

1. RAUF ADESOJI A. AREGBESOLA
2. MRS GRACE TITILAYO LAOYE-TOMORI
3. ACTION CONGRESS (AC)

V.

1. OLAGUNSOYE OYINLOLA
2. ERULU OLUSOLA OBADA
3. PEOPLES DEMOCRATIC PARTY (PDP)
4. INDEPENDENT NATIONAL ELECTORAL COMMISSION
5. RESIDENT ELECTORAL COMMISSIONER/ RETURNING OFFICER OSUN STATE
6. THE ELECTORAL OFFICER, ATAKUMOSA WEST L.G.A. OSUN STATE
7. THE ELECTORAL OFFICER, AIYEDADE L.G.A. OSUN STATE
8. THE ELECTORAL OFFICER BOLUWADURO L.G.A OSUN STATE
9. ELECTORAL OFFICER, BORIPE L.G.A. OSUN STATE
10. THE ELECTORAL OFFICER, EDE NORTH L.G.A OSUN STATE
11. THE ELECTORAL OFFICER, IFE CENTRAL L.G.A OSUN STATE
12. THE ELECTORAL OFFICER, IFE EAST L.G.A. OSUN STATE
13. THE ELECTORAL OFFICER, IFEDAYO L.G.A. OSUN STATE
14. THE ELECTORAL OFFICER, ISOKAN L.G.A. OSUN STATE
15. THE ELECTORAL OFFICER, ODO OTIN L.G.A. OSUN STATE
16. THE ELECTORAL OFFICER, OLA OLUWA LOCAL GOVERNMENT AREA
17. THE PRESIDING OFFICER POLLING UNIT 1-5 WARD 1, ATAKUMOSA WEST LOCAL GOVERNMENT AREA
18. THE PRESIDING OFFICERS, POLLING UNITS I WARD 2, ATAKUMOSA WEST L.G.A.
19. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 4, ATAKUMOSA WEST L.G.A.

20. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 5, ATAKUMOSA WEST L.G.A.
21. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 6 ATAKUMOSA WEST L.G.A.
22. THE PRESIDING OFFICERS, POLLING UNITS 1 – 9 WARD 7, ATAKUMOSA WEST L.G.A.
23. THE PRESIDING OFFICERS, POLLING UNITS 1- 4 WARD 8, ATAKUMOSA WEST L.G.A.
24. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 9, ATAKUMOSA WEST L.G.A.
25. THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 10, ATAKUMOSA WEST L.G.A.
26. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 1, AIYEDADE L.G.A
27. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 2, AIYEDADE L.G.A.
28. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 3, AIYEDADE L.G.A.
29. THE PRESIDING OFFICERS, POLLING UNITS 1-14 WARD4, AIYEDADE L.G.A.
30. THE PRESIDING OFFICERS, POLLING UNITS 1-17 WARD 5, AIYEDADE L.G.A.
31. THE PRESIDING OFFICERS, POLLING UNITS 1-16 WARD 6, AIYEDADF L.G.A.
32. THE PRESIDING OFFICERS, POLLING UNITS 1-16 WARD 7, AI YEDADF L.G.A.
33. THE PRESIDING OFFICERS, POLLING UNITS 1-17 WARD 8, AIYEDADE L.G.A.
34. THE PRESIDING OFFICERS, POLLING UMTS 1-11 WARD 9, AIYEDADE L.G.A.
35. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 10, AIYEDADE L.G.A.
36. THE PRESIDING OFFICERS, POLLING UNITS 1-28 WARD 11, AIYEDADE L.G.A.
37. THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 1, BOLUWADURO L.G.A
38. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 2, BOLUWADURO L.G.A.
39. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 3, BOLUWADURO L.G.A.
40. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 4, BOLUWADURO L.G.A.
41. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 5, BOLUWADURO L.G.A.
42. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 6, BOLUWADURO L.G.A.
43. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 7, BOLUWADURO L.G.A
44. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 8, BOLUWADURO L.G.A.
45. THE PRESIDING OFFICERS POLLING UNITS 1-6 WARD 9, BOLUWADURO L.G.A.

46. THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 10, BOLUWADURO L.G.A.
47. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 1, BORIPE L.G.A.
48. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 2, BORIPE L.G.A.
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55. THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 9, BORIPE L.G.A.
56. THE PRESIDING OFFICERS POLLING UNITS 1-8 WARD 10, BORIPE L.G.A.
57. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD II, BORIPE L.G.A.
58. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 1, EDE NORTH L.G.A.
59. THE PRESIDING OFFICERS, POLLING UNITS 1-22 WARD 2, EDE NORTH L.G.A.
60. THE PRESIDING OFFICERS, POLLING UNITS 1-12 WARD 3, EDE NORTH L.G.A.
61. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 4, EDE NORTH L.G.A.
62. THE PRESIDING OFFICERS, POLLING UNITS 1-13 WARD 5, EDE NORTH L.G.A.
63. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD 6, EDE NORTH L.G.A.
64. THE PRESIDING OFFICERS, POLLING UNITS 1 - 1 1 WARD 7, EDE NORTH L.G.A.
65. THE PRESIDING OFFICERS, POLLING UNITS 1-13 WARD 8, EDE NORTH L.G.A.
66. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 9, EDE NORTH L.G.A.
68. THE PRESIDING OFFICERS, POLLING UNITS 1-4 WARD 10, EDE NORTH L.G.A.
69. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD II, EDE NORTH L.G.A.
70. THE PRESIDING OFFICERS, POLLING UNITS 1-16 WARD 1, IFE CENTRAL L.G.A
71. THE PRESIDING OFFICERS, POLLING UNITS 1-16 WARD 2, IFE CENTRAL L.G.A.
72. THE PRESIDING OFFICERS, POLLING UNITS 1-12 WARD 3, IFE CENTRAL L.G.A.
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- 7 6 THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD8, IFE CENTRAL L.G.A
- 77 THE PRESIDING OFFICERS, POLLING UNITS 1-18 WARD9, IFE CENTRAL L.G.A.

78 THE PRESIDING OFFICERS, POLLING UNITS 1-12 WARD 10, IFE CENTRAL L.G.A.  
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90 THE PRESIDING OFFICERS, POLLING UNITS 1-19 WARD II, IFE CENTRAL L.G.A.  
91 THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD1, IFE EAST L.G.A.  
92 THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 2, IFE EAST L.G.A.  
93 THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD3, IFE EAST L.G.A.  
94 THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 4, IFE EAST L.G.A.  
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100. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD10, IFE EAST L.G.A.  
101. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD1, IFE SOUTH L.G.A.  
102. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD2, IFE SOUTH L.G.A.  
103. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD3, IFE SOUTH L.G.A.  
104. THE PRESIDING OFFICERS, POLLING UNITS 1-12 WARD4, IFE SOUTH L.G.A.  
105. THE PRESIDING OFFICERS, POLLING UNITS 1-13 WARD5, IFE SOUTH L.G.A.  
106. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD6, IFE SOUTH L.G.A.  
107. THE PRESIDING OFFICERS, POLLING UNITS 1-12 WARD7, IFE SOUTH L.G.A.  
108. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD8, IFE SOUTH L.G.A.  
109. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD9, IFE SOUTH L.G.A.  
110. THE PRESIDING OFFICERS, POLLING UNITS 1-11 WARD10, IFE SOUTH L.G.A.

111. THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD11, IFE SOUTH L.G.A
112. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD1, IFEDAYO L.G.A
113. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD2, IFEDAYO L.G.A
114. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD3, IFEDAYO L.G.A
115. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD4, IFEDAYO L.G.A
116. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD5, IFEDAYO L.G.A
117. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD6, IFEDAYO L.G.A
118. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD7, IFEDAYO L.G.A
119. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD8, IFEDAYO L.G.A
120. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 9, IFEDAYO L.G.A.
- 1 2 1 THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 10, IFEDAYO L.G.A.
- 1 2 2 THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD1, ISOKAN L.G.A.
- 1 2 3 THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 2, ISOKAN L.G.A.
- 1 2 4 THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 3, ISOKAN L.G.A.
- 1 2 5 THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 4, ISOKAN L.G.A.
- 1 2 6 THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 5, ISOKAN L.G.A
127. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 6, ISOKAN L.G.A.
128. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 7, ISOKAN L.G.A.
129. THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 8, ISOKAN L.G.A.
130. THE PRESIDING OFFICERS. POLLING UNITS 1-6 WARD 9, ISOKAN L.G.A.
131. THE PRESIDING OFFICERS. POLLING UNITS 1-7 WARD 10, ISOKAN L.G.A.
- 1 3 2 THE PRESIDING OFFICERS. POLLING UNITS 1-5 WARD 1, ISOKAN L.G.A.
- 1 3 3 THE PRESIDING OFFICERS. POLLING UNITS 1-6 WARD 11, ISOKAN L.G.A.
- 1 3 4 THE PRESIDING OFFICERS. POLLING UNITS 1-10 WARD 1, ODO OTIN L.G.A
- 1 3 5 THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD2, ODO OTIN L.G.A.
136. THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 3, ODO OTIN L.G.A.
137. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 4, ODO OTIN L.G.A.
138. THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 5, ODO OTIN L.G.A.
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141. THE PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 8, ODO OTIN L.G.A.
142. THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 9, ODO OTIN L.G.A.

- 143 THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 10, ODO OTIN L.G.A.
- 144 THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 11, ODO OTIN L.G.A.
- 145 THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD 12, ODO OTIN L.G.A.
- 146 THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 13, ODO OTIN L.G.A.
- 147 THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 14, ODO OTIN L.G.A.
- 148 THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 15, ODO OTIN L.G.A.
- 149 THE PRESIDING OFFICERS, POLLING UNITS 1-10 WARD 1, OLA OLUWA L.G.A
- 150 THE PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 2, OLA OLUWA L.G.A.
- 151 THE PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 3, OLA OLUWA L.G.A.
- 152 THE PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 4, OLA OLUWA L.G.A.
- 153 THE PRESIDING OFFICERS, POLLING UNITS 1-8 WARD5, OLA OLUWA L.G.A.
156. PRESIDING OFFICERS, POLLING UNITS 1-6 WARD 8, OLA OLUWA L.G.A.
157. PRESIDING OFFICERS, POLLING UNITS 1-5 WARD 9, OLA OLUWA L.G.A.
158. PRESIDING OFFICERS, POLLING UNITS 1-9 WARD 10, OLA OLUWA L.G.A.
159. PRESIDING OFFICERS, POLLING UNITS 1-7 WARD 11, OLA OLUWA L.G.A.
160. THE INSPECTOR GENERAL OF POLICE
161. THE COMMISSIONER OF POLICE, OSUN STATE

*COURT OF APPEAL  
(IBADAN DIVISION)*

CA/I/EPT/GOV/98/2008

CA/I/EPT/GOV/98/2008

CA/I/EPT/GOV/98/2008

CA/I/EPT/GOV/98/2008

CA/I/EPT/GO V/31/2008

VICTOR AIMEPOMO OYELEYE OMAGE, J.C.A. (*Presided and Read the leading Judgment*)

ABUBAKAR ABDULKADIR JEGA. J.C.A.

