

SUPREME COURT OF NIGERIA
MONDAY 15TH FEBRUARY, 2016. SC. 1/2016
**CORAM:- M. MOHAMMED CJN, M. S. MUNTAKA-
COOMASSIE, J. A. FABIYI, O. O. ADEKEYE,
M. PETER-ODILI, JJSC**

UDOM GABRIEL EMMANUEL APPELLANT
AND

1. UMANA OKON UMANA
2. ALL PROGRESSIVE CONGRESS
3. PEOPLES DEMOCRATIC PARTY
4. INDEPENDENT NATIONAL
ELECTORAL COMMISSION RESPONDENTS
5. RESIDENT ELECTORAL
COMMISSIONERS, AKWA IBOM STATE
6. NIGERIA POLICE FORCE

ELECTION PETITIONS - Crime - Allegation of - Proof - Petitioner who makes allegation of crime - The basis of challenging an election - Must prove that allegation beyond reasonable doubt (H1)

PLEADINGS - Averments - Evidence - Averments in pleadings which are unsupported by evidence go to no issue - And must be discounted (H2)

APPEALS - Grounds - Purpose of - Is to clearly indicate the areas of appellant's complaint - And appellant cannot argue grounds not related to the judgment appealed against (H3)

COURTS - Judgment - Basis - Court is to ensure that its judgment - Is confined to issues raised by parties - But where it raises question suo motu - Parties must be given opportunity to be heard (H4)

JUDGMENTS - Perversity - A decision is perverse when inter alia - It ignores or does not follow principle of law - Which is binding (H5)

ELECTIONS - Results - Regularity of - Presumption of regularity enjoyed by INEC's results are not rebuttable by postulations - But by

cogent credible and acceptable evidence (H6)

DOCUMENTS - Public document - Certified true copy - Document can only be called CTC - If in addition to payment of legal fees - It is dated and subscribed to - By officer with his name and official title (H7)

ELECTION PETITIONS - Votes - Accreditation - Proof - Burden of proving non accreditation of votes is on petitioner - Hence CA was wrong to have relied solely on card reader - To nullify appellant's election (H8)

EVIDENCE - Admissibility - Court is entitled not to place probative value on evidence - Which does not pass the test of cross examination (H9)

EVIDENCE - Exhibit - Use of - Party who produces exhibit so that court could utilize it - Must not dump it on the court - But must tie it to relevant aspects of his case (H10)

FACTS

Petitioners/1st and 2nd respondents filed this petition at the Akwa-Ibom State Governorship Election Petition Tribunal, challenging the election and return of appellant as the Governor of the State. 4th respondent conducted the gubernatorial election in the State on the 11th April 2015. 3rd respondent sponsored appellant in the election. On the other hand, 1st respondent was sponsored by 2nd respondent for the same election. At the end of the polls, 4th respondent declared and returned appellant elected. 1st and 2nd respondents were not satisfied with this declaration.

Hence, they brought the petition, contending among other things that the election was invalid by reason of corrupt practices and non compliance with the provisions of the Electoral Act 2010 (as amended). The parties called several witnesses and tendered exhibits in support of their respective cases. In its judgment, the Tribunal nullified the results of the said election in eighteen out of the thirty one Local Government Areas of the State. Dissatisfied, appellant appealed to the Court of Appeal. The Court affirmed the Tribunal's order nul-

lifting appellant's election in eighteen LGAs and in addition ordered the nullification of the entire results of the governorship election of April 11th 2015 in Akwa Ibom State. Aggrieved further, appellant appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(I) Whether the decision of the Court of Appeal affirming the judgment of the Tribunal that nullified the results of the election in eighteen LGAs of Akwa Ibom State and ordering re-run elections thereat on the ground that the voters in the said LGAs were disenfranchised is not perverse and in breach of the appellant's right to fair hearing and liable to be set aside by this Honourable Court?

(II) Whether the Court of Appeal was right in holding that there was over voting in the election and that the alleged over-voting justified the finding of the Tribunal in regard to purported disenfranchisement of voters and the consequent nullification of the results of the election in the eighteen LGAs?

(III) Whether the decision of the Lower Court affirming the nullification of the results in the eighteen LGAs is not perverse having regard to the fact that the Court relied heavily on legally inadmissible documentary evidence, the makers of which did not testify before the Tribunal?

(IV) Whether the Court of Appeal was right in holding that the 'beyond reasonable doubt, standard of proof enunciated and settled by this Honourable Court was not applicable to the criminal allegations made in the petition, and/or by the first and second respondents?

HELD (Unanimously allowing the appeal per **NWEZE JSC**)

ELECTION PETITIONS - Crime - Allegation of - Proof

1. In my humble view, it is difficult to see how the Lower Court could have, legitimately, wished away the position of this Court which, interpreting the above section, has maintained that a Petitioner who makes an allegation of the commission of a crime the basis of challenging the election of a candidate who was returned, must prove that allegation beyond reasonable

doubt.

Now, as pointed out above, the Lower Court, correctly, found that the allegations of violence, voter intimidation, hi-jacking and snatching of electoral materials, kidnapping, and others, [in paragraphs 27, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 54, 61 (i-iv), 61 (x) (xi), 72(ii), 26-43, 76, 77, 78, 82, 83, 88 and particularly Paragraph 15(1) of the first and second respondent's Petition are criminal in nature and ought to be proved beyond reasonable doubt.

In all fairness, the said Court was right when it held that *"the [trial] Tribunal should not have set aside the provision of the law in proving corrupt practices on the standard of proof beyond reasonable doubt,"* [page 5053 of Vol 5 of the record]. What, however, I find most worrisome in the reasoning of the Lower Court is that, having found that the trial Tribunal, without any warrant whatsoever, purported to *"set aside the provision of the law in proving corrupt practices on the standard of proof beyond reasonable doubt,"* it proceeded to endorse its [the Tribunal's] nullification of the appellant's election in the said eighteen LGAs. The simple truth is that, having failed to prove the allegations in the above paragraphs apropos the said eighteen LGAs, the Petitioners' claim in respect thereof should have been dismissed. (p. 1647 H)

PLEADINGS - Averments - Evidence

2. Regrettably, while the Petitioners failed to prove their allegations, the Lower Courts still found in their favour contrary to the general rule of evidence that cases must be proved *secundum allegata et probata*. That cannot be correct for, as a logical corollary, the allegations [allegata] or averments which a party makes in his pleadings and the proof [probate] he adduces in their support must correspond. In other words, the proof must, at least, be sufficiently extensive to cover all the allegations of the party. It cannot be otherwise for a pleading of averments in proof of which no evidence is offered, virtually, serves no useful purpose.

This is the rationale for the long line of authorities that averments in pleadings, which are unsupported by evidence,

are unavailing to the pleader as they go to no issue, and so must be discountenanced. The explanation is very simple. An averment in a pleading is not evidence and cannot be substituted for evidence. Such an averment does not, therefore, amount to proof unless it is admitted. (p. 1649 D)

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APPEALS - Grounds - Purpose of

3. In my view, there is considerable force in Dodo, SAN'S submission. This must be so for the purpose of Grounds of Appeal is to clearly indicate the areas of the appellant's complaint against the judgment appealed against.

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The said Grounds of Appeal, in turn, animate the issues for determining or resolving the appellant's complaint one way or the other.

That explains why such grounds are expected to isolate and accentuate, for attack, the basis of the reasoning of the decision being challenged. Having thus emphasized them, the appellant, just like a pleader is bound by the averments in his pleadings, is bound by his Grounds of Appeal. As such, he is not at liberty to argue grounds which are not related to the judgment appealed against.

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Accordingly, since the appellant did not challenge the trial Tribunal's findings or decision on grounds other than those accentuated in his Grounds of Appeal, such other findings, whether right or wrong, which are extraneous to the said Grounds, should not have been disturbed by the Lower Court. (pp. 1655 B/1656 D)

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COURTS - Judgment - Basis

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4. That is why it is always advisable for a Court to ensure that its judgment is confined to the issues raised by the parties. Even then, since the Lower Court decided to broach questions outside the ground of disenfranchisement canvassed by the appellant, it should have afforded the appellant [and the respondents] an opportunity of making their comments upon them before taking its decision on them. In effect, contrary to the submission of Chief Wole Olanipekun, what the Lower Court did amounted to a denial of the appellant's opportunity

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of being heard. Unarguably, that approach amounted to a mis-carriage of justice. (p. 1656 H)

JUDGMENTS - Perversity

- 5. As pointed out, a decision is said to be perverse when, inter alia, it ignores, overlooks or does not follow a principle of Law or procedure which is binding.** (p. 1657 G)

ELECTIONS - Results - Regularity of

- 6. Surely, the presumption of regularity enjoyed by INEC'S results are not rebuttable by presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence. This must be so for a Court of law can only pronounce judgment based on credible evidence presented and properly established before it. It is, thus, not at liberty to go outside the evidence and search for extraneous evidence in favour of the parties.** (p. 1659 B)

DOCUMENTS - Public document - Certified true copy

- 7. From the phraseology of the italicised clauses of Subsection (2) (supra), a document can only be called a certified copy of a public document if, in addition to the payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy, (Subsection 1, supra) it (the certificate) is dated and subscribed by such officer with his name and his official title."**

In effect, any document that falls below the above mandatory threshold is inadmissible as a certified copy of a public document.

The whole essence of the Court's insistence on the scrupulous adherence to the above certification requirement of public documents is to vouchsafe their authenticity, vis-à-vis, the original copies, to third parties. That explains why, in the absence of the original document only such, properly, certified copies are admissible as secondary copies of public documents "but no other kind of secondary evidence." (p. 1665 F)

ELECTION PETITIONS - Votes - Accreditation - Proof

8. It will be a costly assumption to rely exclusively on the Report of the Card Reader on accreditation as in this petition to determine the correct figure of persons who were accredited, doing so will be a gamble and a regrettable step.

From every available evidence, the Petitioners relied heavily or solely on the number of accredited voters as contained in exhibit 317 (the Card Reader Report) to conclude there were only 438, 127 accredited voters for the 11th April Governorship election in Akwa Ibom State.

As pointed out above, the Lower Court, regrettably, chose to ascribe to exhibit 317, the card Reader Report) such magnitude of credence that it formed the basis of its decision to nullify the appellant's ejection. In my humble view, that approach was wrong. Quite apart from the challenges associated with the Card Reader and its report (exhibit 317), which the DW24 identified in the unchallenged testimony, I hold that, contrary to the posture of the Lower Court, it was the trial Tribunal that correctly, captured the probative value of the said Card Reader report, exhibit 317.

I have no reason for departing from the above pronouncements which I adopt as part of my reasoning in this appeal. I, therefore, vacate the judgment of the Lower Court woven on the said exhibit 317. I, entirely, endorse the conclusion of the trial Tribunal that "*the burden to establish non-accreditation of 1, 222, 836 votes was on the Petitioners squarely*", page 3168, vol. 4 of the record.

They failed to do because as the trial Tribunal found "the Petitioners relied heavily or solely on the number of accredited voters as contained in exhibit 317 (the Card Reader Report) to conclude that there were only 438, 127 accredited voters for the 11th April Governorship election in Akwa Ibom State," (italics Supplied). I, also, agree with the trial Tribunal that it was "*presumptuous, fallacious...and [a] jurisprudential absurdity for the Petitioners to ascribe to exhibit 317 such magnitude of credence.*" With respect, the Lower Court was, equally, caught in this web of "*presumptuous, fallacious [...]* jurisprudential absurdity" of ascribing "to exhibit 317 such

magnitude of credence.” (pages 3764 -3765 of Vol 4 of the record). (pp. 1666 H/1668 A/1669 B)

EVIDENCE - Admissibility

9. What is more, there is, even, authority for the view that as
B “cross examination plays a vital role in the truth searching
process of evidence procured by examination-in chief it re-
lates to authenticity or veracity of the witness, a Court of law
is entitled not to place probative value on evidence which does
C not pass the test of cross-examination...” In my view, there-
fore, the Lower Court fell into grave error in placing reliance
on the said exhibits, whose makers were not available for cross
examination, in tampering with INEC’s declaration in favour
of the appellant in the said election in the said eighteen LGAs
D of Akwa Ibom State. The same thing applies to exhibits 5 and
6 which were not tendered by their makers. Worse still, these
exhibits did not indicate the date and time they were made.
 (p. 1673 H)

EVIDENCE - Exhibit - Use of

10. That is not the only snag with these exhibits. Contrary to
the position which this Court has taken in several cases, old
and recent, that a party who produces an exhibit so that the
F Court could utilise it in the process of adjudication must not
dump it on the Court, but must tie it to the relevant aspects of
his case, these exhibits were not so tied.

In effect, they were, simply, dumped on the trial Tribu-
nal. That was not good enough. (p. 1674 C)

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NOTABLE POINT OF INTEREST

RHODES-VIVOURE JSC

1. Elections – INEC to bear burden of proving a fair election

H A careful reading and understanding of decided authorities show that
 a petitioner has an uphill task of proving his petition in accordance
 with the Electoral Act. The petitioner is always saddled with difficult
 legal requirements and procedures.

