or scores at the election was hearsay and inadmissible was not erroneous and did not occasion a miscarriage of justice. - Ground 45.*

G 10. *Whether the failure of the tribunal to hold that the respondents having not filed the list of votes objected to could not challenge the results tendered by the petitioners does not amount to incorrect interpretation and application of the provisions of paragraphs 12(2) and 15 of the 1<sup>st</sup> Schedule to the Electoral Act. - Ground 11.*

H 11. *Whether the tribunal was right in failing to hold that the failure by the 4<sup>th</sup> - 1365<sup>th</sup> Respondents and the 1366<sup>th</sup>-1367<sup>th</sup> Respondents to call evidence amounted to abandonment of their pleadings and consequently an admission of allegations in the Petition as regards those parties. - Grounds 9 and 10.*

12. *Whether the decision of the tribunal that the allegations of the petitioners of the non-availability of voters' registers and the non-accreditation of voters in the Boriye Local Government Area were*

*not proved was not erroneous and did not occasion a miscarriage of justice. - Ground 48.*

13. *Whether upon a proper evaluation of the evidence the tribunal ought not to have entered judgment in favour of the petitioners upon their petition. - Grounds 7, 8, 13, 19, 20, 21, 22, 23, 32, 33, 35, 36, 37, 38 and 67.* B

14. *Whether the decision of the tribunal that the reports of the petitioners' polling agents admitted in evidence had no probative value was not erroneous and did not occasion a miscarriage of justice. - Grounds 3, 25.* C

15. *Whether the tribunal was right in failing to rely on and attach any probative value to the evidence of PW80 and PW82 and Exhibits tendered and admitted through the witnesses. -Grounds 52, 62, 63, 64,65.*

16. *Whether the tribunal was right in failing to rely on and attach any probative value to the evidence of PW81 and Exhibits tendered and admitted through the witness? - Grounds 59, 60 and 61.*

17. *Whether the failure of the tribunal to consider the various documents tendered in evidence in support of the petitioners' case was not erroneous and did not occasion a miscarriage of justice. - Grounds 5, 54, 55 and 56.* E

18. *Whether the decision of the tribunal that the petitioners ought to have tendered the stuffed ballot boxes in evidence was not erroneous and did not occasion a miscarriage of justice. -Ground 40.* F

19. *Whether the decision of the tribunal that the petitioners ought to tender two sets of results was not erroneous and did not occasion a miscarriage of justice. - Ground 44.*

20. *Whether the refusal of the tribunal to consider and pronounce upon the contention of the petitioners that considering the number of votes allegedly recorded in most of the polling units in the ten local government areas having regard to the voting time was not erroneous and did not occasion a miscarriage of justice. - Ground 57.* G H

21. *Whether the failure of the tribunal to consider and pronounce upon the evidence and the submissions in the petitioners' written address as regards the discrepancies in the quantity of ballot papers admitted as exhibits and counted in court and the total num-*

*ber of ballot papers recorded as used on Forms EC8A was not erroneous and did not occasion a miscarriage of justice. - Ground 58.*

B *22. Whether the failure of the tribunal to find non-compliance in the affected Local Governments in view of the documentary evidence admitted as Exhibits was not erroneous and did not occasion a miscarriage of justice. - Grounds 12, 50 and 51.*

C *23. Whether the decision of the tribunal that the evidence produced with regard to the ten local government areas did not establish beyond reasonable doubt the allegations of crime contained in the pleading was not erroneous and did not occasion a miscarriage of justice. - Ground 47.*

D *24. Whether the decision of the tribunal that the facts pleaded in respect of Boripe Local Government Area were not proved beyond reasonable doubt was not erroneous and did not occasion a miscarriage of justice. - Ground 19.*

E *25. Whether the decision of the tribunal that the petitioners failed to prove their case with regard to Atakumosa West Local Government Area was not erroneous and did not occasion a miscarriage of justice. - Ground 22.*

F *26. Whether the decision of the tribunal that the petitioners had not linked the alleged perpetrators of the offence to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents was not erroneous and did not occasion a miscarriage of justice. - Ground 46.*

F *27. Whether the admission in evidence by the tribunal of Exhibit R5 (the record of proceedings in the aborted trial) was not erroneous and did not occasion a miscarriage of justice. -Ground 66.*

G *28. Whether the tribunal was right in the circumstances in not annulling the election of the 1<sup>st</sup> Respondent and in not declaring the 1<sup>st</sup> Petitioner as having been duly elected. -Ground 68.”*

On behalf of the 1<sup>st</sup> - 3<sup>rd</sup> Respondents five issues were formulated at pages 19-21 of their joint brief which same are reproduced as follows:-

H *“1. Whether the trial tribunal was not justified in dismissing the petition having regard to the non-credible and largely hearsay evidence led by the appellants at the trial; moreover when in many instances the evidence led ran contrary to or was at variance with the pleadings coupled with the palpable failure of the appellants to prove their case as required by law on various grounds.*

2. *Whether the trial tribunal was not right in dismissing the petition having regard to the total failure of the appellants to relate the avalanche of documents tendered and dumped on the tribunal to the relevant aspects of their case and whether the tribunal's view that the respondents had no duty to file list of votes objected to is assailable.* B

3. *Whether the trial tribunal acted correctly having regards to the inconclusive, inchoate, non-credible and largely hearsay testimonies of the so called experts called by the appellants to have refused to act on their testimonies especially when the so called expert witnesses failed to demonstrate their expertise in relation to the subject matter as required by law and whether the view of the trial tribunal on the evidence of PWs 67, 68, 69 and 70 and exhibits 64, 66, 68 and 70 are justifiable.* C

4. *Whether the trial tribunal did not evaluate and consider the testimonies of witnesses that testified before it and whether 4<sup>th</sup>-1365<sup>th</sup> Respondents and 1366<sup>th</sup>-1367<sup>th</sup> Respondents abandoned their pleadings.* D

5. *Whether the trial tribunal was in error in admitting the record of proceedings in the previous proceedings as exhibit R5 and whether the trial tribunal was wrong in failing to attach any weight to the charts, tables and tabulations done and the evidence adduced by the petitioners/appellants in their final written address."* E

The 4<sup>th</sup> -1365<sup>th</sup> Respondents on their behalf raised only one issue for determination in this appeal and which poses a question thus at page 8 of their brief of argument: F

*"Whether the Honourable Tribunal was right by dismissing the appellants' petition for want of credible and cogent evidence on the allegations of acts of violence and non-compliance with the provisions of the Electoral Act, 2006?"* G

Last but not the least are the 1366<sup>th</sup> and 1367<sup>th</sup> respondents on whose behalf a sole issue was also raised and said:-

*"Whether the trial Tribunal was not right in its findings/conclusions that the Appellants/Petitioner did not establish by credible evidence, the alleged acts of violence and non-compliance with the Electoral Acts 2006 leveled against the Respondents?"* H

OR

*"Whether the 1366<sup>th</sup> and 1367<sup>th</sup> Respondents were under any*

*duty to discharge any evidential burden when the petitioners had not been able to prove the criminal allegations against Respondents beyond reasonable doubt.”*

As a starting point to the determination of this appeal, it would be pertinent to streamline the 28 issues formulated by the appellants which same in my view could conveniently be summarized and accommodated into the following five issues as follows:-

(1) Whether the tribunal was right in its decision by concluding that all the allegations by the petitioners/appellants related to criminal offences and that the proof which must be beyond reasonable doubt.

(2) Whether the tribunal was correct in treating the evidence of petitioners’ witnesses that is to say PW1-PW65 and PW71-PW79 as mere allegation.

(3) Whether the tribunal was right in its conclusion relating the probative value and insufficiency of the evidence of ward supervisors and petitioners/appellants polling agents.

(4) Whether the failure by the 4<sup>th</sup>-1365<sup>th</sup> Respondents also the 1366<sup>th</sup>-1367<sup>th</sup> Respondents to call evidence amounted to abandonment of their pleadings and consequently an admission of allegations in the petition as regards those parties.

(5) Whether the tribunal properly evaluated the evidence of the witnesses inclusive of documentary evidence and arrived at the findings that the petitioners/appellants failed to prove their petition.

The five issues formulated by the 1<sup>st</sup>-3<sup>rd</sup> respondents and one each by the 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup>-1367<sup>th</sup> respondents respectively are also conveniently accommodated within the issues reformulated and would be taken serially.

Issue 1

Whether the tribunal was right in its decision by concluding that all the allegations by the petitioners/appellants related to criminal offences and that the proof required must be beyond reasonable doubt. At page 164 volume 7 of the Record of Appeal, the learned tribunal Judges held and said:-

*“As stated above all the paragraphs of the petition in relation to the said local governments borders on crime. The main allegations are intimidation, scaring of voters, party agents and electoral officers, thuggery, ballot stuffing, ballot snatching, causing hurt, non-counting*

*and non-announcement of result. It can be seen from the pleading, that even non-counting of votes and non-announcement of results were as a result of the disruption, which disruption is a criminal offence."*

On behalf of the appellants, it was submitted that the above findings of the tribunal are totally erroneous and that all the allegations in the petition cannot be said to be criminal in nature. The learned senior counsel for the appellants submitted that there are two fold allegations arising from the petition. That while the first is civil in nature as they complain about non-compliance with the mandatory provisions of the Electoral Act, 2006 on the conduct of a valid election, the second set of allegations are however of criminal in nature as they involve criminal acts. The said counsel related to certain paragraphs of the petition and which distinguish the two kinds of allegations. That contrary to the findings of the tribunal the allegations are not all criminal in nature especially when considered in the light of Respondents' pleadings wherein they joined issues with the appellants on the allegations of non-compliance, which are purely civil in nature.

Submitting on the said issue on behalf of the 1<sup>st</sup>-3<sup>rd</sup> respondents, their counsel Mr. Yusuf O. Ali SAN affirmatively supported the ground anchoring the tribunals' decision in holding that the allegations made in the petition border on commission of crimes which by law are required to be proved beyond reasonable doubts notwithstanding that the allegations were made in an election petition. The senior counsel copiously also referred to certain paragraphs of the petition at pages 151-152 of volume 1 of the record. The summary of the said paragraphs contained therein he argued clearly reveal the allegations of disruption of election by Act of violence perpetrated on voters allegedly by members and chieftains of PDP, non-counting of votes and non-recording of results in form EC8A and non-announcement of results due to disruption coupled with snatching of ballot boxes and illegal ballot papers thumb printing. That these illegal acts were alleged to have been done with the express and implied consent, authority and instruction of the 1<sup>st</sup> - 3<sup>rd</sup> respondents acting severally or in concert. That these allegations, the learned senior argued, amount to offences of dereliction of duties on the part of the Presiding Officers and others who worked for the 4<sup>th</sup> respondent on the

day of the election aside from being offences under the Criminal Code of Osun State. That with the tribunal having found that the allegations contained in the petition border on Commission of Crimes the tribunal was right to have insisted on the proof of the allegations beyond reasonable doubt. Supporting the tribunal's stand, are our  
 B case law and statutes wherein reference was made to section 138(1) and (2) of the Evidence Act, also the case of *Wali v Bafarawa* (2004) 16 NWLR (Pt.898) 1 at 39, as well as case of *Nwobodo v Onoh* (1984) 1 SC NLR 1 at 27. That the standard of proof in criminal  
 C allegations is one of proof beyond reasonable doubt. That this principle of law was evolved by Lord Sankey, L. C. in *Woolmington v DPP* (1935) A. C. 485, and further reinforced by *Denning J.* (as he then was) in *Miller v Minister of Pensions* (1947) 2 All E. R. 372. The said principle has been codified in section 138(1) and (2) of the Evi-  
 D dence Act. Further related authorities are the cases of *INEC v Abubakar* (2009) 8 NWLR (Pt.1143) 259 at 295; and *Gambari v. Saraki* (2009) All FWLR (Pt.469) 445 at 474.

That a global reading of the allegations in the petition as it relates to all the local governments in contention will reveal that same  
 E is made up of accusation of violence, thuggery, criminal intimidation, unlawful possession of fire arms among others which counsel argued all constitute offences under the Criminal Code. That to lay this matter to rest the learned senior counsel referred to sections 127, 129,  
 F 131, 132, 134, 135, 136, 137 and 138 of the Electoral Act which criminalize the allegations, the kind of which form the bedrock of the petitioners' petition.

That in other words, learned senior counsel argued, the allegations of ballot boxes stuffing, ballot boxes snatching impersonation,  
 G intimidation of voters thuggery, illegal use of vehicles on the day of election, scaring away of voters, treating and unduly influencing the process of election among other allegations amount to allegation of commission of crimes, which the counsel argued must be proved beyond reasonable doubt.

H Further still, and also inherent in the petition he argued, are sundry allegations inclusive of non-accreditation of voters, diversion of voting materials to illegal places for illegal uses which come squarely under section 130 of the Electoral Act as dereliction of duty. That these allegations were copiously made against agents of INEC on the

election day. That all pervading was the allegation of commission of crime such that if the allegations are taken away from the petition, it would be bereft of any facts to sustain it. The learned senior counsel re-iterated and emphasized that even the allegations in paragraph 19.1 that no elections were conducted in several polling stations and wards in the local governments would have to be proved beyond reasonable doubt, in view of the averment in paragraph 19.5 of the petition which averment was replicated in respect of other local governments in contention, that votes were later illegally recorded on electoral forms and eventually announced in favour of the 1<sup>st</sup> respondent. B C

In other words, that whenever there is any allegation that elections or voting did not take place at polling units but that votes were accredited for a Candidate, that allegation borders on commission of crime for which specific penalties are stipulated and the allegations must be proved beyond reasonable doubt. Reference was made to the case of *Michael v Yuosuo* (2004) 15 NWLR (Pt.895) 90 at 105. D

That allegations similar to the ones made in paragraph 19.1 not only form the bedrock but permeated the entire gamut of the petitioners/appellants' petition as it relates to all the local governments in contention. To lay the matter to rest, reference was made to paragraphs 62-71 of the petition in relation to Boripe Local Government; paragraphs 29-40 of the petition in respect of Atakunmosa Local Government; paragraphs 42-51 of the petition in respect of Aiyedade Local Government; paragraphs 52-61 of the petition in respect of Boluwaduro Local Government; paragraph 102-109 in respect of Ife East Local Government; paragraphs 110-120 in respect of Ife South Local Government and paragraphs 121-124 and 137 in respect of Ifedayo Local Government. That even in those Local Governments where it was alleged that no election took place, same was attributable to act of violence and other criminal activities alleged against 1<sup>st</sup> - 3<sup>rd</sup> respondents agents, coupled with dereliction of duty and conspiracy by the agents of the 4<sup>th</sup> respondent, INEC. That the allegation of non-holding of election as stated variously in the petition is therefore inter-wired with the allegation of commission of crimes such that the requisite standard of proof is that of proof beyond reasonable doubt. The learned senior counsel prayed this court to affirm the view of the trial tribunal that the standard of proof placed on E F G H

the petitioners/appellants having regard to the averments in the petition was one of proof beyond reasonable doubt.

The learned senior counsel affirmatively submitted therefore that all the allegations contained in the petition generally and in particular in paragraphs 18, 20, 23, 24, 27.2, 27.3, 29.d, 41, 42.d, 51, 52.d, 71, 59, 61, 62.b, 88.d and f, 95, 97.1, 104, 105, 115, 119, 116, 131, 133.d, 148 and 151 of the petition border on commission of crimes and adopted their earlier arguments in this wise. That the fact that the 1<sup>st</sup> - 3<sup>rd</sup> respondents have joined issues with the appellants in their reply to petition is not a reason to convert the averments in the petition from being one bordering on commission of crimes to one on non-compliance. That in point of fact, the burden on the appellants remained unchanged concerning the standard of proof even if the respondents had filed no reply. That the argument in paragraph 7.8 of the appellants brief is, with due respect, unfounded. That the authorities of *Eruotor v Oghumiakpor* (1999) 9 NMLR (Pt.619) 460 at 465, *Ukpo v Imoike* (2009) 1 NWLR (Pt.1121) 90 at 143-144 and *INEC v Oshiomole* (2009) 4 NWLR (Pt.1132) 607 at 670 heavily relied upon in the appellants' brief are unavailing. This, learned counsel submitted because in those cases the allegations of non compliance were glaringly and distinctly pleaded unlike in this case where allegations of commission of crime is not only all prevailing but also all - permeating. That those cases are therefore clearly distinguishable. That this court should in the circumstance uphold the stance of the tribunal and resolve the said issue against the appellants.

On behalf of the 4<sup>th</sup>-1365<sup>th</sup> respondents it was submitted that allegations of commission of crime even in an election petition must be proved beyond reasonable doubt. Cited to buttress the submission was the case of *Buhari v Obasanjo* (2005) 13 NWLR (Pt.941) page 1 at 182. That, tattered evidence which has been successfully discredited and found to be so by the tribunal cannot hinge or sustain proof of allegation of commission of crime beyond reasonable doubt. Reference was made to the decision of this court in *Yusuf v Obasanjo* (2005) 18 NWLR (Pt.956) 96 at 210.

The learned counsel further argued that a consideration of the evidence of the witnesses for the appellants would clearly reveal that they could not sustain proof beyond reasonable doubt. That based

on the analysis of the discrepancies and the unreliability highlighted, that the tribunal is on a solid terrain in concluding that the criminal allegations were indeed not proved even on the balance of probability let alone proof beyond reasonable doubt. That the position of the petitioners would not even have been better even if the Respondents have called no evidence at all. The learned counsel prayed the court to uphold the dismissal of all allegations bordering on the commission of crime in the petition by the tribunal. That the standard of proof of allegations of malpractices, irregularities, violence and fraud in an election petition is one beyond reasonable doubt. In further support of the argument are the cases *Haruna v Modibbo* (2004) 16 NWLR (Pt.900) p.552; *Ogun v Ekweremadu* (2006) 1 NWLR (Pt.961) 255 at 281 and *Imam v Sheriff* (2005) 4 NWLR (Pt.27) p.180. That the said evidential burden was not discharged by the petitioners/appellants while giving evidence before the tribunal.

The learned counsel on behalf of the 1366<sup>th</sup> and 1367<sup>th</sup> respondents in their brief of arguments also submitted in the same vein with the other respondents and opined strongly that the standard of proof of allegations of malpractices, irregularities, violence and fraud in an election petition is one beyond reasonable doubt. The counsel also cited the same authorities by the 4<sup>th</sup>-1365<sup>th</sup> respondents in that behalf.

For the determination of this issue, it would be necessary to figure out the nature of complaint as presented by the petitioners at the tribunal. This would call for the reproduction of certain specific averments at paragraphs 18, 23, 24, 27.2 and 27.3 of the petition at pages 151,153 and 154, which state as follows:-

*“18. Your petitioners claim that the purported elections in the above mentioned Local Government Areas were vitiated by substantial non-compliance with the mandatory statutory requirements of the Electoral Act 2006 which non-compliance substantially affected the validity of the said election such that none of the candidates in the said elections can be validly returned as having validly won the elections in the affected Local Government Areas mentioned in paragraph 17 above? It is pertinent to restate that the ten local governments which are the subject of contention are those listed in paragraph 17 of the petition with those of Ede North and Ola Oluwa Local Governments exclusive. ....*

23. *No votes were recorded in any Electoral Form as having been scored by each candidate at any of the polling stations by any Presiding Officer at any of the said polling units/stations and no such form was given to any of the said polling agents who were available to countersign.*

B 24. *The Presiding Officers in all the said polling units did not at all material times declare the poll results at the various units contrary to section 64 of the Electoral Act.....*

C 27.2. *There were no counting and announcement of result at the polling stations and there were also no collation of election results at the ward level.*

27.3. *Specifically in relation to Boriye Local Government Area, there was no voters register upon which a valid election could be conducted.”*

D It is pertinent to also restate that the two sets of respondents that is to say the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> and also the 4<sup>th</sup> to 1365<sup>th</sup> respondents respectively, did respond to the petition which same are very relevant and material to the determination of this issue. In other words and on the one hand, the reproduction of the replies of the 1<sup>st</sup> set of  
E respondents at paragraphs 9, 13, 22, 46 and 73 at pages 4-5, 6, 10 and 14 of Volume 2 of the record of appeal had this to say:-

F “9. Further, the Respondents, in answer to paragraph 18 of the petition state that the election in the 12 Local Government Areas aforesaid were conducted and held in substantial compliance with the provisions of the Electoral Act, 2006. ....

13. *The Respondents state that paragraph 20 of the petition is false in the sense that the results announced for the stated Local Government Areas in that paragraph were the results of the lawful votes  
G cast at the election and that actual voting took place in the said Local Government Areas. Oral and documentary evidence of the facts that elections were duly held at the said Local Government Area shall be found at the trial. ....*

H “22. *The Respondents deny all allegations that votes were not counted at the polling units, that scores were not recorded on the requisite electoral forms, that results were not announced at the polling units and that there was no collation of the results at the ward level. ....*

46. *The Respondents deny paragraph 102 of the petition and*

*further deny all allegations of breaches of the provisions of Electoral Act made by the petitioners in the said paragraph to the petition.*

.....  
“73. In reaction to paragraph 159 the Respondents shall contend that the election held on 14<sup>th</sup> April, 2007 were conducted in substantial compliance with Electoral Act 2006 and the outcome represented the genuine wish of the electorates in Osun State.” B

On the other hand, the replies of the 4<sup>th</sup> to 1365<sup>th</sup> respondents contained in paragraphs 5, 7, 8, 13, 16 and 58 at pages 701-712 of Volume 2 of the record of appeal also state as follows:-

“5. The Respondents aver and in denial of paragraphs 15, 15.1, 16, 17, 18, 19, 19.1, 19.2, 19.3, 19.4, 19.5 and 19.6 state that the said election was not vitiated by any substantial non-compliance with mandatory statutory requirements and/or irregularities. C

7. The Respondents aver that the result of the said election was a product of lawful votes cast at diverse polling booths across Osun State, duly collated at the unit levels, ward levels, Local Government Levels and the State Level. D

8. The election now being complained about by the Petitioners were conducted in substantial compliance with the provisions of the relevant laws. E

13. Further to paragraph 12 supra, the Respondents state that results of collated votes were recorded in designated and statutory electoral forms and voting took place in all Wards of the State. F

16. The results declared by the Respondents in all polling units in Osun State, save where elections were cancelled, was a true reflection of votes scored by each of the candidates at the election.

