THE CRISIS OF ELECTION PETITIONS AND DECISIONS.

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1. INTRODUCTION

1.1 As was accurately noted in the Report of the Uwais Committee on Electoral Reform, the 85-year old history of elections in Nigeria shows a progressive degeneration of outcomes. "Thus, the 2007 elections are believed to be the worst since the first elections held in 1922".[1] The Report continues with the following gloomy observation.

> "The history also shows that elections conducted by the military tended to be more credible than those conducted by civilian authorities. The primary reason for this has been the effort by politicians to perpetuate their hold on power at all costs. Over the years, the politicians have become more desperate and daring in taking and retaining political power; more reckless and greedy in their use and abuse of power; and more intolerant of opposition, criticism and efforts at replacing them. The electorate, seeing their hopes dashed with each set of elections, have come to believe that politicians lack the will to use state power to transform the lives of ordinary citizens. This loss of confidence in governments by the electorate is a threat to our democratic project."

1.2 As the quality and standard of elections have plummeted, so have the number of election petitions risen astronomically. The elections of

[1] See Report of the Electoral Reform Committee, vol. 1, p. 19, December 2008.

2003 resulted in 574 petitions, whilst those of 2007, produced a whopping 1,475 petitions.

As painstakingly reported by the Uwais Committee the various grounds on which the petitions were based included the following.[2]

> "(i) The opposing candidates were not qualified to contest the election on the date the election held.
>
> (ii) Unlawful disqualification of the petitioner by INEC to contest the election by the fact that his name, photograph and party logo are missing on the ballot papers.
>
> (iii) The election was marred by malpractices such as rigging, snatching of ballot boxes, thuggery, violence, declaration of false results, exclusion of lawful votes from counting, falsification and forgery of result sheets, corrupt practices, over-voting, under-age voting and multiple voting.
>
> (iv) Non-compliance with the provisions of the Electoral Act, 2006.
>
> (v) Indictment of the successful candidate before the election by a Judicial Commission of Inquiry or an Administrative Panel or Tribunal of Inquiry.
>
> (vi) The successful candidate not being lawfully elected by reason of irregularities such as dumping of ballot papers in the ballot boxes, tampering with ballot boxes, general intimidation of the petitioner's agents and supporters at polling units.

[2] See pp. 150-1, para. 5.4.2.3

(vii) Election being held on a day different from the date fixed by INEC without adequately informing the electorates of the substituted date.

(viii) The Respondent was member of a secret society.

(ix) Results from certain electoral wards were unlawfully omitted in collating the final result of the election.

(x) Non-serialization of ballot papers.

(xi) The votes cast exceeded the number of ballot papers issued by INEC for the election.

(xii) All the presiding officers at the election were card-carrying members of the PDP.

(xiii) The elections were invalid by reason of corrupt practices by the successful candidate.

(xiv) Votes were cast at the polling centers where there was no registration of voters during the last exercise for the registration of voters.

(xv) Some results of the elections were yet to be declared by the time of filling petition.

(xvi) Falsification and inflation of figures at Polling Units and collation centres on Form EC8(1) and Form EC8BG."[3]

1.3 There is no doubt that the emergence of Professor Atahiru Jega as the Chairman of INEC and the appointment of some members of the Commission, renowned for their integrity, constitutes a step in the direction of solving the elections and election petition crises in this country. But it is only a partial, or even a minor solution. If we tackle

[3] Pp. 150 – 151 of Report.

the institutional problems more vigorously, the personality problems will solve themselves progressively.

1.4 For example, the Uwais Commission made some crucial and major institutional related recommendations which have still not been implemented.

These include:

(i) A 6-month interval between the conclusion of elections and the assumption of office of elected officials thus giving reasonable time for election petitions to be concluded.

(ii) Giving the National Judicial Council the power to nominate three persons for the position of Chairman of INEC with the National Council of State being empowered to select one of the three to occupy the position.

(iii) The creation of an Election Crimes Tribunal for the prosecution of offenders against the provisions of the Electoral Act. And a prosecutorial Body known as the Electoral Offences Commission to be established to work independently in the arraignment and prosecution of electoral offenders.

1.5 The fact that these recommendations are yet to be implemented, means that the battle for a free, fair and credible elections and election petition system is still some distance away.

With regard to specific tribunals and cases, the Uwais Committee identified the following major problems which have bedeviled the system.

(a) discrepancy between the ineffectiveness, violence and fraud observed by members of the public on election days on one hand and the judgment of the Election Petition Tribunals that people see as validation of fraudulent elections on the other;

(b) delay in the conclusion of election petitions;

(c) allegations of corrupt inducement of tribunal members;

(d) undue emphasis on technicalities instead of substantive matters resulting in judgments that do not satisfy public expectation;

(e) the use of state resources by persons declared winners (respondents) after gubernatorial and presidential elections to prosecute their cases while petitioners depend on their own resources;

(f) The number of election tribunals is inadequate resulting in a heavy caseload for tribunal members;

(g) contradictory judgments by same panels on similar cases and by different panels on similar cases;

(h) members of the public consider the period for determination of election disputes as too lengthy; and

(i) difficulty of obtaining election documents by petitioners.[4]

1.6 My main objective in this Lecture is to subject the attitude of our Election Tribunals and Court of Appeal to a sharp X-ray examination, in order to highlight many areas in which our Judges, either out of sublime ignorance or deliberate mischief, distort substantive and procedural rules and principles of election petitions, thereby giving rise to perverse and unjust decisions, and allowing stolen mandates to remain with the thief.

[4] Page 251, Uwais Report

1.7 Let me list the subject matter or areas of Law and Procedure I intend examining:

(i) The issue of Substantial Non-Compliance with the Electoral Act.

(ii) The Relevance of the doctrine of Beyond Reasonable Doubt. – Where does the concept of Balance of Probability come in?

(iii) Whether Misconduct in an Election must be traced to the Declared Winner before the Announced Fraudulent Result can be affected.

(iv) On whom rests the Burden of Proof that an Election took place and that it was free and fair.

2. SUBSTANTIAL COMPLIANCE

2.1 What is the Effect of Substantial Non-compliance with the Electoral Act?

Due to the fact that Nigerian Judges, even up to the level of the Supreme Court, have had great difficulty understanding this provision, in Section 146(1) of the Electoral Act 2006, they have generally misinterpreted and misapplied it to the detriment of election Petitioners. It is therefore necessary to analyze and explain the effect of the provision before examining how it has been applied or misapplied in our election petition cases.

By section 146(1) of the Electoral Act, 2006:

"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 (i) was conducted substantially in accordance with the principles of this Act and (ii) that the non compliance did not affect substantially the result of the election".

2.2 It is clear that the provision on substantial compliance in section 146 of the Electoral Act, 2006, is conjunctive in nature. For an election not to be invalidated, (i) it must comply substantially with the provisions of the Act and (ii) non-compliance, (whether substantial or insubstantial) must not affect substantially, the result of the elections.
In other words, any election has to clear two hurdles in order to be valid; (i) it must comply substantially with the provisions of the Act; (ii) where there was any non-compliance, no matter how insignificant, it must not have substantial effect on the result.
Therefore a petitioner will succeed if he can establish either of the following:

(a) Substantial non-compliance with the Act, only
or
(b) substantial effect on the result by any degree of non-compliance, no matter how trivial.

2.3 Our Courts have in a majority of cases been operating under the great misapprehension that a petitioner has to establish in every case, not only that there has been a substantial non compliance with the Electoral Act but also that the substantial non compliance must have substantial effect on the result of the election. This is absolutely wrong.

The petitioner need only establish **one** of the two situations in order for the election to be invalid,

1. Substantial non compliance with the electoral Act including the schedules and regulations.

   or

2. Substantial effect on the election result of any infraction of the Electoral Act, schedules, regulations etc no matter how trivial the infraction.

2.4 So engrossed in and under the control of the wrong notion are most of our Judges, that whilst paying lip service to the principle in Morgan v Simpson, [1974] 3 All ER 722, (to be discussed later) which clearly states that substantial non-compliance per se will invalidate an election, they still add a requirement that substantial non-compliance must have had a substantial effect on the outcome of the election. This is absolutely wrong. Thus in Buhari v Obasanjo [2005] 50 WRN 1 at p.178, Belgore JSC (as he then was) made the following statement with regard to an identical provision in the 2002 Electoral Act.

> "It is manifest that an election by virtue of section 135(1) of the Act shall not be invalidated by mere reason that it was not conducted substantially in accordance with the provisions of the Act. It must be shown clearly by evidence that the non-compliance has affected the result of the election."[5]

This is obviously incorrect. Earlier in his judgment Belgore JSC had stated that Morgan v Simpson "emphasizes that once it is clearly proved that the election was so badly conducted and substantially not

[5] At p. 176

in accordance with the law as to election, that election is vitiated".- (p. 177). This is correct and totally in conflict with what he said later, in the same judgment, which is quoted above.

2.5 To add the requirement of effect on election results to a situation where there has been substantial non-compliance, is clear evidence of lack of understanding of the meaning of section 146(1) of the Electoral Act, 2006. This confusion and misunderstanding is evident in the judgment of Ejiwunmi JSC in the same case when he says:

> "I have no doubt that the Learned Justice of the Tribunal rightly interpreted the provisions of section 135(1) of the [2002] Electoral Act. This in effect means that the onus lies on the appellants to establish first, substantial non-compliance and secondly, that it did or could have affected the result of the election".[6]

The second leg underlined above is wrong and unnecessary, once substantial non-compliance is established.

2.6 The Supreme Court in **Awolowo v. Shagari** ([1979] All NLR 120 at 161), whilst agreeing with the law as stated in **Morgan v Simpson**, attempted vainly to distinguish it from the Awolowo Case. It even went as far as trying to pick and choose which aspect of **Morgan v Simpson** to accept and to reject. We shall return to this below.

Infact, the Supreme Court's view in this case and in **Ojukwu v Onwudiwe** ([1984] 1 SC NRL 247 at 305-6), is that in these two Nigerian cases, there was substantial compliance and therefore the

[6] At p. 215

need arose to establish, that the insubstantial non-compliance, affected the outcome of the election.