To my mind I think it is high time something radical and good

the electoral process is done. It is suggested by me that the Electoral Act should be amended to shift the burden of proof to the Independent National Electoral (INEC) to prove that it conducted a fair and reasonable election. (p. 1684 G)

REPRESENTATION

D. D. Dodo, SAN; Chris Uche, SAN; Paul Usoro, SAN; Chief O. E. B. Offiong, SAN; Gordy Uche, SAN, with Dr. G.O.A. Ogunyomi; Nelson Uzuegbu; Reginald Nwobi; Nasir A. Dangiri; Isaac Anumudu; Audu Anuga; Dan Abia; James Odiba; Ofombuk Akpabio (Mrs.); Terhamba Gbashima; Utibe Nwoko; Adetola Ibironke (Miss); Obafolahan Ojibara; Mfon Udeme; A. F. Jumbo; Stella Ebrimoni (Miss); Patrick Okoh; Ime Edem-Nse; Samson A. Eigege; Luter I. Atagher; Ginika Ezeoke; Ikechukwu Duru; Yunusa Umaru; Prince Nwafuru; Olatunji Muritala; Emem Umoh (Miss); Ifeanyi Ndumnego; Kanayo Okafor; D Emmanuel Okorie; Uzoma Nwosu Iheme; Isaac Nwachukwu, E. J. Imuekemeh (Miss), Olakunle Lawal; Blessing Akinsehinwa; Francis Genesis; Modetus Atozie; Ufedo Tom-Yakubu (Miss); James Ebibi; Francis Nsiegbunam; Ijeoma Nwosu (Miss); Jummai Pam; Chinwendu Nduka-Edede (Miss); and Na-Eema Goje (Miss), for the Appellants E

Chief Wole Olanipekun, OFR; SAN; Solomon Umoh, San; Dayo Akinlaja, SAN, with Chief Victor Iyanam; Femi Morohundia; Bola Aidi; Austin Otah; Siji Olowolafe; Edet Ating; Benjamin Alabi; Effiong Abia; Ubong Offiong; Olabode Olanipekiun; Effong Oquong; Olubukola Araromi (Mrs); Aisha Aliyu (Mrs); Bolarinwa Awujoola; C. M. Dioji; F. S. Abiodun; Temitope Olanipekun (Miss); Adebayo Majekolagbei Tolu Adetomiwa; S. O. Enejah; Ademola Oyelayo; Madu Gadzama and Chukwudifu Mbamali, for 1st and 2nd Respondents G

Tayo Oyetibo, SAN and Adekunle Oyesanya, SAN, with Dominic Okon; Edet Bassey; Emmanuel Akpan; Nsikak Udoh; Paul Mgbeoma; M. Mene-Josiah; Faruk Khamagam; Onyinye G. Nwagbarra and Jennifer Adole, for 3rd Respondent H

Dr Onyechi Ikpeazu, OON; SAN; Elder Paul Ananaba, SAN with Raymond Anyawata; E. A. Ibrahim Effiong; Ijeoma Utchay (Mrs); Alex Ejiesieme; Onyinye Anumonye; Emeka Nri-Ezedi; Emeka Eze;

Ogechi Ogbonna; Nwachukwu Ibegbu; Obinna Onya; Chuka Ikpeazu; Julius Mba and Emmanuel Rukari, Esq for 4th and 5th Respondents

CASES REFERRED TO

- CCCTCS Ltd. v. Ekpo (2008) 6 NWLR (pt. 1083) 362
 B Chukwu v. INEC [2014] 10 NWLR (pt. 1415) 385
 Nobis-Elendu v. INEC [2015] LPELR-25127 (SC)
 Nwobodo v. Onoh (1984) 1 SCNLR 1
 Omoboriowo v. Ajasin (1984) 1 SCNLR 108
 C Buhari v. Obasanjo [2005] SCNJ 1
 Abubakar v. Yar'Adua [2008] 19 NWLR (pt. 1120) 1
 Insurance Brokers v. Atlantic Textile [1996] 9 10 SCNJ 171
 Housing Corporation v. Enekwe [1996] 1 SCNJ 98
 Odutola v Papersack Nig Ltd [2006] 18 NWLR (pt. 1012) 470
 D Ajuwon v. Akanni [1993] 9 NWLR (pt. 316) 182
 Magnusson v. Koiki [1993] 9 NWLR (pt. 317) 287
 Gundiri v. Nyako [2014] 2 NWLR (pt. 1391) 211
 Ogbu v. State [1992] 8 NWLR (pt. 295) 255
 Igago v. State [1999] 14 NWLR (pt. 637) 1
 E

STATUTES REFERRED TO

Electoral Act 2010 (as amended), ss. 45, 49
 Evidence Act 2011, ss. 104, 135(1)

F **LEAD JUDGMENT BY NWEZE JSC**

Upon hearing this appeal on February 3, 2016, I allowed it and undertook to adduce my reasons on Monday, February 15, 2016; that is, today. I shall, now, proceed to advance the reasons for my G said decision.

On April 11, 2015, the fourth respondent in this appeal, Independent National Electoral Commission, [INEC, for short] conducted election into the office of the Governor of Akwa Ibom State. The appellant in this appeal, Udom Gabriel Emmanuel, was the candidate of the Peoples Democratic Party, the third respondent herein (in this appeal to be, simply, designated as “PDP”). On the other hand, the first respondent, Umana Okon Umana, was the candidate of the second respondent, All Progressives Congress (hereinafter, simply, referred to as “APC”). Other political parties, equally, sponsored their

candidates.

At the conclusion of the Polls, INEC declared the appellant the winner and, accordingly, returned him as having been, duly, elected. The first and second respondents, who were aggrieved by that declaration, approached the Governorship Election Tribunal (subsequently in this judgment to be, simply, referred to as “the trial Tribunal”) with their Petition. The said Petition was woven around the following two Grounds in paragraph 15:

“15 (i) The election was invalid by reason of corrupt practices and/or non-compliance with the provisions of the Electoral Act, 2010 (as amended);

15 (ii) The first respondent [that is, appellant in this appeal] was not duly elected by majority of lawful votes cast at the election.”

The reliefs were framed in these terms in paragraph 92 of the Petition:

“(i) That it may be determined and thus determined and declared that the first respondent, Udom Gabriel Emmanuel, who was the candidate of the second respondent was not duly elected or returned by the majority of lawful votes cast at the Akwa Ibom State Governorship election held on Saturday, April 11, 2015;

(ii) That it may be determined and thus determined and declared that the said Governorship election of April 11, 2015 and the return of the first respondent. Udom Gabriel Emmanuel, by the third respondent are void/invalid by reason of corrupt practices, non-compliance with the provisions of the Electoral Act (as amended), violation and breaches of various provisions of the said Electoral Act, 2010, the INEC Guidelines and Regulations for the Conduct of the 2015 Governorship Election and Manual;

(iii) That it may be determined and thus determined and declared that the first respondent, Udom Gabriel Emmanuel, did not score and could not have scored majority of lawful votes cast in at least two thirds of the thirty one Local Government Areas of Akwa Ibom State at the Governorship election held on April 11, 2015, and thus his return by the third respondent is unconstitutional, irregular, null and void and of no effect.” [Italics supplied for emphasis]

Pleadings were, duly, settled and exchanged, whereupon the matter went to trial sequel to the consummation of the pre-trial proceedings. In a spirited attempt to prove their case, the Petitioners

marshaled a whopping number of fifty two witnesses. While the appellant called nineteen witnesses, four witnesses testified in defence of his party, PDP. The fourth and fifth respondents, equally, called four witnesses. The trial Tribunal admitted three hundred and sixty exhibits.

B In its judgment of October 21, 2015, [pages 3636 - 3794 of Vol 4 of the records, the trial Tribunal nullified the results of the said election in eighteen out of the thirty one Local Government Areas (hereinafter, simply, referred to as “LGAs”) of the said State. Anchoring its reasoning on the premise that the voters in these LGAs were disenfranchised, it [the trial Tribunal] ordered re-run elections there, [pages 3790 -3791, Vol 4 of the records]. It, however, upheld the election results in thirteen LGAS of the State. For its bearing on the appellant’s complaint against the judgment of the Lower Court in D this appeal, I shall take the liberty to set out the relevant part of the trial Tribunals reasons for dismissing the agitation of the petitioner before it. At pages 3790?-3791 of Vol4, it proceeded thus:

“Clearly the election in the nine Local Governments... together with the eleven Local Governments mentioned had challenge of credibility. Out of these eleven Local Governments, Ibesikpo Asutan and Uyo were earlier mentioned to have witnessed non credible elections. Therefore those two Local Governments are taken out in the computation. It means in simple arithmetical calculation that Local Governments where thousands of voters indicated to vote and were F disenfranchised were eleven...

We are of the firm opinion that the results declared by INEC in these Local Governments be nullified and are hereby nullified. The question is whether the non-compliance is substantial enough to invalidate the entire election? The answer is in the negative in view of G the Supreme Court decision in PDP v. INEC and Ors (2014) 9 - 10 SCNJ 39 - 10...

H Therefore, INEC is ordered to conduct a re-run election in these Local Governments so as to enable those whose constitutional right were breached to exercise their right of franchise...” (Italics supplied)

Disenchanted with the said trial Tribunal order which nullified results in eighteen LGAs, the appellant impugned it at the Court of Appeal (subsequently, simply, referred to as “the Lower Court”), [pages

3801 - 3846, Vol 4 of the record]. I pause here to observe that the first and second respondents did not file any Notice to contend that the judgment of the trial Tribunal be affirmed on grounds other than those contained in the above pages, that is, the order compelling INEC *“to conduct a re-run election in these Local Governments so as to enable those whose constitutional right were breached to exercise their right of franchise...”* [pages 3790 -3791 of Vol 4 of the records, italics supplied]. B

The proximate impulsion to the appeal herein was the order of the lower Court of December 18, 2015. In the said judgment, the Lower Court affirmed the trial Tribunal's order nullifying the appellant's election in eighteen LGAs and, in addition, ordered the nullification of the entire results of the governorship election of April 11, 2015 in Akwa Ibom State. C

The appellant herein was dissatisfied with the outcome of his appeal; hence, his appeal to this Court through his thirty-Grounds Notice of Appeal, [pages 5062 - 5098 of Vol 5 of the record]. He formulated four issues expressed thus:

ISSUES FOR DETERMINATION

(I) Whether the decision of the Court of Appeal affirming the judgment of the Tribunal that nullified the results of the election in eighteen LGAS of Akwa Ibom State and ordering re-run elections thereat on the ground that the voters in the said LGAS were disenfranchised is not perverse and in breach of the appellant's right to fair hearing and liable to be set aside by this Honourable Court? E
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(II) Whether the Court of Appeal was right in holding that there was over voting in the election and that the alleged over-voting justified the finding of the Tribunal in regard to purported disenfranchisement of voters and the consequent nullification of the results of the election in the eighteen LGAS? G

(III) Whether the decision of the Lower Court affirming the nullification of the results in the eighteen LGAS is not perverse having regard to the fact that the Court relied heavily on legally inadmissible documentary evidence, the makers of which did not testify before the Tribunal? H

(IV) Whether the Court of Appeal was right in holding that the 'beyond reasonable doubt, standard of proof enunciated and settled by this Honourable Court was not applicable to the criminal allega-

tions made in the petition, and/or by the first and second respondents?

On their part, the first and second respondents framed their own four issues in the following phraseology:

(1) Whether the Lower Court was not right in affirming the decision of the trial Tribunal which nullified the Governorship election in eighteen LGAS of Akwa Ibom State pursuant to the oral and documentary evidence adduced?

(2) Whether the Lower Court was not right in specifically holding that there was over-voting which vitiated the election?

(3) Whether the documentary evidence in this case were not admissible and properly relied on by the Lower Court?

(4) Whether the Lower Court was not right in holding that the trial Tribunal was in order by not applying standard of proof beyond reasonable doubt in this case?

The other respondents did not file briefs of arguments and, hence, did not formulate any issues for determination. In the determination of the merit of the appellant's complaint against the judgment of the Lower Court, I shall adopt the four issues which he formulated. After all, it is his appeal. However, since the first and third issues are woven around the complaint of the perversity of the findings of the Lower Courts, they will be dealt with together in the new two-pronged issue one.

As would be evident anon, the reasoning of the Lower Court, [pages 35 -38 of the Lower Court's judgment; pages 5053 - 5056 of Vol 5 of the record], which prompted the complaint in the Ground of Appeal from which the appellant's fourth issue eventuated, is, remarkably, abstruse, if not, out rightly, tendentious. As such, I would attend to that issue [issue four], first, before reverting to the other issues seriatim. In this judgment, therefore, the appellant's fourth issue will be disposed of as issue one.

ARGUMENTS ON THE ISSUES

ISSUE ONE (Appellant's original issue four)

Whether the Court of Appeal was right in holding that the 'beyond reasonable doubt' standard of proof enunciated and settled by this Honourable Court, was not applicable to the criminal allegations made in the petition, and/or by the first and second respondents?

At the hearing of this appeal on February 3, 2016, learned senior counsel for the appellant, D. D. Dodo, SAN, who with Paul Usoro, SAN, appeared with other counsel on the List, adopted the brief of argument filed on January 15, 2016 and the reply brief of January 27, 2016. He relied on them in urging the Court to allow the appeal. B

On this issue, the views of the Lower Court were quoted in extenso. Counsel wondered how the Lower Court could have advanced such views in the face of Section 135(1) of the Evidence Act, 2011: a section which prescribed the standard of proof beyond reasonable doubt where a petitioner in an election Petition anchors his complaint on grounds which are criminal in nature. C

He, further, impugned the Lower Court's conclusion that the trial Tribunal's failure to adopt the requisite standard of proof beyond reasonable doubt with regard to the petitioner's allegations of corrupt practices did not occasion any injustice on the appellant. On the contrary, he maintained that the non-application of the said mandatory standard of proof was prejudicial and detracted from the fairness of the trial Tribunals proceedings, *CCCTCS Ltd v Ekpo* (2008) 6 NWLR (Pt.1083) 362, 398. D E

In his view, the Lower Court's reasoning embodied in its decision which upheld the nullification of election results in the said eighteen LGAS, directly, sprang from the erroneous standard of proof which it adopted. Above all, he derided the said Judgment as perverse since the reasoning that yielded it was hinged on wrong principles of law, *Chukwu v. INEC and Ors* [2014] 10 NWLR (Pt.1415) 385, 416; *Nobis-Elendu v INEC and Ors* [2015] LPELR-25127 (SC). F
CONTENTION OF THE FIRST AND SECOND RESPONDENTS

Chief Wole Olanipekun, SAN, who with Adeniyi Akintola, SAN; Solomon Umoh, SAN; Dayo Akinlaja, SAN; Oladapo Olanipekun, SAN, and other counsel on the List, announced appearance for the first and second respondents, adopted the brief filed on January 22, 2016. G

He submitted that the kernel of the decision of the Lower Court on this issue was that over-voting and similar allegations of non-compliance are species of civil allegations for which the standard of proof required is the balance of probabilities, citing *Nwobodo v. Onoh* (1984) 1 SCNLR 1; *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108, 116 etc. H

Learned senior counsel contended that the appellant has not shown any part of the judgment of the trial Tribunal where it applied a wrong burden of proof.

As indicated above, learned senior counsel for the other respondents did not file briefs of argument.

B In his reply, Dodo, SAN, for the appellant, drew attention to paragraphs 6.1-6.5 of the Reply brief where it was pointed out that the Lower Court misapplied the burden of proving the allegations of “*the electoral offences that culminated into over-voting since election*
C *petition is a species of civil suit and not a criminal one.*”

He, equally, canvassed the view that the Lower Court, wrongly, affirmed the decision of the trial Tribunal with regard to the purported mutilations and alterations of Forms EC8B and EC8C - allegations of crime which required proof beyond reasonable doubt contrary to the positions of the two Lower Courts. He maintained that the above misapplications of the burden of proof worked complete injustice against the appellant, pointing out that the Lower Court’s finding that “there were mutilations to clean up over-voting” in one of the wards, [pages 5044 - 5045, Vol 5 of the record], was not
E borne out of the record.

RESOLUTION OF THE ISSUE

Earlier in this judgment, I had observed that the reasoning of the Lower Court, [pages 35 -38 of its judgment; pages 5053 - 5056
F of Vol 5 of the record], which prompted the complaint in the Ground of Appeal from which the appellants fourth issue eventuated, is, remarkably, abstruse, if not, out rightly, tendentious. I say so with profound respect to the distinguished Jurists of the Lower Court.