MED LADAN TSAMIYA. J.C.A.  
RAPHEL CHIKWEAGI30. J.C.A.  
BODE RHODES-VIVOUR. J.C.A.

MONDAY, 30TH MARCH, 2009

*APPEAL - Court of Appeal - Jurisdiction of over proceedings in the tribunal - Section 75, Court of Appeal Act.*

*APPEAL - Exercise of discretion by trial court - Attitude of appellate court thereto - When it will interfere therewith.*

*APPEAL - Interlocutory decision in election petition – Whether appealable – Whether distinction exists between final and interlocutory decisions for purpose of appeal in election petition – Section 318, 1999 Constitution considered.*

*APPEAL - Issues for determination - Formulation of- Power of court of Appeal to formulate.*

*APPEAL - Leave to appeal - Where complaint of appellant is ah. wrongful admission or rejection of evidence - Whether leave required therefor.*

*APPEAL - Preliminary objection to an appeal - Arguments on – Need to incorporate in brief of argument.*

*APPEAL - Relief in an appeal - Grant of- When can be considered*

*APPEAL - Retrial - Order of- When appellate court will make - When it will not make.*

*CONSTITUTIONAL LAW - Right to fair hearing - Constitutional guarantee of- Section 36(1) of the 1999 Constitution.*

*COURT - "Decision" in section 318 (1) of the 1999 Constitution Whether differentiates between interlocutory and final decision*

*DOCUMENT - Certified true copy of a document - Duty on court accepts authenticity of.*

*ELECTION PETITION - Best evidence - Election matters - Resolution of- Best form of evidence required for resolution of.*

*ELECTION PETITION - Election tribunal or court - Power of to other inspection of polling document.*

*ELECTION PETITION - How to handle election petition – Need to handle with elasticity and avoid technicality.*

*ELECTION PETITION - Interlocutory decision in election petition Whether appealable - Whether distinction exists between final, interlocutory decisions for purposes of appeal in election petition - Section 318, 1999 Constitution considered.*

*ELECTION PETITION - Polling Documents - Power of tribunal or court of order production of section 159(1), Electoral Act, 2006 – Essence of.*

*ELECTION PETITION – substantial justice – Grater and need for in electon petition – rationale for.*

*EVIDENCE – Admissibility of document - Certified true copy of public document –when became Admissibility of.*

*EVIDENCE – Admissibility of document - Public document – When became Admissible - Who can-tender.*

*EVIDENCE –Best evidence - Election matters - Resolution of- Best from the evidence required for resolution of.*

*EVIDENCE – documentary evidence- Exclusion of document –public interest involved therein - Need to weigh against injustice to party*

*EVIDENCE – Documentary evidence - Document marked secret – nature of*

*EVIDENCE – Documentary evidence - Polling documents – Power of tribunal or court to order production of- Section 159(1) of the electoral Act, 2006 - Essence of.*

*EVIDENCE – Documentary evidence - Production of – Objection taken to on ground of State privilege - Effect of- Section219(2) of the Evidence Act - Whether conclusive - Section 36(1) the 1999 Constitution.*

*EVIDENCE – Documentary evidence - Public document - What constitute Purpose of - Section 109 (a) (Hi) of the Evidence Act.*

*EVIDENCE – Documentary evidence - Right of party to place before the court all documents that would assist him in proving his case*

*EVIDENCE – Documentary evidence - Where document marked . "rejected" in trial - In fact of - Whether can be tendered again in that trial.*

*EVIDENCE - Exclusion of evidence right of party on ground of public interest. How done- by the whom done – effect of section 220(1) &(2 of the Evidence Act - When will not avail.*

*EVIDENCE - Proof- Documentary evidence - Right of party to place, before the court all documents that would assist him in proving his case.*

*FAIR HEARING - Right to fair hearing - Constitutional guarantee of- Section 36(1) of the 1999 Constitution.*

*FAIR HEARING - True test of fair hearing.*

*FUNDAMENTAL RIGHT- Fair hearing - True test of.*

*FUNDAMENTAL RIGHT - Right to fair hearing - Constitution. guarantee of- Section 36(1) of the 1999 Constitution.*

*INTERPRETATION OF STATUTES - Electoral Act, 2006 - Section, 159(1) of- Essence of.*

*JUDGMENT AND ORDER - Retrial - Order of – When appellate court will make - When it will not make.*

*JURISDICTION - Court of Appeal - Jurisdiction of over proceeding in the trial tribunal - Section 75, Conn of Appeal Act.*

*JURISDICTION - Jurisdiction of court - Fundamental nature of Where court lacks jurisdiction - Effect of.*

*JURISDICTION - Jurisdiction of court - Issue of - When can be raised - How raised - Need to put adverse party on notice.*

*JUSTICE - Miscarriage of justice - What constitutes.*

*JUSTICE - Substantial justice - Greater need thereof in election petition - Rationale for PRACTICE AND PROCEDURE – Appeal relief in an appeal grant of – When can be considered.*

*PRACTICE AND PROCEDURE - Court of Appeal - Jurisdiction of over proceeding in the trial tribunal - Section 15, Court of Appeal Act.*

*PRACTICE AND PROCEDURE - Election petition - How to handle- Need to handle with elasticity.*

*PRACTICE AND PROCEDURE - Exercise of discretion by trial court - Attitude of appellate court thereto - When it will interfere there with*

*PRACTICE AND PROCEDURE - Interlocutory decision in election petition - Whether appealable - Whether distinction exists between final and interlocutory decisions for purposes of appeal in election petition - Section 318, 1999 Constitution considered.*

*PRACTICE AND PROCEDURE - Issues for determination - formulation of- Power of Court of Appeal to formulate.*

*PRACTICE AND PROCEDURE - Leave to appeal - Where complaint of appellant is about wrongful admission or rejection of evidence Whether leave required therefor.*

*PRACTICE AND PROCEDURE - Preliminary objection to an appeal Arguments on - Need to incorporate in brief of argument.*

*PRACTICE AND PROCEDURE - Retrial - New trial at the High I , mi i Power of Court of Appeal to order.*

*PRACTICE AND PROCEDURE -Retrial-Order of-When appellate court will make - When it will not make.*

STATUTE- *Electoral Act, 2006 - Section 159(1) of- Essence of*

*WORD AND PHRASES - "Decision" in section 318(1) of the 1999 Constitution - Whether differentiates between interlocutory and final decision.*

**Issues:**

1. Whether the trial tribunal was right when it rejected in evidence a certified true copy of the Police Final Security Report on the Governorship election in Osun State dated 28/4/08 on the ground that same was stamped "secret", thereby causing a serious miscarriage of justice.
2. Whether leave to appeal required when complaint of appellant on ruling appealed against is on wrongful admission or rejection of evidence.

**Facts:**

In Nigeria, gubernatorial elections were held on the 14<sup>th</sup> day of April 2007. to fill the offices of governors for all the States in the country. The elections were conducted by the 14<sup>th</sup> respondent. The 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent contested the election for Osun State. The Peoples Democratic Party (PDP) fielded the 1<sup>st</sup> respondent, while the Action Congress (AC) fielded the 1<sup>st</sup> appellant

At the conclusion of the election, the 4<sup>th</sup> respondent, Independent National Electoral Commission (INEC) credited the 1<sup>st</sup> responds, with 426.66M votes and the 1<sup>st</sup> appellant with 240, 722 votes and thereby declared the 1<sup>st</sup> respondent as the winner of the election.

Tin' appellants were dissatisfied with the return of the 1<sup>st</sup> respondent as winner of 'the election and filed a petition against same on the 11<sup>th</sup> day of May. 2007 at the Governorship and Legislative Houses Election Petition Tribunal, sitting at Osogbo, challenging the declaration of the 1<sup>st</sup> respondent as Governor of Osun State. The respondents duly filed replies to the petition. After pre-hearing formalities, trial commenced on 3/10/2007.

In a unanimous judgment delivered on 15/7/2008, the five-man panel entered judgment against the appellants and confirmed the respondent as the Governor of Osun State.

Dissatisfied with the judgment, the appellants filed an appeal on the 4<sup>th</sup> of August 2008. However, before then, the appellants had filed four interlocutory appeals on some rulings of the tribunal. On the 11<sup>th</sup> March 2009. Learned counsel for the appellants move a motion for an order consolidating the four interlocutory appeals with the main appeal, with motion was granted.

At the hearing of appeal, the appellants contended that trial tribunal was wrong when it rejected in evidence a certified true copy of the - Police Final Security Report on the Governorship Election in Osun state dated 28/4/08. sought to be tendered from the Bar by learned counsel to the appellants, on the ground that same was stamped 'secret" and marked it "rejected." The appellants also contended that the decision of the trial tribunal dismissing the application to lender the result of the scanning of election materials earlier on ordered by it was wrong.

On their part, the 1<sup>st</sup> - 3<sup>rd</sup> and the 1366<sup>th</sup> - 1367<sup>th</sup> respondents raised preliminary objections to the appeals. According to them, ground 3,4 and 31 of the notice of appeal arose from interlocutory decision of the tribunal the tribunal and that the Court of Appeal had no jurisdiction to hear interlocutory appeals on election petition but final appeals. That leave of the Court of Appeal ought to have been sought and obtained before filing the grounds of appeal filed outside the statutory period of 14 days. Section 220 (1) of the Evidence Act which the Count of Appeal considered in the judgment, provides:

“220 (1) The Minister, or in respect of matters to which the executive authority of a State extends, the governor of the State or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence, when after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest; and any such objection taken before the trial shall be by affidavit and any such objection taken .at the hearing shall be by certificate produced by a public officer.

(2) Any such objection whether by affidavit sworn by the minister or by certificate under his hand shall be conclusive and the court shall not inspect such document or be informed as to the nature of such oral evidence but shall give effect to the affidavit or certificate..."

HEALD (Unanimously allowing the appeal and ordering a re-trial):

On effect where document is marked “rejected” in a trial-

A document marked ”rejected” cannot be again in that trial. Put in another way, once a document is marked “rejected”, it says rejected for the purpose of the trial in which it was marked."rejected" and the defect cannot be cured during, the said trial. [Agbaje v. Adigun ( 1993) 1 NWLR (pt. 269) 261; Bella v. Gov. of Kogi State (1997) 9 NWLR (Pt. 521) 496 referred to.] (P. 471, paras. E-F)

On Jurisdiction of the Court of Appeal over proceedings in the trial tribunal -

The court of Appeal, by virtue of section 15 of the Court of Appeal Act, has jurisdiction over the proceedings in the trial tribunal. That is to say, the court can make any order or give judgment which a trial tribunal/court ought to have made or given. [Union Bank of Nig. Plc v. Sparkling Breweries Ltd (1997) 3 NWLR (Pt. 491) 589; Nteogwuija v. Ikuru 10 NWLR (Pt. 569) 267 referred to.] (P. 471, paras. F-G)

On What constitutes a public document –

By the provision of section 109 (a) (iii) of the Evidence Act, documents forming the acts or records of the acts of public officers, legislative, judicial and executive, whether in Nigeria or elsewhere, are public documents. (p. 472, paras. A-B)

On Admissibility of certified true copy of public document -

By the provision of section 111 of the Evidence Act a certified true copy of a public document becomes admissible under section 112 of the Act as proof of the contents of the original. (P. 472, paras. B-C)

On Requirement of a public document –

A document is a public document if:

It was made under a strict duty to inquire into all the circumstances;

It was concerned with a public matter although the public matter need not be the concern of the entire community.