58. The Respondents deny paragraphs 156, 157, 158, 158.2, 158.3, 158.4, 159.1, 159.2 and 153.7 of the petition and contend that: G

(a) the election in all polling units in Osun State were properly conducted and voters freely cast their votes.

(b) election materials were properly distributed to various polling units. H

(c) the result of the election were duly collated according to law and all statutory forms used in the said collation.

(d) the election was conducted in accordance with the electoral Law.

*(e) the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were duly returned as having won the election according to Law.*

*(f) The petitioners are not entitled to be returned as elected or the entire election voided as prayed for by the petitioners. ”*

With reference to the pleadings of the petitioners/appellants and also the replies by the Respondents as reproduced supra, it is obvious and clear-cut that the respondents had in addition to criminal allegations joined issues with the appellants on the allegations of non-compliance with the provisions of the Electoral Act 2006 which are purely civil in nature. In other words, a very good supporting deduction for instance is paragraph 22 of the replies by the 1<sup>st</sup> - 3<sup>rd</sup> respondents as reproduced above wherein parties specifically joined issues on non-counting, non-recording and non-announcement of results at the unit and wards as per the pleadings at the said paragraph 22 thereof.

The Respondents especially 1<sup>st</sup> -3<sup>rd</sup> respondents strenuously argued on their brief that all the allegations in the petition are criminal in nature. Reference in this respect can be made to sections 28 and 64 of the Electoral Act, 2006 which would serve relevant wherein counting and announcement of results at the polling units and collation centres are matters on compliance with the provisions of the Electoral Act, 2006 and that allegation complaining the violation of same in a petition therefore is one that is civil in nature. The said sections 28 and 64 of the Electoral Act relate to procedure at Election. It follows therefore that allegations touching on non-counting and non-announcement of results touched on non-compliance with the sections 28 and 64 of the Electoral Act. Reference in support is the case of *Eruotar v. Ughmiakpor* (1999) 9 NWLR (Pt.619) 460 wherein the allegations complaining of irregularities were held by the tribunal to be those bordering on crime and which required proof beyond reasonable doubt. This court in reversing the decision held at page 465 of the said authority had this to say:-

*“In election cases there is the increasing trend of lawyers, and even Election Tribunals regarding allegations of some wrong doing as an allegation of Criminality for the purpose of its standard of proof being raised to that beyond reasonable doubt. In my consideration, that does not represent the correct legal position where the allegation is simply that of some wrong doing its proof would be on preponder-*

*ance of evidence. See Omoboriowo v Ajasin (1984) 1 SC 206 at 227-228, (1984)1 SCNLR 108."*

Deducing from the said decision therefore, it follows that irrespective of cause of non-compliance, the allegations coming under the said provisional circumstances would still be civil in nature.

The further authority of the case of Omoboriowo v Ajasin (1984) B SCNLR 1 at pages 108, 152-153 would drive home a nail struck clarification wherein Eso JSC said:-

*"Finally, once the figures are false, whether the falsification was done by the 2<sup>nd</sup> appellant or not, the fact remains that 1<sup>st</sup> appellant cannot and should not be elected on figures other than the majority of the votes cast at the election. Our constitution provides for the election of a Governor who has the vote confidence of the electorate not the one who lives merely on technical confidence.*

*Even, to carry this issue further the pleading of criminal falsification, if there had been one, must at least, include some falsification which may either be criminal or not. The pleading of the greater certainly includes the less and if in proving the less the case of a plaintiff is proved, he could not and should not be penalized for pleading the greater, see Arab Bank Ltd. v Ross (1952) 2 Q.B. 216, per Denning, L. J., at p.229.*

*"Even with ordinary common sense, if I happen to find my lost coat with AB, and on a claim for the recovery thereof, I alleged that AB stole the coat, the fact that I could not prove AB to be the thief does not deny me the recovery of my coat once I establish the coat to be mine and not AB's." Once Chief Ajasin established he had the majority of the votes, the fact that he has failed to prove any crime that went behind the scene, should not deprive him of his otherwise legitimately proved case. He has eminently proved his claim that Chief Akin Omoboriowo was at the time of the election not duly elected by a majority of lawful votes at the election. And he has succeeded on his pleadings. The order of the High Court as confirmed by the Federal Court of Appeal is hereby affirmed."*

Bello, JSC (as he then was) also had this to say at page 116:-

*"It follows therefore that in so far as the petition was founded on those allegations it must be dismissed. However, if the averment alleging crimes against the 2<sup>nd</sup> respondent were excised from the petition, there still remained in the body of the petition sufficient aver-*

*ments without putting directly in issue the commission of a crime by a party to sustain the petition, I think it is essential for better appreciation of the issue to set out the averments relevant to the areas in dispute in the petition stripped of its allegations of crime.....”*

***The interpretation of the foregoing authority presupposes that application of section 137(1) of the Evidence Act to a civil case depends on the contents of the pleadings of each case. In other words, if the averments alleging the commission of a crime are severable and if following such act of severance the petitioners pleadings still contains sufficient averments which suffices and discloses a cause of action devoid of criminal imputation against any of the parties to the proceedings, then the burden of proof laying on the petitioner is not of a criminal nature beyond reasonable doubt but that which requires proof on preponderance of evidence. The principle of severance in cases of this nature is of great significance and has been emphasized by their Lordships as seen in the case of Omoboriowo v Ajasin supra. In other words the determining factor is whether the allegations if severed and put into two separate compartments can be sustained as an entity. If the answer is positive, then proof of one is not dependent on the other but side by side. The crucial determinant factor certainly is dependant on the pleadings of the parties.***

In a recent decision of this court in the case of Olukayode Fayemi & Anor v Olusegun Adebayo Oni & 7 Others unreported per Salami PCA this issue was extensively considered and held thus at page 33 of the judgment:-

*“Application of section 137(1) of the Evidence Act to a civil case depends on the contents of the pleadings of each case. If averments alleging crime are severable and if after such severance there still remains in the pleadings of the petitioners sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings then the burden of proof upon the petitioner or plaintiff is to establish his case within preponderance of evidence.”*

The Court at page 34 of the judgment also had this to say:-

*“Apart from the allegations of crime, the petitioners/appellants averred at paragraph 42 of their petition that the respondent was not*

*duly elected by majority of lawful votes and his election was not valid for reason of non-compliance with the Electoral Act. These are severable and are sufficient grounds under section 145 of the Electoral Act. The excess is deemed abandoned"*

A significant feature of a severance principle as deduced from the decision of *Fayemi v Oni* is where there are two causes of action embedded within the same claim before a court. In such situation, the doing away with one cause of action would have no effect or bearing on the existence of the other. The existence of the two would amount to a surplusage of one to the other. The said view has been clearly enunciated in the case of *Arab Bank Ltd. v Ross (1952) Q.B.* 216, 229 where it was held that:-

*"Under the rules of pleadings, as I have always understood therein, a pleader who has pleaded more than he strictly need have done can always disregard the unnecessary or surplus averments and rely simply on the more limited ones."*

***Taking into consideration the averments of the petitioners/appellants at paragraphs 18, 23, 24, 27.2 and 27.3 of the petition which have all been reproduced somewhere in this judgment, paragraph 18 for instance alleges that the purported elections in the contested Local Governments were vitiated by substantial non-compliance with the mandatory statutory requirements of the electoral Act 2006 which non-compliance substantially affected the validity of the said election such that none of the candidates in the said elections can be validly returned as having validly won the elections in the affected Local Governments. It is also significant to clearly restate again and as earlier pointed out that there are ten Local Governments which are in contention and subject of this appeal. The averments in the said paragraphs are clearly civil in natures which are distinct claims separable from the criminal allegations also in the same petition as it was the case in the authorities of Omoboriowo v Ajasin and also the recent decision in Fayemi v Oni. It is not, in other words correct therefore but erroneously found by the learned tribunal judges that all the allegations by the petitioners/appellants related to criminal offences.***

The averments in the petition are severable wherein after the

criminal aspect had been put aside, the rest of the paragraphs, especially paragraph 18 would be sufficient to sustain a civil claim and the proof which is on the balance of probabilities or preponderance of evidence. This court again in its decision of *Fayemi v Oni* at page 35 of the judgment had this to say:-

B *"With the subject matter at hand being an election petition appeal, it is civil by nature and which needless to state but only obvious that the proof required is on balance of probabilities or preponderance of evidence."*

C It follows therefore that the submissions by the respondents in applauding the erroneous conclusion arrived at by the tribunal of the criminal nature of the petition is a complete misconception and the misinterpretations of the authorities of *Wali v Bafarawa*, *Nwobodo v Onoh* and *Chime v Onyia* under reference amongst others. In other words, while the commission of crime by parties in the Authorities under reference was directly in issue, the situation at hand is remarkably distinguishable and therefore different. The reference made to sections 137(1) and 138(1) and (2) of the Evidence Act is therefore clearly misplaced.

E ***More over and just for further emphasis, by the provision of section 145 of the Electoral Act 2006, the two allegations are severable and serve sufficient to ground a petition. Specifically subsections (1)(b) and (c) states the grounds upon which such petition could be brought.***

F ***"145(1).....***

***(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;"***

G ***By the use of the word or in subsection (b), it presupposes the dividing line and Independent nature of and distinguishing corrupt practices from non-compliance. It will only amount to surplusage as earlier stated therefore to allege both the corrupt practices or non-compliance.***

H With the sustenance and conclusion arrived at that the allegation is civil in nature, it follows and obvious that the standard of proof required is on balance of probabilities or preponderance of evidence. A number of judicial authorities on this point are numerous and in-

clude:- Swem v Dzungwe (1966) 1 SCNLR page 111 at 119; Buhari v INEC (2009) All FWLR (Pt.459) 419 at 522; Chukwuma v Anyakora (2006) All FWLR (Pt.302) 21 and Ajadi v Ajibola (2004) 16 NWLR (Pt.898) 91 at 195.

In the case of Buhari v INEC for instance, Tobi JSC said:-

*“The standard of proof in civil cases including election petitions, is on the preponderance of evidence or the balance of probabilities.”* B

Also in Ajadi v Ajibola the court held that:-

*“Election cases which are sui generis.....require liberal or lighted proof on the balance of probability or on the preponderance of evidence.”* C

Also on the same principle and relevant are the cases of Ukpo v Imoke (2009) 1 NWLR (Pt.1121) 90 at 143-44 and INEC v Oshiomole (2009) 4 NWLR (Pt.1132) 607 at 670-671 where it was held that a petitioner who alleges that there has been non-compliance with Electoral Act is required to prove the allegation on the preponderance of evidence. D

As rightly submitted and argued by the learned appellants’ counsel, had the tribunal properly considered the pleadings of the parties, it would have found that parties joined issue on allegations of non-compliance which is purely civil in nature. In other words, it is not the case and as wrongly held by the tribunal that all allegations in the petition are criminal in nature and hence the 1<sup>st</sup> issue is therefore resolved in favour of the appellants and against the respondents. E F

## ISSUE 2:

Whether the tribunal was correct in treating the evidence of petitioners’ witnesses that is to say PW1-PW65 and PW71-PW79 as mere allegations. G

For a proper understanding of this issue, it will be pertinent to relate to the extracts and synopsis of certain aspects of the tribunal’s findings and conclusions arrived at in its judgment. For instance and in other words, at page 132 of Volume 7 of the record the tribunal held and said:- H

*“We are of the view that evidence of the Ward supervisors who testified are mere allegations which needed proof beyond reasonable doubt which is lacking in this case.”*

At an earlier page 112 of the same volume the tribunal also

held in respect of the evidence of PW9 that: “..... in fact beside the allegation the petitioner did not go further to adduce any evidence to prove beyond reasonable doubt.” At page 113 it went further and said: “The evidence of PW11 also is a mere allegation, which the petitioner failed to prove beyond reasonable doubt.” In relation to PW12, the tribunal further held: “The evidence given by this witness is a mere allegation which was not proved beyond reasonable doubt. There is no evidence before the court that names of voters were recorded on pieces of paper.” - see page 113 of Vol. 7 of the record. The learned counsel argued that this was after the tribunal had stated that PW12 “gave evidence that..... in the polling units election took place, the names of the voters were recorded in pieces of paper.” The tribunal held also that the testimony of PW58 contains mere allegations: see page 113 of Vol. 7 of the record. Also in relation to the evidence of the appellants’ witnesses in Ife East Local Government, the tribunal held that: “what the witnesses stated are mere allegations without the petitioners going further to prove them.” See page 126 of Vol. 7 of the record of proceedings and in relation to Ife South Local Government that: “Taking into consideration all these facts, we are of the view that evidence of the Ward Supervisors who testified are mere allegations which needed proof beyond reasonable doubt which is lacking in this case.” See also page 132 of Vol. 7 of the said record wherein the tribunal held in relation to Ifedayo Local Government that. “We are of the view that the evidence before the tribunal is mere allegation which the petitioners fail to prove as required by law.”

At page 137 of the same volume, the tribunal also regarded the evidence of PW72 and PW73 as allegations. Further still and at page 143 also page 155 where the tribunal held that the evidence of PW54 and PW59 from Isokan Local Government were mere allegations. The learned counsel submitted the confusion by the tribunal in its holdings on the pleadings against the evidence of the appellants’ witnesses. In other words that the evidence of a witness before a court is different from averments in a pleading which may be regarded as mere allegations. The senior counsel also submitted that nothing can be farther from the truth of such erroneous findings.

Submitting on the findings of the tribunal however, the 1- 3 respondents argued that the tribunal, contrary to the impression cre-

ated by the appellants, clearly appreciated the evidence of the respective witnesses as evidence and testimonies. The counsel for instance made reference to the tribunals' opinion at page 113 of volume 7 of the record wherein it said:-

*'The evidence of PW11 also is a mere allegation, which the petitioner failed to prove beyond reasonable doubt.'* B

Commenting on the said opinion, the said learned senior counsel Mr. Yusuf Ali submitted that the tribunal although it appreciated the evidence of the petitioners' witnesses it nevertheless still came to the conclusion that they did not prove the allegations beyond reasonable doubt based on the evidence which in term of quality was no more than mere allegation. The counsel further reiterated that on a dispassionate consideration of the judgment of the tribunal it will reveal that the testimonies were indeed reckoned with although not acted upon due largely to want of credibility. Accordingly that mere reference to the testimonies of some of the petitioners' witnesses as allegations is a mere slip which the learned senior counsel argued has not occasioned any miscarriage of justice. That it is an accepted practice of our jurisprudence that it is not every slip or minor error, especially of semantics, committed by a court that will lead to a reversal of its judgment by an appellate court. That it is only a substantial error that had in turn occasioned a grave miscarriage of justice that could lead to a reversal of a court judgment. The senior counsel in substantiating his arguments cited the cases of *Akomolafe v Guardian Press Ltd.* (2010) 3 NWLR (Pt.1181) 338 at 357-358 and *Solola v State* (2005) 30 WRN 89 at 112. That on a consideration of the records of appeal, same will reveal that no miscarriage of justice had been occasioned by the tribunal simply by branding the testimonies of some of the petitioners/appellants witnesses as mere allegations and which could not sustain the allegations in the petition. The learned senior counsel therefore urged that the said issue be resolved against the appellants. C D E F G

At page 126 of Volume 7 of the record of appeal for instance, the tribunal held in relation to the evidence of the appellants' witnesses in Ife East Local Government and said:- H

*"What the witnesses stated are mere allegations without the Petitioners going further to prove them."*

Also at page 132 of the same volume in relation to Ife South Local Government again, the tribunal had this to say:-

*“Taking into consideration all these facts, we are of the view that evidence of the ward supervisors who testified are mere allegations which needed proof beyond reasonable doubt which is lacking in this case.”*

The implication of the findings of the tribunal amounts to the branding and discrediting the evidence of the appellants witnesses in the said local governments. Furthermore and by the tribunal requiring proof beyond reasonable doubts is suggestive of its lumping both criminal and civil allegations together and without differentiating the two by applying the concept of the principle of severance. The effect of the confusion is a failure to appreciate the clear-cut demarcation streamlined in the case of Omoboriowo v Ajasin supra.

***Perhaps and on a more serious note, the tribunal had not adverted its mind for purpose of appreciating the front loading procedure of witnesses provided for in the Practice Direction. In other words that the statement of a witness once adopted becomes his evidence in chief and the court is under a duty to evaluate same and not to be treated as mere allegation requiring additional proof as deemed needed by the tribunal. Paragraph 1(1)(b), 4(1) and (3) of the Practice Direction for instance provides as follows:-***

***“(1) All petitions to be presented before the Tribunal or Court shall be accompanied by:-***

***(a).....***  
***(b) Written statements on oath of the witness;.....***

***4(1) Subject to any statutory provision or any provision of these Paragraphs relating evidence, any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses in open court.***

***(2) .....***

***(3) There shall be no oral examination of a witness during his***

***evidence in chief except to lead the witness to adopt his written deposition and tender in evidence all disputed documents or other exhibits referred to in the deposition.”***

The use of the word shall in the foregoing provisions, make the compliance compulsory. Deducing from the said pro-

visions also, and under the front loading procedure, the written statements of witnesses are required to be filed alongside the relevant process, that is the petition or reply.

***It is glaring that the 1<sup>st</sup> - 3<sup>rd</sup> respondents senior counsel conceded that the tribunal strayed by the use of the word “mere allegations” to describe the evidence of the appellants’ witnesses and thus the use of a “mere slip” committed by the tribunal. Whether or not the act amounted to a mere slip is dependant on the consequential effect arising there from and its outcome on the appellants’ case.*** In the case of *Nwana v FCDA* (2007) 11 NWLR (Pt.1044) 59 at 78 for instance, the apex court per Chukwuma-Eneh JSC held and said:-

*“It is also preposterous for the respondents to categorize the instant mistake as a slip. It cannot simply be a slip as such. A slip under the banner of ‘Slip Rule’, connotes accidental slip or omission as clerical mistakes in a judgment or order and capable of being amended even at times without notice to the other party. See *Asiyanbi & Ors. v Adeniyi* (1966) NMLR 106, (1967) 1 All NLR 82; *Thynne v Thynne* (1955) p.272. The instant mistake transcends the entire proceedings as it goes to the root of the decision. It is neither accidental slip nor omission and even so, it is not amenable to amendment as contemplated under the slip rule as submitted by the Respondent. It is an irregularity of a fundamental nature.”*

***The concept of a ‘Slip Rule’ presupposes that, it is occasioned by accident or mistake and therefore not deliberate. Another significant feature is that it is amenable to amendment which must not be of a fundamental nature. In other words, it must not transcend the entire proceedings as to have a devastating effect going into the root of the decision. This cannot be said of the situation with the case at hand and under consideration, wherein the tribunal, from the judgment in question, and on appeal, the tribunal, as rightly submitted by the learned senior counsel for the appellants treated the evidence of virtually all the appellants’ witnesses as mere allegations.***

A related and relevant authority is the case of *Agagu v Mimiko* (2009) 7 NWLR (Pt.1140) 342 at 424-425 wherein this court in holding that a witness statement constitutes the evidence in chief,

had this to say:-

*“The exhibits were produced and tendered on the record by sixth petitioner’s witness, one Toyin Abegunde, the representative of INEC and fourth respondent, Resident Electoral Commissioner, Ondo State Contrary to the contention of the learned counsel for the ap-  
 B pellant that it was learned counsel for the first respondent that tendered the documents. See the proceedings of 29<sup>th</sup> November, 2007. The contention of the learned senior counsel for the appellant that  
 C no modicum of oral evidence in chief was produced on the documents is erroneous. The provisions of the Election Tribunal and Court Practice Directions dispensed of oral evidence in chief in the deposition, which will be adopted at the trial by the deponent who will then be cross examined and re-examine. See paragraph 4(1) and (3) of the Practice Directions which provides as follows -*

*“4(1) Subject to any statutory provisions or any provisions of these paragraphs relating to evidence any fact required to be proved at the hearing of a petition shall be proved by written deposition and oral examination of witnesses.....*

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

*“It is clear from the foregoing provisions of the Election Tribunal and Court Practice Direction, that facts are receivable in evidence  
 F by witness statements and viva voce examination of the witnesses. After leading a witness to adopt his statement, he can then be cross-examined and re-examined viva voce.”*

By the tribunal regarding the evidence of the appellants’ witnesses as mere allegations, it gives an indication of its complete misconception of a true and proper effect of a witness statement on oath, which if properly adopted represents the testimony of the witness. In other words and by the tribunal concluding that the testimonies of the appellants’ witnesses needed either to be proved or corroborated, is a clear confirmation of its lack of appreciating the intent of practice direction relating witness statement on oath. The tribunal in the circumstance cannot therefore be said to have given due consideration to the appellants witnesses. In other words, the consequential effect had resulted in a situation where the tribunal had failed to

evaluate, properly and ascribe probative value to the evidence of the appellants' witnesses.

While the 1<sup>st</sup> - 3<sup>rd</sup> respondents senior counsel submitted in one tone that the tribunal "appreciated the written statement on oath of the appellants' witnesses as such" the said counsel however and in a veering situation, proceeded in another tone and defended the same tribunal's action as "a mere slip." As rightly submitted by the learned senior counsel for the appellants, the respondents counsel is certainly approbating and reprobating. This cannot and should not be allowed. This fundamental error is grievous and cannot be ascribed as a slip but has occasioned a grievous miscarriage of justice. There is a remarkable distinction between evidence and mere allegation. While the former is sustainable and can be acted upon, the reverse is the latter which needed the former to ground its acceptance and sustainability.

In the case of *Famurewa v Onigbogi* CA/I/NA/EPT/NA/91/08 delivered on 16<sup>th</sup> April, 2010 by Court of Appeal Ibadan, it was held at page 26 that: "For evidence to be properly evaluated by a trial court it must be balanced, the two sides must be given equal opportunity to put all their cards on the table, on equal footing, without one side being shut out, which is what the tribunal did in respect of the evidence given by PW1 to PW32"

The submission by the learned senior counsel and ascribing the slip as minor error is not in the circumstance justifiable and consequent upon which the reliance on the case of *Akomolafe v Guardian Press* and *Solola v State* cited by the senior counsel supra do not aid his course as his case does not fall within the ambit of his authorities cited under reference. The said senior counsel with all respect has completely misconceived the intendment of paragraph 4(1) and (3) of the Practice Directions as reproduced and also interpreted in the case of *Agagu v mimiko* as well as *Famurewa v Onigbogi* reference supra.