My Lords, first, permit me to invite attention to page 5052 of
G Volume 5 of the record where the said Court, correctly, summed up the legal position in these words “*where there are allegations of corrupt practices which are criminal in nature, the proof should be beyond reasonable doubt see, Ucha v Elechi (sic,) [2012] 3 SC (pt 1) 26, 363; Aregbesola v. Oyinlola (2011) 9 NWLR (Pt.1253) 458; Onaboriowo v Ajasin [1984] 1 SCNLR 108, 152 - 153,*”[Italics supplied for emphasis].
H

Having said that, it proceeded thus:

“*It is not in dispute that paragraphs 27, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 54, 61 (i-iv), 61 (x) (xi), 72 (ii), 26 -43, 76, 77,*

78, 82, 83, 88 and particularly paragraph 15 (1) of the first and second respondents' Petition are based on allegations of violence, voter intimidation, hijacking and snatching of electoral materials, kidnapping, and others, which invariably plead allegation of corrupt practices which are criminal and ought to be proved beyond reasonable doubt." [pages 5052 - 5053 of vol 5 of the record, italics supplied for emphasis] B

Although it found that the "Tribunal should not have set aside the provision of the law in proving corrupt practices on the standard of proof beyond doubt, [page 5053, italics supplied], it, nevertheless, relapsed into the same egregious error which it had accused the trial Tribunal of. Listen to this piece of curious reasoning: C

"To demand that a private entity prove the commission of a crime (and the personages actually responsible), beyond reasonable doubt, is tantamount to making the Law operate in denial of the limitations imposed, on lawful private entities, against the possession and deployment of the sophisticated infrastructure needed for arrests, investigation, confiscation, legitimate violence etc; in quests to unravel the thorough details of so-called crimes. This is a domain exclusive to the State and it is such exclusivity that makes it easier for the State to unravel and prove the commission of crimes beyond reasonable doubt" [pages 5054 -5055 of Vol 5 of the record] D E

The Lower Court's authority for this prospective prescription on the *lex ferenda* [that is, the law as it ought to be] as opposed to the *lex lata* [that is, the law which is, currently, in force as interpreted by this Court] is the opinion of a Lagos based Lawyer, Akinlayo Iwilade, "Required Proof for Criminal Allegations in Election Petitions: A Critique" in The Nation Newspaper of July 16, 2013 (available online at <http://www.thenationonlineng.net/required-proof-for-criminal-allegations-in-election-petition-a-critique>) F G

In one word, the Lower Court, relying on an opinion in a Newspaper article, purported to abrogate Section 135 (1) of the Evidence Act, 2011 by judicial fiat. That section provides that:

135 (1): If the commission of a crime by a party to any proceedings is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt. H

In my humble view, it is difficult to see how the Lower Court could have, legitimately, wished away the position of

this Court which, interpreting the above section, has maintained that a Petitioner who makes an allegation of the commission of a crime the basis of challenging the election of a candidate who was returned, must prove that allegation beyond reasonable doubt. Buhari v Obasanjo [2005] SCNJ 1, 47;

^B Nwobodo v Onoh [1984] 1 SCNLR 27 -28.

Now, as pointed out above, the Lower Court, correctly, found that the allegations of violence, voter intimidation, hijacking and snatching of electoral materials, kidnapping, and others, [in paragraphs 27, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 54, 61 (i-iv), 61 (x) (xi), 72(ii), 26-43, 76, 77, 78, 82, 83, 88 and particularly Paragraph 15(1) of the first and second respondent's Petition are criminal in nature and ought to be proved beyond reasonable doubt.

^D **In all fairness, the said Court was right when it held that "the [trial] Tribunal should not have set aside the provision of the law in proving corrupt practices on the standard of proof beyond reasonable doubt," [page 5053 of Vol 5 of the record].**

^E **What, however, I find most worrisome in the reasoning of the Lower Court is that, having found that the trial Tribunal, without any warrant whatsoever, purported to "set aside the provision of the law in proving corrupt practices on the standard of proof beyond reasonable doubt," it proceeded to endorse its [the Tribunal's] nullification of the appellant's election in**

^F **the said eighteen LGAs. The simple truth is that, having failed to prove the allegations in the above paragraphs apropos the said eighteen LGAs, the Petitioners' claim in respect thereof should have been dismissed.** Omoboriowo v Ajasin (1984) LPELR G - 2646 (SC) 13, E-G; Abubakar v. Yar'Adua [2008] 19 NWLR (Pt.1120) 1, 17.

^H The Lower Court's intriguing ratiocination at page 5053 of Vol 5 of the record must rankle jurists schooled in the common law tradition. According to the Court, the *"law is and still remains, that although election petitions have distinct or peculiar features of their own, they are still a brand of civil cases. Invariably, they are won or lost on the balance of probability or preponderance of evidence,"* [italics supplied for emphasis].

With respect, this statement is, remarkably, imprecise and too

open-ended. Although election petitions are species of civil cases that are sui generis, where allegations of crime form the fulcrum of the claim in them, the requisite standard is that of proof beyond reasonable doubt. I, most respectfully, exhume Sowemimo, JSC (as he then was, later CJN) to address this issue. In *Nwobodo v Onoh* (1983) LPELR -8049 (SC) 6-7, F-A, His Lordship held that:

"...all the allegations complained of are crimes, and although, under Electoral Act 1982, election petition is a peculiar type of civil proceedings the proof of a crime, requisite or burden of where alleged, is that provided under Section 137(1) of the Evidence Act, that is proof beyond reasonable doubt. The onus of proof is therefore on the petitioner and this has not been discharged. Having so decided I hold at this stage that the petitioner has not proved all his relevant complaints beyond all reasonable doubt against any of the respondents."

Regrettably, while the Petitioners failed to prove their allegations, the Lower Courts still found in their favour contrary to the general rule of evidence that cases must be proved secundum allegata et probata. That cannot be correct for, as a logical corollary, the allegations [allegata] or averments which a party makes in his pleadings and the proof [probate] he adduces in their support must correspond. In other words, the proof must, at least, be sufficiently extensive to cover all the allegations of the party. Greenl. Ev. 51; 3 R. S. 636. **It cannot be otherwise for a pleading of averments in proof of which no evidence is offered, virtually, serves no useful purpose.** *Insurance Brokers v Atlantic Textile* [1996] 9 10 SCNJ 171, 183; *Housing Corporation v. Enekwe* [1996] 1 SCNJ 98, 133.

This is the rationale for the long line of authorities that averments in pleadings, which are unsupported by evidence, are unavailing to the pleader as they go to no issue, and so must be discountenanced. *Odutola v Papersack Nig Ltd* [2006] 18 NWLR (pt 1012) 470 etc. **The explanation is very simple. An averment in a pleading is not evidence and cannot be substituted for evidence. Such an averment does not, therefore, amount to proof unless it is admitted.** *Aake and Anor v Akun* [2003] 14 NWLR (Pt.840) 311; (2003) LPELR -72 (SC) 9, paragraph G) *Ajuwon v Akanni and Ors* [1993] 9 NWLR (Pt.316) 182,

200 Magnusson v Koiki and Ors [1993] 9 NWLR (Pt.317) 287.

Different considerations would have applied if the doctrine of severance of pleadings was in issue. This would have been so for the law has, long, been settled that where a Petitioner makes an allegation of crime in his pleadings but, nonetheless, can succeed in his claim without proving the crime it cannot be said that the alleged crime was in issue or directly in issue, Nwobodo v. Onoh [1984] 75 NSCC 7, 76; Military Administrator of Imo State v. Nwauwa [1997] 2 NWLR (Pt.490) 675, 708; Omoboriowo v Ajasin [1984] 1 SCNLR 108, 152.

That was not the case at the trial Tribunal. The Petitioners failed to apply to the trial Tribunal for the special indulgence of the severance of their pleadings at the pre-hearing stage so as to afford the appellant [as respondent] the opportunity of taking steps to react accordingly.

Their attempt to do so in their addresses was, therefore, futile. As this Court held in Gundiri v Nyako [2014] 2 NWLR (Pt.1391) 211, 284-285 “...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...” [Italics supplied]

On the contrary, they [the Petitioners], as the Lower Court indicated above, founded their complaint against the declaration of the appellant as winner in the said eighteen LGAs on sundry allegations of crime which they failed to prove but the Lower Court wished away on the ground that Section 135 of the Evidence Act could be jettisoned for the standard of proof on the balance of probabilities. That is not correct.

Worse still, the conclusion of the Lower Court is not borne out by the records. As will be indicated anon, the trial Tribunal even found that the Petitioners did not succeed in proving, among other things, their allegations of multiple votes. In their futile attempt to establish these allegations, they had marshaled PW50, 51 and PW52 [witnesses I shall return to in the course of this judgment]. At page 3781 of Vol 4 of the record, it [the Tribunal] had this to say:

“The high points of the evidence of PW50, 51 and PW52 is that none of them qualified to be properly so called as ‘experts’ capable of persuading the Court to consider their evidence as experts

as required by the Evidence Act. Our conclusion is premised on the wishy-washy and haphazard analysis they carried out. They failed woefully to provide and demonstrate in the open Court the criteria and vital features by which they arrived at their conclusion. The process and scientific procedure undertaken by the professional in respect of the 13, 258 ballot papers which they allegedly discovered to be multiple/duplicate votes as well as the 100,833 ballot papers which they found not to be human thumbprints ought to have been demonstrated in evidence so that any other expert can get hold of those ballot papers and examine them with a view to verifying the validity of their conclusion...

...the Petitioners should have [tendered] those ballot papers which were actually examined by the so called experts and found to contain multiple thumbprints. Unfortunately, the Petitioners did not do so. They rather obtained all the ballot paper used in all the Local Government Areas in Akwa Ibom State and tendered them thus proving that election took place in Akwa Ibom State”[page 3781 of Vol 4 of the record, italics supplied]

Against this background, what was then the justification for the trial Tribunal’s nullification of the said results in the eighteen LGAs: a nullification the Lower Court affirmed on the ground that the “appellant [did not] suffer any injustice at all simply because the Tribunal failed to adopt the standard of proof beyond reasonable double...2 [page 5055 of Vol 5].

With profound respect, nothing could be farther from the truth. By applying the wrong principle of law, the findings of the Lower Courts cannot survive the charge of perversity. Even on this score alone, I endorse the arguments of senior counsel for the appellant.

As it is well-known, this Court will readily upset concurrent findings of Lower Courts where there are exceptional circumstances, such as, where the findings are perverse; where there was a miscarriage of justice or where a principle of Law or procedure was not followed. *Ogbu v. State* [1992] 8 NWLR (Pt.295) 255; *Igago v. State* [1999] 14 NWLR (Pt.637) 1; *Adeyemi v. The State* [1991] 1 NWLR (Pt.170) 679; *Adeyeye v. The State* (2013) LPELR - 19913 (SC) 46; *Akpabo v State* [1994] 7 NWLR (Pt.359) 635; *Ejikeme v Okonkwo* [1994] 8 NWLR (Pt.362) 266. In all, I resolve this issue in favour of the appellant.

ISSUE TWO (Appellant's original issue one)

Whether the decision of the Court of Appeal affirming the judgment of the Tribunal that nullified the results of the election in eighteen LGAs of Akwa Ibom State and ordering rerun elections thereat on the ground that the voters in the said LGAs were disenfranchised is not perverse and in breach of the appellant's right to fair hearing and liable to be set aside by this Honourable Court?

ARGUMENTS OF COUNSEL

Arguments on this issue were canvassed from pages 5 to 31 of the appellant's brief, [paragraphs 3.1 -3.2.17.2]. In these pages, counsel, first, set out the general principles on the disenfranchisement of voters as enunciated in several decisions of this Court and proceeded to apply them to the decision of the trial Tribunal which nullified elections in the said eighteen LGAs, [pages 5 -31 of the brief and paragraph 3.1 et seq of the Reply Brief]. In a nutshell, the submission here was that the Lower Court's decision affirming the trial Tribunal's nullification of the results of the election in the said eighteen LGAs on the grounds of the disenfranchisement of the voters was a perverse decision. The Court was urged to intervene and set aside the Lower Court's judgment, accordingly.

Chief Wole Olanipekun, SAN, learned senior counsel for the first and second respondents' response to these lengthy submissions of the appellant are captured on paragraphs 4. 1-4, 37, pages 728 of the respondent's brief. The sum total of the arguments in these pages could be found in paragraph 4.2, page 7 of the said brief.

The position of the distinguished senior counsel was that, contrary to the vehement position of the appellant, the judgment of the Lower Court does not qualify as a perverse decision. The basis for this contention was that the said Court did not ignore facts or evidence. On the other hand, it utilised the facts and evidence on record in arriving at its said decision.

It was, further, pointed out that the said Court did not misconceive the thrust of the case presented and did not embark on the consideration of irrelevant issues. In all, learned senior counsel maintained that the judgment of the Lower Court was "*free of the viruses of a perverse decision.*"

RESOLUTION OF THE ISSUE

My Lords, I shall take the liberty to disaggregate the categories

of complaints in this issue. The first complaint is that, in nullifying elections in the said LGAs, the Lower Court relied on grounds other than those canvassed in the Grounds of Appeal.

For the economy of space, only some examples will be considered here. Dodo, SAN, contended that the view of the Lower Court that in Onna LGA *“the revelations on Forms EC8B and EC8C that no agent signed Form EC8B... in Oniong West 111, Ward 12, Oniong East 111, Ward 12, Oniong East 111, Ward 09, Awa 111, Ward 03E”* was an issue that did not arise from the appellant’s Notice and Grounds of Appeal.

The same complaint was canvassed against the approach of the Lower Court’s findings with respect to Oruk Anam; Uruan, Ikot Abasi and Etinr Ekpo; Uyo; Ibeno; Oron; Udung Uko; Etinan; Ini; Nsit Ubium; Nsit Ibom; Ibesikpo Asutan; Ibiono Ibom; Nsit Atai; Ikon; and Eket LGAs, pages 7-31, paragraphs 3.2.1 - 3.2.17.1 of the brief. It was contended that, quite apart from not arising from the Grounds of Appeal, the Lower Court raised these issues suo motu and resolved them against the appellant without hearing from him. The question is: what, then, was the decision of the trial Tribunal which prompted the appellant’s appeal to the Lower Court?

As indicated earlier in this judgment, in its judgment of October 21, 2015, the trial Tribunal nullified the results of the said election in eighteen out of the thirty one LGAs. It reasoned thus:

“Clearly the election in the nine Local Governments... together with the eleven Local Governments mentioned had challenge of credibility. Out of these eleven Local Governments, Ibesikpo Asutan and Uyo were earlier mentioned to have witnessed non-credible elections. Therefore those two Local Governments are taken out in the computation. It means in simple arithmetical calculation that Local Governments where thousands of voters indicated to votes and were disenfranchised were eleven...”

We are of the firm opinion that the results declared by INEC in these Local Governments be nullified and are hereby nullified. The question is whether the non-compliance is substantial enough to invalidate the entire election? The answer is in the negative in view of the Supreme Court decision in PDP v. INEC and Ors [2014] 9 - 10 SCNJ 39 -10...