It is meant for public inspection.

(P. 472, paras. C- D)

On What constitutes public document and Purpose of –

A public document is a document that is made for the purpose of the public or at least a section of the public making use of it. In the instant case, the Final Security Report on the Governorship

election in Osun State marked rejected by the tribunal was a public document. (P. 472, paras. D-E)

On when public document admissible and who may tender same -

Once a public document is signed and certified as required by section 110 and 112 of the Evidence Act, it becomes admissible on production, and it is not necessary to call a witness to prove custody or to verify the document. Such a document can be tendered from the bar by counsel who produced it. This is because court presumes such a document to be genuine under section 114 (1) and (2) of the Evidence Act. [Anatogu v. Iweka II (1995) 8 NWLR (Pt. 415) 547; Agagu v. Dawodit (1990) 7 NWLR (Pt. 160) 56; Anyakora v. Obiakor (1990) 2 NWLR (Pt. 130) 52; Ogbimiyi v. Okudo (1979) 6-9 SC. 32 referred to.] (P. 472, paras. E-H)

On Duty on court to accept the authenticity of a certified line copy of a document -

Once a document is certified, the court ought to accept the authenticity of its contents. (P. 472, para. H)

On Nature of a document marked "secret" -

A document marked secret usually concerns affairs of State. (P. 472, para. H)

Exclusion of evidence on grounds of public interest and by whom and how done -

By the provision of section 220(1) of the Evidence Act, the Minister, or in respect of matters to which the executive authority of a State extends, the governor of the State or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence. when after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest, any such objection taken before the trial shall be by affidavit and if at the trial, then by a certificate produced by a public officer (Pp. 472-473, paras. H-B)

11. *On Effect of objection taken to production of document ground of State privilege -*

By the provision of section 220(2) of the Evidence Act an objection so taken to the production of document whether by affidavit or certificate is conclusive and the court shall not inspect such document. The court shall give effect to the affidavit or certificate. (*P. 473, para. B-C*)

12. *On Whether objection taken to production of document on ground of State Privilege conclusive -*

The provision of section 220(2) of the Evidence Act which makes the decision of a functionary named therein as to the exclusion of evidence on grounds of State privilege or that the document is marked secret, final and that the courts cannot inquire into it, is not to enable in view of the provisions of section 36(1) of the 1999 Constitution which provides in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or tribunal. A trial cannot, be fair when document necessary for determination of the civil right of a party is excluded from the trial. (*P. 473, paras. C E*)

Per OJAGE, J.C.A. at pages 473-474, paras. G C:

"My Lords, in this case, no functionary of State ordered the report withheld. The said report is necessary to ensure the proper administration of justice. This is so because the report is on State of affairs on election day in Osun State in some of its Local Governments, and the observations therein if proved supports the appellant pleadings. The two cases, to wit: *Shyllon v. university of Ibadan (supra)* and *governor of Ekiti state v. Ojo (supra)* relied on the tribunal are not helpful since the report here concerned a community / public while the documents in the case above concerned the affected lecturers. In *Ecwusim v. Okoro (supra)* is also irrelevant since the report is part of the record of proceedings. See page VIII of Volume 1 of the record of proceedings. I am satisfied and hold that rejecting the report was wrong. I say so because according to the pleadings of the appellants they are contesting the results in twelve of the thirty Local Government Areas, having conceded that the elections were properly conducted in eighteen Local Government Areas. The report, being the observations of the Police on the conduct of the elections in most of these twelve Local Government Areas is a relevant document."

13. *On Need to weigh the public interest involved in the exclusion of document vis-a-vis the injury occasioned to the party denied the use of such document –*  
Before a party is denied the use of a document vital to his case, the public interest involved in its exclusion should be dispassionately weighed against the injury thereby caused to the litigant as to determine which way the balance tilts. (P. 473, paras. E-F)

14. *On Power of Court of Appeal to formulate issues -*The Court of Appeal has power to adopt or formulate issues that would determine the real grievance in an appeal. [*Ikegwuoha v. Olunvuchi* (1996) 3 NWLR (Pt. 435) 146; *Aclukit v. Adejoh* (1994) 5 NWLR (Pt. 346) 582 referred to.] (P. 477, paras. A-B)

15. on the power of tribunal or court to order inspection of polling documents-

By the provision of section 159(1) of the Electoral Act, 2006, an order for an inspection of polling document or an inspection of a document or any other packed in the custody of the Chief National Electoral Commissioner or any other officer of the Commission may be made by the election tribunal or the court, if it is satisfied that the order required is for the purpose of instituting or maintaining , election petition. (Pp. 477 - 478, paras. H - B)

16. On Essence of provision of section 159(1) of the Electoral Act. 2006-

The provision of section 159(1) of the Electoral Act 2006 enables a petitioner to inspect documents in the custody of the Independent National Electoral Commission for the purpose of instituting or maintaining an election petition. The intention of legislature is that evidence obtained upon the order for inspection/scanning will support the petition. In the instant case, dismissing the to tender the result of the scanning carried out by the appellants shut out the result of scanning and inspections, which the same trial In or dried, and that was wrong. (P. 478 para, B-C)

17. On Attitude of Court of Appeal to exercise of discretion trial court -

*The Court of Appeal will not interfere with the way trial court exercised its discretionary power, but will be quick to interfere if the court is satisfied that the discretion was wrongly exercised, or the exercise WAS tainted with some illegality or substantial irreguhu Hi or that it is the interest of justice to do so. [Ceekay Traders Ltd. v. Gen. Motors Co. ltd.*

(1992) 2 NWLR (Pt. 222) 132; *Anyah v. A.N.N. Ltd* (1992) 6 NWLR (Pt. 247) 319; *Akujuwa v. Nwaonuma* (1998) 13 NWLR (pt. 583) 632 referred to. ] (p. 478, paras. C-E)

Per OMAGE, J.C.A. at page 478, paras. E-F:

*"My Lords, in this appeal, I find I am compelled Co interfere in the way the tribunal exercised Us discretion. It is necessary to avoid a perverse judgment. All the documents that the petitioners/appellants sought to bring to the tribunal were refused by the dismissal of applications, which ought to have been allowed in to enable the petitioners/appellants support the petition."*

18. On Best form of evidence for resolving election matters –

*In election petition cases, oral evidence and/or the demeanour of witnesses are not as Important and decisive, in settling the issues, as documentary evidence tendered. Documents used in an election und all documents containing facts relevant to the issues in a petition are the best form of evidence for resolving election matters. (P. 478,paras. F-G)*

19. On Right of party to place before the court all the documents that would assist him in proving his case –

*On no account should a party be denied the opportunity to place before the court all the documents that would assist him in proving his case. (P. 478, para. G)*

20. On Greater need to do substantial justice in an election petition -

*The need to do substantial justice is greater in an election petition case than in any other case. This is so because, the court is not only concerned with the rights of the parties inter se, but also the larger interests and the rights of the people in the various Local Government Areas who had exercised their franchise on election day. (P. 479, paras. A-B)*

21. On Need to handle election petition with elasticity- Election petitions must always be handled with elasticity. Too much technicality should be avoided, but not at the

*expense of the general law. [Nwobodo v. Onoh(1984) 1 scnlr 1; chia v. Uma (1998) NWLR (pt. 556) 95 referred to ] (pp. 478, para. H;479, para. B)*

22. *On True test of fair hearing -*

The true test of fair hearing is the impression of a reasonable person who was present at the trial. whether from his observation, justice has been done in the case. In the instant case, the impression of a reasonable man would be one of surprise as to why vital documents to maintain the petition were not allowed as exhibits in the proceedings. [*Mohammed v. Kano N.A. (1968) 1 All NLR 424; ANPP v. I.N.E.C (2004) 7 NWLR (Pt. 871) 16 referred to.] (Pp. 479-480 paras. E-H)*

23. *On What constitutes miscarriage of justice -*

Miscarriage of justice is a failure of justice and it varies from case to case, depending on where it falls. Once what occurs in trial is not justice according to law, a miscarriage of justice has occurred. In the instant case, the rejection of documentary evidence to wit: Police Security Report, Forms EC8A, EC8E and the rulings of the tribunal of 18/2/2008 and 28/4/2008 wherein the appellants were denied the use of vital documents to support their case, amounted to a miscarriage of justice. [*Okonkwo v. Udoh (1997) 9 NWLR (Pt. 519) 16; ANPP v. INEC (2004) 7 NWLR (Pt. 871) 16; Nnaji for v. Ukonu (1986) 4 NWLR (Pt. 36) 505 referred to.] (Pp. 479-480, paras. H-A)*

24. *On Power of Court of Appeal to order a new trial-*

By the provision of Order 4 rule 9 of the Court of Appeal Rules, 2007, the Court of Appeal has the power to order a new trial. (P. 480, para. B)

25. *On When appellate court will not order a retrial -*

Some of the instances, where an appellate court will not make an order of retrial are:

- a) where a retrial will result in injustice or a miscarriage of justice.
- b) where it is sought as a matter of course, routine or form and not based on valid procedural
- c) If there is no special circumstances warranting retrial

[*Okomalu v. Akinbode (2006) 9 NWLR (Pt. 985) 338 referred to.] (P. 480, paras. B-C)*

26. *On when appellate court will order retrial -*

An appellate court will order a retrial when;

- a) a court misdirected itself as to the nature of a party's case, or;
- b) upon wrongful admission or rejection of material evidence, or;
- c) Where to refuse a retrial would occasion a greater injustice than the grant of it.

