

**ALLIANCE FOR DEMOCRACY**

**V.**

- 1. PETER AYODELE FAYOSE**
- 2. JACOBABIODUNALUKO**
- 3. INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC)**
- 4. RESIDENT ELECTORAL COMMISSIONER OF EKITI STATE**
- 5. RETURNING OFFICER FOR EKITI STATE GUBERNATORIAL ELECTION**

*COURT OF APPEAL (ILORIN DIVISION)*

CA/IL/EP/GOV/1/2004

SYLVANUS ADEWERE NSOFOR, J.C.A. (*Presided and Read the Leading Judgment*)

ABOYI JOHN IKONGBEH, J.C.A.

WALTER SAMUEL NKANU ONNOGHEN, J.C.A.

JA' AFARU MIKA'TLU, J.C.A.

NWAL1 SYLVESTER NGWUTA, J.C.A.

FRIDAY', 7TH MAY, 2004

*ACTION ~ Election petition - Nature of- Witnesses - Number of witnesses called by party- Relevance of to proof of his claim -What is material.*

*ACTION - Motion - Nature of.*

*APPEAL ~ Evaluation of documentary evidence by trial court — Attitude of appellate court thereto.*

*APPEAL - Evaluation of evidence by trial court – Altitude of appellate court thereto.*

*APPEAL — Nature of- Whether a new case or continuation' original suit.*

*CONSTITUTIONAL LAW - Governor of a State - Office of Qualification therefor - Section 177 of the 1999 Constitution How satisfied.*

*COURT— Decision of court — Whether based on number of witness called by party - Whether relevant to proof of claim of — What is material.*

*COURT- Judgment of court ~ Validity! of until set aside.*

*COURT - Mistakes - Spelling errors -Attitude of court thereto - When will ignore.*

*CRIMINAL LAW AND PROCEDURE - Commission of crime - Where disclosed in election petition — Duty of Election Tribunal and INEC in respect thereof- Section 144, Electoral Act, 2002,; considered.*

*CRIMINAL LAW AND PROCEDURE - Proof beyond reasonable doubt - Implications of in civil trial and criminal trial -Distinction between.*

*CRIMINAL LAW AND PROCEDURE- Uttering - Offence of- What amounts to - Section 486, Criminal Code.*

*DOCUMENT- Evaluation of documentary evidence by trial court -Attitude of appellate court thereto.*

*ELECTION- Governor of a State - Office of- Qualification therefore - Section 177 of the 1999 Constitution - How satisfied.*

*ELECTION- "Non-qualification" and "disqualification" for election - Distinction*

*between.*

*ELECTION PETITION – Commission of crime – Where disclosed in election petition – Duty of election Tribunal and INEC in repeat thereof – Section 144, Electoral Act, 2002 considered*

*ELECTION PETITION- Nature of election petition – Witness – Number of Witnesses called by party – Relevance of to proof of his claim – What is material.*

*EVIDENCE- Burden of proof on civil cases – On whom lies- How shifts – Evidential burden – Operation of EVIDENCE - Evaluation of evidence by trial court -Attitude of appellate court thereto.*

*EVIDENCE - Expert opinion - How treated - Whether court bound to accept.*

*EVIDENCE - Presumptions - Presumption of withholding of evidence-Section 149(d), Evidence Act - When will be invoked.*

*EVIDENCE - Proof- Allegation of crime - Standard of proof required thereof - Effect of principle of severance of pleadings thereon.*

*EVIDENCE - Proof— Allegation of crime — Standard of proof required thereof- Onus of proof of — On whom lies.*

*EVIDENCE - Proof- Onus of proof - On who lies - What determines.*

*EVIDENCE-Proof- Particular fact- Onus of proof of- On Whom lies.*

*EVIDENCE — Proof beyond reasonable doubt — Implications of in civil trial and criminal trial - Distinction between.*

*EVIDENCE - Proof beyond reasonable doubt - What amounts to.*

*EVIDENCE — Witnesses - Number of witnesses called by a party -Whether relevant to proof of his claim — What is material.*

*JUDGMENT AND ORDER - Judgment of court - Validity of until set aside.*

*PRACTICE AND PROCEDURE-Appeal - Nature of- Whether a new case or continuation of original suit.*

*PRACTICE AND PROCEDURE - Burden of proof in civil cases-On whom lies - How shifts - Evidential burden - Operation of.*

*PRACTICE AND PROCEDURE-Decision of court-Whether based on number of witnesses called by a party — What is material.*

*PRACTICE AND PROCEDURE - Election petition - Nature of-Witnesses — Number of witnesses called by party - Relevance of to proof of his claim - What is material.*

*PRACTICE AND PROCEDURE - Evaluation of documentary evidence by trial court - Attitude of appellate court thereto.*

*PRACTICE AND PROCEDURE - Evaluation of evidence by trial court -Attitude of appellate court thereto.*

*PRACTICE AND PROCEDURE - Judgment of court - Validity of until set aside.*

*PRACTICE AND PROCEDURE - Mistakes - Spelling errors -Attitude of court thereto - When will ignore.*

*PRACTICE AND PROCEDURE - Motion - Nature of.*

*PRACTICE AND PROCEDURE - Pleadings - Allegation of crime - How pleaded - Importance of setting out particulars rather than conclusion.*

*PRACTICE AND PROCEDURE - Pleadings - Bindingness of -Evidence led on unled facts - How treated.*

*PRACTICE AND PROCEDURE - Pleadings - Severance of pleadings — Principle of— Operation of- Effect on standard of proof of allegation of crime.*

*PRACTICE AND PROCEDURE- Witnesses - Number of witnesses called by party — Whether relevant to proof of a claim — Decision of court — Whether based thereon - What is material.*

*WORDS AND PHRASES - "Name " - Meaning of.*

*WORDS AND PHRASES - "Nominal witness" - Who constitutes.*

*WORDS AND PHRASES - "Non-qualification" and "disqualification" for election - Distinction between.*

*WORDS AND PHRASES - "Proof beyond reasonable doubt" - What amounts to.*

**Issues:**

1. Whether a proper evaluation of the case of the appellant was done and whether on the strength of the evidence led, the appellant is entitled to judgment.
2. Who has the onus of proof of change of name from Fayose to Oluwayose and whether in any event exhibits L-L14, T-T8, N 1 and N2 could be relied upon to reach a conclusion that the 1st respondent changed his name from Fayose to Oluwayose.
3. Whether the case of the appellant is one rooted criminality and whether the appellant discharged the burden of proof either on balance of probability or beyond reasonable doubt.

**Facts:**

The appellant, the Alliance for Democracy (AD), one of the registered political parties, was the petitioner before the National Assembly/Governorship and Legislative Houses Election Tribunal for Ekiti State, sitting at Ado-Ekiti. The appellant sponsored Otunba Adeniyi Adebayo as its Governorship candidate in Ekiti State in the election held on 19th April, 2003. The 3rd respondent, which conducted the election, with the 4th and 5th respondents as its officers, returned the 1st and 2nd respondents sponsored by the Peoples Democratic Party (POP) as elected Governor and Deputy Governor respectively by majority of lawful votes cast at the election.

Not satisfied with the result declared, the appellant challenged the election at the aforesaid tribunal on two grounds:

- (a) that the 1st respondent was not qualified to contest the gubernatorial office in Ekiti State; and
- (b) that the 1st respondent did not score majority of lawful votes cast at the election.

The appellant pleaded in paragraphs 9(iii), 10, 13 and 14 of the petition to the effect that the 1st respondent was disqualified from contesting the Ekiti State gubernatorial election conducted on 19th day of April, 2003 because, among others, the 1st respondent did not possess the basic educational qualification to qualify him to contest the election under reference, in that the 1st respondent forwarded to the 3rd respondent educational certificates/credentials bearing the names Oluwayose Ayodele Peter, which the appellant claimed was fraudulent on the part of the 1st respondent. According to the appellant, the 1st respondent did not at anytime attend Federal Polytechnic, Ilaro and he does not possess any of the credentials he submitted to the 3rd respondent, and that the 1st respondent's name - Peter Ayodele Fayose, is distinct and/or different from Oluwayose Ayodele Peter, hence the credentials relied on do not belong to the 1st respondent.

In showing that the 1st respondent is different and distinct from Oluwayose Ayodele Peter, the appellant stated that the 1st respondent is a director of Spotless Investment Limited, a company registered under the Laws of Nigeria. The said company has, as contained in its Memorandum and Articles of Association, two directors, according to the representations

made by the 1st respondent at the time when the company was being incorporated, namely: Ayodele Peter Fayose (the 1st respondent herein); and Oluwayose Ayodele Peters (the name on the credentials presented by the 1st respondent), the appellant contended that the 1st respondent was not and cannot be the one and the same person as Oluwayose Ayodele Peter.

The 1st and 2nd respondents countered all these allegations in their joint reply where they pleaded that the 1st respondent possessed the requisite educational qualification at the time he contested the election. They listed the qualifying certificates he obtained from various educational institutions ranging from First School Leaving -Certificate, West African School Certificate, Ordinary National Diploma and Higher National Diploma. In answer to the allegation that the certificates belonged to one Oluwayose Ayodele Peter and not to the 1st respondent, they explained in their reply that "Oluwayose" became the 1st respondent's surname as from 1974 when his father changed it from the original "Fayose."

In proof of its case that the 1st respondent did not possess the requisite educational qualification when he contested election, the petitioner called eight witnesses. In particular, PW1 testified that the certificates that bore the surname "Oluwayose" belonged to someone from Oluyole Local Government Area of Oyo State, whereas the 1st respondent is from Afao-Ekiti in Irepodun/Ifelodun Government Area of Ekiti State.

The 1st respondent did not testify in person, but DW1 testified -and put in evidence all the certificates the 1st respondent obtained from various educational institutions. The witness also testified as to the change of name and tendered documents to support his evidence, including the Daily Sketch issue of Monday, 22nd July, 1974 which contained classified advertisement for change of name by DW1 from "John Olorunfemi Fayose" to "John Olorunfemi Oluwayose". He explained that he caused his children to also change their surnames with him, but that when the 1st respondent became independent he reverted to the old name of Fayose.

At the end of the trial, the tribunal held that the petitioner not establish the allegation that the 1st respondent did not possess the requisite educational qualifications and dismissed the petition. Being dissatisfied, the appellant appealed to the Court of Appeal 1 contending that the trial tribunal erred in law in holding that the allegations in paragraphs 9(iii) of the petition are criminal in nature and must be proved beyond reasonable doubt, and which petitioner failed to do. The appellant further contended that its case could be determined without deciding the criminal element. The respondents on their part contended that the allegation is criminal in nature and the criminal element cannot be severed from the petition. The allegation constitutes offence of uttering and therefore the petitioner did not establish its claim beyond reasonable doubt.

In the determination of the appeal, the Court of Appeal considered the following statutory provisions.

Section 486 of Criminal Code which provides:

"486. Any person who utters any document which has been issued by lawful authority to another person, and whereby that other person is certified to be a person possessed of any qualification recognized by law for any purpose, or to be the holder of any office, or to be entitled to exercise any profession, trade, or business, or to be entitled to any right or privilege or to enjoy any rank or status, and falsely represents himself to be the other person named in the document, is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the document."

Section 115 of the Electoral Act, 2002 which States :-

" 115-(1) A person commits an offence if he

(k) signs a nomination paper consenting to be a candidate at an election

knowing that he is ineligible to be a candidate at that election;

(2) A person who commits an offence under subsection (1) of this section is liable on conviction to a fine of N200,000.00 or to imprisonment for 2 years or both." Section 138 of the Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990 which provides: "138(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.

(2) The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 141 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."

**Held** (*Unanimously dismissing the appeal*):

1. *On Qualification to contest for the office of Governor of a State -*

**By virtue of section 177 of the Constitution of the Federal Republic of Nigeria 1999, a person shall be qualified for election to the office of Governor of a State if:-**

(a) **he is a citizen of Nigeria by birth;**

(b) **he has attained the age of 35 years;**

(c) **he is a member of a political party and is sponsored by that political party; and,**

(d) **he has been educated up to at least school certificate level or its equivalent.**

(*Pp. 187, paras. F-H; 222, paras. D-F*)

2. *On Qualification to contest for office of Governor of a State -*

**By virtue of section 111 (d) and 182(1)(j) of the Constitution of the Federal Republic of Nigeria, 1999, a person who intends to contest an election to the office of Governor of a State is not qualified to do so if he has not been educated up to school certificate level or its equivalent and is disqualified where he presents forged certificate to the Independent National Electoral Commission (INEC) purporting to have been educated to the level. Section 177(d) does not require that the person must obtain a school certificate, but that he should be educated up to school certificate level or its equivalent. (P. 223, paras. A-D)**

4. *On Distinction between "non-qualification" and "disqualification" to contest election-*

Non-qualification and disqualification to contest election are separate and distinct concepts mutually exclusive. (*P. 187, paras. B-C*)

Per NSOFOR, J.C.A. at page 187, paras. A-D:

"But I ask this: Could the 1st respondent be 'Unqualified' and 'Disqualified' to contest the gubernatorial election all at the same time and in 2003? If he be 'unqualified' to contest, then he never was, or could be 'disqualified' to contest the election. And as it logically arises: who 'disqualified' him? And what 'disqualified' him?

What I am trying to say, perhaps imperfectly, is that there is obviously a distinction between being 'unqualified' and, being 'disqualified' to contest the election, 'non-qualification', 'unqualification', 'disqualification' and, 'qualification' are separate and distinct concepts mutually exclusive. In my respectful opinion, if the 1st respondent be 'unqualified' to contest in the election, he lacked, *ab initio*, the capacity, or the *locum stand*? even to submit to the INEC any documents, or C.V., for consideration for clearance to contest the election. So, INEC could not and would not have anything to consider whether or not to 'disqualify' the prospective contestant. Where, what materials submitted to INEC for clearance to contest are not up to the mark, or inadequate, then a question of 'disqualification' may arise, not

otherwise. No."

4. *On Standard of proof of allegation of crime -*

By virtue of section 138 of the Evidence Act, if the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt. The burden of proving that any person has been guilty of a crime or wrongful act is, subject to the provisions of section 141 of the Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action. In the instant case, the appellant has alleged that the 1st respondent employed certificates that belonged to another person to induce INEC to regard them as his. It is clearly an allegation that the 1st respondent uttered those certificates for which act he is liable to punishment under section 486 of the Criminal Code. It is also clearly an allegation that the 1st respondent acted contrary to the provision of section 115(1)(k) of the Electoral Act, 2002 which is punishable under subsection (2) thereof. (*Pp. 192, paras. F-G; 208-209, paras. A-B, F-B*)

Per ONNOGHEN, J.C.A. at pages 226-227, paras. F-B:

"Having gone through the record of proceedings and briefs of argument, I am of the firm view that the tribunal is right in holding that the allegations against the 1st respondent amounted to commission of crime and that the standard of proof is that of beyond reasonable doubt which the appellant failed to discharge. The fact that the Oluwayose who owns the certificates is said to be one from Oyo State as contained in a form filled in 1985 is not conclusive of the fact that he is not the 1st respondent in view of the fact that other information supplied in that form equally point to the 1st respondent, such as his permanent home address, name of his sponsor; first and middle names, date of birth etc. So, granted that the fact that the owner of the certificates comes from Oyo State is pleaded by the appellant which is denied the other facts revealed in the said form and in evidence which equally point to the 1st respondent as the owner of the certificates show clearly that there are doubts as to the identity of the owner of those certificates and by operation of law, such doubts are to be resolved in favour of the 1st respondent, with such doubts it cannot be said that the appellant has proved the allegations beyond reasonable doubt as required by law."

5. *On Meaning of "proof beyond reasonable doubt"-*

Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, 'of course, it is possible but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice. (*P. 197, paras. F-H*)

6. *On Determination of whether pleading of a party raises issue of commission of crime —*

It is not permissible in a pleading or other similar court process to just state a bland conclusion without accompanying it with the reason or particulars supporting such conclusion. It is the stated reasons or particulars that give the ground character and make it clear to the other side what is required of him by way of defence, if he is required to make one. Depending on the reasons or particulars given in support of a conclusion or statement of fact, the nature of the allegation or allegations contained

in the conclusion or statement would definitely change. Depending on these reasons or particulars the allegations may or may not amount to allegation of the commission of a crime. Once the party making the allegation supplies the particulars for his conclusion, the matter is out of his hands. He cannot dictate whether or how much of the particulars or reasons may be read together with the main conclusion. In the instant case, the appellant gave detailed particulars to support its conclusion that the 1st respondent was not qualified to contest election. These particulars are contained in paragraphs 9, 10, 12, 13 and 14 of the petition. Paragraph 9(1) cannot be read in isolation from the other paragraphs if it is to make sense. In the instant case, the reasons given by the appellant, to justify the conclusion that the 1st respondent was not qualified to contest as Governor, are clearly allegations of crime. (*Pp. 206-207, paras. G-F*)  
Per IKONGBEH, J.C.A. at pages 207-208, paras.

“To utter a document is defined in section 3 of the Code to include using or dealing with, and attempting to use or deal with, and attempting to induce any person to use, deal with, or act upon, the document. The appellant, as we have seen, has alleged that the 1st respondent employed certificates that belonged to another person to induce I.N.E.C. to regard and use them as his. It is clearly an allegation that the 1st respondent uttered those certificates, for which act he was liable to punishment under section 486 of the Code. It is clearly also an allegation that the 1st respondent did an act contrary to the provisions of section 115(l)(k), of the Electoral Act, No. 4 of 2002 and punishable under subsection (2) thereof. In the light of all these provisions, if the facts alleged in paragraphs 9(i), (iii), 10, 12, 13 and 14 of the petition do not amount to an allegation of crime, then I can conceive of no other set of facts that would amount to such allegation. I am not in the least persuaded by Mr. Fagbemi's argument that it cannot be said that any crime is involved here because the 1st respondent is not on trial for uttering.”

7. *On Operation of principle of severance of pleading vis a-vis standard of proof of criminal allegation in civil matters -*

The provisions of section 138(1) of the Evidence Act is subject to the principles of pleadings, which is that if in a civil proceedings averments alleging crime are severable and after such severance there still remains in the pleadings of the plaintiffs or the petition sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings, then the burden of proof upon the plaintiff or the petitioner is to prove his case on the balance of probability. In the instant case, however, if the criminal aspect is removed there is nothing left that can stand on its own [*Omoboriowo v. Ajasin* (1984) 1 SCNLR 108 referred to and applied.] (*P. 230, paras. C-F*)

Per MIKA'ILU, J.C.A at pages 230-231, paras. G-A:

"Undoubtedly even the learned counsel for the appellant has conceded that if element of criminality is removed in this case there is nothing to be decided. In election petition the burden of proof is within the balance of probability, however, where commission of crime is alleged the proof is beyond reasonable doubt. The situation in our case has been caught by the statement of the Supreme Court in *Omoboriowo v. Ajasin* (*supra*) and it has been caught by the provisions of section 138(1) of the Evidence Act. Therefore the burden of proof placed on the petitioner/appellant in this case is to prove the case beyond reasonable doubt."