On the totality of the foregoing deductions, it is obvious that the tribunal's findings arrived at on the evidence of the appellants' witnesses and describing as mere allegations has had a far reaching consequence and thereby negating its ability to arrive at a just determination of the petition. This is in view of the dismissal of the evidence either on mere allegation which needed further proof or proof

beyond reasonable doubt. The evidence by the appellants' witnesses could not have in the circumstance been properly evaluated and thus occasioning a miscarriage of justice. The said issue two is therefore also resolved in favour of the appellants.

**ISSUE 3:**

B Whether the tribunal was right in its conclusion relating the probative value and insufficiency of the evidence of Ward supervisors and petitioners/appellants polling agents. The tribunal at page 164 of volume 7 of the record of proceedings had this say:-

C *"It is true that almost all the witnesses called by the petitioners are ward supervisors. Ward supervisors by virtue of section 77 of the Evidence Act are competent witnesses to give account of what they saw, heard or perceived, of which the tribunal so held, for utmost all of them stated at end of their disposition that apart from personal*  
D *knowledge of the event when I visited the polling unit in the ward, I also received written report from the polling Agent in the unit in the ward.....*

*These witnesses who testified for the petitioners were not stationary in one place, but moved from one polling unit to the other."*

E Submitting on the conclusion arrived at by the tribunal, the learned senior counsel for the appellants argued that the findings both for and against are clearly inconsistent and contradictory, which position is not permitted by a court of law to take. That every political  
F party is entitled to design her party structure in whatever manner it pleases. That whether a political party appoints polling agents, ward agents, monitors or supervisors, ward collation officers, Local Government Area monitors or supervisors or collation officers, state supervisors and agents, by whatever name they are called is her own  
G internal business. That the case of Senator Ibikunle Amosun v INEC & Ors. Case No. CA/I/EPT/GOV/01/2009 relied upon by the tribunal was misplaced. The learned counsel re-iterated the sacrosanct nature of section 77 of the Evidence Act; also the authorities in the cases of Sadau & Anor. V State (1968) NSCC 93 at 97, Kwara, Son  
H of Kuruma v The Queen (1955) A.C. 197 at 203 also Tortii v Ukpabi (1984) 1 SCNLR 214 at 236-237 and 239-240. The learned counsel strongly submitted and faulted the conclusion arrived at by the tribunal in its decision that evidence of non-counting of votes, non-announcement of results and what happened at the various polling

units could only have come from polling agents. That this finding has resulted in substantial miscarriage of justice. That by the nature of the responsibilities of PW1-PW66 and PW71-PW79 as ward supervisors and the fact that they testified that they moved from one polling unit to another, it cannot render their testimonies unreliable. That the said witnesses evidence was as to what they directly witnessed. The learned senior counsel therefore urged the court to so hold against the findings by the tribunal. B

Submitting also on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> respondents, their learned senior counsel urged the evidence of the ward supervisors as largely hearsay. The said counsel relied on the case of Buhari v Obasanjo (2005) 13 NWLR (Pt.941) 1 at 315 wherein Akintan JSC held amongst others and said:- C

*"the position of the law regarding the type of evidence which must be led in support of allegations in which figures or scores of candidates at the election are being challenged should come direct from officers who were on the field where votes were counted and or collated..... The State party agents...(PW1) received the figures he gave in his evidence in Court .....from his partys' agents who were not called as witnesses. Such evidence is therefore in admissible as it is hearsay. The figures he gave the court below in his evidence there were brought to him by his partys polling agents sent to the various polling stations. None of these party agents was called to testify."* D E

That the testimonies of the ward supervisors i.e. PW1-67 and PW73-79 the senior counsel argued, were bedeviled by credibility problem. Furthermore that the opinion held by the tribunal that the evidence of the polling agents of the petitioners'/appellants was desirable to prove the allegations made and that the failure to call them was fatal to the appellants' case is unassailable. The senior counsel in support cited the case of Buhari v. Obasanjo (supra). The said counsel also applauded the tribunal in refusing to accord any weight to the alleged reports of polling agents who never testified before it. That the invocation of the provision of section 91(2). Evidence Act as sought by the appellants' senior counsel is misdirected, as it would not operate to lessen the burden on the appellant to prove their case as required by law, which is what the appellants are praying the court to do. That the case of Ojo v. Gharoro (2006) 10 NWLR (Pt.987) F G H

173 at 203 relied upon by the appellants is most unhelpful. Further still, that the appellants have lost sight of the glaring difference between admissibility of a document and the weight to be attached to it. That the fact of admitting a document in evidence does not mean it is worthy of any weight. The counsel urged that the position of the  
B tribunal on the alleged agent reports be upheld by this court and also refuse to attach any weight to same.

Submitting on behalf of the 4<sup>th</sup>-1365<sup>th</sup> Respondents their learned counsel argued that none of the 82 witnesses called by the petition-  
C ers was a party agent of Action Congress and no evidence was also led to suggest that the party agents are dead or in faraway places where it would be difficult or impossible to get them. That almost all the ward supervisors who gave evidence maintained that they were not permanently stationed in a unit, but moved from one unit to the  
D other. That the issue is not about the competence of the witnesses to give evidence, but rather the credibility/weight that should be attached to their evidence. That it is glaring that no reasonable tribunal will accord such evidence any weight or probative value even where the witnesses are competent. Cited in support was the case of Hashidu v  
E Goje (2006) 2 EPR page 799 at 827-828.

The petitioners/appellants contention was that there was non-counting of votes, non-recording of results and non-announcement of results at the polling unit in the ten local governments in conten-  
F tion wherein the petitioners called evidence that the votes credited to the parties were unlawful votes having being obtained from vitiating circumstances as well as non-compliance with the electoral Act.

In support of these allegations of non-counting of votes, non-recording of results and non-announcement of results at the polling  
G units the appellants led evidence through PW1-PW66 and PW71-PW79 who were their witnesses who acted as ward supervisors. At pages 164 and 165 of the record of appeal Vol. 7 the tribunal amongst others said:-

*“It is true that almost all of the witnesses called by the petition-  
H ers are ward supervisors/ward supervisors by virtue of section 77 of the Evidence Act are competent witnesses to give account of what they saw, heard or perceived of which the tribunal so held, for almost all of them stated at the end of their depositions that “apart from my personal knowledge of these events when I visited the polling units in*

*the ward, I also receive written reports from the polling agent in the units in the ward."*

These witnesses who testified for the petitioners were not stationary in one place, but moved from one polling unit to the other, though some of them testified that they followed the thugs from one polling unit to the other. The question to ask is by merely stating that and tendering the report of the party agent, have the petitioners established the alleged offences beyond reasonable doubt? Is what they stated not a mere allegation which need proof beyond reasonable doubt? In our view the petitioners should have gone further to call those witnesses who were prevented from voting to testify, they could have called the party agent who were at the various polling units who witnessed what happened and who even took the trouble to write reports of what they saw."

Also at page 167 the tribunal proceeded further and said:-

*".....The only oral evidence led by the petitioners is the testimony of the ward supervisors these witnesses by the nature of their duty they move round the wards under their supervision. They cannot therefore give accurate evidence of non-voting, non-counting, non-recording or non-announcement of results."*

Copious reliance was made on the authority in the case of Amosun v INEC & 2 Ors. CA/I/EPT/GOV/01/2009 Ibadan Division delivered on Monday 8<sup>th</sup> day of March, 2010.

In finding against the petitioners/appellants on the issue of non-counting of votes, non-recording of results and non-announcement of results at the polling units, the tribunal held that the evidence of such ought to have only come from polling agents and not the ward supervisors. ***Having regard to the findings of the tribunal at page 164 of the record under reference supra, it is clear that in reliance on section 77 of the Evidence Act the tribunal conceded that ward supervisors are competent witnesses "to give account of what they saw, heard or perceived of which the tribunal so held;" Not too far distant space and time, the same tribunal also at page 165 seriously veered off and branded the evidence of the ward supervisors as mere allegations. Rather and in other words, it held also that evidence of non-counting of votes, non announcement of results and what happened at various polling units ought to have come only from polling***

**agents. This is a glaring inconsistency as it amounts to blowing hot and cold either from the same mouth or at one and the same time. In the absence of any provision in the Electoral Act 2006 which precludes officers of a political party who are not polling agents from testifying on behalf of a party the only guiding principle ought and should be section 77 of the Evidence Act. In other words, the pre-occupation and concern of the tribunal should be whether the witnesses sought to testify “are competent to give account of what they saw, heard or perceived,” in their bid to give first hand evidence. The said section 77 of the Evidence Act is a substantive law which enshrines the direct evidence rule.** In the case of *Kowa v Musa* (2006) 5 NWLR (Pt.972) pages 1 at 34-35 for instance, this court held and said:-

“In matter of evidence, the 1999 Constitution by virtue of its item 23 of part (sic) second schedule places evidence on the Exclusive Legislative list. This means therefore, that since the High Court of a State is a creation of the Constitution, all aspect of evidence must be regulated by an act of the National Assembly and thus exist in the name of the Evidence Act, Cap.112, LFN, 1990. Section 1(2) of the said Act states thus:-

*“This Act shall apply to all judicial proceedings in or before any court established in the Federal Republic of Nigeria.”*

Further still sections 155 and 158 of the said Act provides thus:

155(1): *“All persons shall be competent to testify, unless the court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by reason to tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.”*

The further determinant factor of competence is also dependent on the facts and circumstances of the witness as to the physical disposition of such a person to give direct evidence. In the absence of section 136 of the Electoral Act specifically providing that only polling agents can give evidence as to issues of holding of elections and announcement of results, the unambiguous provision ought to be given its literal interpretation therefore. **Significant to say that the said section of the Electoral Act, however creates an offence for loitering “without lawful excuse after voting or after being**

**refused to vote.** The said section 136 of Act cannot be related to the witnesses PW1-PW66 and PW71-PW79 negatively. This I say because the witnesses were not loitering but had lawful excuse to be at the polling units by being party ward supervisors. Their situation, contrary to the deductions arrived at by the tribunal is different from that of Amosun v INEC & Ors. which was relied on by the said tribunal as well as Buhari v Obasanjo which said authorities do not aid the respondents case as submitted. The witnesses in the authorities under reference were not direct and qualified under section 77 of the Evidence Act but hearsay witnesses. To the contrary however, the witnesses at hand had lawful access to the polling station and were therefore in a proper position to give direct evidence on allegations of over voting, non counting of votes, etc. B C

***It is also trite law that regardless of the source of the evidence by PW1-PW66 and PW71-PW79, or even in the face of contravening the provisions of section 136(i) (ii), the illegality, if any, will attach to the persons of the witnesses and not the evidence given by him. In other words, even where a witness is branded as illegal, the same will not apply to the evidence given by such a witness no matter the source of the evidence which is immaterial. In the case of Sadau & Anor. V State where the apex court relied on the case of Kuruma, Son of Kamitu v the Queen, at page 203 the Privy Council described the position of the law as follows:-*** D E

***“In their Lordships opinion the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is admissible the court is not concerned with how the evidence was obtained.”*** F

Also in Tortii v Ukpabi (1984) 1 SCNLR 214 at 236-237 and 239-240, Eso and Aniagolu JJSC stated respectively and said as follows:- G

***“There is no general rule of law in civil as well as in criminal cases that evidence which is relevant is excluded merely by the way in which it has been obtained; and “Again, as was held in Kuruma v The Queen (1955) A.C. 197, the test to be applied, both in civil and criminal cases, in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained.”*** H

See also *Igbinovia v State* (1981) 2 SC 5,15-16 where Obaseki, JSC, quoting Lord Goddard in *Kuruma v R.* (1955) AC 197 PC at 24 stated and said:-

B *“When it is a question of admission of evidence, strictly, it is not whether the method of which it is obtained is tortuous but excusable, but whether what has been obtained is relevant to the issue being tried.”*

Eso, JSC in further expatiation in same report further said:-

C *“There is no doubt however, that the law on the matter is as stated by Lord Diplock in Reg. v Sang 1980, AC 402 where the Learned Lord said that the Court, that is, the trial court, should not be concerned with the manner by which admissible evidence has been obtained.”*

In a recent decision of *Famurewa v. Onigbogi* supra, this court held and

D *“The PW1 to PW32 gave evidence as the appellants party (AC) Ward Supervisors who were present at the election and monitored same from unit to unit, they did not claim to have participated in the counting or collation of the ballot papers, by which sections 62(1) and 46(1) would have been applicable. Their role was supervisory. It was there-*  
 E *fore wrong for the learned counsel to the 1 and 2 respondents to have argued that their evidence was of low quality and the tribunal correct in not utilizing same and the holding that the polling agents should have been called to testify. Their evidence was tagged as hearsay*  
 F *by the learned counsel and the tribunal; this is also erroneous as their evidence was direct evidence of what they witnessed, not what they were told. The tribunal was therefore wrong to have preferred the evidence of the Respondents witnesses while it rejected that of PW1 to PW32. The ward supervisors were rightly at the various polling*  
 G *units as persons lawfully entitled to be there. There was no evidence led by the Respondents witnesses that they did not supervise or monitor the election or that they were not present at all. In my view even if these witnesses were not ward supervisors for the appellants party (AC) as ordinary citizens who have a stake in the outcome of the*  
 H *election and/or party members are they not entitled to observe the activities on the election day and give evidence if called upon to do so, guided by the provision of the Evidence Act, especially sections 77 and 155 as to giving of oral evidence and who may testify? I hold that they have a right to testify as to what they saw. See Lasun v*

*Awoyemi (2009) 16 NWLR (Pt.1168) page 513, a recent decision of this court and division; Omouga v State (2006) 14 NWLR (Pt.1000) 532 and Obinwunne v. Tabansi-Okoye (2006) 8 NWLR (Pt.981) 1004*"See, page 25-26 of the judgment.

In *Lasun v Awoyemi* (supra) and at page 553 this court held amongst others that ward supervisors cannot be said to be illegally present at the wards and polling units. The court for instance and in the respect said:-

*"In other words, the tribunal found as a fact that all the witnesses called by the petitioner were ward supervisors in their respective wards. It also went further to specify their responsibilities where to supervise and coordinate all the activities of the Action Congress polling agents in all the polling units and monitor election result at the ward levels during collation, and to receive written reports from the agents in the wards after election. Having specified and concluded thus far, it is out of place for the same tribunal to find at page 720 that the Electoral Act, 2006 does not recognize a ward supervisor and has no place for such a person or office. This I say especially in the light of the phrase "persons lawfully entitled to be admitted to the polling station" as provided for by section 62(1) of the Electoral Act, 2006. With the schedule and responsibilities of the ward supervisors so specified by the lower tribunal, one wonders who else other than such officers, should be those persons lawfully entitled to be admitted. I hold therefore that it is totally out of place for the 1<sup>st</sup> and 2<sup>nd</sup> respondents counsel to submit that the ward supervisors were illegally present at the various wards indicated. The use of the word shall in section 62(1) of the Electoral Act is certainly mandatory and the operation which I hold is in favour of the ward supervisors being lawfully entitled to be admitted."*

The case at hand is a replica of the authority in *Lasun v. Awoyemi* supra. In adumbrating further, it is significant to restate that the respondent did not at any time dispute the reason for the presence of the ward supervisors at the polling units at the point in time when they witnessed the transgressions subject of their testimony. The tribunal in its judgment also relied on the case of *Muhammadu Buhari & Anor. v. Olusegun Obasanjo & Ors.* supra in support of the proposition that the evidence of non-counting of votes, non-announcement of results and what happened at the various polling units could

only have come from polling agents. Contrary to the reason arrived at by the tribunal, the intention underlining the apex court's deduction in the said judgment was centred on the reason that such evidence should come "*from officers who were on the field.*" Further still and in the said case, a State party agent gave an oral evidence of facts orally transmitted to him by other party agents even when he never witnessed any event. The distinction of that case with the one at hand is that, the ward supervisors testified to how they were on ground moving about from one polling station to another in order to personally witness the events and incidents for themselves. The said ward supervisors proceeded to give a direct evidence of what they actually witnessed therefore. The confirmation of this is in line with tribunals' holding at page 164 of volume 7 of the record of appeal as reproduced earlier in the judgment where it held that the petitioners ward supervisors moved from one polling units to another. In keeping with the Supreme Court's decision therefore, the petitioners' witnesses in this context were officers who were on the field.

Also and further in the same authority of *Lasun v Awoyemi* this court at page 554 also had this to say:-

"*It is totally alien to our law I hold, to say that only polling agent, presiding officers, polling clerks, voters and observers are competent to give evidence of what happened at a polling unit or collation centre. Any person can qualify as a competent witness upon satisfying the conditions laid down in sections 77 and 155 of the Evidence Act.*"

The tribunal's holding in the respect that the evidence of non-counting of votes, non-announcement of results and what happened at the various polling units only have come from polling agents is certainly erroneous and without any foundation whatsoever but predicated on a hallowed wind. It was the resultant effect of this wrongful conclusion that birthed or led the tribunal discountenancing the evidence led by the petitioners' witnesses through PW1-PW66 and PW71-PW77, that elections were not concluded, votes were not counted and results were not recorded and announced at the polling units in the ten local governments. This erroneous holding as rightly submitted by the learned senior counsel for the appellants, has, without more, resulted in substantial miscarriage of justice.

The next point to be considered is whether the tribunal was

right in holding that the reports of the petitioners' polling agents admitted in evidence had no probative value.

At page 122 of volume 7 of the record of appeal, the tribunal held and said:-

*".....The report of the Agents which were admitted as Exhibits could not add weight to the evidence of the ward supervisors since their reports themselves have no weight since the makers did not come forward to be cross-examined to test the accuracy, veracity and authenticity of the contents of the reports."* B

The underlying reasoning occasioning the relegation of the reports was centrally based on the fact that the makers did not avail themselves for cross-examination. C

Submitting on the error ascribed to the tribunal by the appellants' senior counsel on its findings, the counsel argued that what was tendered by these witnesses who were ward supervisors were written reports and that in consideration of their probative value, the reports have been properly admitted and ought to be utilized in the light of section 91(1)(b) and (2) of the Evidence Act, which provides that the condition that the maker of the statement shall be called as a witness need not be satisfied. The senior counsel re-echoed the sui generis nature of election petition cases in respect of which time is of essence. The authority cited in support is the case of Okhomma v Psychiatric Hospitals Management Board (1997) 2 NWLR (Pt.485) 75 at 90 para. A-B. That the parameter that should be adopted in determining what weight to attach is not subject to the whims and caprices of an individual judge but is as stated in Ojo v Gharoro (2006) 10 NWLR (Pt.987) 173 at 203. That by the nature of the contents of the various polling agents' reports tendered by the petitioners' witnesses, they cannot in anyway be said to be hearsay in the light of the case of Ojo v Gharoro supra. That the conclusion arrived at by the tribunal in this respect cannot be the intendment of the Legislature in promulgating section 91 of the Evidence Act which to all practical intent and purpose serve an exception to documentary hearsay. Further reference was made to the case of Abdulkarim v incar (Nig.) Ltd. H (1992) 7 NWLR (Pt.251) at 17.

Also the cases further referred to are:- Nafiu Rabi v Kano State (1980) 8-11 SC 130; (1981) 2 NCLR 293; Attorney General of Kaduna State v Hassan (1985) 1 NWLR (Pt.8) 483; Military Gov-

ernor of Ondo State v Adewunmi (1988) 3 NWLR (Pt.82) 280; Savannah Bank (Nig.) Ltd. v Pan Atlantic (1987) 1 NWLR (Pt.49) 212.

That the court should apply the above stated principle laid down in the foregoing authorities and uphold the appellants' contention by ascribing due weight to the agents' reports admitted in this case. That

B this is because the appellants have fulfilled the requirements of section 91(2) of the Evidence Act as it is undeniable that undue delay would be occasioned were the appellants to attempt calling more than 1000 polling agents whose reports were tendered in evidence in this case and which reports corroborate the direct, oral evidence of C the ward supervisors.

While questioning the status of polling agents, the learned senior counsel submitted them to be agents of the political parties in the light of the case of Buhari v Obasanjo (supra). That in the instant D case, the polling agents are the agents of the 3<sup>rd</sup> petitioner political party. That as agents, it follows that the polling agents were just tools or instruments through whom the 3<sup>rd</sup> petitioner acted. The case of James v Mid-Motors (1978) 11& 12 SC 31 at 68-69 per Aniagolu, JSC is relevant in substantiation. That the said documents in the circum-

E cumstance, form part of the official record of the 3<sup>rd</sup> petitioner, an entity that can only act through agents. That the counsel to 1<sup>st</sup>-3<sup>rd</sup> respondents cross-examined some of the ward supervisors on the account of the said reports and that they lived up to the challenge.

F That in the circumstance there is no gainsaying the fact that the ward supervisor had proper custody of the said Exhibits which exhibits they produced from their custody and tendered before the tribunal.

That in the absence of any challenge to the authenticity of the documents, the learned senior counsel argued, the tribunal ought to have G attached and appropriate weight to the said exhibits which fully supported the oral evidence of the said ward supervisors. That, its failure to so do has occasioned a substantial miscarriage of justice. Copious reference was, in the circumstance, related to the case of G. Chitex Ind. Ltd. v O. B. I. (Nig.) Ltd. (2005) 14 NWLR (Pt.945) 392 at 411.

