

SUPREME COURT OF NIGERIA
TUESDAY 20TH NOVEMBER, 2012. SC. 410/2012
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-
ENEH, S. GALADIMA, M. U. PETER-ODILI, O. ARIWOOLA
M. D. MUHAMMAD, C. B. OGUNBIYI, JJSC**

1. MARKUS NATINA GUNDIRI
 2. ALH. ABDULRAZAK SA'AD NAMDAS APPELLANTS
AND
 1. REAR ADMIRAL M. H. NYAKO
 2. BALA JAMES NGILARI
 3. PEOPLES DEMOCRATIC PARTY
 4. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
 5. RESIDENT ELECTORAL
COMMISSIONER
 6. THE STATE RETURNING OFFICER
 7. ACTION CONGRESS OF NIGERIA
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EVIDENCE - Evaluation of - Is the duty of trial court - And appellate court should not interfere - Except where there is miscarriage of justice (H1)

EVIDENCE - Evaluation - Basis - Evaluation is not based on number of witnesses - But rather on credibility and acceptability of evidence (H2)

EVIDENCE - Deposition - Adoption of - Witnesses depositions are to be individually identified with the maker - And it is not enough that none of the witnesses disowned the statement (H3)

ELECTION PETITIONS - Jurisdiction - Precondition - For valid exercise of jurisdiction - Witness statements are to accompany the petition to be filed (H4)

EVIDENCE - Facts - Distinction - By Evidence Act s. 115 - A deponent ought not to lump facts derived from personal knowledge - With those obtained from other sources (H5)

ELECTION PETITIONS - Evidence - Polling agents - Petitioners have the burden to prove their petition - And failure to call polling agents as witnesses - Is detrimental to petitioners' case (H6)

ELECTION PETITIONS - Results sheets - Signing of - By signing the results sheet - Agents are presumed to understand what they appended to - And thus cannot deny contents of their signatures (H7)

ELECTION PETITIONS - Electoral Act - Non compliance - Where petitioner raises such complaint - He has a duty to prove same based on polling unit by polling unit (H8)

ACTIONS - Doctrine of severance - Civil & criminal allegations - Where civil allegations are severable from criminal allegation - A party can succeed on his civil allegation - If proved (H9)

ELECTION PETITIONS - Criminal & civil allegations - Severance - It is duty of petitioner and not that of the court - To distinguish criminal allegations - From those which are civil in nature (H10)

ELECTION PETITIONS - Declaratory relief - Proof - Petitioner must establish his case on strength of his evidence - And not on weakness of defendant (H11)

ELECTION PETITIONS - Criminal & civil allegations - Proof - Appellants must prove the criminal allegation - As the Tribunal found that the allegation - Penetrated the entire election (H12)

FACTS

4th respondent conducted gubernatorial election in Adamawa State. 1st and 2nd appellants were Governorship and Deputy Governorship candidates respectively of 7th respondent, while 1st and 2nd respondents were Governorship and Deputy Governorship candidates respectively of 3rd respondent. At the end of the election, 4th, 5th and 6th respondents declared 1st respondent as the winner of the election. Dissatisfied with the results, appellants filed this election petition at the Governorship Election Petition Tribunal in Yola, Adamawa

State.

The complaints of appellants were limited to particular units and wards in 11 local governments out of the 21 local governments in the State. Appellants' grounds of complaint were based on substantial non-compliance with the Electoral Act 2011, irregularities and criminal allegations. At the hearing, appellants front loaded 76 witnesses out of whom 66 were called to testify. It is of note that the polling agents of appellants were not called to testify. Respondents on the other hand also front loaded several names as witnesses, but ended up calling lesser number to testify. At the end of trial, the Tribunal dismissed the petition. Appellants were aggrieved and thus they appealed to the Court of Appeal. The court dismissed the appeal. Aggrieved further, appellants filed appeal in Supreme Court.

ISSUES FOR DETERMINATION

"1. Whether their Lordships of the court below were right in upholding the decision of the Tribunal in refusing to give credence to the evidence of PW1 - PW 65 on the ground that the evidence of those witnesses constituted hearsay evidence in that the witnesses failed to distinguish between what they saw themselves and what they were told by their polling agents quite apart from the fact that some of the depositions made in Hausa language were translated into English language by unidentified persons who failed to sign the jurat to show that the makers of the depositions knew the contents thereof.

2. Whether their Lordships of the court below were right in upholding the decision of the Tribunal that there was no duty on the Respondents to call evidence in rebuttal of what had not been established by the Appellants since the non-compliance alleged was not proved and that the petition was predicated largely on criminal allegations which were not established beyond reasonable doubt apart from the fact that both civil and criminal allegations were so intertwined in the pleadings as to make the doctrine of severance inapplicable.

3. Whether their Lordships of the court below were right when they upheld the decision of the Tribunal rejecting the evidence of PW 66 and his report Exhibit 759 on the ground, amongst others, that he was not an expert, had not witnessed the election and had no expert knowledge or any knowledge superior to that of the judges of

the Tribunal and that his evidence constituted inadmissible opinion evidence.

4. *Whether their lordships of the court below were right when they ruled that appeals are founded on the ratio decidendi of the judgment and that the complaint that the learned judges of the Tribunal preferred the issues formulated by the 3^d Respondent to those formulated by the Appellant did not arise from any of the decidendi of the judgment of the tribunal and therefore upheld the decision of the tribunal to determine the petition on the basis of issues formulated by the 3^d Respondent as opposed to those formulated by the Appellant.*

5. *Whether their Lordships of the court below were right when they upheld the decision of the Tribunal to the effect that forms ECSAs, EC8Bs, ECSCs, ECSDs and voters registers and other electoral documents tendered from the bar by counsel to the Appellants had no evidential value on the ground that they were dumped on the Tribunal not having been tied or related to the Appellants' case through witnesses.*

6. *Whether the learned justices of the court below erred in law when they dismissed the appeal on the ground that it was completely lacking in merit.*

7. *Whether the learned justices of the court below upheld without justification or due consideration the decision of the Tribunal refusing to give probative value to the evidence of PW1 - PW 65 or whether they did so after and due consideration."*

HELD (Unanimously dismissing the appeal per

OGUNBIYI JSC)
EVIDENCE - Evaluation of

1. The cumulative complaint or grouse by the appellants in the 1st set of issues borders on the allegation that the learned tribunal judges either refused or totally failed to evaluate or properly so to do the evidence of 22 of their witnesses. This therefore raises the question of evaluation of evidence which the law specifically gives the duty to the trial court. In other words it is trite law that the onus of evaluating evidence is

stricto sensu that of the trial court and the appellate court should not be seen to interfere therewith except where there is evidence of failure by the trial court to properly evaluate or where there is a miscarriage of justice. It is elementary to state that the trial court is a court of evidence and therefore has the advantage of seeing and assessing the credibility of witnesses and their demeanor. (p. 3359 G) ^B

EVIDENCE - Evaluation - Basis

2. It is pertinent to restate that the question of evaluation of evidence presupposes a construction of an imaginary scale in the mind of trial court judge(s) where upon the evidence of both contenders are put on this scale with the purpose of determining on which side of the scale the pendulum of justice would tilt. The evaluation would not be based on the number of witnesses, but rather on the credibility and acceptability of the evidence. In other words, there are determinant factors that will necessitate an evidence being acceptable and credible. Such evidence must come from a witness who has the first hand knowledge of that which he testifies to. He must in other words be a witness who saw or heard or took part in the transaction upon which he was giving evidence. Where a witness gives an account of information which is not within his personal knowledge, he would not be accredited as a competent witness. (p. 3360 B) ^C
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EVIDENCE - Deposition - Adoption of

3. It is pertinent to state that out of the 66 witnesses called by the appellants, 22 of them stated under cross examination that they made their depositions in Hausa language. The record did not show that the depositions adopted were those made in Hausa language which is not the language of the court. With the depositions adopted being in English language, the question to pose is, were those depositions adopted the same as those made by the witnesses? To my mind and from all indications, the witnesses were adopting to depositions which were not in fact made by them since English language was foreign to their understanding. The appellants owed a duty to the court ^G
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to have presented the very depositions made by the witnesses. The adoption of a different deposition was very defective and it could not have been rectified by the use of an illiterate jurat. From the foregoing findings by the trial tribunal, the law desires that witness depositions are to be individually identified with the maker. It is not enough an identity that non of the witnesses in question disowned the statement. They could not in otherwords have claimed rightly a deposition which was made in English language since they spoke in Hausa. The mentioning of the name of one Sunday Mathew, an interpreter, was not enough an identity. (p. 3361 B)

ELECTION PETITIONS - Jurisdiction - Precondition

4. The law is well settled that as a precondition to the exercise of jurisdiction, the witness statements are to accompany the petition to be filed. The consequential effect of the failure to comply is that the tribunal was on a firm ground when it declined to exercise jurisdiction over the 22 witness depositions which it held were incompetent. (p. 3362 G)

EVIDENCE - Facts - Distinction

5. By the provision of section 115 of the Evidence Act, the law treats facts derived from personal knowledge differently from those derived from information obtained from some other source(s). The implication is that a deponent ought not to lump facts derived from personal knowledge with those obtained from other sources without distinguishing between the two. The particulars of the person who supplied the information with the name, address, time, place and circumstance must be stated by the deponent. The deponent must also state his believe in the information to be true. The particulars of the sources of the facts derived from the polling agents were not stated in the case at hand.

H In the absence of any distinction, therefore, the deduction is to expect the tribunal to sort out which of the mixed up evidence was to be allocated to either the witness or the polling agents. This is not the duty of the tribunal to do in the comfort of their chambers. Hence the deduction arrived at by the tri-

bunal therefore was in order. In otherwords, that the entire evidence constituted hearsay evidence and which was properly rejected. The findings of the tribunal in that respect was reproduced earlier in the course of this judgment. I will not therefore repeat same. (p. 3363 G)

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ELECTION PETITIONS - Evidence - Polling agents

6. It is also relevant to mention that the burden of proof was on the appellants as the petitioners to prove their petition. They are therefore under a duty if they must succeed, to prove their case with all the available evidence they could find. It is intriguing I hold, that the polling agents of the appellants, although they were themselves appointed specifically to witness the elections and are recognized under the Electoral Act, were not however called as witnesses. At least there is no evidence of such on the record.

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The failure to call the polling agents was very detrimental to the appellants' case. There is also no appeal against the said findings. As rightly submitted by the learned 1st and 2nd respondents counsel therefore, the tribunal could not be expected to assume that their evidence would have been favourable to the case of the appellants had the polling agents testified. The law to the contrary would require the tribunal to presume that, had the polling agents been called their evidence would have been detrimental to the appellants' case and hence their reason for refusing them to testify.

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The significance of the polling units agents cannot therefore be underestimated in the case at hand if the appellants must have the facts to prove their case. The best evidence the appellants could have had was that of the agents at the polling units who were physically on ground and in true position to testify as to what transpired at an election. The consequence of shutting them out for whatever reason is very detrimental to the appellants' case. (p. 3364 D)

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ELECTION PETITIONS - Results sheets - Signing of

7. It is pertinent to restate that from the evidence of all the witnesses called by the appellants they admitted that their

polling agents signed all the result sheets and did so voluntarily on the instruction of their party, the 7th respondent. The implication is therefore obvious as it would have authenticated the validity of the documents, in other words, the results sheets. The agents, at law were all presumed to understand what they appended their signatures thereto. They could not in the circumstance have turned around to deny the contents of their signatures. (p. 3366 A)

Electoral Act - Non compliance

8. Where a petitioner complains of non-compliance with the provisions of the Electoral Act, he has a duty to prove the non-compliance alleged based on polling unit by polling unit. It is therefore physically impossible for one person to have supervised the election in ten polling units given the fact that witnesses are to be called from each polling unit. (p. 3366 E)

ACTIONS - Doctrine of severance - Civil & criminal allegations

9. The law is trite and well settled that in situations where civil allegations are severable from criminal allegation, a party is entitled to succeed on his civil allegation if proved. The following authorities are in support. (p. 3371 H)

ELECTION PETITIONS - Criminal & civil allegations - Severance

10. I hasten to point out clearly that for the doctrine of severance to apply, there must be clear and distinctive compartmentalization or separation of criminal allegations from those which are civil in nature. In other words, while in the civil atmosphere there should be no allusion to criminal assertions, so does it also apply to civil assertions. The two cannot be interwoven or criss-crossed.