8. *On Operation of principle of severance of pleading vis a-vis standard of proof of criminal allegation in civil matters —*  
 Although, if allegation of commission of crime by a party to any proceeding is directly in issue in any proceedings, civil or criminal, it must be proved beyond reasonable doubt, an election petition may be sustained in spite of failure to prove the allegation of criminal acts beyond reasonable doubt provided the irregularity or malpractice is proved on preponderance of evidence. However, the fact must not only have been pleaded but must be severable from the allegation of criminal acts. In the instant case, if the fact constituting allegation of crime are excised from the body of the petition, there will be nothing left and *ipso facto* the doctrine of severance is not applicable. [*Anazodo v. Audu* (1999) 4 NWLR (Pt.600) 530; *Eseduwo v. IN EC* (1999) 3 NWLR (Pt.594) 215; *Eboh v. Ogujwfor* (1999) 3 NWLR (Pt.595) 419; *Wuam v. Ako* (1999) 5 NWLR (Pt.601) 150 referred to.] (P. 239, paras. A-D)
9. *On Implication of proving case beyond reasonable doubt in either civil or criminal proceeding –*  
**The consequence of proof beyond reasonable doubt is not the same in a criminal trial as in a civil proceeding in which allegation of crime is in issue. In a criminal proceeding, proof beyond reasonable doubt leads to the conviction of the accused person. However, in a civil proceeding in which allegation of crime is relied on, proof beyond reasonable doubt of the allegation will sustain the claim in support of which the facts of crime are relied on. Failure to attain the proof beyond reasonable doubt means that the claim resting on the facts constituting a crime will be dismissed. Thus, the person against whom the allegation is made in the civil case does not have to be on trial for the offence alleged for the court to require proof beyond reasonable doubt.** (P. 239, paras. F-H)

**Per NGWUTA, J.C.A. at page 239, paras. D-F:**

**"Has the appellant proved its case that the 1st respondent either stole or obtained the documents bearing the name of Ayodele Oluwayose, by means other than theft beyond reasonable doubt? I have no hesitation in answering this question in the negative. In the first place the alleged owner of the document is a necessary witness but was not called. In the same vein if the 1st respondent uttered the documents or certificates the person or authority he uttered it ought to have been called. There was no explanation as to why the alleged owner of the certificates was not called to give evidence or why the person to whom they were uttered was not called."**

10. *On Offence of uttering a document -*  
 By virtue of section 486 of the Criminal Code, any person who utters any document issued by lawful authority to another person, and whereby that other person is certified to be a person possessed of any qualification recognised by law for any purpose, or to be a holder of any office, or to be entitled to exercise trade or business, or to be entitled to any right or privilege, or to enjoy any rank or status and falsely represents himself to be the person named in the document, is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the document. (P. 198, paras. D-E)
11. *On Duty of an election tribunal where commission of criminal offence is disclosed in election petition -*

Pursuant to section 144 of the Electoral Act, 2002, the Attorney-General of the Federation or of a State shall consider any recommendation to him by a tribunal or the Independent National Electoral Commission with respect to the prosecution by him of any person for an offence disclosed in an election petition. Therefore, before the tribunal makes such a recommendation to the Attorney General, the question of a criminal trial of any person for any offence disclosed in an election petition would be premature. (P. 191, paras. F-G)

12. *On Burden of proof in civil cases and how discharged -*

**By section 137 of the Evidence Act, in civil cases, the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings. If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced and so on successively, until all the issues in the pleadings have been dealt with. Where there are conflicting presumptions, the case is the**

**same as if there were conflicting evidence. (P. 209 paras. E-H)**

13. *On Evidential burden of proof in civil cases -*

**By section 135 of the Evidence Act, whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. The burden of proof in a suit or proceeding lies on that person who would have failed if no evidence at all had been taken on either side. (Pp. 209-210, paras. H-B)**

14. *On Burden of proof of particular fact -*

**The onus of proving a particular fact lies on the party who asserts it. In other words, the onus lies upon a party who will fail if such evidence is not adduced. In this case, the onus of proving change of name was properly placed upon the 1st respondent, but the trial tribunal by preponderance of evidence held that he discharged that duty. (P. 237, paras C-D)**

15. *On Onus of proof of an allegation -*

By the rule of pleadings, where a given allegation whether affirmation or negative, forms an essential part of a party's case, the proof of such allegation lies or rests squarely on him. Therefore, a legal burden or primary burden lies on him to establish the allegation. [Melifonwu v. Egbuji (1982) 9 SC 145 referred to.] (P. 188, paras. C-E)

16. *On Attitude of appellate court to evaluation of documentary evidence by trial court -*

The Court of Appeal is in as good a position as the trial tribunal to evaluate documentary evidence. In the instant case, the Court of Appeal evaluated the "C" series of exhibits which the trial tribunal failed to evaluate. Having evaluated the evidence, the trial tribunal could not have arrived at a conclusion different from the one the Court of Appeal arrived at. The only reasonable conclusion that can be reached, therefore, is that not only did the appellant fail to show, even on a balance of probabilities that the 1st respondent was not qualified to contest the election, the 1st respondent proved without serious challenge that he was qualified to contest the election. (P. 221, paras. D-E) Per IKONGBEH, J.C.A. at pages 220, paras. A-D; 221, paras. A-B: "Taken as a whole the most that one can say about exhibits C2, C3 and C12 against the 1st respondent is that it is not clear whether or not he was the one who filled the forms. There is no

warrant for the firm conclusion that another student than the 1st respondent filled those forms. Even if such a conclusion can be reached, I still do not see how that can help the appellant in this case. As I pointed out, the 'C' series of exhibits related only to the H.N.D. Even if it is posses an H.N.D. at the time of the election, the appellant could not claim to have discharged the onus of proving that the 1st respondent did not possess the basic educational qualification. The 1st respondent was not required to parade an array of certificates, diplomas or degrees. All he required was the basic qualification, which, going by the provisions of section 177(d) of the 1999 Constitution, is no more than education up to school certificate level or its equivalent."

"As we saw, the evidence showed that the 1st respondent obtained a secondary school certificate from Olivet High School, Oyo. Also, as we saw, DW1, who testified to this effect, was not challenged on the point. Although there was the contrary evidence of PW1, that cannot nullify exhibit M2, the certificate issued by the West African Examinations Council. The elaborate argument advanced in respect of the 'C' series of exhibits cannot apply here because there is no evidence that any person claiming to hail from Oyo or any other state than Ekiti filled the student's registration form."

17. On Attitude of appellate court to evaluation of evidence by trial court - Evaluation of evidence and ascription of probative value to such evidence are primary functions of a trial court or tribunal which saw, heard and duly assessed the witnesses. Where the trial court or tribunal has satisfactorily evaluated the evidence, it is not the business of an appellate court to substitute its own views for those of the trial court or tribunal. What the appellate court ought to do is to ascertain whether or not there is evidence upon which the trial court acted. Once there is such evidence, the appellate court must not intervene even if the appellate court felt that if the fact were before it, it could not have come to the same decision as the trial court. This is the position, unless the trial court did not properly evaluate the evidence or make a proper use of the opportunity of seeing or hearing the witnesses at the trial, or where it has drawn wrong Conclusion from accepted evidence, or where the finding is shown to be wrong or perverse in that it is not supported by evidence before the trial. [Eigbajele v. Oke (1996) 5 NWLR ([Pt. 447) 128: Sanni v. Ademiluyi (2003) 20 WRN 29 referred to.] (Pp. 235-236, paras. G-B)

18. On Weight attachable to evidence of hand writing expert Evidence of a handwriting expert is no more than an opinion. The primary reason for insisting that experts give opinion evidence and do not decide cases is to ensure that the functions of the tribunal are not usurped by the witness. It is also of significance that the state of mind required of a witness is not the same as that of a jury. It is therefore quite wrong for the jury to be directed that his evidence should be accepted in the absence of reasons for rejecting it. (P. 199, paras. C-E)

19. On Whether number of witnesses relevant to proof of a claim — Decisions of courts are not made based on the number of witnesses a party calls. Generally and normally, each party to a case calls its witnesses to prove by credible evidence the existence of a fact in issue or facts in issue or the non-existence of such facts or fact in issue. Thus, a witness whose evidence at the trial does not and cannot advance or help the case of the party calling him has, in the final result, been called merely to swell the number of witnesses. Such a witness may rightly be described and designated a "nominal witness". In the instant case, the evidence of PW3, PW4, PW5, PW7 and PW8 on the record was totally worthless and unhelpful to the case of the appellants. (P. 177, paras. C-F)

20. On Attitude of court to spelling errors - While a court of law is not permitted to speculate on the origin of a mistake in a document, it is

perfectly entitled, in some circumstances such as the spelling of the surname of D.W.I in Daily Sketch of 22/07/74 in this case, to ignore minor discrepancies occasioned by misspellings. (P. 218, paras. A B)

21. On Treatment of evidence led on facts not pleaded -

Parties and the court are bound by the pleadings in a case, and evidence on facts not pleaded go to no issue. In the instant case, nowhere in the petition filed was the Local Government or State of origin of the 1st respondent made an issue. Those being the case, evidence on such facts go to no issue. (P. 223, paras. G-H)

22. On When presumption of withholding evidence will be invoked -

By virtue of section 149(d) of the Evidence Act, there is a rebuttable presumption that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. But the section does not provide for the bringing up of any person to testify before a court. It deals with the evidence which could be produced but is not produced to establish a point in issue, that is, evidence withheld, which would be conclusive of a matter, one way or the other. Therefore, it was for the appellant, if such evidence existed, which could, if produced be conclusive of the issue, whether the certificates belonged to any other person than the 1st respondent, to produce it. Having asserted otherwise than the 1st respondent did, the appellant withheld and failed to produce such evidence as was, or is available to decide the issue. Section 149(d) of the Evidence Act would be invoked against it. (p.194, paras. A-D)

23. On Nature of election petition -

Election petition is neither civil nor criminal proceedings, but is sui generis and the provisions of the Evidence Act apply to it. (Pp. 238-239, paras. H-A)

24. On Nature of an appeal -

An appeal is by no means an inception of a new case. An appeal is generally regarded as a continuation of the original suit, rather than an inception of a new case. An appeal should normally be confined to consideration of the record which came from the court of trial with no new testimony taken or new issues raised in the appellate court. [Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172 referred to.] (P. 186, paras. E-F)

25. On Nature of a motion -

A motion, whether on notice, inlerparl.es, or ex-pane, is a suit or action. [UAC v. APZ Umeugo (1959) 3 ENLR 30 referred to.] (Pp. 177-178, paras. H-A)

26. On Validity of judgment until set aside -

There is a rebuttable presumption that the judgment of a court of trial appealed against is right until the contrary is shown. (P. 188, para. D)

27. On Meaning of "name" -

The word 'name' is derived from the Latin word nomen-nominis in its noun form. It means that by which a person or a thing is known or called, a designation. (P. 193, paras. A-B)

#### **Nigerian Cases Referred to in the Judgment:**

Anazodo v. Audu (1999) 4 NWLR (Pt. 600) 530 Basheer v. Same (1992) 4 NWLR (Pt. 236) 491 Eboh v. Ogujiofor (1999) 3 NWLR (Pt.595) 419 Eigbejale v. Oke (1996) 5 NWLR (Pt. 447) 128 Eseduwo v. INEC (1999) 3 NWLR (Pt. 594) 215 Lewis and Peat v. Akhimien (1976) 7 SC 157 Melifonwu v. Egbuji (1982) 9 SC 145 Mogaji v. Odofm (1978) 4 SC 91 Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530 Omoboriowo v. Ajasin (1984) 1 SCNLR 108 Oredoyin v. Arowolo (1989) 4 NW7LR (Pt. 114) 172 Sanni v. Ademihtyi (2003) 20 WRN 29 U.A.Cv. A.P.Z. Umeugo (1959) 3 All NLR 30 Wuam v. Ako (1999) 5 NWLR (Pt. 601) 150

#### **Foreign Cases Referred to in the Judgment:**

Howell v. Bering (1915) 1 KB 54  
Kiwi Polish Co. v. Kempthorne (1922) NZLR 117  
Miller v. Minister of Pensions (1947) 2 All ER 372

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

Constitution of the Federal Republic of Nigeria 1999 Ss 177(d), 182(1)0  
Criminal Code, Cap. 77, Laws of the Federation of Nigeria 1990, Ss. 3 and 486  
Evidence Act, Cap. 112, Laws of the Federation of Nigeria 1990, Ss. 137(2), 138(1), 149(d)  
Electoral Act, 2002, Ss. 21, 115(l)(c), (2) and (3); 141, 144 145(1), 115(l)(k)

**Books Referred to in the Judgment:**

Chambers Twentieth Century Dictionary, P. 875 Phipson on Evidence, 14th Edn, Paras. 32-39,  
P. 830

**Appeal:**

This was an appeal against the decision of the Ekiti State Governorship and Legislative Houses Election Tribunal which dismissed the appellant's petition challenging the return of the 1st and 2nd respondents as elected Governor and Deputy Governor respectively of Ekiti State by the 3rd respondent. The Court of Appeal, in a unanimous decision, dismissed the appeal and affirmed the decision of the tribunal

**History of the Case:**

*Court of Appeal:*

Division of the Court of Appeal to which the appeal was brought: Court of Appeal, Ilorin

Names of Justices that sat on the appeal: Sylvanus

Adiewere Nsofor, J.C.A. (Presided and Read the Leading Judgment); Aboyi John Ikongbeh, J.C.A.; Walter Samuel Nkanu Onnoghen, J.C.A.; Ja'afaru Mika'ilu J.C.A.; Nwali Sylvester Ngwuta, J.C.A. Appeal No.: CA/IL/EP/GOV/1/2004

Date of Judgment: Friday, 7th May, 2004

Names of Counsel: L. A. Fagbemi, SAN (with him, Chief A. Ojuawo; H. Afolabi, Esq. and S. O. Ajayi, Esq.) –for the Appellant

Yusuf Ali, SAN (with him, A. A. Kayode, SAN; O. O.

Ajayi, Esq.; K. K. Eleja, Esq.; A. Okeya, Esq.; Y. Dauda,

Esq.; M. I. Ekundayo [Mrs.] and I. Lawal, Esq.) -for the 1st and 2nd Respondents

Omonijo, Esq. -for the 3rd, 4th and 5th Respondents

**Tribunal:**

Name of the Tribunal: National Assembly/Governorship and Legislative Houses Election

Tribunal, Ekiti State Petition No.: EPT/EK/G/4/2003 Date of Judgment: Tuesday, 2nd March, 2004

**Counsel:**

L. A. Fagbemi, SAN (with him, Chief A. Ojuawo; H. Afolabi, Esq. and S. O. Ajayi, Esq.) -for the Appellant Yusuf Ali, SAN (with him, A. A. Kayode, SAN; O. Ajayi, Esq.; K. K. Eleja, Esq.; A. Okeya, Esq.; Y. Dauda, Esq.; M. I. Ekundayo [Mrs.] and I. Lawal, Esq.) -for the 1st and 2<sup>nd</sup> Respondents Omonijo, Esq. -for the 3rd, 4th and 5th Respondents

**NSOFOR, J.C.A. (Delivering the Leading Judgment):** This is an appeal from the decision by the Governorship and Legislative House Election Tribunal, thereafter to be called the tribunal for short) for Ekiti State of Nigeria in the election petition No. EPT/EK/G/4/2003. Judgment in the petition was delivered on the 2nd day of March, 2004.

On the 19th of April, 2003, Independent National Electoral Commission (INEC) conducted in each of the thirty-six (36) “federating States of Nigeria, and including the Federal

Capital Territory (FCT) Abuja an election into the office of Governor for each state of the Federation.

Alliance for Democracy, (hereinafter called A.D. for short), one of the registered political parties, participated in the election. It sponsored a candidate for the election to contest for the office of Governor of Ekiti State who is not a party to the proceedings. Similarly, Peoples Democratic Party (P.D.P. for short) participated in the election. It sponsored Peter Ayodele Fayose for the office of Governor for Ekiti State and Jacob Abiodun Aluko as a Deputy Governor.

At the end of the election, the Resident Electoral Commissioner for Ekiti State and, the Returning Officer for Ekiti State - INEC officials - declared Peter Ayodele Fayose as having won the election, scoring the highest number of lawful votes of 220,906 in the sixteen (16) Local Government Areas (L.G.A.) of Ekiti State. The candidate sponsored by A.D. scored the next highest number of the lawful votes cast.

The INEC officials (R.E.C.) and (R.O.) declared Peter Ayodele Fayose the winner and returned him as duly elected Governor for Ekiti State with Jacob Abiodun Aluko as Deputy-Governor for the State.

Not satisfied, indeed dissatisfied with the declaration and the Return, Alliance for Democracy (AD) filed an election petition on the 19th of May, 2003, challenging the declaration and return made by the INEC officials for Ekiti State.

INEC and its officials who conducted the election are the 3<sup>rd</sup> to the 5th respondents in the election petition filed, while Peter Ayodele Fayose, the Governor, and the Deputy-Governor are the 1st and the 2nd respondents to the election petition. The election petition has thirty-three paragraphs. In paragraph 33 thereof, the petitioner (A.D.) sought for the following reliefs: "33. ... And your petitioner prays:

- (i) That it be determined that the 1st respondent was not duly elected or returned as the Governor of Ekiti State on the ground that he was not qualified to contest the Ekiti State Governorship Election held on the 19th day of April, 2003.
- (ii) That it be determined that the 2nd respondent was, for reasons of lack of qualification of the 1st respondent, also not duly elected,
- (iii) That your petitioner's nominated candidates Otunba Adeniyi Adebayo and Paul Alabi were elected by a majority of lawful votes and ought to have been returned.
- (iv) That the petitioner's nominated candidates be declared as the persons elected and returned having scored the highest number of votes amongst the other contestants and having one-quarter (25%) of votes cast in each of at least, two thirds of the Local Government Areas of Ekiti State.
- (v) That the petitioner may have such further or other orders as may be just." Note: (The italics above are supplied for emphasis for what I may say ut infra.)

The 1st and 2nd respondents filed a joint reply to the petition on the 3rd day of June, 2003; the 3rd, 4th and 5th respondents also filed a joint reply to the petition. This was on the 29th day of May, 2003. The petitioner on the 7th day of June, 2003 filed the "petitioner's response to 1st and 2nd respondents' reply. " So, the petition was brought and contested on the issues or, the issue joined by the parties on the above pleadings.

The petition came on before the tribunal for trial on the 28th day of January, 2004. Actual hearing in the petition started on the same day.

At the trial, the petitioner had called, nominally, eight (8) witnesses. I have on purpose employed the adverb, "nominally". But why? Because only and only because, in my respectful opinion, the decisions by the courts in all cases including an election petition as herein, are made not on a

show of hands or by voting. The decisions are not made based on the number of witnesses a party calls. No. Generally and normally each party calls its witness to prove by credible evidence the existence of a fact in issue or facts in issue, or the non-existence of such facts, or fact in issue.\*A. witness whose evidence at the trial does not and cannot advance or help the case of the party calling him has, in the final result been called merely to swell the number of witnesses. Such a witness may rightly be described and designated a F "nominal witness"

Now, I have to confess with due modesty that I read and read, over and again, the record of proceedings in this appeal.

As a result of my study carefully, such "nominal witness" called by the petitioner will include (a) Fatal Fadahunsi the P.W.3, (b) Idowu Ojele the P.W.4, (c) Foluso Adesokun the P.W.5; (d) Famuseyan Ojo Victor the P.W.7 and (e) Olarewaju James the P.W.8. Their evidence, in my view of the record, was totally worthless. It was wholly useless. It was most unhelpful to the party calling them. Their evidence, in no way, advanced the case of the petitioner. They were merely useful for the purpose of making up numbers.