H That it is not the law, contrary to the tribunal's findings in its judgment that since the makers of the polling agents reports (Exhibits 1-78, 143-146 and 148-153) were not called as witnesses, no weight can be attached to the said exhibits. That the case of Flash Fixed Odds Ltd. v Akatugba (2001) 9 NWLR (Pt.717) 46, 63 is clearly

distinguishable from the facts of this case. The said learned senior counsel for the appellants urged that this court should, for determination of the point at hand, be guided by the authoritative pronouncement arrived at by the apex court in the case of *Ayeni & Ors. v Dada & Ors.* (1978) 11 NSCC 147 at pages 156 and 160 which show clearly that the court can properly attach much weight to such documents notwithstanding that their makers were not called as witnesses to be subjected to cross-examination. Reference was further made to the case of *Okeke v Obidife* (1965) NMLR 113, at 115 also a Supreme Court authority, to buttress the submission. The learned senior counsel in the circumstance urged the court to hold that the petitioners have fully established their case as pleaded and to resolve the issue in favour of the appellants. B C

In response to the appellants' submission and on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> respondents their learned senior counsel Mr. Yusuf Ali reiterated without mincing words that the tribunal simply refused to accord any weight to the alleged reports of polling agents who never testified before it. Copious reference was made to the tribunal's judgment at pages 386 and 387 of Volume 7 of the record. That the view of the tribunal in the respect is also unassailable as it would have worked terrible injustice on the respondents had the tribunal attached probative value on the reports, when the makers were shielded from cross examination by not being called to testify by the petitioners/appellants. Worst still that no reason was adduced for the failure to call them. Reliance was drawn to this court's decision in *Ojukwu v Gov. of Lagos State* (1985) 2 NWLR (Pt.10) 806 at 818 per Nnaemeka-Agu JCA (as he then was). That the arguments contained in the appellants' brief at pages 306-317 are misconceived and should not sway this court to take a position different from the one taken by the tribunal. That the invitation by the appellants on this court to invoke the provisions of section 91 of the Evidence Act is misdirected. That this is because there is paucity of evidence on the likely inconvenience to be encountered if the appellants were to call the polling agent as witnesses. That there is no such slightest evidence of this before the tribunal. That the case of *Ojo v Gharoro* (2006) 10 NWLR (Pt.987) 173 at 203 relied upon by the appellants is most unhelpful. That the witness in that case had an intimate relationship with exhibit "M" which concerned her. That in this case, the agents reports which D E F G H

were tendered as exhibit 1-78, 143-146 and 148-153 were peculiar to the undue makers, and were not documents made by the ward supervisors. That it should also be noted that the content of the said exhibits were tendered in purported prove of criminal allegations and therefore imperativeness of calling the makers as witnesses cannot be over emphasized. That the submission that the third appellant, AC was the actual maker of the report actually prepared by named agents is illogical and unsubstantiated. That the AC was never indicated as the maker of the said report. That in any case it is tantamount to standing logic on its head for anybody to contend that the AC prepared the report when this was not practically possible. That Buhari v Obasanjo cited in support of the proposition at page 310 of the appellants' brief was cited out of context, and that the same goes for James v Mid-Motors supra. That unlike in the case of Nasir v Berim also relied upon by the appellants on page 311 of their brief, the ward supervisors through whom the agents' reports were tendered never pretended to be the makers of the said reports. That the reports therefore cannot by any stretch of imagination qualify either as the ward supervisors' document or documents of the AC.

In further submission, the learned senior counsel argued the appellants having lost sight of the glaring difference between admissibility of a document and the weight to be attached thereto. That the fact of admitting a document in evidence does not make it worthy of any weight. That the case of Chitex Industry Ltd. v Obi Nig. (supra) never decided that a document whose maker was not called to verify the context must be accorded weight unless the document was impugned under cross-examination. That the nature of the documents involved in the case of Ayeni & Ors. v Dada & Others (supra) and copiously relied upon in appellants' brief is quite different from the ones in this case and are not on the same footing. That, while in Ayeni's case the documents are public documents duly certified and tendered before the court, those in this case were produced by some individual members of a political party, the 3<sup>rd</sup> appellant, were not a public body and the documents are also not certified true copy. That the case of Okeke v Obidife cited by the senior counsel for the appellant is also not relevant because the document in consideration in that case relate to one in custody of a public officer unlike the case at hand. That the court should not therefore be strayed by these

authorities which have been distinguished. That the said issue should be resolved against the appellants. That the court should therefore uphold the position of the tribunal on the alleged agent reports and refuse to attach any weight to same.

On the onset and just before the resolution of the point relating the admissibility or not of the polling agents' reports, it would be pertinent to state that the judgment the subject of appeal is contained at pages 9-210 of volume 7 of the record of appeal. The reference made to page 387 of volume 7 by the 1<sup>st</sup> – 3<sup>rd</sup> respondents upon which their arguments are based is seeking reliance on an unsigned and purported judgment which I said earlier is not the judgment appealed against. In other words page 219-423 of volume 7 of the record is unsigned and therefore unauthenticated. The said 1<sup>st</sup> - 3<sup>rd</sup> respondents arguments in reference to the tribunal's holdings at pages 386 and 387 of volume 7 of the record, are therefore not based on any judgment appealed against.

***However and for the determinant relevance or not of the reports by the petitioners/appellants polling agents, recourse can be had to section 91 of the evidence Act*** wherein subsections (1)(b) and (2) provide as follows:-

*“91. (1) In any civil proceedings where direct oral evidence of fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied-.....*

*(b) If the maker of the statement is called as witness in the proceedings:*

*Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been made without success.*

*(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of*

*this section shall be admissible as evidence or may, without any such order having been made, admit such a statement in evidence -*

*(a) Notwithstanding that the maker of the statement is available but is not called as a witness;.....”*

**It is significant to restate that the application and invocation of the foregoing provision of the Evidence Act, which could be at any stage of a proceeding, is subject to the fulfillment of certain conditions serving as pre-requisite to the making of the order there under. In other words, the court must in the first place take all the circumstances into account and if satisfied that either undue delay or expense would otherwise be caused, proceed to admit such statement as evidence regardless to whether or not an order is made to the effect. By the use of the phrase “notwithstanding that the maker of the statement is available but is not called as a witness”, serves relevant for the justification of the entire provision. The determinant factor is squarely centred on the necessity to take into account all the circumstances of the case which should be, to the satisfaction of the court. The application and relevance of this section to the case at hand would only be appreciated in the light of the subject matter of appeal which is by nature an election petition appeal.** It goes without saying and needless to emphasize that such matters are special and therefore sui generis, wherein time is of a great essence and which must be of paramount focus. Any loss of such an important guideline would amount to relegating the intentional purpose for the putting in place a special legislation for the regulating of an Election process.

For purpose of recapitulation, the Ward supervisors in addition to the evidence of what they actually witnessed, also had the duty to supervise the polling agents of the 3<sup>rd</sup> petitioner/appellant and received written reports from them. The reports which were submitted directly to the ward supervisors were also admitted without any objection from the respondents and marked Exhibits 1-78,143-146 and 148-153, respectively. Common and running through the written deposition on oath of each of the ward supervisors as witnesses is the following statement of evidence:-

*“apart from my personal knowledge of these events when I visited the polling units in the ward, I also received written report*

*from the polling agents.”*

while the learned appellants’ senior counsel impressed upon the court to ascribe probative value to the foregoing point of evidence, the learned respondents’ counsel and specifically, the senior counsel representing the 1<sup>st</sup>-3<sup>rd</sup> respondents vigorously submitted the contrary and called on the court to dismiss same as being a blowing tornado storm. At page 122 of volume 7 of the record, which has been reproduced earlier in the judgment, the tribunal held the reports of no value and refused to attach any weight in the absence of the makers being cross examined thereon. B

For a clearer expatiation of section 91 of the Evidence Act, reference can be made to judicial authorities. Specifically and in the case of Okhoina v Physiatic Hospital Management Board reference supra wherein at page 90, this court per Akpabio JCA while relating to an object of documentary evidence and the interpretation of section 91(1) of Evidence Act 1990 pronounced that, “In our law a document must speak for itself.” This authority is a situation where a documentary evidence makes it clear and conveys the appellants’ dismissal wherein the minute by the Head of State contained thereon the document without more, was held as sufficient approval. C D E

Also in the case of Ojo v Gharoro reference supra their Lordships of the apex court made the following affirmative pronouncement relating when oral evidence on document will not constitute hearsay - In other words, at page 203 of the report, Tobi, JSC had the following to say:- F

*“Where a document, by its contents, conveys hearsay evidence then the parol or oral evidence based on that document will definitely or invariably be hearsay. The reverse position is also correct and it is that where a document, by its contents, does not convey hearsay evidence, then the parol or oral evidence based on it will not be hearsay evidence, if the witness has an intimate relationship with the document and gives evidence of that relationship. And so I ask, does exhibit ‘M’ convey hearsay evidence? Has the 1st respondent intimate relationship with the exhibit? I have carefully examined the contents of the exhibit and I am of the firm view that it does not convey hearsay evidence. The exhibit carrying Hospital Number 175119 of the appellant is the case note, narrating a full story of pre-clinical,*

*clinical and post-clinical actions of the respondents. I come to this conclusion because I have carefully examined the contents of the exhibit. And the 1<sup>st</sup> respondent's relationship with exhibit 'M' is not only intimate but 'cordial'."*

B Their Lordship held that the two exhibits 'M' and 'P' which were tendered gave the 1<sup>st</sup> respondent enough materials to give evidence in the way he did and therefore affirmed that the evidence he gave based on the exhibits and more could not be said to amount to a hearsay.

C With the polling agents reports being a direct accounts of what transpired on the day of the election as witnessed by the said agents, in the light of findings by their Lordships in the case of *Ojo v Gharoro*, can the said reports be hearsay as concluded by the tribunal and also contemplated by the 1<sup>st</sup>-3<sup>rd</sup> respondents? The answer to this I hold is D clearly embedded and found in the case of *Ojo v Gharoro supra*. More so especially where the ward supervisors per the evidence had cordial relationship with the various agents whose reports were tendered and admitted in evidence. It has also been resolved earlier in the course of this judgment that the ward supervisors evidence are a E direct accounts of what transpired at the various wards.

***The direction of the line of reasoning by the tribunal cannot be accommodated within the context of the provision of section 91 of the Evidence Act. Specifically and for instance, the legislature cannot be said to enact a law that would serve a defeatist function by rendering section 91(2) of the Act of non effect.***

***The Supreme Court has reaffirmed the guiding principle governing the interpretation of statutes for instance in the case of Abdulkarim v Incar (Nig.) Ltd. (1992) 7 NWLR (Pt.251) page 1 at 17 the court held the principle as resting on the maxim ut res magis valeat quam pereat which in other words is for the purpose of giving such statute an effective result which is consistent and not divergent with the intention of the legislature.*** Plethora of supportive authorities avail in the cases of *Nafiu Rabi v Kano State* (1980) 8-11 SC 130, *Attorney-General of Kaduna State v Hassan* (1985) 1 NWLR (Pt.8) 483; *Military Governor of Ondo State v Adewunmi* (1983) 3 NWLR (Pt.82) 280; and *Savannah Bank (Nig.) Ltd. v Pan Atlantic* (1987) 1 NWLR (Pt.49) 212. For

instance, in the case of Buhari v Obasanjo reference supra the apex court at page 306 per Akintan JSC on the status of polling agents had this to say:-

*"It may be mentioned that polling agents are people appointed by political parties under section 36(1) of the Act.*

B

*.....  
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."*

C

Further related authority is also the case of James v Mid-Motors (1978) reference supra wherein Aniagolu JSC at pages 68-69 had this to say:-

*"Whether it is stated that the corporation itself did the act which constituted the action through its agents or that the act or omission was done by a servant of the corporation in the course of his employment..... amounts practically to the same thing."*

From the foregoing, the act or omissions of the corporation and that of its agent same thing are seen as one and the same act. In applying the same principle therefore, **it is in order to say that the reports prepared by the polling agents, appointed in accordance to section 46(1) under the 2006 Electoral Act were indeed, the reports of the 3<sup>rd</sup> petitioner as their principal. The authorities of Buhari v Obasanjo should be read in conjunction with that of James v Mid-Motors both under reference supra. This is in line with the well established principle of law of agency of Qui Facit per alium facit per se. That is to say that he who does an act through another does it himself. The said exhibits 1-78,143-146 and 148-153 are therefore the Acts of the 3<sup>rd</sup> petitioner who in law and being the principal is the maker or author of the said documents. The case of Nasir v Berini under reference supra is relevant and in point wherein Coker, JSC at pages 293 had this to say:-**

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F

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"At this juncture we comment briefly on a point of law which arose whilst this aspect of the case was being argued. Chief Williams for the defendants submitted that the letter, exhibit 23 should not be regarded as evidence of its contents in view of the provisions of section 90 of the Evidence Act. That section precludes the admission as

H

evidence of written statements when the maker of such statements is not called as a witness and the other conditions of admissibility under that section are not shown to exist. We think the argument overlooked some of the peculiar feature of this case. **The letter, exhibit 23, was put in evidence by Mr. Nasir himself. He had given evidence that he instructed his solicitors to write the letter and he thereafter testified as follows:-**

***“Exhibit 23 speaks of a tacit arrangement between me and the bank ..... the main terms of the tacit arrangement are contained in Exhibit 23.”***

***“In the circumstances in which Exhibit 23 was put in evidence, therefore, the maker of it, i.e. the plaintiff, even though he acted through his agent, his solicitor, gave oral evidence indicating that he was the author of the contents of Exhibit 23. We think therefore that on that basis the judge was right to deal with the contents of Exhibit 23 as if the document was evidence of its contents.”***

The learned senior counsel for the 1<sup>st</sup>-3<sup>rd</sup> respondents in his submission called upon the court to disregard the reliance placed on section 91 of the Evidence Act by the appellants’ counsel. That the invocation of the section is misdirected and that the provision of section 91(2) of the Act would not operate to lessen the burden on the appellant to prove their case.

With all due respect to the said learned senior counsel and contrary to his submission I hold that there appears to be a misconception of the interpretation of section 91 of the Evidence Act as well as the case of *Ojo v Gharoro* which both authorities have been carefully considered earlier in the course of this judgment. The ward supervisors were serving the interest of the 3<sup>rd</sup> petitioner/appellant. They also received the written reports from the polling agents within their areas of supervision. They were rightly at the various polling units as persons lawfully entitled to be there. No evidence by any of the respondents witnesses to the contrary that they did not either supervise, monitor the election or that they were not present at all. In the case of *Famurewa v Onigbogi* (supra) where this court held that even if they were not ward supervisors for the appellants, as ordinary citizen they had stake in the outcome of the election and or being party members. They ought therefore have the right to testify. From the

deposition of the ward supervisors therefore, each one of them were clearly in a position to answer questions on those reports. They were closely related to the agents whose report were also matters within their knowledge. The function of the ward supervisors in guarding the interest of the 3<sup>rd</sup> petitioner is not different from that of polling agents. To that extent they are also agents of the 3<sup>rd</sup> petitioner. This I say especially where counsel to the 1<sup>st</sup>-3<sup>rd</sup> respondents cross-examined some of the ward supervisors on the contents of the said reports received by them from the polling agents as evidenced at pages 132-146 of volume VI of the record of appeal. It is also relevant to emphasize and as earlier stated that the said reports were admitted in evidence without any objection raised from the respondents. Therefore, the working of injustice submitted by the 1<sup>st</sup>-3<sup>rd</sup> respondents senior counsel had the reports been admitted, is in my opinion a mere argument resulting from an afterthought conception. In other words and to put in William Shakespeare's language the conception is "signifying nothing". There is also the failure by the respondents I hold to have considered the authorities of the Supreme Court relating the Principle of Agency and principal as restated in the cases of James v Mid-Motors, Buhari v Obasanjo as well as Nasir v Berini all under reference supra.

Further more and with the tribunal having held earlier that the ward supervisors were competent witnesses, the refusal to attach due and appropriate weight to the reports, wherein they were fully and personally involved and also given oral evidence thereon, amounted to a misplaced contradiction. ***The respondents did not also challenge the authenticity of the said Exhibits 1-78, 143-146 and 148-153 hence, the reason for the calling of the makers of the reports did not therefore arise. In other words the admission of the exhibits without objection presupposed that they were authentic in the absence of any challenge. In the case of G. Chitex Ind. Ltd. v O. B. I. (Nig.) Ltd. (2005) 14 NWLR (Pt.945) 392 at 411, the apex court per Musdapher, JSC had this to say on the foregoing subject:-***

***"Exhibit H which was offered as proof of the loss of N3.5 million is not an authentic document to entitle the appellant to claim such damages. Where a document is challenged and impugned as unauthentic, the maker of the document should***

***be called to support the document, otherwise no weight should be attached to it.”***

***The submission by the learned senior counsel for the 1<sup>st</sup>-3<sup>rd</sup> respondents on the distinction between admissibility of a document and the weight to be attached to it amounts to a misconception of the documents in question and at hand, especially having regard to the pronouncement by His Lordship of the apex court in the case of G. Chitex Ind. Ltd. v O. B. I. Nig. Ltd. supra. In other words while it is not in dispute that there is a distinction between admissibility of a document and the weight to be attached thereto, the situation at hand does not come within that argument and circumstance wherein the reports admitted are worthy of weight.***

***For further confirmation on the weight to be attached to the reports in question, the provision of section 198(2) of the Evidence Act is also relevant and in support wherein the reproduction says:-***

***“A witness may however give oral evidence of statements made by another persons about the contents of a document if such statements are in themselves relevant facts.”***

***The question to pose and following the foregoing authority is, how relevant are the polling agents reports? It is pertinent to restate that the said exhibits as the report by the polling agents are the accounts of what they witnessed at the conduct of the various election. On the authority of the provision of section 198(2) of the Evidence Act therefore, there is no doubt that the statement about the content of such report are in themselves relevant facts as it would serve to confirm or not the allegation of the transgressions complained of by the petitioners. The contents of the report being relevant facts are therefore admissible in evidence and to be accorded the due weight of recognition.*** The reliance on the cases of Buhari v Obasanjo, Ojukwu v Governor of Lagos State, Haruna v Modibbo, and Awuse v Odili by the tribunal in its judgment does not therefore support the position taken by it.

The conclusion arrived at by the apex court in the case of Ayeni & Ors. v Dada & ors. (1978) 11 NSCC 147 at 156 and 160 is instructive and therefore clearly subscribed that the court can properly

attach much weight to such document notwithstanding that their makers were not called as witnesses to be subjected to cross-examination. In that case, a reproduction of certain synopsis is where Fatai-Williams JSC (as he then was) authenticated the view taken by this court in ordering a retrial wherein the learned jurists said:-

*“res inter alios acta” because the contents of those two exhibits were not made on oath and the makers of them..... were not called as witnesses to be subjected to cross-examination during the trial of the case in hand. The gist of the maxim ‘res inter alios acta’ is that objection is raised to a piece of evidence as hearsay on the ground that the particular statement was made or given without oath and without any opportunity to cross-examine the maker of the statement by the party prejudicially affected by such hearsay evidence. See paragraph 647 of Phipson on Evidence, 11<sup>th</sup> Edition at page 278.”*

In that case, the Supreme Court held clearly that even in the absence of the maker of exhibits F and G being called to testify, that the trial judge was perfectly in order in attaching much weight to their evidence. On the authority by their lordships of the apex court supra, it is obvious that the tribunal was in grave error and therefore goofed and veered off in failing to attach any weight to the written reports of the polling agents which were marked as exhibits 1-78, 143-146 and 148-153 as well as exhibits 168-169 which were all admitted without objection from the respondents.

Further still and in *Okeke v Obidife (1965) NMLR 113* and on the same subject matter, the Supreme Court Justices in their wisdom also made the following pronouncements per Brett JSC at page 115 and said:-

*“Secondly, the appellant submits that the judge ought not to have treated the statement contained in the police file as admissible evidence, on the ground that the officer to whom it was made was not called as a witness. In a criminal case this would be a valid objection, but in a civil case formal proof of a document can always be waived. One of the first questions which a lawyer instructed for the defence in a running-down case might be expected to ask his client is whether he had made any statement about the accident and it would have been open to the defence to ask for discovery of any documents on which the plaintiff intended to rely.”*

The nature of the complaint by the petitioners/appellants in the case at hand are two fold, that is, predicated on non-compliance with the Electoral Act which is civil in nature as well as that which borders on commission of crime which is criminal. Their Lordships in the case of *Okeke v Obidife supra*, had beautifully drawn a line of demarcation between criminal cases necessitating the calling of maker of the documents and that which is civil, wherein it was held that *“formal proof of a document can always be waived.”* I n summary and on the deduction of the said issue therefore, the tribunal as rightly submitted by the learned senior counsel for the appellants was greatly in error by failing to attach weight to the polling agents reports which were admitted through the ward supervisors on the ground that the polling agents were not called as witnesses to be cross-examined. The said issue is therefore also resolved in favour of the appellants.

#### ISSUE 4:

Whether the failure by the 4<sup>th</sup>-1365<sup>th</sup> respondents also the 1366<sup>th</sup>-1367<sup>th</sup> respondents to call evidence amounted to abandonment of their pleadings and consequently an admission of the allegation in the petition against the said respondents.

Submitting to substantiate the said issue, the learned senior counsel for the appellants re-iterated the settled law wherein a defendant who fails to call evidence in support of his pleadings is deemed to have abandoned same and that plaintiffs’ case stands unchallenged. Also that mere cross-examination of the witnesses of the petitioners cannot amount to a challenge of the petitioners’ case save where the evidence of such witnesses were shaken or discredited. That by electing not to call any evidence, the 4<sup>th</sup>-1365<sup>th</sup> respondents have abandoned their pleadings with the resultant consequence that the said respondents will be deemed to have accepted the facts of electoral irregularities and substantial non-compliance with the provisions of the Electoral Act adduced by the petitioners/appellants. That the burden of proof on the petitioners in the circumstances is minimal. - The senior counsel in support cited the cases of *Honika Sawmill Nig. Ltd. v Mary* (1990) 5 SCNJ 186 at 195; also *Newbreed Org. Ltd. Erhomosele* (2006) 5 NWLR (Pt.974) 499 at 527. Further authority was the case of *Burammoh v Bamgbose* (1989) 3 NWLR (Pt.109) 352. That the holding by the apex court in the case of *FCDA*

v Nanbi (1990) 3 NWLR (Pt.138) page 270 at 281 is also very relevant. Reference to the petitioners'/appellants pleadings was to paragraphs 19.3, 22, 23, 24, and 27.2 of the petition.