The demarcations should also be clear cut and well defined in the pleadings. The duty to do so rests on the petitioner and it is not that of the court or tribunal as it will amount to taking over the responsibility of doing one party's case to the detriment of the other party. The court is to be seen as an impartial umpire who should be adjudicating between parties. (p. 3372 A)

ELECTION PETITIONS - Declaratory relief - Proof

11. The law is also trite that in a claim for declaration, the onus is on the plaintiff/petitioner to establish his case on the strength of his evidence and not on the weakness of the case of the Defendant. The heavy weather made by the appellants in hammering on the respondents' failure to call evidence in proof of their pleadings is a confirmation that the appellants are hiding behind one finger by abdicating their duty in proving the declaratory reliefs sought for. The proof is not determinant on whether or not the respondents called witnesses, but which squarely rests on the appellants by law. (p. 3372 D)

ELECTION PETITIONS - Criminal & civil allegations - Proof

12. I wish to point out also that the inextricably intertwined nature of the criminal and civil allegations was found by the tribunal as in built in the pleadings. I seek to emphasize that there is no appeal against the findings.

In other words, if the criminal allegation had penetrated the entire election of the 4th February, 2012 as per the tribunal's findings, it is then only reasonable to draw a conclusion that there is nothing left upon which the appellants are to contest on a platform of civil allegations.

The appellants for all intent and purpose have to contend with proving criminal allegations. This, I hold especially on the confirmation by the lower court in its findings at page 3904 of the record reproduced earlier in the course of this judgment wherein it held that:- "the fate of the petition remained only on the prove (sic) or otherwise of the several criminal allegations contained in the said petition."

The dilemma in which the appellants have found themselves is very critical and unwinding. In other words, the appellants by their appeal are fighting tooth and nail that the principle of the doctrine of severance ought to have applied to their petition. They are also contending that having failed to prove the criminal allegations, they could still anchor on the civil alternative claim. It is obvious that the appellants are not resting their appeal on criminal allegations, which they

have found to be a very hard nut to crack. The truth is also obvious and staring in the appellants' faces that they have completely shut out themselves from relying on civil allegations. The confirmation is on the record wherein both the lower court and also the tribunal had found on the intertwined nature of the appellants' petitions and concluded that they are criminal in nature. The appellants in the circumstance have found themselves at a crossroad since they are neither here nor there. While the criminal aspect is no longer open to them, they are not also availed the civil alternative having been long shut out. The said issues 2 and 6 are therefore resolved against the appellants. (p. 3375 B)

NOTABLE POINTS OF INTEREST

D CHUKWUMA-ENEH JSC

1. Expert witness must show special skill in the field he is called to testify

It is no wonder then that the Tribunal has so castigated pw66's ability to inspect these electoral materials with his naked eyes in analyzing the documents. The witness clearly does not qualify as an expert witness under the Evidence Act as he has not shown any special skill in the field in which he is called to testify and as it is the judge that decides whether or not a witness is an expert based on his knowledge and skill, the Tribunal based on its opinion rightly dismissed pw66's evidence as worthless in that regard and is duly supported by the facts and evidence as per the record. (p. 3383 E)

PETER-ODILI JSC

G ***2. Address of counsel serves only as persuasion to the court***

As if the possibility of the severance sought is not in sight, the next nagging question is whether the application to so sever could be taken seriously as was done in this instance by counsel during his address. The point has to be made without a doubt that the address of counsel though very important remains what it is, the persuasive urging of the counsel for court to go along the particular side urged, it does not change the coloration of being submissions of counsel to the evidence of a party. The chameleonic change in colour at will is not

available to the address of counsel which does not possess the power to cure defects in either pleadings or evidence. What I am trying to say is that the final address of counsel is not the stage for an application for the indulgence of such magnitude sought by a party for the trial court to effect the severance that is needed. A more formal, well defined application is called for. (p. 3393 A) B

REPRESENTATION

Chief Akin Olujinmi SAN with A. K. Jingi, Olufemi Atetedaiye, Oluwole Ihori, Oluseyi Adetetenmi, Ibukun Fasanmi, for the Appellant Kanu Agabi SAN with Mathew Ojua, John Ochogwu, Aromeh Haruna, Linus Akuaji, Peter Erivwode, Wilkey Kehinde, Ngozi Okogbue (Mrs.) Edidiong Usungurua, Ofe Obeten, Nkerewem Anana, Florence Anhioboh (Miss), Effionanwan Etim (Miss), for 1st and 2nd respondents C

J. N. Egwuonwu, Abdulhamid Mohammed Magaji v Magaji, N.N. Sheltha (Miss) Muktar Nasale, U. M. Jawur, B.A. Wali, Arnaka Eke, Hamza Yakubu, for the 3rd Respondent. D

Hassan L. Liman SAN, for 4th, 5th and 6th Respondents and with I. K. Bawa, M. B. Usman, I. M. Dikko, Rahima Amilu, A.D. Auta, Y. D. Dangana, A. B. Usman, Fatima Bukar, J. A. Aiytogo, Emeeyere I. Henry. E

Dr. Muiz A. Banire for 7th Respondent and with him are Nurudeen Ogbara, Kunle Adegoke, Mutiu Olaoye, Adaego Nosiri (Miss) F

CASES REFERRED TO

Edem v. Cannon Balls Ltd (2005) 12 NWLR 27
 Edokpolo & Co. Ltd v. Ohenhen (1994) 7 NWLR (Pt. 358) 511
 Wilson v. Oshin (2000) 6 SC (Pt. 111) 1 G
 Udeagha v. Omegara (2010) 1 NWLR (Pt. 129) 168
 Buhari v. INEC (2008) 4 NWLR (pt. 1078)
 Chukwuma v. Nwoye (2011) All FWLR (pt. 553) 1942
 Okereke v. Yaradua (2008) 12 NWLR (pt. 1100) 95
 Bamaiyi v. State (2001) 8 NWLR (pt. 715) 270 H
 Buhari v. Obasanjo (2005) 1 All FWLR (PT. 273) 154
 Itashidu v. Goje (2003) 15 NWLR (Pt. 843) 352
 FGN v. AIC Ltd. (2006) 4 NWLR (Pt. 970) 337
 Doma v. INEC (2012) All FWLR (Pt. 628) 813

INEC v. Anthony (2011) 7 NWLR (pt. 1245) 22

Agballah v. Sullivan Chime (2009) 1 NWLR (Pt. 22) 373

Okoya V. Santili (1994) 4 NWLR (pt. 338) 280

STATUTES REFERRED TO

^B Evidence Act, s. 115

Evidence Act 2011, ss. 126, 135(1)(2)

LEAD JUDGMENT BY OGUNBIYI JSC

^C This is an appeal against the judgment of the Court of Appeal, Yola, Adamawa State delivered on 22nd September, 2012 by which the court dismissed the appeal of the appellants against the judgment of the Governorship Election Petition Tribunal, Yola, delivered on 25th day of July, 2012 which dismissed their petition. The judgment of the Court of Appeal is contained at pages 3882 to 3918 of vol. VIII of the records of appeal while the Notice of Appeal against the judgment is contained at pages 3941 to 3949. Apart from the appeal of the appellant herein against the said judgment of the Governorship Election Tribunal, Yola to the lower court, there was also another appeal No. CA/YL/EPT/GOV/7/2012 against the same judgment filed by the 7th Respondent herein. The lower court consolidated the two appeals for hearing on the application of the appellants counsel. The judgment of the lower court in respect of this second appeal is contained at pages 3918 to 3934.

^F The Brief facts leading to this appeal is that on the 4th day of February 2012, the 4th respondent conducted in Adamawa State, an election to the office of Governor of Adamawa State. The 1st and 2nd appellants were the Governorship and Deputy Governorship candidates respectively of the 7th Respondent while the 1st and 2nd respondents were Governorship and Deputy Governorship candidates respectively of 3rd respondent at the election. At the end of the election, the 4th, 5th and 6th respondents declared the 1st respondent winner, having credited him with 302,953 votes against 241,023 votes credited to the 1st appellant. Dissatisfied with the return of the 1st respondent as winner of the election, the appellants and their political party, the 7th respondent filed a petition at the Governorship Election Petition Tribunal, Yola. The complaints of the appellants in the petition were limited to particular units and wards in 11 local governments

out of the 21 local governments in Adamawa State. The eleven local governments are Mayo Belwa, Fufore, Yola South, Yola North, Demsa, Madagali, Toundo, Numan, Girei, Mubi North and Maiha.

On the perusal of the totality of the petition, it could be gathered that the grounds predicated the complaints of the appellants against the election in their opinion bordered on substantial non-compliance with the Electoral Act, 2011, irregularities as well as criminal allegations. B

On the one hand and in proof of the petition, the petitioners front loaded 76 witnesses out of whom 66 were called to testify. On the other hand, the 1st and 2nd respondents front loaded 73 witnesses but called only 8 out of the lot. The 3rd respondent who had given notice of its intention to call 73 witnesses ended up calling only 1 while the 4th – 6th respondents called no witnesses out of the 200 witnesses in respect of which they got leave of the Tribunal to call. C D

At the end of the trial, the tribunal by its considered judgment delivered on the 25th day of July, 2012 dismissed the petition and hence an appeal to the Court of Appeal which per its judgment delivered on the 2nd September, 2012 also dismissed the appeal. The notice of appeal before us, being a product of the lower court judgment, was filed on the 3rd October, 2012 and containing nine grounds of appeal with their particulars. In accordance with the practice in this court, parties filed and exchanged their respective briefs of arguments. E The appellant's brief was filed on the 18th October, 2012 and was settled by Akin Olujinmi, SAN, and upon being served with the various. F Respondents briefs the appellants filed two sets of reply briefs in response thereof. In otherwords, while a joint reply brief was filed in respect of 1st, 2nd, 4th, 5th and 6th respondents' brief, another was filed in respect of that of the 3rd respondent. The respective briefs were all G relied upon and adopted at the hearing of the appeal with some amplifications by counsel by means of adumbration.

In the brief of the appellants nine issues were formulated from the nine grounds of appeal. Seven issues were raised on behalf of the 1st and 2nd respondents and also same by the 3rd respondent. The 4th, H 5th and 6th respondents joint brief of argument in the same vein like the other respondents formulated seven issues for consideration. For the determination of this appeal I will deem it appropriate to adopt the issues formulated by the 1st and 2nd respondents as it will serve

sufficient and all inclusive of those raised by the appellants and the other respondents. The reproduction of the seven issues are as follows:-

B “1. Whether their Lordships of the court below were right in upholding the decision of the Tribunal in refusing to give credence to the evidence of PW1 - PW 65 on the ground that the evidence of those witnesses constituted hearsay evidence in that the witnesses failed to distinguish between what they saw themselves and what they were told by their polling agents quite apart from the fact that some of the depositions made in Hausa language were translated into English language by unidentified persons who failed to sign the jurat to show that the makers of the depositions knew the contents thereof. **ARISING FROM GROUND 1 OF THE GROUND OF APPEAL.**

D 2. Whether their Lordships of the court below were right in upholding the decision of the Tribunal that there was no duty on the Respondents to call evidence in rebuttal of what had not been established by the Appellants since the non-compliance alleged was not proved and that the petition was predicated largely on criminal allegations which were not established beyond reasonable doubt apart from the fact that both civil and criminal allegations were so intertwined in the pleadings as to make the doctrine of severance inapplicable. **ARISING FROM GROUNDS 2, 3, AND 4 V OF THE GROUNDS OF APPEAL.**

F 3. Whether their Lordships of the court below were right when they upheld the decision of the Tribunal rejecting the evidence of PW 66 and his report Exhibit 759 on the ground, amongst others, that he was not an expert, had not witnessed the election and had no expert knowledge or any knowledge superior to that of the judges of the Tribunal and that his evidence constituted inadmissible opinion evidence. **ARISING FROM GROUND 7 OF THE GROUNDS OF APPEAL.**

H 4. Whether their lordships of the court below were right when they ruled that appeals are founded on the ratio decidendi of the judgment and that the complaint that the learned judges of the Tribunal preferred the issues formulated by the 3^d Respondent to those formulated by the Appellant did not arise from any of the decidendi of the judgment of the tribunal and therefore upheld the decision of

the tribunal to determine the petition on the basis of issues formulated by the 3^d Respondent as opposed to those formulated by the Appellant. ARISING FROM GROUND 5 OF THE GROUNDS OF APPEAL.