In the instant case, substantial justice would be achieved by a retrial, where all the parties would be given the opportunity to present before the court documentary evidence to maintain/or support his petition. (P. 480 paras. D-E)

27. *Whether interlocutory decision in an election petition appealable -*

The word "decision" as defined under section 318(11) of the 1999 Constitution makes no difference between an Interlocutory decision and a final decision in an election petition. Therefore, an objection to an appeal from an interlocutory decision in election petition is clearly misconceived. All the appellant needs do is include the ground of appeal against the interlocutory decision in the substantive appeal. [Awuse v. Odili (2003) 18 NWLR (PL 851) 116 referred to.] (P. 469, paras. E-F)

28. *On whether leave to appeal necessary where complaint of appellant is about the wrongful admission or rejection of evidence –*

In an appeal, where the complaint of the appellant is that the ruling is concerned with the wrongful admission of evidence, an appellant seeking to appeal does not need the leave of court before he can appeal. The ground of appeal against the ruling can be included when appealing against the final judgment of the trial court. In the instant case, the complaint of the appellants in grounds 3 and 4 of their amended group of appeal is that the tribunal wrongly excluded the certified true copy of the police report in its ruling on 15/5/08. These grounds of appeal were held to be competent and the objections of the 1<sup>st</sup> - 3<sup>rd</sup> and 1366<sup>th</sup> - 1367<sup>th</sup> respondents on same were overruled. [ONWE V. Oke (2001) 3 NWLR (Pt. 700) 406 referred to] I 465, (P. 465 paras. C-E)

29. *On Fundamental nature of issue of jurisdiction and effect of lack of some -*

**The issue of jurisdiction is so fundamental to proceedings in the court that where there is no jurisdiction the entire proceedings is a nullity.** (P 465, para. F)

30. *On When issue of jurisdiction can be raised and how raised –*

**Issue of jurisdiction can be raised informally at an stage of the proceedings, although it is desirable that some process be filed so that the adverse party is taken by surprise.** (P. 465, paras. F-G)

31. *On When grant of a relief in an appeal can be considered-*  
**The grant of a relief can only be properly considered- after the appeal has been heard. (P. 467, para. C)**
32. *On Need to incorporate argument on preliminary objection in the brief of argument -*  
**It is now the accepted practice to incorporate arguments on a preliminary objection to an appeal the briefs of argument. By so doing, there would be no need to file a separate notice of preliminary objection [Maigoro v. Garba (1999) 10 NWLR (Pt. 624)555 referred to.] (P. 462, paras. E-F)**

**Nigerian cases Referred to in the judgement:**

- A.N.P.P v. I.N.E.C (2004) 7 NWLR (Pt. 871) 16**  
**Abdullahi v. Oba (1998) 6 NWLR(pt. 554) 420**  
**Adeleke v. Asani (2002) 8 NWLR (Pt. 768) 26**  
**Aderounmu v. olowu (2000) 4 NWLR(Pt. 652) 253**  
**Aduku v. AdeJoh (1994) 5 NWLR (pt. 346)582**  
**Agagu v. Dawodu (1990) 7 NWLR(pt 160) 56**  
**Agbaje v. Adigun (1993) 1 NWLR (pt. 269)261**  
**Akujinwa v. Nwaonmuma (1998) 13 NWLR (Pt.583) 632**  
**Anatogu v. Iweka II (1995)8 NWLR(pt.415) 547**  
**Anyah v. AN.N. Ltd (1992) 6 NWLR (Pt. 247) 319**  
**Ayankora v. Obiakor (1990)2 NWLR(Pt. 130)52**  
**Atolagbe v. Shorun (1985) 1 NWLR (Pt. 851) 496**  
**Ceekay Traders Ltd v. Gen. motors Co. Ltd (1992) 2 NWLR(pt. 222) 132**  
**Chia v. Uma (1998) 7 NWLR (Pt. 556) 95**  
**Ezewuzim v. Okoro (1993) 5 NWLR (pt 294) 478**  
**Folaran mi v. Abraham (2004) 10 NWLR (pt. 881) 434**  
**Gov. Ekiti State v. ojo (2006) 17 NWLR (pt. 1007) 95**  
**I.C.C. Ltd. v. Granville & Sons Ltd. (1992) 2 NWLR (pt. 465) 187**  
**Ikegwaoha v. Ohawuchi (1996) 3 NWLR (pt. 435) 146**  
**Ikweki v. Ebele (2005) 11 NWLR (pt. 936) 397**  
**M.M.S. Ltd v. Granville & Sons Ltd (1996) NWLR (pt. 945) 517**  
**Maigoro v. Garba (1999) 10 NWLR (pt 945) 555**  
**Mohammed v. Kano N.A. (1968) 1 All NLR 424**

**Ngige v. Obi (2006) 14 NWLR(pt 999) 1**  
**Nnajiofor v. Ukonu (1986) 4 NWLR (pt. 36)505**  
**Nteogwuija v. Ikuru (1998) 10 NWLR (pt 569)267**  
**Nwobodo v. onoh (1984) 1 SCNLR 1**  
**Obiakor v. state (2002) 10 NWLR (pt. 776)212**  
**Ogbunyiya v. Akinbode (2006)9 NWLR(pt 854)338**  
**Okon v. Bob (2004) 1 NWLR (pt.854)378**  
**Okonkwo v. udoh (1997) 9 NWLR (Pt. 519) 16**  
**Onewe v.Oke (2001) 3 NWLR (pt. 700) 406**  
**Orubu v. N.E.C (1988) 5 NWLR (Pt. 94) 323**  
**Saraki v. kotoye (1992) 19 NWLR (pt. 1014) 1**  
**UBA. Plc v. Sparking Brewries Ltd. 1997) 3 NWLR (Pt. 41`9)589**  
**U.T.B nig Ltd. v. Ukpabia (2000) 2 NWLR (pt. 670)570**  
**Univ of lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143**  
**Usani v. Duke (2004) 7 NWLR (pt. 871) 116**

**Foreign Case Referred to in the Judgment:**

*Conway v. Rimmer* (1968) 2 WLR 998

**Nigerian Statutes Referred to in the Judgment:**

Constitution of the Federal Republic of Nigeria 1999. Ss. 146(2)(b) 179,233(2), 318(1)

Court of Appeal Act, Cap. 75, laws of the Federation of Nigeria 1990,8.15

Electoral Act, 2006, S. 159(1);

Evidence Act, Cap. 112, Laws of the Federation of Nigeria,  
1990,Ss. 109(a)(iii), Ill, 112 114(1) (2), 220(1) (2)

**Nigerian Rules of Court Referred to in the Judgment:**

Court of Appeal Rules, 2007, O.4 r 9, O.6 r 2(2) & (3), 3

**Appeal:**

These were five consolidated appeals filed by the appellants against the rulings and final judgment of the Governorship and Legislative Houses Election Tribunal, Osun State, in which the tribunal in its final judgment delivered on 15<sup>th</sup> July, 2008 dismissed the appellants' petition and

entered judgment in favour of the 1<sup>st</sup> respondent as the Governor of Osun State. The Court of Appeal, in a unanimous decision, allowed the appeal and ordered a re-trial.

### **History of the Case:**

#### *Court of Appeal:*

*Division of the Court of Appeal to which the appeal was brought:* Court of Appeal, Ibadan.

*Names of Justices that sat on the appeal:* Victor Aimepomo. Oyeleye Oimage.

*J.C.A. (Presided and Read the leading judgment.):*

Abubakar Abdulkabir Jega, J.C.A. ; Mohammed Iadan Tsamiya, J.C.A; Raphael Chikwe Agbo, J.C.A.; Bode Rhodes- Vivour, J.C.A Bode

#### Appeals Nos

CAI/EPT/GOV/98/2008

CAI/EPT/GOV/98/2008

CAI/EPT/GOV/98/2008

CAI/EPT/GOV/98/2008

CAI/EPT/GOV/31/2008

Date of judgment : Monday, 30<sup>th</sup> March, 2009

*Name of counsel:* Charles Edosomwan, SAN, (with him Deji Sasegbon, SAN., Adewale Afolabi, Esq., Adetunji Ajagbe Esq., Jide Omoworare Esq., Kunle Adegoke Esq., Gbenga Akano Akano, Esq., Ajibola Basiru, Esq., Olusegun Olatooyc, Esq., M.B.O. Ibrahim, Esq., Olayinka Okedara Esq., Yinka Ajayi, Esq., Nath Agunbiade, Esq., Adewumi Oke Esq., T.A. Abdul-Wahab, Esq., Kayode Tinubu, Esq., Tayo Olatubosun, Esq., Kolapo Alimi, Esq., Daud Akinlloye, Esq., Tope Adebayo, Esq., Osumah Charles, Esq., Dapo Akinosun, Esq., Olufemi A. Ifaturoti, Esq., Ayo Oluwa Gbenro (Mrs.), Kunle Abass, Esq., Lanre Obadina, Esq., W. A. Salman Esq.) - for the Appellants

Yusuf Ali, SAN, (with him, Otunba Kunle Kalejaiye, SAN N.O.O Okc, SANJ.A. Ogundere, Esq., Chief Yomi Aliyu. Wolc Olukanmi, Esq., Tewo Lamuye Esq., Kunle Akinyemi, Esq., Tope Elusogbon, Esq., Kunle Akinyemi Esq., Adebisi Raimi, Esq., Luwole Adeosun, Esq., K.K Eleja, Esq., A. Olaoba-ELfuntayo, Esq., Prince Odogiyani A., Olaitan Olabode, Esq., Sola Ajayi, Esq., Kehinde Adesiyani, Esq., Oluwale Kupoluyi, Esq., Jola Akintola Esq., Kanmi Ajibola, Esq., Kose Adewole, Esq., Ademola Adeyemo, Esq., Wahab Ismail, Esq., Yemi Giwa, Esq., E. Ekpo, Esq., Adetunji J. Muraina, Esq., Bola Ogungbe, Esq., Theima Otaigbe, Esq., O.A

oyeleke, Esq., N.N. Adegboyega, Esq., Yakub Dauda Esq Tolulope Omidiji, Esq.) - for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents;

J.K. Gadzama SAN (*with him*, R.O. Yusuf) for the 4<sup>th</sup> – 1365<sup>th</sup> Respondents

Hon. Niyi Owolade (Att-General of Osun State, (with him Alh. K.M. Akano (Solicitor Gen. Of Osun State), A. A. Adewemimo, Esq. (Director of Public Prosecutions), A. Adeniji, Esq. (Dir. Of Civil Litigation), Jide Obisakin Esq., (Chief State Counsel), Funmi Lamuye, Esq. (S.A., L Matters), Tijani Adekilekun, Esq. (Principal Si Counsel), Leke Fadeju, Esq. (Senior State Counsel). I Abidoeye, Esq. (Senior State Counsel) - for the 1366<sup>th</sup> & 1367<sup>th</sup> Respondents.

**OMEGE, J.C.A. (Delivering the Leading Judgment):** The gubernatorial elections were held on the 14<sup>th</sup> day of April, 2007 to fill the office of Governors for all the States in Nigeria. The election were conducted by the 4<sup>th</sup> respondent. The 1<sup>st</sup> appellant and the 1<sup>st</sup> respondent contested the election for Osun State. In Osun State, The People's Democratic Party (PDP) fielded prince Olagunsoye Oyinlola as its candidate while the Action Congress(AC) fielded Mr. Rauf A. Aregbesola as its candidate. After the election the 4<sup>th</sup> respondent, the Independent: National Electoral commission (INEC) credited the PDP candidate with 426,669 vote INEC declares Prince Olagunsoye Oyinlola the winner of the election.

Dissatisfied with the results declared by INEC, Mr. Rauf A. Aregbesola filed a petition on the 11<sup>th</sup> day of May 2007 at the governorship and Legislative Houses Election Petition Tribunal which sat at Oshogbo challenging the declaration, the 1<sup>st</sup> respondent as governor of Osun Stale.