However, in a few cases our courts have interpreted the provision correctly. In **Alhaji Mohammed D. Yusuf & Anor v. Chief Olusegun A. Obasanjo & Ors** ([2005] 18 NWLR (Pt. 956), 96 at 222), the Court of Appeal applied the principle in **Morgan v Simpson,** correctly, when it stated (Per Alagoa JCA) as follows:

> "Section 135(1) of the Electoral Act, 2002 provides that: "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". Thus:-
>
> (1) The election must be conducted substantially in accordance with the provisions of the Electoral Act, 2002.
> (2) Any non-compliance with the provision of the Electoral Act, 2002 should not affect substantially the result of the election.
>
> If these two conditions are satisfied, an election complained about by a petitioner should not be invalidated. That is the acid or litmus paper test that every petition has to subscribe itself to. When this test is carried out, how well has the present petition fared?"[7]

[7] See also Nsofor JCA in **Buhari v Obasanjo** [2005] 2 NWLR (Pt. 910) 241 at 600–601, and Adekeye JCA in **Chief Suleiman M. Ajadi v. Chief Simeon Sule Ajibola** [2004]16 NWLR (Pt. 898)91 at Pp. 156 – 157 and 170 – 171.

2.7 In **Buhari v. Obasanjo**[8], Nsofor JCA, correctly interpreted Section 35(1) of the 2002 Electoral Act, which is in pari materia with section 46(1) of the 2006 Act, when he stated thus:

> "I have above elaborately dealt with and anxiously, painstakingly considered some of the relevant statutory provisions of the Electoral Act, 2002, the fons et origio of a free and fair election in the country in search of and seeking a democratic governance in a free world. And armed with and guided by the principles of law, and fortified thereby vide (i) Lord Denning in **Morgan v Simpson** (1975) QB 151:-
>
> "If the election was conducted so badly that it was not substantially in accordance with the law as to election (Electoral Act, 2002) the election is vitiated irrespective of whether the result was affected or not."

2.8 In **Swem v. Dzungwe**, ([1966] NWLR 297 (SC 1)), the Supreme Court held that once a petitioner establishes non-compliance and the court or the tribunal cannot say whether or not the result of the election could have been affected by such non-compliance, the election will be avoided on the ground that civil cases are proved by a preponderance of accepted evidence. At that stage, the onus shifts to the respondent to show that the non-compliance did not affect the results of the election.

2.9 Now to **Morgan v Simpson**, the locus classicus.

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[8] See footnote 9 above.

A similar section in the English Electoral Act (Representation of the People Act 1949, S. 37(1)) has been given extensive and comprehensive interpretation by the English Court of Appeal, Coram, Lord Denning MR, Stephenson and Lawton LJJ in the case of **Morgan and Ors v. Simpson and Or** ([1974] 3 All ER, Pg. 722).

Section 37(1) of the Representation of the People Act 1949, states as follows:

> "No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections ***or*** that the act or omission *did not* affect the result".

2.10 This is almost identical to section 146(1) of the Nigerian Electoral Act 2006. Before interpreting the effect of this provision, Lord Denning thought that it was necessary that the negative mode in which it was expressed should be transferred into a positive one so as to show when an election is to be declared invalid. According to the positive mode of expressing the subsection " **a Local Government election shall be declared invalid (by reason of any act or omission of the returning officers or any other person in breach of his official duty in connection with the election or otherwise of local election rules) if it appears to the tribunal having cognizance of the question (i) that the election was not so**

conducted as to be substantially in accordance with the law as to elections (ii) or that the act or omission did affect the result".

2.11 In Morgan v. Simpson, the facts where as follows: In a local government election, a total vote of 23,691 votes were cast. 82 ballot papers were validly rejected. Another 44 were also rejected because they had not been stamped with the official mark as required by the law. The polling clerks at the polling stations were at fault for this omission. If the 44 ballot papers had not been rejected, but had been counted, the petitioner, a candidate at the election would have won by a majority of seven votes over the respondent. In consequence of the rejection of the 44 ballot papers, the respondent had a majority of 11 and so was declared to be the successful candidate.

The petitioner sought an Order that the election be declared invalid because it had not been conducted substantially in accordance with the law as to elections; alternatively, that even if it had been so conducted, the omissions of the polling clerks had affected the result.

2.12 The High Court refused to make the Order, but an appeal to the Court of Appeal, the High Court judgment was reversed and the Order made, in the following terms as reported in the [1974] 3 All ER at p. 722.

> "**Held** – (i) Under S. 37(1) an election court was required to declare an election invalid (a) if irregularities in the conduct of the election had been such that it could not be said that the election had been 'so conducted as to be substantially in accordance with the law as to elections', or (b) if the irregularities had affected the result. Accordingly, where

breaches of the election rules, although trivial, had affected the result, that by itself was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the election law it was vitiated irrespective of whether or not the result of the election had been affected (see p. 725 *f* to *h*, p. 728 *d* to *f*, p. 731 *a, b* and *f* to *h*, p. 733 *d* and p. 734 *a*, post); Hackney Case, Gill v. Reed and Holms (1874) 2 O'M & H 77 applied; Birmingham Case, Woodward v. Sarsons (1875) LR 10 CP 733 and Gunn v. Sharpe [1973] 2 All ER 1058 explained; dicta of Golerighe CJ in Birningham case, Woodward v. Sarsons LR to CP at 743 – 745 disapproved.

(ii) Although the election had been conducted substantially in accordance with the law as to local elections, the omission to stamp the 44 ballot papers had affected the result of the election which would therefore be declared invalid (See p.728 *f*, p. 731 *d*, p. 732 *c*, p. 733 *c* and *d* and p. 734 *a*, post)

Decision of the Divisional Court of the Queen's Bench Division [1974] 1 All ER 241 reversed."

2.13 Having done a comprehensive historical review of election cases involving the interpretation of a similar provision, Lord Denning came to the following conclusions:

"(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, **irrespective of whether the result was affected, or not.** That is shown by the

Hackney case[9], where two out of 19 polling stations were closed all day, and 5,000 out of 41,000 voters were unable to vote.

(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown by the *Islington*[10] case where 14 ballot papers were issued after 8 p.m. The election was upheld because the successful candidate won by a majority of 19 votes. Thus, if the 14 votes were deducted from his votes he would still have won by 5 votes.

(3) **But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it *did affect* the result – then the election is vitiated.** That is shown by *Gunn v Sharpe*[11], where the mistake in not stamping 102 ballot papers *did affect* the result. Here by adding the unstamped and uncounted ballot papers, the respondent would have been one out of three persons elected at a local government election. The failure to stamp 102 ballot papers out of 6453 affected the outcome of the election and it was therefore nullified.

Going back to Morgan v. Simpson, Lord Denning said:

"Applying these propositions, it is clear that in this case, although the election was conducted substantially in accordance

9 Hackney Case, Gill v. Reed & Holmes (1874) 2 O' M & H 77, 31 LT, 69.

10 Islington West Division Case, Medhurst v. Lough and Gasquest (1901) 17 TLR 210.

11 [1974] 2 All E.R. 1058.

with the law, nevertheless the mistake in not stamping 44 papers did affect the result. So the election is vitiated. The election of Mr. Simpson must be declared invalid."

2.14 Both Justices Stephenson and Lawton LJJ concurred with the Lord Denning in this conjunctive interpretation of Section 37(1) of the English Act.

According to Lord Stephenson LJ:

> "We are not required to read the conjunction 'and' disjunctively if we are to give effect to the intention of Parliament as expressed in all the provisions including the positive requirements both of the 1949 Act and of the 1872 Act that either a substantial breach of the law or a breach which affects the result will enable and require a court to declare an election void. <u>For the negative form of the section provides that both substantial compliance with the law and no effect on the result are required in conjunction to save breaches of duty or of the rules from avoiding an election, as is pointed out in the judgments of Lord Denning MR and Lawton LJ</u>.[12]

2.15 Lord Stephenson further stated that this construction seemed to be in accordance with the common law and common sense and with the decisions that <u>an election which is conducted in violation of the principles of an election by ballot is no real election and should be declared void, **even though it may not, or could not, have affected the result**</u>**.**

[12] [1974] 3 All ER, 722 at 730-1.

A little lower in the report Stephenson LJ added that, "if substantial breaches of the law are, as I think, enough to invalidate an election, though they do not affect its result, it follows that trivial breaches which affect the results must also be enough. I cannot hold that both a substantial breach and an effect on the result must be found in conjunction before the court can declare an election void".

2.16 In conclusion, the Learned Justice of the Court of Appeal stated as follows:

> "Any breach of the local election rules which affect the result of an election is by itself enough to compel the Tribunal to declare the election void. It is not also necessary that the election should be conducted not substantially in accordance to the law as to local election".

2.17 In the light of this lucid exposition in Morgan v. Simpson on the meaning of a provision of the English Representation of the People Act 1949, similar to section 146(1) of the Nigerian Electoral Act, 2006, there is no doubt that the provision must be interpreted conjunctively, to wit: (i) an election will be invalid if there is substantial non-compliance with the Electoral Act whether or not it affects the result or (ii) independently, where non-compliance whether trivial or substantial has a substantial effect on the result.

2.18 In the Hackney case supra, two out of 19 polling stations were closed all day, it was held that the elections were so badly conducted that they were vitiated, irrespective of whether the result was affected or not. This could be contrasted with the Court of Appeal decision in Buhari v. Obasanjo [2005] 50 WRN 1 at p. 90 that since specific

allegations of wrong doing were made with regard to elections in only 14 out of 36 states, the election in the remaining 22 states were regularly conducted and the ensuing results authentic. Nothing could be further from the truth. If a definite pattern of infractions is established in 14 states, the likelihood is that this constitutes a true representation of the totality of the elections. Malpractices in 14 states, under the Morgan v. Simpson principles constitutes substantial non-compliance. 14 out of 36 is sufficient proof of a wide spread tendency which destroys the credibility of the whole elections. The election is a nullity even though the substantial non-compliance could not have affected the outcome.