5. Whether their Lordships of the court below were right when they upheld the decision of the Tribunal to the effect that forms ECSAs, EC8Bs, ECSCs, ECSDs and voters registers and other electoral documents tendered from the bar by counsel to the Appellants had no evidential value on the ground that they were dumped on the Tribunal not having been tied or related to the Appellants' case through witnesses. ARISING FROM GROUND 8 OF THE GROUNDS OF APPEAL.

6. Whether the learned justices of the court below erred in law when they dismissed the appeal on the ground that it was completely lacking in merit. ARISING FROM GROUND 9 OF THE GROUNDS OF APPEAL.

7. Whether the learned justices of the court below upheld without justification or due consideration the decision of the Tribunal refusing to give probative value to the evidence of PW1 - PW 65 or whether they did so after and due consideration. ARISING FROM GROUND 6 OF THE GROUNDS OF APPEAL."

Issues 1 and 7 taken together.

The learned appellants counsel by raising these issues is questioning the failure by the lower court in giving consideration to the erroneous refusal of the trial tribunal in giving evidential value to the appellants 22 witnesses.

The grouse of the appellants therefore relates to the failure of the tribunal to give evidential value to the evidence of 22 of the appellants witnesses on the ground that the illiterate jurat contained in the witness statement of the witnesses were not signed by the interpreter. The counsel therefore alleged serious error on the part of the lower court in to intervene therein. That it is not shown on the record that Lie lower court did consider the case made out by the appellants against the judgment of the trial tribunal. That the lower court just simply agreed with the tribunal without more and dismissed the issue. That the law is trite that a duty lies on a court to consider all the issues that have been joined by parties. Reference in support was made to the case of Paul Edem Vs. Cannon Balls Ltd & Anor. (2005)

12 NWLR 27 AT 54 - 56. That an illiterate protection law even if it applies is for the protection of an illiterate person who seeks to disown a document which had not complied with the law. That none of the 22 witnesses in question disowned his witness statement. The following authorities are again cited in buttress of the submission:-
 B Edokpolo & Co. Ltd V. Ohenhen (1994) 7 NWLR (Pt. 358) p. 511; Wilson V. Oshin (2000) 6 SC Pt 111 page 1 and Udeagha V. Omegara (2010) 1 NWLR Pt 129 p. 168. The learned counsel listed all the affected witnesses and related in particular to the witnesses P. W 2
 C and PW 3 whom counsel argued gave cogent and compelling evidence of irregularities and substantial non-compliance in Mayo Belwa Local Government Area. He also laid emphasis on the evidence of P.W. 10, P.W. 13, P.W. 15, P.W. 17 and P.W. 18 which were in relation to the corrupt practices perpetrated at various units of Yola South
 D Local Government Area. That their evidence which was unshaken and uncontroverted by the Respondents, go to confirm the allegations of non-accreditation, arbitrary allocation of votes, thuggery, inducement of voters, multiple voting and the fact that no election took place in some of the units of the Local Governments.
 E The learned counsel also emphasized that even the 1st and 2nd respondents witnesses R.W. 1 and R.W. 3 under cross examination did confirm the non-compliance and irregularities alleged by the appellants. In otherwords, that persons of the same name, identity,
 F sex and age voted 8 different times in Biti ward of fufore LGA. That the miscarriage of justice occasioned by the lower court in upholding the decision of the tribunal had put the appellants at a great disadvantage. That had the evidence of the witnesses been accorded their appropriate un-impeached evidential weight, the case of the appellants would have been different. That this court is therefore called n
 G to uphold the said issues raised in favour of the appellants.

In response to the said issues, the learned 1st and 2nd respondents counsel submitted at great extent on the hearsay nature of the evidence of the appellants witnesses PW1 - PW 65. The counsel argued and reiterated the evidence by the witnesses wherein they confirmed that their testimonies were based on what they were told by the polling agents appointed by the appellants and also what they witnessed themselves. That they were neither specific as to what they were told by the agents nor were they specific as to what they per-

sonally witnessed. In other words, that they did not distinguish between what they were told as against what they saw themselves. That the absence of the polling agents to testify at the tribunal as to what took place in their respective units has greatly worked negatively against the appellants. The sum total of the submission is that no explanation was given as to why the polling agents who witnessed the elections were not called to testify. The absence of their reports, counsel submitted was also not explained to the tribunal. That there would have been no method by which the tribunal would have distinguished between what the witnesses saw themselves and what they were told by the polling agents. The absence of the reports did not also avail the tribunal of its contents. That no reason was therefore given by the appellants as to why credence should have been given to the evidence of the said witnesses. B C

Furthermore, counsel submitted that the depositions of the witnesses P. W. 1 - P.W. 65 failed to comply with section 115 of the Evidence Act. That the appellants witnesses alleged several electoral malpractices and criminal offences against the respondents ranging from non-accreditation of voters, over voting, financial Inducement, multiple voting, ballot box stuffing to falsification of results. That all these were stated to have happened at different times and in different places under circumstances which made it impossible for the deponent to have witnessed what was happening at different polling units, at the same time. That the agents at the relevant polling units ought to have been called therefore. That all that was available to the tribunal was the oral reports of the agents which the appellants chose to rely thereon. That the tribunal had no option but to treat such reports as hearsay evidence because the law requires the deponent to disclose the source of his or her information. The learned counsel re-iterated further that the findings by the tribunal which were admitted by the appellants were upheld by the lower court and against which there is no appeal. D E F G

Counsel further submitted that in addition to the depositions all being identical, they were also presented in a language other than that in which they were made. That this was peculiar to the 22 witnesses out of the 66 witnesses called by the appellants. That there was no explanation offered as to how depositions which had been made in Hausa metamorphosed into English. That these were not H

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 matters that a court of justice could ignore. With further reference made to the witness depositions filed along with the petition, the learned counsel pointed out that they were all couched in the same form and style, with the same facts and circumstance repeating themselves. In the circumstance, that the inevitable conclusion is that the petition was not accompanied by valid depositions, thus rendering the petition incompetent and robs the tribunal of the jurisdiction to entertain same. See the case of Buhari V. INEC (2008) 4 NWLR (pt. 1078) and Chukwuma V. Nwoye (2011) All FWLR (pt. 553) 1942 at 1967.

C
 That the failure of the appellants to accompany the petition with credible witness depositions was a fundamental breach which robbed the tribunal of jurisdiction to entertain the petition see the case of Okereke v. Yaradua (2008) 12 NWLR (pt. 1100) 95 at 118.

D
 The learned Senior Counsel urged that the court below was right in upholding the view held by the tribunal that the character of the depositions is unreliable.

E
 The learned counsel on behalf of the 3rd respondent on account of his submission can be rated as an additional spokesman for the 1st and 2nd respondents. This of course is expected especially with the existing party relationship. The counsel in his submission aligned himself in totality with the contention advanced by the 1st and 2nd respondents counsel. In other words and contrary to the submission by the appellants' counsel the said 3rd respondent's counsel argued

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 that the court below gave due consideration to this issue and came to the conclusion that it had no merit. That it is on the record that the witnesses P.W. 1 - P.W. 65 failed to distinguish between what they saw and what they were told by their polling agents. That the lower court

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 was in proper perspective in their conclusion that the decision of the tribunal not to place any probative value on the evidence of P.W. 1 - P.W. 65 could not be faulted.

H
 The learned 3rd respondents counsel in further firm support of the submission made by the 1st and 2nd respondents' counsel also cited a number of authorities which all go to advance the course of the identical nature of the principles highlighted. The counsel on this issue urged that same be resolved in favour of the 1st and 2nd respondents, and against the appellants.

On behalf of the 4th, 5th and 6th respondents, their learned coun-

sel submitted in agreement with the learned friends on behalf of the 1st and 2nd as well as the 3rd respondents. The counsel to buttress his submission went further to accredit and emphasize the findings by the tribunal as self explanatory in that the appellants' witnesses failed to distinguish between what they saw and observed personally as against that told to them by their polling agents. The learned counsel cited the cases of Bamaiyi V. State (2001) 8 NWLR (pt. 715) p. 270 at 290; Buhari V. Obasanjo All FWLR (PT. 273) Page 154, and Itashidu VS. Goje (2003) 15 NWLR (Pt. 843) p. 352 at 393. That the reason abound and which the tribunal considered for not attaching probative value to depositions of the respective petitioners witnesses which reason was also upheld by the Court of Appeal. The counsel therefore urged us to so hold.

On behalf of the 7th respondent, its learned counsel Dr. Banire applied to withdraw their brief filed on 18/10/12 and same was accordingly struck out. There is therefore no brief or submission by the 7ⁿ respondent herein.

In further response to the respondents briefs the two sets of reply briefs filed on behalf of the appellants are merely to fulfill all righteousness because they have nothing new added to the main brief. I have therefore perused and considered the said reply briefs and the totality of the submissions contained therein are not a departure from the main brief but are mere emphasis thereof.

The confirmation of this is the statement made by the appellants' learned counsel himself wherein he concluded the two reply briefs by emphatically stating that the respondents have urged nothing in their briefs to whittle down the cogent arguments of the appellants on all the issues raised in this appeal.

The cumulative complaint or grouse by the appellants in the 1st set of issues borders on the allegation that the learned tribunal judges either refused or totally failed to evaluate or properly so to do the evidence of 22 of their witnesses. This therefore raises the question of evaluation of evidence which the law specifically gives the duty to the trial court. In other words it is trite law that the onus of evaluating evidence is stricto sensu that of the trial court and the appellate court should not be seen to interfere therewith except where there is evidence of failure by the trial court to properly evaluate or

where there is a miscarriage of justice. It is elementary to state that the trial court is a court of evidence and therefore has the advantage of seeing and assessing the credibility of witnesses and their demeanor.

B The totality of the appellants' submission on the issues is that the miscarriage of justice occasioned by the lower court in upholding the decision of the tribunal lies in the refusal to attach evidential weight to the evidence of the said witnesses.

It is pertinent to restate that the question of evaluation of evidence presupposes a construction of an imaginary scale in the mind of trial court judge(s) where upon the evidence of both contenders are put on this scale with the purpose of determining on which side of the scale the pendulum of justice would tilt. The evaluation would not be based on the number of witnesses, but rather on the credibility and acceptability of the evidence. In other words, there are determinant factors that will necessitate an evidence being acceptable and credible. Such evidence must come from a witness who has the first hand knowledge of that which he testifies to. He must in other words be a witness who saw or heard or took part in the transaction upon which he was giving evidence. Where a witness gives an account of information which is not within his personal knowledge, he would not be accredited as a competent witness.

F At page 3909 of the record of appeal, for instance the lower court held thus and said:-

"The lower Tribunal in its judgment made specific findings that those witnesses failed to distinguish between what they saw and what they were told by their polling agents. The tribunal also found that the witnesses PW 1 - PW 65 did not only fail to disclose even the names of those agents who told them what happened at the polling stations, but also failed to present to the Tribunal any written report from any of the agents of what happened at the polling stations. The decision of the lower Tribunal not to place any probative value on the evidence of P.W. 1 - P.W 65 cannot be faulted."

Also at page 216 of its judgment (see page 3655 of the record of appeal) the trial tribunal held and said:-

"Another irritatingly repetitive item most of the witnesses state-

ment on oath of the petitioners' witnesses is the illiterate jurat. Even witnesses who testified before us that they deposed to their witnesses statement in English language their depositions contain illiterate jurat (There are 22 of such witnesses) all the said jurat were not signed by the interpreter. Though the witnesses kept mentioning the name of Sunday Mathew who is a lawyer." B

The learned appellants' counsel submitted at great extent in defence of the illiterate jurat contained in the said witnesses' depositions and the fact that non of the 22 witnesses in question disowned his witness statement. **It is pertinent to state that out of the 66 witnesses called by the appellants, 22 of them stated under cross examination that they made their depositions in Hausa language. The record did not show that the depositions adopted were those made in Hausa language which is not the language of the court. With the depositions adopted being in English language, the question to pose is, were those depositions adopted the same as those made by the witnesses? To my mind and from all indications, the witnesses were adopting to depositions which were not in fact made by them since English language was foreign to their understanding. The appellants owed a duty to the court to have presented the very depositions made by the witnesses. The adoption of a different deposition was very defective and it could not have been rectified by the use of an illiterate jurat.** The learned tribunal judges on this score said thus at page 216 of their judgment, (i.e. to say page 3655 of the record.) C D E F

"Even witnesses who testified before us that they deposed to their witness statement in English their depositions contained illiterate jurat. (There are 22 of those witnesses.) All the said jurats were not signed by the interpreter; though the witness kept mentioning the name of one Sunday Mathew who is a lawyer. This creates a distinct impression in our minds that the written depositions were haphazardly mass-produced and names of witnesses, units, wards and local governments were inserted. They lack the well known individuality and distinction required of a legal deposition which affects the weight we attach to them and we so held." G H

From the foregoing findings by the trial tribunal, the law desires that witness depositions are to be individually iden-

tified with the maker. It is not enough an identity that non of the witnesses in question disowned the statement. They could not in other words have claimed rightly a deposition which was made in English language since they spoke in Hausa. The mentioning of the name of one Sunday Mathew, an interpreter,
B was not enough an identity.