The learned senior counsel further submitted that all the allegations in the paragraphs were made against INEC (i.e. 4<sup>th</sup> -1365<sup>th</sup> respondents) presupposing that elections were not properly held in accordance with the provisions of the oral Act. That the petitioners consequently led evidence both oral and documentary in proof of the said allegations thereby shifting the onus of proof on INEC. The case of Ukpo v Imoke (2009) 1 NWLR (Pt.1121) 90 at 175 was cited in support. That the fact that INEC failed to adduce evidence in proof of its pleadings (in which it denied the allegations made against it by the petitioners) obviously shows that there is sufficient basis for the nullification of the results for the ten local Governments as was done in the case of Amgbare v Sylva (2009) 1 NWLR (Pt.112) 1. The learned senior counsel submitted the finding of the tribunal on the failure to call evidence as perverse and unsupported by evidence on the record. That contrary to the findings thereof, the 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup>- 1367<sup>th</sup> respondents did not even cross examine many of the appellants' witnesses and that even where they purported to cross-examine, they did not effectively challenge the evidence-in-chief of the appellants' witnesses. That although a very significant number of the appellants witnesses were not at all cross-examined by the said respondents, the tribunal however and nevertheless said they were duly cross-examined by them. Furthermore and that even where they purported to have cross examined the witnesses, there was never a challenge to their testimonies thereof. The counsel therefore urged the court to strike out the replies of the 4<sup>th</sup>-1365<sup>th</sup> respondents as well as that of the 1366<sup>th</sup> and 1367<sup>th</sup> respondents. Reference in support was duly made to the case of Alhaji Muhammadu Maigari Dingyadi & Anor. V Aliyu Magatakarda Wamako (supra) at page 433. That the failure of INEC to lead evidence meant not only that their reply was abandoned but also that the allegations in the petition were admitted as true without more.

On the object of pleading the senior counsel to the appellants related to the case of Gero v Dominion Flour Mills Ltd. (1963) 1 All NLR 71 at 77 per Bairamian F. J. also to the case Oduka v Kasunmu (1967) 1 All NLR 293 at 297 as well as Orizu v Anyaegbunam (1978)

5 SC 21 at 33 and *Total v Nwako* (1978) SC 1 at 17. That by INEC abandoning its reply is simply saying that it does not intend to dispute the petitioners' claim; that there are therefore no issues to be tried; in other words, it pleads "no contest"; and that it has no answer to the petitioners' claim.

B Submitting in response to this arm of the argument, the learned counsel to the 4<sup>th</sup>-1365<sup>th</sup> respondents submitted same as misconceived. That it is settled law that where a plaintiff who had alleged the commission of criminal acts has not been able to discharge the burden of proving beyond reasonable doubt as required by law his allegations, a defendant, and (in this particular case) the Respondents, are not duly bound to call witnesses, to establish their defence, since the plaintiffs have not made a *prima facie* case against them. The learned counsel in further grounding his submission again supported  
C his contention with the case of *Akanmode v Dino* (2009) All FWLR (Pt.471) page 929. That the case of the 4<sup>th</sup>-1365<sup>th</sup> respondents are interwoven, wherein evidence called by the 1<sup>st</sup>-3<sup>rd</sup> respondents therefore ensures to the benefit of other Respondents who did not call evidence. That this being the case, it follows that the various allegations made against other Respondents i.e. 4<sup>th</sup>-1365<sup>th</sup> were also not established. That the purport of section 138(2) of the Evidence Act is very clear wherein the burden of proof lies on the person who asserts. That it is only after the Commission of the crime had been proved by the prosecution or the person asserting, like the appellants  
D  
E  
F herein, beyond reasonable doubt that the burden shifts unto the person accused of commission of crimes like the Respondents herein.

That in the case at hand, the scenario as found by the tribunal is that the petitioners never proved the allegations of the several crimes listed in their petition beyond reasonable doubt to warrant the invitation on the Respondents to enter into their defence, of those criminal allegations. That this being the situation, admission of the allegation in the petition, does not therefore arise.

That the situation even in ordinary allegations, the fact of not calling  
G  
H evidence by the 4<sup>th</sup>-1365<sup>th</sup> Respondents is not tantamount to relieve the onus on the appellants. The learned counsel submitted therefore that failure of the 4<sup>th</sup>-1365<sup>th</sup> Respondents to call evidence is neither a mistake nor mere inadvertence. That it is their legal right which they have duly exercised and that not even the court can interfere with

that exercise of right which can neither be termed as an admission nor an abandonment of pleadings. That the case of Newbreed Org. Ltd. v Erhomosele cited by the petitioners/appellants was wrongly misapplied.

Further still and that with the nature of the appellants' reliefs being declaratory, the law is settled that such would not be granted based on admission pleadings. Reference was made to the case of Okedare v Adelara (1994)6 (Pt.349) 157 at 71-172, also Ogunjumo v Ademolu (1995) 4 NWLR (Pt.389) 254 and Anyaru v Mandilas Ltd. (2007) 10 NWLR (Pt.1043) 462 at 447-478. That even if there had been no reply filed by any of the Respondents, the tribunal would still have had discretion to require the fact in the petition to be proved by some other means. The learned counsel to buttress his submission cited the case of NBC v Oboh (2000) 11 NWLR (Pt.677) 212 at 224. That the appellants witnesses were variously impugned and their credibility destroyed through cross examination by all the respondents. That the issue of admission of the case of the petitioners does not therefore arise. That the case of Alhaji Muhammed Dingyadi and Ors. v Aliyu Magatakada Wamakko and Ors. unreported and relied upon by the appellants at paragraph 7.13 of page 52 of their brief is not applicable to this case. That the 4<sup>th</sup>-1365<sup>th</sup> respondents joined issues with the petitioners concerning all the salient averments in the petition and put them to strict proof and importantly because the evidence adduced in support of the petition was challenged and effectively destroyed by all the respondents. That the case is therefore distinguishable. The learned counsel in further expatiation also referred to the decision of this court in Imam v Sheriff supra and that of the Supreme Court in Maduekwe v Okoroafor (1992) 9 NWLR (Pt.263) p.69 at 82 as well as the case of Jacob A. Jolayemi & Ors. v Alhaji Raji Alaoye & Anor. 18 NSCOR Part II, 682 at 703. That the argument submitted by the senior counsel to the appellant is not the true position of the law.

That the petitioners evidence were not only challenged by the testimonies of the 1<sup>st</sup>-3<sup>rd</sup> respondents' witnesses but also shaken, controverted, contradicted and challenged under the fire of cross examination of the 4<sup>th</sup>-1365<sup>th</sup> Respondents among other set of Respondents. That the position of the law is not therefore only clear but also unambiguous and unequivocal. The pronouncement of Niki Tobi JSC

in *T. M. Orugbo & Ors. v Bulara Una & Ors.* 11 NSCQR 537 at 552 was relied upon to the effect that there is no law compelling all parties to give evidence at the trial. That the court should therefore resolve this issue in favour of the respondents and dismiss this appeal with substantial costs against the appellants.

B Responding on the said issue of non calling of witnesses, the 1366<sup>th</sup> and 1367<sup>th</sup> respondents through their learned counsel Mr. Owolade submitted the arguments by the learned senior counsel for the appellants as grossly misconceived. That where a plaintiff who  
C had alleged the commission of criminal acts has not been able to discharge the burden of proving beyond reasonable doubt as required by law his allegations, a defendant, (in this particular case) the Respondents, are not duty bound to call witnesses, to establish their defence, since the plaintiffs have not made a prima facie case against  
D them. Hence, that the respondents do not therefore have any obligation to give any evidence in rebuttal of an evidence which is worthless. The learned counsel cited in support the decision of this court in the case of *Akanmode v Dino (2009)* and that of *Fanami v Bukar* both under reference supra.

E That the petitioners, having not discharged the evidential burden placed on them to prove their criminal allegations beyond reasonable doubt, the Respondents are not under any obligation whatsoever to lead any evidence in rebuttal. The learned counsel called  
F on the court to resolve the sole issue against the appellants and to dismiss their appeal with substantial costs.

This issue centres on the contention by the appellants' senior counsel that the failure by the 4<sup>th</sup>-1365<sup>th</sup> respondent and the 1366<sup>th</sup>-1367<sup>th</sup> respondents to call evidence in support of their pleadings meant  
G that the said pleadings had been abandoned and that the appellants' case stands unchallenged. The appellants contention was seriously challenged by the said affected respondents who argued tenaciously that they are not duty bound to call witnesses to establish their defence, since the appellants had not made out a prima facie case against  
H them. In other words, their defence is anchored on the nature of the evidence of the appellant's witnesses whom they argued were variously impugned and their credibility seriously destroyed through cross examination by all the Respondents. At the trial, the petitioners called 82 witnesses the 1<sup>st</sup>- 3<sup>rd</sup> respondents called 62 witnesses while the 4<sup>th</sup>-

1365<sup>th</sup> respondents (INEC) did not call any witness.

The question to ask is what is the legal effect of the 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup> - 1367<sup>th</sup> respondents' failing to call evidence in the circumstance at hand?

It is pertinent at this juncture to state the general principle of law on pleadings. In other words it is trite law that facts deposed to in pleadings must be substantiated and proved by evidence, in the absence which the averments are deemed abandoned. Various judicial authorities avail and in particular Alhaji Muhammadu Maigari Dingyadi & Anor. V Aliyu Magatakarda Wamako, Ajibade Mayowa & Anor. and FCDA v Naibi (1990) 3 NWLR (Pt.138) 270 at 281 a supreme Court authority supra are relevant in support.

The crux of the respondents' argument is that with the petitioners' evidence being unworthy, and therefore self defeating, the quality has negated the need to call any evidence. It is not in dispute that parties have joined issues on their pleadings. The law is also trite generally and as rightly submitted by the learned counsel for both the 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup>-1367<sup>th</sup> respondents respectively that the plaintiff succeeds on the strength of his case and not on the weakness of the defence. See the case of Ezewusin v Okoro (1993) 5 NWLR (pt.294) 478 at 500. The case of Balogun v UBA Ltd. (1992) 6 NWLR (Pt.389) 254 the same principle is also relevant.

The learned respondents' counsel had also submitted the peculiar nature of relief where it is declaratory in nature, and therefore would not be granted based on admission in the pleadings. The pronouncement by Muhammed, JSC in Anyaru v Mandilas Ltd. (2007) 10 NWLR (Pt.1043) 462 at 447-478 is apt wherein he said:-

*"The requirement of the law regarding the onus placed on a party claiming a declaratory relief as claimed by the appellant in the present case is trite. A claim for a relief of declaration, whether of title to land or not, is not established by an admission by the defendant, because the plaintiff must satisfy the court by cogent and credible evidence called by him to prove that as a claimant, he is entitled to the declaratory relief. It is the law that a court does not grant declaration on admission of parties because the court must be satisfied that the plaintiff on his own evidence is entitled to the relief claimed."*

However and notwithstanding the conclusions arrived at in the foregoing authorities which are the established principles relating

pleadings and evidence, the recourse must also be had to sections 135-139 of the Evidence Act wherein burden of proof as a matter of law is also not static but could shift depending on the circumstance of the case. For instance at paragraphs 19.3, 22, 23, 24, 27.2 of the petition at page 151, 153 and 154 of the record, copious allegation  
 B which are of civil nature were made against INEC i.e. 4<sup>th</sup>-1365<sup>th</sup> Respondents, presupposing that elections were not properly held in accordance with the provisions of the Electoral Act, 2006.

The reproduction of paragraphs 19.3 and 22 would be relevant with the res of paragraphs 23, 24 and 27.2 and 27.3 having  
 C been reproduced earlier in the course of this judgment.

*“19.3. Elections were not conclusive and votes were not counted and results were not recorded in Form EC8A and were not announced and/or declared in most polling stations and wards in the aforementioned local governments due to disruption of voting exercise by acts of violence perpetrated on the voters by thugs and/or law enforcement agents acting in concerts with chieftains and members of the 3<sup>d</sup> Respondent on the election day. 22. There was no counting of votes or recording of votes and no announcement of results were made  
 D by the Presiding Officers  
 E in any of the said polling stations in the aforesaid local government areas. The Presiding Officers were chased away by gun-wielding thugs and hoodlums who were acting on the express or implied instructions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>d</sup> Respondents and their agents  
 F and hirelings.”*

***The petitioners/appellants, it was resolved earlier in this judgment led evidence (both oral and documentary) in proof of the said allegations in the paragraphs and the effect which  
 G was to shift the onus of proof to INEC and which same was not discharged. The case of Ukpo v Imoke supra is in support.***

***It is relevant to further restate that for purpose of grounding the respondents arguments, in rendering worthless the evidence by the appellants’ witnesses, same cannot be brought  
 H within the case of Akanmode v Dino supra. This is in the absence of effectively challenging the appellants witness so as to render their evidence as naught. It is also clear on record and as earlier stated that most of the appellants witnesses were not cross examined and even those who were, their cred-***

**ibility was never challenged. The cross examination did not also in anyway elicit any evidence in support of the averments in the said respondents' briefs. A mere cross examination is not enough to satisfy the Arguments by the learned respondents counsel, contrary to the submission by their learned counsel.** In that vein, the learned counsel for the 4<sup>th</sup>-1365<sup>th</sup> respondents, I hold, has seriously misunderstood the deduction arrived at in the case of Alhaji Muhammed Magatakarda & Ors. v Aliyu Magatakarda Wamako supra which is not distinguishable from the case at hand. The cases of Imam v Sheriff and also that of Maduekwe v Okoroafor supra as well as Jacob A. Jolsyrmi & Ors. v Alhaji Raji Alaoye & Anor (supra) are all not applicable to the respondents case. This is in view of the petitioners/appellants having proved their case with their evidence not being discredited by the Respondents as alleged.

The credibility of the appellants' witnesses in particular, the ward supervisors as well as the polling agents' reports admitted without objection through the witnesses have been extensively dealt with and deliberated upon earlier on somewhere in this judgment. It is unnecessary to therefore revisit that being a concluded matter. The reliance by the appellants on the authorities of Agbi v Ogbeh also Buramoh v Bamgbose as well as other related authorities under reference supra, is on the totality appropriate. The authorities all go to support the argument that the evidence of the petitioners or plaintiffs as the case may be, becomes admissible in the absence of the Respondents or defendants calling evidence, if such evidence is unchallenged, uncontroverted or uncontradicted. The situation at hand is greatly in line with the authorities in favour contrary to mission by the learned respondents counsel.

**In the circumstance of this case, the resultant outcome of the 4<sup>th</sup> to 1365<sup>th</sup> and 1366<sup>th</sup> to 1367<sup>th</sup> respondents' pleadings is that same in the absence of calling any evidence are hereby abandoned. The pronouncement made in the case of Ojoh v Kamalu at page 565 supra is evident wherein Tobi JSC had this to say:-**

***"Pleadings, not being human beings have no mouth to speak in court. And so they speak through witnesses. If witnesses do not narrate them in court, they remain moribund, if***

***not dead at all times and for all times, to the procedural disadvantage of the owner.”***

**Also relevant is *Alao v Akano (2005) 11 NWLR (Pt.935) at 180*, where Akintan, JSC amongst others stated this and said:-**

B ***“.....The law is settled that where issues are joined on any averment in the pleadings but no evidence is led to support such averment, the result is that such averment in the pleadings is either to be struck out or be dismissed. In other***  
 C ***words, such averment could be treated as having been abandoned.”***

From the authority of the case of *Ojoh v Kamalu supra*, their Lordships of the apex court held the view that an abandoned pleading is dead and ***“to the procedural disadvantage of the owner.”***  
 D ***Further still and in addition to its being dead, the effectual pre-supposition is that issues are no longer joined because the being nature of the pleadings can no longer speak through the language of a witness. The consequential outcome is that there would be no reply at all on record in which case issues are no***  
 E ***longer denied because there is no denial.***

INEC in the case at hand offered no evidence whatsoever to disprove the evidence of the petitioners that there was substantial non-compliance with the Electoral Act and that the votes credited to the 1<sup>st</sup> to 3<sup>rd</sup> Respondents were not lawful votes. They did not also  
 F substantiate their own allegation to the contrary as they were bound to do. The case of *Akinfosile v Ijose (1960) 5 FSC 192 at 198* is also relevant and in point where Abbott, FJ said as follows:-

G ***“The person who makes allegations in a pleading is, by the ordinary rules of pleadings, bound to produce evidence to substantiate them as part of his case, and it is not sufficient for him to rely upon the emergence of evidence from the opposite party for the purpose of proving allegations in his own pleadings.”***

H The respondents in question had made out allegations and therefore had joined issues with the petitioners/appellants. However and Instead of adducing evidence to substantiate the allegations, they sought to come through the backdoor by relying on the appellants' own witnesses which they have failed to discredit under cross examination. With all respect, this is a result of a misconception and also

misinterpretation of the law relating to pleadings.

It is again settled law that a defendant who fails to adduce evidence in support of his pleadings or in challenge of the evidence of plaintiffs' witnesses has admitted the facts presented by the plaintiff. See the case of *Imana v Robinson* (1979) 3-4SC 1 at 8 where Aniagolu, JSC held and said:-

*"Not having given evidence either in support of her pleadings or in challenge of the evidence of the plaintiff, the defendant must be assumed to have accepted the facts adduced by the plaintiff notwithstanding her general traverse."*

***The 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup>-1367<sup>th</sup> respondents have both abandoned their pleadings, they cannot in the circumstance be heard to contradict by their arguments what the petitioner have proved by evidence. There cannot therefore be an issue for consideration and which has been formulated by a party that has abandoned his pleadings. This is as laid down by this court again in the case of *Alhaji Muhammed Maigari Dingyadi & Anor v Aliyu Magatakarda Wamako & Ors. supra* wherein Belgore JCA said:-***

***"There is no doubt that the tribunal was clearly in error. There cannot be an issue for consideration formulated by a party that has abandoned his pleadings. The issue so formulated has nothing to hang on. Where a defendant abandons his pleadings, he is taken and as having admitted the allegations against him in the statement of claim."***

The reply of the 4<sup>th</sup>-1365<sup>th</sup> and 1366<sup>th</sup> and 1367<sup>th</sup> Respondents having abandoned their pleadings in the absence of any evidence to substantiate same, cannot be heard to contradict by argument what the petitioners have proved by evidence. The said issue in the result is also resolved in favour of the appellants.

#### ISSUE 5:

Whether the tribunal properly evaluated the evidence of the witnesses inclusive of documentary evidence and arrived at the findings that the petitioners/appellants failed to prove their petition.

The gravamen of the appellants' complaint here is that the tribunal woefully failed to evaluate at all or to properly evaluate the credible evidence of their witnesses. It treated their evidence as mere allegations and did not perform its basic duty of putting the totality of

the testimonies of both parties on an imaginary scale. Their arguments in respect of this issue can be found on pages 104-306 of their brief, paragraphs 16.1-16. 535. The 1<sup>st</sup> -3<sup>rd</sup> respondents advanced effervescent responses to these arguments on paragraphs 9.29 et seq. The 4<sup>th</sup>- 1365<sup>th</sup> respondents' arguments, largely anchored on proof beyond reasonable doubt, cover twenty two pages of their brief, see, paragraphs 16-52, thereof. The terse, if laconic, submissions of the 1366<sup>th</sup>- 1367<sup>th</sup> respondents are contained in their brief of argument, pages 11 and 12. The appellants' reply to the submissions of the 1<sup>st</sup>- 3<sup>rd</sup> respondents can be found on paragraphs 1.19; 1.28; 1.34; 1.37; 1.38; 1.40; 1.48; 1.56; 1.69 etc. Their reply to the arguments of the 1366<sup>th</sup>-1367<sup>th</sup> respondents can, also, be found on paragraphs 3.7 et seq.

The arguments of the parties are as spirited and enthralling as they are voluble, spanning several pages of their respective briefs. In the resolution of this issue, it would suffice to illustrate the approach of the tribunal by employing the first and third limbs of the tripod in the Trinitarian road map which the 1<sup>st</sup> -3<sup>rd</sup> respondents sketched on paragraph 9.74 of their brief. According to them: "... (t) though without formally saying so, the tribunal did evaluation under three groupings. In the first place, it evaluated the testimonies of the so-called supervisors that constitute the bulk of the witnesses called by them....Next, the tribunal evaluated the evidence of the so- called cameramen/journalists.... The tribunal finally evaluated the testimonies of the so-called experts..." [page 266 of the brief]. In this judgment, we shall dwell only on the so-called evaluation of the testimonies of the appellants' witnesses and those of the experts. Before then, however, it would, in our view, be necessary to highlight the role which an appeal court, such as this, is expected to play in the determination this sort of complaint.

A complaint of improper evaluation of evidence is, invariably, hinged on the issue of finding or non-finding of facts in the judgment appealed against. The rationale of all binding authorities on the point is that in dealing with such a complaint, an appellate court is obliged to find out, inter alia:

- (a) What was the evidence before the trial court;
- (b) Whether it accepted or rejected any evidence upon the correct perceptions;

(c) Whether it correctly approached the assessment of the evidence before it and placed the right probative value on it;

(d) Whether it used the imaginary scale of justice to weigh the evidence on either side;

(e) Whether it appreciated upon the preponderance of evidence which side the scale weighed having regards to the burden of proof,

See, *Daramola and Ors v AG, Ondo* (2000) FWLR (pt 6) 997, 1015; 1016; *Osolu v Osolu* (2003) FWLR (pt 172) 1777, 1791.

We shall be guided by these criteria in our resolution of the questions; first, the tribunal's alleged evaluation of the appellants' witnesses.

### APPELLANTS' WITNESSES

The crux of the appellants' complaint centred on the attitude of the tribunal to the testimonies of their witnesses in ten local government areas. With regard to Boripe Local government Area, the appellants called PW9; PW10; PW11; PW12; PW58; PW62; PW63; PW65 and PW74. The respondents, on their part, presented their case through RW39; RW43 and RW50. What was the tribunal's approach to the testimonies of these witnesses?

In the first place, it took the view that the testimony of PW9 was a mere allegation see page 112, Vol 7 of the record. It elided any consideration of the responses elicited from him in cross examination on behalf of the 1366<sup>th</sup>-1367<sup>th</sup> respondents: responses which confirmed his depositions on oath on the role of the police men on duty on the day in question, page 136 of Vol 6 and the responses, also, elicited from him in cross examination, page 135 of Vol 6, to effect that there was no proper accreditation.