Therefore, INEC is ordered to conduct a re run election in

these Local Governments so as to enable those whose constitutional right were breached to exercise their right of franchise...”[Pages 3790 - 3791 of Vol 4 of the records, italics supplied]

Aggrieved by this conclusion, the appellant approached the Lower Court. His complaint, before the said the Lower Court, that the trial Tribunal erred in law when it held that “thousands of voters indicated (sic) to vote and were disenfranchised...”, runs through the gamut of Grounds One (page 3803); two (page 3804) three (page 3805); five (page 3807); six (page 3809); seven (page 3811); eight (pages 3813 -3814); nine (page 3816); ten (page 3818); eleven (page 3820); twelve (page 3822); thirteen (page 3824); fourteen (page 3826); sixteen (page 3828); eighteen (page 3831); nineteen (page 3833); twenty (page 3834); twenty one (page 3835); twenty two (page 3836); twenty three (page 3837) of the Notice.

Somewhat, most curiously, as learned senior counsel for the first and second respondents pointed out on page 2 [paragraph 4.4 of the respondents’ brief]...the Lower Court [that is, the Court of Appeal] did not restrict itself to oral evidence of disenfranchisement of voters but nullified the election for non-compliance with the principles of the Electoral Act based on the evidence adduced.

Wait a minute: did the trial Tribunal nullify the elections in the said LGAS on grounds of non-compliance with the principles of the Electoral Act as contended on behalf of the respondents? I will summon the said Tribunal to supply the answer. Hear its reasons on this score:

“The question is whether the non compliance is substantial enough to invalidate the entire election? The answer is in the negative in view of the Supreme Court decision in PDP v INEC and Ors [2014] 9 - 10 SCNJ 39 - 10...

Therefore, INEC is ordered to conduct a re-run election in these Local Governments so as to enable those whose constitutional right were breached to exercise their right of franchise. ...”[pages 3790 -3791 of Vol 4 of the records, italics supplied]

In one word, the basis of the nullification was on the ground of disenfranchisement which was why it compelled INEC to conduct a re-run election in these Local Governments so as to enable those whose constitutional rights were breached to exercise their right of franchise.

Expectedly, Dodo, SAN, for the appellant contended [page 2, paragraph 3.1.2 of the Reply brief] that “...*this...is an unequivocal acknowledgement by the first and second respondents that the Lower Court had misconceived ‘the thrust of the case presented, and took ‘irrelevant matters into consideration’ and its judgment was accordingly perverse.*” B

In my view, there is considerable force in Dodo, SAN’S submission. This must be so for the purpose of Grounds of Appeal is to clearly indicate the areas of the appellant’s complaint against the judgment appealed against. Nwankwo v. Nwankwo (1993) LPELR -2111 (SC) 8, A-C; and to give notice to the respondent of the errors complained of, The Min., PMR v. El (Nig) Ltd (2010) LPELR -3189 (SC) 43. D -G; Saraki v. Kotoye [1992] 9 NWLR (Pt.264) 156; Peters v. State [1992] 9 NWLR (Pt.265) 323; Kalu v. Uzor [2006] 8 NWLR (Pt.981) 66: that is, errors complained D of against the ratio decidendi, Ikweki and Ors v Ebele and Anor (2005) LPELR -1490 (SC) 34 -35, paragraph G; Egbe v Alhaji [1990] 1 NWLR (Pt 128) 546, 590. C

The said Grounds of Appeal, in turn, animate the issues for determining or resolving the appellant’s complaint one way or the other. John Holt Ventures Ltd. v Opura [1996] 9 NWLR (Pt.470) 101, 113; Ononiwu v. R.C.C. Ltd [1995] 7 NWLR (pt.401) 214; Sadiku v A G Lagos State [1994] 7 NWLR (pt.355). E

That explains why such grounds are expected to isolate and accentuate, for attack, the basis of the reasoning of the decision being challenged. Having thus emphasized them, the appellant, just like a pleader is bound by the averments in his pleadings, is bound by his Grounds of Appeal. As such, he is not at liberty to argue grounds which are not related to the judgment appealed against. Saraki v Kotoye (1992) 9 NWLR (Pt.264) 156; Bhojsons Plc v. Daniel-Kalio (2006) 5 NWLR (Pt.923) 330. F G

Like the appellant in this appeal, the first and second respondents were, equally, circumscribed to those complaints of the appellant as accentuated in his Grounds of Appeal. As such, if they [first and second respondents] had other reservations about, or grievances against, the reasoning that informed the conclusion of the trial Tribunal, they should have either cross appealed, Bhojsons Plc v Daniel H

Kalio (supra) or filed a Notice to contend that the said judgment should be affirmed on grounds other than those evident in the reasoning of the said trial Tribunal, Adekeye and Ors v Akin-Olugbade (1987) LPELR- 240/1985 (SC); Emeka v Okadigbo and Ors (2012) LPELR 69/2012 (SC, Ogungbadejo v. Owoyeni (1993) LPELR- SC.279/1990; Ogwuma Associated Co Nig Ltd v IBWA [1988] 1 NWLR (Pt.73) 658; Orekan v B. P. Nig Ltd [1972] 1 All NLR (Pt.1) 45; Afro Continental Seaways Ltd v Nigeria Dredging Roads and General Works Ltd (1977) 5 SC 235; Eliochin v Mbadiwe [1986] 1 NWLR (Pt.14) 47.

The Lower Court was, also, bound by the same prescription. The reason is simple. Its jurisdiction, being statutory, must be exercised in accordance with the Statutes which confer it, particularly, the provisions of the Constitution.

Accordingly, since the appellant did not challenge the trial Tribunal's findings or decision on grounds other than those accentuated in his Grounds of Appeal, such other findings, whether right or wrong, which are extraneous to the said Grounds, should not have been disturbed by the Lower Court.

Oshodi v. Eyifunmi (2000) 13 NWLR (Pt.684) 298, 352.

As this Court explained in Bhojsons Plc v Daniel Kalio (supra):
"Grounds of appeal are the complaints of the appellant on the judgment, appealed against. They are the pillars on which the entire appeal stands and an appellate Court cannot go outside them in search of greener pastures for any of the parties. Where an issue before a trial Court is not raised by a ground of appeal, the issue cannot be taken by the appellate Court because it is not before that Court. Issues coming for adjudication before an appellate Court are erected by the ground or grounds of appeal. Courts of law, like umpires in a game, cannot go outside the Rules of the Court and do things in the way they like. Courts are bound by the processes placed before them. They have no business to dabble with issues not placed before them." [Italics supplied for emphasis]

That is why it is always advisable for a Court to ensure that its judgment is confined to the issues raised by the parties. Commissioner for Works Benue State v. Devcon vbn Development Consultants Ltd [1988] 3 NWLR (Pt.83) 407; Nigerian Housing Development Society Ltd. v Mumuni (1977) 2 SC 57; Adeniji v.

Adeniji (1972) 1 All NLR (Pt.1) 278; All v. Alesinloye (2000) 6 NWLR (pt.660) 177, 211- 212.

Even then, since the Lower Court decided to broach questions outside the ground of disenfranchisement canvassed by the appellant, it should have afforded the appellant [and the respondents] an opportunity of making their comments upon them before taking its decision on them. In effect, contrary to the submission of Chief Wole Olanipekun, what the Lower Court did amounted to a denial of the appellant's opportunity of being heard. Unarguably, that approach amounted to a miscarriage of justice. Aermacchi S.P.A. v. A.I.C. Ltd. [1986] 2 NWLR (Pt.23) 443, 449; Kuti v. Balogun [1978] 1 SC 53, 60; Iri v. Erhurhobara [1991] 2 NWLR (pt.173) 252, 265; Ndiwe v. Okocha [1992] 7 NWLR (pt.252) 129, 139.

In all, the Lower Court's extensive foray into extraneous issues, just like the brilliant submissions of learned senior counsel for the first and second respondents on them, outside the contours of the complaints which the appellant mapped in his aforesaid Grounds of Appeal, are liable to be discountenanced. I entertain no doubt that it [the Lower Court] lacked the vires to pronounce on issues or findings on which the appellant did not appeal against, Adeyemi v. Olakunri (1999) 14 NWLR (Pt.638) 204, 211. What, readily, comes to my mind here is the witty aphorism, which was popular in the heyday of the Roman amphitheatre and the Latin days of the Law, "*bene cucurrit sed prete viam*" - a good showing outside the permissible compass of the contest!

Now, the second complaint embedded in the above issue is the question whether the Lower Court's affirmation of the nullification of the election results in the said eighteen LGAs is not perverse.

As pointed out, a decision is said to be perverse when, inter alia, it ignores, overlooks or does not follow a principle of Law or procedure which is binding. Ogbu v. State (supra); Igago v. State (supra); Adeyemi v. The State (supra); Adeyeye v. The State (supra); Akpabo v. State (supra); Ejikeme v. Okonkwo (supra). What then are the applicable principles for the proof of disenfranchisement on which the trial Tribunal hinged its decision: and what was the appellants' grouse at the Lower Court?

It is no longer open to any disputation that this Court has,

consistently, maintained that, in order to prove disenfranchisement, a Petitioner must scale the Trinitarian tests enunciated in such cases like *Ngige v. INEC* (2015) 1 NWLR (pt. 1440) 281, 326; *Ucha v. Elechi and Ors* [2012] 13 NWLR (pt. 1317); *Oke v. Miniko* (No 2) [2014] 1 NWLR (pt 1388) 332. In effect, such a Petitioner should
 B summon disenfranchised voters from each Polling Unit/boot or station to testify, *Audu v. INEC* (No 2) [2010] 13 NWLR (pt 1212) 456, 523; *Kakih v. PDP* [2014] 15 NWLR (pt 1430) 374 etc.

How did the Petitioners fare at the trial Tribunal? My Lords,
 C kindly bear with me for I will delve into their performance from LGA to LGA; first, Onna LGA.

By exhibit EEEE1 (Form EC8D), this LGA has 57, 996 registered voters dispersed in 31 Polling Units (exhibits 221 - 2212, EC8B). On the authority of the above cases, did the Petitioners prove disen-
 D franchisement? Only two witnesses testified here, namely, PW1 (Unit 016, Primary School - Abak Ishiet in Awa Ward 111) and PW3 (Unit 007, Town Hall, Ikot Obio Eket).

In Oruk Anam, there are 90, 595 registered voters (exhibit EEEE1 Form EC8D) and 169 Polling Units (exhibits YY1-YY13, Forms
 E EC8B). The three LGAS of Uruan, Ikot Abasi and Etim Ekpo have 143, 522 registered voters (exhibit EEEE1] and 251 Polling Units. Yet, only three APC Polling unit agents and registered voters were called to give evidence.

The eleven LGAs in exhibit EEEE1, Form EC8D (from Ibeno
 F to Uyo) have 570, 008 registered voters spread out in 1014 Polling Units. Here, the elections were nullified, not on the judicially-endorsed grounds for upholding disenfranchisement, but rather on the ground that party agents did not sign.

In doing so, the Lower Court, clearly, overlooked the trenchant provisions of Section 45 (3) of the Electoral Act, 2010 (as amended) which state that:

“45...

(3) *Where in this Act, an act or thing is required or authorized
 H to be done by or in the presence of polling agent the non-attendance of the polling agent at the time and place appointed for the act or thing or refusal by the Polling agent to do the act or thing shall not, if the act or thing is otherwise done properly, invalidate the act or thing.*”
 (Italics supplied)

There is nothing on the record to show that the Petitioners [now, first and second respondents] were able to rebut the above presumption in favour of the said results declared by INEC in the units in question. On the contrary, they, presumptuously, argued that since the agents did not sign, they must have been denied. In paragraph 4.23, page 24 of the respondents' brief, they asked rhetorically "if agents were not denied, how come they did not sign if indeed there was collation?"

Surely, the presumption of regularity enjoyed by INEC'S results are not rebuttable by presumptuous postulations or rhetorical questions but only by cogent, credible and acceptable evidence. CPC V. INEC and Ors (2011) LPELR - 8257 (SC) 57, A-B; Omoboriowo v. Ajasin [1984] 1 SCNLR 708; Jalingo v. Nyame [1992] 3 NWLR (pt 231) 530; Finebone v. Brown (1999) 4 NWLR (pt. 600) 613; Hashidu v. Goje (2003) 15 NWLR (pt. 843) 352, Buhari v. Obasanjo (2005) 13 NWLR (pt.941) 1; Nwobodo v. Onoh (1984) 1 SCNLR (pt.231) 538. ***This must be so for a Court of law can only pronounce judgment based on credible evidence presented and properly established before it. It is, thus, not at liberty to go outside the evidence and search for extraneous evidence in favour of the parties.*** CPC v. INEC and Ors (supra) Abubakar v. Yar'Adua (2009) 19 NWLR (pt. 1120) 1.

Worse still, the Petitioners' averments in their Pleadings on the absence of the signature of agents are contradictory inter se. For example, contrary to the allegation in paragraph 74 of the Petition, (page 74 of Vol. 1 of the record), in paragraphs 37, 38, 39, 40, 41, 42, 43, 44, 45, 46 and 47 of the Petition, particularly, paragraph 37 (pages 14 - 19 of Vol 1 of the record), the same petitioners averred that results were recorded in the respective Forms EC8As which were duly signed by the agents of the party and presiding officers.

The Lower Court's affirmation of the nullification of the said results is, clearly, without justification as the respondents (as Petitioners) came nowhere near the threshold of the requirements of proof of disenfranchisement as this Court has held, repeatedly. Audu v. INEC and Ors (2010) 13 NWLR (pt 1212) 456, 526; Buhari v. INEC and Ors (2009) All FWLR (pt 459) 1, 569.

This is, clearly, evident in what happened in the two sets of LGAs. The first set of LGAs, where results were nullified were: Onna

(where only PW1's testimony, pages 531 - 534, Vol. 1) was solely relied on; Ikot Obio Eket (where PW3's evidence, page 538 - 540 of Vol. 1 was relied on); Uyo (where the testimony of PW34, pages 2924 - 2927 vol 3 was relied on); Ibesikpo Asutan (where only the evidence of PW 35, pages 111 - 114, Vol 1 was relied on).

B Others are: Ikono where the trial Tribunal placed reliance solely on the testimony of DW21, pages 2168 - 2170, Vol 3) Oruk Anam (only PW38's evidence, pages 115 - 120, Vol 1 was relied on); Uruan [the sole evidence of PW 39, pages 639 - 640, Vol 1); Ikot Abasi (the lone evidence of PW 39, pages 615 - 616, Vol 1); Etim Ekpo (evidence of PW 42, pages 715-716, Vol 1). Meanwhile earlier in this judgment, I had indicated the total number of registered voters and polling Units. The simple implication is that the petitioners' case should have collapsed like a pack of cards, Ngige v. INEC (supra); Kakih v. D PDP (supra); Ucha v. Elechi (supra); Audu v. INEC (supra) etc.

The same unfortunate scenario played out in the second category of LGAs where elections were nullified based on the evidence of PW48 alone, pages 68 - 110, Vol 1; pages 2827-2835, Vol 3; 2915-2923, Vol 3 and, in particular page 3174, Vol 4, where these State-
E ment of this witness were adopted. These LGAs are; Ibeno; Ibiono Ibom; Nsit Ibom, Nsit Ubium; Ini; Oron; Nsit Atai; Etinan and Udung Uko. Most worrisomely, according to the trial Tribunal:

F *"The PW48 disenfranchised himself when he went to a wrong polling unit in ward 3 as stated in paragraph 23 of his witness statement instead of ward 4, which is his correct ward as contained in exhibit 314 and A and B (first Petitioner's PVC)."*
(page 3786, Vol 4 of the record, italics supplied).