2.19 The judgments of Niki Tobi, JSC, in Atiku Abubakar v. Yar'Adua ([2009] 5 WRN 1) and Buhari v. Yar' Adua [2009] 7 WRN 1, respectively on the subject of substantial compliance, present a study in contrasting style and conclusions. In Atiku Abubakar v. Yar' Adua, the learned Justice of the Supreme Court adopted the 2nd and 3rd principles laid down in Morgan v. Simpson hook line and sinker. However with regard to rule 1, that is where there is substantial non-compliance, he exhibited considerable equivocation on its status in Nigerian law.

2.20 First, he applied Rule 1 of Morgan v. Simpson to the case and held that there was no substantial non-compliance, just mere allegations. According to him:

> "What does Morgan say? In (1) and (3) the election is vitiated. In (2) the election is not vitiated. In (1) Lord Denning said that if the election was conducted badly that it was not substantially in accordance with the law as to election, the election will be vitiated. Is there any proof by

> the appellants that the election was conducted so badly that it was not substantially in accordance with the Electoral Act? I see tons and torrents of allegations but I do not see proof of them. I do not see proof that the election was conducted badly, not to talk of proof that the election was conducted "so badly" And what is more. I do not see any evidence proving the Hackney type of closure of polling stations and disenfranchisement of voters. I only see allegations upon allegations. Why then Morgan?"[13]

2.21 Not comfortable with this line of argument which he knew was in conflict with the universal and unqualified condemnation of the elections as a disastrous failure, Niki Tobi JSC, goes all out to eliminate the risk of the election being declared null and void for substantial non-compliance by declaring that Rule 1 is not Nigerian Law! But he had earlier on admitted that the principles in Morgan v. Simpson represent the position in Nigerian Law. According to him,

> Section 37(1) of the Representation of the Peoples Act, 1949 is generally similar to section 146(1) of the Electoral Act, 2006. **In that general context, reference to Morgan is proper and I underline *in that general context*. I agree with the positive interpretation of the subsection by Lord Denning**. I am however wondering whether that positive interpretation does not throw the burden of proof in this case on the appellants as petitioners. And here, I rely on the following sentence:

[13] [2009] 5 WRN 1, at 158

> "If it appears to the tribunal having cognizance of the question that the election was not so conducted as to be substantially in accordance with the law as to election and that the act or omission did affect the result."

Curiously, in Buhari v. INEC (Buhari v. Yar Adua) delivered on the same day, Hon. Justice Niki Tobi hardly made any reference or allusion to Morgan v. Simpson at all. Rather he adopted hook line and sinker, the view that under Section 146(1) of the Electoral Act, a petitioner first had too establish that there had been substantial non-compliance with the "provisions" of the Act and additionally that the non-compliance had a substantial effect on the result of the election. In other words, he reversed the intendment of the Section, eliminating a major liability of INEC and transferring the onus of proof to the Petitioner. Moreover, Niki Tobi, JSC, introduced the word "provision" which is not in the Act and disregarded the word "principle" which is in the Act because of his expressed dislike for the latter. Thus he interpreted the Section as "substantial compliance with the "provisions" instead of substantial compliance with the "principles" of the Act. We shall revisit this anon.

2.22 Apart from eliminating Morgan v. Simpson from consideration, Niki Tobi, JSC, gave short shrift to a Nigerian Supreme Court case, Swem v. Dzengwe [1960] 1 SCNLR 111, which was decided along the line of Morgan v. Simpson and instead embraced a series of other cases that either misinterpreted Section 146(1) or to which on the facts of the case the section was not applicable. In Awolowo v. Shagari,[14] the winner of the election needed to score at least one quarter of the votes

[14] (1979) 6-9 SC 37

cast in two-thirds of the 19 States of Nigeria. Alhaji Shehu Shagari achieved this score in 12 States, falling one short of the minimum required to win. Obaseki, JSC held that inspite of this shortfall in Shagari's score, there had been substantial compliance with the Law. According Obaseki, JSC:

> "There is no evidence that the non-compliance with section 34(1) (c)(ii), one of the provisions of Part II has affected the result, i.e., but for the non-compliance, the petitioner would have won, to enable the tribunal declare the result invalid. The petitioner pleaded a substantial non-compliance i.e. failure to obtain one quarter of the votes cast in each of at least two-thirds of all the States in the Federation. But the evidence established this non-compliance in only one State."[15]

2.23 In other words in the view of Obaseki JSC, this was not a case of substantial non-compliance. What Niki Tobi JSC, ended up doing was wholesale adoption of the Court of Appeal (Presidential Election Tribunal) misinterpretation of the meaning and effect of Section 146(1). He stated thus:

> "In Buhari v. Obasanjo (2005) 50 WRN 1; (2005) 2 NWLR (Pt. 910) 241, the Court of Appeal held that by virtue of section 135(1) of the Electoral Act, 2006, an election shall not be liable to be invalidated by reason of non-compliance with the provisions of the Electoral Act if it appears to the Election Tribunal or court that the election was conducted substantially in accordance with the principles of the Act

[15] [1979] 6-7 SC, p. 82

and that non-compliance did not affect substantially the result of the election. In other words, non-compliance with the provisions of the Act without more is not sufficient to invalidate an election. Consequently, unless there is some proof that non-compliance with the provisions of a section of the Act substantially affected the result, the election will not be invalidated; and that non-compliance with Electoral Act, without more, is not sufficient to invalidate the election.

In Buhari v. Obasanjo (2005) 50 WRN 1; (2005) 13 WRN (Pt. 941) 1, when the case came to the Supreme Court on appeal, the court held that where an allegation of non-compliance with the electoral law is made, the *onus* lies on the petitioner firstly to establish the non-compliance, and secondly, that it did or could have affected the result of the election. It is after the petitioner has established the foregoing that the *onus* would shift to the respondent whose election is challenged, to establish that the result was not affect.

The above cases have been decided along the same line and it is that the first burden is on the petitioner to establish not only substantial non-compliance with the principles of the Electoral Act but also that such non-compliance affected the result of the election."

2.24 It is obvious that this is a gross misinterpretation of S. 146 of the Electoral Act 2006. What Niki Tobi, JSC, has done is to eliminate a major condition, 'that of substantial compliance' per se which must be present for an election to be valid. He has thus on his own, subjected the Act to judicial amendment.

In a judgment totally in contrast, philosophically, and in terms of judicial orientation, to the one above, George Adesola Oguntade JSC, did not merely disagree with the leading majority judgment, but demonstrated why the majority was wrong and he was unquestionably right. He laid the foundation for his conclusions by stating that a close scrutiny of Section 146(1) amply showed that non-compliance which is forgiven under its provisions, was only non-compliance "which does not compromise the principles of the Election Act, 2006.[16] A Petitioner who seeks a relief premised on non-compliance with the provision of the Electoral Act must first of all call satisfactory evidence of the failure to comply with the provisions of the Electoral Act".

2.25 Oguntade JSC, now applied the test which determines whether non-compliance is substantial and therefore devastating to the election as follows:

> "If a petitioner calls satisfactory evidence of such a nature that shows that the non-compliance complained of *compromises the principles of the Electoral Act*, he is without more entitled to succeed. This is because section 146(1) above does not forgive such non-compliance that offends against the principles of the Electoral Act. However, it is possible that the nature of the non-compliance complained of and in respect of which evidence has been called, is not such that compromises the principles of the Electoral Act. In that case, *the petitioner is still entitled to judgment unless the respondent, against whom the complaint is made, satisfies the court or tribunal that the non-compliance complained of did not*

[16] Emphasis added.

substantially affect the result of the election or that there was no such non-compliance.

It seems to me, that, given the fact that laws are made to be obeyed, it will be sufficient for a petitioner to lead evidence of non-compliance, and if such evidence is satisfactory, the petitioner should be entitled to judgment unless the respondent in its defence shows that there was no such non-compliance or that, if there was one, it did not affect the principles of the Electoral Act and in addition that it did not substantially affect the result of the election. To accept otherwise i.e. it is the petitioner who should prove non-compliance and, still go further to prove its substantial effect on the result of the election, is in my view akin to approaching the matter on the basis or notion that laws are not primarily made to be obeyed. In my humble view, it is the person who has broken the law through non-compliance with the provisions of the law, who should in a state of remorse plead 'I am sorry this non-compliance occurred, but it has not compromised the principles of the Electoral Act; and the result of the election would still have been the same even if there was compliance with the provisions of the Act."

2.26 When reasoning, logic and justice coincide, a judgment flows smoothly, and the arguments achieve a high level of lucidity. This is obvious in Justice Oguntade's judgment above. One other curious matter that arose from the judgment of Niki Tobi, JSC in Buhari v. Yar' Adua & Ors is the use of the term principles in Section 146(1) of the 2006 Electoral Act. The Section, as we know states that an election shall not be invalidated by reason of non-compliance with the

provisions of the Act, if the election was conducted substantially in accordance with the principles of the Act and that non-compliance did not affect substantially the result of the election. Justice Niki Tobi proclaimed that he was extremely uncomfortable with the word 'principles' in the subjection and that the word 'provisions' should have been used as it is presently in the English Act from which it was copied. In an earlier case,[17] he had made the following observations:

> "I would like to say by way of passing remark that I do not like the word 'principle' in the subsection. I would have preferred the word 'provisions' I say this because it is not quite easy for a tribunal or this court to determine what constitutes the 'principle' of the Decree particularly in the absence of a definition of the word. But that does not lie in my mouth, the Judge that I am. It lies in the mouth of the maker and so let it be 'principle'."

2.27 The main grouse of the learned Justice with the word 'principle' was now spelt out in some detail thus:

> "As I have said above, it is the same word that is in section 146(1) of the Act. The word in its nebulous content, in my view, means contextually basic laws or canons. It could also lazily mean *credo* or *decretum*. All that I am doing is in the realm of speculation and guess, which I ought to avoid as a Judge. If the draftsman used the word "provisions" I will not be involved in the exercise of diction and syntax. All members of the legal profession know the meaning and context of the word "provision" and will

[17] Basheer v. Same [1992] 4 NWLR (Pt. 236) 491 at 519, C.A.

contextually refer to the sections of the Electoral Act, 2006. If the word "principles" is now a darling of the draftsman (and it appears so) then it is my view that the word should be interpreted in the interpretation clause. If it is not interpreted, the courts may have some problem of interpretation. Is the word "principles" larger in scope than "provisions"? If so, how larger is it? Conversely, if the word is "smaller" in scope than the word "provision", how smaller in scope and here smaller is used as conveying less legal content. I am confused. I could be alone in the pool of confusion. Election, particularly in Nigeria, is a very emotional and quarrelsome matter; it is a matter where Nigerians fight to a finish. In the circumstances, words in an Act policing it cannot afford to be vague and nebulous. It is possible I am wrong. Some other Judge may have a precise definition of the word in the context it is used in section 146(1). I should therefore blame my lack of adequate knowledge."