More worrisomely, it even held that the direct evidence of the PW10 that he was about to be shot required corroboration, page 112, Vol 7 of the record. This is notwithstanding the fact that he was not cross examined on this testimony. Worse still, the tribunal missed the opportunity of evaluating the evidence of PW10 having regard to the deposition of RW39 who, under cross examination, admitted that he left for his house immediately after he had voted and that he did not know what happened at the polling unit, page 872 of Vol 6 of the record.

There was, also, the testimony of PW11: this was the witness:

who, under cross examination, gave evidence as to what he saw; who, under cross examination by the 4<sup>th</sup> - 1365<sup>th</sup> respondents, asserted that election was peaceful before PDP thugs arrived; and who was not cross examined by the 1366<sup>th</sup>-1367<sup>th</sup> respondents. The tribunal was content in dismissing his evidence as mere allegations. PW12, who testified in respect of ward 6, stated under cross examination that there was no voters' register and that no accreditation took place and that the police assisted the PDP thugs in carrying away ballot boxes. He was not even cross examined. PW58 even testified that he was molested and that he personally saw the thugs as they were doing the thumb printing. The tribunal did not even advert to the testimonies of PW62; PW63; PW65 and PW74. Instructively, whereas PW9; PW10; PW11; PW12; PW58; PW62; PW63; PW65 and PW74 testified in respect of the various polling units in D Boripe, the respondents called evidence in respect of only three polling units: evidence which did not fare so well during cross examination. The effect is that the testimonies of appellants' witnesses in respect of the other polling units were not challenged.

EW PW13-16; PW60; 61 AND 66 testified in favour of the appellants inspect of ATAKUNMOSA WEST Local Government. The tribunal merely summarised the testimonies of these witnesses without actually evaluating them. This is surprising having regard to the testimonies of the witnesses which the respondents produced, namely, F RW1-7; 13; 14 and 24 and their conduct during cross examination.

Since the tribunal did not evaluate the evidence of the parties it was not in a position to make findings on the fact that the evidence of RW1-7; RW13; 14 and RW 24 were only in respect of ten polling G units. This meant that it did not also make any findings of fact that, in respect of the polling units where the respondents did not call evidence, the testimonies of the appellants' witnesses remained unchallenged. Above all, without the evaluation of evidence, it failed to make findings relating to the proof of the appellants' allegations for H this local government.

As with the other local governments, there was no attempt to evaluate the evidence of the parties in IFE CENTRAL LOCAL GOVERNMENT. It would appear that the tribunal could seldom spare the time to attend to the testimonies of the witnesses hence it took the

easy way out. It made a terse summation of the testimonies of PW17; 18; 20; 21 and 22. Worse still it did not advert to their testimonies which were elicited in cross examination. The implication of its approach is that there was no finding as to whether the respondents adduced such quality of evidence that could effectively rebut the testimonies proffered in favour of the appellants. B

The testimonies of the appellants' witnesses in IFE EAST LOCAL GOVERNMENT AREA did not fare any better in the hands of the tribunal. Indeed, almost all their testimonies were characterised as "mere allegations." As such, they did not enjoy the singular privilege of being evaluated. Even the PW26, who was not cross examined by the 4<sup>th</sup>-1365<sup>th</sup> and 1366-1367<sup>th</sup> respondents, did not merit the tribunal's exercise of the duty of evaluation of evidence. His evidence, just like the testimonies of PW23; 24; 27 etc, were classified as mere allegations. In all, the tribunal, due to its failure to evaluate the evidence, missed the opportunity of making findings of facts with regard to the probative value of the testimonies of the five witnesses who testified in favour of the respondents for only five units. C D

At pages 127-132, Vol. 7 of the records, the tribunal dealt perfunctorily with the evidence of the petitioners' witnesses in IFE SOUTH LOCAL GOVERNMENT AREA. Hence, it did not evaluate them. These witnesses were: PW30; 32; 33; 41; 64; 71 and 76. Their testimonies were not tested against the background of the testimonies of the witnesses for the respondents, namely, RW34; 41; 51; 55. F This notwithstanding, at page 132 of Vol 7, their testimonies were dismissed as mere allegations. Instead of embarking on the evaluation of the evidence of these witnesses, the tribunal opted for the facile approach of reviewing the pieces of evidence. The same fate befell the testimonies of RW34; 41; 51 and 55. G

In IFEDAYO LOCAL GOVERNMENT AREA, both the testimonies in favour of the appellants and those in favour of the respondents were not subjected to the rigours of assessment. On the other hand, they were merely summed up, see, pages 133-134, Vol 7, for the review of the testimonies of 42; 56 and 57, on the one hand; and pages 140-142, for the review of the testimonies of RW21; 22; 26 and 58. This was also the approach to the testimonies of PW34; 35; 36; 37; 38 and 43, who testified in favour of the appellants, on the one hand; and RW10; 11; 12 and 16, on the other hand with re- H

spect to Boluwaduro local Government Area. It is even more amazing having regard to the inconsistencies and contradictions that characterised the testimonies of the aforesaid respondents' witnesses.

In ISOKAN LOCAL GOVERNMENT AREA, there was no attempt to evaluate the testimonies of the appellants' witnesses: PW52; B 54; 55; 59; 75; 77 and 78 alongside the testimonies of the respondents' witnesses; RW20; 27; 32; 44; 46; 47; 48; 52; 53 and 56, before deciding to accept the testimonies of the respondents' witnesses. Two instances will be cited here to demonstrate the error of the tribunal here: was it possible to resolve the probative value of the C evidence of RW 27 without first reconciling the differences in exhibits 315 (b) (1-333) and 153 (1-7), that is, Form EC8A for the unit? The same question may be posed with regard to the evidence of RW 52 D who was confronted with exhibit 433 B, see page 910, Vol. 6. This may be compared with exhibit 146 (2), result form EC8A for the unit. These show the glaring consequences of the tribunal's abdication of its duty of the evaluation of the evidence adduced before it. To say the least, the tribunal went about its duty in a very shoddy and sloppy manner. That explains its disdain for these irreconcilable differences between the oral testimonies of the above respondents' E witnesses with the documents which it admitted in evidence. We are perturbed, indeed, disconcerted about this lackadaisical disposition of the tribunal because the law has long been settled that documentary evidence is the yardstick or hangar for assessing the veracity of F oral evidence or its credibility, *Fashanu v Adekoya* (1974) 6 SC 83; *Kimdey v Mil Gov, Gongola State* (1981) 2 NWLR (PT 77) 445.

As with the other local governments, the testimonies of witnesses (PW61; 2; 3; 4; 5; 6; 7; 8; 44; 47 and 48, for the appellants; G RW 28; 33; 35; 36; 37; 38; 45; 49; 57; 59 and 60, for the respondents) in ODO OTIN LOCAL GOVERNMENT AREA were not evaluated. The tribunal did not deem it fit to consider exhibit 377 C for unit 3 ward 3 against the background of the evidence elicited from RW 28 in cross examination. Equally, the RW28's response to exhibit 217 for Odo Otin local government Area, where his unit was H totally blank, was not even adverted to. The same applies to RW33 who claimed that he voted. However, exhibit 375 B, voters' register for his unit, disclosed that he did not vote as his name was neither accredited nor ticked as having voted. RW35 equally claimed that he

voted. However in exhibit 385 (C), voters' register for ward 14 (where he claimed to have voted), his name was neither accredited nor ticked as having voted.

It is even more amazing that the tribunal chose not to evaluate the evidence even against the background of the fact that majority of Forms EC8As, whose certified true copies were produced by INEC, were blank. Even R18, which the respondents tendered, did not help matters. Since his name was not ticked on the certified true copy of the voters' register for his unit, would his claim that he voted still show that election in his unit was conducted in compliance with the Electoral Act?

What was the tribunal's justification for not estimating the claim of the RW 6 that he voted when exhibit 217, the certified true copy of the result sheet for Odo Otin, showed that majority of the units, including his unit, were blank?

The same question may, also, be asked with respect to R18. Whereas RW38 claimed that he voted, exhibits 217 and R18 were blank. Whereas RW 45 claimed that he voted, his name appeared in exhibit 216 (3), Form EC8A, the result sheet for ward 4.

What explanation could be offered as to why the tribunal glossed over all these inconsistencies: inconsistencies which could have weighed in its mind? It preferred merely to review the evidence of the parties and, above all, just, with a wave of the hand, dismiss the assertions of the appellants as mere allegations!

Against this background, we agree with the appellants' submission that the tribunal's findings that they failed to provide evidence for their allegations in the above local governments were perverse findings.

Now, it was contended on behalf of the 1<sup>st</sup> -3<sup>rd</sup> respondents that the submission of the appellants was tantamount to dictating a straight-jacketed form of judgement writing. We, entirely, agree with the observation that a trial court is free to adopt its own style in writing a judgement so far as the judgement manifests a true reflection of the evaluation of the evidence adduced by both sides to the dispute, Aguocha v Aguocha (2005) 1 NWLR (pt .906) 165, 197.

***However, as shown above, the tribunal only concerned itself with a summary or re-statement of the testimonies of the witnesses. This was where it erred. A summary or restatement***

**of evidence is not the same thing as evaluation of evidence,**  
 Uwegba v AG, Bendel State (1986) 1 NWLR (pt 16) 303. **While the**  
**summation of the evidence simply means what it says, namely,**  
**making a summary of the evidence, the evaluation or appraisal**  
**of evidence is a much more rigorous process which entails**  
 B **the assessment or estimation of the evidence with a view to**  
**ascribing credit or value to it,** Onwuka v Ediala (1989) 1 NWLR  
 (pt 96) 182, 208.

**Unlike a mere review of evidence, its actual evaluation**  
 C **involves a reasoned belief of the evidence of one of the con-**  
**tending parties and disbelief of the other or a reasoned pref-**  
**erence of one version to the other. Above all, there must be**  
**an indication on record as to how the court arrived at its con-**  
**clusion of preferring one piece of evidence to the other.** Inter-  
 D estingly, the evaluation and findings of fact do not have to cover  
 numerous pages, or rather a substantial portion, of the judgement in  
 as much as they are, properly, done and carried out as required by  
 law, Oduwole v Aina (2001) 17 NWLR (pt 741) 1; Onwuka v Ediala  
 (1989) 1 NWLR (pt 96) 182; Akintola v Balogun (2000) 1 NWLR (Pt  
 E 642) 532.

For the future guidance of all trial courts, we shall further elu-  
 cidate on this point. A review is a narration in precise form of the  
 material evidence adduced by each party to a case in support of its  
 pleadings. It is after the review that all available evidence in the case,  
 F that is, the pieces of evidence adduced by both parties to the dispute,  
 are evaluated. In other words, all the evidence are supposed to be  
 placed on an imaginary scale so that the trial court could determine  
 in whose favour the evidence preponderates, Mogaji v Odofoin (1978)  
 G 4 SC 91; Bello v Eweka (1981) 1 SC 101; Amokomowo v Andu  
 (1985) 1 NWLR (pt 3) 530.

Put differently, the court is required to construct an imaginary  
 scale on which it would put the totality of the evidence adduced by  
 both parties: the evidence adduced by the plaintiff, on one side of  
 H the scale and, that of the defendant, on the other side; and weigh  
 them together. The court would then determine which is heavier.  
 The weight or value is not determined by the number of witnesses  
 called by each party but by the quality or the probative value of the  
 testimony of the witnesses. This approach is to enable the trial court

determine the issues upon the principle that in civil cases, disputes between the parties ought to be decided properly on the balance of probabilities, *Mogaji v Odofin* (supra); *Usman v Garke* (2003) 14 NWLR (pt 840) 261; *Itauma v Akpe-Ime* (2000) 12 NWLR (pt 680) 156; *Mobil Prod. Nig UnLtd. v. Monokpo* (2003) 18 NWLR (pt. 852) 346, 436; *Osazuwa v. Isibor* (2004) 3 NWLR (pt 859) 16, 39; *Opadere v. Odebunmi* (2003) 16 NWLR (pt.845) 46, 57 - 58. Where the evidence called by one of the parties tilts the scale towards one side of the balance, the court would anchor its findings of fact on such evidence, *Osazuwa v. Isibor* (supra); *Bodi v. Agyo* (2003) 16 NWLR (pt 846) 305, 323-324. B  
C

The tribunal's approach was, clearly, wrong. It would appear that it equated the witnesses' statement on oath with ordinary averments in pleadings. That perhaps explains why it treated the sundry depositions of the appellants' witnesses as "mere allegations." We find considerable force in the contention of the appellants' counsel that the tribunal's approach betrayed a misconception of the character or status of the written statement on oath. We endorse their submission that under the frontloading requirement, a witness' deposition once adopted becomes effective as the evidence in chief of such a witness, *Agagu v Mimiko* (2009) 7 NWLR (pt 1140) 342, 424-425. D  
E

Further evidence of the tribunal's abdication of its duty of the evaluation of evidence can be found in the view it took regarding the character of the averments of the appellants relating to non-compliance with the mandatory provisions of the Electoral Act: non-counting of results; non-recording of forms, see, paragraphs 18; 20; 23; 24; 27.2; 27.3; 29.d; 41; 42.d; 51; 52.d; 71; 59 etc; for the first - third respondents, see paragraphs 9; 13; 22; 46 and 73 of their reply, page 4-5; page 6; page 10 and page 14 of vol 2 of the record; *G* for the 4<sup>th</sup>-1365<sup>th</sup> respondents, paragraphs 5; 7; 8; 13; 16; 58, pages 701-702 of vol 2 of the record. On the one hand, the tribunal acknowledged that the petitioners led evidence on non-counting etc, pages 126-127 of Vol 7. On the other hand, instead of utilising that evidence in its evaluation of evidence, it took the view that the said allegations were criminal in nature. PW1-PW65; PW71-PW79, as shown above, also gave evidence. The tribunal indeed knowledged them, pursuant to section 77 of the Evidence Act, as competent witnesses who could give oral account of what they saw, heard or per- F  
G  
H

ceived. However, instead of evaluating their evidence, it concluded that only polling agents were entitled to give evidence of non-counting. This is rather strange having regard to the quantum of materials which the respondents supplied through RW7; 12; 16; 24; 37; 49; 50; 57; 58; 59 and 60 from which tribunal would have, on the imaginary scale, found in whose favour the balance tilted.

We entertain no doubts, having regard to the avalanche of authorities on the matter, that these averments are civil in nature and the requisite proof is on the balance of probabilities pursuant to the construction of an imaginary scale, *Eruotor v Ughumiakpor* (1999) 9 NWLR (pt 619) 460, 465; *Omoboriowo v Ajasin* (1984) 1 SC 206, 227-228. The net effect is that the tribunal was in error in not evaluating the evidence relating thereto on the erroneous assumption that they were criminal allegations which ought to be proved beyond reasonable doubt.

Further more, the petitioners' case on the pleadings and evidence was that the results declared in the ten local government areas were invalid and ought to have been cancelled because there was no counting of votes; there was no announcement of results at the polling stations and there was no collation at the ward level. In short, their case was that INEC did not properly conduct election in accordance with the Electoral Act. Now, the 4<sup>th</sup>- 1365<sup>th</sup> and 1366<sup>th</sup>- 1367<sup>th</sup> respondents did not call any evidence. If the tribunal had constructed an imaginary scale, as it was supposed to have done, the said respondents would had no evidence on their side of the scale. In effect, the scale would have preponderated in favour of the appellants, against these said respondents, on question of the non-conduct of the election in accordance with the Act.

From all we have shown above, it cannot be gainsaid that the tribunal rejected the appellants' pieces of evidence on the wrong perception that while some averments were mere allegations and some needed corroboration; others required proof beyond reasonable doubt. Having dismissed some of the pieces of evidence as mere allegations, the implication is that it did not assess them and, therefore, could not ascribe credit or any probative value to them. We are satisfied that, since it categorised other pieces of evidence as requiring proof beyond reasonable doubt, it, invariably, relieved itself of the duty of constructing an imaginary scale: an exercise only associ-

ated with proof on the preponderance of evidence in civil cases, Mogaji v Odojin (supra); *Eruotor v. Ughumiakpor*(supra); Omoboriowo v Ajasin (supra); Mobil Prod. Nig UnLtd v. Monokpo (supra); Osazuwa v. Isibor (supra); Opadere v. Odebunmi (supra).

The net effect of it all is that the tribunal did not, and could not, appreciate, upon the preponderance of evidence, the side to which the scale tilted having regard to the burden of proof, Daramola and Ors v AG, Ondo (supra); Osolu v Osolu (supra).

The so-called evaluation of the evidence of PW 67; 68; 69 and 70, on the one hand; and that of PW 80; 81 and 82, on the other side, were a total travesty, caricature or mockery of the whole concept of evaluation of evidence. In the 1<sup>st</sup> place, the 1<sup>st</sup> -3<sup>rd</sup> respondents contended, very forcefully, that the tribunal evaluated the testimonies of PW67; 68; 69 and 70, citing pages 208-213 of the record. We have perused the records, again and again, see, for example, pages 369-370 of vol 6 of the record, in relation to the cross examination of the 68. We find no piece of evidence on these pages which wear any visage of an admission of the poverty of the video recording. Equally, pages 369-370 of vol 6 do not bear out the respondents' claim that PW70 made certain admissions regarding Ward 2, unit 3. What is more, our close reading of page 184 of vol 7 intimates us that the tribunal, actually, acknowledged PW80 as a finger print expert.

PW 80 made far-reaching revelations in his testimony. He tendered exhibits 83; 88; 89; 90: exhibits which were admitted without objection. Although RW61 and 62 testified on behalf of the respondents, their testimonies did not confute the said evidence of PW 80. Indeed, the tribunal did not attach any weight to the testimony of PW61 because "*his evidence was also buttered (sic) under cross examination and a number of errors pointed out in the report such that the tribunal cannot attach any weight to his evidence*"; see page 205 of vol 7, judgement of the tribunal. The tribunal could not place any premium on the opinion of PW 62 because "he is not an expert in the field he was called to give his opinion", page 205 of Vol 7, judgement of the tribunal. In effect, on the imaginary scale, the opinions of PW80; PW 81 and 82 were the only outstanding pieces of evidence. This, naturally, would have tilted the scale in favour of the appellants, if the tribunal did not abdicate its responsibility. Incidentally, the crux

of the evidence of PW80 and 82, for instance, was that of the total 203574 votes allegedly cast for the first and second respondent in the ten contested local governments, 85177 votes representing 41.84 % were multiple votes. Equally, PW 80's evidence was neither dis-  
 B the tribunal imputed certain conclusions which were not derivable from this witness's testimony to him, see, for example, page 184 of vol 7 of the record for its erroneous interpretation of the aspects of his evidence; see, also page 199 of Vol 7. The tribunal's view is clearly  
 C not borne out by the record, see, for example, page 417 of vol 6, for the correct version of the ipse dixit of this witness to the effect that he was a part of the team that worked under Adrian Forty prior to his demise; and that after Adrian Forty's death, the process did not com-  
 D mence de novo. We invite the witness to reproduce his evidence:

D That I am part of the team that worked under Adrian Forty that is correct and before his death we had concluded our assign-  
 E ment but when he died I was asked to continue as his colleague and that is why this particular assignment was resurrected. That after the death of Adrian Forty I did not start the process afresh",

E [italics supplied for emphasis page 417 of Vol 6 of the record].  
 Further instances of the tribunal's wrong attribution of evidence to the witness can be found elsewhere, see, for example, 185 of vol 7. However, a perusal of pages 272-280 of vol 3 will expose the  
 F tribunal's summary as an unwarranted misrepresentation of the witness's evidence.

Now, notwithstanding the tribunal's finding that PW80 is an expert and actually admitted the reports he made, it, surprisingly, refused to accord any weight to the said reports. It reasoned that the  
 G witness did only 10% of the work. Its further reasons were that the reports were not signed and that the other members of the panel of experts were not invited to give evidence. With due respect, the find-  
 H ing relating to the percentage of work was a share orchestration of half-truths. This is rather strange. On page 417 of Vol 6, the witness explained that they had completed the assignment. However, they subsequently, embarked on a review. It was the 10 % of this review that had been reviewed.

We agree with the contention that any unsigned document carries no weight even if it had been admitted in evidence, Omega

Bank v O. B. C Ltd (2005) 1 SCNJ 150; Garuba v Kwara Investment Co Ltd (2005) 5 NWLR (pt 917) 160. However, the instant case is clearly distinguishable from the scenarios that played out in the above cases. This witness was a member of the team of experts who did the analyses and prepared the said reports. In our view, therefore, he qualifies as a maker of the said reports, see, section 91 (4) of the Evidence Act. Finally, from our perusal of page 647 of Vol 6 of the records, we are satisfied with the explanation for the absence of the other members of the team who were not called to give evidence: members who, according to the evidence of this witness, were outside this country, and whose procurement would entail a lot of expense. According to him: "...at the end of the analysis, there was a collective truth clear from the analysis that 51 experts and myself, they could have been here to defend and attest but for time and expenses such will consume" see, page 647 of vol 6 for the responses elicited from PW82 under cross examination. This explanation comes within the beneficent ambience of section 91 (2) of the Evidence Act, Audu v Ahmed (1990) 3 NWLR (pt 150) 287; Igunbor v Obianke (1976) 9 and 10 SC 179; I.I.T.A. V Amrani (1994) 3 NWLR (pt 334) 296. The tribunal was, therefore, in error in not according the documents their due weight.

Quite apart from the issue of misrepresentation, it is evident that the tribunal's approach to the testimonies of the other experts was anything but wholesome. PW81, for example, testified that he participated in the physical inspection and analyses of electoral materials used or alleged to have been used in the ten disputed local governments in order to discover whether or not there were malpractices which might be apparent. He tendered exhibits 451-460. He made startling revelations in his evidence, see, pages 30 -38 of Vol 3. For Example, on pages 37-38, he testified that:

Upon inspection of the forms EC8B produced by INEC for inspection and certified by INEC for Ife Central Local Government, I found that it was one Alhaji S. O. A Nofiu whose name and signature appeared as the agent for the Peoples Democratic Party (PDP) in nine out of the eleven wards in Ife Central Local Government...

Upon inspection of the Form EC8D which was duly certified by INEC, the number of registered voters for Boripe Local Government Area as recorded on the Form EC8D for Boripe Local Gov-

ernment Area was 12, 631 while the votes for PDP (Peoples Democratic Party) on the same form EC8D for Boripe Local Government was 14, 497 and the total votes recorded on the EC8D is 14, 839...