So, the Lower Courts relied on the testimony of a witness who,
G even, disenfranchised himself according to the trial Tribunal, in nullifying elections in these LGAs. Haba! The question must be posed here: why did the Lower Courts wish away the testimonies of DW10, DW13, DW14, DW15, DW18 and DW 28 who, testifying for the appellant and his party and other respondents at the trial with regard
H to the same LGAs, maintained that elections took place thereat and that they voted in their respective Polling Units? In any event, if I may ask, how did the testimony of PW48 satisfy the Trinitarian tests enunciated in the cases of Ngige v. INEC (supra); Kakih v. PDP (supra); Ucha v. Elechi (supra); Audu v. INEC (supra) etc. Wonders shall never

end!

Two further points. The respondents made so much weather of the testimony of PW33. He is Don Etiebert. At page 24, paragraph 4.23 of the respondents' brief, it was contended that the Lower Court was right not to have disturbed the probative value given by the trial Tribunal to the evidence of PW33 (that is, Don Etiebert). B

His LGA, Oruk Anam, as shown above, has 90,595 registered voters (exhibit EEEE1, Form EC8D) and one Hundred and sixty nine Polling Units, (Forms EC8Bs, exhibits YYY1-YY13). From page 3786 of Vol 4, we read that: C

"PW33 (Chief Don Etiebert) a former Minister of the Federal Republic of Nigeria, a member, Board of Trustees of PDP and a registered voter in Unit 11, Ward 1 of Oruk Anam LGA...testified that he went to his Polling Unit at Oruk Anam LGA to vote. He was accredited and he returned to his house to later go to the unit for voting. It was then information got to him that no results were made available to his unit and the same problem was applicable to other Polling Units across Oruk Anam LGA. This was the information he received personally from people in his Polling Unit and his LGA that no result sheets were made available." (Italics supplied) E

Curiously, on the strength of the above information he, avowedly, received from un-named persons, not only in his unit, but across the entire Oruk Anam LGA, the trial Tribunal believed him, describing him as a "witness of truth." The Lower Court affirmed that. F

Holy Moses! Surely, if the purpose of relating the information he received from those un-named persons to the trial Tribunal was to establish the truth thereof for the endorsement of their probative value, the Lower Courts goofed. That, definitely, was impermissible by virtue of a community rendition of Sections 37 and 38 of the Evidence Act, 2011, *Ojo v. Gharoro* (2006) All FWLR (pt.316) 197, 217; *Ijioffor v. State* (2001) 4 SCNJ 230; *Utteh v. State* [1992] 2 SCNJ (pt 1) 183; *JSC Bendel State v. Omo* (1990) 6 NWLR (pt 157) 407; *Jolayemi v. Alaoye* (2004) 12 NWLR (pt. 887) 322. G

These sections would have had no place, however, if the information was related just to show that it was made and not to establish the truth in it. *Utteh v. State* (supra), *Kala v. Potiskum* (1998) 3 NWLR (pt 540) 1 *Okoro v. State* (1998) LPELR -2493 (SC) 117; *Ozude v. IGP* (1965) ANLR 106; T. A. Aguda, Law and Practice Relating to H

Evidence (Ibadan: MIJ Professional Publishers, 1998) para 45.

In effect, that piece of Chief Etiebet's evidence was inadmissible and there was even no use confronting it before expunging it from the record, Buhari v. Obasanjo (2005) 7 NWLR (pt 910) 241, 435; Okpara v. Federal Republic of Nigeria [1977] NSCC 166; Management Enterprises v. Otusanya (1987) NSCC 577; Ojukwu v. Onwudiwe (1984) SCNLR 247.

Worse still, even if that testimony was admissible, it was, simply, illogical to hold that the happenstances in Chief Etieberts Unit 11, Ward 1 sufficed to mirror the events in the entire one Hundred and sixty nine Polling Units, (Forms EC8Bs, exhibits YYY1-YYY13) of Oruk Anam LGA. The only way the Petitioners could have established disenfranchisement in Oruk Anam LGA was by calling the disenfranchised voters in the entire one Hundred and sixty nine polling Units, Audu v. INEC (No 2) [2010] 13 NWLR (pt 1212) 456, 523; Kakih v. PDP [2014] 15 NWLR (pt 1430) 374; Ucha v. Elechi and Ors (2012) 13 NWLR (pt 1317) 330; Gundiri v. Nyako (2014) 2 NWLR (pt 1391) 211.

In a rather awkward manner, the Lower Court sought to, and unjustifiably, substituted its own views for the trial Tribunal's assessment of the credibility of some witnesses. They are PW44; PW 46; PW4 and PW7 whose testimonies were, devastatingly, discredited during cross examination (pages 545, Vol 1; 3130 -3132; 548 and 3134; 541 of Vol 1; 1416 of the record, respectively). The said Tribunal saw and observed their demeanour at the witness box and, accordingly, refused to ascribe any credibility to their testimonies. There was no juridical reason why the Lower Court should have interfered with the trial Tribunal's findings on the credibility of these witnesses, Akpapuna v. Nzeka 11 (1983) 2 SCNLR 1; Agbaje v. Ajibola [2002] 2 NWLR (pt 750) 127, Okosi v. State [1989] 1 NWLR (pt 100) 1; Motonwase v. Sorungbe (1988) 5 NWLR (pt 92) 9; Adelumola v. State [1988] 1 NWLR (pt 73) 683; Sugh v. State (1988) 2 NWLR (pt 77) 475.

Like Oruk Anam, like other LGAS. In Onna (with 57, 996 registered voters spread out in 131 Polling Units), only PW1 (of Unit 016, Primary School, Abak Ishiet in Awa Ward 11) and PW 3 (of Unit 007, Town Hall, Ikot Obio Eket) gave evidence (with the Lower Courts utilising their testimonies in proof of averments for the entire

Onna LGA); Uruan, Ikot Abasi and Etim Ekpo LGAS have 143, 522 registered voters in 251 Polling Units yet only three APC Polling Agents and registered voters testified etc.

The respondents, perhaps, buoyed by the approach of the Lower Court, which veered off tangent from the complaint of the appellant in his Grounds of Appeal, equally, tried to make mountains out of what they termed “alterations and mutilation of figures in some wards,” (see, for example, paragraph 4. 9. (1) (d); (2) (b); (3) (b); (a) (d), page 10); (5) (c); (7) (a); (8) (a), page 11; (13) (a) and (b); (14) (a) and (b), page 14 etc of the respondent’s brief). Although, as already shown, they [respondents] neither cross appealed nor filed a respondents Notice to contend on these issues, suffice it to note that these were not proved as required by law to warrant the anchorage of the decision to nullify the said results on them, *Nwobodo v. Onoh* (1984) 1 SC 1, 118 -119.

The respondents’ submissions with regard to hijacking of election materials, multiple thumb-printing of votes (see, for example, paragraph 4.12, page 20 of the respondents, brief), unarguably, fall into this category of allegations that fell below the threshold of proof, *Nabature v. Mahuta and Ors* (1992) 9 NWLR (pt. 263) 85, 106; *Ikoku v. Olli* (1962) 2 NSCC 137; *Oni v. Adeyinka* (1999) 8 NWLR (pt. 562) 425; *Egbe v. Etchie* (1955-56) NRNLR 134; *Opia v. Ibru and Ors* (1992) 3 NWLR (pt. 231) 658, 708 - 709; *Nwobodo v. Onoh* (1984) 1 SCNLR 1, 27; *Falae v. Obasanjo* (1999) 4 NWLR (pt. 559) 476; *Oni v. Adeyinka* (1999) 8 NWLR (pt. 231) 658, 430 431.

In all, for the reasons, already, adduced above, namely, that the Lower Court, on its own, framed and determined, questions which orbited outside the canvass of the narrow questions in the appellant’s Grounds of Appeal afore-cited, I hold the view that its affirmation of the trial Tribunal’s nullification of the said election results was, evidently, perverse. It is on this score that I hold that these findings must be disturbed for occasioning grave miscarriage of justice on the appellant, *Ogbu v. State* (supra); *Igago v. State* (supra); *Adeyemi v. The State* (supra); *Adeyeye v. The State* (supra); *Akpabo v. State* (supra); *Ejikeme v. Okonkwo* (supra). I, equally, resolve this issue in favour of the appellant.

ISSUE TWO (b) (Appellant’s original issue three)

Whether the decision of the Lower Court affirming the nullification of the results in the eighteen LGAS is not perverse having regard to the fact that the Court relied heavily on legally inadmissible documentary evidence, the makers of which did not testify before the Tribunal?

B Learned senior counsel for the appellant, Dodo, SAN, devoted paragraphs 5.1 - 5.4, pages 34 - 37 of the appellant's brief, and paragraphs 5. 1 - 5. 5, pages 13 -15 of the Reply Brief, to this issue which was the appellant's original issue Three.

C Arguments on this issue were woven around three main planks or premises. In the first place, it was pointed out that, in affirming the trial Tribunal's nullification of the said results, the Lower Court relied on a host of INEC documents (public documents) which were inadmissible by virtue of Section 104 of the Evidence Act, 2011. These
D public documents were certified with engraved signatures on them, albeit, without the subscription of the name (s) and the official title (s) of the officers who certified them, (paragraph 5. 1, pages 34 - 35 of the brief). Counsel urged the Court to expunge them from the record.

Listing the documents as exhibit 317 (the Card Reader Data);
E exhibit 12 (police Report on the said election) and exhibit 337 (the Report of the Civil Defence Corps on the election) (Ikot and Eket LGAS, page 5045, vol, 5), he contended that their makers did not testify before the trial Tribunal. As such, the appellant did not have the opportunity of testing their credibility as well as the veracity of the
F contents of the said documents. He maintained that, in the circumstance, the said documents lacked probative value. He pointed out that this applied to all the documents which the Lower Court, erroneously, relied on even as their makers did not testify and could not
G be cross examined.

In his response, Chief Olanipekun, SAN, pointed out that this issue was raised for the first time and hence the appellant should have sought and obtained the leave of Court. He contended that the electoral documents tendered in this case were all properly given
H probative value. He pointed out that the first and second respondent and the appellant had pleaded exhibit 317. He maintained that there was no controversy about the contents of exhibits 12 and 337 and so there was no need to call their makers as their contents were not in dispute. In his view, the other electoral documents were properly

certified and were tendered from the Bar.

RESOLUTION OF THE ISSUE

My Lords, in all honesty, I had always believed that, since this Court had interpreted the provisions apropos the certification of public documents in several decisions, all Courts should be properly guided on their import. As if, in anticipation of the sort of arguments in this appeal, the drafts person of Section 104 of the Evidence Act, 2011, split its provisions into three subsections unlike the erstwhile Section 111 of the repealed Evidence Act which had just one long-winded provision. This is what the Act has made of the certification provision: B

“104 (1) Every public officer having custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy of such document or part of it as the case may be. C

(2) The certificate mentioned in Subsection (1) of this section shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies. E

(3) An officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.” (Italics supplied for emphasis) F

From the phraseology of the italicised clauses of Subsection (2) (supra), a document can only be called a certified copy of a public document if, in addition to the payment of legal fees prescribed in that respect, together with a certificate written at the foot of such copy that it is a true copy, (Subsection 1, supra) it (the certificate) is dated and subscribed by such officer with his name and his official title.” G

In effect, any document that falls below the above mandatory threshold is inadmissible as a certified copy of a public document. Omisore v. Aregbesola and Ors (2015) 15 NWLR (pt 1482) 205, 294 Ndayako v. Mohammed (2006) 17 NWLR (pt.10009) 676; Tabik Investment Ltd v. Guaranty Trust Bank Plc (2011) LPELR - 3131 (SC); Nwabuoku v. Onwordi (2006) All FWLR H

(pt. 331) 1236, 1251 - 1252.

- The whole essence of the Court's insistence on the scrupulous adherence to the above certification requirement of public documents is to vouchsafe their authenticity, vis-à-vis, the original copies, to third parties.*** G and T. I. Ltd. and Anor v. Witt and Bush Ltd. (2011) LPELR -1333 (SC) 42, C-E. ***That explains why, in the absence of the original document only such, properly, certified copies are admissible as secondary copies of public documents "but no other kind of secondary evidence."***
- C G. and T. I. Ltd and Anor v. Witt and Bush Ltd (supra); Araka v. Egbue (2003) 33 WRN 7; Minister of Lands, Western Nigeria v. Azikiwe (1969) 1 All NLR 49; Nzekwu v. Nzekwu (1989) 2 NWLR (pt 104) 373, Tabik Investment Ltd and Anor v Guarantee Trust Bank Plc (2011) 6 MJSC (pt 1) 1, 21; Dagaci of Dere v. Dagaci of Ebwa D (2006) 30 WRN 1; Iteogu v. LPDC (2009) 17 NWLR (pt 1171) 614, 634 etc.

EXHIBIT 317 (THE CARD READER REPORT)

- The Lower Court placed reliance on exhibit 317 (the Card Reader Data). At page 5047 of Vol 5, it held thus *"pertinent also is exhibit 317, the report of accredited voters in the election on polling unit by polling unit in the entire state, shows that the number of accredited voters was 437, 128 while the alleged number of votes cast was 1, 222, 836."*

- F As against the above posture of the Lower Court, the trial Tribunal did not recognise the said Card Reader as "the recognised mode upon which accreditation is to be done by the provisions of the Electoral Act," (citing Sections 49 (1) and (2) of the Act, (page 3763 of Vol 4 of the record). It reasoned that:

- G *"It therefore means that for a correct total accreditation report to be secured under the Electoral Act, 2010 (as amended) the total number of voters who are in the voters' register whose names were accredited and which the card reader could not capture due to the challenges it had must be reconciled with the available card reader*
- H *report to secure a near accurate number of persons who were accredited in an election."*

It will be a costly assumption to rely exclusively on the Report of the Card Reader on accreditation as in this petition to determine the correct figure of persons who were accred-

ited, doing so will be a gamble and a regrettable step.