The learned appellants' counsel cited the case of Udeagha V. Omegora (2010) 11 NWLR (Pt 1204) page 168 wherein it was held that a witness can adopt an irregular written deposition. With all respect, the situation at hand is remarkably distinguishable from the
 C case under reference because it has nothing to do with adopting an irregular deposition. It is rather to do with a different deposition made in a distinct and alien language and which is being sought for adoption. The authority under reference, cannot with all respect, be applied in this case. In the same vein and for further expatiation, I would
 D wish to state that there was also no explanation offered as to how depositions which were made in Hausa language could metamorphosed, into English language, as rightly submitted by the 1st and 2nd respondents' counsel. There was again no dispute that, the depositions of the 22 witnesses were made in Hausa language and that the
 E jurat was not signed. In the circumstance, and contrary to the submission by the learned Senior Counsel for the appellants therefore, the lower court was right in upholding the decision of the tribunal when it said thus:-

F *"The deposition under consideration were said to be made in Hausa language and translated and written into English by unidentified persons who failed to sign, to show that the makers of the depositions knew the contents thereof. The implication or the conclusion*
 G *to be derived from that is that the deponent did not know the contents of what they deposed to."*

The law is well settled that as a precondition to the exercise of jurisdiction, the witness statements are to accompany the petition to be filed. The consequential effect of the
 H **failure to comply is that the tribunal was on a firm ground when it declined to exercise jurisdiction over the 22 witness depositions which it held were incompetent.** See the case of Okereke v. Yaradua (2008) 12 NWLR (Pt. 1100) page 95. It is also the contention of the appellants that the court below refused to give any

consideration to their ground of appeal which complained that the tribunal refused to give probative value to the evidence of P.W.I - P.W. 65.

At page 3910 of the lower court's judgment, it held thus.

"The lower Tribunal in its judgment made specific findings that those witnesses failed to distinguish between what they saw and what they were told by their polling agents. The tribunal also found that the witnesses P.W.I - P. W. 65 did not only fail to disclose even the names of those agents who told them what happened at the polling stations, but also failed to present to the tribunal any written report from any of the agents of what happened at the polling station."

For the determination as to whether or not the lower court erred in not giving proper consideration as alleged, recourse must be had to the record of appeal in order to get the proper picture of what transpired. For instance, it is on record that the witnesses P.W.I - P.W. 65 failed to distinguish between what they said they were told from what they alleged they witnessed themselves. There is also no dispute that not a single one of the witnesses furnished the names of the agents who were alleged to have made reports to the witnesses. Not also a single one of those witnesses tendered the written reports which they alleged were delivered to them by the polling agents. There is also no appeal by the appellants contending that the record of appeal is defective on the foregoing findings made by the trial tribunal. In the absence of any challenge therefore the findings are binding.

It is also on record that the witnesses PW 1 - PW 65 being supervisors, their testimonies were based on what they were told by the polling agents, appointed by the appellants, as well as what they did witness themselves. In their testimonies, they gave evidence as to what they alleged transpired at the polling stations and the evidence which did not distinguish between what they saw, which was within their knowledge as against that which was told to them by polling agents. ***By the provision of section 115 of the Evidence Act, the law treats facts derived from personal knowledge differently from those derived from information obtained from some other source(s). The implication is that a deponent ought not to lump facts derived from personal knowledge with those obtained from other sources without distinguishing between the two. The particulars of the person who supplied the infor-***

mation with the name, address, time, place and circumstance must be stated by the deponent. The deponent must also state his believe in the information to be true. The particulars of the sources of the facts derived from the polling agents were not stated in the case at hand. See the cases of FGN V. AIC Ltd. (2006) B 4 NWLR (Pt. 970) 337 at 357 and Doma V. INEC (2012) All FWLR (Pt. 628) 813 at 829. **In the absence of any distinction, therefore, the deduction is to expect the tribunal to sort out which of the mixed up evidence was to be allocated to either the witness or the polling agents. This is not the duty of the tribunal to do in the comfort of their chambers. Hence the deduction arrived at by the tribunal therefore was in order. In other words, that the entire evidence constituted hearsay evidence and which was properly rejected.** The findings of the tribunal in D that respect was reproduced earlier in the course of this judgment. I will not therefore repeat same.

It is also relevant to mention that the burden of proof was on the appellants as the petitioners to prove their petition. They are therefore under a duty if they must succeed, to E prove their case with all the available evidence they could find. It is intriguing I hold, that the polling agents of the appellants, although they were themselves appointed specifically to witness the elections and are recognized under the Electoral Act, were not however called as witnesses. At least there is no F evidence of such on the record.

At page 3655 of the record, the trial tribunal in that respect held and said:-

“for some unexplained reason, the petitioners failed to call a G single polling unit agent who was at the polling units and witnessed first hand, the entire election process at the said units from commencement of election to announcement of result.”

The failure to call the polling agents was very detrimental to the appellants’ case. There is also no appeal against the H said findings. As rightly submitted by the learned 1st and 2nd respondents counsel therefore, the tribunal could not be expected to assume that their evidence would have been favourable to the case of the appellants had the polling agents testified. The law to the contrary would require the tribunal to

presume that, had the polling agents been called their evidence would have been detrimental to the appellants' case and hence their reason for refusing them to testify. As a corollary, a case in reference is INEC V. Anthony (2011) 7 NWLR (pt. 1245) p. 22 – 23 wherein it was held thus:-

"By the provision of section 46(1) of the Electoral Act, 2006, each political party may by notice in writing addressed to the Electoral Officer of the Local Government or Area Council appoint a person as a polling unit to attend at each polling unit in the Local Government Area Council for which it has candidate. Such polling agents by the provision of section 44(3) of the Electoral Act, 2006, shall be present at the distribution of Electoral Materials from the office to the polling booth. Therefore from the above the only persons who are entitled by law to testify as to whether or not election result sheets were distributed and the time of the arrival of electoral materials at the polling units are the polling units agents."

The significance of the polling units agents cannot therefore be underestimated in the case at hand if the appellants must have the facts to prove their case. The best evidence the appellants could have had was that of the agents at the polling units who were physically on ground and in true position to testify as to what transpired at an election. The consequence of shutting them out for whatever reason is very detrimental to the appellants' case. See the case of Hashidu V. Goje (2003) 15 NWLR (PT 843) 352 and Buhari V. Obasanjo (2005) All 1 FWLR (pt 273) 1 at 164 - '165 wherein Ejigunmi JSC said amongst others:-

"The evidence required to establish a crime must be evidence of a witness who saw or heard or took part in the transaction upon which he was giving evidence. It is written law that hearsay evidence is not admissible for the purpose of establishing a crime. See section 77 of the Evidence Act."

On the fatal effect of failing to call a polling agent, the case of Agballah V. Sullivan Chime (2009) 1 NWLR (Pt. 122) 373 at 433 - 434 is relevant wherein it was held in part thus:

"None of the appellant's party agent that allegedly represented, signed and collected the election results forms from the numerous polling units was called to testify in the petition. A fortiori the failure of the appellant to call the party agent that represented and served as

his representative at the various polling units to give evidence was fatal to the petition.”

It is pertinent to restate that from the evidence of all the witnesses called by the appellants they admitted that their polling agents signed all the result sheets and did so voluntarily on the instruction of their party, the 7th respondent. The implication is therefore obvious as it would have authenticated the validity of the documents, in otherwords, the results sheets. The agents, at law were all presumed to understand what they appended their signatures thereto. They could not in the circumstance have turned around to deny the contents of their signatures. See the case of Egbase V. Oriareghan (1985) 2 NWLR (Pt 10) 887 also that of Okoya V. Santili (1994) 4 NWLR (PT. 338) P. 280 - 281.

I also hasten to add that as a ward supervisor such person is a competent witness under the Evidence Act; the issue in this case however is the failure to distinguish the clear cut evidence between information which is within his personal knowledge as against the information given him by the polling agent, who ought to have been called as a witness, but was not.

Where a petitioner complains of non-compliance with the provisions of the Electoral Act, he has a duty to prove the non-compliance alleged based on polling unit by polling unit. See again the case of Ucha Anor. V. Elechi & 1774 Ors (2012) 3 SC (Pt 1) p. 26. **It is therefore physically impossible for one person to have supervised the election in ten polling units given the fact that witnesses are to be called from each polling unit.**

See the case of Senator Julius Ali Ucha V. Chief Martin Elechi & Ors. (supra) 2012 3 SC (Pt. 1) p. 26. There is also no evidence indicating or giving the reason why they (agents) were not called or available. The reports by the agents in respect of which all the witnesses spoke so much about were also not tendered in evidence. One therefore wonders whether the appellants were really set out to prove their petition. Even if for some reasons the polling agents were not called to testify, the appellants should have foreseen that the agents’ reports are a necessity and therefore ought to have been laid before the tribunal. The witnesses P.W. 1 -P.W. 65 had their limitations and should not have been left to dabble through both what they saw and also

that which was told to them by the polling agents. The appellants as architects of their case ought to have gone a step further. There was no way the tribunal would have known the contents of the reports without the makers identifying and placing them properly before them. The lower court and of course the tribunal could not be faulted in the conclusion arrived thereat page 3660 of the record wherein it held thus:-

“Unfortunately, they failed to distinguish between what they saw and what they were told by their polling unit agents. They also failed to disclose single name of their agents who not only told them what happened at their units but submitted to them a report. None of the reports by the polling agents was tendered in evidence even if to corroborate the testimonies of these wards supervisors ... this tribunal has no choice than to treat their entire evidence as hearsay evidence also.”

There is no evidence that the appellants appealed against the foregoing findings of fact. They cannot now be heard to complain because they will have no justification since they are deemed to have admitted the facts so arrived at as being correct. The application of the law to the facts so arrived at cannot also be disputed as rightly held by the lower court wherein it affirmed that the trial tribunal was right when it refused to give credence to the evidence of PW 1 - PW 65. Issues 1 and 7 are therefore resolved against the appellants.

The next set of issues to be considered are the earlier adopted 1st and 2nd respondents' issues 2 and 6 which will also be taken together. The same I hold also encapsulate the appellants' issues 2, 3, 4, and 9. The said 1st and 2nd respondents issues 2 and 6 therefore read as follows:-

(2). Whether their Lordships of the court below were right in upholding the decision of the Tribunal that there was no duty on the Respondents to call evidence in rebuttal of what had not been established by the appellants since the non-compliance alleged was not proved and that the petition was predicated largely on criminal allegations which were not established beyond reasonable doubt apart from the fact that both civil and criminal allegations were so intertwined in the pleadings as to make the doctrine of severance inapplicable.

(6) Whether the learned justices of the Court below erred in

law when they dismissed the appeal on the ground that it was completely lacking in merit.

The appellants' basic complaint in the foregoing issues squarely centres on the principle of the doctrine of severance and sought specifically to question the conclusion arrived at by the lower court wherein it held thus at pages 3897 to 3898 of the record in respect of the decision of the trial tribunal and said:

"The above conclusion by the lower tribunal was rightly arrived at and AD V. Fayose was applicable in the circumstances. Where both civil and criminal allegations are implicitly intertwined in the pleadings giving rise to the petition, the doctrine of severance is not applicable."