At the trial, Chief Akungida, the Ekiti State Treasurer for A.D. (what an important position of honour and status) testified as the P.W.I. The exhibits received in evidence as evidence through him included:

(1) "Exhibits A-A23" (i.e. Action in suit No. FHC/AK/CS/ 64/2003 "ex-parte motion"  
(2)"Exhibits B, B1 - B57" (i.e. action in suit No. HAD/13M7 7003 also "ex-parte motion"  
A motion, whether "on notice", inter panes or, "ex-parte" is a "suit" or, "action". See Kiwi Polish Co. v. Kempthorne (1922 N.Z.L.R 117. The U.A.C v. A.P.Z. Umeugo (1959) 3 E.N.L.R. 30.f  
But significantly the exhibits A series and B series (supra) are? each a motion ex-pane, seeking for an order by court granting "leave'J to the applicants to apply for orders of mandamus and certiorari-commanding the 1st, 2nd and 3rd respondents therein to bring to; the court the affidavit, forms, information and credentials submitted by the 5th respondent (Mr. Ayo Fayose) the 1st named respondent in the appeal before us) for the purpose of quashing or setting them aside as being false.

Significantly, there is nothing ex-fade the exhibits A and B series, or in facie the exhibits that "Leave to apply" for the prerogative orders was ever granted. No.

(ii) Assume argumentto that "leave to apply" was ever granted, there was no indication that a "motion on notice", inter paries, was ever moved or, if ever moved, that the prerogative orders sought for issued. No. Exhibits A and B decided nothing. They determined nothing. Yes. These exhibits, for whatever reasons they were pleaded and tendered in evidence, were wholly and entirely valueless and useless for the purpose of determining the election petition in the favour of the petitioner.

(3) "Exhibits C1 - C14". (i.e. the personal data and other documents of and relating to the 1st respondent (e.g. exhibit C1 is Polytechnic, Ibadan, Nigeria, Higher National Diploma bearing the names of "Oluwayose Ayodele Peter").

The petitioner closed his (or its) case at the trial with the evidence by the P. W; 8, The 1st and 2nd respondents had called the evidence of two witnesses. They closed their case thereafter. These are (i) Pastor John Olorunfemi Oluwayose (D.W.I). And through him these exhibits were tendered in evidence as evidence as belonging to the 1st respondent namely:

- (i) "Exhibits M1 - M5 (i.e. Primary School Leaving Certificate dated 14/1/1974.
- (ii) West African Examination Council Certificate dated June, 1979.
- (iii) National diploma dated 18-7-1984
- (IV) Higher National Diploma dated 1-7-1987).

(4) "Exhibits N1 - N2" (i.e. motor vehicle driving license issued to the D.W.I on the 5th of May, 1983.

(b) "Certificate of Ordination". (No. 2587-93" dated 28-9-1994 awarded or issued to the D.W.I)

The 1st and 2nd respondent had closed their side of the case with the testimony by Adigun Gazal Ramoni (D. W.2). Through the j), W.2 were received as evidence among other exhibits:

(5) "Exhibits R1 - R3" (i.e. (a) certified true copy of Polytechnic, Ibadan, graduation list dated 12th February, 1988. (b) "R3" shows the 1st respondent as one of the graduants).

(6) "Exhibits T1 - T8" (i.e. Daily Sketch Newspaper issue of the 12th of July, 1974." "T6" captioned, "change of name", shows the name change of or by the D.W.I).

The 3rd, 4th and 5th respondents called the evidence of one witness only.

Thereafter, they closed their case. He was Samuel Omolayo the D.W.3 Through him were tendered and received as evidence:-

(7) "Exhibits U1 and U2" (i.e. P.D P. list of his (or its) candidates for the election of the 19-4-2003 submitted to INEC).

(8) "Exhibits VI - V2" (i.e. A.D. list of candidates for the 19-4-2003 election submitted to INEC

(9) "Exhibits WJ - WJ9" (i.e. the 1st respondent's Curriculum Vitae (C.V.) submitted to INEC for the purpose of clearance to contest the election as qualified so to do).

Note: All other documentary evidence, received in evidence and tendered as exhibits, not herein specified, I shall, later in the judgment, touch on and deal with, if and where necessary so to do. At the conclusion of the trial and after receiving the written final addresses by the counsel, the tribunal adjourned for its judgment. In a reserved and well considered judgment, after reviewing elaborately all the evidence adduced, (oral and documentary) and considering it along side with the submissions by counsel in their written addresses, the tribunal dismissed the petition in toto. In reaching its conclusion, it wrote at page 227 of the record, inter alia, as follows: "We should from the totality of the evidence adduced

Before us in the course of hearing this petition we did not have any evidence which showed us that exhibits M I MS did not belong to the 1st respondent taking' into account the argument of the petitioner. The crux of the petitioner's case rest (sic) on the ownership of the certificates/credentials and the onus to prove that they belong to another other than the 1st respondent is on the petitioner. It is our view that such evidence as adduced by the petitioner did not discharge the burdens It fell short of bringing someone to claim them. In view, of the foregoing this petition lacks merit and it ought to be dismissed and it is hereby dismissed."

Now, I shall pause here for a while for a comment or two firstly on the transcript of the evidence or the record of proceedings before me. With the greatest respect to my Lords of the tribunal, I am constrained to observe that the record of proceedings was very poorly? And awkwardly kept. It is patently queer, to say the least. It is not easily discernable at what point the evidence-in-chief of a witness started or ended, and the cross-examination of the witness by the cross-examining counsel commenced and stopped.

Besides, simple rules of English grammar were observed in-; disobedience, not in obedience.

The evidence as recorded is not easily' readable; the pagination of the record of proceeding quite inaccurate 'i and confusing. The effect of these avoidable slips succeeded in i making the writing of the judgment by the Justices drudgery -'more hard work than necessary. It is cautioned that such an ugly exercise will never ever repeat itself. I will say no more.

Dissatisfied and aggrieved with the judgment by the tribunal, the petitioner has naturally and logically appealed to this court from the judgment by a "notice of appeal" filed on the 11th of March, 2004, raising seventeen (17) grounds of appeal.

But, grounds of appeal or a ground of appeal against a decision J must relate to the rationem decidendi of the decision and should be a challenge to the validity of the ratio. It is difficult to conceive how the only one issue on which the judgment of the tribunal was decided could be proliferated into those seventeen (17) grounds of appeal. The "notice of appeal" together with the "grounds of appeal" and their respective "particulars" decline to reproduce them.

Now, paragraph 4(2) of the Electoral Act, 2002 1st Schedule thereof, provides that an election Petition shall be confined "to a distinct issue (sic) or major facts of the election petition". This opens the doors to me to "the grounds and the facts" forming the foundation of the petition in order to facilitate a quick understanding and an appreciation of the issue(s) canvassed and agitated by the parties before the tribunal at the trial. Put in another form, what was the case of the petitioner as pleaded?

Rather than give a synopsis of the "major facts", let the pleading, *ipse*, speak. I shall, therefore, carry the following relevant paragraphs of the petition:

"B". "9, Your petitioner states ... that

- (i) The 1st respondent was not qualified to contest for the gubernatorial office of Ekiti State conducted on the 19th day of April, 2003.
- (ii) 1st respondent did not score a majority of lawful votes cast at the election of 19th April, 2003.
- (iii) The 1st respondent was disqualified from contesting the Ekiti State gubernatorial election conducted on 19th day of April, 2003, because 1st respondent did not possess the basic educational qualification to qualify him to contest the election under reference.
  - (b) 1st respondent claimed to have attended Federal Polytechnic, I Iain.
  - (c) 1st respondent forwarded to the 3<sup>rd</sup> respondent educational certificates/credentials bearing names of Oluwayose Ayodele Peter. Petitioner pleads and shall rely on the credentials submitted to the 3<sup>rd</sup> respondent by the 1<sup>st</sup> respondent. Notice is hereby given to the respondents to produce the credentials at the trial.
  - (d) Petitioner shall contend that the use of the names and credentials of Oluwayose Ayodele Peter was fraudulent on the part of the 1st respondent.

*Particulars*

- (i) 1st respondent did not at any time attend Federal Polytechnic, Ilaro and he did not possess any of the credentials, which were submitted to the 1st respondent (sic) respondent?
- (ii) The 1st respondent Peter Ayodele Fayose is distinct and/or different from Oluwayose Ayodele Peter hence the credentials relied on did not belong to the 1st respondent.

"10. In showing that the 1st respondent is distinct from Oluwayose Ayodele Peter your petitioner shall state, that:-

- (i) 1st respondent is director of Spotless Investment Limited a company registered under the Laws of Nigeria.
- (ii) The said company has two directors according to the representations made by the 1st respondent at the time when the company was being incorporated.
- (iii) The names of the directors of Spotless Investment Limited as contained in Memorandum and Articles of Association of the said company are:
  - (a) Ayodele Peter Fayose, (the 1<sup>st</sup> respondent herein)
  - (b) Oluwayose Ayodele Peters (the name on the credentials presented by the

1<sup>st</sup> respondent)

- (iv) The signatures of the two directors as evidence from the Memorandum and Articles of Association of the Company are not the same.
- (v) Your petitioner shall contend that at material times 1st respondent was not and cannot be one and the same person as Oluwayose Ayodele Peter.
- (vi) 1st respondent in filing his papers for the gubernatorial election represented to have the basic educational qualification and in support of his claim he submitted to the 3rd respondent's credentials which he claimed belong to him.
- (vii) Credentials submitted by the 1st respondent are those of Oluwayose Ayodele Peter as the 1st respondent does not possess any educational qualification to qualify for election as Governor of Ekiti State.

"11. Your petitioner shall state that the facts of false misrepresentation made by the 1st respondent were within the knowledge of the 2nd respondent who actively encouraged the 1st respondent.

"12. Your petitioner states that the 1st respondent at all relevant material times relevant to this petition was not educated up to School Certificate level in that he 1st respondent,

- (i) did not possess Grade II Teacher's Certificate,
- (ii) did not possess the City Guilds Certificate,
- (iii) did not possess the equivalents of any Certificates in (i), (ii) and (iii).

13. Your petitioner states further that the 1st respondent at all relevant material times to this petition did not possess a primary Six School Leaving Certificate. Furthermore your petitioner avers that the 1st respondent has never been in the public or private sector in Nigeria at all or for a period of 10 years.

(C) "14. *Your petitioner states also that the 1st respondent did not attend any course or training in any institution at all for a period of 1 year.*

"28. Your petitioner states that if the votes cast for the 1st respondent which is (sic) 220, 906 are voided then the remaining number of votes at the Governorship Election in Ekiti State on 19th day of April, 2003 would come to 194,091.

29. Your petitioner states also that of the total number of valid votes remaining, your petitioner's nominated candidates - Otunba Adeniyi Adebayo and Paul Alabi scored the majority of lawful votes cast at the said election that is 169,191 votes".

Again, I advert to paragraph 12(1) of the 1st Schedule to the Electoral Act, 2002. It stipulates, inter alia that the respondent to an election petition "shall ... file his reply specifying in it which of the facts alleged in the election petition he admits and which he denies, and setting out the facts on which he relies in opposition to the election petition."

So, I ask: how did the joint reply of the 1st and 2nd respondent's deal with and answer the allegations of the petition? Paragraphs 2, 3, 5 of their joint reply are relevant. They read:

"2. The respondents deny paragraphs 9, 10, 11, 12, 13, H, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, and 33 of the petition and put the petitioner to the strictest proof of same.

3. The respondents in answer to paragraphs 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, and 22 of the petition aver as follows:

- (i) The 1st respondent was born in November 1960 and given the name Ayodele Peter Fayose because his father at the material time was 'i bearing and answering the name John Fayose.
- (ii) That some time in 1974 the father to the 1st respondent changed his surname from

Fayose to Oluwayose when he received the divine call to serve the Lord as he is presently a pastor of the Christ Apostolic Church and he is now known and called Pastor John Olorunfemi Oluwayose.

- (iii) A copy of the affidavit affirming paragraph 3(ii) above sworn to on 10th March, 2003 at Ibadan High Court Registry is hereby pleaded.
- (iv) When the father of the 1st respondent changed his name, he also changed the names of some of his younger children whereupon the name of the 1st respondent was changed to Ayodele Peter Oluyose
- (v) However when the 1st respondent came of age he preferred to bear the surname of Fayose in preference to the changed surname of Oluwayose and thus reverted to the old traditional name of Ayodele Peter Fayose. Thus between 1974 and 1992 the 1st respondent was answering the name Oluwavose Avodele Peter from 1992 he reverted back (sic) to this traditional surname Fayose.
- (vii) .....
- (viii) The 1st respondent avers that he has the basic educational qualification to contest as Governor of Ekiti State as he possesses the following educational qualification:
  - (a) Primary Six Leaving Certificate.
  - (b) West African School Leaving Certificate obtained from Olivet Baptist High School, Oyo, June 1979.
  - (c) National Diploma Certificate in Science Laboratory Technology obtained from the Federal Polytechnic, Ilaro in 1984.
  - (d) Higher National Diploma Certificate in Science Laboratory Technology (Biological Science) from the Polytechnic, Ibadan in 1987.
- (ix) Having obtained his H.N.D. Certificate the 1st respondent did his one year compulsory National Youth Corps and was given discharge certificate which is hereby pleaded. (x) In the denying paragraphs 23 and 24 of the petition the 1st respondent says that in Form C.0.7 of the company and Allied Matters Decree filed, only the first names and surnames of the directors were stated thereon while the full names including the middle names of these directors are Ayodele Peter Oluwayose and Ayodele Ajisafe. The directors are two distinct persons though members of the same larger family of Fayose in Ekiti State both of whom were resident at SW8/132 Ring Road, Ibadan when Spotless Investments Limited was incorporated in 1990.
  - (5) In specific answer to paragraphs 9(ii), 28, 29, 31, 32 and 33 of the petition the respondents aver that the votes cast for the 1st respondent at the 19th April, 2003 election were valid votes and cannot be voided. The figures quoted in paragraph 8 of the petition are valid and the 1st respondent who scored the highest number of votes was lawfully declared elected as Governor of Ekiti State".

Now, to the joint reply of the 3rd, 4th and 5th respondents! Paragraphs 3 and 5 of the joint reply are relevant. They read:

- "3. The respondents deny paragraphs 20, 25, 26, 27, 28, 29, 31 and 33 of the petition.
- 5. With reference to paragraphs 28 and 29 of the petition the respondents aver as follows:
  - (i) The 1st respondent never submitted any sworn affidavit to them.
  - (ii) The votes cast at the 19th April, 2003 election were valid and cannot be voided. The figures quoted in paragraph 8 of the petition are valid -jj and the candidate with the highest number of votes stood elected as Governor of Ekiti State"

I pointed out above, that the petitioner filed a *"response to 1st and 2nd respondents' reply"*

on the 7th of June, 2003. Therein the petitioner had denied the allegations by paragraphs 3, 5, 6 and 7 of the 1st and 2nd respondents' joint reply.

Now, an appeal is, by no means, an inception of a new case. An appeal is generally regarded as a continuation of the original suit rather than an inception of a new action. An appeal should normally be confined to consideration of the record which came from the court with no new testimony taken or new issues raised in the appellate court. See *Oredoyin v. Arowolo* (1989) 4 N.W.L.R. (Pt. 114) 172 at p. 211. Therefore the important question becomes this:-What issues, or an issue arising from the pleadings, were or, was canvassed at the trial before the tribunal and now being pursued on, an appeal in this court?

Before I embark on the investigation, I shall pause for a while for my comments on those portions of the petition italicised above by me and the denoted by the margin as "(A)", "(B)" and "(C)".

The petition, see paragraph 9, had employed the terms "nonqualification" and "disqualification". And paragraph 14 pleaded, a non-attendance of course or training in any institution at all nor for a period of one year. Not even what in the Ibo language is called, "*Akwukwo OtaAkara*", meaning a village kindergarten school under a tree shade and, so implying a non-qualification to contest the 19<sup>th</sup> April, 2003 election!

But I ask this: Could the 1st respondent be "unqualified" and ".disqualified" to contest the gubernatorial election all at the same time and in 2003? If he be "unqualified" to contest, then he never was, or could be "disqualified" to contest the election. And as it logically arises: who "disqualified" him? And what "disqualified"

him?

What I am trying to say, perhaps imperfectly, is that there is obviously a distinction between being "unqualified" and, being "disqualified" to contest the election. "Non-qualification" and "unqualification", "disqualification" and, "qualification" are separate and distinct concepts mutually exclusive. In my respectful opinion, I if the 1st respondent be "unqualified" to contest in the election, he lacked, *ab inito*, the capacity, or the "*locus standi*" even to submit 'to the INEC any documents, or C.V. for consideration for clearance :3o .contest the election. So, INEC could not and would not have anything to consider whether or not to "disqualify" the prospective contestant. Where, what materials submitted to INEC for clearance to contest are not up to the mark, or inadequate, then a question of "disqualification" may arise, not otherwise. No.

In my view of the allegation against the 1st respondent, it can .not be otherwise than a matter of "non qualification", or "unqualification" to contest, but certainly, in my view, not a matter of "disqualification". The line of distinction is there and clear. It must always be drawn, not lost sight of.

: - Now, to better enable me to formulate the issue, arising from the state of the parties' pleadings that came on for trial, I shall, firstly advert to section 177 of the Constitution of Nigeria, 1999. The section provides:-

"A person shall be qualified for election to the office of Governor of a State if :-

- (a) he is a citizen of Nigeria by birth
- (b) he has attained the age of 35 years
- (c) he is a member of a political party and is sponsored by that political party,
- (d) *he has been educated up to at least School Certificate level or its equivalent*".

(*The italics supplied for emphasis only*) It is paragraph 177(d) (*supra*) that is

relevant. The petition is concerned with it. And it concerns the petition.

The allegation in the petition against the 1st respondent is that the materials which he submitted to INEC, on the basis of which he obtained clearance as being qualified to contest the election, are not his. So, the live issue becomes this: whose was or were the materials or the material submitted to INEC on the basis of which the 1<sup>st</sup> respondent qualified to contest the governorship election on the 19-4-2003? Therefore, the issue only was the "ownership" of the certificates/credentials submitted to INEC by the 1st respondent See *Dering v. Howell* (1915) 1 K.B.54 at page 62; *Lewis Peat v. Akhimien* (1976) Vol. 1 Federation of Nigeria L.R.80, (1976) 7 SC 157. In my respectful opinion, a resolution of the issue holds the master key to the appeal and desposes of it wholly and entirely. Pure and simple. Now, by the rule of pleadings, where a given allegation, whether affirmative or negative forms an essential part of a party's case, the proof of such allegation lies or rests squarely on him. Therefore, a "legal burden", "primary burden" is on the petitioner. And there is, however, a presumption, rebuttable though, that the judgment of the court of trial appealed against is right until the contrary is shown. Therefore, in this court the petitioner, *qua* appellant, has the onus to show the contrary. See *Anieka Melifonwui v. Egbuji* (1982) 9 S.C. 145 at 165

Herein, the petitioner is the "appellant". The respondents at the trial remain "respondents" herein. In compliance with the rules of the court, each party had filed its brief of argument therein setting out the issues for the determination of the Court of Appeal.