From every available evidence, the Petitioners relied heavily or solely on the number of accredited voters as contained in exhibit 317 (the Card Reader Report) to conclude there were only 438, 127 accredited voters for the 11th April Governorship election in Akwa Ibom State. (pages 3764 -3765 B of Vol 4 of the record)

I must pause here to draw attention to the challenges associated with the said Card Reader. At page 3762 of Vol 4, it pointed out that:

“The DW4 is the Head of Department of the third respondent in charge of ICT/VR Department. His evidence was that they were still uploading data to the server and they continued uploading until six or seven weeks after the election until it was shut down in Abuja. He concluded that they did not conclude uploading before it was shut down. He therefore concluded that exhibit 317 was not the total number of accredited voters.” (Italics supplied) C D

The trial Tribunal found that, “*unfortunately the maker of exhibit 317 was not called by the Petitioners to contradict DW24*”(and hence) his “*evidence on accreditation therefore is unshakeable as Mount Gibraltar. We want to note that the maker of [the] Card Reader Report, exhibit 317 [Mrs. Abimbola] was never called to testify...*” (pages 3762 - 3762 of Vol 4, italics supplied). E

After citing and examining some decided cases, (pages 3765-3767 of Vol 41, the trial Tribunal proceeded thus: F

“INEC witnesses, DW24, DW25, DW26 and DW27, in their respective evidence- in-chief, stated that the process of accreditation proceeded as was expressly provided for in the Electoral Act in the face of the Card Reader Machine challenges during the election. The process of manual accreditation is found in Section 49 of the Electoral Act and details of such accreditation cannot be found in a Card Reader data. In fact, the Card Reader data is not at all mandated by Section 49 (supra) for the determination of accredited Voters. It was therefore presumptuous, fallacious, inept and a jurisprudential absurdity for the Petitioners to ascribe to exhibit 317 such magnitude of credence. We beg to disagree. Exhibit i.e. Card Reader report on accreditation was not the ultimate determinant of the total number of accredited voters and we so hold.” (pages 3767 -3768, Vol 4 of G H

the record, italics supplied for emphasis)

As pointed out above, the Lower Court, regrettably, chose to ascribe to exhibit 317, the card Reader Report) such magnitude of credence that it formed the basis of its decision to nullify the appellant's ejection. In my humble view, that approach was wrong. Quite apart from the challenges associated with the Card Reader and its report (exhibit 317), which the DW24 identified in the unchallenged testimony, I hold that, contrary to the posture of the Lower Court, it was the trial Tribunal that correctly, captured the probative value of the said Card Reader report, exhibit 317.

In the recent decision in *Okereke v. Umahi and Ors* (unreported judgment of this Court in Appeal No. SC. 1004/2015 of February 5, 2016), I had this to say about the Card Reader:

"Prior to the authorisation of its use by the Guidelines and Manual (supra), the Electoral Act, 2010 (as amended), in Sections 49 (1) and (2), had ordained an analogue procedure for the accreditation process. As a corollary to the procedure outline above, the Act, in Section 53 (2), enshrines the consequences for the breach, negation or violation of the accreditation procedure in Section 49 (supra). With the advantage of hindsight,

INEC, pursuant to its powers under the said Electoral Act, authorised the deployment of the said Card Readers.

Even with the introduction of the said device, that is, the Card Reader Machine, the National Assembly, in its wisdom, did not deem it necessary to bowdlerise, or even amend, Section 49 (supra) from the Electoral Act so that the card Reader procedure would be the sole determinant of a valid accreditation process. Contrariwise, from the Corrigendum No 2, made on March 28, 2015, amending paragraph 13 (b) of the Approved Guidelines, it stands to reason that the card Reader was meant to supplement the Voters' Register and was never designed or intended to supplant, displace or supersede it.

Indeed, since the Guidelines and Manual (supra), which authorised the use and deployment of the electronic Card Reader Machine, were made in exercise of the powers conferred by the Electoral Act, the said Card Reader cannot, logically, depose or dethrone the Voters' Register whose Juridical roots dare, firmly, embedded or entrenched in the selfsame Electoral Act from which it (the Voters

Register), directly, derives its sustenance and currency.

Thus, any attempt to invest it (the Card Reader Machine procedure) with such overarching pre-eminence or superiority over the Voters? Register is like converting an auxiliary procedure-into the dominant method procedure of proof, that is, proof of accreditation. This is a logical impossibility.” (pages 32 - 33 of the judgment) B

I have no reason for departing from the above pronouncements which I adopt as part of my reasoning in this appeal. I, therefore, vacate the judgment of the Lower Court woven on the said exhibit 317. I, entirely, endorse the conclusion of the trial Tribunal that “the burden to establish non-accreditation of 1, 222, 836 votes was on the Petitioners squarely”, page 3168, vol. 4 of the record. C

They failed to do because as the trial Tribunal found “the Petitioners relied heavily or solely on the number of accredited voters as contained in exhibit 317 (the Card Reader Report) to conclude that there were only 438, 127 accredited voters for the 11th April Governorship election in Akwa Ibom State,” (italics Supplied). I, also, agree with the trial Tribunal that it was “presumptuous, fallacious...and [a] jurisprudential absurdity for the Petitioners to ascribe to exhibit 317 such magnitude of credence.” With respect, the Lower Court was, equally, caught in this web of “presumptuous, fallacious [...] jurisprudential absurdity” of ascribing “to exhibit 317 such magnitude of credence.” (pages 3764 -3765 of Vol 4 of the record). D
E
F

Before dealing with exhibits 12 and 337, I would like to dispose of the arguments of the respondents with regard to PW49, pages 29 et seq of the respondents’ Brief. According to the trial Tribunal, at page 3776 of Vol 4:

“PW 49 tendered a report and appendices which are exhibits 666 (1-5). The said report is titled ‘Report on Akwa Ibom State 2015 Governorship Election Materials Inspection and Analysis.’ The Tribunal was baffled that the witness would never concede to being an expert despite the repeated cross examination on whether or not he was an expert. H

Strange enough, the PW50, PW51, PW52 who also participated in forensic analysis of ballot papers and other election materi-

als all declined being experts!

The Evidence Act, 2011 has no room for admission of the opinion of ‘Professional’ witnesses such as PW 49, it only permits the admission of opinion by experts pursuant to Section 68...It seems to us, and rightly too that the legal implication of PW49’s statement that he is not an expert is caught by Section 67 of the Evidence Act and becomes inadmissible in law...In this case even without undertaking the anatomy or morphology of PW 49’s evidence he himself expressly stated under cross examination...that he is a professional...

The PW49 having even declined being an expert under what basis will this Tribunal accept his evidence under Sections 67 and 68 of the Evidence Act? Furthermore, the so called expert failed to demonstrate in the open Court how he arrived at the findings. All what happened was a display of video clips of what he did and dumping or documents and the analysis and not how they were scientifically and systematically arrived at. This conduct fell below the criteria required of PW49 that is assuming we even magnanimously considered him as an expert...

On the whole we find no basis to accept the purported expert evidence of PW49. Certainly, accepting the drama he put on before us as an expert will turn this Tribunal into a carnival. The evidence of PW49 with all the exhibits presented by him are hereby rejected having not met the requirement of the law as contemplated by Sections 67 and 68 of the Evidence Act 2010 (as amended)[sic, Evidence Act, 2011].”[Italics supplied for emphasis]

PW50 and PW51, who were part of the team that were described as Professionals, did not impress the Tribunal. Listen to this admirable and impeccable finding:

“The highpoints of the evidence of PW50, PW51 and PW52 is that none of them qualified to be properly so called as ‘experts’ capable of persuading this Court to consider their evidence as experts as required by the evidence Act. Our conclusion is premised on the wishy-washy and haphazard analysis they carried out. They failed woefully to provide and demonstrate in the open Court the criteria and vital features by which they arrived at their conclusion. The process and scientific procedure undertaken by the professional in respect of the 13,258 ballot papers which they allegedly discovered to be multiple/duplicate votes as well as the 100,833 ballot papers which

they found not to be human thumbprints ought to have been demonstrated in evidence so that any other expert can get hold of those ballot papers and examine them with a view to verifying the validity of their conclusion...We cannot in the circumstance give probative value to the evidence of the evidence of PW50, PW51 and PW 52. Assuming we are wrong and accept the evidence of these witnesses as proved the only consequential effect will be to subtract the total of 129, 209 votes from 996, 071 votes. The first respondent (that is, the appellant in this appeal) would still have won the election with a very wide margin as against the 89, 865 votes the petitioners scored.” (pages 3781 -3782, italics supplied for emphasis) ^B ^C

In my humble view, the above findings and conclusions deserve plaudits and not excoriation. Unfortunately, the Lower Court, instead of affirming the brilliant performance of the said Tribunal, opted to pillory it. As learned senior counsel for the respondents pointed on page 29, paragraph 5.3, of the respondents’ brief the first and second respondents’ appealed against the decision... and the success of the appeal led to the nullification of the election in the entire thirty one LGAs of the State. ^D

With profound respect to the learned senior counsel and the Lower Court, this was a, completely, unwarranted interference with a flawless and unimpeachable judicial finding: a perfect and watertight finding, firmly, rooted in good law. Incidentally, I dealt with this question of experts and the imperatives of the provision of the scientific basis of their findings in *Okereke v. Umahi and Ors* (supra) thus: ^E ^F

“...although expertise, for evidential purposes, cannot be equiparated with Scholastic knowledge or professorial attainment.” *R v. Silverlock* (1894) 2 Q. B. 766; *AG, Federation v. Abubakar* (2007) All FWLR (pt 375) 405, 555; *Azu v. State* (1993) 7 SCNJ pt 1 151; *Sowemimo v. State* (2004) All FWLR pt 203 951, an expert is, all the same, a person who is specially skilled in the field he is giving evidence, *AG, Federation v. Abubakar* (supra). ^G

For this purpose, formal learning on the subject is discounted once affirmative responses are returned to Lord Russell’s Trinitarian posers in *R. v. Silverlock* (supra), namely, “is he peritus? Is he skilled Has he adequate knowledge? *Oguonzee v. State* (1998) 5 NWLR (pt 551) 60; *Sowemimo v. State* (supra); *I. H. Dennis, The Law of Evidence* (Second Edition) (London: Maxwell, 2042) 702 -710. ^H

That notwithstanding, such a person, who is paraded as an expert, must furnish the Court with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable it (the Court) to form its own independent judgment by the application of those criteria to the facts proved in evidence, Phipson on Evidence (12th Edition), paragraph 1227, page 497; David v. Edinbury Magistrates (1953) SC 34, 40.

Put differently, the opinion and conclusions, which such an expert proffered before the trial Court, must be supported by scientific analysis otherwise his evidence would be valueless or worthless. SPDC Ltd v Farah and Ors (1995) 3 NWLR (pt 382) 148; SPDC v. Otoko (1990) 6 NWLR (pt. 159) 693; Ogiale v. SPDC (Nig) Ltd (1997) 3 NWLR (pt 480) 165. It cannot be otherwise for, as Lawton LJ, observed in Turner [1975] Q. B. 834, 841: an observation which I adopt as part of my reasoning in this appeal:

“An expert’s opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a Jury... If on the proven facts, a Judge... can form (his) own conclusions without help, then the opinion of an expert is unnecessary.” See, also, M. Redmayne, Expert

Evidence and Criminal Justice (Oxford: O. U. P., 2001) 140 - 149, in I. H. Denis. The Law of Evidence (supra) 702. (pages 29 - 30).

Again, I see no reason for departing from my above reasoning which I adopt in this judgment. The situation is, even, worse in the instant appeal where the above witnesses, expressly, denied being experts, preferring instead to be addressed as *“Professionals.”* Professionals, indeed!!!

EXHIBITS 12 AND 337: POLICE AND CIVIL DEFENCE’S REPORTS

My Lords, exhibits 12 (Report of the civil Defence) and 337 (Police Report), as counsel for the appellant pointed out (paragraph 5.2.1, page 36) “formed part of the planks on which the Court of Appeal rested its findings and decision in regard to some of the LGAs.” Again, this is, rather, strange. I, entirely, endorse Dodo. SAN’s submission that the Lower Court *“was in error...in relying on...all the documents that the Court relied upon including but not limited to exhibits 12, 317 and 337 - when the makers thereof did not testify*

before the Court and there was no opportunity to test their credibility and veracity of the documents in cross examination,” (paragraph 5.4, page 37 of the appellant’s brief). Interestingly, the police Report, even, listed what it called the “*Achievements of the police*” as follows:

- (i) Peaceful conduct at the election in the State;
- (ii) Safety of election staff and materials; B
- (iv) Adherence to election standard operation practice for Police Officers;
- (v) Protection of INEC officers across the State;
- (vi) Vigilance dedication and resilience of officers and men C throughout the election
- (vii) Synergy among security agencies and formation of joint operations centre for interaction of various security agencies;
- (viii) Arrest of political thugs who attempted snatching ballot boxes and recovery of some snatched boxes (Italics supplied, page 7 D of exhibit 337 which did not indicate which of the Political Parties unleashed political thugs)

At page 2, lines 21 - 26, it mentioned “pockets of incidents in some parts of the State” in three [3], of the thirty one [31] LGAs. As, already, pointed out above, the makers of exhibits 12 and 337 were E not called to testify.

Yes, as this Court explained in *Dawodu v. Olugundudu* [1986] 4 NWLR (pt. 33) 104, 114:

“certain features of our adversary system of administration of justice carry with them some implications of inevitable delay. The audi alteram partem rule (which together with the rule nemo judex in causa sua form the twin pillars upon which fair hearing is based), carry with it the need to give to all parties due notice of hearing and the opportunity to be heard and to cross examine every witness called F by one’s adversaries. Generally, a breach of the rule, save in a few statutory exceptions will invalidate the proceedings because it is breach of not only the right to fair hearing entrenched in our Constitution but also a breach of rule of natural law.” (Italics supplied for emphasis) H

What is more, there is, even, authority for the view that as “cross examination plays a vital role in the truth searching process of evidence procured by examination-in chief it relates to authenticity or veracity of the witness, a Court of law

is entitled not to place probative value on evidence which does not pass the test of cross-examination...”Buhari v. INEC (2008) 19 NWLR (pt 1120) 246, 414 415; Shinkafi and Anor v. Yari and Ors (unreported decision of this Court of January 8, 2016). ***In my view, therefore, the Lower Court fell into grave error in placing reliance on the said exhibits, whose makers were not available for cross examination, in tampering with INEC’s declaration in favour of the appellant in the said election in the said eighteen LGAs of Akwa Ibom State. The same thing applies to exhibits 5 and 6 which were not tendered by their makers. Worse still, these exhibits did not indicate the date and time they were made.***

That is not the only snag with these exhibits. Contrary to the position which this Court has taken in several cases, old and recent, that a party who produces an exhibit so that the Court could utilise it in the process of adjudication must not dump it on the Court, but must tie it to the relevant aspects of his case, these exhibits were not so tied.

In effect, they were, simply, dumped on the trial Tribunal. That was not good enough. Ivienagbor v. Bazuaye (1999) 9 NWLR (pt 620) 552; (1999) 6 SCNJ 235, 243; Owe v. Oshinbanjo (1965) 1 All NLR 72 at 15; Bornu Holding Co. Ltd. v. Alhaji Hassan Bogoco (1971) 1 All NLR 324 at 333; Alhaji Onibudo & Ors v Alhaji Akibu & Ots [1982] 7 SC 60, 62; Nwaga v Registered Trustees Recreation Club (2004) FWLR (pt 190) 1360, 1380-1381; Jalingo v. Nyane (1992) 3 NWLR (pt 231) 538; Ugochukwu v. Co-operative Bank (1996) 7 SCNJ 22.

Others include: WAB v Salanah Ventures (2102) FWLR (pt. 112) 53, 72; Obasi Brothers Ltd v. MBA Securities Ltd (2005) 2 SC (pt 1) 51, 68; ANPP v INEC (2010) 13 NWLR (pt 1212) 549; Ucha v. Elechi (2012) 13 NWLR (pt 1317) 330, 360; Onisore v. Aregbesola (2015) 15 NWLR (pt 1482) 202, 323, 324.