The learned counsel on the foregoing pronouncement submitted that the lower court merely confirmed the holding of the tribunal without any consideration of the arguments by the appellants. The counsel relied on the authorities of *Omoboriowo V. Ajasin* (1984) 1 SCNLR page 108 and *Fayemi V. Oni* (2010) 17 NWLR (Pt. 1222) P326 which were urged upon the tribunal to the effect that allegations that are civil in nature can be severed from the ones that are criminal in a pleading with a view to applying the appropriate standard of proof in each case. That it was in the basis of these authorities therefore, that the tribunal was urged to invoke the doctrine at the final address stage which fact counsel argued was acknowledged by the Tribunal in its judgment at pages 3655 - 3656 of vol. VIII of the record. That by the tribunal selecting certain sub-paragraphs of paragraph 18 which are criminal in nature and glossing over those sub paragraphs which are civil in nature, the appellants are clearly denied their right to fair hearing.

The learned counsel heavily relied on the case of *Omoboriowo V. Ajasin* (supra) and submitted as obvious from the record that the lower court, from the record did not give proper consideration to the appellants' appeal and hence the erroneous confirmation by the trial tribunal in its judgment. The further complaint by the appellants was against the holding by the tribunal that the hub of the petition was the several criminal allegations raised in the petition. Counsel again submitted the absence of consideration by the lower court and hence a further denial of fair-hearing. That the summary of the appellants' arguments at the lower court was to the effect that the petition raised

both civil and criminal allegations. That since the lower court held at page 3901 that the petition raised both civil and criminal allegations, It was therefore clearly wrong for the lower court to uphold the decision of the tribunal that the hub of the petition was the several criminal allegations raised therein.

In further submission, the learned appellants counsel also emphasized that in the absence of the 4th to 6th respondents failing to call any witness in support of their pleadings, the effect in law is that they are deemed to have totally abandoned their pleadings. The learned counsel in buttress of his submission cited the cases of Alhaji Muhammadu Maigari Dingyadi and Anor. V. Aliyu Magatakarda Wamako (2008) 17 NWLR (Pt. 1116) 395 at 431. That the 4th - 6th respondents are therefore deemed in law to have admitted all the evidence given by the appellants relating to non compliance with the Electoral Act and irregularities in the conduct of the election. That by the 1st to 3rd respondents also having failed to lead evidence in support of also deemed to have abandoned their pleadings in respect of the averments. That had the lower court given proper consideration to the issues raised by the appellants, it would have found in their favour therein. The counsel therefore urged that this court should resolve the issues in favour of the appellants.

The 1st and 2nd respondents issues 2 and 6 were taken together and same as 1 said earlier encompasses appellants issues 2, 3, 4 and 9. The learned counsel on behalf of the 1st and 2nd respondents on the foregoing issues therefore submitted at great extent in urging the court in the light of concurrent findings of facts by of both the court below and the trial tribunal to uphold the judgments in the absence of impeaching or faulting same in this appeal.

That with criminal allegations made in virtually every paragraph of the petition, once those paragraphs were struck out there would have been little or nothing left to go to trial. That it was only at the final address stage that it dawned on the appellants that they have not come anywhere near proving the several criminal allegations made by them in the petition and hence the application in urging the tribunal to sever the pleadings so that the petition would rest solely on civil allegations. That such an application cannot be made at such final address stage without affording respondents the opportunity to address on the issue. That the severance of pleadings was not an exer-

cise which the tribunal could undertake in the privacy of the judges' chambers behind the back of the respondents. That the appellants singled out 50 paragraphs of the petition which in their view supported the grounds of non compliance with the provisions of the Electoral Act and which contention was refused by the trial tribunal and was also upheld by the lower court.

The learned counsel submitted further that the appellants on their part have not in this appeal shown that the criminal and civil allegations were not inextricably intertwined or that the allegations were severable. That the failure to do so is fatal to their appeal. On the pronouncement made by the tribunal on paragraphs 18 (a) -(s) of the petition, the learned counsel re - emphasized that the appellants, in the absence of any complaint thereon cannot be heard at this stage that the allegations are not criminal in nature and which same were not proved. That the proof of allegations of corrupt practices and the other criminal allegations must be beyond reasonable doubt. Counsel related to the view which has been well settled in the case of *Falae V. Obasanjo* No. 1 (1999) 4 NWLR (pt. 599) 435 and *Wall V. Bafarawa* (2004) 16 NWLR (Pt 900) 6 & 7. The learned counsel further argued that the appellants listed what they alleged to be the civil allegations made in the petition. This, counsel submitted were all mixed up with criminal allegations which were not proved.

That the non compliance pleaded was not substantial having regard to the generality of the complaints in respect of the local government areas. The counsel analyzed the said local governments complained against and submitted in totality that the effect of the non compliance alleged was neither pleaded nor proved.

Counsel also submitted that the failure to plead an alternative result by the appellant was detrimental to their case. That it was expected of them to have stated the official scores and thereafter state the scores which they believe are correct. That the results declared by INEC is, in law, presumed to be correct. Furthermore that the criminal allegations having not been proved by the appellants, there was no duty on the respondents to call evidence in rebuttal.

On the question of abandonment of pleadings by the respondents as alleged by the appellants, learned counsel submitted that there was no evidence to be rebutted with the appellants failing to prove the allegation made in the petition. That evidence may also be

led by way of a cross examination. Counsel therefore urged that the issues ought to be resolved against the appellants.

The 3rd respondents' counsel in respect of issues 2 and 6 submitted along the same line of arguments by the 1st and 2nd respondents. I will not therefore repeat his submission for purpose of avoiding monotony and also to save time. B

The 4th, 5th and 6th respondents argued issues 2 and 6 in their issue 2, 4 and 7.

In their submission on issue 2 relating the principle of the doctrine of severance, counsel argued the appellants' mis-appreciation of the holdings by the trial tribunal which was affirmed by the court of appeal. That the paragraphs of the petition contained allegations of crime which were inextricably interwoven with civil allegations. That the appellants counsel in urging the tribunal to sever the civil allegation was rightly refused by the tribunal because it would have amounted to a counsel's address taking the place of evidence. That the law is trite that where civil allegation is not severable from criminal allegation, the civil allegation cannot therefore succeed on its own. Counsel therefore urged us to hold that the appellants' pleadings before the tribunal are not severable from the criminal allegations. That the said issue should be resolved against the appellants. C
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On the question of abandonment of pleadings by the respondents, the learned senior counsel representing the 4th, 5th and 6th respondents again submitted the clear mis-appreciation of the position of the law by the appellants. That non-calling of witnesses did not amount to non calling of evidence. The appellants are to rely on the strength of their case and not on the weakness of the defence. See the case of Ucha V. Elechi (2012) All FWLR (Pt. 625) P 237 at 262. That this court should therefore affirm the judgment of the lower court. Learned counsel further argued that the appellants in the circumstance are only entitled to be granted the reliefs which they asked for subject however to the proof thereof by evidence. That in the absence of such proof the lower court was in order by affirming the decision of the trial tribunal. That the issues in the circumstance should be resolved against the appellants therefore. F
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The determination of the said issues 2 and 6 are clearly predicated on the principle of the doctrine of severance. ***The law is trite and well settled that in situations where civil allegations are***

severable from criminal allegation, a party is entitled to succeed on his civil allegation if proved. The following authorities are in support. Nwobodo V. Onoh (1984) NSCC 1 at 16 - 17; Wuam Vs. Ako (1999) 5 NWLR (Pt. 601).

I hasten to point out clearly that for the doctrine of severance to apply, there must be clear and distinctive compartmentalization or separation of criminal allegations from those which are civil in nature. In otherwords, while in the civil atmosphere there should be no allusion to criminal assertions, so does it also apply to civil assertions. The two cannot be interwoven or criss-crossed. See the case of AD V. Fayose (2005) 10 NWLR (Pt. 932) P 151 at 239. ***The demarcations should also be clear cut and well defined in the pleadings. The duty to do so rests on the petitioner and it is not that of the court or tribunal as it will amount to taking over the responsibility of doing one party's case to the detriment of the other party. The court is to be seen as an impartial umpire who should be adjudicating between parties.***

The law is also trite that in a claim for declaration, the onus is on the plaintiff/petitioner to establish his case on the strength of his evidence and not on the weakness of the case of the Defendant. The heavy weather made by the appellants in hammering on the respondents' failure to call evidence in proof of their pleadings is a confirmation that the appellants are hiding behind one finger by abdicating their duty in proving the declaratory reliefs sought for. The proof is not determinant on whether or not the respondents called witnesses, but which squarely rests on the appellants by law. The case in reference is CPC V. INEC (2012) FWLR (Pt. 617) 605 at 633 - 634. The law is also well settled that it is the pleadings that determines the plaintiffs claim. At this stage I will also seek to rely on the judgment of the tribunal wherein it held at page 3658 of the record of appeal and said:-

"The hub of this petition upon which the wheel turns are the several allegations of crime made by the petitioner against the 1st, 3^d and 4th Respondents. The allegations include among others (1) Rigging (2) Snatching of ballot boxes (3) Stuffing of ballot boxes with thump print ballot papers in favour of the 1st and 3^d respondents (4)

Underage voters and voting (5) allocation of results in favour of 1st and 3^d respondents (6) falsification of results (7) monetary inducement of voters (8) non accreditation of registered voters (9) preventing accredited voters from voting (10) diversion of ballot papers and ballot boxes (11) intimidation and harassment of voters (12) thuggery and violence etc. It is the contention of the petitioners that these criminal allegations rendered the entire election of 4th February, 2012 invalid. It is trite law that these criminal allegations need to be proved by the petitioners beyond reasonable doubt.” B

It is further very significant to restate that their Lordships of the court below after they had reviewed the record relating the petition and the evidence in respect thereof, came to the following deductions at pages 3901 - 3902 of the record of this appeal and comprehensively said thus:- C

“Having perused the contents of the petition contained at pages 1 - 69 of volume 1 of the records of appeal, it is evident that of the 152 paragraphs thereof, 129 paragraphs were devoted to both criminal and civil allegations against the 1st - 3rd respondents whilst 86 of the paragraphs are express criminal allegations. See paragraphs 28, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 96, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 113, 114, 115, 116, 117, 118, 119, 120, 121, 125, 126, 127, 130, 131, 132, 133, 134, 137, 140, 141, 143, 144, 145, 146, and 147 of the petition. The criminal allegations contained in the above mentioned paragraphs of the petition ranged from multiple, thumb-printing of ballot papers, arbitrary allocation of figures, multiple voting, intimidation and harassment of voters over voting, snatching of ballot boxes, financial inducement, bribery, thuggery, falsification of voters, kidnapping of ACN agents, etc. Undoubtedly, these were criminal acts which needed to have been proved beyond reasonable doubt as required under section 135 (1) and (2) of the Evidence Act 2011, and there seems to be no contention by the appellants on that position of the law, on the authorities relied upon by all counsel herein. I agree with them too. It is preposterous to suggest that an act of falsification can be weaned of its criminality.” F

In the light of the above deductions arrived at by the lower H

court, their Lordships of that court therefore upheld the findings of the tribunal in the following terms at pages 3903 to 3904 of the record:-

B *"I fail to see any error in the opinion of the learned trial lower Tribunal stated above. This is because of the fact that having earlier declined the invitation by the petitioners/appellants to sever/separate the criminal allegations from the civil allegations of non-compliance with the electoral act, 2010 (as amended because they inextricably intertwined, and had further found that the civil allegations of non-compliance with the electoral act, 2010 (as amended) was not proved by the appellants the fate of the petition remained only on the prove (sic) or otherwise of the several criminal allegations contained in the said petition. I am satisfied that this issue is lacking in merit and it is therefore resolved against the appellants."*

D From the collective deduction of the concurrent findings of fact by the two lower courts, the following conclusion is very apt. In otherwords, the following phrase in the judgment of the tribunal at page 3658 which was earlier reproduced supra is very crucial; I will deem it necessary to again make reference thereto even at the risk of repetition. This is what it said:-

F *"It is the contention of the petitioners that these criminal allegations rendered the entire election of the 4th February, 2012 invalid. It is trite law that these criminal allegations need to be proved by the petitioners beyond reasonable doubt."*

G It is not surprising therefore that the 4th, 5th and 6th respondents counsel in their submission argued that the appellants counsel on his argument failed to appreciate the holdings of the Tribunal which was affirmed by the lower court. This, learned counsel submitted because on a perusal of the paragraphs of the petitions, they contain allegations of crime which are inextricably interwoven with the civil allegations. The case of AD V. Fayose (supra) is also well applied that if the civil allegation is not severable from criminal allegations, then the civil allegations cannot succeed on its own. The two will become like Siamese twins.