In the appellant's brief filed on the 16th of March, 2004, counsel had formulated three issues for determination. They are:

- "(1) Whether a proper evaluation of the case of the petitioner was done and whether on the strength of the evidence led, the petitioner is entitled to judgment.
- (2) Who has the onus of proof of change of name from Fayose to Oluwayose and whether in any event, exhibits L-L4, T-T8, and N1 and N2 could be relied on to reach a conclusion that the 1st respondent had changed his name from Fayose to Oluwayose? and
- (3) Whether the case of the petitioner is one rooted in criminality and whether the petitioner discharged the burden of proof either on the balance of probabilities or beyond reasonable doubt".

The brief of argument on behalf of the 1<sup>st</sup> and 2nd respondents was filed on the 22nd of March, 2004. At page 18 paragraph 3.00 thereof, three issues were distilled for determination, to wit:

- "(1) Whether the tribunal did not do a proper evaluation of the case for the appellant and whether from the totality of the evidence led the appellant was entitled to judgment.
- (2) Whether the 1st and 2nd respondents have not shown that there was a change of family name of the 1<sup>st</sup> respondent from Fayose to Oluwayose and whether the tribunal was not therefore entitled to rely on the exhibits especially exhibits L1-L4, T1-T8; N1 and N2 to find that there was a change of name from Fayose to Oluwayose.
- (3) Whether having regard to the nature of the allegation made against the 1st respondent, allegation of criminality was not in issue and whether the appellant discharged the burden of proof either on the balance of probability or proof beyond reasonable doubt.

And on the behalf of the 3rd to 5th respondents, the respondent's brief was filed on the 30th of March, 2004. Three issues were formulated at page 2 thereof. These are:

- (i) Whether a proper evaluation of the case of the petitioner/ appellant was done and whether on the strength of the evidence led the petitioner was entitled to judgment,
- (ii) Whether or not the election tribunal could have relied on the exhibits tendered before it especially exhibits L-L4; T-T8; N1 and N2 to arrive at a final conclusion that there was a

change of name from Fayose to Oluwayose.

(iii) Whether or not the petitioner/appellant's allegations made against the 1st respondent do not bother on criminality which in law must be proved beyond reasonable doubt."

At the hearing of the appeal on the 28th of April, 2004, counsel of the 3rd-5th respondents was absent from court. No reasons were given to court or in court for the non-attendance to court by either respondents or their counsel. We, however, heard the appeal, there being proof before us that the respondents were put on notice of the date of the hearing through their counsel.

Now, I have scrutinized and examined the issues as respectively formulated by the parties respectively. They all deal with and concern the proper evaluation of the evidence as led at trial and the standard of proof required of the appellant to succeed in his (or its) claim. The issues could, in my view, conveniently be taken, dealt with and disposed of, *uno flatu*. Condensed and concisely stated, the live issue for determination, to my mind, boils down to this: Whether, on the totality of the evidence - qualitatively, not quantitatively - the appellant ought to succeed, to establish his (or its) claim on the preponderance of evidence (See *A.R. Mogaji v. Rabiatu Odofin & Ors.* (1978) 4 S.C. 91, on the "proof of beyond reasonable doubt." See section 138(1) of Evidence Act, Cap, 112, Laws of Nigeria, 1990.

At the hearing, Mr. Fagbemi, learned Senior Advocate of Nigeria, (S.A.N.), for the appellant had adopted the appellant's brief. In his oral submission in amplification thereof, he submitted, among other things, that the allegations in or by paragraphs 9 and 10 of the petition did not constitute an allegation of a crime. As he reasoned, nobody was on trial before the tribunal. The tribunal could not have sentenced the appellant. It was the further submission by the senior counsel that the appellant, *qua* petitioner at the trial, had no obligation to call the evidence of any person bearing the name, "Oluwayose," or to produce any such person physically; as according to him, the tribunal opined rather wrongly.

It was rather pressed on us that it was for the 1st respondent (Peter Ayodele Fayose), to come forward to testify *viva voce*.

In conclusion, he submitted that enough material was placed before the tribunal, to entitle the appellant to judgment. He urged us, therefore, to allow the appeal.

On their part, the learned Senior Advocate of Nigeria, (S.A.N.) Mr. Ali for the 1st and 2nd respondents had similarly adopted his brief of argument. He submitted among other things, in his oral submission in amplification of his brief of arguments, that on a close look at paragraphs 9 and 10 of the petition, the gist thereof is criminal in nature. It suggests and implies a crime either of stealing, or uttering of the certificates submitted to INEC (3rd-5th respondents), or even forgery of those credentials, on the basis of which, INEC cleared the 1st respondent as qualified to contest the 19th April, 2003, election to the office of Governor of Ekiti State. Reference was further made to section 115(1)(c) of the Electoral Act, 2002.

It was the further submission by Mr. Ali, S.A.N. that in the Light of the petition, it was for the appellant to prove the allegations reasonable doubt. He referred us to the testimony by Pastor John Olorunfemi Oluwayose (D.W.1) and Adigun Gazal Ramoni (p.W.2) which, according to him, was enough to destroy the case made by the appellant at the trial. Concluding, he urged us to dismiss the appeal.

In the exercise of his right to the last word, but purely only on points of law. learned senior counsel, Mr. Fagbemi, S.A.N. drew our attention to section 145 sub-section (1) of the Electoral Act, 2002.

Now, I shall pause here, again, for a while for a comment on some aspects of the learned submissions by counsel orally during the hearing, for the purpose of clarity and elucidation to

put the point(s) aside. Surely, firstly, I am in complete agreement with the submission by Mr. Fagbemi, SAN, that nobody, let alone the appellant, was on trial before the tribunal.

The tribunal could not pass any sentence on him for committing any criminal offence. Indeed! And the submission is in line with some of the contentions by counsel in the appellant's brief.

Needless reproducing section 145(1) of the Electoral Act, 2002. I have duly studied it carefully,

But the submission by counsel is, with respect, most unpersuasive. Why? Because the tribunal was not sitting as a criminal court of trial. No. It had no jurisdiction to try a criminal offence. Yes.

But then, there is a section 144 of the self same Electoral Act, 2002. The Attorney-General of the Federation, or of a State "shall consider any recommendation to him or a tribunal by the commission with respect to the prosecution by him of any person for an offence disclosed in an election petition." Therefore, before the tribunal made a recommendation to the Attorney-General of (herein Ekiti State) or the Federation, the question of a criminal trial of any person, (including the appellant herein) for any offence disclosed in an election petition would not ever be considerable. It is premature; "praematurus."

Now, I have duly and painstakingly considered the contentions by the counsel in their respective briefs. Before I go any further. In my consideration of the issue involved, I shall pause to make a necessary digression. An election of a person to the office of Governor of a State, in the present pursuit by Nigeria and, all Nigerians for democratic governance would be something of great concern to all concerned. And for a candidate for an election to such a high office of honour, respect, and status, to secure a clearance or a decree of qualification to contest the election by "uttering", or submitting to INEC false or fake documents, or certificates, would to say the least, be most unconscionable and I dare add, sinful. And the tribunal was also a court of conscience, a court of equity. Yes!

Therefore, by the parity of reasoning when it was said, *ut supra* that it was the "ownership" of those credentials submitted by Peter 1 Ayodele Fayose (1st respondent) to INEC for his clearance that was an issue central to the petition or this appeal, it was an abbreviated form of saying or asking the petitioner (herein the appellant) to establish by credible evidence that those certificates or credentials were either forged by the 1st respondent or faked or even stolen from their owner. However, looked at, some crime is in issue. I am therefore, in agreement with the submission by Mr. Ali, S.A.N. the respondent's brief and/or orally in this court, that the allegations by the petition were allegations of criminality. Pure and simple, But could the criminal content(s) of the petition be severable excisable so that after the surgical operation excising the criminality aspects thereof, what is left over could, or would, ground actionable cause of action in the petitioner? That is the question. In my respectful opinion, after a careful study of the pleadings, unless I understood them imperfectly, it is the allegations involving and involved in criminality that are the sole and only foundation of the case of the appellant. The criminal content or aspect of the allegations by the appellant against the 1st respondent cannot be severed. It is unexcisable. No more and no less.

And here section 138(1) of the Evidence Act, becomes relevant and applicable. It provides:

"138(1) If the commission of a crime by a party to an? proceeding is directly in issue (and it is, in the present election petition), in any proceeding civil or criminal (the election petition is a civil proceeding), it must be proved beyond reasonable doubt." (*The brackets with their contents are mine*).

Again, much heavy weather -what an attempt, *ah asino lanam* meaning to get wool from an

ass - had been made by the appellant both in the appellant's brief and, orally by counsel in his submission, of a name change. And I ask this: what, really, is in a name, or-a name "*cucullus non facit monachum*".

Now, "name" derived from the Latin: *nomen - nominis*, in its form, (See Chambers Twentieth Century Dictionary at page 875) is defined to mean "that by which a person or a thing is known or called, a designation."

Of what concern or to whom does it matter if "A" chooses to be called or known by many or very many names? I confess that I J010W of no legislation or a Decree in Nigeria restricting any person(s) a number of names he may be called or known by. No such law! It follows logically and reasonably, in my view, that, if, as the appellant contended, the credentials or certificates, whatever name "or names thereon, and uttered to INEC, belong to any person or persons other than to the 1st respondent, put in other words that the 1st respondent forged the name or names of the true owner of the "certificates or credentials in those documents submitted to INEC for his clearance as qualified to contest the election, then, in my view, it behooves of the appellant to prove the forgery.

Forgery is a crime. And the above opens, the door to me to consider the submission both in the appellant's brief and, orally by Mr. Fagbemi, S.A.N. to the effect that there was no obligation for the appellant to bring another person physically before the tribunal to testify that he owned the certificates.

Indeed, what attracted the criticism of the tribunal by the counsel appears to be an observation at page 280 of the record by the tribunal to the effect that:

"The simple duty the petitioner owes the tribunal, the cause of justice and fairness was simply to produce

another Ayodele Peter Oluwayose to come forward ..." In my view, with respect, learned senior counsel missed the point totally. Surely, there was no obligation on the appellant to produce any person physically before the tribunal to testify as to who he was, or his ownership of the credentials or otherwise. All the criticism of the tribunal arises from a misconception of the meaning of what was really meant.

"What oft was well thought yet never so well expressed." (See Alexander Pope). The criticism was *ab irato* - unfair, unprovoked.

Now, it was the appellant who asserts the negative. As pointed out above, and at the risk of a repetition, where a given allegation whether positive or negative forms an essential part of a party's case

the proof of such allegation rests on him. And this leads me to section 149(d) of the Evidence Act - a presumption, rebuttable though.

"(d) that evidence which could be and is not produced would if produced, be unfavorable to the person withholds it."

Section 149(d) (*supra*) does not provide for the bringing up of any person to testify before a court. It deals with the "evidence which could be produced and is not produced" to establish a point in issue evidence withheld, which would be conclusive of the matter, one way or, the other. Therefore, it was for the appellant, if such evidence existed, which could, if produced would be conclusive of the issue whether the certificates belonged to any other than to the respondent, to produce it. Having asserted otherwise than the respondent did, and the appellant withheld and failed to produce such evidence as was, or is available to decide the issue, section 149(d) of the Evidence Act would be invoked against him (or This, in my view, was all the tribunal would be understood as saying If Therefore there was no question of "double

standards" as contended by counsel in the appellant's brief.

Now, what is (i) the evidence - evidence legally receivable and legally received and credible led by the parties and their witnesses before the tribunal and,

(ii) What is meant by "proof beyond reasonable doubt" not\*« "proof beyond shadow of doubt" as Mr. Fagbemi, SAN, rightly, in my view, submitted?"

Firstly to the evidence! The testimony by Chief Akungide Ajayi; (P.W.I) is relevant. The gist of the evidence by the P.W.I was:- Hey knew the 1st respondent (Peter Ayodele Fayose). Alliance For Democracy (AD), *qua* petitioner, filed an election petition against' the 1st respondent because he (1st respondent) did not possess any certificate(s). He did not even have any secondary School education. He did not attend Polytechnic, Ibadan. However there was someone else, "Oluwayase (as spelt) Fayose who attended Polytechnic, Ibadan." See page 32 of the record of Proceedings.

Before challenging the educational qualification of the 1st respondent, the P.W.I stated that he and his party chairman approached the Polytechnic, Ibadan, authority to confirm their knowledge of the person who, actually, did attend the Polytechnic, Ibadan. It was the Polytechnic, Ibadan, authority which furnished P.W.I with exhibits C 1 - C14, listed above. At page 33 of the record is recorded the question by counsel to the reply by P.W.I as follows: -

"Mr. Fagbemi, S.A.N. Did you ask whether one Ayodele Fayose has attended Polytechnic Ibadan?"

P.W. 1. Yes."

And at page 35 of the record the following appeared:

"Mr. Fagbemi. The 1 st respondent said it is (*sic*) claiming that his father changed his name in 1974 from Fayose to Oluwayose, is that correct?"

P.W.I. No it is not correct, we all know him as Fayose. Fagbemi. The 1st respondent claimed that it was only in 1992 that he reverted to Fayose from Oluwayose (as spelt).

P.W.I. It is not correct, he is all along been known as Fayose." I', Continuing still-in-chief, the record of appeal at page 36 showed as follows:

"Fagbemi. What do you want the tribunal to do for you?"

P.W.I We want the tribunal to nullify the election of Ayodele Fayose and return Otunba Adeniyi Adebayo as the Governor and Dep. Governor of Ekiti State respectively.

Mr. Fagbemi, SAN. That is all for this witness.

When questioned by counsel, Mr. Ali, SAN, for the 1st & 2nd respondents, the P.W. 1 confessed his ignorance of the "outcome" of "exhibit C" series and exhibits B to B5.

Pressed further by Mr. Ali, SAN, the record of appeal at page 41 read:

"Mr. Ali SAN - There is no person you know physically personally that you know as Peter Ayodele Oluwayose

P.W.I. I do not know any person."

Questioned by Mr. Omonijo of counsel for the 3rd -5th respondents the P.W.I, at page 45 of the record, admitted that his investigation revealed that one Ayodele Oluwayose Peter did attend Olivet Baptist High School, but not Fayose.

Alfred Osagie (P.W.2) a handwriting expert - "*peritus*" - testified to the effect that the office of Mr. Lateef Fagbemi & Co., M. K. O. House, Ibadan, had sent to him exhibits D - D20, "Particulars of directors and of any changes therein" of Spotless Investments Ltd. of whom the 1st respondent was one for an examination and analysis of the names and signatures and compare them, (See exhibits F – FII) with exhibit A. His written report on the analysis and comparison is exhibit H dated the 28th November,

2003.

Now, to the evidence by Pastor John Olorunfemi Oluwayose (D.W.I)! He is the Father to the first respondent.

The witness left his home in Afao in AdoEkiti for Ibadan where he has been living since April 11<sup>th</sup> 1959. The 1st respondent was born Ibadan in 1960, 15<sup>th</sup> November.

The witness' family name is Fayose. Following his conversion to Christianity, he changed his family surname to Oluwayose and published the name change in the Daily Sketch Newspaper (exhibits T-T8) issue of July 22<sup>nd</sup>. 1974.

Copies of exhibits T-T8 he sent to some of his sons including the 1st respondent then in Olivet High School, Oyo.

The witness' motor driving license (exhibit N1) dated 5<sup>th</sup> June, 1983 and his Priestly Ordination Certificate (exhibit N2) dated 27<sup>th</sup> September, 1994, showing that he had been going by or known as Oluwayose were received in evidence as evidence of the name change.

It was part of the D.W.I's evidence (See page 121 of the record of appeal) that the 1st respondent first attended I.B.C. School when he was of school age for a few months, from which school, he was moved to St. Louis Primary School, Aboderin Street, Orita Challenge, Ibadan. From there he was admitted to Olivet Baptist High School. The 1st respondent later attended Federal Polytechnic, Ilaro, (now in Ogun State), and thereafter Polytechnic, Ibadan. (i) The 1st respondent's Primary School Leaving Certificate,

(ii) His West African Examinations Council School Certificate of June, 1979 is exhibit M2 - Certificate No, SC 159301 -

His National Diploma in Science Laboratory Technology dated 18/7/1984 is exhibit M3. In July 1987 the 1st respondent obtained Higher National Diploma also in Science Laboratory Technology. This is exhibit M4. He was awarded the Certificate of National Service (exhibit M5) in 1988, 3<sup>rd</sup> September.

As the D.W.I further testified, the 1st respondent's surname while in the primary School was Fayose. But in the other school which he attended, he used Oluwayose as his surname (reflected in exhibits M2, M3, M4 and M5 respectively). His surname as Fayose is reflected in exhibit M1.

The 1st respondent, according to the D.W.I, as at today is being ailed Fayose. The D.W.I further testified, (See page 125 of the record of appeal) "even today some people call me Fayose. In so far as it is your name they can call you that. All other names remain valid" He stated that Ayodele Ajisafe Fayose is his (D.W.I's) son and brother to the 1st respondent. Ayodele Ajisafe Fayose is presently living in London, England, he stated.

The D.W.I had denied that he ever knew the P.W.6 (Abiodun Samuel) or heard of him.

Mr. Akintola of counsel for the appellant, qua petitioner, at the trial, did effectively cross-examine the D.W.1.

Adigun Gazal Ramoni (D.W.2) and the 1st respondent *were* students together in the Polytechnic. Ibadan Both studied science and graduated in 1988. To confirm that both graduated from the polytechnic together DW2 tendered the certificate true copy of the graduation list(exhibit R1-R3) and further his national Diploma dated 1<sup>st</sup> July 1987 (exhibits S1 S2)

Now, what was tribunal's handling or treatment of the of the evidence placed before it? Before I go into this, let me first deal with and consider the "standard of proof as required "standard of proof" as require by the tubunal to apply by law in reaching its decision.

It is said that the standard of proof is "beyond reasonable doubt". See section 138(1) of the Evidence Act (*supra*).if What does it connote? What, it is, has not been statutorily defined. No.

But the principle laid in the decided case which has been consistently adopted by our courts is, as stated in *Miller v. Minister of Pensions* (1947) 2 All E.R. 372 per Denning, J. (as then he was) at page 373:

"Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence, "of course, it is possible but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice." Perhaps at the risk of a repetition, I had earlier on in the judgment discussed the "legal onus", or - primary burden" of proof and on whom it squarely rested. And I also discussed earlier on in the judgment the distinction between "onus of proof and "standard of proof as required by section 138(1) of the Evidence Act (supra). The tribunal, in its view of the allegations against the 1<sup>st</sup> and 2nd respondents as pleaded by appellant, came to the conclusion that the allegations involved the commission of a crime requiring be proved beyond reasonable doubt. In my opinion respectfully, conclusion was rightly arrived at.

At page 286 of the record of appeal the tribunal held:

"In the petition before us, we have considered all the averments relating to the grounds upon which the petition was brought, but we find that if the criminal aspect is removed, there is nothing left that can stand on its own."