Accordingly, I, equally, resolve this issue in favour of the appellant.

ISSUE THREE (Appellant’s original issue two)

Whether the Court of Appeal was right in holding that there was over-voting in the election and that the alleged over-voting justified the finding of the Tribunal in regard to purported disenfranchise-

ment of voters and the consequent nullification of the results of the election in the eighteen LGAs?

The question in this issue revolves around the propriety of the Lower Court's reliance on exhibit 317 [Card Reader Report] in holding that there was over-voting in the election and that the alleged over-voting was a sufficient warrant for the trial Tribunals nullification of the election in the said eighteen LGAs on the ground that the voters were disenfranchised.

Having, exhaustively, dealt with the probative value of the Card Reader report [exhibit 317] earlier in this judgment, I need not repeat myself here. I, therefore, adopt my reasoning on the said Card Reader here in holding that the Lower Court should not have placed any probative value on the said exhibit because of the reasons, already, advanced above. The only mode of proving disenfranchisement, as shown above, is by calling, at least, one registered voter Polling Unit by Polling Unit etc as enunciated in the cases I had referred to before now. *Ucha v Elechi and Ors* (supra); *Ngige v INEC* (supra); *Kakih v PDP* (supra) etc. I, also resolve this issue in favour of the appellant.

Having resolved all the issues in favour of the appellant, I find that this appeal must be, and is hereby, allowed as being meritorious. The Petitioners, inter alia, failed to discharge the burden of proving their criminal allegations, as shown above just as they did not discharge the burden of proving non compliance with the Electoral Act, *Ucha v Elechi and Ors* (supra). What is more, they failed to prove their entitlement to the reliefs sought in their Petition: a matter that is declaratory in nature, *CPC v INEC* [2012] FWLR (pt 517) 605, 633 - 634; *Omisore v. Aregbesola* (supra).

As, already, indicated earlier, instead of proving their claim on disenfranchisement by the production of the Voters' Register and testimonies Polling Unit by Polling Unit, they placed reliance on the Card Reader Report, exhibit 317. Most, curiously, most of their documents lacked any probative value since their makers were not called for the purpose of testing their credibility and probing the veracity of the said documents. The hiatuses in their case have been pointed out in the reasons for this judgment and there is no point repeating them here.

Accordingly, I hereby vacate the orders of the Lower Courts

nullifying the appellant's election in the said eighteen LGAs. In consequence, I allow this appeal since the Petitioner (first and second respondents in this appeal) have, woefully, failed to prove their complaints against his said election in the said LGAs. Parties are to bear their respective costs.

B

MOHAMMED CJN

This appeal was heard on Wednesday 3rd February, 2016. On that I delivered my own Concurring Judgment agreeing with the lead Judgment delivered by my learned brother Nweze, JSC., allowing the appeal, setting aside the judgment of the Court of Appeal delivered on 18th December 2015 affirming the Judgment of the Akwa Ibom State Governorship Election Tribunal of 21st October, 2015, nullifying the Governorship election conducted in 18 Local Government Areas of the State on the ground that the voters in those Local Government Areas have been disenfranchised. In place of the Judgment of the Court below and the Judgment of the Election Tribunal now set aside, a Judgment dismissing the petition of the 1st and 2nd Respondents for failing to prove their case to warrant the nullification of the election in the named 18th Local Government Areas of Akwa Ibom State was entered. On that day I indicated that I shall give my own reasons for allowing the appeal today and I now proceed to do so.

This appeal is against the Judgment of the Court of Appeal Abuja Division given on 18th December, 2015, in an appeal by the Appellant against the Judgment of the Akwa Ibom State Governorship Election Tribunal of 21st October, 2015. The Tribunal's decision was on the petition that was filed by the 1st and 2nd Respondent in respect of the Governorship Election that was conducted on 11th April, 2015 by the 4th Respondent, INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) and in which the Appellant who was the 3rd Respondent's Peoples Democratic Party (PDP) candidate for the election, was declared the winner with 996,071 votes while the 1st Respondent who was sponsored for the election by the 2nd Respondent ALL PROGRESSIVES CONGRESS (APC) garnered 89,865 votes.

Dissatisfied with the results of the election, the 1st and 2nd

Respondent, proceeded to the Governorship Election Tribunal with their petition filed on 30th April, 2015. Challenging the election and return of the Appellant on two specific grounds in Paragraph 15 of the petition as follows:

“15(i) The election was invalid by reasons of corrupt practices and/or non-compliance with the provisions of the Electoral Act 2010^B as amended.

(ii) The 1st Respondent was not duly elected by majority of lawful votes cast at the election.”

After filing relevant replies by the Respondents, the petition^C was heard by the Tribunal in the course of which hearing, the petitioner as now 1st and 2nd Respondents called 52 witnesses while the Appellant in Response all 19 witnesses. Other Respondents also called 4 witnesses each. At the end of the hearing in a considered judgment the Tribunal nullified election in 18 Local Government Areas out of 31 in Akwa Ibom State and ordered rerun election in the affected^D Local Government Areas.

Aggrieved by this Judgment of the Tribunal, the Appellants as declared winner of the election appealed to the Court of Appeal Abuja Division which dismissed the appeal and affirmed the Judgment of^E the Tribunal. The Appellant then proceeded to this Court on further appeal upon a Notice of Appeal containing 30 grounds of Appeal from which 4 issues for determination of the appeal were formulated in the Appellants brief of argument. The main issue is whether or not^F the decision of the Court of Appeal affirming the nullification of the election in 18 Local Government Areas of Akwa Ibom State on the ground that the voters in the affected Local Government Areas were disenfranchised is not perverse and in breach of the Appellant's right of fair hearing and liable to be aside. What can constitute a perverse^G decision was laid down by this Court in UDENAGWU VS UZUEGBU (2003) 13 NWLR (Pt.836) 136. On the allegation by the 1st and 2nd Respondents that the voters in the 18 Local Government Areas of Akwa Ibom State were disenfranchised, the burden placed on the petitioners now Respondents is not at all in doubt having regard to a^H plethora of decisions of this Court. The law is trite that a voter is disenfranchised when his right to vote is taken away from him. That is to say he claims to be a registered voter but was not allowed to vote. In otherwords, the Court would be satisfied on the proof of

disenfranchisement of voters when such voters give clear evidence that they were duly registered for the election but were not given the opportunity to cast their votes. In this regard it is necessary for such voters to tender in evidence their respective voters cards and Registers of voters from each affected polling unit to confirm the allegation of non-voting. Most important of all is the need for such disenfranchised voters to give evidence to show that if they had been given the opportunity to vote, the candidate of the political party of their choice would have won the election. See NGIGE & ORS VS. INEC & 3 ORS (2015) 1 NWLR (PT.1440) 281 at 326 OKE VS MIMIKO (No.2) (2014) 1 NWLR (Pt.1388) 332 an UCHE & ANOR VS ELECHI & 2 ORS (2012) 13 NWLR (Pt.1317) 330. In the present case the evidence led by the 1st and 2nd respondents in proof of disenfranchisement of voters in all the 18 Local Government Areas of Akwa Ibom State did not satisfy the requirement of the law in proving disenfranchisement from one polling unit to the other as required by law. For this reason, the Governorship Tribunal and by extension, the Court of Appeal were wrong in finding with the scanty evidence led by the Petitioners 1st and 2nd Respondents that their claim on the alleged disenfranchisement of voters in 18 Local Government Areas in Akwa Ibom State, had been proved to justify giving judgment in their favour.

It is therefore for the above reasons and more comprehensive reasons given in resolving all the issues identified in the Appellant's brief of argument in the lead Reasons for judgment allowing this appeal prepared by my learned brother Nweze, JSC. with which I entirely agree, that I allowed this appeal, set aside the judgments of the Election Tribunal and the Court of Appeal and replaced them with the finding of dismissal of the Petition of the 1st and 2nd Respondents and affirming the election and return of the Appellant as duly elected Governor of Akwa Ibom State in the Governorship Election conducted by the 4th respondent on 11th April, 2015.

H

MUHAMMAD JSC

On Wednesday, 3rd of February, 2016, I agreed with my, learned brother, Nweze, JSC, who delivered the lead Judgment, allowing the appeal and reasons for doing so adjourned to today.

My learned brother, Nweze, JSC, afforded me the opportu-

nity to read before today, the reasons he marshaled for allowing the appeal. I am in agreement with him in his reasoning which I adopt as mine. I have nothing more to add. I allow the appeal and abide by consequential orders made in the lead reasoning including order on costs.

B

GALADIMA JSC

This Court heard and allowed this appeal on Wednesday the 3rd of February, 2016. I promised to proffer my reasons today, Monday, February 15th, 2016. My reasons are set out below. C

The lead judgment in this appeal was made available to me. I have carefully read it before now I am in complete agreement with the reasons and conclusions arrived by my learned brother NWEZE JSC. I am in complete agreement with him that this appeal has merit D and must be allowed.

The appeal is against the judgment of the Court of Appeal Holden in Abuja in Appeal No: CA/EPT/656/205 delivered on the 18th December, 2015, in which the Court affirmed the decision of the Trial Tribunal. Consequent upon this the Appellant filed his Notice of Appeal on 30th December, 2015 containing 30 Grounds. E

The facts of the case have been ably stated in detail in the lead judgment. It is unnecessary for me to repeat them, except if the need arises for me to make reference for the purpose of emphasis. F

Learned senior counsel for the Appellant D.D DODO, SAN formulated the following FOUR ISSUES for determination in the Appellant's brief of argument filed 15th January, 2016 the Issues are:-

"1. Whether the decision of the Court of Appeal affirming the Judgment of the Tribunal that nullified the results of the Election in 18 LGAs of Akwa Ibom State and ordering return elections thereat on the ground that the voters in the said LGAs were disenfranchisement is not perverse and in breach of the Appellant's right to fair hearing and liable to be set aside by this Honourable Court? (Grounds 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 24, 23 and 25. H

2. Whether the Court of Appeal was right was right in holding that there was over-voting in the Election and that the alleged over

voting justified the finding of the Tribunal in regard to purported disenfranchised of voters and the consequential nullification of the results of the Election in the 18 LGAs? (Grounds 21, 24).

3. Whether the decision of the Lower Court affirming the nullification of the results of the Election in the 18 LGAs is not perverse having regard to the fact that the Court relied heavily on the legally inadmissible documentary evidence, the makers of which did not testify before the Tribunal? (Grounds 28, 29 and 30)

4. Whether the Court of Appeal was right in holding that the “beyond reasonable standard, doubt” standard of proof enunciated and settled by this Honourable Court, was not applicable to the criminal allegations made in the Petition, and/or by the 1st and 2nd Respondents? (Grounds 22, 26 and 27)”

In the 1st and 2nd Respondents’ brief settled by their senior counsel CHIEF WOLE OLANIPEKUN SAN, 4 Issues formulated for determination of this appeal are similar in content with those of the Appellant. The issues are as follow:-

“1. Whether the Lower Court was not right in affirming the decision of the Trial Tribunal which nullified the Governorship Election in eighteen Local Government Areas of Akwa Ibom State pursuant to the oral and documentary evidence adduced - Grounds 1, 2, 3, 4, 5,6, 7, 8,9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23 and 25.

2. Whether the Lower Court was not right in specifically holding that there was over-voting which vitiated the Election Grounds 21 and 24.

3. Whether the documentary evidence in this case were not all admissible and properly relied on by the Lower Court - Grounds 28, 29 and 30.

4. Whether the Lower Court was not right in holding that the Trial Tribunal was in order by not applying standard of proof beyond reasonable doubt in this case Grounds 22, 26 and 27.

It is to be noted that no briefs of argument were filed on behalf of the 3rd and 4th Respondents by their counsel TAYO OYETIBO, SAN and for 4th and 5th Respondents by their counsel DR. ONYEACHI IKPEAZU SAN respectively. The 6th Respondent though duly served with the Hearing Notice was absent.

It is equally pertinent to state that the Appellant filed his reply brief in respect to the 1st and 2nd Respondents Brief of Argument on

27th January, 2016.

On the Appellant's Issue I and II it is the contention of the Appellant that the Lower Court had misconceived the thrust of case presented and decided to take irrelevant matters into consideration and therefore its judgment was perverse. It is submitted that the respondents have failed to contest the contention of the Appellant that the trial Tribunal nullified the Elections Results in the 18 LGAs of Akwa Ibom State on the sole ground that thousand of voters indicated to vote at the election but were disenfranchised and secondly that Appellant's Grounds of Appeal before the Lower Court challenged the decision of the Trial Tribunal only on this Ground. May it be noted here that there was neither a Cross-Appeal nor a Respondent's Notice before the Court below that could have placed other issue before the Court. I agree with the learned senior counsel for the Appellant that there was no basis for the Court below to have completely veered from the Respondents' claim of disenfranchised voters into the realm of an Issue that does not arise from the Grounds of Appeal before the Court. There was really no basis for that. Appellate Courts enjoined not the veer outside the confines of the Ground of Appeal before it. For it is now trite that a Notice of Appeal is the basic foundation and backbone of every appeal. No Appellate Court can go outside it and dabble with issue not placed before it. See RALPH VWAZURIKE & ORS v. ATTORNEY GENERAL OF THE FEDERATION (2007) 2 SCNJ. 369; EGHOLGBIN OKETIE & ORS v. AMBROSE OLUGHOR & 6 ORS (1995) 5 SCNJ 217.

The argument of the respondent that the Appellant did not challenge the crucial finding of the Court below to the effect that *"where the Court/Tribunal has nullified an election for non-compliance the Issue of proving disenfranchisement is non-sequitur and cannot stand"*. The Appellant continually contended that the Tribunal nullified the election in the said 18 LGAs on SOLE ground of "thousands of voters indicated to vote were disenfranchised". It was also consistently asserted on each of those particular of the Grounds of Appeal that nullification of the election were not only at all based on the issues and/or Grounds which the Lower Court raised and on which basis it reached its decision.

The foregoing apart in the Appellant's issue 2 the crux of the Appellant's contention is about the undue reliance of Exhibit 317

(Card Reader Report) by the Court below to conclude that there was over-voting in the election and that this was enough for the Trial Tribunal to nullify the election in the said 18 LGAs. The Court had relied on all the documents namely Exhibits 12, 317, and particularly 337 when the makers did not testify before the Court, and therefore there was no opportunity to test their credulity and veracity. These are reports of the Civil Defence and Police respectively. The same thing applies to Exhibit 5 and 6 which were not tendered by their makers.

Apart from these facts, the act of dumping exhibits on the Trial Tribunal, without more, is not good enough. It places a great hurdle to the Court and prevents it from utilizing such documents for the proper adjudication. See *UCHA v. ELECHI* (2012) 13 NWLR (PT.317) 330; *OMISORE v. AREGBESOLA* (2015) 15 NWLR (PT. 1482) 202. 232; *JALINGO v. NYAME* (1992) 3 NWLR (PT. 231) 538.