I hasten to add also that the appellants did not deem it necessary to appeal against the foregoing findings. They are therefore deemed to have admitted same. Also, that with the allegations being criminal in nature, they knew and have conceded that the allegations

needed to be proved beyond reasonable doubt.

It is also on record that the appellants invited the tribunal judges to sever the criminal allegations from the civil allegations because they were inextricably intertwined. The learned counsel for the 4th, 5th and 6th respondents on their brief submitted in great detail that such invitation by the appellants at an address stage was meant to overreach the respondents, who would not have had the opportunity to put in their response, if the act of severance was to be done in the comfort of the tribunal judges chambers. B

I wish to point out also that the inextricably intertwined nature of the criminal and civil allegations was found by the tribunal as in-built in the pleadings. I seek to emphasize that there is no appeal against the findings. ‘ C

In other words, if the criminal allegation had penetrated the entire election of the 4th February, 2012 as per the tribunal’s findings, it is then only reasonable to draw a conclusion that there is nothing left upon which the appellants are to contest on a platform of civil allegations. D

The appellants for all intent and purpose have to contend with proving criminal allegations. This, I hold especially on the confirmation by the lower court in its findings at page 3904 of the record reproduced earlier in the course of this judgment wherein it held that:- “the fate of the petition remained only on the prove (sic) or otherwise of the several criminal allegations contained in the said petition.” E F

The dilemma in which the appellants have found themselves is very critical and unwinding. In other words, the appellants by their appeal are fighting tooth and nail that the principle of the doctrine of severance ought to have applied to their petition. They are also contending that having failed to prove the criminal allegations, they could still anchor on the civil alternative claim. It is obvious that the appellants are not resting their appeal on criminal allegations, which they have found to be a very hard nut to crack. The truth is also obvious and staring in the appellants’ faces that they have completely shut out themselves from relying on civil allegations. The confirmation is on the record wherein both the lower court and also the tribunal had found on the intertwined na- G H

ture of the appellants' petitions and concluded that they are criminal in nature. The appellants in the circumstance have found themselves at a crossroad since they are neither here nor there. While the criminal aspect is no longer open to them, they are not also availed the civil alternative having been long shut out. The said issues 2 and 6 are therefore resolved against the appellants.

At this point and with the conclusion arrived thereat on issues 2 and 6 supra, it will only amount to an academic exercise to consider the rest of the issues 3, 4 and 5 herein which by implication are also all resolved against the appellants.

On the totality of this appeal and with all issues resolved against the appellants, I hold the firm view that the appeal is devoid of any merit and is hereby dismissed. In otherwords, the judgment of the lower court which upheld that of the trial Tribunal is also affirmed. In the final result therefore, the election and return of the 1st and 2nd respondents as the Governor and Deputy Governor of Adamawa State respectively, is further upheld. I make no order as to costs.

ONNOGHEN JSC

I have had the benefit of reading in draft, the lead judgment of my learned brother OGUNBIYI, JSC just delivered. I agree with his reasoning and conclusion that the appeal is without merit and should be dismissed.

The facts of this case are the same as in appeal No. SE/409/2012 BETWEEN ACTION CONGRESS OF NIGERIA VS REAR ADMIRAL MURTALA H. NYAKO & ORS both of which originating from the same election petition filed by the appellants in both appeals before us. The lead judgment in that appeal was written by MUHAMMAD JSC and delivered this morning, in which the appeal was also dismissed for want of merit and to which judgment I concurred.

I accordingly dismiss the instant appeal and abide by the consequential orders made by OGUNBIYI, JSC in the lead judgment including the order as to costs. Appeal dismissed.

CHUKWUMA-ENEH JSC

I have read the judgment prepared and delivered by my learned brother Ogunbiyi in this matter with which I entirely agree. The instant appeal is against the concurrent decisions of the Tribunal and the lower court in this matter. The appellants have appealed against the decision of the lower court to this court and have challenged it substantially on the same questions of facts as in the lower court - which in the main has involved the Tribunal's appraisal of evidence as given at the trial that is to say, by ascribing value to the evidence of the appellants' witnesses - as this is an area exclusively within the domain of the trial Tribunal that has seen, heard and watched the demeanours of the witnesses in the matter. And these findings have been confirmed by the decision of the lower court giving rise to a concurrent decision. And I have made these points against the background of this appeal being founded on grounds of facts and/or at best on mixed law and facts. I must even then remind myself in that regard that in principle it is not right for an appellate court as this court to disturb such judgments simply because it would have come to a different decision on the facts so long as the judgments are supported by evidence as per the record of appeal and which, with respect, is the case here. See *Ogbere Egri v. Edediho Uperi* (1973) 11 SC 299 and *Ogundulu and others v Chief E.G. Phillips and others* (1973) 1 NWLR 226.

The appellants have confined their complaints in this appeal to the election having been flawed on substantial non-compliance based on a two-pronged ground of irregularities and criminal allegations. Based on this complaint and as decided in *Uche & Anor. V. Elechi & Ors.* (2012) 3 SC at pg 26, the appellants are required to prove non-compliance as alleged here based on polling unit to polling unit and in the instant matter eleven out of twenty one Local Government Areas of Adamawa State as have been alleged as invalid by corrupt practices and substantial non-compliance. The task in this regard is onerous. The other difficulty that appellants' case has run into at the trial according to them is the failure of the Tribunal not severing the criminal allegations from the civil ones, so as to enable the appellants prove their civil allegations. Again, the appellants ought to have appreciated their case, making section 138(1) of the Act applicable vis-à-vis the doctrine of severance. There is no doubt that the issue of

crimes has arisen from the pleadings and indeed the commission of these crimes has formed the basis of the petition. What the appellants are saying is that where as found by the Tribunal to be so even though the issue has been belatedly raised at the address stage of the instant proceedings and that where the standard of proof for the commission of the crimes could not be reached and that the other grounds on civil allegations not bordering on crimes ought to have been severed from the criminal allegations so as to enable the appellants fall back on a lower standard of proof as enunciated in the case of *Nwobodo v. Onoh* (1984) 1 SCNLR, at page 27-28. The appellants hold the Tribunal as having erred in that regard. The Tribunal rightly in my view has found that in the circumstances of this case that severance of criminal from civil allegations is not practicable. The appellants in this Court on these questions have not produced any superior arguments based on exceptional circumstances to render these findings untenable in principle on the facts and evidence before the Court as per the record. Again, the appellants ought have appreciated their case from the beginning so as to go for the higher standard of proof required in criminal matters in proving the allegations as it is their manner of pleading their criminal and civil allegations that has gotten the allegations so intertwined that severance as sought by appellants at that stage has not been practicable.

A concurrent decision in the context of the two lower courts' decisions in this matter entails that there is sufficient evidence to support the decisions of the lower courts upon which the findings of both lower courts' on facts etc are based and are so supported by the record of appeal and so should not be disturbed when the findings are not perverse. An appellate court as the Apex court in this appeal will only intervene where some miscarriage of justice or the violation of a substantial principle of law and/or procedure is involved or the findings are perverse. See *Enang v. Agu* (1981) 1/12 SC 171. This conclusion holds sway even so in resolving these issues raised by the appellants in this appeal. And so the appellants have to prove a case of exceptional circumstances to justify this court's intervention in this matter and it is a trite requirement in cases of concurrent decisions.

Coming back to this matter the fundamental flaw in the appellants' case here based on an overview of the seven issues identified for determination as raised from the nine grounds of appeal filed in

this matter by them is predicated on the failure of the appellants to show exceptional circumstances predicated upon any new substantial and arguable point or points not otherwise previously taken and fully considered by the two lower courts and which are otherwise material to the case and so to this appeal, which if now considered by this court and given their probative value by this court will lead to B upturning the decision of the lower court particularly and the concurrent decisions in this matter and thus will leave the concurrent decisions of the two lower courts at sixes and sevens The burden on the appellants in this appeal cannot be pitched any lower and with C respect they have failed to do so. And this court will intervene in this matter only where the appellants have made out the grounds of exceptional circumstances to so warrant the interference.

The appellants have not been able to come up with a case i.e. any cognizable misdirection on the facts in this appeal as per their D complaints cum their brief that is, as founded on their grounds of appeal serving as exceptional circumstances to uphold their complaints. I have thoroughly scrutinized the totality of their case here as per the record with a view to identifying any new substantial and arguable point or points in their case as to be decisive in this appeal. E Putting it mildly, I have not been appraised of any. In fact what the appellants have regrettably done here is simply to re-package and re-submit, with respect, the stale issues and hackneyed arguments in their brief based on their complaints and grounds which have failed F to impress the lower courts, for re-evaluation by this court in the hope of this court reversing the decision of the lower court. My initial reaction in the absence of showing any exceptional circumstances in that regard in this matter leaves me with no other option but to hold G clearly that the appeal is not worth the candle. However, the nature of this appeal constrains this Court to come down to the hard facts of the appeal.

The appellants seem to have lost sight of the pertinent law to the effect that respondents in appeals of this nature have always rested H their cases on a substantial compliance and not on an absolute compliance with the provisions of the Electoral Act in order to sustain the return of the winner in the election as the 1st respondent here and that in such circumstances credible witnesses have to be called by the petitioners as the appellants here to prove their case of substantial

non-compliance. To discharge that onus, becomes a nightmare where as here the criminal and civil allegations as taken by the appellants, the very basis of the petition, are so intertwined that severance is not practicable. See *Uche v. Elechi* (supra). In this matter one may well ask whether the appellants have otherwise proved their case as per the petition. It is against this background that I have set out to examine more closely the appellants' case as per their brief in which they have raised the issues of some alleged irregularities made *ad nauseam* therein to wit: of not having given due credence to the evidence of pw1 - pw65 in the case by the trial Tribunal as confirmed by the lower court. The answer to the question whether the appellants have been able to dislodge the findings of the two lower courts on this issue is definitely in the negative because their witnesses' evidence as per their depositions on this score has been substantially based on hearsay and therefore, inadmissible. In that regard the pw1 - pw63 have been unable to confine their evidence to what they, each of them, - pw1 - pw65 have seen and observed by their personal knowledge themselves in contradiction to what their polling agents (who have not testified before the Tribunal) have given to them by their oral reports. Having lumped the two separate streams of evidence together as given by them to the Tribunal their case in that "regard is bound to fail as the Tribunal's duty as confirmed by the lower court does not include disentangling such confusion: See section 115 of the Evidence Act. There is therefore no better way to describe their evidence (i.e. of pw1-pw65) that to hold their evidence on the whole as hearsay and so not being legal evidence worthy of credence to be given any probative value. Both lower courts rightly in my view rejected their evidence; even then as none of the polling agents have been called to testify in corroboration before the Tribunal. The rejection of their evidence no doubt has dealt a fatal blow to the appellants' case in the petition to the point of having no leg on which to stand. This confusion has been further compounded as some of pw1-pw65, about 22 of them who are illiterates have needed to be protected under the Illiterates Protection Act. It is the law that where a witness as an illiterate has made his statement in a foreign language as in this case in Hausa language, that both the statement in a foreign language and the English translation thereof have to be tendered together and in that case the jurat so provided in Respect of the

statement must be signed by an interpreter who recorded the statement. This process has not been followed for the rest of the 22 illiterates as witnesses in this matter vis-à-vis their depositions recorded by unidentifiable persons as found and rejected by the Tribunal and rightly upheld by the lower Court. It is not being denied that the depositions of the 22 of them have been taken and recorded under strange circumstances without due adherence to the provisions of the illiterate protection law requiring the insertion of jurats properly so attested and signed by an identifiable interpreter as the maker. These statements have been rightly rejected by the Tribunal and confirmed by the lower court for their inadmissibility in evidence as not having complied with the provisions of Illiterates Protection Act which precludes drawing the inference that any of the 22 Hausa witnesses have understood the contents of their depositions. See Ezera v. Ndukwe (1961) ANLR 564. Even then it has attacked the competency -of the petition. These critical aspects of the appellants' case in that regard have simply 'been barely renovated and represented without more by appellants to this court for further re-evaluation where as I have said above the two lower courts have rightly rejected the same on the best evidence rule. All I am attempting to say here is that no attempt has been made by appellants to improve their case excepting re-submitting without more their case on issues previously considered by the two lower courts for this court to re-evaluate them when the facts and evidence upon which the two lower courts have based their findings are replete in the record in support thereof (of their findings) and have not been showed to be perverse or a clear violation of any principles of law or procedure leading to any miscarriage of justice. The findings are supported by the facts and evidence on the record.