In my judgment, the above finding is wholly unimpeachably right, Consequently the tribunal adverted to and considered section 486 of the Criminal Code Act, Cap. 77, Laws of the Federation, 1990 and held rightly, in my view, that it is relevant and applicable to the petition. It is necessary to carry section 486 of the Criminal Code. It

"Any person who utters any document which has been issued by lawful authority to another person and I whereby that other person is certified to be a person \ possessed of any qualification recognized by law for I any purpose, or to be the holder of any office, 01 to be J entitled, to exercise any profession, trade or business, j or to be entitled to any right or privilege, or to enjoy any rank or status and falsely represents himself to be the person named in the document, is guilty of an offence of the same kind and is liable to the same punishment ( as if he had forged the document."

I had earlier on in this judgment earned the relevant evidence -oral and documentary - by the parties and their witnesses placed before the tribunal to which it would apply the principles of law discussed above in arriving at a conclusion whether *vd non* the appellant proved his (or its) case against the respondents beyond reasonable doubt. This is *terminus ad quern*.

But before I go any further into the judgment, I shall pause here, again, for a while to consider and dispose of a point arising from the submission in the appellant's brief, page 16, paragraph 8.5 thereof. The argument and submission inflicted on us by the counsel was that the evidence by Alfred Osagie (P.W.2) was unchallenged.

As contended by Mr. Fagbemi, S.A.N., the evidence conclusively proved that the 1st respondent (Peter Ayodele Fayose) had always been Fayose and not Oluwayose. Accordingly, counsel submitted in his brief that exhibits M2-M5 (*supra*) did not belong to 1<sup>st</sup> respondent and that he could not rely on them or any of them.

Alfred Osagie (P.W.2) was a handwriting expert - "*peritus*" His evidence is no more than an opinion. Of what value was it in the circumstance of the appeal? For assistance, it is of

importance to refer to "Phipson on Evidence" 14th Edition paragraphs 32-39 at page 830.

The learned editors had this to say of such evidence:

"The primary reason for insisting that experts give opinion evidence and do not decide cases is to ensure that the functions of the tribunal are not usurped by the witnesses. It is also of significance that the state of mind required of a witness is not the same as that of a jury." ^ Now, let it be said, *hie et nunc*, for the mention of it, that their | Lordships of tribunal sat in a dual capacity: (i) *qua* jury - those :twelve reasonable men and women - Judges of facts, *qua* matters of fact, and (ii) Judges of law, *qua* matters of law. At page 829, *ibidem*, appears the following:

"... it is quite wrong for the jury to be directed that his evidence should be accepted in the absence of reasons for rejecting it.

From the above, it is sufficient for me just to say that I have not been persuaded by the learned submission of the Senior Advocate of Nigeria. It, therefore, disposes of the contention completely.

Having said the above, then, what was the tribunal's handling or treatment of the evidence placed by it? This would constitute the "*terminus a quo*."

Now, writing in page 277 of the record of appeal, the tribunal asked: "Has the petitioner been able to discharge the burden placed on him?" And answering itself the above poser, the tribunal further wrote,

*ibidem*, as follows:-

"We say no as he has not been able to discharge the burden placed on him, be it proof beyond reasonable doubt nor on balance of probabilities. We hold that from the totality of the evidence adduced before us in the course of hearing this petition, we did not have any evidence which showed us that exhibits M1-M5 did not *I* belong to the 1st respondent taking into account the argument of the petitioner. The crux of the petitioner's case rest (*sic*) on the ownership of the certificates/ credentials and the onus to prove that they belong to another person other than the 1st respondent is on the petitioner. It is our view that such evidence as adduced by the petitioner did not discharge the burden." I confess that I find myself fully in complete agreement with the conclusion above reached by the tribunal. It is unassailable. It is, certainly, conclusive of the appeal. So, *cadit quaeslio*.

In my respectful opinion, the appeal never ever had a ghost of chance to succeed. It is devoid of any merits. It ought, *ex necessitate*, to be dismissed.

In sum, the judgment by the Governorship and Legislative ,1 Houses Election Tribunal for Ekiti State in suit No. EPT/EK/G/4/2003 on the 2nd day of March, 2004. is, accordingly, affirmed by me. The appeal is, therefore, dismissed by me. The petitioner/ appellant shall be mulcted in costs in favour of the 1st & 2nd"respondents fixed at N5000 and N5000 also in favour of the 3rd to the 5th respondents, cumulatively N10,000.00 only.

**IKONGBEH, J.C.A.:** The petitioner before the National Assembly/ Governorship and Legislative Houses Election Tribunal, sitting at Ado-Ekiti, has brought this appeal. The petitioner/appellant, the Alliance for Democracy (A.D.), is one of the registered political parties that sponsored candidates at the governorship elections held on 19/04/2003. For Ekiti State it sponsored Otunba Adeniyi Adebayo as its governorship candidate, with Chief Paul Alabi as his deputy. Among others, the Peoples Democratic Party (P.D.P), also sponsored candidates for the same office. At the end of the election exercise the Independent National Electoral Commission (I.N.E.C.), the 3rd respondent to the petition and before us, returned the P.D.P. candidate, the 1st respondent, with his deputy, the 2nd respondent, as

duly elected by a majority of lawful votes cast at the election.

Not happy with the results of the election, the petitioner challenged it before the election tribunal aforesaid. The two main grounds on which the petition was brought were stated in paragraph 9(1) and (ii) of the petition as follows:

- "(i) the 1st respondent was not qualified to contest for the gubernatorial office of Ekiti State conducted on 19th day of April, 2003;
- (ii) 1st respondent did not score a majority of lawful votes cast at the election of 19th April, 2003;"

The petitioner did not pursue the second ground, but rather concentrated all its efforts on the first, namely, that the 1st respondent was not qualified to contest, or was disqualified from contesting, the election. Its reasons for arriving at such conclusion were contained in paragraphs 9(iii), 10, 12, 13 and 14 of the petition as follows:

- "(iii) the 1st respondent was disqualified from contesting the Ekiti State gubernatorial election conducted on 19th day of April, 2003, because:
  - (a) 1st respondent did not possess the basic educational qualification to qualify him to contest the election under reference,
  - (b) 1st respondent claimed to have attended Federal Polytechnic, Ilaro,
  - (c) 1st respondent forwarded to the 3rd respondent educational certificates/credentials bearing the names Olowayose Ayodele Peter. Petitioner pleads and shall rely on all credentials submitted to the 3rd respondent by the 1st respondent. Notice is hereby given to the respondents to produce the credentials at the trial,
  - (d) The petitioner shall contend that the use of the names and credentials of Olowayose Ayodele Peter was fraudulent on the part of the 1st respondent.

*Particulars*

- (i) the 1st respondent did not at anytime attend Federal Polytechnic, Ilaro; and he does not possess any of the credentials he submitted to the 3rd respondent;
  - (ii) the 1st respondent - Peter Ayodele Fayose - is distinct and/or different from Oluwayose Ayodele Peter hence the credentials relied on, did not belong to the 1st respondent.
10. In showing that the 1st respondent is different and distinct from Oluwayose Ayodele Peter, your petitioner, states that:
- (i) 1st respondent is a Director Spotless Investment Limited, a company registered under the Laws of Nigeria;
  - (ii) the said company, has two directors according to the representations made by the 1st respondent at the time when the company was being incorporated,
  - (iii) the names of the directors of Spotless Investment--Limited as contained in the Memorandum and Articles of Association of the said company are:
    - (a) Ayodele Peter Fayose (the 1<sup>st</sup> respondent herein);
    - (b) Oluwayose Ayodele Peters (the name on the credentials presented by the 1st respondent);
  - (iv) the signatures of the two directors as evident from the Memorandum and Articles of Association of Company are not the same,

- (v) Your petitioner shall contend that at all material times, the 1st respondent was not, and can not be one and the same person as Oluwayose Ayodele Peter;
  - (vi) 1st respondent in filing his papers for the gubernatorial election, represented to have basic educational qualifications and in support of his claim, he submitted to the 3rd respondent credentials which he claimed belonged to him;
  - (vii) the credentials submitted by the 1st respondent are those of Oluwayose Ayodele Peter as the 1st respondent does not possess any educational qualification to qualify him for election as governor of State,
12. Your petitioner states that the 1st respondent at all relevant material times relevant to this petition, was not educated up to school certificate level in that the 1st respondent;
- (i) did not possess a secondary school certificate;
  - (ii) did not possess a Grade II Teacher's Certificate,
  - (iii) did not possess the City and Guilds Certificate;
  - (iv) did not possess the equivalents of any of the certificates in (i) - (iii)
13. Your petitioner states further that the 1st respondent, at all relevant material times to this petition did not possess a primary six school leaving certificate. Furthermore your petitioner avers that the 1st respondent has never been in public or private sector in Nigeria at all or for a period of 10 years.
14. Your petitioner states also that the 1st respondent did not attend any course or training in any institution at all nor for a period of 1 year."

The 1st and 2nd respondents countered all these allegations in their joint reply, where they averred that the 1st respondent possessed the requisite educational qualification at the time he contested the election. They listed the qualifying certificates that he had obtained from various educational institutions, ranging from the First School Leaving Certificate, through the West African School Certificate (W.A.S.C.) and the Ordinary National Diploma (O.N.D.), to the Higher National Diploma H.N.D.) In answer to the allegation that the certificates claimed by the 1st respondent as his belonged to one Oluwayose Ayodele Peter and not to the 1st respondent, the 1st and 2nd respondents explained in their reply that "Oluwayose became the 1st respondent's family name as from 1974, when his father changed to it from the original "Fayose", which explained why the new name appeared on all the certificates obtained subsequently by the 1st respondent.

In proof of its case that the 1st respondent did not possess the requisite educational qualification when he contested the election, the petitioner called and relied on the testimony of eight witnesses, particularly, PW1, who testified, inter alia, that the certificates that bore the surname "Oluwayose" belonged to someone else, who hails from Oluyole Local Government Area of Oyo State and not to the 1st respondent, who, admittedly, is from Afao-Ekiti in Irepodun/ Ifelodun Local Government Area of Ekiti State.

The 1st respondent did not testify personally, but his father. DW1, testified on his behalf and put in evidence all the certificates that, according to him, his son had obtained from the various educational institutions that he (1st respondent) attended. He also testified as to the change of name by him and tendered documents to support his evidence. DW2, who claimed to have been a classmate of the 1st respondent at one of the institutions, also testified for him. These were the only witnesses that testified for the 1st and 2nd respondents. The 3rd - 5th

respondents called one witness.

At the end of the trial the tribunal, after considering the evidence before it and the written addresses submitted by counsel on behalf of the parties, came to the conclusion that the petitioner had failed to establish its allegation that the 1st respondent did not possess the requisite educational qualification to entitle him to contest the election. It accordingly dismissed the petition.

Aggrieved the petitioner has brought this appeal, raising in the appellants' brief of argument prepared on its behalf by Mr. L. O. Fagbemi S. A. N., the following three issues for determination by us:

- "(i) whether a proper evaluation of the case of the petitioner was done and whether on the strength of the evidence led, petitioner is entitled to judgment?;
- (ii) who has the onus of proof of change of name from Fayose to Oluwayose and whether in any event exhibits; L-L4, T-T8, N1 and N2 could be relied on to reach a conclusion that 1st respondent changed his name from Fayose to Oluwayose?; and
- (iii) whether the case of the petitioner is one rooted in criminality and whether the petitioner discharged the burden of proof either on the balance of probability or beyond reasonable doubt?"

For the 1st and 2nd respondents Mr. Y. Ali, S.A.N., formulated the following three issues in their brief of argument:

1. Whether the tribunal did not do a proper evaluation of the case for the appellant and whether from the totality of the evidence led the appellant was entitled to judgment;
2. Whether the 1st and 2nd respondents have not shown that there was a change of the family name of the 1st respondent from Fayose to Oluwayose and whether the tribunal was not therefore entitled to rely on the exhibits tendered especially exhibits L1-L4, T1-T8, N1 and N2 to find that there was actually a change of name from Fayose to Oluwayose.
3. Whether having regard to the nature of the allegations made against the 1st respondent, allegation of criminality was not in issue and whether the appellant discharged the burden of proof either on the balance of probability or proof beyond reasonable doubt."

Mr. T. Omonijo filed a brief of argument on behalf of the 3rd-5th respondents. Although hearing notice was served on him, neither he nor any representative of these respondents was in court. Their case on the appeal was, therefore, taken as argued on their brief. Learned counsel formulated the following three issues in the brief:

- “(i) Whether a proper evaluation of the case of the petitioner (appellant) was done and whether on the strength of the evidence led, the petitioner was entitled to judgment. Whether or not the election petition tribunal could have relied on the exhibits tendered before it, especially exhibits L-L4, T-T8, N1 & N2 to arrive at a final conclusion that there was a change of name from Fayose to Oluwayose.
- (ii) Whether or not the petitioner/appellant's allegations made against the 1st respondent do not bother on criminality which in law, must be proved beyond reasonable doubt."

Considering that the general complaint of the appellant centers on the correctness or otherwise of the tribunal's view on the burden of proof, I think the most appropriate place to start

is that point. This is the point covered by the third issue formulated on behalf of each set of parties.

The appellant's counsel, both in the appellant's brief and in his oral amplification before us, submitted that the tribunal was wrong in its view that the allegations the appellant made against the 1st respondent were criminal in nature and that, therefore, the standard of proof required from the appellant was proof beyond reasonable doubt. To show that the allegations were not criminal in nature, learned senior counsel drew attention to paragraph 9(i) - (iii) of the petition. He then submitted that all that the appellant needed to do was "to adduce or lead evidence to show that the 1st respondent has not got the qualification which he claims to have". While conceding that the facts presented in the petition "may constitute an offence of uttering", senior counsel pointed out that, "the 1st respondent is not on trial for uttering of documents." It was counsel's contention that the appellant's case against the 1st respondent, which, according to him, "has to do with whether or not he has the basic educational qualification to contest the election..., can be decided without determining the criminal element in the complaint". In senior counsel's view, therefore, the standard of proof required of the appellant was "no more than one on the balance of probability and not a proof beyond reasonable doubt". After referring to section 137 of the Evidence Act senior counsel contended that "the petitioner having given evidence that the 1st respondent is not the same person as Ayodele Olowayose, the burden of proving the contrary rests on the respondents unless they are contending that the petitioner has not made out any case that could warrant them to give evidence in rebuttal."

Mr Ali, S.A.N, for the 1st and 2nd respondents, in answer, started by pointing out that in order to ascertain the true nature of the appellant's allegation against the 1st respondent it is necessary to consider more than the grounds stated in paragraph 9(i)-(iii). According to the learned Senior Advocate of Nigeria, the facts in support of those grounds must also be taken into consideration along with the grounds. In his view, the facts alleged in paragraphs 9(iii)(a)-(d), 10, 11 and 12 as constituting the grounds for the petition must be considered together with the two grounds stated in paragraph 9(i)-(iii). These facts, senior counsel pointed out, are the reasons for the conclusion, reached by the appellant in the grounds that the 1st respondent did not qualify to contest the election. Counsel then concluded that "it is the totality of the petition that would have to be looked at in determining whether allegations of crime are/is involved.

Having myself read the petition I am inclined to agree with Mr. Ali that one needs to look beyond paragraph 9(i) and (ii) of the petition in one's quest to ascertain the true nature of the allegations made by the appellant against the 1st respondent. Sub-paragraph (i) contains the bare conclusion that the 1st respondent was not qualified to contest the election. This, by itself, does not amount to an allegation of crime. It is, however, not usual, or, I venture to suggest, not permissible in a pleading or other similar court process, to just state a bland conclusion without accompanying it with the reasons or the particulars supporting, such conclusion. It is the stated reasons or particulars that give the ground character and make it clear to the other side what is required of him by way of defence if he is required to make one. Depending on the reasons or particulars given in support the conclusion or statement of fact, the nature of the allegation or allegations contained in the conclusion or statement would definitely change. Depending on those reasons or particulars the allegations may or may not amount allegations of the commission of a crime.

In the instant case the appellant gave detailed particulars to support its conclusion that the 1st respondent was not qualified to contest the election. These particulars are given, as we have already seen, in paragraphs 9(iii)(a)-(d), 10,12,13 and 14. In my view, paragraph 9(i) cannot be

read in isolation from these particulars if it is to make sense. The true nature of the allegation in paragraph 9(i) can only be ascertained in relation to the particulars in the other paragraphs. If such particulars are not supplied the other side can legitimately demand them. Once the party making the allegation supplies the particulars for his conclusion, the matter is out of his hands. He cannot dictate whether, or how much of, the particulars or reasons may be read together with the main conclusion.

Now, looking at all the paragraphs of the petition that I set out earlier on in this judgment, would one say that, within its proper context, the allegation, that the 1st respondent was not qualified, is civil or criminal in nature?

As can be seen from the particulars or reasons given in support of the conclusion that the 1st respondent was not qualified, the appellant is clearly saying that the 1st respondent used someone else's certificates claiming them to be his and, by that representation, which he knew to be false, induced I.N.E.C. to allow him to contest the election. This is clearly an allegation that the 1st respondent acted contrary to the provisions of section 486 of the Criminal Code, which provides, *inter alia*, that-

"Any person who utters any document which has been issued by lawful authority to another person, and whereby, that other person is certified to be a person possessed of any qualification recognized by law for any purpose ... and falsely represents himself to be the other person named in the document, is guilty of an offence of the same kind and is liable to the same punishment as if he has forged the document."

So, it is an offence to utter a document and the punishment is the same as for forging the document. To utter a document is defined in section 3 of the Code to include using or dealing with, and attempting to use or deal with, and attempting to induce any person to use, deal with, or act upon, the document. The appellant, as we have seen, has alleged that the 1st respondent employed certificate that belonged to another person to induce I.N.E.C. to regard and use them as his. It is clearly an allegation that the 1st respondent uttered those certificates, for which act he was liable to punishment under section 486 of the Code. It is clearly also an allegation that the 1st respondent did an act contrary to the provisions of section 115(1)(k), of the Electoral Act, No.4 of 2002 and punishable under subsection (2) thereof. The relevant provisions of the section stipulate:

- " 115.- (1) A person commits an offence if he -.....  
(k) signs a nomination paper consenting to be a candidate at an election knowing that he is ineligible to be a candidate at that election;  
(2) A person who commits an offence under subsection (1) of this section is liable on conviction to a fine of; N200, 000.00 or to imprisonment for 2 years or to both."

In the light of all these provisions, if the facts alleged in paragraphs 9(i), (in), 10,12, Band 14 of the petition do not amount to an allegation of crime, then I can conceive of no other set of facts that would amount to such allegation. I am not in the least persuaded by Mr. Fagbemi's argument that it cannot be said that any crime is involved here because the 1st respondent is not on trial for uttering. This argument, with the profoundest respect to the learned senior advocate, betrays a lack of appreciation of the provisions of section 138 of the Evidence Act, which provide:

- "138. (1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding, civil or criminal, it must be proved beyond reasonable doubt.  
(2) The burden of proving that any person has been guilty of a crime or wrongful act

is, subject to the provisions of section 141 of this Act, on the person who asserts it, whether the commission of such act is or is not directly in issue in the action."

What counts is not the fact that the person against whom the allegation is made is being tried. What counts is the fact that the allegation of a criminal nature is made at all and that it is directly in issue. Once that is the case the person making the allegation is bound to beyond reasonable doubt even if the trial in hand is not of person against whom the allegation was made.

What was directly in issue in the case now on appeal was the question whether or not the 1st respondent presented someone else's certificates to I.N.E.C. intending the latter to accept them as his and, on that basis, to allow him to contest the election. The question whether or not he was qualified was only a matter of inference to be drawn from the result of the inquiry whether or not he uttered someone else's certificates. Before such inference could be drawn the facts first had to be ascertained.