His claim reads as follows:-

1. That votes recorded and /or returned in the following local government Areas, namely Atakumosa west local government , Ayedaade local government, Boluwaduro local government, Borije local government, Ede north local government, Ife central local government Local Government, Iledayo Local Government Isokan Local Government, Odo-Otin Local govemmnn Ola Oluwa Local Government, do not represent Lawful votes cast in the said Local Government Areas in Osun State Governorship Election held on 14<sup>th</sup> April. 20007 and as having been obtained in vitiating circumstances of substantial non-compliance with mandatory provisions of Electoral Act, 2006, violence malpractices which substantially affected the validity of the said elections that none of the

candidates in the said elections can be returned as having validly won in the said affected Local Government Areas.

2. That the said Olagunsoye Oyinlola was not duly elected by majority of lawful votes case in the Osun State Governorship Election held on April, 14<sup>th</sup> 2007 and that his election is void.
3. That Rauf Aregbesola was elected and ought to have been returned having scored the highest number of vote cast in the Osun State Governorship Election held on April, 14<sup>th</sup> 2007, and satisfied the requirements of Section 179 Constitution of the Federal Republic of Nigeria, 1999 and the Electoral Act, 2006.
4. That the 1<sup>st</sup> petitioner be declared validly elected as returned.

Alternatively the petitioner prays:-

1. That the Osun State Governorship Election held on April 14<sup>th</sup>, 2007 is void on the ground that the election was not conducted substantially in accordance with the provisions of Part IV of the Electoral Act, 2006.
2. That the said election was vitiated by substantial non compliance with the mandatory statutory requirement which substantially affected the validity of the said elections that none of the candidates in the said election can be validly returned as having validly won the said election.
3. That the Osun State Governorship Election held on the 14<sup>th</sup> of April, 2007 be nullified or cancelled and the 4<sup>th</sup> respondent is to conduct fresh elections for the office of the Governor of Osun State.

The ground upon which the petition was brought are as follow:-

1. The 1<sup>st</sup> respondent was not duly elected by majority of lawful vote cast at the election and did not score  $\frac{1}{4}$  of the lawful vote cast in  $\frac{2}{3}$  majority of the local government area of Osun State were lawful vote were cast as required by the provision of the constitution and the Electoral Act, 2006.
2. No election was conducted in several polling station wards in the Aforementioned local government Areas.
3. In the few areas where elections were held, the elections Were disrupted by acts of violence in several polling units and wards in the aforementioned Local Government Areas by acts of violence perpetrated on the voters by thugs and / or law enforcement agents acting in concert with chieftains and members of the 3<sup>rd</sup> respondent on the said day of election.
4. Elections were not conclusive and votes were not counted and results were not recorded in Form EC8A and were no announced and/or declared in most of the polling station and wards in the aforementioned

Local Governments due to disruption of voting exercise by acts of violence perpetrated on the voters by thugs and/or law enforcement agent acting in concert with chieftains and members of the 3<sup>rd</sup> respondent on the election day.

5. Electoral materials, especially, ballot papers and ballot boxes were snatched, seized and later stuffed with illegal ballot papers thumb-printed in favour of the 1<sup>st</sup> and 2<sup>nd</sup> respondents by thugs and law enforcement agents.
6. These ballot boxes with already thumb-printed ballot paper were later returned and forcefully deposited local Government Area collation centers and were counted as valid votes, illegally recorded on the Electoral Form EC8A and eventually announced in the favour of the first respondent
7. All the widespread disruptions, irregularities and malpractices referred to in this petition were done the express and /or implied consent, Authority or instruction of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents acting severally or in concert

The respondent duly filed replies to the petition

The petition was heard by justices T.D. NARON THE CHAIRMAN, S.Mohammed. J.N. Akpughunum, A. T. Bademasi and J.E.Ekanem.

After pre-hearing formalities, trial commenced on 3/10/2007 with pwi giving evidence and ended with the delivering of judgment on 7/2008.

At the trial, the petitioner (1<sup>st</sup> appellant) called 102 witnesses Several documents were admitted as exhibits.

The 1<sup>st</sup> to 3<sup>rd</sup> respondents called 28 witnesses.

The 4<sup>th</sup> respondent (INEC) did not call any witness. This was also the case with the 5<sup>th</sup> to 1,367<sup>th</sup> respondents. They did not call evidence in support of their pleadings. In a unanimous 11 judgment delivered on 15/7/2008, the tribunal entered judgment in favour of the 1<sup>st</sup> respondent as the Governor of Osun State.

Dissatisfied with the judgment, the 1<sup>st</sup> appellant filed an appeal on the 4<sup>th</sup> of August, 2008. But before the 4<sup>th</sup> August, 2008, the appellant. had filed for interlocutory appeals. For ease of reference, I shall set the briefs filed by the parties.

1. Notice of appeal filed on 9/5/08. Brief filed on 1/9/08
2. Notice of appeal filed on 29/7/08. Brief filed on 1/9/08
3. Notice of appeal filed on 29/7/08. Brief filed on 1/9/08
4. Notice of appeal filed on 3/3/08. Brief filed on 27/3/0

Learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed their brief on the substantive appeal on 15/9/08 and on the Interlocutory appeal briefs filed as follows:-

1. Brief filed on 15/9/08. It also contains a preliminary objection
2. Brief filed on 15/9/08. It also contains a preliminary objection
3. Brief filed on 15/9/08
4. Brief Filed on 4/4/08. It also contains a preliminary object ion Learned counsel for the 4<sup>th</sup> - 1365<sup>th</sup> respondents filed briefs on 8/10/08 while Brief on the substantive appeal.

No brief was filed on the 1<sup>st</sup> interlocutory appeal.

Brief on the 2<sup>nd</sup> and 3<sup>rd</sup> interlocutory appeals were filed on 8/10/08 While Brief on the 4<sup>th</sup> interlocutory appeal was filed on 1/12/08.

Learned counsel for the 1366<sup>th</sup>-1367<sup>th</sup> respondents filed Brief on the substantive appeal on 17/2/09. No briefs were filed on the interlocutory appeals.

The appellants filed reply briefs on 22/9/08, 10/12/08, 6/3/09. The reliefs claimed by the appellants are:- An order allowing the appeal.

1. An order setting aside the judgment and rulings of the Osun State Governorship and legislative Houses Election Petition Tribunal, holden at Oshogbo which judgment and ruling were delivered on 15<sup>th</sup> July, 2008.
2. An order nullifying the judgment of the tribunal dated 15<sup>th</sup> July, 2008.
3. An order directing a retrial of the petition.
4. An order remitting this petition to the president of the court of Appeal and directing that the same be heard by a fresh tribunal.
5. An order directing the President of the court of Appeal to constitute a fresh Osun State Government Election Petition Tribunal for the Purpose of hearing this petition a fresh.
6. Further and, or Alternatively 1,2,3,4,5 and 6 above. An order that votes recorded and/or returned in the following Local Government Areas, namely Atakumosa West Local Government

Area, Boriye Local Government Area boluwaduro Local Government Area, Ife South Local government Area Ifedayo local Government Area, Isokan Local Government Area and Boriye Local Government Area do not represent lawful votes in the Osun State Governorship election held on 14<sup>th</sup> April, 2007 and . having been obtained in vitiating circumstances of substances non-compliance with mandatory provision of electoral Act 2006, violence and malpractices which substantially affected the validity of the said election that none of the candidates in the said election can be validly returned as having validly won in the said affected local Government Areas.

7. An order that the said Prince Olagunsoye Oyinlola was not duly elected by majority of lawful votes cast in the Osun State Governorship election held on 14<sup>th</sup> April. 2007 and that his election is void.
8. An order that Rauf A. Aregbesola was elected and ought to have been returned having scored the highest number of vote cast in the Osun State Governorship Election held on April, 2007 and satisfied the requirements of section 179 of the Constitution and Electoral Act.
9. An order that the 1<sup>st</sup> petitioner/appellant be declared validly elected or returned. Further and in the alternative to 7,8, .9 and 10 above.
10. That the Osun State Governorship Election held on April 14, 2007 is void on the ground that the election was not conducted substantially in accordance with the provisions of Part IV of the Electoral Act, 2006.
11. That the said election was vitiated by substantial non- compliance with the mandatory statutory requirement which substantially affected the validity of the said elections that none of the candidates in the said election can be validly returned as having validly won the said election.

That the Osun State Governorship Election held on of April, 2007 be nullified or cancelled and the respondent is to conduct fresh elections for the olli of the Governor of Osun State.

Learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondents, Mr. Yusuf M SAN and the learned counsel for the 1366<sup>th</sup>-1367<sup>th</sup> respondents filed notice of preliminary objection. Arguments on the preliminary objection were incorporated in their respective briefs of argument. It is now the accepted practice to incorporate arguments on the preliminary objection in the briefs; and I do allow this now. By doing, there would be no need to file a separate notice of preliminary objection. See *Maigoro v. Garba* (1999) 10 NWLR (Pt. 624) P. 555.

In the preliminary objections filed by learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondents. The grounds of the objection read as follow

1. The substratum of the complaint in grounds 3, 4, 7 and 31 relate to interlocutory decisions of the tribunal therefore not part of the judgment.
2. The appellants did not seek nor obtain any leave of court to raise the purported grounds.
3. The said grounds are incurably defective, incompetent and liable to be struck out.
4. The other grounds of appeal are vague, prolix, verbose unwieldy, argumentative and generally offend;  
provisions of the rules of the Court of Appeal.
5. Particulars subjoined to most of the grounds are unrelated subjoined to most of the ground are unrelated to and independent of and are extraneous to the ground of appeal.
6. Some of the ground are unintelligible, incomprehensible and incompetent.
7. The grounds of appeal are liable to be struck out for \ in ions various of incompetence.
8. The complaint in some of the grounds of appeal are directed at mere obiter as opposed to the ratio of the tribunal decision
9. The upholding of the objection would lead to the dismissal of the appeal.

Learned counsel for the 1366<sup>th</sup> – 1367<sup>th</sup> respondent in his preliminary objection also played that the relief and grounds and all issues thereon be dismissed.

The ground of the objection are that :-

1. Grounds 3, 4 and 31 of the grounds of appeal do not relate to the judgment of the trial tribunal.
2. Ground 3,4 and 31 relate to interlocutory decision and the appellants did not file any notice of appeal against the said interlocutory decision/rulings neither is there ,raise application for leave to appeal out of time and/or to raise issues of mixed facts and law.
3. The appellants' case both at the lower tribunal and before his honorable court does not justify the granting of the relief prayed for.

Ground 1 ,2, and 3, of the 1<sup>st</sup> and 3<sup>rd</sup> respondents

Preliminary objection and grounds 1 and 2 of the 1366<sup>th</sup> – 136<sup>th</sup> – 1367<sup>th</sup> preliminary objection are saying the same thing. I shall take them together since they are allied.

It is necessary to reproduce the grounds of appeal for better understanding of the complaint.