2.28 Indeed, Niki Tobi, JSC was wrong and another Judge, Oguntade JSC, had a precise and lucid working definition for the word 'principle' in the context in which it was used in Section 146(1) of the Electoral Act 2006.[18]

In the first place, Oguntade JSC, broke down Section 146(1) into 3 parts for the purpose of analyzing it and giving it the proper interpretation; a task which Niki Tobi, JSC, declared to be beyond him "for lack of adequate knowledge"[19].

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18 Buhari v. INEC; Yar' Adua & Ors [2009] 7 WRN, 1 at pp. 226-227.

19 At p. 116, lines 46 – 48.

Now to Justice Oguntade's analysis of Section 146(1).

(a) "an election shall not be invalidated by reason of non-compliance with the provisions of this Act if it appears to the Election Tribunal or Court…

(b) that the election was conducted substantially in accordance with the principles of this Act …

(c) and that the non-compliance did not affect substantially the result of the election.

2.29 According to Oguntade, JSC, the central and major purpose of Section 146(1) is that non-compliance with the principles of the Electoral Act ought not to be forgiven or overlooked. With that rich and informative background about the indispensable, mandatory, and peremptory nature of the principles of the Electoral Act stipulated in Section 146(1), the learned Justice of the Supreme Court now listed the said principles of the Act lucidly and in detail as follows:[20]

> "The Electoral Act, 2006 did not specially set out the principles of the Act. It seems obvious however that the 'principles' of the Electoral Act are **the fundamental elements of the law governing elections, which must be seen as sacrosanct in a democratic system of government**.[21] The question that follows is – what are these principles which section 146(1) above regard as sacrosanct? A perusal of the totality of the provisions of the Act easily leads to the conclusion that these principles include (1) *Inclusiveness*. Inclusiveness is in the sense that all persons entitled to vote under the Nigerian, 1999

[20] At pp. 226-7

[21] Emphasis added.

Constitution are not precluded from exercising the right to vote, this is why it is required under the Act that there should be registration of voters before the elections and why under sections 10 to 25 of the Electoral Act certain provisions are made concerning registration and as to persons presenting themselves to vote. They must first be asked certain questions which are directed to confirming their eligibility to vote. The second is *transparency*.

The necessity for transparency explains why it is required by section 45(2) that ballot papers be serialized and bound in booklets. This provision is no doubt a bold effort to eliminate the possibility of the ballot papers being substituted with some others. It ensures that ballot papers which are moved across the country from State to State and from polling unit to polling unit, would be monitored and accounted for during the elections and further for use in the event of a dispute after the election. Without ballot papers being serialized and bound in booklets as required by section 45(2), it becomes possible to print fake ballot papers which can then be introduced into the ballot fraudulently. When ballot papers are not serialized and bound as required by law, the principle of transparency in the election is compromised and the elections no matter how otherwise properly conducted loses credibility. Another identifiable 'principle' of the Electoral Act, 2006 is '*secrecy'*. Indeed Section 53(1) thereof provides:

> "Voting at an election under this Act shall be by open secret ballot."

Now in exhibit P2/A1 paragraph 1.3, the 1st and 2nd respondents who conducted the elections stated the ingredients of a good and acceptable election as:

> "(a) "Transparency and neutrality
> (b) High level of integrity
> (c) Credibility, courage and dedication
> (d) Respect for the secrecy of the vote, and
> (e) Acting in accordance with the law."

2.30 Thus the provision of the word 'principle' which Niki Tobi, JSC found nebulous, vague and confusing has been shown by proper interpretation to be the live wire of the Electoral Act, the very heart of the Act, central to its relevance and effectiveness. To have abandoned it as the Court of Appeal did at first instance and as Niki Tobi, JSC and the majority did at the appeal level, is to abandon the very essence, the lifeblood, the very heart of Electoral Act 2006. This obviously fundamentally affected the validity of their conclusions, because they did not apply the law of the Electoral Act.

2.31 Sadly, this misleading interpretation of Section 146 (1) of the 2006 Electoral Act, has been imbibed by virtually all the election tribunals and the Court of Appeal and is being regurgitated repeatedly in election petition judgments to the detriment of victims of electoral fraud and malpractices, and at the expense of free and credible elections and democracy. Two recent examples will suffice. In Accord Party v. Saraki [2009] 16 WRN 131 at 167, Denton-West JCA, stated thus at the Ilorin Court of Appeal:

"Following the above, the law as it stands requires the petitioner after establishing the substantial non-compliance occasioned by breach of section 45(1) and (2) of the Act, to go ahead and prove that the non-compliance affected the result of the election. It is clear from the decided authorities that before a petition can succeed on the ground of non-compliance with the provision of the Electoral Act, the petitioners must prove not only that there was non-compliance with the provisions of the Electoral Act but also that non-compliance substantially affect the result of the election. In other words, the petitioner has two burdens to prove:

(1) that the non-compliance took place and
(2) that the non-compliance substantially affected the result of the election.

2.32 In order for non-compliance with the electoral rules to render the election invalid or contrary to the principle of the Electoral Act, it must be so great and substantial and the court or tribunal must be satisfied that it affected or might have affected the majority of the voters or the result of the election. See Sorunke v. Odebunmi (1960) 5 FSC 175; (1960) SCNLR 414, Uwawah v. Ekwejunor-Echie (1962) 1 SCNLR 157, Dada v. Dosunmu (2006) 50 WRN 1; (2006) 12 MJSC 115; (2006) 18 NWLR (Pt. 1010) 134; Amosun v. INEC (2007) All FWLR (Pt. 391) 1712."

2.33 I have spent considerable time on the issue of substantial compliance because the Courts at all levels are still peddling the misleading interpretation of section 146(1) of the 2006 of the Electoral Act even

as late as 2010. See Sankey JCA in Lawal v. Magaji [2010] 8 WRN 102 at 176 where he states as follows:

> "The position of the law is that for an allegation of non-compliance with the electoral provisions to sustain an election petition, the *onus* lies on the petitioner to first establish the existence of the non-compliance and secondly, to show that it did or could have affected the result of the election. It is also beyond argument that a candidate in an election who alleges in his petition a particular non-compliance must satisfy the court that the non-compliance is not only substantial but that it affects substantially the result of the election. See section 146(1) of the Electoral Act, Nnachi v. Ibom (2004) 1 EPR 786 at 791.

This monster of misleading interpretation of Section 146(1) must be slayed once and for all.

3. MUST ELECTION MALPRACTICES, FRAUD, CORRUPTION, ETC BE TRACED TO THE DECLARED WINNER IN ORDER TO AFFECT HIS 'VICTORY'?

3.1 In quite an extra-ordinary number of election cases, either the trial tribunal or the Court of Appeal have taken the incredible position that where malpractices, fraud, corruption, ballot snatching, etc are established as having occurred in the course of an election, in favour of the person eventually declared the winner, of such an election, unless it is established that he participated or that he consented, to the said malpractice, his result cannot be affected by such malpractices, fraud, rigging or manipulation and entry of false figures, etc.

3.2 In Chime v. Ezea[22] , Adekeye JCA, as she then was, held that irregularities in an election which are neither that of the candidate nor linked to him cannot affect the election! What a sweeping and misleading and unjust declaration.

She followed with the following statement. "I cannot trace any evidence on printed record on which I can find the irregularity of allotment of votes established against the appellant in this case".

Please note, dear audience, the learned Justice of the Court of Appeal was not saying that there were no illegal allotment of votes in favour of the Appellant. All she was saying was that she could not trace the illegal allotment to him. Therefore everything was alright.

3.3 Unfortunately, this misleading, shocking and grossly unjust principle was not the creation of the Court of Appeal, but infact emanated from the Supreme Court in a thoughtless moment of judicial politics rather than judicial principles.

Adekeye JCA, as she then was, added:
"Is this Court now being asked to perform the arduous task of nullifying an election when the irregularities complained of were not the act of this candidate known to this court or attributed to him? The answer is in the negative. An election in his country is not a carnival …. People must learn to accept defeat graciously"

Again this Judge is not interested in the outcome of fraud and rigging, but only on who the perpetrator is".

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22 [2009] 34 WRN 45 at 114.

Chime v. Ezea [2009] 34 WRN 40 at 119.

3.4 In Buhari v. Obasanjo [2005] 50 WRN 1, at p.236 in the face of massive evidence of fraud, rigging, in favour of Obasanjo, Ejiwunmi JCS declared:

> "**An elected candidate cannot have his election nullified on the ground of corrupt practices or any other irregularity committed in the process of the election unless it can be proved that the candidate expressly authorized the illegality. See Oyegun v. Igbinedion (1992) 2 NWLR (Pt. 226) 747 at 759-760, Agomo v. Iroakeji (1998) 19 NWLR (Pt. 568) 173, Egbe v. Etchie (1955)-1956) WRNLR 134 and Keti v. Isa (1965) NNLR 17, Obasanjo v. Buhari (2003) 17 NWLR (Pt. 850) 510 at 578."**
> **Per Ejiwunmi JSC [p. 236] lines 45-5**
>
> **"The position of the law is that irregularities at an election which are neither the act of a candidate nor linked hum cannot affect his election. An elected candidate cannot have his election nullified on the ground of corrupt practices of any other illegality committed in an election unless it be established that the candidate expressly authorized the illegality. See Oyegun v. Igbinedion (1992) 2 NWLR (Pt. 26) 747 at 759, Ogomo v. Iroakeji (1998) 19 NWLR (Pt. 568) 133."**
> **Per Edozie JSC [p. 269] lines 35-45.**

3.5 Since then, every Judge in subsequent cases has been intoning this outrageous assault on free, fair and credible elections as if it is a religious creed.