My ultimate conclusion on this point is therefore, that the .appellant has made allegations of a criminal nature against the 1st respondent.

What then should have been the standard of proof required, and on whom should that burden of proof have lain?

I think section 138 to which I just made reference has answered these two questions. Since the allegation made was of a criminal nature proof must be beyond reasonable doubt. The person who made the allegation, i.e., the appellant, had the burden of proof. The tribunal was, therefore, in my view, perfectly in order when it arrived at these conclusions.

As to the last point, i.e., who had the burden of proof, I think reference should also be made to section 137 of the Act and I think Mr. Fagbemi was right when he did so. The section provides:

- "137. (1) In civil cases the burden of first proving the existence or non-existence of a fact lies on the party against whom the judgment of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.
- (2) If such party adduces evidence which ought reasonably to satisfy a jury that the fact sought to be proved is established, the burden lies on the party against whom judgment would be given if no more evidence were adduced; and so on successively, until all the issues in the pleadings have been dealt with.
- (3) Where there are conflicting presumptions, the case is the same as if there were conflicting evidence."

Reference in this regard must also be made to sections 135 and 136, which provide:

- "135. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
136. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Now, just before PW1 went into the witness box, who would have failed if no evidence at all had been taken and if the matter were to end there?

Of course, the appellant would have failed since the respondents in their reply did not admit the facts in issue and there would have been no facts before the tribunal upon which it could have come to the conclusion, as asserted by the appellant, that the 1st respondent was not

qualified to contest the election. The appellant was obliged to introduce before the tribunal evidence that the certificates that the 1st respondent presented to I.N.E.C. belonged to someone other than himself, that he was aware that in fact they did not belong to him, and that he induced I.N.E.C. to regard and use them as his own. I agree with Mr. Fagbemi that once the appellant did this, the burden would, pursuant to the dictates of section 137(2) of the Evidence Act, have shifted to the 1st respondent to show otherwise.

Now, what was the evidence proffered by the appellant in proof of the facts in support of its allegation that the 1st respondent was not qualified to contest the election?

As was noted at the beginning of this judgment, the appellant, as petitioner, called eight witnesses. Only PW1 testified directly on the point as to whether or not the 1st respondent possessed the certificates he said he possessed. PW2 was a hand-writing expert called for the sole purpose of showing, as alleged in paragraph 10(iii) and (iv) of the petition, that the two directors of the Spotless Investment Company Ltd. were Ayodele Peter Fayose, the 1st respondent, and one Oluwayose Ayodele Peter, whose certificates the 1st respondent was alleged to have used as his to contest the election, no doubt with a view to showing that the two were different and distinct persons. The evidence of PW3, PW4, PW7 and PW8 amounted to no more than that it was made general knowledge, by those who claimed to know, that the 1st respondent was not qualified. The evidence of PW6 was meant to show that the 1st respondent's father, DW1, never at any time changed his surname from Fayose Oluwayose. The cumulative effect of the evidence of PW1, PW2 and PW6 was meant to show that:

1. the family name of the 1st "respondent who hails from Afao-Ekiti in Irepodun/Ifelodun Local Government of Ekiti State, was and still remains Fayose;
2. it has never been changed, certainly not in 1974, because after that year both the 1st respondent and his father, DW1 still freely used it;
3. there is another person, who hails from Oluyole Local Government Area of Oyo State, known as Ayodele Oluwayose; and
4. the certificates presented to I.N.E.C. by the 1<sup>st</sup> respondent belonged to this Ayodele Oluwayose not to the 1st respondent, who never attended any of the institutions that he claimed to have attended.

PW1 was the star witness on the point as to the 1st respondent's non-qualification. He testified-in-chief at p. 29 of the record that the 1st respondent "did not have any secondary school education". On p. 32 the following dialogue ensued between Mr. Fagbemi and the witness:

"Fagbemi, S.A.N. The 1st respondent said he attended polytechnic Ibadan and he was issued with necessary papers.

PW1. No he did not attend Polytechnic Ibadan.

Mr. Fagbemi, S.A.N. who attended the Polytechnic Ibadan?

PW1. There is one Oluwayase Fayose who attended Polytechnic Ibadan.

PW1. Before we challenge the qualification we went to Polytechnic Ibadan, with my chairman to confirm who attended Polytechnic Ibadan."

Again, at pages 35-36 the following dialogue was recorded:

"Mr. Fagbemi, S.A.N.: You earlier said you went to the Polytechnic to detain C1 to C16, to confirm the student who attended Polytechnic Ibadan.

PW1: Yes.

Fagbemi, S.A.N.: This Ayodele Fayose is from Afao Ekiti, look at exh. C2 item No. 9 part of the document from the Polytechnic, read.

PW1: State of Origin of Ayodele Fayose is from Oyo State, Oluyole local government.

Fagbemi, S.A.N.: Look at exh. C7 State identification form,

PWI: He said he is from Oluyole L.G., Oyo State.

Mr. Fagbemi, S.A.N.: Have a look at C12, see Item 1 (b) what is the name.

PW1: Date and place of birth Ibadan, Oluyole L.G.

Mr. Fagbemi: Where is Afao?

PWI: Afao is in Irepodun/Ifelodun L.G."

Of course, had the matter ended here and no further evidence had been taken, then the tribunal or, for that matter, any court of law, would have been bound to accept the evidence that the 1st respondent did not have any secondary school education and never attended the Polytechnic, Ibadan, as he claimed and that the person who did so was a person from Oyo State.

Was there any further evidence? What was the effect of such" further evidence?

The record shows that there was. There was the evidence of the same witness under cross-examination. More particularly, at pages 38 - 39 of the record, the following dialogue was recorded between Mr. Ali, for the 1st and 2nd respondents, and the witness:

"Mr. Ali, S.A.N.: Have you heard of Olivet Baptist High School, Oyo. See exh. A19 paragraph 8 counter-affidavit, read it.

P.W1: read as follows: That for my Secondary School Education I attended Olivet Baptist High School where I sat for the West African Certificate Examination with registration No. 19107134 and passed with Third Div., with card No. 30 in June 1979 which is annexed hereto as

Mr. Ali, S.A.N.: You referred to in the counter-affidavit is not part of the document you filed.

PWI: No it is not part of it.

Mr. Ali, S.A.N.: Please read paragraph 3 of PW1 read as follows: that I know as a fact my said father who is still alive changed his name from Fayose to Oluwayose sometimes 1974 when he received a divine call, to serve the Lord as he is presently a pastor of the Christ Apostolic Church and is now known and called Pastor John Olurunfemi Oluwayose.

A copy of the affidavit deposed to by my said Alio father on this matter is annexed here to as exh.

Ali: That affidavit is not part of the documents you brought in court.

PWI: Yes it is not part of it. Mr. Ali. S.A.N.: Look at A20 paragraph 10 of the same counter affidavit.

PWI: read as follows: that I am informed by Mr. Olusegun Adegboye and I verily became (read believe?) same to be true and correct that the SSS Abeokuta Ogun State in the normal course of their duties of screening and investigating aspirant for elective offices contacted the Federal Polytechnic, Ilaro to confirm or verify the facts deposed to by me in paragraph 9 alone and received from that investigation a letter dated 3rd February, 2003 confirming the truth of the said facts. A copy of the letter is annexed as exh. A45.

Mr. Ali, S.A.N.: The document which confirms his being a student at Federal Polytechnic, Ilaro is not pan of the document.

XX: No it is not."

Then there was the testimony of DW1, the 1st respondent's father, and DW2, who claimed to be his classmate at the Polytechnic, Ibadan. DW1 testified as to the circumstances in

which he changed his family name from Fayose to Oluwayose in 1974. To prove that he did in fact change his family name in 1974 from Fayose to Oluwayose, he put in evidence that 'T' serves of exhibits. Exhibit T was the *Daily Sketch* issue of Monday, July 22, 1974. The relevant pages, i.e., the "Classified Advertisements" page, was marked exhibit T6. Thereon, was the advertisement -

"I formally called John Olorunfemi Fayose of Box 619, Ibadan now wish to be called John Olorunfemi Oluwayose. Former documents remain unchanged.

Bankers, Corporations. Suppliers Customers and Public please note."

He testified that he sent copies of the newspaper to all the schools where he had children, including Olivet Baptist High School, Oyo, whose the 1st respondent was reading for his West African School Certificate examination.

To prove that he used the new name thereafter, he put in evidence the 'N' serves of exhibits. Most notable were his driver's license, issued on 05/05/83, the agreement he signed with the " authorities of Christ Apostolic Church on 27/09/94 when he was ordained minister, and the certificate of ordination issued on 27th/ 28th September, 1994.

As to how come his son, the 1st respondent, now bears the surname "Fayose" instead of "Oluwayose" to which the witness testified that he had changed it, the witness testified at pages 124-125.

"Mr. Ali,SAN: On exhibits 'M2' and 'M5 take a look at them, the surname on those certificates. Mr. Akintola, S.A.N.: I object it is a leading question.

Mr. Ali, SAN: What are the surnames? It is Oluwayose. M2 to M5 - The one for primary school is Fayose.

Mr. Ali, SAN: As at today what is the surname of your son the Governor.

DW1: They call him Fayose,

Mr. Ali SAN: What do you know about change of name of the 1st respondent.

DW1: I asked him why he change his name, he said during political campaign they kept saying we only know Fayose if you are like your father we shall vote for you, so he changed to Fayose, that is one of his excuses.

Mr. Ali, SAN: At Afao where you came from is everyone at home with your change of name?

DW1: Even today someone called me Fayose. In so far as it is your name they can call you that. All other names remain valid.

Mr. Ali, SAN: Is the 1st respondent the only one bearing Fayose?

DW1: There is Joseph Olusegun Fayose, his name is still the same, he did not change and since he is an adult he could not change his name."

Under cross-examination by Mr. Omonijo, for the 3rd - 5th respondents, he testified on the same point at pages 126 - 127:

"Mr. Omoniju: You are the natural father of Ayodele Fayose:

DW1: Yes.

Omonijo: As a matter of fact at a point in time you changed to Oluwayose.

Yes, I changed my name.

Omonijo: When he became an adult he changed to Fayose again.

DW1: Yes

Mr. Omonijo: You as a father you approved of the change.

DW1: I said I cannot change him being an adult, we are about to have two families."

On the same point, he testified under cross-examination by Mr. Akintola, for the

appellant, as follows at page 129:

"Mr. Akintola, S.A.N.: 1st respondent you told this tribunal that he changed his name because of pressure from his people.

DW1: No, I did not say that I only said that people kept telling him that they know him with Fayose and that he has the right to bear the name he likes to bear.

Mr. Akintola, S.A.N.: I suggest to you, that he changed his name when he was joining politics. When exactly the 1st respondent did joined polities.

DW1: I do not know.

Mr. Akintola, S.A.N.: You told this tribunal of undue pressure at Afao of having known him as Fayose.

D.W.I: This was between 2000 to 2001." (Italics mine).

It can be seen that even under cross-examination the evidence of the witness remained the same, i.e., that he did change the family name.

As to the 1st respondent's schooling and qualifications he testified-in-chief thus at pages 121-122.

"Mr Ali, S.A.N: Did the 1st respondent attend any school?

DW1: Yes he did, (i) he attended I. B. C. School when he was of school age for a few month as Primary 1 boy. When I noticed that the road was risky, I took him to St. Louis, Primary School Aboderin Street, Orita Challenge, Ibadan, and from there he was admitted to, Olivet Baptist High School, Polytechnic, Ilaro (Federal).

Ali, S.A.N: In all these schools did he obtain certificates?

DW1: Yes if not I will not have been paying money.

Mr. Ali, S.A.N.: Take a look at this.

DW1: This is his Primary School Certificate – Fayose, Oluwayose or whatever you call it.

This was his OND Certificate in Ilaro with Peter Ayodele Oluwayose.

This is his H.N.D. from Ibadan Polytechnic, Ibadan.

This is his N.Y.S.C. Certificate where he served at Research Institute Idiajunre, Ojebu Ode, Ibadan :

Mr. Ali, S.A.N.: All these certificates you said belong to the 1st respondent.

DW1: Yes."

He tendered the certificates as the 'M' series of exhibits.

As to whether or not the person named on the 'C' series of exhibits, i.e., the certificate obtained from Polytechnic. Ibadan, was different from the 1st respondent, he testified at page

"Mr. Ali, S.A.N.: Please take a look at exhibit C2.

DW1: Yes. That was the form the 1st respondent filled when: he was going to Polytechnic, He was born in Ibadan, I was there for 40 something years.

Mr. Akintola: Whatever he says will be hearsay.

Mr. Ali, S.A.N.: He said he has sponsored the 1st respondent to go to school. Nobody has yet come to say he is his father.

DW1: Nobody will ever come.

Mr. Ali, S.A.N.: The address on the exhibit - SW 9/2770 Orita Challenge, Ibadan.

DW1: Yes that is our address.

Mr. Ali, S.A.N.: Take a look at exhibit C2 one witness came to say Oluwayose on exhibit C2 is different.

DW1: No it is the same Fayose.

There are several points worthy of note about the testimony of, DW1. Firstly, the evidence of the witness is positive and cogent. As has been seen, the witness in his evidence-in-chief testified positively to some crucial facts. He testified that he changed the family name,' in 1974, that the 1st respondent obtained his W.A.S.C. from Olivet High School, Oyo and O.N.D. from Federal Polytechnic, Ilaro. Mr Akintola, for the appellant, never, in his cross-examination of the witness, which spans from pages 127 - 134 of the record, asked the witness one single question on the aspects of his testimony that the 1st respondent obtained W.A.S.C. and O.N.D. from Olivet High, School, Oyo, and Federal Polytechnic, Ilaro, respectively. Nor did he in any way impugn the genuineness of any of the two certificates. Learned senior counsel concentrated his attack only on the evidence of change of name and on the evidence as to attendance by the 1st respondent at the Polytechnic, Ibadan, for the obtainment of the H.N.D. On this second point the questions were not directed at showing that the H.N.D. Certificate was not genuine, but rather at showing that it could not have belonged to the 1st respondent. I return to this aspect of the matter later. Now, assuming for the sake of argument only, that the standard »Of proof required was only on a balance of probabilities, which side •would be said to have made out a weightier case?

I have no difficulty whatsoever in casting my lot for the 1st and 2nd respondents. They produced evidence that far outweighed that proffered by the appellant. For instance, on the question of change of name, DW1 tendered a copy of the Daily Sketch of 22/07/74 where the change of name was advertised. No evidence was produced by the appellant to offset this. The only attack on it was in Mr. Fagbemi's address where he argued that because the surname of the person who placed the advertisement was spelt "Fayose" it could not have been DW1, whose surname was and has always been spelt "Fayose", who placed the advertisement.

It must be pointed out, however, that apart from the fact that no evidence was produced to show that someone other than DW1 placed -the advertisement, the evidence of the witness that it was he who did so was not challenged in cross-examination. The fact of the difference in the spelling of the surname is definitely not enough to destroy the positive evidence of DW1 that he placed that particular advertisement. After all, spelling mistakes are commonplace, As Mr. Ali appropriately pointed out in the 1st and 2nd respondents' brief of argument, even the appellant's counsel in the record of proceedings the appellant was recorded as having wrongly spelt his (counsel's) own name and other particulars. A ready example can be seen on page 292 of the record. The address for service on the 1st and 2nd respondents recorded as having been supplied by the appellant on its notice of appeal was:

*Peter Ayodele Fayose*  
C/o his Solicitors  
Yusuf Ghalib House  
Unity Road, Ilorin.  
(Italics mine for highlight).

Mr. Ali has never, in any of the documents he has filed in this court written his middle name with a "U" but an "O". Nor has he ever spelt his surname with a double "L". Nor is his office at Ghalib House, but at Ghalib. It must be remembered that DW1 did not say that he published and printed the Daily Sketch that carried his advertisement. Just like the secretary of the tribunal, who compiled the record of proceedings, could have been responsible for the misspellings pointed out regarding the notice of appeal, the same could he said oft lie publishers or printers of the Daily Sketch. While a court or tribunal is not permitted to speculate on the origin of a mistake in a document, it is perfectly entitled, in circumstances such as this to ignore minor

discrepancies occasioned by misspellings.

I think all that I have said here have answered the question raised in the second issue as formulated in the three set of brief of argument. Whatever burden of proof levied on the 1st and 2nd respondents as regards the change of name from Fayose to Oluwayose was effectively discharged by the evidence of DWI in this regard and the documents he tendered, especially the 'T' and 'N' serves of exhibits. The tribunal was, therefore, in any view, justified in its conclusion that DWI changed his family name in 1974. This issue is accordingly resolved against the appellant and in favour of the 1st and 2nd respondents.

On the evidence of DWI that he sent a copy of the Daily Sketch to, among other places, Olivet High School, Oyo, where the 1st respondent was reading for his W.A.S.C. examination, it is little wonder that when the certificate was eventually issued in June 1979 it bare "Oluwayose" as the surname of the recipient, instead of 'Fayose' who went in there.

On the question of the possession by the 1st respondent of educational qualification, I have already observed that the appellant's counsel did not at all ask any question of DWI regarding the latter's testimony that the 1st respondent attended Olivet High School, Oyo, and Federal Polytechnic, Ilaro, and obtained his W.A.S.C and O.N.D. respectively therefrom. The only aspect of his testimony in this regard that he, was asked any question on by the appellant's counsel was his testimony regarding the H.N.D. The question-and-answer session between counsel and the witness was recorded thus at page 133:

"Mr. Akintola SAN: Take a look at exhibit C2 paragraph 9(a) and (b) - Oluwayose - Oyo State, Oluyole Local Government.

Exhibit C3 item 6 1st paragraph Oluwayose Oluyole, Ogbomosho - State of Origin Oyo State, Oluyole Local Government.

See. Exhibit C12 - please read paragraph 1(a) to (d).

DWI: (a) Oluwayose Ayodele Peter

(b) Ibadan, Nigerian -

Local Govt. Oluyole L.G. State Oyo."

It can be seen that the only fact brought out here is that in the student's registration forms of the student concerned, Peter Ayodele Oluwayose, stated that he hailed from Oluyole Local Government of Oyo State. The argument put forward on behalf of the appellant in this regard is, as we have seen, that since the Peter Ayodele Oluwayose who filled the forms, exhibit C2, stated in the forms that he hailed from a Local Government in Oyo State, he must be a different and distinct person from the 1st respondent, who, admittedly, hails from Ekiti State. This has to be so, according to the argument, because one person cannot at the same time hail from two different Local Governments in two different states.

With respect, this would have been a very strong argument in favour of the appellant had it been based on a more solid state of facts. The conclusion, having regard to the state of the evidence, takes a great amount of strain to arrive at. True, that fact that the student on exhibits C2, C3 and C12 is stated to hail from Oluyole Local Government of Oyo State may suggest that that student is not the same person as the 1st respondent, who, as DWI admits, is from Irepodun/Ifelodun Local Government of Ekiti State. It is, however, equally true that there are facts on those exhibits that point to the contrary. As we have seen from the evidence of DWI, the 1st respondent, from 1974, when his father changed the family name to the end of his student days, bore the named Peter Ayodele Oluwayose. He decided to revert to the old family name 'Fayose' only after becoming a man of his own. The student on exhibits C2, C3 and C12 was Peter Ayodele Oluwayose. The forms were filled at a time when the 1st respondent was still

known by that name. The permanent home address of the student corresponded with that of the 1st respondent, namely, No/SW9/2770 Orita, Challenge, Ibadan. One of the persons chosen by the applicant as his next of kin was Mr. J. O. Oluwayose, of the same address. Be it remembered that the 1st respondent's father's name had by the time the forms were filled become John Olorunfemi Oluwayose. There is no evidence, and nobody has suggested, that any other person than the 1st respondent called Peter Ayodele Oluwayose lives at this address.