#### Ground 3

The honorable tribunal erred in law when in course of trial, it rejected in evidence a certified true copy of the police Final Security Report of the governorship Election in Osun state dated 28/4/08 on the ground that the same was stamped “secret” and was therefore not a public document.

#### Ground 4

The learned Judges of the tribunal erred in law in rejecting in evidence the certified true copy of the final security Report of the Nigeria police Force on the 14<sup>th</sup> of April, 2007 Governorship Election in Osun State and there by refused to give it its true probability value and to nullify both votes allegedly scored and election in the 10 contested Local Government Areas of Osun State as sought by the 1<sup>st</sup> appellant.

#### Ground 7

The honorable tribunal erred in law when it held that it could not reverse and admit the Nigeria Police Final Security/Intelligence Report on the Election dated 28/4/2007 on the ground it would amount to sitting on appeal over its own ruling.

#### Ground 31

The honorable members of the tribunal erred in law in proceeding to deliver the judgment proceeding to deliver the judgment on 15th July, 2008 when it had in the circumstances become improperly constituted, was no longer competent and had no more jurisdiction to do so, thereby rendering its judgment a nullity.

Learned counsel for the 1st to 3rd respondents observed that complaint in grounds 3,4,7 and 31 reproduced above relate to interlocutory decisions of the tribunal, contending that the appeal is, incompetent since there is no right of appeal. Reliance was placed on:-

*Orubu v. NEC* (1988)3 NSCC p 333; (1988) 5 NWLR (Pt. 94) 323;

*Okon v. Rob* (2004) 1 NWLR (Pt. 854) p. 378

On grounds 3, 4 and 31 learned counsel for the 1366<sup>th</sup>-1367<sup>th</sup> respondent observed that they did not flow from the judgment of the trial tribunal.

He submitted that a ground of appeal that is not related to the judgment appealed against is incompetent and ought to be struck out.

Reference was made to:-

*Robert Ikweki & Ors. v. James Ebele & Anoi*: 21 NSCQR p. 450

(2005) 11 NWLR (Pt. 936) 397

*Suraki v. Kotoye* (1992) 9 NWLR (Pt. 264) p. 156.

He urged the court to strike out the incompetent grounds of appeal and the issues raised thereon. Responding learned counsel for the appellant observed that complaints in ground 31 is an issue of jurisdiction. Relying on *Onwe v. Oke* (2001) 3 NWLR (Pt. 700) P. 406; *Obiakor v. The Stale* (2002) 1C) NWLR (Pt. 776) p. 612

He submitted that a decision on admissibility is not an interlocutory decision but part of the main decision that can be raised as to right in the main appeal.

On the ground of 31, he submitted that leave is not require to raise a fresh issue of jurisdiction on appeal.

The submission of both counsel on their preliminary objection is that grounds 3, 4 and 31 in the notice of appeal arose from interlocutory appeals on election petition the court of appeal hears only appeals from final decision. That Court of appeal hears only appeals from final decisions. That no leave were field outside the stationary period of 14 days

Ground 3and 4 are ground of appeal that the appellant consider to be the wrongful rejection of evidence by the trial tribunal.

My Lord, the position of evidence by the law is that where the complaint of the appellant is that the ruling is concerned with the wrongful admission of evidence or the wrongful rejection of evidence an appellant seeking to appeal against the ruling can be included when appealing against the final judgment of the trial court. See *onwe v. Oke*. (2001) 2 NWLR (pt. 700) p. 406

The complaint of the appellant in ground 3,and 4 of their amended ground of appeal is that the trial tribunal wrongly excluded the certified true copy of the police report in its ruling on 15/5/08 . In view of what I have been saying supra ground 3 and 4 are competent ground of appeal. The preliminary objection of the 1st – 3rd and 1366th – 1367th respondent on the said ground 31 is that member of the tribunal had no jurisdiction to delivered on 15/7/08

The issue of jurisdiction is so fundamental to proceeding in court that where there is no jurisdiction the entire proceeding is a nullity consequently, jurisdiction can be raised informally at any stage of the proceeding although it is desirable that some process be failed so that the advices party I not taken by supreme . Ground 31 is that process.

On the other ground of appeal , learned council for the 1st to 3rd respondent observed that the appeal is incompetent on the grounds that particular are unrelated to or at variance with the ground.

Particularly are argumentative, narrative, verbose, and/or unwieldy and the grounds are vague. Relying on other 6 rules 2(3) of the court of Appeal Rules, 2007; *Abdullahi v. Oba*(1998) 6 NWLR (pt. 554) 420; *Adeleke v. Asani* (2002) 8 NWLR (Pt. 768)p. 26

Counsel submitted that the grounds of appeal should be struck out; and said this was not a ground of objection in the pith objection filed by learned counsel for the 1366<sup>th</sup>-1367<sup>th</sup> respondents

In response, learned counsel for the appellants observe, that the grounds do not offend Order 6 rules 2(2) and 3 of the Court of Appeal Rules, 2007. Referring to: *Adeleke v. Asani* (2002) 8 NWLR (Pt. 768) p. 26 cited by Mr. Yusuf, SAN. Mr. Kola Awoderin. SAN observed that the case was not applicable as it is on grounds of Appeal which are not clear enough to enable the other party and the court appreciate the complaint of the appellant. He relied on *Aderon v. Olowu* (2000) 4 NWLR (Pt. 652) p. 253.

Contending that the submissions of learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondents are clearly misconceived.

My Lords Order 6 rule 2(3) and 3 of the Court of Appeal rules 2007 states that:-

- "(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing or the appeal without argument of narrative and shall be numbered consecutively.
3. Any ground which is vague or general in terms or which discloses no reasonable ground of appeal shall not be permitted, save the general ground that the judgment is against the weight of the evidence, and ground of appeal or any part thereof which is not permitted under this rule may be struck out by the court of its own motion on application by the respondent."

Where there is non-compliance with the above stated proviso this court has jurisdiction to strike out any or all of the ground appeal.

This discretion must be exercised judicially and judiciously That is to say the discretion must be exercised with correct convincing reason. *I.C.C. Ltd. v. Granville & Sons Ltd.* (1996) NWLR (Pt. 465) P. 187.

My Lords, I have diligently examined all the grounds of ap. and I am satisfied that they are not vague, argumentative neither are the particulars at variance with the grounds, rather the ground relate to exactly the complaints of the appellant at the trial tribunal. These grounds as with all grounds of appeal have given good notice and information to the respondents of the exact nature of the Appellant's grievance/complaints. Once the ground of appeal satisfies the purpose, it should not be struck out; and I will not strike it out.

Aderounmu v. olowu (2002) 4 NWLR (pt.652) p.253 a supreme court decision is clear on this point. Submission of decision is clear on this point.

Submission of learned counsel for the 1st -3rd respondents are hereby overruled.

Finally, learned counsel for the 1366<sup>th</sup> -1367<sup>th</sup> respondent raised a third ground of objection and it is that the appellant does not justify the granting of the reliefs prayed for. On this, I say it would be premature and impossible at this stage to address this ground of objection the grant of a relief can only be properly considered after the appeal has been heard. The said ground is clearly incompetent. In sum, both preliminary objection lack merit. They are all overruled

On the 11<sup>th</sup> of March, 2009, learned counsel for the appellants, Mr Kola Awoderin SAN moved a motion before us wherein he sought another to consolidate his four interlocutory appeals with the substantive appeal. The application was granted by this court thereafter learned counsel for the appellants adopted his brief.

He urged us to admit the police security report and forms EC8D and EC8E and nullify the vote in ten Local government Areas, contending that if this is done the 1<sup>st</sup> appellant would be the clear winner of the election.

Mr. Y. Ali, learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents adopted his brief and observed that the appellant was unable to prove and of his claims. On the documents that were marked rejected he submitted that they were useless and worthless; he said the appellant failed to tender and exhibit the election results

In conclusion he submitted that there is nothing in this case for section 15 of the court of Appeal Act to declare the appellant Winner. Reference was made to Obi v. INEC (2007)11 NWLR (pt.1046) p. 560. HE urge us to dismiss each of the ground of appeals

Learned counsel for the 4th - 1365th respondents adopted his brief and observed that INEC did not call any witness because the appellant failed woefully to prove his case. He adopted Mr. Y. Ali's submission and further observed that the appeals should be dismissed.

Learned counsel for the 1366th -1367th respondent adopted his brief and urge us to dismiss the appeal. In his reply on point of law, Mr. k. Awoderin, SAN referred us to the definition of polling agent in the manual of election officials, 2007.

My Lords, I have examined the issues formulated by the parties and I consider issue No. 3 in the appellants' amended brief of argument and the issues in the interlocutory appeals to be arid important, they being on rejection of evidence, procedure and the discretionary powers of a trial Judge. I shall now consider issue No. 3. It reads:-

"Whether the tribunal was right when it rejected in evidence a certified true copy of the Police final Security Report on the Governorship election in Osun State dated 28/4/08 the ground that the same was stamped "Secret" thereby causing a serious miscarriage of justice."

Before I examine the merit of this issue, I wish to consider objection raised by learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondent on the issue. Learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondents observed that the ground from which the issue is distilled is predicated on an interlocutory ruling. He contended that the grounds are incompetent. He adopted the legal arguments already reproduced in this judgment. Issue No. 3 examines whether the trial tribunal was right or wrong to reject the Police Final Security Report on the Governorship Election in Osun State.

On 15/5/2008, the learned counsel for the appellant, Mr. K. Awoderin, SAN sought to tender from the Bar, the Police Final Security Report and some other documents, this was in the course of trial. He was unsuccessful; because the court overruled him.

In a ruling delivered on the same day, the tribunal rejected the exhibit and marked the document rejected. It is now the contention of learned counsel for the 1<sup>st</sup> - 3<sup>rd</sup> respondents that the said ruling is interlocutory, and there was failure to comply with the statutory requirements for the filing of such appeals and in any case appeals tribunal deals only with appeals from final decisions. I have said earlier in this judgment that the rejection by the tribunal of the Police Final Security Report is an issue on whether the said report was wrongly rejected, and in such case leave is not necessary before appeal on it can be taken. The appellant may include the ground appeal against the ruling of the trial tribunal when appealing against the final judgment.

In this case, that was what the appellant did. He has included the ground of appeal against the ruling wherein the report was rejected in the main appeal as grounds 3 and 4 and formulated issue 3 therefrom. Issue No. 3 is thus very much in order. I wish at this stage to state the position of the law on interlocutory appeals in election petition cases.

In election petition cases, there has been fluctuations in opinion on whether a dissatisfied party can appeal from a decision made in the course of election petition trial or whether only a final decision on the merit is appealable. see: *Okon v. Bob* (2004), NWLR (Pt. 854) p.378; *Usani v. Duke* (2004) 7 NWLR (Pt. 871) p. 116 decisions of the Court of Appeal.