There are numerous other such cases, but let me give one more; Lawal v. Magaji [2010] 8 WRN 102 at 172.

> "Where allegations of violence are made in an election and these acts cannot directly or indirectly be linked to a candidate at the election, the candidate cannot be held responsible for those acts. It is only where the evidence in court directly connects the candidate with the nefarious acts of violence and corruption that the election of the candidate will be nullified." – Sankey J.C.A. at page 172."

3.6 If an election is rigged or manipulated by fraud or violence in such a way as to give victory to a person who otherwise would have lost, do we say that result should not be disturbed because the fraud, violence or rigging cannot be directly linked to its beneficiary?

This is a monstrous principle still being perpetrated by our Judges unchecked. In all relevant sections of the Constitution, it is clearly prescribed that the winner of an election must have scored a majority of the votes cast at the election, where there are only two candidates, or the highest number of votes where there are more than two candidates – (See Sections 134(1) (2) (3) and (4); 179 (1) (2) (3) (4) and (5) of the Constitution).

3.7 There are two critical issues to be considered here. These are (i) Morality and (ii) Constitutionality.

(i) On the moral issue, is it morally right that someone who was illegally and criminally assisted to obtain fake votes and a fake mandate should be declared the winner of the election

simply because someone else rather than himself was responsible for the fraud and manipulation? What about the electorate, the voters who cast the majority or highest votes for the candidate who had no one to cheat and commit crimes on his behalf. Should a Court of Law be seen to uphold results of an election which they know to be false?

(ii) On the constitutional issue, the argument is simple. The Constitution declares mandatorily that the winner of an election is the candidate who scores the majority of votes when there are only two contestants, and the candidate who scores the highest votes in the cases involving more than two contestants. (See Section 134 (1)(2)(3)(4) and 179 (1)(2)(3)(4) and (5) of the Constitution.

The Constitution does not contain any provision for majority of votes or highest votes obtained by fraud, manipulation and corruption.

3.8 It is therefore immoral, illegal and unconstitutional for any court to state that an election candidate is entitled to benefit from an election rigging in his favour provided there is no proof of his involvement in the fraud and rigging.

I am relieved and pleased that the recent nullification of the 2007 Governorship election of Delta State in Ogboru v. Uduaghan was based purely on the malpractices and irregularities of INEC and not Uduaghan. This case indicates that our Courts are finally breaking their embrace with impunity and welcoming the dawn of integrity and the sanctity of the mandate in our election culture.

4. PROOF BEYOND REASONABLE DOUBT

4.1 This principle, said to derive from Section 138 of our Evidence Act is the favourite weapon of Judges who want to bludgeon innocent election petitioners into pulp.

According to Section 138,

> "If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt."

4.2 What a majority of Judges including some Supreme Court Justices have done, is to assume that proof beyond reasonable doubt means, proof beyond any shadow of doubt, and that it is an impossible standard to achieve in a civil case, particularly in election petitions.

4.3 Consequently, when confronted with a petition alleging the following list of acts, the judicial response is always the same – rejection of the petition. The acts are:

1. Forgery relating to ballot paper or certificate of return – S. 125(1(a) Electoral Act.
2. Willful destruction of ballot paper or certificate of return – S. 125(1)(b) Electoral Act.
3. Forging a ballot paper or official mark on a ballot paper – S. 125(1)(e) Electoral Act.
4. Giving a ballot papers without authority to a person.

5. Deliberately placing any unauthorized paper in the ballot box – S. 25(1)(h) Electoral Act.
6. Deliberately taking away a ballot paper from a polling station - S. 125(1)(i) Electoral Act.
7. Destruction without authority of a ballot box or its contents or handling a ballot box without authority – S. 125(1)(j) Electoral Act.
8. Publishing or announcing a false result or a result at variance with a signed certificate of return S. 130(4) Electoral Act.
9. Delivering or causing to be delivered a false certificate of return – S. 130(5) Electoral Act.
10. Wrongful voting, i.e. voting where one is prohibited from voting – S. 133 or where not registered. – S. 134. Electoral Act.
11. Inducing by bribing anyone to procure votes or return anyone to an elective office – S. 131(1-3), 137. Electoral Act.
12. Snatching or destroying election materials including ballot papers and boxes – S. 136(1)(j). Electoral Act.
13. Absence of serial numbers on ballot papers – S. 45. Electoral Act.
14. No voting due to absence of election officials or election materials. Electoral Act.
15. Late voting affecting the opportunity to vote or the integrity of the election. Electoral Act.
16. Failure to count votes at polling stations, entering the votes scored in result sheets, signing and stamping them and giving the party agents a copy each after they have counter-signed – S. 64 (1-3) Electoral Act.
17. Failure to announce results at polling station – S. 64(4). Electoral Act.

4.4 Why this outright rejection? Because in the opinion of these Judges it is impossible to prove the allegations beyond reasonable doubt in that a criminal act had occurred in the process of hearing a civil case. Proof beyond reasonable doubt is the bogey man erected by Judges who are determined to block election petitioners' access to justice.

4.5 One strange phenomenon in all these judgments is that such Judges never bother to define what they understand by proof beyond reasonable doubt. If asked to do so they would probably state that it is proof beyond possibility.

And yet not only is the definition simple, but proof beyond reasonable doubt is easily attainable and has been attained in many election petitions. But the tribunal Judges have a fatal mind set which disables their intellectual abilities.

Let us quickly run down a few of these cases and end up with Nwobodo v. Onoh from whence the misconception started.

4.6 In Olawepo v. Saraki [2009] 45 WRN 80 at 142-3, Owoade JCA stated thus:

"The law is settled that in an election where the petitioner makes an allegation of crime as in this case, against a respondent and he makes the commission of the crime as the basis of his petition, Section 138(1) of the Evidence Act, 1990 imposes a strict burden on the petitioner to prove the crime beyond reasonable doubt. If the petitioner fails to discharge this burden, his petition must fail"

4.7 In Mufutau v. Muideen Thomas JCA, [2009] 32 WRN 150 at 163 Court of Appeal stated that once the Electoral Commission announces the result of an election, it is presumed correct and authentic and the petitioner who alleges the opposite must offer clear and positive proof that the result is incorrect and not authentic. If the allegation is of fraud, it must be proved beyond reasonable doubt, because fraud is a crime. If it is of violence, the spread whereby it substantially affects the result must be clearly pleaded given in evidence.

Again in Garuba v. Kadiri [2009] 39 WRN 102 at 120, the Court of Appeal again declared that allegations of crime in an election petition are expected to be proved beyond reasonable doubt.

4.8 What is Proof Beyond Reasonable Doubt?

(i) "If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with a sentence "of course it is possible but not in the least probable the case is proved beyond reasonable doubt". Miller v. Minister of Pensions [1947] 2 All ER 372 at pp. 373 – 4.

(ii) Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. It need not reach certainty, but must carry a high degree of probability. See Lord Denning in Miller v. Minister of Pensions.

(iii) In a civil case, all that is required is "a reasonable degree of probability". If the evidence is such that the tribunal can say "we think it is more probable than not", the burden is discharged, but if the probabilities are equal, it is not.
- Lord Denning.

In civil cases proof is therefore established by a preponderance of probability.

(iv) Coming again to proof beyond reasonable doubt, it is unnecessary that every fact in host of charges must individually be proved beyond reasonable doubt. What is important is that taken as a whole, the charges have been proved beyond reasonable doubt.
R v. Vanbalen [1972] S.A.S.R. 353 at 374.

4.9 In other words, even in an election petition involving allegation of crimes, it is not the individual allegations that matter. It is the impact of the totality of the allegations, the trend they establish and the total perception they create. Hence a feeling of high probability of election malpractices is not as difficult to establish as the Courts would have us believe. In 2007, no Judge needed any proof that unspeakable crimes had been committed beyond reasonable doubt. It was brazen, it was universal. It could be seen, smelt and tasted everywhere. The Courts should have taken judicial notice of it.

4.10 In Onoh v. Nwobodo (1983) Belgore JCA, as he then was still got stubbornly stuck in the beyond reasonable doubt groove. Said he, "I cannot see the rationale for holding in the same breathe that they [The High Court] were satisfied the petitioner (sic) proved the alleged facts in his petition beyond reasonable doubt when not a single crime was proved against 2nd, 3rd, 4th and 5th appellants" p. 115 [2004] 10 WRN.

4.11 In otherwords, even if it could be proved that Nwobodo's votes were more than that of Onoh, unless a crime was proved against someone, the true result should be rejected. But nobody was being tried for committing a crime. Poor Nwobodo simply wanted to demonstrate that he scored the highest votes, contrary to FEDECO manipulation.

Belgore JCA, as he then was continued thus:

"The petitioner alleges in paragraph 5 of the petition that false returns were made and accused 2nd, 3rd, 4th and 5th respondents of falsifications in various Local Government returns form EC8A… It is incumbent on the petitioner to prove that the 2nd, 3rd, 4t and 5th appellants made false returns and thereby committed corrupt practice whereby they would be criminally liable. The proof required is a very high one-beyond reasonable doubt "Belgore, JCA, [2004] 10 WRN at pp. 114-5.

4.12 It is clear that the Judges of the Court of Appeal were determined to tie falsification of figures to the commission of a criminal offence, in order to introduce the ubiquitous, "proof beyond reasonable doubt", as if this was a criminal trial of FEDECO officials.

Surprisingly, even the trial Election Tribunal made up of High Court Judges, demonstrated a deeper knowledge of the law in this aspect of law than the Court of Appeal, to which an appeal from their decision went. They held that there was nothing sacrosanct in the words, and that Courts had to look beyond the words beyond reasonable doubt.