I am of the respectful view that the 1st and 2nd Issues formulated by the Appellant and as considered them generally hereto by me, but more painstakingly considered in the lead judgment of my learned brother NWEZE JSC together with all other Issues set out for determination with him and I also inevitably come to the same conclusion that the appeal has merit and must be allowed. I abide by the consequential orders made in the lead reasoning including that on costs.

RHODES-VIVOUR JSC

This appeal has been brought by Udom G. Emmanuel, the Governor of Akwa Ibom State, to set aside the Judgment of the Court of Appeal on 18 December 2015, which nullified his election into the office of Governor of Akwa Ibom State, and ordered fresh elections for that office. On 3 February, 2016 your lordships set aside the Judgment of the Court of Appeal for reasons to be given on 15 February, 2016 by my learned brother, Nweze JSC. These are the reasons that led me to that conclusion.

The case of the 1st and 2nd Respondents is that there was no election in the whole of Akwa Ibom State. That is to say the people in the state who would have voted for the 1st and 2nd Respondents

were disenfranchised.

In Ngige v. INEC (2015) 1 NWLR (Pt.1440) p.281 I explained how a petitioner establishes that voters were disenfranchised. I said:

“A voter is disenfranchised when his right to vote is taken away. That is to say he claims to be registered but was not allowed to vote. When would the Court be satisfied that voters were disenfranchised?” ^B

(a) The disenfranchised voters must give evidence to establish the fact that they were registered but were not allowed to vote.

(b) The voters card and voters register for the polling unit must be tendered.

(c.) All the disenfranchised voters must testify to show that if they were allowed to vote their candidate would have won the election.” ^C

There are 31 Local Governments in Akwa Ibom State and very well over 2,000 polling units spread across the State. Fifty-three witnesses, mainly collation and Polling Agents and a sprinkling of voters gave evidence that there was no election in their Polling Units. This might well be so, but the evidence led on disenfranchisement covered not many Polling Units, and were not enough to nullify the election. It was not substantial. ^D

In Ucha & Anor v. Elechi & 1774 Ors (2012) 13 NWLR (Pt.1317) p.330. I reminded would be Petitioners in Election Petitions how difficult it is to succeed in an election Petition when I said that: ^E

“The results declared by INEC are prima facie correct and the onus is on the petitioner to prove the contrary. Where a petitioner complains of non-compliance with provisions of the Electoral Act, he has a duty to prove it polling unit by polling unit, ward by ward and the standard required is proof on the balance of probabilities and not an minimal proof. He must show figures that the adverse party was credited with as a result of the non compliance, Forms EC8A, election materials not stamped/signed by Presiding Officers. He must establish that non compliance was substantial, that it affected the election result. It is only then that the Respondents are to lead evidence in rebuttal...” ^F

The 1st and 2nd Respondent were unable to show that there was no election, polling unit by polling unit, ward by ward. They were able to show no election or irregularities in polling units that ^H

their fifty-three witnesses went to. This surely has not covered the over 2,000 polling units with evidence of irregularity in voting.

Claims that there was no election is not imagined or perceived. It must be proved to the satisfaction of the Court, and this the 1st and 2nd Respondents failed to do, and that explains why this appeal succeeds.

Section 49 of the Electoral Act 2010 states that:

“49 (1) Any person intending to vote with his voter’s card shall present himself to a Presiding Officer at the polling unit in the constituency in which his name is registered with his voter’s card.

(2) The Presiding Officer shall, on being satisfied that the name of the person is on the Register of voters, issue him a ballot paper and indicate on the Register that the person has voted.”

The Electoral Act is an Act of the National Assembly. Section 49 (1) and (2) above makes it abundantly clear that on election day a person would be allowed to vote if his name is on the Register of voters. There is no provision for Card Reader.

The Card Reader is the brainchild of the former head of INEC. It has no statutory backing. It was introduced to improve the accreditation process. The card reader does not violate any law. It makes election credible and transparent when it works properly. It follows naturally that once the National Assembly amends the Electoral Act to provide for card readers, then card readers would be very relevant for nullifying elections. On the simple position now, if 100 voters are on the Register of voters. The card reader accredited 50 voters on the day of election, but 80 voters cast their votes on election day, there was no over voting since voters were less than those in the Register of voters. The election would be nullified if the number of voters exceeds the number of voters in the Register of voters.

A careful reading and understanding of decided authorities show that a petitioner has an uphill task of proving his petition in accordance with the Electoral Act. The petitioner is always saddled with difficult legal requirements and procedures.

To my mind I think it is high time something radical and good the electoral process is done. It is suggested by me that the Electoral Act should be amended to shift the burden of proof to the Independent National Electoral (INEC) to prove that it conducted a fair and reasonable election.

For this and the comprehensive reasoning rendered by my learned brother Nweze, JSC which I read in draft, I also would allow the appeal.

AKA'AH'S JSC

We heard this appeal together with Appeals No. SC.3/2016; SC.2/2016; SC.4/2016; SC.6/2016 and SC.7/2016 on 3rd February, 2016 and allowed them and adjourned to today, Monday, 15th February, 2016 to advance reasons for allowing the appeals.

My learned brother, Nweze, JSC painstakingly gave reasons for allowing this appeal and the others. I entirely agree with these reasons for the judgment and I adopt them as mine.

This appeal deals with the election into the office of the Governor of Akwa Ibom which was conducted by the Independent National Commission (INEC) the 4th Respondent in this appeal on 11th April, 2015. The appellant who was sponsored by the Peoples Democratic Party (PDP) now 3rd Respondent was declared as the winner of the said election and therefore returned as the elected Governor of Akwa Ibom State.

The 1st Respondent was sponsored by the All Progressives Congress (APC), 2nd Respondent for the election. They were aggrieved with the conduct and outcome of the election and filed a petition before the Akwa Ibom State Governorship Election Tribunal. They questioned the election on two grounds contained in Paragraph 15 of the petition as follows:-

“15(1) The election was invalid by reason of corrupt practices and/or non-compliance with the provisions of the Electoral Act 2010 (as amended).

“(ii) The 1st respondent was not duly elected by majority of lawful votes cast at the election”.

They accordingly sought for the following reliefs in Paragraph 92 of the petition.

“(i) That it may be determined and thus determined and declared that the 1st Respondent Udom Gabriel Emmanuel who was the candidate of the 2nd respondent was not duly elected or returned by the majority of lawful votes cast at the Akwa Ibom State Governorship election held on Saturday April, 11th 2015.

(ii) *That it may be determined and thus determined and declared that the said Governorship election of April 11, 2015 and the return of the 1st respondent, Udom Gabriel Emmanuel by the 3rd respondent are void/invalid by reasons of corrupt practices, non-compliance with the provisions of the Electoral Act (as amended) violation and breached of the various provisions of the said Electoral Act, 2010, the INEC Guidelines and Regulations for the conduct of the 2015 Governorship Election and Manuel.*

(iii) *That it may determined and thus determined and declared that the respondent, Udom Gabriel Emmanuel did not score and could not have scored majority of lawful votes cast in at least two thirds of the thirty-one local Government Areas of Akwa Ibom State at the Governorship election held on April 11, 2015 and thus his return by the 3rd respondent is unconstitutional irregular, null and void and of no effect”.*

After hearing oral evidence from the parties and admitting 360 Exhibits and considering the evidence, the Tribunal nullified the results of the election in 18 out of the 31 Local Government Areas. A re-run was ordered for the 18 Local Government Areas where the election was ordered because the voters were disenfranchised. The Tribunal upheld the results in the remaining 13 Local Government Areas. The appellant appealed against the judgment of the Tribunal to the Court of Appeal. The 1st and 2nd respondents did not file any Notice that the trial Tribunal’s judgment be affirmed on other grounds but the Court of Appeal after hearing the appeal went ahead to set aside the Tribunal’s order upholding the results in the 13 Local Government Areas and in addition ordered the nullification of the entire results of the Governorship election of April 11, 2015 in Akwa Ibom State.

Apart from behaving like a Father Christmas in favour of the 1st and 2nd respondents in the nullification of the results in the 13 Local Governments the lower Court did not show that the 1st and 2nd respondents proved the commission of crime beyond reasonable doubt as stipulated in Section 135(1) Evidence Act to warrant the nullification of the election in the said 13 Local Government Areas. See Buhari v. Obasanjo (2005) SCNJ 1.

The 1st and 2nd respondents challenged the election of the appellant as being invalid because of corrupt practices and the sec-

ond relief sought for declaration that the return of the 1st respondent is void or invalid by reason of corrupt practices. Where a petitioner alleges that the election is invalid because of non-compliance with the provisions of the Electoral Act he has the burden of showing that the non-compliance substantially affected the result of the election. Section 139(1) of the Electoral Act 2010 (as amended) provides that:- B

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

The 1st and 2nd respondents failed to prove the corrupt practices they alleged in the petition.

In an effort to prove there was over voting reliance was placed on Exhibit 317 (the Card Reader Report). While the introduction of the Card Reader is commendable for the accreditation of voters, it has not been made part of the Electoral Act. Not only that there are instances where the card reader did not function well and resort had to be made to manual accreditation. The evidence of DW4 showed that Exhibit 317 did not contain the total number of accredited voters. These pieces of evidence were crucial in showing that the allegations contained in the petition were not proved even on the balance of probabilities. E

It is for these reasons and the more comprehensive reasons contained in the judgment of my Lord Nweze, JSC that I allowed the appeal on 3rd February, 2016. Parties are to bear their respective costs. F

KEKERE-EKUN JSC

When we heard this appeal on Wednesday 3rd February 2016, I agreed with the lead judgment of my learned brother, Nweze, JSC that the appeal has merit and I accordingly allowed it. I promised to give my reasons for so doing today, 15th February 2016. H

This appeal arose out of the Governorship election held in Akwa Ibom State on 11th April, 2015 wherein the Appellant was returned as the duly elected Governor of the State. The appeal is against the decision of the Court of Appeal delivered on 18th Decem-

ber, 2015 affirming the judgment of the Akwa Ibom State Governorship Election Tribunal delivered on 21st October, 2015, which nullified the election in eighteen Local Government Areas (LGAS) of the State and ordered a re-run in the affected LGAs.

B I have had the benefit of reading before now the reasons just proffered by my learned brother, Nweze, JSC for allowing the appeal. I agree entirely and adopt the reasons and conclusions as mine. I wish to add a few comments in support.

C It is well settled that an election petition is a proceeding, which is sui generis, being of its own kind, possessing an individualistic character, which is unique and like only to itself. It is unlike ordinary civil proceedings and governed by its own unique Constitutional and statutory provisions. See: Buhari v. Yusuf (2003) 14 NWLR (Pt. 841) 446; Hassan v. Aliyu (2001) 17 NWLR (Pt. 1223) 547; Enuwa v. O.S.L.E.C. D (2006) 10 NWLR (Pt. 1012) 544.

E Certain precedents have been laid down by this Court to serve as a guide to Tribunals and Courts in evaluating evidence and resolving the various issues that may arise. For instance, it has long been settled that where allegations of corrupt practices are made, which are criminal in nature, notwithstanding the fact that election petitions are a specie of civil proceedings, the standard of proof is as provided for in Section 135 (1) of the Evidence Act 2011 (formerly Section 138 (1) of the Evidence Act 1990), that is, proof beyond reasonable doubt. See: Abubakar v. Yar'Adua (2008) 19 NWLR (Pt. 1120) 1 @ F 143 D 144 B; Buhari v. Obasanjo (2005) 13 NWLR (Pt. 941) 1; Omoboriowo v. Ajasin (1984) 1 SCNLR 108; Kakih v. PD.P. (2014) 15 NWLR (Pt. 1430) 374 @ 422-423 B-C; Nwobodo v. Onoh (1944) 1 SCNLR 27-28.

G By the doctrine of stare decisis, a point of law that has been settled by a superior Court must be followed by a lower Court. See: Chukwuma Ogwe & Anor. v. I.G.P. (2015) LPELR-SC 214/2013; Royal Exchange Assurance Nig. Ltd. v. Aswani Textiles Ind. Ltd. (1991) 2 NWLR (Pt. 176) 639 @ 672. Thus, the Court of Appeal and the H Tribunal are bound by these authorities. The 1st and 2nd respondents, having made allegations of violence, voter intimidation, hijacking, kidnapping, snatching of electoral materials, etc., had no option but to prove the allegations beyond reasonable doubt. Having failed to discharge the onus on them, the Court below erred in applying a

different standard of proof i.e. on the balance of probabilities, to the facts of the case. There is no doubt that where a principle of law is wrongly applied to the facts of a case, the decision arising therefrom would be said to be perverse and would not be allowed to stand. See: *Nobis-Elendu v. INEC* (2015) LPELR-25127 (SC); *Ebba v. Ogodo* (1984) 1 SCNLR 372; *Adeyemi v. The State* (1991) 1 NWLR (Pt. 170) 635. B

The same principle of *stare decisis* applies to proof of disenfranchisement of voters, which was one of the grounds upon which the election in 18 Local Government Areas was nullified. This C

Court has laid down in a plethora of cases that in order to prove disenfranchisement, the petitioner has the onerous task of proving his case through the testimony of disenfranchised voters: polling unit by polling unit, ward by ward. See: *Ucha v. Elechi* (2012) 13 NWLR (Pt. 1317) 330; *Oke v. Mimiko (No.2)* (2014) 1 NWLR (Pt. D 1388) 332; *Ngige v. INEC* (2015) 1 NWLR (Pt. 1440) 281.

This Court in *Ngige v. INEC* (supra) @313 F-H, noted that proof of non-compliance with the provisions of the Electoral Act in the conduct of an election, which rests squarely on the petitioner, is a Herculean task and the decision of a petitioner to file a petition seeking the nullification of an election on grounds of non-compliance is not a decision to be taken lightly. E

It is my view that if the Court below had been properly guided by the settled precedents on proof of non-compliance, it would have had no difficulty in finding that the evidence led by the 1st and 2nd respondents did not meet the required standard of proof. F

In this case, heavy reliance was placed on the Card Reader Report (Exhibit 317) as constituting conclusive proof of the number of accredited voters for the Akwa Ibom State Governorship election, which took place on 11th April 2015. This Court has held in several recent decisions that the function of the Card Reader machine is solely to authenticate the owner of a voter's card and to prevent multi-voting by a voter. For the time being, it has not replaced the manual accreditation provided for in Section 49 of the Electoral Act, 2010 (as amended). See: *Shinkafi v. Yari* (unreported) SC.907/2015 delivered on 8/1/2016; *Okereke v. Umahi* (unreported) SC.1004/2015 delivered on 5/2/2015 at pages 31-34; *Nyesom v. Peterside & Ors.* (unreported) SC.1002/2016 delivered on 12/2/2016. I therefore H

agree with my learned brother, Nweze, JSC that the lower Court erred in ascribing such probative value to the Card Reader Report, whose maker, in any event, was not called to testify.

It was for these and the more comprehensive reasons articulately adumbrated by my learned brother, Nweze, JSC, that I allowed the appeal.

I abide by all the consequential orders made, inclusive of costs.

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