Now the tribunal failed to ascribe any weight or value to his evidence and the exhibits tendered through him. It reasoned that, as  
B the witness was not an expert in election matters or the production of the electoral documents, his evidence was not direct. Its further reason for not according the exhibits any weight was that the twenty other persons that worked in conjunction with this witness's  
C organisation did not sign exhibits 451-460, see, 190-194 of Vol 7 of the record.

With profound respect to the tribunal, its above findings were products of illogical obscurantism. PW 81 never arrogated the status of expert to himself. His evidence was that he participated in the  
D physical inspection of electoral materials. His testimony was, therefore, based on the things apparently observed on the electoral materials. We do not agree with the tribunal's reasoning that the witness should have participated in the conduct of the election or the preparation of the electoral documents before he could make observations  
E on the electoral materials used. On the other hand, we take the view that his evidence was rather direct as to the observations he made on the electoral materials. This is consistent with the direct evidence rule enshrined in section 77 of the Evidence Act. In *Ajiboye v State* (1984)  
F 8 NWLR (pt 364) 593, 600, it was held that "a witness in a case is supposed to give evidence of what he personally said, did or discovered... see, also, per Onu JSC in *Kala v Potiskum* (1998) 1 KLR (pt 57) 231, 248.

What is more, the witness deposed that his organisation worked  
G in conjunction twenty other persons. He identified the reports which were tendered in evidence. We see no reason why the tribunal failed to accord weight to his evidence and the exhibits tendered.

The respondents' witnesses did not succeed in discrediting the  
H evidence of PW82, hence it remained unchallenged. Instead of evaluating the pieces of evidence this witness adduced by placing them on an imaginary scale, as shown above, the tribunal rejected them for extraneous reasons: reasons which were, irreparably non-sequitur. Listen to this:

We have considered the evidence adduced by the witness where he admitted that he is a Chemical Engineer, that he did not study Political Science or Computer Science, and more importantly, he stated that he did not offer any course on Election Materials analysis in any of the Institutes he attended and he has never worked for INEC as a staff or Consultant. Even the petition which has to guide to him as to the allegation contained therein, he said he read it and left in the office of the lawyer. The witness has not demonstrated any special skill in relation to the field he was called to give an opinion. Based on the above facts and taking into consideration the case of ANPP v Usman (supra) and section 57 of the Evidence Act and the fact that the witness has not provided the basis for his opinion, the tribunal cannot regard the witness as an expert on the field he is called to give opinion,

(Page 198 of Vol 7 of the record). The tribunal refused to accord any weight to the report tendered by the witness on the ground that he was not an expert. Although we acknowledge the undoubted prerogative of the trial court to consider whether a witness qualifies as an expert, see, AG Federation and Ors v Abubakar and Ors (2007) 4 SC (pt 11) 62, 247; Azu v The State (1993) 6 NWLR (pt 299) 303, we take the view that the tribunal, in this case, exercised prerogative in a jaundiced manner for it glossed over the unimpeachable basis of his expertise Elicited during cross examination. Hear him:

I have been trained in Batch Items Managements, at the three training at MBA, intervene and soft promotion, teaching how to analysis (sic) the movement of components, such as cheque leaves, ballot papers of components of a batch after they have been used, even when an item was not present when the substance was being used. (See Page 647 of Vol 6)

Surely, the tribunal's view of expert opinions does not tally with the long line of authorities on the point. We are satisfied that this witness PW 82 is an expert. He was engaged as a software expert to gather election materials as used by INEC and to analyse them for irregularities such as multiple thumb printing and ballot stuffing in the ten disputed local governments. At page 636 - 637 of Vol 6 of the record, the witness gave a resume of his qualifications and the numerous courses he attended on ICT in Nigeria; UK; France; USA

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and China.

From his academic and establishment credentials, we find it strange that the tribunal could afford the laxity of wishing away the expertise of this witness. We take the firm view that he qualifies as an expert under section 57 of the Evidence Act. In *Seismograph Services Ltd v Onokpasa* (1972) ANLR (reprint) 347, 357-359, Sowemimo JSC (as he then was), approvingly, cited *USSB v The Ship St Albans* (1931) AC 632, 642 where Lord Merrivale restated the relevant question to be asked in such a Situation as articulated by the distinguished Law Lord, Lord Russell of Kilowen thus: is he peritus; is he skilled; has he an adequate knowledge? See, also, *Akusobi v Obineche* (2000) 2 NWLR (pt 857) 355; *R v Onitiri* 11 WACA 58; *Seismograph services Ltd v Onakpasa* (1972) NSCC 231; *Bendel Newspapers Corporation v Okafor* (1993) 4 NWLR (Pt 289) 617; *Uchegbu v State* (1993) 2 NWLR (pt 309) 89.

Having made the analysis, the witness prepared his report which he identified. These reports were admitted in evidence as exhibits 461 (1-10). We take the view that under section 91 (4) of the Evidence Act, having made the reports, the witness qualifies as their maker. The tribunal was wrong in its conclusion: a conclusion that deprived these exhibits of their well-merited weight and robbed them of their choice vantage place among the pantheon of exhibits in the case. Finally, we are, equally, of the firm view that by the nature of the evidence which the witness was called to give and which he actually gave, his participation in the conduct of the election was not a valid pre-requisite for his expertise in the exercise he undertook. The tribunal, therefore erred in denying due weight to his reports.

A perusal of the report/outcome of this witness' forensic inspection/analysis of the ballot papers for the Local Governments in question would reveal the impact it would have made on the mind of the tribunal if their dispassionate consideration had been undertaken. For their bearing on this issue, we shall reproduce his testimony:

38, 908 ballot papers with their serial numbers on EC40C and or EC25 were used in polling units/wards/local governments other than where the ballot papers were supposed to be used, exhibit 461 (5),

[page 183 of Vol 3 of the record].

I found that ballot papers from a single booklet were used in

two or more polling units and this incident of using ballot papers from split ballot paper booklets in two or more polling units affected 69, 401 ballot papers,

[page 185 of Vol 3 of the record].

The implication is that, just as with the testimonies of the other witnesses for the appellants, the tribunal failed to evaluate the testimonies of these experts and the exhibits which they tendered. This was clearly a wrong approach which cannot be allowed to stand. On that score, we entirely endorse the submissions of the appellants' counsel that this issue ought to be resolved in their favour.

Having dismissed the cross appeal of the 1<sup>st</sup> - 3<sup>rd</sup> Cross Appellants and resolved the issues in the main appeal in favour of the Appellants, the appellants have proved the allegations of non compliance with the provisions of the Electoral Act 2006 against the Respondents in the conduct of the 14th April, 2007 gubernatorial election in the 10 disputed Local Governments of Osun State, on the balance of probabilities. As a consequence of the foregoing finding, the entire purported result declared in respect of the 10 contested Local Governments of Osun State are hereby declared null and void. For the avoidance of doubt, the 10 affected Local Governments are as follows :-

1. Atakunmosa West
2. Aiyedaade
3. Boluwaduro
4. Boriye
5. Ife Central
6. Ife East
7. Ife South
8. Ifedayo
9. Isokan
10. Odo Otin

As a consequence of the foregoing, a computation of the votes recorded for both the 1<sup>st</sup> - 3<sup>rd</sup> Appellants and 1<sup>st</sup> - 3<sup>rd</sup> Respondents in the disputed 10 Local Governments will be made with a view to deducting same from the totality of the results. The overall results of the election is contained in Form EC8D tendered in evidence as exhibit 92(1-2). The nullified votes in the 10 disputed Local Governments are as follows:

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S/N Local Governments		Votes Recorded for the 1 <sup>st</sup> Petitioner	Votes Recorded for the 1 <sup>st</sup> Respondent
B	2 Atakumosa West	2,489	15,471
	3 Aiyedaade	3,096	33,805
	5 Boluwaduro	1,784	7,902
C	6 Boripe	328	14,497
	11 Ife Central	4,866	62,257
	12 Ife East	13,746	35,574
D	14 Ife South	5,226	16,312
	15 Ifedayo	2,041	8,122
	22 Isokan	3,249	16,243
E	25 Odo Otin	5,098	43,606
	Total for the 10 LGs	41,923	253,789
F The total votes credited to both parties in the above table in the 10 Local Governments which have been nullified/voided will now be deducted from the overall total votes credited to both parties as follows:			
G		1 <sup>st</sup> Petitioner	1 <sup>st</sup> Respondent
	Total Score of Parties on EC8D (Exhibit 92(1-2) and EC8E (Exhibit 91	240,722	426,669
H	Total Score of Parties in the Ten Local Government affected by evidence of unlawful votes	41,923	253,789
	Difference on Deduction	198,799	172,880

From the above total, it is clear that the 1st Appellant has the majority of highest lawful votes of 198, 799 as against 172,880 by the 1<sup>st</sup> Respondent. See the case of Amadasun v Ativie (2010) All FWLR (Pt.505) 1728 where this court had this to say at page 1728:

*“Adjudication in election matters would normally revolve around documentary evidence in most cases. It is part of the resolution of election disputes to cancel unlawful credited votes in appropriate circumstances.”*

The appellants sought for the following reliefs by paragraph 4 of their notice of appeal on page 599 of Vol.7 of the record.

*“4.1 - An order allowing the Appeal of the Appellant and setting aside the judgment of the tribunal dismissing the petitioner’s petition.*

*4.2 - An order that votes recorded and/or returned in the following Local Government Areas, namely, Atakumosa West Local Government, Ayedaade Local Government, Boluwaduro Local Government, Boriye Local Government, Ife Central Local Government, Ife East Local Government, Ife South Local Government, Ifedayo Local Government, Isokan Local Government and Odo-Otin Local Government, do not represent lawful votes cast in the said Local Government Areas in the Osun State Governorship election held on 14 April, 2007 and as having been obtained in vitiating circumstances of substantial non-compliance with mandatory provisions of Electoral Act, 2006, violence and malpractices which substantially affected the validity of the said elections that none of the candidates in the said elections can be validly returned as having validly won in the said affected Local Government Areas.*

*4.3 - An order that the said Prince Olagunsoye Oyinlola was not duly elected by majority of lawful votes cast in the Osun State Governorship election held on April 14, 2007 and that his election is void.*

*4.4- An order that Rauf Adesoji Aregbesola was elected and ought to have been returned having scored the highest number of votes cast in the Osun State Governorship Election held on April 14, 2007, and satisfied the requirements of the Section 179 Constitution of the Federal Republic of Nigeria, 1999 and the Electoral Act, 2006.*

4.5 - *An Order that the 1st Petitioner/Appellant be declared validly elected or returned.*”

In considering the foregoing reliefs sought for, the provision of section 146(1) of the Electoral Act, 2006 is relevant and same is hereby reproduced as follows:-

B “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.”

C The Supreme Court in *Buhari v Obasanjo* (2005) All FWLR (Pt.273) 1, interpreted section 135(1) of the Electoral Act 2002 which is similar to Section 146(1) of the Electoral Act 2006, wherein Belgore JSC (as he then was) said:-

D “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  
E goals scored. The petitioner must not only show substantial non-compliance but also the figures i.e. votes that the compliances attracted or omitted. The elementary evidential burden of “The person asserting must prove” has not been derogated from by section 135(1).  
F The Petitioners must not only assert but must satisfy the court that the non-compliance has so affected the election result to justify nullification.”

G The petitioners/appellants must not only prove non-compliance but must in addition establish that the non-compliance has so affected the result of the election. It is my opinion that the conduct of the 14<sup>th</sup> April 2007 gubernatorial election in Osun State cannot be said to be in substantial compliance with the provisions of the Electoral Act 2006.

H The petitioners now appellants have proved non-compliance in the conduct of the election and the said non-compliance has greatly affected the overall result of the election in the context of the ten disputed Local Governments. See the cases of *Oputa v Ishida* (1993) 3 NWLR (Pt.279) 34 at 63; *Biyu v Ibrahim* (2006) 8 NWLR (Pt.981) 1 at 50, *Sorunke v Odebunmi* (1960) SCNLR 414 and *Bassey v*

Yound (1963) 1 SCNLR 61.

Reference is further made to section 179(2) of the 1999 Constitution, and same is hereby reproduced as follows:-

*“A candidate for an election to the office of Governor of a State, shall be deemed to have been duly elected where, there being two or more candidates-*

*(a) he has the highest number of votes cast at the election; and  
(b) he has not less than one-quarter of all the votes, cast in each of at least two-thirds of all the local government areas in the State.”*

From the above cited provision of the Constitution, a candidate can only be declared and returned as a Governor if he scores the highest number of votes cast at the election and has not less than one quarter of all the votes cast in each of the at least two thirds of the Local Governments in the State. Osun State has 30 Local Governments, having voided the results in the 10 disputed Local Governments on grounds of non-compliance there is indeed no doubt that the 1st Appellant has scored the highest number of votes cast and has not less than one quarter of all the votes cast in at least two thirds of all the Local Governments in the State.

The first appellant from what has been laid before the court, has satisfied the two Constitutional requirements to be returned as the duly elected Governor of Osun State. The consequential effect of the foregoing is that the 1<sup>st</sup> Respondent Prince Olagunsoye Oyinlola, who was returned as the elected Governor of Osun State by the 4<sup>th</sup> and 5<sup>th</sup> Respondents, was not validly elected on the ground that he did not score the majority of the valid votes at the election and therefore, he did not satisfy the provision of section 179(2)(a) of the 1999 Constitution.

Section 147(2) of the Electoral Act is also relevant and is hereby reproduced:-

*“147(1).....*

*(2) If the tribunal or court determines that a candidate who was returned as elected was not validly elected on the ground that he did not score the majority of valid votes cast at the election, the election tribunal or the court as the case may be, shall declare as elected the candidate who scored the highest number of valid votes cast at the election and satisfied the requirements of the Constitution and this Act.”* (Emphasis is mine)

The first appellant, Engr. Rauf Adesoji Aregbesola, having been shown to have scored the majority of the lawful votes cast at the election as provided by section 147(2) of the Electoral Act and having also fulfilled the constitutional requirements of section 179(2)(a) and (b) of the 1999 constitution of the Federal Republic of Nigeria is hereby declared as the winner of the gubernatorial election held on 14<sup>th</sup> April, 2007 in Osun State. See also the case of Ejioru v Irona (2005) All FWLR (Pt.442) 1066 at 1093-1094.

On the whole and based on the foregoing, the appellants' appeal has merit and succeeds on all reliefs (4.1) - (4.5) as sought for in their notice of appeal dated 14<sup>th</sup> May 2010 and filed on 16<sup>th</sup> May, 2010 on pages 546-601 of Volume 7 of the record of appeal.

In the result the appeal is hereby allowed and the judgment of the tribunal dismissing the petition is hereby set aside. It is hereby ordered as follows:

1. That an Order is hereby made declaring all the votes recorded in the 10 disputed Local Governments as null and void.
2. That the return of the 1<sup>st</sup> Respondent, Prince Olagunsoye Oyinlola as the Governor of Osun State at the Governorship election of 14<sup>th</sup> April, 2007 be and is hereby nullified, he having not been duly elected by the majority of lawful votes cast at the elections.
3. That the first appellant, Engr. Rauf Adesoji Aregbesola having satisfied the requirements of section 179(2)(a) and (b) of the Constitution of the Federal Republic of Nigeria, 1999 and by virtue of section 147(2) of the Electoral Act, 2006 be and is hereby declared the duly elected Governor of Osun State.
4. That the Certificate of return issued to Prince Olagunsoye Oyinlola as the elected Governor of Osun State is hereby cancelled.
5. The Independent National Electoral Commission, the Fourth Respondent is hereby ordered to issue Engr. Rauf Adesoji Aregbesola a Certificate of return as the duly elected Governor of Osun State.
6. That Engr. Rauf Adesoji Aregbesola and Mrs. Grace Titilayo Laoye-Tomori, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants shall be sworn in as the Governor and Deputy Governor respectively of Osun State.

There shall be no order as to costs; each party is to bear his/her costs.

At this juncture I wish to state that the old and ancient definition of Democracy simply put is *"the government of the people, by the people and the people."* The central focus from this definition

therefore is, “the people” in whom the inherent mandate lies, who are to choose those who should govern the State of their affairs. The definition is clear and unambiguous as it excludes all forms of imposition which certainly is alien to its purport.

Unlike the existence of a society whose outlook is dynamic in nature for purpose of societal convenience, the same cannot be said of a true Democracy wherein the change must bear allegiance to the true yearnings of the people it seeks to govern. Importing dynamism into Democracy would erase the conservative nature of the definition which had long stood the test of time. In the circumstance, it cannot therefore be over emphasized that the process of Democracy should be seen, by those it seeks to govern, as transparently free and fair from all forms of human manipulations no matter how ingenuously invented.

I also wish to commend counsel for all the parties for the industry and commitment. However we must hasten to add that what the appellants and the 1<sup>st</sup>-3<sup>rd</sup> Respondents/Cross Appellants filed as briefs in this appeal are turgid theses of lambent, if, tedious prose and not briefs as contemplated by the draftsman of the Rules of this Court. Their share volume is enough to intimidate a faint-hearted reader.

On the 14<sup>th</sup> day of April 2007, the Independent National Electoral Commission, the 4<sup>th</sup> Respondent herein (henceforth to be referred to as INEC) Conducted governorship elections in the 36 States of the Federal Republic of Nigeria.

In Osun State seven political parties presented candidates who contested the election. Among those who contested the election in that State are the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Cross Respondents who were sponsored by Action Congress and 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Cross Appellants by Peoples Democratic Party. At the conclusion of the election, INEC declared the 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Cross Appellants as the winners of the Osun State gubernatorial election with 420,669 votes as against 240,722 votes scored by the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Cross Respondents and were duly returned as Governor and Deputy Governor of Osun State respectively.

The 1<sup>st</sup> -3<sup>rd</sup> Appellants/Cross Respondents are dissatisfied with the result as announced by INEC. Being dissatisfied and aggrieved they presented a petition challenging the declaration of the result at the National Assembly/Governorship and Legislative Houses Elec-

tion Petition Tribunal sitting at Osogbo, the Osun State Capital. This petition was heard and dismissed by a panel led by Hon. Justice Thomas D. Naron. On appeal, the Court of Appeal set aside the decision of the Tribunal and ordered for a retrial before a different panel.

B The petition was retried and the new panel led by Hon. Justice Ali Garba found no merit in the petition and accordingly dismissed it, after having cancelled the result of unit 001 in ward 9 of Atakumosa West Local Government and unit 1 in ward 9 of Ifedayo Local Government.

C Being dissatisfied and aggrieved, the petitioners filed an appeal against the decision. Their Notice of Appeal dated 14<sup>th</sup> June 2010 was filed on the 16<sup>th</sup> of June 2010. This notice of Appeal is at pages 546-601 of volume 7 of the Record of Appeal.

D The Respondents are also dissatisfied with certain aspects of the judgment and have also brought this Cross Appeal. The Notice of Cross Appeal is dated and filed on the 22<sup>nd</sup> day of June 2010. This notice which contains seven grounds of appeal is at page 657-670 of volume 7 of the record of appeal.

E The judgment herein is in respect of the cross appeal. Parties filed and exchanged briefs of argument. The Cross Appellants brief of argument is dated 7<sup>th</sup> day of July, 2010 and filed on the 8<sup>th</sup> July 2010. At page 15 of the brief aforesaid, Mr. Yusuf O. Ali, SAN, leading a host of senior and junior counsel, formulated three issues for the determination of the cross appeal. These issues read as follows:-

F 1. Whether having regard to the pleadings and evidence called the trial tribunal was not in error in nullifying the results of the election in unit 1 ward 9 of Atakumosa West Local Government and unit 1 in ward 9 of Ifedayo Local Government.

G 2. Whether the tribunal was right in refusing to strike out the petition when same was presented out of the statutory prescribed period for presenting same and when same is vitiated by the joinder of unknown Respondents, the ground is unknown to law couple with H the fact of the pleadings in the petition not supporting the grounds.

3. Whether the tribunal was not wrong in refusing to attach probative value to the evidence of RW 61 and RW 62 when the testimonies of the said witnesses were credible and covered by the pleadings of the 1st - 3<sup>rd</sup> Respondents/Cross Appellants.

The Appellants/Cross Respondents' Brief of Argument which was settled by Egun Sofunde SAN and a host of senior lawyers and one other counsel is dated and filed on the 16<sup>th</sup> July 2010. At page 3 of the brief aforesaid, the Cross Respondents issued a notice of preliminary objection challenging the competence of the cross appeal in the following words:- B

*"2.1. Take notice that the Appellants/Cross Respondents shall at or before the hearing of the cross appeal raise preliminary objection that the notice of cross appeal and/or Grounds 4, 5, 6 and 7 of the notice of cross appeal are incompetent and liable to be struck out or dismissed together with the issues formulated thereon on all or any or a combination of the following grounds as follows:- C*

*2.1.1 That the cross appeal is incompetent and liable to be struck out having been filed outside the mandatory 21 day period.*

*2.1.2 That ground 4 of the notice of cross appeal is incompetent as same is vague and liable to be struck out together with any arguments purportedly predicated on same. D*

*2.1.3 That Ground 5 of the Notice of Cross Appeal is not concise but vague, prolix, verbose, unwieldy, argumentative and generally offends the provisions of the Court of Appeal Rules 2007. E*

*2.1.4 That Ground 6 of the Notice of Cross Appeal is incompetent as same is at variance with and hence not derived from the ruling of the tribunal.*

*2.1.5 That Ground 7 of the Notice of Cross Appeal is incompetent as same is at variance with and hence not derived from the ruling of the Tribunal. F*

*2.1.6 That issue No.2 purportedly formulated from the incompetent grounds 5, 6 and 7 of appeal is ipso facto incompetent. Take further notice that the Appellants/Cross Respondents shall also pray that the Cross Appellants brief is incompetent and ought to be struck out having been filed outside the period prescribed by the Practice Direction. G*

The preliminary objection is argued at pages 4-5 of the Appellants/Cross Respondents' brief of argument. In case the preliminary objection fails, five issues were formulated for the Cross Respondents in reaction to the issues formulated by the Cross Appellants at page 8 of the Cross Appellants Brief of argument. These issues read as follows:- H

1. Whether the tribunal was right in nullifying the results for unit 1 of ward 9 of Atakumosa West Local Government and unit 1 of ward 9 of Ifedayo Local Government having regard to the pleading of the Appellants/Cross Appellants and the evidence of irregularities found by the Tribunal?