4.13 According to the High Court Judges, whilst it was acceptable to apply the "beyond reasonable doubt" standard to cases and petitions involving the commission of a crime, it is not the technical language used that was important in election petitions. What was important was the truth about the results. According to the majority decision in Nwobodo v. Onoh at the High Court level – [2004] 10 WRN 27 at 108:

> "We are under no doubt whatsoever that the petitioner had fully established the fact that incorrect results had been announced and published by the 5th respondent with regard to Ezeagu, Isi Uzo and Igbo Etiti …….. There had been complaint that the word falsification had been used and an argument whether the elements in the allegation are complete. We are not concerned with the language used. We are not concerned whether there had been falsification in the true sense or not or whether the *mens rea* has been proved or not. *All that we know has been fully established is that the figures as established by FEDECO as the results of the election are not correct. We are fully satisfied that the figures have been inflated and that they should be corrected so as to reflect the true and accurate results of the election……"*

4.14 The principal objective of the petitioner was to satisfy section 164(7) of the Constitution and prove that he scored a majority of lawful votes which entitled him to be returned as Governor – Nwobodo v. Onoh [2004] 10 WRN, p. 122.

In Arab Bank v. Ross [1952] K.B. 216 at 229, Denning L.J. held thus: "Under the rules of pleading, as I have always understand them, a pleader who has pleaded strictly more than he need have done, can

always disregard the unnecessary and surplus averments and rely simply on the more limited ones"

4.15 On this issue of falsification, Obaseki JSC made the following observations:

> "Looking at the pleadings (1) can it be said that the issue of falsification is not severable from the issue of the alleged correct votes cast for the petitioner and the 1st respondent at the election? (2) Can it be said, having regard to the record of proceedings for the application for further and better particulars and the statement of further particulars filed, that any charge of falsification was made against any party to these proceedings?
>
> In answer to the 1st question, I would say that the pleadings severed the issue of falsification from issue of correct return. It is my observation that every sub-paragraph of paragraph 5 pleaded correct votes cast separately from the inflated votes. Likewise, schedule B attached to the petition was pleaded as the correct and authentic results while schedule A was pleaded as containing the falsified results. By denying schedule B the respondent joined issue with the petitioner to prove the figures which is a totally different issue from the issue of falsification which was joined when the respondents denied the existence of inflation and the votes pleaded as votes added illegally to the correct votes cast. Furthermore, I find that the charge of falsification was not made against the respondents."

4.16 In the light of the above, Obaseki JSC, held that there was no need to prove the commission of any criminal offence and consequently the question of proof beyond reasonable doubt did not arise.

To buttress this view point, Obaseki JSC relied on Benson Ikoku v. Enoch Oli [1962] 1 All NLR 194 at 199 where Unsworth F.J. stated thus:

> "The provisions of section 137(1) were considered by this court in the case of Sunday E. Oso v. Chief Festus Okotie Eboh *unreported suit* (FSC. 407/1959) where we held that the issue of a crime must arise on the pleadings. We have not, however, previously considered the scope of the subsection. *In my view, the subsection only applies where there is a specific allegation of a crime in the pleadings so that the commission of a crime can properly be said to be a basis or foundation of the claim or defence as the case may be*. For example, the subsection would apply where a defendant in an action for libel pleaded justification of an allegation that the plaintiff committed a criminal offence or where a petitioner sought divorce under the Matrimonial Causes Act, on the grounds of rape, sodomy or bestiality. In the present case, the matter directly in issue is not whether a crime has been committed but whether the prosecution was without reasonable and probable cause and malicious …."

4.17 In conclusion, Obaseki JSC held that "the commission of a crime by a party to this proceeding is not directly in issue and the petitioner is not required in law to discharge the burden of proving the crime or offence of falsification against any party to the proceeding. The standard of proof required of the petitioner in these proceedings to succeed is the balance of probabilities.."
[2004] 10 WRN at pp. 131-2

4.18 In order to facilitate their a priori determination of ensuring victory for the NPN Ruling Party candidate, the majority of Judges at the Court of Appeal targeted the primary evidence of the actual results, tarred it as secondary evidence which was not admissible and then dismissed Nwobodo's case.

4.19 Again, Obaseki JSC had an unchallengeable response to this stratagem.

> "I now turn to the question of admissibility of the documents exhibits A to A95, B, C, C1, D, E, F, G, G1, G2, H, H1 and H2 tendered by the petitioner's witnesses. These were certificates of results issued by the Presiding Officers, Assistant Returning Officers and Deputy Returning Officers, Learned counsel for the respondent contended that the submission of counsel for the appellants that they are not primary evidence should be rejected. In my opinion there is no basis for treating the said exhibits other than as primary evidence. They were forms completed and signed by the FEDECO officials mostly Assistant Returning Officers and party agents in several parts and these were the signed copies delivered to each candidate or his agent. Their preparation was in the course of the official duties of the Assistant Returning Officers and as required by law.
>
> They are primary evidence under section 93(2) of the Evidence Act and are admissible under section 95 of the Evidence Act. It is observed that their rejection by the majority of justices of the Federal Court of Appeal as inadmissible evidence led inevitably to their decision to allow the appeal and dismiss the petition for

lack of proof. Their rejection in effect wiped out all the evidence led in proof of the petition. Now that I have declared the exhibits admissible as primary evidence, their full weight and evidential value given to them by the Election Court are automatically restored."

4.20 In Nwobodo's case, Eso JSC stated that the whole essence of Section 137(1) of the Evidence Act is to prevent a litigant from being adjudged guilty of a criminal offence except the proof of the crime was beyond reasonable doubt. It is not to restrict the civil right of a plaintiff or petitioner or absolve a defendant or respondent as the case ay be from civil liability – p. 147. So if an electoral officer is not under trial for election offences, the question of proof beyond reasonable doubt cannot arise.

4.21 Clearly concerned about the injustice involved in concentrating on proving that someone was guilty of committing a crime, rather than the critical issue of who scored the highest vote, Eso JSC continued thus:

"I think the time is ripe in this country when the Federal Military Government should give a serious consideration to amending the provision of section 137(1) of the Evidence Act in line with the English situation as already discussed. To leave the law as it is, especially as it has now been interpreted once for all by this court, and my own interpretation is a mere dissent from the majority, will, in my respectful view, lead to injustice being done to litigants who have a just claim but which claim is based upon an allegation of a crime. This may also be a matter for the consideration of the Law Reform Commission.

To go back to my own interpretation of section 137(1) of the Evidence Act, I will find it difficult to hold a general allegation of wrong doing, as in this case, which is falsification of results and no more to amount to such a serious offence as forgery and thereby overlooking the real crux of the matter in this case, which is determination of who has the majority of lawful votes in an election. For a general discussion on a general allegation of wrong doing see the case of *Davy v. Garrett* 7 Ch. D 489.

But then, even where the allegation of a crime has been made in the pleading, it may be possible to prove the case without the proof of the crime. Where that is so, and I think this case is a good instance, then the mere fact that the crime has not been proved is no bar to proving the case on some other evidence on the balance of probabilities. It is to be noted that what section 137(1) of the Evidence Act requires is that the crime – *not* the case – shall be proved beyond reasonable doubt. If it is possible to prove one's case by lesser evidence, non-offering of the major evidence does not detract from the validity of the proof of the case for the plaintiff or petitioner as the case may be."

4.22 In any case, as Eso JSC, stated in his judgment, the petitioner John Nwobodo had provided proof beyond reasonable doubt that he was the person elected Governor of Anambra State on 13 August 1983. In the three Local Government Areas concerned, the Assistant Returning Officer of each constituency, a Federal Electoral Commission Official, the National Security Organization Officer in that area and the Party Agent, all gave evidence and tendered original documents (EC8A) for election results to the Court. Based on this, the trial Court held that proof beyond reasonable doubt had been established. In other words the evidence was so strong that it carried a high degree of probability.

The likelihood of its not being correct was remote. But the political Judges of the Court of Appeal refused to acknowledge the truth staring them in the face.

Thoroughly exasperated, Eso, JSC, exclaimed, "I find it difficult to follow the reasoning of the Court of Appeal that proof in this case has not met the required standard. FEDECO Officials were called, the N.S.O. was called. What further evidence would have been called even in a Criminal Court?"

4.23 It has become clear that the requirement by some Judges that proof of election fraud, rigging, falsification of results, etc should be beyond reasonable doubt, is a bogey set up to stultify and frustrate truth and justice. It is the moral, legal and constitutional duty of a Court or Tribunal in an election case, to sift diligently through all the mass of materials in an attempt to identify the true and valid votes scored by the parties; not to erect barriers of technical terms and obscurantism in order to cover up a clear act of gross injustice.

It is also clear, that in Nwobodo v. Onoh, the Court of Appeal and the Majority in the Supreme Court deliberately decided to ignore the mass of evidence of electoral misconduct, manipulation, falsification and rigging, hoping vainly to justify their injustice on the alter of beyond reasonable doubt. They obviously failed in the Court of Justice and Public opinion.

4.24 So too did the Ekiti Election Tribunal behave like the Proverbial Ostrich in Dr. Fayemi's election petition. They ignored masses and masses of evidence, intoning their religious creed of beyond reasonable doubt.

They even went so far as to infer that the victims of election fraud were responsible for the burning down of the INEC office at Ido-Osi.

But when Daniel came to Judgment in the persons of the Judges of the Court of Appeal, what findings did they make?

4.25 Proper Evaluation of Evidence

They held that had careful consideration been given to the pleadings and evaluation done of the evidence by all parties and taking into account both oral and documentary evidence, the majority judges of the trial tribunal would have arrived at a different conclusion on the issue.

"It is obvious and overwhelming that the majority of Judges of the Tribunal were totally wrong to have refused to nullify the election in all the polling units of Ipoti wards A and B, of Ijero Local Government and the four wards of Ido-Osi Local Government of Ekiti State. This is in view of the compelling believable cogent unchallenged oral and documentary evidence marshaled by the Appellants before the trial Tribunal and also having regard to the nature of the allegations made about non-compliance with the provisions of the Electoral Act and the Manual for Elections in the conduct of the re-run elections in the affected wards.

So much for proof beyond reasonable doubt in the Fayemi v. Oni case.