In *Awuse v. Odili* (2003) 18 NWLR (Pt. 851) P. 116, the Supreme court made pronouncements the issue of appealable decisions from decision of the Governorship and Legislative Houses Election Tribunal of the court of Appeal and in the process examined the provision of section 233(2) and 146(2)(b) of the 1999 Constitution and laid to rest the matter

once and for all that "decision" as has been define under section 318 of the 1999 Constitution included interlocutory ruling in any proceeding. *Okon's* case and *Usani's* were decided on 31/7/2003 and 15/11/2003 respectively before the decision in *Awuse* on 28/11/2003.

In the light of the decision of the supreme Court in *Awuse v. Odili* (supra) " decision" as defined under section 318(1) of the 1999 constitution makes no difference between an interlocutory decision and final decision in an election petition. In the circumstances, an objection to an appeal from an interlocutory decision is clearly Misconceived. All that the appellant needs do is include the ground of appeal against the interlocutory decision in the substantive appeal. It is now time to consider Issue No. 3.

Learned counsel for the 1<sup>st</sup>-3<sup>rd</sup> respondents observed that the tribunal was right to reject the Police Final Security Report when the learned counsel for the appellants sought to tender it as an exhibit was also right to refuse to admit it as an exhibit after it was marked rejected.

Reliance was placed on *Ngige v. Obi* (2006) 14 NWLR (pt.999) p. 1 that the trial the trial tribunal could not overrule itself since the decision to reject the document is unassailable. Learned counsel observed that the document is a security document that is highly classified, and that through it is certified it is not a public document. Reliance was placed on - *Shyllon v. University of Ibadan* (2007)1 NWLR (pt. 1014) p. 1 and *Governor of Ekiti State v. Ojo* (2006) 17 NWLR(pt. 1007) p. 95.

He further observed that this court can admit the document as an exhibit only if it was made part of the record of proceedings of the lower court. Relying on – *Ezewusim v. Okoro* (1993) 5 NWLR (Pt. 294) 478.

He submitted that the said document is not part of the record of proceedings of the lower court and so could not be admitted to appeal by this court.

Concluding his submissions, learned counsel observed that the decision of the tribunal would have been the same even if the said report had been admitted. He contended that the report would have been accorded no weight being documentary hearsay since the maker is unknown, nor testified before the tribunal. He further observed that the information in the report was substantially exaggerated and that the content of the report to a considerable extent is outside the pleading.

Learned counsel for the 4<sup>th</sup> – 1365<sup>th</sup> respondents and learned counsel for the 1367<sup>th</sup> respondents made no submission on the said report in other respective brief. In his submissions, learned counsel for the appellants observed that the Police Security Intelligence Report is a public documents. He referred to section 109 (a) (iii) of the Evidence Act.

U.T.B Nig Ltd. v. Ukpabi a (2000) 2 NWLR (Pt. 670) p. 570.

He further observed that the said document being a certified true copy of public document is admissible without calling a witness or laying any foundation. Reliance was placed on – *Anatogu v. Iweka* (1995) 8 NWLR (Pt. 415) p. 547.

Appellants’ counsel submitted that the report is admissible in evidence, notwithstanding that it is marked “Secret” because it contains report of the widespread cases of malpractices, thuggery, violence, ballot snatching and stuffing, obstruction and intimidation of voters, facts relevant to this petition/appeal. Concluding his submission, counsel submitted that if the report had been admitted the decision would have gone in favour of the appellants. He urged us to answer issue 3 in the negative.

Relevant extracts from the proceedings in the trial tribunal on 15/5/2008 read as follows:

Awoderin, SAN ..... I wish to tender from the Bar two documents.

Report of the Police Monitoring group from Abuja. It is a CTC of it. In urging the tribunal to admit the report, I wish first to rely on the decision of this tribunal in the case of Hon. Julius S.O. Akinremi v. Mr. Binuyo & 36 others petition No. HA/EPT/05/8/2007 delivered on 28/9/2007 when the tribunal held that the certified true copy of a public document is admissible and could be tendered from the Bar. I urge the tribunal, in the same vein to admit this document which is pleaded and which meets the requirements of the law. I urge the tribunal to hold itself bound by the decision in that case.....”

In a considered ruling delivered on the same way (15/5/2008), the tribunal noticed that the report is marked “Secret” relied on the case *Shyllon v. University of Ibadan* (2007) 1 NWLR (Pt. 1014) p. 1 and *Governor of Ekiti State v. Ojo* (2006) 17 NWLR (Pt. 1007) p. 95 and concluded as follows:

.....the tribunal holds that the report sought to be tendered is not a public document and cannot be tendered from the Bar even though certified. The document is therefore rejected and shall be so marked.

My Lords, I must state straight away that a document marked rejected cannot be tendered again in trial. Put in another way once a document is marked rejected it stays rejected for the purposes of the trial in which it was marked rejected and defect cannot be cured during the said trial. See; *Agbaje v. Adigun & Others* (1993) 1 NWLR (Pt. 269) p. 271; *Bello v. Gov. of Kogi State* (1997) 9 NWLR (Pt. 521) p. 520.

This court, by virtue of section 15 of the Court of Appeal Act, 1976, has jurisdiction over the proceedings in the trial tribunal. That is to say this court can make any order or give

judgment, which the trial tribunal ought to have made or given. See; *Union Bank of Nig. Plc v. Sparkling Breweries Ltd.* (1997) 3 NWLR (Pt. 491) Pt. 589. P. 267. *Nteogwuija v. Ikuru* (1998) 10 NWLR (Pt. 569) p. 267.

It is now our duty to examine whether the trial was right to mark the report rejected. I quote here examples of the documents. The report is titled: -

“Final Security Report on April, 14<sup>th</sup> 2007, Gubernatorial/House of Assembly Election in Osun State.”

It emanates from B department Operations of the Inspector General of Police Office in Abuja. It's reference No. is C1 234/B DEPT/FhQ/ Vol. 29/113 dated 28/4/07. It is marked secret and it is a certified true copy. It is signed by C.S.P Ahmed Muhammad (team leader) Section 109 (a) (iii) of the Evidence Act stated that: 109 the following documents are public documents

(a) documents forming the acts or records of the acts-

(iii) of public officers, legislative, judicial and executive whether in Nigeria or elsewhere and by virtue provisions of the provision of Section 111 of the Evidence Act a certified true copy of a public document become admissible under section 112 of the Evidence Act as proof of the contents of the original.

A document is public document if: -

- (a) it was made under a strict duty to inquire into all the circumstances;
- (b) it was concerned with a public matter although the public matter need not be the concern of the entire community.
- (c) It is meant for public inspection.

A public document is thus a document that is made for the purpose of the public or at least a section of the public making use of it.

The Final Security Report on the Governorship election in Osun State was made by a police officer under a strict duty by the Inspector General of Police to inquire into the conduct of the elections. The said document marked rejected is a public document. The position of the law is that once a public document is signed certified required by sections 111, 112 of the Evidence Act, it becomes admissible on production, and it is not necessary to call a witness to prove custody or to verify the document. See: *Anatogu v. iweka* (1995) 8 NWLR (Pt. 415) p. 547; *Agagu v, Dawodu* (1990) 7 NWLR (pt. 160} p. 56; *Anyakora v. Obiakor* (1990) 2 NWLR (Pt. 130) p. 52.

Such a document can be tendered from the Bar by counsel who produced it. See *Ogbuanyinya v. Ohi Okudo* (1979) 6-9 SC p 32.

This is so because the court presumes such a document to be genuine. See section 114(1) and (2) of the Evidence Act.

Once a document is certified the court ought to accept the authenticity of its contents. The Final Security Report is a Certified true Copy of the original. A document marked secret usually concerns affairs of State. State privilege. "Section 219(1) provides that the respect of matters to which the executive authority of a state extends, the government of the state or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence, when after consideration, he is satisfied that the production of such document or the giving of such oral evidence is against public interest; any such objection taken before the trial shall be by affidavit and if at trial then by a certificate production by a public office. Subsection (2) goes on to say that an objection so taken, whether by affidavit or certificate is conclusive and the court shall not inspect such document. The court shall give effect to the affidavit or certificate.....

This provision apparent makes the decision of a functionary named there as to the exclusion of evidence on ground of State privilege or that document is marked Secret, final and the court cannot inquire.

This is not tenable in view of the provisions of section 36( 1) of the constitution which states that in the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or tribunal. A trial cannot be fair when document necessary for determination of her civil right is excluded for her trial.

For a trial to be fair as envisaged by the Constitution, it is important that before a party is denied the use of a document vital to his case the public interest involved in its exclusion should be dispassionately weighed against the injury thereby caused to the litigant as to determine which way the balance tilts.

In *Conway v Rimmer* (1968) 2 WLR P. 998, the House of lords held that the courts have powers to order production of a State document and to overrule the Ministers' decision to withhold it on ground of privilege if such a course is dominantly necessary to ensure the proper administration of justice.

My lord, in this case, no functionary of State ordered the report withheld. The said report is necessary to ensure the proper administration of justice. This is so because the report is on the state of affairs on Election Day in Osun state in some of its local government, and the observation therein if proved supports the appellant's pleadings. The two cases, to wit; - *shyllon v University of Ibadan* (supra) and *government of ekiti state v Ojo* (supra) relied on by the tribunal are not helpful since the report here concerned a community/public while the documents in the case above concerned the affected lecturers. In *Ezewusiu v. Okoro* (supra) is also irrelevant since the report is part of the record of proceedings. See page VIII of Volume 1 of the record of proceedings.

I am satisfied and hold that rejecting the report was wrong. I say so because according to the pleadings of the appellants they are contesting the results in twelve of the thirty Local Government areas, having conceded that the elections were properly conduct in eighteen Local Government Areas.

The report, being the observations of the Police on the conduct of the elections in most of these twelve Local Government Area is relevant document. The issue in the petition/appeal is the conduct of the elections in twelve Local Government Areas. They are:

1. Atakumosa West Local Government Area
2. Aiyedade Local Government Area.
3. Boluwaduro Local Government Area
4. Boripe Local Government Area
5. Ede Local Government Area
6. Ife Central Local government
7. Ife East Local Government Area
8. Ife South Local Government Area
9. Ifedayo Local Government Area.
10. Isokan Local Government Area
11. Odo Otin Local Government Area
12. Ola Oluwa Local Government Area

On 22nd day of May, 2007, on an application by the appellants (as petitioners, the tribunal granted an order directing INEC and the Resident Electoral Commissioner (the 4th and 5th respondents) to make available for inspection by the petitioner's counsel all polling documents ballot papers and other electoral materials in their custody which were used for the conduct of the gubernatorial election in Osun State. This was done according to the tribunal for the purpose of enabling the applicants to maintain their petition against the respondents. See Vol. VII page 307 of the record of appeal.