It can be seen that, apart from the fact as to the local government and state of origin, all the facts that I highlighted correspond with the particulars of the 1st respondent. Where, then, is the justification for ignoring all those facts and latching on to the single one, which is neither here nor there, to reach such a crucial conclusion as that the student who filled the forms was not the same as the 1st respondent?

Taken as a whole the most that one can say about exhibits C2, C3 and C12 against the 1st Respondent is that it is not clear whether or not he was the one who filled the forms. There is no warrant for the firm conclusion that another student than the 1st respondent filled those forms.

Even if such a conclusion can be reached, I still do not see how that can help the appellant in this case. As I pointed out, the 'C' series of exhibits related only to the H.N.D. Even if it is accepted that the 1st respondent did not possess an H.N.D. at the time of the election, the appellant could not claim to have discharged the onus of proving that the 1st respondent did not possess the basic educational qualification. The 1st respondent was not required to parade an array of certificates, diplomas or degrees. All he required was the basic qualification, which, going by the provisions of section 177(d) of the 1999 Constitution, is no more than education up to school certificate level or its equivalent. This means, by the provisions of section 318 -

- "(a) a Secondary School Certificate or its equivalent, or Grade 11 Teacher's Certificate, the City and Guilds Certificate;
- Or
- (b) education up to Secondary School Certificate level; or
- (c) Primary Six School Leaving Certificate or its equivalent and
  - (i) service in the public or private sector in the Federation in any capacity acceptable to the Independent National Electoral Commission for a minimum of ten years, and
  - (ii) attendance at courses and training in such institutions as may be acceptable to the Independent National Electoral Commission for periods totaling up to a minimum of one year, and
  - (iii) the ability to read, write, understand and communicate in the English language to the satisfaction of the Independent National Electoral Commission; and
  - (d) any other qualification acceptable by the Independent National Electoral Commission"

As we saw, the evidence showed that the 1st respondent obtained a Secondary School Certificate from Olivet High School, Oyo. Also, as we saw, DW1, who testified to this effect, was not challenged on the point. Although there was the contrary evidence of PW1, that cannot nullify exhibit M2, the certificate issued by the West African Examinations Council. The elaborate argument advanced in respect of the 'C' series of exhibits cannot apply here because there is no evidence that any person claiming to hail from Oyo or any other state than Ekiti filled the student's registration form. In the second place, exh. B42, the application form filled by the 1st respondent when he sought admission into the Federal Polytechnic, Ilaro, (with his

photograph attached), shows his name, permanent home address and next of kin to correspond with such particulars given on exhs. C2, C3 and C12, about which counsel on behalf of the appellant made so much.

The complaint of Mr. Fagbemi that the tribunal failed to evaluate the evidence regarding the 'C' series of exhibits does not avail the appellant. This court is in as good a position as the tribunal to evaluate documentary evidence. That is what I have done here. The tribunal could not have arrived at different conclusion from the one I arrived at.

In the face of all these, the only reasonable conclusion that one can reach is that not only did the appellant fail to show, even on a balance of probabilities, that the 1st respondent was not qualified to contest the election, but also that the 1st respondent proved without serious challenge that he was. The tribunal was, therefore, right in its conclusion that the petitioner/appellant failed to discharge the burden on it, which was to prove that the certificates, exhibits M1-M5 belonged to someone else and not to the 1st respondent. If on the balance of probabilities it follows that it failed also on proof beyond reasonable doubt.

It is for these reasons that I agree with the lead judgment of my learned brother, Nsofor, JCA, that this appeal lacks merit and ought to be dismissed. I too would dismiss it and affirm the decision of the tribunal dismissing the appellant's petition. I abide by all the consequential orders made in the lead judgment.

**ONNOGHEN, J.C.A.:** I have had the benefit of reading in draft the lead judgment of my learned brother Nsofor, JCA just delivered.

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

The primary issue arising from the grounds of appeal for determination in this appeal is whether by the provisions of section 177(d) of the Constitution of the Federal Republic of Nigeria, 1999 (hereinafter referred to as the 1999 Constitution) the 1st respondent is qualified to contest the Ekiti State Governorship election held sometime in April 2003. In other words did the 1st respondent possess the constitutionally required minimum qualification to contest that election?

It is clear from the grounds of appeal filed and the issues formulated therefrom by learned senior counsel for the appellant that the fact that the 1st respondent scored majority of lawful votes to win the election in question is not made an issue in this appeal. That fact is, therefore, taken as conceded by the appellant.

Section 177 of the 1999 Constitution which deals with the qualification for election to the office of Governor of a State in Nigeria provides as follows:

"177. A person shall be qualified for election to the office of Governor of a State if:

- (a) he is a citizen of Nigeria by birth;
- (b) he has attained the age of thirty-five years;
- (c) he is a member of a political party and is sponsored by that political party;  
and
- (d) he has been educated up to at least school certificate level or its equivalent."

For the purposes of this appeal as revealed by the facts of the case, the relevant subsection of section 177 is (d) *supra*.

In other words, the appellant is contending that the 1st respondent had not been educated up to at least school certificate level or its equivalent. The simple reason why the appellant is saying so is that since the surname of the owner of an H.N.D. certificate which the 1st

respondent presented to I.N.E.C. as his is one Oluwayose from Oluyole Local Government of Oyo State and the same surname appears on the O.N.D. and School Certificates so presented, the certificates cannot belong to the 1st respondent who is a native of Afao in Ekiti State and goes by the surname of Fayose. In other words if the appellant establishes the fact that the owner of the certificates presented by the 1st respondent is not the same as 1st respondent, then 1st respondent has no backed up basic or educational qualification to contest the said election. It be noted that section 177(d) does not require that the person obtain a school certificate but that he should be educated up to certificate level or its equivalent.

It must also be noted that by the provisions of section 182(1)(j) of the 1999 Constitution a person who presented a forged certificate to INEC for the purposes of election to the office of Governor of a State is thereby disqualified. The said section provides:

"182(1) No person shall be qualified for election to the office of Governor of a State if:

- (j) he has presented a forged certificate to the Independent National Electoral Commission."

What the sections 177(d) and 182(1)(j) are saying is simply that a person who intends to contest an election to the office of Governor of a State is not qualified to do so if he has not been educated up to school certificate level or its equivalent and is disqualified where he presents forged certificates to INEC purporting to have been educated to the level.

From the pleadings of the appellant, particularly paragraphs 9 and 10 of the petition the appellant is saying that the 1st respondent is in breach of sections 577(d) and 182(1)(j) of the 1999 Constitution.

The primary question is whether the appellant proved that the 1st respondent is not qualified to contest the election in question. To do so the appellant has argued that since the Oluwayose who owns the educational qualification presented to I.N.E.C. by the 1st respondent is from a local government in Oyo State whereas the 1st respondent is from Ekiti State, the certificates cannot legally be said to belong to the 1st respondent who did not even testify at the trial to explain the inconsistency.

It is trite law that parties and the court are bound by the pleadings in a case and that evidence on facts not pleaded goes to no issue. I have gone carefully through the petition, reply and response to the reply filed by the parties to the petition and have not seen where the local government or state of origin of the 1st respondent is made an issue in the petition.

That being the case, it is my considered view that any evidence on facts not pleaded in his case, local government or state of origin of the 1st respondent, grounds to no issue. That being the case, it is my view that the appellant cannot rely on such evidence to urge on the court that the Oluwayose who owned the certificates presented to I.N.E.C. by the 1st respondent is not the same person as the 1<sup>st</sup> respondent. There is evidence on record based on the pleadings which was accepted by the lower tribunal to the effect that the original surname of the father of the 1st respondent was changed sometime in 1974 from Fayose to Oluwayose. That the school certificate, O.N.D. and H.N.D. presented by the 1st respondent were obtained by him after 1974 and bear the surname of Oluwayose with the 1st and 2nd or middle names remaining constant. There is evidence also which the tribunal accepted that the 1st respondent later on reverted to the old family name of Fayose.

I therefore hold the view that having regards to the pleadings and evidence before the court the appellant has failed to prove that the 1st respondent does not possess the basic or minimum educational qualifications to contest the election into the office of Governor of Ekiti State.

That apart, there is also the issue as to whether having regards to the state of the pleadings

particularly the averments contained in the petition touching and concerning the qualification of the 1<sup>st</sup> respondent to contest the said election, the standard of proof required of the petitioner/appellant is proof on the balance of probabilities or beyond reasonable doubt.

In paragraph 9 of the petition, the appellant pleaded as follows: "9. Grounds and facts in support of the petition

Your petitioner states that the grounds on which this petition is predicated, brought and upon which the election of the 1st respondent is being questioned are that:

- (i) the 1st respondent was not qualified to contest for the gubernatorial office of Ekiti State conducted on 19th day of April, 2003.
- (ii) 1<sup>st</sup> respondent did not score a majority of lawful votes cast at the election of 19th April 2003;
- (iii) the 1st respondent was disqualified from contesting the Ekiti State gubernatorial election on 19th day of April, 2003, because:
  - a. 1st respondent did not possess the basic educational qualification-to qualify him to contest the election under reference.
  - b. 1st respondent claimed to have attended Federal Polytechnic, Ilaro.
  - c. 1st respondent forwarded to the 3rd respondent educational certificates/credentials bearing the names Oluwayose Ayodele Peter. Petitioner pleads and shall rely on all credentials submitted to the 3rd respondent by the 1st respondent. Notice is hereby given to the respondents to produce the credentials at the trial.
  - d. Petitioner shall contend that the use of the names and credentials of Oluwayose Ayodele Peter was fraudulent on the part of the 1st respondent.

*Particulars*

- i. 1st respondent did not at anytime attend Federal Polytechnic, Ilaro; and he does not possess any of the credentials he submitted to the 1st respondent (*sic*)
- ii. The 1st respondent - Peter Ayodele Fayose is distinct and/or different from Oluwayose Ayodele Peter hence the credentials relied on, did not belong to the 1st respondent." See also paragraph 10 of the petition.

From the above pleading it is clear that the appellant alleged that the 1st respondent submitted the credentials of another person entirely to the 3rd respondent claiming same to be his for the purpose of contesting election into the office of Governor of Ekiti State and that he was fraudulent in so doing. The tribunal found the allegation to be criminal in nature by virtue of section 486 of the Criminal Code and held that the standard of proof required of the appellant is proof beyond reasonable doubt. The appellant is not satisfied with that holding.

Section 486 of the Criminal Code provides as follows:

"486. Any person who utters any document which has been issued by lawful authority to another person, and whereby that other person is certified to be a person possessed of any qualification recognized by law for any purpose, or to be the holder of any office, or to be entitled to exercise any profession, trade, or business, or to be entitled to any right or privilege or to enjoy any rank or status, and falsely represents himself to be

the person named in the document, is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the document."

I am of the view that from the facts pleaded in paragraphs 9 and 10 of the petition 1st respondent is alleged to have committed a criminal offence recognized by section 486 of the Criminal Code. Apart from the provisions of section 486 of the Criminal Code, the allegations contained in the said paragraphs of the petition also constitute an offence under section 115(1)(k) of the Electoral Act, 2002 and punishable under section 115(2) and (3) of the said Electoral Act, 2002. To make it worse the appellant specifically pleaded that the 1st respondent, by his actions committed fraud and proceeded to give particulars thereof

The question that follows is what is the standard of proof where an allegation of commission of crime is made in any proceeding? The answer can be found in section 138 of the Evidence Act, Cap. 112, Laws of the Federation, 1990 particularly sub-section 1 thereof which provides thus:

"138(1) If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt."

Subsection (2) of section 138 goes on to place the burden of proof of the allegation of crime or wrongful act on the appellant who asserted same.

Having gone through the record of proceedings and briefs of argument, I am of the firm view that the tribunal is right in holding that the allegations against the 1st respondent amounted to commission of crime and that the standard of proof is that of beyond reasonable doubt which the appellant failed to discharge.

The fact that the Oluwayose who owns the certificates is said to be one from Oyo State as contained in a form filled in 1985 is not conclusive of the fact that he is not the 1st respondent in view of the fact that other information supplied in that form equally point to the 1st respondent, such as his permanent home address, name of his sponsor; first and middle names, date of birth etc. So, granted that the fact that the owner of the certificates comes from Oyo State is pleaded by the appellant which is denied the other facts revealed in the said form and in evidence which equally point to the 1st respondent as the owner of the certificates show clearly that there are doubts as to the identity of the owner of those certificates and by operation of law, such doubts are to be resolved in favour of the 1<sup>st</sup> respondent. With such doubts it cannot be said that the appellant has proved the allegations beyond reasonable doubt as required by Law.

In conclusion I too find no merit in this appeal which is consequently dismissed. I abide by the consequential orders contained in the lead judgment of my learned brother Nsofor, J.C.A. including the order as to cost. Appeal dismissed.

**MIKA'ILU, J.C.A.:** Briefly the background of this appeal is that the appellant, Alliance for Democracy (AD) sponsored a candidate for Gubernatorial Election held in Ekiti State on the 19th April, 2003. The 1st respondent and the 2nd respondent also contested at the said election as candidates for the offices of Governor and Deputy-Governor, respectively under the umbrella of People democratic Party (PDP) also a registered political party. At the end of the exercise the 1st and 2nd respondents were declared winners of the election by the 3rd respondent returning them as duly elected by a majority of lawful votes cast at the election. The appellant was unhappy with the result and therefore filed its petition before the National Assembly/Governorship and Legislative Houses Election Tribunal, Ekiti State. The main grounds of the petition were that the 1st respondent was not qualified to contest for the election and that he did not score a majority of lawful votes at the election.

At the tribunal, the main issue heard and determined was as to whether the 1st respondent was qualified or disqualified to contest for the election. The main reason advanced by the appellant was, the 1st respondent did not possess the basic educational qualification to qualify him to contest the election. Refer to paragraph 9(iii) of the petition. The averment of the appellant before the tribunal was that the certificates/credentials used by 1st respondent were bearing the names Oluwayose Ayodele Peter, who was different and distinct from the 1st respondent who was Peter Ayodele Fayose.

The petition was heard by the tribunal which dismissed it. Appellant aggrieved with the decision filed this appeal before this court. Briefs have been filed and exchanged. In the appellant's brief of argument three main issues have been formulated for determination. They are:

1. Whether a proper evaluation of the case of the petitioner was done and whether on the strength of the evidence -led, the petitioner is entitled to judgment?
2. Who has the onus of proof of change of name from Fayose to Oluwayose and whether in any event exhibits L-L14, T-T8, N1 and N2 could be relied upon to reach a conclusion that the 1st respondent changed his name' from Fayose to Oluwayose? and
3. Whether the case of the petitioner is one noted in criminality and whether the petitioner discharged the-burden of proof either on balance of probability or beyond reasonable doubt?

Before venturing into the first issue of proper evaluation of the evidence it would be most appropriate first to deal with the burden of proof. On this the averment of the learned counsel for the appellant is that the duty imperative in the appellant is to adduce or lead evidence to show that the 1st respondent has not got the qualification which he claims to have. That section 486 of the Criminal Code? which election tribunal relied on to say that the allegation against the 1<sup>st</sup> respondent is criminal in nature creates the offence of uttering. Having reproduced the section the learned counsel for the appellant has submitted that the facts as presented in the petition even though may constitute an offence of uttering, however, one important and a crucial fact which must be appreciated is that, the 1st respondent is not on trial for uttering of documents. Rather the case against 1st respondent has to do with whether or not he has the basic educational qualification to contest the election under reference and same can be decided without determining criminal element, if any, contained in the complaint. He has referred to *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108.

He has further submitted that the standard of proof required determining the issue of qualification of 1st respondent is no more than one on balance of probability and not a proof beyond reasonable doubt. He has averred that it was therefore wrong for the election tribunal to elevate the complaint or case of the petitioner to one within the realm of criminal proceedings and that the criminal element, if any, cannot be excised from the petition, for if done, the petition would collapse. That the correct approach would have been to give effect to section 137(1) and (2) of the Evidence Act instead of the reasoning of the tribunal that the first respondent is under no obligation to give evidence. With this the appellant's counsel has submitted that to succeed in pursuing its case on the balance of probability, all the petitioner is to do:-

- i. Establish that Ayodele Oluwayose is different from 1st respondent, Ayodele Fayose.
- ii. 1<sup>st</sup> respondent never changed his name from Ayodele Fayose to Ayodele Oluwayose.

He has concluded that the above obligation has been discharged. He urged this court to hold that on balance of probability has the appellant proved its case and is entitled to the reliefs contained in the petition.

On the other hand it is the averment of the learned counsel for the 1st and 2nd respondents that the grounds for bringing a case cannot be divorced from the circumstances that gave rise to the cause of action. That for the appellant to succeed, the grounds of its petition and the facts in support thereof are the relevant considerations in determining the burden of proof that it has to discharge. He has maintained that reading of paragraph 9(i)(ii) and (iii) of the petition reveals that without the particulars endorsed in paragraph (iii)a, b, c, d and paragraphs 10, 11 and 12 of the petition will show that the particulars give reasons to the grounds. If this is accepted, and it is logical thing to do, then it is the totality of the petition that would have to be looked at in determining whether allegations of crime are/is involved. That the case is not that the 1st respondent did not attend any school to qualify him to contest the election but rather the case of the appellant is that he submitted another person's certificates fraudulently to contest the election. Then, the learned counsel submits that having regard to section 486 of the Criminal Code and section 115(1)(k), (2) and (3) of the Electoral Act, it cannot be doubted that it is a grievous offence punishable in our penal laws for anyone to put forward for any purpose certificates or credentials belonging to someone else as his own. He has further added that section 21 of the Electoral Act also prescribes penal sanctions against anyone that does any of the things alleged against the 1st respondent in the petition. He has concluded that the principle of proof beyond reasonable doubt is applicable to this case.

In the brief of argument of the 4th and 5th respondents the averment is that the implication being conveyed here is one of fraud in the obtainment of the 1st respondent's various educational certificates and in his attendance of various institutions of learning for his education. Reliance here is placed upon section 138(1) of the Evidence Act in averring that the duty to prove the alleged Commission of a crime beyond reasonable doubt is on the petitioner/appellant.

The decision of the tribunal on this can be seen from page 275 to page 277 of the record. The tribunal has reasoned that where section 138(1) of the Evidence Act applies, the whole petition should be looked into to determine whether if the criminal aspect is excised there is anything to consider. Reliance has been made by the tribunal /a on the case of *Omoboriowo v. Ajasin* (1984) 1 SCNLR 108; 141 where Bello. J.S.C. (as he was then) stated as follows:-

"However, the provisions of section 137(1) of the Evidence Act, (which is now section 138(1)) is subject to the principle of severance of pleadings which may be stated thus; if in a civil proceeding averments alleging a crime are severable and if after such severance there still remains in the pleadings of the plaintiff or the petitioner sufficient averments which disclose a cause of action which is devoid of criminal imputation against any party to the proceedings, then the burden of proof upon the plaintiff or the petitioner is to prove his case within the balance of probability."