4.26 In the case of Omoboriowo v. Ajasin [2003] 50 WRN 132 (SC) which was on all fours with Nwobodo v. Onoh [2004] 10 WRN 27 and decided on the same day, surprisingly, the same Supreme Court, failed to apply section 137(1) of the Evidence Act to the case, on the ground

that at the close of his case, the Petitioner Ajasin abandoned the allegations of crimes against FEDECO Official. "It follows therefore that in so far as the petition was founded on those allegations it must be dismissed. However, if the averments alleging crimes against the 2nd respondent were excised from the petition, there still remained in the body of the petition sufficient averments without putting directly in issue the commission of a crime by a party, to sustain the petition".

But this also applied to Nwobodo's case.

4.27 Based on a chart containing the votes of the parties prepared from the valid result sheets at polling stations and schedule of valid votes issued by returning officers, presented by the Petitioner, Ajasin, the Courts at all levels, High, Appeal and Supreme held that Ajasin was entitled to rely on a standard of proof within the standard of probabilities, rather than proof beyond reasonable doubt. According to Bello, JSC as he then was, where a petitioner challenges the correctness of the return of an electoral declared by the Returning Officer, then, except in respect of arithmetic errors in collation, the petitioner must lead evidence which will directly or indirectly establish the votes scored by him and his opponent at the polling booths. This Ajasin had successfully done in this case.

4.28 And yet, this is what precisely, Nwobodo had also successfully done in his case against Onoh. His counsel had led the Assistant Returning officers, officials of FEDECO, from three Local Governments whose result sheets clearly established that Nwobodo was the winner of the election. But the same Supreme Court, earlier on the same day rejected these result sheets and having done that concluded by a

majority of 4 to 3 that Nwobodo's evidence of falsification of results by FEDECO in favour of Onoh was not proved beyond reasonable doubt.

Two cases, similar facts, and circumstances, opposite results! What happened? It was a case of judicial politics and total abandonment of independence, impartiality, objectivity and justice!

Nwobodo won the votes of Anambra people, but lost in the judicial polls. It is still happening now.

4.29 In his book, Democracy and Prebendal Politics in Nigeria (Spectrum Books, 1991, pp. 177-9) Professor Richard Joseph proffered a political explanation for this legal and judicial puzzle of conflicting judgments for similar facts and situation.

According to him:

"One major cause of the electoral disorder of 1983 …. was the effort of the NPN to move from being a ruling party whose strength exceeded that of other parties, to one which enjoyed a monopoly of power within the political system. To achieve this objective, it was necessary for the party to increase the size of its votes in the states it already controlled through its control of the voter registration and voting process, and to pry away from the opposition the heart of their political bases. Three States were of strategic importance in the latter strategy: Kano, Anambra and Oyo."

4.30 Oyo had to be taken. Ondo was expendable, but it would have been nice as a surplussage. What we saw in operation in the Court in 1983, was the judicial version of that political struggle. Anambra State had

to be brought into the fold at all costs and FEDECO, the Police, the NSO, and the Judiciary had to play their roles. Attempts by the Supreme Court Judges who decided against Nwobodo, but favoured Ajasin, to distinguish between the two cases, was simply pathetic.

4.31 The second reason for the different result in the Ajasin case was that the Ondo people had demonstrated unequivocally in August 2003 that they were determined to protect their votes by guns, thunder and blood, and were clearly prepared to repeat that episode again, at every level of the judicial process.

4.32 In the recent Court of Appeal case of Chief Great Ogboru v. Dr. Emmanuel Uduaghan, Appeal No: CA/B/EPT/38/10 of 9 -11-10, the shallowness of the argument that any allegation of misconduct in an election must be proved beyond reasonable doubt was once more exposed. The Court made the following clarifications on the obfuscations created by earlier judgments;

> "Before we conclude this judgment, we shall respond, even if cursorily, to the submission of the counsel for the respondents on the cogency of proof beyond doubt as an ubiquitous feature of the burden of proof in election petitions which allege electoral malfeasances, see, paragraphs 3.54, 3.55 and 3.56 of the first respondent's brief, pages 36-37; paragraph 6.348 – 6.350 of the brief of argument of 2nd and 2975th respondents; paragraph 7.14 to 7.16, page 22 of the brief of 3rd – 2974th respondents.
>
> In our respectful view, these contentions glossed over the implication of the radical logic that dictated the formidable reasoning of Eso JSC in Omoboriowo v. Ajasin (1981 – 1990

LRECN 332); a decision which endorsed the concept of severance of criminal averments in pleadings. According to this prescription: a magisterial prescription which has been endorsed by the apex Court in other decisions, see, Nwobodo v. Onoh (1981-1990) LRECN 369; Torti v. Ukpabi (1981-1990) LRECN 221, if in an election petition the allegations of crimes are severed from the pleadings and the extant surviving averments can still sustain a ground or an election petition, then the court is empowered to sever the said criminal averments and deal with the petition on the basis of the surviving averments.

4.33 As correctly noted by the Court this view was also expressed in another recent Court of Appeal, namely, Fayemi v. Oni in which Salami PCA stated thus:

> "If averments alleging crime are severable and if after such severance there remain in the pleadings of the petitioners sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings then the burden of proof upon the petitioner is to establish his case on a preponderance of evidence, [citing *Arab Bank Ltd v. Ross* (1952) Q.B. 216, 229; *Omoboriowo v Ajasin* (supra)]…
>
> Apart from the allegation of the commission of crime, the petitioner/appellants averred… that the first respondent was not duly elected by majority of lawful votes and his election was not valid for reason of non-compliance with the Electoral Act… These averments are severable and are sufficient grounds under section 145 of the Electoral Act. The excess is deemed abandoned…

True indeed, the case of the appellants on the pleadings is that no elections known to the Electoral Act, 2006 … were conducted….

With the subject mater at hand being an election petition appeal, it is civil by nature and which needless to state but only obvious that the proof required is on the balance of probabilities or preponderance of evidence…. [see, pages 33-35]"

5. BURDEN OF PROOF IN ELECTION CASES

5.1 In the recently decided Benin Court of Appeal case of Chief Great Ovedje Ogboru & Anor v. Dr. Emmanuel Ewetan Uduaghan & Ors (Appeal) No:CA/B/EPT/38/10, many spurious myths which have been used by Courts in the past to inflict injustice on hapless election petitioners, were blown to smithereens. See Nwobodo v. Onoh and Buhari v. Obasanjo (supra)

5.2 In the first place the Court held that the so-called presumption of the correctness of election results was not a sacrosanct doctrine and that certain conditions precedent had to be established before reliance could be placed on the presumption.

"In other words, the presumption of genuineness of election results does not operate independently of same facts which will support it, Amgbare v. Sylva [2009] 1 NWLR (Pt. 1121) 1, pages 61-62. In the instant case, the inconsistencies, questions and duplications of forms manifest on all the above [Responds'] exhibits for eleven Local Government Areas, negate any presumption of correctness or

genuineness. On the other hand, they demand explanations from the purported makers of those documents.

Worse still, there is neither Form EC25; Form EC40C; nor the voters, Register before this court. Yet these are the pieces of evidence upon which to found the presumption of authenticity of the result." (See pages 32 – 34 of the Certified True Copy of the Judgment)

5.3 Even more devastating for fraudulent candidates and colluding INEC officials was the court's very incisive, well researched and lucid pronouncement on which party has the burden to prove the validity or invalidity of elections.

The popular and misleading judicial view had always been the trite and shallow intonement: "He who asserts must prove"

5.4 Relying on cases like Chime v. Ezea [2009] 2 NWLR (Pt. 1125) 253; Awuse v. Odili [2005] 16 NWLR (Pt. 932) 416 at 488, the respondents argued that once the first respondent had been declared winner of the election, the declaration enjoyed the presumption of regularity and that the burden of proof was on the petitioner who asserted that there was no election. Therefore the petitioner had the duty to tender the voters' Registers for the polling units in order to establish their allegations that voters did not vote in the election. It was also the duty of the Petitioner to call voters from every polling unit to testify that they could not and did not vote.

5.5 The Court of Appeal's response to these outrageous arguments was a devastating rejection and a complete restatement of the law regarding the burden of proof in election petitions. In the first place, the Court

made it clear that there was a distinction between voting and elections. Election, said the court, was a generic term; a process which embraced the entire gamut of activities ranging from accredition, voting, collating to recording on all INEC Forms and declaration of results. There was therefore a world of difference between an averment of "no voting" and one of "no election".

5.6 The court then made the following pronouncements, which I regard as a revolution on election petition proceedings.

> "Only recently, this Court had the opportunity of elucidating on the concept of burden of proof on the pleadings. That was in Olateru v. Sanni [Appeal No: CA/IL/87/06, unreported judgment delivered on June 2, 2010] where the court made these insightful clarifications:
>
> > "As is well known, in civil cases, there is the general burden of proof on the plaintiff to prove his claim or relief before a court by virtue of section 137 (1) of the Evidence Act, Frempong II v. Brempong II (1952) 14 WACA 13; Olowu v. Olowu (1985) 3 NWLR (Pt. 13) 372; Fashanu v. Adekoya (1974) 6 SC 83; Commissioner of Police v. Oguntayo (1993) 6 NWLR (Pt. 299); Kokoro-Owo v. Ogunbabi (1993) 6 NWLR (313) 627.
> >
> > What is, perhaps, not well-known is that there is yet another kind of burden which is dictated by the nature of the pleadings. This is known as the burden of proof on the pleadings. Unlike the general burden referred to earlier, the burden of proof on the pleadings rests on any party

[whether the plaintiff or the defendant] who substantially asserts the affirmative of the issue. This category of burden is fixed at the beginning of the trial by the state of the pleadings, it is settled as a question of law, remaining unchanged throughout the trial, exactly where the pleadings place it, Imana v. Robinson (1974) 6 SC 83."

5.7 In Imana v. Robinson (supra), Aniagolu JSC delivering the unanimous judgment of the Supreme Court, approvingly adopted the exposition in Phipson on Evidence (supra) as the Nigerian law on the subject:

'The burden of proof, in this sense, rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue. 'It is an ancient rule founded on consideration of good sense, and it should not be departed from without strong reasons'. It is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting in any circumstances whatever. If, when all the evidence, by whosoever introduced, it is in, the party who has this burden has not discharged it, the decision must be against him.