B 2. Whether the Tribunal was right in refusing to strike out the petition for incompetence, having found that the petition was presented within the time prescribed for presentation of the petition.

C 3. Whether the Tribunal was right in holding that the Appellants/Cross Respondents did not lump together two or more Respondents as a single Respondent.

4. Whether the Tribunal was right in holding that the ground of the petition comes within the provision of the Electoral Act, 2006.

D 5. Whether the Tribunal was right in finding the evidence of RW61 and RW62 contradictory and unreliable.

E The preliminary objection herein challenges the competence of the cross appeal a challenge if successful robs this Court of its jurisdiction to hear and determine the said cross appeal. The law is settled that where a preliminary objection is raised against the hearing of appeal, same must be taken first. See *JAIYEOLA VS ABIOYE* (2003) 4 NWLR (PT.810) 397 AT 414 paragraphs E-F; *OSUN STATE GOVT VS DLAMI (NIG.) LTD.* (2003) 7 NWLR (PT.818) 72 paragraphs D-E.

F The first ground of the preliminary objection is that the cross appeal is incompetent and liable to be struck out having been filed outside the mandatory 21 day period. Mr. Ebun Sofunde learned senior counsel for the Cross Respondent, leading other senior counsel, argued that the Cross Appellants are caught by the 21 day rule in G Section 149 of the Electoral Act, 2006 and paragraph 1 of the Election Petition Practice Direction No.2 of 2007, since they decided to appeal against a decision in which they were declared winners.

H In reply, Mr. Yusuf O. Ali learned senior counsel who led a team of senior counsel and other counsel submitted that the objection is misconceived in the sense that it fails to appreciate the limit or scope of the provisions of Section 149 of the Electoral Act, 2006. According to the learned senior counsel, the judgment of the tribunal did not invalidate the election of the 1<sup>st</sup> Cross Appellant as such the cross appeal does not fall within the contemplation of Section 149(1)

or 149(2) of the Electoral Act, 2006. This being so, learned senior counsel contended that the provision of paragraph 1 of the Election practice Direction No. 2 of 2007 that prescribes 21 days within which to file notice of appeal does not apply in respect of the cross appeal. In aid learned senior counsel cited the authority in *BUHARI VS OBASANJO* (2005) 13 NWLR (PT.941) 1 at 179; and *ADEBISI ADEGBUYI & ANOR. VS HON. MUSTAPHA & ORS.* (2010) ALL FWLR (PT.524) 176. B

For proper consideration of the first ground of objection, I hereby reproduce hereunder the provision of Section 149(1) and (2) of the electoral act, 2006 as follows:- C

*“149(1) If the Election Tribunal or the Court, as the case may be, determines that a candidate returned as elected was not validly elected, then 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.* D

*(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.”* E

**Pursuant to paragraph 1 of the Election Petition Practice Directions, No.2 of 2007, an Appellant is required to file his Notice and Grounds of appeal at the registry of the election petition tribunal within 21 days from the date of the decision appealed against. This provision is consistent with the provisions of Section 149 of the Electoral Act 2006.** F

**In *BUHARI VS OBASANJO* (2005) 13 NWLR (PT.941) 1 the Supreme Court was faced with a similar situation as in this case. In that case, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents raised a preliminary objection on the ground that the cross appeal was filed outside the 21 days provided under Section 138(1) and (2) of the Electoral Act, 2002. Having examined the Section aforesaid which is the same as Section 149(1) and (2) of the Electoral Act, 2006, the Supreme Court held at page 179** G

paragraphs G-H as follows:-

***“It could be seen that section 138 of the Electoral 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 1<sup>st</sup> and 2<sup>nd</sup> Respondents/Cross Appellants validly elected. Therefore the provisions of the section have no application here.”***

C Relying on the provision of paragraph 51 of the Procedure for Election Petitions, which is the same as paragraph 51 of the Rules of Procedure for Election Petition under the 1<sup>st</sup> Schedule of the Electoral Act 2006, the Supreme Court in the same case held thus:-

D *“By the provisions of Section 27(2) (a) of the Supreme Court Act, Cap. 424, the period prescribed for the giving of notice 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 for giving notice to appeal as such and in the light of paragraph 51 of the*  
E *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 20<sup>th</sup> December, 2004. Three months from thence ended on 20<sup>th</sup> March, 2005 but the cross appeal herein was filed on 15<sup>th</sup> 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.”*

G In ADEBUYI VS MUSTAPHA (SUPRA) at pages 185-186 paragraphs B-F, my Lord Justice Alagoa, JCA said:-

“The preamble to the Practice Directions, No.2 of 2007 reads as follows;

H *‘For the purpose of appeals coming to the Court of Appeal under Section 149 of the electoral Act, 2006 No.2 this Practice Directions shall be strictly observed by all parties:- It is very clear from this preamble that certain specie of appeals are not covered under the ambit of section 149 of the Electoral Act, 2006..... These provisions are clear and unambiguous, the 1<sup>st</sup> Appellant in the present appeal,*

*now being considered, was not returned as the winner by Independent National Electoral Commission and his complaint at the election petition tribunal against the return of the 1<sup>st</sup> Respondent was dismissed. In that case, the decision appealed against certainly does not come within the contemplation of section 149 of the electoral Act. Section 51 of the First Schedule to the Electoral Act, 2006 provides that in such cases, recourse must be had to the Practice and Procedure relating to appeals in the Court of Appeal regard being had to the need for urgency in electoral matters.”*

I agree with the view of my Lord Justice Alagoa JCA and **I feel bound by the decision of the Supreme Court in BUHARI VS OBASANJO (supra)**. Section 24(2)(a) of the Court of Appeal Act, 2004 provides as follows:-

*“The periods for the giving of notice of appeal or notice of application for leave to appeal are:-*

*(a) In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision.”*

In the instant case, the judgment against which the cross appeal is filed was delivered on the 28<sup>th</sup> of May 2010. Notice of Cross Appeal was filed on the 22<sup>nd</sup> of June 2010, a period of less than one month. The Cross Appeal was therefore filed within time. This is so because the Tribunal did not nullify the return of the 1<sup>st</sup> and 2<sup>nd</sup> Cross Appellants as the elected Governor and Deputy Governor of Osun State as contemplated by Section 149 of the Electoral Act 2006.

The 2<sup>nd</sup> and 3<sup>rd</sup> grounds of the preliminary objection are directed against grounds 4 and 5 of the grounds of the cross appeal. Mr. Sofunde, learned senior counsel for the Cross Respondents submitted in argument that these grounds of appeal are vague, prolix and argumentative and are therefore in clear violation of Order 6 Rule 3 of the Court of Appeal Rules. Learned senior counsel cited in aid OSASONA VS AJAYI (2004) 14 NWLR (PT.884)527AT 545; ABDULLAHI VS OBA (1998) 6 NWLR (PT.554) 420 at 427-8.

In a further argument, learned senior counsel submitted that the grounds are not only vague, prolix and argumentative; they are also contrary to Order 6 Rule 2(3) of the Rules of this Court. In aid the following cases were cited as follows:-

ISMADE VS OKEI (1998) 2 NWLR (PT.538) 455 at 463;

ABDULLAHI VS OBA (SUPRA); ADELEKE VS ASANI (2002) 8 NWLR (PT.768) 26 at 43.

In reply to the submission on behalf of the Cross Appellants, Mr. Yusuf O. Ali, learned senior counsel for the Cross Appellants submitted that the grounds of the cross appeal are neither argumentative, prolix, verbose, unwieldy or at variance with the judgment or ruling being complained against.

In a further argument, learned senior counsel submitted that the Cross Respondents have not said that they are misled or that they misunderstand the grounds of cross appeal, instead they employed close to 71 pages argument on the merit of the issues formulated from the said grounds of appeal. According to the learned senior counsel, this is an obvious indication that the Cross Respondents are not in any way misled or confused by the said grounds of appeal. In aid learned counsel cited *AKANBI VS SALWA & ORS. (2003) 6 SCNJ 246 at 254.*

***A ground of appeal is a statement by a party aggrieved with the decision of a Court, complaining that the Court from which the appeal is brought made a mistake in the finding of facts or application of law to certain sets of facts. In other words, a ground of appeal is the complaint of the Appellant against the judgment of the Court. Such a complaint must be based on the live issue or issues in controversy in the suit.*** See *IWUOHA V NIPOST LTD. (2003) 8 NWLR (PT.822) 308 at 332* paragraphs A-B. ***A ground of appeal is no doubt a pillar upon which the appeal rests. Once it is succinctly couched and the parties understand and appreciate the meaning of the contents thereof, such a ground of appeal will not be incompetent merely because it is technically defective.*** See *AKANBI VS SALAWA (supra)*, which is also reported in (2003) 13 NWLR (PT.838) 637, *NWADIKE VS IBEKWE (1987) 4 NWLR (PT.67) 718 at 744*, *MDPDT VS OKONKWO (2006) 7 NWLR (PT.711) 206.*

***I agree that the Cross Respondents have not shown that they have either been misled or that a miscarriage of justice has been occasioned as a result of the manner grounds 4 and 5 of the cross appeal have been couched. I therefore find no reasonable cause to declare grounds 4 and 5 incompetent.***

The 4<sup>th</sup> and 5<sup>th</sup> grounds of the preliminary objection are di-

rected against the 6<sup>th</sup> and 7<sup>th</sup> grounds of appeal. According to the Cross Respondents the two grounds are at variance with and do not derive from the ruling of the Tribunal. For a proper consideration of the argument here, it is pertinent to set out the two grounds of appeal without their particulars as follows:-

*“(6) The Honourable trial tribunal erred in law in failing to strike out the petition for incompetence when same was filed outside of the time allowed by law.*

*“(7) The Honourable trial tribunal erred in law in failing to strike out the 17<sup>th</sup> - 1365<sup>th</sup> Respondents listed as 17<sup>th</sup>-157<sup>th</sup> Respondents (sic) in the petition when they were wrongly fused and unknown to law as designated in the petition.”*

The two issues for the determination of the case which were distilled and issued at the end of the Pre-Hearing Conference and adopted by the Tribunal read as follows:-

*“(1) Whether the 1<sup>st</sup> Respondent was duly elected as Governor of Osun State in the 14<sup>th</sup> April, 2007 gubernatorial election in Osun State in substantial compliance with the provisions of the Electoral Act, 2006 and the Manual for Election, having regard to the totality of the evidence adduced at the trial (both oral and documentary).*

*“(2) Whether from the facts before the Tribunal, the Governorship Election held in Osun State on the 14<sup>th</sup> April, 2007 was vitiated by any form of irregularities and/or corrupt practices and in the circumstances warrant ordering a fresh election.”*

These issues are at page 109 of volume 7 of the record of appeal. Clearly the 6<sup>th</sup> and 7<sup>th</sup> grounds of the cross appeal have no relationship with the two issues formulated for the determination of the petition at the lower court. ***I also read through the judgment of the tribunal at pages 9-210 of volume 7 of the record of appeal, I found no passage where the tribunal commented on the question of whether or not the petition was filed out of time and whether the 17<sup>th</sup> - 157<sup>th</sup> Respondents were wrongly or rightly fused in the petition. In COOPERATIVE & COMMERCE BANK PLC & ANOR. VS JONAH DAN OKORO EKPERI (2007) 1 SC (PT.11) 130 at 147 lines 9-22, Tobi JSC said:-***

***“It is elementary law that a ground of appeal must arise***

*from or relate to the judgment of the court. It must directly emanate from the judgment of the Court. It must complain against the ratio decidendi of the case, not the obiter dictum. An Appellate Court should not be placed in a position of speculation or conjecture whether a ground of appeal arises*  
 B *from or relates to the judgment of the Court. And that is why our adjectival law requires that the grounds of appeal must be drafted with concision, precision or exactness. There is no room for vague and rigmarole language in the drafting of grounds of appeal.”*  
 C

In OBI VS INEC and 6 ORS. (2007) 7 SC 268 AT LINES 34-296 lines 2-4, the Supreme Court, per Aderemi JSC said:-

*“The Court below is, in my humble view right in the order made striking out the said two grounds of appeal which are unre-*  
 D *lated to the decision of the trial court and of course, the issues erroneously formulated therefrom, have no legal foundation, their being struck out is justifiable.”*

***Having found that the 6<sup>th</sup> and 7<sup>th</sup> grounds of cross appeal do not arise from the decision against which the cross***  
 E ***appeal lies, they are liable to be struck out. I accordingly strike them out.***

Having struck out grounds 6 and 7, the 2<sup>nd</sup> issue for the determination of the cross appeal as formulated by the Cross Appellant  
 F from competent ground 5 and incompetent grounds 6 and 7 is incompetent and same ought to be, and it is hereby struck out.

On the whole the preliminary objection succeeds in part as the objection embedded on grounds 4, 5 and 6 are hereby upheld.

I will now proceed to consider the cross appeal on the basis of  
 G the two surviving issues formulated by the Cross Appellants and those issues formulated by the Cross Respondents. I have reproduced these issues elsewhere in this judgment.

Having carefully gone through the issues formulated by parties, I am satisfied that the two surviving issues of the Appellant have  
 H covered the field. The Cross Respondents’ 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> issues are not predicated on any valid ground(s) of the cross appeal. They are therefore struck out. I adopt the two issues as formulated by the Respondents/Cross Appellants in the determination of this cross appeal.

On the first issue for the determination of the cross appeal, it is argued for the Cross Appellant that the tribunal was wrong when it relied on pieces of evidence which did not form part of the Cross Respondents pleadings to nullify the results of election at Maroko Polling Unit 1 Ward 9 of Atakumosa West Local Government and Unit 1 ward 9 Ora in Ifedayo Local Government. According to the learned senior counsel for the Cross Appellants evidence of over voting and multiple registration of voters more than once on the voters register were not pleaded by the Cross Respondents. B

Learned senior counsel copiously quoted the pleadings of the Cross Respondents and the passage of the judgment where the reasons for the cancellation of the results of the two polling units and came to the conclusion that the tribunal did not advert its mind to decided cases on this issue and therefore reached a wrong conclusion. In aid, learned senior counsel cited AGAGU VS MIMIKO (2009) 7 NWLR (Pt.1140) 343 at 408, where this Court, per Abdullahi, PCA (as he then was), held that parties are bound by their pleading. Also cited in aid are ORJI VS PDP (2009) 14 NWLR (PT.1161) 311 at 399-400, BUHARI VS OBASANJO (2005) 13 NWLR (PT.941) 1 at 239-240; HASHIDU VS GOJE (2005) 15 NWLR (PT.843) 352 at 377-378; YAHASAI VS INCAR MOTORS (1976) 2 ALR COMM. 44 at 48. C D E

Finally this Court is urged to resolve this issue in favour of the Cross Appellant and the votes from the concerned polling units be restored in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Cross Appellants. F

In reply, it is argued for the Appellant/Cross Respondent that the tribunal did not state anywhere in its judgment that it nullified the results in the units on the ground of over voting, rather the tribunal nullified the result of the two units on the ground of irregularity. This being so, it is further argued that there are sufficient averments in the pleadings of the Appellants/Cross Respondents in support of the finding or irregularity in the two units. G

***The finding of the tribunal with respect to the cancellation of the results of the two units is at pages 79 and its back. It is aptly produced in the briefs of both parties. It is therefore sufficient to state here that the cancellation of the results was attributable to irregularity in the conduct of the election in the two units. RW22 and RW9 were witnesses called by the Re-*** H

**spondents/Cross Appellants and they made admission against the Cross Appellants interest. This is evidence that carries sufficient weight. The admission of these witnesses under cross examination that the election in these two units was not conducted in substantial compliance with the Electoral Act 2006 cannot be ignored because same did not form part of the pleadings. Election Petitions are sui generis, and unlike the normal cases, certain evidence though not pleaded are capable of being acted upon. For example, where there is a proven case that a ballot box in a polling unit was snatched and taken away, it will be preposterous for a tribunal to accept a result from that polling unit because it was not pleaded that the ballot box in that unit was snatched and taken to an unknown destination.**

I agree that in general parties are bound by their pleadings. In the instant case the Appellants/Cross Respondents pleaded at page 155 paragraph 31 of volume 1 of the record of appeal concerning Atakumosa West Local Government as follows:-

*“Your petitioners say that at Ward 1, where there are four polling units, PDP stalwart led by one Ogunleye, Joshua Oladipo, Osun State House of Assembly Candidate on the platform of the PDP led some thugs to attack the 3<sup>d</sup> petitioners polling agents while some voters were attacked, beaten and machetted/wounded. Among the wounded are Messer Gbamila, Gbogundan and Kehinde Ajiyo”*

At page 196 paragraph 123 of the same record, it is pleaded concerning ward 9 Ifedayo Local Government Area as follows:-

*“Your petitioners say that at Ora Zone comprising wards 7, 8, 9 and 10, one major Omotaru (rtd.), one Yemi Faroubi (Chairman of Osun State Broadcasting Corporation) and one Funmilayo Olasehinde who are known PDP members/Leaders led Soldiers and Mobile Policemen to invade the various polling units in the 4 wards in Ora Zone where they scared away voters and agents and members of the 3<sup>d</sup> petitioners and then stuffed the ballot boxes with already thumb-printed ballot papers in favour of the 1<sup>st</sup> and 3<sup>d</sup> Respondents.”*

It can be seen from the pleadings reproduced herein above that the issues of over voting and multiple registration of voters non

ticking of names of voters more than once on the voters register was pleaded. The evidence upon which the tribunal relied was not provided by the Appellants/Cross Respondents. Since the Cross Appellants supplied the evidence aforesaid, the tribunal was right when it relied on same to cancel the result of the two units.

For the reasons I have set out herein, this issue is resolved against the Cross Appellants and the grounds upon which it is formulated is accordingly dismissed. B

On the 3<sup>rd</sup> issue, which has now become the 2<sup>nd</sup> issue, by virtue of the striking out of the 2<sup>nd</sup> issue for the determination of this cross appeal, it is argued for the Respondents/Cross Appellants that RW62 are expert in their respective fields who came to the tribunal to testify in rebuttal of the evidence of the PW80, PW81 and PW82 and they testified about their professional attainments which convincingly demonstrated that they are experts in finger prints, statistics and data analysis respectively, but the tribunal in its judgment refused to rely on the opinion of the witnesses. Learned senior counsel for the cross Appellant has therefore urged this Court to reverse the finding of the tribunal and place premium on the evidence of RW61 and RW62. C

The submission on behalf of the Cross Appellants here seems strange. It has not been shown throughout the submissions of the counsel, where the refusal of the tribunal to place reliance on the evidence of RW61 and RW62 has led to a miscarriage of justice to the Cross Appellants. Be that as it may, the issue herein clearly attacks the findings of facts and seriously challenges the judgment in an area which is only narrowly open to this Court. The appraisal of oral evidence and the ascription of probative value to such evidence is the primary duty of a tribunal of trial and this Court would only interfere with the performance of that exercise if the trial court has drawn wrong conclusions from accepted or proved facts. See *FASANU VS ADEKOYA* (1974) 1 ALL NLR (PT.1) 35 at 41; *EKI V GIWA* (1977) 11 NSCC 96.1 ***The law is settled that whether or not a witness can be regarded as an expert is a question for the judge who heard the witness to decide. In ATTORNEY GENERAL OF THE FEDERATION & 2 ORS. VS ABUBAKAR & ORS. (2007) 4 SC (PT.11) 62 at 247 LINES 9-10, the Supreme Court per Aderemi JSC had this to say:-*** E

***“In legal parlance, an expert is any person who is spe-*** F

***cifically skilled in the field he is giving evidence. But I hasten to add that whether or not such a witness can be regarded as an expert is a question for the judge to decide.” See AZU VS THE STATE (1993) 6 NWLR (PT.299) 303.***

***The learned trial judges of the tribunal gave the reasons why they did not accord much reliance on the evidence of RW61 at page 200 paragraph 5 of their judgment.*** This paragraph is reproduced hereunder as follows:-

*“He stated in paragraph 8 of his statement on oath that he was engaged by the 1<sup>st</sup> Respondent’s lawyer to examine the ballot papers used for the conduct of the election in dispute and to conduct through examination and analysis of the impression thereon with the aim of ascertaining if any of the ballot papers disclose any evidence of multiple thumb print by an individual. He said he did that and his conclusion is that it is scientifically impossible to determine with certainty that multiple voting was involved, since less than 10% of the total votes were clear, smudged and faint impressions.*

*..... That it is impossible by finger print analysis to ascertain the allegation in dispute considering the condition under which the ballot papers were kept.”*

This was part of the statement of RW61 who carried his inspection two years after the conduct of the election. The tribunal refused to agree with the opinion since the examination and analysis were not carried out immediately after the election and there was no conclusive evidence on whether there was multiple thumb-printing or not. The report was not helpful to the tribunal and was therefore rightly rejected.

As for RW62, the tribunal, after a careful evaluation of evidence before it came to the following conclusion thus:-

*“The same observation applies in (sic) RW62 who never had any training, experience and expertise in detection of malpractices and irregularities which amount to non compliance, even though he may be an expert in statistics. He is not especially skilled on the subject of detection of electoral malpractices which is the subject of PW82/3 analysis and the entries he set out to discredit in his evidence.”*

As I have earlier alluded to, the prerogative of declaring a witness an expert is that of the judge who heard and examined the witness. ***As far as I am concerned, the learned trial judges of***

***the tribunal have competently handled the evidence of RW61 and RW62. I do not think I have any justification to interfere with that exercise.***

For all I have said here, this issue is also resolved in favour of the Cross Respondents and against the Cross Appellants. The grounds upon which it has been distilled are hereby dismissed. B  
Having resolved the two surviving issues against the Respondents/ Cross Appellants, this cross appeal shall be, and it is hereby dismissed for lack of merit. I make no order as to cost.

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GARBA JCA

I agree.

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GALINJE JCA

I agree.

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NWEZE JCA

I agree.

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JAURO JCA

I agree

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