In demonstration of the incompetency of these witnesses, the lower court at page 3909 of the record has concluded as follows:

"The lower Tribunal in its judgment made specific findings that those witnesses failed to distinguish between what they saw and what they were told by their polling agents. The tribunal also found that the witnesses pw1-pw65 did not only fail to disclose even the names of those agents who told them what happened at the polling stations, but also faulted to present to the Tribunal any written report from any of the agents of what happened at the polling stations. The deci-

sion of the lower Tribunal not to place any probative value on the evidence of pwl- pw65 cannot be faulted.”

And at p.3655 of the records the Tribunal has continued as follows:

B *“Even witnesses who testified before us that they deposed to their witness statement in English their depositions contained illiterate jurat. (There are 22 of those witnesses.) All the said jurats were not signed by the interpreter; though the witness kept mentioning the name of one Sunday Matthew who is a lawyer. This creates a distinct impression in our minds that the written depositions were haphazardly mass-produced and names of witnesses, units, wards and local governments were inserted. They lack the well know individuality and distinction required of a legal deposition which affects the weight we attach to them and we so held.”*

D The lower court in its reaction to the findings on the evidence of pwl-pw65 at p.3610 of the record said:

E *“The lower tribunal in its judgment made specific findings that those witnesses failed to distinguish between what they saw and what they were told by their polling agents. The tribunal also found that the witnesses pwl-pw65 did not fail to disclose even the names of those agents who told them what happened at the polling station, but also failed to present to the tribunal any written report from any of the agents of what happened at the polling station.”*

F These findings apart from being concurrent findings on questions of facts cannot be faulted as they are unarguably supported by facts and evidence replete in the Record of Appeal. I uphold them as they have not been showed to be perverse nor have occasioned any injustice. The probability of the appellants’ case overall has suffered G its greatest damage by the evidence of PW66. And it is most astounding he has been called as his evidence as an expert from the start to finish has lacked any credibility, as it seemed as it has been played out of a comic story book. It is as hopeless as that. He, with his team, has been called to conduct physical inspection of the Electoral materials H deployed in this exercise and to investigate and report on them. These materials, ordinarily would have been examined and analysed by biometric or forensic means and not probably simply by naked eyes which is the only means by which pw66 has attempted to examine the thumb prints etc vis-à-vis the contention of multiple thumb print-

ing and voting as per the Electoral materials used in the election. The futility of the exercise is evidence from the start of it, as PW66 is not an expert to prove the unnecessary gloss if an/ put on these materials. These investigations of the Electoral materials have involved Exhibits p760 - p771 tendered from the bar and more or less dumped on the Tribunal. It is submitted by the appellants that these exhibits have not been properly evaluated by the lower courts and that if the lower courts had so done it would have tilted the scales of justice in the appellants' favour in the petition. Indeed in my view, the lower Courts from the records have given due consideration to PW66's evidence.

The foregoing abstract of the trial Tribunal's consideration of pw66's evidence is supported by the evidence and facts on record. Again, this issue which has been exhaustively tried by the lower courts have been repackaged and re-submitted on similar arguments to this court to be re-evaluated and it is not good enough and to underscore the weightlessness of his evidence on this point the findings of the Tribunal as confirmed by the lower court against it as at P.3912 of the record is as set out thus:

"it is clear from the record before me that pw66 did not participate in the election that was attacked and did not also witness the conduct of the election. He had no expert knowledge or any knowledge superior to that of the judge of the Tribunal".

It is no wonder then that the Tribunal has so castigated pw66's ability to inspect these electoral materials with his naked eyes in analyzing the documents. The witness clearly does not qualify as an expert witness under the Evidence Act as he has not showed any special skill in the field in which he is called to testify and as it is the judge that decides whether or not a witness is an expert based on his knowledge and skill, the Tribunal based on its opinion rightly dismissed pw66's evidence as worthless in that regard and is duly supported by the facts and evidence as per the record. See *Azu v. The state* (1993) 6 NWLR (pt. 299) 303. As a follow-up, I have to say that it is not clear what the appellants have wanted this court to make of the evidence of pw66 excepting to show the desperation of the appellants' case in the matter; honestly it is difficult to find. And I do not see the need of examining the case of dumping of the said exhibits in this matter on the Tribunal save to hold that on the peculiar facts of this

matter that these exhibits have been so dumped and have been rightly found to have no evidential value in this matter.

They appellants have not come to this court on any new cogent, and substantially arguable point or points in this appeal howbeit but on a palpably weak evidence of PW1- pw65 and pw66 of little or no probative value as posited by the appellants at the lower courts and here. Simply put, this court therefore cannot see any grounds to interfere with the unimpeachable decisions of the two lower courts in this appeal and to set aside the concurrent decisions of the two lower courts when the appellants have failed to prove their case and they have to succeed on the strength of their case. I have found their proposition in this respect on the above premises as *non-sequitur*. Again more particularly as there is no miscarriage of justice in this matter.

I must end this judgment by adverting to the principle enunciated in *Woodward v Sarson* (1989), 10 CP 733 at 751 per Lord Coleridge on the quantum of materials on which to predicate substantial non-compliance as a complaint in an election matter so as to nullify the result therefrom. I cannot overemphasize its applicability to this case. The instant ejection from the evidence as found by the Court has been conducted in substantial compliance with the Electoral Act. And so must stand. On the backdrop of the principle from *Woodward's* case (*supra*) it seems to me that the result of the election has not been 'affected by the alleged non-compliance as the 1st respondent has won with a clear lawful majority of votes in the Election. I must also say that I do not find it necessary to involve examining the principle in *Morgan v Simpson* (1975) QB 151 per Lord Dining MR on the question of another angle from which to construe the issue of substantial non-compliance as it has not frontally arisen from the facts and circumstances of their case here.

It is certain from the foregoing findings that the appellants have challenged events that have happened at the venue of voting i.e. at the polling units and as the petitioners they cannot all by themselves be personally present at all the polling units in this case i.e. at the eleven Local Government Areas in dispute here. They must necessarily rely on the testimonies of their agents and supervisors who are on the ground watching these scenarios play out and it is their evidence of what have happened at the various polling units that are

admissible as the best evidence of what have happened thereat and not the evidence of PW1 to PW65 and PW66. See *Ogbu v. Nnaji* (1999) 4 NWLR (Pt. 597) 87.

For the above reasons and fuller reasons in the lead judgment, this appeal is most unmeritorious and a sheer waste of the valuable; time of this court. I therefore, agree with the lead judgment which has comprehensively and satisfactorily dealt with all the issues identified for determination here in dismissing this appeal. Again, I too dismiss it and abide by the order in the lead judgment.

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PETER-ODILI JSC

I agree totally with the judgment just delivered by my learned brother Clara Bata Ogunbiyi JSC. In support of the reasoning, I shall state some comments.

D

This is an appeal against the judgment of the Court of Appeal, Yola, Adamawa State delivered on 22nd September, 2012, in which that court dismissed the appeal against the decision of the Governorship Election Petition Tribunal, Yola delivered on 25th day of July, 2012 which dismissed their petition.

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FACTS

On the 4th day of February, 2012, the 4th respondent conducted in Adamawa State election to the Office of Governor of Adamawa State. The 1st and 2nd appellants were the Governorship and Deputy Governorship candidates respectively of the 7th respondent while the 1st and 2nd respondents were the Governorship and Deputy Governorship candidates respectively of the 3rd respondent at the election. At the end of the election, the 4th, 5th and 6th respondents declared the 1st respondent winner, having credited him with 302,953 votes against 241,023 votes credited to the 1st appellant. The difference between them in votes being 61,930 votes.

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Dissatisfied with the return of the 1st respondent as winner of the election the appellants and their political party, the 7th respondent filed a petition at the Governorship Election Tribunal, Yola against the return of the 1st respondent as winner of the election. The complaints of the appellant in the petition were limited to particular units and wards in 11 Local Governments out of the 21 Local Governments in Adamawa State. The more detailed account of the com-

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plaints are well stated in the lead judgment.

On the 5th November, 2011 date of hearing, Chief Akin Olujinmi SAN of the appellants adopted their brief of argument filed on the 15/10/12. In the brief were couched nine Issues for determination which are as follows:

B 1. Whether the lower court gave proper consideration to the complaint of the appellants concerning the refusal of the trial tribunal to give evidential value to the evidence of 22 of the appellants witnesses on the ground that those who interpreted the witness statements of the witnesses to them failed to sign the depositions to show
C that the makers of the depositions knew the contents thereof.

2. Whether on a proper consideration of the petition and the complaint of the appellants against the decision of the trial tribunal, the lower court was right in its holding that it was impossible to sever
D civil from criminal allegations.

3. Whether the lower court properly considered the complaints of the appellants against the decision of the trial tribunal which had reduced the basis or hub of the petition to only criminal allegations notwithstanding that the petition raised both civil and criminal allegations.
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4. Whether in the light of the materials before the lower court, the court properly considered the case of abandonment of pleadings made by the appellants against the respondents.

F 5. Whether having regard to the issues raised in the petition and the evidence on record, the lower court was right when it held that the tribunal was correct to have adopted issues distilled by the 3rd respondent.

6. Whether it was proper for the lower court to dismiss the
G appellants' issue six without giving it any consideration at all.

(sic) brief were framed seven (7) issues for determination stated hereunder thus;

H 1. Whether their Lordships of the court below were right in upholding the decision of the tribunal in refusing to give credence to the evidence of PW1 - PW65 on the ground that the evidence of those witnesses constituted hearsay evidence in that the witnesses failed to distinguish between what they saw themselves and what they were told by their polling agents quite apart from the fact that some of the depositions made in Hausa language were translated

into English Language by unidentified persons who failed to sign the jurat to show that the makers of the depositions knew the contents thereof.

2. Whether their Lordships of the court below were right in upholding the decision of the tribunal that there was no duty on the respondents to call evidence in rebuttal of what had not been established by the appellants since the non-compliance alleged was not proved and that the petition was predicated largely on criminal allegations which were not established beyond reasonable doubt apart from the fact that both civil and criminal allegations were so intertwined in the pleadings as to make the doctrine of severance inapplicable.

3. Whether their Lordships of the court below were right when they upheld the decision of the tribunal rejecting the evidence of PW66 and his report Exhibit 759 on the ground, amongst others, that he was not an expert, had not witnessed the election and had no expert knowledge or any knowledge superior to that of the judges of the tribunal and that his evidence constituted inadmissible opinion evidence.

4. Whether their Lordships of the court below were right when they ruled that appeals are founded on the ratio decidendi of the judgment and that the complaint that the learned judges of the tribunal preferred the issues formulated by the 3rd respondent to those formulated by the appellant did not arise from any of the ratio decidendi of the judgment of the tribunal and therefore upheld the decision of the tribunal to determine the petition on the basis of issues formulated by the 3rd respondent as opposed to those formulated by the appellant.

5. Whether their Lordships of the court below were right when they upheld the decision of the tribunal to the effect that forms ACSAs, ECSBs, ECSCs, ECSDs and voters registers and other electoral documents tendered from the bar by counsel to the appellants had no evidential value on the ground that they were dumped on the tribunal not having been tied or related to the appellants' case through witnesses.

6. Whether the learned justices of the court below erred in law when they dismissed the appeal on the ground that it was completely lacking in merit.

7. Whether the learned justices of the court below upheld without justification or due consideration the decision of the tribunal refusing to give probative value to the evidence of PW1 - PW65 or whether they did so after due consideration.

Mr. Egwuonwu, learned counsel for the 3rd respondent adopted their brief settled by Abdulahmid Mohammed and filed on 19/10/12. In it were raised seven (7) issues for determination as follows:

1. Whether their Lordships of the court below are right in upholding the decision of the tribunal in refusing to give credence to the evidence of PW1 -PW65 on the ground that the evidence of those witnesses constituted hearsay evidence in that the witnesses failed to distinguish between what they saw themselves and what they were told by their polling agents quite apart from the fact that some of the depositions made in Hausa language were translated into English language by unidentified persons who failed to sign the jurat to show that the makers of the depositions knew the contents thereof.