Then, the tribunal having considered all the averments relating to the grounds upon which the petition was brought has come up with the finding that if the criminal aspect is removed there is nothing left that can stand on it's own. It has also added that section 486 of the Criminal Code is apposite in this case, restating that by virtue of section 138(1) of the Evidence Act where commission of crime is alleged the standard of proof required of the petitioner in the circumstances must be beyond reasonable doubt.

Undoubtedly even the learned counsel for the appellant has conceded that if element of criminality is removed in this case there is nothing to be decided. In election petition the burden of proof is within the balance of probability, however, where commission of crime is alleged the proof is beyond reasonable doubt. The situation in our case has been caught by the statement of the Supreme Court in *Omoboriowo v. Ajasin* (*supra*) and it has been caught by the provisions of section 138(1) of the

Evidence Act. Therefore the burden of proof placed on the petitioner/appellant in this case is to improve the case beyond reasonable doubt. All the averment of the appellant's counsel in this regard fails.

I will now proceed to deal with issue which has been formulated as follows:-

"Whether a proper evaluation of the case of the petitioner was done and whether on the strength of the evidence led, petitioner is entitled to judgment?" The question raised by the appellant is whether or not the appellant proved its contention that Ayodele Oluwayose is different from Ayodele Fayose and that the 1st respondent never changed his name from Oluwayose to Fayose.

The appellant has averred that apart from being common ground between the parties, PW1 gave the evidence of the fact that, 1<sup>st</sup> respondent is from Afao-Ekiti in Irepodun/Ifelodun Local

Government of Ekiti State. Also that Ayodele Oluwayose who attended the Polytechnic Ibadan is from Oluyole Local Government of Oyo State. In support of these exhibits C2, C3, C7 and C12, official documents of the Polytechnic Ibadan showing that Ayodele Oluwayose who attended the Polytechnic Ibadan is from Oyo State, exhibit C7 is the State Identification form of the student duly signed by the executive secretary of Oluyole Local Government and it is to the effect that Ayodele Peter Oluwayose is from Oluyole Local

Government of Oyo State. It has been added that PW6 also gave evidence of the fact that 1<sup>st</sup> respondent's father is from Afao Ekiti in Irepodun/Ifelodun Local Government of Ekiti State.

On question of change of name in 1974 from Fayose to Oluwayose, the appellant's contention is that the 1st and 2nd respondents, through DW1 and DW2 tendered pieces of documentary evidence to buttress the assertion. Following documents have been tendered.

- (i) Exhibit T6 as evidence of change of name in 1974 by one John Olorunfemi *Fayouse* which is not the same as *Fayose* by which the 1st respondent and his father are known. DW2 gave evidence that the name of the 1st respondent is *Fayose* and not *Fayouse*. However, respondents did not lead any evidence to show how *Fayouse* came to be on exhibit T6. In fact they never explained away the name *Fayose*.
- (ii) Exhibits LI - L4, Building plan was tendered to show who the draughtsman of DW1 was as at 1978.
- (iii) Exhibit N1, being drivers license of DW1 as at 1983 was tendered to show that as at 1983, DW1 was bearing Oluwayose.
- (iv) Exhibit N2, Ordination Certificate was tendered to show that as at 1994 DW1 had been ordained as a Pastor.

With the above the appellant has submitted that it is the; pleadings of the parties that identify the issue to be decided in a given case reproducing paragraph 3(i) and (ii) of its reply of 1st and 2nd respondents as follows:-

"3(i) The 1st respondent was born in November 1960 and given the name Ayodele Peter Fayose because his father at that material time was bearing and answering the name John Fayose.

(ii) That some time in 1974 the father to the 1<sup>st</sup> respondent changed his surname from Fayose to Oluwayose when he received divine call to serve the Lord as he is presently a Pastor of the Christ Apostolic Church and he is now known and called Pastor John Olorunfemi" Oluwayose. (See pages 14 - 15 of the record)".

With the above the appellant has submitted that the onus or duty which the respondents have is to prove the assertion of change of name in 1974 while the only duty on the petitioner is to rebut this assertion. That exhibits K and O have bear tendered to show that up to 1976 and 1977,

DW1 has not changed his name in that, he was bearing Fayose. That DW1 admitted that exhibits K and O bear Fayose which negates the claim of the DW1 that he had changed his name from Fayose to Oluwayose in 1974. Relying on the case of *Mogaji v. Odofin* (1978) 4 S.C. 91; 93 the appellant submitted that the duty imperative on a judicial officer before reaching a decision is to evaluate pieces of evidence adduced by the parties. It maintains that the tribunal did not evaluate the evidence adduced by the petitioner.

That the tribunal did not say anything about the pieces of evidence given by PW 1, PW2 and PW6 as well as exhibits C2, C3, C7, C12, D1-D20, F1-F11, G1, HI, K and O. That none of the evidence was rejected yet the tribunal concluded that the petitioner did not prove its case. The appellant argues that tribunal acted contrary to the dictates of the Supreme Court admonition in *Odofin v. Mogaji (supra)*- It has added that section 16 of the Court of Appeal Act empowers this court to review the appeal filed on the bundles of documents as contain in the printed records.

The learned counsel for the 1st and 2nd respondents has counter-argued that the tribunal meticulously reviewed and evaluated the testimonies of witnesses. He has submitted that there is no set of method or way of writing good judgment by a trial court. What is required of a trial court is a full understanding of the facts as placed , therefore it, appropriate marriage of the facts to the law and a dispassionate consideration of the cases of the parties. That a trial court need not believe or disbelieve a witness in so many words once the drift of the judgment shows a clear understanding of the issues involved. On the method of judgment the learned counsel [as referred to *Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530; 46 in which he has cited the statement of Uwaifo, JSC at length.

Having maintained that the burden of proof in this case is beyond reasonable doubt he has opined that testimonies of the PW 1, PW2 and PW6 are not only unreliable but they are at large. That PW1 under oath stated that he knows the 1st respondent's father (DW1) facially. When DW1 was invited to stand up for recognition the PW1 could not identify/recognize him. At page 44 of the record, die was shown exhibits D1-D20, B17-B34 and that the two sets of documents were the same but he stated that they were not the same. The tribunal checked them and noted they were the same. That PW2 in examination-in-chief stated he was in the police force for 23 years but under cross-examination he agreed that he was in the police force for 36 years 3 months. Also DW6 who claimed to be a draughtsman who worked for DW1 could not produce any of the plans; he claimed he ever did for the DW1. He has concluded that PW1, PW2 and PW6 cannot even be held to have discharged an onus of proof even on the balance of probability.

On issue of change of name in 1974 the learned counsel for the 1st and 2nd respondents, has maintained that the respondents have no duty to proof any change of name. He has however averred that the appellant had failed to explain the following:-

- i. The similarity in the first name and middle name of the 1<sup>st</sup> respondent and the one on exhibit C1 - C14.
- ii. The similarity between the date of birth, former schools attended as filled in exhibits C1 - C14 and those of the 1st respondent as pleaded and supported by evidence called by the respondents.
- iii. The similarity between the name of the Father of person on exhibits C1 - C14 and his address compare to the name and address of the DWI as given in evidence and supported by other pieces of evidence before the tribunal.

He has added that the evidence of DW1, that the 1st respondent was born in Ibadan in 1960 and that he lived his early adult life there, means as at 1985 which he was filling exhibits C1 - C14he

had been living in Ibadan for 25 years. This may demonstrate testified by the DWI that he, the respondent, is entitled to claim Ibadan (Oluyole Local Government).

On spelling of Fayose on exhibit T6 the learned counsel for 1<sup>st</sup> and 2<sup>nd</sup> respondents has averred that the substance of the matter is that there was a change of name in 1974 as pleaded. The first names and second name on exhibit T6 are the same with that of DWI. That the exhibit T6 was tendered to show that there was change of name from Fayose to Oluwayose and this is evident on the exhibit. He has also added that all the personal data contained on exhibits C2, C3 C7 and C12 belong to the 1st respondent. His first name and middle name, his date of birth, the names and residential address of his father, the fact of his attendance at Olivet Baptist High School, Oyo and Federal Polytechnic, Ilaro. That all these cannot be coincidental, Also DWI explained why the 1<sup>st</sup> respondent was entitled to claim to have come from Oluyole Local Government, Ibadan. The learned counsel is also of the view that the testimony of PW2 is full of equivocation and confusion. He was not even sure which of the documents he examined were made by one person or two different persons. Nowhere had he stated that any of the signatures belonged to the 1st respondent or any of the disputed hand writing belonged, to the 1st respondent. He has maintained that the evidence of PW-1 and PW2 is not conclusive proof that the 1st respondent is not the owner of M2-M5. He has finally submitted that the tribunal properly evaluated the testimonies of the witnesses called and came to the right conclusion that the appellant was undeserving of victory. He urges this court to resolve the issue against the appellant.

As for the 4th and 5th respondents in the brief they have opined that a lot of fuss has been made in respect of a change of name from Fayose to Oluwayose and from simple spellings of Fayose and Fayouse.

They have submitted that whether it is spelt Fayose or Fayouse, the two mean one and the same thing and any error in the spelling should be regarded as minor and any attempt by the petitioner/ appellant, to capitalize on it should be regarded as basing its appeal on ordinary legal technicality. They have opined that the pieces of evidence of DWI are quite powerful and unimpeachable that the tribunal had no option other than to believe them, with this they have called upon this court to dismiss this appeal on the ground that it lacks merit as the grounds on which it is predicated are fashioned ordinarily on technicalities.

It is bristle clear from the pleadings of the parties that the main issue in contention in this matter is the change of name from Fayose to Oluwayose. Once this issue is resolved all other issues are solved. The tribunal has clearly understood this and in its judgment it has made it clear where at page 278 of the record of proceedings it quoted paragraph 9(d) of the petition which reads:

"9(d) The petitioner shall contend that the use of the names and credentials of Oluwayose Ayodele Peter was fraudulent on the past of the 1st respondent. *Particulars:*

- (i) 1<sup>st</sup> respondent did not at any time attend Federal Polytechnic, Ilaro and he does not possess any of the credentials he submitted to 3<sup>rd</sup> respondent.
- (ii) The 2<sup>nd</sup> respondent (*sic*) Peters Ayodele Fayose is distinct and/or different from Oluwayose Ayodele Peter hence credentials relied on did not belong to the 1st respondent."

Now the question is whether the tribunal properly evaluated the evidence adduced before it. At this stage it must be noted that evaluation of evidence and ascription of probative value to such evidence are primary functions of a trial court or tribunal which saw, heard and duly assessed the witnesses. Where trial court or tribunal has satisfactorily evaluated the evidence, it is not the business of appellate court to substitute its own views for those of the trial court or tribunal. What appellate court ought to do is to ascertain whether or not there is evidence upon which the trial court acted. Once there is such evidence, the appellate court must not intervene even if such appellate court felt that if the facts were

before it, it could not have come to the same decision as the trial court. This is the position unless if the trial court did not properly evaluate the evidence or make a proper use of the opportunity of seeing or hearing the witnesses at the trial or where it has drawn wrong conclusion from accepted evidence or where the finding is shown to be wrong or perverse in that it is not supported by evidence before the trial court. See *Peter Eigbejale v. Oke* (1996) 5 NWLR (Pt. 447) 128, (1996) 5 SCNJ 49; *Saimi v. Ademiluyi* (2003) 3 NWLR (Pt. 807) 381, (2003)20WRN29.

In our case it is clear that the trial tribunal in its judgment having identified the main issue to be decided made it clear that eight (8) witnesses testified for the petitioner through whom some documents were tendered in evidence. Out of the eight witnesses it made it clear that PW3 testified in connection with what he heard about the non-qualification of the 1st respondent in its judgment. It stated that testimonies of PW4 and PW7 were in line with that of PW3. It has made it clear that three witnesses testified for the defence. The tribunal went over the evidence of these witnesses. It made its judgment clear in the following words:-

"We have considered the submissions of both parties with regards to the change of name of DW1, we believe the 1st and 2nd respondents counsel that the 1<sup>st</sup> respondent was known as Fayose prior to 1974 and that the change in DW1 surname changed his name from Fayose to Oluwayose. This is evident by the Exhibits mentioned earlier in the 1st and 2nd respondents submissions, namely exhibits T1 - T8 for the Daily Sketch Publication of 22nd July, 1974, exhibits NI and N2 drivers licence and ordination certificate respectively. The building plan of 1978 with J. O. Oluwayose ... (see pages 279 - 280 record)".

On the issue of the name in the Daily Sketch Newspaper as "Fayouse" the tribunal has made it clear that it did not regard the spelling mistake therein as an issue. It has made it clear that it attached weight to exhibits T1 - T8 and it also acted upon the evidence of DW1 and DW2. Other documents also considered by the tribunal were exhibits M1-M5 and R1-R3. Then it came to the following conclusion:-

"In view of the foregoing, the 1<sup>st</sup> respondent had proved on the balance of probabilities that:-

- (1) The DW1 changed his name in 1974 which in effect automatically changed the names of his under aged children of which the 1st respondent was one.
- (2) The 1st respondent is the owner of the certificates/credentials exhibits Mm MI - M5 as a result of the change of name in 1974.
- (3) That the names on the Form C07 of Spotless Investment Limited was that of the 1st respondent and his brother".

The above has undoubtedly solved the issue raised by the appellants as to the burden of proof of change of name. The onus of proving a particular fact lies on the party who asserts it. In other words the onus lies upon a party who will fail if such evidence is not adduced. *Peter Basheer v. Same* (1992) 4 NWLR (Pt. 236) 491. In the case at hand the onus of proving change of name was properly placed upon the respondent, and the tribunal by preponderance of evidence has held that he has discharged such duty. With this it held that the petition had no merit and dismissed the same.

I am of the view that, the tribunal had properly evaluated the evidence adduced before it. Once there are two different versions of a story and the court believed and acted upon one version the effect is that, the other version has been disbelieved. It is quite clear that the tribunal has discharged its function of evaluating the evidence properly and in coming to its decision it has acted upon oral as well as documentary evidence before it. I agree that on the strength of evidence the petitioner/appellant was not entitled to judgment. Issue (ii) as to who has the onus of proof of change

of name from Fayose to Oluwayose has been subsumed by the above consideration.

In the final conclusion, I hold that the appeal has no merit. I affirm the decision of the tribunal. The appeal is hereby dismissed with costs fixed at N10,000.00 in favour of the appellant. I therefore agree with the conclusion in the leading judgment of my learned brother, S. A. Nsofor, JCA. **NGWUTA, J.C.A.:** I have had the privilege and opportunity of reading in advance the judgment just delivered by my learned brother, Nsofor, JCA, and I entirely agree with his reasoning and conclusion. The 3rd and last issue in the appellant's brief of argument dealt with the issue of criminality *vel non* of the facts upon which the appellant relied in its petition and whether or not the appellant proved those facts either on the preponderance of evidence or beyond reasonable doubt.

It is the appellant's case that the facts on which it relied are not of criminal nature and that it proved the said facts on the balance of probability. In the alternative it argued that even if those facts are allegation of crime it proved its case beyond reasonable doubt.

In response to the above the 1st and 2nd respondents, in their brief of argument contended that the facts relied on constitute commission of crime and that the appellant did not prove its case either on the preponderance of evidence or beyond reasonable doubt. The argument of the 3rd to the 5th respondent as contained in their brief is essentially to the same effect.

In my humble view the appellant's *case* is predicated exclusively on the allegation that Ayodele Fayose (the 1st respondent) is distinct from Ayodele Oluwayose and that the 1st respondent submitted to 3rd respondent (INEC)... documents which bear the name Ayodele Oluwayose and which do not belong to the 1st respondent. Without the above allegation the appellant has no *case*. All other issues canvassed are variation of this central point in the *case*.

The substance of the facts relied on by the appellant is that the 1<sup>st</sup> respondent either stole the documents he submitted to INEC or that he procured them by means other than theft. In either case the appellant uttered the said document to the relevant authorities in seeking to contest the election.

Stealing and uttering are criminal offences under the relevant statutes: The tribunal below was right to have invoked the provision of S. 486 of the Criminal Code. The section makes uttering a criminal offence which attracts the same punishment as forgery. Learned senior counsel for the appellant Fagbemi, SAN subtly conceded that the facts as presented in the petition constitute the offence of uttering. He tried to water-down the effect of his concession by saying that the 1<sup>st</sup> respondent is not on trial for uttering of documents. In other words learned counsel is saying that since the 1<sup>st</sup> respondent is not on trial for the uttering of documents which the appellant alleged in its petition, the appellant is required only to prove the criminal allegation of uttering on the preponderance of evidence. With due respect I do not subscribe to this view. Though, the 1st respondent is not on trial as the learned counsel rightly pointed out, and though election petition is neither civil nor criminal proceeding but is *sui generis*, the provisions of the Evidence Act apply to it. S. 138(1) of the Evidence Act, Cap. 112, *Laws of the federation, 1990* provides "If the commission of a crime by a party to any proceeding is directly in issue in any proceeding civil or criminal, it must be proved beyond reasonable doubt." See *Anazodo v. Audu* (1999) 4 NWLR (Pt. 600) 530. *Ezeduwo v. INEC* (1999) 3 NWLR (Pt. 594) 215; *Eboh v. Ogujiofor* (1999) 3 NWLR (Pt. 595) 419. I am aware that this court held in *Wuam v. Ako* (1999) 5 NWLR (Pt. 601) 150 that an election petition may be sustained inspite of failure to prove allegation of criminal acts beyond reasonable doubt provided irregularity or malpractice is proved on preponderance of evidence. However, the facts must not only have been pleaded but must be severable from allegation of criminal acts. In the *case* at hand if the facts constituting allegation of crime are excised from the body of the petition, there will be nothing left and *ipso facto* the doctrine of severance is not

applicable. The appellant is bound to prove its *case* beyond reasonable doubt or it will be dismissed.

Has the appellant proved its *case* that the 1st respondent either stole or obtained the documents bearing the name of Ayodele Oluwayose by means other than theft, beyond reasonable doubt? I have no hesitation in answering this question in the negative. In the first place the alleged owner of the document is a necessary witness but was not called. In the same vein if the 1st respondent uttered the documents or certificates the person or authority he uttered it ought to have been called. There was no explanation as to why the alleged owner of the certificates was not called to give evidence or why the person to whom they were uttered was not called.

I wish to state that the consequence of proof beyond reasonable doubt is not the same in a criminal trial as in a civil proceeding in which allegations of crime are in issue.

In criminal proceeding proof beyond reasonable doubt leads to the conviction of the defendant or accused person. However in a civil proceeding in which allegation of crime is relied on proof beyond reasonable doubt of the allegation will sustain the claim in support of which the facts of crime were relied on. Failure to attain the proof beyond reasonable doubt means that the claim resting on the facts constituting a crime will be dismissed. The person against whom the allegation is made in the civil *case* does not have to be on trial for the offence alleged for the court to require proof beyond reasonable doubt.

Based on the above and the fuller reasons given in the lead judgment I agree that this appeal is devoid of merit and ought to be dismissed. Consequently, I also dismiss the appeal and abide by the consequential orders in the lead judgment.

*Appeal dismissed.*