On the 10<sup>th</sup> of August, 2007, the appellants (as petitioners) brought another application wherein they sought two reliefs, it reads:-

1. Leave and order of this honourable tribunal permitting the petitioner's forensic experts to inspect by way of machine/electronic scanning, all ballot papers which were used for the conduct of the Governorship election in Osun state on 14/4/2007 in the following local government areas:
  - A. Atakumosu West Local Government Area
  - B. Aiyedaade Local Government Area
  - C. Boluwaduro Local Government Area
  - D. Boripe Local government Area
  - E. Ede local Government Area
  - F. ife central Local Government Area
  - G. ife -East Local Government Area
  - H. ife - South Local Government Area
  - I. ifedayo Local Government Area
  - J. Isokan Local Government Area
  - K. odo Otin Local Government Area

- L. Ola Oluwa Local Government Area
2. leave and order of this tribunal permitting handwriting and forensic experts to conduct an inspection of Forms EC8A, EC8B, EC8C, EC8D, EC8E and all forms and materials used for the conduct of the Governorship election in Osun State on 14/4/2007 in the aforesaid local governments.

The application was granted on 14/8/2007.

And so there was compliance with these orders. On completion of the exercise petitioners (appellants) brought an application praying for:-

- 1 An order granting leave of the petitioners/applicants to bring and move the application outside pre-hearing session of the tribunal.
- 2 An order granting the petitioners an extension of time within which to seek leave to file, serve and rely upon in the prosecution of this petition additional documents and witness statement on oath of Adrian Forty who has been listed as a witness for the petitioners as at the time of presentation of the petition.
- 3 An order granting the petitioner an extension of time within which to file and serve written statement on oath of Adrian Forty who has been listed as a witness for the petitioner as at the time of filing the petition.
- 4 An order deeming as having properly filed and served the witness statement on oath of Adrian Forty and the accompanying documents referred to in the support of this application and separately filed along herewith the necessary fee having been paid.

In a ruling delivered on 18/2/2008, the tribunal dismissed the, application. On 16th of April, 2008, the petitioner brought another application, this time praying for the following orders.

- 1 An order granting leave to the petitioners/applicants/appellants to bring and move this application outside pre-hearing session or the tribunal.
- 2 An order for extension of time to include Tunde Yadoka as one of the witnesses of the petitioners/applicants/appellants.
- 3 Leave and order of this honourable tribunal permitting the petitioners/applicants/appellants to call Tunde Yadoka as an additional witness.
- 4 An order granting the petitioners/applicants/appellants an extension of time within which to file, serve and rely upon written deposition of Tunde Yadoka together with exhibits attached thereto.
- 5 An order deeming as having been properly filed a served the witness statement on oath of Tunde Yadoka together with exhibits attached thereto and referred to in the affidavit in support of this application and separately filed along herewith the necessary filing fees having been paid.
- 6 And for such other or further orders as this tribunal may deem fit in the circumstances of this application.

The application was moved and the tribunal in a ruling delivered on the 28<sup>th</sup> of April, 2008, dismissed the application in its entirety two interlocutory appeals were then filed by the petition/appellants. They are notice of appeal filed on 9/5/2008 and 3/3/2008. Briefs in respect of both appeals were tiled by the appellants on 2008 and 27/3/2008.

Briefs were filed by learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents on 4/4/2008 and 15/9/2008 while learned counsel for the, 4<sup>th</sup> -1365<sup>th</sup> respondents filed briefs on 27/5/2008 and 8/10/2008.

Learned counsel for the 1366<sup>th</sup> - 1367<sup>th</sup> respondents did not file any brief on these two interlocutory appeals. Both appeals shall be taken together.

I have diligently examined all the briefs filed on the two interlocutory appeals and I am satisfied that the central issue for determination is:-

Whether the tribunal correctly exercised its discretion by dismissing both applications?

Indeed, this court power to adopt or formulate issue that will determine the real grievance in an appeal. See; Ikegwuoha v. Ohawuchi (1996) 3 NWLR (Pt. 434) P. 146; Aduku v. Adejoh (1994) 5NWLR (Pt. 346) P. 582.

Learned counsel for the appellants argued that the refusal of the Tribunal to grant the application was perverse. He submitted that the Tribunal did not exercise its discretion judicially and judiciously contending that this is a proper case for this court to interfere. Counsel relied on: - Atolagbe v. Shorun (1985) 2 NWLR (pt.2360) at 375. University of Lagos v. Aigoro (1985) 1 NWLR (pt.1) p. 143

Learned counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the tribunal exercised its discretion judicially and judiciously in refusing the of the 4 appellants. He observed that the case of university of Lagos v. Aigoro (supra) does not ensure in favors of the appellants since the tribunal took all relevant materials into consideration dismissing the application.

Concluding submission, he contends that no injustice has been occasioned by the appellants who have failed to present third case properly. Reliance was placed on Folarinmi v. Abraham (2004) 10NWLR (pt.881) p. 434 and M .M.S. Ltd. v. Oteju (2005) 14 NWLR (pt.954) p. 517.

Learned counsel for the 4<sup>th</sup>-1365<sup>th</sup> respondents observed that the tribunal properly exercised its discretion, it is not the province of this court to interfere. He submitted that the tribunal exercised its discretion properly by dismissing both applications. In the interlocution appeals CA/I/EPT/GOV./98/2008 the reason given for dismissing the application is that section 159 of the Electoral Act does not contemplate the bringing of inspection report/evidence of inspection of polling documents to be admitted in evidence. It further held that it did not make an order that the inspection report be brought to the tribunal.

In interlocutor appeal CA/I/EPT/GOV./31/2008, the tribunal dismissed the application because it was of the view that no extreme circumstance existed to warrant the grant of the leave sought.

In the first interlocutory appeal supra the application was brought under section 159(1) of the Electoral Act. 2006. It read:-

“an above for an inspection of polling document or an inspection of a document or any other packet in the custody of the chief national electoral commissioner or any other officer of the commission may be made by the election tribunal or the court if it is satisfy that the order required is for the purpose of instituting or maintaining an election petition.”

The above provision enables a petitioner to inspect document in the custody of 1NEC for the purpose of instituting or maintain election petition. To my mind, it is so obvious that the intention of the legislature is that evidence obtained upon the orders for inspection/scanning will support the petition. Dismissing the application shuts out the result of the scanning and inspections which the same tribunal earlier ordered. This is wrong.

This court will not interfere with the way a trial Judge exercises his discretionary power but will be quick to interfere if the court is satisfied that the discretion was wrongly exercised or the exercise was tainted with some illegality or substantive irregularity or that it is the interest of justice to do so. See: Ceekav Traders Ltd. v. Gen. Motors Ltd. (1992) 2 NWLR (Pt. 222) P. 132; Anyali v. A.N.N. Ltd. (1992) 12 NWLR (Pt. 247) p. 319; Akitjinwa v. Nwaonunm(1998) 13 NWLR , (pt.583) p. 632.

My Lords, in this appeal, I find I am compelled to interfere in the way the tribunal exercised its discretion. It is necessary to avoid a perverse judgment. All the documents that the petitioners/appellants sought to bring to the tribunal were refused by the dismissal of applications, which ought to have been allowed into enable the petitioners/appellants support the petitioned.

I have observed that in election petition cases oral evidence and/or the demeanor of witnesses are not as important and decisive in settling the issues as documentary evidence tendered. Documents used in an election and all documents containing facts relevant to the issues in a petition are the best form of evidence of resolving election mailers. On no account should a party be denied the opportunity to place before the court all the document that would assist him in proving his case; a defence of name.

In *Nwobodo v. Onoh* (1984) 1 SCNLR p. 1, the Supreme Court observed that:-

"Election petitions are by their nature peculiar from any other proceedings... it is the duty of the court therefore to endeavour to hear them without allowing technicalities too unduly batter their jurisdiction."

In my view, the need to do substantial justice is greater in an election petition in cases between any other case. This is so because the court is not only concerned with the rights of the parties inter se but also the larger interests and the rights of the people in the various local government Areas who had exercised their franchise on Election Day. Election petitions must always be handled with elasticity. See *chia v, uma* (1998) 7 NWLR (Pt. 556) p. 95.

Too much technical should be avoided; but not at the expense of our general law.

Rejection of forms EC8D, EC8E.

In the proceedings on 18/4/2008, learned counsel for the petitioners/ appellants had this to say to the tribunal:

“The next set of items we would like to tender is item 1 which is Forms EC8A, EC8B, EC8C, EC8D and EC8E. These have been jointly inspected and agreed to be tendered by consent.”

Well over 100 documents were tendered. Petitioners/appellants’ counsel forgot to tender Forms EC8D and EC8E. He claims inadvertence. Of what harm is a document that all parties agree could be admitted as an exhibit. The tribunal was clearly in the wrong to refuse to admit in evidence as exhibits Forms EC8D and EC8E.

In *Muhammed v. Kano N.A.* (1968) 1 All NLR p. 424, Ademola. CJN stated the test for fair hearing. He said:

It has been suggested that a fair hearing does not mean a fair trial. We think a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing. We therefore see no difference between two. The true test of fair hearing it was suggested by counsel is the impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case. We here feel obliged to agree with this."

See also *ANPP v. INEC* (2004) 7 NWLR (Pt. 871) p. 16.

In my view, impression of a reasonable man would be one of surprise documents to maintain the petitions were not allowed as exhibits in the proceeding. Miscarriage of justice is a failure of justice and it varies from case to case depending on where it fails. Once what occurs in trial is not justice according to law, a miscarriage of justice has occurred. See: - *H. Okonkwo v. G. Udoh* (1997) 9 NWLR (Pt. 519) p. 16; *A.N.P.P v. I.N.E.C. & Ors* (2004) 7 NWLR (Pt. 871)p.16; *Nnajifor v. Ukonu* (1986) 4NWLR (Pt. 36) P. 505.

The rejection of documentary evidence to wit: Police security Report, Forms EC8D. EC8E and the rulings of the tribunal on 18/2/ 2008 and 28/4/2008 wherein the petitioner/appellant was denied the use of vital documents to support the petitioner's case amounts to a miscarriage of justice.

By virtue of the provisions of Order 4 rule 9 of the court of Appeal Rules, 2007, this Court has the power to order a new trial. In *Okomalu v. Akinbode* (2006) 9 NWLR (Pt. 985) P. 338, the Supreme Court stated the instance when an appellate court will not make an order of retrial:

- 1 Where a retrial will result in injustice or a misc. of justice.
- 2 Where it is sought as a matter of course, routine or fun and not based on valid procedural reasons.
- 3 If there is no special circumstances warranting retrial.”

These are some but not all the instances when the appellate court will not order a retrial when a judge misdirects himself as to the nature of a party's case or upon wrongful admission or rejection of material evidence, or/and to refuse a retrial would occasion a greater injustice than the grant of it.

I am satisfied that substantial justice would be achieved by a retrial where all the parties are given the opportunity to present before the court documentary evidence to maintain/or

support his petition.

In the light of all that has been said in this judgment, the President of the Court of Appeal is hereby directed to constitute a fresh Osun State Governorship Election Petition Tribunal for the purpose of hearing this petition afresh.

Appeal succeeds.

JEGA, J.C.A: I agree.

TSAMIYA, J.C.A: I agree.

AGBO, J.C.A: I agree.

RHODES-VIVOUR, J.C.A: I agree.