2. Whether their lordships of the Court of Appeal were right when they held it is only when the appellants prove the allegations made in the petition that the respondents are entitled to call evidence in rebuttal and that the Petition was based on criminal allegations which were intertwined in the pleadings making them un-severable.

3. Whether their lordships of the Court of Appeal were right when they upheld the decision of the tribunal in determining the petition of the appellants on the issues formulated by the 3rd respondent as opposed to those formulated by the appellants.

4. Whether their lordships of the Court of Appeal were right when they upheld the decision of the tribunal rejecting the evidence and report of exhibit 759 of the PW66 as being inadmissible.

5. Whether their lordships of the Court of Appeal were right when they upheld the decision of the tribunal to the effect that the forms ACSAs, EC8Bs, ECSCs, ECSDs and voter registers and other electoral documents tendered from the bar by the appellants counsel lacks evidential value on the ground that they were dumped on the tribunal without relating them to the appellants case through the witness of the appellants.

6. Whether the learned justices of the Court of Appeal were right when they dismissed the appeal of the appellants on the ground

that it was completely lacking merit.

7. Whether the learned justices of the Court of Appeal were right when they upheld the decision of the tribunal refusing to accord probative value to the evidence of PW66.

For the 4th, 5th and 6th respondents was filed a brief of argument settled by Hassan M. Liman SAN of the 14/10/12 which was adopted of counsel on their behalf. In the brief of argument were formulated seven (7) issues for determination, viz: B

1. Whether the Court of Appeal was right in upholding the decision of the trial tribunal that the written depositions filed by the appellant's witnesses and the appellants failure to name the polling agents or to call the polling agents as witnesses affected the weight to be attached to the depositions and or amounted to inadmissible hear-say evidence. C

2. Whether the Court of Appeal was right when it affirmed D the decision of the tribunal which declined to apply the doctrine of severance of pleadings in view of the nature of the appellants' petition and that the appellants have not established their criminal allegations on proof beyond reasonable doubt.

3. Whether the Court of Appeal was right when it affirmed the holding of the learned Judges of the tribunal that the evidence of PW66 did not establish the corrupt practices. Malpractices, irregularities or acts of non compliance alleged by the appellants in the petition. E

4. Whether the Court of Appeal was right in its resolution of the issue raised by the appellants on alleged abandonment of pleadings by the respondents at the trial tribunal. F

5. Whether the Court of Appeal was right when it affirmed that the learned Judges of the trial tribunal were right to have relied on the three issues formulated in the 3rd respondent Written Final Address in determining the petition. G

6. Whether the Court of Appeal was right when it affirmed the decision of the trial tribunal which refused to give probative value to forms ACSAs, EC8Bs, ECSCs, EC8Ds, voter registers and other electoral documents tendered from the bar by the counsel to appellants on the ground that they were dumped on the tribunal. H

7. Whether in the light of the pleadings and evidence led by the appellant in-proof of their case, the Court of Appeal was right

when it affirmed the dismissal of the petition and the refusal of the tribunal in not returning the 1st respondent herein as the elected Governor of Adamawa State.

I shall restrict my comments to Issues 2 and 9 distilled by the appellants which are as follows:

B 2. Whether on a proper consideration of the petition and the complaint of the appellants against the decision of the trial tribunal, the lower court was right in the holding that it was impossible to sever civil from criminal allegations.

C 9. In the light of the pleadings in the petition, the evidence led in support and the failure of the respondents to call evidence to controvert the evidence of the appellants, was the lower court right in dismissing the appellants' appeal.

(sic) conclusion that the case of AD v. Fayose (2004) 8 NWLR D (pt. 876) 639 applied to hold that severance was not applicable. Learned counsel said the case of AD v. Fayose (supra) did not apply and the result of what the trial tribunal did occasioned a miscarriage of justice and the decision should be set aside. That going along with what the tribunal did, the Court of Appeal was in error since they did E not give due consideration to the appeal of the appellant.

Learned Senior Advocate for the appellant had set out snippets of various testimonies of their witnesses at the tribunal contending that the evidence proffered were overwhelming and un rebutted and so no basis for the tribunal and affirmed by the lower court that F the appellants had failed to prove their case beyond reasonable doubt in circumstances of civil standard of proof which were called for and the criminal standard of proof for those areas which were purely criminal. That this error occurred because the two courts below operated from the stand point that the allegations of the appellants were G criminal. He further submitted that personal knowledge evidence of their witnesses were treated as testimonies stemming from information received from third parties which was not the correct state of affairs. He cited section 126 of the Evidence Act (as amended), H Aregbesola v. Oyinlola (2011) 9 NWLR (Pt. 1253) 458 at 562-563.

Chief Olujinmi of senior counsel said the Court of Appeal should have found what the tribunal did as perverse especially with the tribunal ascribing to petitioners witnesses testimonies that were not theirs. Of particular mention being the Tribunal using the testi-

mony of PW20 which was limited to his specific area of operation as yardstick for other testimonies of witnesses.

Responding for the 1st and 2nd respondents, Mr. Kanu Agabi SAN said the appellants' as petitioners ought to establish their case on the strength of their evidence and not on the weaknesses of the case of the respondents. He cited *CPC v INEC (2012) FWLR (Pt.617) 605 at 633 - 634*. He said the appellants admit that the criminal and civil allegations were intertwined but that the tribunal should have separated them. He went on to say that the issue of severance of Pleadings upon which the appellants place so much emphasis was the ultimate proof that the petition was speculative. That the criminal allegations were made in virtually every paragraph of the petition and if those paragraphs were struck out there would be little or nothing left to go to trial. That the bottom line is that the allegations were not proved by the appellants. He referred to *Nwobodo v. Onoh (2004) 10 WRN 27 at 85*; *PDP v. INEC (2012) 7 NWLR (Pt. 1300) 538 at 560*; *Falae v. Obasanjo No.1 (1999) 4 NWLR 4 (Pt. 599) 435*; *Wali v. Bafarawa (2004) 16 NWLR (Pt. 900) 6 at 7*.

That the non-compliance pleaded was not substantial. He cited *Uche v Elechi (2012) 3 SC (Pt. 1) 26*. Also that the appellants failed to adduce credible evidence in proof of their petition and so the respondents were not obliged to adduce any evidence in rebuttal. He cited *Buhari v. Obasanjo (2005) ALL FWLR (Pt. 275)7 at 48*. That the failure of the respondents to call evidence did not convert incredible evidence to credible evidence. He cited *M. I. N. Ltd v. M. F. K. W. A. Ltd (2005) 10 NWLR (Pt. 934)*; *Konwei v. IGP (2007) ALL FWLR 1699*.

Learned counsel for the 3rd respondent contended that appellants admitted the interwoven nature of the criminal and civil allegations and so counsel at the address stage calling on the court of trial to sever the allegations into the different compartments of criminal and civil respectively was outside the law since such an application needed be formally presented and not during counsel's address. That neither the criminal nor the civil allegations were proved by the appellants. He stated on for the 3rd respondent that there was no nexus between the alleged electoral malpractices and the respondents. That cross-exam of the witnesses of the appellants damaged irretrievably the case of the appellants.

Mr. Liman SAN for the 4th, 5th and 6th respondents submitted that the address of counsel and in this instance for the appellant cannot take the place of evidence however well presented since it cannot cure the shortcomings in the evidence proffered. He cited *Niger Construction Ltd v. Okugbeni* (1 987) 2 SC 1 08 at 144.

B The main thrust of the question raised in respect to whether or not the Trial Tribunal was right in not severing the criminal allegations from the civil ones and from which the appellant could have succeeded in proving the civil allegations and thereby establish his case and perhaps the declaration as winner he seeks. In answer it has to be stated that the parties are not disputing the power of court to carry out severance of the criminal from the civil allegations when necessary, the grey area in answer is whether such a call on court to effect such a severance can be made through counsel's final address D and the circumstances under which the severance can be made.

Indeed where the occasion calls for it, severance can be and this is settled law and practice. See *Nwobodo v. Onoh* (1984) NSCC 1 at 16 – 17, *Wuam v. Ako* (1999) 5 NWLR (pt. 601) 150 at 163. In the case in hand the tribunal refused the severance sought on the ground that the criminal allegation and intertwined with the civil allegations, such that severance was impossible and the consequence was that the only way to prove their case acceptably would have to be by the criminal standard of proof as proof on the preponderance of evidence would not do the work of the discharging of the onus of proof in the prevailing circumstances. The Appeal Court agreed with this. For a fact going into the petition there are numerous paragraphs of the complaints which were criminal in nature. Where such criminal allegations did not stand alone, connotations of a criminal nature got interwoven with what ordinarily would have been classified as civil allegations. It therefore emerges that the surgical operation which is really what severance is all about is impossible to be carried out. The only way open to the appellant at the trial stage in the situation was to go for the higher standard of proof for the entire petition in ensuring that nothing was left to chance as the requirement was of a greater degree than would have been the case if the criminal allegations could be confined to its compartment and the civil on their own so that a proof on the balance of probability could be used for those in the compartment of the civil, good enough to establish the case of the H

petitioner/appellant. I rely on Agagu v. Mimiko (2009) 7 NWLR (Pt. 1140) 342 at 401; AD V. Fayose (2005) 10 NWLR (Pt. 932) 121 at 239

As if the possibility of the severance sought is not in sight, the next nagging question is whether the application to so sever could be taken seriously as was done in this instance by counsel during his address. The point has to be made without a doubt that the address of counsel though very important remains what it is, the persuasive urging of the counsel for court to go along the particular side urged, it does not change the coloration of being submissions of counsel to the evidence of a party. The chameleonic change in colour at will is not available to the address of counsel which does not possess the power to cure defects in either pleadings or evidence. What I am trying to say is that the final address of counsel is not the stage for an application for the indulgence of such magnitude sought by a party for the trial court to effect the severance that is needed. A more formal, well defined application is called for. I place reliance on Niger Construction Ltd v. Okugbeni (1987) 2 SC 108 at 144; Luke v. R. S. H. T. D. A. (2010) 5 NWLR (Pt. 1188) 604; Udeozo v Federal Republic of Nigeria (2007) 15 NWLR (Pt. 1058) 399 at 518.

The tribunal and the court below made concurrent findings of” facts which based on the pleadings and evidence before the trial court are unassailable and being in the absence of a miscarriage of justice, or a violation of some principles of law or procedure or any substantial error apparent on the face of record. It cannot also be said those findings were perverse, therefore this court cannot venture into interfering or intervening on what transpired in the two courts below. See Mogaji v. Cadbury (Nig) Ltd (1985) 2 NWLR (Pt. 7) 393; Layinka v. Makinde (2002) 10 NWLR (Pt. 775) 358; Mini Lodge Limited v. Ngei (2010) ALL FWLR (Pt. 506) 1806 at 1834.

In the light of the foregoing and the fuller reasoning in the lead judgment, I too dismiss the appeal. I abide the consequential orders made in the lead judgment.

MUHAMMAD JSC

I have had a preview of the lead judgment of my learned

brother Ogunbiyi, JSC just delivered. I entirely agree with my lord that the appeal lacks merit and it deserves to be dismissed.

It must be emphasized that the appellants whose task in the appeal is to off-set the concurrent findings of the two lower courts seem to have set out on a near-impossible bid. All the grounds in their Notice
B of Appeal call for a further evaluation of the evidence they led on specific points at the tribunal. Theirs certainly is not an easy task. This Court is always reluctant to allow such appeals except where the appellant succeeds in showing that the error in the judgment appealed
C against has occasioned miscarriage of justice. See *Echi v. Nnamani* (2000) 8 NWLR (Pt.667) 1 at 12 and *Adimora v. Ajufor* (1988) 3 NWLR (pt.80) 1.

In the case at hand the Appellants failed to prove all the grounds in their petition. The evidence they led are either of little probative
D value or none at all as they are inadmissible in the first place. The tribunal had no difficulty in seeing through these lapses in Appellant's case and correctly finding that the Appellant after all led no evidence whatsoever in proof of their petition. The lower court's affirmation of the unassailable decision of the tribunal is impeccable. It cannot be
E interfered with. I affirm same and dismiss the unmeritorious appeal for this and the further reasons adumbrated in the lead judgment. I abide by the consequential orders made in the lead judgment including the one on cost.

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