5.8 We have no reason whatsoever for departing from this eloquent exposition of the law. In our view, that is a correct restatement of the consistent posture of the Supreme Court on the is question, see, Elemo & Ors v. Omolade & Ors (1968) NMLR 359; Atane v. Amu (1974) 10 sc 237; Fashanu v. Adekoya (1974) 6

SC 83; Kate Enterprises Ltd. V. Daewoo Nig. Ltd. (1985) 2 NWLR (Pt. 5) 116, etc. There is no gainsaying in the fact that we are bound by these illuminating decisions of the apex court. Hence, we are under obligation to ignore any other decision, including decisions of this Court, which, to employ the apt expression of the Supreme Court, fail "to distinguish [between] the two distinct and frequently confused meanings which have always been attached to the words 'burden of proof'", see, Elemo & Ors v. Omolade & Ors (supra) at 361. Unarguably, any contrary decision of any other court on these two distinct meanings of the expression "burden of proof" could be, justifiably, classified as a decision reached *per incuriam*.

5.9 It is from this perspective, therefore, that we are endorsing the submissions of the counsel for the appellants. We, entirely agree with him that having regard to the above negative averments which the appellants made in their p leadings that no elections known to law were conducted on April 14, 2007, the respondents, who positively asserted that elections were duly conducted, had the burden of proof on the pleadings to plead the constitutive activities that define an election, namely, accreditations, Ajadi v. Ajibola (2004) 1 LRECN 255, 355 – 356 ETC. In this regard, they had the burden to plead Form EC25, a form which shows that result sheets were issued; Form EC40C, a form which shows that the said result sheets were distributed before the results in EC8A were recorded; Amgbare v. Slyva (supra) 60-63; voters' register, Nweke v. Ejims (1999) 2 LRECN 84, 99; Nwakanma v. Abaribe (2010) All FWLR (Pt. 505) 1767, 1880; Form EC8A which is the primary evidence of votes cast in the election; the foundation or base on which the pyramid of the

election process is built; Nwobodo v. Onoh (supra); Awuse v. Odili (2005) 16 NWLR (Pt. 952) 416; 488; Sa Biya v. Tukur (1983) 11 SC 109; EC40C, Agagu v. Mimiko (2009) 7 NWLR (Pt. 1140) 342, 408; Nwole v. Iwuagwu (2005) 16 NWLR (Pt. 952) 543, 569; Ukpo v. Imoke (2009) 1 NWLR (Pt. 1121) 90, 149; Ajadi v. Ajibola (2004) 16 NWLR (Pt. 898) 91, 183."

5.10 This correct exposition of the law regarding the burden of proof in election cases had eloquently been made by Justices Umaru Abdullahi PCA and Isa Salami PCA in Agagu v. Mimiko [2009] 7 NWLR (Pt. 1140) 342 and Fayemi v. Oni Appeal No: CA/IL/EPT/GOV/1110, respectively, but no one took notice until the well researched and brilliant work of the Justices of the Benin Court of Appeal gave them deserved publicity.

5.11 According to Abdullahi, PCA, in the Agagu v. Mimiko case:

"It was the first respondent's case that there was no election held. The appellant who incidentally was the first respondent to the petition responded that the election was conducted. *The burden of introducing evidence otherwise known as evidential burden squarely rests on the party who substantially asserts the positive before evidence is adduced*. Thereafter, the burden of proof rests on the party who will fail if no further evidence is produced. Where this is done, the burden of proof will shift on the other party to introduce evidence, which if accepted will then defeat the claim of the petitioner."

"Salami PCA, who read leading judgment in Fayemi v. Oni after citing Agagu v. Mimiko; Amgbare v. Sylva; Ukpo v. Imoke, etc, held thus:

> In the matter under consideration, it was the appellants' case that no election was conducted in the six disputed wards while the respondents asserted that there were elections in those wards. The onus in line with the case of Agagu v. Mimiko (supra) shifted onto to the respondents who asserts the positive and, therefore, submitted the contrary. I am aware, and as rightly submitted by the … respondents, that the principle of law is to place the general burden of proof on the appellants as the petitioners. However, it is also trite that the said principle is not static but that which could certainly shift depending on the circumstances as it is in the case at hand. That submission by the learned respondents' counsel does not, therefore hold water…

5.12 Commenting on the above passage, the court in Ogboru v. Uduaghan stated that the implication of this position was that since the appellants were asserting the negative that no election was held, they had no burden to plead any documentary proof of their negative averment. Abdullahi, PCA, explained the rationale of this position in Agagu v. Mimiko (supra) at 432-433 thus:

> The petitioner who asserted that no election held cannot be required to prove the holding of the election by producing its result. It is the respondent/appellant who alleged that there was a free and fair election that is under

obligation to tender the result of the election in the nature of Form EC8A in proof of their assertion that election was freely and freely conducted and results duly collated and declared. Their failure to do so means they failed to prove that elections were held and, therefore, impliedly admitted that there was no election…"

5.13 In the view of the Court of Appeal in Ogboru case, all the authorities cited by the respondents on the burden of proof, were in relation of proof of voting, not proof of elections. Those authorities which include Ayogu v. Nnamani [2005] LRECN 55; Awuse v. Odili [2005] 1 LRECN 114; Chime v. Ezea [2008] 2 LRECN 673, might have required the petitioner to prove "non voting", but they did not apply to an allegation of "non-election". According to the court:

> "The implication of this position is that since the appellants were asserting the negative that no election was held, they had no burden to plead any document in proof of their negative averment, Amgbare v. Sylva (supra) 72.

5.14 After concluding that the respondents had failed to prove the positive assertion that valid elections had been conducted, the court added:

"In the face of this lacunae in the respondent's pleadings, the irresistible conclusion is that the said election was afflicted by an irreversible electoral due process deficit. The deficit was so corrosive that it infested the entire process with an incurable or untreatable virus. Any vote returned in such circumstances for any particular voting unit must be invariably, infested with that virus of undue electoral process, Ajadi v. Ajibola (2004) 1 LRECN 255, 355-356 etc. That is our finding in this case."

5.15 In the light of the total mockery of elections and democracy that characterized the 2007 Governorship elections in Delta State, the Court of Appeal felt compelled to state the following hard and unpalatable truths about that electoral process:

> "In the circumstance, we have no choice than to enter an order dismantling his [Uduaghan's] over three and half years' illegal occupancy of the Government House which is the very symbol of the people's mandate: indeed, his illegal habitation of the said Government House for the said period of time is a mockery and, indeed, an affront to the indefeasible rights of the electorate in Delta State to elect their Governor through a free and fair contest.
>
> It is unfortunate that the law would permit this sort of anomalous situation: an unfortunate situation where a man who usurped the sacred mandate of the people would be allowed to fritter away their common patrimony without their due authorization: authorization that should come through free and fair elections where the said electorate, in whom sovereignty resides in a democracy, are afforded the opportunity of exercising their franchise. It is arguable whether this state of affairs could be permitted to endure in other civilized jurisdictions!

6. <u>CONCLUSION</u>

6.1 In conclusion, Nigerians must insist that the Courts must stop deliberately misinterpreting the Electoral Laws to suit the party in power, in Election Petitions.

1. Once there is evidence of substantial non-compliance with the Electoral Act, the election must be voided. The Petitioner does not have to prove that the substantial non-compliance also substantially affected the result. That is perverse double jeopardy. It is only if the non-compliance is not substantial, that the Petitioner has to show that it had a substantial effect on the result of the election.
2. Once there is any malpractice, fraud, manipulation, etc, which affects the outcome, the election must be nullified regardless of whether the beneficiary of fraud had a hand in the malpractice. No one who does not have the electoral mandate of the people should be sneaked in by such a perverse logic. That is mandate stealing by judicial assistance.
3. The doctrine of proof beyond reasonable doubt has no place in election petitions. Just disregard the invalid votes, count the valid votes and declare the true winner. It is only if the perpetrators of election crimes are to be tried that the doctrine of beyond reasonable doubt becomes relevant.
4. The burden of proof for establishing that there was an election and that it was free and fair should be on INEC. For it is INEC that conducted the election and is in possession of all the election materials. The petitioner/victim of election malpractices should not be given the burden of proving what he did not conduct or organize. Once an allegation of non-election or gross malpractices is made, the burden should be on INEC to rebut it.

6.2 As the President of the Court of Appeal, Justice Umaru Abdullahi stated in the case of Agagu and Mimiko [2010] 32 WRN 16 at 91.

> The petitioner, who avers that election was not held, cannot be required to prove the holding of the election by producing its results. It is the respondent/applicant who alleged that there was a free and fair election that is under the obligation to tender the result of the election in the nature of form EC 8^{A} in proof of their assertion that election was freely and fairly conducted and results duly collated and declared.

6.3 I cannot end this lecture without reading out in full the justified censure of Mrs. Ayoka Adebayo by Justice Isa Ayo Salami at the Court of Appeal Ilorin in the Fayemi v. Oni case. It will be a happy note on which to end the lecture and depart for our offices and homes.

Thus stated Salami, President of the Court of Appeal:

> "From the deductive summary of the above, what beats the imagination was the prevaricating conduct of the fourth respondent. This was the Resident Electoral Commissioner who protested against the results of the four wards of Ido-Osi which she declared as fake. She refused to announce those results as to do so would amount to an affront on her Christian conscience. She, in consequence, abandoned her duty post. Somewhat, intriguingly, and to the consternation of the whole world, she subsequently emerged. Without offering any explanation whatsoever, she accepted and announced the self-same results which she had earlier impugned as being repulsive to her conscience.

> The absence of evidence, therefore, explaining the change of heart by the fourth respondent in the light of all that transpired, in my humble view, leaves very much to be desired of the third and fourth respondents who, by the nature of responsibility reposed in them, held the entire key of ensuring that free and fair elections are conducted for the Nigerian people. The betrayal of this confidence will have a devastating and lasting effect. The cumulative outcome is to lend a corroborative credence to the allegations of non-compliance levied by the appellants. The said issue without more is also resolved in favour of the appellants against the respondents.

Distinguished Ladies and Gentlemen, it is clear, that we may have good laws, but without men and women of integrity to execute them, there will never be credible elections.

Thank you.